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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* will make available all cases back to 1658.

Each title will be preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis will be found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise summary, a black-letter epitome, indicative of its scope, will precede the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, will prove of great convenience and value in legal research.

An index will be found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum will be kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes will conveniently, and with certainty, keep each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A	A	Am.Law Reg.(O. S.)	American Law Register Old Series
Abb.	Atlantic Reporter	Am.L.Rev.	American Law Review
Abb.Adm.	Abbott (U.S.)	Am.L.T.Bankr.	American Law Times Bankruptcy Re ports
Abb.App.Dec.	Abbott's Admiralty (U.S.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.Negl.Cas.	American Negligence Cases
Abb.N.Cas.	Abbott's Decisions (N.Y.)	Am.Negl.R.	American Negligence Reports
Abb.Pr.	Abbott's New Cases (N.Y.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Abb.Pr.N.S.	Abbott's Practice (N.Y.)	Am.Prob.	American Probate
A'Beck.Res.	Abbott's Practice New Series (N.Y.)	Am.Prob.N.S.	American Probate New Series
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)	Am.Pr.	American Practice
[1917]A.C.	[1917] Appeal Cases (Can.)	Am.R.	American Reports
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.R.&Corp.	American Railroad & Corporation
Acton	Acton (Eng.)	Am.R.Rep.	American Railway Reports
Adams	Adams Reports (N.H.)	Am.S.R.	American State Reports
Add.	Addison (Pa.)	Am.St.R.D.	American Street Railway Decisions
Add.Eccl.	Addams' Ecclesiastical (Eng.)	And.	Anderson (Eng.)
A.&E.	Adolphus & Ellis (Eng.)	Andr.	Andrews (Eng.)
A.&E.Enc.L	American & English Encyclopædia of Law	Ann.Cas.	American & English Annotated Cases
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Aik.	Aikens (Vt.)	Anstr.	Anstruther (Eng.)
A.K.Marsh.	A. K. Marshall (Ky.)	Anth.N.P.	Anthon's Nisi Prius (N.Y.)
Ala.	Alabama	App.D.C.	Appeal Cases (D.C.)
Ala.App.	Alabama Appellate Court	App.Cas.	Law Reports Appeal Cases (Eng.)
Alaska	Alaska	App.Div.	Appellate Division (N.Y.)
Alb.L.J.	Albany Law Journal	Ariz.	Arizona
A.L.C.	American Leading Cases	Ark.	Arkansas
Alc.&N.	Alcott & Napier (Eng.)	Ark.Just.	Arkley's Justiciary (Sc.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	Arn.	Arnold (Eng.)
Aleyn	Aleyn (Eng.)	Arn.&H.	Arnold & Hodges (Eng.)
Alison Pr.	Alison's Practice (Sc.)	Ashm.	Ashmead (Pa.)
Allen	Allen (Mass.)	Aspin.	Aspinwall's Maritime Cases (Eng.)
Allen (N.B.)	Allen, New Brunswick	Atk.	Atkyn (Eng.)
Alta.L.	Alberta Law	Austr.C.L.R.	Commonwealth Law Reports, Aus- tralia
A.L.R.	American Law Reports	Austr.Jur.	Australian Jurist
Am.Bankr.	American Bankruptcy (U.S.)	Austr.L.T.	Australian Law Times
Ambl.	Ambler (Eng.)		
A.M.C.	American Maritime Cases		
Am.Corp.Cas.	American Corporation Cases		
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases	Bacon Abr.	Bacon's Abridgment (Eng.)
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series	Bail.Eq.	Bailey's Equity (S.C.)
Am.&Eng.Ency. Law	American and English Encyclopedia of Law	Bailey.	Bailey's Law (S.C.)
Am.&E.Eq.D.	American & English Decisions in Eq- uity	B.&Ad.	Barnewall & Adolphus (Eng.)
Am.&Eng.Pat. Cas.	American and English Patent Cases	B.&Ald.	Barnewall & Alderson (Eng.)
Am.&Eng.R.R. Cas.	American and English Railroad Cases	Baldw.	Baldwin (U.S.)
Am.Electr.Cas.	American Electrical Cases	Balf.Pr.	Balfour's Practice (Sc.)
Am.&E.R.Cas.	American & English Railroad Cases	Ball&B.	Ball & Beatty (Ir.)
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series	Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Am.J.Int.L.	American Journal of International Law	Bann.	Bannister (Eng.)
Am.L.J.	American Law Journal (Pa.)	Bann.&A.	Banning & Arden (U.S.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)	Barb.	Barbour (N.Y.)
Am.L.Rec.	American Law Record (Ohio)	Barb.Ch.	Barbour's Chancery (N.Y.)
Am.L.Reg.	American Law Register	B.&Arn.	Barron & Arnold (Eng.)
Am.L.Reg.N.S.	American Law Register New Series	Barn.	Barnardiston King's Bench (Eng.)
		Barn.Ch.	Barnardiston Chancery (Eng.)
		Barnes	Barnes' Practice Cases (Eng.)
		Barnes Notes	Barnes' Notes (Eng.)
		Batty	Batty (Ir.)
		B.&Aust.	Barron & Austin (Eng.)
		Bart.	Baxter (Tenn.)
		Bay	Bay (S.C.)
		B.&B.	Broderip & Bingham (Eng.)
		B.C.	British Columbia

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)	C.P.D.	Law Reports Common Pleas Division (Eng.)
C.J.	Corpus Juris	Crabbe	Crabbe (U.S.)
C.J.Ann.	Corpus Juris Annotations	Cranch	Cranch (U.S.)
C.J.S.	Corpus Juris Secundum	Cranch C.C.	Cranch's Circuit Court (U.S.)
C.&K.	Carrington & Kirwin (Eng.)	Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
C.&L.	Connor & Lawson (Ir.)	Cr.App.	Criminal Appeals (Eng.)
Cl.App.	Clark's Appeal Cases (Eng.)	Crawf.&D.	Crawford & Dix (Ir.)
Cl.Ch.	Clarke's Chancery (N.Y.)	Crawf.&D.Abr.	Crawford & Dix's Abridged Cases (Ir.)
Clark & F.	Clark & Finnelly (Eng.)	Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Clark & Fin.N.S.	Clark's House of Lords Cases (Eng.)	Cr.L.Mag.	Criminal Law Magazine
Clarke	Clarke's Chancery (N.Y.)	Cr.&Ph.	Craig & Phillips (Eng.)
Clarke & S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)	C.Rob.	Christopher Robinson's Admiralty (Eng.)
Clarke Ch.	Clarke's Chancery (N.Y.)	Cro.Car.	Croke Charles (Eng.)
Clayt.	Clayton's Reports, York Assizes (Eng.)	Cro.Eliz.	Croke Elizabeth (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)	Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Clev.L.Rec.	Cleveland Law Record (Oh.)	Crompton & J.	Crompton & Jervis (Eng.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)	Crompton & M.	Crompton & Meeson (Eng.)
Cl.&F.	Clark & Finnelly (Eng.)	Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Clif.EL.Cas.	Clifford's Southwick Election Cases	Cr.&Ph.	Craig & Phillips (Eng.)
Cliff.	Clifford (U.S.)	Ct.CL	Court of Claims (U.S.)
C.L.R.	Common Law Reports (Eng.)	Ct.Cust.&Pat.	Court of Customs and Patent Appeals
C.&M.	Carrington & Marshman (Eng.)	App.	Cunningham (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)	Cunn.	Curtis (U.S.)
Cock.&Rowe.	Cockburn & Rowe's Election Cases	Curt.	Curtis Ecclesiastical (Eng.)
Code Rep.	Code Reporter (N.Y.)	Curt.Eccl.	Curtis Ecclesiastical (Eng.)
Code Rep.N.S.	Code Reports New Series (N.Y.)	Cush.	Cushing (Mass.)
Coff.Prob.	Coffey's Probate (Cal.)	Cust.A.	United States Customs Appeals
Co.Inst.	Coke's Institutes	Cyc.	Cyclopedia of Law & Procedure
Coke	Coke (Eng.)	Cyc.Ann.	Cyclopedia of Law & Procedure Annotations
Col.Cas.	Coleman's Cases (N.Y.)		
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)	D	D
Col.C.C.	Collyer's Chancery Cases (Eng.)	Dak.	Dakota
Coldw.	Coldwell (Tenn.)	Dal.C.P.	Dalison's Common Pleas (Eng.)
Coll.	Collyer (Eng.)	Dall.	Dallaman's Decisions (Tex.)
Col.L.Rep.	Colorado Law Reporter	Dall.	Dallas (Pa.)
Col.Law Review	Columbia Law Review	Dall.	Dallas (U.S.)
Coll.&B.Bank.	Collier and Eaton's American Bankruptcy Reports	Dalr.Dec.	Dalrymple's Decisions (Sc.)
Colles	Colles' Cases in Parliament (Eng.)	Daly	Daly (N.Y.)
Colo.	Colorado	Dan.	Daniell (Eng.)
Colo.App.	Colorado Appeals	Dana	Dana (Ky.)
Colq.	Colquit	Dane Abr.	Dane's Abridgment
Coltm.	Coltman (Eng.)	Dans.&L.	Danson & Lloyd (Eng.)
Comb.	Comberbach (Eng.)	D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Com.Cas.	Commercial Cases (Eng.)	Dauph.Co.	Dauphin County (Pa.)
Com.L.	Commercial Law (Can.)	Dav.&M.	Davidson & Merivale (Eng.)
Comptr.Treas.	Comptroller Treasury Decisions	Davys	Davys (Ir.)
Dec.	Comstock (N.Y.)	Day	Day (Conn.)
Comst.	Comyns (Eng.)	D.B.&M.	Dunlop, Bell & Murray (Sc.)
Comyns	Comyns Digest (Eng.)	D.C.	District of Columbia
Comyns Dig.	Comyns Digest (Eng.)	D.Chipm.	D. Chipman (Vt.)
Con.&Law.	Connor & Lawson (Ir.)	Deac.	Deacon (Eng.)
Conf.	Conference Reports (N.C.)	Deac.&C.	Deacon & Chitty (Eng.)
Conn.	Connecticut	Deady	Deady (U.S.)
Conn.Surr.	Connolly's Surrogate (N.Y.)	Dears.&B.	Dearsley & Bell (Eng.)
Const.	Constitutional Reports (N.C.)	Dears.C.C.	Dearsley's Crown Cases (Eng.)
Cooke	Cooke (Eng.)	Deas & A.	Deas & Anderson (Eng.)
Cooke	Cooke (Tenn.)	De Gex	De Gex (Eng.)
Cooke & A.	Cooke & Alcock (Ir.)	De G.F.&J.	De Gex, Fisher & Jones (Eng.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)	De G.J.&S.	De Gex, Jones & Smith (Eng.)
Coop.	Cooper's Chancery (Eng.)	De G.&J.	De Gex & Jones (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)	De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)	De G.&Sm.	De Gex & Smale (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)	Del.	Delaware
Coop.t.Eld.	Cooper's Cases tempore Eldon (Eng.)	Del.Ch.	Delaware Chancery
Co.P.C.	Coke's Reports (Eng.)	Del.Co.	Delaware County (Pa.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)	Dem.Surr.	Demarest's Surrogate (N.Y.)
Court.&Mael.	Courtney & Maclean (Sc.)	Den.	Denio (N.Y.)
Cow.	Cowen (N.Y.)	Den.C.C.	Denison's Crown Cases (Eng.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)	Desaus.Eq.	Desaussure (S.C.)
Cowp.	Cowper (Eng.)	Dev.Ot.Cl.	Devereux's Court of Claims (U.S.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases	Dev.L.	Devereux (N.C.)
Cox C.C.	Cox's Criminal Cases (Eng.)	Dev.&Bat.	Devereux & Battle (N.C.)
Cox Ch.	Cox's Chancery (Eng.)	Dick.	Dickens (Sc.)
Cox & Atk.	Cox & Atkinson (Eng.)	Dill.	Dillon (U.S.)
C.&P.	Carrington & Payne (Eng.)	Dirlet.Dec.	Dirleton's Decisions (Sc.)
O.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)	Disn.	Disney (Oh.)

TABLE OF ABBREVIATIONS

D.&L.
Dods.
Dom.L.R.
Donnelly
Dorion
Dougl.
Dougl.
Dougl.El.Cas.
Dow
Dow & Cl.
Dow.&L.
Dow.N.S.
Dowl.

Dowl.P.C.
Dowl.P.C.N.S.

D.&R.
Draper
Drew.
Drinkw.
D.&R.Mag.Cas.

D.&R.N.P.
Dr.&Sm.
Drury
Dr.&Wal.
Dr.&War.
D.&Sw.
Dud.Eq.
Dudl.
Duer
Dunl.B.&M.
Dunlop
Dunn.
Durie
Durn.&E.
Duv.
Dyer

Dowling & Lowndes (Eng.)
Dodson's Admiralty (Eng.)
Dominion Law Reports (Can.)
Donnelly (Eng.)
Dorion (L.C.)
Douglas (Eng.)
Douglass (Mich.)
Douglas' Election Cases (Eng.)
Dow (Eng.)
Dow & Clark (Eng.)
Dowling & Lowndes (Eng.)
Dowling, New Series (Eng.)
Dowling's English Bail Court (Practice) Cases
Dowling's Practice Cases (Eng.)
Dowling's Practice Cases New Series (Eng.)
Dowling & Ryland (Eng.)
Draper (U.C.)
Drewry (Eng.)
Drinkwater (Eng.)
Dowling & Ryland's Magistrate Cases (Eng.)
Dowling & Ryland's Nisi Prius (Eng.)
Drewry & Smale (Eng.)
Drury (Ir.)
Drury & Walsh (Ir.)
Drury & Warren (Ir.)
Deane & Swabey (Eng.)
Dudley (S.C.)
Dudley (Ga.)
Duer's Superior Court (N.Y.)
Dunlop, Bell & Murray (Sc.)
Dunlop (Sc.)
Dunning (Eng.)
Durie (Sc.)
Durnford & East (Eng.)
Duvall (Ky.)
Dyer (Eng.)

E

East
East.L.R.
East P.C.
East.T.
E.&B.
E.B.&E.
E.B.&S.
E.C.L.
Eden
Edgar
Edm.Sel.Cas.
E. D. Smith
Edw.
Edw.
Edw.Abr.

Edw.Adm.
E.&E.
Enc.Pl.&Pr.
Ency.Law.

Eng.Ad.
Eng.C.C.
Eng.Ch.
Eng.Ecd.
Eng.Ecc.R.
Eng.Exch.
Eng.L.&Eq.
Eng.Rep.R.
Eng.Ry.&C.Cas.
Eng.&Ir.App.

Eq.Cas.Abr.
Eq.Rep.
E.R.C.
Esp.
Euer
Exch.
Exch.Cas.

East (Eng.)
Eastern Law Reporter (Can.)
East's Pleas of the Crown (Eng.)
Eastern Term (Eng.)
Ellis & Blackburna (Eng.)
Ellis, Blackburn & Ellis (Eng.)
Ellis, Best & Smith (Eng.)
English Common Law
Eden (Eng.)
Edgar (Sc.)
Edmond's Select Cases (N.Y.)
E. D. Smith (N.Y.)
Edwards (Eng.)
Edwards' Chancery (N.Y.)
Edwards' Abridgment of Prerogative Court Cases
Edwards' Admiralty (Eng.)
Ellis & Ellis (Eng.)
Encyclopædia of Pleading & Practice
American and English Encyclopædia of Law
English Admiralty
English Crown Cases
English Chancery
English Ecclesiastical Reports
English Ecclesiastical Reports
English Exchequer Reports
English Law & Equity
English Reports, Full Reprint
English Railway and Canal Cases
Law Reports, English and Irish Appeal Cases
Equity Cases Abridged (Eng.)
Equity Reports (Eng.)
English Ruling Cases
Espinasse's Nisi Prius (Eng.)
Euer (Eng.)
Exchequer (Eng.)
Exchequer Cases (Sc.)

Ex.D.

Eyre

Law Reports Exchequer Division (Eng.)
Eyre's Reports (Eng.)

F

Falc.
Falc.&F.
Far.
F.Cas.No.
F.(Ct.Sess.)
F.
F.(2d)
F.Supp.
Ferg.Cons.
F.&F.
Fish.Pat.Cas.
Fish.Pat.R.
Fish.PrizeCas.
Fitzg.
Fitzh.
Fitzh.N.Br.
Fla.
Flipp.
Fl.&K.
Fonb.Eq.
Fonbl.
Fonbl.R.
Forbes
Forr.
Forrester
Fortesc.
Fost.
Fost.
Fost.&Fin.
Fount.Dec.
Fox
Fox & S.
Freem.
Freem.
Freem.K.B.

Falconer's Court of Sessions (Sc.)
Falconer & Fitzherbert (Eng.)
Farresley (Eng.)
Federal Cases (U.S.)
Fraser's Court of Sessions Cases (Sc.)
Federal Reporter (U.S.)
Federal Reporter Second Series
Federal Supplement
Ferguson's Consistory (Eng.)
Foster & Finlason (Eng.)
Fisher's Patent Cases (U.S.)
Fisher's Patent Reports (U.S.)
Fisher's Prize Cases (U.S.)
Fitzgibbon (Eng.)
Fitzherbert's Abridgment (Eng.)
Fitzherbert's Natura Brevium (Eng.)
Florida
Flippin (U.S.)
Flanagan & Kelly (Ir.)
Fonblanque's Equity (Eng.)
Fonblanque (Eng.)
Fonblanque's English Cases
Forbes (Eng.)
Forrest (Eng.)
Forrester's Cases (Eng.)
Fortescue (Eng.)
Foster (Eng.)
Foster (N.H.)
Foster & Finlason (Eng.)
Fountainhall's Decisions (Sc.)
Fox Reports (Eng.)
Fox & Smith (Ir.)
Freeman's Chancery (Eng.)
Freeman's Chancery (Miss.)
Freeman's King's Bench (Eng.)

G

Ga.
Ga.App.
Ga.Dec.
Gale
Gal.
G.Coop.
G.&D.
Geld.&M.
Gibb.Surr.
Giffard
Giff.&H.
Gil.
Gilb.
Gilb.Cas.
Gilb.C.P.
Gilb.Exch.
Gill
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Gilm.
Gilm.&Falc.
Gilp.
Glasc.
Glyn&J.
Godb.
Godo.

Georgia
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G. Cooper (Eng.)
Gale & Davidson (Eng.)
Geldart & Maddock (Eng.)
Gibbon's Surrogate (N.Y.)
Giffard (Eng.)
Giffard and Hemming (Eng.)
Gilfillan's Edition (Minn.)
Gilbert's (Eng.)
Gilbert's Cases (Eng.)
Gilbert's Common Pleas (Eng.)
Gilbert's Exchequer (Eng.)
Gill (Md.)
Gill & Johnson (Md.)
Gilm. (Va.)
Gilmour & Falconer (Sc.)
Gilpin (U.S.)
Glascock (Ir.)
Glyn & Jameson (Eng.)
Godbolt (Eng.)
Godolphin's Abridgment of Ecclesiastical Law
Goebel's Probate Court Cases
Gosford (Eng.)
Gouldsbrough (Eng.)
Gow (Eng.)
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Grant Ch.
Grant Err.&App.
Gratt.
Gray

Goeb.
Gosf.
Gouldsb.
Gow
Gow N.P.
Grant
Grant Ch.
Grant Err.&App.
Gratt.
Gray

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Gouldsbrough (Eng.)
Gow (Eng.)
Gow's English Nisi Prius Cases
Grant's Cases (Pa.)
Grant's Chancery (U.C.)
Grant's Error & Appeal (U.C.)
Grattan (Va.)
Gray (Mass.)

Green Cr.
Greene
Gwillt.T.Cas.

Green's Criminal Law (Eng.)
Greene (Iowa)
Gwillim's Tithe Cases (Eng.)

H

Hadd.
Hagg.Adm.
Hagg.Cons.
Hagg.Eccl.
Hailes Dec.
Hale
Hale Ecc.
Hale P.C.
Hall
Hall&T.
Halsbury L.Eng.
Handy
Han.(N.B.).
Hard.
Hardres
Hare
Harp.Eq.
Harr.
Harr.(Del.)
Harr.(Mich.)
Harr.&G.
Harr.Ch.
Harr.&H.
Harr.&J.
Harr.&M.
Harr.&R.
Harr.&W.
Hask.
Havil.
Hawaii
Hawaii.Fed.
Hawaiian Rep.
Hawk.P.C.
Hay.Exch.
Hayes
Hayes&J.
Hay&M.
Hayw.
Hayw.
Hayw.&H.
Haz.Reg.
H.Bl.
H.&C.
Head
Heisk.
Hem.&M.
Hempst.
Hen.&M.
Het.
Het.C.P.
H.&H.
Hill
Hill S.C.
Hill &Den.
Hill &Den. Supp.
Hilt.
Hil.T.
H.L.Cas.
H.&N.
Hob.
Hodg.El.
Hodges
Hoffm.
Hoffm.Land Cas.
Hog.
Holmes
Holt Adm.Cas.
Holt Eq.
Holt K.B.
Holt N.P.
Home
Hope Dec.
Hopk.
Hopk.Dec.

Haddington (Eng.)
Haggard's Admiralty (Eng.)
Haggard's Consistory (Eng.)
Haggard's Ecclesiastical (Eng.)
Hailes' Decisions (Sc.)
Hale's Common Law (Eng.)
Hale's Ecclesiastical (Eng.)
Hale's Pleas of the Crown (Eng.)
Hall's Superior Court (N.Y.)
Hall & Twells (Eng.)
Halsbury's Law of England
Handy (Oh.)
Hannay's Reports, New Brunswick
Hardin (Ky.)
Hardres (Eng.)
Hare (Eng.)
Harper (S.C.)
Harrison's Chancery (Mich.)
Harrington (Del.)
Harrington's Michigan Chancery Reports
Harris & Gill (Md.)
Harrison's Chancery (Eng.)
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Harris & Johnson (Md.)
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Harrison & Rutherford (Eng.)
Harrison & Wollaston (Eng.)
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Hawaiian
Hawaiian Federal
Hawaii Reports
Hawkins' Pleas of the Crown (Eng.)
Hayes Exchequer (Ir.)
Hayes (Ir.)
Hayes & Jones (Ir.)
Hay & Marriott (Eng.)
Haywood (N.C.)
Haywood (Tenn.)
Haywood & Hazelton (U.S.)
Hazard's Register (Pa.)
Henry Blackstone (Eng.)
Hurlstone & Coltman (Eng.)
Head (Tenn.)
Heiskell (Tenn.)
Hemming & Miller (Eng.)
Hempstead (U.S.)
Henning & Munford (Va.)
Hetley (Eng.)
Hetley's Common Pleas (Eng.)
Horn & Hurlstone (Eng.)
Hill (N.Y.)
Hill (S.C.)
Hill & Denio (N.Y.)
Lalor's Supplement to Hill & Denio's (N.Y.)
Hilton (N.Y.)
Hilary Term (Eng.)
House of Lords Cases (Eng.)
Hurlstone & Norman (Eng.)
Hobart (Eng.)
Hodgins' Election (U.C.)
Hodges (Eng.)
Hoffman's Chancery (N.Y.)
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Holt's Nisi Prius (Eng.)
Home (Sc.)
Hope's Decisions (Sc.)
Hopkins' Chancery (N.Y.)
Hopkins' Decisions (Pa.)

Hopw.&C.
Hopw.&P.
Hosea
Houst.
Houst.Cr.
How.
How.(Miss.)
How.A.Cas.
How.N.P.
How.Pr.
How.Pr.N.S.
How.St.Tr.
Hud.&B.
Hughes
Hughes
Hume
Humphr.
Hun
Hurl.&Gord.
Hurl.&W.
Hutt.

Hopwood & Coltman (Eng.)
Hopwood & Philbrick (Eng.)
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Camb.L.J.	Cambridge Law Journal	Miss.L.J.	Mississippi Law Journal
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Cornell L.Q.	Cornell Law Quarterly	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
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Idaho L.J.	Idaho Law Journal	Temp.L.Q.	Temple Law Quarterly
Ill.L.Rev.	Illinois Law Review	Tenn.L.Rev.	Tennessee Law Review
Ind.L.J.	Indiana Law Journal	Tex.L.Rev.	Texas Law Review
J.Am.Jud.Soc.	Journal of the American Judicature Society	Tul.L.Rev.	Tulane Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	U.Chi.L.Rev.	University of Chicago Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	U.Cin.L.Rev.	University of Cincinnati Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Detroit L.J.	University of Detroit Law Journal
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Kan.City L.Rev.	Kansas City Law Review	U. of Pitts.L.Rev.	University of Pittsburgh Law Review
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Ky.L.J.	Kentucky Law Journal	Va.L.Rev.	Virginia Law Review
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VOLUME FOURTEEN

CASE.

As a Noun

—**Ordinary, Popular Senses.** It has been said that the word "case" has various meanings.²³ In ordinary phraseology, it has been held to mean event or happening, instance, occasion, situation or circumstances, and the like;²⁴ and, in particular connections, to mean chance, contingency, and condition or state of circumstances;²⁵ also party, result, and side.²⁶

In the entirely different sense of that which incloses or contains, "case" has been defined as meaning a box, covering, or sheath, of any kind; anything intended to inclose or contain something;²⁷ also a box and its contents.²⁸ Used in this sense, but always considering the particular circumstances of its use, "case" has been held to connote something substantial, as of wood or metal; useful, but not necessarily of permanent value;²⁹ and so has been held to include tin cans and stoneware receptacles.³⁰

—**Technical, Legal Sense.** In its legal sense, as

a cause, or a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice, the term is defined in the C.J.S. title Actions § 1 b (1); and, in a particular connection, the word has been held equivalent to, or at least coextensive with, "claim."³¹ For the use of "case" as a brief name for action on the case, see the C.J. S. title Case, Action On § 2, also 11 C.J. p 3 note 9; as a method of presentation of errors for review see the C.J.S. title Appeal and Error § 910; within a constitutional provision relating to the transfer of a case by the supreme court to another court see the C.J.S. title Courts § 348, also 15 C.J. p 1039 note 52; and within a statute conferring appellate jurisdiction on the federal circuit court of appeals see the C.J.S. title Federal Courts § 287, also 25 C.J. p 961 note 39.

Phrases: "Capital case," see Capital 12 C.J.S. p 1129 notes 29-37, "case arising from injuries to the person,"³² "case at law,"³³ "case for winding up affairs of any such bank,"³⁴ "case in equity,"³⁵ "case involving construction of the revenue laws,"³⁶ "case

23. W.Va.—Dickey v. Smith, 26 S.E. 373, 42 W.Va. 805, 809.

24. Del.—Highfield v. Delaware Trust Co. Super., 188 A. 919, 922. N.Y.—Southwick v. Southwick, 49 N. Y. 510, 517.

Wyo.—Messenger v. Converse County, 117 P. 126, 19 Wyo. 309, 323. 10 C.J. p 1246 notes 34, 35.

25. Mont.—State ex rel. Carleton v. Dist. Court of Lewis and Clarke County, 82 P. 789, 790, 33 Mont. 133, 8 Ann.Cas. 752.

26. W.Va.—Dickey v. Smith, 26 S.E. 373, 42 W.Va. 805, 809.

27. U.S.—Austin, Nichols & Co. v. U. S., N.Y., 171 F. 79, 80, 96 C.C.

A. 183—Bradley v. Dull, C.C.Pa. 19 F. 913, 914, both cases quoting Webster D.

10 C.J. p 1246 note 49 [a].

28. Cal.—Ex parte Reineger, 193 P. 81, 83, 184 Cal. 97.

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Cal.—Ex parte Reineger, 193 P. 81, 83, 184 Cal. 97.

29. U.S.—U. S. v. Austin, Nichols & Co., N.Y., 22 S.Ct. 918, 919, 186 U. S. 298, 46 L.Ed. 1173.

10 C.J. p 1246 note 49 [a].

30. U.S.—Austin, Nichols & Co. v. U. S., N.Y., 171 F. 79, 80, 96 C.C. A. 183.

31. Ga.—Metropolitan Casualty Ins.

Co. v. Maloney, App., 192 S.E. 320, 325.

32. Ga.—Cantrell v. Davis, 169 S.E. 38, 176 Ga. 745—Cantrell v. Davis, 169 S.E. 39, 40, 46 Ga.App. 710.

33. Cal.—Morgan v. Somervell, App., 65 P.2d 820.

34. U.S.—Bank of America Nat. Trust & Savings Ass'n v. U. S. Nat. Bank of Los Angeles, D.C.Cal., 3 F.Supp. 990, 991.

35. Fla.—In re Palmer's Adoption, 176 So. 537, 538—First Trust & Savings Bank v. West Lake Inv. Co., 141 So. 894, 105 Fla. 590.

36. Mo.—State ex rel. and to Use of Parish v. Young, 38 S.W.2d 1021, 1022, 327 Mo. 909.

made" or "case-made,"³⁷ "case of boundary,"³⁸ "case on appeal,"³⁹ "case" or "claim,"⁴⁰ "case or controversy,"⁴¹ "case pending,"⁴² "case [or cases] respecting title to land,"⁴³ "case stated,"⁴⁴ "case which originated in court of appeals,"⁴⁵ "class case,"⁴⁶ "every case tried in said court,"⁴⁷ "in each case" as meaning "in each estate," see the C.J.S. title Bankruptcy § 638, "settled case," see the C.J.S. title Appeal and Error § 912; "statement of the case," see the C.J.S. title Appeal and Error § 910, "sufficient case for the jury,"⁴⁸ and "suit or case,"⁴⁹ also "all civil cases," see the C.J.S. title Juries § 17, and 35 C.J. p 154 note 81, "cases at law,"⁵⁰ "cases for winding up affairs,"⁵¹ "cases in equity,"⁵² "cases involving the tax or revenue laws,"⁵³ "cases in which county is interested,"⁵⁴ "cases of actual controversy,"⁵⁵ "cases" of contested elections,⁵⁶ "cases of fraud,"⁵⁷ "cases of public importance,"⁵⁸ "cases once adjudicated,"⁵⁹ "cases,

suits, or pleas,"⁶⁰ "in all cases at law and in equity originating in the circuit courts,"⁶¹ "in all cases at law without regard to the amount in controversy," see the C.J.S. title Juries § 17, also 35 C.J. p 154 note 82, and "in all cases decided."⁶²

As an Adjective

Case law. The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases;⁶³ the body of law by judicial decisions, as distinguished from law derived from statutory and other sources.⁶⁴

Case system. A method of teaching or studying the science of the law by a study of the cases historically, or by the inductive method. It was introduced in the Law School of Harvard University in 1869-1870 by Christopher C. Langdell, Dane Professor of Law.⁶⁵

37. Okl.—*Janes v. Tomilson*, 50 P.2d 636, 637, 174 Okl. 400—*Lillard v. Meisberger*, 240 P. 1067, 1068, 113 Okl. 228—*Hoffman Bros. Inv. Co. v. Porter*, 172 P. 632, 633, 68 Okl. 136—*In re Opinion of the Judges*, 232 P. 121, 122, 29 Okl.Cr. 27.

See also C.J.S. title Appeal and Error § 910, and C.J.S. title Criminal Law § 1764, also 17 C.J. p 150 note 5.

38. Tex.—*Braumiller v. Burke*, 230 S.W. 400, 401, 111 Tex. 145—*Maxfield v. E. L. Sterling & Sons*, 217 S.W. 937, 110 Tex. 212—*West Lumber Co. v. Goodrich*, Com.App., 223 S.W. 183, 181.

39. N.C.—*Abernethy v. Burns*, 188 S.E. 97, 98, 210 N.C. 636. See also C.J.S. title Appeal and Error § 910.

40. Ga.—*Metropolitan Casualty Ins. Co. v. Maloney*, App., 192 S.E. 320, 325.

41. U.S.—*Everglades Drainage & Development Corporation v. Fairbanks, Morse & Co.*, C.C.A.Fla., 75 F.2d 794, 796—*Commissioner of Internal Revenue v. Liberty Bank & Trust Co.*, C.C.A., 59 F.2d 320, 322.

42. N.Y.—*Lanfield v. Cady*, 290 N.Y. S. 234, 236, 248 App.Div. 926.

43. Ga.—*Colley v. Atlanta & W. P. R. Co.*, 118 S.E. 712, 713, 156 Ga. 43—*Dixon v. Bond*, 88 S.E. 825, 827, 18 Ga.App. 45.

44. Mass.—*Brodie v. Donovan*, 9 N.E.2d 386, 387—*Heaphy v. Kimball*, 200 N.E. 551, 553—*Raymond v. Davies*, 199 N.E. 321, 322, 102 A.L.R. 1112—*Royal Paper Box Co. v. Mun-*

ro & Church Co., 138 N.E. 223, 284 Mass. 446—*Beckwith v. Inhabitants of Town of Boylston*, 187 N.E. 617, 284 Mass. 279—*Lukiwesky v. Kuporotz*, 186 N.E. 560, 561, 283 Mass. 524—*Prendergast v. Sexton*, 184 N.E. 363, 364, 282 Mass. 21—*Merrimac Chemical Co. v. Moore*, 181 N.E. 219, 221, 279 Mass. 147—*Fрати v. Jannini*, 115 N.E. 746, 747, 226 Mass. 430.

Neb.—*Furnas County Farm Bureau v. Brown*, 200 N.W. 451, 452, 112 Neb. 637.

45. Ohio.—*Cady v. Cleveland Worsted Mills Co.*, 184 N.E. 511, 512, 126 Ohio St. 171.

46. Cal.—*Goodspeed v. Great Western Power Co. of California*, App., 65 P.2d 1342, 1345.

47. Tex.—*Taliaferro v. Hale*, Civ. App., 47 S.W.2d 340, 342.

48. Nev.—*McCafferty v. Flinn*, 107 P. 225, 226, 32 Nev. 269.

49. Tex.—*De Shazo v. Webb*, Civ. App., 109 S.W.2d 264, 268.

50. Minn.—*Swanson v. Alworth*, 209 N.W. 907, 909, 168 Minn. 84.

Nev.—*City of Reno v. Dixon*, 172 P. 367, 368, 42 Nev. 67.

See also Courts C.J.S. § 323, and 15 C.J. p 1029 notes 19-21, C.J.S. § 421, and 15 C.J. p 1096 notes 22-32.

51. N.Y.—*Bryce v. National City Bank of New Rochelle*, 282 N.Y. S. 913, 914, 246 App.Div. 608.

52. Fla.—*Milton v. City of Marianna*, 144 So. 400, 402, 107 Fla. 251—*State v. Circuit Court for Eleventh*

Judicial Circuit, 135 So. 866, 868, 102 Fla. 112.

53. Kan.—*City of Independence v. Hindenach*, 61 P.2d 124, 127, 144 Kan. 414, 107 A.L.R. 645.

54. Ky.—*Commonwealth v. Euster*, 35 S.W.2d 1, 2, 237 Ky. 162.

55. U.S.—*Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, Mo., 57 S.Ct. 461, 463—*Ashwander v. Tennessee Valley Authority*, Ala., 56 S.Ct. 466, 473, 297 U.S. 288, 80 L.Ed. 688—*Columbian Nat. Life Ins. Co. v. Foulke*, C.C.A.Mo., 89 F.2d 261, 262—*Columbian Nat. Life Ins. Co. v. Foulke*, D.C.Mo., 13 F. Supp. 350, 352.

56. Mo.—*State ex rel. Hollman v. McElhinney*, 286 S.W. 951, 953, 315 Mo. 731.

57. Tex.—*Austin v. Grissom-Robertson Stores*, Civ.App., 32 S.W.2d 205, 206.

58. N.D.—*Murphy v. Swanson*, 198 N.W. 116, 119, 50 N.D. 788, 32 A.L.R. 32.

59. Ky.—*Arnett v. Deem*, 205 S.W. 914, 915, 181 Ky. 762.

60. Tex.—*De Shazo v. Webb*, Civ. App., 109 S.W.2d 264, 267.

61. Fla.—*In re Palmer's Adoption*, 176 So. 537, 538.

62. Fla.—*Lafayette Fire Ins. Co. v. Camnitz*, 149 So. 653, 655, 111 Fla. 556.

63. Black L.D.

64. Bouvier L.D.

65. Black L.D.

11 C.J. p 20 note 5.

CASE, ACTION ON

This Title includes actions of trespass on the case, as distinguished from other forms of action; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom they may be maintained; proceedings therein; review of proceedings; and costs in such actions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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§ 1. Historical

The action of case was created to supply a special form of action for particular cases wherein the ancient forms of action did not provide a remedy.

The action on the case or action of case was invented for the purpose of supplying a special form of action for particular cases where the existing writs did not apply or did not afford an adequate remedy.¹ It took its name from the fact that plaintiff in such a situation was authorized to bring a special action on his own case.² It is a remedy given by the common law, but the issuance of writs

under such circumstances was sanctioned and enforced at an early date by the Statute of Westminster II, 13 Edward I chapter 24.³

§ 2. Nature and Scope of Remedy in General

In general, where there has been injury for which none of the established forms of action will lie, an action on the case may be maintained.

In general, where there exists a legal right on one side and a legal wrong on the other, accompanied by damages, the action of case will furnish a remedy where no specific remedy exists,⁴ and it

1. U.S.—*H. J. Jaeger Research Laboratories v. Radio Corporation of America*, C.C.A.N.J., 90 F.2d 826.
Ala.—*Brasher v. First Nat. Bank of Birmingham*, 168 So. 42, 46, 232 Ala. 340—*Bentley-Beale, Inc. v. Wesson Oil & Snowdrift Sales Co.*, 165 So. 830, 832, 231 Ala. 562.
Del.—*Wise v. Western Union Telegraph Co.*, 172 A. 757, 758, 6 W. W.Harr. 155.
Me.—*Wadleigh v. Katahdin Pulp & Paper Co.*, 100 A. 150, 116 Me. 107.
Mich.—*Creek v. Laski*, 227 N.W. 817, 248 Mich. 425, 65 A.L.R. 1113.
Mont.—*Samuel v. Moore Mercantile Co.*, 204 P. 376, 378, 62 Mont. 232, citing *Corpus Juris*.
Utah.—*California Land & Construction Co. v. Halloran*, 17 P.2d 209, 212, 82 Utah 267, citing *Corpus Juris*.

2. U.S.—*Cockrill v. Butler*, C.C.Ark., 78 F. 679, reversed on other grounds *Cockrill v. Cooper*, 86 F. 7, 29 C.C.A. 529.

3. U.S.—*H. J. Jaeger Research Laboratories v. Radio Corporation of America*, C.C.A.N.J., 90 F.2d 826.

1 C.J. p 987 notes 47, 48—11 C.J. p 3 notes 1-4.

Statute created no new liabilities but merely afforded a remedy.—*Heaney v. Sprague*, 11 R.I. 456, 26 Am. R. 502.

4. Del.—*Wise v. Western Union Telegraph Co.*, 172 A. 757, 6 W.W. Harr. 155.

Md.—*Miller v. West*, 167 A. 696, 165 Md. 245.

11 C.J. p 7 note 66.

Any act done or omitted to be done contrary to the obligation of the law.

—*Garber v. Whittaker*, 174 A. 34, 6 W.W.Harr. 272.

Breach of duty by

(1) Constable.—*Roup v. Simpson*, 2 Pa.Dist. & Co. 404.

(2) Trustee.—*Gillespie v. Hughes*, 86 Ill.App. 202.

Malicious destruction of will, causing loss to legatee.—*Creek v. Laski*, 227 N.W. 817, 248 Mich. 425, 65 A. L.R. 1113.

More neglect of some legal duty may constitute sufficient ground.—*McInerney v. Nachman*, 3 N.E.2d 105, 286 Ill.App. 477.

Wrongful act, which may produce injury to another as natural and probable consequence, and which does produce such injury will sustain action on the case.—*Louis Kamm, Inc. v. Flink*, 175 A. 62, 113 N.J.Law 582.

may be defined as a form of action devised to cover all cases of this nature.⁵ It is a suppletory personal action⁶ founded on the mere justice and conscience of plaintiff's right to recover in the nature of a bill in equity,⁷ and it is peculiarly adapted to the redress of injuries arising from any new relation in which the parties may be placed by the varying changes in society and business, whether arising from statutory provisions or otherwise;⁸ hence it is no objection that there is no precedent for a particular action of this nature.⁹ On the other hand it has been held that case will not lie where plaintiff can have adequate redress by any of the forms of action known and practiced.¹⁰

To support an action on the case, there must be an actionable wrong and consequent injury,¹¹ but it is not necessary that the act complained of involve any moral turpitude¹² or benefit to defendant.¹³

In its most comprehensive signification an action on the case includes assumpsit as well as an action in form *ex delicto*,¹⁴ although in modern times it is, as is noted in the title Actions § 34, ordinarily understood as meaning an action in the latter form.

The distinctions between the action on the case and other forms of action are considered in the title Actions § 36 d, where also, in § 39, is considered

the effect of code and other statutory provisions abolishing the common-law forms of action.

The action on the case is often referred to as "case,"¹⁵ or "trespass on the case,"¹⁶ and it was originally called "special action on the case."¹⁷

§ 3. Direct or Consequential Nature of Injury

An action on the case will not ordinarily lie for the direct consequences of a tort unless no force was present.

While an action on the case will lie to recover damages for torts which are not committed with force,¹⁸ or for tortious damages occasioned by force where the injury is not direct or immediate but is consequential,¹⁹ ordinarily trespass is the proper remedy for a tort committed with force, the direct and immediate consequence of which is the injury complained of, as is discussed in C.J.S. title Trespass § 58, also 63 C.J. p 965 note 98; but, as is stated in the title Actions § 36 d, it has been held in some cases that plaintiff may waive the trespass and bring case for consequential damages notwithstanding the injury is direct. Whether case or trespass should be resorted to in an action for negligent injury is discussed in C.J.S. title Negligence § 176, also 45 C.J. p 1046 notes 98-3.

An injury is to be regarded as consequential where it arises after the act has been completed al-

5. Conn.—Nolan v. New York, N. H. & H. R. Co., 39 A. 115, 70 Conn. 159, 188, 43 L.R.A. 305.

Where none of established forms of action will lie, an action on the case may be maintained.

Ala.—Brasher v. First Nat. Bank of Birmingham, 168 So. 42, 48, 232 Ala. 340, quoting *Corpus Juris*—Holder v. Elmwood Corporation, 165 So. 235, 237, 231 Ala. 411, citing *Corpus Juris*.

Mich.—Creek v. Laski, 227 N.W. 817, 248 Mich. 425, 65 A.L.R. 1113.

1 C.J. p 987 note 48—11 C.J. p 4 notes 17 [a], 18.

6. Ala.—Brasher v. First Nat. Bank of Birmingham, 168 So. 42, 232 Ala. 340—Bently-Beale v. Wesson Oil & Snowdrift Sales Co., 165 So. 830, 231 Ala. 562.

11 C.J. p 3 note 8.

7. Ala.—Brasher v. First Nat. Bank of Birmingham, 168 So. 42, 47, 232 Ala. 340, quoting *Corpus Juris*.

W.Va.—Fetty v. Carroll, 190 S.E. 683, 684, citing *Corpus Juris*.

11 C.J. p 3 note 12.

Equitable right destroyed may support an action on the case.—Severign Camp, W. O. W., v. Feltman, 147 So. 396, 226 Ala. 390.

8. Ala.—Brasher v. First Nat. Bank

of Birmingham, 168 So. 42, 232 Ala. 340.

11 C.J. p 3 note 13.

9. Mich.—Creek v. Laski, 227 N.W. 817, 819, 248 Mich. 425, 65 A.L.R. 1113, quoting *Corpus Juris*.

11 C.J. p 4 notes 19, 20.

10. Ala.—Kelly v. McCaw, 29 Ala. 227.

Mass.—Adams v. Paige, 7 Pick. 542.

Vt.—Griffin v. Farwell, 20 Vt. 151.

11. Ill.—Reeda v. Tribune Co., 218 Ill.App. 45.

Or.—Condit v. Bodding, 33 P.2d 240, 147 Or. 299.

Essential elements are duty imposed by law, violation thereof, and injury proximately caused by failure to perform duty.—Hummer v. R. C. Huffman Const. Co., C.C.A.Ill., 63 F. 2d 372.

12. Ill.—Doremus v. Hennessy, 62 Ill.A. 391, affirmed 52 N.E. 924, 54 N.E. 524, 176 Ill. 608, 68 Am.S.R. 203, 43 L.R.A. 797.

Mass.—Adams v. Paige, 7 Pick. 542.

13. Eng.—Pasley v. Freeman, 3 T.R. 51, 100 Reprint 450, 12 E.R.C. 235.

14. Iowa.—New York Life Ins. Co. v. Clay County, 267 N.W. 79, 221 Iowa 966.

Me.—Wadleigh v. Katahdin Pulp & Paper Co., 100 A. 150, 116 Me. 107.

11 C.J. p 3 notes 6, 7.

15. Iowa.—New York Life Ins. Co. v. Clay County, 267 N.W. 79, 221 Iowa 966.

11 C.J. p 3 note 9.

16. U.S.—Munal v. Brown, C.C.Colo., 70 F. 967.

17. Ala.—Brasher v. First Nat. Bank of Birmingham, 168 So. 42, 232 Ala. 340—Bently-Beale, Inc. v. Wesson Oil & Snowdrift Sales Co., 165 So. 830, 231 Ala. 562.

11 C.J. p 3 note 11.

18. Fla.—Atlantic Coast Line R. Co. v. Rutledge, 165 So. 563, 122 Fla. 154.

Iowa.—New York Life Ins. Co. v. Clay County, 267 N.W. 79, 80, 221 Iowa 966.

11 C.J. p 4 note 22.

"Case" and "trespass" distinguished see Actions § 36 d.

19. Ala.—Pan American Petroleum Co. v. Byars, 153 So. 616, 228 Ala. 372.

Fla.—Atlantic Coast Line R. Co. v. Rutledge, 165 So. 563, 564, 122 Fla. 154, citing *Corpus Juris*.

Ind.—Indiana Pipe Line Co. v. Christensen, 123 N.E. 789, 188 Ind. 400.

Iowa.—New York Life Ins. Co. v. Clay County, 267 N.W. 79, 80, 221 Iowa 966.

Pa.—Stapp v. Lenker, 43 Pa.Co. 696, 11 C.J. p 4 notes 17, 22.

though occasioned thereby,²⁰ or if a new impetus is given by another.²¹

§ 4. Injury Common to All

Plaintiff must have sustained injury other than that common to all.

Case cannot be sustained where the injury is alike common to all, and where no right peculiar to the party has been affected.²²

§ 5. Particular Grounds of Action and Defenses

- a. Breach of duty imposed by contract
- b. Enforcement of statutory rights
- c. Injury to incorporeal rights
- d. Injury or diminution of value of lien
- e. Injuries to realty
- f. Defenses

a. Breach of Duty Imposed by Contract

An action on case may be maintained for a tortious breach of duty arising out of contract.

In general, where an action is based entirely on the breach of the terms of a contract between the parties, and involves no element of tort, case will not lie;²³ but where the duty is imposed by the contract or grows out of it by a legal implication and injury results from the violation or disregard of that duty, an action on the case may be maintained.²⁴ In the latter case the contract is mere inducement and the tort arising from the breach of the duty is the gravamen of the action.²⁵ An action on the case also may often be a better remedy for a breach of a common-law duty which has been

a subject of contractual relations.²⁶

The duty violated may arise out of an express or implied contract,²⁷ and it is not necessary that the contract relate to a business affected with a public interest.²⁸

This rule permits an action on the case to be brought against attorneys for their negligence, as discussed in the title Attorney and Client § 155, and surgeons and physicians for ignorance and want of skill in the treatment of a patient, as shown in C.J.S. title Physicians and Surgeons § 57, also 48 C.J. p 1138 note 61, and the principle has been extended to the unskillful performance of other contracts requiring a high degree of skill.²⁹

Money had and received. Case will not lie where the breach of duty complained of is defendant's refusal to turn over to plaintiff money received by the former for the latter's use. Assumpsit is the only remedy.³⁰ On the other hand, where one received money in specie, simply for safe-keeping, to be redelivered on demand and converted it to his own use, it was held that there was a breach of his duty to redeliver the specific money, which supported an action on the case.³¹

b. Enforcement of Statutory Rights

In the absence of provision of another remedy, case may be employed to enforce a statutory right.

Where a statute creates a cause of action and provides that the remedy shall be in case, case will lie therefor,³² and where the statute merely imposes a duty or liability without providing any remedy, an action on the case will lie if appropriate to the character of the injury.³³ Where, however, the

20. Pa.—Stapp v. Lenker, *supra*.
Va.—Jordan v. Wyatt, 4 Gratt. 151,
45 Va. 151, 47 Am.D. 720.
11 C.J. p 5 note 23.

21. Pa.—Cottler v. Cummins, 6
Serg. & R. 343.

22. Vt.—Hall v. Eaton, 25 Vt. 458.

23. Del.—Garber v. Whittaker, 174
A. 34, 6 W.W.Harr. 272.
Assumpsit and case distinguished
see Actions § 36 c.

24. Ala.—Silverstein v. First Nat.
Bank of Birmingham, 165 So. 827,
833, 231 Ala. 565, citing *Corpus*
Juris—Western Union Telegraph
Co. v. Bowen, 76 So. 985, 16 Ala.
App. 253.

Del.—Garber v. Whittaker, 174 A. 34,
6 W.W.Harr. 272—Mackenzie Oil
Co. v. Omar Oil & Gas Co., 154 A.
883, 891, 4 W.W.Harr. 435, citing
Corpus Juris.

Wash.—Flessner v. Carstairs Pack-
ing Co., 160 P. 14, 93 Wash. 48.
11 C.J. p 6 note 55.

Right to sue either in contract or
tort generally see Actions § 47.
Waiver of contract and action in tort
see Actions § 51.

Fraud on one's rights is actionable
as such, notwithstanding those
rights may depend in a measure on
contract relations between the same
parties.—Oliver v. Perkins, 52 N.W.
609, 92 Mich. 304—11 C.J. p 6 note
55 [a].

Gratuitous undertaking out of
which misfeasance grows.—Banfield
v. Addington, 140 So. 893, 896, 104
Fla. 661.

25. Del.—Keith Co. v. Booth Fish-
eries Co., 87 A. 715, 27 Del. 218.
11 C.J. p 6 note 56.

26. Me.—Milford v. Bangor R., etc.,
Co., 71 A. 759, 104 Me. 233, 30 L.
R.A., N.S., 531.

N.Y.—Orange County Bank v. Brown,
3 Wend. 158.

Pa.—McCall v. Forsyth, 4 Watts &
S. 179.

11 C.J. p 7 note 57.

27. Ala.—Moore v. Appelton, 26 Ala.
633—Myers v. Gilbert, 18 Ala. 467.
11 C.J. p 7 note 63.

28. Ala.—Western Union Telegraph
Co. v. Bowen, 76 So. 985, 16 Ala.
App. 253.

29. Pa.—Erie City Iron Works v.
Barber, 102 Pa. 156—Zell v. Ar-
nold, 2 Penn. & W. 292.
11 C.J. p 7 note 62.

30. R.I.—Riley v. La Rue, 39 A. 753,
20 R.I. 425—Royce v. Oakes, 39 A.
758, 20 R.I. 418, 39 L.R.A. 845.

31. R.I.—Royce v. Oakes, 38 A. 371,
20 R.I. 252.

32. Conn.—Guthrie v. Crover, 38
Conn. 75.
11 C.J. p 7 note 69.

33. W.Va.—Mapel v. John, 24 S.E.
608, 42 W.Va. 30, 57 Am.S.R. 839,
32 L.R.A. 800.
11 C.J. p 7 note 71.

statute prescribes a remedy other than case for the enforcement of a right or liability created by the statute case will not lie, although independent of the statute it would be the appropriate form of remedy,³⁴ unless, under the circumstances the statutory remedy is inadequate³⁵ or unavailable.³⁶

Case is the proper remedy to recover a tax under a statute,³⁷ or for damages for the taking of property under an act alleged to be unconstitutional.³⁸

As a rule, case is not the remedy under a penal statute.³⁹ It may, however, be brought when the party seeks to recover for special damages occasioned by the breach of a penal statute.⁴⁰

c. Injury to Incorporeal Rights

Case is an appropriate remedy for an injury to an incorporeal right.

Where the right or property injured is intangible and incapable of manual possession, case is the appropriate remedy,⁴¹ since such property is impossible of manual possession and hence physical force cannot be applied to it.⁴²

d. Injury or Diminution of Value of Lien

Wrongful injury or diminution of the value of prop-

erty subject to a lien may support an action on the case by the lienholder.

As stated in *Corpus Juris*, which statement has been quoted and cited with approval, where plaintiff has a lien on the property injured, he may maintain an action on the case, where the injuries complained of diminish the value of his security or operate to make it ineffectual,⁴³ on the theory that the wrong is done to property of which plaintiff has neither the possession nor the right to possession, and, since trespass, detinue, or trover will not lie, the law will afford a remedy for the injury by an action on the case.⁴⁴ This includes actions by mortgagees,⁴⁵ or landlords having a lien on the property injured.⁴⁶

e. Injuries to Realty

Case will lie for consequential injuries to real property or injury by one lawfully thereon.

An action on the case is the proper remedy for consequential injuries to real property,⁴⁷ and proof of possession is not essential to a recovery.⁴⁸ So, when defendant does some act on his own land which results in an injury to the land or other property of an adjoining owner, case may be maintained.⁴⁹ Case is also the only remedy where the

34. Mass.—*Wiley v. Yale*, 1 Metc. 553.

11 C.J. p 7 note 70.

35. Ill.—*Lawrence v. Hagerman*, 56 Ill. 69, 8 Am.R. 674.

Mass.—*Adams v. Paige*, 7 Pick. 542.

36. S.C.—*Michalson v. All*, 21 S.E. 323, 43 S.C. 459, 49 Am.S.R. 357.

37. R.I.—*Franklin v. Warwick, etc.*, Water Co., 52 A. 988, 24 R.I. 224.

38. Ohio.—*Hamilton County v. Cincinnati, etc., Turnp. Co., Wright* 603.

39. Va.—*Russell v. Louisville, etc., R. Co.*, 25 S.E. 99, 93 Va. 322.

11 C.J. p 7 note 72.

40. R.I.—*Aldrich v. Howard*, 7 R.I. 199.

11 C.J. p 7 note 73.

41. Fla.—*Atlantic Coast Line R. Co. v. Rutledge*, 165 So. 563, 122 Fla. 154.

Pa.—*Sporting Club v. Vosburg*, Wilcox 285.

11 C.J. p 8 notes 84, 86–88, p 9 notes 89–96.

Case as remedy for flooding and flowage see C.J.S. title Waters § 36, also 67 C.J. p 730 note 53; as remedy for pollution of waters see C.J.S. title Waters § 54, also 67 C.J. p 781 note 26.

Case as remedy for injury or disturbance of an easement see C.J.S. title Easements § 107, also 19 C.J. p 991 note 38.

42. S.C.—*Marshall v. White*, 1 Harp. 122.

43. U.S.—Board of Drainage Com'rs of McCracken County, for Use of Mayfield Creek Drainage Dist. No. 1, v. Fletcher, D.C.Ill., 7 F.Supp. 587, affirmed, C.C.A., 72 F.2d 8.

Cal.—*McGaffey Canning Co., Inc. v. Bank of America*, 294 P. 45, 48, 109 Cal.App. 415, citing *Corpus Juris*.

Fla.—*Seaboard All-Florida Ry. v. Leavitt*, 141 So. 886, 891, 105 Fla. 600, citing *Corpus Juris*—*J. G. White Engineering Corporation v. People's State Bank of Lakeland*, 87 So. 753, 756, 81 Fla. 35, citing *Corpus Juris*.

Okl.—*Hugo State Bank v. Hugo Nat. Bank*, 220 P. 868, 869, 96 Okl. 135, quoting *Corpus Juris*.

Tenn.—*Rent-A-Car Co. v. Belford*, 45 S.W.2d 49, 52, 163 Tenn. 590, citing *Corpus Juris*.

Wyo.—*First Nat. Bank of Newcastle v. Sorenson*, 217 P. 948, 951, 30 Wyo. 136, citing *Corpus Juris*.

11 C.J. p 9 note 97.

44. Ala.—*Aderholt v. Smith*, 3 So. 794, 83 Ala. 486.

11 C.J. p 9 note 97.

45. Ohio.—*Allison v. McCune*, 15 Ohio 726, 45 Am.D. 605.

11 C.J. p 9 note 98.

46. Ala.—*Collier v. Faulk*, 69 Ala. 58—*Hussey v. Peebles*, 53 Ala. 432.

11 C.J. p 9 note 99.

47. Ill.—*Holm v. Cook County*, 213 Ill.App. 1.

Kan.—*Wilkins v. Lee*, 85 P. 140, 141, 73 Kan. 321.

11 C.J. p 4 note 22 [a].

Escape of oil

Ind. — *Indiana Pipe Line Co. v. Christensen*, 123 N.E. 789, 188 Ind. 400.

48. Ala.—*Huff v. Dyer*, 77 So. 926, 16 Ala.App. 332, certiorari denied 78 So. 988, 201 Ala. 699.

Injury by trespasser in possession of part

W.Va.—*Lyons v. Fairmont Real Estate Co.*, 77 S.E. 525, 71 W.Va. 754.

49. Wyo.—*Town Council of Town of Hudson v. Ladd*, 263 P. 703, 707, 37 Wyo. 419, citing *Corpus Juris*. 11 C.J. p 9 note 1.

Excavations

An action on the case lies where injury results to plaintiff's real property from excavations on adjoining property.—*Panton v. Holland*, 17 Johns. N.Y., 92, 8 Am.D. 369.

Construction of railroad

Damages to adjoining property resulting from the construction of a railroad may be recovered in an action on the case.—*Northern Cent. R. Co. v. Holland*, 12 A. 575, 117 Pa. 613—*Pennsylvania R. Co. v. Duncan*, 5 A. 742, 111 Pa. 352—*Philadelphia, etc., R. Co. v. Patent*, 17 Wkly.N.C., Pa., 198.

injury is done on plaintiff's land by one who has the right of entry thereon.⁵⁰

Reversionary interest. For an injury to property which affects its reversionary value, and in which plaintiff has only a reversionary interest, case is the appropriate remedy.⁵¹ Thus, case is the landlord's remedy for injury to the reversion when a tenant is in possession for a fixed and unexpired term.⁵²

f. Defenses

Matters tending to show the absence or discharge of the alleged duty are available as a defense. Coverture is not a defense.

In order for a matter to constitute a defense, it must be sufficient to negative plaintiff's right to recover. Accordingly, when parties by an express agreement assume the performance of an obligation which, aside from the agreement, the law implies, whatever will in law excuse a breach of the express obligation will, in an action on the case for breach of the implied obligation, be a defense thereto.⁵³ The defense of contributory negligence to an action on the case for damages for neglect to perform an obligation arising out of contract must be based on plaintiff's obligation under the contract or its incidents, and plaintiff's negligence must be a proximate cause of defendant's breach, and hence must occur before or concurrently with such breach.⁵⁴ Coverture, however, is not a defense, as the action is in form *ex delicto*.⁵⁵

Overhanging eaves

Damages caused by water flowing from overhanging eaves may be recovered in an action on the case.—*Garraty v. Duffy*, 7 R.I. 476.

50. Me.—*Hinks v. Hinks*, 46 Me. 423.

Pa.—*Edelman v. Yeakel*, 27 Pa. 26. 11 C.J. p 9 note 5.

51. Fla.—*Atlantic Coast Line R. Co. v. Rutledge*, 165 So. 563, 122 Fla. 154.

11 C.J. p 4 note 17, p 9 note 6.

Unassigned dower interest is in its nature a reversionary interest, within this rule, so as to authorize an action on the case by the widow for injuries to the freehold after the death of her husband but before the assignment of dower.—*Rogers v. Potter*, 32 N.J.Law 78.

52. N.J.—*Van Ness v. New York & New Jersey Tel. Co.*, 74 A. 456, 78 N.J.Law 511.

11 C.J. p 10 note 7.

53. Ill.—*Standard Brewery v. Hale, etc., Malting Co.*, 70 Ill.App. 363, affirmed 49 N.E. 507, 171 Ill. 602. 11 C.J. p 10 note 23.

54. Me.—*Crosby v. Plummer*, 89 A. 145, 111 Me. 355.

55. Ala.—*Britt v. Pitts*, 20 So. 484, 11 Ala. 401.

56. Del.—*Duross v. Hobson*, 53 A. 438, 19 Del. 445.

11 C.J. p 11 note 27.

Civil jurisdiction and authority of justices of the peace see C.J.S. title Justices of the Peace §§ 26–52, also 35 C.J. p 487 note 26–p 552 note 73.

Procedural act abolishing the distinctions between trespass and case does not enlarge the jurisdiction of magistrates so as to include actions on the case.—*Printing House v. Chachkin*, 14 Pa.Dist. 77.

57. N.Y.—*Brisbane v. Pennsylvania R. Co.*, 98 N.E. 752, 205 N.Y. 431, 44 L.R.A., N.S., 274, Ann.Cas.1913E 593, reversing 125 N.Y.S. 1042, 141 App.Div. 366.

11 C.J. p 11 note 30.

Nuisances; obstruction of way

"Actions on the case for nuisances, or for the obstruction of one's right of way are according to all authori-

§ 6. Jurisdiction and Venue

In the absence of statutory permission, an action on case cannot be brought in a court of inferior jurisdiction. The usual rules as to venue apply.

In some jurisdictions, an action on the case cannot be brought before a court of inferior jurisdiction, but must be brought in a higher court.⁵⁶

As pointed out in C.J.S. title Venue § 8, also 67 C.J. p 25 note 27–p 26 note 32, the test as to whether an action is transitory or local lies in the nature of the subject of injury. If the transaction on which the action is founded could have taken place anywhere, the action is generally regarded as transitory; but when the cause of action could only have arisen in a particular place, the action is local. Accordingly, where an action on the case arises from an injury to real property, it is a local action,⁵⁷ and in the absence of a statute to the contrary the venue must be laid in the county in which the cause of action arose.⁵⁸ Where the injury is either to personal rights or to personal property, it is a transitory action and may be brought wherever the court can obtain jurisdiction of the parties.⁵⁹

§ 7. Time to Sue

An action on the case must be brought within the time limited by statute.

The time within which an action on the case may be brought, under statutes of limitations of general application, is considered in C.J.S. title Limitations of Actions § 73, also 37 C.J. p 772 notes

ties local."—*Crook v. Pitcher*, 61 Md. 510, 513.

58. Mass.—*Sumner v. Finegan*, 15 Mass. 280.

11 C.J. p 11 note 30.

In Texas

(1) Under a statute providing that no inhabitant of the state shall be sued outside the county of his domicile except where "the foundation of the suit is some crime or offense or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where . . . the trespass was committed," the word "trespass" includes actions of trespass on the case.—*Page v. Schlortt*, Civ.App., 71 S.W.2d 836—11 C.J. p 11 note 33.

(2) So, an action of trespass on the case may be brought in the county where the trespass was committed or where defendant had his domicile.—*Hill v. Kimball*, 13 S.W. 59, 76 Tex. 210, 7 L.R.A. 618. 11 C.J. p 11 note 30 [a].

59. N.H.—*Henry v. Sargeant*, 13 N. H. 321, 40 Am.D. 146. 11 C.J. p 11 note 32.

19-27. Where a declaration sets forth a cause of action for which case is the appropriate remedy, a particular limitation applicable to actions on the case will be applied.⁶⁰ A statute requiring all special actions on the case, for criminal conversation, assault and battery, and false imprisonment, to be brought within one year after the cause of action accrues, refers only to the specific actions designated and not to all special actions on the case.⁶¹

§ 8. Persons Entitled to Sue and Person Liable; Parties

Rules of general application control as to the persons entitled to sue and the parties to action on the case.

In accordance with the usual rules governing parties plaintiff, as discussed in C.J.S. title Parties § 6, also 47 C.J. p 22 note 25, an action on the case for the enforcement of a right must be in the name of the person having the legal title.⁶² So, where property is destroyed by fire, the owner and lessor is a proper party in an action on the case for the recovery of the value thereof.⁶³ In some jurisdictions, an assignor of a part of a claim for damages may maintain an action on the case.⁶⁴

In accordance with the usual rules as to joinder of parties plaintiff in civil actions, as discussed in the C.J.S. title Parties §§ 17-29, also 49 C.J. p 53 note 70-p 66 note 55, where a wrong constitutes a direct as well as a consequential injury to land in the possession of a life tenant, the latter may waive the trespass and join with the remainderman in an action on the case for the recovery of the consequential damages sustained by him.⁶⁵

Defendants. Where two or more have jointly committed an injury which is in itself a tort, or where the liability sought to be enforced does not originate in a contract, or is not so declared on,

plaintiff may at his option sue one, or join as defendants all or some, of those who committed the alleged injury.⁶⁶ Where the liability as set forth in the declaration is obviously founded on contract, but the injury complained of is in its character a tort, plaintiff may sue one or more of those liable.⁶⁷ However, where a breach of contract is the gravamen of the action and the contract is material, all jointly liable thereon must be joined.⁶⁸

§ 9. Pleading

- a. Declaration
- b. Plea or answer
- c. Issues and proof

a. Declaration

- (1) In general
- (2) Description of subject of injury
- (3) Statement of plaintiff's interest
- (4) Statement of injury
- (5) Averments as to damages

(1) In General

The ordinary rules, more particularly those of common-law pleading, apply to the requisites and sufficiency of the declaration, which must clearly state a cause of action.

The requisites and sufficiency of a declaration in an action on the case depend generally on the particular circumstances on which the action is founded, and reference should be made to the titles which deal with the particular torts for which the action is brought.

The distinguishing characteristic of an action on the case seems to be that all the facts on which plaintiff relies must be stated in his declaration.⁶⁹

The name given to the declaration or writ by plaintiff is not conclusive as to the form of the ac-

60. Ill.—Mount v. Hunter, 58 Ill. 246.

11 C.J. p 11 notes 35, 36.

61. U.S.—Cockrill v. Cooper, Ark., 86 F. 7, 29 C.C.A. 529, reversing, C. C., Cockrill v. Butler, 78 F. 679.

Ark.—Elmrich v. Little Rock Tract, etc., Co., 70 S.W. 1035, 71 Ark. 71—St. Louis, etc., R. Co. v. Anderson, 35 S.W. 791, 62 Ark. 360—Little Rock, etc., R. Co. v. Chapman, 39 Ark. 463, 43 Am.S.R. 274—St. Louis, etc., R. Co. v. Morris, 35 Ark. 622.

62. U.S.—Sevier v. Holliday, Super. Ark., 21 F.Cas.No.12,680 a, Hempst. 160.

63. Ill.—Peoria & P. U. Ry. Co. v. United States Rolling Stock Co., 28 Ill.App. 79.

64. Va.—Tyler v. Ricamore, 12 S.E. 799, 87 Va. 466.

65. Pa.—McIntire v. Westmoreland Coal Co., 11 A. 308, 118 Pa. 108.

66. W.Va.—Bloss v. Plymale, 3 W. Va. 393, 100 Am.D. 752.
11 C.J. p 12 notes 41, 42.

67. Vt.—Vail v. Strong, 10 Vt. 457.

An action against common carriers for the loss of property has been held to be based on tort where the gravamen is the breach of duty.—Orange Bank v. Brown, 3 Wend., N. Y., 158.

68. Vt.—Vail v. Strong, 10 Vt. 457.
11 C.J. p 12 note 43.

69. Me.—Hathorn v. Calef, 53 Me. 471.

Statements injurious to reputation
Whether cause of action based on statements injurious to reputation

and character was one for slander or was an action on the case, statement of cause of action by clear and distinct averments was required. The petition should clearly state character of suit and place court in possession of alleged slanderous matter with such innuendoes as are necessary to explain its meaning, and a petition, alleging that deputy sheriff's character and reputation had been damaged by sheriff's statements that he had discharged deputy for incompetency, inability, insubordination, immorality, and general misconduct, was insufficient, where no attempt was made to set out or detail substance of any of statements made by sheriff and it was not alleged wherein statements were false.—Murray v. Harris, Tex.Civ. App., 112 S.W.2d 1091, error dismissed.

tion, but such question is to be determined from the nature of the wrong alleged and the character of the relief sought.⁷⁰ For instance, if the declaration sets forth a contract as mere inducement, but the gravamen of the action is a tort connected with the contract, the declaration will be construed as one in case.⁷¹

By way of inducement, opening the way to a statement of the gravamen of the action, the declaration may set forth a contract between plaintiff and defendant,⁷² or any matter which in itself would afford no ground of action or cause of complaint.⁷³ So, plaintiff may allege facts which in themselves constitute a trespass, where they constitute only a part of his cause of action.⁷⁴

Actions on statutes. Where plaintiff declares on a statute which does not prescribe the form of declaration or give directions with regard thereto, his declaration should be drawn as at common law,⁷⁵ stating all the facts on which plaintiff relies,⁷⁶ and all circumstances essential to support the action.⁷⁷ Further, where a statute prescribes a remedy by way of an action on the case, whether the declaration therein should be in form assumpsit or in tort is to be determined from the nature of the facts to be stated and established to make out the cause of action.⁷⁸

It is not necessary or advisable to recite a public statute, as a misrecital may sometimes be fatal; it is only necessary to state facts which bring plaintiff's case within the provisions of the statute and generally to refer to it.⁷⁹

Conclusion. The declaration should conclude "to the damage of the plaintiff," and the sum named

should be sufficient to cover the real demand,⁸⁰ since, as will be hereinafter discussed in § 11, greater damages cannot be recovered than plaintiff has laid in the conclusion of his declaration. It is not an objection to a count in case that the form of the conclusion is in debt and not in case,⁸¹ but lack of an *ad damnum* clause in a declaration is an omission of matter of substance, and cannot be disregarded on a demurrer to the declaration.⁸²

Duplicity. A declaration in case stating facts constituting more than one cause of action against defendant is not bad for duplicity, unless plaintiff relies on each of them as a distinct ground of recovery.⁸³

Amendment. In order to cure imperfections and mistakes in the manner of stating plaintiff's case, particular allegations in the declaration may be changed by amendment, and other allegations added, provided the identity of the cause of action is preserved, and the form of the action is not changed.⁸⁴ It has also been held that plaintiff may amend his declaration so as to change the form of the action to an action on the case, where the amendment does not change the cause of action.⁸⁵

(2) Description of Subject of Injury

The subject of the injury should be described in the declaration with reasonable definiteness.

In an action on the case for damages to realty, the place where the acts complained of were done is material and traversable,⁸⁶ and allegations thereof must, either by the name of the land or close, or in some other way, designate or describe such place with a reasonable degree of definiteness, or the declaration will be bad on demurrer.⁸⁷

70. Ill.—George v. Illinois Cent. R. Co., 197 Ill.App. 152.

Mich.—Wood v. Michigan Air Line Co., 45 N.W. 980, 81 Mich. 358. 11 C.J. p 12 notes 50, 51.

71. Ala.—Sharpe v. Birmingham Nat. Bank, 7 So. 106, 87 Ala. 644. 11 C.J. p 13 note 52.

72. Ala.—Dixon v. Barclay, 22 Ala. 370. 11 C.J. p 15 note 90.

73. Mass.—Richards v. Farnham, 13 Pick. 461.

74. Mich.—Oliver v. Perkins, 52 N. W. 609, 92 Mich. 304.

75. N.Y.—Bayard v. Smith, 17 Wend. 88.

Declaration held sufficient

Conn.—Guthrie v. Crover, 38 Conn. 75.

76. Me.—Wadleigh v. Katahdin Pulp & Paper Co., 100 A. 150, 116

Me. 107—Hathorn v. Calef, 53 Me. 471.

77. N.Y.—Bayard v. Smith, 17 Wend. 88.

R.I.—Smith v. Tripp, 13 R.I. 152. 11 C.J. p 13 note 58.

78. Me.—Wadleigh v. Katahdin Pulp & Paper Co., 100 A. 150, 116 Me. 107—Hathorn v. Calef, 53 Me. 471.

79. N.Y.—Bayard v. Smith, 17 Wend. 88.

80. N.Y.—Corning v. Corning, 6 N. Y. 97.

11 C.J. p 13 notes 62, 63.

81. N.Y.—Bayard v. Smith, 17 Wend. 88.

11 C.J. p 13 note 64.

82. W.Va.—McGlamery v. Jackson, 68 S.E. 105, 67 W.Va. 417, 21 Ann. Cas. 239.

83. Conn.—Raymond v. Sturges, 23 Conn. 134.

11 C.J. p 13 note 59.

84. N.H.—Newell v. Horn, 47 N.H. 379.

85. N.J.—Price v. New Jersey R., etc., Co., 32 N.J.Law 19.

Pa.—Smith v. Bellows, 77 Pa. 441. 11 C.J. p 13 note 66.

86. W.Va.—McDodrill v. Pardee, etc., Lumber Co., 21 S.E. 878, 40 W.Va. 564.

But in Delaware, it has been held that, although in *quare clausum* fregit an allegation of description of a close by abutments, etc., is material under the statute, in case for removing gravel from the land of plaintiff, although the land is described in the narration, the description is immaterial and requires no proof.—*Smethurst v. Journey*, 1 Del. 196.

87. Me.—Moody v. Hinkley, 34 Me. 200.

W.Va.—McDodrill v. Pardee, etc., Lumber Co., 21 S.E. 878, 40 W.Va. 564.

Where the subject matter of the injury is personal property, a description of the quality, quantity, number, and value may be given in general terms.⁸⁸

Where the subject matter of the tort is in reversion, the declaration must charge that the act complained of was done to the damage of the reversion,⁸⁹ or must state an injury of such a permanent nature as to be necessarily injurious thereto.⁹⁰ It is not sufficient that the injury complained of might be of such a permanent nature as to affect the reversion.⁹¹

(3) Statement of Plaintiff's Interest

Where not implied by law, plaintiff's right, interest, or title infringed should be alleged.

Plaintiff's right, interest, or title infringed should be generally or particularly alleged, at least where it is not implied by law.⁹² In actions on the case for damage it is an established rule that plaintiff's right or interest in such property should be stated according to the facts,⁹³ but it is a well recognized practice to state it in the least definite manner conceivable.⁹⁴

Where the injury was to real property in possession of plaintiff, it is sufficient to state that plaintiff was possessed of the land at the time of the injury,⁹⁵ and his rights and interests are matters of evidence only.⁹⁶ In other words, if the action is for consequential injuries to real property in plaintiff's possession, title need not be alleged in plaintiff, since possession is sufficient to sustain the action.⁹⁷ Where the tort consisted in an injury to goods, an averment that they were the goods "of the plaintiff," or that he "was lawfully possessed"

of them, sufficiently alleges plaintiff's right to them or interest in them, either absolutely or to a limited extent.⁹⁸ Where the injury was in respect of an incorporeal hereditament appurtenant to land or houses, it is sufficient in an action against a stranger to the title to allege that at the time of the commission of the injury plaintiff was possessed of a house or land, and that by reason of such possession he was entitled to some easement in the exercise of which he was disturbed.⁹⁹ Where plaintiff's right is not possessory, but in reversion, his specific interest must be expressly stated in the declaration according to the facts, because, not being in possession, his damages cannot be known except by a direct description of his title and the injury received.¹

Interest originating from defendant's obligation. Where the right of plaintiff arises from an obligation by defendant to observe some duty, the nature of the duty must be stated, whether it is based on an express contract between the parties or on an implication of law, and the allegations must clearly show that, either by express contract or by implication of law, defendant was compelled to do or refrain from doing the act regarding which he is sought to be held liable.²

Where the injury arises from the breach of an obligation imposed on defendant by reason of an express or implied contract, it is imperative to refrain from laying a promise as if the action were in assumpsit;³ but the contract should be correctly set forth as an inducement to the statement and description of the wrong or injury done.⁴ It is not necessary to state the contract formally unless it

88. W.Va.—Newlon v. Reitz, 7 S.E. 411, 31 W.Va. 483.
11 C.J. p 14 note 70.

89. Ill.—Chicago v. McDonough, 1 N.E. 337, 112 Ill. 85.
11 C.J. p 14 note 72.

Action by landlord

A declaration by a landlord, in an action on the case for an injury to the land while in the possession of a tenant, is bad where it alleges an injury to the property generally and neither limits the complaint to an injury done to plaintiff's reversionary estate and interest in the property nor avers that there was any injury to that estate or interest.—Rowland v. Fuller, How.A.Cas., N.Y., 629.

90. Ill.—Chicago v. McDonough, 1 N.E. 337, 112 Ill. 85.
11 C.J. p 14 note 72.

91. N.H.—Davis v. Jewett, 13 N.H. 88.

92. N.Y.—Gilbert v. Field, 3 Cal. 329.

11 C.J. p 14 note 75.

93. N.H.—Davis v. Jewett, 13 N.H. 88.

94. Va.—Patrick v. Ruffners, 2 Rob. 209, 41 Va. 209, 40 Am.D. 740.
W.Va.—Standiford v. Goudy, 6 W. Va. 364, 365.

"According to the practice well recognized . . . declarations in actions of . . . case for the recovery of damages to real estate, generally state the right of property in the least definite manner conceivable, and merely mention the land, without any description that serves any practical purpose of distinguishing it from any other tract of the same character."—Standiford v. Goudy, supra.

95. Pa.—Heaton v. Pennsylvania R. Co., 98 Pa.Super. 162.
11 C.J. p 14 note 80.

96. N.H.—George v. Fisk, 32 N.H. 32.

97. Ala.—Sloss-Sheffield Steel & Iron Co. v. Wilkes, 165 So. 764, 768, 231 Ala. 511, citing *Corpus Juris*.

11 C.J. p 14 note 81.

98. Ala.—Joseph v. Henderson, 10 So. 843, 95 Ala. 213.

Pa.—Good v. Harnish, 13 Serg. & R. 99.

11 C.J. p 14 note 82.

99. Va.—Patrick v. Ruffners, 2 Rob. 209, 41 Va. 209, 40 Am.D. 740.

11 C.J. p 14 note 83, p 15 notes 84, 85.

1. N.H.—George v. Fisk, 32 N.H. 32—Davis v. Jewett, 13 N.H. 88.

11 C.J. p 15 note 86.

2. Conn.—Hewison v. New Haven, 34 Conn. 136, 91 Am.D. 718.

11 C.J. p 15 note 88.

3. Ark.—Reardon v. Farrington, 7 Ark. 364.

N.Y.—Beard v. Yates, 2 Hun 466.

11 C.J. p 15 note 89.

4. N.H.—Newell v. Horn, 47 N.H.

constitutes a material part of plaintiff's case,⁵ nor is it necessary, when the injury was caused by a misfeasance or a malfeasance, to state formally or substantially the consideration of the contract,⁶ although, where the nonfeasance of defendant is the cause of the damage done to plaintiff by the breach of contract, its consideration should be so stated.⁷ It is necessary to set forth only so much of the contract as is requisite to establish plaintiff's right of action and to render the statement of his case intelligible,⁸ omitting those matters which are not a necessary part of the case, and that do not affect those matters which are necessary.⁹

For the breach of a duty imposed by law and not connected with, or dependent on, a contract, plaintiff must aver the facts on which the duty arose.¹⁰ However, an express allegation of a duty is not essential, since if the facts stated raise the duty, an express allegation is unnecessary,¹¹ and if the facts stated do not raise the duty, an express allegation of duty is immaterial.¹² As a general rule, it is sufficient to allege the facts out of which the duty arose, and that defendant failed to perform such duty.¹³ Where the liability arises from the nature of defendant's employment, it is necessary only to state succinctly what the situation of defendant was that caused the duty and the liability to arise,¹⁴ and it is not necessary to state or to prove that any contract existed between the parties.¹⁵

(4) Statement of Injury

The declaration must contain a sufficient allegation of the wrong or breach of duty giving rise to the injury complained of.

Where plaintiffs show generally and comprehensively a right in themselves, an injury by defendants, and a loss sustained by them in consequence, it is as a rule sufficient.¹⁶ The facts alleged in the declaration, except where the action is brought on a statute, should show clearly and distinctly that some tort and not a mere breach of contract has been committed,¹⁷ and must sufficiently state such facts as show an invasion of the legal right of plaintiff with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury.¹⁸ It should set forth a breach of duty imposed on defendant by contract¹⁹ or the breach of an obligation of law which defendant owed to plaintiff.²⁰ It should distinctly appear from the allegations that the injury followed consequentially and did not arise directly from the acts of defendant.²¹

The injury should not be stated as having been committed *vi et armis*; but a declaration that is good in every respect, except in the use of the words "with force and arms," is not affected by their wrongful use and is aided by verdict where defendant is not deprived of any advantage by their use.²² Also, these words may be construed as surplusage,²³ or if necessary the declaration may be amended.²⁴

379—Webster v. Hodgkins, 25 N. H. 128.

Vt.—Wright v. Geer, 6 Vt. 151, 27 Am.D. 538.

5. Vt.—Hyde v. Moffat, 16 Vt. 271, 278.

"When an action counts merely upon a contract, and claims damages for the breach, or for the non-fulfilment, of such contract, the precise terms of the contract become important, and must be set out. But when the contract is merely referred to as matter of inducement, and the failure to fulfil the contract is not the ground of damage, it is sufficient to allude to it in general terms."—Hyde v. Moffat, *supra*.

6. Ind.—Flint, etc., Mfg. Co. v. Beckett, 79 N.E. 503, 167 Ind. 491, 12 L.R.A., N.S., 924.

11 C.J. p 15 note 91.

7. Ala.—Newton v. Brook, 132 So. 722, 134 Ala. 269—Moseley v. Wilkinson, 24 Ala. 411.

11 C.J. p 16 note 92.

8. Vt.—Hyde v. Moffat, 16 Vt. 271.

11 C.J. p 16 note 93.

9. N.H.—Webster v. Hodgkins, 25

N.H. 128.

10. U.S.—World's Columbian Exposition Co. v. Republic of France, Ill., 91 F. 64, 33 C.C.A. 333.

11 C.J. p 16 note 95.

11. Del.—Wise v. Western Union Telegraph Co., 172 A. 757, 6 W.W. Harr. 155.

12. Conn.—Hewison v. New Haven, 34 Conn. 136, 91 Am.D. 718.

13. U.S.—World's Columbian Exposition Co. v. Republic of France, Ill., 91 F. 64, 33 C.C.A. 333.

11 C.J. p 16 note 96.

14. N.H.—Low v. Tilton, 19 N.H. 271.

11 C.J. p 16 note 98.

15. N.H.—Hall v. Cheney, 36 N.H. 26.

Vt.—Wright v. Geer, 6 Vt. 151, 27 Am.D. 538.

16. Conn.—Twiss v. Baldwin, 9 Conn. 291.

Declarations held sufficient

U.S.—Times Herald Pub. Co. v. Philadelphia Record Co., D.C.Pa., 45 F.2d 229—Boston Elevated Ry. Co. v. Paul Boynton Co., Mass., 211 F. 812, 128 C.C.A. 338, certiorari

denied 35 S.Ct. 418, 238 U.S. 618, 59 L.Ed. 1492.

Declarations held insufficient

Tex.—Sisler v. Mistrot, Civ.App., 192 S.W. 565.

17. Del.—Garber v. Whittaker, 174 A. 34, 6 W.W.Harr. 272.

11 C.J. p 12 note 47.

18. Vt.—Sprague v. Fletcher, 30 A. 693, 67 Vt. 46.

19. Ala.—Moore v. Appleton, 26 Ala. 633.

20. Ala.—Mobile, etc., R. Co. v. Crenshaw, 65 Ala. 566—Mobile, etc., R. Co. v. Williams, 53 Ala. 595.

11 C.J. p 16 note 8.

21. Mass.—Barnes v. Hurd, 11 Mass. 57.

11 C.J. p 16 note 6.

22. S.C.—White v. Marshall, 1 Harp. 122.

11 C.J. p 16 note 1.

23. S.C.—P—r v. Bogan, 2 McCord 386.

24. Me.—Matthews v. Treat, 75 Me. 594.

A general averment of the wrongful act or injury is sufficient, as a rule, without a detailed statement of the means by which it was effected.²⁵

Whereas or wherefore. It does not seem necessary to make a direct averment, but the statement of the injury may be by way of recital, as by the use of the words, "whereas" or "wherefore;" nor are such modes of expression open to objection.²⁶

Illegality of act. Where the act or omission complained of was not prima facie actionable, it should be stated that the act was done wrongfully;²⁷ or some equivalent averment must be used,²⁸ and the facts showing the unlawfulness must be set out.²⁹

Motive or intent. Where the act or omission complained of is not prima facie actionable, because indifferent in itself, the intent with which it was done becomes material and requires, as do all substantive matters of fact, a specific allegation thereof.³⁰ In such a case, it is sufficient if it is stated substantially in accordance with the facts of the case.³¹ However, where the act occasioning the damage is itself unlawful, without any other extrinsic circumstances, the malicious intent of the wrongdoer is immaterial, and no allegation thereof is necessary.³²

Scienter. Where, in order to enable plaintiff to recover for an injury, it is necessary that defendant should have had knowledge of certain facts, such knowledge on his part must be pleaded with sufficiency.³³ However, where a scienter should be, but is not, averred, the defect is a purely technical one, and a complaint may be amended without introducing a new cause of action.³⁴

Time. An exact statement of the time at which the injury was committed is not as a rule requisite, and where it is possible that it could have been com-

mitted on several days, it may be laid as having been committed on a specified day and on divers other days and times between that day and the commencement of the suit. Where, however, a special period is assigned by means of a continuando, it becomes matter of description and not merely a formal allegation of time.³⁵

(5) Averments as to Damages

Special as distinguished from general damages must be pleaded.

Allegations of damages that are implied or presumed to have accrued in consequence of the wrong complained of need not be made;³⁶ but the fact that the plaintiff gratuitously undertakes to enumerate some portions of his general damage will not preclude his also proving other general damage.³⁷ On the other hand, if the damages sustained have not necessarily resulted from the act complained of, and therefore are not implied by law, plaintiff must allege the particular or special damages sustained and meant to be relied on at the trial;³⁸ but any illegal claim of special damage is mere surplusage.³⁹

Matter in aggravation. In cases where it is not requisite to allege defendant's knowledge of certain facts, or his malice, yet where such knowledge, or a spirit of ill will, a desire to injure, or to gratify revenge, existed, and can be proved, it may be advisable to allege such matter in aggravation of damages; but since such a statement is not necessary to enable plaintiff to recover, it need not be proved.⁴⁰

b. Plea or Answer

The general issue is a plea of not guilty.

In case, the general issue is a plea of not guilty,⁴¹

25. Ala.—Stein v. Ashby, 24 Ala. 521.

11 C.J. p 17 note 19.

26. Mass.—Houghton v. Davenport, 23 Pick. 235.

W.Va.—Rogers v. Coal River Boom, etc., Co., 23 S.E. 919, 26 S.E. 1008, 41 W.Va. 593.

27. Ill.—Burnap v. Dennis, 4 Ill. 478.

W.Va.—Pickens v. Coal River Boom, etc., Co., 41 S.E. 400, 51 W.Va. 445, 90 Am.S.R. 819.

11 C.J. p 16 note 10.

28. Ala.—Guilford v. Kendall, 42 Ala. 651.

29. N.H.—Perry v. Buss, 15 N.H. 222.

30. Conn.—Dauchy v. Salisbury, 29 Conn. 124.

11 C.J. p 17 note 13.

31. Ind.—Keesling v. McCall, 36 Ind. 321.

Pa.—Graham v. Noble, 13 Serg. & R. 233.

Va.—Marshall v. Bussard, Gilm., 21 Va. 9.

32. N.Y.—Panton v. Holland, 17 Johns. 92, 8 Am.D. 369.

Pa.—Cottrel v. Cummins, 6 Serg. & R. 343.

33. N.H.—Mahurin v. Harding, 28 N.H. 128, 59 Am.D. 401.

11 C.J. p 17 note 16.

34. Pa.—Erie City Iron Works v. Barber, 102 Pa. 156.

35. Del.—Eliason v. Draper, 77 A. 769, 25 Del. 64.

11 C.J. p 13 note 57.

36. Ill.—Chicago West. Div. R. Co. v. Klauber, 9 Ill.App. 613.

Vt.—Hutchinson v. Granger, 13 Vt. 386.

11 C.J. p 17 note 20.

37. Vt.—Hutchinson v. Granger, supra.

38. W.Va.—McGlamery v. Jackson, 68 S.E. 105, 67 W.Va. 417, 21 Ann. Cas. 239.

11 C.J. p 17 note 22.

39. Ill.—Hiner v. Richter, 51 Ill. 299.

40. Conn.—Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am.D. 682—Twiss v. Baldwin, 9 Conn. 291.

Va.—Trice v. Cockran, 8 Gratt. 442, 49 Va. 442, 56 Am.D. 151.

41. W.Va.—Dunham v. Western Union Telegraph Co., 102 S.E. 113, 35 W.Va. 425.

11 C.J. p 17 note 25.

which is merely a denial or traverse of the facts alleged.⁴² Non assumpsit is not a proper plea.⁴³ A plea of the general issue, framed in case, and pleaded jointly to counts in case and trespass, is irregular.⁴⁴

Special pleas or answers must sufficiently meet the declaration.⁴⁵ A special plea which alleges an accounting but shows no satisfaction is bad.⁴⁶

c. Issues and Proof

(1) In general

(2) Under general issue

(1) In General

The pleadings and proof must correspond.

The pleading and the proof must correspond,⁴⁷ and this rule is not affected by statutes abolishing the distinctions between the forms of actions in trespass and in case.⁴⁸ To recover, plaintiff must prove the material averments of the declaration.⁴⁹ The acts or omissions of defendant, which are insisted on as a tortious violation of the duty imposed by his contract, must be proved as alleged;⁵⁰ but plaintiff need not prove each and every allegation of the declaration, since it is sufficient to prove enough of the allegations to establish a cause of action.⁵¹

Where plaintiff has gone out of his way to particularize and state in detail his title or interest instead of contenting himself with a general state-

ment thereof and there is a misdescription, the variance will be fatal, unless it is matter that can be regarded as merely surplusage which may be rejected.⁵²

Where it is requisite to set out a contract by way of inducement to plaintiff's right, a material variance between the allegation of the contract as stated and the proof adduced in support thereof will be fatal,⁵³ the rule governing being the same as in assumpsit;⁵⁴ and although unnecessary details stated in connection with the contract must be proved as alleged, yet the proof of more than is stated will not occasion a fatal variance.⁵⁵

(2) Under General Issue

Under the general issue defendant may make any defense which tends to show that plaintiff has no cause of action.

Subject to the qualifications hereinafter stated, the general issue in an action on the case puts in issue every essential fact alleged in the declaration, including plaintiff's right to maintain the action.⁵⁶ Under it defendant may not only contest the truth of the declaration, but make any defenses that tend to show that plaintiff has no right of action,⁵⁷ although such defenses are in confession and avoidance of the declaration.⁵⁸ Thus, defendant may offer evidence of a release,⁵⁹ license,⁶⁰ justification,⁶¹ former recovery,⁶² compromise,⁶³ satisfaction,⁶⁴ accord and satisfaction,⁶⁵ mitigation

42. W.Va.—Dunham v. Western Union Telegraph Co., *supra*.

43. Ala.—Wilkinson v. Moseley, 30 Ala. 562.

44. N.J.—Truax v. Pennsylvania R. Co., 33 A. 278, 58 N.J.Law 218.

45. Ill.—Fitch v. Haight, 5 Ill. 51. N.Y.—Fry v. Bennett, 7 N.Y.Super. 54.

11 C.J. p 18 note 32.

46. Ill.—Fitch v. Haight, 5 Ill. 51.

47. Mass.—Hill v. Haskins, 8 Pick. 83.

11 C.J. p 18 note 35.

48. Ark.—Chrisman v. Carney, 33 Ark. 316.

Ill.—Gay v. De Werff, 17 Ill.App. 417. 11 C.J. p 18 note 36.

Effect generally of codes and practice acts abolishing distinctions between trespass and case see Actions § 39.

49. Ala.—Thornton v. Dwight Mfg. Co., 34 So. 187, 137 Ala. 211.

50. Ala.—Wilkinson v. Moseley, 18 Ala. 288.

51. Ill.—O'Callaghan v. Dellwood Park Co., 149 Ill.App. 34, affirmed 89 N.E. 1005, 242 Ill. 336, 134 Am. S.R. 331, 26 L.R.A., N.S., 1054, 17

Ann.Cas. 407—Ottawa v. Hayne, 114 Ill.App. 21, affirmed 73 N.E. 385, 214 Ill. 45.

52. Del.—Chorman v. Queen Anne's R. Co., 53 A. 438, 19 Del. 417. Mich.—Lull v. Davis, 1 Mich. 77.

11 C.J. p 18 note 42.

53. Conn.—Maine v. Bailey, 15 Conn. 298.

11 C.J. p 18 note 44.

54. N.H.—Mahurin v. Harding, 28 N.H. 128, 59 Am.D. 401—Webster v. Hodgkins, 25 N.H. 128.

55. Ala.—Moseley v. Wilkinson, 24 Ala. 411.

N.H.—Webster v. Hodgkins, 25 N.H. 128.

11 C.J. p 18 note 46.

56. Tenn.—Raines v. Mercer, 55 S. W.2d 263, 165 Tenn. 415.

11 C.J. p 17 notes 26, 27.

57. Fla.—Atlantic Coast Line R. Co. v. Crosby, 43 So. 313, 53 Fla. 400. 11 C.J. p 19 note 47.

58. Va.—Big Sandy & C. R. Co. v. Ball, 113 S.E. 722, 133 Va. 431.

W.Va.—Dunham v. Western Union Telegraph Co., 102 S.E. 113, 85 W. Va. 425.

59. Pa.—Lyon v. Marclay, 1 Watts 271.

Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780. 11 C.J. p 19 note 48.

60. N.H.—Hills v. Boston, etc., R. Co., 18 N.H. 179.

11 C.J. p 19 note 49.

61. Ala.—Peoples Furniture Co. v. Wilson, 173 So. 85, 86, 233 Ala. 578, citing *Corpus Juris*.

Ill.—Cincinnati, H. & D. R. Co. v. Goodson, 101 Ill.App. 123.

Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.

11 C.J. p 19 note 50.

62. Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.

11 C.J. p 19 note 51.

63. Ill.—O'Donnell v. Brink's Express Co., 95 Ill.App. 411.

Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.

64. Pa.—Lyons v. Marclay, 1 Watts 271.

11 C.J. p 19 note 52.

65. D.C.—Metropolitan R. Co. v. Snashall, 3 App.D.C. 420.

Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.

of damages⁶⁶ or a matter of defense arising after the commencement of the suit.⁶⁷

On the other hand, matters of inducement in a declaration are not traversed by a plea of the general issue.⁶⁸ Also, the statute of limitations cannot be urged as a defense under such a plea,⁶⁹ nor can a breach of warranty,⁷⁰ or title in defendant to a right of way claimed to have been obstructed,⁷¹ be urged under the general issue.

Under rules of court in some jurisdictions, the plea of not guilty in an action on the case operates as a denial only of the breach of duty or wrongful act alleged to have been committed by defendant, and not of the facts stated in the inducement, and no defence other than such denial is admissible under that plea.⁷²

§ 10. Evidence

The rules of evidence applicable to civil actions generally apply to actions on the case.

In accordance with the rules governing civil actions generally, in case plaintiff has the burden of proving the material allegations in his declaration. Thus, in case for damages sustained by the carelessness of defendant the burden of showing negligence is on plaintiff. Where, however, a wrong or omission is proved from which damages result, proof of the wrong implies a neglect requiring an explanation from defendants.⁷³ In the absence of facts giving rise to a presumption of accident or simple negligence the presumption is that the acts set forth in the declaration were done intentionally, and the fact that the declaration alleges that they were done carelessly and negligently does not necessarily imply that they were not done intentionally.⁷⁴

Admissibility. In case for damages for unlawful and violent dispossession brought by tenants against a landlord, evidence of the temper and disposition of defendant and his wife who committed the acts of violence are admissible to sustain the allegation that plaintiffs were kept out of possession by threats and violence.⁷⁵ In case for damages caused by defendants' sending out circulars and doing other acts affecting plaintiff's credit and business reputation, the proof of such acts is admissible to show the intent of defendants, and as contributing to the destruction of plaintiff's business.⁷⁶

Sufficiency. As in other civil actions, in case plaintiff must prove the material allegations in his declaration by a preponderance of the evidence, and a preponderance is sufficient.⁷⁷

§ 11. Trial, Judgment, Review, and Costs

The rules as to trial, judgment, review, and costs applicable to civil actions generally apply in actions in case.

As in other civil actions, in an action on the case disputed questions of fact are for the determination of the jury⁷⁸ under proper instructions, which should correctly state the law applicable to the case,⁷⁹ and instructions which are defective in this particular should be refused if requested.⁸⁰ Accordingly, where the leading proposition of an instruction requested is proper, but taken as a whole the instruction is defective in distinctness and clearness, the court has a right to refuse it.⁸¹

Verdict and findings. A finding which is good in substance is not vitiated because of informality.⁸² Where case is founded purely on a tort, and there are several defendants, the finding may be, as in

66. Ill.—George v. Illinois Cent. R. Co., 197 Ill.App. 152.

67. Ill.—Kapischki v. Koch, 54 N.E. 179, 180 Ill. 44—Chicago v. Babcock, 32 N.E. 271, 143 Ill. 358.

Pa.—Lyon v. Marclay, 1 Watts 271. 11 C.J. p 19 note 53.

68. Ill.—Mueller v. Hayes, 151 N.E. 874, 321 Ill. 275. 11 C.J. p 17 note 28.

Ownership, possession, or operation of the properties of instrumentalities causing injury is not put in issue, and this rule is not limited to property and instrumentalities ordinarily and commonly used in the business of defendant, where the allegation of the business of defendant is entirely immaterial to the cause of action, nor is the rule one which applies only to railroads, municipal corporations and quasi public corporations; it applies to in-

dividuals also.—Mueller v. Hayes, supra.

69. Ill.—Chicago v. Babcock, 42 N.E. 271, 143 Ill. 358.

Tenn.—Illinois Cent. R. Co. v. Wade, 1 Tenn.Civ.A. 780.

Vt.—Kidder v. Jennison, 21 Vt. 108.

70. Ill.—Ziegenhein v. Staiger, 133 Ill.App. 191.

71. R.I.—Schaeffer v. Brown, 50 A. 640, 23 R.I. 364.

72. U.S.—Patterson v. Jacksonville Traction Co., Fla., 213 F. 289, 130 C.C.A. 13.

11 C.J. p 19 notes 56, 57.

73. Me.—Crosby v. Plummer, 89 A. 145, 111 Me. 355.

74. Vt.—Ex parte Cote, 106 A. 519, 93 Vt. 10.

75. Mich.—Baumier v. Antiau, 31 N.W. 888, 65 Mich. 31.

76. Mich.—Oliver v. Perkins, 52 N.W. 609, 92 Mich. 304.

77. **Evidence held sufficient** to support a finding of malice.—F. B. Miller Agency v. Home Ins. Co., 276 Ill. App. 418.

Evidence held insufficient to show a wrongful interference with plaintiff's reelection as a school superintendent.—Cobb v. Morrison, 104 A. 829, 79 N.H. 74.

78. Ala.—Pan American Petroleum Co. v. Byars, 153 So. 616, 228 Ala. 372.

79. Mass.—Wilson v. Coffin, 2 Cush. 316.

80. Md.—Scott v. Bay, 3 Md. 431. 11 C.J. p 19 note 65.

81. Ala.—Dixon v. Barclay, 22 Ala. 370.

82. Ill.—Stern v. Glattstein, 80 Ill. App. 367. 11 C.J. p 19 note 67.

actions of trespass vi et armis, that some of defendants are guilty and others not guilty.⁸³ Where the tort arose out of a contract which is alleged to be a joint one and there are two or more defendants, the jury must return a verdict against all or none.⁸⁴

Damages. Where all defendants have been found guilty, damages must not be assessed severally,⁸⁵ although if they are so assessed plaintiff may cure the irregularity either by entering a nolle prosequi as to one of defendants and taking judgment against the others, or by remitting the lesser dam-

ages, or by taking judgment only for the greater ones.⁸⁶

Since the action is founded on the plaintiff's title in justice and equity to receive a compensation in damages, the damages are to be estimated by the jury in view of all the circumstances of the particular case,⁸⁷ and, subject to the qualification that greater damages than plaintiff has laid in the conclusion of his declaration cannot be recovered,⁸⁸ complete recovery may be had for all damages suffered as the proximate result of the wrong.⁸⁹

CASE AT LAW. See Case ante p 1 note 33.

CASEIN. An albumenoid of milk,¹ which has been classed as clearly a manufactured article.² It is also called "casein industrielle;"³ is more commonly known in trade and commerce as "lactarene;"⁴ and sometimes carries the trade name "plasmon."⁵

CASE LAW. See Case ante p 2 notes 63, 64.

CASEMENT. A window sash opening on hinges affixed to the upright side of the frame, said to indicate either an inswinging or outswinging sash and to include wooden as well as steel construction.⁶

Phrases: The word has been used adjectively in a number of phrases, such as "casement roll-up screens," "casement side-hinged screens," "casement

window," and "casement window operator."⁷

CASE SYSTEM. See Case ante p 2 note 65.

CAS FORTUIT. See Cas 13 C.J.S. p 1768 note 15.

CASH.

As a Noun

—**In General.** A term which may be used to signify money,⁸ or its equivalent,⁹ including coin or specie, and, under certain circumstances, bank notes, drafts, bonds, or commercial paper easily convertible into money.¹⁰ The particular signification of the word may depend on the context or the circumstances of its use.¹¹

—**As Money Readily Available.** With reference

83. Conn.—Walcott v. Canfield, 3 Conn. 194.

Ill.—Winslow v. Newlan, 45 Ill. 145. Me.—Gillerson v. Small, 45 Me. 17. 11 C.J. p 20 note 68.

84. Conn.—Walcott v. Canfield, 3 Conn. 194. 11 C.J. p 20 note 69.

85. Ky.—Dougherty v. Dorsey, 4 Bibb 207. Pa.—Shultz v. Hunter, 2 Browne 233.

86. Ky.—Dougherty v. Dorsey, 4 Bibb 207.

87. Tenn.—Jones v. Allen, 1 Head 626.

88. N.Y.—Corning v. Corning, 6 N. Y. 97.

89. Ala.—Birmingham Waterworks Co. v. Martini, 56 So. 830, 2 Ala. App. 652.

Injury to reversion

Where land in the possession of a tenant is injured by the wrongful act of a third person, the owner is entitled only to such damages as may have been done to the reversion.—Rowland v. Fuller, How.A.Cas. N. Y., 629.

1. U.S.—Ducas Co. v. U. S., C.C.N. Y., 143 F. 362, 363.

2. U.S.—U. S. v. Brownell, C.C.N. Y., 159 F. 219, 220.

3. U.S.—Ducas Co. v. U. S., C.C.N. Y., 143 F. 362, 363.

4. U.S.—U. S. v. Brownell, C.C.N.Y., 159 F. 219, 220.

5. U.S.—U. S. v. Corsi, 2 Ct.Cust. App. 292, 293.

6. U.S.—Johnson Metal Products Co. v. Lundell-Eckberg Mfg. Co., D.C.N.Y., 18 F.Supp. 572, 574, 575, 576, quoting Webster D.

7. U.S.—Johnson Metal Products Co. v. Lundell-Eckberg Mfg. Co., supra.

8. Or.—Hartwig v. Rushing, 182 P. 177, 180, 93 Or. 6.

9. Ga.—Kerlin v. Young, 125 S.E. 204, 207, 159 Ga. 95.

10. N.Y.—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

As including security in lieu of cash "Cash . . . is not necessarily so many physical dollars represented by currency or by bank deposits. Security used for certain purposes in lieu of cash may be 'cash' in the

sense in which we refer to nonmortgageable property."—American Brake Shoe & Foundry Co. v. New York Rys. Co., D.C.N.Y., 277 F. 261, 279.

Bank's deposit certificate payable on presentation and indorsed in blank, deposited in lieu of cash bail, was considered "cash."—Bingham v. Montcalm County, 232 N.W. 348, 251 Mich. 651.

11. Significance dependent on use

"In respondent's brief it is said that, 'In modern times, there is no word in the English language so pregnant with meaning as the little word 'cash,' used in the proper relation' and it is further said, in the same connection, that it 'contains a world of significance.' On turning however to the standard dictionaries of the English language, we find that its primary meaning is 'a box;' and that its common meaning is 'money,' and that it sometimes means 'ready money.' Accepting these definitions as probably correct, it does not seem to us that the word 'cash,' when used in the connection in which it is in this case, signifies anything."—Hooper v. Flood, 54 Cal. 218, 221.

to its availability for immediate use, it has been said that, in popular parlance, "cash" is used to refer not merely to money, but to money in hand, under full control for use in paying obligations and liabilities,¹² and has been defined as meaning money at command or in hand,¹³ either in current coin or other legal tender, or in bank bills or checks paid and received as money;¹⁴ money in the treasury;¹⁵ money on hand or subject to the owner's right of immediate possession;¹⁶ money on hand which a merchant, trader, or other person has to do business with;¹⁷ ready money.¹⁸

—Referring to Medium of Payment. With particular reference to the medium used, "cash" has been defined or employed as meaning bank bills

and bank notes;¹⁹ coin;²⁰ currency;²¹ current money;²² gold and silver or its equivalent;²³ money;²⁴ specie, or its equivalent in current bills of specie paying banks;²⁵ that which circulates as money.²⁶ In this use "cash" draws a distinction between "money" and "other things of value."²⁷

—Referring to Time of Payment. With reference to the terms or time of payment, "cash" has been defined as meaning immediate payment; money paid down;²⁸ money or its equivalent paid immediately or promptly after purchasing.²⁹ Although frequently used as the antonym of "credit," it has been said that the word does not necessarily imply a payment at any particular time,³⁰ and that, in mercantile dealings, "cash" may, and usually does, permit payment in ten or thirty days.³¹

12. Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.

"Cash" a free, nonmortgageable asset
"Cash, qua cash, could not be mortgaged. This proposition needs little argument to sustain it. Cash is variable and shifting. Because it is a 'free asset,' it is, and properly may be, relied upon by creditors or taken into consideration when they extend credit. It must be used to pay obligations and liabilities arising out of contract or tort. It must be under full control of the corporation, else the corporation cannot do business."—American Brake Shoe & Foundry Co. v. New York Rys. Co., D.C.N.Y., 277 F. 261, 279.

13. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235.

11 C.J. p 21 note 16.

14. U.S.—Palliser v. U. S., N.Y., 10 S.Ct. 1034, 1035, 136 U.S. 257, 34 L.Ed. 514.

La.—Dunlap v. Whitmer, 62 So. 933, 943, 133 La. 317, Ann.Cas.1915C 990.

Similar definitions

(1) "Current money in hand."—Jenkins v. International Life Ins. Co., 232 S.W. 3, 6, 149 Ark. 257.

(2) "Current money in hand or readily available, especially coin or government notes and bank notes actually in one's possession."—State v. Woodward, 93 So. 826, 208 Ala. 31.

(3) "Money in chest, or on hand."—Delaume v. Agar, McG., La., 97, 105.

(4) "Money in hand, and not credits."—Van Ingen v. Whitman, 62 N.Y. 513, 520.

15. N.Y.—In re McKendrie's Estate, 271 N.Y.S. 228, 231, 150 Misc. 665.

16. N.Y.—In re McKendrie's Estate, supra.

17. Va.—Blair v. Wilson, 28 Gratt.

165, 175, 69 Va. 165, 175, quoting Bouvier L. D.

18. Ga.—Kerlin v. Young, 125 S.E. 204, 207, 159 Ga. 95.

N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235—Smith v. Burch, 28 Hun 331, 332—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

11 C.J. p 21 note 17.

19. U.S.—Palliser v. U. S., 10 S.Ct. 1034, 1035, 136 U.S. 257, 34 L.Ed. 514.

Mass.—Phillips v. Blake, 1 Metc. 156, 159.

6 C.J. p 1184 note 5.

20. Neb.—Behrends v. Beyschlag, 69 N.W. 835, 836, 50 Neb. 304.

21. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235.

22. Neb.—Behrends v. Beyschlag, 69 N.W. 835, 836, 50 Neb. 304—State v. Moore, 67 N.W. 876, 878, 48 Neb. 870.

23. Ala.—St. John v. Mobile, 21 Ala. 224, 226.

24. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

Wash.—Maskell v. Spokane Cycle & Auto Supply Co., 170 P. 350, 351, 100 Wash. 16, L.R.A.1918C 929.

11 C.J. p 21 note 13.

25. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235—Crocker v. Crane, 21 Wend. 211, 219, 34 Am.D. 228.

11 C.J. p 20 note 16, p 21 note 11.

Popular and legal meanings

"The term cash has two meanings, one a payment in current bills, the other in specie. The first is the popular, the latter the legal meaning. The former has, in common parlance, entirely supplanted the latter."—Farr v. Sims, 9 S.C.Eq. 122, 131, 24 Am.D. 396.

26. U.S.—U. S. v. Williams, D.C. Wash., 232 F. 324, 325.

N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235.

27. As indicating medium and not time of payment

In interpreting a conversation between parties to a transaction, in which the words, "if he would pay me \$50 in cash, I would get out of the trade," were used, the court said: "Appellee insists that because 'he understood that the \$50 was to be cash' the time of its payment was fixed. The term 'cash' in the connection used in the sentence conveys no such meaning, but only distinguishes between money and property, or other thing of value."—Britain v. Rice, Tex.Civ.App., 204 S.W. 254, 256.

28. Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.

Ark.—Jenkins v. International Life Ins. Co., 232 S.W. 3, 6, 149 Ark. 257.

29. N.Y.—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

11 C.J. p 22 note 22.

30. Tex.—Britain v. Rice, Civ.App., 204 S.W. 254, 256.

31. N.Y.—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

—What the Term Includes. Under particular circumstances, and, of course, depending in each instance on the context or circumstances of its use, it has been held that "cash" includes generally bank accounts, bills, and deposits,³² bank paper,³³ checks,³⁴ city bonds,³⁵ commercial paper, bonds, warrants, and other securities easily converted into cash,³⁶ corporate stock into which cash has been converted,³⁷ interest-bearing notes,³⁸ liberty bonds and war savings stamps,³⁹ municipal orders, warrants, or scrip, as well as payments in currency,⁴⁰ orders on an estate paid in course of its administration,⁴¹ prepaid shares of stock in a building and loan association,⁴² promissory notes and mortgages,⁴³ shares of stock in a public service corporation,⁴⁴ specie,⁴⁵ and treasury notes;⁴⁶ also, more specifically, where an agreement or intention of the parties to that effect is shown, it has been held

that "cash" may include furniture measured in terms of money,⁴⁷ property of equivalent value,⁴⁸ prune orchard valued in dollars,⁴⁹ services rendered,⁵⁰ and stocks of goods invoiced at a fixed price in money.⁵¹ Under other circumstances, however, the word has been held not to include bank notes,⁵² bills receivable,⁵³ checks,⁵⁴ check returned unpaid, even though paid several days thereafter,⁵⁵ foreign bills,⁵⁶ gold dust,⁵⁷ goods,⁵⁸ government bonds,⁵⁹ insurance premiums in course of collection, even though they may be collected within ninety days,⁶⁰ judgments,⁶¹ interest in assets,⁶² interest in meat business, hides, and household furniture,⁶³ promissory notes,⁶⁴ real estate in absence of a manifest intent that it was used for that purpose,⁶⁵ treasury notes,⁶⁶ or war currency of the Confederate States.⁶⁷

—Other Terms Compared. "Cash" has been held

32. Conn.—Beit v. Beit, 119 A. 144, 147, 98 Conn. 274.

Miss.—Gresson v. State, 6 Miss. 33, 38.

N.J.—Baldwin v. Baldwin, 151 A. 741, 742, 107 N.J.Eq. 91.

N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235—In re McKendrie's Estate, 271 N.Y.S. 238, 231, 150 Misc. 665.

33. N.Y.—Keith v. Jones, 9 Johns. 120, 121.

34. U.S.—Webster v. Lanum, N.Y., 137 F. 376, 379, 70 C.C.A. 56.

Cal.—Albert v. Pearson, 229 P. 998, 999, 68 Cal.App. 657.

Mich.—Bingham v. Montcalm County, 232 N.W. 348, 251 Mich. 651—Glines v. State Sav. Bank, 94 N.W. 195, 197, 132 Mich. 638.

N.Y.—Van Decar v. Streeter, 240 N.Y.S. 492, 497, 136 Misc. 206.

35. U.S.—American Brake Shoe & Foundry Co. v. New York Rys. Co., D.C.N.Y., 277 F. 261, 279.

36. Wash.—Maskell v. Spokane Cycle & Auto Supply Co., 170 P. 350, 351, 352, 100 Wash. 16, L.R.A.1918C 929.

37. Wash.—Maskell v. Spokane Cycle & Auto Supply Co., supra.

38. Wis.—Walter Alexander Co. v. Wisconsin Tax Commission, 254 N.W. 544, 548, 215 Wis. 293.

39. N.J.—Baldwin v. Baldwin, 151 A. 741, 742, 107 N.J.Eq. 91.

Wash.—Automobile Underwriting Agency v. State, 219 P. 872, 873, 127 Wash. 88.

40. Ark.—Arkansas Public Utilities Co. v. Incorporated Town of Heber Springs, 235 S.W. 999, 1001, 151 Ark. 249.

41. N.Y.—Commercial Credit Corporation v. Third & Lafayette Streets Garage, 228 N.Y.S. 166, 168, 131 Misc. 786.

42. N.J.—Baldwin v. Baldwin, 151 A. 741, 742, 107 N.J.Eq. 91.

43. Cal.—In re Carrillo's Estate, 203 P. 104, 105, 187 Cal. 597.

11 C.J. p. 21 note 19 [b].

44. N.J.—Baldwin v. Baldwin, 151 A. 741, 742, 107 N.J.Eq. 91.

45. Conn.—Beit v. Beit, 119 A. 144, 147, 98 Conn. 274.

46. S.C.—Meng v. Houser, 34 S.C. Eq. 210, 213.

Wash.—Automobile Underwriting Agency v. State, 219 P. 872, 873, 127 Wash. 88.

47. Or.—Hartwig v. Rushing, 182 P. 177, 181, 93 Or. 6.

48. Ga.—Kerlin v. Young, 125 S.E. 204, 207, 159 Ga. 95.

49. Or.—Hartwig v. Rushing, 182 P. 177, 181, 93 Or. 6.

50. U.S.—In re Ballou, D.C.Ky., 215 F. 810, 812.

51. Or.—Hartwig v. Rushing, 182 P. 177, 181, 93 Or. 6.

52. N.J.—Trenton State Bank v. Cox, 8 N.J.Law 172, 174, 14 Am.D. 417.

53. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235.

54. Tex.—Simpson v. Goggin, Civ. App., 5 S.W.2d 610, 611.

Wis.—Hall v. Storrs, 7 Wis. 253, 256.

55. N.J.—Duryee v. Zipkin, 172 A. 794, 795, 12 N.J.Misc. 523.

N.Y.—Durant v. Abendroth, 69 N.Y. 148, 153, 25 Am.R. 153—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 467, 226 App.Div. 235.

56. Mass.—Jones v. Fales, 4 Mass. 245, 253.

57. Cal.—Gunter v. Sanchez, 1 Cal. 45, 49.

N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 467, 226 App.Div. 235.

58. N.Y.—Haviland v. Chace, 39 Barb. 233, 235.

59. N.M.—In re Keel's Estate, 25 P. 2d 806, 808, 37 N.M. 569.

60. Wash.—Automobile Underwriting Agency v. State, 219 P. 872, 873, 127 Wash. 88.

61. Ga.—Johnson v. Redwine, 33 S. E. 676, 677, 105 Ga. 449.

62. N.Y.—Van Ingen v. Whitman, 62 N.Y. 513, 520—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 467, 226 App.Div. 235.

63. Conn.—Beit v. Beit, 119 A. 144, 146, 98 Conn. 274.

64. U.S.—Travelers Ins. Co. v. Wolfe, C.C.A.Ohio, 78 F.2d 78, 82.

Ark.—Jenkins v. International Life Ins. Co., 232 S.W. 3, 6, 149 Ark. 257.

Mass.—Pierce v. Bryant, 5 Allen 91, 93.

N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 467, 226 App.Div. 235.

Tex.—Citizens' Nat. Bank of Stamford v. Stevenson, Civ.App., 211 S. W. 644, 645.

65. Pa.—Watson v. Martin, 77 A. 450, 228 Pa. 248, 250, 20 Ann.Cas. 1288.

66. Conn.—Foquet v. Hoadley, 3 Conn. 534, 537.

67. Ala.—Kitchell v. Jackson, 44 Ala. 302, 304.

N.C.—McNeill v. Shaw, 62 N.C. 91.

synonymous with "money;"⁶⁸ is frequently used as the antonym of "credit;"⁶⁹ and has been distinguished from "credit,"⁷⁰ "money,"⁷¹ "note,"⁷² and "securities;"⁷³ also from the phrases "book or paper" see Book 11 C.J.S. p 520 note 75, and "promise to pay."⁷⁴

—In Phrases.

Cash on hand. Money at hand ready to be used; actual cash or its equivalent, and actually on hand;⁷⁵ quick assets out of which payment can be made without delay;⁷⁶ ready money, or that which in ordinary business usage is the same thing.⁷⁷ It has been said that the phrase, as commonly used, has a broader connotation than a literal interpretation would give it,⁷⁸ and that this is so whether the phrasing is "cash on hand" or "cash in hand."⁷⁹ The phrase applies to all money readily available for use,⁸⁰ specifically to bank notes, checks, drafts, bills of exchange, certificates of deposit, or other like instruments which pass with or without indorsement from hand to hand as money, or are immediately convertible into money,⁸¹ to cash in vault,⁸² to money in a solvent bank subject to

check,⁸³ to money in a bank in the form of short-time certificates of deposit bearing interest.⁸⁴ In a particular connection, it has been held to include only such cash and receipts as have been secured in the ordinary course of business,⁸⁵ and to exclude borrowed money or that procured and received upon an express promise to repay it on a day certain.⁸⁶ It has been held not to include cash items or balances due from others, even though they are good solvent credits,⁸⁷ loans to others on long time, stock of companies not intended to be sold, and other investments of like kind,⁸⁸ promissory notes,⁸⁹ or real or personal estate to be converted into cash where the conversion has not been made.⁹⁰

Copper cash. A "cash," or copper cash, is a Chinese coin, composed of copper and lead, or copper and nickel, passing by count as money in China and, in an early case, said to be the only coin used there, at that time.⁹¹

Credit in cash. An order by one person on another, to hold to the use, or at the command, of a third person, a certain sum, which means to pay the money to him; to pay over the money.⁹²

68. N.Y.—Commercial Credit Corporation v. Third & Lafayette Sts. Garage, 234 N.Y.S. 463, 466, 226 App.Div. 235—In re McKendrie's Estate, 271 N.Y.S. 228, 232, 150 Misc. 665.

69. Ala.—State v. Woodward, 93 So. 826, 827, 208 Ala. 31.

Cal.—Parrish v. American Ry. Employees' Pub. Corporation, 256 P. 590, 591, 83 Cal.App. 298.

Or.—Hartwig v. Rushing, 182 P. 177, 181, 93 Or. 6.

Tex.—McInnis v. Brown County Water Improvement Dist. No. 1, Civ. App., 41 S.W.2d 741, 746. 11 C.J. p. 21 note 19.

70. Tex.—Citizens' Nat. Bank of Stamford v. Stevenson, Civ.App., 211 S.W. 644, 645.

71. U.S.—McGovern v. U. S., C.C.A. Ill., 272 F. 262, 263.

72. Ark.—Jenkins v. International Life Ins. Co., 232 S.W. 3, 6, 149 Ark. 257.

Mass.—Pierce v. Bryant, 5 Allen 91, 93.

73. Wis.—Walter Alexander v. Wisconsin Tax Commission, 254 N.W. 544, 548, 215 Wis. 293.

74. U.S.—Hart v. Commissioner of Internal Revenue, C.C.A., 54 F.2d 848, 852.

75. Conn.—State v. New York, N. H. & H. R. Co., 22 A. 765, 767, 60 Conn. 326.

76. Iowa.—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679.

77. Conn.—State v. New York, N. H. & H. R. Co., 22 A. 765, 767, 60 Conn. 326.

78. Not used in a literal sense

"Under present-day methods, 'cash on hand' in a literal sense is virtually nonexistent. The more the 'cash,' the less the likelihood that it will be kept literally 'in hand.'—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679.

79. "Cash in hand" compared

"Some emphasis has been laid by appellant upon the expression 'cash in hand.' But the will in terms refers to 'cash on hand.' Whatever distinction is to be recognized between the two expressions, the terms actually used will not bear the emphasis thus put by appellant."—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679.

80. Iowa.—In re Johnston's Estate, supra.

81. Conn.—State v. New York, N. H. & H. R. Co., 22 A. 765, 767, 60 Conn. 326.

82. Fla.—Briar Holding Co. v. Palm Beach Bank & Trust Co., 136 So. 341, 342, 102 Fla. 874.

83. Iowa.—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679. Or.—In re Blanford's Estate, 3 P.2d 116, 117, 137 Or. 256.

N.J.—See Atlantic City O. E. v. International Fidelity Ins. Co., 85 A. 325, 326, 83 N.J.Law 583.

84. Readily available money in bank

"Money in bank is money on hand. This is conceded by appellant as to money subject to check. We think it equally true in common parlance that money in bank readily available is deemed for all practical purposes as money in hand, even though it be represented by short-time certificates bearing interest."—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679.

85. U.S.—Stoddard v. Miami Savings & Loan Co., C.C.A.Ohio, 63 F. 2d 851, 852.

86. U.S.—Stoddard v. Miami Savings & Loan Co., supra.

87. Fla.—Briar Holding Co. v. Palm Beach Bank & Trust Co., 136 So. 341, 342, 102 Fla. 874.

88. Conn.—State v. New York, New Haven & Hartford R. Co., 22 A. 765, 767, 60 Conn. 326.

89. Or.—In re Banfield's Estate, 3 P.2d 116, 117, 137 Or. 256.

90. Tex.—Simpson v. Goggin, Civ. App., 5 S.W.2d 610, 611.

91. Percentage of alloy

"The pieces were composed of 60 per cent. to 70 per cent. of copper, and 30 per cent. to 40 per cent. of lead or nickel."—Crocker v. Redfield, C.C.N.Y., 6 Fed.Cas.No.3,400, 4 Blatchf. 378.

92. Eng.—Ellison v. Collingridge, 9 C.B. 570, 573, 67 E.C.L. 570, 137 Reprint 1014.

Value in actual cash. The phrase, and other like expressions, convey the thought of the sum which can be obtained at a fair sale, hence equivalent to "market value."⁹³

Other phrases: "Actual capital paid in cash or property," see Actual 1 C.J.S. p 1439 note 79, "actual cash," see Actual 1 C.J.S. p 1439 note 83, "actual cash paid in," see Actual 1 C.J.S. p 1439 note 85, "actually and in good faith paid in cash," see Actually 1 C.J.S. p 1445 note 52, "actually receive in cash,"⁹⁴ "all cash, negotiable notes and mortgages,"⁹⁵ "amount of cash invested by each,"⁹⁶ "at its fair cash value," see At 7 C.J.S. p 166 note 93, "at its true value in cash," see At 7 C.J.S. p 166 note 96, "at par, for cash,"⁹⁷ "cash after paying all my debts,"⁹⁸ "cash at time of sale,"⁹⁹ "cash down," see C.J.S. title Sales § 262, also 55 C.J. p 569 note 76 (a), "cash in bank," see Banks and Banking § 985, "cash in hand,"¹ "cash in lieu of bail," see Bail § 10, "cash in savings or other banks,"² "cash on delivery," see C.J.S. title Sales § 262, also 55 C.J. p 569 note 76(a), "cash or its equivalent,"³ "cash that is left after my demise,"⁴ "'cash' to be paid therefor,"⁵ "cash which I may

have on hand,"⁶ "commissions on cash,"⁷ "down payment . . . in cash, and not its equivalent,"⁸ "except for cash or its equivalent,"⁹ "for cash,"¹⁰ "for cash or on credit,"¹¹ "if he would pay me \$50 in cash,"¹² "in cash,"¹³ "in cash or notes,"¹⁴ "in lieu thereof . . . cash may be deposited,"¹⁵ "one-third cash,"¹⁶ "paid in cash,"¹⁷ "payment in cash,"¹⁸ "percentage in cash,"¹⁹ "price which it will bring in cash,"²⁰ "receives in cash,"²¹ "remainder of whatever cash will be mine,"²² "sale for cash," see C.J.S. title Sales § 234, also 55 C.J. p 514 note 38, "spot cash,"²³ "true value in cash,"²⁴ and "twenty-five cents in cash for each pole."²⁵

As a Verb

Like other words applicable to, or descriptive of, money, it has been held that the word, as a verb, has reference to the medium of exchange in use.²⁶

Phrase: "He had gotten his pay-check cashed."²⁷

As an Adjective

Cash account. In bookkeeping, the record of all cash transactions; an account of money received and expended.²⁸

93. U.S.—Castner, Curran & Bullitt, Inc. v. Lederer, D.C.Penn., 275 F. 221, 225.

94. Tex.—Simpson v. Goggin, Civ. App., 5 S.W.2d 610, 612.

95. Man.—Re Ferguson, 18 Man. 532, 534.

96. Ga.—Kerlin v. Young, 125 S.E. 204, 207, 159 Ga. 95.

97. **As excluding transaction on credit**

"The permit required the stock to be issued 'for cash,' which excluded the idea of credit and required payment concurrent with delivery."—Parrish v. American Ry. Employees' Pub. Corporation, 256 P. 590, 591, 83 Cal.App. 298.

98. N.J.—Baldwin v. Baldwin, 151 A. 741, 742, 107 N.J.Eq. 91.

99. N.Y.—Van Decar v. Streeter, 240 N.Y.S. 492, 497, 136 Misc. 206.

1. N.Y.—In re McKendrie's Estate, 271 N.Y.S. 228, 232, 150 Misc. 665.

2. N.Y.—In re McKendrie's Estate, supra.

3. U.S.—Erhard v. Boone State Bank of Boone, Iowa, C.C.A. Iowa, 65 F.2d 48, 55.

Iowa.—German American State Bank of Chalco, Nebraska v. Farmers' & Merchants' Savings Bank of Lidderdale, 211 N.W. 386, 387, 203 Iowa 276.

4. Cal.—In re Carrillo's Estate, 203 P. 104, 105, 187 Cal. 597.

5. Tex.—Citizens' Nat. Bank of

Stamford v. Stevenson, Civ.App., 211 S.W. 644.

6. Iowa.—In re Johnston's Estate, 180 N.W. 740, 741, 190 Iowa 679.

7. N.M.—In re Keel's Estate, 25 P. 2d 806, 807, 37 N.M. 569.

8. N.Y.—Commercial Credit Corporation v. Third & LaFayette Sts. Garage, 234 N.Y.S. 463, 467, 226 App.Div. 235.

9. U.S.—In re Ballou, D.C.Ky., 215 F. 810, 812.

10. Mo.—Mead v. McLaughlin, 42 Mo. 198, 201.

11. Wash.—Maskell v. Spokane Cycle & Auto Supply Co., 170 P. 350, 351, 100 Wash. 16, L.R.A.1918C 929.

As meaning "money's worth"

"The statute applies, not only to sales for money, but also to sales for property measured in money or, in the words of the books, for the equivalent of money or money's worth."—Hartwig v. Rushing, 182 P. 177, 181, 93 Or. 6.

12. Tex.—Britain v. Rice, Civ.App., 204 S.W. 254, 256.

13. U.S.—Travelers Ins. Co. v. Wolfe, C.C.A.Ohio, 78 F.2d 78, 82. Cal.—Albert v. Pearson, 229 P. 998, 999, 68 Cal.App. 657.

14. Mo.—State ex rel. National Life Ins. Co. of Montpelier, Vt., v. Hyde, 241 S.W. 396, 397, 292 Mo. 342.

15. Mich.—Wolfe v. A. E. Kusterer

& Co., 257 N.W. 729, 730, 269 Mich. 424.

16. Cal.—In re Carrillo's Estate, 203 P. 104, 105, 187 Cal. 597.

17. **"Paid within a reasonable time" distinguished**

Idaho.—Hoskins v. Michener, 197 P. 724, 725, 33 Idaho 681.

18. B.C.—Turner v. Cowan, 9 B.C. 301, 302.

Held not "payment in cash"

"The tender of a certified check of a third person accompanied by refusal to get it cashed . . . was not the equivalent of payment in cash."—Chertok v. Kassabian, 151 N. E. 108, 109, 255 Mass. 265.

19. Neb.—State v. Moore, 67 N.W. 876, 878, 48 Neb. 870.

20. Tex.—McInnis v. Brown County Water Improvement Dist. No. 1, Civ.App., 41 S.W.2d 741, 746.

21. N.J.—Duryee v. Zipkin, 172 A. 794, 795, 12 N.J.Misc. 523.

22. Conn.—Beit v. Beit, 119 A. 144, 145, 98 Conn. 274.

23. Pa.—Morris v. Supplee, 57 A. 566, 567, 203 Pa. 253.

24. Or.—Ankeny v. Blakly, 74 P. 435, 439, 44 Or. 78.

25. Ark.—Arkansas Public Utilities Co. v. Incorporated Town of Heber Springs, 235 S.W. 999, 1000, 151 Ark. 249.

26. Ark.—Cook v. State, 196 S.W. 922, 924, 130 Ark. 90.

27. Ark.—Cook v. State, supra.

28. Black L. D.

Cash advances. A term customary among merchants when they wish to restrict the meaning of the word "advances" to actual disbursements of money.²⁹

Cash discount. A deduction which the seller allows from the price at which goods are billed to the purchaser for payment of the bill within a specified time.³⁰

Cash items. In bookkeeping, items based on any actual transaction which increases or diminishes the cash on hand.³¹ In a particular connection, the phrase has been held to refer to cash in course of collection and remittance,³² and to include notes, checks, or memoranda on hand at the end of a day's work, which, for the time being, are treated as cash in order to make the books balance,³³ but, where qualified by restrictive words as in the phrase "cash item deposited in an account subject to check," to exclude a time certificate, such as a certificate of deposit forwarded for collection.³⁴ Where referring to money in course of collection and remittance, "cash items" has been held equivalent to "transitory items."³⁵ As applied to false entries by officers and agents of national banks see Banks and Banking § 646.

Cash market value. The amount of money that property would bring in the market, with a fair

and reasonable time within which to procure a purchaser at the existing market value;³⁶ the fair or reasonable cash price for which property can be sold in the market;³⁷ the price property would sell for at cash sale, but not at forced sale;³⁸ the price which property would sell for in cash when offered for sale by a person desiring, but not compelled, to sell, and bought by a person desiring, but under no necessity, to buy.³⁹ The phrase implies the placing of an estimate of value on specific property, based on facts and on the opinions and estimates of persons acquainted with it.⁴⁰ "Cash market value" has been held synonymous with, or equivalent to, "actual cash market value,"⁴¹ "actual value,"⁴² "fair cash market value,"⁴³ "fair cash value,"⁴⁴ "fair market or real value,"⁴⁵ "fair market value,"⁴⁶ and "market value."⁴⁷

Cash money. A term somewhat more definite than money alone, and, in a restricted sense, meaning actual money on hand.⁴⁸ The phrase has been used in a broad and comprehensive sense, by context meaning money loaned and evidenced by notes and mortgage,⁴⁹ and money deposited in a bank and invested in a saving association.⁵⁰

Cash net profits. By context, net profits at their actual cash valuation where the increase of the business was represented by assets, whether invested in stock, machinery, or outstanding accounts.⁵¹

29. La.—Turpin v. Reynolds, 14 La. 473, 477.

30. U.S.—Leonard v. U. S., Ct.Cl., 7 F.Supp. 295, 298.

Provision for cash discount as, not importing a sale on credit see C.J. S. title Sales § 235, also 55 C.J. p 516 note 84.

31. U.S.—U. S. v. Young, D.C.Ala., 128 F. 111, 114.

32. La.—In re Hibernia Bank & Trust Co., 169 So. 464, 472, 185 La. 448.

33. Tex.—Green v. Farmers & Merchants State Bank, Civ.App., 100 S.W.2d 132, 138.

34. U.S.—Clarksburg Trust Co. v. Commercial Casualty Ins. Co., C.C. A.W.Va., 40 F.2d 626, 629.

35. La.—In re Hibernia Bank & Trust Co., 169 So. 464, 472, 185 La. 448.

36. Tex.—Texas Midland R. Co. v. Burt, Civ.App., 243 S.W. 669, 671.

37. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 224, 193 Ill. 464.

38. Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.

39. Tex.—Gillam v. State, Civ.App., 95 S.W.2d 1019, 1020.

Similarly expressed

(1) The price which the owner, if

desirous of selling, would, under ordinary circumstances surrounding the sale of property, have sold the property for, and what a person desirous of purchasing would, under such circumstances, have paid for it.—Conness v. Indiana, etc., R. Co., 62 N.E. 221, 224, 193 Ill. 464.

(2) The amount of money that a person desiring to sell, but not bound to do so, could, within a reasonable time, procure for such property from a person who desires to buy, but is not bound to purchase, the property.—Fort Worth & D. S. P. Ry. Co. v. Gilmore, Tex.Civ.App., 13 S.W.2d 416, 417.

40. Tenn.—Wray v. Knoxville, L. F. & J. R. Co., 82 S.W. 471, 473, 113 Tenn. 544.

41. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 224, 193 Ill. 464.

42. Tex.—Fort Worth & D. N. Ry. Co. v. Sugg, Civ.App., 68 S.W.2d 570, 572.

43. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 224, 193 Ill. 464.

Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, 776—McInnis v. Brown County Water Improvement Dist. No. 1, Civ.App., 41 S.W.2d 741, 746.

44. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 224, 193 Ill. 464.

45. Ala.—State v. Woodward, 93 So. 826, 208 Ala. 31.

46. Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, 776—McInnis v. Brown County Water Improvement Dist. No. 1, Civ.App., 41 S.W.2d 741, 746.

47. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 224, 193 Ill. 464.

Iowa.—Hetland v. Bilstad, 118 N.W. 422, 423, 140 Iowa 411.

Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, 776—McInnis v. Brown County Water Improvement Dist. No. 1, Civ.App., 41 S.W.2d 741, 746—Missouri, K. & T. Ry. Co. of Texas v. Murray, Civ.App., 150 S.W. 217, 218.

48. Ill.—Lich v. Werling, 151 Ill. App. 340, 346.

N.Y.—In re McKendrie's Estate, 271 N.Y.S. 228, 232, 150 Misc. 665.

49. Ill.—Lich v. Werling, 151 Ill. App. 340, 346.

50. N.Y.—In re McKendrie's Estate, 271 N.Y.S. 228, 229, 150 Misc. 665.

51. N.Y.—Fries v. Parr, 139 N.Y.S. 220, 226.

Cash price. The price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices.⁵²

Cash purchase. A transaction made by a payment of the purchase money on the one side, and the delivery of the thing purchased on the other,⁵³ and it has been held that it is none the less a cash purchase because a check was provisionally accepted by the seller in lieu of money.⁵⁴ It is one of the ordinary modes of purchase known to the law and to the course of business.⁵⁵

Cash reserve. Amount held in reserve to meet the contingencies of a business.⁵⁶

Cash sale. A sale for money in hand, or one for ready money, as distinguished from one on credit.⁵⁷

Cash securities. The phrase has been construed to signify bonds or negotiable instruments that are easily convertible into equivalent money; and has been distinguished from "bank deposit,"⁵⁸ which is treated generally in Banks and Banking § 273.

Cash settlement. Payment of an obligation in full in cash; sometimes called "full cash settlement."⁵⁹

Cash terms. Also referred to as "terms cash."⁶⁰ A term *prima facie* importing that no credit is to

be given, although it may mean that the money is to be paid in a month, or in a longer or shorter time.⁶¹ It has been held that the term necessarily imports nothing more than a cash transaction as distinguished from an exchange, that it does not necessarily imply payment in advance of shipment,⁶² and that it negatives the existence of any agreement for a discount.⁶³

Cash value. Money value, the value payable in money as distinguished from a price which would be employed as the basis of an exchange;⁶⁴ the actual value;⁶⁵ the amount at which a property would be appraised if taken in payment of a just debt due from a solvent debtor;⁶⁶ the amount of cash for which an article will exchange in fact;⁶⁷ the market value;⁶⁸ the price which the property will bring when offered for sale by one who desires to sell, but is not compelled to do so, and is bought by one who desires to purchase, but is not compelled to do so;⁶⁹ the usual selling price at private sale and not at forced or auction sale;⁷⁰ the value for purposes of sale, if the property is salable.⁷¹ It has been said that "cash value" is measured by the amount of cash into which property can be converted,⁷² or the amount of cash required to procure it, provided its utility is commensurate with its cost;⁷³ that it presupposes an ability to sell or transfer;⁷⁴ that it implies the ex-

52. Bouvier L.D.

N.J.—See *Steward v. Scudder*, 24 N. J. Law, 96, 101.

Price in money as distinguishing "purchase" from "barter" see *Barter* 9 C.J.S. p 1551 note 68.

53. N.Y.—*Lester v. Jewett*, 11 N. Y. 453, 454.

Or.—*Powell v. Dayton, S. & G. R. Co.*, 12 P. 665, 667, 14 Or. 356.

54. Ala.—*Bass v. Green & Yates*, 78 So. 869, 201 Ala. 515.

55. N.Y.—*Abbey v. Deyo*, 44 Barb. 374, 379.

56. Wash.—*Automobile Underwriting Agency v. State*, 219 P. 872, 873, 127 Wash. 88.

57. Or.—*Anderson v. Wallowa Nat. Bank*, 198 P. 560, 561, 100 Or. 679, quoting *Corpus Juris*.

11 C.J. p 24 note 57, p 25 notes 58-61.

See also *Factors* C.J.S. § 11, and 25 C.J. p 350 notes 74-80, C.J.S. § 31, and 25 C.J. p 363 notes 92-96; *Sales* C.J.S. §§ 132, 234, 239, 251, 262, and 55 C.J. p 569 note 76, p 570 note 77, p 571 note 96, C.J.S. §§ 403, 404, 412, and 55 C.J. p 921 notes 65, 71; *Vendor and Purchaser* C.J.S. § 99; *Cash Sale* 11 C.J. p 25 notes 60, 61.

58. Or.—*Bissinger & Co. v. Massa-*

chusetts Bonding & Ins. Co., 163 P. 592, 593, 33 Or. 283.

59. Ark.—*Jenkins v. International Life Ins. Co.*, 232 S.W. 3, 6, 149 Ark. 257.

60. Md.—*Lawder & Sons Co. v. Albert Mackie Grocer Co.*, 54 A. 634, 635, 97 Md. 1, 62 L.R.A. 795.

Wis.—*Wellauer v. Fellows*, 4 N.W. 114, 116, 48 Wis. 105.

61. N.H.—*George v. Joy*, 19 N.H. 544, 546.

62. Wis.—*Wellauer v. Fellows*, 4 N. W. 114, 116, 48 Wis. 105.

63. Md.—*Lawder & Sons Co. v. Albert Mackie Grocer Co.*, 54 A. 634, 635, 97 Md. 1, 62 L.R.A. 795.

64. Ark.—*Baucum v. Arkansas Power & Light Co.*, 15 S.W.2d 399, 401, 179 Ark. 154.

65. Kan.—*Wood v. Syracuse School Dist. No. 1*, 193 P. 1049, 1050, 108 Kan. 1.

N.Y.—*In re Dupignac's Estate*, 204 N.Y.S. 273, 276, 123 Misc. 21.

66. Wash.—*Bank of Fairfield v. Spokane County*, 22 P.2d 646, 652, 173 Wash. 145.

11 C.J. p 26 note 66.

67. Mass.—*National Bank of Commerce v. City of New Bedford*, 29 N.E. 532, 533, 155 Mass. 313.

Or.—*Citizens Nat. Bank of Baker City v. Baker County Board of Equalization*, 222 P. 341, 345, 109 Or. 669—*Ankeny v. Blakley*, 74 P. 485, 489, 44 Or. 78.

68. Ky.—*Insurance Co. of North America v. McCraw*, 75 S.W.2d 518, 520, 255 Ky. 839—*New York Underwriters Ins. Co. v. Mullins*, 52 S.W.2d 697, 703, 244 Ky. 788.

11 C.J. p 26 note 72.

69. Ky.—*Travellers' Indemnity Co. v. B & B Ice & Coal Co.*, 58 S. W.2d 640, 642, 248 Ky. 443.

70. La.—*Volunteer State Life Ins. Co. v. Union Title Guarantee Co.*, 143 So. 43, 44, 175 La. 183.

Mich.—*Cleveland-Cliffs Iron Co. v. Republic Tp.*, 163 N.W. 90, 93, 196 Mich. 189.

11 C.J. p 26 note 67.

71. Hawaii.—*In re Assessment of Taxes*, 15 Hawaii 1.

72. Nev.—*State v. Central Pac. R. Co.*, 10 Nev. 47, 68.

Tex.—*Fort Worth & D. N. Ry. Co. v. Sugg*, Civ.App., 68 S.W.2d 570, 572.

73. Nev.—*State v. Central Pac. R. Co.*, 10 Nev. 47, 74.

74. Wash.—*Bank of Fairfield v. Spokane County*, 22 P.2d 646, 652, 173 Wash. 145.

istence of property to be sold or transferred,⁷⁵ and an inherent value independent of its ownership or the uses to which it is put;⁷⁶ and that it imports value in money presently paid,⁷⁷ although the phrase has also been held to signify value in cash or the equivalent of cash as distinguished from a sum laid down on the spot in cash.⁷⁸ "Cash value" has been held synonymous with, or equivalent to, "actual value,"⁷⁹ "clear market value,"⁸⁰ "fair and reasonable cash value,"⁸¹ "fair market value,"⁸² "market cash value,"⁸³ "market value,"⁸⁴ "salable value,"⁸⁵ "transfer value,"⁸⁶ and "value."⁸⁷ The phrase also has been compared with "market value,"⁸⁸ and has been distinguished from "book value," see Book 11 C.J.S. p 522 note 21.

Copper cash swords. Swords made up of a number of copper coins corded together and securely fastened around an iron rod or bar covered by metal foil.⁸⁹ As included in the metal schedule of the tariff law see C.J.S. title Customs Duties § 34, also 17 C.J. p 561 note 18 [a].

Fair and reasonable cash value. Price which the property would bring at a fair voluntary sale. The phrase has been held to import value in money presently paid, and to exclude a valuation based on credit.⁹⁰ It has been held equivalent to "cash value" see supra note 81, and to "fair market or real value."⁹¹

Fair cash valuation. A "fair cash valuation" is

such a price as honest and impartial men would naturally and reasonably place upon any given piece of property in view of its useful capabilities and the end to be accomplished by its sale and purchase.⁹²

Fair cash value. "Fair cash value" means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing;⁹³ fair or reasonable cash price for which property can be sold in the market;⁹⁴ the price property will bring in a fair market.⁹⁵ It has been said that the phrase generally means market value, but that if the property is in actual use by the owner in such a way that it possesses a peculiar value to him, which would be sacrificed if placed upon the general market, "fair cash value" may have reference to its value to the owner.⁹⁶ "Fair cash value" has been held equivalent to "cash market value" see supra note 44, and "true value in cash."⁹⁷

Other phrases: "Actual cash market value," see Actual 1 C.J.S. p 1439 note 84, "actual cash payment," see Actual 1 C.J.S. p 1439 note 86, "actual cash receipts," see Actual 1 C.J.S. p 1439 note 87, "actual cash valuation," see Actual 1 C.J.S. p 1440 note 88, "actual cash value," see Actual 1 C.J.S. p 1434 notes 69-87, "actual cash value of all real estate,"⁹⁸ "at its fair cash value," see At 7 C.J.S. p 166 note 93, "cash bail," see Bail §§ 10, 52, "cash

75. Wash.—Bank of Fairfield v. Spokane County, supra.

76. Mich.—Perry v. Big Rapids, 34 N.W. 530, 67 Mich. 146, 147, 11 Am. S.R. 570.

77. Ala.—State v. Woodward, 93 So. 826, 827, 208 Ala. 31.

78. Ark.—Baucum v. Arkansas Power & Light Co., 15 S.W.2d 399, 401, 179 Ark. 154.

79. U.S.—In re Lang Body Co., C.C. A.Ohio, 92 F.2d 338, 340.

Kan.—Wood v. Syracuse School District No. 1, 193 P. 1049, 1050, 108 Kan. 1.

Tex.—Fort Worth & D. N. Ry. Co. v. Sugg, Civ.App., 68 S.W.2d 570, 572.

80. N.Y.—In re Dupignac's Estate, 204 N.Y.S. 273, 276, 123 Misc. 21.

81. Ala.—State v. Woodward, 93 So. 826, 827, 208 Ala. 31.

82. N.Y.—In re Dupignac's Estate, 204 N.Y.S. 273, 276, 123 Misc. 21.

83. Tex.—Missouri, K. & T. Ry. Co. v. Murray, Civ.App., 150 S.W. 217, 218.

84. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Murray, supra.

85. U.S.—In re Lang Body Co., C.C. A.Ohio, 92 F.2d 338, 340.

Kan.—Wood v. Syracuse School Dist. No. 1, 193 P. 1049, 1050, 108 Kan. 1.

Tex.—Fort Worth & D. N. Ry. Co. v. Sugg, Civ.App., 68 S.W.2d 570, 572.

86. Wash.—Bank of Fairfield v. Spokane County, 22 P.2d 646, 652, 173 Wash. 145.

87. Mo.—Sisk v. American Central Fire Ins. Co., 69 S.W. 687, 692, 95 Mo.App. 695.

88. Ark.—Baucum v. Arkansas Power & Light Co., 15 S.W.2d 399, 401, 179 Ark. 154.

89. Decorative novelties

"The articles are in form of swords, and are metal novelties imported to serve generally a decorative purpose, as ornaments."—Soy Kee & Co. v. U. S., C.C.N.Y., 177 F. 601.

90. Ala.—State v. Woodward, 93 So. 826, 827, 208 Ala. 31.

91. Ala.—State v. Woodward, supra.

92. Tenn.—Jones v. Whitworth, 30 S.W. 736, 737, 94 Tenn. 602.

Variations in valuation

"The same piece of property has different values at different times

and in different situations. It will command one price when desired for one purpose, and another price when desired for another purpose; and about all these, fair-minded men may honestly entertain a wide difference of opinion."—Jones v. Whitworth, 30 S.W. 736, 737, 94 Tenn. 602.

93. Mass.—National Bank of Commerce v. New Bedford, 56 N.E. 288, 290, 175 Mass. 257.

Or.—Ankeny v. Blakley, 74 P. 485, 489, 44 Or. 78.

94. Ill.—Conness v. Indiana, I. & I. R. Co., 62 N.E. 221, 225, 193 Ill. 464.

95. Tex.—McInnis v. Brown County Water Improvement Dist. No. 1, Civ.App., 41 S.W.2d 741, 746.

96. Tenn.—Southern R. Co. v. Memphis, 148 S.W. 662, 669, 126 Tenn. 267, 41 L.R.A., N.S., 828, Ann.Cas. 1913E 153.

97. Or.—Ankeny v. Blakley, 74 P. 485, 489, 44 Or. 78.

98. Or.—Citizens National Bank of Baker City v. Baker County Board of Equalization, 222 P. 341, 344, 109 Or. 669.

basis," see Basis 10 C.J.S. p 1 notes 4, 5, "cash book," see Book 11 C.J.S. p 520 note 64, "cash capital," see Capital 12 C.J.S. p 1124 notes 3, 4, "cash' contract,"⁹⁹ "cash dividend," see C.J.S. title Corporations § 458, also 11 C.J. p 22 note 32, "cash dividends paid under policy contracts,"¹ "cash entry,"² "cash method,"³ "cash money I leave,"⁴ "cash note,"⁵ "cash payment,"⁶ "cash receipts and disbursements basis," see Basis 10 C.J.S. p 2 note 19, "cash receipts and disbursements method,"⁷ "cash surrender value," see C.J.S. title Insurance § 460, also 37 C.J. p 443 note 3 (b), and see also Bankruptcy § 188, C.J.S. title Garnishment § 110, and 28 C.J. p 166 notes 85-90 and also Cash Surrender Value 11 C.J. p 25 note 63, "fair cash market value,"⁸ "full and fair cash value,"⁹ "full and true cash value,"¹⁰ "full cash value,"¹¹ "market cash value,"¹² "proper cash items,"¹³ "reasonable cash market value,"¹⁴ "reasonable cash value,"¹⁵ "reasonable market cash value,"¹⁶ "rest of my cash money,"¹⁷ "stated cash value,"¹⁸ "then

cash value,"¹⁹ "three-fourths of the actual cash value,"²⁰ "true cash value,"²¹ and "true cash value of property."²²

CASHEW NUT. The kidney-shaped nut of the *Anacardium occidentale*, consisting of a kernel inclosed in a very hard shell, which is borne upon a swollen, pear-shaped, edible stalk.²³

Cashew-nut oil. Known as cardol see Cardol 12 C.J.S. p 1144 note 92, and said to be the cause of poisoning by contact under some circumstances.²⁴

CASHIER.

As a Noun

An officer or agent whose business is mainly to take care of the money of an institution, of a private person, or of a firm;²⁵ one who is a custodian of money, especially one who has charge of receipts, disbursements, cash on hand, and ordinary financial transactions of a mercantile house or the like.²⁶ Used specifically with reference to banks, see the

99. What is

A "cash contract" of a municipal corporation is "one not creating a 'debt,'" within constitutional limitation.—*Jeffersonville v. Cotton State Belting Supply Co.*, 118 S.E. 442, 30 Ga.App. 470.

See also C.J.S. title Municipal Corporations § 1851, also 44 C.J. p 1128 notes 21-25.

1. Miss.—Penn Mut. Life Ins. Co. v. Henry, 70 So. 452, 454, 110 Miss. 400.

2. What is

"The purchase from the government for cash and at the government price" of homestead land by one who has entered thereon.—*Fideler v. Norton*, 80 N.W. 128, 136, 32 N.W. 57, 4 Dak. 258.

3. U.S.—*In re Newman*, C.C.A.Ohio, 94 F.2d 108, 110.

4. N.Y.—*In re McKendrie's Estate*, 271 N.Y.S. 228, 229, 150 Misc. 665.

5. In England

A bank note of a provincial bank or of the Bank of England.—*Black L.D.*

Defined generally see Bills and Notes § 7; and see also Cash Note 11 C. J. p 23 note 52.

6. "Promise to pay" distinguished U.S.—*Hart v. Commissioner of Internal Revenue*, C.C.A., 54 F.2d 848, 852.

7. U.S.—*Insurance Finance Corporation v. Commissioner of Internal Revenue*, C.C.A.Tax App., 84 F.2d 382—*Hart v. Commissioner of Internal Revenue*, C.C.A.Tax App., 54 F.2d 848, 852.

Fla.—*Orlando Orange Groves Co. v. Hale*, 161 So. 284, 294, 119 Fla. 159.

8. Ill.—*Conness v. Indiana, I. & I. R. Co.*, 62 N.E. 221, 224, 193 Ill. 464.

Tex.—*West Texas Hotel Co. v. City of El Paso*, Civ.App., 83 S.W.2d 772, 776—*McInnis v. Brown County Water Improvement Dist. No. 1*, Civ.App., 41 S.W.2d 741, 746.

9. Mass.—*Tremont & Suffolk Mills v. City of Lowell*, 39 N.E. 1028, 1029, 163 Mass. 283.

10. S.D.—*Richardson v. Howard*, 120 N.W. 768, 769, 23 S.D. 86.

11. U.S.—*San Francisco Nat. Bank v. Dodge*, Cal., 25 S.Ct. 384, 386, 197 U.S. 70, 49 L.Ed. 669.

Cal.—*Ballerino v. Mason*, 23 P. 530, 83 Cal. 447.

Idaho.—*Humbird Lumber Co. v. Thompson*, 83 P. 941, 945, 11 Idaho 614.

Nev.—*State v. Virginia & T. R. Co.*, 46 P. 723, 23 Nev. 288, 35 L.R.A. 759.

"Value" synonyms

Cal.—*Los Angeles v. Western Union Oil Co.*, 118 P. 720, 731, 161 Cal. 204.

"Market value" synonyms

Cal.—*Los Angeles v. Western Union Oil Co.*, 118 P. 720, 721, 161 Cal. 204—*Crocker v. Scott*, 87 P. 102, 106, 149 Cal. 575.

12. Tex.—*Missouri, K. & T. Ry. Co. v. Murray*, Civ.App., 150 S.W. 217, 218.

13. U.S.—*U. S. v. Young*, D.C.Ala., 128 F. 111, 115.

14. Tex.—*Byers v. Shelton*, Civ. App., 282 S.W. 635, 637.

"Value" equivalent

Tex.—*Rowland v. City of Tyler*, 5 S. W.2d 756, 760.

15. Tex.—*Missouri, K. & T. Ry. Co. of Texas v. Murray*, Civ.App., 150 S.W. 217, 218.

"Reasonable market cash value" equivalent

Tex.—*Missouri, K. & T. Ry. Co. of Texas v. Murray*, Civ.App., 150 S. W. 217, 218.

16. Tex.—*Missouri, K. & T. Ry. Co. v. Murray*, supra.

17. Ill.—*Lich v. Werling*, 151 Ill. App. 340, 346.

18. Wis.—*State v. Weigle*, 168 N.W. 385, 389, 168 Wis. 19.

19. "Clear market value" synonymous

Neb.—*In re Woolsey's Estate*, 190 N. W. 215, 216, 109 Neb. 138, 24 A.L. R. 1038.

20. Ky.—*Insurance Co. of North America v. McCraw*, 75 S.W.2d 518, 519, 255 Ky. 839.

21. Or.—*Citizens National Bank of Baker City v. Baker County Board of Equalization*, 222 P. 341, 344, 109 Or. 669.

22. Wash.—*Great Northern R. Co. v. Snohomish County*, 98 P. 924, 926, 48 Wash. 478.

23. N.Y.—*McDonald v. Triest*, 103 N.Y.S. 1041, 1043, 1044, 119 App. Div. 75, 78, quoting *Century D.*

24. N.Y.—*McDonald v. Triest*, supra, quoting *American Encyclopedia*.

25. Mich.—*Peo. v. Messer*, 111 N.W. 854, 857, 148 Mich. 168.

Tex.—*Rosenberg v. Texarkana First Nat. Bank*, Civ.App., 27 S.W. 897, 898, quoting *Black L. D.*

23. Tex.—*Mills v. State*, 23 Tex. 295, 304—*Miller v. State*, 225 S.

title Banks and Banking § 209. Sometimes it is abbreviated "cash," see Abbreviations 1 C.J.S. p 276 note 5. In particular connections, the word has been held to imply service as representative of the employer,²⁷ and to include an assistant cashier,²⁸ and one who represents his employer in the handling of various payrolls;²⁹ but not to include an office employee who neither collects nor disburses any moneys in the business except for the expenses of the office.³⁰ As used under varying circumstances, "cashier" has been held included within the terms "employee" and "servant,"³¹ and has been held both included and not included within the term "clerk," having been held equivalent thereto,³² and, under other circumstances, distinguished therefrom.³³

Phrases: "Agent and cashier,"³⁴ "agent, cashier, or secretary," see Agent 3 C.J.S. p 346 note 10, "agent, cashier, or secretary, president, or other head thereof," see Agent 3 C.J.S. p 346 note 11, "any cashier, or other officer, agent, or servant,"³⁵ and "asst. cashier, freight dept.,"³⁶ and also, adjectively, "cashier's check," see Bills and Notes § 5.

As a Verb

In military law, to deprive a military officer of his rank and office.³⁷ Discharge or dismissal of officers of the army and navy is treated generally in the title Army and Navy § 17 c.

CASHLITE. An amercement or fine; a mulct.³⁸

CASING HEAD GAS. See the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 741 notes 34-37.

CASING HEAD GASOLINE. See the C.J.S. title

Mines and Minerals § 3.

CASINO. A building, in the nature of a public park improvement, intended for public amusement or convenience.³⁹

CASK. A receptacle for liquids,⁴⁰ its size depending on the circumstances or the understanding of the parties using the term.⁴¹ "Cask" has been distinguished from "barrel," see Barrel 9 C.J.S. p 1549 note 3, and "keg."⁴²

Phrases: "Any cask," see Any 3 C.J.S. p 1403 note 81; also "600 casks of . . . German black lead,"⁴³ and "two casks of distilled spirits."⁴⁴

CASKET. "Coffin" and "casket" are sometimes used interchangeably, although it has been said that a "casket" is not necessarily a "coffin."⁴⁵

CASO FORTUITO. In Spanish law, an unforeseen and irresistible event, such as flood, fire, shipwreck, etc., like the "Act of God."⁴⁶

CASSARE. Law Latin, in old English law, to quash or make void, to annul, or to abate;⁴⁷ also to break.⁴⁸

CASSATION. In French law, annulling; reversal; specifically, breaking the force and validity of a judgment, or a decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is broken or annulled.⁴⁹

Cassation, court of. French, "cour de cassation." The highest court in France; so termed from possessing the power to quash (casser) the decrees of inferior courts. It is a court of appeal in criminal as well as civil cases.⁵⁰

W. 379, 381, 88 Tex.Cr. 69, 12 A. L.R. 597.

11 C.J. p 22 note 37, p 23 notes 38-43.

27. Wash. — Sunada v. Oregon-Washington R. & Nav. Co., 203 P. 64, 65, 118 Wash. 241.

28. Wash. — Sunada v. Oregon-Washington R. & Nav. Co., supra.

29. Wash. — Sunada v. Oregon-Washington R. & Nav. Co., supra.

30. N.Y.—Metropolitan Bank of New York v. Baker, Hamilton & Pacific Co., 178 N.Y.S. 140, 141.

31. Kan.—State v. Yeiter, 38 P. 320, 321, 54 Kan. 277.

32. Kan.—State v. Yeiter, supra.

33. Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

34. Ohio.—State v. Kusnick, 15 N.E. 481, 484, 45 Ohio St. 535.

35. Mich.—People v. Measser, 111 N. W. 854, 148 Mich. 168.

36. Wash. — Sunada v. Oregon-Washington R. & Nav. Co., 203 P. 64, 118 Wash. 241.

37. Black L. D. See also Dig. Op. Judge Adv. Gen. p 547.

38. Black L. D.

39. N.J.—Ross v. Long Branch, 63 A. 609, 73 N.J.Law 292, 293.

40. U.S.—Williams v. U. S., Okl., 158 F. 30, 32, 88 C.C.A. 296.

41. Mass.—Keller v. Webb, 125 Mass. 88, 89, 28 Am.R. 209.

42. Porto Rico.—Matter of Protest of Sucesores de Lomba, 2 Porto Rico Fed. 64, 67.

43. Mass.—Keller v. Webb, 125 Mass. 88, 28 Am.R. 209.

44. U.S.—Williams v. U. S., Okl., 158 F. 30, 32, 88 C.C.A. 296.

45. Ga.—Ware v. State, 121 S.E. 251, 31 Ga.App. 554.

46. Escriche Dicionario, citing Partidas VII tit XXXIII by 11. See also Cas 13 C.J.S. p 1768 note 15, and Casus Fortuitus post.

47. Adams Gloss.

Cassabitur breve—the writ shall be quashed.—Adams Gloss., citing Fleta lib v c 6 § 47.

Cassate—quashed.—Adams Gloss., citing Bracton, fol 394.

Cassatio — a quashing, making void; an abatement.—Adams Gloss.

Cassetur — shall be annulled.—Adams Gloss.

48. Black L. D.

49. Black L. D., citing Merlin Répertoire de Jurisprudence.

50. Black L. D.

Constitution

"It is composed of forty-five. Conseillers, with one Premier Président

CASSETUR BILLA or QUOD BILLA CASSETUR.

In practice, the form of judgment for defendant on a plea in abatement where the action was commenced by bill; the form of entry made by plaintiff, after plea in abatement, where the plea could not be confessed and avoided, traversed, or demurred to;⁵¹ and amounting, in fact, to a discontinuance of the action.⁵²

CASSETUR BREVE or QUOD BREVE CASSETUR.

In practice, the form of the judgment for defendant on a plea in abatement, where the action was commenced by original writ;⁵³ a judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.⁵⁴

CASSOCK or CASSULA. A garment worn by a priest.⁵⁵

CAST.**As a Noun**

That which is formed by founding; anything shaped in or as if in a mold.⁵⁶

Cast of sculpture. In the technical or professional sense, one taken from an original creation in clay, as part of the process of making the completed statue in bronze or marble, and in a broader sense the term embraces casts from sculptured objects in marble or bronze which reproduce the original objects.⁵⁷

and three Présidents de Chambre. Attached to it are sixty lawyers who are both Avoués and Avocats."—Bouvier L. D.

51. Burrill L. D.

52. Adams Gloss.

53. Burrill L. D.—Stephen Pl. pp 130, 131.

54. Black L. D., citing 5 Term 634.

55. Black L. D.

56. U.S.—Gary v. Cockley, Ohio, 65 F. 497, 501, 13 C.C.A. 17, quoting Century D.

57. U.S.—Benziger v. U. S., C.C.N. Y., 107 F. 257, 258.

58. Ky.—Frank v. Dierson, 30 S.W. 2d 950, 951, 235 Ky. 229.

59. Cal.—Covina Union High School Dist. of Los Angeles County v. McClellan, 228 P. 409, 410, 67 Cal. App. 640.

N.D.—State v. Blaisdell, 119 N.W. 360, 364, 18 N.D. 31.

60. Black L. D.

61. Anderson L. D.

62. Black L. D.

63. U.S.—Gary v. Cockley, Ohio, 65 F. 497, 501, 13 C.C.A. 17.

64. U.S.—U. S. v. Jones, Pa., 26 F. Cas.No.15,481, 1 Wash.C.C. 363, 4 Dall. 412. See U. S. v. Vanranst, Pa., 28 F.Cas.No.16,608, 3 Wash.C. C. 146.

65. Black L. D.

66. Ga.—Mackey v. Blake, 15 Ga. 402, 403.

67. Ky.—Frank v. Dierson, 30 S.W. 2d 950, 951, 235 Ky. 229.

68. Black L. D.

69. In tariff legislation, applies to iron in the ore, reduced, as a first result, to a metallic sponge or pasty mass and in that condition delivered from the furnace, and, by a second operation, melted and run into molds.—Gary v. Cockley, Ohio, 65 F. 497, 501, 13 C.C.A. 17.

70. Neb.—Bryan v. Lincoln, 70 N. W. 252, 253, 50 Neb. 620, 35 L.R. A. 752.

N.D.—State v. State Board of Cannvassers, 172 N.W. 80, 37, 44 N.D. 126.

As a Verb

—**Present Tense.** Used in the sense of "to throw," the word implies force.⁵⁸ As meaning to deposit a ballot the word implies the expression of a choice.⁵⁹ In old English practice, to allege, offer, or present; to proffer by way of excuse;⁶⁰ also to invest with; to place upon;⁶¹ and to overcome, overthrow, or defeat in a civil action at law; hence it is used in connection with the imposition upon a party litigant of costs in the suit.⁶² In an entirely different sense, to form into a particular shape, by pouring liquids into a mold.⁶³

Cast away. Applied to a ship, the phrase has been defined as meaning to destroy; to shipwreck; to wreck; to unfit her for service beyond the hopes of recovery by ordinary means, and has been held synonymous with "destroy."⁶⁴

Other phrases: "Cast an essoin,"⁶⁵ "cast in his suit,"⁶⁶ and "cast upon the lot."⁶⁷

—**Preterit and Past Participle.** The preterit and past participle is also "cast," and it occurs in some phrases which have been given judicial construction.

Phrases: "A is 'cast' for the costs of the case,"⁶⁸ "cast steel,"⁶⁹ "majority of the votes cast,"⁷⁰ "the number of votes cast,"⁷¹ "the votes cast for governor,"⁷² "two-thirds of the votes cast,"⁷³ "votes cast,"⁷⁴ and "votes cast at such election,"⁷⁵ also,

Okl.—Incorporated Town of Westville v. Incorporated Town of Stillwell, 105 P. 664, 667, 24 Okl. 892. Pa.—Doyle's Nomination, 24 Pa.Co. 27, 32.

71. Tenn.—Catlett v. Knoxville, S. & E. Ry. Co., 112 S.W. 559, 563, 120 Tenn. 699.

72. N.D.—State v. Blaisdell, 119 N. W. 360, 365, 18 N.D. 31.

73. Cal.—Covina Union High School Dist. of Los Angeles County v. McClellan, 228 P. 409, 410, 67 Cal. App. 640.

74. Ariz.—Hicks v. Krigbaum, 108 P. 482, 486, 13 Ariz. 237.

N.D.—State v. Blaisdell, 119 N.W. 360, 362, 18 N.D. 31.

Okl.—Westville v. Stillwell, 105 P. 664, 667, 24 Okl. 892.

S.D.—Mueller v. Holter, 194 N.W. 844, 845, 46 S.D. 535.

Tex. — Itasca Independent School Dist. v. McElroy, 123 S.W. 117, 118, 103 Tex. 64.

75. Wash.—Gottstein v. Lister, 153 P. 595, 611, 88 Wash. 462, Ann.Cas. 1917D 1008.

used adjectively, "cast and malleable,"⁷⁶ and "cast metal."⁷⁷

—**CASTING.** Present participle of "cast," used, sometimes adjectively, in phrases which have been judicially construed or defined.

CASTING away. Applied to a ship, it has been said that "casting away" is, like burning, a species of destruction, and means such an act as causes the vessel to perish; to be lost; to be irrecoverable by ordinary means.⁷⁸

CASTING vote. As a term peculiar to deliberative or parliamentary bodies generally see the C.J.S. title Parliamentary Law § 5, also 46 C.J. p 1382 notes 8-14, and specifically to municipal bodies see the C.J.S. title Municipal Corporations § 405, also 43 C.J. p 509 note 25-p 510 note 31.

CASTE. A class or grade, or division of society separated from others by differences of wealth, hereditary rank or privileges, or by profession or employment,⁷⁹ having special significance when applied to the artificial divisions or social classes into which the Hindus are rigidly separated.⁸⁰

CASTELLAIN. In old English law, the lord, owner, or captain of a castle, the constable of a fortified house; also a person having the custody of one of the crown mansions; an officer of the forest.⁸¹

CASTELLANIA. Law Latin, the office of a castellan; also the territory, precinct, or jurisdiction of a castle.⁸²

CASTELLANUS or **CASTELLARIUS.** Law Latin, the keeper or constable of a castle.⁸³ In old English law, the keeper, captain, or constable of a

castle or fortified house, acting in the place or in the name of the owner.⁸⁴

CASTELLARIUM or **CASTELLATUS.** In old English law, the precinct or jurisdiction of a castle.⁸⁵

CASTELLI-GUARDIA. Law Latin, guard of a castle or castle guard.⁸⁶

CASTELLOREUM OPERATIO. In Saxon and old English law, castle work; service and labor done by inferior tenants for the building and upholding of castles and public places of defense.⁸⁷

CASTIGATIO ILLA IN CASU CONSIMILI TIMOREM ALIIS PRÆBAT DELINQUENDI.⁸⁸

CASTIGATORY. In Law Latin, called "castigatorium,"⁸⁹ and described as an instrument of punishment known to the ancient common law by which a woman convicted of being a common scold was punished by being plunged into the water;⁹⁰ variously called "coke stole"—corrupted from choking stool—or "gogin-stole,"⁹¹ "cucking-stool," "ducking-stool," "scolding-stool," "trebucket," "tumbrel," and "tymborella."⁹²

CASTIGO. In Spanish law, punishment one of whose principal objects, declares Escriche, is to deter from crime, hence he considers the phrase "castigo ejemplar"—exemplary punishment—as tautological, since all punishment should be exemplary.⁹³

CASTINGS. Articles cast by patterns and drawings to form parts of a machine; and, in a strict or technical sense, it refers to such articles in their relatively rough state, and so has been specifically

76. U.S.—Gary v. Cockley, Ohio, 65 F. 497, 501, 13 C.C.A. 17.

77. U.S.—Gary v. Cockley, supra.

78. U.S.—U. S. v. Johns, C.C.Pa., 26 F.Cas.No.15,481, 4 Dall. 412, 1 Wash.C.C. 383. See U. S. v. Varnant, Pa., 28 F.Cas.No.16,608, 3 Wash.C.C. 146, 147.

79. Century D.

80. U.S.—In re Akhay Kumār Mozumdar, D.C.Wash., 207 F. 115, 117, 11 C.J. p 27 note 91 [a].

81. Black L. D.

82. Adams Gloss.

83. Black L. D.

84. Adams Gloss.

85. Black L. D.

86. Adams Gloss.

As impost levied

In old English law, castle guard is an imposition laid upon such of the king's subjects as dwell within a

certain compass of any castle, to the maintenance of such as watch and ward it.—Adams Gloss., citing Magna Charta cap 2.

87. Black L. D., citing Cowell.

Charge or contribution

One of the three necessary charges, "trinoda necessitas," to which all lands among the Saxons were expressly subject. Toward this some gave their personal service, and others a contribution of money or goods.—Black L. D., citing 1 Blackstone Comm. p 263, and Cowell.

88. A maxim meaning "Chastisement in him may occasion terror to others [may deter others] from offending in a like case."—Adams Gloss., citing Wingate Max. p 140 § 4.

89. Adams Gloss.

90. U.S.—U. S. v. Royall, C.C.D.C., 27 F.Cas.No.16,202, 3 Cranch C.C. 620.

Pa.—See James v. Commonwealth, 12 Serg. & R. 225, 226.

Lord Coke says that in law it "signifieth a stool that falleth down into a pit of water, for the punishment of the party in it"—U. S. v. Royall, C.C.D.C., 27 F.Cas.No.16,202, 3 Cranch C.C. 620.

Construction

"It was an instrument of punishment consisting of a stool or chair fixed to the end of a long pole or stick of timber, provided for scolding women wherein they were seated and plunged, soused, or ducked overhead in water."—Adams Gloss., citing 4 Blackstone Comm. pp 168, 169 and Fleta ii c 12 § 29.

91. Adams Gloss.

92. U.S.—U. S. v. Royall, C.C.D.C., 27 F.Cas.No.16,202, 3 Cranch C.C. 620.

93. Escriche Diccionario.

held not to include parts of a machine, although made of cast iron, which have been bored, drilled, planed and finished, so as to be ready for immediate assembling.⁹⁴

Phrases: "Castings forming parts of machines,"⁹⁵ "castings of iron not specially provided for,"⁹⁶ and "malleable-iron castings."⁹⁷

CASTLE. A fortress in a town; the principal mansion of a nobleman;⁹⁸ a large, fortified building; a fortress.⁹⁹ In legal acceptance, a man's house is regarded as his castle;¹ but in applying this doctrine it has been held that "castle" does not include one's own automobile on a public street.²

Phrases: "Her castle of defense,"³ and "right of castle."⁴

CASTLEGUARD. In feudal law, an imposition anciently laid upon such persons as lived within a certain distance of any castle, toward the maintenance of such as watched and warded the castle.⁵

Castleguard rents. In old English law, rents paid by those who dwelt within the precincts of a castle, toward the maintenance of such as watched and warded it.⁶

CASTRACIÓN or CASTRADURA. In Spanish law, castration, which, if done purposely against another's will, is punished with imprisonment. For-

merly, it was treated as homicide unless required as a surgical operation.⁷

CASTRATION. The act of gelding.⁸ Castration of animals running at large see Animals § 139.

CASTRENSIS. In the Roman law, relating to the camp or military service.⁹

CASTRUM. Latin, in Roman law, a camp. In old English law, a castle, or a castle, including a manor.¹⁰

CASUAL.

As a Noun

A person who receives relief and shelter for one night, at the most, in a hospital, workhouse, or police station, or one who receives treatment in a hospital for an accidental injury, generally at irregular and uncertain periods, or because of some accident;¹¹ also, in a particular connection, a laborer or an artisan employed only irregularly.¹²

As an Adjective

As an adjective the word has been defined as meaning accidental, coming by chance, fortuitous, happening by accident; also as meaning haphazard, incidental, indeterminate, occasional, uncertain, unexpected, unforeseen, or unpremeditated,¹³ or without regularity.¹⁴ It has been said that the word

94. U.S.—Bromley v. U. S., Pa., 156 F. 958, 959, 84 C.C.A. 458—Lehigh Mfg. Co. v. U. S., C.C.Pa., 153 F. 596, 597.

95. Not included by phrase "castings of iron not specially provided for"

U.S.—Bromley v. U. S., Pa., 156 F. 958, 959, 84 C.C.A. 458.

96. U.S.—Bromley v. U. S., supra.

97. U.S.—Gary v. Cockley, Ohio, 65 F. 497, 501, 13 C.C.A. 17.

98. Black L. D., citing 3 Inst. p. 31.

99. Webster New Int. D.

1. Ala.—Jones v. State, 76 Ala. 8, 16.

"The law regards a man's house as his castle, or, as was anciently said, his tutissimum refugium."—Watts v. State, 59 So. 270, 273, 177 Ala. 24.

2. S.C.—State v. McGee, 193 S.E. 303, 306.

3. Fla.—Russell v. State, 54 So. 360, 363, 61 Fla. 50.

4. S.C.—State v. Boyd, 119 S.E. 839, 840, 126 S.C. 300.

Right of defense when assaulted in one's own dwelling house see C.J. S. title Homicide § 130, also 30 C. J. p. 71 note 57.

5. Black L. D.

6. Black L. D.

7. Escriche Diccionario.

8. Bouvier L. D.

9. Black L. D.

Castrense peculium

A portion of property which a son acquired in war, or from his connection with the camp.—Black L. D.

10. Black L. D.

11. U.S.—U. S. v. New York, O. & W. R. Co., D.C.N.Y., 216 F. 702, 705.

Ill.—Aurora Brewing Co. v. Industrial Board of Illinois, 115 N.E. 207, 208, 277 Ill. 142.

12. Ill.—Aurora Brewing Co. v. Industrial Board of Illinois, 115 N.E. 207, 208, 277 Ill. 142.

Iowa.—Herbig v. Walton Auto Co., 182 N.W. 204, 206, 191 Iowa 394—Badard v. Sweinhart, 172 N.W. 937, 938, 186 Iowa 655.

13. U.S.—U. S. v. New York, O. & W. R. Co., D.C.N.Y., 216 F. 702, 705.

Ga.—Atlanta Distributing Terminals v. Board of Com'rs, etc., of Fulton County, 170 S.E. 52, 56, 177 Ga. 250—Hall v. County of Greene, 46 S.E. 69, 119 Ga. 253, 254—Lewis v. Lofley, 19 S.E. 57, 59, 92 Ga. 804—Williams v. Sumter County, 94 S.E. 913, 21 Ga.App. 716.

Ill.—Aurora Brewing Co. v. Industrial Board of Illinois, 115 N.E. 207, 208, 277 Ill. 142.

Ind.—Hovey v. Foster, 21 N.E. 39, 41, 118 Ind. 502.

Iowa.—Herbig v. Walton Auto Co., 182 N.W. 204, 206, 191 Iowa 394.

Kan.—Root v. Topeka Ry. Co., 153 P. 550, 551, 96 Kan. 694.

La.—Ranson-Rooney v. Overseas Ry., 134 So. 765, 768, 17 La.App. 205.

Mich.—Dyer v. James Black Masonry & Contracting Co., 158 N.W. 959, 960, 192 Mich. 400.

Mo.—March v. Bernardin, 76 S.W.2d 706, 707, 229 Mo.App. 246—Sonnenberg v. Berg's Market, 55 S.W.2d 494, 495, 227 Mo.App. 391.

N.J.—Sabella v. Brasileiro, 91 A. 1032, 1033, 86 N.J.Law 505.

Pa.—Snively v. Hackenburg, 4 Pa. Dist. & Co. 28, 29.

Tex.—Texas & N. O. R. Co. v. Owens Civ.App., 54 S.W.2d 848, 853.

W.Va.—Dickinson v. Talbott, 170 S.E. 425, 427, 114 W.Va. 1.

Wis.—Holmen Creamery Ass'n v. Industrial Commission of Wisconsin, 167 N.W. 808, 809, 167 Wis. 470.

11 C.J. p. 28 notes 9, 12.

14. Cal.—Maryland Casualty Co. v. Pillsbury, 158 P. 1031, 1033, 17 Cal. 748—Blood v. Industrial Acc

imports impermanence,¹⁵ and that, in a particular connection, and as related to action or omission to act, it may import negligence.¹⁶ "Casual" has been contrasted with, or distinguished from, "causal,"¹⁷ "constant,"¹⁸ "important," "material,"¹⁹ "regular," and "stated,"²⁰ and also contrasted with the phrase "of a casual nature."²¹

Casual deficiency or casual deficit. A phrase said to imply the existence of an emergency in the governmental finances and authority to contract a debt to meet it,²² a levy of taxes to meet all lawful li-

bilities that have accrued and a liability arising subsequently from an unanticipated cause,²³ a legal indebtedness which may include items of current expense,²⁴ and an insufficiency of levy due to oversight;²⁵ but it has been held that the term does not include a deficiency resulting from a mere temporary need of money to meet current expenses;²⁶ and so the use of the phrase has been held to be proper as referring to a failure in the revenue,²⁷ some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense.²⁸ It has been said

Commission of State of California, 157 P. 1140, 30 Cal.App. 274.
 Colo.—Lackey v. Industrial Commission of Colorado, 249 P. 662, 80 Colo. 112.
 Conn.—De Carli v. Manchester Public Warehouse Co., 140 A. 637, 638, 107 Conn. 359, 60 A.L.R. 1191.
 Ill.—Chas. A. Smith & Co. v. Industrial Commission, 132 N.E. 470, 299 Ill. 377—Consumers' Mut. Oil Producing Co. v. Industrial Commission, 124 N.E. 608, 609, 289 Ill. 423—Chicago Great Western R. Co. v. Industrial Commission of Illinois, 120 N.E. 503, 510, 284 Ill. 573.
 Ind.—Mason v. Wampler, 166 N.E. 885, 886, 89 Ind.App. 483—Zeidler v. Prueher, 154 N.E. 35, 85 Ind. App. 627.
 Iowa.—Gardner v. Trustees of Main St. M. E. Church of Ottumwa, 250 N.W. 740, 745, 217 Iowa 1390—Porter v. Mapleton Electric Light Co., 133 N.W. 803, 805, 191 Iowa 1031—Herbig v. Walton Auto Co., 182 N.W. 204, 206, 191 Iowa 394—Bedard v. Sweinhart, 172 N.W. 937, 186 Iowa 655.
 La. — Ranson-Rooney v. Overseas Ry., 134 So. 765, 768, 17 La.App. 205.
 Me.—Mitchell's Case, 118 A. 287, 289, 121 Me. 455, 33 A.L.R. 1447.
 Mass.—In re Gaynor, 104 N.E. 339, 217 Mass. 86, 88, L.R.A.1916A 363.
 Mich.—Dyer v. James Black Masonry & Contracting Co., 153 N.W. 959, 961, 192 Mich. 400.
 Minn.—Billmeyer v. Sanford, 225 N. W. 426, 427, 177 Minn. 465.
 Mo.—March v. Bernardin, 76 S.W.2d 706, 708, 229 Mo.App. 246—Sonnenberg v. Berg's Market, 55 S.W.2d 494, 495, 227 Mo.App. 391.
 Neb.—Bridger v. Lincoln Feed & Fuel Co., 179 N.W. 1020, 1021, 105 Neb. 272.
 Ohio.—State ex rel. Bettman v. Christen, 190 N.E. 233, 235.
 Pa.—Callihan v. Montgomery, 115 A. 889, 893, 272 Pa. 56.
 Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, 853, quoting *Corpus Juris*.
 Utah.—Palle v. Industrial Commis-

sion, 7 P.2d 284, 290, 79 Utah 47, 81 A.L.R. 1222.
 Vt.—Le Blanc v. Nye Motor Co., 147 A. 265, 266, 102 Vt. 194—Chamberlain v. Central Vermont Ry. Co., 137 A. 326, 329, 100 Vt. 284.
 W.Va.—Dickinson v. Talbott, 170 S. E. 425, 427, 114 W.Va. 1.
 Wis.—Holmen Creamery Ass'n v. Industrial Commission of Wisconsin, 167 N.W. 808, 809, 167 Wis. 470.
Antonyms
 It has been said that its meaning may be more clearly understood by referring to its antonyms, which are "certain," "periodic," "regular," and "systematic."
 U.S.—Western Union Telegraph Co. v. Hickman, W.Va., 248 F. 899, 901, 161 C.C.A. 17.
 Me.—Pooler's Case, 118 A. 590, 591, 122 Me. 11.
 Mo.—Barlow v. Shawnee Inv. Co., App., 48 S.W.2d 35, 45.
 11 C.J. p 28 note 19 [a].
 15. Conn.—De Carli v. Manchester Public Warehouse Co., 140 A. 637, 638, 107 Conn. 359, 60 A.L.R. 1191.
 16. Kan.—Root v. Topeka Ry. Co., 153 P. 550, 98 Kan. 694.
 17. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, 853.
 18. Pa.—Snaveley v. Hackenburg, 4 Pa.Dist. & Co. 28, 29.
 19. Tex.—Cotulla State Bank v. Herron, Civ.App., 202 S.W. 797, 798.
 20. Ill.—Thede Bros. v. Industrial Commission, 121 N.E. 172, 173, 285 Ill. 483—Aurora Brewing Co. v. Industrial Board of Illinois, 115 N.E. 207, 208, 277 Ill. 142.
 Iowa.—Dial v. Coleman's Lunch, 251 N.W. 33, 34, 217 Iowa 945—Gardner v. Trustees of Main St. M. E. Church of Ottumwa, 250 N.W. 740, 744, 217 Iowa 1390—Herbig v. Walton Auto Co., 182 N.W. 204, 206, 191 Iowa 394.
 Mich.—Dyer v. James Black Masonry & Contracting Co., 153 N.W. 959, 960, 192 Mich. 400.
 Neb.—Petrov & Giannou v. Shewan, 137 N.W. 940, 942, 108 Neb. 466—Nedela v. Mares Auto Co., 184 N.

W. 835, 836, 106 Neb. 833—Bridger v. Lincoln Feed & Fuel Co., 179 N. W. 1020, 1021, 105 Neb. 272.
 Ohio.—State ex rel. Bettman v. Christen, 190 N.E. 233, 235.
 21. Mass.—In re Gaynor, 104 N.E. 339, 340, 217 Mass. 86, L.R.A.1916A 363.
 22. "The phrase is broad and comprehensive and in our judgment applies to any liability of the state existing at any time when the Legislature in recognition of the same, regardless of when it arose, adopts a plan for the refunding and eventual discharge thereof."—Dickinson v. Talbott, 170 S.E. 425, 428, 114 W. Va. 1.
 23. U.S.—Commercial Trust Co. of Hagerstown v. Laurens County, D. C.Ga., 267 F. 901, 904.
 24. Ga.—Central of Georgia Ry. Co. v. Wright, 139 S.E. 890, 901.
 25. Accepted as an "apt definition of the term"
 "And if, during the period in which the expense was incurred and the tax was levied, by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency, casual in its nature . . . arose."—Central of Georgia Ry. Co. v. Wright, supra.
 26. U.S.—Commercial Trust Co. of Hagerstown v. Laurens County, D. C.Ga., 267 F. 901, 904.
 27. Ky.—State Budget Commission v. Lebus, 51 S.W.2d 965, 969, 244 Ky. 700.
 11 C.J. p 28 note 19 [a].
 See also C.J.S. title States § 179, and 59 C.J. p 272 notes 17, 18 [b].
 28. U.S.—Farmers' Loan & Trust Co. of New York v. Wilcox County, Ga., C.C.A.Ga., 287 F. 809, 812—Commercial Trust Co. of Hagerstown v. Laurens County, D.C.Ga., 267 F. 901, 904.
 Ga.—Atlanta Distributing Terminals v. Board of Com'rs, etc., of Fulton County, 170 S.E. 52, 56, 177 Ga. 250—Citizens' Bank of Moultrie v. Rockdale County, 119 S.E. 322, 332, 156 Ga. 500—Wright v. Southern Ry. Co., 91 S.E. 681, 146 Ga. 581—Hall v. County of Greene, 46 S.E.

that "casual deficits" and "failures in the revenue" are synonyms, or that "failures in the revenue" may be considered as explanatory of "casual deficits."²⁹

Casual evidence. The phrase is used to denote,—in contradistinction to "preappointed evidence,"—all such evidence as happens to be adducible of a fact or event, but which was not prescribed by statute or otherwise arranged beforehand to be the evidence of the fact or event.³⁰

Casual negligence. Negligence attributable to a contractor employed by the principal and for which the latter is not responsible, although he would be responsible for the same thing if done by his servant, the phrase being held to be interchangeable or synonymous with "collateral negligence."³¹

Casual pauper. A poor person who, in England, applies for relief in a parish other than that of his settlement. The ward in the workhouse to which such paupers are admitted is called the "casual ward."³²

Casual poor. Such poor persons as are suddenly taken sick or meet with some accident when away from home, and are thus providentially thrown upon the charities of those among whom they may happen to be, and the term has been held not to include an infirm and helpless slave to whom the master has refused relief.³³ In English law, those who are not settled in a parish.³⁴ The subject matter of furnishing relief to the transient poor is treated generally in the C.J.S. title Paupers § 2, also 48 C.J. p 431 note 40—p 432 note 48.

Casual vacancy. A vacancy in an office by the

candidate elected thereto failing or refusing to qualify, or when he dies before entering upon the discharge of the duties of the office; a term used in connection with constitutional or statutory provisions for filling such a vacancy by appointment or election.³⁵

Other phrases: "Any casual vacancy," see Any 3 C.J.S. p 1403 note 82, "casual allusion in a conversation,"³⁶ "casual and incidental to his farming,"³⁷ "casual and involuntary,"³⁸ "casual and involuntary way,"³⁹ "casual and not in the usual course of the trade,"⁴⁰ "casual and transitory,"⁴¹ "casual connections,"⁴² "casual ejector," see the C.J.S. title Ejectment § 2, also 19 C.J. p 1029 note 12 [a], "casual employees," see the C.J.S. title Workmen's Compensation Acts § 69, also 71 C.J. p 436 note 23—p 441 note 74, "casual employment," see the C.J.S. title Workmen's Compensation Acts § 69, also 71 C.J. p 436 note 26—p 437 note 27, "casual expenses,"⁴³ "casual laborer,"⁴⁴ "casual or involuntary,"⁴⁵ "casual sale or other casual disposition of personal property,"⁴⁶ "incidental, casual, and temporary,"⁴⁷ "is but casual,"⁴⁸ "of a casual nature,"⁴⁹ and "purely casual employment," see the C.J.S. title Workmen's Compensation Acts § 69, also 71 C.J. p 439 note 35.

CASUALLY. The adverb of "casual," as used in the phrase "casually and involuntarily."⁵⁰

CASUALTY. It has been said that "casualty" is a word of quite frequent use but that its definition has not been very accurately settled by the courts.⁵¹ As applied to losses and injuries the word has been defined as an accident, chance, con-

69, 119 Ga. 253, 254—Lewis v. Lofley, 19 S.E. 57, 59, 92 Ga. 804—Williams v. Sumter County, 94 S. E. 913, 21 Ga.App. 716.

29. Ky.—State Budget Commission v. Lebus, 51 S.W.2d 965, 969, 244 Ky. 700.

30. Black L.D.

31. N.Y.—Weber v. Buffalo Railway Co., 47 N.Y.S. 7, 11, 20 App.Div. 292.

32. Black L.D.

33. N.J.—Force v. Haines, 17 N.J. Law 385, 405.

34. Black L.D.

35. Pa.—Com. v. Wise, 65 A. 535, 540, 216 Pa. 152.

36. Tex.—Cotulla State Bank v. Herron, Civ.App., 202 S.W. 797, 798.

37. Minn.—Hagelstad v. Uslak, 252 N.W. 480, 190 Minn. 513.

38. "Willful" distinguished Minn.—State v. Shevlin-Carpenter

Co., 113 N.W. 634, 637, 102 Minn. 470.

39. Kan.—Root v. Topeka Ry. Co., 153 P. 550, 96 Kan. 694.

40. Ala.—National Cast Iron Pipe Co. v. Higginbotham, 112 So. 734, 736, 216 Ala. 129.

D.C.—Hoage v. Hartford Accident & Indemnity Co., 77 F.2d 331, 332, 64 App.D.C. 258.

41. Me.—Smith v. Haine Safety Boller Co., 112 A. 516, 521, 119 Me. 552.

42. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, 853.

43. Ohio.—State ex rel. Bettman v. Christen, 190 N.E. 233, 235.

44. Ind.—Makeever v. Marlin, 174 N.E. 517, 519, 92 Ind.App. 158.

45. "Willful" distinguished Wash.—Luedinghaus v. Pederson, 171 P. 530, 531, 100 Wash. 580.

46. U.S.—50 East 75th St. Corpora-

tion v. Commissioner of Internal Revenue, C.C.A.Tax App., 78 F.2d 158, 160.

47. Ind.—Mason v. Wampler, 166 N. E. 885, 886, 89 Ind.App. 483.

48. Wis.—Johnson v. Wisconsin Lumber & Supply Co., 234 N.W. 506, 507, 203 Wis. 304, 72 A.L.R. 1279.

49. Mass.—In re Gaynor, 104 N.E. 339, 340, 217 Mass. 86, L.R.A.1916A 363.

50. Kan.—Root v. Topeka Ry. Co., 153 P. 550, 551, 96 Kan. 694—Cummings v. Wichita R. & Light Co., 74 P. 1104, 68 Kan. 218, 1 Ann. Cas. 708.

51. Idaho.—Eaton v. Glindeman, 195 P. 90, 91, 33 Idaho 389.

Iowa.—Banker's Mut. Casualty Co. v. Council Bluffs First National Bank, 108 N.W. 1046, 1048, 131 Iowa 456.

tingency, event, or incident due to some sudden, unexpected, or unusual cause, not to be foreseen or guarded against, that which comes by chance or without design or without being foreseen,⁵² or that which proceeds from an unknown cause, or is an unusual effect of a known cause,⁵³ without any element of conscious human design or intentional human agency; but in ordinary usage the term may be, and quite commonly is, applied to such a loss or injury notwithstanding the conscious or intended act of some other person produces it,⁵⁴ as a fortuitous happening caused by some human agency which one cannot control,⁵⁵ and, more specifically, disability or loss of life in battle or military service from wounds, etc.⁵⁶

Under the particular circumstances of specific cases, as when the use of the word in statutes and the like is discussed, it has been held that a collision,⁵⁷ a derailment,⁵⁸ a windstorm,⁵⁹ and the loss of defendant's answer from the file of a court,⁶⁰ constitute "casualties;" but under other circumstances, it has been held or said that a failure to follow instructions of the board of county commissioners,⁶¹ an effect arising from legislative action,⁶² a train dispatcher's forgetfulness and failure to order cars picked up by a train,⁶³ darkening

of a street by the construction of an elevated road,⁶⁴ deterioration from ordinary wear and tear,⁶⁵ excessive and unusual summer heat,⁶⁶ proceedings relating to the widening and opening of streets,⁶⁷ progressive decay of the underside of the planks of a wharf,⁶⁸ the authorization for the payment of a liability rendered necessary by the act of a judge,⁶⁹ and the usual overflow of a large river,⁷⁰ are not to be considered as constituting "casualties."⁷¹ In particular connections, and depending on the circumstances of its use, "casualty" has been contrasted with, or distinguished from, "act of God," see Act of God 1 C.J.S. p 1431 note 10, "catastrophe,"⁷² "misfortune,"⁷³ "negligence,"⁷⁴ and "unavoidable accident," see Accident 1 C.J.S. p 444 note 37.

Casualties of superiority. In Scotch law, payments from an inferior to a superior, that is, from a tenant to his lord, which arise upon uncertain events, as opposed to the payment of rent at fixed and stated times.⁷⁵

Casualties of wards. In Scotch law, the mails and duties due to the superior in ward-holdings.⁷⁶

Inevitable casualty. An accident which happens without the slightest degree of negligence or default of the party charged.⁷⁷ The phrase has been com-

52. U.S.—Crystal Springs Distillery Co. v. Cox, C.C.Ky., 47 F. 693, 695.

Ill.—Morris & Co. v. Industrial Board of Illinois, 119 N.E. 944, 946, 284 Ill. 67, L.R.A.1918E 919.

Iowa.—Banker's Mut. Casualty Co. v. Council Bluffs First National Bank, 108 N.W. 1046, 1048, 131 Iowa 456.

Ky.—Bennett v. Howard, 195 S.W. 117, 118, 175 Ky. 797, L.R.A.1917E 1075—Gill v. Fugate, 78 S.W. 188, 191, 117 Ky. 257, 25 Ky.L. 1367.

La.—Cook & Laurie Contracting Co. v. Denis, 49 So. 1014, 1015, 124 La. 161.

Mo.—Webb v. Baldwin, 147 S.W. 849, 851, 165 Mo.App. 240.

Neb.—Anthony v. Karbach, 90 N.W. 243, 244, 64 Neb. 509, 97 Am.S.R. 662.

Pa.—McCarty v. New York & Erie R. Co., 30 Pa. 247, 251.

Va.—Stieffen v. Darling, 163 S.E. 353, 354, 158 Va. 375.

11 C.J. p 29 note 25, p 30 note 26-38.

As referring to "some sad accident" Miss.—Thompson v. Tillotson, 56 Miss. 36, 39.

53. U.S.—Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., La., 11 S.Ct. 490, 493, 139 U.S. 79, 35 L.Ed. 97.

11 C.J. p 30 notes 37, 38.

54. Iowa.—Banker's Mut. Casualty Co. v. Council Bluffs First Nation-

al Bank, 108 N.W. 1046, 1048, 131 Iowa 456.

55. U.S.—U. S. v. Pennsylvania Co., D.C.Pa., 239 F. 761, 764.

56. U.S.—U. S. v. New York, O. & W. R. Co., D.C.N.Y., 216 F. 702, 705.

57. U.S.—Helvering v. Owens, C.C. A.2, 95 F.2d 318, 319.

58. U.S.—Denver & R. G. R. Co. v. U. S., Utah, 233 F. 62, 64, 147 C.C. A. 132—U. S. v. Northern Pacific Ry. Co., C.C.A.Wash., 215 F. 64, 67.

Ga.—Oakland Motor Car Co. v. Rippey Motor Co., 154 S.E. 823, 824, 41 Ga.App. 784.

59. Ga.—Mayer v. Morehead, 32 S.E. 349, 350, 106 Ga. 434.

60. Ark.—Cady v. Pack, 205 S.W. 819, 820, 135 Ark. 445.

61. Ohio.—Rabb v. Board of Com'rs of Cuyahoga County, 173 N.E. 255, 257, 36 Ohio App. 481.

62. Ga.—Lawrence v. White, 63 S.E. 631, 634, 131 Ga. 840, 19 L.R.A., N. S., 966, 15 Ann.Cas. 1097.

63. U.S.—U. S. v. Missouri Pacific R. Co., D.C.Colo., 235 F. 944, 947.

64. Ill.—Chicago v. Nichols, 52 N. E. 359, 360, 177 Ill. 97.

65. U.S.—Matheson v. Commissioner of Internal Revenue, C.C.A.Tax App., 54 F.2d 537, 539.

66. U.S.—Crystal Springs Distillery Co. v. Cox, C.C.Ky., 47 F. 693, 695.

Ga.—Oakland Motor Car Co. v. Rippey Motor Co., 154 S.E. 823, 824, 41 Ga.App. 784.

67. N.Y.—Mills v. Baehr, 24 Wend. 254, 255.

Va.—Stieffen v. Darling, 163 S.E. 353, 354, 158 Va. 375.

68. Idaho.—Eaton v. Glandeman, 195 P. 90, 91, 33 Idaho 389.

69. Ill.—Tearney v. Harding, 166 N. E. 526, 528, 335 Ill. 123.

70. Ga.—Oakland Motor Car Co. v. Rippey Motor Co., 154 S.E. 823, 824, 41 Ga.App. 784.

71. Ill.—Morris & Co. v. Industrial Board of Illinois, 119 N.E. 944, 946, 284 Ill. 67, L.R.A.1918E 919.

Ohio.—Rabb v. Board of Commissioners of Cuyahoga County, 173 N.E. 255, 257, 36 Ohio App. 481.

72. La.—Reynolds v. Board of Com'rs of Orleans Levee Dist., 71 So. 787, 791, 139 La. 518.

73. Ky.—Ison v. Buskirk-Rutledge Lumber Co., 266 S.W. 243, 245, 205 Ky. 583.

74. U.S.—U. S. v. Great Northern R. Co., Wis., 220 F. 630, 632, 136 C.C.A. 238.

11 C.J. p 29 note 25 [b].

75. Black L.D.

76. Black L.D.

77. U.S.—Hodgson v. Dexter, D.C., 12 F.Cas.No.6,565, 1 Cranch C.C. 109.

pared with "act of God," see Act of God 1 C.J.S. p 1431 note 21.

Unavoidable casualty. In the sense in which "unavoidable" means inevitable, as distinguished from unavoidable by the exercise of due care, it has been said that the phrase signifies a happening or non-happening of an event that cannot be avoided,⁷⁸ or an accident which human prudence, foresight, and sagacity cannot prevent.⁷⁹ In the sense in which "unavoidable" means inevitable by the exercise of due care, as distinguished from actually or absolutely inevitable, an "unavoidable casualty" is one which could not have been avoided by the exercise of reasonable diligence and skill,⁸⁰ or an event or casualty happening against the will and without the negligence or other default of a party.⁸¹ Interpreting the words "unavoidable casualty," not according to their strict and philosophical significance but in conformity to their popular every-day acceptance, the phrase includes an occurrence in which there is a degree of unexpectedness, something unforeseen and not contemplated, although in the natural course of things.⁸² According to such popular every-day acceptance, and not according to a very strict and narrow construction, the phrase is not limited to an injury done by some other means than human instrumentality, but will include an injury by a stranger,⁸³ although in a particular connection and context it has been held that the words do not include an injury through accident or negligence by an outsider.⁸⁴ The phrase has been held not to include a bad market.⁸⁵ "Un-

avoidable casualty" has been distinguished from "accident," see Accident 1 C.J.S. p 444 note 38. Destruction of premises by reason of unavoidable casualty as affecting the liability under a lease see Landlord and Tenant C.J.S. § 414, also 36 C.J. p 202 note 1, and C.J.S. § 486, also 36 C.J. p 329 note 79, and unavoidable casualty preventing the presentation of a defense as ground for a new trial see the C.J.S. title New Trial § 81, also 46 C.J. p 214 note 79 [c].

Unavoidable casualty or misfortune. The phrase has been defined as meaning some mishap which could not have been guarded against by the exercise of ordinary care;⁸⁶ such casualty or misfortune as could not by the exercise of reasonable skill and diligence have been avoided.⁸⁷ It is something more than mere misfortune,⁸⁸ the word "unavoidable" being construed to apply to both "casualty" and "misfortune."⁸⁹ As ground for opening or vacating a judgment see the C.J.S. title Judgments § 280, also 34 C.J. p 313 note 22-p 314 note 23, and, when preventing a defense, as ground for new trial see the C.J.S. title New Trial § 82, also 46 C.J. p 216 note 96 [a] (3).

Other phrases: "Accidental fire or other casualty,"⁹⁰ "accident or casualty," see Accident 1 C.J.S. p 445 note 61, "any casualty not caused by the landlord,"⁹¹ "casualty, accident or emergency," see Accident 1 C.J.S. p 446 note 79, "casualty or accident," see Accident 1 C.J.S. p 446 note 80, "casualty or necessity,"⁹² "casualty or unavoidable accident,"⁹³ "destruction . . . by any casualty not

78. Okl.—Cotton v. Harris, 235 P. 607, 608, 108 Okl. 203.

79. Ohio.—Day Wood Heel Co. v. Rover, 175 N.E. 588, 590, 123 Ohio St. 349.

65 C.J. p 1197 note 94.

"By a strict definition, applied to the subject matter . . . such is the philological meaning of the words, and in this sense . . . they clearly signify occurrences of an unusual and extraordinary character."—Welles v. Castles, 3 Gray, Mass., 323, 325.

80. Ky.—Bennett v. Howard, 195 S. W. 117, 118, 175 Ky. 797, L.R.A. 1917E 1075.

81. Okl.—Howe v. Farmers' & Merchants' Bank, 263 P. 673, 675, 129 Okl. 140.—Wagner v. Lucas, 193 P. 421, 423, 79 Okl. 231.

82. Ala.—Kirby v. Davis, 97 So. 655, 656, 210 Ala. 192.

R.I.—Phillips v. Sun Dyeing, Bleaching, and Calendering Co., 10 R.I. 453, 461.

83. Ala.—Kirby v. Davis, 97 So. 655, 656, 210 Ala. 192.

84. Mass.—Leominster Fuel Co. v. Scanlon, 137 N.E. 271, 272, 243 Mass. 126, 24 A.L.R. 1459.

85. Ky.—Bennett v. Howard, 195 S. W. 117, 119, 175 Ky. 797, L.R.A. 1917E 1075.

86. Ky.—Cleveland v. Couch, 21 S. W.2d 468, 470, 231 Ky. 332.

87. Ky.—Ray v. Arnett, 106 S.W. 828, 829.—Louisville & N. R. Co. v. Paynter's Adm'x, 101 S.W. 935, 938, 125 Ky. 520.

88. Ky.—Ison v. Buskirk-Rutledge Lumber Co., 266 S.W. 243, 245, 205 Ky. 533.

89. Ohio.—Rabb v. Board of Commissioners of Cuyahoga County, 173 N.E. 255, 257, 36 Ohio App. 481.

90. U.S.—U. S. v. Sisk, N.C., 176 F. 835, 839, 100 C.C.A. 355.—Crystal Springs Distillery Co. v. Cox, C.C. Ky., 47 F. 693, 695.

91. Ga.—Lawrence v. White, 63 S.E. 631, 634, 131 Ga. 840, 19 L.R.A., N.S., 966, 15 Ann.Cas. 1097.

92. Abandoning poor land for better In holding that leaving a homestead

because unable to make a living on it is not a case of "casualty or necessity," within a statutory provision, the court said: "The two words may fairly imply various other events, impossible to enumerate; but no proper construction can make them cover an indefinite abandonment for years, induced by the fact that the owner has found elsewhere a location deemed more advantageous."—Thompson v. Tillotson, 56 Miss. 36, 49.

93. U.S.—U. S. v. Northern Pacific Ry. Co., C.C.A.Wash., 215 F. 64, 67.

"Emergency" distinguished

U.S.—U. S. v. Missouri Pacific R. Co., D.C.Colo., 235 F. 944, 947.

"Trivial mischance or mishap" contrasted

"The words of exemption quoted above . . . are coupled with the superhuman, and perforce imply unexpected and unforeseen disaster. There is obviously a wide field between such extraordinary events . . . and mischances and mishaps of a comparatively trivial nature

caused by the landlord,"⁹⁴ "deterioration 'by any casualty,'"⁹⁵ "fire and other unavoidable casualty,"⁹⁶ "fire or other casualty,"⁹⁷ "fires, storms, shipwreck, or other casualty,"⁹⁸ "hail, drought or any unavoidable accident or casualty," see Accident 1 C.J.S. p 444 note 39, "in case of casualty, or unavoidable accident, or the act of God," see Accident 1 C.J.S. p 444 note 40, "inevitable accident or casualty," see Accident 1 C.J.S. p 446 note 94, "inevitable casualty or accident,"⁹⁹ "liability rendered necessary by any unforeseen casualty,"¹ and "violence, casualty, or any undue means;"² also "accidents and casualties of every kind,"³ "casualties or consequences of war,"⁴ "reasonable wear, accidental fire, and unavoidable casualties,"⁵ "strikes and other unavoidable casualties,"⁶ and "unforeseen casualty or misfortune."⁷

CASUALTY INSURANCE. See the C.J.S. title Insurance § 6, also 11 C.J. p 30 notes 39-48.

CASU CONSIMILI or CONSIMILI CASU. Literally "In a like case."⁸ In old English law and practice, a writ of entry, framed under the provisions of the Statute of Westminster II, 13 Edw. I c 24, which lay for the benefit of the reversioner, where a tenant by the curtesy, or tenant for life, aliened in fee, or in tail, or for another's life, and which was brought by him in reversion against the party

to whom such tenant so aliened to his prejudice, and in the tenant's lifetime.⁹

CASU PROVISIO. Literally "In the case provided."¹⁰ A writ of entry framed under the provisions of the Statute of Gloucester, 6 Edw. I c 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.¹¹

CASUS. Latin, chance, accident, an event; also a case; a case contemplated.¹²

Casus amissionis. A case of loss; an accident by which a loss happened, such as fire, flood, robbery, shipwreck, etc.¹³

Casus belli. An occurrence giving rise to or justifying war.¹⁴

Casus fœderis. In international law, the particular event or situation contemplated by a treaty, or stipulated for, or which comes within its terms.¹⁵ In maritime law, the term is also applied to an ordinary contract, for example, a respondentia bond.¹⁶ In mercantile or commercial law, the case or event contemplated by the parties to a contract, or stipulated for by it, or coming within its terms.¹⁷

Casus fortuitus. Latin, a fortuitous, inevitable, or unforeseen accident, chance, or event, caused by a force that one cannot resist;¹⁸ vis major;¹⁹ used

which constantly arise and are dealt with in every line of action."—U. S. v. Missouri Pacific R. Co., *supra*.

94. Ga.—Mayer v. Morehead, 32 S.E. 349, 350, 106 Ga. 434.

95. Miss.—Forsdick v. Board of Supervisors of Quitman County, 25 So. 294.

96. Ohio.—Day Wood Heel Co. v. Rover, 175 N.E. 588, 590, 123 Ohio St. 348.

97. N.Y.—Mills v. Baehr, 24 Wend. 254, 255.

Va.—Stieffen v. Darling, 163 S.E. 353, 354, 153 Va. 375.

As interruption of use

"The term 'other casualty' refers to some fortuitous interruption of the use. This is clear, not only upon the import of the words, but from the connection in which they are found."—Mills v. Baehr, 24 Wend., N.Y., 254, 255.

98. U.S.—Matheson v. Commissioner of Internal Revenue, C.C.A. Tax App., 54 F.2d 537, 538.

99. Pa.—McKinley v. C. Jutte & Co., 79 A. 244, 245, 230 Pa. 122, Ann. Cas.1912A 452.

Wash.—Alaska Coast Co. v. Alaska Barge Co., 140 P. 334, 336, 79 Wash. 216, L.R.A.1915C 423.

"Act of God" distinguished see Act of God 1 C.J.S. p 1431 note 22.

1. Ill.—Tearney v. Harding, 166 N. E. 526, 528, 335 Ill. 123.

2. Ill.—Morris & Co. v. Industrial Board of Illinois, 119 N.E. 944, 946, 284 Ill. 67, L.R.A.1918E 919.

3. La.—Reynolds v. Board of Commissioners of Orleans Levee District, 71 So. 787, 791, 139 La. 518.

Held to include "catastrophe"
La.—Reynolds v. Board of Commissioners of Orleans Levee District, 71 So. 787, 791, 139 La. 518.

4. N.Y.—Welts v. Connecticut Mut. L. Ins. Co., 43 N.Y. 34, 38, 8 Am. R. 513.

5. Ala.—Kirby v. Davis, 97 So. 655, 656, 210 Ala. 192.

6. Ky.—Bennett v. Howard, 195 S. W. 117, 118, 175 Ky. 797, L.R.A. 1917E 1075.

Limited by "ejusdem generis" rule
"We think it clear that the use of the words 'other unavoidable casualties' . . . after the word 'strikes' plainly indicates the words 'unavoidable casualties' were not used in a broader sense than strikes, but embrace only such casualties as were of a like nature to strikes. In other words, the casualties must be such as were due to outside forces, or to the conduct of third parties over which the lessees have

no control."—Bennett v. Howard, *supra*.

7. Ky.—Z. Harrell & Co. v. Banks, 151 S.W. 13, 14, 151 Ky. 71.

8. Adams Gloss.

9. Black L.D.

One of several writs

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete.—Black L.D., citing 3 Blackstone Comm. p 51.

10. Jacob L.D.

11. Black L.D.

12. Black L.D.

13. Adams Gloss., citing 4 Erskine Inst. tit 1 § 54.

14. Black L.D.

15. Black L.D.

16. Adams Gloss.

17. Black L.D.

U.S.—See Franklin Ins. Co. v. Lord, C.C.Mass., 9 F.Cas.No.5,057, 4 Mason 248, 253.

18. U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 973, 120 U.S. 707, 30 L.Ed. 776.

19. U.S.—Viterbo v. Friedlander, *supra*.

La.—Dejean v. Louisiana Western R. Co., 118 So. 822, 823, 167 La. 111—

to designate a loss happening in spite of all human effort and sagacity.²⁰ "Casus fortuitus" has been compared with "act of God" see Act of God 1 C.J. S. p 1431 note 11.

Casus major. In the civil law, a casualty; an extraordinary casualty, as fire, shipwreck, etc.²¹

Casus omissus. A case omitted; an event or contingency for which no provision is made; particularly a case not provided for by the statute on the general subject, and which is therefore left to be governed by the common law,²² although it may occur in a contract as well as in a statute.²³

CASUS FORTUITUS EST ACCIDENS, QUOD PER CUSTODIAM, CURAM VEL DILIGENTIAM MENTIS HUMANÆ NON POTEST EVITARI AB EO QUI PATITUR.²⁴

CASUS FORTUITUS; MAGIS EST IMPROVISUS PROVENIENS EX ALTERIUS CULPA, QUAM FORTUITUS.²⁵

CASUS FORTUITUS NON EST SPERANDUS; ET NEMO TENETUR DIVINARE.²⁶

CASUS FORTUITUS NON EST SUPPONENDUS.²⁷

CASUS OMISSUS ET OBLIVIONI DATUS DISPOSITIONI JURIS COMMUNIS RELINQUITUR.²⁸

Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co., 38 So. 873, 115 La. 1, 5, 112 Am.S.R. 259, 5 Ann.Cas. 818, 70 L.R.A. 562. 67 C.J. p 256 note 29.

20. U.S.—The Majestic, N.Y., 17 S. Ct. 597, 602, 166 U.S. 375, 41 L.Ed. 1039.

Wash.—Alaska Coast Co. v. Alaska Barge Co., 140 P. 334, 336, 79 Wash. 216.

21. Black L.D.

22. Black L.D.
11 C.J. p 31 note 69.

23. Bouvier L.D.

24. A maxim meaning "A chance case is an accident which cannot be averted by the custody, care or diligence of the human mind, from that which one is exposed to."—Adams Gloss., citing 3 Kent Comm. p 300 note (a).

25. A maxim meaning "A chance case: this is the most unexpected as arising from the fault of another than as happening accidentally."—Adams Gloss., citing 3 Kent Comm. p 301 note (a) note 1.

26. A maxim meaning "A fortuitous event is not to be expected, and

no one is bound to foresee it."—Black L.D.

27. A maxim meaning "A fortuitous event is not to be presumed."—Black L.D.

28. A maxim meaning "A case omitted and given to oblivion [forgotten] is left to the disposal of the common law."—Black L.D.

More freely rendered

"A particular case, left unprovided for by statute, must be disposed of according to the law as it existed prior to such statute."—Black L.D., citing Broom Max. p 46.

29. A maxim meaning "An omitted case is deemed as lost."—Adams Gloss., citing Wharton L. Lex.

30. A maxim meaning "A case (or class of cases) omitted is to be held as (intentionally) omitted."—Trayner Leg. Max.

Applied in

Ala.—State v. Crenshaw, 35 So. 456, 138 Ala. 506, 509.

Tex.—Estes v. Terrell, 92 S.W. 407, 408, 99 Tex. 622.

31. A maxim meaning "The immediate or proximate, not the remote case, is to be reviewed or consid-

CASUS OMISSUS HABETUR PRO AMISSO.²⁹

CASUS OMISSUS PRO OMISSO HABENDUS EST.³⁰

CASUS PROXIMA NON REMOTA SPECTATUR.³¹

CAT. A carnivorous quadruped which has long been kept by man in a domestic state as a pet and for catching rats and mice.³² Property in cats, and liability of an owner for injuries by a cat see the title Animals § 3 a note 23, and § 148 a note 54.

In the manufacture of lumber, the word is used adjectively in the phrase "cat faces" see the C.J.S. title Logs and Logging § 1, also 11 C.J. p 33 note 10.

As an instrument of punishment. The word has also been defined as an instrument with which criminals are flogged; it consists of nine lashes of whipcord, tied to a wooden handle, and is frequently called cat-o-nine-tails.³³

CATALLA. The word among the Normans primarily signified only beasts of husbandry, or, as they are still called, "cattle," but, in a secondary sense, the term was applied to all movables in general, and not only to these, but to whatever was not a fief or feud.³⁴

ered."—Adams Gloss., citing 3 Kent Comm. p 302 note 1.

32. Me.—Thurston v. Carter, 92 A. 295, 112 Me. 361, 363, L.R.A. 1915C 359.

11 C.J. p 31 notes 74–77.

A thing of value

Conn.—Ford v. Glennon, 49 A. 189, 74 Conn. 6, 7.

33. Black L.D.

34. Black L.D.

U.S.—See Chicago & Aurora R. Co. v. Thompson, 19 Ill. 578, 584, quoting 2 Blackstone Comm. p 385.

As beasts

"Catalla" had nearly or quite the sense of 'averia'—beasts or cattle,—being demandable under that name."—Adams Gloss., citing Bracton fol 159 b.

Goods and chattels

"From a very early period it has been united with the word 'bona,' in the familiar term 'bona et catalla,' of which the familiar modern phrase 'goods and chattels' is a translation."—Adams Gloss., citing Bracton fol 60 b and Reg. Orig. pp 140, 141.

Catalla felonum, vel fugitivum aut utlagatorum

Law Latin, the chattels of felons,

CATALLA JUSTE POSSESSA AMITTI NON POSSUNT.³⁵**CATALLA REPUTANTUR INTER MINIMA IN LEGE.**³⁶**CATALLIS CAPTIS NOMINE DISTRICTIONIS.**

An obsolete writ that lay where a house was within a borough, for rent issuing out of the same, and which warranted the taking of doors, windows, etc., by way of distress.³⁷

CATALLIS REDDENDIS. An obsolete writ that lay where goods delivered to a man to keep till a certain day were not upon demand redelivered at the day.³⁸

CATALOGUE. A list or enumeration of names, titles, or articles arranged methodically, often in alphabetical order.³⁹

Catalogue system or method. A system or method of doing business, the chief element of which consists in dealing directly with the customer or consumer by means of placing in his hands a printed catalogue containing a description of the articles of merchandise offered for sale and the price thereof.⁴⁰

CATALS. Goods and chattels.⁴¹

CATALYST. A substance used to stimulate chemical reaction, otherwise sluggish, between other substances, by bringing the reaction substances into contact with the catalyst substance, which merely by its presence, and without being used up, removes chemical resistance to reaction, just as a lubricant, by its presence removes friction from the moving parts of a mechanical device.⁴²

Phrases: "Commercial catalyst" and "vanadium catalyst;" also "catalyst carriers."⁴³

CATAMENIAL BANDAGES. Sanitary pads or napkins for use by women during menstruation.⁴⁴

CATANEUS. A tenant in capite, or a tenant holding immediately of the crown.⁴⁵

CATASCOPUS. An old name for an archdeacon.⁴⁶

CATASTRO. In Spanish law, the grand assessment roll of a locality.⁴⁷

CATASTROPHE. A notable disaster; a more serious calamity than might ordinarily be understood from the term "casualty."⁴⁸

CATCH.**As a Verb**

—**Present tense.** It has been said that the word does not aptly apply to inanimate things, but implies the taking captive of a living or moving thing.⁴⁹ The term necessarily involves at least a momentary possession.⁵⁰

Phrases: "Catch and have in his possession," and "fish for and catch."⁵¹

—**Catching.** The verbal noun in the plural, "catchings," given its ordinary meaning, has been defined as things caught, and in the possession, custody, power, and dominion of the party, with a present capacity to use them for his own purposes, and it has been said that in the whale fishery the word has no technical signification apart from its ordinary meaning,⁵² and has been construed as including "blubber," see *Blubber* 11 C.J.S. p 368 note 86. As a term used in marine insurance see the C.J.S. title Insurance § 311, also 38 C.J. p 1032 notes 33-35, and as share of profits constituting compensation of seamen on fishing voyages see the C.J.S. title Seamen § 153, also 56 C.J. p 1058 note 86.

Phrases: "Catching or taking of food fish,"⁵³

or fugitives, or outlaws.—*Adams Gloss.*

Catalla otiosa

Law Latin, unemployed, idle goods or chattels, as distinguished from animals.—*Adams Gloss.*

35. A maxim meaning "Chattels justly possessed cannot be lost."—*Black L.D.*, citing *Jenkins Cent.* p 28.

36. A maxim meaning "Chattels are considered in law among the least things."—*Black L.D.*, citing *Jenkins Cent.* p 52.

37. *Black L.D.*

38. *Black L.D.*

39. U.S.—See *Ward v. South Dakota*

Retail Merchants' & Hardware Dealers' Assoc., C.C.S.D., 150 F. 413, 415.

40. U.S.—*Ward v. South Dakota Retail Merchants' & Hardware Dealers' Assoc.*, supra.

41. *Black L.D.*
See also *Catalla ante*.

42. U.S.—*General Chemical Co. v. Standard Wholesale Phosphate & Acid Works*, D.C.Md., 22 F.Supp. 332, 334, 340.

43. U.S.—*General Chemical Co. v. Standard Wholesale Phosphate & Acid Works*, supra.

44. U.S.—*Kotabs, Inc., v. Kotex Co.*, C.C.A.N.J., 50 F.2d 810, 811.

45. *Black L.D.*

46. *Black L.D.*

47. *Escrache Diccionario.*

48. La.—*Reynolds v. Board of Com'rs of Orleans Levee Dist.*, 71 So. 787, 791, 139 La. 518.

49. Me.—*State v. Dunning*, 22 A. 109, 110, 83 Me. 178, 180.

50. Me.—*State v. Dunning*, 22 A. 109, 110, 83 Me. 178.

51. Me.—*State v. Dunning*, supra.

52. U.S.—*Rogers v. Mechanics' Ins. Co.*, C.C.Mass., 20 F.Cas.No.12,016, 1 Story 603, 607.

53. Wash.—*State v. Tomich*, 255 P. 122, 123, 143 Wash. 364.

also "outfits and catchings," see the C.J.S. title Insurance § 311, also 38 C.J. p 1032 notes 33-35; and, used adjectively, "catching bargain," see the titles Assignments § 14, Attorney and Client § 186, and the definition Bargain 9 C.J.S. p 1540 note 27-p 1541 note 37.

—**Caught.** Preterit and past participle of "catch," which may be, and has been, employed as meaning "detected" or "found;"⁵⁴ and in a particular connection has been said to be equivalent to "caught and possessed."⁵⁵

As an Adjective

Catch basin. A reservoir placed at the point of discharge of a pipe into a sewer, to retain matter which would not pass readily through the sewer.⁵⁶ It has been held that catch basins are in the main auxiliaries to drainage, and may or may not be a part of a paving program, and are analogous to "storm sewers."⁵⁷

Catch tax. A tax applied by statute to fish caught. It has been held that, under certain conditions, it is sometimes equivalent to "severance tax," but under other circumstances, it has been contrasted with "occupation tax" and "poundage tax."⁵⁸

Catch time charter. As a contract under which compensation is paid for time a boat is actually used, see the C.J.S. title Shipping § 43, also 58 C.J. p 204 note 9 [b].

CATCHLAND. Land in Norfolk, so called because it is not known to what parish it belongs, and the minister who first seizes the tithes of it, by right of preoccupation, enjoys them for that year.⁵⁹

CATCHPOLE or CATCHPOLL. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons.⁶⁰

CATEGORICAL. Without qualification or condition, whether expressing affirmation or negation.⁶¹

As to the necessity of categorical answers to interrogatories in an examination before trial see the C.J.S. title Discovery § 65, also 18 C.J. p 1106 note 59, and in the examination of a witness at the trial see the C.J.S. title Witnesses § 352, also 70 C.J. p 568 note 95-p 569 note 97.

CATER COUSIN. From the French, "quatreousin," a cousin in the fourth degree; hence any distant or remote relative.⁶²

CATERER. One who furnishes everything needful for entertainment.⁶³

Club caterer. One who provides a banquet under contract with a club, distinguished from an innkeeper.⁶⁴

CATGUT. An article prepared from the small intestine of the sheep by a process of cutting and cleaning and drying; in its crude form, it is regarded as an unmanufactured article, and does not become the catgut of commerce until it has been subjected to the cutting, cleaning, and drying process.⁶⁵

Phrases: "Catgut of commerce," "manufactures of catgut," and "surgical antiseptic catgut."⁶⁶

CATHEDRAL. The church of the bishop of the diocese, in which is his "cathedra," or throne, and in that respect the principal church of the diocese.⁶⁷

Phrases: "Any cathedral or collegiate church," see Any 3 C.J.S. p 1403 note 83, and "cathedral preferments."⁶⁸

CATHEDRATIC. In English ecclesiastical law, a sum of two shillings paid to the bishop by the inferior clergy; also called "synodals."⁶⁹

CATHOLIC. In its original sense, the word has been defined as meaning universal in reach, comprehensive, or general. More specifically it has been defined as of or pertaining to the church universal,⁷⁰ the whole christian church or the Holy Christian Church, and, in accordance with the de-

54. Ill.—People v. Strutynski, 12 N. E.2d 628, 632, 367 Ill. 551.

55. Me.—State v. Dunning, 22 A. 109, 110, 83 Me. 178.

56. Century D.

57. Fla.—City of Ft. Myers v. State, 117 So. 97, 104, 95 Fla. 704.

58. Wash.—Booth Fisheries Corporation v. Case, 47 P.2d 834, 835, 182 Wash. 392.

59. Black L. D., citing Cowell

60. Black L. D.

Opprobrious use

Formerly the term was applied without reproach, as an ordinary official epithet; in later times applied as a term of contempt for a sheriff's officer, assistant, or bailiff.—Adams Gloss.

61. Standard D.

62. Black L. D.

63. Standard D.

64. N.H.—Amey v. Winchester, 39 A. 487, 488, 68 N.H. 447, 73 Am. S.R. 614, 39 L.R.A. 760.

65. U.S.—Davies v. U. S., C.C.N.Y., 115 F. 232.

66. U.S.—Davies v. U. S., supra.

67. Black L. D.

68. In English ecclesiastical law, all deaneries, archdeacons, and canons, and generally all dignities and offices in any cathedral or collegiate church, below the rank of a bishop.—Black L. D.

69. Black L. D.

70. Ky.—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 336, 267 Ky. 358.

crees of the seven general councils, as meaning not heretical, not schismatic.⁷¹ It has been said that "Catholic," without any prefix, does not signify any particular religion, but is applied to the whole of the Christian church, and is contained in the confession of faith of many of the Protestant churches;⁷² and when so used it has been held not to be the same as, but to be distinguished from, "Roman Catholic."⁷³

Catholic creditor. In Scotch law, a creditor whose debt is secured on all or several distinct parts of the debtor's property.⁷⁴

Catholic Emancipation Act. The statute of 10 George IV c 7, by which Roman Catholics were restored, in general, to the full enjoyment of all civil rights except that of holding ecclesiastical offices and certain high appointments in the state.⁷⁵

Roman Catholic. A Christian who admits the authority of the pope. It has been said that the phrase, "Roman Catholic," is included within the term "Christian."⁷⁶ As referring to the Roman Catholic church see the C.J.S. title Religious Societies § 2, also 54 C.J. p 9 note 35.

Other phrases: "Catholic Apostolic Church,"⁷⁷ "Catholic Chapel,"⁷⁸ "Greek Catholic Church" and

"Holy Catholic, Apostolic and Roman Church,"⁷⁹ and "Method Czechoslovak Catholic Church."⁸⁰

CATONIANA REGULA. In Roman law, the rule which is commonly expressed in the maxim, "Quod ab initio non valet tractu temporis non convalebit," meaning that what is at the beginning void by reason of some technical, or other, legal defect will not become valid merely by length of time.⁸¹

CATTLE.

As a Noun

In its restricted sense, "cattle" has been defined as meaning domestic animals of the bovine species or of the cow kind.⁸² In its more comprehensive sense, "cattle" is a collective name not only for domestic quadrupeds of the bovine tribe but also for other domestic quadrupeds, held as property or raised for some use, such as for tillage or other labor or as food for man.⁸³ As a collective noun, "cattle" may embrace a number of animals and different kinds of stock.⁸⁴ Having regard for the context or the circumstances of its use the word "cattle" may or may not include asses,⁸⁵ buffaloes, see Buffalo 12 C.J.S. p 376 notes 89, 90, calves running with their mothers,⁸⁶ carabao calves,⁸⁷ dogs,⁸⁸

71. Pa. — Czechoslovak Catholic Church Charter, 7 Pa.Dist. & Co. 18.

72. Pa. — Czechoslovak Catholic Church Charter, supra.

73. Md.—Dolan v. Baltimore, 4 Gill 394, 405.
11 C.J. p 33 note 14 [b].

74. Black L. D.

75. Black L. D., citing 3 Steph. Comm. p 109.

76. N.H.—Hale v. Everett, 53 N.H. 9, 54, 16 Am.R. 82.

77. Pa. — Czechoslovak Catholic Church Charter, 7 Pa.Dist. & Co. 18.

78. Vt.—O'Hear v. De Goesbriand, 33 Vt. 593, 607, 80 Am.D. 653.

79. Pa. — Czechoslovak Catholic Church Charter, 7 Pa.Dist. & Co. 18.

80. Pa. — Czechoslovak Catholic Church Charter, supra.

81. Black L. D.

82. U.S.—U. S. v. Schmoll, C.C.N.Y., 154 F. 734, 735.

Ark.—Perkins v. State, 34 S.W.2d 746, 182 Ark. 1167.

Ga.—Murray v. Southern Pacific Co., 296 P. 667, 669, 112 Cal.App. 150.

La.—State v. Hunley, 72 So. 376, 377, 139 La. 846—State v. Majors, 59 So. 904, 905, 131 La. 468.

N.Y.—Bell v. Erie R. Co., 171 N.Y. S. 341, 343, 183 App.Div. 608.
11 C.J. p 33 note 19.

In the Western States, "cattle" means neat cattle, straight-backed, domesticated animals of the bovine genus, regardless of sex, as distinguished from the hump-backed cattle of India and Africa.—State v. District Court of Fifth Judicial Dist. in and for Nye County, 174 P. 1023, 1025, 42 Nev. 218.

Age of animal

While "cattle" is not necessarily limited to bovines of any particular age, the word is not generally taken to mean calves or animals younger than yearlings, although, under particular circumstances, it may be sufficiently broad in its acceptation to include them.

Neb.—Peterson v. Citizens' Bank of Stuart, 220 N.W. 575, 577, 117 Neb. 327.

Nev.—State v. District Court. of Fifth Judicial Dist. in and for Nye County, 174 P. 1023, 1025, 42 Nev. 218.

83. U.S.—Ash Sheep Co. v. U. S., Mont., 40 S.Ct. 241, 243, 252 U.S. 159, 64 L.Ed. 507, affirming 250 F. 592, 162 C.C.A. 608, 250 F. 591, 162 C.C.A. 607, affirming, D.C., 229 F. 479—U. S. v. Schmoll, C.C.N.Y., 154 F. 734, 735.

Ark.—Perkins v. State, 34 S.W.2d 746, 182 Ark. 1167.

Nev.—State v. District Court of Fifth Judicial Dist. in and for Nye County, 174 P. 1023, 1025, 42 Nev. 218.

N.Y.—Bell v. Erie R. Co., 171 N.Y. S. 341, 343, 183 App.Div. 608.

Or.—Hall v. Marshall, 27 P.2d 193, 195, 145 Or. 221.

Tex.—Hubotter v. State, 32 Tex. 479, 484—Matthews v. State, 47 S.W. 647, 648, 39 Tex.Cr. 553.

Va.—Tate v. Ogg, 195 S.E. 496, 499.

Wash.—State v. Swager, 188 P. 504, 506, 110 Wash. 431.

11 C.J. p 33 note 19, p 34 notes 20–25.

Lexicographers have variously derived the word "cattle" from "chat-tels" and from the Norman French "catel" or the Old English "catel," signifying goods, cattle, movables.—U. S. v. Mattock, D.C.Or., 26 F.Cas. No.15,744, 2 Sawy. 148, 149.

84. Iowa.—State v. Jackson, 105 N. W. 51, 52, 128 Iowa 543.

85. Ill.—Ohio & Mississippi R. Co. v. Brubaker, 47 Ill. 462, 463.

Ind.—Enders v. McDonald, 31 N.E. 1056, 1058, 5 Ind.App. 297.

86. Neb. — Peterson v. Citizens' Bank of Stuart, 220 N.W. 575, 577, 117 Neb. 327.

87. Philippine.—U. S. v. Lopez, 25 Philippine 589, 594.

88. Va.—Tate v. Ogg, 195 S.E. 496, 499.

goats,⁸⁹ hogs,⁹⁰ horses,⁹¹ mares,⁹² mules,⁹³ oxen,⁹⁴ pigs,⁹⁵ poultry,⁹⁶ sheep,⁹⁷ steers,⁹⁸ "swine,"⁹⁹ or yearlings.¹

The word may be either singular or plural, so that the use of the term "cattle" may mean one cattle,² although such use is described as rare.³ As used in statutes referring to responsibility for injuring or killing cattle see the title Animals 3 C.J.S. p 1348 notes 98, 6-10, and the C.J.S. title Railroads § 552, also 52 C.J. p 24 note 81-p 25 note 9; and in statutes requiring railroads to construct cattle guards see the C.J.S. title Railroads § 176, also 51 C.J. p 709 note 73-p 710 note 77.

Neat cattle. A descriptive term, signifying animals of the genus bos; commonly applied in the United States to describe a beast of the bovine genus, such as a cow or a steer,⁴ and to distinguish cattle of the ox kind from cattle generally,⁵ and, specifically, from horses, goats, sheep, or swine.⁶

Stock cattle. An expression, said not to carry a universally accepted meaning, but, depending on the

circumstances of its use, to be given the meaning common to the understanding of cattle men in general.⁷ Under particular circumstances, the term has been held to include all descriptions of cattle except steer cattle over the age of three years,⁸ and has been distinguished from "beef cattle" see Beef 10 C.J.S. p 226 note 30.

Working cattle. Also called "work cattle,"⁹ and defined as meaning cattle that have worked.¹⁰ It has been held that the term is limited to animals of the bovine genus, is not extended to include all domestic quadrupeds used as beasts of burden, such as horses, mules, and asses,¹¹ and has been held synonymous with "steers."¹²

Other phrases: "All of my cattle (except oxen),"¹³ "any cattle,"¹⁴ "beef cattle" see Beef or Beeve 10 C.J.S. p 226 note 30, "cattle, branded and unbranded,"¹⁵ "cattle, horses, sheep or hogs,"¹⁶ "cattle or live stock,"¹⁷ "cattle, or swine, or sheep, or goats,"¹⁸ "cattle, pigs, hogs, sheep or goats,"¹⁹ "drafts on shipments of cattle,"²⁰ "hides of cat-

89. N.C.—State v. Groves, 25 S.E. 819, 820, 119 N.C. 822.

90. U.S.—Decatur First Nat. Bank v. St. Louis Home Sav. Bank, 21 Wall. 294, 301, 22 L.Ed. 560.

Mo.—Henderson v. Wabash, etc., R. Co., 81 Mo. 605, 606.

Ind.—Enders v. McDonald, 31 N.E. 1056, 1057, 1058, 5 Ind.App. 297.

91. Ind.—Enders v. McDonald, supra.

Ky.—Louisville & Frankfort Railroad Co. v. Ballard, 2 Metc. 177, 183.

Mo.—State v. Taylor, 85 S.W. 564, 566, 186 Mo. 608.

Okl.—Keys v. U. S., 103 P. 874, 875, 2 Okl.Cr. 647.

11 C.J. p 33 note 19 [g].

92. Mo.—State v. Taylor, 85 S.W. 564, 566, 186 Mo. 608.

11 C.J. p 33 note 19 [g] (3), (8).

93. Ala.—Brown v. Bailey, 4 Ala. 413, 414.

Ill.—Toledo, Wabash & Western Ry. Co. v. Cole, 50 Ill. 184, 186.

Ind.—Enders v. McDonald, 31 N.E. 1056, 1058, 5 Ind.App. 297.

94. N.C.—Randall v. Richmond & D. R. Co., 10 S.E. 691, 692, 104 N.C. 410.

95. Mo.—State v. Pruett, 61 Mo. App. 156, 157.

96. Va.—Tate v. Ogg, 195 S.E. 496, 499.

97. U.S.—Ash Sheep Co. v. U. S., Mont., 40 S.Ct. 241, 243, 252 U.S. 159, 64 L.Ed. 507, affirming 250 F. 592, 162 C.C.A. 608, 250 F. 591, 162 C.C.A. 607, affirming, D.C., 229 F. 479—U. S. v. Mattock, D.C.Or., 26 F.Cas.No.15,744, 2 Sawy. 148.

Ind.—Enders v. McDonald, 31 N.E. 1056, 1058, 5 Ind.App. 297.

11 C.J. p 33 note 19 [j].

98. Wash.—State v. Brookhouse, 38 P. 862, 10 Wash. 37.

11 C.J. p 33 note 19 [k].

99. Ind.—Enders v. McDonald, 31 N.E. 1056, 1058, 5 Ind.App. 297.

1. La.—State v. Eaglin, 86 So. 658, 659, 148 La. 75.

11 C.J. p 34 note 19 [k].

2. Tex.—Mathews v. State, 47 S.W. 647, 648, 48 S.W. 189, 190, 39 Tex.Cr. 553.

3. *Rare use*

"Also, formerly, rarely used as a singular for beast, ox."—Perkins v. State, 34 S.W.2d 746, 182 Ark. 1167, quoting Webster New Int. D.

4. Mo.—State v. Bowers, 1 S.W. 288—State v. Lawn, 80 Mo. 241, 242.

N.M.—Wilburn v. Terr., 62 P. 968, 969, 970, 10 N.M. 402—Terr. v. Christman, 58 P. 343, 344, 9 N.M. 582.

5. Mo.—State v. Harris, 267 S.W. 802, 803.

Wash.—State v. Swager, 188 P. 504, 506, 110 Wash. 431.

Proper use

"The term 'neat cattle' more appropriately describes kine, or animals of the bovine species."—Mathews v. State, 47 S.W. 647, 648, 48 S.W. 189, 39 Tex.Cr. 553.

6. Kan.—State v. Hoffman, 37 P. 138, 139, 53 Kan. 700.

Nev.—State v. District Court of Fifth Judicial Dist. in and for Nye County, 174 P. 1023, 1025, 42 Nev. 218.

7. Iowa.—Wilson v. Delaney, 113 N.W. 842, 843, 137 Iowa 636.

8. Tex.—Elliott v. Long, 14 S.W. 145, 146, 77 Tex. 467.

9. U.S.—Kennedy v. Hills, C.C.A. Wash., 233 F. 666, 667.

10. Kan.—Wessels v. Territory of Kansas, 1 Kan. 525, 527, McC. 100.

11. U.S.—Kennedy v. Hills, C.C.A. Wash., 233 F. 666, 667.

12. Kan.—Wessels v. Territory of Kansas, 1 Kan. 525, 527, McC. 100.

13. Tex.—Hawes v. Foote, 64 Tex. 22, 26.

14. U.S.—Decatur First National Bank v. St. Louis Home Savings Bank, Ill., 21 Wall. 294, 300, 22 L. Ed. 560.

15. Neb. — Peterson v. Citizens' Bank of Stuart, 220 N.W. 575, 577, 117 Neb. 327.

16. N.Y.—Bell v. Erie R. Co., 171 N.Y.S. 341, 343, 183 App.Div. 608.

17. N.C.—James v. Atlantic Coast Line R. Co., 82 S.E. 1026, 1028, 166 N.C. 572, L.R.A.1915B 163, Ann. Cas.1915B 470.

18. N.Y.—Folden v. State, 63 Misc. 466, 468.

19. Ark.—Perkins v. State, 34 S.W. 2d 746, 182 Ark. 1167.

20. U.S.—Ash Sheep Co. v. U. S., Mont., 40 S.Ct. 241, 243, 252 U.S. 159, 64 L.Ed. 507, affirming 250 F. 592, 162 C.C.A. 608, 250 F. 591, 162 C.C.A. 607, affirming, D.C., 229 F. 479—Decatur First National Bank v. St. Louis Home Savings Bank, Ill., 21 Wall. 294, 301, 22 L. Ed. 560.

tle,"²¹ "horses, cattle, hogs, sheep, or other live stock,"²² "horses, mules, or cattle,"²³ "large cattle,"²⁴ "nine head of cattle,"²⁵ "one or more head of neat cattle,"²⁶ "one pair of working cattle,"²⁷ "or any other specie of cattle,"²⁸ "ordinary cattle,"²⁹ "range cattle,"³⁰ "stealing cattle,"³¹ "steer cattle,"³² "three head of cattle,"³³ and "two head of neat cattle."³⁴

As an Adjective

Used adjectively "cattle" occurs in various phrases.

Cattle gate. In English law, a customary proportionate right of pasture enjoyed in common with others; a right to pasture cattle in the land of another.³⁵ In a particular application called "beast gate," see *Beast* 10 C.J.S. p 220 note 76.

Cattle range. A large section of country consisting generally of many square miles which is usually uninclosed and has no definite or fixed boundaries on which cattle are permitted to run at large during the entire year.³⁶ It is a distinctive term,³⁷ applied to a range usually and customarily used for cattle, to distinguish it from "sheep range," and "cattle and sheep range."³⁸

Cattle rustling. A well understood term and usually understood to apply to the stealing of bovine cattle, it being a matter of common knowledge that bovine cattle are more generally allowed to run at large on a range, without herders, than are other

animals, and therefore more easily stolen and driven away than other animals.³⁹

Cattle stealing. The term has been defined by statute to mean the theft of any horned animal, and all animals having the hoof cloven, except hogs, and held to include the theft of a goat.⁴⁰

Other phrases: "Cattle and sheep range,"⁴¹ "cattle beast," see *Beast* 10 C.J.S. p 220 note 82, "cattle guard," see the C.J.S. title *Railroads* § 1, also 11 C.J. p 34 note 28, and "cattle pass," see the C.J.S. title *Railroads* § 1, also 11 C.J. p 34 note 29.

CAUCASIAN. A term used in the classification of races. The common classification is that of Blumenbach, who makes five divisions, the first of which is the Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia.⁴²

CAUCIÓN. In Spanish law generally, security for the performance of an obligation. In the criminal law it signifies a penalty which consists in requiring the offender to execute an undertaking similar to a bond to keep the peace.⁴³

CAUCUS. A convention of voters who believe in, or adhere to, the principles of their party.⁴⁴ As related to selection of delegates to a nominating convention see the C.J.S. title *Elections* § 98, also 20 C.J. p 106 note 62; and to nominations for local offices see the C.J.S. title *Elections* § 104, also 20 C.J. p 108 note 8.

21. U.S.—*U. S. v. Schmoll*, C.C.N.Y., 154 F. 734, 735—*U. S. v. Winter*, N.Y., 134 F. 841, 842, 67 C.C.A. 437.

22. Or.—*Hall v. Marshall*, 27 P.2d 193, 194, 145 Or. 221.

23. U.S.—*Ash Sheep Co. v. U. S.*, Mont., 40 S.Ct. 241, 242, 252 U.S. 159, 64 L.Ed. 507, affirming 250 F. 592, 162 C.C.A. 603, 250 F. 591, 162 C.C.A. 607, affirming, D.C., 229 F. 479—*U. S. v. Ash Sheep Co.*, Mont., 254 F. 59, 165 C.C.A. 469.

24. Philippine.—*U. S. v. Lopez*, 25 Philippine 589, 594.

25. Nev.—*State v. District Court of Fifth Judicial Dist. in and for Nye County*, 174 P. 1023, 1025, 42 Nev. 218.

26. Wash.—*State v. Swager*, 188 P. 504, 506, 110 Wash. 431.

27. Me.—*Bowzey v. Newbegin*, 48 Me. 410.

28. La.—*State v. Eaglin*, 86 So. 658, 659, 148 La. 75—*State v. Hunley*, 72 So. 376, 377, 139 La. 846.

29. Tex.—*Clarendon Land, Investment & Agency Co. v. McClelland*, Civ.App., 31 S.W. 1088, 1089.

30. Ariz.—*Wightman v. King*, 250 P. 772, 773, 31 Ariz. 89.

31. Neb.—*Gragg v. State*, 201 N.W. 338, 340, 112 Neb. 732.

32. Tex.—*Elliott v. Long*, 14 S.W. 145, 146, 77 Tex. 467.

33. Cal.—*People v. Littlefield*, 5 Cal. 355, 356.

34. Ark.—*Perkins v. State*, 34 S.W. 2d 746, 182 Ark. 1167.

Mo.—*State v. Dewitt*, 53 S.W. 429, 430, 152 Mo. 84.

35. Black L. D.

36. Mont.—*State v. Cunningham*, 90 P. 755, 756, 35 Mont. 547.

S.D.—*Holcomb v. Keliher*, 59 N.W. 227, 5 S.D. 438, 441.

37. Or.—*Big Butte Horse and Cattle Association v. Anderson*, 289 P. 503, 507.

38. Idaho.—*State v. Butterfield*, 165 P. 218, 219, 30 Idaho 415—*State v. Omaschevriaria*, 152 P. 280, 282, 27 Idaho 797.

39. Cal.—*Galeppi v. C. Swanston & Son*, 290 P. 116, 119, 107 Cal.App. 30.

40. Ga.—*Sherrod v. State*, 167 S.E. 761, 762, 46 Ga.App. 344.

41. Idaho.—*State v. Butterfield*, 165 P. 218, 219, 30 Idaho 415.

42. Miss.—*Rice v. Gong Lum*, 104 So. 105, 109, 139 Miss. 760, 11 C.J. p 35 note 31 [a].

Other races distinguished

"The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; the Ethiopian, or negro (black) race, occupying all Africa, except the North; the American, or red race, containing the Indians of North and South America; and the Malay, or brown race, occupying the islands of the Indian Archipelago."

U.S.—*In re Ah Yup*, C.C.Cal., 1 F. Cas.No.104, 5 Sawy. 155.

Miss.—*Rice v. Gong Lum*, 104 So. 105, 109, 139 Miss. 760.

Wash.—*In re Takuji Yamashita*, 70 P. 482, 483, 30 Wash. 234.

43. Escribiche Diccionario.

11 C.J. p 35 notes 34-36.

44. Pa.—*In re Gibbons*, 5 Pa.Dist. 194, 196.

CAUDA TERRÆ. Law Latin, literally, the tail or end of the land, or a land's end; the bottom or extreme part of a ridge or furrow in arable land; the bottom or lower end of a field; just as "caput terræ"—a "headland"—was at the upper end.⁴⁵

CAULCEIS. Highroads or ways pitched with flint or other stones.⁴⁶

CAULKER. See Calker or Caulker 12 C.J.S. p 883 notes 81, 82.

CAUPO. Latin, a petty tradesman, a huckster.⁴⁷ In the civil law, an innkeeper.⁴⁸

CAURSINES. Italian merchants who came into England in the reign of Henry III, where they established themselves as money lenders, but were soon expelled for their usury and extortion.⁴⁹

45. Adams Gloss.

46. Black L. D.

47. Adams Gloss.

48. Black L. D., citing Dig. 4, 9, 4, 5.

49. Black L. D., citing Cowell.

50. Black L. D.

Causa causæ—the cause of a cause.—Adams Gloss.

Causa causata—the state or condition caused, that is, the consequential damage or immediate cause.—Adams Gloss.

Causa causati—the cause of the thing caused.—Adams Gloss.

Causa cognita—a known cause; a cause understood, recognized. —Adams Gloss.

Causa efficiens—the efficient or producing cause.—Adams Gloss.

Causa patet—the reason is open, obvious, plain, clear, or manifest; a common expression in old writers.—Black L. D., citing Perkins Pl. c 1 §§ 11, 14, 97.

Causa patet ex præmissis—the reason is plain from the premises.—Adams Gloss., citing Perk. c 3 § 226.

Causa perpetua—a perpetual or permanent cause.—Adams Gloss., citing Mackelday Civ.L. § 315.

Causa pia—a pious or charitable cause.—Adams Gloss., citing Mackelday Civ.L. § 157.

Causa quod ex fato contingit—by or from a cause which comes to pass, or befalls one through or by bad fortune, ill fate, or calamity.—Adams Gloss., citing Ulpianus Dig. iv p 9 fr 3 § 1.

Causa scientæ patet—the reason of the knowledge is clear, evident.—Adams Gloss.

Causa sonica—a dangerous, seri-

ous cause, arising from a morbus soniticus.—Adams Gloss.

Causæ errore probatio—a proving, or the proof of a case or cause of error.—Adams Gloss.

51. Black L. D.

Causa turpis—a base (immoral or illegal) cause or consideration.—Black L. D.

52. Black L. D.

Causa possessionis — the source, cause, ground, reason, object of possession.—Adams Gloss.

53. Black L. D.

Causa cadere—to fail in his cause, that is, to lose the thing sued for.—Adams Gloss.

Causa cognita—upon the cause being examined, investigated judicially.—Adams Gloss.

Causa matrimonialis—a matrimonial cause.—Black L. D.

Causa paucorum calculorum — a cause of small importance; a dispute about a small sum.—Adams Gloss.

Causa testamentaria—a testamentary cause.—Black L. D.

Causa utrinque perorata—in the cause or suit closed on both sides.—Adams Gloss.

Causæ collectio—a recapitulation, summary of a, or the, cause; a summing up of things relating to a cause.—Adams Gloss.

Causæ coniectio—the putting together, summarizing of the controverted question, or subject matter of a controversy; hence, the drift, draft, or outlines of a law case.—Adams Gloss.

Causis et litibus præpositus—of causes and suits preferred or placed before.—Adams Gloss.

CAUSA.

Latin

A cause, reason, occasion, motive, or inducement;⁵⁰ also a condition, a consideration, motive for performing a juristic act.⁵¹ In the civil law and in old English law, the word signified a source, ground, or mode of acquiring property, and hence a title; one's title to property;⁵² also a cause, or a suit or action pending.⁵³ In old European law, any movable thing or article of property.⁵⁴

In the ablative case, where it carries the force of a preposition, it means by virtue of, on account of; also with reference to, in contemplation of.⁵⁵

Causa causans. Literally "the cause causing," that is, the cause producing another cause;⁵⁶ the cause which sets in operation every agency that contributes to the effect or destruction;⁵⁷ the efficient cause;⁵⁸ the immediate cause, or the last link in the chain of causation;⁵⁹ compared with, or distinguished from, the "causa sine qua non."⁶⁰

54. Black L. D.

55. Black L. D.

Causa adulteri—on account of adultery; by reason of adultery.—Adams Gloss.

Causa hospitandi—for the purpose of being entertained as a guest.—Adams Gloss.

Causa impubertatis or minoris ætatis—on account of impuberty or minor age.—Adams Gloss.

Causa præcontractus—on account of precontract.—Adams Gloss.

Causa qua supra—for the reason as above.—Adams Gloss., citing Bacon Max. in Reg. p 9.

Causa venditionis—on account of a selling, sale; by reason of a vending or vendition.—Adams Gloss.

Causæ jactitationis matrimonii—by reason of a boast of marriage.—Adams Gloss.

56. Adams Gloss.

57. U.S.—Ætna Fire Ins. Co., of Hartford, Conn. v. Boon, Conn., 95 U.S. 117, 127, 132, 24 L.Ed. 395.

58. U.S.—Hayes v. Michigan Cent. R. Co., Ill., 4 S.Ct. 369, 111 U.S. 228, 241, 28 L.Ed. 410.

Iowa.—Cavanaugh v. Centerville Black Coal Co., 109 N.W. 303, 131 Iowa 700, 705, 7 L.R.A., N.S., 907, 11 C.J. p 35 note 55 [a].

59. Black L. D.

11 C.J. p 35 note 55.

60. U.S.—Hayes v. Michigan Cent. R. Co., Ill., 4 S.Ct. 369, 111 U.S. 228, 241, 28 L.Ed. 410.

Iowa.—Van Camp v. City of Keokuk, 107 N.W. 933, 935, 130 Iowa 716. N.Y.—Dulfer v. Brooklyn Heights R. Co., 101 N.Y.S. 207, 208, 115 App. Div. 670, 671—Trapp v. McClellan,

Causa data et non secuta. Consideration given and not followed, that is, no event took place—no benefit resulted from the consideration given.⁶¹

Causa jactitationis maritaggi (or matrimonii). A suit of jactitation of marriage.⁶²

Causa mortis. In contemplation of approaching death. The term commonly occurs in the phrase "donatio causa mortis," or "causa mortis donatio," which means a gift made by a person in sickness, who, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, to keep as his own in case of the donor's decease.⁶³

The subject of gifts "causa mortis" is discussed in the C.J.S. title Gifts § 72 et seq, also 28 C.J. p 684 note 60 et seq.

Causa proxima. The immediate, nearest, or latest cause, the efficient cause or the one that necessarily sets the other causes in operation.⁶⁴

Causa rei. In the civil law, things accessory or appurtenant; the accessions, appurtenances, or fruits of a thing, comprehending all that the claimant of a principal thing can demand from a defendant in addition thereto, and especially what he would have had, if the thing had not been withheld from him.⁶⁵

Causa remota. A remote or mediate cause; a cause operating indirectly by the intervention of other causes.⁶⁶

Causa sine qua non. A cause without which (that is, if it had not existed), the injury would not have taken place.⁶⁷

Iusta Causa. In the civil law, a just cause; a lawful ground.⁶⁸

Spanish

In Spanish law, the means of acquiring title, as by sale, succession, etc. Also a suit or action; and, as in English law, it may be applied to either criminal or civil proceedings, although for the latter the more common term is "pleito."⁶⁹

CAUSA AUT ARGUMENTO AUT PROBATIONE CONSTAT.⁷⁰

CAUSA CADIMUS AUT LOCO, AUT SUMMA, AUT TEMPORE, AUT QUALITATE.⁷¹

CAUSA CAUSÆ EST CAUSA CAUSATI.⁷²

CAUSA ECCLESIAE PUBLICIS ÆQUIPARATUR; ET SUMMA EST RATIO QUÆ PRO RELIGIONE FACIT.⁷³

CAUSÆ DOTIS, VITÆ, LIBERTATIS, FISCO SUNT INTER FAVORABILIA IN LEGE.⁷⁴

CAUSÆ QUÆ NON SUNT DE MATRIMONIO VEL TESTAMENTIS SPECTANT AD CURIAM NOSTRAM.⁷⁵

CAUSA ET ORIGO EST MATERIA NEGOTII.⁷⁶

CAUSAL. Of, pertaining to or constituting a cause; containing or involving a cause, indicating or expressing a cause, causative,⁷⁷ having an entirely distinct meaning from "casual," see Casual ante p 28 note 17.

Phrases: "Causal connection,"⁷⁸ "causal insan-

74 N.Y.S. 130, 133, 68 App.Div. 362, 367.

61. Adams Gloss.

62. Adams Gloss.

See also C.J.S. title Marriage § 70, and 38 C.J. p 1361 note 92-p 1362 note 5.

63. Black L. D.

"Inter vivos" distinguished

Mich.—Keller v. McConville, 141 N. W. 652, 175 Mich. 479, 493. 11 C.J. p 36 note 64 [a].

64. U.S.—Ætna Fire Ins. Co. of Hartford, Conn. v. Boon, Conn., 95 U.S. 117, 130, 24 L.Ed. 395.

65. Black L. D.

66. Black L. D.

67. U.S.—Hayes v. Michigan Cent. R. Co., Ill., 4 S.Ct. 369, 111 U.S. 228, 241, 28 L.Ed. 410.

Mont.—Fisher v. Butte Electric Ry. Co., 235 P. 330, 332, 72 Mont. 594. N.Y.—Dulfer v. Brooklyn Heights R. Co., 101 N.Y.S. 207, 208, 115 App. Div. 670.

68. N.Y.—Bregman v. Kress, 81 N. Y.S. 1072, 83 App. 1, 2, quoting Kinney L. D.

69. Escriche Diccionario.

11 C.J. p 35 notes 44-53.

70. A maxim meaning "A cause consists either in argument or demonstration."—Adams Gloss.

71. A maxim meaning "We fail in (lose) our cause either on account of place, or subject-matter, or time, or quality."—Adams Gloss., citing Justinian Inst. iv 6 § 34.

72. A maxim meaning "The cause of a cause is the cause of the thing caused."—Black L. D. See Marble v. City of Worcester, 4 Gray, Mass., 395, 398.

73. A maxim meaning "The cause of the church is equal to public cause; and paramount is the reason which makes for religion."—Black L. D., citing Coke Litt. p 341.

74. A maxim meaning "Causes of dower, life, liberty, revenue, are

among the things favored in law."—Black L.D., citing Coke Litt. p 341.

75. A maxim meaning "The causes which are not concerning marriage or testaments are tried, examined or judged by our court."—Adams Gloss.

76. A maxim meaning "The cause and origin is the substance of the thing."—Black L.D.

77. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, 853, quoting New Standard D.

78. Ala.—Alabama Power Co. v. Bass, 119 So. 625, 628, 218 Ala. 586, 63 A.L.R. 1.

"Causal relation" compared

Ind.—Lasear, Inc., v. Anderson, 192 N.E. 762, 765, 99 Ind.App. 428.

"Proximate cause" distinguished

"Where the act is one of omission, causation is established when the doing of the act would have prevented the result, though the omission of duty might not be the proximate cause. On the other hand,

ity,"⁷⁹ and "causal relation."⁸⁰

CAUSA LATET, VIS EST NOTISSIMA.⁸¹

CAUSA MATRIMONII PRÆLOCUTI. Literally, "By reason of a marriage before treated of." A writ of entry that formerly lay where a woman had given lands to a man in fee simple, with the intent that he should marry her, and he refused to do so within a reasonable time, after having been required by the woman.⁸²

CAUSAM NOBIS SIGNIFICES or **CAUSAM NOBIS SIGNIFICES QUARE.** Law Latin, literally "You signify to us the reason [why]." A writ which formerly lay, commanding a mayor of a city or town to show cause why he delayed the performance of certain duties.⁸³

CAUSAM POSSESSIONIS NEMINEM SIBI MUTARE POSSE.⁸⁴

CAUSANTE. In Spanish law, grantor; and generally one from whom a right is derived.⁸⁵

CAUSA PROXIMA NON REMOTA SPECTATUR.⁸⁶

CAUSARE. In the civil and old English law, to be engaged in a suit, to litigate, or to conduct a cause.⁸⁷

if the result would have happened just as it did, regardless of the omission of duty, the failure to perform the duty is not a factor, and causal connection would not appear."—*Alabama Power Co. v. Bass*, 119 So. 625, 628, 218 Ala. 586, 63 A.L.R. 1.

79. N.H.—*Bean v. Philadelphia Fire & Marine Ins. Co.*, 190 A. 131, 133.

80. Ind.—*Lasear, Inc. v. Anderson*, 192 N.E. 762, 765, 99 Ind.App. 428.

81. A maxim meaning "The cause lies hid, the power is most evident."—*Adams Gloss*.

82. *Burrill L.D.*

83. *Adams Gloss*.

84. A maxim meaning "No man can change the cause or ground of possession for himself, i. e., for his own advantage."—*Adams Gloss*, citing *Julianus Dig. xli 5 fr 2 § 1*.

85. *Escrache Diccionario*.

86. A maxim meaning "The immediate and not the remote cause is to be considered."—*Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 364, 1 Am.R. 431.

Applied in

U.S.—*Ætna Fire Ins. Co. of Hartford, Conn. v. Boon, Conn.*, 95 U.S. 117, 130, 24 L.Ed. 395.

Ala.—*First Nat. Bank v. Equitable Life Assur. Soc. of U. S.*, 144 So. 451, 455, 225 Ala. 586.
11 C.J. p 36 note 66 [a].

Otherwise rendered

Following the usual phrasing of the proximate cause doctrine, it has been said that the true meaning of the maxim is as follows: "An efficient, adequate cause being found, must be considered the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result."—*Mead v. Chickasha Gas & Electric Co.*, 278 P. 286, 291, 137 Okl. 74—11 C.J. p 36 note 66 [b].

Succession and not time controls

It has been said that "the maxim is not to be controlled by time or distance, but by the succession of events."—*Kellogg v. Chicago and Northwestern Ry. Co.*, 26 Wis. 223, 239, 7 Am.R. 69.

87. *Black L.D.*

88. A maxim meaning "A spiritual cause may be committed to a lay prince."—*Adams Gloss*.

89. N.Y.—*Harper v. Remington Arms Co.*, 280 N.Y.S. 862, 866, 156 Misc. 53, citing *Beale, The Proxi-*

CAUSA SPIRITUALIS COMMITTI POTEST PRINCIPIO LAICO.⁸⁸

CAUSATION. It has been said that where the act is the failure to perform or the omission of a legal duty, causation is established when the doing of the act would have prevented the result.⁸⁹

CAUSATOR. In old European law, one who manages or litigates another's cause.⁹⁰

CAUSA VAGA ET INCERTA NON EST CAUSA RATIONABILIS.⁹¹

CAUSE.

In General

It has been said that while "cause" may have various meanings and shades of meanings,⁹² it is a word in common use and of generally known meanings implying a consequence,⁹³ and, in its ordinary sense of the word, has reference to the physical, as distinguished from the legal, cause.⁹⁴

As a Noun

Philosophically speaking, the sum of all the antecedents of any event constitutes its cause; but ordinarily each separate antecedent of an event is considered as a cause for such event, provided, however, that the event could not have happened except for such antecedent;⁹⁵ and so the word has

mate Consequences of an Act, and 33 *Harvard L.Rev.* 633, 637.

90. *Black L.D.*, citing *Spelman*.

91. A maxim meaning "A vague and uncertain cause is not a reasonable cause."—*Black L.D.*

92. Kan.—*Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252, 256.

93. U.S.—*U. S. v. Kenofsky, La.*, 37 S.Ct. 438, 439, 243 U.S. 440, 61 L.Ed. 836.

Conn.—*Kelsey v. Rebuzzini*, 89 A. 170, 172, 37 Conn. 556, 52 L.R.A., N.S., 103—*Monroe v. Hartford St. R. Co.*, 56 A. 498, 501, 76 Conn. 201.

Me.—*State v. Verrill*, 112 A. 673, 674, 120 Me. 41.

N.M.—*Pettes v. Jones*, 66 P.2d 967, 972, 47 N.M. 167.

N.C.—*Miller v. Marriner*, 121 S.E. 770, 773, 187 N.C. 449.

Okl.—*In re Benson*, 62 P.2d 962, 965, 178 Okl. 299.

94. Me.—*State v. Verrill*, 112 A. 673, 674, 120 Me. 41.

95. Kan.—*Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252, 256.

Mo.—*Griffin v. Anderson Motor Service Co.*, 59 S.W.2d 805, 808, 227 Mo.App. 855, quoting *Corpus Juris*.
Mont.—*Burns v. Eminger*, 276 P. 437, 442, 84 Mont. 397.

een defined specifically as a state of facts from which a certain condition, commonly called a result or effect, arises, that condition which determines the final result or whose share in the matter is the more conspicuous and is the more immediately preceding and proximate to the event; that in which a thing under given circumstances follows, or that which produces or effects a result, or from which anything proceeds, and without which it would not exist.⁹⁶ "Cause" has also been defined as that which supplies a motive, decides action, or constitutes the reason for anything done,⁹⁷ hence in pleading, reason, motive, or matter of excuse or justification;⁹⁸ and in the civil and Scotch law, the consideration of a contract, that is, the inducement to it, or motive of the contracting party or entering into it;⁹⁹ and it is used also in the civil law in the sense of "res," a thing.¹ In particular connections, "cause" has been held equivalent to "just cause,"² and has been compared with, or distinguished from, "agency,"³ "cause of action," see Actions 1 C.J.S. p 952 notes 70, 71, "condition,"⁴ "matter," see Actions § 1 c (1) note 72 "medium," "occasion," "opportunity," and "situation."⁵

For "cause" used as referring to ground of dismissal or removal of officers see the C.J.S. titles Corporations § 738, also 14 a C.J. p 76 notes 60-66, Justices of the Peace § 9, also 35 C.J. p 463 note 6; 464 note 17 [a], Municipal Corporations § 507, also 43 C.J. p 656 note 96-p 657 note 6, Officers 60, also 46 C.J. p 986 notes 98, 99 and § 62, 46 C.J. p 992 notes 84-86, Schools and School Districts 202, also 56 C.J. p 400 note 71-p 404 note 43; and for the removal of servants see the C.J.S. title Master and Servant § 44, also 39 C.J. p 89 notes 69-6.

In its judicial sense of an action, case, or proceeding in or before, a court or tribunal, "cause" is defined generally in the title Actions § 1 c, and also in various particular C.J.S. titles, such as Banks and Banking § 426, Contempt § 66, also 13 C.J. p 60 note 25, Courts §§ 502-521, also 15 C.J. p 1145 note 63-p 1152 note 58, Depositions § 98, also 18 C.J. p 749 note 15, and Landlord and Tenant § 761, also 36 C.J. p 648 note 92.

Cause de remover plea. Law French, cause to remove a plea.⁶

Causes célèbres. A work containing reports of the decisions of interest and importance in French courts in the seventeenth and eighteenth centuries; also a single trial or decision is often called a "cause célèbre," when it is remarkable on account of the parties involved or the unusual, interesting, or sensational character of the facts.⁷

Commercial causes. Within an order of court for prompt trial the term means causes arising out of the ordinary transactions of merchants and traders.⁸

Concurrent causes. In the sense of occupying exactly the same space of time, the phrase has been defined as meaning coincident or contemporaneous causes, and, in the sense of operating to produce a result, as meaning causes acting conjointly, and connectedly coöperating to produce the result.⁹ If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes; they run together, as the word signifies, to the same end. If, however, two distinct causes are successive and unrelated in their operation they cannot be concur-

6. Ala.—Thompson v. Louisville, etc., R. Co., 8 So. 406, 407, 91 Ala. 496, 11 L.R.A. 146.

7. Mo.—Griffin v. Anderson Motor Service Co., 59 S.W.2d 805, 808, 227 Mo.App. 855, quoting *Corpus Juris*.
8. Mont.—Burns v. Eminger, 276 P. 437, 442, 84 Mont. 397.

9. N.Y.—Trapp v. McClellan, 74 N.Y.S. 130, 133, 68 App.Div. 362.

10. N.J.—State v. Dougherty, 4 Or. 200, 203.

11. C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

12. D.—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S.D. 401.
13. Va.—State v. Baller, 26 W.Va. 90, 94, 53 Am.R. 66.

14. 1 C.J. p 336 note 74, p 37 notes 75-83.

15. Mo.—Griffin v. Anderson Motor Service Co., 59 S.W.2d 805, 808, 227 Mo.App. 855, quoting *Corpus Juris*.

16. Black L.D.

17. Black L.D.

As consideration

"The civilians use the term 'cause,' in relation to obligations, in the same sense as the word 'consideration' is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement—'id quod inducet ad contrahendum.'"—Mouton v. Noble, 1 La. Ann. 192, 194.

1. Black L.D.

2. N.J.—Brokaw v. Burk, 93 A. 11, 12, 89 N.J. Law 132.

3. Me.—Cleveland v. Bangor, 32 A. 892, 896, 87 Me. 259, 47 Am.S.R. 326.

See also "agency" in the sense of instrumentality by which a thing is done 2 C.J.S. p 1024 note 14.

4. Me.—Cleveland v. Bangor, 32 A. 892, 896, 87 Me. 259, 47 Am.S.R. 326.

5. N.Y.—Trapp v. McClellan, 74 N.Y.S. 130, 133, 68 App.Div. 362.

6. Tex.—Houston R. Co. v. Maxwell, 128 S.W. 160, 163, 61 Tex.Civ.App. 80, 85.

7. Wash.—Redford v. Spokane St. Ry. Co., 46 P. 650, 651, 15 Wash. 419.

8. W.Va.—State v. Baller, 26 W.Va. 90, 94, 53 Am.R. 66.
9. 50 C.J. p 833 note 75 (h).

As relating to inanimate things

"The activities of inanimate things are usually mere conditions and not causes."—Anderson v. Byrd, Neb., 275 N.W. 825, 826.

5. Me.—Cleveland v. Bangor, 32 A. 892, 896, 87 Me. 259, 47 Am.S.R. 326.

6. Adams Gloss.

7. Black L.D.

8. Stroud Jud.D.

9. Ky.—Stacy v. Williams, 69 S.W. 2d 697, 705, 253 Ky. 353.

10. N.Y.—Fleming v. Buswell, 57 N.Y.S. 230, 232, 39 App.Div. 196.

ring; one of them must be the proximate, and the other the remote, cause.¹⁰ "Concurrent cause" has been distinguished from "contributory cause," "efficient cause,"¹¹ "intervening means or instrument,"¹² and "proximate cause."¹³

As used in the law of negligence, see the C.J.S. title Negligence § 110, also 45 C.J. p 925 note 18-p 926 note 25.

Efficient cause. The "working cause," or that cause which produces effects or results.¹⁴ The term has been held synonymous with "first cause," "initial cause," and "proximate cause";¹⁵ compared with "procuring cause"¹⁶ and "proximate cause."¹⁷

First cause. The cause acting first and immediately producing the injury, or setting other causes in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor.¹⁸

Immediate cause. It has been said that the term is not capable of perfect or general definition.¹⁹ While it is a term frequently used to express the same meaning as "proximate cause," or as a synonym thereof,²⁰ it has also been distinguished therefrom,²¹ and its use as meaning "proximate cause" criticized as without discrimination,²² and manifestly wrong when implying time or distance.²³ It has been said that the nearest or immediate cause of an effect may be merely an instrument of the

dominant or efficient cause.²⁴

Intervening cause. It has been said that "intervening cause" is a phrase probably not capable of definition in terms which will be applicable to all cases, and that events of causative influence may intervene between the initial act and the final result, without displacing the initial act from the position of proximate cause, if the intermediate events themselves were natural sequences of the initial act;²⁵ but that the "intervening cause" to which the law has reference is one which moves from some source independent of the plaintiff and defendant,²⁶ and implies responsibility for the result.²⁷ In this sense, "intervening cause" has been defined as meaning an independent cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated;²⁸ an independent cause which intervenes between the original wrongful act or omission and the injury turns aside the natural sequence of events, and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated;²⁹ the act of an independent agency which destroys the causal connection between the original act and the injury, the independent act being the immediate cause.³⁰ Referred to as "efficient intervening cause," it has been defined as

10. Ariz.—Salt River Valley Water Users' Ass'n v. Cornum, 63 P.2d 639, 644.

Ky.—Stacy v. Williams, 69 S.W.2d 697, 705, 253 Ky. 353.

Pa.—Herr v. Lebanon, 24 A. 207, 208, 149 Pa. 222, 34 Am.S.R. 603, 16 L.R.A. 106.

11. Ky.—Stacy v. Williams, 69 S.W. 2d 697, 705, 253 Ky. 353.

12. Pa.—Behling v. Southwest Pennsylvania Pipe Lines, 28 A. 777, 778, 160 Pa. 359, 40 Am.S.R. 724.

13. Ky.—Stacy v. Williams, 69 S.W. 2d 697, 705, 253 Ky. 353.

14. Ariz.—Crandall v. Consolidated Telephone & Electric Co., 127 P. 994, 996, 13 Ariz. 322.

Ill.—Pullman Palace Car Co. v. Laack, 32 N.E. 285, 291, 143 Ill. 242, 18 L.R.A. 215.

15. Wis.—Winchel v. Goodyear, 105 N.W. 824, 827, 126 Wis. 271.

16. Wash.—Bagley v. Foley, 144 P. 25, 26, 82 Wash. 222.

17. Ill.—McRae v. Hill, 126 Ill.App. 349, 353.

18. Wis.—Winchel v. Goodyear, 105 N.W. 824, 827, 126 Wis. 271.

19. Logical and legal meaning distinct

"Even if it had an ascertainable

logical meaning, which is more than doubtful, it would not follow that the legal meaning is the same."—Rogers v. Missouri Pac. R. Co., 88 P. 885, 75 Kan. 222, 223, 121 Am.S.R. 416, 10 L.R.A., N.S., 658, 12 Ann.Cas. 441.

20. Ga.—Godwin v. Atlantic Coast Line R. Co., 48 S.E. 139, 141, 120 Ga. 747.

50 C.J. p 841 note 91 [a].

21. Ga.—Dunbar v. Davis, 122 S.E. 895, 32 Ga.App. 192, 193.

50 C.J. p 841 note 91 [b].

22. Nev.—Longabaugh v. Virginia City and Truckee R. Co., 9 Nev. 271, 294.

23. Wis.—Deisenrieter v. Kraus-Merkel Malting Co., 72 N.W. 735, 737, 97 Wis. 279.

24. U.S.—Richmond Coal Co. v. Commercial Union Assur. Co., Ltd., C.C.Cal., 159 F. 985, 987.

25. Mo.—Waggoner v. Bernie Bank, 281 S.W. 130, 131, 220 Mo.App. 165.

26. Iowa.—Fishburn v. Burlington & N. W. Ry. Co., 103 N.W. 481, 485, 127 Iowa 482.

Acting independently and effectively
"It is when a new cause intervened which was not set in motion

by the primary cause, but originated independently and acted effectively that the primary cause ceases to be regarded as the proximate cause."—Lawrence v. Heidbreder Co., 93 S.W. 897, 900, 119 Mo.App. 216.

As related to the earlier act

"An act may furnish the occasion for another act, and such second act may be the cause of an injury without the first act in any manner being a contributing cause of such injury; such second act may be the result of some intervening cause in no manner flowing from the original act, but which cause is given an opportunity to operate through the occasion furnished by such original act."—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S.D. 401.

27. Iowa.—Fishburn v. Burlington & N. W. Ry. Co., 103 N.W. 481, 485, 127 Iowa 482.

28. U.S.—Winona v. Botzet, Minn. 169 F. 321, 329, 94 C.C.A. 563, 2 L.R.A., N.S., 204.

29. Kan.—Hartman v. Atchison, & S. F. Ry. Co., 146 P. 335, 339, 94 Kan. 184, L.R.A.1915D 563.

30. N.J.—Davenport v. McClella, 96 A. 921, 88 N.J.Law 653.

aning a new and independent force which breaks causal connection between the original wrong and the injury;³¹ a new proximate cause which makes the connection with the original cause and makes itself solely responsible for the result in action; an independent force, entirely superseding the original action and rendering its effect in causation remote.³² As applied specifically to questions of liability for negligent acts, see the C.J. title Negligence § 111, also 45 C.J. p 930 note -p 931 note 54.

Joint cause [or causes] of action. A term which includes causes of action against wrongdoers as well as causes of action against joint parties to a contract.³³

Juridical cause. A cause that, by the usual course of events, would result, in the particular injury, in independent disturbing moral agencies intervening, and the term has been used sometimes as the equivalent of "proximate cause."³⁴

Just cause. Legal cause or lawful cause;³⁵ lawful ground.³⁶ In a particular connection, it has been held that "just cause" implies the existence of facts justifying the action taken, something more than mere wish.³⁷ "Just cause" has been held syn-

onymous with, or equivalent to, "ample cause,"³⁸ "just and sufficient cause,"³⁹ "legal cause,"⁴⁰ and "reasonable cause,"⁴¹ has been compared with, or distinguished from, "actual cause,"⁴² "excuse,"⁴³ and "probable cause."⁴⁴

Probable cause. "Probable cause" has been defined as meaning a cause which is probable;⁴⁵ a belief founded on reasonable grounds;⁴⁶ a reasonable ground of presumption that a charge is or may be well founded.⁴⁷ It has been said that the term is difficult to define,⁴⁸ but that it signifies about the same in law as in common parlance;⁴⁹ that it does not import absolute certainty but only implies the existence of reasonable grounds for belief.⁵⁰ "Probable cause" has been held synonymous with, or equivalent to, "proximate cause,"⁵¹ "reasonable cause,"⁵² "reasonable or probable cause,"⁵³ has been likened to "sufficient cause;"⁵⁴ has been both compared with, and distinguished from, "actual and positive cause,"⁵⁵ "beyond a reasonable doubt,"⁵⁶ "good reason to believe,"⁵⁷ "legal cause,"⁵⁸ "malice,"⁵⁹ and "reasonable cause."⁶⁰ "Probable cause," as affecting or determining legal action or legal rights, is treated, inter alia, in such titles as Arrest, Attachment, Bail, Criminal Law, False Imprisonment, Habeas Corpus, Internal Revenue, Libel

Neb.—Anderson v. Byrd, 275 N. W. 825, 826.

N.C.—Horton v. Forest City Tel. Co., 54 S.E. 299, 301, 141 N.C. 455.

Ala.—Williamson v. Howell, 17 Ala. 830, 831.

Index of causes of action in general see C.J.S. title Actions § 61.

Ala.—Montgomery v. Wright, 72 Ala. 411, 422, 47 Am.R. 422, citing Wharton Negl. §§ 303, 324.

Or.—State v. Langford, 176 P. 197, 202, 90 Or. 251.

La.—State v. Donzi, 63 So. 405, 406, 133 La. 925—State v. Baker, 36 So. 703, 704, 112 La. 801.

Cal.—Good v. San Diego, 90 P. 14, 46, 5 Cal.App. 265.

Pa.—Arthur v. Philadelphia, 117 A. 269, 270, 273 Pa. 419.

Or.—State v. Langford, 176 P. 197, 202, 90 Or. 251.

Ky.—Sehon v. Whitt, 92 S.W. 280, 281, 28 Ky.L. 1222.

N.Y.—Bregman v. Kress, 81 N.Y.S. 1072, 1073, 83 App.Div. 1. C.J. p 433 note 72 [d].

W.Va.—Davis v. Chesapeake & D. Ry. Co., 56 S.E. 400, 401, 61 W.Va. 246, 9 L.R.A., N.S., 993.

S.C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

44. "Probable cause" both compared and distinguished

Ky.—Sehon v. Whitt, 92 S.W. 280, 281, 28 Ky.L. 1222.

W.Va.—Davis v. Chesapeake & O. R. Co., 56 S.E. 400, 401, 61 W.Va. 246, 9 L.R.A., N.S., 993—Claiborne v. Chesapeake & O. R. Co., 33 S.E. 262, 265, 46 W.Va. 363.

45. Mont.—State v. Gardner, 240 P. 984, 985, 74 Mont. 377.

46. Mo.—Freymark v. McKinney Bread Co., 55 Mo.App. 435, 437.

47. Ill.—People v. Union El. R. Co., 110 N.E. 1, 7, 269 Ill. 212, quoting Webster Int.D.

48. Mo.—Boeger v. Langenberg, 11 S.W. 223, 224, 97 Mo. 390, 396, 10 Am.S.R. 322.

Tex.—Dwyer v. Testard, 65 Tex. 432, 434.

50 C.J. p 421 note 75.

49. Tex.—Dwyer v. Testard, supra.

50. Pa.—Commonwealth v. Hunsinger, 89 Pa.Super. 238, 241.

51. Iowa.—Watson v. Dilts, 89 N.W. 1063, 1069, 116 Iowa 249, 93 Am.S.R. 239, 57 L.R.A. 559.

50 C.J. p 841 note 88 [b].

52. U.S.—Stacey v. Emery, Tenn., 97 U.S. 642, 646, 24 L.Ed. 1035—Schnorenberg v. U. S., C.C.A.Wis., 23 F.2d 38, 40.

S.C.—McCall v. Alexander, 65 S.E. 1021, 1022, 84 S.C. 187.

50 C.J. p 421 note 81—52 C.J. p 1185 note 64 [a].

53. N.C.—Motsinger v. Sink, 84 S.E. 847, 849, 168 N.C. 548.

54. Cal.—People v. Coombs, 98 P. 686, 687, 9 Cal.App. 262.

55. Wis.—State v. Davie, 22 N.W. 411, 412, 62 Wis. 305.

56. Idaho.—State v. Arregui, 254 P. 783, 794, 44 Idaho 43, 52 A.L.R. 463.

50 C.J. p 421 note 85.

"'Beyond a reasonable doubt' must include 'probable cause.' But 'probable cause' does not include or measure up to satisfaction 'beyond a reasonable doubt.' They are widely different. 'Beyond a reasonable doubt' may be likened to the summit of a high mountain, and 'probable cause' to a halfway station on the mountain side. Few may reach the summit, but many may reach the halfway station."—U. S. v. McGuire, D.C.N.Y., 300 F. 98, 102.

57. Mich.—Meddaugh v. Williams, 12 N.W. 34, 35, 43 Mich. 172.

58. Ky.—Sehon v. Whitt, 92 S.W. 280, 281, 28 Ky.L. 1222.

See also C.J.S. title Malicious Prosecution § 26, also 38 C.J. p 404 note 73 [b].

59. Cal.—Griswold v. Griswold, 77 P. 672, 673, 143 Cal. 617.

60. Ala.—Sanders v. Davis, 44 So. 979, 983, 133 Ala. 375.

and Slander, Malicious Prosecution, Process, and Searches and Seizures.

Proximate cause. The name of a legal doctrine of causation.⁶¹ Literally "proximate cause" means the cause nearest to the effect produced,⁶² and this is said to be its meaning in ordinary language;⁶³ but in legal terminology the term is not confined to its literal meaning,⁶⁴ nor to its significance in the understanding of the layman,⁶⁵ and it has been broadly referred to as the cause to which the effect is attributed by the rational judgment of mankind.⁶⁶ "Proximate cause" has been defined as a cause, not necessarily the last, in a connected succession of events leading to a result;⁶⁷ that cause which naturally led to and which might have been expected to produce the result;⁶⁸ that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause;⁶⁹ that which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which that event would not have occurred;⁷⁰ that which stands next in causation to the effect—not necessarily in time

or space, but in causal relation;⁷¹ the dominant cause, not the one which is incidental to that cause, its mere instrument, although the latter may be nearest in place and time;⁷² the efficient cause;⁷³ the nearest, the immediate, the direct cause;⁷⁴ the one that necessarily sets the other cause or causes in operation;⁷⁵ the primary cause, even though it may act through successive instruments;⁷⁶ the real, actual, efficient, or responsible cause.⁷⁷

More strictly defined, an act is the proximate cause of an event when, in the natural order of things and under the particular circumstances surrounding it, such an act would necessarily produce the event;⁷⁸ but the practical construction placed upon the term by many of the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.⁷⁹

It has been said that, although established in use,⁸⁰ it is an unsatisfactory phrase,⁸¹ difficult to define,⁸² that no general or authoritative definition has been evolved, as a matter of law, but that the definition in each instance is to be determined by

61. Mass.—*Marble v. Worcester*, 4 Gray 395, 397.
62. Mo.—*Lawrence v. Heidbreder Ice Co.*, 93 S.W. 897, 899, 119 Mo.App. 316.
63. Cal.—*Hyer v. South California Auto. Club Inter-Ins. Exch.*, 246 P. 1055, 1056, 77 Cal.App. 343. 50 C.J. p 837 note 72.
64. Tex.—*Texas & P. Ry. Co. v. Bigham*, 38 S.W. 162, 163, 90 Tex. 223.
65. Cal.—*Hyer v. South California Auto. Club Inter-Ins. Exch.*, 246 P. 1055, 1056, 77 Cal.App. 343. 50 C.J. p 837 note 72.
66. Tex.—*Chicago, R. I. & G. R. Co. v. Coffee*, Civ.App., 126 S.W. 638, 640.
67. U.S.—*Richmond Coal Co. v. Commercial Union Assur. Co., Ltd.*, C.C.Cal., 159 F. 985, 987.
68. Tex.—*Texas & P. Ry. Co. v. Bigham*, 38 S.W. 162, 163, 90 Tex. 223.
69. Ky.—*Louisville Home Tel. Co. v. Gasper*, 93 S.W. 1057, 1059, 123 Ky. 128, 29 Ky.L. 578, 9 L.R.A., N.S., 548. 50 C.J. p 840 note 85.
70. Colo.—*Blythe v. Denver & R. G. R. Co.*, 25 P. 702, 703, 15 Colo. 333, 22 Am.S.R. 403, 11 L.R.A. 615. 50 C.J. p 842 note 96.
71. Mo.—*Dickson v. Omaha, etc., R. Co.*, 27 S.W. 476, 478, 124 Mo. 140, 46 Am.S.R. 429, 25 L.R.A. 320. 50 C.J. p 838 note 75.
72. Ill.—*Pullman Palace Car Co. v. Laack*, 32 N.E. 285, 291, 143 Ill. 242, 18 L.R.A. 215. 50 C.J. p 839 note 82.
73. U.S.—*Ætna Ins. Co. v. Boon, Conn.*, 95 U.S. 117, 133, 24 L.Ed. 395. 50 C.J. p 839 notes 80, 81, p 842 notes 4, 5, 6.
74. Colo.—*Blythe v. Denver & R. G. R. Co.*, 25 P. 702, 703, 15 Colo. 333, 22 Am.S.R. 403, 11 L.R.A. 615.
75. N.Y.—*Port Washington Nat. Bank & Trust Co. v. Hartford Fire Ins. Co.*, 300 N.Y.S. 874, 875, 253 App. Div. 760. 50 C.J. p 839 note 76.
76. Colo.—*Blythe v. Denver & R. G. R. Co.*, supra. 50 C.J. p 841 notes 90-92.
77. U.S.—*Ætna Ins. Co. v. Boon, Conn.*, 95 U.S. 117, 130, 24 L.Ed. 395.
78. N.Y.—*Port Washington Nat. Bank & Trust Co. v. Hartford Fire Ins. Co.*, 300 N.Y.S. 874, 875, 253 App. Div. 760. 50 C.J. p 839 notes 78, 79, p 840 notes 83, 84, p 842 note 98.
79. Iowa.—*Fishburn v. Burlington, etc., R. Co.*, 103 N.W. 481, 487, 127 Iowa 483.
80. S.C.—*Mayrant v. Columbia*, 57 S.E. 857, 858, 77 S.C. 231, 10 L.R.A., N.S. 1094. 50 C.J. p 842 note 9.
81. Ill.—*Kinloch Long Distance Tel. Co. v. Alton Gas & Electric Co.*, 210 Ill.App. 540, 545.
- Ind.—*Cincinnati, H. & D. R. Co. v. Acree*, 82 N.E. 1009, 1011, 42 Ind. App. 127.
- N.C.—*Inge v. Seaboard Air Line R. Co.*, 135 S.E. 522, 525, 192 N.C. 522.
- West Constr. Co. v. Atlantic Coast Line R. Co.*, 113 S.E. 672, 673, 184 N.C. 179. 50 C.J. p 842 notes 1-3.
- Other and similar definitions, see 50 C.J. p 838 note 75, p 839 notes 76-82, p 840 notes 83-87, p 841 notes 88-95, p 842 notes 96-9.
78. Ind.—*Enochs v. Pittsburgh, C. & St. L. R. Co.*, 44 N.E. 658, 659, 145 Ind. 635. 50 C.J. p 840 notes 86, 87.
79. Ill.—*Missouri Malleable Iron Co. v. Dillon*, 69 N.E. 12, 17, 206 Ill. 145.
- Armour v. Golkowska*, 66 N.E. 1037, 1038, 202 Ill. 144.
- Wright v. Illinois Central R. Co.*, 119 Ill. App. 132, 135.
- Utah.—*Larson v. Calder's Park Co.*, 180 P. 599, 604, 54 Utah 325, 4 A. L.R. 731. 50 C.J. p 841 notes 88, 89.
80. Va.—*Etheridge v. Norfolk Southern R. Co.*, 129 S.E. 680, 683, 143 Va. 739.
81. Va.—*Etheridge v. Norfolk Southern R. Co.*, supra.
82. Miss.—*Pietri v. Louisville & N. R. Co.*, 119 So. 164, 165, 152 Miss. 185. 50 C.J. p 836 note 68, p 839 note 82 [d] (3) (4) (5).

the peculiar facts or circumstances of the case;⁸³ also that the difficulty lies in applying the definition, as announced, to the facts in the particular case;⁸⁴ and so the phrase has been variously and frequently applied to different classes of cases in different senses, the definitions varying and depending on the sense in which the term is used.⁸⁵

It has been held that the term implies an unbroken causal connection,⁸⁶ or something more than a mere succession of events or a succession of causes and effects,⁸⁷ and may imply the existence of two or more possible causes;⁸⁸ that it refers to the person producing the result as distinguished from the moving influence itself,⁸⁹ and to a situation which, with reference to particular circumstances, must be

looked at as a practical unit, rather than as calling for inquiry into a purely logical priority;⁹⁰ but that it does not necessarily refer to time or distance,⁹¹ although, under particular circumstances, proximity of time or space may be involved as having an evidential bearing upon it;⁹² nor, as generally held, does the phrase involve the idea of necessity of result from the act,⁹³ although the contrary seems also to have been held.⁹⁴

"Proximate cause" has been held equivalent to, or interchangeable or synonymous with, "directly contributed to,"⁹⁵ "efficient procuring cause,"⁹⁶ "initial cause,"⁹⁷ "means which 'thereby caused,'"⁹⁸ and "sole proximate cause;"⁹⁹ also compared and sometimes distinguished from "direct cause,"¹ "in-

83. Mich.—Stoll v. Laubengayer, 140 N.W. 532, 534, 174 Mich. 701. 50 C.J. p 836 note 68, p 837 note 71.

84. Okl.—Wichita Falls & N. W. Ry. Co. v. Cover, 164 P. 660, 662, 65 Okl. 110.

Tex.—Shippers' Compress & Warehouse Co. v. Davidson, 80 S.W. 1032, 1034, 35 Tex.Civ.App. 558.

85. Colo.—Carlock v. Denver & R. G. R. Co., 133 P. 1103, 1104, 55 Colo. 146.

Mass.—McDonald v. Snelling, 14 Allen 290, 294, 92 Am.D. 768.

N.Y.—Saugerties Bank v. Delaware & Hudson Co., 141 N.E. 904, 905, 236 N.Y. 425.

50 C.J. p 837 note 70.

86. N.J.—Kelson v. Public Service R. Co., 110 A. 919, 920, 94 N.J. Law 527.

No other separating act

"It must be an efficient act of causation separated from its effect by no other act of causation."—Smith v. Connecticut, R. & Lighting Co., 67 A. 888, 889, 80 Conn. 268, 17 L.R.A., N.S., 707—50 C.J. p 838 note 75.

"Sequence is not broken by reason of contributory or concurring causes."—Schell v. German Flats, 104 N.Y.S. 116, 120, 54 Misc. 445.

"Test of proximate cause is 'whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause.'"—Stemmler v. Pittsburgh, 135 A. 100, 101, 287 Pa. 365, 49 A.L.R. 1227.

87. Ark.—Chicago, R. I. & P. Ry. Co. v. Miles, 124 S.W. 1043, 92 Ark. 573.

Kan.—Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 377, 15 Am. R. 362.

88. Mo.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 1028, 219 Mo.App. 234.

More than one

(1) "There may be more than one proximate cause of an event."—Robertson v. Holden, Tex.Civ.App., 297 S.W. 327, 332.

(2) "It is not necessary that the proximate cause . . . be the sole cause."

Mont.—McCloskey v. Butte, 253 P. 267, 269, 78 Mont. 180.

Tex.—Missouri, K. & T. R. Co. v. Cardwell, Civ.App., 187 S.W. 1078, 1076.

(3) "Where several causes concur to produce certain results, either cause may be termed a 'proximate cause,' if it is an efficient cause of the result in question."—Godfrey v. Payne, Mo.App., 251 S.W. 133, 135—50 C.J. p 843 note 15.

(4) "If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but if the two are successive and unrelated in their operation, one of them must be proximate and the other remote."

N.Y.—Roedecker v. Metropolitan St. R. Co., 84 N.Y.S. 300, 303, 87 App. Div. 227.

Pa.—Herr v. Lebanon, 24 A. 207, 208, 149 Pa. 222, 34 Am.S.R. 603, 16 L. R.A. 106.

Must be a concurring cause

"It must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances."

Ky.—Nelson Creek Coal Co. v. Bransford, 225 S.W. 1070, 1071, 189 Ky. 741.

Tex.—Bleich v. Emmett, Civ.App., 295 S.W. 223, 225.

89. Cal.—Merrill v. Los Angeles Gas & Electric Co., 111 P. 534, 536, 158 Cal. 499, 139 Am.S.R. 134, 31 L.R.A., N.S., 559.

Or.—Cheffings v. Hines, 206 P. 726, 729, 104 Or. 81.

90. U.S.—Union Pacific R. Co. v. Hadley, Neb., 38 S.Ct. 318, 319, 246 U.S. 330, 62 L.Ed. 751.

91. Ark.—Chicago, R. I. & P. Ry. Co. v. Miles, 124 S.W. 1043, 92 Ark. 573.

Kan.—Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 377, 15 Am. R. 362.

Ky.—Georgetown Tel. Co. v. McCullough, 80 S.W. 782, 783, 118 Ky. 182, 26 Ky.L. 72, 11 Am.S.R. 294.

50 C.J. p 838 note 75 [c] (1), p 839 note 82.

92. Mo.—Dickson v. Omaha & St. L. R. Co., 27 S.W. 476, 478, 124 Mo. 140, 46 Am.S.R. 429, 25 L.R.A. 320.

50 C.J. p 838 note 75 [c] (2).

"Only when causes are independent is the nearest in time looked to."

—Muller v. Globe & Rutgers Fire Ins. Co., N.Y., 246 F. 759, 762, 159 C. C.A. 61.

93. Mo.—Waggoner v. Bernie Bank, 231 S.W. 130, 131, 220 Mo.App. 165—Lawrence v. Heibredner Co., 93 S.W. 897, 900, 119 Mo.App. 316.

94. N.Y.—Laidlaw v. Sage, 52 N.E. 679, 688, 158 N.Y. 73, 44 L.R.A. 216.

95. Mo.—Evans v. Klusmeyer, 256 S.W. 1036, 1038, 301 Mo. 352.

96. Tex.—Munger v. Hancock, Civ. App., 271 S.W. 228, 231.

97. Wis.—Winchel v. Goodyear, 105 N.W. 824, 827, 126 Wis. 271.

98. Ky.—Fetter Co. v. Coggeshall, 271 S.W. 1074, 1075, 208 Ky. 721.

99. Tex.—El Paso Electric Co. v. Sawyer, Civ.App., 291 S.W. 667, 673.

1. Ga.—Godwin v. Atlantic Coast Line R. Co., 48 S.E. 139, 141, 120 Ga. 747.

Or.—Cheffings v. Hines, 206 P. 726, 729, 104 Or. 81.

Wis.—Wills v. Ashland Light, Power

intermediate cause,"² "last cause,"³ "major cause,"⁴ and "sole cause,"⁵ and distinguished from, and held to be the antithesis of, "remote cause."⁶ As used in the law of negligence generally, see the C.J.S. title Negligence § 103, also 45 C.J. p 897 note 2-p 901 note 26, and as applied to the law of damages see the C.J.S. title Damages § 19, also 17 C.J. p 734 note 26-p 741 note 76.

Remote cause. While it has been found impracticable to prescribe by abstract definition, applicable to all possible states of facts, what is a remote cause,⁷ it has been defined, under particular states of facts, as a cause operating mediately through other causes to produce an effect,⁸ a cause the connection between which and the effect is uncertain, vague, or indeterminate,⁹ a cause which does not contain in itself the element of necessity between it and its effect,¹⁰ a cause which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn, or that cause which some indefinite or independent force merely took advantage of to accomplish something not the probable or natural effect thereof,¹¹ an improbable cause,¹² that which may have happened, and yet no injury have occurred notwithstanding no injury could have occurred if it had not happened;¹³ or that which would not, according to the experience of mankind, lead to the event which happened.¹⁴

Unforeseen cause. A cause which is not foreknown or which could not have been foreseen as likely to arise or occur.¹⁵

Other phrases: "Accidental cause," see Accidental 1 C.J.S. p 451 note 35, "accidental or unavoidable cause," see 1 C.J.S. p 456 note 50, "actual and positive cause,"¹⁶ "accident, mistake, or any unforeseen cause,"¹⁷ "accident, mistake, or unforeseen cause," see Accident 1 C.J.S. p 445 note 58, "accident or unforeseen cause," see Accident 1 C.J.S. p 445 note 68, "actual cause,"¹⁸ "adequate cause," see C.J.S. title Homicide § 46, also 29 C.J. p 1130 note 49 (a), "ample cause,"¹⁹ "any cause," "any cause not within the power of the railroad company to prevent," "any cause originating after the delivery of the policy," "any cause or proceeding," see Any 3 C.J.S. p 1403 notes 84-87, "any cause or proceeding whatever," see Any 3 C.J.S. p 1414 note 88, "any cause reasonably beyond its control," "any cause relied on," see Any 3 C.J.S. p 1403 notes 88, 89, "any cause whatever or whatsoever," see Any 3 C.J.S. p 1414 note 89, "any other cause," "any other cause affecting the validity," "any other cause beyond the control of," "any other cause of indebtedness whatever," "any other cause whatever," see Any 3 C.J.S. p 1416 notes 47-51, "any valid cause," see Any 3 C.J.S. p 1411 note 57, "at any time and for any cause whatsoever," see Any 3 C.J.S. p 1421

& St. Ry. Co., 84 N.W. 998, 1000, 108 Wis. 255.
50 C.J. p 841 note 92 [b].

2. S.C.—Snipes v. Atlantic Coast Line R. Co., 56 S.E. 959, 960, 76 S. C. 207.

3. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Ryon, 177 S.W. 525, 527.

4. Va.—Etheridge v. Norfolk Southern R. Co., 129 S.E. 680, 683, 143 Va. 789.

5. Colo.—Colorado Springs & Interurban Ry. Co. v. Allen, 135 P. 790, 792, 55 Colo. 391.

6. Colo.—Blythe v. Denver & R. G. R. Co., 25 P. 702, 703, 15 Colo. 333, 22 Am.S.R. 403, 11 L.R.A. 615.

Tex.—Fort Worth & D. C. Ry. Co. v. Amazon, Com.App., 276 S.W. 162, 166.

50 C.J. p 841 note 95 [a].

7. Me.—Cleveland v. Bangor, 32 A. 892, 895, 87 Me. 259, 47 Am.S.R. 326.

8. Ala.—Newsome v. Louisville & N. R. Co., 102 So. 61, 64, 20 Ala. App. 349, quoting Standard D.

9. N.Y.—Seifter v. Brooklyn Heights R. Co., 62 N.E. 349, 169 N.Y. 254, 259—Laidlaw v. Sage, 52 N.E. 679, 683, 158 N.Y. 73, 44 L.R.A. 216.
54 C.J. p 109 notes 4, 5.

10. N.Y.—McGovern v. Degnon-McLean Contracting Co., 105 N.Y.S. 408, 410, 120 App.Div. 524.

"Although the existence of the remote cause is necessary for the existence of its effect (for unless there has been a remote cause there can be no effect), still the existence of the remote cause does not imply the existence of the effect. The remote cause being given, the effect may or may not follow."—Salsedo v. Palmer, C.C.A.N.Y., 278 F. 92, 96.

Distinguishing characteristic

"It is this idea of necessity—the necessary connection between the cause and its effect—that is the prime distinction between proximate and remote cause."—McGovern v. Degnon-McLean Contracting Co., 105 N.Y.S. 408, 410, 120 App.Div. 524.

11. U.S.—Goodlander Mill Co. v. Standard Oil Co., Ill., 63 F. 400, 405, 11 C.C.A. 253, 27 L.R.A. 583.

Ill.—Mallen v. Waldowski, 67 N.E. 409, 410, 203 Ill. 87.
54 C.J. p 109 note 9.

12. Ill.—Armour v. Golkowska, 66 N.E. 1037, 1038, 202 Ill. 144, 148.
Iowa.—Cavanaugh v. Centerville Block Coal Co., 109 N.W. 303, 131 Iowa 700, 707, 7 L.R.A.N.S., 907.

50 C.J. p 841 note 95 [a]—54 C.J. p 109 note 7 [a].

13. N.C.—Troy v. Cape Fear & Y. V. R. Co., 6 S.E. 77, 81, 99 N.C. 298, 6 Am.S.R. 521.
54 C.J. p 109 note 10.

14. Ky.—Dunn v. Central State Hospital, 248 S.W. 216, 218, 197 Ky. 807.

15. Colo.—New Albany Hotel Co. v. Dingman, 131 P. 126, 128, 65 Colo. 306.

Conn.—McCaffrey v. Groton & S. St. Ry. Co., 84 A. 284, 286, 85 Conn. 584.

Me.—Wardwell's Case, 116 A. 447, 448, 121 Me. 216.
65 C.J. p 1234 note 95.

16. Wis.—State v. Baltes, 198 N.W. 232, 234, 183 Wis. 545—State v. Davie, 22 N.W. 411, 412, 62 Wis. 305.

17. R.I.—Dillon v. O'Neal, 58 A. 455, 26 R.I. 87.

18. W.Va.—Davie v. Chesapeake & Ohio Ry. Co., 56 S.E. 400, 401, 61 W.Va. 246.

19. Pa.—Arthur v. Philadelphia, 117 A. 269, 270, 273 Pa. 419—Thomas v. Connell, 107 A. 691, 692, 264 Pa. 242.

note 38, "be the cause of,"²⁰ "by any cause," see By 12 C.J.S. p 869 note 80, "by reason of an accident or other cause," see Accident 1 C.J.S. p 446 note 78, "cause and nature of the accusation," see the C.J.S. title Indictments and Informations § 90, also 31 C.J. p 650 note 65 b, "cause depending,"²¹ "cause for removal,"²² "cause in admiralty,"²³ "cause independent of all other causes,"²⁴ "cause of action," see Actions § 8 a (1), "cause of action accrued,"²⁵ "cause of action arising under the laws of the United States,"²⁶ "'cause of action arose' in this state," see Arise 6 C.J.S. p 339 note 2, "cause of action involving,"²⁷ "cause of action on contract,"²⁸ "cause of action to which decedent would have been a party,"²⁹ "cause of action to which the United States is a party,"³⁰ "cause of an act,"³¹ "cause of com-

plaint,"³² "cause of . . . imprisonment,"³³ "cause of injury,"³⁴ "cause of such contest,"³⁵ "cause of suit,"³⁶ "cause of the injury,"³⁷ "cause or matter,"³⁸ "cause or matter in which he has been attorney or counsel,"³⁹ "cause or proceeding,"⁴⁰ "cause remaining untried,"⁴¹ "cause shown,"⁴² "cause to believe," see Bankruptcy § 215 a (2) (b), "cause to believe a trader insolvent,"⁴³ "civil cause,"⁴⁴ "colorable cause,"⁴⁵ "contingent or accidental cause," see Accidental 1 C.J.S. p 456 note 57, "contributing cause,"⁴⁶ "contributing proximate cause,"⁴⁷ "contributory cause,"⁴⁸ "direct and proximate cause,"⁴⁹ "direct cause,"⁵⁰ "efficient and proximate cause,"⁵¹ "efficient procuring cause,"⁵² "except for just cause,"⁵³ "final disposition of the

20. Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Quinn, 101 N.E. 406, 409, 54 Ind.App. 11.

"Occasion" (verb) synonymous

Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Quinn, supra.

21. U.S.—U. S. v. Reese, C.C.Cal., 27 F.Cas.No.16,138, 4 Sawy. 629, 634.

22. N.D.—Clark v. Wild Rose Special School Dist. No. 90, 182 N.W. 307, 308, 47 N.D. 297.
11 C.J. p 40 note 22.

23. U.S.—The Linseed King, N.Y., 52 S.Ct. 450, 453, 285 U.S. 502, 76 L.Ed. 903.

As including proceeding to impose liability for a maritime tort see Admiralty § 59.

24. Me.—Bouchard v. Prudential Ins. Co. of America, 194 A. 405, 408.

25. "Claim accrued" distinguished N.Y.—Edlux Const. Corporation v. State, 300 N.Y.S. 509, 511, 252 App. Div. 373.

26. U.S.—Mathers & Mathers v. Urschel, C.C.A.Okl., 74 F.2d 591, 593.
See also Arise 6 C.J.S. p 333 notes 78, 79.

27. Okl.—Barnes v. C. B. Cozart Grain Co., 153 P. 441, 442, 59 Okl. 157.

"Amount in controversy" equivalent see Amount 3 C.J.S. p 1057 note 4.

28. N.Y.—Perlman v. Perlman, 247 N.Y.S. 453, 454, 139 Misc. 396.
Tex.—N. Estrada, Inc., v. Terry, Civ. App., 293 S.W. 286, 288.

29. N.Y.—In re Herle's Estate, Sur., 300 N.Y.S. 103, 115, 165 Misc. 46.

30. U.S.—Shirer v. Davis, C.C.A.S. C., 295 F. 317.

31. S.D.—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S. D. 401.

"Occasion for an act" distinguished S.D.—Fletcher v. South Dakota Cent. Ry. Co., supra.

32. Ohio.—State v. State Bd. of Dental Examiners, 14 Ohio S. & C. P. 245, 248.

33. N.Y.—Spear v. Wardell, 1 N.Y. 144, 155.

34. Conn.—Christian v. City of Waterbury, 193 A. 602, 604, 123 Conn. 152.

Me.—Bouchard v. Prudential Ins. Co. of America, 194 A. 405, 408.

"Occasion" compared

"The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act."

Ill.—Illinois Cent. R. Co. v. Oswald, 170 N.E. 247, 249, 333 Ill. 270—Weinberg v. Richardson, App., 10 N.E.2d 893.

Neb.—Anderson v. Byrd, 275 N.W. 825, 826.

See C.J.S. title Negligence § 111, also 45 C.J. p 931 note 55—p 932 note 56.

35. Or.—Whitney v. Blackburn, 21 P. 874, 876, 17 Or. 564, 11 Am.S.R. 857.

36. Or.—State v. Vincent, 52 P.2d 203, 206, 152 Or. 205.

37. Me.—State v. Verrill, 112 A. 673, 674, 120 Me. 41.
11 C.J. p 40 note 24.

38. N.Y.—Keeffe v. Syracuse Third National Bank, 69 N.E. 593, 594, 177 N.Y. 305.

39. N.Y.—Davis v. Seaward, 146 N. Y.S. 981, 985, 85 Misc. 210.

40. Okl.—State v. Martin, 256 P. 681, 683, 125 Okl. 51.

41. Pa.—Preston v. Englert, 5 Binn. 390, 391.

42. N.Y.—People v. Karlovsky, 263 N.Y.S. 293, 295, 147 Misc. 56.

43. R.I.—Goldsworthy v. Roger Williams Nat. Bank, 10 A. 632, 633, 15 R.I. 586.

44. Philippine.—U. S. v. Gutierrez, 12 Philippine 529, 532.

45. Ala.—Broom v. Douglass, 57 So. 860, 864, 175 Ala. 268, 44 L.R.A., N.S., 164, Ann.Cas.1914C 1155.

46. S.D.—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S.D. 401.

47. Defined as "a cause which, in a continuous sequence unbroken by any other new independent cause, contributes to produce an event or injury, and but for which same would not have occurred."—Great West Mill & Elevator Co. v. Hess, Tex.Civ.App., 281 S.W. 234, 238.

48. Ky.—Stacy v. Williams, 69 S.W. 2d 697, 705, 253 Ky. 353.

49. "Immediate and proximate cause" compared

Mo.—Herke v. St. Louis & N. R. Co., 125 S.W. 822, 823, 141 Mo.App. 613.

"Nearest cause" distinguished

"When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen."—Gordon v. Bedard, Mass., 164 N.E. 374, 376—Lynn Gas & Electric Co. v. Meriden F. Ins. Co., 33 N.E. 690, 691, 153 Mass. 570, 35 Am.S.R. 540, 20 L.R.A. 297.

50. Ga.—Godwin v. Atlantic Coast Line R. Co., 48 S.E. 139, 141, 120 Ga. 747.

Mo.—Meysenburg v. Schlieper, 48 Mo. 426, 434.
Or.—Chaffings v. Hines, 206 P. 726, 729, 104 Or. 81.

"Occasion" distinguished

Mo.—Meysenburg v. Schlieper, 48 Mo. 426, 434.

51. Mont.—Burns v. Eminger, 276 P. 437, 442, 84 Mont. 397.

52. Tex.—Munger v. Hancock, Civ. App., 271 S.W. 228, 231.

53. Pa.—Arthur v. Philadelphia, 117 A. 269, 270, 273 Pa. 419.

cause,"⁵⁴ "for any cause," see Any 3 C.J.S. p 1412 note 75, "for cause only after a public hearing,"⁵⁵ "for cause shown,"⁵⁶ "for other reasonable cause, according to the usual rules in such cases,"⁵⁷ "for such other cause as the court in its discretion may deem sufficient,"⁵⁸ "for sufficient cause,"⁵⁹ "from any cause," see 3 C.J.S. p 1412 note 76, "good and sufficient cause,"⁶⁰ "good cause,"⁶¹ "good cause shown,"⁶² "good cause to the contrary,"⁶³ "if by any cause," see Any 3 C.J.S. p 1415 note 8, "if by reason of fire, explosion or other cause,"⁶⁴ "immediate and proximate cause,"⁶⁵ "independent cause of an injury,"⁶⁶ "independent intervening cause,"⁶⁷ "initial and moving cause" and "initial cause,"⁶⁸ "interested in the cause,"⁶⁹ "interested in the 'cause or proceeding,'"⁷⁰ "interested in the event of the cause,"⁷¹ "intermediate cause,"⁷² "in which the cause of action . . . arose," see Arise 6 C.J.S. p 339 note 3, "irresistible superhuman cause,"⁷³

"just and sufficient cause,"⁷⁴ "just cause or excuse,"⁷⁵ "justifiable cause,"⁷⁶ "lack of probable cause,"⁷⁷ "last cause,"⁷⁸ "lawful cause,"⁷⁹ "left without cause,"⁸⁰ "legal cause,"⁸¹ "legal cause and good excuse," see the C.J.S. title Trespass § 159, also 63 C.J. p 1087 notes 27-29, "legitimate cause,"⁸² "major cause,"⁸³ "natural cause [or causes],"⁸⁴ "nature and cause,"⁸⁵ "nature and cause of the accusation," see the C.J.S. title Indictments and Informations § 90, also 31 C.J. p 650 notes 63-65, "nearest cause,"⁸⁶ "occurrence out of which the cause of action arose,"⁸⁷ "on sufficient cause,"⁸⁸ "order to show cause," see the C.J.S. title Motions and Orders § 20, also 42 C.J. p 489 note 58-p 493 note 6, "or for other reasonable cause,"⁸⁹ "originating cause,"⁹⁰ "or other sufficient cause,"⁹¹ "other cause [or causes],"⁹² "other good and sufficient cause,"⁹³ "other good cause,"⁹⁴ "other legal or eq-

Wis.—State v. Dahl, 122 N.W. 748, 749, 140 Wis. 301.

54. U.S.—In re Brightman, C.C.N. Y., 4 F.Cas.No.1,878, 14 Blatchf. 130, 132.

55. N.J.—Brokaw v. Burk, 98 A. 11, 12, 89 N.J.Law 132.

56. R.I.—Case v. Mason, 23 A. 48, 15 R.I. 51, 52.

57. Conn.—Perry v. M. M. Foklin Co., 123 A. 28, 30, 100 Conn. 104.

58. Ky.—Burns v. Burns, 190 S.W. 683, 686, 173 Ky. 105.

59. Minn.—Pederson v. Newton, 165 N.W. 378, 379, 139 Minn. 24.

60. Conn.—Richey v. First Nat. Bank & Trust Co., 195 A. 732, 733, 123 Conn. 380.

Ind.—Stetson v. Rochester Shoe Co., 52 N.E. 149, 150, 151 Ind. 675.

61. Ill.—Wheeler v. Pullman Iron & Steel Co., 32 N.E. 420, 422, 143 Ill. 197, 17 L.R.A. 818.
28 C.J. p 718 note 82.

62. N.Y.—Colton v. Raymond, 85 N. Y.S. 210, 213, 41 Misc. 580.

Tex.—Smalley v. Paine, 116 S.W. 38, 40, 102 Tex. 304.

63. Minn.—State v. Kloempken, 176 N.W. 642, 643, 145 Minn. 496.
28 C.J. p 718 note 82 [b].

64. U.S.—Hickman v. Cabot, W.Va., 183 F. 747, 749, 106 C.C.A. 183.

65. Mo.—Herke v. St. Louis & N. R. Co., 125 S.W. 822, 823, 141 Mo.App. 613.

66. Tex.—Jones v. George, 61 Tex. 345, 352, 48 Am.R. 280.

67. Mich.—Lydman v. De Haas, 151 N.W. 718, 722, 185 Mich. 128.

Mo.—Brubaker v. Kansas City Electric Light Co., 110 S.W. 12, 15, 130 Mo.App. 439.

68. Wis.—Winchel v. Goodyear, 105 N.W. 824, 827, 126 Wis. 271.

69. La.—State v. Banta, 47 So. 538, 539, 122 La. 235.

70. Ala.—Ellis v. Smith, 42 Ala. 349, 353.

71. Me.—Call v. Pike, 66 Me. 350, 353.

72. S.C.—Snipes v. Atlantic Coast Line R. Co., 56 S.E. 950, 960, 76 S.C. 207.

73. Limited to natural causes

"The words 'irresistible superhuman cause' . . . refer to those natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ."—Fay v. Pacific Imp. Co., 26 P. 1099, 1101, 28 P. 943, 93 Cal. 253, 27 Am. S.R. 198, 16 L.R.A. 183—33 C.J. p 816 notes 59, 60.

74. Or.—State v. Langford, 176 P. 197, 202, 90 Or. 251.

75. Mo.—State v. Caldwell, 231 S.W. 613, 615.

"Malice" compared

Mo.—State v. Caldwell, *supra*.

76. W.Va.—Reynolds v. Reynolds, 69 S.E. 381, 383, 68 W.Va. 15, Ann. Cas.1912A 889.
35 C.J. p 896 note 11.

77. "Malice" not convertible term
Ark.—Foster v. Pitts, 38 S.W. 1114, 63 Ark. 387.

78. Tex.—Missouri, K. & T. Ry. Co. of Texas v. Ryon, Civ.App., 177 S. W. 525, 527.

79. Eng.—Jenkins v. Cook, 1 P.D. 80, 100.

"Sufficient cause" synonymous

Or.—State v. Langford, 176 P. 197, 202, 90 Or. 251.

80. Ga.—Parker v. Parker, 67 S.E. 812, 134 Ga. 316.

81. Ala.—Gill v. State, 61 Ala. 169, 172.

Cal.—Wells v. McCarthy, 90 P. 203, 206, 5 Cal.App. 301.

Ky.—Sehon v. Whitt, 92 S.W. 280, 281, 28 Ky.L. 1222.

"Sufficient cause" synonymous

Or.—State v. Langford, 176 P. 197, 202, 90 Or. 251.

"Physical cause" distinguished

Me.—State v. Verrill, 112 A. 673, 674, 120 Me. 41.

82. La.—Miller v. Manhattan Life Ins. Co., 34 So. 723, 725, 110 La. 652.

83. Va.—Etheridge v. Norfolk Southern R. Co., 129 S.E. 680, 683, 143 Va. 789.

84. Cal.—Slevin v. San Francisco Police Fund Commissioners, 55 P. 785, 786, 123 Cal. 130.
45 C.J. p 394 note 20.

85. Miss.—Norris v. State, 38 Miss. 373, 380.

86. Mass.—Gordon v. Bedard, 164 N.E. 374, 376—Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 33 N.E. 690, 691, 158 Mass. 570, 35 Am.S.R. 540, 20 L.R.A. 297.

87. Ill.—Van Meter v. Goldfare, 236 Ill.App. 126, 131.

88. Tenn.—Tomlinson v. Board of Equalization, 12 S.W. 414, 417, 88 Tenn. 1, 6 L.R.A. 207.

89. Conn.—Etchells v. Wainwright, 57 A. 121, 124, 76 Conn. 534.

90. Wis.—Winchel v. Goodyear, 105 N.W. 824, 827, 126 Wis. 271.

91. N.Y.—Matter of Hermann, 165 N.Y.S. 298, 304, 178 App.Div. 182.

92. Pa.—Hatfield v. Thomas Iron Co., 57 A. 950, 953, 208 Pa. 478.
46 C.J. p 1144 note 66.

93. Neb.—State v. Hay, 63 N.W. 821, 823, 45 Neb. 321.

94. U.S.—In re Jackson, D.C.Wis., 13 F.Cas.No.7,123, 7 Biss. 280.

uitable cause,"⁹⁵ "other reasonable cause,"⁹⁶ "other sufficient cause,"⁹⁷ "pending cause [or causes],"⁹⁸ "physical cause,"⁹⁹ "probable cause for believing,"¹ "procuring cause," see Brokers § 91, "reasonable and probable cause,"² "reasonable cause,"³ "reasonable cause of seizure,"⁴ "reasonable cause to believe,"⁵ "reasonable cause to suspect,"⁶ "reasonable or probable cause,"⁷ "removal for just cause,"⁸ "removal without proper cause,"⁹ "removed for

cause,"¹⁰ "same cause,"¹¹ "sole cause,"¹² "sole proximate cause,"¹³ "sufficient cause,"¹⁴ "sufficient legal cause,"¹⁵ "upon proper cause shown,"¹⁶ "upon sufficient cause shown by affidavit,"¹⁷ "without apparent cause,"¹⁸ "without good cause,"¹⁹ "without intervening cause,"²⁰ "without just cause,"²¹ "without legal cause,"²² "without reasonable cause,"²³ "without sufficient cause,"²⁴ "without the interven-

Mass.—Graves v. School Committee of Wellesley, 12 N.E.2d 176, 179.

Tenn.—Ingersoll v. Coal Creek Coal Co., 98 S.W. 178, 186, 117 Tenn. 263, 119 Am.S.R. 1003, 9 L.R.A., N.S., 282, 10 Ann.Cas. 829.

95. Pa.—Wood v. Kerkeslager, 76 A. 425, 426, 237 Pa. 536—Norfolk & W. Ry. Co. v. Swift, 62 Pa.Super. 573, 574.

96. Conn.—Brown v. Congdon, 50 Conn. 302, 309.

97. Del.—In re Assessment Board of Kent County, 140 A. 701, 702.

N.Y.—Matter of Donlon, 21 N.Y.S. 114, 115, 66 Hun 199—In re Issacs' Estate, 169 N.Y.S. 1070, 1072, 103 Misc. 191—In re Peterson's Estate, 124 N.Y.S. 907, 909, 68 Misc. 10. 46 C.J. p 1144 note 66 [o].

Referring to causes named

"'Other sufficient cause' means causes of like nature with those named."—Matter of Beach, 24 N.Y.S. 717, 718, 3 Misc. 393, 1 Pow.Surr. 469.

98. Mass.—Browne v. Browne, 102 N.E. 329, 330, 215 Mass. 76.

Miss.—Williams v. Doolittle, 98 So. 842, 844, 134 Miss. 870.

99. Me.—State v. Verrill, 112 A. 673, 120 Me. 41.

1. Ala.—Bessemer v. Eidge, 50 So. 270, 273, 162 Ala. 201.

"Good reason to believe" not equivalent see C.J.S. title Criminal Law § 309, also 16 C.J. p 292 note 61 [a] (6).

2. Ont.—Webber v. McLeod, 16 Ont. 609, 616.

3. U.S.—Schnorenberg v. U. S., D.C. Wis., 23 F.2d 38, 40.

Wis.—State v. Baltes, 198 N.W. 282, 284, 183 Wis. 545.

52 C.J. p 1185 note 64.

Rational or sensible cause

"A reasonable cause is simply a rational or sensible cause as contradistinguished from a fancied cause which has no reason to support it."—Sanders v. Davis, 44 So. 979, 983, 153 Ala. 375.

"Reasonable excuse" synonymous Eng.—Synge v. Synge, [1900] P. 180, 193.

"Sufficient cause" equivalent

U.S.—The George W. Wells, D.C. Mass., 118 F. 761, 763.

4. U.S.—Stacey v. Emery, Tenn., 97 U.S. 642, 646, 24 L.Ed. 1035.

5. U.S.—Grant v. National Bank, Ill., 97 U.S. 80, 81, 24 L.Ed. 97. 52 C.J. p 1185 note 67.

"Reasonable cause for believing a thing as a fact has always been defined as such grounds of belief as would warrant a cautious man in the conclusion that it is true."—Brown v. Yielding, 90 So. 499, 501, 206 Ala. 504.

"Reasonable cause to suspect" distinguished

U.S.—Grant v. National Bank, Ill., 97 U.S. 80, 81, 24 L.Ed. 971.

52 C.J. p 1185 note 67 [b].

6. U.S.—Grant v. National Bank, supra.

52 C.J. p 1185 note 68.

7. U.S.—Schnorenberg v. U. S., C. C.A.Wis., 23 F.2d 38, 39.

Idaho.—In re Squires, 92 P. 754, 755, 13 Idaho 624.

N.C.—Motsinger v. Sink, 84 S.E. 847, 849, 168 N.C. 548.

52 C.J. p 1186 note 27.

"Reasonable doubt" distinguished

Idaho.—State v. Layman, 125 P. 1042, 1043, 22 Idaho 387.

"Beyond a reasonable doubt" distinguished see C.J.S. title Criminal Law § 345, also 16 C.J. p 331 note 4 [a].

8. Cal.—Good v. San Diego, 90 P. 44, 46, 5 Cal.App. 265.

9. Mass.—Murray v. Boston Justices Municipal Court, 123 N.E. 682, 683, 233 Mass. 186.

10. Fla.—Gary v. Kissimmee River Cattle Co., 95 So. 657, 660, 85 Fla. 268.

11. Ind.—Lake Erie & W. R. Co. v. Huffman, 97 N.E. 434, 436, 177 Ind. 126, Ann.Cas.1914C 1272.

56 C.J. p 123 note 34.

12. Colo.—Colorado Springs & Interurban Ry. Co. v. Allen, 135 P. 790, 792, 55 Colo. 391.

Me.—Bouchard v. Prudential Ins. Co. of America, 194 A. 405, 408.

N.C.—Penn v. Standard Life Ins. Co., 76 S.E. 262, 263, 160 N.C. 399, 42 L.R.A., N.S., 597.

S.D.—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S.D. 401.

13. Mont.—Mihelich v. Butte Electric Ry. Co., 281 P. 540, 546.

Tex.—El Paso Electric Co. v. Sawyer, Civ.App., 291 S.W. 667, 673.

14. Ga.—Lancaster v. Hill, 71 S.E. 731, 732, 136 Ga. 405, Ann.Cas. 1912C 272.

Minn.—State v. Duluth, 55 N.W. 118, 120, 53 Minn. 238, 39 Am.S.R. 595.

N.Y.—Sausbier v. Wheeler, 299 N.Y. S. 466, 472, 252 App.Div. 267.

Tenn.—McKee v. Board of Elections, 116 S.W.2d 1033, 1036.

60 C.J. p 992 note 56.

"Sufficient legal cause" distinguished

U.S.—The Trader, D.C.S.C., 17 F.2d 623, 625.

"Sufficient reason" compared and distinguished

N.J.—Gilroy v. Supreme Court, I. O. F., 67 A. 1037, 1038, 75 N.J.Law 584, 14 L.R.A., N.S., 632.

15. U.S.—The Trader, D.C.S.C., 17 F.2d 623, 625.

16. N.J.—National Packing Co. v. Garven, 78 A. 703, 706, 79 N.J.Law 266.

17. Ind.—Tucker v. Tucker, 142 N. E. 11, 13, 194 Ind. 108.

18. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, 853.

19. Iowa.—State v. Weymiller, 198 N.W. 780, 782, 197 Iowa 1273.

Mo.—State v. Williams, 116 S.W. 1128, 1129, 136 Mo.App. 304.

20. Iowa.—Ballagh v. Interstate Business Men's Acc. Assoc., 155 N. W. 241, 244, 157 N.W. 726, 176 Iowa 110, L.R.A.1917A 1050.

21. Del.—Donaghy v. State, 100 A. 696, 709, 29 Del. 467.

"Without lawful excuse" equivalent

W.Va.—State v. Constable, 112 S.E. 410, 411, 90 W.Va. 515.

22. Ga.—Freeman v. Macon Gaslight & Water Co., 56 S.E. 61, 63, 126 Ga. 843, 7 L.R.A., N.S., 917.

"Without any justification" equivalent

Ga.—Freeman v. Macon Gaslight & Water Co., supra.

23. U.S.—The George W. Wells, D. C.Mass., 118 F. 761, 763.

"Without sufficient cause" equivalent

U.S.—The George W. Wells, supra.

24. U.S.—Collie v. Fergusson, Va., 50 S.Ct. 189, 191, 281 U.S. 52, 74 L.Ed. 696—Pacific Mail S. S. Co. v.

tion of other independent cause,"²⁵ and "without valid cause,"²⁶ also "any and all suits, proceedings, causes, or actions," see Any 3 C.J.S. p 1412 note 3, "any of the following causes," see Any 3 C.J.S. p 1413 note 35, "any one of the following causes," see Any 3 C.J.S. p 1413 note 50, "any unforeseen causes,"²⁷ "causes arising out of the same transaction,"²⁸ "causes beyond its control,"²⁹ "causes beyond the control,"³⁰ "causes, civil and criminal, affecting persons," see Affect 2 C.J.S. p 919 note 93, "causes now pending,"³¹ "for causes to be judged of,"³² "other accidental and natural causes,"³³ "other accidental causes," see Accidental 1 C.J.S. p 457 note 59, "other causes beyond their reasonable control,"³⁴ "other causes of whatsoever nature,"³⁵ "other legitimate causes,"³⁶ and "reasons or causes beyond one's control."³⁷

As a Verb

—**Present Tense.** As a verb, "cause" has been defined as meaning to act as a cause or agent in producing, to be the cause or occasion of, to compel, or force;³⁸ to bring about;³⁹ to bring into existence;⁴⁰ to effect⁴¹ as an agent;⁴² to make;⁴³ to produce.⁴⁴ It has been said that as a verb, the word is one of very broad import and generally known meaning, implying affirmative,⁴⁵ voluntary and intentional⁴⁶ action; and that, in a particular connection, it may well be used with reference to acts which bring about,⁴⁷ or assist in the continuance of a state already existing.⁴⁸ While it has been said to be generally descriptive of some affirmative act—an act of commission,⁴⁹ it has also been held, under particular circumstances, to imply passive neglect, deeds of omission, and failures to exercise duties faithfully.⁵⁰ "Cause" has been held equivalent to, or synonymous with, "compel"⁵¹ "create,"

Schmidt, Cal., 36 S.Ct. 531, 533, 241 U.S. 245, 60 L.Ed. 932—Feldman v. American Palestine Line, D.C.S.D., 25 F.2d 1002—The Chester, D. C.Md., 25 F.2d 903, 910—The Trader, D.C.S.C., 17 F.2d 623, 625—Burns v. Fred L. Davis Co., C.C.A. Mass., 271 F. 439, 444—The George W. Wells, D.C.Mass., 118 F. 761, 763.

69 C.J. p 1322 note 2.

25. Tex.—Jones v. George, 61 Tex. 345, 352, 48 Am.R. 280.

26. Pa.—In re Walker, 38 A. 148, 150, 179 Pa. 24.

27. Colo.—New Albany Hotel Co. v. Dingman, 181 P. 126, 128, 66 Colo. 306.

28. "Transactions connected with the same subject of action" distinguished

Wis.—Emerson v. Nash, 102 N.W. 921, 923, 124 Wis. 369, 109 Am.S.R. 944, 70 L.R.A. 326.

29. Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., 201 S.W. 154, 155, 156, 139 Tenn. 137.

"Unavoidably prevented" equivalent
Tenn.—Carolina Spruce Co. v. Black Mountain R. Co., supra.

30. U.S.—Consolidation Coal Co. v. Peninsular Portland Cement Co., C.C.A.Mich., 272 F. 625, 630.

Okl.—Zilar v. Abrams, 16 P.2d 872, 873, 160 Okl. 207.

11 C.J. p 40 note 28.

31. U.S.—U. S. v. Chicago, St. P., M. & O. R. Co., D.C.Minn., 151 F. 84, 100.

Okl.—Ex p. Copeland, 115 P. 627, 5 Okl.Cr. 551, 552.

Wis.—Thies v. State, 189 N.W. 539, 540, 178 Wis. 98.

See C.J.S. titles Criminal Law § 202, also 16 C.J. p 210 note 25, and

Venue § 131, also 67 C.J. p 139 note 60.

32. Ga.—Smith v. City of Winder, 96 S.E. 14, 22 Ga.App. 278.

33. Wis.—Kronshage v. Varrell, 97 N.W. 928, 929, 120 Wis. 161.

34. N.Y.—Traylor v. Crucible Steel Co., 183 N.Y.S. 181, 183, 192 App. Div. 445.

35. U.S.—Mellon v. Federal Ins. Co., D.C.N.Y., 14 F.2d 997, 1002.

36. U.S.—Castle v. Logan, Iowa, 140 F. 707, 709, 72 C.C.A. 201.

37. La.—Marionneaux v. Smith, App., 163 So. 206, 208.

"Fortuitous event" compared
La.—Marionneaux v. Smith, supra.

"Intervening impossibility" compared
La.—Marionneaux v. Smith, supra.

"Vis major" compared
La.—Marionneaux v. Smith, supra.

38. S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

39. U.S.—U. S. v. Kenofsky, La., 37 S.Ct. 438, 439, 243 U.S. 440, 61 L. Ed. 836—Huffman v. U. S., Colo., 259 F. 35, 38, 170 C.C.A. 35.

Cal.—People v. Gilbert, App., 78 P.2d 770, 774.

Mo.—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 840, 227 Mo.App. 675.

S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

40. Ark.—Kansas City Southern Ry. Co. v. Cecil, 283 S.W. 1, 2, 171 Ark. 34.

Cal.—People v. Gilbert, App., 78 P.2d 770, 774.

Mo.—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 840, 227 Mo.App. 675.

S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

"To bring to pass"

N.Y.—People v. Harrison, 170 N.Y.S. 876, 878, 183 App.Div. 812.

41. N.Y.—People v. Harrison, supra.

42. U.S.—Huffman v. U. S., Colo., 259 F. 35, 38, 170 C.C.A. 35.

Cal.—People v. Gilbert, App., 78 P. 2d 770, 774.

S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

43. Cal.—People v. Gilbert, App., 78 P.2d 770, 774.

Mo.—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 840, 227 Mo.App. 675.

S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

44. Ark.—Kansas City Southern Ry. Co. v. Cecil, 283 S.W. 1, 2, 171 Ark. 34.

N.Y.—People v. Harrison, 170 N.Y.S. 876, 878, 183 App.Div. 812.

S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

45. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.

46. Ill.—City of Chicago v. McKinley, 176 N.E. 261, 265, 344 Ill. 297.

47. U.S.—United States v. Kenofsky, La., 37 S.Ct. 438, 439, 243 U.S. 440, 61 L.Ed. 836.

48. Wash.—State v. Strom, 258 P. 15, 144 Wash. 334.

49. N.Y.—People v. Harrison, 170 N.Y.S. 876, 878, 183 App.Div. 812.

50. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.

Ga.—Louisville & N. R. Co. v. Warfield, 65 S.E. 308, 310, 6 Ga.App. 550.

R.I.—Carroll v. Allen, 37 A. 704, 705, 20 R.I. 144.

51. S.C.—Poole v. Vernon, 20 S.C.L. 667, 670.

"induce,"⁵² "occasion,"⁵³ "originate" and "produce,"⁵⁴ has been compared with, or distinguished from, "allow,"⁵⁵ "direct,"⁵⁶ "excuse,"⁵⁷ "occasion,"⁵⁸ "permit,"⁵⁹ and "suffer."⁶⁰

Phrases: "Cause or permit,"⁶¹ "cause or permit such vehicle to stand,"⁶² "cause or procure,"⁶³ "cause suit to be brought,"⁶⁴ "cause such child to attend public school,"⁶⁵ "cause the same to be published,"⁶⁶ "cause . . . to be administered,"⁶⁷ "cause to be adopted,"⁶⁸ "cause to be collected,"⁶⁹ "cause to be deposited,"⁷⁰ "cause to be examined,"⁷¹ "cause to be issued,"⁷² "cause to be printed,"⁷³ "cause . . . to be published,"⁷⁴ "cause . . . to be put into packages,"⁷⁵ "cause . . . to be run, surveyed, marked and ascertained,"⁷⁶ "cause to be set up or established,"⁷⁷ "cause to be sold,"⁷⁸ "cause to be transported,"⁷⁹ "encourage, cause, and

contribute,"⁸⁰ "place or cause to be placed,"⁸¹ and "shall cause the intoxication,"⁸² also "causes . . . or assists or encourages."⁸³

—**Caused.** The preterit and past participle of "cause." It has been held to import some positive, affirmative act,⁸⁴ and an act already done;⁸⁵ and has been held synonymous with, equivalent to, or compared with "allowed,"⁸⁶ "contributed,"⁸⁷ "initiated,"⁸⁸ "occasioned,"⁸⁹ and "permitted."⁹⁰

Phrases: "Accident caused by violent or external means," see Accident 1 C.J.S. p 445 note 52, "accidents caused by teams, automobiles or elevators," see Accident 1 C.J.S. p 448 note 16, "caused a letter to be written,"⁸¹ "caused, allowed, or permitted," see Allow 3 C.J.S. p 890 note 38, "caused and permitted fire to escape,"⁹² "caused and pro-

52. Cal.—People v. Gilbert, App., 78 P.2d 770, 774.

53. Cal.—People v. Gilbert, supra—People v. Halbert, 248 P. 969, 973, 78 Cal.App. 598.

54. Cal.—People v. Gilbert, App., 78 P.2d 770, 774.

55. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.

56. N.H.—Burnham v. Aiken, 6 N. H. 306, 328.

57. "Excuse" both compared and distinguished
S.C.—State v. Craig, 159 S.E. 559, 560, 161 S.C. 232.

58. S.D.—Fletcher v. South Dakota Cent. Ry. Co., 155 N.W. 3, 5, 36 S. D. 401.

59. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.
N.Y.—People v. Harrison, 170 N.Y.S. 876, 878, 183 App.Div. 812.

60. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.

61. N.Y.—People v. Harrison, 170 N. Y.S. 876, 878, 183 App.Div. 812—Hochstrasser v. Martin, 16 N.Y.S. 558, 560, 62 Hun 165.

62. Ill.—City of Chicago v. McKinley, 176 N.E. 261, 265, 344 Ill. 297.

63. N.C.—Miller v. Marriner, 121 S. E. 770, 773, 187 N.C. 449.

64. "Begin" or "commence"
"The term 'cause suit to be brought,' as used in the statute, means merely 'commence' or 'begin.'" —State v. Osen, N.D., 272 N.W. 788, 784.

65. N.H.—State v. Hall, 64 A. 1102, 1104, 74 N.H. 61.

66. Idaho.—Mundell v. Swedlund, 71 P.2d 434, 445.

67. N.Y.—La Beau v. Peo., 34 N.Y. 223, 228.

68. Nev.—State v. Board of Education, 1 P. 844, 849, 18 Nev. 173.

69. U.S.—U. S. v. Port of Mobile, C. C.Ala., 12 F. 768, 770, 4 Woods 536.
Mo.—State v. Moeller, 48 Mo. 331, 334.

70. U.S.—Burton v. U. S., Minn., 142 F. 57, 58, 62, 73 C.C.A. 243.

71. N.D.—State v. Stockwell, 134 N. W. 767, 779, 23 N.D. 70.

72. U.S.—Home Title Ins. Co. of New York v. Keith, D.C.N.Y., 230 F. 905, 906.

73. Eng.—Kelly v. Gavin, [1902] 1 Ch. 631, 634.

74. Mo.—Webb v. Strobach, 127 S. W. 680, 682, 143 Mo.A. 459.

75. S.C.—State v. Cain, 58 S.E. 937, 938, 78 S.C. 348.

76. N.J.—State v. Coleman, 13 N.J. Law 98, 99.

"To run, survey, mark and ascertain" equivalent
N.J.—State v. Coleman, 13 N.J. Law 98, 99.

77. Miss.—Anderson v. Faulconer, 30 Miss. 145, 146.

78. Wis.—Berlin Mach. Works v. Perry, 38 N.W. 82, 87, 71 Wis. 495, 5 Am.S.R. 236.

79. U.S.—Huffman v. U. S., Colo., 259 F. 35, 36, 170 C.C.A. 35.

80. Wash.—State v. Strom, 258 P. 15, 144 Wash. 334.

81. U.S.—U. S. v. Kenofsky, La., 37 S.Ct. 438, 439, 243 U.S. 440, 61 L.Ed. 836.

82. Kan.—Werner v. Edmiston, 24 Kan. 147, 152.

83. U.S.—Comitez v. Parkerson, C.C. La., 50 F. 170, 171.

As including failure or omission to prevent

"While it is possible that the strict

meaning of the words 'causes,' 'assists,' or 'encourages' might not, if employed under other circumstances, include failure or omission to prevent, it is also clear that it was the intention of the legislature . . . to make all who were liable for an unlawful act liable in solido."—Comitez v. Parkerson, supra.

84. Ark.—Kansas City Southern Ry. Co. v. Cecil, 283 S.W. 1, 2, 171 Ark. 34.

85. W.Va.—Moore v. Hope Natural Gas Co., 86 S.E. 564, 566, 76 W. Va. 649.

86. Ala.—Louisville & N. R. Co. v. Smith, 50 So. 241, 245, 163 Ala. 141.

Mo.—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 840, 227 Mo.App. 675.

87. Ark.—Fourche River Valley, etc., R. Co. v. Tippet, 142 S.W. 520, 524, 101 Ark. 376.

Iowa.—Collier v. McClintic-Marshall Construction Co., 138 N.W. 522, 523, 157 Iowa 244.

88. U.S.—Stainer v. San Luis Valley Land & Mining Co., D.C.Colo., 166 F. 220, 227, 92 C.C.A. 128.

89. U.S.—Baker v. Williamsburgh City F. Ins. Co., C.C.Cal., 157 F. 230, 234.

Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Quinn, 101 N.E. 406, 409, 54 Ind.App. 11.
46 C.J. p 893 note 92 [e].

90. Mo.—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 840, 227 Mo.App. 675.

91. N.J.—Voorhees v. Thomas, 152 A. 4, 5, 107 N.J. Law 134.

92. Ark.—Kansas City Southern Ry. Co. v. Cecil, 283 S.W. 1, 2, 171 Ark. 34.

cured,"⁹³ "caused and suffered,"⁹⁴ "caused another . . . to kill,"⁹⁵ "caused by accident," see Accident 1 C.J.S. p 446 note 81, "caused by his heedlessness or his reckless disregard of the rights of others,"⁹⁶ "caused by his own negligence,"⁹⁷ "caused by it,"⁹⁸ "caused by or arising from," see Arise 6 C.J.S. p 338 note 90, "caused by order of any civil authority,"⁹⁹ "caused by such intoxication,"¹ "caused" by the owner's illegal or improper conduct,"² "caused by the performance of the work,"³ "caused directly or indirectly, wholly or partly, by bodily or mental infirmity,"⁴ "caused or allowed," see Allow 3 C.J.S. p 890 note 39, "caused or induced,"⁵ "caused solely by collision,"⁶ "caused" the land to be sold,"⁷ "caused" the transportation of,"⁸ "caused to be issued,"⁹ "caused to be patented,"¹⁰ "caused to be published,"¹¹ "caused to be written,"¹² "caused . . . to percolate and flow,"¹³ "damages . . . caused by or arising from," see Arise 6 C.J.S. p 338 note 90, "injury caused by accident," see Accident

1 C.J.S. p 447 note 1, "injury proximately caused by accident,"¹⁴ "means which 'thereby caused'"¹⁵ "proximately caused,"¹⁶ "proximately caused by accident," see Accident 1 C.J.S. p 447 note 7, "proximately caused thereby,"¹⁷ "strain caused by an accident," see Accident 1 C.J.S. p 447 note 10, and "strike not caused . . . by the contractor."¹⁸

—**Causing.** Present participle of "cause," which has been defined as meaning bringing about.¹⁹

Phrases: "Accident causing injury," see Accident 1 C.J.S. p 445 note 53, "'causing' the use of the mails,"²⁰ "causing . . . to be issued,"²¹ "injuries causing such loss,"²² "proximately causing,"²³ and "the day and hour of any accident causing the injury."²⁴

As an Adjective

Cause books. Books kept in the central office of the English supreme court, in which are entered

93. Eng.—Farley v. Danks, 4 E. & B. 493, 499, 82 E.C.L. 493, 119 Reprint 180.

94. R.I.—Carroll v. Allen, 37 A. 704, 705, 20 R.I. 144.

95. Miss.—Brown v. State, 115 So. 433, 435, 149 Miss. 239.

96. Tex.—Pfeiffer v. Green, Civ. App., 102 S.W.2d 1077, 1085.

97. Fla.—Florida East Coast R. Co. v. Hayes, 64 So. 274, 276, 66 Fla. 589.

98. U.S.—Lehigh Valley R. Co. v. Allied Machinery Co. of America, C.C.A.N.Y., 271 F. 900, 903—Lehigh Valley R. Co. v. John Lysaght, Limited, C.C.A.N.Y., 271 F. 906, 910.

Fla.—Seaboard Air Line Ry. v. Mullin, 70 So. 467, 471, 70 Fla. 450, L.R.A.1916D 982, Ann.Cas.1918A 576.

99. N.Y.—Port Washington Nat. Bank & Trust Co. v. Hartford Fire Ins. Co., 300 N.Y.S. 874, 875, 253 App.Div. 760.

1. Ont.—De Struve v. McGuire, 25 Ont.L. 87, 90, 20 Ont.W.R. 374—Trice v. Robinson, 16 Ont. 433.

2. N.H.—Palmer v. Concord, 48 N.H. 211, 214, 97 Am.D. 605.

3. As incidental to the work

"It would be difficult to attribute any reasonable meaning to the language that the injury must be 'caused by the performance of the work' unless that language be interpreted as meaning substantially that the injury must be sustained by reason of the performance of the work and as an incident thereto."—Ocean Accident & Guarantee Corporation, Limited, of London, England, v.

Northern Texas Traction Co., Tex. Civ.App., 224 S.W. 212, 216.

4. U.S.—Scanlan v. Metropolitan Life Ins. Co., C.C.A.Ill., 93 F.2d 942, 946.

Held to mean resulting directly or independently of all other causes, etc., in death."—Ætna Life Ins. Co. v. Allen, C.C.A.Me., 32 F.2d 490, 494.

5. U.S.—U. S. v. Reed, C.C.A.N.Y., 96 F.2d 785, 787.

6. Cal.—Moblad v. Western Indemnity Co. of Dallas, Tex., 200 P. 750, 53 Cal.App. 683.

7. N.C.—Miller v. Marriner, 121 S. E. 770, 773, 187 N.C. 449.

8. Colo.—Huffman v. U. S., Colo., 259 F. 35, 38, 170 C.C.A. 35.

9. U.S.—Home Title Ins. Co. of New York v. Keith, D.C.N.Y., 230 F. 905, 907.

10. U.S.—American Casting Mach. Co. v. Pittsburgh Coal Washer Co., Pa., 237 F. 590, 597, 150 C.C.A. 472.

11. N.J.—Haase v. State, 20 A. 751, 752, 53 N.J.Law 34.

12. La.—Reems' Succ., 38 So. 930, 931, 115 La. 102, 104.

13. Kan.—Shomon v. Spring River Power Co., 99 P. 235, 236, 78 Kan. 779.

14. Colo. — Carroll v. Industrial Commission, 195 P. 1097, 1098, 69 Colo. 473.

15. Ky.—Fetter Co. v. Coggeshall, 271 S.W. 1074, 1075, 208 Ky. 721.

16. Cal.—Smith v. Los Angeles & P. Ry. Co., 33 P. 53, 54, 98 Cal. 210. Iowa.—Towberman v. Des Moines City R. Co., 211 N.W. 854, 855, 202 Iowa 1299.

17. Cal. — Westwater v. Grace

Church, 73 P. 1055, 1056, 140 Cal. 339.

18. Reasonable efforts to avert strike implied

"A strike due to the failure of the contractor to pay the wages essential to keep the work going, if those wages are reasonable in amount, and if cheaper labor cannot be obtained at the prevailing market rates, is not one resulting in necessary delay, but, on the contrary, is caused or provoked by the contractor itself. The contract does not mean that whenever a strike is threatened the contractor may abandon all effort to avert it, and fold his hands until such time as lower wages may prevail."—McGovern v. City of New York, 138 N.E. 26, 31, 234 N.Y. 377, 25 A.L.R. 1442.

19. U.S.—Shea v. U. S., Ohio, 251 F. 440, 448, 163 C.C.A. 458.

20. U.S.—Shea v. U. S., supra.

21. U.S.—Home Title Ins. Co. of New York v. Keith, D.C.N.Y., 230 F. 905, 907.

22. Tex.—Federal Life Ins. Co. v. White, Civ.App., 23 S.W.2d 832, 834.

Equivalent expressions

"These expressions, 'resulting from,' 'injuries causing such loss,' and 'loss of life sustained by' . . . referring to the same subject matter, to wit, compensation for the loss of life, must be construed to mean the same thing."—Federal Life Ins. Co. v. White, Tex.Civ.App., 23 S.W.2d 832, 834.

23. Iowa. — Towberman v. Des Moines City R. Co., 211 N.W. 854, 855, 202 Iowa 1299.

24. Mass.—In re Hurle, 104 N.E.

all writs of summons issued in the office.²⁵

Cause list. In England, an official list of actions, demurrers, petitions, appeals, etc., set down for trial or argument in open court.²⁶

CAUSE OF ACTION. See Actions § 1 c.

CAUSEWAY. An elevated roadway over marshy ground, especially the approach to a bridge;²⁷ a raised roadbed through lowlands;²⁸ a way raised above the natural level of the ground by stones, earth, timber fascines, etc., serving as a dry passage over wet or marshy ground, or as a mole to confine water to a pond or restrain it from overflowing lower ground;²⁹ also a crossing so as to afford access to lands separated by a railroad or a way graded so as to make it convenient to cross the track of a railroad;³⁰ usually a grade crossing;³¹ but sometimes, depending on conditions, a crossing over or under the railroad.³² It has been said that "causeway" is undoubtedly a part of a road, but that it is not a bridge nor a viaduct;³³ and it has been also distinguished from a levee, see Levees and Flood Control § 1, also 36 C.J. p 997 note 2 [d].

Phrases: "Causeway or other adequate means of crossing,"³⁴ "causeway proper," "22nd Street Causeway," and "22nd Street Causeway Job;"³⁵ and also "causeways or levees."³⁶

CAUSEY. See Calceata, Calcetum, or Calcey, ante.

CAUSIDICUS. In the civil law, a speaker or pleader; one who argued a cause ore tenus.³⁷

CAUTELA. In Latin generally, care, caution, vigilance, or prevision.³⁸ In juridical Latin, a surety, or security.³⁹

CAUTIO. Latin, in general, wariness, precaution, caution, circumspection.⁴⁰ In legal parlance, "cautio" is the general term for the documentary evidence of a contract or obligation.⁴¹

In the civil and French law. Security given for the performance of any thing; bail; a bond or undertaking by way of surety; and, more specifically, also the person who becomes a surety.⁴²

In Scotch law. A pledge, bond, or other security for the performance of an obligation, or the completion of the satisfaction to be obtained by a judicial process.⁴³

Cautio de damni infecti. Security against threatened or anticipated damage.⁴⁴

Cautio fidejussoria. Security by means of bonds or pledges entered into by third parties.⁴⁵

Cautio juratoria. Security given by the oath of the party;⁴⁶ more specifically, that which a suspender swears is the best he can afford in order to obtain a suspension.⁴⁷

Cautio muciana. Security given by an heir or legatee, in order to obtain immediate possession of the inheritance or legacy, binding him and his surety for his observance of a condition annexed to the bequest, where the act which is the object of the condition is one which he must avoid committing during his whole life, for example, that he will

336, 337, 217 Mass. 223, L.R.A. 1916A 279, Ann.Cas.1915C 919.

25. Black L.D.

26. Sweet L.D.

Analogous to the calendar or docket in American courts.—Abbott, L.D.

27. U.S.—Tampa Shipbuilding & Engineering Co. v. General Const. Co., C.C.A.Fla., 43 F.2d 309, 312, 85 A.L.R. 1178.

28. Miss.—Board of Sup'rs of Quitman County v. Carrier Lumber & Mfg. Co., 60 So. 326, 327, 103 Miss. 324.

29. Iowa.—State v. Burlington, C. R. & N. R. Co., 68 N.W. 819, 820, 99 Iowa 565—Gray v. Burlington & M. R. R. Co., 37 Iowa 119, 123. Neb.—Omaha & R. V. R. Co. v. Severin, 46 N.W. 842, 843, 30 Neb. 318.

30. Pa.—Port v. Huntingdon & B. T. R. Co., 31 A. 950, 951, 168 Pa. 19.

11 C.J. p 41 note 59.

31. Iowa.—State v. Burlington, C.

R. & N. R. Co., 68 N.W. 819, 820, 99 Iowa 565.

11 C.J. p 41 note 60.

32. Pa.—Port v. Huntingdon & B. T. R. Co., 31 A. 950, 168 Pa. 19.

33. Neb.—Omaha & R. V. R. Co. v. Severin, 46 N.W. 842, 843, 30 Neb. 318, 321.

Tex.—Coleman-Fulton Pasture Co. v. Aransas County, Civ.App., 180 S.W. 312, 316.

34. Iowa.—State v. Burlington, C. R. & N. R. Co., 68 N.W. 819, 820, 99 Iowa 565—Gray v. Burlington & M. R. R. Co., 37 Iowa 119, 123. Neb.—Omaha & R. V. R. Co. v. Severin, 46 N.W. 842, 843, 30 Neb. 318.

35. U.S.—Tampa Shipbuilding & Engineering Co. v. General Construction Co., C.C.A.Fla., 43 F.2d 309, 312, 85 A.L.R. 1178.

36. Miss.—Board of Supervisors of Quitman County v. Carrier Lumber & Mfg. Co., 60 So. 326, 327, 103 Miss. 324.

37. Black L.D.

38. Black L.D.

39. Adams Gloss.

Cautela idonea prestanda—a sufficient surety to be answerable, etc.—Adams Gloss., citing Pomponius Dig. xiii, 7 fr 6.

Cautela interponere—a security to interpose, stand between.—Adams Gloss., citing Ulpianus Dig. iii, 3 fr 15.

Cautela reddere—a security to give back, return, restore.—Adams Gloss., citing Gaius Dig. x, vi, 3 fr 14.

40. Adams Gloss.

41. Adams Gloss.

42. Black L.D.

43. Black L.D.

44. Adams Gloss., citing Mackeldey Civ.L. § 516.

45. Bouvier L.D., citing Du Cange Glossarium.

46. Burrill L.D.

47. Erskine Pr. 4, 3, 6.

never marry, never leave the country, never engage in a particular trade, etc.⁴⁸

Cautio pignoratitia. A pledge by a pledge or deposit of goods.⁴⁹

Cautio pro expensis. Security for costs or expenses.⁵⁰

Cautio usufructuaria. Security, which tenants for life give, to preserve the property rented free from waste and injury.⁵¹

CAUTION.

As a Noun

Careful consideration of the outcome of any act or course;⁵² and in this sense "caution" has been distinguished from "intelligence"⁵³ and "prudence."⁵⁴ In Scotch law and in admiralty law surety, security, bail, an undertaking by way of surety.⁵⁵

Caution juratory. In Scotch law, security given by oath; that which a suspender swears is the best he can afford in order to obtain a suspension.⁵⁶

Lodge a caution. A term used under the Torrens system of registering land titles by which a purchaser at a tax sale must "lodge a caution" or register his tax deed to avoid being cut out by a transfer made by the registered owner.⁵⁷

Ordinary caution. A condition of mind very difficult of definition, having different meanings under the various circumstances that may surround the person proposed to exercise it;⁵⁸ defined generally as meaning such caution as is usually exercised by prudent men in the particular transactions in which they are engaged;⁵⁹ and, in a particular

connection and context, as absence of culpable negligence.⁶⁰

Other phrases: "Against the caution,"⁶¹ and "caution commensurate with the obvious peril."⁶²

As a Verb

To caution oneself to take heed, or to exhort one to take heed;⁶³ to give notice of, or warn against, danger;⁶⁴ to warn; also, in a use indicated as obsolete except in Scots law, to furnish with a caution or proviso, or to qualify by a saving clause.⁶⁵

CAUTIONARY. In Scotch law, an instrument in which a person binds himself as surety for another.⁶⁶

Cautionary judgment. Where an action in tort was pending and plaintiff feared defendant would dispose of his real property before judgment, a cautionary judgment was entered with a lien on the property.⁶⁷

CAUTIONE ADMITTENDA. In English ecclesiastical law, a writ that lies against a bishop who holds an excommunicated person in prison for contempt, notwithstanding he offers sufficient caution or security to obey the orders and commandment of the church for the future.⁶⁸

CAUTIONER. In Scotch law, a surety; a bondsman; one who binds himself in a bond with the principal for greater security.⁶⁹

CAUTIONNEMENT. In French law, the same as becoming surety in English law.⁷⁰

48. Black L.D.

49. Bouvier L.D.

Also called "*Cautio pignoratitia*" Adams Gloss.

50. Bouvier L.D.

51. Bouvier L.D., quoting Erskine Inst. 2, 9, 59.

52. Standard D.

53. "*Intelligence*" is not a synonym for 'caution,' 'prudence,' or 'care.' A very intelligent man may be a very imprudent one, or an unusually and unnecessarily cautious one."—Van Cleve v. St. Louis, M. & S. E. R. Co., 101 S.W. 632, 634, 124 Mo.App. 224.

54. Cal.—People v. Anderson, 208 P. 324, 326, 58 Cal.App. 267.

55. Black L.D.

56. Black L.D.

57. Ont.—Re Lord, 30 Ont.L. 582, 586, 19 Dom.L.R. 809, 5 Ont.W.N. 912.

58. Tenn.—Bowen v. State, 9 Baxt. 45, 49, 50, 40 Am.R. 71.

59. U.S.—U. S. v. Hopkins, D.C.N.D., 26 F. 443, 444.

Similar definition

"Such caution as 'a person of ordinary prudence would use for his own protection under the same circumstances, in view of the danger to be avoided.'"—Jansen v. Southern Pacific Co., 89 P. 616, 617, 5 Cal.App. 12.

60. N.Y.—People v. Angelo, 159 N.E. 394, 395, 246 N.Y. 451.

61. Wyo.—Koppala v. State, 89 P. 576, 93 P. 662, 663, 15 Wyo. 398.

62. "*Ordinary care*" equivalent Neb.—Vertrees v. Gage County, 115 N.W. 863, 864, 81 Neb. 213. 11 C.J. p 42 note 78 [c].

63. U.S.—Arnold v. U. S., C.C.A. Colo., 94 F.2d 499, 505.

64. U.S.—Arnold v. U. S., supra.

Wyo.—Koppala v. State, 89 P. 576, 93 P. 662, 663, 15 Wyo. 398.

65. U.S.—Arnold v. U. S., C.C.A. Colo., 94 F.2d 499, 505.

66. Black L.D.

67. Pa.—Seisner v. Blake, 13 Pa.Co. 333.

So in an action on a note against a religious association, where it was alleged that defendant was endeavoring to sell its real estate before judgment on the note.—Witmer & Dundore v. Port Treverton Church, 17 Pa.Co. 38, 39.

68. Black L.D., citing Reg. Orig. p 66.

69. Black L.D.

As security for debt or appearance

"He is still a cautioner whether the bond be to pay a debt, or whether he undertake to produce the person of the party for whom he is bound."—Black L.D.

70. Black L.D.

CAUTIONRY. In Scotch law, suretyship.⁷¹

CAUTIOUS. Prudent, over prudent, timid, timorous, or fearful.⁷² While it has been said that the meanings "over prudent," "timorous," and "timid" are obsolete,⁷³ they have also been referred to as constituting the secondary meaning of the word and as indicating that there is a shade of difference in meaning between the words "cautious" and "prudent," the former sometimes suggesting the idea of timidity,⁷⁴ but in a particular connection and context it has been said that the two words are synonymous, or may be used interchangeably.⁷⁵

Phrases: "Prudent and cautious man,"⁷⁶ "really cautious,"⁷⁷ and "reasonably cautious and prudent person."⁷⁸

CAUTIOUSLY. In a cautious manner, as in the phrase "cautiously and carefully."⁷⁹

CAUTIVO. In Spanish law, captive.⁸⁰

CAUTUM INTELLIGITUR, SIVE PERSONIS, SIVE REBUS CAUTUM SIT.⁸¹

C. A. V. See Abbreviations 1 C.J.S. p 276 note 5.

CAVE. A hollow place in the earth;⁸² a subterranean cavity capable of being possessed and used by one who has no title to the surface of the real estate within which it lies.⁸³ It has been said that more often it is a natural cavity, but not necessarily so;⁸⁴ that it consists of the cavity and so much of the material above, about, and below the

cavity as is necessary to preserve and maintain the cavity; and that it may imply an ownership separate and apart from that of the remaining portion of the land.⁸⁵ The terms, "cave" and "building," have been compared see Building 12 C.J.S. p 382 note 38.

CAVE A SIGNATIS.⁸⁶

CAVEAT. Latin literally, "Let him beware."⁸⁷ In general, the term has been defined as meaning a formal notice or warning given by a party interested, to a court, judge, or ministerial officer against the performance of certain acts within his power and jurisdiction; an intimation given to some judge or officer notifying him to suspend a proceeding until the merits of the caveat are determined.⁸⁸ It has been said that a "caveat" is an objection to the issuance of papers in a particular proceeding;⁸⁹ that it is in the nature of an inhibition and has the effect of suspending proceedings;⁹⁰ and that it always precedes the act, and is never heard of as a means of undoing what has been already done.⁹¹

As used specifically in connection with the appointment of an executor or administrator, see the C.J.S. title Executors and Administrators § 56, also 23 C.J. p 1061 note 98; in patent law, see the C.J.S. title Patents § 130, also 48 C.J. p 168 note 85-p 169 note 91, and also 11 C.J. p 43 note 2; and in probate proceedings see the C.J.S. title Wills § 322, also 68 C.J. p 900 note 35.

CAVEAT ACTOR.⁹²

71. Black L.D.

72. Pa.—*McClafferty v. Philp*, 24 A. 1042, 1043, 151 Pa. 86—*Mahler v. Dunn*, 15 Pa.Dist. 273, 276.

73. Pa.—*Mahler v. Dunn*, supra.

74. Cal.—*People v. Anderson*, 203 P. 324, 326, 58 Cal.App. 267.

Pa.—*McClafferty v. Philp*, 24 A. 1042, 1043, 151 Pa. 86.

Wis.—*Eggett v. Allen*, 82 N.W. 556, 558, 106 Wis. 633.

75. Ark.—*Hurley v. Gus Blass Co.*, 88 S.W.2d 850, 851, 191 Ark. 917.

Neb.—*Suhr v. Lindell*, 277 N.W. 381, 385, 133 Neb. 856.

N.C.—*Malcolm v. Mooresville Cotton Mills*, 133 S.E. 7, 9, 191 N.C. 727.

76. Idea of timidity excluded by context

"The standard by which defendant's conduct should be tested is . . . that of an ordinarily cautious and prudent man. The word 'cautious,' when not so limited, may suggest the idea of timidity. . . . But the necessity of reasonable grounds of suspicion on the part of defendant had been impressed upon

the minds of the jury, and in view of this we do not think the omission of any qualifying word before 'prudent and cautious' was error."—*Jenkins v. Gilligan*, 108 N.W. 237, 238, 131 Iowa 176, 9 L.R.A., N.S., 1087.

77. Wis.—*Eggett v. Allen*, 82 N.W. 556, 557, 106 Wis. 633.

78. Vt.—*McAndrews v. Leonard*, 134 A. 710, 717, 99 Vt. 512.

79. N.Y.—*Horton v. New York Cent. R. Co.*, 200 N.Y.S. 365, 366, 205 App.Div. 763.

80. *Escriche Diccionario*.

81. A maxim meaning "He is considered safe who may be secured either in person or property."—*Adams Gloss*.

82. Mo.—*State v. Clark*, App., 238 S. W. 77, quoting *Century D*.

83. Ind.—*Marengo Cave Co. v. Ross*, App., 7 N.E.2d 59, 62.

84. Mo.—*State v. Clark*, App., 238 S.W. 77, quoting *Century D*.

85. Ind.—*Marengo Cave Co. v. Ross*, App., 7 N.E.2d 50, 62.

86. A proverb meaning "Beware of those who are marked," that is, avoid bad company.—*Adams Gloss*.

87. Pa.—*Kenyon v. Stewart*, 44 Pa. 179, 189.

88. Pa.—*In re Phillips' Estate*, 143 A. 9, 293 Pa. 351.
11 C.J. p 43 note 94.

89. Md.—*Barton v. Swainson*, 101 A. 607, 608, 130 Md. 630.

90. N.J.—*Slocum v. Grandin*, 38 N. J.Eq. 485, 488.

As injunction

"A caveat has the quality and effect of an injunction, and stays the proceedings to allow an opportunity of contesting the validity of a will, or the right to the administration, or the right to letters-patent."—*Adams Gloss*, citing 3 Blackstone Comm. pp 98, 246.

91. Pa.—*Kenyon v. Stewart*, 44 Pa. 179, 190.

92. A maxim meaning "Let the actor or doer beware, or be cautious," or "Let him beware of his own conduct."—*Adams Gloss*.

CAVEATEE. One cited under a caveat.⁹³

CAVEAT EMPTOR.⁹⁴ For applications of this maxim see particular C.J.S. titles, such as Executions § 221, also 23 C.J. p 654 note 38—p 655 note 51, Executors and Administrators §§ 293, 642, also 24 C.J. p 184 note 71—p 185 note 74, p 689 note 2—p 690 note 8, Guardian and Ward § 139, also 28 C.J. p 1201 note 5—p 1202 note 13, Judicial Sales § 39, also 35 C.J. p 75 note 65—p 78 note 5, Mortgages § 738, also 42 C.J. p 210 note 63—p 211 note 71, Partition § 204, also 47 C.J. p 566 notes 12—17, Receivers § 258, also 53 C.J. p 223 notes 7—16, Sales §§ 44, 169, 186, also 55 C.J. p 150 note 75—p 152 note 92, p 388 notes 8, 9, p 415 note 91—p 416 note 94, and Taxation §§ 905, 918, also 61 C.J. p 1304 note 99—p 1305 note 5, p 1328 notes 24, 25, p 1330 notes 48—51; and also the maxim in 11 C.J. p 43 note 4 [d], [e].

CAVEAT EMPTOR, QUI IGNORARE NON DEBUIIT QUOD JUS ALIENUM EMIT.⁹⁵

CAVEATOR. One who files a caveat.⁹⁶

CAVEAT SACERDOS NE DE HIIS QUI EI CONFITENTUR PECCATA SUA ALICUI RECITET QUOD EI CONFESSUS EST, NON PROPINQUIS NEC EXTRANEIS; QUOD SI FECERIT, DEPONATUR, ET OMNIBUS DIEBUS VITÆ SUÆ IGNOMINIOSIS PERGRINANDO PŒNITEAT.⁹⁷

CAVEAT VENDITOR.⁹⁸

CAVEAT VIATOR.⁹⁹

CAVENDUM EST A FRAGMENTIS.¹

CAVENDUM EST ETIAM NE MAJOR PŒNA, QUAM CULPA, SIT; ET NE IISDEM DE CAUSIS ALII PLECTANTUR, ALII NE APPELLENTUR QUIDEM.²

CAVENDUM TAMEN EST NE CAVELLANTUR RES JUDICATÆ, UBI LEGES CUM JUSTITIA RETROSPICIERI POSSINT.³

CAVE QUID DICIS, QUANDO, ET CUI.⁴

CAVERE. Latin, in the civil and common law, to take care, or to exercise caution; to take care or provide for; to provide by law; to give security, or to give caution or security on arrest.⁵

CAVERS. Persons stealing ore from mines in Derbyshire, punishable in the berghmote or miners' court; also officers belonging to the same mines.⁶

CAVIAR. A relish consisting of the roe of the sturgeon or other fish, pressed and salted; especially as prepared in Russia;⁷ and, in a particular connection, held to be correctly classified as "fish roe preserved for food purposes."⁸

CAVITY. A hollow, a hollow place, a void or empty space in a body.⁹

Phrases: "Hollow or cavity" and "rectangular cavity."¹⁰

93. U.S.—See *Turner v. American Security & Trust Co.*, App.D.C., 29 S.Ct. 420, 422, 213 U.S. 257, 53 L. Ed. 788.

94. A maxim meaning "Let the buyer beware (or take care)."—Black L.D.

"Caveat venditor" distinguished N.Y.—*Hargous v. Stone*, 5 N.Y. 73, 82—*Wright v. Hart*, 13 Wend. 449, 453.

95. A maxim meaning "Let a purchaser beware, who ought not to be ignorant that he is purchasing the rights of another. Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another." Black L.D.—11 C.J. p 44 note 5.

96. U.S.—*Turner v. American Security & Trust Co.*, App.D.C., 29 S.Ct. 420, 422, 213 U.S. 257, 53 L. Ed. 788.

97. A maxim meaning "Let the priest beware of telling any one, whether relatives or strangers, the sins that any one has confessed to him; if he has done this, let him be deposed and do a pilgrim's pen-

ance in shame all the days of his life."—Adams Gloss., citing 2 Best Evid. § 584.

98. A civil law maxim meaning "Let the seller beware."—Abbott L.D.

In English and American Jurisprudence

"'Caveat venditor' is sometimes used as expressing, in a rough way, the rule which governs all those cases of sales to which 'caveat emptor' does not apply."—Black L.D.

As applicable to executory contracts N.Y.—*Howard v. Hoey*, 23 Wend. 350, 353, 35 Am.D. 572.

In Roman law

"A maxim or rule, casting the responsibility for defects or deficiencies upon the seller of the goods, and expressing the exact opposite of the common law rule of 'caveat emptor.'"—Black L.D.

11 C.J. p 45 note 7 [a]. "Caveat emptor" distinguished see *Caveat Emptor ante*, note 94.

99. A maxim meaning "Let the traveler beware."—Black L.D.

1. A maxim meaning "Beware of

fragments," or, more freely, "Care is to be taken of small pieces."—Adams Gloss., citing Bacon, Aph. p 26.

2. A maxim meaning "Care is likewise to be taken in all cases that the penalty does not exceed the fault (the punishment does not exceed the guilt); and also that some men may not suffer for offenses for which others are not so much as called to account."—Adams Gloss.

3. A maxim meaning "It is, however, to be guarded against, that adjudged cases be not reversed, where the laws on a review appear to have had respect to justice."—Adams Gloss.

4. A proverb meaning "Be cautious what you say, when, and to whom."—Adams Gloss.

5. Black L.D.

6. Black L.D.

7. Standard D.

8. U.S.—*Hansen v. U. S.*, C.C.N.Y., 175 F. 392.

9. Century D.

10. U.S.—*Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co.*, C.C.A.Mich., 230 F. 120, 131.

CAYA. Latin, in old English law, a quay, kay, key, or wharf.¹¹

CAYAGIUM. Law Latin, in old English law, cayage or kayage; a toll or duty anciently paid the king for landing goods at a quay or wharf.¹²

CAYENNE PEPPER. An article of commerce that takes its name from Cayenne, South America, although the genuine Cayenne pepper is said never to have been imported and to be almost unknown to the trade in this country; in the commercial sense, the term has been defined as a preparation from the dried fruit of various species of capsicum, in which the ingredients are capsicum, rice flour, and other mixtures.¹³

Phrase: "Cayenne pepper . . . unground."¹⁴

CAZA. Spanish, literally, "chase, hunt."¹⁵

C. B. See Abbreviations 1 C.J.S. p 276 note 5.

C. C. See Abbreviations 1 C.J.S. p 276 note 5.

C. C. P. See Abbreviations 1 C.J.S. p 276 note 5.

CEAP. A bargain, anything for sale, a chattel; also cattle, as being the usual medium of barter. Sometimes used instead of "ceapgild."¹⁶

CEAPGILD. Payment or forfeiture of an animal; an ancient species of forfeiture.¹⁷

CEASE.

Present Tense

In its intransitive sense, it has been defined as meaning to be done away with or to be an extinction;¹⁸ to become extinct or pass away;¹⁹ to come to an end, or stop.²⁰ In its transitive sense, to put a stop to;²¹ to stop or put an end to.²²

"Cease" has been contrasted with "continue,"²³ and, in a particular connection, distinguished from "vacate and dismiss."²⁴ It has been said that "cease" is generally used to indicate cessation of activity rather than to describe an activity in opposition to that then existing;²⁵ that it implies a prior existence,²⁶ a discontinuance,²⁷ and permanent abandonment rather than mere temporary cessation;²⁸ and, under some circumstances, a discontinuance of purpose as distinguished from a cessation of physical existence.²⁹

Phrases: "Cease and determine,"³⁰ "cease issuing poll taxes,"³¹ "cease to act,"³² "cease to be a turnpike road,"³³ "cease to be operated,"³⁴ "cease to employ,"³⁵ "cease to occupy,"³⁶ "cease to reside,"³⁷ "seminary shall cease,"³⁸ "shall cease,"³⁹ and "shall cease to exist."⁴⁰

11. Black L.D.

12. Black L.D.

13. U.S.—Cruikshank v. U. S., N.Y., 59 F. 446, 447, 8 C.C.A. 171.
11 C.J. p 45 note 10.

14. U.S.—Cruikshank v. U. S., supra.

15. Velázquez Spanish-Eng.D.
11 C.J. p 45 note 11.

16. Black L.D.

17. Black L.D., citing Cowell.

18. Cal.—Thomason v. Ruggles, 11 P. 20, 23, 69 Cal. 465.
11 C.J. p 45 note 19.

19. Conn.—MacDonald v. Aetna Indemnity Co., 96 A. 926, 927, 90 Conn. 226.

20. Ark.—Martin v. Gray, 97 S.W. 2d 439, 441.

21. Cal.—Thomason v. Ruggles, 11 P. 20, 23, 69 Cal. 465.

Conn.—MacDonald v. Aetna Indemnity Co., 96 A. 926, 927, 90 Conn. 226.

22. U.S.—Huasteca Petroleum Co. v. Cia de Navegacao Lloyd Brasileiro, D.C.N.Y., 297 F. 318, 321.

23. "Continue" the opposite in meaning

"One cannot 'stop' or 'cease' doing a thing and at the same time continue its performance."—Martin v. Gray, Ark., 97 S.W.2d 439, 441.

24. U.S.—Huasteca Petroleum Co. v.

Cia de Navegacao Lloyd Brasileiro, D.C.N.Y., 297 F. 318, 321.

25. U.S.—Huasteca Petroleum Co. v. Cia de Navegacao Lloyd Brasileiro, supra.

26. Me.—Jordan v. Haskell, 63 Me. 189, 192.

27. Ark.—Martin v. Gray, 97 S.W.2d 439, 441.

28. Mich.—City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mutual Fire Ins. Co., 40 N.W. 777, 778, 72 Mich. 654, 16 Am.S.R. 552.

11 C.J. p 45 note 18 [c].

29. N.Y.—Canandarqua Academy v. McKechnie, 90 N.Y. 618, 626.

30. Pa.—Lantz v. Vermont L. Ins. Co., 21 A. 80, 82, 139 Pa. 546, 23 Am.S.R. 202, 10 L.R.A. 577.

31. Ark.—Martin v. Gray, 97 S.W.2d 439, 441.

32. Mich.—Peo. v. Plymouth Plank Road Co., 32 Mich. 248, 250.

Utah.—Van Cott v. Wall, 178 P. 42, 45, 53 Utah 282.

33. Eng.—Justices of Peace v. Rochdale, 8 App.Cas. 494, 503.

34. Mich.—City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mut. F. Ins. Co., 40 N.W. 777, 778, 72 Mich. 654, 16 Am.S.R. 552.

11 C.J. p 45 note 18 [c].

Permanent cessation implied

"The whole clause . . . shows that the parties contemplated a permanent cessation of operations."—Poss v. Western Assur. Co., 7 Lea, Tenn., 704, 708, 40 Am.R. 68.

35. "Discharge" equivalent

"The phrase 'cease to employ' is merely a euphemism for the word 'discharge.'"—Jacobs v. Cohen, 76 N. E. 5, 11, 183 N.Y. 207, 111 Am.S.R. 730, 2 L.R.A., N.S., 292, 5 Ann.Cas. 280.

36. Minn.—Jaenicke v. Fountain City Drill Co., 119 N.W. 60, 61, 106 Minn. 442—Quehl v. Peterson, 49 N.W. 390, 391, 47 Minn. 13.

37. N.J.—State v. Camden, 39 N.J. Law 57, 58.

38. N.Y.—Canandarqua Academy v. McKechnie, 90 N.Y. 618, 626.

39. U.S.—Huasteca Petroleum Co. v. Cia de Navegacao Lloyd Brasileiro, D.C.N.Y., 297 F. 318, 321.

Conn.—MacDonald v. Aetna Indemnity Co., 96 A. 926, 927, 90 Conn. 226.

"Shall be forfeited" equivalent

U.S.—Wallamet Falls, C. & L. Co. v. Kittridge, C.C.Or., 29 F.Cas.No.17, 105, 5 Reporter 104, 5 Sawy. 44, 45.

40. Pa.—Merwine v. Mt. Pocono Light & Improvement Co., 156 A. 150, 151, 304 Pa. 517.

Ceased

The preterit and past participle of "cease," which, in a particular connection, has been defined as meaning went out of existence, and has been held equivalent to "recalled,"⁴¹ "repealed,"⁴² and "revoked."⁴³

Phrases: "Ceased to be a newspaper of general circulation,"⁴⁴ "ceased to be a turnpike road,"⁴⁵ "ceased to be thereon,"⁴⁶ "ceased to do business" see Business 12 C.J.S. p 791 note 89, and "ceased to work."⁴⁷

Ceasing

Present participle of "cease."

Phrases: "Ceasing to do business" see Business 12 C.J.S. p 791 note 90, "ceasing to perform its duties,"⁴⁸ "ceasing to reside,"⁴⁹ and "seminary ceasing."⁵⁰

CEDAR. "Cedrela odorato," a cabinet wood of the mahogany group, capable of taking a high polish.⁵¹

CEDE. A word ordinarily defined as meaning to yield, surrender, or give up;⁵² but in particular connections, "cede" has been construed as having been used in a passive sense, and has been defined as meaning to be yielded up;⁵³ and also, under particular circumstances, as meaning to assign or transfer;⁵⁴ to grant, although used in its ordinary sense it has been distinguished from "grant."⁵⁵ It has

been said that "cede" is in no sense a technical word, but one in every day use, and that, while there is no difficulty as to its natural import and meaning, its precise meaning and signification depend somewhat upon the subject matter in connection with which it is used,⁵⁶ and in connection with what precedes and follows it.⁵⁷

Phrases: "Cede to said city,"⁵⁸ and "lands to cede to my said son John;"⁵⁹ also "Spain cedes Porto Rico to the United States."⁶⁰

CEDENT. In Scotch law, an assignor;⁶¹ specifically, one who transfers a chose in action.⁶²

CEDO. The ordinary word used in Mexican conveyances to pass title to lands, where it may be rendered also as "I deliver up, make over, or resign."⁶³

CEDULA. Law Latin, in English law, a schedule.⁶⁴

In Spanish law, written "cédula," the word is used in two principal senses; in the first, it applies to private instruments;⁶⁵ a personal identification paper;⁶⁶ or, more specifically, an act under private signature, by which a debtor admits the amount of the debt, and binds himself to discharge the same on a specified day or on demand;⁶⁷ in the second sense, the term is used for a variety of public documents;⁶⁸ and has been defined as a citation or a notice posted on the house door of a defendant in default,⁶⁹ or of a fugitive criminal, re-

41. Cal.—Oakland Paving Co. v. Hilton, 11 P. 3, 6, 69 Cal. 479.

42. Cal.—Thomason v. Ruggles, 11 P. 20, 23, 69 Cal. 465.

43. Cal.—Oakland Paving Co. v. Hilton, 11 P. 3, 6, 69 Cal. 479.

44. Cal.—In re Simpson, 217 P. 789, 790; 62 Cal.App. 549.

45. Eng.—Justices of Peace v. Reg., 8 App.Cas. 781, 789.

46. Me.—Jordan v. Haskell, 63 Me. 189, 192.

47. Alta.—Clark v. Moore, 1 Alta.L. 49, 53.

48. **Willful failure implied**

"This court has construed this language to mean 'the wilful and voluntary forsaking or relinquishment of the office or of the right to . . . the same, or a wilful or voluntary failure . . . to discharge its duties.'—City of Macon v. Bunch, 118 S.E. 769, 771, 156 Ga. 27.

49. N.J.—State v. Dilloway, 31 N. J.Law 42, 43.

50. N.Y.—Canandarqua Academy v. McKechnie, 90 N.Y. 618, 626.

51. U.S.—In re Myers, C.C.N.Y., 69 F. 237, 239.

"Cedar" without a qualifying term

"It is a very significant fact that this cedrela . . . is the only wood in the United States which is known as 'cedar' pure and simple."—In re Myers, supra.

"Cedar" with qualifying terms

"All the other varieties have some qualifying term placed before them, such as white-cedar, Spanish-cedar, red-cedar, etc."—In re Myers, supra.

52. Md.—Baltimore v. Baltimore & Y. Turnp. Road, 31 A. 420, 421, 80 Md. 535.

N.J.—Somers v. Pierson, 16 N.J.Law 181, 184.

53. N.J.—Somers v. Pierson, supra.

54. Wharton L.Lex.

Transfer of title and sovereignty

"When one nation 'cedes' territory to another, it hands over the title and sovereignty, good as against all the world. But this does not necessarily determine in what way it shall be held by the new sovereign."—Goetze v. U. S., C.C.N.Y., 103 F. 72, 77, reversed on other grounds 21 S. Ct. 742, 182 U.S. 221, 45 L.Ed. 1065.

55. Md.—Baltimore v. Baltimore &

Y. Turnp. Road, 31 A. 420, 421, 80 Md. 535.

56. Md.—Baltimore v. Baltimore & Y. Turnp. Road, supra.
N.J.—Somers v. Pierson, 16 N.J.Law 181, 184.

57. N.J.—Somers v. Pierson, supra.

58. Md.—Baltimore v. Baltimore & Y. Turnp. Road, 31 A. 420, 421, 80 Md. 535.

59. N.J.—Somers v. Pierson, 16 N.J. Law 181, 184.

60. U.S.—Goetze v. U. S., C.C.N.Y., 103 F. 72, 77.

61. Burrill L.D.

62. Black L.D.

63. Cal.—Mulford v. Le Franc, 26 Cal. 88, 108.

64. Adams Gloss.

65. Escriche Diccionario.

11 C.J. p 46 notes 42-45.

66. Porto Rico.—García v. Garzot, 13 Porto Rico 835, 840—Banco Español de Puerto Rico v. Bolívar, 7 Porto Rico 68, 83.

67. Black L.D.

68. Escriche Diccionario.

11 C.J. p 46 note 42-p 47 note 48.

69. Escriche Diccionario.

quiring him to appear before the court where the accusation is pending.⁷⁰

CEDULE. In French law, a note in writing;⁷¹ the technical name of an act under private signature.⁷²

CEDULÓN. In Spanish law, a summons to an absent or absconded defendant; an edict of excommunication; also a poster tending to discredit some individual.⁷³

CELADA. In Spanish law, the concealment of a person so as to facilitate his commission of a crime; also deceit, fraud, etc.⁷⁴

CELATION. In medical jurisprudence, concealment of pregnancy or delivery.⁷⁵

CELDRA. In old English law, a chaldron; in old Scotch law, a measure of grain, otherwise called a "chalder."⁷⁶

CELEBRATE. In a particular connection, "celebrate" has been held equivalent to "solemnize."⁷⁷

Phrase: "To solemnize or celebrate."⁷⁸

CELESTIAL MARRIAGE. A form of marriage in the mormon church, solemnized by a duly constituted church authority or "by the holy and eternal priesthood of the saints," is designated a "celestial" or "patriarchal" marriage" and is binding not only during this life but also throughout the life to come.⁷⁹ It has been said that "celestial marriage" is a matter of general history and may fairly be presumed to be a matter of common knowledge;⁸⁰ and has been held equivalent to "marriage for time and eternity" and "patriarchal marriage;" and distinguished from "marriage for time only."⁸¹ Judicial notice of celestial marriage see the C.J.S. title Evidence § 93, also 23 C.J. p 160 note 54. "Celestial mar-

riage," as related to the constitutional prohibition against polygamous unions see the C.J.S. title Marriage § 1, also 38 C.J. p 1274 note 11 [a], and as constituting a valid common-law marriage see the C.J.S. title Marriage § 35, also 38 C.J. p 1320 note 46 [a] (2).

CELIBACY. The condition or state of life of an unmarried person.⁸²

CELIBATO. In Spanish law, the state of being unmarried.⁸³

CELL. A very small room, often not much larger than many closets in private houses.⁸⁴ As not included within the term "building" see Building 12 C.J.S. p 383 note 6, and as not constituting, when applied to a group of cells, a "permanent county building" see Building 12 C.J.S. p 388 note 46.

CELLAR. A room or set of rooms below the surface of the ground and usually under a building;⁸⁵ sometimes a room under a sidewalk.⁸⁶ In a particular connection, "cellar" has been defined by statute as meaning a story more than one half below the level of the curb.⁸⁷ "Cellar" has been held synonymous with "vault,"⁸⁸ and has been compared with, and distinguished from, "basement," see Basement 9 C.J.S. p 1554 note 47, and, when under the sidewalk, has been held to be sometimes equivalent to "areaway," see Areaway 6 C.J.S. p 332 note 44. The word has also been used to designate a receptacle on the truck of a railroad car or engine placed underneath the bearing of the axle for the purpose of keeping the bearing properly oiled while in motion; see C.J.S. title Railroads § 1, and also 11 C.J. p 47 note 58.

CELLERARIUS. A butler in a monastery; sometimes in universities called "manciple" or "caterer."⁸⁹

70. Black L.D.

71. Adams Gloss.

72. La.—Campbell v. Nicholson, 3 La. Ann. 458, 461.

73. Escriche Diccionario.

74. Escriche Diccionario.

75. Black L.D.

76. Black L.D.

77. N.J.—Pearson v. Howey, 11 N. J. Law 12, 19.

78. N.J.—Pearson v. Howey, supra.

79. Idaho.—Toncray v. Budge, 95 P. 26, 36, 14 Idaho 621.

An eternal relationship

"Respecting celestial marriage it is said: 'Marriage, as regarded by the Latter-Day Saints, is ordained of God, and designed to be an eternal

relationship of the sexes. With this people it is not merely a temporal contract to be of effect on earth during the mortal existence of the parties, but a solemn agreement which is to extend beyond the grave. In the complete ceremony of marriage, as prescribed by the church, the man and the woman are placed under covenant of mutual fidelity,—not 'until death do you part,' but 'for time and for all eternity.'"—Hilton v. Roylance, 69 P. 660, 665, 669, 25 Utah 129, 95 Am.S.R. 321, 58 L.R.A. 723, quoting Talmage, Articles of Faith p 457.

80. Utah.—Hilton v. Roylance, supra.

81. Idaho.—Toncray v. Budge, 95 P. 26, 36, 14 Idaho 621.

82. Black L.D.

83. Escriche Diccionario.

84. U.S.—Pauly Jail-Bldg. & Mfg. Co. v. Kearney County, Kan., 68 F. 171, 173, 15 C.C.A. 351.

85. Webster D.

86. Neb.—State v. Armstrong, 149 N.W. 786, 788, 97 Neb. 343, Ann. Cas.1917A 554.

87. N.J.—Board of Tenement House Supervision v. Schlechter, 83 A. 783, 784, 33 N.J. Law 88.
N.Y.—People v. Butler, 109 N.Y.S. 900, 904, 125 App.Div. 384.

88. Tex.—Bigham v. State, 20 S.W. 577, 31 Tex.Cr. 244, 249.

89. Black L.D.

CELLULAR BOX. See Box 11 C.J.S. p 762 note 41.

CELLULOID. An arbitrary and fanciful trade-name for various compounds of pyroxyline.⁹⁰

CELLULOSE. A carbohydrate in which the carbon and water are united in the same proportion as in starch, the difference being in the structure of the molecules; it has been said to be the principal component of paper or wood and the common raw material employed in the arts of paper and wood-pulp manufacture.⁹¹

CEMENT. In its ordinary commercial sense, the word has been defined as a substance used in a soft or pasty state to join stones or bricks in a building, etc., which afterward becomes hard like stone.⁹² In a larger sense, the word has been defined as meaning any substance used by men or animals for making bodies adhere to each other, as glue, sealing wax, starch paste, etc.⁹³ "Cement," as commonly used, implies that a substance is dissolved in a solvent, and when the solvent is evaporated the cement hardens, and binds the layers of material together.⁹⁴ It has been said that the word "cement" has

various significations, its precise definition depending on the circumstances of its use; that it has the ordinary commercial meaning of hydraulic cement, and also a larger, and perhaps more generally accepted, sense.⁹⁵

Natural cement. The quick-setting product of a low-temperature kiln burning a cement rock of irregular composition.⁹⁶

Portland cement. The slow-setting product of a high-temperature kiln burning a pulverized cement rock, or mixture of clay and limestone of a very exact and regular composition.⁹⁷

Other phrases: "A thin layer of heat and moisture-proof glue or cement;" also, as a verb, "cemented together."⁹⁸

CEMENTERIO. In Spanish law, cemetery.⁹⁹

CEMENTING. A specific method of uniting substances; and "cementing" has been compared with other specific methods of securing materials together, such as "nailing," "pegging," "riveting," "sewing," "soldering," "vulcanizing," and "welding."¹

90. U.S.—Celluloid Mfg. Co. v. Cellulose Mfg. Co., C.C.N.J., 32 F. 94, 96.

Properties and use

"The substance has had a wide reputation and popularity on account of its beauty and utility, and the great number of uses of varied character to which it can be adapted. It has been extensively used for the outside portion of collars and cuffs, whereby these articles became impervious to water, and retained the smoothness and glossiness of highly starched linen; but celluloid cuffs are easily distinguished from starched linen cuffs."—Celluloid Mfg.

Co. v. Read, C.C.Conn., 47 F. 712, 713.

91. U.S.—Bauer Bros. Co. v. Bogalusa Paper Co., C.C.A.La., 96 F.2d 991, 993.

92. Webster New Int.D.

As an article of produce

"We think cement, which is taken from the earth, manufactured, and made an article of merchandise, should be regarded as an article of produce."—Haebler v. New York Produce Exch., 44 N.E. 87, 90, 149 N.Y. 414.

93. Webster New Int.D.

94. U.S.—Brunswick-Balke-Collender

Co. v. Seamless Rubber Co., D.C. Conn., 27 F.2d 925, 926.

95. U.S.—American Sulphite Pulp Co. v. Howland Falls Pulp Co., Me., 80 F. 395, 404, 25 C.C.A. 500.

96. U.S.—Donaldson v. Roksament Stone Co., C.C.N.Y., 170 F. 192, 193.

97. U.S.—Donaldson v. Roksament Stone Co., supra.

98. U.S.—Brunswick-Balke-Collender Co. v. Seamless Rubber Co., D.C. Conn., 27 F.2d 925, 926.

99. Escriche Diccionario.

11 C.J. p 43 notes 64-66.

1. Brunswick-Balke-Collender Co. v. Seamless Rubber Co., supra.

CEMETERIES

This Title includes lands used for burial of the dead, whether in churchyards or other places, and regulations relating thereto; organization, franchises, and powers of companies formed to provide and maintain such places; and rights, duties, and liabilities of such companies and of purchasers of lots or other rights or privileges in respect of property.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definitions and Kinds

A cemetery is a place or area of ground set aside for the burial of the dead. There are two classes of cemeteries, public and private.

A cemetery is a place where the dead bodies of human beings are buried;¹ it is a place or area of ground set apart for the burial of the dead,² either by public authority or private enterprise.³ The term is synonymous with graveyard,⁴ burial ground,⁵ and place of burial,⁶ and it includes not only lots for depositing the bodies of the dead, but also such avenues, walks, and grounds as may be necessary for its use or for ornamental purposes.⁷ The term "graveyard" is also defined as a place for the burial of the dead.⁸ The terms "cemetery," "burying ground," and "graveyard," as used in tax exemption laws are defined in the C.J.S. title in Taxation § 292, also 61 C.J. p 490 notes 38-40, 44. Because of its inherent nature, a burial ground is not subject to laws of ordinary property nor liable to be devoted to common uses.⁹

The law contemplates two classes of cemeteries, public and private.¹⁰ The former class is used by the general community or neighborhood or church, while the latter is used only by a family or a small

portion of a community.¹¹ A public cemetery is as much a public place as a courthouse or a market.¹²

§ 2. Establishment and Regulation

A cemetery is created by setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground as a place of burial. The state in the exercise of its police power has the right to provide for the establishment and discontinuance of cemeteries and to regulate their use, and this power it can delegate to municipalities or other qualified agencies of local government.

A cemetery is not created merely by the use of a tract of land for the burial of the dead, but it is created by the act of setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground as a place of burial.¹³ The use of ground for a public or private cemetery is not unlawful,¹⁴ but private interests in the place of burial are so far public that they are subject to the control of the public authorities having charge of police regulations,¹⁵ and the state in the exercise of its police power has the right to provide for the establishment and discontinuance of cemeteries and to regulate their use,¹⁶ including the right to require the removal

1. Ind.—Winters v. State, 9 Ind. 172, 11 C.J. p 50 note 1.

2. Ill.—Village of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

Kan.—City of Wichita v. Schwertner, 286 P. 266, 130 Kan. 397.

Tex.—Damon v. State, Com.App., 52 S.W.2d 368—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13, 11 C.J. p 50 note 2.

3. Tex.—Damon v. State, Com.App., 52 S.W.2d 368—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.

4. La.—Metairie Cemetery Assoc. v. Board of Assessors, 37 La. Ann. 32.

5. Mass.—Jenkins v. Andover, 103 Mass. 94, 104, 4 Am.R. 555.

Mo.—Fore v. Hoke, 48 Mo.App. 254, 262.

6. La.—Metairie Cemetery Assoc. v. Board of Assessors, 37 La. Ann. 32.

7. Ohio.—Wrey v. Nowlin, 19 Ohio N.P.N.S., 484.

S.C.—Board of Com'rs for Clarendon County v. Holladay, 189 S.E. 885, 182 S.C. 510, 109 A.L.R. 1496.

Tex.—Damon v. State, Com.App., 52 S.W.2d 368—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.

11 C.J. p 50 note 6.

8. Kan.—Gray v. Craig, 172 P. 1004, 103 Kan. 100.

23 C.J. p 824 note 32.

9. Pa.—St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa.Super. 146.

10. Kan.—City of Wichita v. Schwertner, 286 P. 266, 130 Kan. 397.

N.Y.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 553, affirmed 219 N.Y.S. 413, 213 App.Div. 682.

11 C.J. p 50 note 7.

Only two classes
Mo.—Mount v. Yount, 281 S.W. 119, 220 Mo.App. 187.

"Old family graveyard" in exception in deed not only identifies the land excepted, but indicates the purpose of the exception, and the persons benefited by it, and such exception is for the sole purpose of a graveyard, and for the interment only of persons answering the description of members of the grantor's family, which included his lineal descendants generally.—Brown v. Anderson, 11 S.W. 607, 608, 88 Ky. 577, 11 Ky.L. 107.

11. Kan.—City of Wichita v. Schwertner, 286 P. 266, 130 Kan. 397.

S.C.—County Board of Com'rs for Clarendon County v. Holladay, 189 S.E. 885, 888, citing *Corpus Juris*.

11 C.J. p 50 note 8.

Use of family ground by public

The use of land by the public with the consent of the owner for burial purposes for a hundred years creates a public cemetery, although originally it was used only for burial of the owner's family.—In re Hunlock's

Creek Cemetery, 16 Pa.Dist. & Co. 152.

12. Kan.—Cemetery Assoc. v. Meninger, 14 Kan. 312.

Tex.—Peterson v. Stolz, Civ.App., 269 S.W. 113, 117, quoting *Corpus Juris*.

13. Ill.—Village of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

Abandonment for all other purposes results in law from the setting apart and appropriation of land as burial ground.—Smallwood v. Midfield Oil Co., Tex.Civ.App., 89 S.W.2d 1086, error dismissed.

14. Tex.—Farb v. Theis, Civ.App., 250 S.W. 290.

15. U.S.—Gamage v. Masonic Cemetery Ass'n, D.C.Cal., 31 F.2d 308, reversed on other grounds Masonic Cemetery Ass'n v. Gamage, C.C.A., 38 F.2d 950, 71 A.L.R. 1027, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

Mich.—Wetherby v. City of Jackson, 249 N.W. 484, 264 Mich. 146.

N.C.—Shields v. Harris, 130 S.E. 189, 190 N.C. 520.

11 C.J. p 50 note 11.

16. Ala.—Alosi v. Jones, 174 So. 774, 234 Ala. 391.

Ill.—Catholic Bishop of Chicago v. Village of Palos Park, 121 N.E. 561, 286 Ill. 400.

Ind.—Park Hill Development Co. v. City of Evansville, 130 N.E. 645, 190 Ind. 432.

of the remains of persons theretofore buried.¹⁷ The exercise of the police power with regard to cemeteries is subject to the usual constitutional limitations,¹⁸ and the only basis for its exercise is protection of the life, health, comfort, and well-being of the community.¹⁹ As burial places are indispensable and concern the public health, they are not the subject of absolute prohibition by legislative action.²⁰ The exercise of the police power is not prevented by provisions in corporate charters under which lands are held for burial purposes,²¹ for neither the state nor a municipality can preclude itself from enacting laws prohibiting burials in places where they constitute a public nuisance,

and notwithstanding a charter has been granted to a cemetery association, the state or a municipality is not precluded from prohibiting further burials in the cemetery because of changed conditions rendering such further burials dangerous to health.²² However, a corporation cannot be deprived of its charter rights by an attempt at regulation which cannot be justified as an exercise of the police power.²³

The power existing in the legislature to regulate the establishment and maintenance of cemeteries and places of burial may be delegated by the legislature to municipalities or other qualified agencies of local government.²⁴ A statute which con-

Md.—Gordon v. Commissioners of Montgomery County, 184 A. 676, 164 Md. 210.

N.Y.—Moritz v. United Brethren Church on Staten Island, 199 N.E. 29, 269 N.Y. 125, reversed on other grounds 278 N.Y.S. 342, 244 App. Div. 121—Baylis v. Van Nostrand, 162 N.Y.S. 831, 176 App. Div. 396—Wojtkowiak v. Evangelical Lutheran St. John's Church of Buffalo, 255 N.Y.S. 180, 142 Misc. 264, reversed on other grounds 259 N.Y.S. 481, 236 App. Div. 411, affirmed 185 N.E. 779, 261 N.Y. 656.

Tenn.—Mensi v. Walker, 26 S.W.2d 132, 160 Tenn. 468, appeal dismissed Walker v. Mensi, 51 S.Ct. 363, 283 U.S. 791, 75 L.Ed. 1417.

11 C.J. p 50 note 12—12 C.J. p 915 note 81.

Exhumation or removal of dead bodies see C.J.S. title Dead Bodies § 4, also 17 C.J. p 1140 note 28—p 1142 note 66.

Conditions for location of cemetery

The state in its exercise of the police power may declare the conditions under which a cemetery may be located.—Mensi v. Walker, 26 S.W.2d 132, 160 Tenn. 468, appeal dismissed Walker v. Mensi, 51 S.Ct. 363, 283 U.S. 791, 75 L.Ed. 1417.

Operation of mortuaries

General cemetery act which if interpreted to permit operation of mortuaries in cemeteries, applied to each member of a general class of lot owners in California cemeteries was not invalid as discriminatory.—Vesper v. Forest Lawn Cemetery Ass'n, Cal.App., 67 P.2d 368.

Land draining into stream used for water supply

Act precluding use for burial of dead of any land, drainage from which passed into any stream furnishing all or part of water supply of any city, except beyond distance of one mile from such city, does not apply to land which drained into river more than three miles down stream from pumping station supplying city with water.—Common-

wealth Trust Co. of Pittsburgh v. Allegheny Cemetery, 187 A. 506, 324 Pa. 78.

Statutes limited to public cemeteries

(1) Where the legislature has enacted one set of laws for public cemetery associations and another set for cemeteries owned and conducted by private persons or religious corporations, a cemetery owned and operated by a religious corporation is not governed by the statutes applicable to public cemetery associations.—In re Front Street, Sewer Assessment, 163 N.W. 978, 138 Minn. 67.

(2) A statute expressly limited to public or common cemeteries does not apply to private cemeteries.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 219 N.Y.S. 413, 218 App. Div. 682, affirming 217 N.Y.S. 413, 127 Misc. 558.

17. U.S.—Masonic Cemetery Ass'n v. Gamage, C.C.A. Cal., 38 F.2d 950, 71 A.L.R. 1027, reversing, D.C., Gamage v. Masonic Cemetery Ass'n, 31 F.2d 308, and certiorari denied 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

Cal.—Bean v. Odd Fellows Cemetery, 18 P.2d 667, 217 Cal. 787—Seale v. Masonic Cemetery Ass'n, 18 P.2d 667, 217 Cal. 286.

N.C.—Humphrey v. Front St. M. E. Church, 13 S.E. 793, 109 N.C. 132.

Pa.—Craig v. Pittsburgh First Presb. Church, 88 Pa. 42, 32 Am.R. 417.

18. U.S.—Gamage v. Masonic Cemetery Ass'n, D.C. Cal., 31 F.2d 308, reversed on other grounds, C.C.A., Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 1027, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

19. Ind.—Park Hill Development Co. v. City of Evansville, 130 N.E. 645, 190 Ind. 432.

Exercise of police power generally see C.J.S. title Constitutional Law § 175, also 12 C.J. p 908 note 22 et seq.

20. Ill.—Village of Villa Park v.

Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

11 C.J. p 51 note 18.

21. Ill.—Lakeview v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am.R. 71. Mass.—Woodlawn Cemetery v. Everett, 118 Mass. 354—Sohier v. Trinity Church, 109 Mass. 1.

22. Mo.—Union Cemetery Assoc. v. Kansas City, 161 S.W. 261, 252 Mo. 466.

23. Ill.—People v. John Doe of Rosehill Cemetery Co., 166 N.E. 112, 334 Ill. 555.

11 C.J. p 51 note 14.

Regulation as to headstones

Statute prohibiting one in control of cemetery from prohibiting erection of headstones approved by government for soldiers' graves was held invalid.—People v. John Doe of Rosehill Cemetery Co., 166 N.E. 112, 334 Ill. 555.

24. Ala.—Alosi v. Jones, 174 So. 774, 776, citing *Corpus Juris*.

Md.—Gordon v. Commissioners of Montgomery County, 164 A. 676, 164 Md. 210.

Mich.—Wetherby v. City of Jackson, 249 N.W. 484, 264 Mich. 146, citing *Corpus Juris*.

Ohio.—Fraser v. Lee, 8 Ohio App. 235.

11 C.J. p 51 note 23.

County commissioners

Md.—Gordon v. Commissioners of Montgomery County, 164 A. 676, 164 Md. 210.

Determination of facts

Legislature may enact law and delegate power to court or municipal legislative body authorized to determine facts under which law should be applied.—Mensi v. Walker, 26 S.W.2d 132, 160 Tenn. 468, appeal dismissed Walker v. Mensi, 51 S.Ct. 363, 283 U.S. 791, 75 L.Ed. 1417.

Removal of bodies buried within city limits

Cal.—Bean v. Odd Fellows Cemetery Ass'n, 18 P.2d 667, 217 Cal. 787—Seale v. Masonic Cemetery Ass'n, 18 P.2d 667, 217 Cal. 286.

fers upon a local governmental agency a wholly unregulated discretion to allow or prevent establishment or maintenance of a cemetery is invalid,²⁵ but a statute is not unconstitutional where arbitrary power is not granted,²⁶ as where the use by the local agency of the authority granted is to be based on the exercise of the police power.²⁷

Crematories. The police power may be invoked to prevent the establishment of a crematory only where the public health, safety, convenience, or welfare is or may be jeopardized. The fact that the advance of the market value of property in the neighborhood may be retarded is not a ground.²⁸

§ 3. — By Municipal Corporations

- a. In general
- b. Establishment and management of municipal cemetery

a. In General

A municipality may adopt reasonable regulations with respect to burial places under express legislative authority or under its general police powers. However, it must not act arbitrarily or unreasonably.

The burial of the dead and the maintenance of cemeteries is not a municipal affair subject to

regulation only under the express powers conferred by the charter of the municipality, but it is a subject for regulation under legislative enactment or under the police power.²⁹ A municipality may adopt reasonable regulations with respect to burial places within its limits under express legislative authority or grant of power for the purpose,³⁰ or under its general powers to safeguard the public health, welfare, and safety.³¹ Such power must not be exercised in an arbitrary or unreasonable manner,³² or in such a manner as to be discriminatory or creative of a monopoly.³³ The power when thus possessed is a continuing power which may be exercised by the municipality from time to time as the public health and welfare may require,³⁴ and it may prohibit future burials in existing cemeteries or the establishment of new cemeteries within specified portions of their corporate limits,³⁵ prevent the extension or enlargement of cemeteries already existing,³⁶ or require the removal of bodies from a cemetery already existing.³⁷ An ordinance is not arbitrary, unreasonable, or unjustly discriminatory because it permits the continued existence and operation of other well kept cemeteries in the district and prohibits future burials in a certain cemetery which is greatly neg-

25. Md.—Commissioners of Prince George's County v. Northwest Cemetery Co., 154 A. 452, 160 Md. 653.

26. Tenn.—Mensi v. Walker, 26 S. W.2d 132, 160 Tenn. 468, appeal dismissed Walker v. Mensi, 51 S. Ct. 363, 283 U.S. 791, 75 L.Ed. 1417.

Regulations as to location of burial places generally see *infra* § 15.

Declaration of conditions to be met
Tenn.—Mensi v. Walker, *supra*.

27. Md.—Gordon v. Commissioners of Montgomery County, 164 A. 676, 164 Md. 210.

Home rule

Statute placing cemeteries and other projects in a certain county under supervision of county commissioners was held not invalid extension of commissioners' authority in disregard of home rule amendment to constitution, where privilege under such amendment was not exercised within county.—Gordon v. Commissioners of Montgomery County, *supra*.

28. Cal.—Abbey Land, etc., Co. v. San Mateo County, 139 P. 1068, 167 Cal. 434, 52 L.R.A., N.S., 408, Ann.Cas.1915C 804.

29. U.S.—Masonic Cemetery Ass'n v. Gamage, C.C.A.Cal., 38 F.2d 950, 71 A.L.R. 1027, reversing, D.C., Gamage v. Masonic Cemetery Ass'n, 31 F.2d 308, and certiorari

denied 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

30. Ala.—Alosi v. Jones, 174 So. 774, 234 Ala. 391.

Tex.—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.
11 C.J. p 51 note 25.

31. Tex.—Ex parte Adlof, *supra*.
11 C.J. p 51 note 24.

32. N.Y.—Moritz v. United Brethren Church on Staten Island, 278 N.Y.S. 342, 244 App.Div. 121, reversed on other grounds 199 N.E. 29, 269 N.Y. 125.

Tex.—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.
11 C.J. p 51 note 26.

33. Ala.—Bryan v. Birmingham, 45 So. 922, 154 Ala. 447, 129 Am.S.R. 63.

Cal.—Ex p. Bohen, 47 P. 55, 115 Cal. 372, 36 L.R.A. 618.

R.I.—Iuszkewicz v. Luther, 76 A. 829, 30 R.I. 570.
11 C.J. p 52 note 27.

34. N.Y.—Peo. v. Pratt, 29 N.E. 7, 129 N.Y. 68.

35. Mo.—German Evangelical Protestant Congregation of Church of Holy Ghost v. Schreiber, 209 S.W. 914, 277 Mo. 113, certiorari dismissed Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost, 40 S.Ct. 9, 250 U.S. 677, 63 L.Ed. 1202.

11 C.J. p 52 note 29.

Plenary power

Ala.—Alosi v. Jones, 174 So. 774, 234 Ala. 391, citing *Corpus Juris*.

36. N.Y.—Moritz v. United Brethren Church on Staten Island, 199 N.E. 29, 269 N.Y. 125, reversed on other grounds 278 N.Y.S. 342, 244 App.Div. 121.

11 C.J. p 52 note 30.

Exception in New York City charter

Greater New York municipal charter section prohibiting any person, association, or corporation from using any land for cemetery purposes in Richmond county was held to except Richmond county from general provisions of general statute providing for acquisition of property by religious corporations for cemetery purposes.—Moritz v. United Brethren Church on Staten Island, *supra*.

37. U.S.—Masonic Cemetery Ass'n v. Gamage, C.C.A.Cal., 38 F.2d 950, 71 A.L.R. 1027, reversing, D.C., Gamage v. Masonic Cemetery Ass'n, 31 F.2d 308, and certiorari denied 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

Cal.—Bean v. Odd Fellows Cemetery Ass'n, 18 P.2d 667, 217 Cal. 787—Seale v. Masonic Cemetery Ass'n, 13 P.2d 667, 217 Cal. 286.

N.C.—Humphrey v. Front St. M. E. Church, 13 S.E. 793, 109 N.C. 132.

lected,³⁸ or directs the removal of bodies from the neglected cemetery where it is a menace to the safety of life and property in the district.³⁹ However, an ordinance which prohibits further burials in a cemetery not because of the fact that they would endanger the public health, but because the continued existence of the cemetery is detrimental to neighborhood real estate values, is so unreasonable and oppressive that it cannot be sustained as a valid exercise of the police power.⁴⁰ The adequacy of existing burying grounds may be considered in allowing or disallowing the reopening of a cemetery.⁴¹ An ordinance forbidding the establishment of a new cemetery applies to prevent burial in a cemetery laid out but in which no bodies have been interred.⁴² An ordinance promulgating a rule on which the state has already legislated is invalid.⁴³ In the absence of authority from the legislature, a municipality has no control over cemeteries established outside of the city limits.⁴⁴

b. Establishment and Management of Municipal Cemetery

When expressly so authorized, a municipality may

own and maintain cemeteries. It may exercise general control over a cemetery owned by it, but must not exercise the control in an arbitrary, unreasonable, or capricious manner.

When permitted by statute or by charter, a city has power to acquire land for cemetery purposes and to maintain cemeteries,⁴⁵ and, although not expressly stated in the grant of power, it may do this outside the city limits.⁴⁶ Power granted by a city charter to purchase grounds for cemetery purposes outside the city is not inconsistent with a statute empowering purchase of lands for such purposes within the city limits.⁴⁷ Under a charter giving a city authority to establish cemeteries, it has discretion to judge of their necessity and to select their location.⁴⁸ Where a statute authorizes a town to own and manage a cemetery, a conveyance of land to the trustees of the town for use as a cemetery vests title in the town.⁴⁹

A city may, of course, exercise general control over a cemetery owned by it;⁵⁰ but such control must not be exercised in an arbitrary, unreasonable, or capricious manner,⁵¹ and the city is governed by the same rules as control private corporations engaged in a similar business under like

38. Ala.—*Alosi v. Jones*, 174 So. 774, 234 Ala. 391.

39. U.S.—*Masonic Cemetery Ass'n v. Gamage*, C.C.A.Cal., 38 F.2d 950, 71 A.L.R. 1027, reversing, D.C., *Gamage v. Masonic Cemetery Ass'n*, 31 F.2d 308, and certiorari denied 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

40. Mo.—*Union Cemetery Assoc. v. Kansas City*, 161 S.W. 261, 252 Mo. 466.

41. Ala.—*Alosi v. Jones*, 174 So. 774, 234 Ala. 391.

42. Minn.—*State v. Harrington*, 209 N.W. 6, 167 Minn. 410.

43. **Depth of graves**
Borough was powerless to require certificates of inspection by ordinance regulating depth of graves after state health department promulgated similar rule as to same subject matter.—*Commonwealth v. Dickey*, 175 A. 285, 115 Pa.Super. 164.

44. Ind.—*Begein v. Anderson*, 28 Ind. 79.—*Bogert v. Indianapolis*, 13 Ind. 134.

45. Iowa.—*Duntz v. Ames Cemetery Ass'n*, 186 N.W. 443, 192 Iowa 1341. Tenn.—*Town of Pulaski v. Ballentine*, 284 S.W. 370, 153 Tenn. 393.

Statute pertaining to town not applicable to city

Comp.St.1921, § 4311, authorizing town trustees to enter into an optional contract for the purchase of lands for cemetery purposes, and requiring calling an election to vote on such purchase, is not applicable to a

city of the first class, under § 4310.—*Huston v. City of Miami*, 224 P. 316, 98 Okl. 35.

46. **Permission to bury nonresidents**
Priv.Acts 1925 c 475, amending Acts 1903 c 269, conferring upon town right to acquire property for cemetery, was held not invalid because permission was granted to allow burial of people who had resided outside town.—*Town of Pulaski v. Ballentine*, 284 S.W. 370, 153 Tenn. 393.

47. Okl.—*City of Tulsa v. Purdy*, 174 P. 759, 73 Okl. 98.

48. Ind.—*Greencastle v. Hazelett*, 23 Ind. 186.

49. Ky.—*City of Hartford v. Gillespie*, 86 S.W.2d 1003, 260 Ky. 833.

50. Ga.—*Nicolson v. Daffin*, 83 S.E. 658, 142 Ga. 729.

Mich.—*Wetherby v. City of Jackson*, 249 N.W. 484, 264 Mich. 146.

Mo.—*Hammersley v. La Forge*, App., 80 S.W.2d 211.

Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Graves and vaults

(1) An ordinance of a city owning and maintaining a cemetery which provides that no person other than the city brick mason and gravedigger should dig graves or construct vaults in the cemetery has been held not unconstitutional nor unreasonable.—*City Council of Augusta v. Bredenberg*, 91 S.E. 486, 146 Ga. 459.

(2) There is also authority holding that an ordinance prohibiting one from digging a grave in the cemetery for compensation without consent of the superintendent thereof is unreasonable and unconstitutional, being an unlawful restriction on a useful and harmless avocation.—*Ex parte Adlof*, 215 S.W. 222, 86 Tex.Cr. 13.

Remedy for injury to others by lot owner

If a purchaser of a burial lot in a municipal cemetery, by failing to act or acting wrongfully, injures the rights of others, the city may resort to its right of general control to avail itself of the remedy.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

51. Ga.—*Nicolson v. Daffin*, 83 S.E. 658, 142 Ga. 729.

Mich.—*Wetherby v. City of Jackson*, 249 N.W. 484, 485, 264 Mich. 146, citing *Corpus Juris*.

Tex.—*Ex parte Adlof*, 215 S.W. 222, 86 Tex.Cr. 13.

Funerals within cemetery grounds

Rules of home rule city providing that funerals, while within city cemetery grounds, shall be under control of superintendent of cemeteries, and that no tents except those owned by city will be allowed in city cemeteries for funerals, was held a valid exercise of police power, and not arbitrary, capricious, and unreasonable.—*Wetherby v. City of Jackson*, 249 N.W. 484, 264 Mich. 146.

circumstances.⁵²

Powers of the city council over cemeteries which are not divested by a statute delegating certain powers to a commission are retained by the council.⁵³ Notwithstanding the chairman of the city council is ex officio a member of the board of trustees of a cemetery, such board, unless the cemetery may be regarded as a part of the city property, cannot be regarded as a city board or agent.⁵⁴ When so provided by statute a township trustee is required to care for and maintain a public cemetery within the town and owned by it.⁵⁵ A city council is without authority to divest itself of title to a municipal cemetery and to confer upon private citizens the control and management vested by statute in the city.⁵⁶

§ 4. Change of Control

Change of control of a cemetery from a town to a city organized within the limits of the town may be effected by the legislature if the rights of the inhabitants are saved to them. A statute which requires a city to transfer a cemetery to a private corporation without adequate compensation is invalid.

The control of a cemetery which has been acquired by a town solely for public use, and in which it has no beneficial interest, may lawfully be taken from it by the legislature and vested in a city which has been organized within its limits, and which embraces the cemetery within its boundaries, if the rights and beneficial interests in the property of the inhabitants of both city and town are saved to them.⁵⁷ A statute providing that the title to public burial grounds located within a city is vested in the corporation where located authorizes township trustees to deed cemetery property within a city's limits to the city.⁵⁸ A statute which requires the city to transfer a cemetery to a private corporation without adequate compensation is invalid.⁵⁹ When not required by statute, an order of

court is not necessary to enable a cemetery to be conveyed by a township board to a cemetery corporation.⁶⁰ A statute providing that, where a township is divided, its burying ground shall belong to the township in which it lies thereafter does not apply to a case where the cemetery falls within the limits of a city incorporated from the township.⁶¹

§ 5. Corporations and Associations

Under express statutory definition, a cemetery corporation means any corporation organized for the burial of the dead in a vault or receptacle.

Under express statutory definition, a cemetery corporation means any corporation organized for the burial of the dead in a vault or a receptacle.⁶² A corporation organized as a fraternal body and so incorporated does not constitute a cemetery corporation, although it has owned and managed a cemetery as a voluntary service to the community for many years.⁶³

§ 6. — Formation and Organization in General

Dependent on applicable statutory provisions in the various jurisdictions, a cemetery corporation may or may not be organized under the general corporate law and may or may not be organized for pecuniary profit.

Cemetery corporations are usually regarded as organized for public rather than for private purposes,⁶⁴ and their management has been held to be in the nature of a charitable, pious, or sacred trust.⁶⁵ Ordinarily, statutes expressly provide for their formation, and a corporation organized under the general corporation law as a business corporation rather than under the special statutory provisions is not entitled to the rights of a cemetery corporation.⁶⁶ However, when permitted by statute, commercial corporations for owning, managing, and operating cemeteries may be organized

52. Mich.—Wetherby v. City of Jackson, *supra*.

53. Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

54. N.J.—Trustees of Hoboken Cemetery v. Griffin, 95 A. 758, 88 N.J.Law 111, affirmed Trustees of Hoboken Cemetery v. City of Hoboken, 99 A. 1070, 89 N.J.Law 111.

55. Ind.—Sell v. State, 125 N.E. 402, 188 Ind. 671.

56. Ky.—City of Hartford v. Gillespie, 86 S.W.2d 1003, 260 Ky. 833.

Recovery of possession and proceeds of sale of lots

Ky.—City of Hartford v. Gillespie, 86 S.W.2d 1003, 260 Ky. 833.

57. Wis.—Columbus v. Columbus, 52 N.W. 425, 82 Wis. 374, 16 L.R. A. 695.

58. Ohio.—King v. City of Shelby, 178 N.E. 22, 40 Ohio App. 195.

59. Mass.—Mount Hope Cemetery v. Boston, 33 N.E. 695, 158 Mass. 509, 35 Am.S.R. 515.

60. Mich.—Rowley v. Laingsburg Cemetery Ass'n, 184 N.W. 480, 215 Mich. 673.

61. Mich.—Buena Vista Tp. Bd. of Health v. East Saginaw, 7 N.W. 808, 45 Mich. 257.

62. N.Y.—Moore v. United States Cremation Co., 9 N.E.2d 795, 798, 275 N.Y. 105.

63. Kan.—Dunlap v. Union Lodge No. 15, I. O. O. F., 232 P. 715, 129 Kan, 287.

64. Ill.—East Hill Cemetery Co. v. Thompson, 97 N.E. 1036, 53 Ind. App. 417.
11 C.J. p 52 note 40.

Quasi public service corporations
N.J.—Bliss v. Linden Cemetery Ass'n, 107 A. 594, 90 N.J.Eq. 404, affirmed 109 A. 500, 91 N.J.Eq. 329.

65. N.J.—Dennis v. Glenwood Cemetery, 130 A. 378, 96 N.J.Eq. 399.

66. N.Y.—Grace v. Repose Mausoleums, Inc., 139 N.Y.S. 300, 78 Misc. 213, 215.

under the general statutes.⁶⁷ The duration of a cemetery corporation which is incorporated as a benevolent corporation is necessarily perpetual.⁶⁸ Where a statute requires a portion of the lots in a cemetery to be occupied as a condition for the incorporation of a cemetery association, it is not necessary that all the lots be occupied by the dead.⁶⁹ A statute prohibiting additional cemetery corporations in a certain county has been held not to prohibit the incorporation of a cemetery association in existence and operating a cemetery at the time of the enactment of the statute.⁷⁰ Under a statute authorizing individuals to associate for the purpose of procuring and establishing a burying ground, individuals may associate to enlarge a burying ground theretofore used as a public burying ground.⁷¹ Where title to land purchased by a religious corporation is taken in the name of trustees to hold for the use and benefit of the members of the parish, a majority of the parishioners are not proprietors and entitled to incorporate under a statute permitting incorporation by proprietors of a cemetery.⁷²

Pecuniary profit. In accordance with statutory provisions in the particular jurisdictions, cemetery corporations may⁷³ or may not⁷⁴ be organized for profit. Incorporators who are the only parties financially interested in the undertaking and who take all the risks incident to the enterprise cannot be considered as promoters taking a secret profit, where the extent of the return on their investment or their profit is definite and liquidated.⁷⁵

Amendment of by-laws. An amendment of the by-laws of a cemetery association without notice to its members as required by the by-laws is invalid, although the by-laws do not provide the manner of notice.⁷⁶

§ 7. — Membership

Under express statutory provisions, owners of lots become members of the cemetery corporation. Where the corporation is not for pecuniary profit, the members cannot make a profit for themselves.

Under express statutory provisions in some jurisdictions, or under express provisions in the charter of the corporation, owners of lots purchased of cemetery corporations may become members thereof, and be entitled to vote in the election of officers and on other matters to the same extent as stockholders in other corporations.⁷⁷ Ownership of a lot is not equivalent to membership in a society which by its charter was to consist of such persons as might be admitted members and comply with the articles and rules of the society.⁷⁸

Where a cemetery corporation is formed under laws relating to the formation of corporations not for pecuniary profit, the members cannot make a profit for themselves out of the sales of lots or other revenue of the cemetery; nor can they make a gift of their revenue to another and independent corporation.⁷⁹

§ 8. — Stock

When permitted by statute a cemetery corporation may issue stock and pay dividends to stockholders. Stockholders may enact by-laws and the laws generally applicable to the ownership of stock may be enforced.

When permitted by statute cemetery corporations may be organized as business rather than as charitable corporations, and may issue stock and pay dividends to stockholders.⁸⁰ In accordance with the provisions of the statute, stockholders may claim dividends if after current expenses are deducted from the total receipts from all sources a surplus remains, but the trustees need not declare a dividend, the declaration with them being dis-

67. Wis.—Hillier v. Lake View Memorial Park, 243 N.W. 406, 208 Wis. 614.

Consent to be governed by general law

Ohio.—Board of Education of City of Akron v. Proprietors of Akron Rural Cemetery, 144 N.E. 113, 110 Ohio St. 430.

68. Mo.—Newton v. Newton Burial Park, 34 S.W.2d 118, 326 Mo. 901.

69. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 542, 204 Ind. 705.

70. N.Y.—Baylis v. Van Nostrand, 162 N.Y.S. 831, 176 App.Div. 396.

71. Conn.—Edwards v. Stonington Cemetery Assoc., 20 Conn. 466.

72. Mass.—Simon v. Sleinis, 170 N.E. 421, 270 Mass. 465.

73. Mo.—United Cemeteries Co. v.

Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

Wis.—Hillier v. Lake View Memorial Park, 243 N.W. 406, 208 Wis. 614.

11 C.J. p 53 note 44.

74. Ohio.—State v. Meyer, 19 Ohio App. 436—Frey v. Nowlin, 19 Ohio N.P., N.S., 484.

11 C.J. p 53 note 43.

Profit by natural persons permitted

Although under the statutes in Ohio a cemetery corporation may not be conducted for profit, a natural person or association may operate a cemetery for profit.—State v. Meyer, 19 Ohio App. 436.

75. N.J.—Dennis v. Glenwood Cemetery, 130 A. 373, 96 N.J.Eq. 399.

76. Neb.—State v. Offutt, 236 N.W. 174, 121 Neb. 76.

77. Kan.—Davis v. Coventry, 70 P. 583, 65 Kan. 557, appeal dismissed 24 S.Ct. 855, 193 U.S. 668, 48 L. Ed. 840.

Pa.—Com. v. Fisher, 2 Brewst. 394, 7 Phila. 264.

Tex.—Oakland Cemetery Co. v. People's Cemetery Assoc., 57 S.W. 27, 93 Tex. 569, 55 L.R.A. 503.

78. Pa.—Com. v. Union Burial-ground Soc., 78 Pa. 308.

79. N.J.—Clark v. Rahway Cemetery Co., 61 A. 261, 69 N.J.Eq. 636.

80. Mass.—Fopiano v. Italian Catholic Cemetery Ass'n, 156 N.E. 708, 260 Mass. 99.

N.Y.—Firmes v. Mt. Hope Cemetery Ass'n, 161 N.E. 452, 248 N.Y. 152, affirming 224 N.Y.S. 797, 222 App. Div. 656.

11 C.J. p 53 note 52.

cretionary in accordance with the general power of directors of a corporation over dividends.⁸¹ Where there never have been any profits or moneys unexpended in the hands of the association, not needed for the care and improvement of the cemetery grounds, a promoter and stockholder is not entitled to an accounting.⁸² Where a cemetery corporation has power to issue and to sell stock, the directors may sue the stockholders for their unpaid stock subscriptions, and if the directors do not do so, equity will assume jurisdiction to compel stockholders to pay the amount unpaid on their stock subscriptions for the purpose of paying the debts of the corporation.⁸³ A bill in equity for the abrogation of a by-law, under which the incorporators of a cemetery corporation design to perpetuate themselves in office, will not lie until it is manifest that a change cannot be effected through appropriate corporate action, mandamus may be resorted to to compel the calling of a corporate meeting, and a majority of the stockholders may enact by-laws.⁸⁴ A cemetery corporation's by-law prohibiting the sale of stock until it is first offered for sale to the corporation is valid and binding on each stockholder, and the corporation is not required to recognize as stockholders persons who have bought stock not previously offered to the corporation.⁸⁵

The issuance of certificates of stock does not confer the usual rights of a corporation stockhold-

er, where such is not contemplated by the statute governing incorporation of cemeteries.⁸⁶ Where specific provision is made for the organization of cemetery corporations, but such corporations are made subject to the general supervisory powers of the legislature, an issue of stock by such a corporation, although unauthorized, may be validated by a subsequent act of the legislature. The rights of stockholders may be protected in equity, and the laws generally applicable to the ownership of stock may be enforced.⁸⁷

§ 9. — Land Shares or Certificates

Under statutes so providing, a cemetery corporation, in payment for the land purchased, may give land shares, or certificates which entitle the holder to receive a certain part of the proceeds of subsequent sales of burial lots.

Under statutes which so provide, a cemetery corporation may purchase land, giving in payment therefor what are known as land shares or certificates authorizing the holders to receive a certain percentage of the proceeds of subsequent sales of burial lots by the cemetery corporation; and the rights of holders and transferees of such shares and certificates as between themselves or in relation to the association or corporation must be determined by their contracts, as construed in connection with the governing law and the circumstances.⁸⁸ Where the statute provides that cemetery corporations may issue certificates of indebted-

81. N.Y.—*Firmes v. Mt. Hope Cemetery Ass'n*, supra.

Proportional part of surplus

Where a statute provides for the exchange of certificates of indebtedness for shares of stock, the holders to receive in lieu of interest a semi-annual dividend for their proportional part of the surplus over current expenses, the term "proportional part of the surplus" should be interpreted to mean such part of the total dividend as each stockholder's shares bear to the total shares issued.—*Firmes v. Mt. Hope Cemetery Ass'n*, supra.

Receipts from sale of lots

"Total receipts from all sources" include receipts from the sale of lots.—*Firmes v. Mt. Hope Cemetery Ass'n*, supra.

82. N.J.—*Kennedy v. Tranquility Cemetery Co.*, 95 A. 115, 84 N.J.Eq. 632.

83. Mich.—*C. H. Little Co. v. Woodward Ave. Cemetery Assoc.*, 97 N.W. 682, 135 Mich. 248.

84. Mass.—*Granara v. Italian Catholic Cemetery Assoc.*, 105 N.E. 1073, 218 Mass. 387.

85. Mass.—*Fopiano v. Italian Catho-*

lic Cemetery Ass'n, 156 N.E. 708, 260 Mass. 99.

86. N.J.—*East Ridgelawn Cemetery Co. v. Frank*, 75 A. 1006, 77 N.J.Eq. 36.

11 C.J. p 53 note 51.

87. Mass.—*Granara v. Italian Catholic Cemetery Assoc.*, 105 N.E. 1073, 218 Mass. 387.

88. N.J.—*Bittles v. West Ridgelawn Cemetery Co.*, 120 A. 647, 97 N.J.Eq. 808.

N.Y.—*Sullivan v. Mt. Carmel Cemetery Ass'n*, 155 N.E. 580, 244 N.Y. 294, affirming 216 N.Y.S. 576, 217 App.Div. 309, and answering certified questions 218 N.Y.S. 914, 218 App.Div. 737.—*Reese v. Pinelawn Cemetery*, 276 N.Y.S. 381, 243 App.Div. 165.—*Singer v. Mt. Carmel Cemetery Ass'n*, 216 N.Y.S. 916, 217 App.Div. 780.—*In re Chauncey*, 181 N.Y.S. 653, 191 App.Div. 359, reversing 175 N.Y.S. 2, 106 Misc. 534.—*Gillman v. Owens*, 171 N.Y.S. 596, 184 App.Div. 209.

11 C.J. p 53 note 61, p 54 note 77.

Legislature cannot destroy the rights the certificate holders have to require that the terms of their certificates, lawfully issued, be com-

plied with.—*Hughes v. Pinelawn Cemetery*, 177 N.Y.S. 175.

Restriction to net proceeds

Under statute providing that cemetery corporations might agree to pay vendor of lands one half of proceeds of all sales, and that residue should be applied to preservation, improvement, and embellishment of the cemeteries, holders of land purchase certificates can be entitled to share only in one half of net proceeds of sales.—*Reese v. Pinelawn Cemetery*, 276 N.Y.S. 381, 243 App.Div. 165.

Waivers of proportionate share of proceeds resulting from sale of four hundred acres of land, in order that corporation might pay its debts, have been supported by consideration, and the corporation was required to apply first its share of proceeds of sale to liquidate the indebtedness and then have recourse to proportionate share of those signing waivers to extent necessary to pay any deficiency; further, where waivers were without time limit, the fact that the land was not sold until some twelve years later did not affect their validity, especially where failure to sell within reasonable time

ness of a particular nature and for particular purposes, the corporation is impliedly prohibited from issuing any others.⁸⁹ Irregularities in the issuing of land shares by a cemetery association and the rights of the shareholders cannot be adjudicated in a proceeding to which they are not made parties.⁹⁰

Such certificates are not to be regarded as stock certificates,⁹¹ but have been held more in the nature of nonnegotiable promises to pay money,⁹² and the holder is chargeable with notice of statutory restrictions on the powers of the corporation.⁹³ The holders are not to be regarded as ordinary stockholders, and as such deferred to the claims of creditors, but on distribution of the proceeds of a sale of the corporation property on insolvency, they are entitled to equality of payment therewith.⁹⁴ They are not to be regarded as holders of liens on the land out of which the burial lots were formed,⁹⁵ and if in any event they may be so regarded, they may lose such liens by reason of laches.⁹⁶

In accordance with applicable statutory provisions, where the association fails to apply the proportionate share of proceeds for payment of certificates as required, a holder is entitled to equita-

ble relief to determine the amount of his interest in the proceeds and for payment of the same,⁹⁷ but he is entitled only to an action in equity for an accounting and incidental relief and he is not entitled to maintain an action at law.⁹⁸ Where money from the sale of lots which rightfully belongs to certificate holders is withheld from them, the certificate holders are entitled to interest.⁹⁹

Holders of debt certificates have a right to insist that the land be sold for cemetery purposes only and that out of the proceeds not payable to the vendors or land certificate holders, the directors shall set up a sinking fund for their payment.¹

A certificate holder is not entitled to obtain an injunction against the prosecution of actions at law by third persons against a cemetery corporation.²

§ 10. — Officers, Agents, and Management

The management of a cemetery association or corporation is to be exercised by its officers and agents chosen in accordance with, and possessing the powers limited by, governing statutory and charter provisions.

Unless expressly authorized so to do by statute, a cemetery association cannot deprive itself of the right to select its own officers and control its own affairs.³ Where a general statute author-

was not advanced as ground of invalidity until after sale in reliance on waivers.—*Reese v. Pinelawn Cemetery*, *supra*.

89. N.J.—*East Ridgelawn Cemetery Co. v. Frank, Ch.*, 104 A. 594.

11 C.J. p 53 note 61 [c], p 54 note 77.

Terms of trust

Terms of trust created for cemetery purposes requiring payment by cemetery to trustee for benefit of holders of unauthorized certificates are void.—*Atlas Fence Co. v. West Ridgelawn Cemetery*, 182 A. 902, 119 N.J.Eq. 552.

90. N.J.—*Bliss v. Linden Cemetery Assoc.*, 87 A. 224, 81 N.J.Eq. 394.

91. Md.—*Gregory v. Chapman*, 87 A. 523, 119 Md. 495.

N.Y.—*American Exch. Nat. Bank v. Woodlawn Cemetery*, 105 N.Y.S. 305, 120 App.Div. 119, reversed on other grounds 87 N.E. 107, 194 N.Y. 116.

92. N.Y.—*Glass v. Springfield L. I. Cemetery Soc.*, 299 N.Y.S. 244, 252 App.Div. 319.

11 C.J. p 54 note 63.

Purchaser for value without notice takes fees from prior equitable assignment.—*Glass v. Springfield L. I. Cemetery Soc.*, *supra*.

93. N.Y.—*American Exch. Nat. Bank v. Woodlawn Cemetery*, 87 N.E.

107, 194 N.Y. 116, reversing 105 N.Y.S. 305, 120 App.Div. 119.

Fraudulent issue

Where such shares are fraudulently issued by an officer of the corporation, the corporation is not liable to purchasers in good faith.—*American Exch. Nat. Bank v. Woodlawn Cemetery*, *supra*.

94. Md.—*Gregory v. Chapman*, 87 A. 523, 119 Md. 495.

95. Md.—*Gregory v. Chapman*, *supra*.

96. N.J.—*Atlas Fence Co. v. West Ridgelawn Cemetery*, 182 A. 902, 119 N.J.Eq. 552.

Violation of conditions of conveyance

In suit to require accounting of trustees for cemetery, certificate holders' trustee was held entitled to receive fair value of trust estate which it had conveyed to cemetery association on conditions which were violated, but was not entitled to priority over other creditors where the certificate holders had lost their right to a vendor's lien.—*Atlas Fence Co. v. West Ridgelawn Cemetery*, *supra*.

97. N.Y.—*Gilliran v. Owens*, 171 N.Y.S. 596, 184 App.Div. 209.

98. N.Y.—*Sullivan v. Mt. Carmel Cemetery Ass'n*, 155 N.E. 580, 244 N.Y. 294, affirming 216 N.Y.S. 576,

217 App.Div. 309 and answering certified question 218 N.Y.S. 914, 218 App.Div. 737.—*Glass v. Springfield L. I. Cemetery Soc.*, 299 N.Y.S. 244, 252 App.Div. 319.—*Singer v. Mt. Carmel Cemetery Ass'n*, 216 N.Y.S. 916, 217 App.Div. 780.

Conditions improperly imposed

N.Y.—*Glass v. Springfield L. I. Cemetery Soc.*, 299 N.Y.S. 244, 252 App.Div. 319.

99. N.Y.—*Reese v. Pinelawn Cemetery*, 276 N.Y.S. 381, 243 App.Div. 165.

11 C.J. p 54 note 69.

Extra allowance to attorneys representing intervening plaintiffs may be granted.—*Reese v. Pinelawn Cemetery*, *supra*.

1. N.Y.—*In re Chauncey*, 181 N.Y.S. 653, 191 App.Div. 359, reversing 175 N.Y.S. 2, 106 Misc. 534.

2. N.Y.—*Rosenberg v. Mount Carmel Cemetery Ass'n*, 155 N.E. 902, 244 N.Y. 573, reversing 216 N.Y.S. 906, 217 App.Div. 780.

3. Pa.—*In re North Forest Cemetery Assoc.*, 19 Pa.Dist. 730.

Invalidation of charter

A provision in the charter of a cemetery association that the trustees shall be the regularly elected trustees of a specified church invalidates the charter because of the fact that it takes from the members

izes the lot holders to conduct the affairs of the association they may lawfully do so, although the association has been incorporated under a special act vesting its control in its stockholders, in a case where the stockholders have abandoned the control.⁴ The right of control over a cemetery maintained by a church is vested, when so provided by statute, in those designated by the canons, regulations, and customs of the church society.⁵ Express statutory provisions as to the election and qualification of officers must be complied with.⁶

The exercise of responsibility in discretionary matters by cemetery trustees must not be too minutely scrutinized.⁷ Where the minimum number of trustees necessary for a quorum transact business in which one of the trustees present is disqualified because of personal interest, a quorum is lacking invalidating the act.⁸

§ 11. — Powers, Duties, and Liabilities

A cemetery corporation cannot engage in activities

outside the purposes of its incorporation. In the absence of statute, it is not exempt from civil liability and an action at law will lie against it for ordinary indebtedness for work or services. A cemetery corporation may receive bequests if authorized by statute or by its charter and it may buy and sell vaults to its lot owners at cost.

A cemetery corporation cannot engage in activities outside the purposes of its incorporation,⁹ or create obligations contrary to statute,¹⁰ and two cemetery companies, without statutory power, cannot enter into a joint undertaking which makes each liable for moneys received by the other.¹¹ In the absence of statute, a cemetery corporation or association is not exempt from civil liability,¹² and an action at law will also lie against it for ordinary indebtedness for work or services.¹³ It has a right and is under a duty to prevent any trespass on the cemetery, and this right and duty may be guarded by the adoption of reasonable rules and regulations.¹⁴ Where a cemetery corporation has invoked the power of eminent domain to acquire rights in lands of others, it can be compelled

of the corporation the right to choose their trustees.—In re North Forest Cemetery Assoc., *supra*.

4. N.J.—Kennedy v. Tranquility Cemetery Co., 95 A. 115, 84 N.J.Eq. 632.

5. Pa.—Brnllovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, 191 A. 655.

6. Quorum
N.Y.—Springfield Cemetery Society v. Gilleran, 106 N.E. 110, 212 N.Y. 336, affirming 147 N.Y.S. 511, 163 App.Div. 1.

Directors must be lot owners where the statute so provides.—Springfield Cemetery Soc. v. Gilleran, *supra*.

Qualifications of lot owners to vote

(1) When so provided by statute or by the charter of the corporation, lot owners may vote at the election of directors or trustees.—In re Fentonville Cemetery Ass'n, 264 N.Y.S. 790, 238 App.Div. 491—11 C.J. p 53 notes 48, 49, p 54 note 73 [a].

(2) Owner of lot acquired before incorporation may vote as representative of more than one lot.—In re Fentonville Cemetery Ass'n, *supra*.

(3) Lot owner has one vote for each lot owned by him.—In re Fentonville Cemetery Ass'n, *supra*.

(4) Trustees are not entitled to votes representing unsold lots remaining in their hands.—Commonwealth v. Fisher, 2 Brewst., Pa., 394, 7 Phila. 264.

Creditors, in the absence of statute, have no right to vote.—Bonyng v. Frank, N.J., 90 A. 676, affirmed 38

A. 456—Bonyng v. Frank, 98 A. 456, 89 N.J.Law 239, Ann.Cas.1913D 211.

Illegally issued stock will not entitle the owners to elect trustees.—Cooke v. Marshall, 46 A. 447, 196 Pa. 200, 64 L.R.A. 413, affirming 43 A. 314, 191 Pa. 315, 64 L.R.A. 413.

Limitation of terms

Where a full board of directors was elected without designation as to the term of each and the statute provided that the term should be three years with one third elected annually, it was proper for the directors to agree among themselves as to whom should constitute the third whose term would expire at the end of the year, and the limitation of the terms of one third of the directors after election to conform to the statute has been held not to interfere with the franchise right of the electors.—In re Washington Cemetery, 238 N.Y.S. 664, 135 Misc. 763.

7. Pa.—Dries v. Charles Evans Cemetery Co., 167 A. 237, 109 Pa. Super. 493.

8. S.C.—Fidelity Fire Ins. Co. v. Harby, 153 S.E. 141, 156 S.C. 238.

9. Mining

A cemetery corporation may not undertake the business of mining or empower another by contract or lease to conduct mining operations without express legislative authority, since the lands are devoted to a public use or purpose, and it is a matter in which the public has an interest.—Briggs v. Bloomingdale Cemetery Ass'n, 185 N.Y.S. 348, 113 Misc. 685.

10. N.J.—Atlas Fence Co. v. West

Ridgelawn Cemetery, 182 A. 902, 119 N.J.Eq. 552.

N.Y.—Sullivan v. Mt. Carmel Cemetery Ass'n, 155 N.E. 580, 244 N.Y. 294, affirming 216 N.Y.S. 576, 217 App.Div. 309 and answering certified question 218 N.Y.S. 914, 218 App.Div. 737—Singer v. Mt. Carmel Cemetery Ass'n, 216 N.Y.S. 916, 217 App.Div. 780.

11. N.J.—East Ridgelawn Cemetery Co. v. Frank, 75 A. 1006, 77 N.J.Eq. 36.

12. Malicious prosecution

In Ohio, an action for malicious prosecution can be maintained against a cemetery association, organized under Gen.Code § 10093 et seq.—Canton Cemetery Ass'n v. Slayman, 121 N.E. 819, 99 Ohio St. 23.

13. N.Y.—Sullivan v. Mt. Carmel Cemetery Ass'n, 155 N.E. 580, 244 N.Y. 294, affirming 216 N.Y.S. 576, 217 App.Div. 309 and answering certified question 218 N.Y.S. 914, 218 App.Div. 737—Singer v. Mt. Carmel Cemetery Ass'n, 216 N.Y.S. 916, 217 App.Div. 780.

14. Tex.—Oakland Cemetery Lot Owners' Ass'n v. Castleberry, Civ. App., 25 S.W.2d 639.

Decoration of graves at burials

Cemetery society would not be restrained from enforcing regulations whereby society reserved right to provide grass, matting, and tents for decoration of graves at burials, where evidence disclosed that regulations were adopted as result of complaints of trespass on lots and graves, that regulations were not unreasonable, and that charge required for use of such equipment

to afford reasonable service to the public at reasonable rates.¹⁵ A statute which authorizes a religious corporation to take and hold realty for cemetery purposes authorizes the use of the realty for such purposes.¹⁶

A cemetery association may receive a bequest for the benefit of a cemetery when so permitted under applicable statutory provisions.¹⁷ Likewise, a cemetery corporation may accept a bequest setting apart a sum in perpetuity for the care of a burial lot, if authorized so to do by its charter¹⁸ or by statute,¹⁹ but in the absence of charter or statutory authorization a cemetery company cannot act as trustee of a fund bequeathed for the maintenance of a lot if it is not named as trustee in the will.²⁰ Under statutes expressly so providing, a cemetery association has the duty to accept sums offered to it for the perpetual care of a lot or grave.²¹

Manufacture and sale of vaults. A cemetery corporation has been held to have implied power to buy and sell vaults to its lot owners at cost.²² The making and disposing of vaults to its lot owners by a cemetery association is authorized by a statute empowering it to construct and operate proper means for disposing of the dead,²³ and such activities do not constitute the engaging in an unauthorized business for profit.²⁴

Rights as to unsold lots. A cemetery corporation organized for profit holds unsold lots as private property which it may use for such purposes as it sees fit,²⁵ and it may sell burial plots at a price fixed by it or refuse to sell.²⁶ Under a

trust of land for cemetery purposes which does not state whether it shall be used or sold for free burial purposes, the trustees may sell lots for a reasonable price.²⁷ Where there is a reasonable and valid ordinance prohibiting the interment of the dead within certain limits in a city, permission by the city to a company to use land therein for a cemetery is sufficient consideration for its agreement to limit the prices of burial lots.²⁸

§ 12. — Funds

The disposal of funds derived from the sale of burial lots is usually dependent on statutory or charter provisions. Funds of a cemetery association may not be diverted to purposes other than those to which they should rightfully be applied, and investments and deposits must be made in accordance with statute.

The question of whether funds derived from the sale of burial lots are held in trust for the benefit of the lot owner necessarily depends on the terms of the charter and statutes under which the corporation is organized.²⁹ Under the construction of some charters it has been held that a surplus may be divided among the members,³⁰ while a cemetery association organized for the purpose of establishing a public cemetery, without capital stock or contributions from its members, is a trustee for the benefit of those who lawfully make use of lots sold to them by it, and is in duty bound to account to its beneficiaries, the lot owners, for moneys received therefrom.³¹ The execution of the trust, where a trust is regarded as existent, will be strictly enforced in a court of equity on the application of any member of the association,³² or any lot owner.³³ The date fixed for payment of a cem-

was similar in amount to charge of other large cemeteries in vicinity.—*Orlowski v. St. Stanislaus Roman Catholic Church Soc.*, 292 N.Y.S. 333, 161 Misc. 480.

15. N.H.—*Browne v. Park Cemetery*, 101 A. 34, 78 N.H. 387.

16. N.Y.—*Wojtkowiak v. Evangelical Lutheran St. John's Church of Buffalo*, 259 N.Y.S. 481, 236 App. Div. 411, reversing 255 N.Y.S. 180, 142 Misc. 264, and affirmed 185 N.E. 779, 261 N.Y. 656.

17. Iowa.—*Meeker v. Lawrence*, 212 N.W. 688, 203 Iowa 409.

N.Y.—*In re Pearsall's Estate*, 211 N.Y.S. 841, 125 Misc. 634.

18. Mich.—*In re More*, 146 N.W. 319, 179 Mich. 237.

19. Mass.—*In re Bartlett*, 40 N.E. 899, 163 Mass. 509.

Mich.—*In re More*, 146 N.W. 319, 179 Mich. 237.

N.J.—*Moore v. Moore*, 25 A. 403, 50 N.J.Eq. 554.

N.Y.—*In re Schuler*, 24 N.Y.S. 847, Pow.Surr. 490.

20. Pa.—*In re Lewis' Estate*, 30 Pa. Dist. 391.

21. Wis.—*Wauwatosa Cemetery Ass'n v. City of Wauwatosa*, 271 N.W. 402.

22. Pa.—*Dries v. Charles Evans Cemetery Co.*, 167 A. 237, 109 Pa. Super. 498.

23. Minn.—*State ex rel. Benson v. Lakewood Cemetery*, 267 N.W. 510, 197 Minn. 501.

24. Minn.—*State ex rel. Benson v. Lakewood Cemetery*, supra.

25. Mont.—*Davisson v. Mt. Moriah Cemetery Ass'n*, 288 P. 612, 87 Mont. 459, 81 A.L.R. 1419.

26. Mo.—*United Cemeteries Co. v. Strother*, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

27. Ill.—*Brown v. Hill*, 119 N.E. 977, 284 Ill. 286.

28. Tex.—*Austin v. Austin City Cemetery Assoc.*, 73 S.W. 525, 96 Tex. 384.

29. Ill.—*Bourland v. Springdale*

Cemetery Assoc., 43 N.E. 86, 158 Ill. 458.

Perpetual care fund in trust

Under declaration of trust to cemetery for cemetery purposes which contained condition that perpetual care fund be set aside from proceeds of sale of cemetery lots, direct beneficiary of perpetual care fund was cemetery association and not the trustee.—*Atlas Fence Co. v. West Ridgelawn Cemetery*, 182 A. 902, 119 N.J.Eq. 552.

30. Ill.—*Bourland v. Springdale Cemetery Assoc.*, 43 N.E. 86, 158 Ill. 458.

31. Minn.—*Brown v. Maplewood Cemetery Assoc.*, 89 N.W. 872, 85 Minn. 498.

32. Minn.—*Brown v. Maplewood Cemetery Assoc.*, supra.

N.Y.—*Tyndall v. Pinelawn Cemetery*, 91 N.E. 591, 198 N.Y. 217, affirming 119 N.Y.S. 1148.

11 C.J. p 55 note 86.

33. Minn.—*Brown v. Maplewood*

etery association's certificates of indebtedness limits the time up to which the directors may exercise discretion as to the application of the proceeds of sales of lots which are due to the holders of the certificates.³⁴ The fact that a by-law of a town, relative to a cemetery, provides that the moneys received by the trustees for lots shall constitute a fund for the purpose of the improvement of the cemetery does not create a trust which can be enforced in equity by the owners of the lots, particularly where the deeds under which plaintiffs hold their lots are subject to any by-laws, rules, or regulations which the town may thereafter adopt.³⁵

It is regarded as a matter of sound public policy to protect the funds of a cemetery association from diversion to purposes other than those to which they were originally appropriated; so, funds derived by a cemetery association from the sale of lots, under a contract that the money paid shall be used in the protection and ornamentation of the cemetery, cannot be diverted to other purposes.³⁶ The fact that the members of a cemetery company are also members of a particular church will not warrant the company in diverting its funds to the church.³⁷ When permitted by statute it is proper for a cemetery association to pay all or any part of the proceeds from the sale of lots on the purchase price of the cemetery.³⁸

Investments and deposits. Funds held by a cemetery corporation in trust must be invested only as authorized by statute.³⁹ That money left in

trust by bequest is paid over directly to directors of a cemetery corporation without an order of court, as provided for by statute, gives them no greater right to invest the money than they would have, had they been designated by the court.⁴⁰ Under statutes so providing, a cemetery association may deposit at interest funds intrusted to it for the perpetual care of lots and graves with the treasurer of the municipality nearest to the cemetery.⁴¹

§ 13. — Supervision and Control

Where a trust for the establishment and maintenance of a cemetery is a charitable use, equity has jurisdiction to remedy such evils and irregularities as may arise in the administration of the trust.

In those jurisdictions in which a trust for the establishment and maintenance of a cemetery or public burying ground is a charitable use, equity is the proper jurisdiction in which to seek a remedy for such evils and irregularities as may arise in the administration of the trust by the corporation holding the legal title.⁴² Such proceedings may be instituted either by the attorney-general or by the parties in interest, but where the proceeding is instituted by lot holders or creditors, the attorney-general should be brought in and given the opportunity to take charge of and control that portion of the litigation which relates to the public right.⁴³ Under statutes expressly so providing, specified courts have the power of visitation of cemetery corporations.⁴⁴

Cemetery Assoc., 89 N.W. 872, 85 Minn. 498.

N.J.—Clark v. Rahway Cemetery Co., 61 A. 261, 69 N.J.Eq. 636.

34. N.Y.—Sullivan v. Mt. Carmel Cemetery Ass'n, 155 N.E. 580, 244 N.Y. 294, affirming 216 N.Y.S. 576, 217 App.Div. 309 and answering certified question 218 N.Y.S. 914, 218 App.Div. 737—Singer v. Mt. Carmel Cemetery Ass'n, 216 N.Y.S. 916, 217 App.Div. 780.

35. Mass.—Fay v. Milford, 124 Mass. 79.

36. Ky.—Cave Hill Cemetery Co. v. Gosnell, 161 S.W. 980, 156 Ky. 599.

37. N.J.—Clark v. Rahway Cemetery Co., 61 A. 261, 69 N.J.Eq. 636.

38. N.Y.—In re Norton, 161 N.Y.S. 710, 97 Misc. 289.

39. Mo.—Dunnegan Grove Cemetery v. Farm & Home Savings & Loan Ass'n, App., 93 S.W.2d 95.

Stock of building and loan association

Investment by cemetery corporation of funds left by testatrix for

care of her grave and of various sums which had been donated for care and upkeep of graves of various donors in stock of building and loan association was held unauthorized, where the statute permitted investment only in United States government, state, county, or municipal bonds, or first real estate mortgages or deeds of trust.—Dunnegan Grove Cemetery v. Farm & Home Savings & Loan Ass'n, supra.

40. Mo.—Dunnegan Grove Cemetery v. Farm & Home Savings & Loan Ass'n, supra.

41. Wis.—Wauwatosa Cemetery Ass'n v. City of Wauwatosa, 271 N.W. 402.

Liability of third-class city for interest

City which paid interest to cemetery association on deposits for perpetual care of cemetery for many years, and continued to accept deposits and to pay interest for four years after becoming third-class city, which was not liable under statute for interest, was held not en-

titled to deduct interest paid during such period from amount on deposit due association, since deposits were in nature of trust, association reaped no benefit and was prevented from otherwise investing funds, and city was estopped to deny trusteeship by asserting it was mere depository.—Wauwatosa Cemetery Ass'n v. City of Wauwatosa, supra.

42. N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 160 A. 688, 110 N.J.Eq. 580.

11 C.J. p 55 note 90.

43. N.J.—Bliss v. Linden Cemetery Assoc., 87 A. 224, 81 N.J.Eq. 394.

44. N.Y.—In re Norton, 161 N.Y.S. 710, 97 Misc. 289.

Cemetery corporations not exempted from visitation

Exemption of "proprietors of any burying ground" from provisions of chapter relating to visitation of corporations has been held not to exempt corporations owning and operating cemeteries.—Hillier v. Lake View Memorial Park, 243 N.W. 406, 208 Wis. 614.

§ 14. — Insolvency and Receivers

Receivership proceedings and a sale of the property of the association or corporation may be had and a distribution of the assets made.

While it has been held that the procedure prescribed in the case of an insolvent business corporation is inapplicable to an insolvent corporation formed under an act for the incorporation of cemeteries and administering a charitable use,⁴⁵ it has also been held that a receiver may be appointed and the franchise of a cemetery corporation forfeited under the sanction of a general statute,⁴⁶ and that under its general equity powers a chancery court may appoint a receiver to administer a trust which the trustees of an incorporated association, a charitable trust, are violating.⁴⁷ Notwithstanding a receivership, a cemetery association may be permitted to elect a board of trustees,⁴⁸ and title to its land remains in the corporation.⁴⁹

Sale of property. The receiver under a power to continue the business of the corporation should not be given unlimited power to sell lots other than necessary to meet expenses of maintenance and repair,⁵⁰ and, further, it has been held that

he cannot sell the property of the corporation in violation of rights of certificate holders,⁵¹ but it is not necessary that the property of the cemetery be sold as a whole.⁵² However, a separate sale of the owners' possible reversionary interest and of the right to sell platted plots for burial purposes will not be permitted.⁵³

Where burial lots have been sold by a cemetery corporation, under an agreement for perpetual care and maintenance by the corporation, a decree of sale of the property of the corporation in insolvency properly requires the purchaser to invest a fund sufficient for the proper care and maintenance of such lots,⁵⁴ but in the absence of such a contract or of a statute creating the duty, the court cannot impose the duty on the purchaser to make improvements or provide for the future care or upkeep of the cemetery.⁵⁵

Distribution of assets. Liabilities, although different in form, which have been contracted for the general purposes of the corporation, are entitled to share equally in the distribution of the corporation's assets on insolvency.⁵⁶ However, the holder of a mortgage or a deed of trust is entitled to pref-

Examination of officers and witnesses

N.Y.—In re Norton, 161 N.Y.S. 710, 97 Misc. 239.

45. N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 160 A. 688, 110 N.J.Eq. 580.
11 C.J. p 55 note 97.

46. Ind.—Valhalla Memorial Park Co. v. Lowery, 199 N.E. 247, 209 Ind. 423.

47. N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 160 A. 688, 110 N.J.Eq. 580.

Parties

(1) The attorney general is a necessary party.—Atlas Fence Co. v. West Ridgelawn Cemetery, supra.

(2) The trustees should be made parties.—Brown v. East Ridgelawn Cemetery, 100 A. 337, 87 N.J.Eq. 173—11 C.J. p 55 note 98.

(3) Where a suit is also to restrain a cemetery association from applying lot sales proceeds according to a trust agreement, the certificate holders entitled to part of the proceeds under the trust agreement are necessary parties.—Brown v. East Ridgelawn Cemetery, supra.

48. Election to supply lost regulations

N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 184 A. 817, 120 N.J.Eq. 435.

49. N.Y.—Hughes v. Pinelawn Cemetery, 177 N.Y.S. 175.

50. Ill.—Chicago Trust Co. v. Su-

preme Liberty Life Ins. Co., 261 Ill.App. 551.

51. N.Y.—In re Chauncey, 181 N.Y.S. 653, 191 App.Div. 359, reversing 175 N.Y.S. 2, 106 Misc. 534—Hughes v. Pinelawn Cemetery, 177 N.Y.S. 175.

Effect of statute as to execution sale
Real Property Law § 450, as amended by L.1918 c 404, authorizing sale under execution to satisfy a valid judgment of cemetery lands in which interments had not been made, cannot operate to deprive the holders of land certificates of rights previously acquired pursuant to a valid statute, and hence does not justify as against such holders sale of cemetery lands not occupied or sold for burial purposes.—In re Chauncey, 181 N.Y.S. 653, 191 App.Div. 359, reversing 175 N.Y.S. 2, 106 Misc. 534.

52. N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 184 A. 638, 120 N.J.Eq. 239, affirmed 187 A. 366, 120 N.J.Eq. 615, and 187 A. 366, 120 N.J.Eq. 616.

Choice between bids

Bid for cemetery lands in receivership which provided for improvements, perpetual care fund, and continuing under existing franchise and regulations was held fair and acceptable, as against bid made without deposit which provided for no perpetual care fund, speculative bid depending on sale of lots, and bid of mortgagor alleged to be mainly interested in developing near-by com-

petitive cemetery.—Atlas Fence Co. v. West Ridgelawn Cemetery, supra.

Sale to benevolent association
of small plot, with provisions that it should be used exclusively for interment of persons of Jewish faith, and that grantee abide by rules and regulations of cemetery, and contribute to its perpetual care, may be approved, and receiver would be authorized to pay commission of ten per cent to broker who negotiated sale.—Atlas Fence Co. v. West Ridgelawn Cemetery, 193 A. 847, 122 N.J.Eq. 296.

53. Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

54. Md.—Gregory v. Chapman, 87 A. 523, 119 Md. 495.

55. Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

56. Md.—Gregory v. Chapman, 87 A. 523, 119 Md. 495.
11 C.J. p 55 note 94.

Trustee's lien for compensation

Under declaration of trust which contained condition that trustee conveying the land should be paid reasonable compensation for its services, trustee did not have vendor's lien for stipulated compensation, since compensation was not part of consideration for the conveyance.—Atlas Fence Co. v. West Ridgelawn Cemetery, 182 A. 902, 119 N.J.Eq. 552.

erence,⁵⁷ and where land has been purchased by a cemetery corporation, and in payment therefor certificates have been issued entitling the holders to one half of the proceeds of burial lots sold, the holders of such certificates, on a sale of the property of the corporation in insolvency, are entitled, as creditors, to prove a claim for one half of the proceeds of such sale available for distribution, to be added to their claims on account of sales of burial lots as to which they have had no accounting.⁵⁸

§ 15. Location

State or local legislative bodies may prohibit the establishment of cemeteries in certain places, but may not do so unreasonably or for merely aesthetic reasons.

State or local legislative bodies may prohibit the establishment of cemeteries in certain places or forbid future interments in cemeteries located within a specified area,⁵⁹ as within city limits,⁶⁰ but such circumstances may exist as would make it unreasonable, even in a city, absolutely to prohibit burial anywhere within the city limits.⁶¹ The interment of the bodies of the dead is proper and necessary, and state and municipal authorities may not prohibit the location of cemeteries in places where no possible danger to human life or health can result, merely for aesthetic reasons,⁶² or because cemeteries are not an agreeable subject of contemplation and are a source of annoyance to nerv-

ous or superstitious persons,⁶³ or because the value of adjoining land will be lessened.⁶⁴ The authorities of a city have no power to prohibit the establishment of cemeteries outside of the city limits,⁶⁵ unless expressly authorized by the legislature.⁶⁶ An ordinance prohibiting establishment of cemeteries within a certain distance of the corporate limits is to be strictly construed against the municipality, and it does not apply to premises previously established and dedicated as a cemetery.⁶⁷

A zoning ordinance which places an existing cemetery in a residence district has been held not to restrict the use of the cemetery.⁶⁸ A property owner's knowledge that a zoning ordinance is pending does not deprive him of the right to use his land for the establishment of a cemetery.⁶⁹

§ 16. — Consent of Adjacent Landowners

When so provided by statute, a cemetery cannot be laid out within a certain distance of a dwelling house, store, or place of business without the consent of the owner of the same.

Under statutes so providing, a cemetery cannot be laid out within a certain distance of a dwelling house, store, or place of business without the consent of the owner of the same,⁷⁰ whether the land is acquired by an appropriation proceeding or by purchase.⁷¹ A statute of that nature which exempts cemeteries of a certain size already in ex-

57. Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

N.J.—Atlas Fence Co. v. West Ridgelawn Cemetery, 193 A. 847, 122 N.J.Eq. 296.

58. Md.—Gregory v. Chapman, 87 A. 523, 119 Md. 495.

59. Cal.—Odd Fellows' Cemetery Assoc. v. San Francisco, 73 P. 987, 140 Cal. 226.

Ill.—Rosehill Cemetery Co. v. City of Chicago, 8 N.E.2d 664, 366 Ill. 207—Village of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

N.J.—Newark v. Watson, 29 A. 487, 56 N.J.Law 667, 24 L.R.A. 843.

60. U.S.—Laurel Hill Cemetery v. San Francisco, Cal., 30 S.Ct. 301, 216 U.S. 358, 54 L.Ed. 515.

Cal.—Odd Fellows' Cemetery Assoc. v. San Francisco, 73 P. 987, 140 Cal. 226.

N.Y.—Peo. v. Pratt, 29 N.E. 7, 129 N.Y. 68, reversing 14 N.Y.S. 804, and affirming 114 N.Y.S. 551.

61. Ala.—Bryan v. Birmingham, 45 So. 922, 154 Ala. 447, 129 Am.S.R. 63.

11 C.J. p 52 note 31.

62. Ill.—Rosehill Cemetery Co. v.

City of Chicago, 8 N.E.2d 664, 366 Ill. 207.

Ind.—Park Hill Development Co. v. City of Evansville, 130 N.E. 645, 190 Ind. 432.

11 C.J. p 52 note 32.

Location of cemetery near park

Ordinance making it unlawful for any person to inter anybody in any cemetery within one thousand feet of any park located prior to passage of ordinance without reference to cemeteries established subsequently, is invalid, being unreasonable and discriminatory. Owner of land bounded on two sides by cemetery and on other two by highways, may not be forbidden by city to use it for a cemetery merely because persons visiting an adjacent park will pass along a ridge where they can overlook it less than one thousand feet away.—Park Hill Development Co. v. City of Evansville, supra.

63. Ill.—Rosehill Cemetery Co. v. City of Chicago, 8 N.E.2d 664, 366 Ill. 207—Village of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

64. Ill.—Village of Villa Park v. Wanderer's Rest Cemetery Co., supra.

65. Ind.—Begein v. Anderson, 28 Ind. 79—Bogert v. Indianapolis, 13 Ind. 134.

66. Ordinance enacted under power delegated by the legislature, prohibiting establishment of cemetery within one mile of corporate limits of village, is not unconstitutional as infringing right of property where there were available sites not within one mile from limits.—Catholic Bishop of Chicago v. Village of Palos Park, 121 N.E. 561, 286 Ill. 400.

67. Ill.—Village of Villa Park v. Wanderer's Rest Cemetery Co., 147 N.E. 104, 316 Ill. 226.

68. Kan.—City of Wichita v. Schwertner, 286 P. 266, 130 Kan. 397.

69. Pa.—Fierst v. William Penn Memorial Corporation, 166 A. 761, 311 Pa. 263.

70. Ohio.—Moore v. Hill Crest Cemetery Ass'n, 163 N.E. 727, 29 Ohio App. 509—Frey v. Nowlin, 19 Ohio N.P., N.S., 484.

11 C.J. p 55 note 1.

71. N.H.—Stevens v. Manchester, 63 N.H. 390.

11 C.J. p 55 note 2.

istence at the time of its enactment does not exempt a cemetery of that size not in existence.⁷² A statute providing that no cemetery shall be laid out within a certain distance of a dwelling house does not prohibit the taking of the dwelling house and the land on which it stands.⁷³ Such a statute is aimed at the grounds as a whole,⁷⁴ and in calculating the distance thereof from dwellings, the authorities must consider not only the dwellings erected but also such as may be erected, allowing for the improvements made in the township.⁷⁵

§ 17. — Consent of Public Authorities

When so provided by statute the consent of the county or municipal authorities within or near whose limits it is proposed to locate a cemetery is necessary.

Under statutes so providing, the consent of the county or municipal authorities within or near whose limits it is proposed to locate a cemetery is necessary,⁷⁶ unless the owner of the lands is of a class expressly exempted.⁷⁷ Such a statute does not apply to a tract dedicated to cemetery purposes before the enactment of the statute, or to additions or extensions originally dedicated with an existing cemetery although they have never been used,⁷⁸ but it applies to the use of additions or extensions subsequently acquired by an existing

cemetery association.⁷⁹

Mode in which obtained. Where the statute so provides, consent and approval must be obtained by written application,⁸⁰ notice of which must be published for a specified period.⁸¹ If the mode in which consent shall be granted is prescribed, such mode must be followed,⁸² but otherwise such consent may be granted by the municipal authorities on motion, and it is not necessary that it be given by ordinance or formal resolution.⁸³ Mere acquiescence by the city is not necessarily sufficient to show consent,⁸⁴ but a long delay in objecting to the use of the land for cemetery purposes may constitute laches barring equitable relief if public health is not involved.⁸⁵ The officers of a city or town may act on applications to approve cemetery locations until the election and qualification of their successors.⁸⁶

It is within the power of the local authorities to limit the consent to a portion of the land described in the application, and it is not a condition precedent to the exercise of their power that the application be limited to the portion finally fixed on.⁸⁷ That applicant is not the owner of the land at the time of filing his application is no ground for refusal of a permit.⁸⁸ Where the statute does

72. Ohio.—*Moore v. Hill Crest Cemetery Ass'n*, 163 N.E. 727, 29 Ohio App. 509.

73. N.H.—*Crowell v. Londonderry*, 63 N.H. 42.

74. Wis.—*Maede v. Broehm*, 139 N. W. 408, 151 Wis. 563.

75. Vt.—*Camp v. Barre*, 29 A. 811, 66 Vt. 495.

76. Ga.—*Southview Cemetery Ass'n v. Kitchens*, 133 S.E. 919, 162 Ga. 322.

N.Y.—*People ex rel. Hirsch v. Department of Health of City of New York*, 212 N.Y.S. 680, 126 Misc. 122.

11 C.J. p 56 note 6.

Sale of lots for cemetery purposes

That a person merely undertakes to sell lots for cemetery purposes and does not intend to so use them himself does not remove the necessity of procuring the permit required by statute.—*De Foor v. Donaldson*, 135 S.E. 405, 163 Ga. 36.

77. Religious corporation

Consent of county board of supervisors is not prerequisite to use for cemetery purposes by religious corporation of land acquired for such purposes when expressly exempted by the statutes.—*Wojtkowiak v. Evangelical Lutheran St. John's Church of Buffalo*, 259 N.Y.S. 481, 236 App.Div. 411, reversing 255 N.Y.

S. 180, 142 Misc. 264, and affirmed 185 N.E. 779, 261 N.Y. 656.

78. N.J.—*Borough of West Long Branch v. Home Building & Realty Co. of Long Branch*, 133 A. 758, 99 N.J.Eq. 738.

79. Ga.—*De Foor v. Donaldson*, 135 S.E. 405, 163 Ga. 36.—*Southview Cemetery Ass'n v. Kitchens*, 133 S. E. 919, 162 Ga. 322.

N.Y.—*Moritz v. United Brethrens Church on Staten Island*, 199 N.E. 29, 269 N.Y. 125, reversed on other grounds 278 N.Y.S. 342, 244 App. Div. 121.

80. N.J.—*Burdette v. Fairview*, 49 A. 1029, 66 N.J.Law 523.

Wis.—*Porch v. St. Bridget's Cong.*, 51 N.W. 1007, 81 Wis. 599. 11 C.J. p 56 note 7.

81. N.Y.—*Palmer v. Hickory Grove Cemetery*, 82 N.Y.S. 973, 84 App. Div. 600.

82. Mass.—*Inhabitants of Canton v. Westbourne Cemetery Corporation of Boston*, 146 N.E. 258, 251 Mass. 128.

11 C.J. p 56 note 9.

Vote of inhabitants

Under St.1855 c 257; Gen.St. c 28 §§ 5, 11; Pub.St. c 82 §§ 18, 21; Rev. L. c 78 § 30; and St.1908 c 379 § 1, "permission of town" must result from vote of inhabitants of town in town meeting legally assembled and not by action by selectmen of the

town.—*Inhabitants of Canton v. Westbourne Cemetery Corporation of Boston*, supra.

83. Wis.—*Porch v. St. Bridget's Cong.*, 51 N.W. 1007, 81 Wis. 599.

Vote of county commissioners

The grant of a permit by county commissioners of Fulton county to establish cemetery on land adjacent to city of Atlanta by majority vote of commissioners of Fulton county, was held valid.—*Hallman v. Atlanta Child's Home*, 130 S.E. 814, 161 Ga. 247.

84. Wis.—*Pfleger v. Groth*, 79 N.W. 19, 103 Wis. 104.

85. N.J.—*Borough of West Long Branch v. Home Building & Realty Co. of Long Branch*, 133 A. 758, 99 N.J.Eq. 738.

86. N.J.—*Webb v. Township Committee of Hanover Tp.*, 142 A. 244, 105 N.J.Eq. 738.

Propriety of township committee acting on applications to approve cemetery locations in new township on eve of election of successors is not for court, and action cannot be held unconscionable. — *Webb v. Township Committee of Hanover Tp.*, supra.

87. N.Y.—*Rottkamp v. Springfield Cemetery Soc.*, 118 N.Y.S. 911, 134 App.Div. 270.

88. N.J.—*Borough of West Long Branch v. Home Building & Realty*

not require notice or hearing, the granting or refusing of a permit is not a judicial action,⁸⁹ but it has been held quasi judicial in character, and if the local authorities are improperly influenced the consent is void.⁹⁰ A board of county commissioners in exercising its discretion need not, unless required by constitutional or statutory provisions, accept the advice of a city planning commission or secure its approval.⁹¹

Reconsideration. A resolution once passed may be reconsidered and the amount of property reduced without the publication of a new notice.⁹² However, after a permit has been issued and the grantee has incurred expenses and assumed obligations on the expectation of using the permit, it cannot be rescinded without a hearing.⁹³

Review of action. When so provided by statute, review of the action of the municipality may be had by application to some state board, such as the board of health.⁹⁴ On such appeal the state board acts judicially, and persons interested have a right to be heard.⁹⁵ The state board is not confined to the consideration of sanitary questions, nor is it required to examine witnesses on matters in controversy before it. The determination of the state board on such appeal is presumed to rest on proper grounds, and that presumption can be overcome only by the certificate of the board to the contrary, or by clear proof to the contrary, in case a rule to obtain the board's certificate proves ineffectual.⁹⁶ The granting of the application on a refusal of the local authorities to consent is a reversal of the decisions of the local authorities,

and the formal statement that their action is reversed is immaterial.⁹⁷ A review of the legality of a permit may be barred by laches.⁹⁸

A grant of permission will not be reversed by a court of equity where there has been no abuse of discretion.⁹⁹

Assignment of permit. A permit to use certain land for burial purposes is a personal privilege and is not assignable, and even though considered as a grant running with the land, the permit does not attach if the land is not used for burial purposes.¹ Permission obtained by a trustee for the cemetery need not be expressly assigned to the cemetery corporation when it is organized.²

§ 18. — Enjoining Location

Illegal or improper establishment of burial places to the injury of others may be enjoined.

Chancery has jurisdiction to enjoin the establishment of burial places illegally or improperly to the injury of others.³ The injury must, however, be of a positive and substantial character, and not doubtful or contingent.⁴ A private party has no standing in a suit for an injunction except on the ground of nuisance,⁵ and he is not entitled to an injunction where the only probable injury is depreciation in the value of his property.⁶ A city will not be enjoined from using certain lands for cemetery purposes where the lands are the only available and suitable site.⁷ Under a statute which prohibits a cemetery to be laid out within a certain distance of a dwelling house or place of business without the consent of the owner of the

Co. of Long Branch, 133 A. 758, 99 N.J.Eq. 738.

11 C.J. p 56 note 7 [b].

89. Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247.

90. N.J.—Long v. Union Tp., 74 A. 294, 79 N.J.Law 70.

91. Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247.

92. N.Y.—Rottkamp v. Springfield Cemetery Soc., 118 N.Y.S. 911, 134 App.Div. 270.

93. Ga.—Fairview Cemetery Co. v. Wood, 138 S.E. 88, 36 Ga.App. 709. N.J.—Montefiore Cemetery Co. v. Board of Com'rs of City of Newark, Sup., 130 A. 730.

94. N.J.—Dodd v. State Bd. of Health, 51 A. 456, 67 N.J.Law 463.

95. N.J.—Borough of West Long Branch v. Home Building & Realty Co. of Long Branch, 133 A. 758, 99 N.J.Eq. 738.

¹¹ C.J. p 56 note 17.

96. N.J.—Dodd v. Francisco, 53 A. 219, 68 N.J.Law 490.

97. N.J.—Dodd v. State Bd. of Health, 51 A. 456, 67 N.J.Law 463.

98. N.J.—Guenther v. Board of Com'rs of City of Newark, 132 A. 85, 4 N.J.Misc. 120.

99. No abuse of discretion shown. Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247.

1. Mass.—Weiss v. City of Woburn, 160 N.E. 444, 263 Mass. 30.

2. Ga.—Fairview Cemetery Co. v. Wood, 138 S.E. 88, 36 Ga.App. 709.

3. N.C.—Surratt v. Dennis, 155 S.E. 865, 866, citing *Corpus Juris*. 11 C.J. p 56 note 23.

4. Mich.—Upjohn v. Richland Bd. of Health, 9 N.W. 845, 46 Mich. 542.

11 C.J. p 57 note 24.

5. N.J.—Borough of West Long Branch v. Home Building & Realty Co. of Long Branch, 133 A. 758, 99 N.J.Eq. 738.

Defendant's knowledge of invalid zoning ordinance

That defendants knew of provi-

sions of invalid zoning ordinance before establishing cemetery did not entitle others to restrain defendants from using land for cemetery.—*Fierst v. William Penn Memorial Corporation*, 166 A. 761, 311 Pa. 263.

Objection to arrangement for holding property

Plaintiff seeking to restrain the establishment of a cemetery as a nuisance can object only to the right of the holders of the property to establish and operate a cemetery, and he is not concerned with the strictly legal form of the arrangement by which the property is held.—*Normandy Consol. School Dist. of St. Louis County v. Harral*, 286 S. W. 86, 315 Mo. 602.

6. Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247. Pa.—Mainiero v. Most Precious Blood Cemetery Ass'n, 16 Pa.Dist. & Co. 307.

11 C.J. p 57 note 24 [a].

7. N.C.—Harrison v. City of New Bern, 137 S.E. 582, 193 N.C. 555.

same, the property owner may enjoin a threatened establishment of a cemetery if he has not given his consent,⁸ and, likewise, when permission of a city or town, as required by statute, has not been obtained, the city or town may safeguard its interests by injunction,⁹ unless it has been guilty of laches barring equitable relief.¹⁰

Relief against a cemetery on the ground that it is a nuisance is treated in C.J.S. title Nuisances, § 42, also 46 C.J. p 696 notes 32, 33.

§ 19. Acquisition of and Title to Land

A cemetery corporation may acquire property in accordance with statutory authority, but the amount of land which may be acquired may be limited by statute or by its charter. A private cemetery cannot be established or acquired by dedication.

Generally stated, a cemetery corporation may acquire property in a manner in accordance with statutory authorization,¹¹ but by reason of charter or statutory restrictions, the total land which may be acquired may be limited.¹² An act prohibiting the acquisition of land for cemetery purposes by other than existing cemetery corporations applies to prohibit the acquisition of new lands by an existing unincorporated cemetery association.¹³ The acquisition, improvement, and use of an additional tract adjoining a cemetery may be a mere addition within the cemetery corporation's charter and not the creation of a new cemetery although the plots are separated by a street.¹⁴

Where land has been conveyed to a cemetery

corporation and the provision for payment is one which the corporation has not power to make, the corporation cannot retain the land without making compensation to the vendor, and where the land cannot be restored to the grantor because of the burial uses to which it has been put with the acquiescence of the grantor, equity will devise a way by which the contract of the parties may be carried out as nearly as possible.¹⁵ Where the sole consideration for a transfer of land to a cemetery corporation was a certificate giving the vendor a share in the proceeds of the subsequent sale of the land by the cemetery company, the cemetery company cannot enforce specific performance of the contract to convey without submitting the question of the validity of the certificate to determination.¹⁶ Where, by statute, a cemetery corporation is required to devote a fixed part of the proceeds of all sales of lots and plots to the payment of purchase money, and the residue to the preservation and embellishment of the cemetery property, a contract by which it attempts to give to the vendors of land purchased by it a share in the proceeds of subsequent sales, without reference to this statutory provision, is invalid.¹⁷ By statute in some jurisdictions provision is made for the creation of a family burying ground or cemetery by a conveyance of the land in trust to the county in which it is situated.¹⁸

A private cemetery cannot be established¹⁹ or acquired²⁰ by dedication. That bodies are buried in graves on private land of another, not dedi-

8. Ohio.—*Moore v. Hill Crest Cemetery Ass'n*, 163 N.E. 727, 29 Ohio App. 509—*Frey v. Nowlin*, 19 Ohio N.P.N.S., 484.

Wis.—*Maede v. Broehm*, 139 N.W. 408, 151 Wis. 563.

9. Mass.—*Inhabitants of Canton v. Westbourne Cemetery Corporation of Boston*, 146 N.E. 253, 251 Mass. 128.

10. N.J.—*Borough of West Long Branch v. Home Building & Realty Co. of Long Branch*, 133 A. 753, 99 N.J.Eq. 733.

11. N.Y.—*In re Pearsall's Estate*, 211 N.Y.S. 841, 125 Misc. 634.

Gift under will

N.Y.—*In re Pearsall's Estate*, supra.

12. N.Y.—*Moore v. U. S. Cremation Co.*, 9 N.E.2d 795, 275 N.Y. 105, reversing 291 N.Y.S. 289, 249 App. Div. 637, and affirming 286 N.Y.S. 639, 158 Misc. 621, reargument denied 11 N.E.2d 743, 275 N.Y. 544.

Pa.—*Commonwealth Trust Co. of Pittsburgh v. Allegheny Cemetery*, 187 A. 506, 324 Pa. 78.

Lands used for crematory and columbarium

The use of lands for the erection

of a crematory and a columbarium for the cremation of dead bodies and the burial of the remains in urns in wall niches, constitutes use of land for "cemetery purposes," within a statute limiting acquisition of land for cemetery purposes.—*Moore v. U. S. Cremation Co.*, 9 N.E.2d 795, 275 N.Y. 105, reversing 291 N.Y.S. 289, 249 App. Div. 637, and affirming 286 N.Y.S. 639, 158 Misc. 621, reargument denied 11 N.E.2d 743, 275 N.Y. 544.

Effect of subsequent statutes

Act with no repealing clause empowering corporation to sell tracts of land and to acquire additional ground not exceeding one hundred acres did not limit land which it might thereafter purchase to one hundred acres, where it still had authority under prior acts to acquire approximately twenty-five acres. Acts which conferred authority to acquire and hold lands, in each instance not to exceed one hundred acres, and which contained no repealing clauses, were not repugnant to each other and entitled corporation to acquire total of three hun-

dred acres although it had not at time of enactment of last act acquired maximum number of acres it was authorized to under prior acts.—*Commonwealth Trust Co. of Pittsburgh v. Allegheny Cemetery*, 187 A. 506, 324 Pa. 78.

13. N.Y.—*Baylis v. Van Nostrand*, 162 N.Y.S. 831, 176 App. Div. 396.

14. Ill.—*Rosehill Cemetery Co. v. City of Chicago*, 185 N.E. 170, 352 Ill. 11, 87 A.L.R. 742.

15. N.J.—*Bliss v. Linden Cemetery Assoc.*, 96 A. 1001, 85 N.J.Eq. 501, reversing 91 A. 304, 83 N.J.Eq. 494. 11 C.J. p 57 note 34.

16. N.J.—*East Ridgelawn Cemetery Co. v. Frank*, 75 A. 1006, 77 N.J. Eq. 36.

17. N.J.—*East Ridgelawn Cemetery Co. v. Frank*, supra.

18. Mo.—*Wooldridge v. Smith*, 147 S.W. 1019, 243 Mo. 190, 40 L.R.A., N.S., 752.

19. Mo.—*Wooldridge v. Smith*, supra.

20. Miss.—*Morgan v. Collins School House*, 133 So. 675, 677, citing *Corpus Juris*.

cated for burial purposes, and permitted to remain there for the prescriptive term, establishes no easement by prescription in favor of the descendants of those buried.²¹

Treated elsewhere in this work are: Acquisition of land for cemetery purposes by condemnation, see C.J.S. title Eminent Domain § 61, also 20 C.J. p 585 note 99—p 100 note 5; adverse possession of cemetery or burial ground, see Adverse Possession §§ 9, 38; and dedication of land to public use as a cemetery, see C.J.S. title Dedication § 8, also 18 C.J. p 47 notes 60–66.

Use of property. Trustees of a parish cemetery cannot require the parish to account for profits resulting from use of part of the grounds not used for burial purposes where the trustees have acquiesced in the use with no arrangement for an accounting.²²

§ 20. — Title and Rights Acquired

That land is dedicated or conveyed for burial purposes does not necessarily deprive the grantor of the fee, but a conveyance will not be construed to create an estate on condition unless such intent is clearly indicated. Tenancy in common cannot exist with respect to land dedicated as a cemetery.

Legal or equitable title to land dedicated for a cemetery is not destroyed by such dedication,²³ and

the fee remains in the original owner and his heirs.²⁴ The right of the public in a duly dedicated public cemetery or the right of relatives of deceased persons in ground dedicated to family burials is a mere easement and not a fee.²⁵

Although land is conveyed for the sole purpose of a burying ground, if it does not appear that the consideration paid was less than its full value, or that the grantor had any interest in or reason for having the land used solely for burial purposes, the conveyance vests in the grantee an absolute estate in fee simple.²⁶ A conveyance will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated,²⁷ but a conveyance will be held to create an estate on condition or a trust for the purpose when a construction of the deed as a whole so indicates.²⁸ A limitation "in trust to have and use as a burying ground" is not a qualification of the estate granted, but of the uses to which, in the hands of the cestui que trust, the land may be applied.²⁹ If the grantee is legally incapable of holding the fee, a deed of the land for burial purposes will not transfer the fee to it.³⁰ When the conveyance is on condition precedent the grantee does not

21. Mo.—Wooldridge v. Smith, 147 S.W. 1019, 243 Mo. 190, 40 L.R.A., N.S., 752 and note.

N.Y.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

22. Mass.—Simon v. Sleinis, 170 N.E. 421, 270 Mass. 465.

23. Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

24. Mich.—Badeaux v. Ryerson, 182 N.W. 22, 213 Mich. 642.

N.Y.—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 420, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682, citing *Corpus Juris*.

25. N.Y.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 219 N.Y.S. 413, 218 App.Div. 682, affirming 217 N.Y.S. 413, 127 Misc. 558. Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.

Tex.—Bockel v. Fidelity Development Co., Civ.App., 101 S.W.2d 628, 630, citing *Corpus Juris*.

Use for mineral purposes by owner
Where ancestor had started burial plot located in tract which he later deeded away, heirs could obtain only

easement by obtaining use of graveyard by adverse possession, and could not interfere with rights of subsequent paper title holders in use of land for mineral purposes.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn.App. 392.

26. U.S.—Wright v. Morgan, Colo., 24 S.Ct. 6, 191 U.S. 55, 48 L.Ed. 89. Pa.—Congregation Shaarai Shomayim v. Moss, 22 Pa.Super. 356. R.I.—Field v. Providence, 24 A. 143, 17 R.I. 803.

11 C.J. p 57 note 37.

27. Me.—Phinney v. Gardner, 115 A. 523, 121 Me. 44.

Md.—Columbia Bldg. Co. v. Cemetery of the Holy Cross, 141 A. 525, 155 Md. 221.

Mo.—Allison v. Cemetery Caretaking Co., 223 S.W. 41, 283 Mo. 424. 11 C.J. p 57 note 38.

Absence of provision for reversion or reentry

Although the intention that the land is to be used as a cemetery is expressed, if there is no provision for reversion or reentry on condition broken, an absolute fee will be held to have been granted.

U.S.—Thornton v. Natchez, Miss., 129 F. 84, 63 C.C.A. 526.

Me.—Phinney v. Gardner, 115 A. 523, 121 Me. 44.

Md.—Columbia Bldg. Co. v. Cemetery

of the Holy Cross, 141 A. 525, 155 Md. 221.

Mo.—Allison v. Cemetery Caretaking Co., 223 S.W. 41, 283 Mo. 424.

28. Mo.—Adams v. Highland Cemetery Co., 192 S.W. 944.

Pa.—Gumbert's App., 1 A. 437, 110 Pa. 496.

Conveyance by trustee unauthorized

A town which was made trustee of land donated for cemetery purposes was held not entitled to convey the same to a corporation, although such conveyance would be for the benefit of the cemetery.—Adams v. Highland Cemetery Co., Mo., 192 S.W. 944.

29. Pa.—Congregation Shaarai Shomayim v. Moss, 22 Pa.Super. 356, 360.

30. Mich.—Badeaux v. Ryerson, 182 N.W. 22, 213 Mich. 642.

Tex.—Smallwood v. Midfield Oil Co., Civ.App., 89 S.W.2d 1036, error dismissed.

Deed to Indian tribe

Where owner of land used as an Indian cemetery executed deed to Indian tribe describing the land as "Indian burying ground," and subsequently conveyed fee to other persons, and where such Indian tribe was not capable of taking the fee, such deed did not convey legal title,

take title until the condition is fulfilled.³¹ Where the condition subsequently becomes unlawful the grantee takes the estate freed therefrom.³²

Tenancy in common cannot exist with respect to land dedicated as a cemetery,³³ since unity in right of occupancy is an essential element of such tenancy, see C.J.S. title *Tenancy in Common* § 4, also 62 C.J. p 410 note 40.

§ 21. — Sale, Encumbrance, or Lease

- a. Sale generally
- b. Mortgage or encumbrance
- c. Lease
- d. Sale under judicial process; foreclosure

a. Sale Generally

The power to alienate cemetery lands is restricted,

and grantees named in subsequent deed took the fee subject to the right of the public to use the land as a cemetery.—*Badeaux v. Ryerson*, 182 N.W. 22, 213 Mich. 642.

Conveyance to cemetery

A conveyance in trust to a church and cemetery does not vest any title in the cemetery as an entity, since it is incapable of receiving conveyances as do persons and corporations.—*Smallwood v. Midfield Oil Co.*, Tex.Civ.App., 89 S.W.2d 1086, error dismissed.

31. N.Y.—*Bennett v. Culver*, 27 Hun 554, affirmed 97 N.Y. 250.

32. Mo.—German Evangelical Protestant Congregation of Church of Holy Ghost v. Schreiber, 209 S.W. 914, 277 Mo. 113, certiorari dismissed *Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost*, 40 S.Ct. 9, 250 U.S. 677, 68 L.Ed. 1202, 11 C.J. p 58 note 39.

Prohibition by city ordinance

Where a deed is made on condition subsequent that premises should be used as a cemetery, and a city ordinance renders further performance of condition unlawful, condition is discharged, and title of grantee is no longer subject to it.—*German Evangelical Protestant Congregation of Church of Holy Ghost v. Schreiber*, supra.

33. Tex.—*Smallwood v. Midfield Oil Co.*, Civ.App., 89 S.W.2d 1086, error dismissed.

34. U.S.—*Chew v. First Presbyterian Church of Wilmington, Del.*, D.C.Del., 237 F. 219.

Mich.—*Richmond Hills Memorial Park Ass'n v. Richardson*, 266 N.W. 396, 398, 275 Mich. 403, quoting *Corpus Juris*.

Mo.—*United Cemeteries Co. v. Strother*, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438, citing *Corpus Juris*.

Tex.—*Smallwood v. Midfield Oil Co.*, Civ.App., 89 S.W.2d 1086, error dismissed.

11 C.J. p 58 note 42.

35. Pa.—In re Mt. Calvary Methodist Protestant Church Trustee, 116 A. 319, 272 Pa. 453.—In re Jessop's Petition, 9 Pa.Dist. & Co. 292.

Question for orphans' court

On petition in the orphans' court by a church, under Revised Price Act, Pa.St.1920 § 1831 et seq. for leave to convey a building formerly used as a house of worship and certain surrounding land, opposed by owners of burial lots in an adjoining part of the churchyard, questions involved were held peculiarly one for the orphans' court, and in the absence of an abuse of discretion its conclusion must be sustained.—In re Rorer's Estate, 123 A. 781, 279 Pa. 313.

Statute providing for sale of church property

A statute providing for the appointment of a trustee for the sale of church property does not apply to the sale of a cemetery since cemetery property is not the subject of sale except as provided by statute.—In re Jessop's Petition, 9 Pa.Dist. & Co. 292.

36. Mass.—*Trefry v. Younger*, 114 N.E. 1033, 226 Mass. 5.

Tex.—*Barker v. Hazel-Fain Oil Co.*, Civ.App., 219 S.W. 874, 876, citing *Corpus Juris*.

37. Mo.—*United Cemeteries Co. v. Strother*, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438—*Allison v.*

but the fee of a cemetery may be sold subject to the rights of lot owners.

As it has been held to have been well stated in *Corpus Juris*, lands once legally devoted to, and used for, burial become appropriated to a public purpose in such a sense that the power of the body in which the legal title may rest to use or alienate the same while such dedication remains in force is restricted,³⁴ and, except as provided by statute, land dedicated for, and used as, a burying ground cannot be sold.³⁵ However, in the absence of statutory prohibition, subject to the rights of the lot owners, the fee of a cemetery may be lawfully sold,³⁶ and so the owner of a cemetery or a cemetery association may sell the land to another person or association for cemetery purposes.³⁷ Also, lands which are not used for burial purposes may be sold so long as lot owners are not deprived of the use of, or access to, their lots and the integrity of the cemetery is not interfered with.³⁸

Cemetery Caretaking Co., 223 S.W. 41, 283 Mo. 424.

Fraternal society

A fraternal order or society maintaining a cemetery may sell it to a corporation organized for the purpose of conducting a cemetery.—*Dunlap v. Union Lodge No. 15, I. O. O. F.*, 282 P. 715, 129 Kan. 287.

Deed by tenant in common or co-partner

Where property was conveyed to a number of grantees as "stockholders of the Lawson Cemetery Company" and deed provided that the land should be divided in burial lots and conveyed by the president, a deed of such company, signed by one of the grantees elected as president, conveyed at least a good equitable title, under Rev.St.1909 § 2787, whether the grantees in the original deed be considered tenants in common or copartners.—*Allison v. Cemetery Caretaking Co.*, 223 S.W. 41, 283 Mo. 424.

38. Cal.—In re Laurel Hill Cemetery Ass'n, 233 P. 732, 73 Cal.App. 193.

Mass.—*Trefry v. Younger*, 114 N.E. 1033, 226 Mass. 5.

Mich.—*Richmond Hills Memorial Park Ass'n v. Richardson*, 266 N.W. 396, 275 Mich. 403.

Miss.—*Morgan v. Collins School House*, 133 So. 675, 677, citing *Corpus Juris*.

11 C.J. p 58 notes 45, 48.

Transfer for stock

Trustees of a church, grantees in a deed of land for cemetery purposes, vested with fee-simple title, and authorized by their governing authority to sell part of the land, had no authority to convey the land to an oil company in consideration of

Where land is conveyed to trustees for cemetery purposes, the surviving trustee cannot pass title by a deed in his individual capacity and can convey it only as trustee, subject to the trust.³⁹ Where it is beyond the power of a cemetery corporation to sell its lands, it must repay with interest money given it for portions thereof.⁴⁰

Abandoned cemetery. In the absence of statutory prohibition, an abandoned cemetery may be alienated.⁴¹

b. Mortgage or Encumbrance

If not in violation of statute or charter provisions, land comprising a cemetery may be mortgaged for cemetery purposes, subject to the rights of the lot owners.

Subject to rights of lot owners, land comprising a cemetery may be mortgaged,⁴² at least, lands on which no interments have been made;⁴³ but a cemetery corporation has no power to mortgage, or to create debts on the faith of, its lands if such is violative of its charter or a statute under which it was incorporated.⁴⁴ So, a cemetery corporation cannot validly mortgage its property for other than cemetery purposes.⁴⁵ Where it is beyond the power of a cemetery corporation to mortgage its cemetery lands, it cannot validate or give legal effect to its void act by ratification or by acceptance of benefits thereunder.⁴⁶ A mortgage on cemetery lands given to secure the purchase price is not

a lien on the land, but a lien on one half of the proceeds of the sale of burial lots, where a statute requires the appropriation of such half to the payment of the purchase price.⁴⁷

c. Lease

Cemetery lands may not be leased for other than cemetery purposes without express legislative authority.

Cemetery lands may not be leased for other than cemetery purposes without express legislative authority.⁴⁸ A general grant of power to all membership corporations to lease lands is limited or restricted as to cemeteries when expressly so provided.⁴⁹

d. Sale under Judicial Process; Foreclosure

When so provided by statute an indebtedness against a cemetery corporation cannot be enforced by levy and sale under execution. A valid mortgage may be foreclosed, but the status of the premises and the rights of the lot owners must not be disturbed.

When so provided by statute, an indebtedness against a cemetery corporation cannot be enforced by levy and sale under execution.⁵⁰ A statute permitting lands no longer used for cemetery purposes and cemetery land in which there are no graves or sold lots to be sold under judicial process is constitutional.⁵¹ A valid mortgage of the cemetery, or lien, deed of trust, or land contract may

one-eighth of its capital stock instead of money.—*Barker v. Hazel-Fain Oil Co.*, Tex.Civ.App., 219 S.W. 874, error refused.

Recording statutes

Land separated from the rest of the cemetery and platted into business lots is governed by a statute pertaining to the subdivision of land into lots for purpose of sale and not by a statute relating to the recording of a map of the cemetery.—*Hollywood Cemetery Ass'n v. Powell*, 291 P. 397, 210 Cal. 121, 71 A.L.R. 310.

39. Or.—*Bitney v. Grim*, 144 P. 490, 73 Or. 257.

40. Ky.—*Woodland Cemetery Co. v. Ellison*, 67 S.W. 14, 23 Ky.L. 2222.

41. N.Y.—*A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682. Tex.—*Bockel v. Fidelity Development Co.*, Civ.App., 101 S.W.2d 628, 631, citing *Corpus Juris*.

Effect of dedication statute

A statute which dedicates certain cemeteries to a public use does not apply to prevent alienation of an abandoned cemetery.—*A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*,

217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

42. Mass.—*Trefry v. Younger*, 114 N.E. 1033, 226 Mass. 5.

43. N.J.—*Spear v. Locust Wood Cemetery Co.*, 66 A. 1068, 72 N.J. Eq. 821.

N.Y.—*Ross v. Glenwood Cemetery Assoc.*, 81 N.Y.S. 779, 81 App.Div. 357.

44. Minn.—*Wolford v. Crystal Lake Cemetery Assoc.*, 56 N.W. 56, 54 Minn. 440.

Tex.—*Oakland Cemetery Co. v. People's Cemetery Assoc.*, 57 S.W. 27, 93 Tex. 569, 55 L.R.A. 503.

45. N.J.—*Fidelity-Union Trust Co. v. Union Cemetery Ass'n*, 139 A. 706, 102 N.J.Eq. 100.

Improvement or repair of cemetery

A deed of trust of property used as a burial ground was invalid, it not purporting on its face to have been given for the purpose of raising funds to improve or keep in repair the cemetery, and the proceeds not being used for such purpose, where grantee had notice that prior to its being acquired by the grantor it had been platted and dedicated as a public cemetery, and lots had been sold and persons buried therein.—

Allison v. Cemetery Caretaking Co., 223 S.W. 41, 283 Mo. 424.

46. Minn.—*Wolford v. Crystal Lake Cemetery Assoc.*, 56 N.W. 56, 54 Minn. 440.

47. N.J.—*Fidelity Union Trust Co. v. Union Cemetery Ass'n*, 145 A. 537, 104 N.J.Eq. 326.

48. N.Y.—*Briggs v. Bloomingdale Cemetery Ass'n*, 185 N.Y.S. 348, 113 Misc. 685.

Absolute right of renewal void

A stipulation giving to a lessee of cemetery lands an absolute right of renewal after a term of five years was void, as constituting an evasion of Membership Corporations Law § 13, and in contravention thereof, the lease being one for a continuous term of more than five years at the lessee's election.—*Briggs v. Bloomingdale Cemetery Ass'n*, supra.

49. N.Y.—*Briggs v. Bloomingdale Cemetery Ass'n*, supra.

50. N.Y.—*Du Bois v. Fantinekill Cemetery Ass'n*, 192 N.Y.S. 145, 118 Misc. 37.

Tex.—*Oakland Cemetery Co. v. People's Cemetery Assoc.*, 57 S.W. 27, 93 Tex. 569.

51. N.Y.—*Johnson v. Ocean View Cemetery*, 191 N.Y.S. 128, 198 App. Div. 854.

be foreclosed,⁵² but the status of the premises and the rights of the lot owners must not be disturbed.⁵³ Lands of a cemetery corporation on which interments have not been made and which have not been sold for burial purposes may be sold under mortgage foreclosure.⁵⁴

§ 22. — Abandonment and Reversion to Original Owners

- a. In general
- b. What constitutes
- c. Reversion to original owners

a. In General

A cemetery may be abandoned as a burial place but the doctrine of abandonment which permits appropriation of abandoned property by the first taker does not apply.

A cemetery may be abandoned as a burial place,⁵⁵ especially when expressly so authorized by the legislature,⁵⁶ but the doctrine of abandonment which comprises the voluntary relinquishment of ownership whereby the thing so dealt with ceases to be the property of any person and becomes the subject of appropriation by the first taker, see Abandonment § 1, does not apply to land dedicated

and used as a burying ground.⁵⁷ A statute which merely expresses the consent of the state to the abandonment of a cemetery when so desired at the discretion of the governing body of the association does not permit the removal of remains interred therein against the consent of lot owners.⁵⁸ Likewise, it has been held that, when land has been conveyed to a village as a public cemetery, it is not competent for the authorities, in their character of trustees, to abandon the use and thereby defeat the beneficial interest of the public therein.⁵⁹ Notwithstanding a conveyance for cemetery purposes is subject to forfeiture for breach of condition subsequent as to such use, the breach is excused when such further use is prevented by act of law.⁶⁰

b. What Constitutes

A cemetery does not lose its character as such from mere disuse, but it may be said to be abandoned when all the bodies have been removed or the cemetery has been so neglected as entirely to lose its identity as such.

A cemetery does not lose its character as such from mere disuse or because further interment in it has ceased or become impossible,⁶¹ and where

52. Mich.—Richmond Hills Memorial Park Ass'n v. Richardson, 286 N.W. 396, 275 Mich. 403 quoting *Corpus Juris*.

Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

N.J.—Fidelity Union Trust Co. v. Union Cemetery Ass'n, 145 A. 537, 104 N.J.Eq. 328.

Lien on proceeds from sale of lots

On foreclosure of the vendor's equitable lien on one half of the proceeds of the sale of burial lots, which half a statute provides shall be set aside to pay the purchase price, the value of the land is properly based on its value as a cemetery, including expenditures, since land when dedicated to burial acquires a unique value by grace of its consecration and the exclusiveness of the cemetery franchise. In such foreclosure the interest on the sum found to be the value of the cemetery is improperly allowed, since the principal debt is due and payable out of the proceeds of the sales of lots. Allowance for legal expense incurred in litigation necessary to obtain the cemetery's franchise is improperly allowed as being a duplication included in the valuation of the cemetery, in which the value of the franchise is a material element.—Fidelity Union Trust Co. v. Union Cemetery Ass'n, *supra*.

53. Mo.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

Foreclosure of land contract by vendors

Vendors of lands for cemetery purposes who join in platting, dedication, and sale of burial lots or rights of burial therein cannot foreclose land contract and, without more, turn premises to other purposes.—Richmond Hills Memorial Park Ass'n v. Richardson, 286 N.W. 396, 275 Mich. 403.

Unrestricted power of sale void

An unrestricted power of sale in a deed of trust is void.—United Cemeteries Co. v. Strother, 61 S.W.2d 907, 332 Mo. 971, 90 A.L.R. 438.

Remedy in equity

Where vendees of land for use as cemetery, part of which had been released for burial purposes and part dedicated for roads, were in default, vendors were held required to seek remedy in equity where rights of all interested persons could be protected.—Richmond Hills Memorial Park Ass'n v. Richardson, 286 N.W. 396, 275 Mich. 403.

54. N.Y.—Ross v. Glenwood Cemetery Assoc., 81 N.Y.S. 779, 81 App. Div. 357.

55. N.Y.—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

Not prohibited by statute

A statute which merely gives local authorities control of the easement

of burial in a cemetery theretofore possessed by the community in general does not prevent abandonment of the cemetery.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

Remains cemetery until abandoned

Land conveyed and used for burial purposes remains a cemetery until abandoned or vacated by lawful authority.—Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States, 227 N.W. 870, 200 Wis. 163.

56. Cal.—Hornblower v. Masonic Cemetery Ass'n of City and County of San Francisco, 214 P. 978, 191 Cal. 83.

Or.—Bitney v. Grim, 144 P. 490, 73 Or. 257.

57. Me.—Phinney v. Gardner, 115 A. 523, 121 Me. 44.

58. Cal.—Hornblower v. Masonic Cemetery Ass'n of City and County of San Francisco, 214 P. 978, 191 Cal. 83.

59. U.S.—Mahoning County Com'rs v. Young, Ohio, 59 F. 96, 8 C.C.A. 27, reversing, C.C., Young v. Mahoning County Com'rs, 51 F. 535.

N.Y.—Rousseau v. Troy, 49 How.Pr. 492.

11 C.J. p 59 note 56.

60. U.S.—Mahoning County Com'rs v. Young, Ohio, 59 F. 96, 8 C.C.A. 27, reversing, C.C., Young v. Mahoning County Com'rs, 51 F. 535.

61. N.Y.—Clarke v. Keating, 170 N.

premises have been dedicated as a graveyard, they remain subject to that use so long as bodies remain buried there, and until they are removed by public authority, or by friends or relatives.⁶²

As it has been said to have been well stated in *Corpus Juris*, so long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a cemetery, it is not abandoned,⁶³ but it may be said to be abandoned where all the bodies have been removed,⁶⁴ or the cemetery has been so neglected as entirely to lose its identity as such, and is no longer known, recognized, and respected by the public as a cemetery.⁶⁵ Abandonment may result from inconsistent use, as where the public and those interested in a cemetery have permanently appropriated it to a use or uses entirely inconsistent with its purpose as a cemetery, so that it has become impossible to use it longer for cemetery purposes.⁶⁶

c. Reversion to Original Owners

Land abandoned as a cemetery will revert to the

original owner unless it has been conveyed absolutely in fee simple.

Where land has been dedicated to cemetery purposes, and there has been a lawful and effectual abandonment of the cemetery as such, the land will revert to the original owner,⁶⁷ but where lands are conveyed absolutely, and in fee simple, there will be no resulting claims, although abandoned for cemetery purposes.⁶⁸ Where the conveyance is made on condition subsequent, the land must be held and used in strict conformity to the terms of the conveyance, and for the use declared; otherwise the heirs of the grantor will become reinvested with the title.⁶⁹ Where lands are conveyed in trust solely for cemetery purposes, no action will lie by the heirs of a grantor to enforce a right of reverter as long as the trust is in force,⁷⁰ but when the trust relation is terminated by the abandonment of the cemetery, it becomes the duty of the trustees to reconvey the property.⁷¹

§ 23. Title and Rights of Owners or Licensees of Grounds, Lots or Graves

A lot owner cannot sue to obtain an adjudication of the rights of a third party against the cemetery association.

Y.S. 187, 183 App.Div. 212—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

S.C.—*Frost v. Columbia Clay Co.*, 124 S.E. 767, 130 S.C. 72.

Tex.—*Damon v. State*, Com.App., 52 S.W.2d 368, affirming, Civ.App., 37 S.W.2d 405—*Barker v. Hazel-Fain Oil Co.*, Civ.App., 219 S.W. 874, error refused.

Wis.—*Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States*, 227 N.W. 870, 200 Wis. 163.

11 C.J. p 58 note 51.

62. S.C.—*Frost v. Columbia Clay Co.*, 124 S.E. 767, 130 S.C. 72.

Tex.—*Barker v. Hazel-Fain Oil Co.*, Civ.App., 219 S.W. 874, 880, error refused, quoting *Corpus Juris*.

Wis.—*Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States*, 227 N.W. 870, 200 Wis. 163.

11 C.J. p 58 note 52.

Cemetery subject to spray of oil

The fact that a cemetery is subject to spray of oil from adjacent wells does not necessarily render it unfit for cemetery purposes.—*Barker v. Hazel-Fain Oil Co.*, Tex.Civ.App., 219 S.W. 874, error refused.

63. N.Y.—*A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 219 N.Y.S. 413, 416, 218 App.Div. 682, quoting *Corpus Juris*, affirming 217 N.Y.S. 413, 127 Misc. 558.

Pa.—In re *Hunlock's Creek Cemetery*, 16 Pa.Dist. & Co. 152.

64. N.Y.—*Clarke v. Keating*, 170 N.Y.S. 187, 183 App.Div. 212, modifying 169 N.Y.S. 24, 102 Misc. 361—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

65. N.Y.—In re Board of Transportation of City of New York, supra—*A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 217 N.Y.S. 413, 420, 127 Misc. 558, quoting *Corpus Juris*, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

S.C.—*Frost v. Columbia Clay Co.*, 124 S.E. 767, 770, quoting *Corpus Juris*.

11 C.J. p 58 note 54.

Evidence held to show abandonment N.J.—*Van Buskirk v. Standard Oil Co.*, New Jersey, 134 A. 676, 100 N.J.Eq. 301, reversing 121 A. 450, 94 N.J.Eq. 686.

66. Mo.—*Campbell v. Kansas City*, 13 S.W. 897, 102 Mo. 326, 10 L.R.A. 593.

11 C.J. p 59 note 55.

67. Mich.—*Badeaux v. Ryerson*, 182 N.W. 22, 213 Mich. 642.

N.Y.—*A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 219 N.Y.S. 413, 218 App.Div. 682, affirming 217 N.Y.S. 413, 127 Misc. 558, citing *Corpus Juris*—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

11 C.J. p 59 note 58.

Partition after abandonment

Fee owners of land dedicated for cemetery purposes could, after abandonment of cemetery uses thereof, acquire unincumbered fee by partition action.—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

Power of legislature over title

Where state did not have title, legislature on vacating cemetery could not pass title to city.—*Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States*, 227 N.W. 870, 200 Wis. 163.

Further use of property

A city's prohibition, under statute, of further burials in cemetery ipso facto restored property to other purposes consistent with rights accompanying lots occupied by graves.—*Alosi v. Jones*, 174 So. 774, 234 Ala. 391.

68. Mo.—*German Evangelical Protestant Congregation of Church of Holy Ghost v. Schreiber*, 209 S.W. 914, 277 Mo. 113, certiorari dismissed *Schreiber v. German-Evangelical Protestant Congregation of Church of Holy Ghost*, 40 S.Ct. 9, 250 U.S. 677, 63 L.Ed. 1202.

11 C.J. p 59 note 59.

69. Md.—*Reed v. Stouffer*, 56 Md. 236.

70. Cal.—*Weisenberg v. Truman*, 53 Cal. 63.

71. Cal.—*Schlessinger v. Maillard*, 11 P. 728, 70 Cal. 326.

The interest of a lot owner in a cemetery association is too remote to enable him to bring an action to obtain adjudication of the rights of a third party against the cemetery association.⁷²

§ 24. — Mode of Acquisition

No formal deed is necessary to confer the exclusive right to the use of a lot in a cemetery, nor is it necessary that a certificate of sale be recorded.

No formal deed is necessary to confer the exclusive right to the use of a lot in a cemetery for burial purposes; oral permission from the proprietors is sufficient.⁷³ Likewise, it is not necessary that the deed or certificate of sale be recorded.⁷⁴ Adverse possession of a cemetery lot is treated in the title Adverse Possession §§ 9, 38.

Sale of lots. The power of the president to bind a cemetery corporation by a sales contract may be inferred from evidence that he acted for the corporation in the sale of lots on other occasions, and the corporation, if it has received the consideration for the contract, is estopped to repudiate it.⁷⁵ A contract for the sale of lots executed in his own name by an officer having no personal

interest in the transaction is binding on the association without a formal assignment to it, where it takes over the contract, accepts the benefits thereof, and discharges its obligations.⁷⁶ In a suit by a corporation on a contract to purchase lots, an answer alleging that defendant had been excused from payment by an agreement with a corporate officer is demurrable where it fails to allege consideration for the agreement.⁷⁷

§ 25. — Title Acquired

Ordinarily, the purchaser of a lot in a cemetery acquires only a privilege, easement, or license to make interments in the lot purchased, subject to regulations governing the cemetery and to the police power of the state. A contract of sale may be canceled for a mistake of fact or for substantial misrepresentations.

While in some cases under the particular circumstances involved, the purchaser has been held to acquire a fee limited in its use,⁷⁸ ordinarily, the purchaser of a lot in a cemetery, although under a deed absolute in form and containing words of inheritance, is regarded as acquiring only a privilege, easement, or license to make interments in the lot purchased, exclusively of others, so long as the lot remains a cemetery,⁷⁹ and the fee remains

72. N.Y.—Sonkin v. Sullivan, 155 N. E. 901, 244 N.Y. 571, reversing 216 N.Y.S. 919, 217 App.Div. 780.

73. Ala.—Union Cemetery Co. v. Alexander, App., 69 So. 251, 252, 253.

11 C.J. p 59 note 63.

74. Mass.—Trefry v. Younger, 114 N.E. 1033, 226 Mass. 5.

75. N.J.—Safir v. West Ridgelawn Cemetery, 158 A. 415, 108 N.J.Law 315.

76. Colo.—American Agency & Investment Co. v. Gregg, 6 P.2d 1101, 90 Colo. 142.

77. Ga.—Slaten v. College Park Cemetery Co., 193 S.E. 872.

78. N.J.—New York Bay Cemetery Co. v. Buckmaster, 9 A. 591, 49 N. J.Law 449.

11 C.J. p 60 note 68.

79. Ala.—Alosi v. Jones, 174 So. 774, 234 Ala. 391.

Cal.—Hollywood Cemetery Ass'n v. Powell, 291 P. 397, 210 Cal. 121, 71 A.L.R. 310.

Ga.—Mayor and Aldermen of Savannah v. Colding, 181 S.E. 821, 181 Ga. 260—City Council of Augusta v. Bredenberg, 91 S.E. 486, 146 Ga. 459.

Ill.—People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 353 Ill. 534.

Iowa.—Carter v. Town of Avoca, 197 N.W. 897, 197 Iowa 670.

Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

Mass.—Trefry v. Younger, 114 N.E. 1033, 226 Mass. 5.

Mich.—Rowley v. Laingsburg Cemetery Ass'n, 184 N.W. 480, 215 Mich. 673.

N.Y.—Empire Monument Co. v. Lewis, 299 N.Y.S. 338, 252 App.Div. 301—Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App.Div. 415—Clarke v. Keating, 170 N.Y.S. 187, 189, 183 App.Div. 212, citing *Corpus Juris*—Cemetery Gardens v. Blueweiss, 251 N.Y.S. 546, 548, 140 Misc. 608, citing *Corpus Juris*.

Or.—Mansker v. City of Astoria, 198 P. 199, 204, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435, citing *Corpus Juris*.

Pa.—Walter v. Baldwin, 193 A. 146, 126 Pa.Super. 589.

Va.—Goldman v. Mollen, 191 S.E. 627.

W.Va.—Sherrard v. Henry, 106 S.E. 705, 88 W.Va. 315, 21 A.L.R. 645. 11 C.J. p 60 note 69.

"The right or title acquired under a conveyance of a plot of ground for burial purposes is oftentimes likened to an easement, sometimes to the grant of a pew in a church, and occasionally to both an easement and a license, but probably most frequently to a license or privilege. Although the right created by the conveyance of a lot for burial purposes is not one which, on the one hand, possesses all the inherent and essential qualities of an easement, and, on the other hand, is subject to the limitations and qualifications

which control and govern a pure easement, it does possess many of the characteristics of an easement; and it likewise possesses some of the qualities of a license, although it is unaccompanied by some of the characteristics of a license and unaffected by some of the qualifications and limitations which govern and control a pure license. And furthermore, when it is said that the right acquired by the purchaser of a burial lot bears an analogy to a pew tenancy, it must be remembered that the word 'analogy' is used in its strict sense of denoting only a partial similarity, for the likeness between the two rights is not perfect. Occasionally the suggestion is made that a conveyance for burial purposes creates an estate in the nature of a qualified or base fee. The right with which we are now dealing is in reality *sui generis*, for the reason that the places where the dead sleep are by all humankind treated as holy ground and by us are withdrawn from many of the rules which govern ordinary property; and consequently it is difficult to define or to describe such right when we use words which are usually employed in designating other rights possessing qualities in part similar and in part dissimilar to those inhering in the right of burial."—Mansker v. City of Astoria, *supra*.

Analogous to grant of pew

A grant of a lot in a cemetery is

in the grantor subject to the grantee's right to the exclusive use of the lot for burial purposes.⁸⁰ The lot owner's title to the lot is a legal estate,⁸¹ and his interest is a property right entitled to protection from invasion,⁸² but only in a restricted sense does it constitute an interest in real property.⁸³ The rights of the owner are subject to reasonable rules and regulations governing the cemetery,⁸⁴ and to the police power of the state,⁸⁵ in the exercise of which not only may future interments be prohibited but also the remains of persons theretofore buried may be removed.⁸⁶ Although the owner of a burial lot in which no interment has been made may lose the use of his lot by a law prohibiting interment therein, he is not entitled to compensation on the ground that his property has been taken for a public use.⁸⁷ A statute under which deeds to cemetery lots are

executed becomes part of the deeds and no greater or different rights can be conferred by the deeds than are authorized by statute.⁸⁸ Rules and regulations referred to in the contract of sale become part of the contract.⁸⁹

Possession of a burial lot, unless voluntarily relinquished, continues as long as the graves are marked and distinguishable as such and the cemetery continues to be used.⁹⁰ When by lawful authority the ground ceases to be a place of burial, a lot holder's right ceases, except for the purpose of removing remains previously buried.⁹¹ When an inhabitant of a town has acquired a license to use a lot in a public cemetery for burial purposes, his removal from the town does not constitute a revocation of his license or an abandonment of his lot.⁹²

somewhat analogous to a grant of a pew in a church.

Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Mass.—Trefry v. Younger, 114 N.E. 1033, 226 Mass. 5.

11 C.J. p 60 note 69 [a].

Dedication as family or semipublic burial ground

Whether tract was dedicated by owner as family or as semipublic burial ground, those having right of burial therein obtained easement, or license having all qualities of easement.—In re Board of Transportation of City of New York, 251 N.Y. S. 409, 140 Misc. 557.

80. Cal.—Hornblower v. Masonic Cemetery Ass'n of City and County of San Francisco, 214 P. 978, 191 Cal. 83.

Ill.—Brinkerhoff v. Huntley, 223 Ill. App. 591.

N.Y.—Smith v. Rector, etc., of Trinity Church in City of New York, 252 N.Y.S. 53, 140 Misc. 301, affirmed 254 N.Y.S. 922, 234 App.Div. 840.

Identity of grantee

Where a deed to cemetery lots gave grantee's first name as Morris, whereas he claimed his name was Mortimer, and defendant grantor's officers said grantee told them his name was Morris, and grantee's father's will so describes him, it was held that there was no doubt as to grantee's identity.—Harrison v. Hebrew Community of Borough Park, 189 N.Y.S. 888, 197 App.Div. 880.

81. N.J.—Hudek v. St. Peter Greek Catholic Cemetery Ass'n, 138 A. 654, 101 N.J.Eq. 399, affirmed 140 A. 920, 102 N.J.Eq. 332.

Lot is real property

N.Y.—Empire Monument Co. v. Lewis, 299 N.Y.S. 338, 252 App.Div. 301.

82. Cal.—Hornblower v. Masonic Cemetery Ass'n of City and County of San Francisco, 214 P. 978, 191 Cal. 83.

Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.—Certia v. University of Notre Dame Du Lac, Ind., 141 N.E. 318, 82 Ind.App. 542.

N.Y.—Oakka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App.Div. 415.

W.Va.—Sherrard v. Henry, 106 S.E. 705, 83 W.Va. 315, 21 A.L.R. 645.

Right of trustees to replat lots

Trustees may not replat occupied portion of cemetery so as to change size of original lots, nor may they encroach on any lot as theretofore platted and occupied, although encroachment does not interfere in any way with remains of one buried in it.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

83. N.Y.—Cemetery Gardens v. Blueweiss, 251 N.Y.S. 546, 140 Misc. 608.

84. Ga.—City Council of Augusta v. Bredenberg, 91 S.E. 486, 146 Ga. 459.

Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693.

Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

La.—Petit v. Depass, 5 La.App. 40.

Graves and vaults

Rights of holder of easement for burial purposes in a cemetery owned and maintained by city were subject to subsequent ordinance that no person other than city brick mason and gravedigger should dig graves or construct vaults in cemetery.—City Council of Augusta v. Bredenberg, 91 S.E. 486, 146 Ga. 459.

85. U.S.—Gamage v. Masonic Ceme-

tery Ass'n, D.C.Cal., 31 F.2d 308, reversed on other grounds, C.C.A., Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 107, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

Ky.—Brunton v. Roberts, 97 S.W. 2d 413, 265 Ky. 569, 107 A.L.R. 1289.

86. W.Va.—Sherrard v. Henry, 106 S.E. 705, 83 W.Va. 315, 21 A.L.R. 645.

11 C.J. p 60 note 70.

87. Pa.—Kincaid's App., 66 Pa. 411, 5 Am.R. 377.

88. U.S.—Masonic Cemetery Ass'n v. Gamage, C.C.A.Cal., 38 F.2d 950, 71 A.L.R. 1027, reversing, D.C., Gamage v. Masonic Cemetery Ass'n, 31 F.2d 308, and certiorari denied 51 S.Ct. 30, 282 U.S. 852, 75 L.Ed. 755.

89. Cal.—Forest Lawn Memorial Park Ass'n v. De Jarnette, 250 P. 581, 79 Cal.App. 601.

90. Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381; 100 Or. 435.

11 C.J. p 60 note 74.

Protection so long as circumstances warrant

Courts are prone to protect sacredness of final resting place of buried dead so long as circumstances warrant.—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

91. Ala.—Bessemer Land, etc., Co. v. Jenkins, 18 So. 565, 111 Ala. 135, 56 Am.S.R. 26.

11 C.J. p 60 note 71.

92. Me.—Gowen v. Bessey, 46 A. 792, 94 Me. 114.

A landowner who has permitted the use of his land as a cemetery cannot refuse to permit those who have buried their dead therein to have access to the graves and to bury other members of their families, but he may prohibit such use to all other persons.⁹³

Cancellation of contract of sale. The contract of sale of a cemetery lot may be canceled by the cemetery corporation where, through a mistake of fact, regulations of the corporation which are part of the contract are violated by the sale.⁹⁴ Misrepresentations of a substantial nature by the cemetery association will entitle the purchaser to rescind the contract of sale,⁹⁵ but mere promises of future conduct and condition which were not made dishonestly does not justify rescission although they are not fulfilled.⁹⁶

Record of deed as notice. In the absence of a statute so providing, a record of a deed conveying a lot in a cemetery is not constructive notice to a subsequent purchaser, and when the equities are with the subsequent purchaser, the court will not grant a decree requiring him to remove a body buried there and quieting title in the former purchaser.⁹⁷

§ 26. — Descent of Title

Title to a burial lot descends to heirs or lineal descendants, who take subject to all conditions under which the ancestor held it.

93. Miss.—*Morgan v. Collins School House*, 133 So. 675, 160 Miss. 321.

94. Cal.—*Forest Lawn Memorial Park Ass'n v. De Jarnette*, 250 P. 581, 79 Cal.App. 601.

Sale to negro in violation of regulations

Where through mistake a cemetery corporation having a regulation against interment of negroes sells a lot to a negro without knowledge of his race, it may cancel the contract of sale.—*Forest Lawn Memorial Park Ass'n v. De Jarnette*, supra.

95. Ill.—*Hintz v. Ridgewood Cemetery Co.*, App., 6 N.E.2d 695.

96. Mich.—*Lewis v. Glen Eden Development Co.*, 268 N.W. 760, 276 Mich. 627.

97. Iowa.—*King v. Frame*, 216 N. W. 630, 204 Iowa 1074.

98. Ill.—*People ex rel. Paxton v. Bloomington Cemetery Ass'n*, 187 N.E. 455, 353 Ill. 534.

Pa.—*In re Holbrook's Estate*, 1 Pa. Dist. 259.

11 C.J. p 60 note 77.

99. R.I.—*In re Waldron*, 58 A. 453,

26 R.I. 84, 106 Am.S.R. 688, 67 L. R.A. 118.

11 C.J. p 61 note 78.

It has also been stated that a cemetery lot descends to lineal descendants of owner unaffected by any devise.—*Brunton v. Roberts*, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

1. N.Y.—*Smith v. Rector, etc., of Trinity Church in City of New York*, 252 N.Y.S. 53, 140 Misc. 301, affirmed 254 N.Y.S. 922, 234 App. Div. 840.

Ohio.—*Fraser v. Lee*, 8 Ohio App. 235.

11 C.J. p 61 note 79.

Lots acquired before incorporation of cemetery association

In accordance with applicable statutory provisions, it has been held that heirs and devisees of original owners of lots acquired before incorporation of a cemetery association succeed to the rights of their ancestors or devisors.—*In re Fentonville Cemetery Ass'n*, 264 N.Y.S. 790, 238 App.Div. 491.

2. Wis.—*Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States*, 227 N.W. 870, 200 Wis. 163.

A burial lot is regarded as property in which title may in most cases descend to heirs or lineal descendants.⁹⁸ It does not pass under a general residuary clause in a will, but descends to the heirs as intestate property.⁹⁹ An heir to whom a burial lot descends takes it subject to all the conditions under which the ancestor held it.¹ Heirs may maintain an action to preserve their interest and to remove a cloud on their title, but the original grantor or successors must be made a party.²

§ 27. — Sale or Encumbrance

The transfer of a cemetery lot is subject to the rules of the cemetery association. After interments have been made, a burial lot can neither be sold nor mortgaged.

The transfer of a cemetery lot is subject to the rules which may be prescribed by the constitution and by-laws of the cemetery association, relative to the recording of such transfers.³ Where charter provisions of a cemetery company prohibit the transfer of lots without the consent of the managers, such provisions will bind grantees, and a transfer without such approval will pass no title,⁴ and when the giving of such consent is not strictly ministerial, a mandamus will not lie to compel the managers to permit a conveyance.⁵ A statute requiring consent of the association does not permit an arbitrary refusal of consent but requires the exercise of a reasonable line of conduct which is based on all the facts and circumstances.⁶ The

3. Pa.—*Jacobs v. Union Cemetery Assoc.*, 1 Pa.Super. 156.

4. Ky.—*Dickens v. Cave Hill Cemetery Co.*, 20 S.W. 282, 93 Ky. 385, 14 Ky.L. 347.

Pa.—*Com. v. Mt. Moriah Cemetery Assoc.*, 10 Phila. 385, 2 Wkly.N.C. 244.

5. Ky.—*Dickens v. Cave Hill Cemetery Co.*, 20 S.W. 282, 93 Ky. 385, 14 Ky.L. 347.

6. N.Y.—*Du Bois v. Fantinekill Cemetery Ass'n*, 192 N.Y.S. 145, 118 Misc. 37.

Transfer of fraction of lot

Under L.1891 c 344, requiring consent of president of cemetery association to transfer of a cemetery lot, and L.1847 c 133 § 11, as amended by L.1880 c 566, making provision as to inalienability of cemetery lots under certain circumstances, and Membership Corporation Law § 69a, providing that cemetery lots be held in inalienable form, officers of a cemetery association had a perfect right and acted reasonably in refusing to consent to a transfer of a fraction of a lot originally conveyed in 1891.—*Du Bois v. Fantinekill Cemetery Ass'n*, supra.

holder of a lot cannot convey title in fee but a conveyance carries such rights as he possesses.⁷ A document in order to pass title to a burial lot need not take the form of a real estate deed.⁸

After interments have been made in a burial lot, the owner thereof can neither sell⁹ nor mortgage¹⁰ the same, and may be enjoined from so doing.¹¹ In the absence of a prohibitory statute or regulation, one who acquires the certificate of title to a vault or burial lot may dispose of whatever rights of burial may be in the vacant space therein, but he cannot interfere with the remains buried there.¹² When permitted by statute, a cemetery lot may be sold even after interments have occurred if the bodies have been removed.¹³

§ 28. — Rights in Alleys and Approaches to Lots

The owner of a burial lot has the right to free and unobstructed access thereto and to the use of the necessary driveways and approaches to his lot.

The owner of a burial lot has the right to free and unobstructed access thereto and to the use of the necessary driveways and approaches to his lot.¹⁴ By platting a cemetery and selling the lots with reference to the plat, the association impliedly dedicates the avenues, alleys, and open places for the use of those interested in the lots,¹⁵ and this purpose must not be interfered with.¹⁶ So, a cemetery association may be compelled by a lot owner to keep the walks, drives, and approaches in proper repair.¹⁷ If there are prepared driveways, a lot owner does not acquire, by the purchase of the lot, any right of way to the lot over the grounds of the cemetery which are used or intended for burial purposes.¹⁸ No interest in the alleys which separate a lot from other lots, except a right of way, passes to a purchaser unless particularly expressed in the deed.¹⁹

A license to a lot owner to improve adjacent walks is not irrevocable, and if the lot owner abuses the privilege or exceeds his authority, revocation of the license is justified.²⁰

7. Mich.—Wells v. Daniell, 253 N. W. 285, 266 Mich. 250.

Right to compel trustees to furnish water

Where superintendent of city cemetery aided original grantee in transferring portion of lot and records of trustees showed transfer and user thereof by grantee's transferee for upward of twenty years, trustees' contention that such transferee obtained no rights, asserted when transferee's heirs sought to compel trustees to furnish water, was held stale and unavailable.—Wells v. Daniell, 253 N.W. 285, 266 Mich. 250.

8. Ohio.—Fraser v. Lee, 8 Ohio App. 235.

9. Tex.—Peterson v. Stolz, Civ.App., 269 S.W. 113, citing *Corpus Juris*, 11 C.J. p 61 note 85.

Conveyance by surviving tenant by entirety

Wife, as surviving tenant by the entirety of cemetery plot, could not, under New York Membership Corporation Law § 84, convey any rights in plot to parties not related to her.—In re Bernstein, 262 N.Y.S. 503, 146 Misc. 603.

10. Ala.—Kerlin v. Ramage, 76 So. 360, 200 Ala. 423, L.R.A.1918A 142. Tex.—Peterson v. Stolz, Civ.App., 269 S.W. 113. 11 C.J. p 61 note 86.

Mortgage on monument

Intentional construction of monument on cemetery lot so as to become part of realty, which was not subject to lien for security of debt because of nature of dedication and use, rendered chattel mortgage

thereon void.—Peterson v. Stolz, supra.

11. N.Y.—Schroder v. Wanzor, 36 Hun 423.

12. Ohio.—Fraser v. Lee, 8 Ohio App. 235.

13. N.Y.—Johnson v. Ocean View Cemetery, 191 N.Y.S. 123, 193 App. Div. 854.

Sale for unpaid taxes and expenses

When so provided by statute, a sale may be had of such portion of a single burial lot as has not been occupied for unpaid lot taxes, and for unpaid expenses of restoring a lot after removal of a body.—Johnson v. Ocean View Cemetery, supra.

14. Iowa.—Crawford v. City of Winterset, 172 N.W. 640, 136 Iowa 297.

Wis.—Dunbar v. Oconomowoc Cemetery Ass'n, 207 N.W. 265, 139 Wis. 164.

11 C.J. p 61 note 89.

15. La.—Sheean v. Carra, 82 So. 399, 145 La. 440.

Wis.—Dunbar v. Oconomowoc Cemetery Ass'n, 207 N.W. 265, 139 Wis. 164.

16. Wis.—Dunbar v. Oconomowoc Cemetery Ass'n, supra.

Construction of tomb in open semicircle

Where lots in a cemetery were sold with reference to a plan showing avenues and an open semicircle, on which the lots fronted, the parish priest could not remove a monument, sell a lot to his mother in the central part of the semicircle, and have a tomb constructed there, as against

complaint of lot owners.—Sheean v. Carra, 82 So. 399, 145 La. 440.

Permitting use for burials

(1) An association, by permitting use of alleyway for burial purposes, violates the rights of lot owners.—Dunbar v. Oconomowoc Cemetery Ass'n, 207 N.W. 265, 139 Wis. 164.

(2) Cemetery lot owner permitted to use alleyway for burial is a necessary party to a suit against association to prevent interference with right of other lot owners.—Dunbar v. Oconomowoc Cemetery Ass'n, supra.

17. Tex.—Houston Cemetery Co. v. Drew, 36 S.W. 802, 13 Tex.Civ.App. - 536.

18. Ill.—Mount Greenwood Cemetery Assoc. v. Hildebrand, 126 Ill. App. 399.

19. Conn.—Seymour v. Page, 33 Conn. 61.

Ill.—Mount Hope Cemetery Assoc. v. New Mount Hope Cemetery Assoc., 92 N.E. 912, 246 Ill. 416. 11 C.J. p 61 note 91.

Closing streets

Lot owner cannot enjoin association from closing streets on which his lot abuts where he is not deprived of reasonably convenient access and integrity of cemetery as burial place is not interfered with. Right to close streets may be exercised by board of managers without direct action of members.—Pick v. Oak Hill Cemetery Ass'n, 29 Pa.Dist. 463.

20. Iowa.—Crawford v. City of Winterset, 172 N.W. 640, 136 Iowa 297.

§ 29. — Duty to Care for and Repair, and Liability for Negligence

- a. Rights as to care and maintenance
- b. Duties as to care and maintenance

a. Rights as to Care and Maintenance

The purchaser of a burial lot is entitled to care for it either in person or by agent. Trustees of a cemetery are entitled to supervision of lots to prevent them from becoming unsightly.

The purchaser of a burial lot and his successors are entitled to exercise the right to care for the lot,²¹ either in person or by agent,²² subject to reasonable rules and regulations of the cemetery association, see *infra* § 30. The discontinuance of a burying ground does not deprive the relatives of those buried there of the right to protect the graves from obliteration or desecration,²³ but such right exists only so long as the bodies remain buried there.²⁴ The owner of a lot must not exercise his rights so as to injure others.²⁵

The proprietor of a cemetery is entitled to su-

pervision over the lots to prevent them from becoming unsightly.²⁶

b. Duties as to Care and Maintenance

- (1) In general
- (2) Duty to maintain in safe condition

(1) In General

A cemetery association must care for the lots if so required by statute. A duty imposed by charter to keep the grounds in repair does not include lots sold to individuals.

A provision in a charter of a cemetery association that the association shall, out of the proceeds of sales of lots, keep the grounds in repair and in good order does not charge the association with the duty of caring for and keeping in repair lots which have been sold to individuals for burial purposes.²⁷ Representations by a cemetery association that it will put aside a certain sum to care for the lots as required by statute impose no greater duty than that imposed by the statute.²⁸ In the absence of contract a lot owner is not personally liable to the cemetery association for the ex-

Placing curb around walk

Where plaintiff, who had purchased a circular lot in cemetery established and maintained by defendant city as a public burial place, and who had been given permission by the city council to improve walk and driveway surrounding lot, placed a cement curb around the walk, giving impression to observers that entire area encircled by curb was plaintiff's, it was held that the city was justified in revoking license and requiring removal of curb.—*Crawford v. City of Winterset*, *supra*.

Revocation not enjoined

Even though the city council gave plaintiff, who had purchased a circular lot in cemetery established and maintained by defendant city, a right to improve walk surrounding circular tract on which plaintiff had constructed a mausoleum, the right acquired by plaintiff was a revocable license, and court of equity cannot properly enjoin its withdrawal.—*Crawford v. City of Winterset*, *supra*.

21. Mich.—*Wells v. Daniell*, 253 N. W. 285, 266 Mich. 250.
- Minn.—*Scott v. Lakewood Cemetery Ass'n*, 208 N.W. 811, 167 Minn. 223, 47 A.L.R. 64.
- N.Y.—*Orlowski v. St. Stanislaus Roman Catholic Church Soc.*, 292 N.Y.S. 333, 161 Misc. 480.
- Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.
- Tex.—*Ex parte Adlof*, 215 S.W. 222, 86 Tex.Cr. 13.

Right to grade lot

Owner of lots was entitled to reasonable access thereto, as against owner of unsold portions of tract, and could grade and improve them, and remove material therefrom, if reasonably necessary and proper.—*Trefry v. Younger*, 114 N.E. 1033, 226 Mass. 5.

22. Mich.—*Wells v. Daniell*, 253 N. W. 285, 266 Mich. 250.
- Minn.—*Scott v. Lakewood Cemetery Ass'n*, 208 N.W. 811, 167 Minn. 223, 47 A.L.R. 64.
- Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.
- Tex.—*Ex parte Adlof*, 215 S.W. 222, 86 Tex.Cr. 13.
23. Tex.—*Damon v. State*, Com. App., 52 S.W.2d 368, affirming, Civ. App., 37 S.W.2d 405.
24. Tex.—*Bockel v. Fidelity Development Co.*, Civ.App., 101 S.W. 2d 628.
25. Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.
26. Ill.—*Brown v. Hill*, 119 N.E. 977, 284 Ill. 286.
- Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Manner of supervision

While trustees may not dig into or desecrate graves needlessly, change lot lines, or place posts or new markers where graves are located, they may change condition of lot

overgrown with weeds or otherwise become unsightly, and they may have ruined markers repaired or removed and may mark corners of lots with simple markers if they do not disturb graves themselves.—*Brown v. Hill*, 119 N.E. 977, 284 Ill. 286.

27. Ill.—*Bourland v. Springdale Cemetery Assoc.*, 42 N.E. 86, 158 Ill. 468.

N.J.—*Clark v. Rahway Cemetery Co.*, 61 A. 261, 69 N.J.Eq. 636.

28. N.J.—*Dennis v. Glenwood Cemetery*, 130 A. 373, 96 N.J.Eq. 399.

Failure to comply with part of statute as excuse

That a cemetery corporation has failed to comply with one section of a statute does not excuse compliance with other provisions requiring it to set aside a certain percentage of the purchase price of each burial lot for permanent maintenance of the cemetery.—*American Cemetery Co. v. U. S.*, D.C.Kan., 28 F.2d 918.

Suit by bondholders

In suit to compel payment of bonds issued by cemetery association, which had failed to set aside fund for preserving, improving, and embellishing cemetery grounds, as required by statute, it was held that the court had a primary duty to protect rights of lot owners and to insure them care of their lots, and that equities required care of cemetery should receive first consideration.—*Dennis v. Glenwood Cemetery*, 130 A. 373, 96 N.J.Eq. 399.

pense of caring for the lot.²⁹ A rule of the cemetery giving it authority to remove bodies buried on plots, in case the owner fails to care for such plot in accordance with the regulations of the cemetery, is valid and may be enforced.³⁰

(2) Duty to Maintain in Safe Condition

A cemetery association must keep premises used by lot owners and visitors in a reasonably safe condition.

A cemetery association owes to lot owners and visitors lawfully on the premises the duty to have such parts thereof as are used for travel or occupation by persons attending interments in a reasonably safe condition,³¹ but it is not liable to owners of lots who leave the avenues or ways provided for access to lots and suffer personal injuries on that part of the ground outside of the limits of such ways.³² To recover, plaintiff must show that the association was at fault,³³ and in the absence of proof that the person injured was not a trespasser, the doctrine of *res ipsa loquitur* does not

apply.³⁴ As in civil actions generally, negligence of the cemetery association³⁵ and contributory negligence of plaintiff³⁶ are questions of fact for the jury or for the trial court sitting without a jury.

§ 30. — Regulations of Care and Management of Lots

Proprietors of a cemetery may make rules and regulations for the care and management of lots, but they must be reasonable and uniform in their application.

The proprietors of a cemetery may make rules and regulations for the care and management of lots in the cemetery,³⁷ particularly when expressly authorized by statute.³⁸ The rules and regulations must be reasonable,³⁹ equal in their operation, and uniform in their application to all owners of lots in the cemetery.⁴⁰ A rule prohibiting the owner of a lot previously purchased from caring for his own lot or from hiring his own caretaker is unreasonable,⁴¹ but a rule may require that the work be done by competent persons and it may regulate

29. Mo.—Monett Lodge No. 106 I. O. O. F. v. Hartman, 170 S.W. 670, 185 Mo.App. 148.

30. Mass.—Green v. Danahy, 111 N.E. 675, 223 Mass. 1.

31. Conn.—Meyer v. St. Augustine's Church of Bridgeport, 146 A. 817, 109 Conn. 410.

D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.D.C. 336.

Mich.—Stewart v. Woodmere Cemetery Ass'n, 178 N.W. 654, 211 Mich. 282.

N.Y.—Nesterovich v. Mt. Olive Cemetery, 204 N.Y.S. 154, 122 Misc. 455, reversed on other grounds 208 N.Y.S. 609, 212 App.Div. 286.

Duty is imperative

D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.Div. 336.

Invitees

Husband and wife visiting cemetery to decorate grandchild's grave were held "invitees," not "licensees," as regards cemetery's liability for injury to wife by falling into open grave.—Cedar Hill Cemetery v. Ball, supra.

32. N.Y.—Nesterovich v. Mt. Olivet Cemetery, 208 N.Y.S. 609, 611, 212 App.Div. 286, reversing 204 N.Y.S. 154, 122 Misc. 455, quoting *Corpus Juris*.

11 C.J. p 62 note 93.

Uncared-for portion of cemetery

Seven-year old boy, injured by fall of gravestone while walking between grave mounds in uncared-for portion of cemetery for own purposes not connected with use of cemetery, was mere licensee, and was not entitled to recover from cemetery association, in absence of notice of defective condition of gravestone.—

Nesterovich v. Mt. Olivet Cemetery, 208 N.Y.S. 609, 212 App.Div. 286, reversing Nesterovich v. Mt. Olive Cemetery, 204 N.Y.S. 154, 122 Misc. 455.

33. Conn.—Meyer v. St. Augustine's Church of Bridgeport, 146 A. 817, 109 Conn. 410.

Hole left by grave marker

Conn.—Meyer v. St. Augustine's Church of Bridgeport, supra.

Notice of defect in construction of roadway is not necessary

Mich.—Stewart v. Woodmere Cemetery Ass'n, 178 N.W. 654, 211 Mich. 282.

Evidence of condition after accident

Mich.—Stewart v. Woodmere Cemetery Ass'n, supra.

34. N.Y.—Nesterovich v. Mt. Olive Cemetery, 204 N.Y.S. 154, 122 Misc. 455, reversed on other grounds 208 N.Y.S. 609, 212 App.Div. 286.

35. D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.D.C. 336.

Mich.—Stewart v. Woodmere Cemetery Ass'n, 178 N.W. 654, 211 Mich. 282.

N.Y.—Eustace v. The Evergreens, 196 N.E. 560, 267 N.Y. 523, reversing 274 N.Y.S. 748, 242 App.Div. 791.

Evidence held sufficient for jury

D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.D.C. 336.

N.Y.—Eustace v. The Evergreens, 196 N.E. 560, 267 N.Y. 523, reversing 274 N.Y.S. 748, 242 App.Div. 791.

36. D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.D.C. 336.

Mich.—Stewart v. Woodmere Ceme

tery Ass'n, 178 N.W. 654, 211 Mich. 282.

N.Y.—Eustace v. The Evergreens, 196 N.E. 560, 267 N.Y. 523, reversing 274 N.Y.S. 748, 242 App.Div. 791.

Taking path instead of walk

D.C.—Cedar Hill Cemetery v. Ball, 78 F.2d 220, 64 App.D.C. 336.

Plaintiff held not contributorily negligent

Conn.—Meyer v. St. Augustine's Church of Bridgeport, 146 A. 817, 109 Conn. 410.

37. Ga.—Nicolson v. Daffin, 83 S.E. 658, 142 Ga. 729, L.R.A.1915E 168.

N.Y.—Orlowski v. St. Stanislaus Roman Catholic Church Soc., 292 N.Y.S. 333, 161 Misc. 480.

Tenn.—Martin v. Forest Hill Cemetery, 8 Tenn.Civ.A. 289.

11 C.J. p 62 note 4.

38. Mo.—Hammersley v. LaForge, App., 80 S.W.2d 211.

11 C.J. p 62 note 5.

Adornment of lots

Mo.—Hammersley v. LaForge, supra.

39. Iowa.—Chariton Cemetery Co. v. Chariton Granite Works, 197 N.W. 457, 197 Iowa 403, 32 A.L.R. 1402.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 331, 100 Or. 435.

11 C.J. p 62 note 6.

40. Or.—Mansker v. City of Astoria, supra.

Tex.—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.

11 C.J. p 63 note 7.

41. Iowa.—Chariton Cemetery Co. v. Chariton Granite Works, 197 N.W. 457, 197 Iowa 403, 32 A.L.R. 1402.

the manner of doing the work,⁴² or it may require a lot owner or his employee to notify cemetery officials before entering on work in the cemetery.⁴³ If consent of the superintendent is required, provision must be made as to how it shall be obtained.⁴⁴ The fact that a certificate conferring the right of burial in a cemetery states that it is subject to such regulations as may from time to time be prescribed authorizes the imposition of regulations in addition to those expressly stated in the certificate.⁴⁵

A cemetery association may establish annual and perpetual care rates leaving acceptance thereof optional,⁴⁶ but it cannot require the owner of a lot previously purchased to pay rates or to contribute to an endowment fund for the care of all lots in the cemetery,⁴⁷ even if the owner has neglected the care of his lot; and although the lot was conveyed subject to rules and regulations.⁴⁸

A statute empowering directors of incorporated

cemeteries to levy assessments on cemetery lots for improvements is not invalid as taking property without due process, and to warrant an assessment under such a statute, it is not necessary that all the lots assessed are occupied by dead bodies.⁴⁹

An incorporated cemetery may use the police power of the state for enforcement of its statutory powers.⁵⁰

§ 31. — Right of Burial

The right of burial in a burying ground is an easement, license, or privilege subject to reasonable rules and regulations of the proprietor of the cemetery.

A decent burial in a suitable place is the right of everyone, springing from the necessities of the case, and is recognized in all well-ordered communities,⁵¹ but the privilege of burial in any particular cemetery must be founded on some title or right recognized by law.⁵² The right of burial in a particular plot in a burying ground is an easement, license, or privilege,⁵³ which may be lost

Minn.—Scott v. Lakewood Cemetery Ass'n, 208 N.W. 811, 167 Minn. 223, 47 A.L.R. 84.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Pa.—Benson v. Laurel Hill Cemetery Co., 68 Pa.Super. 242.
11 C.J. p 62 note 6 [b].

42. Minn.—Scott v. Lakewood Cemetery Ass'n, 208 N.W. 811, 167 Minn. 223, 47 A.L.R. 84.
11 C.J. p 62 note 6 [a].

43. Iowa.—Chariton Cemetery Co. v. Chariton Granite Works, 197 N.W. 457, 197 Iowa 403, 32 A.L.R. 1402.

44. Tex.—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.

Unreasonable enforcement of rule requiring consent

A rule requiring the written authority of the commission charged by law with the superintendence of the cemetery before any professional gardener or other person for hire can be employed to care for a lot is unreasonably enforced by the arbitrary refusal to grant permission to a lot owner to employ a suitable person to care for the lot, because in the opinion of the commission it can furnish material and perform the work required cheaper than the service may elsewhere be obtained.—Nicolson v. Daffin, 83 S.E. 658, 142 Ga. 729, L.R.A.1915E 168 and note.

Ordinance held unconstitutional

An ordinance of a city prohibiting one from dressing or keeping any grave or burial lot in a public cemetery for compensation, without consent of superintendent thereof, was held unreasonable and unconstitutional, being an unlawful restriction

on a useful and harmless avocation, and because not uniform in its application to all owners of lots, no condition being specified as to how the consent of the superintendent should be gained.—Ex parte Adlof, 215 S.W. 222, 86 Tex.Cr. 13.

45. Mass.—Green v. Danahy, 111 N. E. 675, 223 Mass. 1.

46. Mich.—Wells v. Daniell, 253 N. W. 285, 266 Mich. 250.

Refusal to supply water to coerce payment is unreasonable

Mich.—Wells v. Daniell, supra.

47. Or.—Mansker v. City of Astoria, 199 P. 381, 100 Or. 435, denying petition 198 P. 199, 100 Or. 435.

Future possibilities

Where plaintiff's lot was not overgrown with weeds or brush, and in fact seemed too bare of growth, a regulation of the municipal cemetery commission requiring plaintiff to furnish a fund to care perpetually for the lot and keep it free from weeds and brush cannot be sustained on the theory that it might in the future become overgrown.—Mansker v. City of Astoria, supra.

48. Or.—Mansker v. City of Astoria, supra.

Increase in rates

It has been held that a lot owner is not personally liable to pay a rate for the care of the lot prescribed in the regulations where it is an increase over the rate in the regulations at the time of purchase, although the purchaser took the lot subject to regulations of the association.—Monett Lodge No. 106 I. O. O. F. v. Hartman, 170 S.W. 670, 185 Mo.App. 148.

49. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 542, 204 Ind. 705—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N. E. 537, 204 Ind. 693.

Complaint not demurrable

In incorporated cemetery's action to collect assessment on lots, complaint substantially alleging that all lots were burial lots and part of cemetery, for cemetery purposes, was held not demurrable as failing to allege that lots assessed were used for burial.—Paul v. Walkerton Woodlawn Cemetery Ass'n, supra.

50. Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, supra.

51. Pa.—Kitchen v. Wilkinson, 26 Pa.Super. 75.
11 C.J. p 63 note 13.

52. Pa.—Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, 191 A. 655.

53. Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Tenn.—Boyd v. Ducktown Chemical & Iron Co., App., 89 S.W.2d 360, 19 Tenn.App. 392.

Tex.—Bockel v. Fidelity Development Co., Civ.App., 101 S.W.2d 628.

Kinship to owner

Plaintiff, who was not mentioned in his grandfather's will and was disinherited by his father, had no right of burial in private family burial ground dedicated by grandfather merely because of his kinship.—Bockel v. Fidelity Development Co., supra.

by abandonment of the land as a burying ground.⁵⁴ The right carries with it the privilege to bury according to the usual custom in the neighborhood,⁵⁵ but it is subject to the reasonable rules and regulations promulgated by the proprietor of the cemetery or burying ground;⁵⁶ however, where there is no restriction of the right of sepulture on the purchase of a lot, the managers of the cemetery have no power afterward to abridge such right by any unreasonable limitation thereon.⁵⁷ Rules and regulations may include a requirement that interments be made in vaults or inclosed in stone, brick, or concrete,⁵⁸ but not a provision preventing the use of grave boxes or vaults not furnished by the proprietor of the cemetery.⁵⁹ A cemetery corporation has the right to limit all interments in lots to members of the family owning lots and the relatives of such persons,⁶⁰ or to members of the white race.⁶¹ Subject to the regulations of the cemetery, the owner of a burial lot may permit the interment of any relative, or even a stranger, in his lot;⁶² but

in the case of two or more joint owners, no one has that right; it would require the consent of all.⁶³ Where lots are sold for use for burial purposes only, the lot owner is not entitled to bury a pet dog on his plot.⁶⁴

A cemetery association may require a person to establish his interest in the plot by documentary proof or affidavit before permitting interment therein.⁶⁵

A statute which permits the owner of a lot to revoke the designation of persons or classes of persons in whose favor interments have been restricted, has been held to apply to the original owner and not to his descendants.⁶⁶

Religious restrictions. One who secures the privilege of burial in a cemetery subject to the charge and control of a religious organization takes the right subject to the rules of such organization, which may limit the right of interment to its members or to those who die in communion with it.⁶⁷

54. Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

N.Y.—Clarke v. Keating, 170 N.Y.S. 187, 183 App.Div. 212, modifying 169 N.Y.S. 24, 102 Misc. 361.—In re Board of Transportation of City of New York, 251 N.Y.S. 409, 140 Misc. 557.

Or.—Manser v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Tex.—Bockel v. Fidelity Development Co., Civ.App., 101 S.W.2d 628.

55. Ill.—People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 353 Ill. 534.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

N.Y.—A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 558, affirmed 219 N.Y.S. 413, 218 App.Div. 682.

56. Ind.—Tatman v. Rochester Lodge No. 47, I. O. O. F., 164 N.E. 718, 88 Ind.App. 507.

Or.—Manser v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

11 C.J. p 63 note 14.

57. Ill.—People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 353 Ill. 534.

11 C.J. p.63 note 17.

58. Ind.—Tatman v. Rochester Lodge No. 47, I. O. O. F., 164 N.E. 718, 88 Ind.App. 507.

Pa.—Dries v. Charles Evans Cemetery Co., 167 A. 237, 109 Pa.Super. 498.

Charge for setting vault

The proprietor of a cemetery may make a charge of five dollars for setting a vault not furnished by it. —Tatman v. Rochester Lodge No. 47,

I. O. O. F., 164 N.E. 718, 88 Ind.App. 507.

Right of third person to question rules

Manufacturer of cemetery vaults is not entitled to question reasonableness of regulation by cemetery corporation excluding use of cement vaults other than those made by the cemetery corporation.—Davisson v. Mt. Moriah Cemetery Ass'n, 238 P. 612, 87 Mont. 459, 81 A.L.R. 1419.

59. Ill.—People ex rel. Paxton v. Bloomington Cemetery Ass'n, 187 N.E. 455, 353 Ill. 534.

60. La.—Farely v. Metairie Cemetery Assoc., 10 So. 386, 44 La.Ann. 28.

61. Cal.—Forest Lawn Memorial Park Ass'n v. De Jarnette, 250 P. 581, 79 Cal.App. 601.

11 C.J. p 63 note 16.

62. Pa.—Lewis v. Walker, 30 A. 500, 165 Pa. 30.

63. Pa.—Lewis v. Walker, supra.

11 C.J. p 63 note 19.

64. Ky.—Hertle v. Riddell, 106 S.W. 282, 127 Ky. 623, 32 Ky.L. 477, 128 Am.S.R. 364, 15 L.R.A.,N.S., 796.

Pa.—St. Peter's Evangelical Lutheran Church v. Bean, 15 Pa.Dist. 636.

65. N.Y.—Smith v. Rector, etc., of Trinity Church in City of New York, 252 N.Y.S. 53, 140 Misc. 301, affirmed 254 N.Y.S. 922, 234 App. Div. 840.

Omission of name of person entitled to burial

One who merely wrote letter to church listing persons entitled to burial in cemetery plot was held not liable to person whose name was omitted for damages for mental an-

guish resulting from delay in interment of latter's mother.—Smith v. Rector, etc., of Trinity Church in City of New York, supra.

66. N.Y.—Hegeman v. Woodlawn Cemetery, 220 N.Y.S. 379, 219 App. Div. 573.

Abrogation of legal rights not authorized

Statute relating to revocation of designation of persons to be interred in cemetery lots has been held not to authorize abrogation of legal rights, as distinguished from a mere designation.—Hegeman v. Woodlawn Cemetery, supra.

67. Pa.—Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, 191 A. 655—Weyl v. Mount Sinai Cemetery Ass'n of Pa., 12 Pa.Dist. & Co. 439.

11 C.J. p 63 note 20.

Must show right to burial

Father who was not a member of church which operated cemetery was held not entitled to compel church to permit burial of his daughter in cemetery, in absence of any showing of title, contract, or right, through membership or otherwise.—Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, Pa., 191 A. 655.

Relatives of deceased buried in cemetery

That relatives of father who was seeking permission to bury his daughter in cemetery operated by church to which father did not belong were buried in cemetery was held not to confer upon father right to future burials in the land, but at most gave him only right to protect

Even those who are members of the congregation have no right to burial except such as is conferred by the church laws.⁶⁸ Whether a person is in communion with a religious organization and entitled to burial in its cemetery is purely a question over which the church itself has exclusive jurisdiction, and must be determined by the proper ecclesiastical authorities.⁶⁹ However, the cemetery association has the burden of establishing an asserted violation of a regulation justifying refusal of interment to a deceased who committed suicide.⁷⁰

§ 32. — Crypts and Mausoleums

The purchaser of a crypt in a mausoleum is entitled to a deed. Ownership of a tomb is subject to conditions prescribed by the proprietor of the cemetery.

A contract to "deed" a crypt in a mausoleum free of encumbrances is not satisfied by a certificate of ownership, but the purchaser is entitled to a deed capable of being recorded. A tender of a certificate of ownership of a crypt in a mausoleum to authorize recovery of the purchase price must

be kept good by being brought into court. Further, a corporation contracting to convey such a crypt by deed cannot recover on the tender of a certificate of ownership, executed by another corporation which acquired title subsequently to the date of the certificate.⁷¹ The ownership of a tomb is subject to conditions prescribed by the proprietor of the cemetery.⁷² The rights of a licensee of a burial vault depend on the terms of the contract under which the vault is held.⁷³ Under a statute permitting a lot owner to erect a monument on his lot, a lot owner may erect a tomb or burial vault wholly or partly above the ground.⁷⁴

§ 33. — Tombstones and Monuments

A lot owner may erect proper tombstones and monuments subject to reasonable rules of the cemetery. Monuments and erections capable of being removed are the property of the lot holder.

The right of sepulture in a burial lot, as a general rule, carries with it the right of erecting monuments or memorial tablets over the graves therein.⁷⁵ This right is, however, subject to reasona-

graves from unlawful desecration.—*Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, supra.*

Prior operation on nonsectarian basis

That cemetery had been operated upon a nonsectarian basis by cemetery corporation prior to cemetery being acquired by church organization was held not to estop church organization to deny to public the use of the land for burial purposes on the payment of prescribed fee, since land was not dedicated to public merely because it was used for purposes permitted by charter of cemetery corporation.—*Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, supra.*

Effect of charter to maintain public burying ground

Cemetery operated by church organization is not a "public cemetery" open to public on a nondiscriminatory basis because of provisions in church charter stating that collateral purpose for its being organized was to maintain a "public burial ground," since "public" as used in charter meant those who were members of church in good standing.—*Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, supra.*

Removal of body

(1) Mandamus will not lie against Catholic cemetery authorities to permit removal of body to unconsecrated ground after long lapse of time, although burial in cemetery was in-

tended to be temporary and removal contemplated, where such agreement was not known by cemetery authorities and if known would have resulted in refusal of burial in first instance.—*Hoppe v. Cathedral Cemetery, 43 Pa.Co. 53.*

(2) In such action, declarations of decedent expressing a wish as to burial are admissible, but are not controlling.—*Hoppe v. Cathedral Cemetery, supra.*

68. Pa.—*Brnilovich v. St. George Independent Serbian Orthodox Church of Pittsburgh, South Side, 191 A. 655.*

69. Me.—*Roman Catholic Bishop of Portland v. Yencho, 130 A. 177, 124 Me. 397.*

11 C.J. p 64 note 21.

70. N.J.—*Hudek v. St. Peter Greek Catholic Cemetery Ass'n, 133 A. 654, 101 N.J.Eq. 399, affirmed 140 A. 920, 102 N.J.Eq. 332.*

Evidence insufficient to show suicide
N.J.—*Hudek v. St. Peter Greek Catholic Cemetery Ass'n, supra.*

71. Wash.—*Mausoleum Sales Co. v. Brewer, 158 P. 256, 91 Wash. 694—Mausoleum Sales Co. v. Morgan, 158 P. 255, 91 Wash. 617.*

72. La.—*Petit v. Depass, 5 La.App. 40.*

Presumption that ownership was regularly acquired

La.—*Petit v. Depass, supra.*

73. La.—*Duplantis v. Chauvin, 161 So. 610, 182 La. 281, transferred from, App., 158 So. 653.*

11 C.J. p 60 note 76.

Breach by lessor

Where lessor of vault in tomb believing lease had expired removed body from vault but, on discovering error, instead of immediately restoring body to its original compartment, as matter of convenience, placed it in different compartment which was not properly sealed, lessor's conduct constituted breach of lease entitling lessee to recover rental paid.—*Duplantis v. Chauvin, supra.*

74. N.Y.—*Tonella v. Fishkill Rural Cemetery, 236 N.Y.S. 683, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App.Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.*

75. Ill.—*Brown v. Hill, 119 N.E. 977, 284 Ill. 286.*

N.J.—*Donohue v. Fitzsimmons, 122 A. 617, 95 N.J.Eq. 125, citing Corpus Juris.*

N.Y.—*Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App.Div. 415.*

Or.—*Mansker v. City of Astoria, 193 P. 199, 100 Or. 435, petition denied 199 P. 331, 100 Or. 435, citing Corpus Juris.*

11 C.J. p 62 note 95.

License to contractor to remove monument

A widow can, with the consent of the heirs, erect a monument at the grave of her deceased husband, and give to the contractor a license to enter the burial lot for the purpose of removing it if it is not satisfactory, or is not paid for according to the terms of the contract.—*Fletcher v. Evans, 2 N.E. 837, 140 Mass. 241*

ble rules of the cemetery,⁷⁶ the rights of the lot owner,⁷⁷ and such reasonable control as a court of equity should exercise to prevent infraction of the recognized rules of propriety.⁷⁸ The purchaser of a burial lot may not erect improper monuments or such as bear improper inscriptions,⁷⁹ and if any of the markers or monuments on a lot fall into a ruinous condition, so as to disfigure the rest of the cemetery, the proprietor may cause them to be repaired or removed.⁸⁰

Ownership. All monuments and erections capable of being removed, placed on burial lots under a license, will be regarded as the personal property of the lot holder, and he has the right to remove the same when the lot ceases to be used for

purposes of burial.⁸¹ The property in a tombstone remains in the person who erects it, and after his death passes to the heirs.⁸²

§ 34. — Remedies

Interference with the rights of a lot owner may be basis for a cause of action for damages or it may be prevented by injunction.

An unlawful and unwarranted interference with the exercise of the right of burial in a cemetery lot is a tort which gives a cause of action against the wrongdoer.⁸³ The chancery court has jurisdiction to protect the rights of a lot owner and an infringement of his rights may be prevented by injunction.⁸⁴ For a lot owner to be entitled to an

Right of heir to compel removal

Where the right to bury the body of the deceased husband of a granddaughter of the original purchaser of a cemetery lot was given by all heirs of such purchaser and was acquiesced in by the cemetery association, an heir could not insist on the removal of a headstone over such husband's grave, against the wishes of any of the other heirs or against the wishes of the widowed granddaughter, who erected the headstone, although it bore the name of the deceased husband only.—*Donohue v. Fitzsimmons*, 122 A. 617, 95 N.J.Eq. 125.

76. Cal.—*Zimmer v. Congregation Beth Israel*, 263 P. 232, 203 Cal. 203.

N.J.—*Donohue v. Fitzsimmons*, 122 A. 617, 95 N.J.Eq. 125.

N.Y.—*Tonella v. Fishkill Rural Cemetery*, 236 N.Y.S. 663, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App. Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.

11 C.J. p 62 note 96.

Requirement that foundations be built by cemetery association

A rule of a cemetery, requiring all foundations for monuments to be built by the cemetery association, was held unreasonable as depriving lot owner, who otherwise conforms to reasonable rules of cemetery, of his privilege of personally caring for and adorning his graves, or having it done by those of his own selection.—*Chariton Cemetery Co. v. Chariton Granite Works*, 197 N.W. 457, 197 Iowa 403, 32 A.L.R. 1402.

Decree permitting removal

Where a headstone was erected on a grave in violation of the reasonable rules of a cemetery association, it was held that a decree would be advised permitting cemetery to remove the headstone, unless it was placed in conformity to rules and regulations within thirty days from the entry of the decree.—*Donohue v.*

Fitzsimmons, 122 A. 617, 95 N.J.Eq. 125.

77. N.Y.—*Tonella v. Fishkill Rural Cemetery*, 236 N.Y.S. 663, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App. Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.

11 C.J. p 62 note 97.

78. N.Y.—*Tonella v. Fishkill Rural Cemetery*, supra.

R.I.—*McGann v. McGann*, 66 A. 52, 28 R.I. 130.

79. Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Tablet to memory of dog

A lot owner is not entitled to erect a tablet to the memory of his dog on the burial lot.—*St. Peter's Evangelical Lutheran Church v. Bean*, 15 Pa. Dist. 636.

80. Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

81. Md.—*Partridge v. Baltimore First Independent Church*, 39 Md. 631.

82. N.Y.—*Mitchell v. Thorne*, 32 N. E. 10, 134 N.Y. 536, 30 Am.S.R. 699.

Pa.—*In re Mear's Estate*, 12 Pa. Dist. & Co. 273, affirmed 149 A. 157, 299 Pa. 217—*In re Kalbach's Estate*, 10 Pa. Dist. & Co. 195.

R.I.—*McGann v. McGann*, 66 A. 52, 28 R.I. 130.

11 C.J. p 62 note 2.

83. Ala.—*Union Cemetery Co. v. Alexander*, App., 69 So. 251.

Ga.—*Wright v. Hollywood Cemetery Corp.*, 38 S.E. 94, 112 Ga. 834, 52 L.R.A. 621.

84. N.J.—*Hudek v. St. Peter Greek Catholic Cemetery Ass'n*, 138 A. 654, 101 N.J.Eq. 399, affirmed 140 A. 920, 102 N.J.Eq. 332.

N.Y.—*Orlowski v. St. Stanislaus Roman Catholic Church Soc.*, 292 N. Y.S. 333, 161 Misc. 480—*Tonella v. Fishkill Rural Cemetery*, 236 N. Y.S. 663, 135 Misc. 81, affirmed 241

N.Y.S. 851, 229 App. Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617. Or.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Pa.—*Benson v. Laurel Hill Cemetery Co.*, 68 Pa. Super. 242.

Tex.—*Donaldson v. Oak Park Cemetery*, Civ. App., 110 S.W.2d 119.

11 C.J. p 63 note 9.

Action to restrain and for damages

Action to restrain cemetery society from enforcing regulations adopted for conduct of cemetery, and for damages allegedly arising out of enforcement of such regulations, was held properly maintained in equity court.—*Orlowski v. St. Stanislaus Roman Catholic Church Soc.*, 292 N.Y.S. 333, 161 Misc. 480.

Interference with burial

Chancery court has jurisdiction of suit to restrain interference with burial in cemetery plot owned by deceased.—*Hudek v. St. Peter Greek Catholic Cemetery Ass'n*, 138 A. 654, 101 N.J.Eq. 399, affirmed 140 A. 920, 102 N.J.Eq. 332.

Restraining conversion of park spaces into burial lots

Owners of burial lots in cemetery were prima facie entitled to restrain conversion of two park and flower bed spaces on opposite sides of cemetery entrance into burial lots, and to require cemetery association to establish a fund for perpetual upkeep of balance of cemetery.—*Donaldson v. Oak Park Cemetery*, Tex. Civ. App., 110 S.W.2d 119.

Interference with contract

Plaintiff contracting with cemetery lot owner to construct mausoleum could sue to restrain cemetery association from interfering with contract.—*Tonella v. Fishkill Rural Cemetery*, 236 N.Y.S. 663, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App. Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.

Enjoining refusal of burial permits

The refusal of burial permits to

injunction, an injury to a right must be threatened or invaded,⁸⁵ and he must not be guilty of laches.⁸⁶ The managers of a cemetery may be compelled by mandamus to permit the burial of persons entitled to sepulture therein.⁸⁷ If the owner of a vault in violation of a lease thereof disturbs the interments therein, the lessee may sue for breach of contract.⁸⁸ An owner of a lot in a denominational cemetery has no such property rights as are enforceable in equity, where in accordance with the rules and regulations of the religious organization, burial is refused.⁸⁹ The mere fact that a coowner of a cemetery lot objects to his coowner using the property for his own exclusive benefit and advantage does not, of itself, give rise to a cause of action for

damages.⁹⁰

A statute which prescribes remedies for the enforcement of the duty of cemetery corporations to establish improvement funds has been held valid,⁹¹ but a statute which declares an antecedent failure of a cemetery corporation to set up an improvement fund to be a personal charge against present officers is invalid.⁹²

§ 35. Trespasses and Offenses

As will be seen from the following sections there may be either a civil or criminal liability for trespass or other injuries to a cemetery or to burial lots.

compel compliance with an unreasonable regulation may be enjoined.—*Mansker v. City of Astoria*, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Submission of dispute to association
Cemetery association having no by-laws could not object to maintenance of suit to restrain association from interfering with construction of mausoleum on ground that dispute must be first submitted to members of the association before resort to law.—*Tonella v. Fishkill Rural Cemetery*, 236 N.Y.S. 663, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App.Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.

Inclusion of other relief

In entering a decree for an injunction against the enforcement of a by-law prohibiting a person from hiring anyone to take care of his lot, the court will not include the right of the lot owner to grade at will.—*Benson v. Laurel Hill Cemetery Co.*, 68 Pa.Super. 242.

Evidence

(1) Evidence in suit to restrain interference with construction of mausoleum was held not to show proposed mausoleum was injurious to surrounding lots.—*Tonella v. Fishkill Rural Cemetery*, 236 N.Y.S. 663, 135 Misc. 81, affirmed 241 N.Y.S. 851, 229 App.Div. 732, affirmed 175 N.E. 338, 255 N.Y. 617.

(2) In a suit by the owner of a cemetery lot to enjoin the cemetery association from enforcing against her its endowment plan for caring for the lots, which had been adopted after she purchased her lot, evidence was held not to sustain the association's contention that plaintiff's lot had been neglected so as to be a nuisance, and that the cemetery association had expended funds received for other purposes on the care of that lot.—*Mansker v. City of Astoria*, 199 P. 381, 100 Or. 435, denying petition 198 P. 199, 100 Or. 435.

85. Cal.—*Vesper v. Forest Lawn Cemetery Ass'n*, App., 67 P.2d 368. Kan.—*Earhart v. Mt. Vernon Cemetery Ass'n*, 227 P. 351, 116 Kan. 437.

Mere sentiment or temper

To warrant an injunction, the threatened injury or invasion must be something more than that resulting from mere sentiment or temper.—*Perkins v. Lawrence*, 138 Mass. 361.

Suit to restrain removal of tree on defendant's lot

Permanent injunction will not be granted at suit of owner of lot in cemetery against owner of adjoining lot, on which there is an ornamental tree shading plaintiff's lot, to prevent the owner of the lot where tree is located from cutting down, removing, or destroying the tree to prepare for burial purposes.—*Earhart v. Mt. Vernon Cemetery Ass'n*, 227 P. 351, 116 Kan. 437.

Alterations for improvement of cemetery

A lot owner has no standing in equity to complain of alterations made in good faith for the general improvement of the cemetery, and not impairing the value of his lot or his means of access to it.—*Perkins v. Lawrence*, 138 Mass. 361.

Operation of mortuary

(1) Cemetery lot owner who suffers no injury or damage and whose rights are not invaded and whose easement is not interfered with, and who cannot establish that maintenance of mortuary in cemetery impairs beauty and value of his lot, nor convenience of ingress to, or egress from, lot, cannot complain of nor enjoin operation of mortuary.—*Vesper v. Forest Lawn Cemetery Ass'n*, Cal.App., 67 P.2d 368.

(2) Owner of private cemetery lot is not entitled to injunctive relief against operation of mortuary in cemetery on ground that owner had vested right in cemetery and to uses

to which cemetery might be put, and that right had been invaded by the mortuary, in absence of injury to owner.—*Vesper v. Forest Lawn Cemetery Ass'n*, supra.

(3) Allegation of common-law dedication of property for cemetery purposes did not warrant action by owner of cemetery lot to enjoin operation of mortuary in cemetery, in absence of allegation of damage to owner.—*Vesper v. Forest Lawn Cemetery Ass'n*, supra.

86. Cal.—*Vesper v. Forest Lawn Cemetery Ass'n*, supra.

Pendency of test case as excuse for laches

Alleged pendency of test case respecting rights of defendants to conduct mortuary in private cemetery would not excuse laches of owner of cemetery lot in seeking injunctive relief.—*Vesper v. Forest Lawn Cemetery Ass'n*, supra.

87. Pa.—*Mt. Moriah Cemetery Assoc. v. Com.*, 81 Pa. 235, 22 Am.R. 743.

88. La.—*Duplantis v. Chauvin*, 161 So. 610, 182 La. 281, transferred 158 So. 653.

Puerto Rico.—*Clemadell v. Juana Diaz*, 14 Porto Rico 608.

89. N.Y.—*McGuire v. St. Patrick's Cathedral*, 7 N.Y.S. 345, 54 Hun 207.

90. La.—*Stewart v. Metairie Cemetery Ass'n*, 111 So. 616, 163 La. 108.

Suit by coowner refusing maintenance

Coowner of cemetery lot, refusing to contribute for maintenance, was held not entitled to damages from coowners objecting to burial.—*Stewart v. Metairie Cemetery Ass'n*, supra.

91. Tenn.—*Spring Hill Cemetery v. Lindsey*, 37 S.W.2d 111, 162 Tenn. 420.

92. Tenn.—*Spring Hill Cemetery v. Lindsey*, supra.

§ 36. — Civil Liability

- a. Right to, and nature of, remedy
- b. Who may sue
- c. Who liable
- d. Pleading
- e. Evidence
- f. Damages

a. Right to, and Nature of, Remedy

An action at law or a suit in equity may be resorted to as a remedy against desecration or wrongful invasion of burial grounds or lots.

An action of trespass for damages may be brought against a person who desecrates or wrongfully invades burial grounds or the burial lot of another,⁹³ or recourse may be had to equity to restrain a threatened trespass or for other relief.⁹⁴ When occasion warrants, equity will command removal of bodies wrongfully interred in another's lot.⁹⁵ A statute prohibiting the willful and malicious destruction and disfigurement of a tombstone does not warrant an injunction restraining defendant from moving a tombstone which is partially on the adjacent lot.⁹⁶ The right to damages for a

negligent or willful invasion of a graveyard may be lost by leaving the ground uncared for.⁹⁷ The owner of a cemetery lot is entitled to all remedies which the law affords as if he owned a fee simple.⁹⁸

Where there are circumstances which will warrant a change of location of a cemetery and the removal of the bodies interred therein, there is no absolute right to prevent removal of remains buried there, or other use of the land, but the rights of all parties are bounded by rules of propriety and reasonableness determinable by a court of equity on due application.⁹⁹

b. Who May Sue

The owner or proprietor of a cemetery, one with an easement or right of burial in a cemetery plot, and near relatives of deceased persons buried in the cemetery have a right to prevent desecration or interference with graves.

When one buries his dead in soil to which he has the freehold right or to the possession of which he is entitled, there is no difficulty in his protecting their graves from insult and injury by an action of trespass against a wrongdoer.¹ This right is

93. Ala.—Holder v. Elmwood Corporation, 165 So. 235, 231 Ala. 411.

Ga.—Phinlitz v. Gardner, 125 S.E. 195, 159 Ga. 136.

Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

11 C.J. p 64 note 25, p 65 note 38.

Case or trespass

In action against cemetery owner for trespass to lot allegedly in possession of plaintiff and other heirs of purchaser thereof, counts claiming damages for mental suffering were held maintainable only as in case as distinguished from trespass.—Holder v. Elmwood Corporation, 165 So. 235, 231 Ala. 411.

Malicious injury under statute

Under a statute providing that, if anyone willfully and maliciously injures any fence or other erection in or about a burial ground, he shall be liable to an action for damages, one is not liable for removing a stone wall from about a burial ground, where such removal was not done maliciously.—Fletcher v. Kezer, 50 A. 558, 73 Vt. 70.

94. U.S.—Chew v. First Presbyterian Church of Wilmington, Del., D.C.Del., 237 F. 219.

Ill.—Brown v. Hill, 119 N.E. 977, 284 Ill. 286.

Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

Mo.—Polhemus v. Daly, App., 296 S.W. 442.

Or.—Mansker v. City of Astoria, 198

P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

Pa.—St. Peter's Evangelical Lutheran Church v. Kleinfelter, 96 Pa.Super. 146.

Tex.—Cochran v. Hill, Civ.App., 255 S.W. 768—Barker v. Hazel-Fain Oil Co., Civ.App., 219 S.W. 874, 878, error refused, quoting *Corpus Juris*.

W.Va.—Sherrard v. Henry, 106 S.E. 705, 88 W.Va. 315, 21 A.L.R. 645.

11 C.J. p 64 note 32.

Protection of land not occupied by graves

Power of a court of equity to prevent the desecration of graves by the pasturing of stock on land belonging to a cemetery association and by renting such land for oil and gas purposes was held to extend to the protection of the entire lot owned by the association, irrespective whether there were any graves in any certain part of it.—Cochran v. Hill, Tex.Civ.App., 255 S.W. 768.

Injunction held necessary

Mo.—Polhemus v. Daly, App., 296 S.W. 442.

95. Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

W.Va.—Sherrard v. Henry, 106 S.E. 705, 88 W.Va. 315, 21 A.L.R. 645.

Justification for refusal to remove bodies

Where because of lack of orderliness in location of graves in country churchyard two bodies were unintentionally buried in lot belonging to another family, considerations of respect for the dead and regard for

feelings of their kindred and friends were held not to justify refusal of their relatives to move bodies.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

Laches

Where two bodies had been buried by mistake in cemetery lot belonging to another family, suit to compel removal of bodies was held not barred by laches, although about ten years had elapsed since one burial and about twenty years since the other, since no disadvantage resulted to defendants because of such delay.—Brunton v. Roberts, supra.

96. Mo.—Hammersley v. La Forge, App., 80 S.W.2d 211.

97. S.C.—Frost v. Columbia Clay Co., 124 S.E. 767, 130 S.C. 72.

Estoppel

In action for damages against a clay company and others, for trespassing on, and excavating in, a graveyard, which had formerly been the family burying ground of plaintiff's family, but had not been used for over twenty years, it was held that refusing to direct verdict for plaintiff was proper, where grounds for estoppel, presenting a question for the jury, were present.—Frost v. Columbia Clay Co., supra.

98. Ky.—Brunton v. Roberts, 97 S.W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

99. N.H.—Wilson v. Read, 68 A. 37, 74 N.H. 322, 124 Am.S.R. 973, 16 L.R.A.N.S., 332.

11 C.J. p 65 note 35.

1. Ala.—Bessemer Land, etc., Co.

not limited to the owners of the freehold, and one who has a mere easement or right of burial in a cemetery plot may maintain an action or seek an injunction against those who without his consent negligently or wantonly disturb it.² A court of equity will enjoin interference with graves on land dedicated to the public for burial purposes at the suit of the proprietor of a cemetery,³ or of any party having deceased near relatives buried therein.⁴ The heirs at law of the original owner of a burial lot in a cemetery, which lot abuts on a public street or alleyway and in which members of the family are buried, have such a special interest as to entitle them to maintain a bill to remove obstructions in the thoroughfare adjoining the lot.⁵ Where a right of way to, or a right to maintain, a cemetery lot for burial purposes is held in common by several persons, any one or more of them

may maintain an action to prevent an interruption or destruction of those rights without making the others parties.⁶

Injury to tombstone. The person erecting a tombstone may maintain an action for its injury, and after his death the heirs of him in whose honor it was erected may prosecute such action.⁷

c. Who Liable

Owners of the fee as well as strangers are liable for unlawful interference with a burial ground or plot.

Where one is permitted to bury his dead in a public cemetery, even though this is by license or privilege, he acquires such a possession of the spot of ground in which the bodies are buried as will entitle him to maintain an action against the owners of the fee⁸ or strangers who without right disturb it.⁹ So, a cemetery corporation may be lia-

v. Jenkins, 18 So. 565, 111 Ala. 135, 56 Am.S.R. 26.

2. Ala.—Holder v. Elmwood Corporation, 165 So. 235, 231 Ala. 411.

Ga.—Phinizy v. Gardner, 125 S.E. 195, 159 Ga. 136.

III.—Brown v. Hill, 119 N.E. 977, 234 Ill. 286.

Iowa.—Carter v. Town of Avoca, 197 N.W. 897, 197 Iowa 670.

Or.—Mansker v. City of Astoria, 198 P. 199, 100 Or. 435, petition denied 199 P. 381, 100 Or. 435.

11 C.J. p 65 note 41.

Tenant in common of lot

Plaintiff, even if tenant in common with other heirs of purchaser of cemetery lot, could herself maintain action for trespass thereto, where plaintiff sought only damages which were personal to her and which could not be suffered by others, such as damages for mental suffering.—Holder v. Elmwood Corporation, 165 So. 235, 231 Ala. 411.

3. Tex.—Cochran v. Hill, Civ.App., 255 S.W. 768, 770, quoting *Corpus Juris*.

11 C.J. p 65 note 42.

4. Mo.—Polhemus v. Daly, App., 296 S.W. 442.

Tex.—Cochran v. Hill, Civ.App., 255 S.W. 768.—Barker v. Hazel-Fain Oil Co., Civ.App., 219 S.W. 874, error refused.

Wis.—Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States, 227 N.W. 870, 200 Wis. 163.

11 C.J. p 64 note 27, p 65 note 43.

Use of cemetery for class exercises

Acts of college in permitting students to use cemetery for class exercises was held to constitute trespass on rights of surviving kindred.—Wilder v. Evangelical Lutheran Joint Synod of Wisconsin and Other States, 227 N.W. 870, 200 Wis. 163.

Spraying of oil

If spraying of oil by a neighboring oil company is to such an extent as to constitute a nuisance, it is a wrong of which persons having relatives and other dead buried there can complain.—Barker v. Hazel-Fain Oil Co., Tex.Civ.App., 219 S.W. 874, error refused.

Pasturing land and renting for oil purposes

The widow of an original incorporator of defendant cemetery association and a daughter and heir of another incorporator, and relatives and heirs of original incorporators, many of whom had loved ones buried in the cemetery, could intervene in trespass to try title to enjoin plaintiff from pasturing the land with stock, and from renting it for oil and gas purposes.—Cochran v. Hill, Tex.Civ.App., 255 S.W. 768.

5. Ala.—Weiss v. Taylor, 39 So. 519, 144 Ala. 440.

6. Mo.—Tracy v. Bittle, 112 S.W. 45, 213 Mo. 302, 15 Ann.Cas. 167.

N.Y.—Mitchell v. Thorne, 32 N.E. 10, 134 N.Y. 536, 30 Am.S.R. 699.

S.C.—Kelly v. Tiner, 74 S.E. 30, 91 S. C. 41.

7. N.Y.—Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App. Div. 415.

11 C.J. p 62 note 3, p 65 note 46.

Substitution of government markers for headstones

Cemetery could not maintain action to recover damages for removal of old headstones from graves of Civil War veterans and substitution by government markers, where evidence did not disclose that those who erected original stones or heirs at law of those buried objected to removal, on theory that association was trustee of interests of heirs at law of those buried, where none of

interested parties ever requested association to bring action.—Oatka Cemetery Ass'n v. Cazeau, supra.

8. Ala.—Holder v. Elmwood Corporation, 165 So. 235, 231 Ala. 411.

Iowa.—Carter v. Town of Avoca, 197 N.W. 897, 197 Iowa 670.

11 C.J. p 65 note 47.

Lessor of vault or niche

(1) The lessor of a vault or niche is devoid of the right to remove remains interred there, and if he does so in violation of the lease he is liable.

La.—Duplantis v. Chauvin, 161 So. 610, 182 La. 281, transferred, App., 158 So. 653.

Porto Rico.—Clemadell v. Juana Diaz, 14 Porto Rico 608.

(2) This is true although at the time of the renting of the vault in the tomb as temporary sepulcher no particular vault is designated, leaving it to lessor's option to designate any one of vaults, where lessor exercises that option and the body of lessee's kin is sealed therein.—Duplantis v. Chauvin, supra.

9. Ky.—Brunton v. Roberts, 97 S. W.2d 413, 265 Ky. 569, 107 A.L.R. 1289.

N.Y.—Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App.Div. 415.

W.Va.—Sherrard v. Henry, 106 S.E. 705, 88 W.Va. 315, 21 A.L.R. 645.

11 C.J. p 66 note 48.

Defendant aiding or abetting removal of headstones

If removal of headstones from cemetery was unauthorized, defendant, who was not in graveyard at time headstones were removed, would be equally accountable with actual perpetrator, if defendant incited, promoted, aided, or abetted removal.—Oatka Cemetery Ass'n v.

bie for its negligence,¹⁰ or the negligence of its officers and agents,¹¹ but a cemetery association is not liable for negligence in failing to maintain a guard to prevent bodies from being stolen.¹² A person who has a right to use a plot of ground as a cemetery is not liable to the owner of the fee for so doing.¹³

d. Pleading

In trespass the declaration should describe the close alleged to have been broken into with reasonable accuracy, and must show title or interest in plaintiff sufficient to support the action.

In trespass the declaration should describe the close alleged to have been broken with reasonable accuracy,¹⁴ and must show title or interest in the party plaintiff, sufficient to support the action he seeks to maintain.¹⁵

e. Evidence

Material evidence is admissible and that which is immaterial is inadmissible.

Cazeau, 275 N.Y.S. 355, 242 App.Div. 415.

Oil company holding lease

Where owners of land deeded it to trustees of a church for cemetery purposes, and the dedication was completed by use of the land as a cemetery, persons having their dead buried therein could protect the graves, not only as against the grantor and trustees of the church, but also as against an oil company holding the deed of the trustees, for which it had paid cash consideration before proceeding to drill an oil well on the land.—*Barker v. Hazel-Fain Oil Co.*, Tex.Civ.App., 219 S.W. 874, error refused.

10. Mass.—*Donnelly v. Boston Catholic Cemetery Assoc.*, 15 N.E. 505, 146 Mass. 163.

Negligent burial of stranger in another's grave

Mass.—*Donnelly v. Boston Catholic Cemetery Assoc.*, supra.

11. Ind.—*East Hill Cemetery Co. v. Thompson*, App., 97 N.E. 1036.

12. N.Y.—*Coleman v. St. Michael's Protestant Episcopal Church*, 155 N.Y.S. 1036, 170 App.Div. 658, reversing 153 N.Y.S. 455, 90 Misc. 118.

13. La.—*Kenner v. Cousin*, 112 So. 508, second case, 163 La. 624.

14. Ala.—*Bessemer Land, etc., Co. v. Jenkins*, 18 So. 565, 111 Ala. 135, 56 Am.S.R. 26.

Description held sufficient

A close is described with sufficient accuracy, where it is described as a burial lot in a graveyard, near a city named in a certain county, which

graveyard is now included in land occupied by a designated company but which for many years has been used and occupied as a burying ground, having been dedicated for that purpose by defendant.—*Bessemer Land, etc., Co. v. Jenkins*, supra.

15. Ala.—*Bonham v. Loeb*, 18 So. 300, 107 Ala. 604.

Ind.—*Redwood Cemetery Assoc. v. Bandy*, 93 Ind. 246.

Actual possession by heirs of purchaser

In action against cemetery owner for trespass on lot sold to plaintiff's father, counts alleging that father, mother, and two children were buried therein, and that since father's death plaintiff and other heirs had had continuous possession, and exercised ownership over lot, installing grave markers, placing flowers, and planting and replacing shrubs, were held to show heirs' actual possession under claim of ownership for over ten years, and sufficient possession to support action of trespass.—*Holder v. Elmwood Corporation*, 165 So. 235, 231 Ala. 411.

16. Ala.—*Holder v. Elmwood Corporation*, 165 So. 235, 231 Ala. 411. Mo.—*Hammersley v. La Forge*, App., 30 S.W.2d 211.

Tombstone partially on adjacent lot
In suit for injunction to restrain city employees from moving tombstone, evidence that such tombstone was partially on adjacent lot was held admissible.—*Hammersley v. La Forge*, supra.

Sale contract and deed

In action against cemetery owner

As in civil actions generally, competent evidence material to the issues is admissible,¹⁶ and evidence immaterial to the issues is inadmissible.¹⁷ Likewise, evidence will be held sufficient or insufficient for particular purposes in accordance with the facts adduced in the record.¹⁸

f. Damages

The measure of damages for trespass will be the cost of restoration if that is the most economical way of repairing the injury. When circumstances warrant, nominal damages or exemplary damages may be recovered.

The measure of damages for injury resulting from a wrongful invasion of plaintiff's lot or burial ground will be the cost of restoration if that is the most economical method of repairing the injury,¹⁹ and it will not be the difference in market value of the land before and after the alleged trespass.²⁰ While the breaking and entering of plaintiff's close is the gist of the action, the circumstances accompanying the trespass and which give character to it may be shown and considered

for trespass on lot allegedly in possession of plaintiff and other heirs, sale contract therefor between defendant and plaintiff's father, and deed conveying lot to father's estate, even if insufficient as muniment of title, could be regarded as color of title to be considered in connection with possessory acts.—*Holder v. Elmwood Corporation*, 165 So. 235, 231 Ala. 411.

17. Tex.—*Magnolia Pipe Line Co. v. Leach*, Civ.App., 17 S.W.2d 471.

Grant of right of way

In suit for desecration of grave, evidence offered by defendant showing grant of right of way across graveyard was properly rejected, since the grant would not authorize defendant to dig a ditch through the graveyard and desecrate graves.—*Magnolia Pipe Line Co. v. Leach*, supra.

18. Mo.—*Polhemus v. Daly*, App., 296 S.W. 442.

Fact of family burial ground

Mo.—*Polhemus v. Daly*, supra.

Pasturing land and removing turf

Mo.—*Polhemus v. Daly*, supra.

19. Ky.—*North East Coal Co. v. De Long*, 70 S.W.2d 972, 254 Ky. 22—*North East Coal Co. v. Pickelsimer*, 68 S.W.2d 760, 253 Ky. 11.

Mass.—*Bowen v. Jones*, 125 N.E. 142, 234 Mass. 90.

Surface cracks in graves

Ky.—*North East Coal Co. v. De Long*, 70 S.W.2d 972, 254 Ky. 22—*North East Coal Co. v. Pickelsimer*, 68 S.W.2d 760, 253 Ky. 11.

20. Mass.—*Bowen v. Jones*, 125 N.E. 142, 234 Mass. 90.

in mitigation or aggravation of the act.²¹ Plaintiff has the burden of showing the essential elements authorizing an award of damages.²² Where a corpse is wrongfully disinterred, one on whom rests the duty of reinterment may recover from the wrongdoer the expense thereby incurred.²³ The jury may take into consideration not only the injury to the property but also the injured feelings of plaintiff,²⁴ but where the interred bodies have not been disturbed, the next of kin without interest in the land, cannot recover for mental suffering.²⁵

Nominal damages only will be assessed where the acts complained of were done in good faith,²⁶ and where no special damages were shown and no expenses were incurred;²⁷ but where some damages have been sustained, plaintiff is entitled to more than nominal damages.²⁸

Exemplary damages. The general rule, that, where the injury has been wanton and malicious or the result of gross negligence or reckless disregard of the rights of others equivalent to an intentional violation of them, exemplary damages may be awarded is applicable in suits for damages for the disinterment of dead bodies,²⁹ for interference with the right of burial,³⁰ and for burying a person in plaintiff's lot without his consent.³¹

§ 37. — Criminal Responsibility

- a. Nature and elements of offenses
- b. Indictment and trial

a. Nature and Elements of Offenses

In some jurisdictions desecration of, or injury to, burying grounds or monuments is a statutory offense of which intent is usually an important element.

Under statutes so providing, the desecration of, or injury to, burying grounds or monuments, or the destruction of, or injury to, fences or trees on the land, is a specific offense.³² The intent is usually an important element of such offenses,³³ but where one intends the wrongful act prohibited, other good intention will not avail him.³⁴ Under a statute prohibiting the destruction of any inclosure for the burial of the dead, a prosecution will lie against one who destroys a line fence between his land and a cemetery.³⁵ A mere trespass or indignity subjected to a grave does not constitute the crime of malicious injury to a grave.³⁶

Where an ordinance prohibits the burial of a human body within a prescribed district, and makes the sale or purchase of a lot therein for burial purposes a misdemeanor, such sale or purchase does not amount to a misdemeanor until the offense of such burial has been committed.³⁷ Such an ordinance is a valid exercise of the police power.³⁸

21. Utah.—Thirkfield v. Mountain View Cemetery Assoc., 41 P. 564, 12 Utah 76.
11 C.J. p 66 note 51.

22. La.—Leathers v. Odd Fellows' Rest, 69 So. 853, 138 La. 17.

23. Ga.—McDonald v. Butler, 74 S. E. 573, 10 Ga.App. 845.

24. Ala.—Bessemer Land, etc., Co. v. Jenkins, 18 So. 865, 111 Ala. 135, 56 Am.S.R. 26.
11 C.J. p 66 note 54.

25. Ky.—North East Coal Co. v. De Long, 70 S.W.2d 972, 254 Ky. 22.—North East Coal Co. v. Pickelsimer, 68 S.W.2d 760, 253 Ky. 11.

26. Vt.—Hunt v. Tolles, 52 A. 1042, 75 Vt. 43.

27. Ind.—Hamilton v. New Albany, 30 Ind. 482.

28. Mass.—Bowen v. Jones, 125 N. E. 142, 234 Mass. 90.

29. Ga.—McDonald v. Butler, 74 S. E. 573, 10 Ga.App. 845.
11 C.J. p 66 note 57.

30. Ala.—Union Cemetery Co. v. Alexander, App., 69 So. 251.

Ga.—Wright v. Hollywood Cemetery Corp., 38 S.E. 94, 112 Ga. 884, 52 L.R.A. 621.
11 C.J. p 66 note 58.

31. Md.—Smith v. Thompson, 55 Md. 5, 39 Am.R. 409.

32. Ala.—Young v. State, 147 So. 650, 25 Ala. App. 413.

Ga.—Pritchett v. State, 179 S.E. 915, 51 Ga.App. 228.—Mathews v. State, 125 S.E. 781, 33 Ga.App. 178.

Mich.—People v. Allen, 176 N.W. 468, 209 Mich. 102.

11 C.J. p 66 note 61.
Burial vault as not the subject of burglary at common law is treated in Burglary § 16.

Injury to private burying ground

A statute penalizing injury to a private burying ground which has been reserved in the sale of surrounding land applies to a private burying ground, although there has been no sale of surrounding land.—Pritchett v. State, 179 S.E. 915, 51 Ga.App. 228.

33. Ky.—Masters v. Com., 140 S.W. 1021, 145 Ky. 611.

Tex.—Bird v. State, 79 S.W. 25, 46 Tex.Cr. 135.

Vt.—Fletcher v. Kezer, 50 A. 558, 73 Vt. 70.

Tombstone chipped by moving

That there were some chipped places in tombstone made by prying it up to place rollers under it was held not to show "malice" of city employees moving stone which was partially on adjacent lot, within statute making it felony to willfully and maliciously destroy and disfigure tombstone.—Hammersley v. LaForge, Mo.App., 80 S.W.2d 211.

34. Tex.—Phillips v. State, 29 Tex. 226.—Bird v. State, 79 S.W. 25, 46 Tex.Cr. 135.

Cutting trees by owner of land

Cutting trees on a public burial ground for the purpose of private profit, without the consent of the public authorities having charge of it, is a violation of a statute which provides a penalty for destroying trees within the limits of a place of burial, although the person who cuts them is the owner of the fee of the land and believes that his acts are lawful.—Com. v. Viall, 2 Allen, Mass., 512—11 C.J. p 66 note 64.

35. Mich.—People v. Allen, 176 N. W. 468, 209 Mich. 102.

Claim of right to use of way

An unfounded claim of right to the use of a way leading to a cemetery for access to defendant's land beyond the cemetery does not justify defendant in cutting the fence between the cemetery and his land.—People v. Allen, supra.

36. Ark.—Giles v. State, 78 S.W.2d 70, 190 Ark. 218.

Walking and urinating on grave

Ark.—Giles v. State, supra.

37. Cal.—Ex p. Bohen, 47 P. 55, 115 Cal. 372, 36 L.R.A. 618.

38. Pa.—Blakely v. Gielinsky, 44 Pa.Co. 443.

b. Indictment and Trial

The indictment must adequately describe the offense. Competent evidence is admissible and it must be sufficient to show commission of the crime by defendant to sustain a conviction.

In indictments for statutory offenses of this nature, it is generally necessary and sufficient to charge the offense in the words of the statute,³⁹ but even though the indictment is not phrased in the strict language of the statute, it is sufficient if it adequately describes the offense.⁴⁰ The indictment must mention the cemetery, but it is not essential that it should be described by metes and bounds;⁴¹ neither is it necessary to allege any own-

ership of the same,⁴² nor to state whether such cemetery is a public or a private ground, when the offense relates to either.⁴³

Testimony by defendant as to his understanding of his rights is admissible on the issue of willfulness.⁴⁴ In a prosecution for disturbing a private burying ground, the deed reserving the burying ground is admissible.⁴⁵

To sustain a conviction the evidence must show that the crime was committed,⁴⁶ and that defendant was the perpetrator thereof.⁴⁷ The court in its charge to the jury may give the statute upon which the indictment is based.⁴⁸

CEMETERY WORK. In a particular connection the term has been defined as meaning the work of platting, grading, planting, beautifying, and maintaining a tract of land in such manner as to render it a proper place for sepulture of the dead, and to preserve it as such.¹

CENCERRADA. In Spanish law, a disturbance corresponding to the "charivari" of American rural communities.²

CENDULÆ. Small pieces of wood laid in the form of tiles to cover the roof of a house; shingles.³

CENEGILD. In Saxon law, an expiatory mulct or fine paid to the relatives of a murdered person by the murderer or his relatives.⁴

CENELLÆ. In old records, acorns.⁵

CENLEXUS TOLLIT ERROREM.⁶

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he might appear and justify the sale.⁷

CENS. French, in French and Canadian law, a tax tribute, or payment imposed on a tenant;⁸ an annual tribute or due reserved to a seignior or lord, and imposed merely in recognition of his superiority.⁹

CENSARIA. Law Latin, in old English law, a farm, or house and land let at a standing rent.¹⁰

CENSARII. Law Latin, in old English law, farmers, or such persons as were liable to pay a census (tax).¹¹

39. Ind.—State v. McClure, 4 Blackf. 323—Lay v. State, 39 N.E. 768, 12 Ind.App. 362.

N.C.—State v. Wilson, 94 N.C. 1015. Tex.—Phillips v. State, 29 Tex. 226. 11 C.J. p 66 note 66.

40. Ga.—Pritchett v. State, 179 S. E. 915, 51 Ga.App. 228.

Affidavit

An affidavit which states that the prosecuting witness had probable cause for believing and did believe that defendant willfully removed a fence about monuments, gravestones, and memorials, and willfully cut or injured trees within the inclosure is sufficient to charge the offense.—Young v. State, 147 So. 650, 25 Ala. App. 413.

Injury to private burying ground

Indictment alleging that accused willfully injured private burying ground by digging into graves was held to charge violation of statute penalizing mutilation or injuring of private burying ground, and was held not demurrable for failure to allege that private burying ground

allegedly injured by accused had been reserved in sale of surrounding land, where indictment alleged that there had not been any sale of surrounding land.—Pritchett v. State, 179 S.E. 915, 51 Ga.App. 228.

41. Mass.—Com. v. Wellington, 7 Allen 299. 11 C.J. p 67 note 67.

42. Mass.—Com. v. Cooley, 10 Pick. 37.

43. Ind.—Lay v. State, 39 N.E. 768, 12 Ind.App. 362.

44. Mich.—People v. Allen, 176 N. W. 468, 209 Mich. 102.

45. Ga.—Mathews v. State, 125 S.E. 781, 33 Ga.App. 178.

Record of deed

Ga.—Mathews v. State, supra.

46. Ark.—Giles v. State, 78 S.W. 2d 70, 190 Ark. 218.

47. Ark.—Mitchell v. State, 58 S.W. 2d 205, 187 Ark. 1163.

Defendant in same group as perpetrators

The fact that defendant was in the same group as two persons who

turned over tombstones is not sufficient to convict him of the crime of malicious injury to graves where he himself did not go into the cemetery and had nothing to do with the crime charged.—Mitchell v. State, supra.

48. Ga.—Mathews v. State, 125 S.E. 781, 33 Ga.App. 178.

1. Cal.—Rosedale Cemetery Ass'n v. Industrial Accident Commission of California, 174 P. 351, 352, 37 Cal. App. 706.

2. Escriche Diccionario.

3. Black L.D.

4. Black L.D.

5. Black L.D.

6. See Consensus Tollit Errorem post, of which maxim this is said to be an erroneous form.

7. Black L.D.

8. Adams Gloss., citing Guyot Inst. Feod. c 9.

9. Black L.D.

10. Black L.D.

11. Black L.D.

CENSATARIO. The debtor, encumbrancer, or tenant, under the Spanish contract of "censo."¹²

CENSERE. In the Roman law, to decree, or ordain;¹³ to resolve.¹⁴

CENSITAIRE. In Canadian law, a tenant by "cens."¹⁵

CENSITIO. Latin, in Roman law, a taxing, tax, or tribute.¹⁶

CENSIVE. In Canadian law, tenure by "cens."¹⁷

CENSO.

In Spanish law, the right to receive a fixed revenue from a certain source; the right of exacting an annual rent or pension from another to whom something has been granted or given; also a contract by which one person sells and another purchases a right to receive an annual pension or sum; an encumbrance which one imposes on his property in favor of another who advances him a certain capital, and in this sense it is a right to receive an annual pension to secure the payment of which some other property is pledged; its most important use at present, however, is to denote a ground rent or annuity charged upon a real estate but carrying also a personal liability.¹⁸

CENSOR. Originally, a Roman magistrate; and derivatively a censorer, or critic, a rigid judge of morals;¹⁹ hence a person who regulates or prohibits the publication of any newspaper or the production of any play or any part thereof.²⁰

CENSORIOUSNESS. A disposition to blame and

condemn, or the habit of censuring or reproaching.²¹

CENSORSHIP. The act or practice of censoring, or previously examining for the purpose of regulation, modification, or suppression.²²

CENSUALES. Persons who, to procure the protection of the church, bound themselves to pay an annual tax or quitrent only of their estates to a church or monastery.²³

CENSUALISTA or CENSUARIO. The annuitant under the Spanish contract of "censo."²⁴

CENSUERE. Latin, in Roman law, "They have decreed." The term of art, or technical term for the judgment, resolution, or decree of the senate.²⁵

CENSUMETHIDUS or CENSUMORTHIDUS. A dead rent, like that which is called "mortmain."²⁶

CENSURA. In Spanish law, the judgment of the censor as regards a literary work or writing; also an ecclesiastical penalty sometimes involving suspension from spiritual duties.²⁷

CENSURABLE. A term held to be equivalent to "culpable."²⁸

CENSURE. A term equivalent to, or synonymous with, "aspersions," see *Aspersion* 6 C.J.S. p 790 note 80, or "obloquy."²⁹

In ecclesiastical law, a spiritual punishment consisting in withdrawing from a baptized person, whether belonging to the clergy or the laity, a privilege which the church gives him, or in wholly expelling him from the christian communion.³⁰

12. *Escrache Diccionario.*

13. *Black L.D.*

14. *Adams Gloss.*

15. *Black L.D.*

16. *Adams Gloss.*

Censitio levare—to levy a tax.—*Adams Gloss.*

17. *Black L.D.*

18. *Cal.*—*Hart v. Burnett*, 15 *Cal.* 530, 557.

Tex.—*Trevino v. Fernandez*, 13 *Tex.* 630, 655.

11 *C.J.* p 67 notes 9–15, p 68 notes 19–21.

Kinds, parties; rights and liabilities
Cal.—*Hart v. Burnett*, 15 *Cal.* 530, 557.

Tex.—*Trevino v. Fernandez*, 13 *Tex.* 630, 655.

11 *C.J.* p 69 notes 26–34.

Not contrary to American law in Puerto Rico

"It probably cannot be denied that a censo redimible existing at the date of the treaty of Paris in favor of a defendant remained good thereafter. Neither can we find that such

a censo is contrary to any law of the United States applicable in Porto Rico against perpetuities. It is doubtful, even, if such a perpetuity as this is, is repugnant to the law of any state of the Union. It does not appear to be of the kind that is legislated against by the American states, even though such censos are not much in use throughout the nation."—*U. S. v. St. John's Gas Co.*, 5 *Porto Rico Fed.* 173, 184.

19. *Adams Gloss.*

20. *Wharton L.D.*

21. *N.Y.*—*Cooper v. Greeley*, 1 *Den.* 347, 360.

11 *C.J.* p 69 note 37.

22. Held not radio censorship

Radio commission's refusal to renew broadcasting license on ground that public interest, convenience, or necessity would not be served, held not to constitute "censorship" of the radio station because there was no attempt on the part of the commission to subject any part of applicant's broadcasting matter to scrutiny prior to its release; and in

considering question whether public interest, convenience, or necessity would be served by renewal of applicant's license the commission held merely to have exercised its right to take note of applicant's past conduct, which is not censorship.—*KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 *F.2d* 670, 672, 60 *App.D.C.* 79.

23. *Black L.D.*

24. *Escrache Diccionario.*

25. *Black L.D.*, citing *Taylor Civ.L.* p 566.

26. *Black L.D.*

27. *Escrache Diccionario.*

28. *Mass.*—*Waltham Bank v. Wright*, 8 *Allen* 121, 122.

29. *Cal.*—*Bettner v. Holt*, 11 *P.* 713, 70 *Cal.* 270, 275.

30. *Black L.D.*

Enumeration of various censures

"The principal varieties of censures are: Admonition, penance, suspension, excommunication, sequestration, deprivation, and degradation."—*Sweet L.D.*

CENSUS

This Title includes enumeration of the inhabitants of the country or state and collection of statistics of their condition, property, commerce, etc., by public authority.

Matters not in this Title, treated elsewhere in this work, see *Descriptive-Word Index*

Analysis

- § 1. Definitions—p 101
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§ 1. Definitions

A census is an official enumeration of population.

"Census," in its ordinary meaning refers to an official enumeration of the population of a country or district;¹ an official enumeration of the population of a country or of a city or other administrative district.² In general, a census must be an official enumeration of the people, and, as such, a public record, containing not merely a sum total, but an official list, of the names of all the inhabitants preserved in the public archives and, except in so far as the statute under which it is taken prescribes otherwise, subject to public inspection.³ In old European law, a census was "a tax, or tribute; a toll";⁴ while in Roman law it was "a numbering or enrollment of the people, with a valuation of their fortunes."⁵

§ 2. When and under What Authority Taken

A census is generally taken under the authority of the constitutional or statutory provisions of a particular

administrative unit and at such times as are provided therein.

Under express provisions of the constitution of the United States, article 1 § 2 paragraph 3, a census of the United States is taken once in every ten years, the methods of taking and administrative details being provided for from time to time by congress, which has exclusive authority over matters regarding the national census.⁶

Censuses of the various states are also ordinarily taken once in ten years under the provisions of the various state constitutions and acts of the legislature, and where the legislature has provided a method of determining population, that method is exclusive.⁷ Where a constitutional provision requires the taking of a census from the first of May in a specified year, and further requires a census to be taken in another year and every tenth year thereafter, it is within the power of the legislature to fix, as to any census subsequent to the first, a date other than the first of May as the time when it shall be taken.⁸ Where a state con-

1. S.D.—Vale Independent Consol. School Dist. No. 2 of Butte County v. School Dist. No. 71 of Meade County, 222 N.W. 948, 949, 54 S.D. 207.

2. S.D.—Vale Independent Consol. School Dist. No. 2 of Butte County v. School District No. 71 of Meade County, supra.

Other definitions

(1) "A census in modern times is an official enumeration of the inhabitants of a state or country, with details of sex, age, family, occupation, possessions, etc."

Ind.—Huntington v. Cast, 48 N.E. 1025, 149 Ind. 255, 258.

Mo.—State v. Wooten, 122 S.W. 1101, 139 Mo.App. 221, 230.

(2) Further definitions see 11 C.J. p 70 note 1 [a].

3. Tex.—Holcomb v. Spikes, Civ. App., 232 S.W. 891, 893, dismissed for want of jurisdiction, quoting *Corpus Juris*. 11 C.J. p 70 notes 2, 3.

Relation to acts of congress

The general definition must be considered in relation to the national census in the light of the acts of congress authorizing the taking of a particular census.—Holcomb v. Spikes, supra.

4. Black L.D.

Census regalis

In English law, the annual revenue or income of the crown.—Black L.D.

5. Ind.—Huntington v. Cast, 48 N.E. 1025, 149 Ind. 255, 259.

6. D.C.—U. S. ex rel. City of Atlanta, Ga., v. Steuart, 47 F.2d 979, 60 App.D.C. 83.

7. Wash.—State v. Smith, 270 P. 306, 149 Wash. 173, adhered to 284 P. 796, 155 Wash. 422.

8. Mass.—In re Opinion of Justices, 108 N.E. 502, 220 Mass. 609.

11 C.J. p 71 note 11.

stitution required the taking of a census at certain regular periods, an act of the legislature providing for such an enumeration seven years after the prescribed period is constitutional, such enactment having been neglected by previous sessions of the legislature.⁹

Under an express or an implied power, a municipal corporation may take a census pursuant to an ordinance, although a federal census has been taken but a short time before,¹⁰ especially where territory has been added in the meantime.¹¹ Where, however, a municipal corporation has no such implied powers, obviously the power to take a census must be expressly granted.¹² Accordingly, where a municipality is by statute granted the power to take a census for certain purposes, it cannot take a census for other purposes.¹³ A municipal body cannot determine, or declare by its ordinance, the population of a town or city without any previous census or enumeration of the inhabitants thereof.¹⁴

§ 3. Scope and Extent

The scope and extent of a census is limited to the provisions of the legislation under which the census is taken.

Although the provisions of the federal constitution merely direct congress to take a census of the population for the purpose of apportioning representatives and direct taxes, laws requiring additional information concerning property and other like matters are constitutional.¹⁵ However, in case no details are expressly required except the enumeration of the inhabitants, it has been held that no matters can be inquired into except such as appertain to the individual, as sex, age, nationality, etc.¹⁶ Under a statute or constitutional provision requiring a census to be taken of legal voters, a legal voter is one who possesses all the constitutional qualifications required to entitle one to be a

voter and who has become registered as a voter in accordance with the statutes.¹⁷

§ 4. Officers

The appointment, powers and functions, and compensation of officers to take a census is usually a matter of statutory regulation.

The federal director of the census is invested with discretion in matters of form and procedure when these are not specifically provided for by law, and the exercise of this authority cannot be controlled by state legislation.¹⁸ A federal statute requiring that preference be given to honorably discharged soldiers in making appointments to positions in the executive branch of the government has been held not to apply to positions created by an act to make a business census, where it was clear that congress did not so intend when passing census act.¹⁹

A state statute providing for the taking of a census at certain intervals and making it the governor's duty to appoint a superintendent of the census at least six months before each interval is directory only as to time of appointment.²⁰

Under some state statutes the county commissioners have no jurisdiction or control over the taking of the enumeration of the county, and have no authority to amend or revise it.²¹

Compensation. The compensation to which an officer or an agent is entitled is ordinarily specified by the act under which he is appointed.²² Where the statute does not fix the compensation of census special agents, but only a maximum beyond which they cannot be paid, the compensation may be fixed by the appointing power within such limitation;²³ but the compensation specified in an agent's commission cannot be reduced by a rule of the department, of which rule the agent has not been informed.²⁴ The fact that one is to be paid by the day contemplates a daily service.²⁵

9. N.Y.—*People v. Rice*, 31 N.E. 921, 135 N.Y. 473, 16 L.R.A. 836.

10. Ky.—*Lancaster v. Owensboro*, 72 S.W. 731, 24 Ky.L. 1978.

La.—*McFarlain v. Jennings*, 31 So. 62, 106 La. 541.

11. Ky.—*Lancaster v. Owensboro*, 72 S.W. 731, 24 Ky.L. 1978.

12. Porto Rico.—*Patrón v. San Juan Municipality*, 11 Porto Rico 375.

13. Wash.—*State v. Smith*, 270 P. 306, 149 Wash. 173, adhered to 284 P. 796, 155 Wash. 422.

City of third class, acting under commission form of government, cannot ascertain its population by enumeration provided for in statute, except to advance from third to sec-

ond class city.—*State v. Smith*, supra.

14. Cal.—*Cothran v. Cook*, 80 P. 699, 146 Cal. 468.

15. U.S.—*U. S. v. Moriarity*, C.C.N. Y., 106 F. 886.

11 C.J. p 71 note 18.

16. Hawaii.—*Republic v. Paris*, 10 Hawaii 579.

17. Mass.—*In re Opinion of the Justices*, 143 N.E. 142, 247 Mass. 583.

18. D.C.—*U. S. ex rel City of Atlanta, Ga., v. Steuart*, 47 F.2d 979, 60 App.D.C. 83.

19. U.S.—*Gossnell v. Spang*, C.C.A. Pa., 84 F.2d 889, vacating, D.C., *Spang v. Roper*, 13 F.Supp. 840,

certiorari denied *Spang v. Gossnell*, 57 S.Ct. 233, 299 U.S. 605, 81 L.Ed. 446.

20. R.I.—*In re Census Superintendent*, 15 A. 205, 15 R.I. 614.

11 C.J. p 71 note 20.

21. Kan.—*State v. Duncan*, 4 P.2d 443, 134 Kan. 85.

22. U.S.—*Test v. U. S.*, 27 Ct.Cl. 352.

11 C.J. p 71 note 21.

23. U.S.—*Barre v. U. S.*, 27 Ct.Cl. 357—*Test v. U. S.*, 27 Ct.Cl. 352.

24. U.S.—*Ogden v. U. S.*, 27 Ct.Cl. 469.

25. U.S.—*Ebert v. U. S.*, 29 Ct.Cl. 183.

11 C.J. p 71 note 24.

§ 5. Making Enumeration

The processes of making an enumeration are generally governed by statutory enactment. Examine Pocket Parts for later cases.

§ 6. Compilation and Publication of Returns

In the absence of a statute providing when the census shall go into legal effect, it becomes official as of the date of the publication of returns.

Where the statute provides a method by which a census shall become final, a census does not go into legal effect until there has been a compliance with the statute.²⁶ In the absence of a statute requiring any formal action by the census board or the legislature, a census goes into legal effect, as such, on its compilation and publication by the census superintendent or board.²⁷ It is generally held that a census, after it has been officially determined²⁸ or ascertained and published,²⁹ does not relate back and give the fact force as of the date of which the census was to be taken; but it has also been held that a census, being the enumeration of the population and not the announcement of the result, becomes effective as of the date taken.³⁰ An authorized announcement of a federal census is

official, even though not final,³¹ and expressly subject to correction.³²

No official notice can be taken of a census until it goes into legal effect,³³ and changes in classifications based on the census are not permissible until there has been a legal ascertainment of the fact of increase by means of official publication or announcement.³⁴

Effect of census. The population of a particular district for official purposes is determined by the last census and not by the actual population of the district at the time in question.³⁵ A federal tabulation or census has no force within a state, except as provided by the constitution or laws of the state, but it is the best evidence of the number of inhabitants which can be obtained.³⁶ Until the complete and certified work of census enumerators, who are constituted public officers and have qualified as such, is impeached by proper and sufficient evidence, it must be given the credit accorded by law to other official acts.³⁷ A municipal census, when taken, is conclusive, in the absence of any averment of fraud or mistake,³⁸ and is not subject to collateral attack.³⁹

26. Iowa.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.

Certification by secretary of state

Where the publication of the census is to be under the secretary of state's certification, the date of such certification determines the date on which the census becomes effective. Accordingly, where the secretary of state did not certify 1925 census of Iowa until February 1, 1926, census did not become effective until such date.—Broyles v. Mahaska County, supra.

Certification to governor

A census made by an individual acting under a resolution of the town, sworn to be correct by this individual, is not conclusive proof of the population of the town, since the statute makes it necessary that the census be certified to the governor, that the facts under which it is taken be investigated by him, and that a proclamation be issued and published by the governor in response to the census.—State ex rel. Garland v. Dietlein, 2 La.App. 572, certified questions answered 104 So. 56, 158 La. 314.

Entry on records

Where the statute provides that the result of a municipal census shall be entered on the records of the body having legislative functions, the affidavits of the enumerators, such action not having been taken, are not prima facie evidence of the correctness of the census.—

Flowers v. Smith, 112 S.W. 499, 214 Mo. 98.

27. Pa.—Lewis v. Lackawanna County, 50 A. 162, 200 Pa. 590.

S.C.—Forde v. Owens, 158 S.E. 147, 150, 160 S.C. 168, quoting *Corpus Juris*.

11 C.J. p 71 note 25.

28. Iowa.—Broyles v. Mahaska County, 239 N.W. 1, 213 Iowa 345.

No retroactivity

Prior to effective date of the census, Feb. 1, 1926, the city of Oska-loosa, Iowa, had in law a population of fewer than ten thousand.—Broyles v. Mahaska County, supra.

29. Pa.—Commonwealth v. Walter, 118 A. 510, 274 Pa. 553—Lewis v. Lackawanna County, 50 A. 162, 200 Pa. 590.

30. Tenn.—Underwood v. Hickman, 39 S.W.2d 1034, 162 Tenn. 689.

31. Okl.—Board of Com'rs of Coal County v. Mathews, 296 P. 481, 147 Okl. 296—Herndon v. Excise Board of Garfield County, 295 P. 223, 147 Okl. 126.

Issuance of bulletin by the census director stating the population of a particular county is the completion of the census as to that county.—Holcomb v. Spikes, Tex.Civ.App., 232 S.W. 891, dismissed for want of jurisdiction.

32. Okl.—Elliott v. State, 1 P.2d 370, 150 Okl. 275.

Tex.—Holcomb v. Spikes, Civ.App.,

232 S.W. 891, dismissed for want of jurisdiction.

33. Ark.—Childers v. Duvall, 63 S. W. 802, 69 Ark. 336.

Minn.—Wolfe v. Moorehead, 107 N. W. 728, 98 Minn. 113.

Tex.—Holcomb v. Spikes, Civ.App., 232 S.W. 891, dismissed for want of jurisdiction.

34. N.J.—In re City of Passaic, 23 A. 517, 54 N.J.Law 156.

Pa.—Commonwealth v. Walter, 118 A. 510, 274 Pa. 553—Lewis v. Lackawanna County, 50 A. 162, 200 Pa. 590—Burns v. Handley, 106 Pa. 245—Commonwealth v. Harding, 87 Pa. 343.

35. Iowa.—State v. Seaton, 181 N. W. 796, 191 Iowa 81.

Meaning of "population"

Under a statute which so provides, the word "population" means that shown in the last preceding state or national census, unless otherwise specially provided.—State v. Seaton, supra.

36. Pa.—Commonwealth v. Walter, 118 A. 510, 274 Pa. 553.

37. Ky.—Lancaster v. Owensboro, 72 S.W. 731, 24 Ky.L. 1978.

38. Ky.—O'Bryan v. Owensboro, 68 S.W. 858, 69 S.W. 800, 113 Ky. 680, 24 Ky.L. 469, 645.

39. Mo.—State v. Cass County Ct., App., 119 S.W. 1014—State v. Cass County Ct., 119 S.W. 1010, 137 Mo. App. 698.

Ratification of void census. Where a municipal census is void for technical irregularities, it may be ratified by the city authorities; but they are not required to treat it as valid unless they are willing so to do.⁴⁰

Recanvass. Where the ordinance under which a municipal census is taken does not confine any enumerator to any particular part of the work, the council and the mayor may have the work of some of the enumerators recanvassed by another, particularly where the enumeration is not to be complete until the result is declared by the ordinance of the council adopting the completed work of their enumerators.⁴¹

Publication of bulletins. The fact that a bulletin of the United States census originally prepared by a special census agent is accepted by the superintendent of the census, and approved by the secretary of the interior under whose direction the work was done, does not bind the census office to publish it in its original form.⁴²

§ 7. Making False Return

It is usually, under the statutes, an indictable offense to make a false or fictitious census return.

The making of a false or fictitious census return in the federal decennial census is an indictable offense.⁴³ Even in making correction or additions to his schedules after their return, the enumerator acts in his official capacity and subject to the penalties prescribed for making false returns.⁴⁴ Although an enumerator in a federal census alone may be able to commit the misdemeanor of willfully and knowingly making a false certificate or fictitious return, nevertheless all persons who conspire with such enumerator may be punished under

a federal statute, 18 U.S.C.A. § 55, providing a punishment for persons who conspire to commit an offense against the United States, although they may be incapable themselves of doing the overt act.⁴⁵

Indictment. The offense of falsifying census returns is created and defined by statute and an information charging such offense in the words of the statute is sufficient.⁴⁶ An indictment for making a false and fictitious census return need not charge that it was made to the supervisor of the district, he being the only one authorized to receive it; nor need it allege that the return was made on a prescribed and adopted form; nor is the indictment defective because a portion of such return contains information not required by statute and omits information which is so required.⁴⁷

§ 8. Refusal to Furnish Information

Where so provided by statute, it is an indictable offense to refuse to furnish an enumerator with required information.

Under a statute which so provides, it is a misdemeanor to refuse to render to the census enumerator the required information.⁴⁸ This information required by statute to be furnished is not limited merely to population and sex, but may include a knowledge of one's possessions, business, or profession.⁴⁹ The exaction of a penalty for refusal to give certain information is ineffective, however, in the absence of any statute requiring such information to be given.⁵⁰ A refusal to furnish information under a question which is not authorized by statute to be propounded by the enumerator, does not subject the person refusing to answer to a statutory prosecution for such refusal.⁵¹

40. Kan.—State v. Faulkner, 20 Kan. 541.

41. Ky.—Lancaster v. Owensboro, 72 S.W. 731, 24 Ky.L. 1978.

42. D.C.—Donaldson v. Wright, 7 App.D.C. 45.

43. U.S.—U. S. v. Moriarity, C.C.N.Y., 106 F. 886.

44. U.S.—Ching v. U. S., Md., 118 F. 538, 55 C.C.A. 304.

45. U.S.—U. S. v. Stevens, D.C. Minn., 44 F. 132.

46. Mo.—State v. Alsop, 123 S.W. 1011, 140 Mo.App. 194.

Form of indictment

U.S.—U. S. v. Moriarity, C.C.N.Y., 106 F. 886.

Indictment held sufficient in proceeding for conspiring with census enumerator to falsify schedules.—U. S. v. Stevens, D.C.Minn., 44 F. 132.

47. U.S.—U. S. v. Moriarity, C.C.N.Y., 106 F. 886.

48. U.S.—U. S. v. Sarle, C.C.R.I., 45 F. 191.

11 C.J. p 72 note 42.

49. U.S.—U. S. v. Moriarity, C.C.N.Y., 106 F. 886—U. S. v. Sarle, C.C.R.I., 45 F. 191.

11 C.J. p 72 note 43.

50. U.S.—U. S. v. Mitchell, D.C.Ohio, 58 F. 993.

Hawaii.—Republic v. Paris, 10 Hawaii 579.

Iowa.—State v. Deitrick, 159 N.W. 595, 178 Iowa 48.

11 C.J. p 72 note 44.

51. Iowa.—State v. Deitrick, supra.

CENSUS CHILDREN. The number of children officially registered.¹

CENT. One of the minor coins of the United States,² a common abbreviation being "c" or "ct.," see Abbreviations 1 C.J.S. p 276 note 5.

Phrase: "Dollars and cents."³

CENTAVO. In the Spanish speaking countries, a copper cent or nickel coin in value six tenths of a cent (actual) and one cent (nominal); the one hundredth part of a peso.⁴

CENTENA. Law Latin, in general, a hundred.⁵ Also, in old records and pleadings, a hundred-weight.⁶

CENTENARII. Petty judges, under-sheriffs of counties, who had rule of a hundred (centena), and judged smaller matters among them.⁷

CENTENI. The principal inhabitants of a "centena," or district composed of different villages, originally in number a hundred, but afterward only called by that name.⁸

CENTER or CENTRE. In its strict, scientific sense, the primary meaning of the word is the point or

place equally distant from the extremities or from the different sides of anything; but it has been held that, ordinarily, the word does not necessarily mean, and is not necessarily limited to, the precise geographical or mathematical center; and that, giving it a sense in which it is used in common parlance, the term means the middle or central point or portion of anything;⁹ also something between two other objects.¹⁰

Center line. As applied to public highways and railroads the term means the line equidistant from each of the side lines of the roadway proper, and is usually the line surveyed when the road is laid out;¹¹ the one that bisects the middle line of the usable road.¹²

Other phrases: "Center of intersection,"¹³ "center of the concession,"¹⁴ "center of the highway,"¹⁵ "center of the main channel of [named] . . . river,"¹⁶ "center of the road,"¹⁷ "center of the section,"¹⁸ "center of the stream,"¹⁹ "center of the traveled portion of the road,"²⁰ "in the center of land No. (61) sixty-one,"²¹ "in the center of the district,"²² "in the center of the two acres of land,"²³ and "near the center of the proposed road."²⁴

1. Nev.—State v. Sweeney, 55 P. 88, 89, 24 Nev. 350.

2. Ill.—Linck v. Litchfield, 31 N.E. 123, 141 Ill. 469, 481.

3. N.Y.—People v. Lammerts, 58 N.E. 22, 164 N.Y. 137, 143.

Tex.—Miller v. Lacy, 33 Tex. 351, 353.

4. U.S.—Serralles v. Esbri, Porto Rico, 26 S.Ct. 176, 179, 200 U.S. 103, 111, 50 L.Ed. 391.

5. Adams Gloss.

6. Black L.D.
Centena piscium—a hundredweight of fish.—Adams Gloss.

7. Black L.D.

8. Black L.D.

9. Ark.—Hill v. Ralph, 265 S.W. 57, 59, 165 Ark. 524.

Ga.—Bass v. Harden, 128 S.E. 397, 400, 160 Ga. 400.

10. Ga.—Rowland v. Mathews, 113 S.E. 442, 444, 153 Ga. 849.

Need not be at mid point

"In everyday speech we often refer to an object between two other objects as the one in the center, although such object is not at the mid point."—Rowland v. Mathews, 113 S.E. 442, 444, 153 Ga. 849.

11. Vt.—Maynard v. Weeks, 41 Vt. 617, 619.

12 C.J. p 73 note 8.

The three lines of a road

"Public roads and highways, also railroads, are regarded as having

three lines: the center line, which is usually the line surveyed when the road is laid out, and on each side of which the road is laid; the two side lines, at equal distances from the center line, and between which lies the territory covered by the road."

Tex.—Couch v. Texas, etc., R. Co., 107 S.W. 372, 49 Tex.Civ.App. 188, 189.

Vt.—Maynard v. Weeks, 41 Vt. 617, 619.

12. Mo.—Harmon v. Fowler Packing Co., 108 S.W. 610, 129 Mo.App. 715, 719.

13. Tex.—Thrush v. Lingo Lumber Co., Civ.App., 262 S.W. 551, 552.

Wis.—Weiberg v. Kellogg, 205 N.W. 896, 899, 188 Wis. 97.

14. Ont.—Scryver v. Young, 14 Ont. W.R. 530, 531.

15. **Held to mean the center of the traveled part of the highway.**—Darnell v. Ransdall, Mo.App., 277 S.W. 372, 373.

16. **Phrase held to mean the middle of the broad and distinctly defined bed of the main river, as distinguished from the changing line of navigation.**—Hill City Compress Co. v. West Kentucky Coal Co., 122 So. 747, 748, 155 Miss. 55.

17. **With reference to length**

"A point in the middle of the road equidistant from the termini."—Rice

v. Douglas County, 183 P. 768, 771, 93 Or. 551.

With reference to width

(1) The center of the worked part of the road irrespective of the smooth or traveled track.—Earing v. Lansing, 7 Wend. N.Y., 185, 187.

(2) The center of the beaten or traveled track, without reference to the worked part.—Smith v. Dygert, 12 Barb. N.Y., 613, 616.

11 C.J. p 73 note 7 [a] (3).

18. Minn.—Lunz v. Sandmeier's Estate, 215 N.W. 426, 427, 172 Minn. 338.

19. **Center of whole stream**

The phrase "means the center of the whole stream, and not the center of that portion of a stream parted by the presence of an island therein which runs between the island and the land on the bank of the river."—Kerr v. Fee, 161 N.W. 545, 546, 179 Iowa 1097.

20. Mo.—Darnell v. Ransdall, App., 277 S.W. 372, 373.

21. Ga.—Rowland v. Mathews, 113 S.E. 442, 444, 153 Ga. 849.

22. Ark.—Hill v. Ralph, 265 S.W. 57, 59, 165 Ark. 524.

23. Ga.—Bass v. Harden, 128 S.E. 397, 400, 160 Ga. 400—Bass v. African Methodist Episcopal Church, 104 S.E. 437, 438, 150 Ga. 452.

24. Or.—Rice v. Douglas County, 183 P. 768, 771, 93 Or. 551.

CENTESIMA. The one hundredth part of a thing, as a revenue or tax; also with reference to interest, one per cent monthly.²⁵

CENTIME. The name of a denomination of French money, being the one-hundredth part of a franc.²⁶

CENTIMETER-GRAM-SECOND SYSTEM. As a system of units for measurement, see the C.J.S. title *Weights and Measures* § 1, also 11 C.J. p 73 notes 10, 11. It is commonly abbreviated "C. G. S.," see *Abbreviations* 1 C.J.S. p 276 note 5.

CENTIPOISE. As a unit for measuring viscosity see C.J.S. title *Weights and Measures* § 1.

CENTRAL. At or near the center, relating to the center, situated in or near the center or middle.²⁷

Central criminal court. A court, established in London in 1834, having jurisdiction to try all offenses committed within the city of London, the county of Middlesex, and certain suburban parts of Essex, Kent, and Surrey, and of offenses committed on the high seas, formerly within the jurisdiction of the high court of admiralty.²⁸

Central office. The central office of the supreme court of judicature in England is the office established in pursuance of the recommendation of the legal departments commission in order to consolidate the offices of the masters and associates of the common-law divisions, the crown office of the king's bench division, the record and writ clerk's report, and enrollment offices of the chancery division, and a few others.²⁹

Other phrases: "Central power or generating plant" and "central station,"³⁰ "central time," see C.J.S. title *Time* § 7, also 11 C.J. p 73 notes 14, 15, and "electric central station power plant."³¹

CENTRALIZATION. This word is used to express the system of government prevailing in a country where the management of local matters is in the hands of functionaries appointed by the ministers of state, paid by the state, and in constant communication and under the constant control and inspiration of the ministers of state, and where the funds of the state are largely applied to local purposes.³²

CENTRALLY. An adverb, meaning in the center of;³³ but, like its root word "center," it has been held not limited strictly to the exact or mathematical center.³⁴

Phrases: "Centrally located in said district,"³⁵ "centrally of the limbs of the passage,"³⁶ "centrally pivoted,"³⁷ and "extending centrally."³⁸

CENTRIFUGAL MACHINE. A machine in which, either the machine itself, or some portion thereof, so moves as to produce the desired results by centrifugal force.³⁹

CENTUMVIRI. In Roman law, the name of an important court consisting of a body of one hundred and five judges. It was made up by choosing three representatives from each of the thirty-five Roman tribes. The judges sat as one body for the trial of certain important or difficult questions, called "causæ centumvirales," but ordinarily they were separated into four distinct tribunals.⁴⁰

CENTURY. One hundred; a body of one hundred men. The Romans were divided into "centuries" as the English were divided into hundreds; also a cycle of one hundred years.⁴¹

CEO. Law French, this, that; plural "ceux."⁴²

25. Adams Gloss.

Usuræ centesimæ

Twelve per cent per annum; that is, a hundredth part of the principal due each month, the month being the unit of time from which the Romans reckoned interest.—Black L.D.

26. Black L.D.

27. U.S.—Nutter v. Mossberg, D.C. Mass., 128 F. 55, 57.

Ark.—Hill v. Ralph, 265 S.W. 57, 59, 165 Ark. 524.

Ga.—Bass v. Harden, 128 S.E. 397, 400, 160 Ga. 400, quoting *Corpus*

Juris.

11 C.J. p 73 note 12.

28. Sweet L.D.

11 C.J. p 73 note 13.

29. Black L.D.

30. N.Y.—People ex rel. Taylor v.

Walsh, 248 N.Y.S. 753, 757, 140 Misc. 25.

31. N.Y.—People ex rel. Taylor v. Walsh, supra.

32. Black L.D.

33. U.S.—In re Buehler, Cust. & Pat.App., 88 F.2d 740, 741.

34. U.S.—Solmson & Co. v. Bredin, Md., 136 F. 187, 189, 69 C.C.A. 203 —Nutter v. Mossberg, D.C. Mass., 128 F. 55, 57, affirmed 135 F. 95, 99, 68 C.C.A. 257.

Ark.—Hill v. Ralph, 265 S.W. 57, 59, 165 Ark. 524.

35. Ark.—Hill v. Ralph, 265 S.W. 57, 59, 165 Ark. 524.

36. U.S.—In re Buehler, Cust. & Pat.App., 88 F.2d 740, 741.

37. U.S.—Nutter v. Mossberg, D.C. Mass., 128 F. 55, 57, affirmed 135 F. 95, 99, 68 C.C.A. 257.

38. U.S.—Solmson & Co. v. Bredin, Md., 136 F. 187, 188, 69 C.C.A. 203.

39. U.S.—U. S. v. J. Reid & Co., 17 C.C.P.A. 253, 255.

40. Black L.D.

41. Black L.D.

42. Adams Gloss.

Ceo est un comon erudicion en nostre ley—this is a common doctrine in our law.—Adams Gloss.

Ceo n'est ley—this is not law.—Adams Gloss.

Ceo poies retter à vostre folly demesne—you may lay this to your own folly.—Adams Gloss.

Ceo purra il retter à sa negligence—he must charge this to his own negligence.—Adams Gloss.

Ceo serra marveillous ley—this would be strange law.—Adams Gloss.

Ceo vous moustre—this shows to you.—Adams Gloss.

CEORL or CHURL. A tenant at will of free condition who held land of the thane on condition of paying rent or services; a freeman of inferior rank occupied in husbandry.⁴³

CEPI. Latin, literally, "I have taken." This word was of frequent use in the returns of sheriffs when they were made in Latin, and particularly in the return to a writ of *capias*.⁴⁴

CEPISSE QUIS INTELLIGITUR, QUAMVIS ALII ACQUISIT.⁴⁵

CEPIT. Literally "He took."⁴⁶ In civil practice, this was the characteristic word employed in Latin writs of trespass for goods taken, and in declarations in trespass and replevin.⁴⁷ In criminal practice, it was a technical word necessary in an indictment for larceny.⁴⁸

Cepit et abduxit. The emphatic words in writs in trespass or indictments for larceny, where the thing taken was a living chattel, that is, an animal.⁴⁹

Cepit et asportavit. "He took and carried away."⁵⁰ The technical term in writs of trespass where the writ was for dead things.⁵¹

Cepit in alio loco. Literally "He took in another place."⁵² In the old practice, a plea in bar in an action of replevin by which defendant pleaded that he took the goods in another place than that mentioned in the declaration.⁵³

Non cepit. Literally "He did not take." The general issue in replevin.⁵⁴

CEPPAGIUM. In old English law, the stumps or

roots of trees which remained in the ground after the trees were felled.⁵⁵

CERA or CERE. In old English law, wax, or a seal.⁵⁶

Cera impressa. Wax impressed, or wax with an impression;⁵⁷ hence an impressed seal;⁵⁸ a seal.⁵⁹

CERAGRUM. In old English law, a payment to provide candles in the church.⁶⁰

CERA SINE IMPRESSIONE NON EST SIGILLUM.⁶¹

CERCENAMIENTO. In Spanish law, the lopping or clipping off, as of some part of the body; mutilation.⁶²

CEREBRAL. Of or pertaining to the brain.⁶³

Phrases: "Cerebral atrophy," see the C.J.S. title *Insane Persons* § 2, also 32 C.J. p 602 note 14, p 603 note 15, "cerebral embolism," see the C.J.S. title *Insane Persons* § 2, also 32 C.J. p 603 notes 16, 17, and "cerebral hemorrhage."⁶⁴

CEREVISA, CEREVISIA, or CERVISIA. In old English law, ale or beer.⁶⁵

CERRAMIENTO. In Spanish law, the inclosure of land.⁶⁶

Cerramiento de razones. The closing of a cause preparatory to judgment.⁶⁷

CERTA. The feminine singular, also the neuter plural, of the Latin adjective "certus-a-um," meaning certain, or sure;⁶⁸ also determined, or particularly specified.⁶⁹

43. Black L.D.

44. Black L.D.

45. A maxim meaning "Any one is understood to have inherited, although he has acquired it of another."—Adams Gloss.

46. Black L.D.

Cepit et abcarriavit—"he took and carried away."—Adams Gloss., citing Dyer p 70 a.

47. Ark.—Davis v. Calvert, 17 Ark. 85, 89.

N.Y.—Cummings v. Vorce, 3 Hill 282, 283.

Replevin "in the cepit" is a form of replevin which is brought for carrying away goods merely.—Black L.D.

48. Black L.D.

49. Black L.D.

50. Bouvier L.D.

Cepit et asportavit centum cuniculos—"he took and carried away a hundred rabbits."—Adams Gloss.

51. Adams Gloss., citing 4 Blackstone Comm. p 231.

52. Bouvier L.D.

53. Sweet L.D.

54. Ark.—See Davis v. Calvert, 17 Ark. 85, 89.

Minn.—See Lewis v. Buck, 7 Minn. 104, 116, 82 Am.D. 73.

Mo.—See Pulliam v. Burlingame, 81 Mo. 111, 115, 51 Am.R. 229.

55. Black L.D.

56. Black L.D.

57. Adams' Gloss., citing 3 Coke Inst. p 169.

58. Black L.D.

59. U.S.—Pierce v. Indseth, Minn., 1 S.Ct. 418, 421, 106 U.S. 546, 27 L.Ed. 254—Pillow v. Roberts, Ark., 13 How. 472, 473, 14 L.Ed. 228. 11 C.J. p 73 note 27.

60. Black L.D.

61. A maxim meaning "Wax without an impression is not a seal."—

Adams Gloss., citing 3 Coke Inst. p 169.

Applied in Pierce v. Indseth, Minn., 1 S.Ct. 418, 421, 106 U.S. 546, 549, 27 L.Ed. 254—Pillow v. Roberts, Ark., 13 How. U.S., 472, 473, 14 L.Ed. 228.

62. Philippine.—U. S. v. Bogel, 7 Philippine 285, 286.

63. Webster New Int. D.

64. "Apoplexy" synonymous Tenn.—Willis v. Heath, App., 107 S. W.2d 228, 230.

65. Black L.D.

66. Escriche Diccionario.

67. Escriche Diccionario.

68. Andrews Latin—Eng. Lex. *Certa et utilia agendo*—Law Latin, by doing things sure and useful.—Adams Gloss.

69. Adams Gloss.

Certa res—In old English law, a certain thing.—Black L.D.

CERTA DEBET ESSE INTENTIO, ET NARRATIO, ET CERTUM FUNDAMENTUM, ET CERTA RES QUÆ DEDUCITUR IN JUDICIUM.⁷⁰

CERTAIN. In its primary descriptive sense, the word has been defined as meaning clear or distinct;⁷¹ capable of being ascertained and definitely fixed;⁷² free from doubt;⁷³ and in a particular connection, when referring to future contingencies, the word, it has been held, is not to be construed as meaning absolutely certain but rather in the sense of likely or to express likelihood or probability.⁷⁴ "Certain" has been held to be a synonym of "apparent," see Apparent 3 C.J.S. p 1427 note 85, and the antonym of "casual," see Casual ante p 27 note 14.

In a demonstrative sense, not specifically named, indeterminate, indefinite;⁷⁵ a particular portion;⁷⁶ one or some among possible others.⁷⁷

Certain services. In feudal and old English law, such services as were stinted (limited or defined) in

quantity, and could not be exceeded on any pretense; as to pay a stated annual rent, or to plow such a field for three days.⁷⁸

Other phrases: "Certain and determinate,"⁷⁹ "certain ascertained membership,"⁸⁰ "certain attorney,"⁸¹ "certain case,"⁸² "'certain' contract,"⁸³ "certain, definite, and ascertained amount,"⁸⁴ "certain demand,"⁸⁵ "certain duty,"⁸⁶ "certain information,"⁸⁷ "certain instructions,"⁸⁸ "certain knowledge,"⁸⁹ "certain machinery, apparatus, plant and equipment,"⁹⁰ "certain mortgage,"⁹¹ "certain notes,"⁹² "certain piece of land,"⁹³ "certain point,"⁹⁴ "certain powers and privileges,"⁹⁵ "certain provisions respecting marriage,"⁹⁶ "certain rent" or "certain rents,"⁹⁷ "certain specified sums,"⁹⁸ "certain specified times,"⁹⁹ "certain state highways or sections thereof,"¹ "certain sum,"² "certain to a reasonable probability,"³ "certain to die,"⁴ "certain to result in the future,"⁵ "'certain yearly' or 'other rent,'"⁶ "morally certain,"⁷ "period certain and prefixed,"⁸ "place certain,"⁹ "rea-

70. A maxim meaning "The design and narration ought to be certain, and the foundation certain, and the matter certain, which is brought into court to be tried."—Black L.D., citing Coke Litt. p 303 a.

71. Burrill L.D.

72. U.S.—Mobile & O. R. Co. v. Tennessee, Tenn., 14 S.Ct. 968, 972, 153 U.S. 486, 497, 38 L.Ed. 793—Gerrish v. Atlantic Ice & Coal Co., C.C.A.Ga., 30 F.2d 648, 650.

Ky.—Singer v. Campbell, 290 S.W. 667, 668, 217 Ky. 830.

La.—Lee v. Pearson, App., 143 So. 516, 518.

11 C.J. p 74 note 37 [a].

73. Tex.—St. Louis, etc., R. Co. v. Burns, 9 S.W. 467, 71 Tex. 479, 481.

74. N.D.—Larson v. Russell, 176 N.W. 998, 1002, 45 N.D. 33.

75. Mo.—Wilhite v. Armstrong, 43 S.W.2d 422, 423, 328 Mo. 1064.

76. Neb.—Wayne County v. Steele, 237 N.W. 284, 291.

N.J.—Bell v. Martin, 18 N.J.Law 167, 168.

77. U.S.—In re Mineral Lac Paint Co., D.C.Pa., 17 F.Supp. 1, 2, quoting Webster New Int.D.

78. Black L.D.

79. Kan.—Bunting v. Speck, 21 P. 288, 41 Kan. 424, 431, 3 L.R.A. 690. La.—Lee v. Pearson, App., 143 So. 516, 518.

80. Cal.—In re Merchant, 77 P. 475, 143 Cal. 537, 540.

81. Tex.—Brazoria County v. Grand Rapids School-Furniture Co., Civ. App., 43 S.W. 900, 901.

82. N.J.—Fittichauer v. Metropolitan Fire-Proofing Co., Ch., 61 A. 746.

83. La.—Losecco v. Gregory, 32 So. 985, 108 La. 648, 651.

84. Del.—Thomas v. Mariner, 66 A. 99, 21 Del. 571.

85. Tex.—Duncan v. Magette, 25 Tex. 245—Harbin v. Hood, Civ. App., 285 S.W. 338, 840—Worley v. Smith, 63 S.W. 270, 26 Tex.Civ. App. 270, 272.

86. S.C.—Morton v. Comptroller General, 4 S.C. 430, 473.

87. S.C.—State v. Griffin, 54 S.E. 603, 74 S.C. 412, 414, 415.

88. Mo.—Wilhite v. Armstrong, 43 S.W.2d 422, 423, 328 Mo. 1064.

89. La.—Howard v. Ingle, App., 180 So. 248, 252.

90. U.S.—In re Mineral Lac Paint Co., D.C.Pa., 17 F.Supp. 1, 2.

91. Mich.—Cooper v. Bigley, 13 Mich. 463, 479.

92. N.J.—Martin v. Bell, 18 N.J.Law 167, 168.

93. R.I.—State v. Burdick, 2 A. 764, 15 R.I. 239, 240.

94. Ga.—Sitton v. Cureton, 72 Ga. 207.

95. Ala.—Glenn v. Lynn, 7 So. 924, 89 Ala. 608, 611.

96. Philippine.—U. S. v. Mata, 18 Philippine 490, 493.

97. Pa.—Shaffer v. Sutton, 5 Binn. 228, 230.

11 C.J. p 75 note 54.

98. Cal.—In re Bourn's Estate, App., 78 P.2d 193, 199.

99. Neb.—State v. Ure, 156 N.W. 1053, 1055, 99 Neb. 486.

1. Held not limited to those existing

In construing the text phrase as

used in a statute authorizing the borrowing of a specified sum for highway construction, the court said: "We do not think that the word 'certain,' without further amplification or explanation, so qualifies the general nature of the language of the act as to limit its application to the highways existing at the time of its passage."—Summer v. State Highway Commission of South Carolina, 141 S.E. 366, 374, 143 S.C. 196.

2. U.S.—Ashcraft v. Bream, D.C. Pa., 2 F.Supp. 344, 346.

Ark.—Bank of Holly Grove v. Sudbury, 180 S.W. 470, 121 Ark. 59, Ann.Cas.1917D 373.

Me.—Waterhouse v. Chouinard, 149 A. 21, 22, 128 Me. 505.

Mich.—White v. Wadhams, 170 N.W. 60, 62, 204 Mich. 381.

11 C.J. p 75 note 55.

3. Wash.—Gallamore v. Olympia, 75 P. 978, 980, 34 Wash. 379.

4. Ga.—Jackson v. State, 56 Ga. 235, 236.

5. N.D.—Larson v. Russell, 176 N.W. 998, 1002, 45 N.D. 33.

6. Pa.—McGee v. Fessler, 1 Pa. 126, 130.

7. Mont.—State v. Gleim, 41 P. 998, 1002, 17 Mont. 17, 52 Am.S.R. 655, 31 L.R.A. 294—Territory of Montana v. McAndrews, 3 Mont. 158, 165.

8. Pa.—Shaffer v. Sutton, 5 Binn. 228, 230, quoting 2 Blackstone Comm. p 143.

9. Me.—Greenleaf v. Watson, 22 A. 165, 83 Me. 266, 267.

sonably certain,"¹⁰ and "sum certain in money."¹¹

CERTAINLY. An adverb, as used in the phrase "certainly impending."¹²

CERTAINTY. A term which has been defined generally as meaning absence of doubt,¹³ or free from doubt.¹⁴

In a legal sense, sufficient positive facts so proved as to take a matter out of the realm of conjecture and presumption;¹⁵ and more specifically, in a particular connection, a clear and distinct setting down of facts, so that they may be understood both by the party who is to answer the matters stated against him, the counsel who are to argue them, the jury who will decide upon their existence, and the court who will be the judges of the law arising out of them.¹⁶ While it has been said that we have no precise idea of the signification of the word, which is as indefinite in itself as any word that can be used,¹⁷ a distinction has long been made be-

tween three manner of certainties: (1) Certainty to a common intent which describes the mode of statement in which words are used in their ordinary meaning, although by argument or inference they may be made to bear a different one.¹⁸ (2) Certainty to a certain intent in general, which is in general what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear.¹⁹ (3) To a certain intent in every particular, which is that technical accuracy of statement which precludes all question, inference, or presumption against the party pleading.²⁰

Moral certainty. A certainty beyond a reasonable doubt;²¹ a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it;²² that degree of proof which produces conviction in an unprejudiced mind;²³ that degree of proof which the law requires of moral evidence;²⁴ that full and complete assurance which

10. Mo.—Brown v. Forrester, etc., Box Co., 243 S.W. 330, 331.

As meaning "beyond a reasonable doubt"

Tex.—Gulf, etc., R. Co. v. Harriett, 15 S.W. 556, 80 Tex. 73, 82, 83—St. Louis, etc., R. Co. v. Burns, 9 S.W. 467, 71 Tex. 479, 481.

As meaning "certain to reasonable probability"

Wash.—Gallamore v. Olympia, 75 P. 978, 980, 34 Wash. 379.

"Reasonably expected" synonyms

Mo.—Garard v. Manufacturer's Coal, etc., Co., 105 S.W. 767, 771, 207 Mo. 242.

11. Ark.—Bank of Holly Grove v. Sudbury, 180 S.W. 470, 121 Ark. 59, Ann.Cas.1917D 373.

Me.—Waterhouse v. Chouinard, 149 A. 21, 22, 128 Me. 505.

Okl.—Union Nat. Bank v. Mayfield, 169 P. 626, 628.

12. U.S.—Borges v. Loftis, C.C.A. Cal., 87 F.2d 734, 735.

13. Tex.—Gulf, etc., R. Co. v. Harriett, 15 S.W. 556, 80 Tex. 73, 82.

14. N.C.—State v. Shaw, 49 N.C. 440, 443, quoting Walker D.

15. R.I.—Reynolds v. Blaisdell, 49 A. 42, 23 R.I. 16, 19.

16. Mo.—State v. Burke, 52 S.W. 226, 151 Mo. 136, 143.

11 C.J. p 75 note 66.

Similarly expressed

"Such clearness and distinctness of statement of facts constituting a cause of action that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who is to

give judgment."—Luhrig Coal Co. v. Ludlum, 69 N.E. 652, 69 Ohio St. 311, 314.

17. Me.—Kennebec Purchase v. Lowell, 2 Me. 149, 154.

11 C.J. p 75 note 68.

Not an absolute term, but one to be understood in a human sense as applied to human affairs.—Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City, C.C.A.Mo., 64 F.2d 602, 604.

18. Ala.—David v. David, 66 Ala. 139, 148.

Ark.—State v. Parker, 34 Ark. 158, 159, 36 Am.R. 5.

Ohio.—State v. Whitmore, 185 N.E. 547, 552, 126 Ohio St. 381—Dunbrui v. State, 87 N.E. 837, 839, 80 Ohio St. 52.

11 C.J. p 75 notes 69, 70.

19. U.S.—U. S. v. Watkins, D.C., 28 F.Cas.No.16,649, 3 Cranch C.C. 441. Ala.—Moseley v. White, 1 Port. 410, 417.

11 C.J. p 75 note 71.

20. Abbott L.D.

21. Okl.—Hendrix v. U. S., 101 P. 125, 129, 2 Okl.Cr. 240.

"It has also been used as indicating a conclusion of the mind established beyond a reasonable doubt."

Conn.—State v. Gallivan, 53 A. 731, 733, 75 Conn. 326, 96 Am.S.R. 203. Mass.—Commonwealth v. Costley, 118 Mass. 1, 24.

See also Beyond 10 C.J.S. p 353 note 45.

"Proof beyond a reasonable doubt" Fla.—Woodruff v. State, 12 So. 653, 31 Fla. 320, 337.

22. U.S.—Hopt v. Utah, Utah, 7 S.

Ct. 614, 120 U.S. 430, 440, 30 L.Ed. 708.

Ala.—McKleroy v. State, 77 Ala. 95, 97.

Ark.—Maxey v. State, 52 S.W. 2, 3, 66 Ark. 523.

Cal.—People v. Lew Fook, 75 P. 188, 141 Cal. 548.

Mass.—Commonwealth v. Costley, 118 Mass. 1, 24—Commonwealth v. Webster, 5 Cush. 295, 320, 52 Am. D. 711.

Miss.—James v. State, 45 Miss. 572, 574.

Mo.—State v. Orr, 64 Mo. 339, 344.

Okl.—Hendrix v. U. S., 101 P. 125, 129, 2 Okl.Cr. 240.

Tenn.—Odeneal v. State, 157 S.W. 419, 123 Tenn. 60.

Tex.—Pharr v. State, 10 Tex.App. 485, 489.

Must be conclusive

"Moral certainty requires that the circumstances, taken together, should be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion that the accused, and no one else, committed the offense charged."—Commonwealth v. Goodwin, 14 Gray, Mass., 55, 57.

23. Cal.—People v. Lew Fook, 75 P. 188, 141 Cal. 548—Freese v. Hibernia Savings & Loan Soc., 73 P. 72, 173, 139 Cal. 392.

Mont.—State v. Cassill, 229 P. 716, 719, 71 Mont. 274.

Or.—State v. Megorden, 88 P. 306, 310, 49 Or. 259, 14 Ann.Cas. 130.

24. Cal.—People v. Lew Fook, 75 P. 188, 141 Cal. 548.

N.Y.—In re Langlois' Estate, 14 N.Y. Supp. 146, 147, 2 Conn.Surr. 481, 484, 26 Abb.N.C. 226.

admits of no degrees, and induces a sound mind to act without doubt upon the conclusions to which it naturally and reasonably leads;²⁵ that high degree of probability, although less than absolute assurance, that induces prudent and conscientious men to act unhesitatingly in matters of the gravest importance;²⁶ the highest degree of certainty obtainable in human affairs;²⁷ the state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it,²⁸ the conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to truth.²⁹

Nevertheless it has been said that the phrase, "moral certainty" is an artificial form of words, having no precise and definite meaning;³⁰ that it has been introduced into our jurisprudence from

publicists and metaphysicians;³¹ and that it bears the same relation to human conduct that absolute certainty does to mathematical subjects.³² "Moral certainty" has been compared with "abiding faith," see *Abiding* 1 C.J.S. p 308 note 66, "absolute certainty,"³³ "absolute certitude,"³⁴ "absolute or mathematical certainty,"³⁵ "mathematical demonstration,"³⁶ "reasonable certainty,"³⁷ and "strong presumption."³⁸

Other phrases: "Absolute certainty," see *Absolute*, *Pocket Parts*, 1 C.J.S. p 375 note 5.1, "absolute or mathematical certainty,"³⁹ "commercial certainty,"⁴⁰ "convenient certainty,"⁴¹ "mathematical certainty,"⁴² "moral and reasonable certainty,"⁴³ "moral certainty or conviction,"⁴⁴ "reasonable and moral certainty,"⁴⁵ "reasonable certainty,"⁴⁶ "to a

25. Md.—*Bowman v. Little*, 61 A. 1084, 1086, 101 Md. 273.
N.Y.—*In re Langlois' Estate*, 14 N.Y. S. 146, 147, 2 Conn.Surr. 431, 26 Abb.N.C. 226.
Okl.—*Hendrix v. United States*, 101 P. 125, 129, 2 Okl.Cr. 240.

26. U.S.—*Ross v. Montana Union R. Co.*, C.C.Mont., 45 F. 424, 425.
Conn.—*State v. Gallivan*, 53 A. 731, 733, 75 Conn. 326, 96 Am.S.R. 203.
Ga.—*Austin v. State*, 64 S.E. 670, 6 Ga.App. 211.
Mass.—*Commonwealth v. Costley*, 118 Mass. 1, 23.

Capable of inducing action

"It is not only what men in general would unhesitatingly 'believe' to be true, but what they would be willing and ready to 'act' on."—*State v. Gleim*, 41 P. 998, 1002, 17 Mont. 17, 52 Am.S.R. 655, 31 L.R.A. 294—*Territory of Montana v. McAndrews*, 3 Mont. 158, 165.

27. Mont.—*State v. Cassill*, 229 P. 716, 719, 71 Mont. 274.
Wis.—*Schwantes v. State*, 106 N.W. 237, 244, 127 Wis. 160.

28. Cal.—*People v. Lew Fook*, 75 P. 188, 141 Cal. 548.
Mont.—*State v. Gleim*, 41 P. 998, 1002, 17 Mont. 17, 52 Am.S.R. 655, 31 L.R.A. 294.
11 C.J. p 76 note 74.

29. Mont.—*Territory of Montana v. McAndrews*, 3 Mont. 158, 165.
11 C.J. p 76 note 75.

30. Conn.—*State v. Gallivan*, 53 A. 731, 733, 75 Conn. 326, 96 Am.S.R. 203.

31. Mass.—*Commonwealth v. Costley*, 118 Mass. 1, 23.

32. Mont.—*State v. Gleim*, 41 P.

998, 1002, 17 Mont. 17, 52 Am.S.R. 655, 31 L.R.A. 294—*Territory of Montana v. McAndrews*, 3 Mont. 158, 165.

33. Mass.—*Commonwealth v. Costley*, 118 Mass. 1, 24.

34. Md.—*Bowman v. Little*, 61 A. 1084, 1086, 101 Md. 273.

35. Ala.—*McKleroy v. State*, 77 Ala. 95, 97.

36. Md.—*Bowman v. Little*, 61 A. 1084, 1086, 101 Md. 273.

37. Tex.—*St. Louis, A. & T. R. Co. v. Burns*, 9 S.W. 467, 468, 71 Tex. 479, 481.

38. **Nothing but strong presumption**
"It was observed by Pufendorf, that, 'when we declare such a thing to be morally certain, because it has been confirmed by creditable witnesses, this moral certitude is nothing else but a strong presumption grounded on probable reasons, and which very seldom fails and deceives us.'"—*Commonwealth v. Costley*, 118 Mass. 1, 23, 24.

39. Ala.—*McKleroy v. State*, 77 Ala. 95, 97.

40. U.S.—*Gerrish v. Atlantic Ice & Coal Co.*, C.C.A.Ga., 80 F.2d 648, 650.

41. Tenn.—*Kendrick v. Dallum*, Cooke 220, 224.

W.Va.—*Kemble v. Herndon*, 28 W. Va. 524, 530.

42. U.S.—*Gerrish v. Atlantic Ice & Coal Co.*, C.C.A.Ga., 80 F.2d 648, 650.

43. Ga.—*Tanner v. Hinson*, 118 S.E. 630, 155 Ga. 838—*Warren v. Gay*, 51 S.E. 302, 303, 123 Ga. 243—*Dwight v. Jones*, 42 S.E. 48, 115

Ga. 744—*Murray v. State*, 114 S. E. 907, 29 Ga.App. 207—*Bivins v. State*, 113 S.E. 57, 29 Ga.App. 49.
"Beyond a reasonable doubt," see *Beyond* 10 C.J.S. p 353 note 45.

44. Cal.—*People v. Lew Fook*, 75 P. 188, 141 Cal. 548.

45. U.S.—*Hopt v. Utah*, Utah, 7 S. Ct. 614, 120 U.S. 430, 440, 30 L.Ed. 708.

Ga.—*Norman v. State*, 74 S.E. 428, 10 Ga.App. 802.

"Reasonable and moral certainty" may be said to be that degree of probability which exists with such strength as to justify human action upon it."

Ga.—*Austin v. State*, 64 S.E. 670, 6 Ga.App. 211.

Idaho.—*People v. Dewey*, 6 P. 103, 106, 2 Idaho, Hasb., 83.

Mass.—*Commonwealth v. Costley*, 118 Mass. 1, 24—*Commonwealth v. Webster*, 5 Cush. 295, 320, 52 Am. D. 711.

46. Conn.—*Johnson v. Connecticut Co.*, 83 A. 530, 531, 85 Conn. 438.

N.C.—*Wilkinson v. Dunbar*, 62 S.E. 748, 750, 149 N.C. 20.

Pa.—*McCroscon v. Philadelphia Rapid Transit Co.*, 129 A. 568, 283 Pa. 492.

Tex.—*St. Louis, A. & T. R. Co. v. Burns*, 9 S.W. 467, 468, 71 Tex. 479, 481.

52 C.J. p 1185 note 69.

"The being free from reasonable doubt."

N.C.—*State v. Shaw*, 49 N.C. 440, 443.

Tex.—*St. Louis, A. & T. Ry. Co. v. Burns*, 9 S.W. 467, 468, 71 Tex. 479, 481.

"Absolute certainty" contrasted see *Absolute*, *Pocket Parts*, 1 C.J.S. p 375 note 5.1.

moral certainty,"⁴⁷ and "with reasonable certainty."⁴⁸

CERTIFICANDO DE RECOGNITIONE STAPULÆ. Latin, literally "For certifying as to a recognition of a staple."⁴⁹ In English law, a writ commanding the mayor of the staple to certify to the lord chancellor a statute-staple taken before him where the party himself detains it, and refuses to bring in the same.⁵⁰

CERTIFICATE. A certificate in its most general and widest sense has been defined as meaning a certain assurance of that which it states;⁵¹ a declaration in writing;⁵² an authoritative attestation;⁵³ a writing giving assurance that a thing has or has not been done, that a fact exists or does not exist;⁵⁴ a written testimony to the truth of any fact;⁵⁵ the usual and customary method to indicate what has or has not been done.⁵⁶

More specifically, the word has been defined as meaning a documentary declaration regarding facts from the public authority, as an attestation of facts contained in a public record;⁵⁷ a statement in writ-

ing by a person having a public or official status concerning some matter within his knowledge or authority;⁵⁸ a writing by which an officer or other person bears testimony that a fact has or has not taken place;⁵⁹ a writing so signed and authenticated as to be legal evidence;⁶⁰ also a writing made in any court and properly authenticated to give notice to another court of anything done therein.⁶¹

Strictly speaking, a certificate by a public officer may be said to be a statement written and signed, but not necessarily nor usually sworn to, which is by law made evidence of the truth of the facts stated for all or for certain purposes;⁶² and, popularly, the term has been held to import a completed document;⁶³ a document in which the officer issuing the same purports to state on his own authority that certain acts have been done;⁶⁴ the statement of some fact, in writing, signed by the party certifying;⁶⁵ and that the certificate testifies to the truth.⁶⁶ Official certificates must be duly authenticated or they cannot serve that purpose, although, in the absence of special requirements, no set form is necessary.⁶⁷

47. "Beyond a reasonable doubt" equivalent

U.S.—Fidelity Mut. Life Ass'n v. Mettler, Tex., 22 S.Ct. 662, 666, 185 U.S. 308, 46 L.Ed. 922—Ross v. Montana Union Ry. Co., C.C.Mont., 45 F. 424, 425.

Ala.—Bailey v. State, 32 So. 57, 58, 133 Ala. 155—Dent v. State, 17 So. 94, 105 Ala. 14, 17—Jones v. State, 14 So. 772, 773, 100 Ala. 88—McKleroy v. State, 77 Ala. 95, 97.

Conn.—State v. Gallivan, 53 A. 731, 733, 75 Conn. 326, 96 Am.S.R. 203.

Fla.—Woodruff v. State, 12 So. 653, 658, 31 Fla. 320.

Ga.—Bone v. State, 30 S.E. 845, 847, 102 Ga. 387.

Ill.—Taylor v. Pegram, 37 N.E. 837, 839, 151 Ill. 106—Carlton v. People, 37 N.E. 244, 247, 150 Ill. 181, 41 Am.S.R. 346.

Mass.—Commonwealth v. Costley, 113 Mass. 1, 23.

Mont.—State v. Cassill, 229 P. 716, 719, 71 Mont. 274.

48. N.D.—Larson v. Russell, 176 N.W. 998, 1002, 45 N.D. 33.

49. Adams Gloss.

50. Black L.D., citing Reg. Orig. p 148.

Similar writ

"There is a like writ to certify a statute-merchant, and in divers other cases."—Black L.D., citing Reg. Orig. pp 151, 152.

51. N.H.—Lord v. Colley, 6 N.H. 99, 103, 25 Am.D. 445.

52. Me.—Ticonic Bank v. Stackpole, 41 Me. 302, 305.

53. Mont.—In re Kostohris' Estate, 29 P.2d 829, 834, 96 Mont. 226.

54. U.S.—Cincinnati, N. O. & T. Ry. Co. v. Fidelity & Deposit Co., of Maryland, C.C.A.Ohio, 296 F. 298, 301, citing *Corpus Juris*.

Ark.—Cook v. Ziff Colored Masonic Lodge No. 119, 96 S.W. 618, 80 Ark. 31, 36—Keith v. Freeman, 43 Ark. 296, 304.

N.Y.—People v. Foster, 58 N.Y.S. 574, 27 Misc. 576, 582.

55. Ga.—Mosley v. Carswell, 152 S.E. 856, 41 Ga.App. 267.

Ind.—Federal Union Surety Co. v. Schlosser, 114 N.E. 875, 877, 66 Ind.App. 199.

Iowa.—State v. Rhine, 50 N.W. 676, 84 Iowa 169, 172.

56. Okl.—Dickinson v. Perry, 181 P. 504, 511, 75 Okl. 25, citing *Corpus Juris*.

57. N.Y.—People v. Foster, 58 N.Y.S. 574, 27 Misc. 576, 582, quoting Standard D.

58. Rapalje & L. L. D.

59. Ind.—Federal Union Surety Co. v. Schlosser, 114 N.E. 875, 877, 66 Ind.App. 199, quoting *Corpus Juris*. 11 C.J. p 76 note 82.

60. N.Y.—People v. Foster, 58 N.Y.S. 574, 27 Misc. 576, 582, quoting Standard D.

61. N.Y.—Fay v. Muhlker, 20 N.Y.S. 671, 1 Misc. 321, 323.

11 C.J. p 76 note 80.

62. N.C.—State v. Abernethy, 130 S.E. 619, 620, 190 N.C. 768.

63. U.S.—Merrell v. Tice, Mo., 104 U.S. 557, 561, 26 L.Ed. 854.

La.—Tranchina v. Williams, 120 So. 832, 833, 10 La.App. 656.

64. U.S.—Dolan v. U. S., Mo., 133 F. 440, 441, 449, 69 C.C.A. 274.

65. Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 141, 177 Ga. 648.

66. Held insufficient as "certificates"

(1) Where a judge, upon the statement of counsel that "he was going, or would go, immediately to the clerk of this court and give his personal check for the payment of these [specified] costs," issued his certificate that "all the costs . . . have been paid;" but it subsequently developed that such costs had not been, in fact, paid, the appellate court, after quoting the definition of the word "certificate," said: "A purported certificate which does not testify to the truth is really not a certificate. A certificate such as is the one made in this case should bind nobody, but should yield to the facts and be disregarded."—Mosley v. Carswell, 152 S.E. 856, 41 Ga.App. 267.

(2) Clerk's certificate as to the filing of certain original document concluding with the statement "as I am informed and believe through such information; but there is no memoranda of the filing in my office nor have I any independent recollection thereof," held not sufficient certificate.—Federal Union Surety Co. v. Schlosser, 114 N.E. 875, 877, 66 Ind.App. 199, quoting *Corpus Juris*.

67. U.S.—Cincinnati, N. O. & T. P.

In particular connections and depending, of course, on the context, or the circumstances of its use, "certificate" has been held equivalent to, or synonymous with, "license,"⁶⁸ "protest,"⁶⁹ "recommendation,"⁷⁰ "ticket,"⁷¹ and "written statement,"⁷² and contrasted with, or distinguished from, "diploma,"⁷³ "jurat,"⁷⁴ "license,"⁷⁵ and "warrant."⁷⁶

Certificate creditors. Certificate or warrant creditors of a city are those who become creditors from the fact that the money is not on hand, derived from the revenues, to pay them when the debt is created.⁷⁷

Certificate into chancery. In English practice, a document containing the opinion of the common-law judges on a question of law submitted to them for their decision by the chancery court.⁷⁸

Certificate of deposit. As the written acknowledgment by a bank or banker of the receipt of a sum of money on deposit subject to particular conditions, see the C.J.S. title Banks and Banking § 311, and considered with reference to its negotiability see the C.J.S. title Bills and Notes § 23.

A "certificate of deposit" has been held to be a chose in action,⁷⁹ and, in a particular connection, to be included by the terms "obligation" and "obligation or other security."⁸⁰

Certificate of holder of attached property. A certificate required by statute, in some states, to be given by a third person who is found in possession of property subject to an attachment in the sheriff's hands, setting forth the amount and character of such property and the nature of defend-

ant's interest in it.⁸¹

Gold certificate. In the United States a certificate issued by the secretary of the treasury, that gold coin or bullion of a certain stated value in dollars has been deposited in the treasury and is payable to the bearer on demand.⁸² It has been held to be properly called a "United States treasury note."⁸³

Trial by certificate. A mode of trial now little in use; it is resorted to in cases where the fact in issue lies out of the cognizance of the court, and the judges, in order to determine the question, are obliged to rely on the solemn averment or information of persons in such a station as affords them the clearest and most competent knowledge of the truth.⁸⁴

Other phrases: "Certificate for costs," see C.J.S. title Costs §§ 211, 263, also 15 C.J. p 168 notes 84-89, and p 170 notes 17-26, "certificate for shares,"⁸⁵ "certificate of acknowledgment," see C.J.S. title Acknowledgments §§ 83-124, "certificate of architect," see C.J.S. title Contracts § 496 et seq, also 9 C.J. p 755 note 52 et seq, "certificate of authority,"⁸⁶ "certificate of convenience and necessity,"⁸⁷ "certificate of corporate stock," see C.J.S. title Corporations § 258, also 14 C.J. p 478 note 43, "certificate of donation,"⁸⁸ "certificate of election" see C. J.S. title Elections § 240, also 20 C.J. p 205 notes 10-25, "certificate of evidence," see C.J.S. title Appeal and Error § 973, "certificate of fact or facts,"⁸⁹ "certificate of final settlement,"⁹⁰ "certificate of incorporation," see C.J.S. title Corporations § 23 et seq, also 14 C.J. p 92 note 40 et seq, "certificate [or certificates] of indebtedness,"⁹¹ "cer-

Ry. Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Ohio, 296 F. 298, 300, 301.

Ark.—Keith v. Freeman, 43 Ark. 296, 304.

N.C.—State v. Abernethy, 130 S.E. 619, 620, 190 N.C. 768.

68. Ill.—Wilkie v. Chicago, 58 N.E. 1004, 188 Ill. 444, 453, 80 Am.S.R. 182.

69. Me.—Ticonic Bank v. Stackpole, 41 Me. 302, 305.

70. N.H.—Lord v. Colley, 6 N.H. 99, 103, 25 Am.D. 445.

71. "Webster's New International Dictionary says . . . 'ticket' is a 'certificate.'"—Hall v. U. S., D.C. Cal., 10 F.Supp. 739, 740.

72. Ill.—People v. Nordheim, 99 Ill. 553, 560.

73. Ala.—Nelson v. State, 12 So. 421, 97 Ala. 79, 80—Brooks v. State, 6 So. 902, 88 Ala. 122.

74. U.S.—U. S. v. Julian, Ct.Cl., 16

S.Ct. 801, 802, 162 U.S. 324, 40 L. Ed. 984.

Nev.—Comstock Mill & Min. Co. v. Allen, 31 P. 434, 436, 21 Nev. 325.

"Jurat" included

A jurat, when spoken of as the certificate of an officer who administers an oath, has been held included in the term "certificate."—U. S. v. McDermott, Ky., 11 S.Ct. 746, 140 U. S. 151, 153, 35 L.Ed. 391.

75. Ala.—Nelson v. State, 12 So. 421, 97 Ala. 79, 80—Brooks v. State, 6 So. 902, 88 Ala. 122.

76. U.S.—Edmondson v. Bloomshire, Ohio, 11 Wall. 382, 390, 20 L.Ed. 44.

77. La.—Johnson v. New Orleans, 15 So. 100, 46 La.Ann. 714.

78. Black L.D.

79. Ga.—Philpot v. Temple Banking Co., 60 S.E. 480, 3 Ga.App. 742.

Pa.—Commonwealth v. Compton, 20 A. 417, 137 Pa. 138.

80. U.S.—Neall v. U. S., Cal., 118 F. 699, 706, 55 C.C.A. 31.

81. Black L.D., citing N.Y.Code Civ. Proc. § 650, Civ.Pract.Act § 913.

82. Webster New Int. D. See Howard Sav. Inst. v. Newark, 44 A. 654, 655, 63 N.J.Law 547.

83. N.J.—Randall v. State, 22 A. 45, 46, 53 N.J.Law 485.

84. Black L.D.

85. Pa.—Harr v. Market Street Title & Trust Co., 190 A. 903, 905, 326 Pa. 410.

86. Tex.—Franklin Fire Insurance Co. v. Hall, 247 S.W. 822, 112 Tex. 332.

87. Tex.—Sheppard v. Owl Refining Co., Civ.App., 68 S.W.2d 1101, 1102.

88. Ark.—Young v. Pumphrey, 83 S. W.2d 84, 86, 191 Ark. 98.

89. Tex.—Franklin Fire Ins. Co. v. Hall, 247 S.W. 822, 112 Tex. 332.

90. U.S.—U. S., for Use of U. S. Rubber Co., v. Ambursen Dam Co., D.C.Cal., 3 F.Supp. 548, 550.

91. U.S.—U. S. v. Powell, C.C.A.Va., 95 F.2d 752, 754—City Bond & Fi-

tificate of indebtedness or an evidence of debt,"⁹² "certificate of insurance," see C.J.S. title Insurance §§ 1452-1474, also 45 C.J. p 8 note 11-p 58 note 36, "certificate of interest in profit-sharing agreement,"⁹³ "certificate of judge,"⁹⁴ "certificate of marriage," see C.J.S. title Marriage § 33, also 38 C.J. p 1315 note 92, "certificate of membership," see C.J.S. title Insurance §§ 1453, 1455, also 45 C.J. p 8 note 15-p 13 note 88, "certificate of naturalization," see C.J.S. title Aliens § 143, "certificate of occupancy,"⁹⁵ "certificate of probable cause," see C.J.S. title Criminal Law § 1717, also 17 C.J. p 109 note 66-p 111 note 96½, "certificate of probate," see C.J.S. title Wills § 499, also 68 C.J. p 1135 note 18-p 1136 note 23, "certificate of protest," see C.J. S. title Bills and Notes § 377, and C.J.S. title Notaries § 6, also 46 C.J. p 510 notes 35-44, "certificate of public convenience and necessity,"⁹⁶ "certificate of purchase,"⁹⁷ "certificate of qualification,"⁹⁸ "certificate of reasonable doubt," see C.J.S. title Criminal Law § 1717, also 17 C.J. p 109 note 66-p 111 note 96½, "certificate of redemption," see C.J.S. titles Mortgages § 852, also 42 C.J. p 411 notes 67-77, Taxation § 879, also 61 C.J. p 1279 note 69-p 1280 note 94, "certificate of registry," see C.J.S. title Shipping §§ 1, 15, also 58 C.J. p 31 note 11, and p 59 note 46, "certificate of sale,"⁹⁹ "certificate of sale to the State,"¹ "certificate of shares of stock,"² "certificate of stock," see C.J.S. title Corporations §§ 258-267, also 14 C.J. p

478 note 43-p 491 note 11, "certificate of tax sale," see C.J.S. title Taxation §§ 822-825, also 61 C.J. p 1220 note 76-p 1224 note 52, "certificate or policy upon the assessment plan,"³ "certificate or warrant from some officer authorized . . . to issue the same,"⁴ "certificate sent to 1 B,"⁵ "continuation certificate,"⁶ "declaration and certificate,"⁷ "false certificate in writing,"⁸ "good certificate,"⁹ and "hair-cutter's certificate,"¹⁰ also "certificates of beneficial interest in property,"¹¹ "certificates of courts, public officials, and persons transacting business,"¹² "certificates of interest in an oil title,"¹³ "certificates of its indebtedness,"¹⁴ "certificates of notaries," see C.J.S. title Notaries § 8, also 46 C.J. p 519 note 13-p 521 note 58, "certificates of stock or profits or interest in property or accumulations of a corporation,"¹⁵ "delinquency certificates" see the C.J.S. title Taxation § 736 et seq, also 61 C.J. p 1108 note 6 et seq, "gold and silver certificates" and "silver certificates."¹⁶

CERTIFICATE OF ASSIZE. A writ granted for the reexamination or retrial of a matter passed by assize before justices.¹⁷

CERTIFICATIO ASSISÆ NOVÆ DISSEISINÆ. Law Latin, a certification of assise of novel disseisin.¹⁸

CERTIFICATION. Specifically, the doing of ev-

- nance Co. v. Welch, D.C.Cal., 9 F. Supp. 500, 501—Fidelity Trust Co. v. Lederer, C.C.A.Pa., 289 F. 1009, 1012—Armstrong v. Union Trust & Savings Bank, C.C.A.Wash., 248 F. 263, 270.
- Fla.—Hubert v. City of Vero Beach, 112 So. 52, 53, 93 Fla. 323.
- Ga.—Jefferson Banking Co. v. Trustees of Martin Institute, 91 S.E. 463, 466, 146 Ga. 383.
- Ohio.—State ex rel. Stauss v. Cuyahoga County, 196 N.E. 890, 896, 130 Ohio St. 64.
- Pa.—Commonwealth v. Roxford Knitting Co., 110 A. 726, 721, 268 Pa. 266.
- 11 C.J. p 77 note 3 [a].
92. Md.—City of Baltimore v. Machen, 104 A. 175, 177, 132 Md. 618.
93. N.C.—State v. Heath, 153 S.E. 855, 858, 199 N.C. 135.
94. Tex.—Herring v. State, 35 S.W. 2d 737, 738, 117 Tex.Cr. 211.
95. N.J.—Frank J. Durkin Lumber Co. v. Fitzsimmons, 147 A. 555, 557, 106 N.J.Law 183.
96. Tex.—Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ.App., 92 S.W.2d 296, 301.
97. United States receiver's certificate, showing payment for land, held

- to be a "certificate of purchase" and prima facie evidence of ownership.
- Cal.—Sacre v. Chalupnik, 205 P. 449, 451, 188 Cal. 386—Saecker v. Cohn, 179 P. 890, 891, 180 Cal. 151.
- Ind.—Splahn v. Gillespie, 48 Ind. 397, 402.
- 11 C.J. p 78 note 10.
98. Ala.—Jackson v. City of Sylacauga, 144 So. 125, 126, 25 Ala.App. 244.
99. Cal.—Corporation of America v. Eustace, 17 P.2d 723, 726, 217 Cal. 102—Cooper v. Gibson, 24 P.2d 952, 957, 138 Cal.App. 532.
1. Ark.—Keith v. Freeman, 43 Ark. 296, 303.
2. Mass.—Smith v. Worcester & S. St. Ry. Co., 113 N.E. 462, 463, 224 Mass. 564.
3. Mo.—Lee v. Missouri State Life Ins. Co., 261 S.W. 33, 85, 303 Mo. 492.
4. U.S.—Tyler v. Shelby County, Tex., C.C.Tex., 47 F.2d 103, 105.
5. U.S.—McCormack v. U. S., C.C.A. N.Y., 66 F.2d 519, 521.
6. Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 141, 177 Ga. 648.
7. U.S.—U. S. v. Ambrose, Ohio, 2

- S.Ct. 682, 108 U.S. 336, 340, 27 L. Ed. 746.
8. Tex.—Graham v. State, 57 S.W. 2d 850, 854, 123 Tex.Cr. 121.
9. Tex.—Lord v. New York L. Ins. Co., 66 S.W. 690, 95 Tex. 216, 222, 93 Am.S.R. 827.
10. Neb.—Lane v. State, 232 N.W. 96, 99, 120 Neb. 302.
- "Certificate of registration as a registered barber" distinguished see Barber 9 C.J.S. p 1539 note 79.
11. U.S.—In re Hotel Gibson Co., D. C. Ohio, 11 F.Supp. 30, 33.
12. Okl.—Dickinson v. Perry, 181 P. 504, 511, 75 Okl. 25.
13. Cal.—People v. Daniels, App., 76 P.2d 556, 558.
14. U.S.—Lawyers' Mortg. Co. v. Anderson, D.C.N.Y., 1 F.Supp. 462, 464.
15. U.S.—Brooklyn Trust Co. v. Corwin, D.C.N.Y., 5 F.Supp. 287, 290.
16. N.J.—Howard Sav. Inst. v. Newark, 44 A. 654, 655, 63 N.J.Law 547.
17. Black L.D., citing Fitzherbert Nat. Brev. p 181.
18. Adams Gloss., citing Reg. Orig. p 200.

everything needed to bind the bank.¹⁹ In Scotch practice, the assurance given to a party of the course to be followed in case he does not appear or obey the order of the court.²⁰

Phrases: "Certification of a check,"²¹ "certification of proceedings to lower court,"²² and "valid and lawful certification."²³

CERTIFICATION OF ASSIZE. In English practice, a writ anciently granted for the reëxamining or retrial of a matter passed by assize before justices, now entirely superseded by the remedy afforded by means of a new trial.²⁴

CERTIFICATORIA. In Spanish law, certificate.²⁵

CERTIFICATS DE COUTUME. In French law, certificates given by a foreign lawyer, establishing the law of the country to which he belongs upon one or more fixed points. These certificates can be produced before the French courts, and are received as evidence in suits on questions of foreign law.²⁶

CERTIFY.

Present Tense

To attest, give certain knowledge or information of, make evident, make known or established, testify or vouch for the truth of a fact or facts, or to

testify to, or vouch for, a thing,²⁷ either in writing or orally as to its truth or excellence.²⁸ As ordinarily used with reference to documents or papers, the word has been defined as meaning to affirm or assert in writing the correctness or identity of the designated instrument, or to make a declaration about in writing,²⁹ under hand or hand and seal.³⁰

Phrases: "Certify and return,"³¹ "certify under his hand and seal,"³² and "chief engineer . . . should 'certify.'"³³

Certified

The past tense and past participle of the verb "certify," which, in a particular connection, has been held to include the idea of "filed."³⁴

Certified copy. A copy made or attested by officers having charge of the original and authorized to give copies officially, and it has been held that the use of any specific words is not necessary to constitute a copy a certified copy;³⁵ but an oral or verbal statement has been held insufficient.³⁶

Under particular circumstances a "certified copy" has been held equivalent to "a true and attested copy," see *Attest* 7 C.J.S. p 692 note 41, and a "duplicate,"³⁷ but under other circumstances it has been distinguished from "duplicate"³⁸ and "true copy."³⁹

19. U.S.—U. S. v. Potter, C.C.Mass., 56 F. 83, 91.

N.Y.—Sundail Const. Co. v. Liberty Bank of Buffalo, 13 N.E.2d 745, 746, 277 N.Y. 137.

20. Black L.D.

21. Fla.—Tunncliffe v. Sears, 148 So. 197, 198, 107 Fla. 669—Bank of Bay Biscayne v. Ball, 128 So. 491, 492, 99 Fla. 745.

Kan.—McAdoo v. Farmers' State Bank of Zenda, 189 P. 155, 156, 106 Kan. 662.

Mo.—Bathgate v. Exchange Bank of Chula, 205 S.W. 875, 876, 199 Mo. App. 583.

N.Y.—World Exchange Bank v. Commercial Casualty Ins. Co., 173 N.E. 902, 904, 255 N.Y. 1.

See also Banks and Banking § 371.

22. Tex.—Shipp v. Metzger, Civ. App., 96 S.W.2d 315, 318.

23. Mass.—Ames v. Commissioner of Corporations and Taxation, 169 N.E. 139, 142, 269 Mass. 352.

24. Black L.D.

25. Escriche Dictionario.

26. Black L.D., citing Argles French Merc. L.

27. U.S.—Doherty v. McDowell, D.C. Me., 276 F. 728, 730.

Cal.—Ainsa v. Mercantile Trust Co. of San Francisco, 163 P. 898, 901, 174 Cal. 504.

Ill.—Chicago, etc., R. Co. v. People, 65 N.E. 701, 200 Ill. 237, 243.

Minn.—Kipp v. Dawson, 60 N.W. 845, 59 Minn. 82, 85—State v. Brill, 59 N.W. 989, 58 Minn. 152, 156.

Mo.—State ex Inf. Carnahan ex rel. Webb v. Jones, 181 S.W. 50, 52, 266 Mo. 191.

Mont.—In re Kostohris' Estate, 29 P.2d 829, 834, 96 Mont. 226.

N.C.—State v. Abernethy, 130 S.E. 619, 620, 190 N.C. 768.

11 C.J. p 79 note 40.

28. N.Y.—People v. Foster, 58 N.Y. S. 574, 27 Misc. 576, 582, quoting Standard D.

29. Cal.—Harting v. Cebrian, 51 P. 2d 195, 198, 10 Cal.App.2d 10.

Iowa.—Sawyer v. Lorenzen & Weise, 127 N.W. 1091, 149 Iowa 87, 92, Ann.Cas.1912C 940.

Or.—State v. Gee, 42 P. 7, 28 Or. 100, 105.

Pa.—Title Guaranty & Trust Co. of Scranton v. Hildebrand, 41 Pa.Super. 136, 140.

30. N.Y.—People v. Foster, 58 N.Y.S. 574, 27 Misc. 576, 582, quoting Standard D.

31. N.D.—Murray Bros. & Ward Land Co. v. Buttles, 156 N.W. 207, 210, 32 N.D. 565.

32. N.C.—State v. Abernethy, 130 S.E. 619, 620, 190 N.C. 768.

33. U.S.—Cincinnati, N. O. & T. Ry.

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34. N.D.—Murray Bros. & Ward Land Co. v. Buttles, 156 N.W. 207, 210, 32 N.D. 565.

35. U.S.—Doherty v. McDowell, D.C. Me., 276 F. 728, 730.

Cal.—Harting v. Cebrian, 51 P.2d 195, 198, 10 Cal.App.2d 10, citing Corpus Juris.

Mont.—In re Kostohris' Estate, 29 P.2d 829, 834, 96 Mont. 226.

11 C.J. p 78 note 26.

36. Ill.—Chicago, etc., R. Co. v. People, 65 N.E. 701, 200 Ill. 237, 243.

37. U.S.—Millan v. Mannington Exch. Bank, W.Va., 183 F. 753, 755, 106 C.C.A. 327.

38. Ind.—Nelson v. Blakey, 54 Ind. 29, 36.

39. Terms not interchangeable

In construing a statutory provision requiring the presentation of "certified copies" of certain documents, the court said: "The question presented to us is whether a 'true copy' is a 'certified copy.' We think these terms are not interchangeable and that a 'certified copy' implies more than a 'true copy,' and that a 'true copy' is not a 'certified copy.'" —Ehrlich v. Mulligan, 140 A. 463, 465, 104 N.J.Law 375, 57 A.L.R. 596.

Other phrases: "Certified, audited, and paid,"⁴⁰ "certified by the chairman and secretary,"⁴¹ "certified by the mayor,"⁴² "certified to the county auditor,"⁴³ "proceedings . . . shall be certified . . . to the county clerk,"⁴⁴ and "value of the work has been certified by the municipal engineer;"⁴⁵ also, as a participial adjective, "certified carriers,"⁴⁶ "certified case," see C.J.S. titles Appeal and Error §§ 389, 390, also 3 C.J. p 989 note 56-p 1003

note 44, Criminal Law § 1700, also 17 C.J. p 92 note 7-p 93 note 23, and Federal Courts § 202, also 3 C.J. p 1000 note 12-p 1003 note 44, and 25 C.J. p 864 note 58-p 867 note 99, "certified check," see C. J.S. title Banks and Banking § 371, "certified public accountant," see Accountant 1 C.J.S. p 636 notes 8-12, "'certified seed' potatoes,"⁴⁷ "duly certified copy,"⁴⁸ and "true and certified copy."⁴⁹

40. Ind.—Etzold v. Board of Com'rs of Huntington County, 146 N.E. 842, 844, 82 Ind.App. 655.

41. Mo.—State ex Inf. Carnahan ex rel. Webb v. Jones, 181 S.W. 50, 52, 266 Mo. 191.

42. N.C.—State v. Abernethy, 130 S. E. 619, 620, 190 N.C. 768.

43. N.D.—Murray Bros. & Ward

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44. Mo.—State ex Inf. Carnahan ex rel. Webb v. Jones, 181 S.W. 50, 52, 266 Mo. 191.

45. N.J.—Holden v. Mayor and Council of Borough of North Arlington, Bergen County, 163 A. 447, 448, 10 N.J.Misc. 1294.

46. Cal.—People v. Henry, 21 P.2d 672, 676, 131 Cal.App. 82.

47. N.J.—Spence v. Hutchinson, 130 A. 612, 613.

48. Pa.—Title Guaranty & Trust Co. of Scranton v. Hildebrand, 41 Pa. Super. 138, 140.

49. U.S.—Doherty v. McDowell, D. C.Me., 276 F. 728, 730.

CERTIORARI

This Title includes review by superior courts of judicial action of inferior tribunals or officers in statutory or other proceedings not subjects of appeal or writ of error, etc., by removal and examination of records of such proceedings for correction of errors and irregularities therein; nature and scope of the remedy in general; in what cases and as to what proceedings review by certiorari is allowed; grounds for, jurisdiction to grant, and proceedings to obtain review by certiorari; requisites, issuance, and effect of writs, etc., of certiorari; quashing or dismissing such writs; returns thereto and proceedings thereon; hearing and determination thereof, and effect of decisions thereon; review of the proceedings; and costs on certiorari.

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I. DEFINITION AND NATURE OF WRIT

§ 1. Definition

Certiorari is a writ issued from a superior court to an inferior court or tribunal commanding the latter to send up the record of a particular case.

Certiorari, except in so far as it has been en-

larged and extended by statute, is a writ issued from a superior court and directed to a court or tribunal of inferior jurisdiction, commanding latter to certify and return to former the record in the particular case.¹ It is a common-law² revisory,³

1. Fla.—Young v. Stoutamire, 179 So. 797.

Ill.—People ex rel. Maloney v. Lindblom, 55 N.E. 353, 182 Ill. 241.

Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 98 Ind.App. 29.

Va.—Town of Appalachia v. Mainous, 93 S.E. 566, 121 Va. 666.

W.Va.—Ashworth v. Hatcher, 128 S. E. 93, 98 W.Va. 323.
10 C.J. p 88 note 4.

Effect is removal of record and cause from lower to higher court.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

2. Fla.—Young v. Stoutamire, 179 So. 797.

Me.—Chavarie v. Robie, 194 A. 404.

N.Y.—Peo. v. Priest, 88 N.Y.S. 11, 95 App.Div. 44.

Tenn.—Conners v. City of Knoxville, 139 S.W. 870, 136 Tenn. 428.

Va.—Town of Appalachia v. Mainous, 93 S.E. 566, 121 Va. 666.

W.Va.—Ashworth v. Hatcher, 128 S. E. 93, 98 W.Va. 323.

11 C.J. p 88 note 2.

Statutory provision may be made.—Chavarie v. Robie, Me., 194 A. 404.

Constitutional jurisdiction conferred on supreme court to issue "writ of certiorari" means common-law certiorari.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

Development from criminal side
Although it seems that the writ of

certiorari was on the criminal side in its earliest use, it later became a remedy in civil cases at common law.—Conners v. City of Knoxville, 139 S.W. 870, 136 Tenn. 428.

Out of kings bench or chancery

A writ of "certiorari" at common law was an original writ, issuing out of chancery or the king's bench, to judges or officers of inferior courts, commanding them to return the records of a cause pending before them.—Ashworth v. Hatcher, 128 S.E. 93, 98 W.Va. 323.

3. Ala.—Foley v. Armstrong, 170 So. 547, certiorari denied 170 So. 548, 233 Ala. 175—Waltman v. Ortman, 170 So. 545, 233 Ala. 170, denying certiorari 170 So. 545—

remedial,⁴ and prerogative⁵ writ. The writ is also used, in many jurisdictions, to review not only proceedings of inferior courts but also proceedings of inferior officers, boards, and tribunals exercising judicial or quasi-judicial functions.⁶ It has been said to be "one of the most valuable and efficient remedies" derived from the common law.⁷

The term "*recordari*" is sometimes used where the writ issues to a court not of record.⁸

Bill of certiorari, or certiorari bill, is a bill in equity, prayed for by defendant, having for its object the removal, by a writ of certiorari, of a cause from an inferior court of equity to the court of chancery; and the ground on which such writ is allowed is that, because of the inferior court's limited jurisdiction, or because of its wrongful assumption of jurisdiction, it cannot afford defendant complete justice.⁹

Fowler v. Fowler, 122 So. 444, 219 Ala. 457.

Writ of review

Certiorari is a writ of review.—Leonard v. Wilcox, 142 A. 762, 101 Vt. 195.

4. Ala.—Foley v. Armstrong, 170 So. 547, certiorari denied 170 So. 548, 233 Ala. 175—Waltman v. Ortman, 170 So. 545, 233 Ala. 170, denying certiorari 170 So. 545.
Mo.—State ex rel. Plummer v. Gardner, 234 S.W. 53, 290 Mo. 143.

5. N.J.—Mellor v. Kaighn, 99 A. 207, 89 N.J.Law 543, affirming 96 A. 1015.

R.I.—Chew v. Superior Court, 110 A. 605, 43 R.I. 194.
11 C.J. p 88 note 3.

However, it has been held that certiorari has lost its prerogative character and now belongs to the courts to be used as other process, in the enforcement of private rights and the prevention of private wrongs.—Smith v. Saye, 127 S.E. 568, 131 S.C. 378—Rawl v. McCown, 81 S.E. 958, 97 S.C. 1.

6. N.Y.—People v. Taylor, 205 N.Y. S. 897, 899, 210 App.Div. 196, citing *Corpus Juris*.

7. Tenn.—Tennessee Cent. R. Co. v. Campbell, 75 S.W. 1012, 109 Tenn. 640, 645.

8. N.C.—Taylor v. Johnson, 87 S.E. 981, 171 N.C. 84.

Writ of recordari as method of review in justice of the peace case see C.J.S. title Justices of the Peace § 243, also 35 C.J. p 860 notes 21–26; 53 C.J. p 599 notes 79, 80.

9. R.I.—Hyde v. Superior Ct., 66 A. 292, 28 R.I. 204, 219.
11 C.J. p 88 note 8.

Absence of reported cases in the United States bearing on the use of the certiorari bill seems to indicate that it has rarely, if ever, been resorted to.—Hyde v. Superior Ct., *supra*.

10. Cal.—Howe v. Superior Court of California in and for Sacramento County, 274 P. 992, 96 Cal.App. 769.
Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 83 Colo. 379—Nisbet v. Frincke, 179 P. 867, 66 Colo. 1.
Mass.—Walsh v. Justice of Dist. Ct. of Springfield, 9 N.E.2d 555.
Minn.—State v. Canfield, 208 N.W. 181, 166 Minn. 414.

S.D.—State v. Knight, 219 N.W. 258, 52 S.D. 572.
Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685.

While not so drastic in character as prohibition or mandamus, still certiorari is extraordinary remedy.—State v. Kay, *supra*.

11. Fla.—Edwards v. Knight, 139 So. 582, 104 Fla. 16, adhered to 143 So. 441, 104 Fla. 16.

Mass.—Walsh v. Justice of Dist. Ct. of Springfield, 9 N.E.2d 555.
Tex.—Lafleur v. Switzer, Civ.App., 109 S.W.2d 239.

Narrower in scope than an appeal.—Lafleur v. Switzer, *supra*.

12. Ill.—Brown v. Van Keuren, 172 N.E. 1, 340 Ill. 118—Hahnemann Hospital v. Industrial Board of Illinois, 118 N.E. 767, 282 Ill. 316—Bachechi v. Inlander Paper Co., 252 Ill.App. 178—People ex rel. Holland v. Finn, 247 Ill.App. 53.
Ind.—O'Connor v. Overall Laundry, 183 N.E. 134, 139, 98 Ind.App. 29, citing *Corpus Juris*.

Mo.—State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

Determination of whether judgment was erroneous or without authority.—Towns v. Malone, 116 So. 131, 217 Ala. 273.

13. Ala.—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

N.D.—Baker v. Lenhart, 195 N.W. 16, 80, citing *Corpus Juris*.
Vt.—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied Fonda v. City of St. Albans, 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 259 U.S. 666, 66 L.Ed. 425.

W.Va.—Quesenberry v. State Road Commission, 138 S.E. 362, 103 W.Va. 714—Deitz Colliery Co. v. Ott, 129 S.E. 708, 709, 99 W.Va. 663, citing *Corpus Juris*—Ashworth v. Hatcher, 128 S.E. 93, 98 W.Va. 323.
11 C.J. p 88 note 10.

Writ arraigns regularity of proceedings of an inferior court where no appeal lies, by means of which proceedings absolutely void may be set aside.—State v. Kern, 96 So. 672, 153 La. 829.

Prevention of errors and abuses

Certiorari is a suitable form through which a court of last resort may exercise its final revisory and supervisory powers to correct and to prevent errors and abuses.—Conte v. Roberts, R.I., 192 A. 814—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

Where only remedy available

In the exercise of its final revisory jurisdiction on all questions of law and equity, the supreme court has issued a writ of certiorari when no other remedy has been specifically provided by statute for the review of alleged errors of law committed in an inferior tribunal.—Fainardi v. Dunn, *supra*.

14. Ala.—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

§ 2. Nature of Remedy or Proceeding in General

- a. In general
- b. Character of proceeding

a. In General

Certiorari is an extraordinary writ offering a limited form of review, its principal function being to keep inferior tribunals within their jurisdiction.

Certiorari is an extraordinary remedy¹⁰ offering a limited form of review of a cause or proceeding below,¹¹ its purpose being to bring the record of such cause or proceeding up to the court issuing the writ for consideration by it.¹² It is resorted to for supplying defects of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceedings.¹³ The principal office of the writ is to control the action of an inferior tribunal and to keep it within its jurisdiction;¹⁴ it is not so much to determine the

valid existence of the court or tribunal as it is to determine whether its jurisdiction has been exceeded.¹⁵ Indeed, the writ has been held not to lie to bring in question the legal existence of the court to which it is directed.¹⁶ The common law writ is not a broad or flexible remedy in as much as all that can be done under it is to quash or to refuse to quash the proceedings complained of.¹⁷

The office of a certiorari is to bring up the proceedings of the court below for examination, that they may be affirmed or quashed, and not to enforce any rights growing out of those proceedings,¹⁸ its purpose not being to compel performance.¹⁹

It is not the function of the writ to supply defects in the action of an inferior tribunal²⁰ or to remedy a defect in the law.²¹

The writ will not ordinarily lie for the purpose of restraining excesses in the action of the inferior tribunal,²² although in some jurisdictions, it may be put to such use.²³ Certiorari is not a proper mode of trying title to lands,²⁴ and questions of title to land which arise in the proceedings cannot ordinarily be tried, as is discussed *infra* § 155.

*It is not a proceeding against the tribunal or an individual composing it; it acts on the cause or proceeding in the lower court, and removes it to the superior court for reinvestigation.*²⁵

b. Character of Proceeding

- (1) As action, suit, or special proceeding
- (2) As judicial or quasi-judicial
- (3) As appellate or original
- (4) Writ in nature of audita querela

Ill.—*People ex rel. Maloney v. Lindblom*, 55 N.E. 358, 182 Ill. 241.

Ind.—*Board of Zoning Appeals of City of Indianapolis v. Waintrup*, 193 N.E. 701, 99 Ind.App. 576—*O'Connor v. Overall Laundry*, 183 N.E. 184, 98 Ind.App. 29.

Mo.—*State ex rel. Spencer v. Anderson*, App., 101 S.W.2d 530—*State ex rel. Lindsay v. Kansas City*, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed *State ex rel. Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W. 2d 20, 322 Mo. 368.

R.I.—*State v. Coleman*, 190 A. 791, 109 A.L.R. 787.

S.D.—*State v. Knight*, 219 N.W. 258, 52 S.D. 572.

11 C.J. p 88 note 11.

Jurisdiction and regularity of proceedings

The office of certiorari at common law extends to questions of jurisdiction and of the regularity of the proceedings.—*Towns v. Malone*, 116 So. 131, 217 Ala. 273.

15. Cal.—*Beaumont v. Samson*, 90 P. 839, 5 Cal.App. 491.

11 C.J. p 89 note 12.

16. Ga.—*Shepherd v. Swain*, 157 S. E. 339, 42 Ga.App. 741.

11 C.J. p 89 note 13.

That judgment was not rendered by court is not a ground for certiorari, since the writ cannot be used to call into question the legal existence of the court to which it is directed.—*Shepherd v. Swain*, *supra*.

17. Cal.—*Melick v. Superior Court of California in and for Los Angeles County*, 269 P. 746, 93 Cal. App. 189.

Colo.—*State Civil Service Commission of Colorado v. Cummings*, 265 P. 687, 689, 83 Colo. 379, citing *Corpus Juris*.

Idaho.—*Neil v. Public Utilities Com-*

mission, 178 P. 271, 276, 32 Idaho 44, citing *Corpus Juris*.

Ill.—*People ex rel. Maloney v. Lindblom*, 55 N.E. 358, 182 Ill. 241.

Ind.—*O'Connor v. Overall Laundry*, 183 N.E. 134, 98 Ind.App. 29.

Mich.—*Carroll v. City Commission of Grand Rapids*, 253 N.W. 240, 266 Mich. 123.

Mo.—*State ex rel. Manion v. Dawson*, 225 S.W. 97, 284 Mo. 490.

N.D.—*Molander v. Swenson*, 210 N. W. 9, 54 N.D. 391.

Wis.—*State v. Knight*, 178 N.W. 253, 172 Wis. 138.

11 C.J. p 89 note 14.

Amendment of proceedings of the town board and the committee on common schools, cannot be had to make them correspond to what it is claimed such officers did.—*State v. Knight*, *supra*.

Recovery of funds

Certiorari to quash an order of the county court improperly taking a portion of one school district for use in creating another cannot be converted into a suit by the dismembered district to recover funds collected by the new district from the territory in controversy.—*Cotter Special School Dist. No. 60 v. Baxter County, School Dist. No. 53*, 162 S.W. 58, 111 Ark. 79.

18. Fla.—*Great American Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

N.Y.—*Clark v. Smith*, 294 N.Y.S. 106, 250 App.Div. 233.

N.D.—*Molander v. Swenson*, 210 N. W. 9, 10, 54 N.D. 391, quoting *Corpus Juris*.

11 C.J. p 89 note 15.

19. N.Y.—*Clark v. Smith*, 294 N.Y. S. 106, 250 App.Div. 233—*People ex rel. Hoesterey v. Taylor*, 205 N. Y.S. 879, 210 App.Div. 191, re-

versed on other grounds 147 N.E. 223, 239 N.Y. 626.

Office of certiorari is to review determinations alleged to be illegal and to point out to the tribunal which has acted the just and legal course to pursue, and then to leave the aggrieved parties to pursue such further remedy as the law gives them.—*Clark v. Smith*, 294 N.Y.S. 106, 250 App.Div. 233.

Specific performance

The writ cannot be used to compel the specific performance of a contract.—*People v. Duffey*, 153 N.Y. S. 713, 169 App.Div. 901—11 C.J. p 89 note 16.

20. Mont.—*State v. Mullendore*, 161 P. 949, 53 Mont. 109.

21. S.C.—*Wyse v. Wolfe*, 123 S.E. 818, 129 S.C. 499.

Annulment of election as to change of county boundaries cannot be had for insufficient provision of statute relating thereto.—*Wyse v. Wolfe*, *supra*.

22. Mont.—*State v. Mullendore*, 161 P. 949, 53 Mont. 109.

N.D.—*Molander v. Swenson*, 210 N. W. 9, 54 N.D. 391.

23. La.—*Lemann v. Ascension Parish School Board*, 103 So. 517, 158 La. 81.

24. N.J.—*Jordan v. Teaneck Tp.*, 136 A. 501, 5 N.J.Misc. 336—*Walsh v. Teaneck Tp.*, 136 A. 501, 5 N.J. Misc. 332.

25. Ark.—*Levy v. Lychinski*, 8 Ark. 113.

Mo.—*State v. Dowling*, 50 Mo. 134.

N.Y.—*Devlin v. Platt*, 11 Abb.Pr. 298.

Acts on cause or proceeding in lower court
Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

(1) As Action, Suit, or Special Proceeding

In some jurisdictions certiorari is considered to be an action or suit rather than a special proceeding, while elsewhere the reverse is true.

It has been said that certiorari was not regarded as an action at common law but as a special proceeding,²⁶ and in some of the code states, where proceedings are divided into actions and special proceedings, it is held to be a special proceeding.²⁷ In other jurisdictions, however, certiorari is considered to be an action rather than a special proceeding.²⁸ Moreover, certiorari has been held to be a suit or action within the purview of particular statutes,²⁹ such as a venue statute,³⁰ a statute relating to costs,³¹ and a statute providing for the renewal of suits.³²

(2) As Judicial or Quasi-Judicial

Technically certiorari is a judicial rather than a quasi-judicial proceeding.

A certiorari proceeding is a judicial proceeding in the technical sense, as distinguished from a quasi-judicial one.³³

(3) As Appellate or Original

Certiorari has some of the characteristics of both original and appellate proceedings.

While certiorari has been said to be original in nature,³⁴ it has also been said to be appellate.³⁵

It may be said, indeed, to have characteristics of both. For example, to the extent that it involves the review of the proceedings of an inferior court, certiorari is an appellate proceeding, but to the extent that the subject matter of the proceeding brought before the appellate court will not be re-investigated, tried, or determined on the merits as on appeal or writ of error, it is an original proceeding.³⁶

(4) Writ in Nature of Audita Querela

Where statutes so provide, certiorari will lie instead of audita querela.

In some jurisdictions by express statutory provision the writ of certiorari will lie instead of audita querela.³⁷ The question as to whether this writ will lie for matters arising before or after judgment is considered *infra* § 31.

§ 3. As Ancillary to Appeal or Writ of Error

Certiorari is sometimes employed as an auxiliary process for the obtaining of further information as to a matter before the court.

At common law the writ of certiorari is used for two purposes: (1) As an appellate proceeding for the reëxamination of some action of an inferior tribunal. (2) As an auxiliary process to enable the court to obtain further information with respect to some matter already before it for adjudication.³⁸

26. Fla.—Great American Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

27. S.D.—Campbell v. Common Council of City of Watertown, 195 N.W. 442, 46 S.D. 574.

11 C.J. p 91 notes 44, 45.

28. S.C.—Smith v. Saye, 127 S.E. 568, 131 S.C. 378.

11 C.J. p 91 note 46.

29. Mo.—State ex rel Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

30. Mo.—State ex rel Gardner v. Hall, *supra*.

Transitory or local

A writ of certiorari directed against the state board of equalization cannot be considered a transitory action, within the ordinary classification for venue purposes as transitory and local.—State ex rel Gardner v. Hall, *supra*.

"Suit commenced by summons"

Mo.—State ex rel Gardner v. Hall, *supra*.

31. Wash.—State v. Spokane County, Super.Ct., 82 P. 878, 40 Wash. 453.

32. Ga.—Hendrix v. Kellogg, 32 Ga. 435.

33. Mich.—Ziegel v. Board of Road Comrs., 216 N.W. 426, 427, 241 Mich. 161, quoting *Corpus Juris*.

W.Va.—Reynolds Taxi Co. v. Hudson, 136 S.E. 833, 103 W.Va. 173. 11 C.J. p 90 note 41.

34. R.I.—State v. Coleman, 190 A. 791, 109 A.L.R. 787.

W.Va.—Ashworth v. Hatcher, 128 S. E. 93, 98 W.Va. 323.

As independent action

(1) Certiorari proceedings directed to an intermediate appellate court, requiring it to certify a complete transcript of the record of a divorce action against relator, constitutes a new action and is not a continuance of the divorce action, the parties in the certiorari proceeding not being the same as those to the divorce action.—State ex rel Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

(2) Similarly, it has been held that a certiorari sued out to reverse a judgment of a justice's court is the commencement of a new suit and not a continuation of an old one.—Fenno v. Dickinson, 4 Denio, N.Y., 84.

35. Nev.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312, 43 Nev. 159.

N.Y.—In re Pennsylvania Gas Co., 169 N.Y.S. 820, 103 Misc. 37, reversed on other grounds 171 N.Y. S. 1028, 184 App.Div. 556, affirmed

122 N.E. 260, 225 N.Y. 397, affirmed Pennsylvania Gas Co. v. Public Service Commission, Second Dist. of State of New York, 40 S.Ct. 279, 252 U.S. 23, 64 L.Ed. 434.

Tex.—Lafleur v. Switzer, Civ.App., 109 S.W.2d 239.

As issuing from appellate court

It is an appellate proceeding only in the sense that it issues from an appellate court to review the action of inferior courts.—State v. Coleman, R.I., 190 A. 791, 109 A.L.R. 787.

Not in ordinary and technical form

Proceedings on certiorari are of appellate nature, although not pursued in ordinary and technical form of appeal.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312, 43 Nev. 159.

36. U.S.—U. S. v. Elliott, D.C.Wash., 3 F.2d 496, affirmed, C.C.A., 5 F.2d 292.

Fla.—Atlantic Coast Line R. Co. v. Florida Pine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171.

11 C.J. p 90 note 42.

37. Tenn.—Baker v. Penecost, 106 S.W.2d 220, 171 Tenn. 529.

38. U.S.—U. S. v. Elliott, D.C. Wash., 3 F.2d 496, affirmed, C.C.A., 5 F.2d 292.

Miss.—Shapleigh Hardware Co. v.

It is only the writ as employed for the former purpose that is treated of in this article. The writ as ancillary to an appeal or a writ of error, or to bring up the record, is considered in Appeal and Error §§ 1133-1141, and the writ as ancillary to the writ of habeas corpus is considered in C.J.S. title Habeas Corpus § 122, also 29 C.J. p 196 note 16-p 197 note 19.

Ancillary to mandamus. Where the statute provides that the court may, in its discretion, issue a writ of mandamus in a case where complainant has other means of relief if the slowness of the ordinary forms of law might result in a denial of justice, in such a case a writ of certiorari as an ancillary proceeding may issue.³⁹

§ 4. Distinguished from Other Remedies or Proceedings

- a. Appeal and writ of error
- b. Habeas corpus
- c. Injunction
- d. Mandamus
- e. Prohibition

a. Appeal and Writ of Error

The distinctions between certiorari and the remedy of appeal are considered in C.J.S. title Appeal and Error § 17, and the writ of certiorari is likewise distinguished from the writ of error in C.J.S. Appeal and Error § 9. The unavailability of certiorari when there is available a remedy by appeal or writ of error is considered in this Title *infra* § 39.

Brumfield, 130 So. 98, 159 Miss. 175, quoting *Corpus Juris*.

N.M.—Lea County State Bank v. McCaskey Register Co., 49 P.2d 577, 39 N.M. 454.

N.D.—Baker v. Lenhart, 195 N.W. 16, 23, 50 N.D. 30, quoting *Corpus Juris*.

11 C.J. p 89 note 18.

39. La.—Pullen v. Pullen, 109 So. 400, 161 La. 721.

Modification of custody decree

Certiorari will lie as ancillary to mandamus to review refusal of district court to exercise jurisdiction over proceeding by divorced wife to modify decree awarding custody of children to husband.—Pullen v. Pullen, *supra*.

40. Wis.—Gaster v. Whitcher, 94 N. W. 787, 117 Wis. 668, 98 Am.S.R. 968.

41. N.Y.—People ex rel. Chapman v. Hinkley, 199 N.Y.S. 101—People ex rel. Semenoff v. Nagle, 194 N.Y.S. 602, 118 Misc. 476.

Writ not sustained where jurisdiction shown

Where it is clear that the supreme court justice, in refusing to set aside a warrant of arrest in execution of which relator was committed to jail, acted within his jurisdiction in holding that the warrant should stand, and that relator's remedy was by appeal from the order denying his motion to vacate the warrant, and such an appeal has been taken, the court at special term will not sustain a writ of certiorari brought under a statute providing for a writ of habeas corpus or a writ of certiorari to inquire into the cause of an imprisonment.—People ex rel. Semenoff v. Nagle, *supra*.

42. N.D.—Molander v. Swenson, 210 N.W. 9, 10, 54 N.D. 391, quoting *Corpus Juris*.

11 C.J. p 90 note 33.

43. Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185. Mont.—State v. District Court of

b. Habeas Corpus

Habeas corpus reaches the body but not the record, certiorari reaches the record but not the body.

A writ of habeas corpus reaches the body but not the record; it also reaches jurisdictional matters, but it does not reach the record. A writ of certiorari reaches the record but not the body.⁴⁰

The writ of certiorari may be employed in the alternative to habeas corpus, under statutes so providing, to inquire into the cause of the detention of a person held in custody, where the presence of the person detained is not desired in court.⁴¹

Certiorari as ancillary to Habeas Corpus is considered in C.J.S. title Habeas Corpus § 122, also 29 C.J. p 196 note 16, p 197 note 19.

c. Injunction

An injunction restrains or prohibits; certiorari does neither, but rather annuls.

The office of certiorari is in no sense that of a restraining order. It is not the purpose of the writ to restrain or prohibit, but to annul.⁴² It is not the appropriate remedy to prevent anticipated wrong or injury.⁴³

d. Mandamus

Mandamus issues to compel performance of an unperformed ministerial duty; certiorari issues to review a performed judicial act.

The distinction between mandamus and certiorari is clear and well defined;⁴⁴ mandamus issues to compel, certiorari to review, official or judicial action;⁴⁵ thus the former issues to compel an un-

Second Judicial Dist., 272 P. 242, 83 Mont. 349.

N.D.—Molander v. Swenson, 210 N. W. 9, 54 N.D. 391.

R.I.—Chew v. Superior Court, 110 A. 605, 43 R.I. 194.

11 C.J. p 90 note 34.

44. N.Y.—People ex rel. Hunter Arms Co. v. Foster, 288 N.Y.S. 295, 247 App.Div. 619.

Certiorari as speedier remedy

When certiorari is available it will generally provide an easier and speedier remedy than mandamus.—Wofford Oil Co. of Georgia v. City of Calhoun, 189 S.E. 5, 183 Ga. 511.

45. Fla.—State ex rel. Allen v. Rose, 167 So. 21, 123 Fla. 544.

Iowa.—Madsen v. Town of Oakland, 257 N.W. 549, 552, 219 Iowa 216, citing *Corpus Juris*.

Me.—Rogers v. Brown, 181 A. 667, 668, 134 Me. 88, citing *Corpus Juris*.

Mo.—State ex rel. Smith v. Williams, 275 S.W. 534, 310 Mo. 267.

performed ministerial duty while the latter reviews a performed judicial duty.⁴⁶ Certiorari also differs from mandamus in that by the latter writ the case is proceeded with in the inferior court, in accordance with the order of the court granting it.⁴⁷

The writ of certiorari performs none of the functions of a writ of mandamus.⁴⁸ It does not take the place of mandamus to compel the making of a record, but takes the record as it finds it, excluding the mere evidence which can, in the nature of things, relate to the merits only.⁴⁹ However, it has been held that an application for mandamus may be continued as one for certiorari where that appears to be the proper remedy.⁵⁰

e. Prohibition

Prohibition is a preventive remedy directed to the court itself to restrain future action; certiorari is a corrective remedy to examine some action of a court directed to the cause and not to the court.

Although similar to prohibition in that it will lie for want or excess of jurisdiction, certiorari is to be distinguished from prohibition by the fact that it is a corrective remedy used for the reexamination of some action of an inferior tribunal, and is directed to the cause or proceeding in the lower court and not to the court itself, while prohibition is a preventive remedy issuing to restrain future action, and is directed to the court itself. Statutory

provisions changing the common-law features of prohibition sometimes create further distinctions. So, where an act beyond or in excess of jurisdiction has been done and made of record, the remedy may be by certiorari to quash such record, but if the act is only threatened the remedy is by writ of prohibition.⁵¹ Furthermore, the writ of certiorari can be issued only to a tribunal or person exercising judicial functions, whereas the writ of prohibition can be issued against one exercising either judicial or ministerial functions.⁵²

Prohibition treated as certiorari. Under the practice in force in some jurisdictions of entertaining a petition as an application for the proper relief, where an order complained of in a petition for prohibition has already been made by the court, the petition will be treated as an application for a writ of certiorari.⁵³

§ 5. Converting into Suit in Equity

Certiorari cannot be converted into a suit in equity.

In as much as the writ of certiorari is a common-law one, such a proceeding cannot be converted into a suit in equity, so as to administer a public charity created by a will, when the property, which is the foundation of the charity, is still in the hands of the executor, whose final report is sought to be reviewed by the writ.⁵⁴

N.J.—*Ford v. Gilbert*, 99 A. 621, 89 N.J.Law 482.

N.Y.—*People ex rel. Hunter Arms Co. v. Foster*, 288 N.Y.S. 295, 247 App.Div. 619.

N.D.—*Cofman v. Ousterhous*, 168 N.W. 826, 833, 40 N.D. 390, 18 A.L.R. 219, citing *Corpus Juris*.

11 C.J. p 90 note 35.

Allowance of appeal

Certiorari does not lie to compel a trial judge to grant a suspensive appeal from judgment dissolving restraining order; proper remedy to compel a judge to grant such an appeal being mandamus.—*Hudson v. Skannal*, 162 So. 1, 182 La. 324.

Issuance of license

Remedy of person entitled to have public officer issue license under statute is by mandamus, not certiorari.

N.J.—*Ribnik v. McBride*, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J.Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327.

N.Y.—*Executive Service Corporation*

v. *Quigley*, 243 N.Y.S. 772, 229 App.Div. 852.

46. Fla.—*State ex rel. Allen v. Rose*, 167 So. 21, 123 Fla. 544.

Mo.—*State ex rel. Duraflor Products Co. v. Percy*, 29 S.W.2d 83, 325 Mo. 335.

11 C.J. p 90 note 36.

If officer fails or refuses to perform statutory duties, the remedy is mandamus and not certiorari.—*Ford v. Gilbert*, 99 A. 621, 89 N.J.Law 482.

Compelling judicial action

(1) Certiorari cannot take the place of mandamus to compel circuit court to try case.—*State ex rel. Duraflor Products Co. v. Percy*, 29 S.W.2d 83, 325 Mo. 335.

(2) Compliance with statutory provision for automatic affirmance of judgment of civil court of record, on circuit court's failure to declare its decision within stated time, will be enforced by mandamus to compel latter court to enter judgment of affirmance, and not by certiorari.—*Grodin v. Railway Express Agency*, 156 So. 476, 116 Fla. 378.

47. Va.—*Town of Appalachia v. Mainous*, 93 S.E. 566, 121 Va. 666, 11 C.J. p 90 note 37.

48. Iowa.—*Morrison v. Patterson*, 267 N.W. 704, 221 Iowa 883—*Holcomb v. Franklin*, 235 N.W. 474, 212 Iowa 1159.

49. Mo.—*State v. Broadus*, 149 S.W. 473, 245 Mo. 123, Ann.Cas.1914A 823.

11 C.J. p 90 note 38.

50. N.Y.—*Rucinski v. City of Schenectady*, 293 N.Y.S. 138, 249 App.Div. 344.

Wash.—*State v. Superior Court for Chelan County*, 12 P.2d 420, 168 Wash. 384.

51. Mo.—*State ex rel. Smith v. Williams*, 275 S.W. 234, 310 Mo. 267, 11 C.J. p 90 note 40.

52. Utah.—*Peo. v. House*, 10 P. 838, 4 Utah 369.

53. Wash.—*State ex rel. Shallenberger v. Superior Court of King County*, 25 P.2d 1041, 174 Wash. 627.

54. Colo.—*Peo. v. Court of App.*, 79 P. 1028, 33 Colo. 261.

II. WHEN WRIT LIES

A. IN GENERAL

§ 6. General Statement

General propositions precisely defining when certiorari will lie are practically impossible of formulation because of the nature of the writ and of varying statutory provisions.

It is impossible to lay down any rule which will precisely define when certiorari will lie.⁵⁵ This is sometimes true even as to the law of a particular state, and is especially true when it is attempted to formulate a rule broad enough to cover all jurisdictions. Even where not regulated by statute, the scope of the writ, as shown *infra* § 9, is to some extent different in particular states, the remedy being more comprehensive in some states than in others. Thus, it should be kept in mind, in connection with the law hereinafter stated, that the decisions of a particular state as to the right to the writ may be of little or no value in other states where the scope of the writ is different. Moreover, while in some states there are no statutes providing in what cases the writ will lie, in many states the scope of the writ is expressly defined by statutes, see *infra* §§ 7, 8, which themselves differ to a considerable extent.

Matters to be considered before instituting proceedings. In deciding whether the writ will lie, several matters must be taken into consideration: (1) Are there any statutes or rules of court which change the scope of the writ as it existed at common law, see *infra* §§ 7-9, and, if so, are matters sought to be reviewed such as are reviewable under said statutes or rules of court? (2) In nearly all jurisdictions, is there another adequate remedy, or is the case within an exception so that the writ lies, even if there is another adequate remedy, see *infra* §§ 37-41? (3) Do the matters sought to be reviewed relate to the jurisdiction, *infra* § 23, or are they such that they are reviewable under the practice in the particular state, *infra* §§ 9, 24? (4) In most jurisdictions is the matter sought to be reviewed a judicial or quasi-judicial act, *infra* §§ 17, 18, as distinguished from a ministerial, executive, or legislative act? (5) Is the matter sought to be reviewed within the discretion of the inferior tribunal or officer, see *infra* § 30? (6) Is there

such a "final" adjudication as permits the granting of the writ, see *infra* § 20? (7) Are there any facts connected with the matter such as will induce the court, in the exercise of its discretion, to deny the writ, see *infra* §§ 10-16?

Judgments of justices of the peace. The rules relating to certiorari to review a judgment of a justice of the peace are in many respects different, due in part to statutes solely governing such certiorari proceedings, and are not considered herein, but are discussed at length in C.J.S. title Justices of the Peace §§ 243-266, also 35 C.J. p 859 note 17-p 886 note 14.

Criminal proceedings. The rules governing certiorari in criminal proceedings do not necessarily apply to certiorari in civil proceedings and are treated in C.J.S. title Criminal Law §§ 1629, 1781, also 17 C.J. p 15 note 82-p 18 note 28, p 23 notes 83-93, p 107 notes 37-39, p 166 note 51-p 167 note 76.

§ 7. Constitutional and Statutory Provisions

- a. In general
- b. Extension, limitation, or abolition of writ

a. In General

The power to issue certiorari is sometimes expressly granted by express constitutional or statutory provision; without such provision it may issue as a common-law writ or as a writ the power to issue which is inherent in a superior court.

In as much as the power to issue the writ of certiorari in a proper case is inherent, at least in the higher courts of record,⁵⁶ no statute is necessary to authorize such courts to issue the writ.⁵⁷ In some jurisdictions there is no statute prescribing the function of a writ of certiorari, in which case of course the common law prevails.⁵⁸ In other jurisdictions the writ is controlled entirely by statute,⁵⁹ or may issue as provided by statute or as at common law, where the statute has not abrogated the common-law right.⁶⁰ It is within the legislative province to determine the procedure and practice for review by certiorari,⁶¹ and to designate the

55. Tenn.—Tennessee Cent. R. Co. v. Campbell, 75 S.W. 1012, 109 Tenn. 640.

6 C.J. p 91 note 49.

56. N.M.—Terr. v. Valdez, 1 N.M. 548.

Tenn.—Tennessee Cent. R. Co. v. Campbell, 75 S.W. 1012, 109 Tenn. 640.

11 C.J. p 95 note 21.

57. Del.—Rash v. Allen, 76 A. 370, 24 Del. 444.

11 C.J. p 95 note 22.

58. D.C.—Degge v. Hitchcock, 35 App.D.C. 218.

Mo.—Hannibal, etc., R. Co. v. State Bd. of Equal, 64 Mo. 294.

59. Idaho.—Northwestern & Pacific Hypotheekbank v. Sutphen, 300 P. 496, 50 Idaho 720.

Ill.—Simpson v. Sligar, 239 Ill.App. 484.

60. N.Y.—Gelces v. State Liquor Authority, 278 N.Y.S. 328, 154 Misc. 517.

61. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Statute consolidating practice
The statutory procedure superseded—

courts out of which and to which it shall issue.⁶² A reasonable statutory limitation as to the time within which certiorari may issue is constitutional.⁶³ Nevertheless, a statute providing that, unless the court refuses an application for certiorari within a certain number of days, the writ shall issue has been held to be unconstitutional as a legislative invasion of the prerogative of the judiciary.⁶⁴

Fixing scope of writ. The legislature may, within constitutional limits,⁶⁵ enlarge⁶⁶ or contract⁶⁷ the scope of the remedy of certiorari and the grounds on which it will lie. Statutes claimed to "enlarge" the use of the writ have been strictly construed.⁶⁸ However, statutes claimed to confer

the right to issue the writ should be construed liberally.⁶⁹ Thus, a provision conferring "appellate jurisdiction in all cases, both in law and equity," has been held to authorize the issue of the writ where no other mode of review is specified.⁷⁰

Retroactive effect. Statutory regulations are ordinarily not retroactive.⁷¹

"Special" statutory writs. In investigating the statutory provisions applicable to the writ, it is necessary to remember that in addition to general statutory provisions applicable to certiorari there are often found provisions for a special statutory writ which are more or less different from the general statutes, and which govern certiorari to review certain proceedings;⁷² reference should be made to

ing certiorari to review mandamus, and prohibition consolidates practice relating to such modes of relief, somewhat broadening meaning of terms previously used, scope of relief granted, and jurisdiction of special term.—Penn-York Natural Gas Corporation v. Maltbie, 299 N.Y.S. 1004, 164 Misc. 569.

62. Statute inapplicable

In answer to a contention that the supreme court has no jurisdiction to grant certiorari in a case after the power of such court to entertain a petition for the writ had been taken away by statute, it has been held to be sufficient to state that the Act cited has no application to the case and that, under a rule of the court, writs of certiorari, in cases pending before effective date of Civ.Pract. Act 1933, are governed by former Practice Act, although granted after such date.—People ex rel. Nelson v. Sheridan Trust & Savings Bank, 193 N.E. 186, 353 Ill. 290, reversing 272 Ill.App. 27, certiorari denied Elie Sheetz Candies Co. v. O'Connell, 55 S.Ct. 654, 295 U.S. 740, 79 L.Ed. 1687.

63. N.J.—Red Oaks v. Dorez, Inc., 187 A. 737, 117 N.J.Law 280.

64. Ga.—Holliman v. State, 165 S.E. 11, 175 Ga. 232, denying certiorari 155 S.E. 906, 42 Ga.App. 322.

65. Constitutionality of statute

(1) The proviso of Statute. Act § 121, making a judgment of an appellate court final unless such court shall grant a certificate of importance and an appeal to the supreme court or the supreme court shall require, by certiorari or otherwise, the case to be certified to it, is not unconstitutional.—McGinnis v. McGinnis, 124 N.E. 562, 289 Ill. 608, dismissing error 211 Ill.App. 240.

(2) A statute, providing that "before the writ of certiorari shall lie to any verdict, judgment, order, or ruling of a certain municipal court,

a motion for a new trial must be made before the judge trying the case, and his judgment thereon must be reviewed by the appellate division of such court in the manner provided by the statute, and that the writ shall lie only to the final judgment of the appellate division of such court," has been held not to be unconstitutional as denying the constitutional privilege of the writ of certiorari, since its effect is merely to provide that the writ shall be available only after the losing party has exhausted his remedy in the municipal court.—Orr v. Southern Acceptance Co., 134 S.E. 30, 162 Ga. 400.

66. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452—Butin v. Civil Service Commission of City of Des Moines, 162 N.W. 565, 179 Iowa 1048.

N.Y.—Penn-York Natural Gas Corporation v. Maltbie, 299 N.Y.S. 1004, 164 Misc. 569.

11 C.J. p 95 note 11.

Permitting weighing of evidence

Iowa.—Butin v. Civil Service Commission of City of Des Moines, 162 N.W. 565, 179 Iowa 1048.

Scope not extended

(1) A statutory provision that "a writ of certiorari shall be granted by the Supreme and District Courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy" is not extended by an amendment adding "and also when in the judgment of the court it is deemed necessary to prevent a miscarriage of justice."—Sell v. Davis, 237 N.W. 307, 308, 61 N.D. 130—Livingston v. Peterson, 228 N.W. 816, 59 N.D. 104.

(2) Statute providing for review of actions of boards and commissions by the courts did not enlarge scope of writ, although permitting

additional evidence.—Anderson v. City of Memphis, 72 S.W.2d 1059, 167 Tenn. 648.

67. Ark.—Payne v. McCabe, 37 Ark. 318, 320.

68. Ark.—St. Louis, etc., R. Co. v. Barnes, 35 Ark. 95.

Not substituted for appeal or writ of error

A statute providing that circuit courts shall have power to issue writs of certiorari to any officer or board of officers "to correct any erroneous or void proceedings and to hear and determine the same" does not so enlarge the use of the writ as to make it answer the ends of an appeal or a writ of error for the correction of mere errors in judicial proceedings.—St. Louis, etc., R. Co. v. Barnes, supra.

69. Ohio.—Ferris v. Bramble, 5 Ohio St. 109.

N.Y.—Matter of Semken, 35 N.Y.S. 471, 13 Misc. 488.

70. Minn.—Brown County v. Winona, etc., Land Co., 37 N.W. 949, 38 Minn. 397.

71. Ala.—Mahan v. Lester, 20 Ala. 162.

N.J.—Cowen v. Wildwood, 38 A. 22, 60 N.J.Law 365, affirmed 40 A. 1132, 60 N.J.Law 367.

Change in procedure

A change in the Practice Act relating to procedure in proceedings on certiorari does not impair proceedings already had at the time that the change took place; but thereafter the procedure must be adapted to conform to the new provision.—Demarse v. Bruckman, 293 N.Y.S. 736, 164 Misc. 331.

72. Tenn.—Anderson v. City of Memphis, 72 S.W.2d 1059, 167 Tenn. 648.

11 C.J. p 95 note 18.

Review of tax assessments see C.J.S. title Taxation §§ 567-580, also 61 C.J. p 865 note 22-p 887 note 22.

the specific titles relating to such proceedings for the construction of other statutes of this nature.

b. Extension, Limitation, or Abolition of Writ

(1) Where Writ Is Constitutional Remedy

(2) Where Writ Is Not Constitutional Remedy

(1) Where Writ Is Constitutional Remedy

Where protected by the constitution, certiorari cannot be limited or abolished.

Where the remedy of certiorari is created or guaranteed by constitutional provision, it cannot be limited or taken away⁷³ by statute or by a municipal charter provision.⁷⁴ A statute dispensing with the necessity of granting the writ to designated tribunals is, however, not violative of constitutional provisions permitting the allowance of the writ,⁷⁵ and the legislature may provide an exclusive mode of review in a particular class of cases, notwithstanding a constitutional provision authorizing certiorari generally.⁷⁶

(2) When Writ Is Not Constitutional Remedy

Although the writ, when it is not provided for by constitutional provision, may be denied or abrogated by statute, it seems that it may still issue in special cases.

Where there is no constitutional barrier, the issuance of the writ may be, and has been, limited, denied, or abrogated by statute in some jurisdictions.⁷⁷ Such a statute, however, is not retroactive.⁷⁸ It has been also held that, despite the aboli-

tion of the writ, the courts still possess the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed to be furnished as they had when writs of error and certiorari were in force.⁷⁹ The intent to abrogate the right must clearly appear from the legislative enactment and cannot be inferred from language of doubtful import.⁸⁰ Thus, a statutory provision that decisions of courts or officers shall be final does not, it is generally held, preclude the writ,⁸¹ although there is authority to the contrary.⁸²

Effect of abrogation. Although the right is abrogated by statute, the writ may still issue, with due precaution, in special cases of manifest want of jurisdiction, or where the procedure is manifestly in excess of, or under mere color of, jurisdiction, which could not have been intended to be protected,⁸³ even though the decision or judgment of the inferior court or tribunal is final and conclusive and no appeal lies.⁸⁴ So, if the inferior tribunal was without jurisdiction but proceeded under color of a statute the writ may issue, although the statute inhibits the removal of proceedings had under it;⁸⁵ but it is otherwise where the proceedings are under the statute.⁸⁶

§ 8. — Statutory Writ of Review

The writ of review provided by statute in some jurisdictions is, as a rule, substantially the same as the writ of certiorari.

In several jurisdictions, particularly those of far western and northwestern United States, the statutes provide for a writ called a "writ of review."⁸⁷

73. Fla.—Brinson v. Tharin, 127 So. 313, 99 Fla. 696.

Wyo.—State v. Dahlem, 263 P. 708, 37 Wyo. 498.

11 C.J. p 95 note 23.

Constitutional amendment

Amendment to Const. art 6 § 7, ratified October 7, 1912, Acts 1912 p 30, relating to the abolition of justice's courts in certain cities and the establishment by legislation of courts in lieu thereof, and empowering the legislature to provide rules and procedure as to the correction of errors in and by such courts, does not abrogate Const. art 6 § 4 par 5, allowing the correction of errors in inferior judicatories by writ of certiorari.—Johnston v. Brenau College Conservatory, 91 S.E. 85, 146 Ga. 182, answers to certified questions conformed to 90 S.E. 972, 19 Ga.App. 47.

74. R.I.—Rice v. Board of Canners of City of Woonsocket, 111 A. 748.

75. Pa.—McGinnis v. Vernon, 67 Pa. 149.

76. Tenn.—Louisville, etc., R. Co. v. State, 8 Heisk. 663.

11 C.J. p 95 note 25.

77. Neb.—Engles v. Morgenstern, 122 N.W. 688, 85 Neb. 51, 54.

11 C.J. p 97 notes 38–40.

78. N.J.—Cowen v. Wildwood, 38 A. 22, 60 N.J.Law 365.

79. Neb.—Engles v. Morgenstern, 122 N.W. 688, 85 Neb. 51, 54.

80. Pa.—Chase v. Miller, 41 Pa. 403.

11 C.J. p 96 note 29.

81. Miss.—Allen v. Levee Comrs., 57 Miss. 163.

Wis.—State v. Graham, 19 N.W. 359, 60 Wis. 395.

Wash.—State v. Cowlitz County Superior Ct., 129 P. 900, 72 Wash. 144, 44 L.R.A., N.S., 1209.

Election contest

It has been held that a statutory provision that the decisions of a city council in a contested election case

shall be final and conclusive does not deprive a common-law court of the right to review such action by certiorari; but the statute merely means that the action and decision of the council shall not be reviewable, so far as the merits are concerned.—Rash v. Allen, 76 A. 370, 24 Del. 444.

82. N.Y.—Peo. v. Seaman, 111 N.E. 482, 217 N.Y. 70.

11 C.J. p 96 note 31.

83. N.J.—Benedictine Sisters v. Elizabeth, 13 A. 5, 50 N.J.Law 347.

11 C.J. p 96 note 33.

84. N.Y.—Peo. v. Kingston, 65 N.Y. S. 590, 53 App.Div. 58.

11 C.J. p 97 note 34.

85. N.J.—Ackerman v. Taylor, 9 N. J.Law 65.

11 C.J. p 97 note 36.

86. N.J.—Morris Canal, etc., Co. v. Mitchell, 31 N.J.Law 99—Stanley v. Horner, 24 N.J.Law 511.

87. Cal.—Camm v. Justice's Court

This writ, although unknown as such to the common-law,⁸⁸ is substantially the common-law remedy by certiorari,⁸⁹ with some modifications as to when the writ will issue and what relief may be granted, which, however, do not materially enlarge the scope of the writ or substantially alter its character or purpose.⁹⁰ Hereafter, in this discussion the writ of review will be referred to as certiorari unless there is reason to identify it particularly.

Grounds. The statutes creating and defining writs of review are, with a few exceptions, almost identical in their phraseology, and before the writs will issue it is necessary, under their express provisions, to show: (1) That the court, or board, or tribunal has exceeded its jurisdiction while in the exercise of judicial functions. (2) That there is no remedy by appeal. (3) That there is no other plain, speedy, and adequate remedy.⁹¹ There is an excess of jurisdiction, it seems, where the court or tribunal has not "regularly pursued . . . [the] authority" of such court or tribunal.⁹²

In *Oregon* the writ is concurrent with the right of appeal, and is allowed in all cases where the inferior court, officer, or tribunal in the exercise of judicial functions appears to have exercised such functions erroneously, that is, illegally and contrary to the course of procedure applicable to it, or when it has exceeded its jurisdiction to the injury of some substantial right of plaintiff.⁹³ This, however, does not authorize the writ to be used to correct mere errors in the exercise of

rightful jurisdiction, or to inquire whether the rulings of the inferior tribunal on the law and the evidence, and in the application of the law to the facts, are correct.⁹⁴ Questions of fact are not reviewable nor is the evidence,⁹⁵ and original relief cannot be secured.⁹⁶

In *Washington* the statute authorizes the writ in case of excess of jurisdiction or illegal acts, or to correct any erroneous or void proceeding, or to review a proceeding not according to the course of the common law, provided in all such cases that there is no appeal nor any plain, speedy, and adequate remedy at law.⁹⁷

§ 9. Right to and Grounds for Writ in Particular Jurisdictions

The jurisdictions vary materially as to the right to, and the grounds for, a writ of certiorari; in some a review of all errors of law is permitted, while in others only want or excess of jurisdiction or illegality or irregularity of procedure will be considered.

For convenience in classification, the jurisdictions in the United States, in so far as the law therein as to the scope of certiorari is concerned, may be roughly grouped as follows: (1) States where all errors of law, in addition to jurisdictional questions, may be reviewed. (2) States where want or excess of jurisdiction is the only ground. (3) States where the writ is confined to jurisdictional questions and "illegality" or irregularity of procedure. The grounds for the writ in certain western states, where the writ is called a

of Santa Rosa Tp., 170 P. 409, 35 Cal.App. 293.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 434.

Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

Or.—Lechleider v. Carson, 68 P.2d 482, 156 Or. 636.

Wash.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

11 C.J. p 97 notes 41-47.

88. Wash.—North Bend Stage Line v. Department of Public Works, *supra*.

89. Or.—Lechleider v. Carson, 68 P.2d 482, 156 Or. 636.

Va.—Town of Appalachia v. Mainous, 93 S.E. 566, 121 Va. 666.

11 C.J. p 97 notes 48, 49.

90. Or.—Lechleider v. Carson, 68 P.2d 482, 156 Or. 636.

91. Cal.—Department of Public Works of California, Division of Water Rights, v. Superior Court in and for Siskiyou County, 239 P.

1076, 197 Cal. 215—Camm v. Justice's Court of Santa Rosa Tp., 170 P. 409, 35 Cal.App. 293.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400—State v. Board of Railroad Commissioners of State of Montana, 234 P. 834, 73 Mont. 1.

Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

Utah.—Hillyard v. District Court of Cache County, 249 P. 806, 68 Utah 220.

11 C.J. p 97, note 50.

92. Idaho.—McConnell v. State Bd. of Equalization, 83 P. 494, 11 Idaho 652.

Determination of regularity

(1) Writ of review is not writ of error and cannot take place of appeal, but is simply what the code states it to be; namely, a review of proceedings in inferior tribunal to determine whether authority of

such tribunal has been regularly pursued.—Holmes v. Justice's Court of Oakland Tp., Cal.App., 65 P.2d 820.

(2) The review cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued its authority under a statute, Comp.L. 1917 § 7383, expressly so providing.—Hillyard v. District Court of Cache County, 249 P. 806, 68 Utah 220.

93. Or.—Lechleider v. Carson, 68 P.2d 482, 156 Or. 636—Hochfeld v. City of Portland, 192 P. 911, 97 Or. 572, reversing 190 P. 725, 97 Or. 572.

11 C.J. p 97 notes 52, 53.

94. Or.—Garnsey v. Klamath County Ct., 54 P. 539, 1089, 33 Or. 201.

95. Or.—Cookinham v. Lewis, 114 P. 88, 115 P. 342, 58 Or. 484.

96. Or.—Elmore v. Tillamook County, 105 P. 900, 55 Or. 224.

97. Wash.—State ex rel. Bear Lake Logging Co. v. Superior Court for Snohomish County, 223 P. 1, 128 Wash. 468—State ex rel. Brown v. Brinker, 194 P. 574, 575, 114 Wash. 47, quoting *Corpus Juris*.

"writ of review," are stated in the preceding section. In order better to understand what is said herein in connection with the statements as to when the writ lies, and to be able to distinguish and weigh the decisions in states other than the one in which the proceeding is to be brought, it is deemed advisable to state at the outset, as briefly as possible, without any attempt to collect all the decisions in the respective states, the particular rule, statutory or otherwise, which governs the right to the writ in several of the states where the scope thereof is more or less clearly defined.

In *Alabama* the statute does not authorize the writ of certiorari in any case not provided for by the common law.⁹⁸ Thus, the supervisory power of a superior court over an inferior legal tribunal by means of a common-law writ of certiorari extends only to questions affecting the jurisdiction of the subordinate tribunal and the legality of its proceedings,⁹⁹ and the writ will not be issued to correct defects correctable by appeal.¹ The term "statutory certiorari," as used in this jurisdiction, refers to removal of causes to the superior court for trial de novo.²

In *Arkansas* the well settled practice, in so far as the right of a circuit court to issue a writ of certiorari is concerned, is to limit its issuance to cases: (1) Where the tribunal to which it issues has exceeded its jurisdiction. (2) Where the party applying for it had the right of appeal but lost

it through no fault of his own. (3) In cases where it has supervising control over a jurisdiction which has proceeded illegally and no other mode has been provided for directly reviewing its proceedings.³

In *Colorado* the statute authorizes the writ, not only where the court or tribunal has exceeded its jurisdiction, but also where it has "greatly abused" its discretion.⁴ It is held, however, that the principles governing the writ are not affected by the statutory regulation thereof.⁵ The writ may be granted by the supreme court where its decisions have not been followed by the court of appeals, see *infra* § 22 a.

In *Connecticut* the practice by certiorari has apparently fallen entirely into disuse.⁶

In *Delaware* it has been held that the writ of certiorari is in the nature of a writ of error.⁷

In the *District of Columbia* the writ lies, not only to review jurisdictional errors, but also where the inferior court or a special tribunal has deprived the party of a judicial writ or has imposed a burden on his property without due process of law.⁸

In *Florida* the writ is not a substitute for a writ of error or an appeal, but lies to determine whether the inferior tribunal has exceeded its jurisdiction, "or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law."⁹ The writ is limited to an inquiry as to whether the pro-

98. Ala.—*Pitard v. McDowell*, 60 So. 555, 6 Ala.App. 236, 11 C.J. p 92 note 66.

99. Ala.—*Ex parte Tulley*, 149 So. 700, 227 Ala. 700—*Fowler v. Fowler*, 122 So. 444, 219 Ala. 457—*Ex parte Slaughter*, 116 So. 684, 217 Ala. 515—*Ex parte Big Four Coal Mining Co.*, 104 So. 764, 213 Ala. 305—*Woodward Iron Co. v. Bradford*, 90 So. 803, 206 Ala. 447.

Valid creation, jurisdiction, and proceedings

Certiorari to review findings of inferior civil court and to quash proceedings on ground that act creating court was unconstitutional will be denied, where act creating such inferior court is valid and the court has jurisdiction of subject matter and parties, and its proceedings appear regular on their face.—*Foley v. Armstrong*, 170 So. 547, certiorari denied 170 So. 548, 233 Ala. 175—*Waltman v. Ortman*, 170 So. 545, first case, certiorari denied 170 So. 545, 233 Ala. 170, second case.

Illegal padlock proceedings

Certiorari lies where petitioner's premises were ordered padlocked as liquor nuisance by preliminary order

for injunction without notice or hearing, and where petitioner was not permitted to reopen premises for lawful purposes on execution of bond.—*Ex parte Mundy*, 177 So. 347, 235 Ala. 69—*Ex parte Carroll*, 177 So. 346, 235 Ala. 69—*Ex parte Hollingsworth*, 177 So. 346, 235 Ala. 68—*Ex parte Kadle*, 177 So. 346, 235 Ala. 68—*Ex parte Harvell*, 177 So. 345, 235 Ala. 63.

1. Ala.—*Ex parte Tulley*, 149 So. 700, 227 Ala. 277—*Ex parte Kelly*, 128 So. 443, 221 Ala. 339—*Ex parte Slaughter*, 116 So. 684, 217 Ala. 515.

Conclusions of fact cannot be reviewed.—*Ex parte Sloss-Sheffield Steel & Iron Co.*, 92 So. 458, 207 Ala. 219.

That answers to statutory interrogatories in chancery are not compelled is not reviewable by certiorari.—*Ex parte Kelly*, 128 So. 443, 221 Ala. 339.

2. Ala.—*Fellis v. Royal Harness, etc., Co.*, 54 So. 504, 170 Ala. 160.

3. Ark.—*Merchants', etc., Bank v. Fitzgerald*, 33 S.W. 1064, 61 Ark. 605.

11 C.J. p 92 note 68.

4. Colo.—*Public Utilities Commission of Colorado v. City of Loveland*, 289 P. 1090, 87 Colo. 556—*State Board of Medical Examiners v. Spears*, 247 P. 563, 79 Colo. 588, 54 A.L.R. 1493, error dismissed 48 S.Ct. 163, 275 U.S. 503, 276 U.S. 583, 72 L.Ed. 398, 719—*Nisbet v. Frincke*, 179 P. 867, 66 Colo. 1, 11 C.J. p 92 note 69.

5. Colo.—*Ellis v. Peo.*, 62 P. 232, 15 Colo.App. 341.

6. Conn.—*Williams v. Hartford, etc., R. Co.*, 13 Conn. 110.

7. Del.—*In re Ceresini, Super.*, 189 A. 443—*Kings Adm'x v. Hudson's Adm'r*, 2 Harr. 135.

8. D.C.—*Northern Pac. Ry. Co. v. Interstate Commerce Commission*, 23 F.2d 221, 57 App.D.C. 313, certiorari denied 48 S.Ct. 205, 275 U.S. 572, 72 L.Ed. 433.

11 C.J. p 92 note 73.

9. Fla.—*Young v. Stoutamire*, 179 So. 797—*Des Rocher & Watkins Towing Co. v. Third Nat. Bank*, 143 So. 763, 106 Fla. 466—*Miami Transit Co. v. Stephens*, 143 So. 325, 326, 106 Fla. 353, citing *Corpus Juris*—*Great American Ins. Co. of New York v. Peters*, 141

ceedings legally applicable to the case were followed, and whether or not the rulings of the court below were correct will not be considered.¹⁰

In *Georgia* the remedy is much more extensive in its application than in most of the states. It is a constitutional right,¹¹ always¹² available, to review any final judgment of an inferior court;¹³ nevertheless, an issue of gravity and importance must be raised rather than mere questions of practice and evidence.¹⁴

In *Illinois* certiorari lies only where the inferior court or tribunal has exceeded its jurisdiction, or where it has not proceeded according to law.¹⁵ The second ground for the writ means that the court has not followed the form of proceedings

legally applicable in such cases, and does not authorize a review merely on the ground that the rulings of the inferior court were erroneous.¹⁶

In *Iowa* there are two statutory grounds for the writ: (1) Excess of jurisdiction. (2) Otherwise acting "illegally." The latter ground does not, however, extend to mere errors of law.¹⁷

In *Louisiana* certiorari is an appropriate remedy to inquire into the jurisdiction of inferior courts and into the regularity of their proceedings.¹⁸ Nevertheless, the supreme court will ordinarily grant the writ only in special or extreme cases, whose peculiar circumstances as to the facts or law governing the same justify, in the opinion of the court, a resort to it.¹⁹ Such a case will arise where

So. 322, 105 Fla. 380—*State v. Simmons*, 140 So. 187, 104 Fla. 487—*Brundage v. O'Berry*, 134 So. 520, 522, 101 Fla. 320, citing *Corpus Juris* — *Postal Telegraph-Cable Co. v. Broome*, 126 So. 149, 99 Fla. 272—*American Ry. Express Co. v. Weatherford*, 93 So. 740, 84 Fla. 264—*Haile v. Gardner*, 91 So. 376, 82 Fla. 355—*First Nat. Bank v. Gibbs*, 82 So. 618, 78 Fla. 118—*Harrison v. Frink*, 77 So. 663, 75 Fla. 22.

11 C.J. p 92 note 74.

Governed by common law

(1) Under § 11 art 5 of the Florida constitution, providing that the judges of the circuit courts have power to issue writs of certiorari and all other writs proper and necessary to the complete exercise of their jurisdiction, proceedings under writ of certiorari, issued by circuit court, are governed by common law.—*State v. Simmons*, 140 So. 187, 104 Fla. 487.

(2) The writ of certiorari referred to in § 5 art 5 of the constitution refers to common-law writ employed to review proceedings before and after final judgment, where legal remedy was inadequate.—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 100 Fla. 748.

10. Fla.—*City of Jacksonville Beach v. Waybright*, 178 So. 401—*Hamway v. Seaboard Air Line Ry. Co.*, 136 So. 628, 101 Fla. 1483.

11. Ga.—*Taylor v. Georgia Power Co.*, 161 S.E. 669, 44 Ga.App. 326—*Farmers' & Merchants' Bank v. Willie*, 133 S.E. 44, 35 Ga.App. 202.

12. Ga.—*Wofford Oil Co. of Georgia v. City of Calhoun*, 189 S.E. 5, 183 Ga. 511.

13. Ga.—*Taylor v. Georgia Power Co.*, 161 S.E. 669, 44 Ga.App. 326—*Brumelow Heating & Plumbing Co. v. Atlanta Furniture Co.*, 146 S.E. 639, 39 Ga.App. 72—*Farmers'*

& Merchants' Bank v. Willie, 133 S.E. 44, 35 Ga.App. 202.
11 C.J. p 92 note 75.

Wholly void judgment cannot be corrected.—*Sawyer v. Blakely*, 58 S. E. 399, 2 Ga.App. 159.

14. Ga.—*Hicks v. Louisville & N. R. Co.*, 186 S.E. 662, 182 Ga. 595, dismissing certiorari *Louisville & N. R. Co. v. Hicks*, 176 S.E. 698, 49 Ga.App. 846—*Briesenick v. Diamond*, 142 S.E. 118, 165 Ga. 780, dismissing certiorari 134 S.E. 350, 35 Ga.App. 668—*Louisville & N. Ry. Co. v. Tomlin*, 132 S.E. 90, 161 Ga. 749—*Gialelis v. Rowe*, 132 S. E. 399, 35 Ga.App. 182.

15. Ill.—*Frye v. Hunt*, 5 N.E.2d 398, 365 Ill. 32—*Bartunek v. Lastovhen*, 183 N.E. 333, 350 Ill. 380—*Brown v. Van Keuren*, 172 N.E. 1, 340 Ill. 118—*Fisher v. McIntosh*, 115 N.E. 529, 277 Ill. 432—*Shillock v. Retirement Board of Policemens' Annuity & Benefit Fund*, 1 N.E.2d 727, 285 Ill.App. 178.
11 C.J. p 92 note 76.

16. Ill.—*Peo. v. Lindblom*, 55 N.E. 358, 182 Ill. 241.

17. Iowa.—*Home Owners' Loan Corporation v. District Court of Woodbury County*, 272 N.W. 416—*Morrison v. Patterson*, 267 N.W. 704, 221 Iowa 883—*Main v. Ring*, 260 N.W. 859, 219 Iowa 1270—*Adams v. Smith*, 250 N.W. 466, 216 Iowa 1365—*Fairbanks Morse & Co. v. District Court in and for Palo Alto County*, 247 N.W. 203, 215 Iowa 703—*Anderson v. Jester*, 221 N.W. 354, 206 Iowa 452—*Sinnott v. District Court in and for Clarke County*, 207 N.W. 129, 201 Iowa 292.
11 C.J. p 93 note 78.

Rulings on exceptions and objections to interrogatories may be reviewed only if court exceeded proper jurisdiction or acted illegally.—*Winnesiek County State Bank v. Dis-*

trict Court of Allamakee County, 212 N.W. 391, 203 Iowa 1277.

18. La.—*Lavoy v. Tove Bros. Auto & Taxicab Co.*, 105 So. 292, 159 La. 209.

Judgment without hearing

(1) Certiorari is properly allowed where a party is condemned without a hearing.—*Texas & P. Ry. Co. v. Burch*, 166 So. 117, 184 So. 399.

(2) The rejection of testimony as inadmissible is not such an arbitrary refusal to hear a party as will constitute a ground for certiorari.—*State v. Judges Ct. of App.*, 36 La. Ann. 481.

(3) Plaintiff is entitled to certiorari to set aside judgment dissolving temporary injunctions against disturbance of its possession of realty, entered on same day on which domiciliary notice of hearing was served, under terms of which plaintiff had fifteen days to appear and contest dissolution.—*Texas & P. Ry. Co. v. Burch*, supra.

19. La.—*Cepro v. Matulich*, 95 So. 226, 152 La. 1072—*Fortier v. Gumelsky*, 87 So. 741, 148 La. 768.

Practical deprivation of right of appeal

Where the setting of a case for summary trial because of a reconventional demand would compel the taking of an appeal within twenty-four hours instead of ten days, error therein will be considered on application for a writ.—*Cepro v. Matulich*, 95 So. 226, 152 La. 1072.

If order of judicial sequestration of oil and gas properties was unjustified, company aggrieved by order is entitled to relief.—*Dickinson v. Texana Oil & Refining Co.*, 80 So. 669, 144 La. 489.

Instruction to court of appeal on law question propounded, while controlling on that court, does not preclude supreme court from subsequently reviewing case by writ of

an intermediate appellate court has refused to follow well established rules laid down by the supreme court, see *infra* § 22 a, and the supreme court will correct defects in the judgment of the court of appeals where they are patent on the face of the record.²⁰

In *Maine and Massachusetts*, the usual function of the writ is to enable a party without a remedy by appeal, exception, or other mode of correcting errors of law to bring the true record of an inferior tribunal whose proceedings are judicial or quasi-judicial in nature, properly extended, so as to show the principles of the decision, before a superior court for examination as to material mistakes of law apparent on such record, and only errors of law are reviewable thereon.²¹ The error of law to be corrected should be so substantial in nature as to make it manifest that justice requires the writ to issue to prevent a material wrong.²²

In *Maryland* "the office of the writ is twofold: First, to test the jurisdiction of the inferior tribunal; secondly, to require it to adopt a legal and regular course of procedure in the conduct of the judicial proceeding in which it may be engaged, i. e., to follow the form of procedure legally applicable to the case. In either case, the general rule is that the court from which the certiorari issues, in reviewing the proceedings of the inferior tribunal does not try the merits of the case, unless

authorized by statute to do so, but confines itself to determining whether the inferior tribunal has jurisdiction, or has adopted and followed the regular or legal procedure."²³

In *Michigan* there is more or less conflict in the decisions, and it is difficult to deduce a general rule. The scope of the writ, in earlier years, seems to have been broader than at present. It is now expressly provided by statute that rulings on the issues raised on demurrer, plea to the jurisdiction, or other dilatory plea, where adverse to the moving party, may be reviewed by the writ;²⁴ but the other grounds for the writ are not defined by statute.

In *Minnesota* the scope of the writ seems to be broader than in many other states, and it seems that it is a substitute for a writ of error and that questions other than jurisdictional ones may be reviewed.²⁵

In *Mississippi*, by statute, certiorari "lies to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not";²⁶ and a state railroad commission is an inferior tribunal, within that statute.²⁷ Furthermore, it is held that "a mistaken finding of fact induced by an error of law apparent upon the record, the finding of a fact contrary to law, or the making of an order beyond the cognizance and power of the commission, can and will be corrected by the

certiorari and review, as on appeal.—*Pipes v. Gallman*, 140 So. 40, 174 La. 257, annulling 135 So. 690, 18 La. App. 434, answers conformed to 136 So. 302, 173 La. 158.

20. Correcting date of interest

La.—*Brewer v. Foshee*, 179 So. 87, 189 La. 220, modifying 178 So. 778.

21. Me.—*Jellerson v. Board of Police of City of Biddeford*, 187 A. 713, 134 Me. 443.

Mass.—*Prusik v. Board of Appeal of Building Department of City of Boston*, 160 N.E. 812, 262 Mass. 451—*Bradley v. Board of Zoning Adjustment of City of Boston*, 150 N.E. 892, 255 Mass. 160—*Coolidge v. Bruce*, 144 N.E. 397, 249 Mass. 465.

Nature of writ

"Certiorari" is a writ issued by superior court to inferior one, commanding it to certify up its records of some proceeding not according to course of common law, that it may be determined whether there is any error in record for which it should be quashed.—*Jellerson v. Board of Police of City of Biddeford*, 187 A. 713, 134 Me. 443.

Fact questions

Writ does not lie to correct questions of fact, or to examine sufficien-

cy of evidence to support findings of fact, unless objection was taken to evidence for incompetency, so as to raise legal question.—*Murphy v. Justices of Municipal Court of Dorchester Dist. of City of Boston*, 116 N.E. 969, 228 Mass. 12.

22. Mass.—*Maher v. Commonwealth*, 197 N.E. 78, 291 Mass. 343—*Whitney v. Judges of Dist. Court of Northern Berkshire*, 171 N.E. 648, 271 Mass. 448—*Inhabitants of Town of Westport v. County Com'rs of Bristol County*, 141 N.E. 591, 246 Mass. 556.

Ruling on evidence must have resulted in substantial prejudice.—*Walsh v. Justice of Dist. Ct. of Springfield, Mass.*, 9 N.E.2d 555.

23. Md.—*Riggs v. Green*, 84 A. 343, 118 Md. 218, 226.

24. Mich.—*Boughner v. Bay City*, 120 N.W. 597, 156 Mich. 193.

Overruling of motion to dismiss

Under *Judicature Act* c 14 § 4, abolishing demurrers, pleas in abatement, and pleas to the jurisdiction, certiorari will not lie to review an order overruling a motion to dismiss, on account of matters set up in the notice attached to the general issue, where the matters so set up are not

matters which might have been raised by demurrer, plea in abatement, or plea to the jurisdiction under the former practice.—*Thomas Canning Co. v. Cannors' Exch. Subscribers at Warner Inter-Insurance Bureau*, 167 N.W. 832, 202 Mich. 64.

Refusal to vacate judgment

Where reviewable at all, a denial of a motion to vacate a judgment docketed in the circuit court on a transcript from the justice court is reviewable by certiorari.—*De Guzman v. Shepherd*, 196 N.W. 523, 225 Mich. 606—*Townsend v. Tudor*, 1 N.W. 1050, 41 Mich. 263.

25. Minn.—*Mark v. Keller*, 246 N.W. 472, 188 Minn. 1.
11 C.J. p 93 note 83.

Nature of writ of error

A "writ of certiorari" is a writ of review in the nature of a writ of error or an appeal to review and correct decisions and determinations already made.—*State ex rel. Nordin v. Probate Court of Hennepin County, Minn.*, 273 N.W. 636.

26. Miss.—*Forrest County v. Melton*, 86 So. 369, 123 Mass. 615.
11 C.J. p 93 note 84.

27. Miss.—*Gulf, etc., R. Co. v. Adams*, 38 So. 348, 85 Miss. 772.

superior courts" on certiorari.²⁸ It is also held in that state that evidence may be heard by the circuit court in order to make manifest error of law committed by the inferior tribunal.²⁹

In *Missouri* the office of certiorari is said to be the same as at common law.³⁰ The writ may be resorted to where the court to which it is directed has no jurisdiction or acts in excess or abuse of its jurisdiction or where there is no remedy by appeal or writ of error.³¹

In *New Jersey* the application of the writ has been extended further than in almost any other state. The writ is used in that state, at least to some extent, both as a statutory substitute for

a writ of error and as a common-law writ.³² It is regulated by several statutes, differing according to the court or tribunal involved and the nature of the proceeding. It is a proper method of redress for an individual whose rights are invaded by the action of persons clothed with authority and who exercise that authority illegally.³³ In this respect it is commonly used to review the acts of municipal³⁴ or state³⁵ tribunals, bodies, or officers, and it is often used to review municipal ordinances, in respect of which its scope is much wider than in other states.³⁶ The writ does not lie, however, to a circuit court in the exercise of its judicial functions in the course of the common law,³⁷ even though the court acts without jurisdictional author-

28. Miss.—Gulf, etc., R. Co. v. Adams, *supra*.

29. Miss.—Robinson v. Mhoon, 9 So. 887, 68 Miss. 712.

30. Mo.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654—State ex rel. Manion v. Dawson, 225 S.W. 97, 284 Mo. 490—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo.App. 676.

Nature, scope, and proper use to be made of a writ of certiorari are questions to be determined from the common law and decisions, the common-law writ being unmodified by statute.—State ex rel. Manion v. Dawson, 225 S.W. 97, 284 Mo. 490.

31. Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654. 11 C.J. p 93 note 88.

32. N.J.—Crawford v. Hendee, 112 A. 668, 95 N.J.Law 259. 11 C.J. p 93 note 90.

As writ of error

Office of writ of certiorari, in suit to recover damages for wrongful declaring of chattel mortgage in default and for attempting to foreclose, to review order of court of common pleas setting aside verdict as excessive, is in nature of that of writ of error, and its allowance is governed by similar principles.—Calopoulos v. Chagaris, 126 A. 471, 2 N.J.Misc. 998.

Supervisory purpose

Certiorari is prerogative writ by which supreme court exercises jurisdiction to supervise proceedings of inferior tribunals and governmental establishments.—Mellor v. Kaighn, 99 A. 207, 89 N.J.Law 543, affirming, Sup., 96 A. 1015.

33. N.J.—Hulett v. Borough of Sea Girt, 150 A. 202, 106 N.J.Eq. 118, affirmed 154 A. 741, 108 N.J.Eq. 309.

34. N.J.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J.

Law 302—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169—Williams v. Board of Com'rs of Borough of Audubon, 126 A. 664, 96 N.J.Eq. 459—Baker v. Reeves, 157 A. 174, 9 N.J.Misc. 1303—Araneo-White Const. Co. v. Joint Municipal Sewer Commission, 154 A. 313, 9 N.J.Misc. 243.

Exclusive remedy

Certiorari is not only an adequate, but is the exclusive, remedy for a judicial review of proceedings of a municipal body, in the absence of special equities or acts ultra vires.—Williams v. Board of Com'rs of Borough of Audubon, 126 A. 664, 96 N.J.Eq. 459.

Board of adjustment

(1) Test of validity of order or resolution of board of adjustment should be by certiorari and not by bill for injunction.—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169.

(2) Certiorari will lie to review refusal of board of adjustment to recommend to governing body that proposed structure be allowed in an area restricted by a borough zoning ordinance.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J.Law 302.

Consent given to railroad line

Where a railroad charter gives the right to build a branch line with municipal consent, the city's consent is not ultra vires because the structure will be a public nuisance, and a landowner suffering special damage will be entitled to review the consent by certiorari, because the structure, being authorized by statute, will not be a nuisance subject to indictment or a civil suit for damages, and otherwise he would have no remedy.—Seaman v. City of Perth Amboy, 116 A. 22, 97 N.J.Law 76, affirmed 119 A. 278, 98 N.J.Law 174.

No insistence on personal right

Certiorari proceeding to review municipal action is not personal ac-

tion, in which prosecutor may on snarp grounds insist on personal right.—Town of Hammonton v. Elvins, 127 A. 241, 101 N.J.Law 38—Simmons v. Borough of Wenonah, 143 A. 73, 6 N.J.Misc. 902—Jersey Central Power & Light Co. v. Borough of Spring Lake, 140 A. 877, 6 N.J.Misc. 253.

Reasonableness of municipality's questionnaire issued to applicants for contract being debatable, certiorari will properly issue.—Roselle v. Borough v. Verona, 186 A. 590, 14 N.J.Misc. 649.

35. N.J.—Jersey City v. State Water Policy Commission, 180 A. 627, 13 N.J.Misc. 504.

Validity of permit by state water policy commission for erection of dam to create lake for bathing purposes and bungalow sites twenty-four miles above municipal water supply, where evidence regarding diversion and pollution resulting from use thereof was conflicting, is reviewable by certiorari on municipality's application, debatable questions of law as well as of fact being involved.—Jersey City v. State Water Policy Commission, *supra*.

36. N.J.—Public Service Ry. Co. v. City of Camden, 112 A. 421, 422, 95 N.J.Law 190, citing *Corpus Juris*—Orton v. Metuchen, 49 A. 814, 66 N.J.Law 572—Ostrowsky v. City of Newark, 139 A. 911, 102 N.J.Eq. 169—In re Raymond Plaza West, Newark, 189 A. 105, 15 N.J.Misc. 131—Austermuhl v. Borough of Collingswood, 167 A. 771, 11 N.J.Misc. 671—Van Dine v. Borough of Sussex, 139 A. 342, 5 N.J.Misc. 1066.

11 C.J. p 93 note 92.

37. N.J.—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J.Law 260—Calopoulos v. Chagaris, 126 A. 471, 2 N.J.Misc. 998.

11 C.J. p 93 notes 93, 94.

Court has general jurisdiction

The writ does not lie to review

ity or enlarges or extends its judicial powers.³⁸ The judgment of the court of common pleas on appeal from small cause courts is reviewable only by certiorari, and not by writ of error.³⁹

In *New York* the law governing certiorari to review proceedings against a body or officer exercising judicial, quasi-judicial, administrative, or corporate functions involving the exercise of judgment or discretion has been altered by statute, and writs of certiorari to review, mandamus, and prohibition have been expressly abolished.⁴⁰ The substituted remedy is not available to review determinations made by a court of record or determinations not finally determining the rights of the parties, nor is it available in cases where an adequate review by appeal is available. It is held that the provision that the question involving the merits to be determined on the hearing is whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to

the prejudice of petitioner, is the successor to the former provisions for certiorari.⁴¹

In *North Dakota*, under express provisions of the statute, the writ may be granted by the supreme and district courts when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent a miscarriage of justice.⁴² The statute has been construed to extend the function of the writ to other than judicial or quasi-judicial proceedings, and to extend it to every case where the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction.⁴³

In *Pennsylvania* the statute provides that all appellate proceedings in the supreme court, theretofore taken by writ of error, appeal, or certiorari, shall thereafter be taken in a proceeding to be

proceedings in common-law actions in the circuit court, for the reason that such court is one of record having general jurisdiction over common-law actions.—*Taylor Provision Co. v. Adams Express Co.*, 65 A. 508, 72 N.J.Law 220.

Transfer order

Order of circuit court authorizing transfer of case from district to circuit court because counterclaim exceeded district court's jurisdiction, is not properly reviewable by certiorari.—*Eder v. Hudson County Circuit Court*, 140 A. 883, 104 N.J.Law 260.

38. N.J.—*Eder v. Hudson County Circuit Court*, supra.

39. N.J.—*Corbett v. Madison Y. M. C. A.*, 74 A. 297, 79 N.J.Law 126—*Trimmer v. Bonnell*, 46 A. 768, 65 N.J.Law 66.

40. Certiorari under prior statutes

(1) Formerly, the code expressly provided that the writ can be granted only: First, where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by statute; or second, where the writ may be issued at common law and the right thereto has not been expressly taken away by statute; and it is also provided that the writ cannot be issued to review a determination made "in a civil action or special proceeding, by a court of record, or a judge of a court of record."—*People ex rel. Dawley v. Wilson*, 133 N.E. 45, 232 N.Y. 12, reversing 189 N.Y.S. 585, 198 App.Div. 158, reargument denied 134 N.E. 563, 232 N.Y. 540—*Fulton County v. Board of Hudson River Regulating Dist.*, 248 N.Y.S. 8, 231 App. Div. 408—11 C.J. p 94 note 97.

(2) Where statute prescribed manner in which commissioner of public education should exercise powers conferred on him and perform duties imposed on him under statute relating to World War scholarship, action of commissioner of education in the exercise of such functions was properly reviewable by certiorari.—*People ex rel. Anthony v. Graves*, 279 N.Y.S. 847, 244 App.Div. 860.

(3) It was held that although Education Law §§ 890, 304, substantially reenacting L.1909 c 21 § 360, conferring on the commission of education quasi-judicial functions to determine controversies arising at school meetings, makes the decision of the commissioner on matters of school administration and policy final, in all matters outside its general policy and administration, where the education system interferes with the rights of the people, the courts have full jurisdiction, and hence the adoption of a budget and authorization of a tax levy at an annual school district meeting, without complying with statute as to voting thereon, is subject to review by certiorari.—*Miller v. Gould*, 200 N.Y.S. 884, 121 Misc. 270.

(4) Where claim for services performed for board of education of a city has been presented to the board and has been disallowed on ground that it was not a legal claim, without the board passing on the merits of the claim, certiorari is a proper remedy to compel the board to pass on the claim on its merits.—*People ex rel. Kiehm v. Board of Education of City of Utica*, 190 N.Y.S. 798, 198 App.Div. 476.

(5) Before 1868 the tendency of the courts in New York, in certiorari cases, was to refuse to examine into the evidence or to determine any question beyond that of jurisdiction.—*Matter of Lauterjung*, 48 N.Y.Super. 308.

(6) In the year 1868 the court of appeals extended the scope of the writ.—*Peo. v. Metropolitan Bd. of Police*, 39 N.Y. 506.

(7) It seems that later decisions adopted this modification, and that the rule then was that on a common-law certiorari it is the duty of the court to examine the evidence and to determine whether there was any competent proof of the facts necessary to authorize the adjudication, and whether, in making it, any rule of law affecting the rights of the parties had been violated.—*Peo. v. Board of Police Comrs.*, 6 Hun 229, reversed on other grounds 67 N.Y. 475.

41. N.Y.—*Bonacker v. Chuckrow*, 2 N.Y.S.2d 265, 166 Misc. 171.

Failure to send notice

The clerk of county board of supervisors, by failing to send one supervisor notice of meeting of board, although other members received notice, did not fail to perform a duty specifically enjoined on him by law or violate any rule of law affecting rights of parties within statute setting forth matters which could be determined in a proceeding against a body or officer.—*Bonacker v. Chuckrow*, supra.

42. N.D.—*State ex rel. Olson v. Wellford*, 260 S.W. 593—*Molander v. Swenson*, 210 N.W. 9.

43. N.D.—*State ex rel. Olson v. Wellford*, 260 S.W. 593.

called an appeal; but such statute does not extend the right of review or change the extent in cases already provided for, and hence certiorari lies under such statute only in those cases where it would lie before the statute.⁴⁴

In *Puerto Rico* the writ may be issued where there is a want of jurisdiction or where the procedure established by law has not been followed.⁴⁵

In *Rhode Island*, by statute, the supreme court has jurisdiction to issue certiorari to inferior courts "to correct and prevent errors and abuses therein when no other remedy is expressly provided."⁴⁶

In *Tennessee*, by statutory provision, the writ may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board,

or officer exercising a judicial function has exceeded the jurisdiction conferred or is acting illegally when, in the judgment of the court, there is no other plain, speedy, and adequate remedy. It will lie on suggestion of diminution, where no appeal is given, as a substitute for appeal, instead of *audita querela*, and instead of writ of error.⁴⁷ This provision is not intended to work a change in the common-law function of certiorari as a supervisory writ.⁴⁸ The common-law writ may not be had to correct technical or formal errors not affecting the jurisdiction or power of the inferior tribunal or for the correction of defects not amounting to fundamental illegality,⁴⁹ but is available to review the proceedings of inferior tribunals to determine whether there has been a failure to proceed according to the essential requirements of the law.⁵⁰

44. Pa.—In *re* Incorporation of Elkland Leather Workers' Ass'n, 198 A. 13.

11 C.J. p 94 note 2.

Appeal in nature of certiorari

An appeal from a decree approving the charter of a corporation under the Nonprofit Corporation Law of 1933 is in the nature of a "certiorari."—In *re* Incorporation of Elkland Leather Workers' Ass'n, *supra*.

Litigant cannot be deprived of right of review by appeal in nature of certiorari so far as relates to question of jurisdiction.—Appeal of Walker, 144 A. 288, 294 Pa. 385.

Review by supreme court

(1) The scope of review by the supreme court on certiorari is differentiated, depending on the statutes involved, review being limited to jurisdiction where the statute does not permit an appeal, or where it states that the decision of the court below is final, and review in the broad sense is proper when the statute is silent on the question of appeal.—In *re* Incorporation of Elkland Leather Workers' Ass'n, Pa., 198 A. 13.

(2) Where proceedings in lower court, on appeal from action of board of adjustment in refusing to issue permit for garages, were held pursuant to statute which was silent as to right of appeal to higher court, supreme court on appeal from lower court was required to examine record in the broadest sense allowed by certiorari, that is, to review, solely with view of determining whether there was evidence to justify action taken by court below, and of correcting errors of law appearing therein.—Fleming v. Board of Adjustment of Borough of Prospect Park, 178 A. 813, 318 Pa. 582.

Arrest proceedings in civil cases

(1) The supreme court has juris-

diction to review on certiorari the proceedings of judges of the court of common pleas under a warrant for the arrest of defendant or judgment debtor at the instance of plaintiff, on whose complaint the warrant was issued.—Morch v. Raubitschek, 28 A. 369, 159 Pa. 559.

(2) Proceedings on a warrant for arrest for a fraudulent debt are reviewable on certiorari.—Grieb v. Kuttner, 19 A. 1040, 135 Pa. 281—Hart v. Cooper, 18 A. 122, 129 Pa. 297.

45. Porto Rico.—Montalno v. Nussa, 20 Porto Rico 500.

11 C.J. p 94 note 3.

46. R.I.—Hyde v. Superior Ct., 66 A. 292, 28 R.I. 204, 212.

11 C.J. p 94 note 4.

47. Tenn.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428—Binford v. Carline, 9 Tenn.App. 364.

Certiorari for a full record

Certiorari will lie to compel county court to comply with a statute providing that "when the validity of a last will or testament, written or nuncupative, is contested, the county court shall cause the fact to be certified to the circuit court."—Jenkins v. Jenkins, 77 S.W.2d 805, 168 Tenn. 292.

Certiorari and supersedeas will lie to supersede an illegal and unauthorized entry, action, or order of the trial court.—Johnson City v. Unaka Milling Co., 7 Tenn.Civ.App. 490.

48. Tenn.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

Statutory and common-law writs distinguished

The common-law writ of certiorari will lie only when a body acts beyond its jurisdiction or illegally within its jurisdiction and not to correct erroneous acts, while statutory certiorari is a writ given in lieu

of an appeal and brings the case up for trial *de novo*.—Binford v. Carline, 9 Tenn.App. 364.

Distinction not destroyed

Statutes providing for review of actions of boards and commissions by courts did not destroy distinction between writ of certiorari as employed under common law for review of legality of action of board or inferior tribunal as within its jurisdiction, and writ of certiorari authorized by statute to be employed in lieu of appeal for review and correction of errors of fact and law committed by inferior tribunal.—Anderson v. City of Memphis, 72 S.W. 2d 1059, 167 Tenn. 648.

Scope not curtailed

Tennessee legislative and judicial history manifest a strong purpose not to curtail the right to review by certiorari the exercise of judicial power by inferior or quasi-judicial tribunals.—Rhea County v. White, 43 S.W.2d 375, 163 Tenn. 388.

"From the earliest period of our judicial history, the certiorari has had given to it a much more extended application than in England; and it has been used for purposes wholly unknown to the common law. It has been adopted, with us, as the almost universal method by which the circuit courts of general jurisdiction, both civil and criminal, exercise control over all inferior jurisdictions, however constituted, and whatever their course of proceeding; as well where they have attempted to exercise a jurisdiction not conferred, as where there has been an irregular, or erroneous exercise of jurisdiction, and in criminal proceedings as well as in civil."—Nashville v. Pearl, 11 Humphr., Tenn., 249, 251—11 C.J. p 94 note 5.

49. Tenn.—State v. Hunt, 192 S.W. 931, 137 Tenn. 243.

50. Tenn.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

The supreme court has the power, by certiorari, to revise the action of the court of civil appeals in construing its own rules.⁵¹

In *Vermont* the office of the writ of certiorari is to provide for a review of the judicial action of inferior courts, special tribunals, public officers, and bodies exercising judicial functions in those instances where no other means of review is provided; it is intended mainly to answer the objects and ends which are reached by writs of error, in those cases where that writ lies, that is, to revise the proceedings of inferior tribunals in matters of law.⁵²

In *West Virginia* it has been held that, although the general rule is that inquiry will be made into only such errors and defects as go to the jurisdiction of the court below, and that for all other errors or irregularities the party must resort to his remedy by appeal or writ of error, yet if the inferior tribunal proceeds in a summary manner and not according to the course of the common law, and there is no remedy by appeal or writ of error, the court will consider other than jurisdictional questions.⁵³

In *Wisconsin* a distinction has been drawn between cases where a review is sought of the proceedings of a judicial tribunal and where the tri-

bunal is quasi-judicial. It is held that, in ordinary cases, where the writ goes to inferior courts or tribunals, the record can be inspected only to ascertain whether such court acted within its jurisdiction; but with respect to an officer having only quasi-judicial power, who acts in proceedings of a summary character, out of the course of the common law, the proceedings will be reviewed also to ascertain whether such person, having jurisdiction, has kept within it and has acted strictly according to the law; but the court cannot review mere questions of fact, where there is any contention as to the proof, and it is confined to errors of law as distinguished from errors of judgment.⁵⁴ Later decisions, however, seem to have disregarded this rule, and confine the scope of the writ to jurisdictional questions.⁵⁵

§ 10. Discretion as to Grant of Writ

Ordinarily certiorari issues in the discretion of the court authorized to issue it.

Except where made so by constitutional provision or by statute,⁵⁶ certiorari is not a writ of right, but issues only on special cause shown to the court to which application is made, and the court is vested with judicial discretion to grant or refuse the writ as justice may seem to require,⁵⁷ except, in those jurisdictions where in addition to

51. *Tenn.*—Willoughby v. Jarvis, 189 S.W. 366, 136 Tenn. 279.

52. *Vt.*—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied *Fonda v. City of St. Albans*, 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 259 U.S. 666, 66 L.Ed. 425.

53. *W.Va.*—Poe v. Marion Mach. Works, 24 W.Va. 517.

11 C.J. p 94 note 6.

54. *Wis.*—State v. Whitford, 11 N. W. 424, 54 Wis. 150.

55. *Wis.*—State v. Willcuts, 122 N. W. 1048, 140 Wis. 448—Gaster v. Whitcher, 94 N.W. 787, 117 Wis. 668, 98 Am.S.R. 698.

56. *Ga.*—Taylor v. Georgia Power Co., 161 S.E. 669, 44 Ga.App. 326—Moore v. City of Winder, 73 S.E. 529, 10 Ga.App. 384.

11 C.J. p 128 note 2.

Constitutional right

The right to certiorari in a proper case is a constitutional right and cannot be denied.—Taylor v. Georgia Power Co., 161 S.E. 669, 44 Ga. App. 326—Moore v. City of Winder, 73 S.E. 529, 10 Ga.App. 384.

Unconstitutional statute

So-called "writ of review," not the same as certiorari or writ of review in the nature of certiorari, attempted to be given any aggrieved party

as of right to carry before supreme court orders of department of public works, is in reality an appeal or writ of error, since the statute, declared unconstitutional, makes the issuance of the writ and the review thereunder a matter of right.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217—11 C.J. p 128 note 2 [a].

57. *U.S.*—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App.Div. 889—In re Ban, D.C.N.Y., 21 F.2d 1009—U. S. v. Rauch, D.C.N.Y., 253 F. 814.

Ala.—Byars v. Town of Boaz, 155 So. 383, 229 Ala. 22—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

Ark.—Board of Directors of St. Francis Levee Dist. v. Raney, 76 S.W.2d 311, 190 Ark. 75—Axeley v. Hammock, 50 S.W.2d 608, 185 Ark. 939—White v. Board of Education of Independence County, 42 S.W. 2d 989, 184 Ark. 480—Rural Special School Dist. No. 17 v. Ola Special School Dist. No. 10, 31 S.W. 2d 129, 182 Ark. 197—Williamson v. Mitchell Auto Co., 27 S.W.2d 96, 181 Ark. 693—Park v. Rural Special School Dist. No. 26, 292 S.

W. 697, 173 Ark. 514—Mitchell v. Wright Hill Special School Dist., 258 S.W. 331, 162 Ark. 277—Arkadelphia Milling Co. v. Clark County Board of Equalization, 206 S.W. 70, 136 Ark. 180—Ruse v. Kocourek, 196 S.W. 938, 130 Ark. 39—Kenyon v. Gregory, 192 S.W. 887, 127 Ark. 525.

Cal.—Grinbaum v. Superior Court in and for City and County of San Francisco, 221 P. 635, 192 Cal. 528—Birch v. Board of Sup'rs of Orange County, 215 P. 903, 191 Cal. 235—Howe v. Superior Court of California in and for Sacramento County, 274 P. 992, 96 Cal.App. 767—Associated Credit Exchange of San Francisco v. Barnett, 259 P. 95, 85 Cal.App. 255—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal.App. 392.

D.C.—U. S. ex rel Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

Fla.—Young v. Stoutamire, 179 So. 797—Shayne v. Pike, 178 So. 903, motion denied 180 So. 332—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380—State v. Simmons, 140 So. 187, 104 Fla. 487—Brinson v. Tharin, 127 So. 313, 99 Fla. 696—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264—Haile v. Gardner, 91 So. 376, 82 Fla. 355—First

its ordinary function the writ may also fulfill the purposes of a common-law writ of error, in cases where it is being prosecuted in that capacity.⁵⁸ In as much as the writ is a discretionary one, it is

often denied where the power to issue it is unquestionable.⁵⁹ The general rule is said to be particularly applicable where the writ is to be used to review decisions of special statutory boards.⁶⁰ The

Nat. Bank v. Gibbs, 82 So. 618, 78 Fla. 118—Harrison v. Frink, 77 So. 663, 75 Fla. 22.

Ill.—People v. Burdette, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill. App. 365—People v. Lynch, 255 Ill. App. 601—School Directors of Dist. No. 175, Ogle County, v. School Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447.

Md.—State v. Rutherford, 125 A. 725, 145 Md. 363.

Mass.—McCabe v. Eno, 177 N.E. 857, 277 Mass. 55—Whitney v. Judges of Dist. Court of Northern Berkshire, 171 N.E. 648, 271 Mass. 448—Broderick v. Department of Mental Diseases of Commonwealth of Massachusetts, 160 N.E. 404, 263 Mass. 124—Crofts v. Board of Assessors of North Adams, 158 N.E. 561, 261 Mass. 191—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

Mich.—In re Brewer, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450.

Mo.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335—McFarland v. Terte, 8 S.W.2d 16, 320 Mo. 465—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment Spina v. Union Biscuit Co., App., 273 S.W. 428—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425—State ex rel. Edwards v. Donovan, 41 S.W. 2d 842, 226 Mo.App. 392—State ex rel. Shaw v. Pfeifle, 293 S.W. 512, 220 Mo.App. 676, citing *Corpus Juris*.

Mont.—State v. District Court of Sixteenth Judicial Dist. for Garfield County, 202 P. 387, 61 Mont. 427.

Nev.—Nevada Lincoln Mining Co. v. District Court of Eighth Judicial Dist., 187 P. 1006, 43 Nev. 396.

N.H.—Barker v. Young, 119 A. 330, 80 N.H. 447.

N.J.—Daniel B. Frazier Co. v. Borough of Harvey Cedars, 168 A. 128, 110 N.J.Law 163—Johnson v. Board of Embalmers and Funeral Directors, 153 A. 374, 107 N.J.Law 380, dismissing appeal 149 A. 898, 8 N.J.Misc. 177—Town of Hamonton v. Elvins, 127 A. 241, 101 N.J.Law 38—Crawford v. Hendee, 112 A. 668, 95 N.J.Law 372—Magginnis v. City of Wildwood, Cape May County, 108 A. 780, 94 N.J.Law 90—City of Rahway v. Cleary, 159 A. 813, 10 N.J.Misc.

455, affirmed 162 A. 590, 109 N.J.Law 348—Altschul v. Jersey City, 151 A. 468, 8 N.J.Misc. 708—Simmons v. Borough of Wenonah, 143 A. 73, 6 N.J.Misc. 902—Loomis v. Union City, 141 A. 170, 6 N.J.Misc. 330—Jersey Central Power & Light Co. v. Borough of Spring Lake, 140 A. 677, 6 N.J.Misc. 253—Ninth Street Pier Co. v. Ocean City, 140 A. 447, 6 N.J.Misc. 227—Brown v. Atlantic City, 136 A. 608, 5 N.J.Misc. 397—Smith v. Board of Com'rs of Atlantic City, 136 A. 607, 5 N.J.Misc. 390, affirmed 139 A. 33, 104 N.J.Law 143—O'Connell v. City of Bayonne, 134 A. 182, 4 N.J.Misc. 708.

N.Y.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224—People ex rel. Brooklyn Heights R. Co. v. Public Service Commission of the First Dist., 166 N.Y.S. 825, 101 Misc. 10.

N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—King v. Taylor, 124 S.E. 751, 188 N.C. 450.

N.D.—Cofman v. Ousterhouse, 168 N.W. 826, 40 N.D. 390, 18 A.L.R. 219.

Okl.—Consolidated School Dist. No. 8, Cimarron County, v. Wilder, 297 P. 280, 148 Okl. 91—Oliver v. State, 251 P. 31, 122 Okl. 66—School Dist. Number 6 of McClain County v. Board of County Com'rs of McClain County, 236 P. 21, 108 Okl. 254—Southern Nat. Bank of Wynnewood v. Wallace, 164 P. 461, 63 Okl. 206.

Pa.—Commonwealth v. Brosius, 6 Pa.Dist. & Co. 139.

Porto Rico.—Hernandez v. Hutchinson, 20 Porto Rico 484.

R.I.—Conte v. Roberts, 192 A. 814—Dimond v. Marwell, 190 A. 683—Chew v. Superior Court, 110 A. 605, 43 R.I. 194—Parker v. Superior Court, 100 A. 305, 40 R.I. 214.

Tenn.—Gaylor v. Miller, 59 S.W.2d 502, 166 Tenn. 45—Ashcroft v. Goodman, 202 S.W. 939, 139 Tenn. 625.

Tex.—Schwind v. Goodman, Com. App., 221 S.W. 579, reversing, Civ. App., 186 S.W. 282—Robertson v. National Spiritualists' Ass'n of United States of America, Civ. App., 25 S.W.2d 889, error dismissed.

Utah.—Hallowel, Jones & Donald v. District Court for Utah County, 26 P.2d 543, 82 Utah 561.

Vt.—Chase v. Billings, 170 A. 903—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied Fonda v. City of St. Albans, 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 408,

error dismissed 42 S.Ct. 54, 257 U.S. 666, 66 L.Ed. 425.

Wash.—North Bend Stage Co. v. Department of Public Works, 16 P. 2d 206, 170 Wash. 217—State v. Kay, 4 P.2d 498, 164 Wash. 685.

Wis.—State v. County Board of Sup'rs of Sheboygan County, 216 N.W. 144, 194 Wis. 456.

11 C.J. p 128 note 3.

As regards private suitors

Certiorari is not writ of right, as regards private suitors, and issuance thereof is within sound judicial discretion.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335—State ex rel. Plummer v. Gardner, 234 S.W. 53, 290 Mo. 148.

Continuance of writ discretionary

Certiorari is not writ of right, and may be continued within discretion of court.—State ex rel. McFarland v. Terte, 8 S.W.2d 16, 320 Mo. 465.

Largely discretionary

(1) Issuance of writ of certiorari is largely matter of discretion.—Chase v. Billings, Vt., 170 A. 903.

(2) It is perhaps more discretionary than either prohibition or mandamus.—State v. Kay, 4 P.2d 498, 164 Wash. 685.

Neither side may claim right

Petitioner cannot claim as a matter of right that the writ issue, nor can his opponent claim as a matter of right that the writ shall not issue.—Oxley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.

Review of appellate court judgment

A writ of certiorari from the supreme court to review a judgment of the court of appeals and prevent contrariety of opinions is purely a discretionary writ.—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654.

Writ of review

(1) Writ of review is not writ of absolute right.—Crow v. Board of Sup'rs of Stanislaus County, App., 27 P.2d 655, hearing denied 28 P.2d 906, 135 Cal.App. 451.

(2) Jurisdiction of supreme court to issue "writ of review," is discretionary.—North Bend Stage Line v. Department of Public Works, 16 P. 2d 206, 170 Wash. 217.

(3) Writ of review is not an inalienable right, but merely a privilege which can be exercised only in cases clearly provided.—State v. Kozzer, 247 P. 806, 118 Or. 556.

58. N.J.—Crawford v. Hendee, 112 A. 668, 95 N.J.Law 372.

59. U.S.—Hyde v. Shine, Cal., 25 S.Ct. 760, 199 U.S. 62, 50 L.Ed. 90.

60. Ark.—Mitchell v. Wright Hill

writ will be granted only where necessary to prevent substantial wrong,⁶¹ or to do substantial justice,⁶² especially where the matters in controversy are of a public nature.⁶³ A stipulation between the parties cannot deprive the court of its discretion.⁶⁴

§ 11. — Nature of Discretion

The discretion is a sound judicial discretion founded on correct legal principles and its clear abuse is generally reviewable.

The discretion vested in a court to issue or deny certiorari, is not an arbitrary one, governed by the whim or caprice of the tribunal, but it is a sound,

judicial discretion, dependent on the settled legal principles applicable to the case, and an abuse thereof is generally reviewable;⁶⁵ but such discretion will be interfered with only where a clear case of abuse thereof is shown.⁶⁶ It is important that the writ be guarded from abuse and from encroachment on the regular procedure for review to the confusion of the practice, the practitioners, and the courts.⁶⁷

Cause must be shown. The writ of certiorari, being discretionary, will be allowed or granted only when the application shows some special ground or cause for its issuance.⁶⁸ Conversely, under the rule

Special School Dist., 258 S.W. 331, 162 Ark. 277.

61. Tenn.—Gaylor v. Miller, 59 S.W.2d 502, 166 Tenn. 45—Ashcroft v. Goodman, 202 S.W. 939, 139 Tenn. 625.

11 C.J. p 129 note 6.

Question of practice

To justify the grant of a writ of certiorari the petition must raise an issue of law of gravity and importance rather than a mere question of practice and evidence.—Briesenick v. Dimond, 142 S.E. 118, 165 Ga. 780, dismissing certiorari 134 S.E. 350, 35 Ga.App. 668.

62. Ala.—Byars v. Town of Boaz, 155 So. 383, 229 Ala. 22.

Ark.—White v. Board of Education of Independence County, 42 S.W.2d 989, 184 Ark. 480—Rural Special School Dist. No. 17 v. Ola Special School Dist. No. 10, 31 S.W.2d 129, 182 Ark. 197.

Mo.—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo. App. 676.

N.H.—Barker v. Young, 119 A. 330, 80 N.H. 447.

N.C.—King v. Taylor, 124 S.E. 751, 188 N.C. 450.

Where tribunal has jurisdiction

Where tribunal whose records are attacked has jurisdiction in the premises, writ of certiorari is not granted as of right, but at sound discretion of court, when it appears that injustice will be done.—Rogers v. Brown, 181 A. 667, 134 Me. 88.

63. Tenn.—Gaylor v. Miller, 59 S.W.2d 502, 166 Tenn. 45—Ashcroft v. Goodman, 202 S.W. 939, 139 Tenn. 625.

11 C.J. p 129 note 4.

64. Ill.—Sampson v. Chestnut Tp. Highway Comrs., 115 Ill.App. 443.

65. Ala.—Byars v. Town of Boaz, 155 So. 383, 229 Ala. 22.

Ill.—People v. Burdette, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill. App. 365—School Directors of Dist. No. 175, Ogle County, v. School

Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447.

11 C.J. p 129 note 8.

According to judgment and conscience

Discretion of court on petition for writ of certiorari requires court to act according to dictates of its judgment and conscience, and it involves fair consideration of all peculiar features of particular question involved.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939.

Agreeable to law and justice

The discretion is to be exercised as the justice of the particular case may suggest and as agreeable to the law pertaining thereto.—Byars v. Town of Boaz, 155 So. 383, 229 Ala. 22.

66. Ill.—Butler v. Harrison, 124 Ill. App. 367.

67. Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685.

Certiorari by single taxpayer

The discretion to grant the writ of certiorari should be warily exercised when brought by a single taxpayer, and its effect would be to nullify the valuation of property for taxation in this entire city, especially where the taxpayer had other remedies which would prevent a denial of justice, if the writ were refused.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

For review of court of appeals

In view of the origin and purpose of constitutional amendment of 1916, Const. art 6 § 2 par 5, defining jurisdiction of court of appeals and of supreme court, the supreme court's power to review decisions of court of appeals, a court of last resort in many respects, by certiorari should be exercised cautiously, and writ issued only in cases involving great public concern and in matters of importance.—Central of Georgia Ry. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620, granting certiorari Yesbik v. Central of Georgia Ry. Co., 91 S.E. 274, 19 Ga.App. 252, affirmed 92 S.E. 527, 146 Ga. 769.

After waiver

It would be an abuse of discretion to allow certiorari to review an order to hold to bail, after a trial on the merits had been set aside, to one arrested in suit by capias who, by appearing and pleading after motions were heard and dismissed, waived the right even to have the order to hold to bail set aside after verdict at trial on the merits.—Central Lumber Co. v. Smith, N.J., 132 A. 326.

68. Ark.—Mitchell v. Wright Hill Special School Dist., 258 S.W. 331, 162 Ark. 277.

D.C.—U. S. ex rel. Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

Fla.—Young v. Stoutamire, 179 So. 797.

Ill.—School Directors of Dist. No. 175, Ogle County v. School Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447.

Mo.—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo. App. 676.

N.C.—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—King v. Taylor, 124 S.E. 751, 188 N.C. 450.

Tex.—Schwind v. Goodman, Com. App., 221 S.W. 579, reversing, Civ. App., 186 S.W. 282—Robertson v. National Spiritualists' Ass'n of United States of America, Civ. App., 25 S.W.2d 889, error dismissed—Comstock v. Lomax, Civ. App., 135 S.W. 185.

Porto Rico.—Hernandez v. Hutchinson, 20 Porto Rico 484.

11 C.J. p 129 note 11.

Review of summary proceeding

To justify review of an order refusing leave to file an amended complaint and to grant a temporary injunction until a case can be heard on its merits, it must clearly appear that plaintiff in the action below has alleged facts which, if true, entitle it to a temporary injunction, and that failure to obtain such an injunction will work irreparable injury which will accrue before the case can be heard on the merits, or an

established, the writ will never be denied in a proper case.⁶⁹

§ 12. — Writ Inadequate or Not Beneficial

The writ will be denied where its effect would be inadequate or vain.

In the exercise of the discretion heretofore discussed, the writ of certiorari will not be granted where the remedy afforded will be inadequate or where no beneficial result will follow.⁷⁰ Thus, the writ will not lie where its operation would be vain and useless,⁷¹ as where any judgment that might

be entered would be futile;⁷² neither will the writ issue where it appears that if so issued it must inevitably be quashed,⁷³ as where the action of the inferior tribunal sought to be reviewed is correct.⁷⁴ Certiorari will not be granted to review an alleged determination by the superintendent of insurance where there has been no formal hearing or determination and the only possible return would consist of correspondence.⁷⁵

§ 13. — Writ Prejudicial

The writ should not issue where it would operate inequitably, unjustly, or mischievously.

appeal will lie to the supreme court, as well as a showing that plaintiff has no other plain, speedy, or adequate remedy.—*State v. Smith*, 203 P. 1, 120 Wash. 540.

To review probate matters

The writ of certiorari to annul proceedings in the county court in probate matters is not a writ of right in the sense that the proceeding will be revised for errors as on appeal; relief is only granted in such a case where it is made to appear that the proceeding is void or that some substantial wrong or injustice to the estate has been done.—*Robertson v. National Spiritualists' Ass'n of United States of America*, Tex.Civ.App., 25 S.W.2d 889, error dismissed.—*Comstock v. Lomax*, Tex.Civ.App., 135 S.W. 185.

69. Fla.—*Young v. Stoutamire*, 179 So. 797.

70. Cal. — *Manoogian v. Superior Court in and for Imperial County*, 192 P. 168, 48 Cal.App. 609.

Fla. — *General Motors Acceptance Corporation v. Judge of Circuit Court, Eleventh Judicial Circuit in and for Dade County*, 136 So. 621, 102 Fla. 924.

Iowa.—*State v. Beem*, 207 N.W. 361, 201 Iowa 373.

La.—*State v. Kinsley*, 81 So. 248, 144 La. 676.

Mo.—*McFarland v. Terte*, 8 S.W.2d 16, 320 Mo. 465.

N.J.—*Parker v. Borough of Point Pleasant*, 167 A. 217, 11 N.J.Misc. 535.

N.M.—*Moore v. Brannin*, 255 P. 395, 32 N.M. 249.

N.D.—*State v. Thursby-Butte Special School Dist. No. 37, in McHenry County*, 178 N.W. 787, 45 N.D. 555, citing *Corpus Juris*.

R.I.—*Carpenter v. Town Council of Town of Warwick*, 124 A. 100, 45 R.I. 494.

Vt.—*Chase v. Billings*, 170 A. 903, 106 Vt. 149.

11 C.J. p 130 note 12.

Limit of inquiry as to useful purpose

While a writ of certiorari will not issue unless it may serve some good

purpose, where the proceeding is had to review an admittedly void order of a school board, the inquiry to determine whether a good purpose is served thereby will not extend to the determination of the legality of prior acts of the board which may properly be inquired into in the civil action substituted for quo warranto.—*State v. Thursby-Butte Special School Dist. No. 37, in McHenry County*, 178 N.W. 787, 45 N.D. 555.

Relief impossible

Certiorari will not issue to review orders directing a special administrator to make certain payments, even though those orders were void, where the payments have already been made and the special administrator was not a party to certiorari so that judgment against him for the payments could not be rendered.—*Manoogian v. Superior Court in and for Imperial County*, 192 P. 168, 48 Cal.App. 609.

No function to discharge

Where it appears that a writ of certiorari would no longer have any function to discharge, the application therefor will be dismissed.—*State v. Knisely*, 81 So. 248, 144 La. 676.

71. Ala.—*Putman v. Williams*, 150 So. 702, denying certiorari 150 So. 701, 25 Ala.App. 552.

N.J.—*Riddle v. Commissioner of Banking and Insurance, Sup.*, 100 A. 692—*Union County Development Co. v. Kaltenbach*, 128 A. 396, 3 N.J.Misc. 341—*Henry Becker & Son v. Dowling*, 128 A. 395, 3 N.J.Misc. 333—*Falco v. Kaltenbach*, 128 A. 394, 3 N.J.Misc. 333.

72. N.J.—*Ashworth v. Court of Common Pleas of Sussex County*, 106 A. 20, 92 N.J.Law 282.

Wis.—*State v. County Board of Sup'rs of Sheboygan County*, 216 N.W. 144, 194 Wis. 456.

Inability to afford relief

(1) Since only the municipal court can approve an appeal undertaking under Code § 31, a writ of certiorari is not the proper remedy for the refusal to approve such undertaking, as the supreme court could give no

relief on such a writ, but the proper remedy was by rule to show cause why the undertaking should not be accepted.—*Vicory v. Totaro*, 277 F. 546, 51 App.D.C. 144.

(2) The writ will not issue to review allegedly capricious orders of county commissioners redistricting a county as to commissioner districts where there can be no trial de novo to establish the population of the proposed districts.—*State v. Board of Com'rs of King County*, 263 P. 735, 146 Wash. 449.

73. Ark.—*Park v. Rural Special School Dist. No. 26*, 292 S.W. 697, 173 Ark. 514.

Fla.—*Grand Lodge, K. P., of North America, South America, Europe, Asia, Africa, and Australia v. Williams*, 165 So. 688, 122 Fla. 147—*General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, v. Colyer*, 151 So. 717, 111 Fla. 771.

74. Ala.—*Ex parte Armbrrecht*, 84 So. 725, 203 Ala. 585, denying certiorari *Paterson-Edey Lumber Co. v. Firm Lumber Co.*, 84 So. 314, 17 Ala.App. 262.

Ark.—*Park v. Rural Special School Dist. No. 26*, 292 S.W. 697, 173 Ark. 514.

Fla.—*Grand Lodge, K. P., of North America, South America, Europe, Asia, Africa and Australia v. Williams*, 165 So. 688, 122 Fla. 147.

Directed verdict proper

In certiorari proceedings an insurer on a policy providing for payment to insured in case of permanent disability is not entitled to have a judgment of civil court of record for insured quashed merely because the verdict was directed by such court, where the circuit court affirmed judgment on appeal, insurer offered no evidence, and evidence adduced by insured was consistent with allegations of declaration, did not tend to prove the asserted defense, and was ample to support verdict.—*New England Mut. Life Ins. Co. v. Huckins, Fla.*, 173 So. 696.

75. N.Y.—*In re M. Groh's Sons*, 167 N.Y.S. 883, 101 Misc. 611.

Certiorari should not be allowed where it would operate inequitably and unjustly;⁷⁶ or, as it is sometimes put, the courts are not inclined to allow the writ where the equities of the case do not warrant it.⁷⁷ It should not be employed where its use does an injustice and deprives one of a legal right which would have been established by the proceedings sought to be reviewed had that proceeding been conducted in compliance with the strict forms of law.⁷⁸ It is properly refused where the effect of a reversal would be to cause a loss of more efficient remedies or otherwise to cause prejudice;⁷⁹ or where, should the writ be granted and the proceedings quashed or reversed, mischievous consequences would ensue and the parties or third persons could not be placed in statu quo.⁸⁰

The court will also consider whether or not the issuance of the writ will lead to inextricable confusion.⁸¹

To public. Where great public detriment or inconvenience would result or might have resulted from interfering with the proceedings of public bodies which exercise rights in which the people

at large are concerned, and no substantial injury would result from its refusal, the writ has been denied,⁸² and its allowance in such cases is discretionary.⁸³ Thus, in a case where the allowance of the writ would perhaps suspend for a considerable period of time the prosecution of a great public work of prime necessity to a large number of persons, the discretion lodged in a superior court in the matter of the allowance of the prerogative writ should be sparingly exercised.⁸⁴

§ 14. — Magnitude of Error

The writ will not issue in the absence of substantial injury or injustice to petitioner.

If the error is manifest and substantial injury has been sustained, the writ should be allowed in an otherwise proper case.⁸⁵ Conversely, in the absence of some substantial injury or manifest injustice to petitioner the writ should not, as a rule, issue.⁸⁶ Thus, where there is doubt as to petitioner's right to certiorari and its denial can work no ultimate injury to him it should be denied.⁸⁷ The writ may, and generally will, be denied where substantial justice has already been done,⁸⁸ where

76. N.J.—Brown v. Atlantic City, 136 A. 608, 5 N.J.Misc. 397. 11 C.J. p 130 note 16.

77. N.J.—Loomis v. Union City, 141 A. 170, 6 N.J.Misc. 330.

78. Ark.—Arkadelphia Milling Co. v. Clark County Board of Equalization, 206 S.W. 70, 136 Ark. 180.

79. Mich.—Morrison v. Emsley, 19 N.W. 187, 53 Mich. 564.

80. Cal.—Hagar v. Yolo County, 47 Cal. 222.

Mass.—Rutland v. Worcester County, 20 Pick. 71.

Vt.—Sowles v. Bailey, 37 A. 751, 69 Vt. 277.

81. Cal.—Crow v. Board of Sup'rs of Stanislaus County, 27 P.2d 655, 135 Cal.App. 451, hearing denied 28 P.2d 906, 135 Cal.App. 451.

82. Ill.—School Directors of Dist. No. 175, Ogle County, v. School Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447.

N.J.—Daniel B. Frazier Co. v. Borough of Harvey Cedars, 168 A. 123, 110 N.J.Law 163—Brown v. Atlantic City, 136 A. 608, 5 N.J.Misc. 397.

N.Y.—People ex rel. Hoesterey v. Taylor, 205 N.Y.S. 897, 899, 210 App.Div. 196, reversing 202 N.Y. S. 7, 121 Misc. 713, reversed on other grounds 147 N.E. 223, 239 N. Y. 626, citing *Corpus Juris*.

11 C.J. p 130 note 17.

Where no public convenience would be subserved by granting writ of certiorari to review a matter pending matter before the public utility commissioners, writ will be

denied.—Loomis v. Union City, 141 A. 170, 6 N.J.Misc. 330.

83. N.J.—Brown v. Atlantic City, 136 A. 608, 5 N.J.Misc. 397.

N.D.—State v. State Board of Canners, 172 N.W. 80, 84, 44 N.D. 126, citing *Corpus Juris*. 11 C.J. p 130 note 18.

84. N.J.—Ninth St. Pier Co. v. Ocean City, 140 A. 447, 6 N.J.Misc. 227—Nelson v. Town of Kearny, 132 A. 299, 4 N.J.Misc. 157.

85. Tex. — Schwind v. Goodman, Com.App., 221 S.W. 579, reversing, Civ.App., 186 S.W. 282.

11 C.J. p 130 note 19.

86. Fla.—Young v. Stoutamire, 179 So. 797.

Mass.—Walsh v. Justice of Dist. Ct. of Springfield, 9 N.E.2d 555—Maher v. Commonwealth, 197 N.E. 78, 291 Mass. 343—Whitney v. Judges of District Court of North Berkshire, 171 N.E. 648, 271 Mass. 448—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.

Mont.—State v. District Court of Second Judicial Dist., 272 P. 242, 33 Mont. 349.

N.H.—Barker v. Young, 119 A. 330, 80 N.H. 447.

N.Y.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

R.I.—Dimond v. Marwell, 190 A. 633—Shahagian v. Superior Court, 129 A. 813, 47 R.I. 85.

No injury shown

Improper rendition of personal judgment against nonresident defendant for amount paid from pro-

ceeds of sale of his property under condemnation order is not injurious to him, so that judgment should not be quashed nor sale vacated on certiorari.—Ex parte Luther, 163 So. 596, 232 Ala. 518.

No substantial infirmity below

An application for writ of certiorari to review resolution of board of chosen freeholders relating to procurement of voting machines will be denied, where court is unable to discern such substantial infirmity in proceedings attacked as to call for allowance of writ after consideration of statute involved, affidavits, and briefs.—Shachat v. Board of Chosen Freeholders of Essex County, 189 A. 624, 15 N.J.Misc. 216.

Damage too remote

Length of time in business, methods employed to establish reputation for its cabbage seed, and fact that seeds which defendant raised under contract with plaintiff to be delivered to plaintiff were wrongfully withheld and may reach market without passing through its hands, does not entitle seed company to a writ to review an order vacating a temporary injunction, as cabbage seed is merely a commercial commodity, with a market value, and any damage that would result to the relator aside from its profit in handling the seed would be incidental and remote.—State v. Brawley, 176 P. 337, 104 Wash. 374.

87. Tenn.—Medlin v. Mercantile Bank & Trust Co., 6 Tenn.App. 666.

88. Fla.—Robbins Holding Co. v. Morris, 179 So. 404.

a review of technical nonprejudicial errors or irregularities is sought,⁸⁹ or where, although there is error in fact, substantial justice has been done, and no appreciable injury has resulted to the complaining party.⁹⁰ Injury to a party who makes no complaint is not sufficient.⁹¹

§ 15. — Existence of Other Remedies

Despite the fact that the issuance of certiorari is discretionary it will, as shown *infra* § 37, generally be denied where another equally adequate remedy is available elsewhere.

§ 16. — Laches and Limitations

As is shown *infra* § 66, generally certiorari will not be granted where the petitioner has been guilty of laches, or has not made application therefor in

due season; but these objections are addressed to the sound discretion of the court, and the writ will be awarded or refused according as it may or may not promote the ends of justice.

§ 17. Judicial Nature of Proceedings Reviewable in General

- a. In general
- b. What are judicial or quasi-judicial acts

a. In General

Except in a few jurisdictions certiorari will not lie to review any acts not judicial or quasi-judicial in nature.

Certiorari is the appropriate process to review the proceedings of bodies, and officers acting in a judicial or a quasi-judicial character.⁹² Further-

Mass.—*Marinelli v. Board of Appeal of Building Department of City of Boston*, 175 N.E. 479, 275 Mass. 169.

Tenn.—*Ashcroft v. Goodman*, 202 S. W. 939, 139 Tenn. 625.

Sale of infants' land

Where a guardian applying for sale of ward's land became clerk of the probate court and as clerk gave notice of the application for sale, the wards, receiving full value of the land sold, could not set aside the sale on certiorari.—*Schwind v. Goodman*, Tex.Com.App., 221 S.W. 579, reversing *Goodman v. Schwind*, Civ. App., 186 S.W. 282.

89. Mass.—*Morrison v. Selectmen of Town of Weymouth*, 181 N.E. 786, 279 Mass. 486—*Whitney v. Judges of Dist. Court of Northern Berkshire*, 171 N.E. 648, 271 Mass. 448.

Mont.—*State v. District Court of Second Judicial District*, 272 P. 242, 83 Mont. 349.

N.Y.—*City of New York v. Nixon*, 183 N.Y.S. 6, 111 Misc. 224.

R.I.—*Parker v. Superior Court*, 100 A. 305, 40 R.I. 214.
11 C.J. p 130 notes 13, 20.

90. Mass.—*Amero v. Board of Appeal of City of Gloucester*, 186 N. E. 61, 283 Mass. 45—*Morrison v. Selectmen of Town of Weymouth*, 181 N.E. 786, 279 Mass. 486—*Whitney v. Judges of Dist. Court of Northern Berkshire*, 171 N.E. 648, 271 Mass. 448—*Byfield v. City of Newton*, 141 N.E. 658, 247 Mass. 46.

R.I.—*Sahagian v. Superior Court*, 129 A. 813, 47 R.I. 85—*Parker v. Superior Court*, 100 A. 305, 40 R.I. 214.

Tenn.—*Ashcroft v. Goodman*, 202 S. W. 939, 941, 139 Tenn. 625, quoting *Corpus Juris*.

Tex.—*Schwind v. Goodman*, Com.

App., 221 S.W. 579, reversing, Civ.

App., 186 S.W. 282.
11 C.J. p 130 note 20.

Extrinsic evidence to show absence of injustice

When the petition is presented, evidence extrinsic to the record may be received to show that no injustice has been done.—*Sampson v. Chestnut Tp. Comrs. Highways*, 115 Ill. App. 443.

Failure to give notice

Where action was defaulted and damages assessed on motion a year later, failure to give notice of motion to defendant was not ground for certiorari, in absence of any showing that defendant suffered substantial injury thereby.—*Sahagian v. Superior Court*, 129 A. 813, 47 R.I. 85.

91. Me.—*Cushing v. Gay*, 23 Me. 9.
92. U.S.—*Angelus v. Sullivan*, N.Y., 246 F. 54, 158 C.C.A. 280.

Ark.—*Mitchell v. Directors of School Dist. No. 15*, 239 S.W. 371, 153 Ark. 50—*Monette Road Improvement Dist. v. Dudley*, 222 S.W. 59, 144 Ark. 169.

Cal.—*Norman v. Cogswell*, 255 P. 251, 82 Cal.App. 159—*Broyles v. Mahon*, 237 P. 763, 72 Cal.App. 484.

D.C.—*Northern Pac. Ry. Co. v. Interstate Commerce Commission*, 23 F.2d 221, 57 App.D.C. 318, certiorari denied 48 S.Ct. 205, 275 U.S. 572, 72 L.Ed. 433—*Mickadiet v. Payne*, 269 F. 194, 50 App.D.C. 115, affirmed *Mickadiet v. Fall*, 42 S.Ct. 331, 258 U.S. 609, 66 L.Ed. 783.

Fla.—*Florida Motor Lines v. Railroad Com'rs*, 129 So. 876, 100 Fla. 538—*Harry E. Prettyman, Inc. v. Florida Real Estate Commission*, 109 So. 442, 445, 92 Fla. 515, citing *Corpus Juris*—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

Ga.—*Bryant v. Board of Education of Colquitt County*, 119 S.E. 601, 156 Ga. 688.

Iowa.—*Riley v. City of Des Moines*, 212 N.W. 716, 203 Iowa 1240—*Ebert v. Short*, 201 N.W. 793, 199 Iowa 147—*Lloyd v. Ramsay*, 183 N.W. 333, 192 Iowa 103—*Riggs v. Board of Sup'rs of Van Buren County*, 164 N.W. 359, 181 Iowa 178.

Me.—*Rogers v. Brown*, 181 A. 667, 134 Me. 88.

Mass.—*Morley v. Wilson*, 159 N.E. 41, 261 Mass. 269, certiorari denied 48 S.Ct. 320, 276 U.S. 625, 72 L.Ed. 738—*Lynch v. Crosby*, 134 Mass. 313.

Mich.—*Beaverton Tp. v. Lord*, 209 N.W. 122, 235 Mich. 261.

Minn.—*State v. Canfield*, 208 N.W. 181, 166 Minn. 414.

Mo.—*State ex rel Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397—*State ex rel Manion v. Dawson*, 225 S.W. 97, 100, 284 Mo. 490, citing *Corpus Juris*—*State ex rel Turner v. Penman*, 282 S.W. 498, 220 Mo.App. 193.

N.M.—*State v. Board of Com'rs of Quay County*, 199 P. 359, 361, 27 N. M. 228, quoting *Corpus Juris*.

N.Y.—*Andes Co-op. Dairy Co. v. Baldwin*, 266 N.Y.S. 18, 238 App. Div. 726, affirmed 189 N.E. 705, 263 N.Y. 578—*In re Carp*, 166 N.Y.S. 243, 179 App.Div. 387, affirmed 117 N.E. 1063, 221 N.Y. 643—*People v. Taylor*, 205 N.Y.S. 897, 899, 210 App.Div. 196, citing *Corpus Juris*.

Okl.—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250.

Or.—*Oregon City v. Clackamas County*, 247 P. 772, 118 Or. 546.

R.I.—*Messier v. Healey*, 175 A. 838, 55 R.I. 1—*Sisson v. Peloquin*, 133 A. 621.

Utah.—*Board of Equalization of Kane County v. State Tax Commission of Utah*, 50 P. 418, 88 Utah 219, rehearing denied 54 P.2d 1214, 88 Utah 228.

Vt.—*City of St. Albans v. Avery*, 114

more, it is unquestionably the general rule that this writ will lie for none other than acts partaking of a judicial nature.⁹³

On the other hand, in some jurisdictions the writ is not limited to a review of judicial or quasi-judicial acts. Thus, in one jurisdiction the remedy extends to every case where inferior courts, officers, boards, or tribunals have exceeded their au-

thority and there is no adequate remedy otherwise.⁹⁴ In another jurisdiction certiorari is the proper method of redress for an individual whose rights are invaded by the actions of persons clothed with authority and who exercise that authority illegally, which actions may be administrative or ministerial as well as judicial or quasi-judicial.⁹⁵

In one jurisdiction, while acts wholly administra-

A. 31, 95 Vt. 249, certiorari denied *Fonda v. City of St. Albans*, 42 S. Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 259 U.S. 666, 66 L.Ed. 425.

W.Va.—*Queensberry v. State Road Commission*, 138 S.E. 362, 103 W. Va. 714—*Reynolds Taxi Co. v. Hudson*, 136 S.E. 833, 103 W.Va. 173.

Wis.—*State v. Grootemaat*, 231 N.W. 628, 202. Wis. 155—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 133 Wis. 614.

11 C.J. p 120 note 50.

93. U.S.—*U. S. v. Elliott*, D.C.Wash., 3 F.2d 496, affirmed, C.C.A., 5 F.2d 292.

Ark.—*Monette Road Improvement Dist. v. Dudley*, 222 S.W. 59, 144 Ark. 169.

Cal.—*Blue v. Division of Corporations, Department of Investments*, 48 P.2d 80, 8 Cal.App.2d 485—*Bay-side Land Co. v. Dooley*, 284 P. 479, 103 Cal.App. 253—*Norman v. Cogswell*, 255 P. 251, 82 Cal.App. 159—*Franco-Italian Packing Co. v. State Fish and Game Commission*, 243 P. 705, 75 Cal. App. 794—*Southern California Fish Corporation v. State Fish and Game Commission*, 243 P. 705, 75 Cal.App. 793—*Pacific Marine Products Co. v. State Fish and Game Commission*, 243 P. 705, 75 Cal. App. 791—*Stafford Packing Co. v. State Fish and Game Commission*, 243 P. 704, 75 Cal.App. 790—*Van Camp Sea Food Co. v. State Fish and Game Commission*, 243 P. 702, 75 Cal.App. 764—*Garin v. Pelton*, 209 P. 377, 58 Cal.App. 672—*Sweetnam v. Board of Police Com'rs of City of Los Angeles*, 206 P. 102, 58 Cal.App. 644.

Colo.—*Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap*, 265 P. 94, 83 Colo. 360.

Fla.—*Florida Motor Lines v. Railroad Com'rs*, 129 So. 876, 100 Fla. 538—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

Ga.—*McDonald v. Marshall*, 195 S.E. 571—*Southeastern Greyhound L. v. Georgia Pub. Service Com'n*, 181 S. E. 834, 846, 181 Ga. 75, citing *Corpus Juris*—*Bryant v. Board of Education of Colquitt County*, 119 S.E. 601, 156 Ga. 688.

Me.—*Rogers v. Brown*, 181 A. 667, 134 Me. 88.

Mich.—*Beaverton Tp. v. Lord*, 209 N.W. 122, 235 Mich. 261.

Miss.—*Board of Sup'rs of Forrest County v. Melton*, 86 So. 369, 123 Miss. 615, citing *Corpus Juris*.

Mo.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 621, 310 Mo. 397—*Hawkins v. City of St. Joseph*, 281 S.W. 420—*State ex rel. Turner v. Penman*, 282 S.W. 498, 220 Mo.App. 193.

N.M.—*State v. Board of Com'rs of Quay County*, 199 P. 359, 27 N.M. 228.

N.Y.—*Neddo v. Schrade*, 200 N.E. 657, 270 N.Y. 97, modifying 282 N. Y.S. 251, 245 App.Div. 794—*Long Island R. Co. v. Hylan*, 148 N.E. 189, 240 N.Y. 199, reversing 206 N.Y.S. 239, 210 App.Div. 761—*Kandel v. Greene*, 260 N.Y.S. 502, 263 App.Div. 607, reargument denied 261 N.Y.S. 1024, 238 App.Div. 756—*Fisenne v. Bay Ridge Dist. Local Board*, 294 N.Y.S. 595, 250 App. Div. 460—*Sollecito v. Moss*, 291 N. Y.S. 215, 161 Misc. 168—*Hall v. Hood*, 201 N.Y.S. 498, 121 Misc. 572.

Okl.—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250.

Or.—*Oregon City v. Clackamas County*, 247 P. 772, 118 Or. 546.

R.I.—*Messier v. Healey*, 175 A. 828, 55 R.I. 1—*Sisson v. Peloquin*, 133 A. 621.

Vt.—*Chase v. Billings*, 170 A. 903, 106 Vt. 149.

W.Va.—*Quesenberry v. State Road Commission*, 138 S.E. 362, 103 W. Va. 714.

11 C.J. p 121 note 51.

Revocation of constitutional amendment

Certiorari does not lie to review state convention's ratification of amendment to federal constitution and convention officers' certification thereof to United States secretary of state, such acts not being judicial or quasi-judicial.—*Chase v. Billings*, 170 A. 903, 106 Vt. 149.

Writ of review will lie only to review the exercise of judicial functions.—*Carson Estate Co. v. State Board of Equalization*, 59 P.2d 122, 6 Cal.2d 779—*Standard Oil Co. of California v. State Board of Equalization*, 59 P.2d 119, 6 Cal.2d 557—*Dysart v. Daugherty*, 62 P.2d 612, 17 Cal.App.2d 525—*Schwab-Wilson*

Mach. Corporation v. Daugherty, 59 P.2d 1057, 15 Cal.App. 701.

Certiorari in common law lies only to inferior courts and officers exercising judicial powers to review act judicial in its nature.—*Florida Motor Lines v. Railroad Com'rs*, 129 So. 876, 100 Fla. 538.

Where inferior body is not judicial tribunal, its proceedings will be reviewed on certiorari only when its acts are of a judicial or quasi-judicial character.—*Sweetnam v. Board of Police Com'rs of City of Los Angeles*, 206 P. 102, 58 Cal.App. 644.

Order of another board or tribunal cannot be reviewed by the circuit court in a case removed to it from a board of supervisors, unless such order is the basis for a judgment rendered by the board of supervisors in a judicial proceeding.—*Board of Sup'rs of Forrest County v. Melton*, 86 So. 369, 123 Miss. 615.

94. N.D.—*State ex rel. Olson v. Welford*, 260 N.W. 593.

11 C.J. p 121 note 53.

95. N.J.—*Hulett v. Borough of Sea Girt*, 150 A. 202, 106 N.J.Eq. 118, affirmed 154 A. 741, 108 N.J.Eq. 309—*Williams v. Board of Com'rs of Borough of Audubon*, 126 A. 664, 96 N.J.Eq. 459—*Roselle v. Borough of Verona*, 186 A. 590, 14 N.J.Misc. 649—*Araneo-White Const. Co. v. Joint Municipal Sewer Commission*, 154 A. 313, 9 N.J. Misc. 243.

11 C.J. p 121 note 52.

Refusal to furnish plans

Under a statute preserving to any aggrieved person the right to review the action of a municipality in refusing to furnish plans and specifications for a public work to a prospective bidder, municipality's refusal to furnish plans and specifications for public work to prospective bidder is reviewable by certiorari.—*Araneo-White Const. Co. v. Joint Municipal Sewer Commission*, 154 A. 313, 9 N.J.Misc. 243.

Refusal to call election

Where borough clerk refused to call election on filing of petition signed by twenty per cent of voters, his action will be set aside on certiorari.—*Baker v. Reeves*, 157 A. 174, 9 N.J.Misc. 1303.

tive and not conditioned on quasi-judicial investigation cannot be controlled by the writ, still it is the rule that where an inferior officer or board is charged with an administrative duty, the performance of which as an administrative act depends on and requires the existence or ascertainment of facts, the investigation of such facts is a quasi-judicial action reviewable by certiorari in so far as the facts in the record condition an administrative act.⁹⁶

Particular acts held judicial or quasi-judicial. The following acts, among others, have been held judicial or quasi-judicial: The action or determination of a county board as to a petition for the creation of a new county,⁹⁷ a petition to remove a county seat and remonstrances thereto,⁹⁸ as to notice of election for fire prevention district,⁹⁹ selection of newspaper for election notices,¹ laying out and establishing a highway,² rejecting a claim against the county,³ passing on bond of county officer,⁴ raising salaries of clerks,⁵ division of funds between school districts,⁶ the action or determination of a town board as to compensation due under a contract,⁷ or on a protest to an assessment for weed abatement,⁸ or in a proceeding for maintaining a nuisance;⁹ the action of a school board in locating a schoolhouse,¹⁰ or changing district boundaries;¹¹ an action by a board of adjustment with reference to a zoning ordinance;¹² action by

common council with relation to audit of claim for refund of excess taxes;¹³ action by street commissioners as to permit to erect a garage;¹⁴ decision of insurance commissioner on application for license of an agent;¹⁵ and revocation by state racing commission of permit and license for dog race track.¹⁶ So, where animals are destroyed pursuant to a proper exercise of the police power, proceedings before commissioners to fix their value are judicial in their nature, so as to be reviewable by certiorari.¹⁷ The action of a county court in determining whether charges against a saloon keeper bring the case within the jurisdiction of the court to revoke his license is an exercise of judicial power, so as to be reviewable, although the mere revocation of the license is not the exercise of a judicial function.¹⁸

Decisions of public service commissioners consenting to the discontinuance of a station have been held judicial,¹⁹ as have determinations as to street railroad equipment,²⁰ and also determinations as to the right of a surface street railroad to operate its road with kinetic motors, where based on a public trial after notice to the parties interested.²¹ So, the writ lies to review a decision that public convenience and necessity require the construction of a railroad;²² and the issuance of a certificate of convenience and necessity for a railroad, by the board of railroad commissioners, is a judicial de-

96. S.D.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.

However, it was formerly held that the office of the writ was not confined to a review of judicial or quasi-judicial proceedings but extended to every case where inferior courts, officers, boards, or tribunals had exceeded their jurisdiction and there was no other remedy.—State v. Hughes County, 46 N.W. 1127, 1 S.D. 292, 10 L.R.A. 588.

97. Mont.—State v. Teton County, 134 P. 291, 47 Mont. 531.

98. Iowa.—Herrick v. Carpenter, 6 N.W. 574, 54 Iowa 340.

99. Cal.—Norman v. Cogswell, 255 P. 251, 82 Cal.App. 159.

1. Cal.—Norman v. Cogswell, supra.

2. N.M.—State v. Board of Com'rs of Quay County, 199 P. 359, 27 N.M. 228.

3. Or.—Berridge v. Marion County, 159 P. 628, 81 Or. 391.

4. Cal.—Miller v. Sacramento County, 25 Cal. 94—Peo. v. Marin County, 10 Cal. 344.

5. Cal.—Robinson v. Sacramento County, 16 Cal. 208, criticizing In re Saline County Subscription, 45 Mo. 52, 100 Am.D. 337.

6. Minn.—State v. Wright County, 148 N.W. 53, 126 Minn. 209.

7. N.Y.—Sage v. Broderick, 173 N.E. 908, 255 N.Y. 19, affirming 230 N.Y.S. 904, 224 App.Div. 777.

8. Cal.—Bayside Land Co. v. Dolley, 284 P. 479, 103 Cal.App. 253.

9. W.Va.—Davis v. Davis, 21 S.E. 906.

10. Ill.—Southworth v. Ogle County Bd. of Education, 87 N.E. 403, 238 Ill. 190.

11. Ark.—Mitchell v. Directors of School Dist. No. 15, 239 S.W. 371, 153 Ark. 50.

12. N.J.—J. H. Realty Co. v. Board of Adjustment of City of East Orange, 142 A. 921, 6 N.J.Misc. 540—Del Campo v. Board of Adjustment of City of Newark, 142 A. 920, 6 N.J.Misc. 539—Astopoff v. Bigelow, 142 A. 918, 6 N.J.Misc. 541—Feldman & Pivnick v. Board of Adjustment of City of East Orange, 142 A. 177, 6 N.J.Misc. 520—Ewald v. Board of Adjustment of Borough of Leonia, 142 A. 42, 6 N.J.Misc. 532.

13. N.Y.—People ex rel. Hunter Arms Co. v. Foster, 288 N.Y.S. 295, 247 App.Div. 619.

14. Mass.—Marcus v. Board of

Street Com'rs of City of Boston, 147 N.E. 866, 252 Mass. 331.

15. N.H.—State v. Stevens, 99 A. 723, 78 N.H. 268, L.R.A.1917C 528.

16. Fla.—Six Mile Creek Kennel Club v. State Racing Commission, 161 So. 58, 119 Fla. 142.

17. Tenn.—Lewis v. Shelby County, 92 S.W. 1098, 116 Tenn. 454.

18. Fla.—Harry E. Prettyman, Inc. v. Florida Real Estate Commission, 109 So. 442, 445, 92 Fla. 515, citing *Corpus Juris*, as to judicial character of revocation of occupational licenses generally.

Mo.—State v. Lichta, 109 S.W. 825, 130 Mo.App. 284.

19. N.Y.—Peo. v. State R. Comrs., 53 N.E. 163, 158 N.Y. 421.

20. N.Y.—Peo. v. Public Service Commn., 142 N.Y.S. 942, 157 App. Div. 698.

21. N.Y.—Peo. v. New York R. Comrs., 52 N.Y.S. 908, 32 App.Div. 179, affirmed 53 N.E. 1129, 158 N.Y. 711.

22. N.Y.—Peo. v. State R. Comrs., 54 N.E. 697, 160 N.Y. 202.

termination as to the incorporation of the railroad.²³ So, the extension of time in which a corporation might erect its dam is an exercise of quasi-judicial power.²⁴ The action of a public service commission establishing a through route for the transportation of passengers over two independent street railroad lines, and establishing and apportioning a joint fare, is judicial.²⁵ In one jurisdiction, the scope of the writ is much extended in reviewing findings of its railroad commission.²⁶

b. What Are Judicial or Quasi-Judicial Acts

The nature of the act rather than the officer or body performing it determines whether or not it is judicial or quasi-judicial.

As stated in *Corpus Juris* and approved by subsequent decisions it is difficult, if not impossible, precisely to define what are judicial or quasi-judicial acts,²⁷ and there is considerable conflict in the decisions in regard thereto in connection with the law as to when certiorari will lie. Nevertheless, there are some generally accepted principles where-

by the judicial nature of official acts is ordinarily determinable. It is clear, for example, that it is the nature of the act to be performed, rather than of the office, board, or body which performs it, that determines whether or not it is the discharge of a judicial or a quasi-judicial function.²⁸ The proceeding may be judicial, although exercised by a quasi-judicial officer or body.²⁹ On the other hand, the fact that the person acting is a judge does not make the act judicial in character.³⁰

The mere exercise of judgment or discretion is not the criterion by which a proceeding must be viewed to determine whether or not it is judicial in this connection.³¹ Hence, the exercise of the judgment of an officer or board in determining the existence or nonexistence of facts is not necessarily a judicial act.³²

Wherever an officer or a body is clothed with authority and undertakes to determine the law and the rights of parties in regard to a matter in controversy, such officer or body may be said to act judicially in the sense in which we are speaking.³³

23. N.Y.—*Peo. v. Public Service Commn.*, 88 N.E. 261, 195 N.Y. 157.

24. Ark.—*State v. State R. Commn.*, 158 S.W. 1076, 109 Ark. 100.

25. N.Y.—*Peo. v. Wilcox*, 113 N.Y. S. 861, 129 App.Div. 267, affirmed 87 N.E. 517, 194 N.Y. 383.

26. Miss.—*Gulf, etc., R. Co. v. Adams*, 38 So. 348, 85 Miss. 772.

27. Ga.—*Southeastern Greyhound L. v. Georgia Pub. Service Com'n*, 181 S.E. 834, 836, 181 Ga. 75, quoting *Corpus Juris*.
11 C.J. p 121 note 57.

28. Mo.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397—*State ex rel. Manion v. Dawson*, 225 S.W. 97, 284 Mo. 490.

N.M.—*State v. Board of Com'rs of Quay County*, 199 P. 359, 361, 27 N.M. 228, quoting *Corpus Juris*.
11 C.J. p 121 note 58.

Consideration of statute as a whole cannot be resorted to to determine whether act should be reviewable.—*Daley v. Byrne*, 295 N.Y.S. 452, 250 App.Div. 666.

General character of acting body does not determine the question, acts judicial in their nature being sometimes intrusted to ministerial or executive officers or bodies, and at times acts purely legislative, executive, or ministerial being intrusted to courts of general or special jurisdiction.—*State ex rel. Manion v. Dawson*, 225 S.W. 97, 284 Mo. 490—*State ex rel. Turner v. Penman*, 282 S.W. 498, 220 Mo.App. 193.

29. Fla.—*West Flagler Amusement*
14 C.J.S.—10

Co. v. State Racing Commission, 165 So. 64, 122 Fla. 222.

Ill.—*Jarman v. Board of Review of Schuyler County*, 178 N.E. 91, 345 Ill. 248, 77 A.L.R. 1350.

Mo.—*State ex rel. Manion v. Dawson*, 225 S.W. 97, 284 Mo. 490.

W.Va.—*State v. Martin*, 163 S.E. 350, 852, 112 W.Va. 174, citing *Corpus Juris*.

11 C.J. p 122 note 60.

Quasi-judicial rather than quasi-legislative

Unless a particular decision complained of can be said to have a judicial quality or attribute sufficient to stamp it as quasi-judicial, as distinguished from a quasi-legislative or quasi-executive commission function, certiorari will not lie.—*West Flagler Amusement Co. v. State Racing Commission*, 165 So. 64, 122 Fla. 222.

Governor of a state may be constituted a judicial tribunal by the legislature, so as to authorize a review of his acts.—*State v. Ansel*, 57 S.E. 185, 76 S.C. 395, 11 Ann.Cas. 613.

30. Mont.—*State v. Blaine County Twelfth Judicial Dist. Ct.*, 146 P. 467, 50 Mont. 249.
11 C.J. p 122 note 62.

Order distributing forfeited recognition proceeds

The supreme court will not review an order of the court of common pleas distributing the proceeds of a forfeited recognition in the quarter sessions, as, properly speaking, such order involves no judicial question.—*Com. v. Justice*, 34 Pa. 165.

31. Ark.—*Park v. Rural School*

Dist. No. 26, 292 S.W. 697, 173 Ark. 514—*Graves v. McConnell*, 257 S.W. 1041, 162 Ark. 167—*Patterson v. Adcock*, 248 S.W. 904, 157 Ark. 186.

Fla.—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

N.Y.—*Neddo v. Schrade*, 200 N.E. 657, 270 N.Y. 97, modifying 282 N.Y.S. 251, 245 App.Div. 794—*Daley v. Byrne*, 295 N.Y.S. 452, 250 App.Div. 666—*Fisene v. Bay Ridge Dist. Local Board*, 294 N.Y.S. 595, 250 App.Div. 460—*Santa Clara Lumber Co. v. Commissioners of Land Office*, 204 N.Y.S. 746, 209 App.Div. 705—*People ex rel. Gratiwick v. Commissioners of Land Office*, 196 N.Y.S. 115, 202 App.Div. 240—*People ex rel. Argus Co. v. Hugo*, 168 N.Y.S. 25, 101 Misc. 481, affirmed 168 N.Y.S. 1123, 182 App. Div. 904, and appeal dismissed 120 N.E. 872, 223 N.Y. 714—*In re Kersburg*, 166 N.Y.S. 900, 101 Misc. 241, affirmed 166 N.Y.S. 1100, 179 App. Div. 969.

S.C.—*Wyse v. Wolfe*, 123 S.E. 818, 129 S.C. 499.

11 C.J. p 122 note 66.

Every act involving judgment or discretion is not a judicial act.—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

32. Minn.—*State v. City of Benson*, 209 N.W. 3, 167 Minn. 307.
11 C.J. p 122 note 67.

33. Ga.—*Southeastern Greyhound L. v. Georgia Pub. Service Com'n*, 181 S.E. 834, 846, 181 Ga. 75, citing *Corpus Juris*.

Mo.—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397.

It is not essential that the proceedings should be strictly and technically judicial, in the sense in which that word is used when applied to courts of justice, but it is sufficient if they are quasi-judicial. It is enough if the officers act judicially in making their decision, whatever may be their public character.³⁴ It has been held that in order to render proceedings judicial they must affect the legal or property rights of the citizen in a manner analogous to the procedure of courts acting judicially.³⁵ An act affecting property rights of private persons is said to be clearly judicial.³⁶

The general rule seems to be that, if public notice is required in a proceeding before a local board not having the character of an ordinary court, and a hearing of objections to the contemplated action is provided for, and the order to be made is one which affects the property or the rights of citizens, the proceeding is judicial in nature, so as to be reviewable.³⁷ Furthermore, in order to render an act of an administrative or ministerial officer or body judicial in nature, it has been held

that there must be notice and an opportunity to be heard,³⁸ and a hearing or judicial determination,³⁹ particularly where such notice and hearing is prescribed by law.⁴⁰

Right of appeal. The fact that no right of appeal is given has no bearing on the question whether the proceedings are judicial in their nature.⁴¹

§ 18. Ministerial, Executive, or Legislative Acts

- a. Executive or ministerial acts
- b. Legislative acts

a. Executive or Ministerial Acts

Certiorari will not lie to review acts which are merely ministerial or executive.

Except in those states not limiting the writ to a review of judicial or quasi-judicial acts, see supra § 17 a, the writ of certiorari will not lie to review acts not done in the exercise of judicial power or authority, but which were merely ministerial or executive in their character,⁴² it being imma-

W.Va.—*State v. Martin*, 163 S.E. 850, 852, 112 W.Va. 174, citing *Corpus Juris*.

Proceedings must be authorized
N.Y.—*Sollecito v. Moss*, 291 N.Y.S. 215, 161 Misc. 168.

34. Cal.—*Imperial Water Co. v. Imperial County*, 120 P. 780, 162 Cal. 14, 18.
11 C.J. p 121 note 59.

35. Minn.—*State v. City Council of City of Benson*, 209 N.W. 3, 167 Minn. 307.
11 C.J. p 122 note 63.

36. Mo.—*In re Saline County Subscription*, 45 Mo. 52, 100 Am.D. 337.

37. Ill.—*Jarman v. Board of Review of Schuyler County*, 178 N.E. 91, 345 Ill. 248, 77 A.L.R. 1350.
11 C.J. p 122 note 64.

38. Cal.—*Katenkamp v. Union Realty Co.*, 59 P.2d 473, 6 Cal.2d 765—*Katenkamp v. Department of Finance, Division of State Lands*, 49 P.2d 897, 9 Cal.App.2d 343.

Fla.—*West Flagler Amusement Co. v. State Racing Commission*, 165 So. 64, 122 Fla. 222.

Ga.—*Hallman v. Atlantic Child's Home*, 130 S.E. 814, 161 Ga. 247.

N.Y.—*People ex rel. Argus Co. v. Hugo*, 168 N.Y.S. 25, 101 Misc. 481, affirmed 168 N.Y.S. 1123, 182 App. Div. 904, appeal dismissed 120 N. E. 872, 223 N.Y. 714.

Board of health

The writ will not lie to vacate an order of a board of health allowed by statute to be made without notice on the personal knowledge of the sanitary officers, since there are

no judicial proceedings and no evidence to be returned to the court.—*Peo. v. Yonkers Bd. of Health*, 35 N.E. 320, 140 N.Y. 1, 37 Am.S.R. 522—29 C.J. p 269 note 36.

39. Cal.—*Katenkamp v. Union Realty Co.*, 59 P.2d 473, 6 Cal.2d 765—*Katenkamp v. Department of Finance, Division of State Lands*, 49 P.2d 897, 9 Cal.App.2d 343.

Colo.—*Munn v. Corbin*, 44 P. 783, 8 Colo.App. 113.

N.Y.—*People ex rel. Argus Co. v. Hugo*, 168 N.Y.S. 25, 101 Misc. 481, affirmed 168 N.Y.S. 1123, 182 App. Div. 904, appeal dismissed 120 N. E. 872, 223 N.Y. 714.

Test of "quasi-judicial function" is whether or not the statutory tribunal has exercised a statutory power given it to make a decision having a judicial character or attribute and has acted on notice or hearing required as condition to rendition of decision.—*West Flagler Amusement Co. v. State Racing Commission*, 165 So. 64, 122 Fla. 222.

40. Cal.—*Katenkamp v. Department of Finance, Division of State Lands*, 49 P.2d 897, 9 Cal.App.2d 343.

Quasi-judicial body

A legal official body, set up by a statute providing for due notice and an adversary hearing of conflicting claims to new and special rights or privileges conferred by the statute, and for the due exercise by such body of independent judgment in making an authoritative determination of such claims, may be quasi-judicial in its nature.—*Florida v.*

Railroad Com'rs, 129 So. 876, 100 Fla. 538.

41. Minn.—*State v. Clough*, 67 N.W. 202, 64 Minn. 378.

42. U.S.—*U. S. v. Rauch*, D.C.N.Y., 253 F. 814—*Ex parte Platt*, D.C.N.Y., 253 F. 413.

Ark.—*Park v. Rural Special School Dist. No. 26*, 292 S.W. 697, 173 Ark. 514—*Graves v. McConnell*, 257 S. W. 1041, 162 Ark. 167—*Patterson v. Adcock*, 248 S.W. 904, 157 Ark. 186.

Cal.—*Hartman v. Board of Chiropractic Examiners*, Cal.App., 66 P. 2d 705—*Whitten v. California State Board of Optometry*, 65 P. 2d 1296—*Katenkamp v. Union Realty Co.*, 59 P.2d 473, 6 Cal.2d 765—*Blue v. Division of Corporations, Department of Investments*, 48 P. 2d 80, 8 Cal.App.2d 485—*California Delta Farms v. East Bay Municipal Utility Dist.*, 262 P. 729, 202 Cal. 193—*Mojave River Irr. Dist. v. Superior Court of State of California in and for San Bernardino County*, 262 P. 724, 202 Cal. 717.

D.C.—*Mickadiet v. Payne*, 269 F. 194, 50 App.D.C. 115, affirmed *Mickadiet v. Fall*, 42 S.Ct. 381, 258 U.S. 609, 66 L.Ed. 788.

Fla.—*Florida Motor Lines v. Railroad Com'rs*, 129 So. 876, 100 Fla. 538—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

Mass.—*City of Chelsea v. Treasurer and Receiver General*, 130 N.E. 397, 237 Mass. 422.

Mich.—*Beaverton Tp. v. Lord*, 209 N. W. 122, 235 Mich. 261.

terial whether such acts be performed by a court, officer, or other tribunal.⁴³ Likewise, an act that is clerical rather than judicial is not reviewable.⁴⁴ The fact that the performance of a purely ministerial act involves the exercise of judgment or discretion does not make it reviewable.⁴⁵

In a jurisdiction wherein the constitution, except for local purposes, disposes of the whole judicial power of the state and vests it in courts named therein, the legislature may not confer judicial power upon administrative boards exercising statewide jurisdiction, and certiorari is not available as

a remedy with respect to the proceedings of such boards.⁴⁶

No other remedy available. The fact that there is no other remedy available by which an administrative order of an executive officer might be reviewed by the courts will not warrant the issuance of a writ of certiorari to review it.⁴⁷

There are stray decisions holding certiorari a proper remedy where it would seem that the act to be reviewed was neither judicial nor quasi-judicial, such point not having been urged or considered.⁴⁸ In this class are decisions that certiorari

Minn.—*State v. Canfield*, 208 N.W. 181, 166 Minn. 414.

Miss.—*Anderson v. Franklin County School Board*, 146 So. 134, 164 Miss. 646—Board of Sup'rs of Forrest County v. Melton, 86 So. 369, 123 Miss. 615.

Mo.—*State ex rel Manion v. Dawson*, 285 S.W. 97, 284 Mo. 490—*Hawkins v. City of St. Joseph*, 281 S.W. 420—*State ex rel Turner v. Penman*, 282 S.W. 498, 220 Mo.App. 193.

N.Y.—*Mt. Hope Development Corporation v. James*, 180 N.E. 252, 258 N.Y. 510, affirming 251 N.Y.S. 498, 233 App.Div. 284—*Long Island R. Co. v. Hylan*, 148 N.E. 189, 240 N.Y. 199, reversing 206 N.Y.S. 239, 210 App.Div. 761—*People ex rel Desidrio v. Conolly*, 144 N.E. 629, 238 N.Y. 326, reversing 201 N.Y.S. 934, 207 App.Div. 886—*Kandel v. Greene*, 260 N.Y.S. 502, 263 App. Div. 607, reargument denied 261 N.Y.S. 1024, 238 App.Div. 756—*Santa Clara Lumber Co. v. Commissioners of Land Office*, 204 N.Y.S. 746, 209 App.Div. 705—*In re Carp*, 166 N.Y.S. 243, 179 App.Div. 387, affirmed 117 N.E. 1063, 221 N.Y. 643—*Sollecito v. Moss*, 291 N.Y.S. 215, 161 Misc. 168—*In re Kersburg*, 166 N.Y.S. 900, 101 Misc. 241, affirmed 166 N.Y.S. 1100, 179 App.Div. 969.

Okl.—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250—*Tiger v. Creek County Court*, 146 P. 912, 45 Okl. 701.

Or.—*Oregon City v. Clackamas County*, 247 P. 772, 118 Or. 546.

S.C.—*Spivey v. Blackwood*, 159 S.E. 927, 161 S.C. 521.

S.D.—*Austin v. Eddy*, 172 N.W. 517, 41 S.D. 640.

Tex.—*Johnson v. Coit*, Civ.App., 48 S.W.2d 397.

Vt.—*Chase v. Billings*, 170 A. 903, 106 Vt. 149.

Wis.—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 183 Wis. 614.

11 C.J. p 123 note 89.

Correctness of decision

The law courts have no power to

issue the writ of certiorari to an executive or administrative board, for the sole purpose of reviewing the correctness of its decision.—*Ex parte Platt*, D.C.N.Y., 253 F. 413.

Offer of compromise

Request by commissioner of department of agriculture and markets for payment of stated sum for violation of official order has been held not direction for payment of penalty, but offer of compromise not reviewable by certiorari.—*Beck v. Ten Eyck*, 294 N.Y.S. 541, 162 Misc. 5.

43. Okl.—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250—*Tiger v. Creek County Court*, 146 P. 912, 45 Okl. 701.

Acts of treasurer and receiver-general

The duties imposed on the treasurer and receiver-general of the commonwealth being purely executive and administrative, his acts are not subject to examination by certiorari.—*City of Chelsea v. Treasurer and Receiver-General*, 130 N.E. 397, 237 Mass. 422.

Penitentiary commission

Ark.—*McConnell v. Arkansas Brick, etc., Co.*, 69 S.W. 559, 70 Ark. 568.

Wartime draft board

U.S.—*U. S. v. Rauch*, D.C.N.Y., 253 F. 814—*In re Kitzerow*, D.C.Wis., 253 F. 865.

44. Cal.—*Wright v. Engram*, 201 P. 788, 186 Cal. 659.

Correcting clerical entry

Certiorari does not lie to compel court clerk to enter judgment in "District Court Record," his default being failure to perform a ministerial duty, which could be corrected on motion or by the trial court on its own initiative.—*Parenti v. District Court of Adams County*, 199 N.W. 259, 198 Iowa 560.

Letter from state board of equalization, informing ice distributor of the continuance of a year-old practice of classification of distributors for retail sales tax purposes and containing no threats, was held not an order or decision or other official act of the board, and it will not

justify the interposition of writ of review.—*Teed v. State Board of Equalization*, 55 P.2d 267, 12 Cal.App. 2d 162.

45. Ark.—*Park v. Rural Special School Dist. No. 26*, 292 S.W. 697, 173 Ark. 514—*Graves v. McConnell*, 257 S.W. 1041, 162 Ark. 167—*Patterson v. Adcock*, 248 S.W. 904, 157 Ark. 186.

N.Y.—*Daley v. Byrne*, 295 N.Y.S. 452, 250 App.Div. 666—*Fisenne v. Bay Ridge Dist. Local Board*, 294 N.Y.S. 595, 250 App.Div. 460—*Santa Clara Lumber Co. v. Commissioners of Land Office*, 204 N.Y.S. 746, 209 App.Div. 705—*People ex rel. Gratwick v. Commissioners of the Land Office of State of New York*, 196 N.Y.S. 115, 202 App.Div. 240.

S.C.—*Wyse v. Wolfe*, 123 S.E. 818, 129 S.C. 499.

46. Cal.—*Collier & Wallis v. Astor*, 70 P.2d 171—*Whitten v. California State Board of Optometry*, 65 P.2d 1296—*Carson Estate Co. v. State Board of Equalization*, 59 P.2d 122, 6 Cal.2d 779—*Standard Oil Co. of California v. State Board of Equalization*, 59 P.2d 119, 6 Cal.2d 557—*California Delta Farms v. East Bay Municipal Utility Dist.*, 262 P. 729, 202 Cal. 793—*Mojave River Irr. Dist. v. Superior Court of State of California in and for San Bernardino County*, 262 P. 724, 202 Cal. 717—*Department of Public Works of California, Division of Water Rights v. Superior Court in and for Siskiyou County*, 239 P. 1076, 197 Cal. 215, followed in 239 P. 1080, 197 Cal. 795—*Drummev v. State Board of Funeral Directors and Embalmers, App.*, 77 P.2d 912.

47. D.C.—*Mickadiet v. Payne*, 269 F. 194, 50 App.D.C. 115, affirmed *Mickadiet v. Fall*, 42 S.Ct. 381, 258 U.S. 609, 66 L.Ed. 788.

48. Ala.—*Blount County Comrs. Ct. v. Johnson*, 39 So. 910, 145 Ala. 553.

Iowa.—*Bremer County v. Walstead*, 106 N.W. 352, 130 Iowa 164.

Mich.—*Huyser v. Zeeland, etc., School Inspectors*, 91 N.W. 1020, 131 Mich. 568.

lies to review the act of a health board in refusing to register births as required by statute,⁴⁹ or to test the validity of the act of school trustees in uniting and dividing school districts.⁵⁰

Illustrations of ministerial or executive acts. Among others, the following acts have been held to be ministerial or executive rather than judicial or quasi-judicial so as to be not reviewable by certiorari: Accepting bids and letting contracts;⁵¹ acting as civil service examiners;⁵² adoption of orders as to pilots;⁵³ advertising for and considering proposals for publication of state reports, and contracting in relation thereto;⁵⁴ apportionment of dates for dog races;⁵⁵ approving projects, sites, and plans for housing;⁵⁶ canceling public contracts;⁵⁷ certifying sufficiency of recall petition;⁵⁸ closing a street;⁵⁹ consenting to, and contracting for, a bridge;⁶⁰ contracting for the indexing of public records;⁶¹ controlling occupation of court house;⁶² declaration of a nuisance;⁶³ denying application for permission to sell securities of corporation;⁶⁴ designation of official newspaper;⁶⁵ determining right to inheritance of Indian lands;⁶⁶

determining that claim for exemption was filed under employment agency statute;⁶⁷ disbanding militia company;⁶⁸ eliminating territory from school district;⁶⁹ employing an attorney;⁷⁰ establishing cemetery;⁷¹ estimating cost of bridge;⁷² granting building permit;⁷³ preventing the carrying on of business of selling milk;⁷⁴ promulgation of rules respecting admission to insane asylum;⁷⁵ purchase of lands by public board;⁷⁶ refusal of board of education to issue certificate as to teacher's experience;⁷⁷ refusal of land officers to lease public lands;⁷⁸ refusal to reconsider dismissal of school teacher;⁷⁹ rejecting a bid for county printing;⁸⁰ removal by court of offices and records because of unsuitability of building;⁸¹ revocation of parole by parole board and order of rearrest;⁸² sale of schoolhouse unlawfully and fraudulently;⁸³ selection of newspapers for advertising purposes;⁸⁴ and the subscription to railroad stock and issuance of bonds by county court.⁸⁵

While a grant by commissioners of the land office of land under water has been held to be a ministerial act not reviewable by certiorari,⁸⁶ still

49. N.Y.—Matter of Lauterjung, 48 N.Y.Super. 308.

50. Ill.—Miller v. Township, 15 School Trustees, 88 Ill. 26.

Wis.—State v. Whitford, 11 N.W. 424, 54 Wis. 150.

51. N.Y.—Kandel v. Greene, 260 N.Y.S. 502, 238 App.Div. 607, reargument denied 261 N.Y.S. 1024, 238 App.Div. 756—People ex rel. Argus Co. v. Hugo, 168 N.Y.S. 25, 101 Misc. 481, affirmed 168 N.Y.S. 1123, 182 App.Div. 904, and appeal dismissed 120 N.E. 872, 223 N.Y. 714. 11 C.J. p 124 note 11.

52. N.J.—Clay v. Civil Service Commn., 93 A. 312—Brokaw v. Burk, Sup., 98 A. 11. N.Y.—Peo. v. Roosevelt, 46 N.Y.S. 517, 19 App.Div. 431.

53. Ga.—Daniels v. Commissioners of Pilotage of Bar of Tybee, 93 S. E. 887, 147 Ga. 295. 11 C.J. p 124 note 97.

54. N.Y.—Peo. v. Carr, 23 N.Y.S. 112, 5 Silv.Sup. 302.

55. Fla.—West Flagler Amusement Co. v. State Racing Commission, 165 So. 64, 122 Fla. 222.

56. N.Y.—Mt. Hope Development Corporation v. James, 180 N.E. 252, 258 N.Y. 510, affirming 251 N.Y.S. 498, 233 App.Div. 284.

57. N.Y.—Matter of Standard Bitulithic Co., 105 N.E. 967, 212 N.Y. 179, affirming 146 N.Y.S. 386, 161 App.Div. 191.

58. Cal.—Ogden v. Board of Trustees of City of Colton, 239 P. 855, 74 Cal.App. 159.

59. Cal.—Garin v. Pelton, 209 P. 377, 58 Cal.App. 672.

60. N.Y.—Peo. v. Public Park Comrs., 97 N.Y. 37.

61. Nev.—State v. White Pine County, 101 P. 104, 31 Nev. 113.

Changing room in court house

62. Ga.—McDonald v. Marshall, 195 S.E. 571.

63. Del.—Hartman v. Wilmington, 41 A. 74, 15 Del. 215.

N.Y.—Peo. v. State Bd. of Health, 33 Barb. 344, 12 Abb.Pr. 88, 20 How. Pr. 458.

64. Cal.—Blue v. Division of Corporations, Department of Investments, 48 P.2d 80, 3 Cal.App.2d 485.

65. N.Y.—Peo. v. Wiggins, 92 N.E. 789, 199 N.Y. 332.

66. D.C.—Mickadiet v. Payne, 269 F. 194, 50 App.D.C. 115, affirmed Mickadiet v. Fall, 42 S.Ct. 381, 258 U.S. 609, 66 L.Ed. 788.

67. Cal.—Southern California Nurses Registries Ass'n v. Division of Labor Statistics and Law Enforcement of Department of Industrial Relations of California, 51 P.2d 886, 10 Cal.App.2d 292.

68. N.Y.—Peo. v. Hill, 27 N.E. 789, 126 N.Y. 497, affirming 13 N.Y.S. 637.

69. Miss.—Anderson v. Franklin County School Board, 146 So. 134, 164 Miss. 646.

70. Nev.—State v. Washoe County, 45 P. 529, 23 Nev. 247.

71. Ga.—Hallman v. Atlanta Child's Home, 130 S.E. 814, 161 Ga. 247.

72. Wis.—State v. Wisconsin Highway Commission, 198 N.W. 753, 183 Wis. 614.

73. Cal.—Frasher v. Rader, 56 P. 797, 124 Cal. 132.

74. N.Y.—Peo. v. New York City Health Dept., 100 N.Y.S. 788, 51 Misc. 190, affirmed 102 N.Y.S. 1145, 116 App.Div. 890.

75. N.Y.—Peo. v. Manhattan State Hospital, 39 N.Y.S. 158, 5 App.Div. 249.

76. N.J.—Wilson v. State Water Supply Commn., 93 A. 732, 84 N.J. Eq. 150.

77. N.Y.—Peo. v. Maxwell, 108 N.Y.S. 49, 123 App.Div. 591.

78. Minn.—State v. Iverson, 100 N.W. 91, 92 Minn. 355.

79. N.Y.—Jordan v. Board of Education, 35 N.Y.S. 247, 14 Misc. 119, 25 N.Y.Civ.Proc. 89, 2 N.Y. Ann.Cas. 244.

80. Cal.—Townsend v. Copeland, 56 Cal. 612.

81. Mo.—State v. Shocklee, 141 S.W. 614, 237 Mo. 460.

82. N.Y.—People ex rel. La Placa v. Heacox, 263 N.Y.S. 407, 238 App. Div. 217.

83. Wis.—State v. Kemen, 21 N.W. 520, 61 Wis. 494.

84. N.Y.—Peo. v. Martin, 25 N.Y.S. 775, 72 Hun 354, affirmed 36 N.E. 885, 142 N.Y. 228, 40 Am.S.R. 592.

85. Mo.—In re Saline County Subscription, 45 Mo. 52, 100 Am.D. 337.

86. N.Y.—Peo. v. Woodruff, 66 N.Y.S. 209, 54 App.Div. 1, 3 N.Y. Ann.

where the decision of such commissioners was as to who was a riparian owner entitled to such grant, certiorari has been held to lie to review the decision.⁸⁷

A common council is not exercising judicial or quasi-judicial functions when it is disciplining one of its own members, for words spoken in debate.⁸⁸

The determination of the result of an election is ordinarily not subject to review by certiorari, on the theory that it is merely ministerial,⁸⁹ although the writ has been held proper, in such a case, in some jurisdictions.⁹⁰ So, other ministerial acts connected with elections are not reviewable by certiorari,⁹¹ including the manner of receiving or rejecting votes.⁹²

The granting or refusal of a license by a court or officer or board,⁹³ or the suspension⁹⁴ or revocation thereof,⁹⁵ is not ordinarily considered to be a

judicial act reviewable by certiorari. In some jurisdictions, however, there are decisions to the contrary, particularly where there was notice and a hearing.⁹⁶

An administrative order made by an executive officer of the United States government cannot be reviewed by certiorari.⁹⁷

Military tribunal. It has been held that certiorari cannot issue to a military tribunal.⁹⁸

b. Legislative Acts

The general rule is that certiorari will not lie to review acts legislative in character.

It is clearly the general rule that certiorari will not lie to review acts which are purely legislative in character.⁹⁹ It has also been held that acts which are quasi-legislative¹ or legislative and judicial² are not reviewable by the writ. In one juris-

Cas. 124, appeal dismissed 59 N.E. 1129, 166 N.Y. 597.

87. N.Y.—People v. Jones, 20 N.E. 577, 112 N.Y. 597.

88. Ill.—Butler v. Harrison, 124 Ill. App. 367.

89. Ga.—Harris v. Glenn, 81 S.E. 1103, 141 Ga. 637.
11 C.J. p 124 note 21.

90. N.J.—Bott v. Wurts, 43 A. 744, 881, 63 N.J.Law 289, 45 L.R.A. 251, affirming 40 A. 740, 62 N.J.Law 107.

R.I.—Rice v. Westerly, 85 A. 553, 35 R.I. 117.

S.D.—State v. Stakke, 117 N.W. 129, 22 S.D. 228, rehearing denied 118 N.W. 703, 22 S.D. 451.

91. Ark.—Patterson v. Adcock, 248 S.W. 904, 157 Ark. 186.
Minn.—In re Marshall County, 179 N.W. 571, 146 Minn. 460.
11 C.J. p 124 note 25.

Election proclamation

Proceedings before the governor resulting in a proclamation submitting to the voters a proposition to divide a county are not judicial or quasi-judicial and the act of the governor in issuing the proclamation is not reviewable by certiorari.—In re Marshall County, *supra*.

Order for stock election

Ark.—Patterson v. Adcock, 248 S.W. 904, 157 Ark. 186.

92. Iowa.—Lehigh Sewer Pipe, etc., Co. v. Lehigh, 136 N.W. 934, 156 Iowa 386.

93. Minn.—State v. Lamberton, 34 N.W. 336, 37 Minn. 362.
11 C.J. p 125 note 27.

94. Cal.—Schwab-Wilson Mach. Corp. v. Daugherty, 59 P.2d 1057, 15 Cal. App.2d 701.

Permit to sell stock

An order of the commissioner of corporations suspending a permit to sell stock is not the exercise of a judicial function and is not reviewable by a writ of certiorari.—Schwab-Wilson Mach. Corp. v. Daugherty, *supra*.

95. Cal.—Hartman v. Board of Chiropractic Examiners, Cal.App., 66 P.2d 705.

11 C.J. p 125 note 23.

96. Wis.—State v. Grootemaat, 231 N.W. 628, 202 Wis. 155.

11 C.J. p 125 notes 29–31.

After notice and hearing the granting of a license is quasi-judicial.—Davidson v. Whitehill, 39 A. 1081, 87 Vt. 499.

Real estate broker's license

The power of a real estate brokers' board to deny or revoke a broker's license, under a statute requiring a complaint, hearing, written evidence, and findings and determination, is quasi-judicial and hence reviewable by certiorari.—State v. Grootemaat, 231 N.W. 628, 202 Wis. 155.

97. U.S.—Degge v. Hitchcock, 33 S. Ct. 639, 229 U.S. 162, 169, 57 L.Ed. 1135.

11 C.J. p 125 note 33.

98. S.C.—Matter of Brigadier-Gen., 1 Strobb. 190.

11 C.J. p 125 note 34.

99. Cal.—A. R. G. Bus Co. v. Board of Public Utilities of City of Los Angeles, 185 P. 386, 181 Cal. 508.

Minn.—State v. City Council of City of Benson, 209 N.W. 3, 167 Minn. 307—Johnson v. Mathews, 184 N.W. 214, 150 Minn. 524.

Miss.—Cumberland Telephone & Telegraph Co. v. State, 100 So. 378, 135 Miss. 835.

Mo.—Hawkins v. City of St. Joseph, 281 S.W. 420—State ex rel. Manion v. Dawson, 225 S.W. 97, 284 Mo. 490.

N.Y.—Neddo v. Schrade, 200 N.E. 657, 270 N.Y. 97, modifying 232 N.Y.S. 251, 245 App.Div. 794—Fisene v. Bay Ridge Dist. Local Board, 294 N.Y.S. 595, 250 App.Div. 460—Peo. v. New York Bd. of Health, 33 Barb. 344, 12 Abb.Pr. 38, 20 How.Pr. 458.

Okl.—Haddock v. Johnson, 194 P. 1077, 80 Okl. 250.

R.I.—Sisson v. Peloquin, 133 A. 621.
Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149.

11 C.J. p 123 note 39.

It has been held, however, that certiorari will lie whenever action of a legislative body transcends powers which have been delegated to it, and it is only when city officers have jurisdiction of subject matter and conduct their proceedings consistently with statute that their proceedings are conclusive.—People ex rel. Schick v. Marvin, 292 N.Y.S. 93, 249 App.Div. 293, remitted 2 N.E.2d 634, 271 N.Y. 219, reversing 283 N.Y.S. 203, 246 App.Div. 71, motion denied 8 N.E.2d 618, 274 N.Y. 491.

Wisdom of act cannot be reviewed.—Johnson v. Mathews, 184 N.W. 214, 150 Minn. 524.

Determination of rates for future telephone service is legislative and not judicial.—Cumberland Telephone & Telegraph Co. v. State, 100 So. 378, 135 Miss. 835.

1. Fla.—West Flagler Amusement Co. v. State Racing Commission, 165 So. 64, 122 Fla. 222.

2. Miss.—Anderson v. Franklin County School Board, 146 So. 134, 164 Miss. 646.

diction, however, the function of certiorari is extended to include the review of municipal ordinances, purely legislative in character, where they are beyond the power or authority delegated to the legislating body or if any illegality existed in the enactment of such ordinances or otherwise.³

Under the general rule, the legislative action of a city or town council, board of supervisors, or the like, cannot be reviewed by the writ.⁴ To illustrate, it has been held that the following legislative acts are not reviewable: Granting,⁵ revoking,⁶ or regulating the exercise of,⁷ a franchise to use a street or a highway; the adoption or change of school books;⁸ the determination to issue bonds in conformity with the result of an election;⁹ borrowing money to improve highways, and issuing bonds therefor;¹⁰ the expenditure of city funds for an election;¹¹ the creation of a fire district;¹² fixing the boundaries of a drainage district;¹³ requiring the fencing of a city lot;¹⁴ the delegation of power to locate and purchase a site, and to incur an indebtedness for the erection of a building thereon;¹⁵ the division of a municipality into wards;¹⁶ the fixing of salaries of a board;¹⁷ the formation of school districts;¹⁸ and the organization of a new town out of part of an old one.¹⁹ The determina-

tion by a city council as to whether or not a petition was signed by a majority of the property owners, and whether certain land sought to be annexed abuts the city, have been held to be legislative and not judicial acts.²⁰ In some jurisdictions, the extension of city limits is held to partake of a judicial character so as to be reviewable by certiorari,²¹ while in others such an act is held to be legislative in character.²² The determination to open or close a street is considered to be legislative in some jurisdictions,²³ but is held to be judicial in others.²⁴

§ 19. Audit of Claims

Certiorari to review an audit of claims has been allowed in some jurisdictions and refused in others.

Whether certiorari will lie to review the audit of claims is not at all clear. It has been permitted in some jurisdictions.²⁵ Elsewhere, however, the audit of a claim by a board has been held not judicial in its nature so as to be reviewable by certiorari,²⁶ and the writ has been held not proper, for one reason or another, to review the allowance of illegal claims.²⁷

Where by statute the decision of a superior court confirming the report of an auditor appointed by

Eliminating territory from school district

Miss.—Anderson v. Franklin County School Board, *supra*.

3. N.J.—Harrison Land Co. v. Crucible Steel Co., 98 A. 1085, 86 N.J. Eq. 249, affirming 89 A. 41, 82 N.J. Eq. 414—In re Raymond Plaza West, Newark, 189 A. 105, 15 N.J. Misc. 131—Austermuhl v. Borough of Collingswood, 167 A. 771, 11 N. J. Misc. 671—Van Dine v. Borough of Sussex in Sussex County, 139 A. 342, 5 N.J. Misc. 1066.
11 C.J. p 123 note 90.

Clear proof is required to establish charge of fraudulent conduct or lack of good faith against legislative body to support writ.—Taggart v. City of Asbury Park, 188 A. 490, 15 N.J. Misc. 10.

Resolution calling for referendum

Certiorari is allowable to review a resolution calling for a referendum concerning a municipal lighting plant, where the allowance of the writ is not to prevent a submission of the question to the electorate.—Public Service Electric & Gas Co. v. City of Camden, 181 A. 43, 13 N.J. Misc. 774.

4. N.Y.—Neddo v. Schrade, 200 N.E. 657, 270 N.Y. 97, modifying 282 N. Y.S. 251, 245 App.Div. 794.
R.I.—Sisson v. Peloquin, 133 A. 621.
11 C.J. p 125 note 35.

5. Cal.—Peo. v. Contra Costa County, 55 P. 131, 122 Cal. 421.
11 C.J. p 125 note 36.

6. W.Va.—Wheeling, etc., R. Co. v. Triadelphia, 52 S.E. 499, 58 W.Va. 487, 4 L.R.A., N.S., 321.

7. Mich.—Greenville Gas, etc., Co. v. Greenville, 130 N.W. 333, 165 Mich. 135.

8. Cal.—Peo. v. Oakland Bd. of Education, 54 Cal. 375.

- R.I.—Greenough v. Pawtucket School Committee, 62 A. 978, 27 R.I. 427.

9. Nev.—State v. Osburn, 51 P. 837, 24 Nev. 187.

10. N.Y.—Peo. v. Queens County, 30 N.E. 488, 131 N.Y. 468, reversing 16 N.Y.S. 705.

11. Mo.—Hawkins v. City of St. Joseph, 281 S.W. 420.

12. N.Y.—Peo. v. Queens County, 47 N.E. 790, 153 N.Y. 370, affirming 43 N.Y.S. 1121, 14 App.Div. 608.

13. Mo.—State ex rel Manion v. Dawson, 225 S.W. 97, 284 Mo. 490.

14. N.Y.—Fisenne v. Bay Ridge Dist. Local Board, 294 N.Y.S. 595, 250 App.Div. 460.

15. N.Y.—Peo. v. St. Lawrence County, 25 Hun 131.

16. Mass.—Fitzgerald v. Boston, 108 N.E. 355, 220 Mass. 503.

17. N.Y.—Peo. v. Haverstraw, 48 N. Y.S. 740, 23 App.Div. 231.

18. Cal.—Broyles v. Mahon, 237 P. 763, 72 Cal.App. 484.

- 11 C.J. p 125 note 46.

19. Minn.—Christlieb v. Hennepin County, 22 N.W. 930, 41 Minn. 142.

20. Minn.—State v. City Council of City of Benson, 209 N.W. 3, 167 Minn. 307.

21. Iowa.—Moore v. Perry, 93 N.W. 510, 119 Iowa 423.

22. N.D.—State v. Clark, 131 N.W. 715, 21 N.D. 517.

23. Cal.—Brown v. San Francisco, 57 P. 82, 124 Cal. 274.

24. N.Y.—Peo. v. Shaw, 54 N.Y.S. 218, 34 App.Div. 61.

- 11 C.J. p 125 note 52.

25. N.Y.—Hiscox v. Holmes, 269 N. Y.S. 222, 239 App.Div. 602—People ex rel. Kiehm v. Board of Education of City of Utica, 190 N.Y.S. 798, 198 App.Div. 476.
11 C.J. p 125 note 53—p 126 note 54.

Attorneys' fees

Where town board audited and disallowed claim of town superintendent of highways for attorneys' fees, certiorari was proper remedy.—Hiscox v. Holmes, 269 N.Y.S. 222, 239 App.Div. 602.

26. Mass.—Morse v. Norfolk County, 49 N.E. 925, 170 Mass. 555.

27. Cal.—Burr v. Sacramento County, 31 P. 38, 96 Cal. 210.
11 C.J. p 126 note 56.

agreement of the parties is final and exclusive, it cannot be reviewed by certiorari.²⁸

It has been held that certiorari does not lie to review the action of county commissioners in refusing to pay a private physician engaged by the jailer to treat a sick prisoner where the commissioners have not acted on the physician's bill except to reject it since they had not fixed his pay at something or nothing.²⁹

§ 20. Finality of Determination

a. General principles

b. What constitutes a final determination

a. General Principles

Ordinarily, certiorari will not lie where the proceedings to be reviewed are pending or undetermined.

28. R.I.—*Broley v. Superior Court*, 107 A. 104, 42 R.I. 253.

29. Me.—*Sawyer v. Commissioners of Androscoggin County*, 102 A. 226, 116 Me. 408.

30. Fla.—*Waddell v. McAllister*, 122 So. 578, 97 Fla. 1054.
11 C.J. p 126 note 57.

English practice discussed

III.—Chicago, etc., R. Co. v. Whipple, 22 Ill. 105.

Tenn.—*Beck v. Knabb*, 1 Overt. 55.
Vt.—*See Paine v. Leicester*, 22 Vt. 44.

W.Va.—*Dryden v. Swinburne*, 20 W. Va. 89.

31. U.S.—*Simkins v. Simkins, C.C.A. Canal Zone*, 271 F. 87.

Ala.—*Waltman v. Ortman*, 170 So. 545, second case, 233 Ala. 170, denying certiorari, App., 170 So. 545, first case, following *Foley v. Armstrong*, App., 170 So. 547, certiorari denied 170 So. 548, 233 Ala. 175.

Cal.—*Gumilla v. Industrial Acc. Commission of State of California*, 203 P. 397, 187 Cal. 638—*Frost v. Superior Court in and for Modoc County*, 183 P. 206, 41 Cal.App. 580—*Howe v. Superior Court of California in and for Sacramento County*, 274 P. 992, 96 Cal.App. 769.
Colo.—*Hendricks v. Gates*, 37 P.2d 1094, 95 Colo. 575.

Fla.—*Miami Poultry & Egg Co. v. City Ice & Fuel Co.*, 172 So. 82—*Bringley v. C. I. T. Corporation*, 160 So. 680, 119 Fla. 529—*Grodin v. Railway Express Agency*, 156 So. 476, 116 Fla. 378—*Rifas v. Gross*, 143 So. 600, 106 Fla. 708, quoting *Corpus Juris*—*Brundage v. O'Berry*, 134 So. 520, 101 Fla. 320—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 190 Fla. 748—*Waddell v. McAllister*, 122 So. 578, 97 Fla. 1054—*Kroier v. Kroier*, 116 So. 753, 95 Fla. 865—*First Nat.*

Bank v. Gibbs, 82 So. 618, 78 Fla. 118, citing *Corpus Juris*.

Ga.—*Nalley & Co. v. Moore*, 181 S.E. 429, 51 Ga.App. 718—*Ragsdale v. Middlebrooks*, 176 S.E. 825, 50 Ga. App. 8—*Reed v. V. H. Kriegshaber & Son*, 160 S.E. 560, 44 Ga.App. 64—*Armistead v. Beavers*, 124 S.E. 61, 32 Ga.App. 464—*Starnes v. Bacon*, 103 S.E. 39, 25 Ga.App. 260.

Iowa.—*Hammond v. Des Moines Municipal Court*, 197 N.W. 628, 197 Iowa 511.

Minn.—*Salters v. Uhlir*, 265 N.W. 333, 196 Minn. 541—*In re Martin's Estate*, 235 N.W. 279, 182 Minn. 576—*State v. District Court of Jackson County*, 159 N.W. 965, 134 Minn. 435.

Mo.—*State ex rel. United Brick & Tile Co. v. Wright*, 95 S.W.2d 804, 339 Mo. 160—*State ex rel. Duraflor Products Co. v. Percy*, 29 S.W.2d 83, 325 Mo. 335—*State ex rel. Shaw State Bank v. Pfeifle*, 293 S.W. 512, 516, 220 Mo.App. 676, citing *Corpus Juris*.

Mont.—*State v. District Court in and for Bow County*, 19 P.2d 220, 93 Mont. 439.

N.Y.—*Santa Clara Lumber Co. v. Commissioners of Land Office*, 204 N.Y.S. 746, 209 App.Div. 705—*People ex rel. Pennsylvania Gas Co. v. Public Service Commission, Second District*, 168 N.Y.S. 59, 181 App. Div. 147—*Hall v. Hood*, 201 N.Y.S. 498, 121 Misc. 572.

R.I.—*Conte v. Roberts*, 192 A. 814—*Dimond v. Marwell*, 190 A. 683—*Cranston Loan Co. v. Byrne*, 190 A. 464—*Parker v. Superior Court*, 100 A. 305, 40 R.I. 214.

Tenn.—*First Nat. Bank v. Planters' Nat. Bank of Clarksdale, Miss.*, 12 S.W.2d 528, 158 Tenn. 50.

Vt.—*Leonard v. Willcox*, 142 A. 762, 101 Vt. 195.

Wash.—*State v. Superior Court for Lewis County*, 201 P. 782, 117 Wash. 544.

At common law the writ of certiorari was used both as a writ of review after final judgment and also to remove the entire cause at any stage of the proceeding for hearing and determination in the superior court.³⁰ In the United States it is now the general rule that the writ will be refused where there has been no final determination and the proceedings in the lower tribunal are still pending.³¹ It will not issue on the presumption that the court below, wherein the cause is pending, will commit error.³² Moreover, it has been held that after final disposition of the cause, certiorari will lie only to correct errors which affect such final judgment and not errors affecting only a judgment which is not final.³³

The general rule heretofore stated is not applied inflexibly in all jurisdictions.³⁴ Thus, it has been

Wis.—*State v. Brown*, 182 N.W. 602, 174 Wis. 498.

11 C.J. p 126 note 62.

Purpose of writ of certiorari is to quash an unlawful final judgment or some final and conclusive judicial order where there is no other method of relief therefrom.—*Harrell v. Martin*, 154 So. 186, 114 Fla. 147.

Final appellate judgment

Final adjudication of circuit court in exercise of appellate jurisdiction is reviewable on certiorari.—*Ulsch v. Mountain City Mill Co.*, 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 103 Fla. 932, 104 Fla. 418.

Rehearing pending

Relator could not invoke supreme court's supervisory powers to enforce order, where rules attacking order were pending on rehearing in trial court.—*Succession of Harrison*, 120 So. 617, 167 La. 977.

32. Mont.—*State v. District Court of Second Judicial Dist.*, 272 P. 242, 83 Mont. 349.

33. Ga.—*Reed v. V. H. Kriegshaber & Son*, 160 S.E. 560, 44 Ga.App. 64.

Rulings preceding final judgment

Where the assignments of error were to specified rulings preceding final judgment, and there was no assignment of error to the judgment because of error in it or because of the antecedent errors complained of, the judge did not err in refusing to sanction the petition for a writ of certiorari.—*Sullivan v. B. H. Levy Bros. & Co.*, 106 S.E. 19, 26 Ga.App. 319.

34. Dependent on use of writ

When the writ of certiorari is used to remove, from an inferior to a superior court, a case which the latter court has concurrent jurisdiction to hear and determine, the writ issues before the case has proceeded to a final judgment in the court below. When the writ is used to se-

held that the general supervisory control by courts over inferior judicial or quasi-judicial tribunals is not entirely taken away by a statutory declaration that the judgment of the inferior tribunal must be final before certiorari will lie.³⁵ It has also been held that a court of last resort may in the exercise of its final revisory and supervisory powers permit certiorari to issue to an interlocutory determination where the case presents exceptional circumstances and where probable and irreparable harm would result from delay in deciding the questions presented.³⁶ Furthermore, it is the rule in other states that the writ may lie even before final judgment to determine whether or not an inferior court or tribunal is proceeding without, or in excess of, its jurisdiction,³⁷ or has issued an order or judgment unduly extending its jurisdiction,³⁸ or is proceeding illegally.³⁹ In other jurisdictions, however, the rule is not relaxed even where a question of jurisdiction is involved.⁴⁰ In some other states it has been held that the writ will issue under special circumstances to special and summary tribunals which have not consummated their

authority,⁴¹ although it will not issue before judgment in any case, unless the cause can be continued and completed in the superior court.⁴²

In *New Jersey*, the writ of certiorari substituted by statute for a writ of error, see *supra* § 9, will not lie until after final judgment,⁴³ in cases which cannot be completed by the court from which the writ must issue.⁴⁴ However, the so-called common-law certiorari, going to special and summary tribunals, may issue before the inferior jurisdiction has consummated its authority; it is, as to the time when it may issue, a discretionary writ, and in the absence of a statute requiring it to issue, the time for its allowance is discretionary.⁴⁵ Thus, when the purpose of this writ is to review the proceedings of a special tribunal in matters not legally brought within their jurisdiction or on complaint of irregular procedure in matters legally brought within its jurisdiction, the writ may issue before final decision,⁴⁶ although ordinarily it will not be allowed in the latter case until then, since such tribunal may correct its own errors.⁴⁷ Likewise,

cure an appellate revision, by the superior tribunal, of the proceedings in the inferior court, to the end that errors appearing on the record may be corrected; it will not lie until after final judgment.—*Downer v. Campbell*, 21 Pa.Dist. & Co. 434.

Statutory exception

Under a statute so providing, certiorari will lie where a motion to quash the declaration on jurisdictional grounds, or the issues raised on a demurrer, plea to the jurisdiction or other dilatory plea decided adversely to the party moving, pleading, or demurring.—*Boughner v. Bay City*, 120 N.W. 597, 156 Mich. 193.

35. U.S.—*Angelus v. Sullivan*, N.Y., 246 F. 54, 158 C.C.A. 280.

36. R.I.—*Conte v. Roberts*, 192 A. 814—*Cranston Loan Co. v. Byrne*, 190 A. 464—*Union Mortg. Co. v. Rocheleau*, 154 A. 658, 51 R.I. 345.

Interlocutory order restraining police officials from enforcing gambling statute against persons maintaining "pin game" was reviewable by certiorari in view of irreparable injury which would result from delaying review until final hearing could be obtained and public interest in enforcement of criminal statute involved.—*Conte v. Roberts*, R.I., 192 A. 814.

Not proper case for exception

Ruling allowing amendment of declaration to change plaintiff's name from "Cranston Loan Company, Incorporated," to "Cranston Loan Company," is not reviewable by certio-

rari, although motion to amend declaration was made almost eight years after action was commenced, since ruling was not a "final determination," facts were not sufficiently compelling to invoke exercise of supreme court's revisory and appellate jurisdiction under writ of certiorari, question raised was difficult to decide from record alone, and defendant's rights had been preserved by plea of statute of limitations filed to amended declaration.—*Cranston Loan Co. v. Byrne*, R. I., 190 A. 464.

37. Mo.—*State ex rel. Thomas & Proetz Lumber Co. v. Bader*, 41 S. W.2d 168, 328 Mo. 253.

N.Y.—*Scheidecker v. Department of State*, 273 N.Y.S. 737, 242 App.Div. 119, amended 275 N.Y.S. 530, 242 App.Div. 891.

Tenn.—*State v. Hunt*, 192 S.W. 931, 137 Tenn. 243.

Rescission by state department of determination revoking real estate brokers' licenses because of pending court litigation may be reviewed.—*Scheidecker v. Department of State*, 273 N.Y.S. 737, 242 App.Div. 119, amended 275 N.Y.S. 530, 242 App.Div. 891.

38. Fla.—*Hartford Accident & Indemnity Co. v. City of Thomasville*, Ga., 130 So. 7, 100 Fla. 748. 11 C.J. p 128 note 99.

Manifest lack of jurisdiction is essential

Utah.—*Sammis v. Marks*, 252 P. 270, 69 Utah 26.

39. Tenn.—*State v. Hunt*, 192 S.W. 931, 137 Tenn. 243.

40. Ga.—*Nalley & Co. v. Moore*, 181 S.E. 429, 51 Ga.App. 718.

11 C.J. p 128 note 1.

41. Tenn.—*State v. Hebert*, 154 S. W. 957, 127 Tenn. 220, 242.

11 C.J. p 127 note 66.

42. Mont.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 19 P.2d 220, 93 Mont. 439, citing *Corpus Juris*.

11 C.J. p 127 note 67.

43. N.J.—*Crawford v. Hendee*, 112 A. 668, 95 N.J.Law 259—*Towne v. Kellner*, 168 A. 308, 11 N.J.Misc. 846.

11 C.J. p 127 note 64.

Interlocutory order

In a statutory proceeding in a lower court brought by the state board of medical examiners, certiorari will not lie where there has been no judgment in the court below and the order sought to be reviewed is simply an interlocutory order, certiorari in a statutory proceeding of this kind being a method for review of a final judgment, not an interlocutory order.—*State Board of Medical Examiners v. Levin*, 159 A. 305, 10 N.J.Misc. 321.

44. N.J.—*Crawford v. Hendee*, 112 A. 668, 95 N.J.Law 259.

11 C.J. p 127 note 67.

45. N.J.—*Crawford v. Hendee*, *supra*.

11 C.J. p 127 note 65.

46. N.J.—*City of Plainfield v. McGrath*, 188 A. 733, 117 N.J.Law 348.

47. N.J.—*City of Plainfield v. McGrath*, *supra*—*Breen Iron Works*.

where the object of certiorari is to review municipal action, especially if that action is said to be beyond the corporate power, it is a frequent practice for the writ to issue while yet the final step that will complete the injury is threatened.⁴⁸ There are, however, exceptions to this practice.⁴⁹

Opinions and rulings. Certiorari will not lie to revise or correct erroneous opinions or rulings however hurtful they may be to individuals against whom they are expressed.⁵⁰ An order, judgment, or determination affecting the rights of the prosecutors is necessary as a foundation for the use of the writ.⁵¹

b. What Constitutes a Final Determination

- (1) In general
- (2) Intermediate appellate courts

(1) In General

The substance of finality rather than the form is

generally determinative. The execution of a final judgment is not required.

It would appear that a judgment or decree final in substance although not in form is reviewable by certiorari.⁵² So, the act of a judge in declining to give judgment is equivalent to an entry of judgment so far as the right to bring certiorari, where the judge had made final disposition of the matter so far as he was concerned.⁵³ Moreover, some proceedings, although perhaps not technically final, may be endowed with such attributes of finality as to justify the exercise of judicial discretion in allowing certiorari to review the record thereof.⁵⁴ Nevertheless, it has been held that the writ of certiorari does not lie to review an adjudication which is final by implication merely.⁵⁵ It has also been held that, where no order has been made modifying a judgment after time for appeal or motion for new trial has elapsed, but the trial court indicates its intention of modifying the judgment

v. Richardson, 130 A. 192, 115 N.J. Law 305—City of Newark v. State Board of Tax Appeals, 191 A. 741, 15 N.J.Misc. 368.

48. N.J.—Crawford v. Hendee, 112 A. 668, 95 N.J.Law 259—Public Service Ry. Co. v. City of Camden, 112 A. 421, 95 N.J.Law 190—11 C.J. p 127 note 68.

Resolution for removal of house

A writ of certiorari was not prematurely issued to review a resolution by a city council, authorizing the mayor to remove frame buildings erected on private property on the ground that they had been illegally and improperly constructed.—Public Service Ry. Co. v. City of Camden, supra.

No showing as to prosecutor's injury

Certiorari to review ordinance providing for special assessments was not premature because it was not shown prosecutor's lands would be assessed.—Demarest v. Borough of Bergenfield, N.J., 146 A. 63.

49. N.J.—Neptune Tp. in Monmouth County v. City of Asbury Park, 143 A. 867, 7 N.J.Misc. 5.

Ordinance not passed

Certiorari to review ordinance is premature where the record does not show that the ordinance to be reviewed was passed on date set for final passage, the inference being that the ordinance never was finally passed.—Neptune Tp. in Monmouth County v. City of Asbury Park, supra.

50. N.Y.—Hall v. Hood, 201 N.Y.S. 498, 499, 121 Misc. 572, citing *Corpus Juris*.

51. N.Y.—Hall v. Hood, supra. 11 C.J. p 127 note 70.

52. Tenn.—Hill State Bank & Trust Co. v. Chew, 66 S.W.2d 989, 167 Tenn. 71—Cockrill v. Peoples' Sav. Bank, 293 S.W. 996, 155 Tenn. 342.

Denial of injunction

Where an injunction is the only relief sought, a decree denying the injunction and retaining cause is in substance such a final decree authorizing certiorari from supreme court.—Cockrill v. People's Sav. Bank, supra.

Final plan

Under a statute providing that any person or public corporation affected by the final determination of the board may review it by certiorari on notice to the attorney general, the modification of reservoir plans by board of Hudson river regulating district to provide for construction of bridge instead of ferry is a final plan and final determination reviewable by certiorari.—Fulton County v. Board of Hudson River Regulating Dist., 248 N.Y.S. 8, 231 App.Div. 408.

53. Pa.—Townsend v. Boyd, 8 Del. Co. 214.

54. Mo.—State ex rel United Brick & Tile Co. v. Wright, 95 S.W.2d 804, 339 Mo. 160.

Order vacating default judgment, which purports to deprive petitioner of a judgment entered at a prior term and also of the advantage acquired by a writ of garnishment and the execution, may be so final as to justify the allowance of certiorari to quash it provided the court had no jurisdiction to make the order.—Kroier v. Kroier, 116 So. 753, 95 Fla. 865.

Failure to comply with subpoena duces tecum

Where relator could assume that,

if it failed to produce contracts called for in subpoena duces tecum, facts set out in motion would be taken for confessed, which fact would have resulted in rejection of its demand, its application for certiorari will not be considered as being premature.—Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Bacon, 105 So. 278, 159 La. 169.

Mandamus for inspection of books

Where stockholder of subsidiary corporation obtained peremptory writ of mandamus to inspect subsidiary and parent corporations' books, and corporations within proper time filed motions for new trial and in arrest of judgment, proceedings were not "pending and undetermined," but of sufficient "finality" to justify exercise of judicial discretion to grant certiorari to review record to subsidiary corporation.—State ex rel. United Brick & Tile Co. v. Wright, 95 S.W.2d 804, 339 Mo. 160.

Pendency of hearing on show cause rule

Where district court, on application to advance hearing on rule against surviving spouse to show cause why suspensive appeal from judgment appointing administratrix should not be dismissed, refused application and stated that proper tribunal to dismiss appeal was supreme court, the appointee could apply for certiorari and mandamus to compel district judge to set aside suspensive appeal, prior to date set for hearing on rule, particularly as order purporting to grant suspensive appeal was absolute nullity.—Succession of Pavelka, 102 So. 579, 157 La. 480.

55. Me.—Howland v. Penobscot County, 49 Me. 143.

after the completion of certain computations, certiorari will not lie.⁵⁶

Where three separate items of damages all arise and are claimed under one cause of action, there cannot be a final judgment granting or denying a part of the damages and at the same time contemplating further proceedings in the suit to determine liability as to the remainder of the damages.⁵⁷

A determinative order of a quasi-judicial legal body granting or denying a statutory right or privilege after notice and hearing may be final and reviewable by certiorari.⁵⁸

Execution of judgment. It is not necessary to wait until the final order or judgment has been carried into effect. It may be reviewed as soon as a final adjudication has been had.⁵⁹

Particular determinations as final. The courts have frequently had occasion to determine whether or not particular judgments, decrees, or orders are of sufficient finality so as to warrant the issuance of certiorari for their review. For example, it has been held that the writ will not lie to review intermediate⁶⁰ or interlocutory orders,⁶¹ and this in-

cludes an order refusing or dissolving an injunction;⁶² an order striking out a pleading;⁶³ an order striking out part of the answer or bringing in a new party;⁶⁴ an order overruling a demurrer based on jurisdiction;⁶⁵ an order granting a new trial;⁶⁶ or a refusal to grant a new trial where the proceedings are still pending;⁶⁷ an order continuing a cause for trial;⁶⁸ an order that a party answer interrogatories propounded to him in the taking of depositions;⁶⁹ or intermediate orders in condemnation proceedings.⁷⁰ It has been held, however, that where interlocutory rulings on a plea of *lis pendens* are brought before the supreme court along with a plea to the jurisdiction, such rulings may be passed on.⁷¹

The writ has also been held not to lie in the following cases: Where the judgment against a party is retained for further orders, and there is no judgment disposing of the costs or directing payment of them;⁷² order refusing to dismiss an action on a stipulation over the objection of plaintiff's attorney;⁷³ order for an account in a municipal investigation;⁷⁴ allowance of an appeal;⁷⁵ judgment of federal circuit court of appeals re-

56. Cal.—Lankton v. Superior Court in and for Los Angeles County, 55 P.2d 1170, 5 Cal.2d 694.

57. U.S.—Kean v. National City Bank, C.C.A.Tenn., 294 F. 214, petition dismissed 44 S.Ct. 179, 263 U.S. 729, 68 L.Ed. 528.

58. Fla.—Florida Motor Lines v. Railroad Com'rs, 129 So. 876, 100 Fla. 538.

59. Colo.—Schwarz v. Garfield County Ct., 23 P. 84, 14 Colo. 44.

60. Minn.—Salters v. Uhlir, 265 N. W. 333, 196 Minn. 541—State v. District Court of Jackson County, 159 N.W. 965, 134 Minn. 435.

61. Colo.—Hendricks v. Gates, 37 P. 2d 1094, 95 Colo. 575.

La.—Dawson v. Frazier, 90 So. 570, 150 La. 203.

Minn.—Patterson v. Hall, 192 N.W. 342, 155 Minn. 46.

R.I.—Conte v. Roberts, 192 A. 814. Tenn.—First Nat. Bank v. Planters' Nat. Bank of Clarksdale, Miss., 12 S.W.2d 528, 158 Tenn. 50.

Wash.—State v. Superior Court for Lewis County, 201 P. 782, 117 Wash. 544.

11 C.J. p 127 note 72.

Appointment of master to frame issues entered on motion filed in the wrong county will not be reviewed where decree is not final.—Parker v. Superior Court, 100 A. 305, 40 R.I. 214.

Order setting aside consent of surviving spouse to a will, and decreeing that he shall take his distribu-

tive share, is not reviewable.—Patterson v. Hall, 192 N.W. 342, 155 Minn. 46.

Interlocutory order of court of appeals discharging supersedeas issued by member thereof, directed to chancery court order dissolving injunction will not be reviewed.—First Nat. Bank v. Planters' Nat. Bank of Clarksdale, Miss., 12 S.W.2d 528, 158 Tenn. 50.

62. Wash.—State v. Supreme Court for King County, 177 P. 773, 105 Wash. 324—State v. Brawley, 176 P. 337, 104 Wash. 374. 11 C.J. p 127 note 73.

No finding of insolvency

Application for writ to review order of superior court dissolving temporary restraining order which by statute is not appealable must be dismissed for lack of jurisdiction in supreme court, in absence of finding of insolvency of parties against whom restraining order was sought, because the legislative intent is that such orders shall be reviewed only on appeal from a final judgment.—State v. Superior Court of Washington for Snohomish County, 228 P. 347, 130 Wash. 668—State v. Superior Court for King County, 177 P. 773, 105 Wash. 324—State v. Brawley, 176 P. 337, 104 Wash. 374.

Refusal to dissolve

The court on application for writs of certiorari and prohibition cannot consider attacks on the affidavit for the writ, the injunction bond, etc.,

which will properly be reviewable on appeal from the final judgment.—Castell Land & Harbor Co. v. Roberts, 95 So. 421, 153 La. 115.

63. Wash.—State v. King County Super. Ct., 103 P. 17, 54 Wash. 225.

64. Wash.—State v. Superior Court for Lewis County, 201 P. 782, 117 Wash. 544.

11 C.J. p 127 note 75.

65. N.Y.—People ex rel. Pennsylvania Gas Co. v. Public Service Commission, Second Dist., 168 N.Y.S. 59, 181 App.Div. 147.

66. Minn.—Salters v. Uhlir, 265 N. W. 333, 196 Minn. 541.

67. Ga.—Ragsdale v. Middlebrooks, 176 S.E. 825, 50 Ga.App. 8.

68. Colo.—Hendricks v. Gates, 37 P. 2d 1094, 95 Colo. 575.

69. Cal.—Howe v. Superior Court of California in and for Sacramento County, 274 P. 992, 96 Cal.App. 769.

70. Colo.—Peo. v. Garfield County, 58 P. 591, 26 Colo. 478.

71. La.—Dawson v. Frazier, 90 So. 570, 150 La. 203.

72. N.C.—Smith v. Miller, 71 S.E. 355, 155 N.C. 247.

73. Wash.—State v. Spokane County Super. Ct., 92 P. 349, 47 Wash. 508.

74. N.Y.—Matter of Hamilton, 58 How.Pr. 290.

75. Mich.—Palms v. Campau, 11 Mich. 109.

versing a judgment of the circuit court as it then existed and remanding the cause for further proceedings;⁷⁶ order appointing referees;⁷⁷ order directing a survey and appointing an engineer;⁷⁸ restraint of a sale of property of a surety before the exhaustion of remedies against his principal, where the surety's property has not been levied on.⁷⁹ A verdict and judgment against a plea of no partnership is not a final judgment.⁸⁰ Where a motion is pending in the lower court to set aside the order and judgment complained of, an application for the writ is premature.⁸¹ An order of an intermediate court vacating a judgment of a justice's court is not a final judgment.⁸²

The following, among others, have been held final adjudications so as to be reviewable by certiorari: Sustaining of a general demurrer to the entire complaint;⁸³ action of a county board on a claim presented for audit, where the claim is passed on, and allowed in part and rejected in part;⁸⁴ order directing clerk to issue a warrant for levy of taxes;⁸⁵ confirmation of a commissioner's report in partition;⁸⁶ confirmation of settlement of sheriff's accounts;⁸⁷ order dismissing a city sanitation employee;⁸⁸ entry of judgment of fine and imprisonment for contempt;⁸⁹ order directing sale of decedent's land to pay debts;⁹⁰ partial rejection of a claim by the town auditor;⁹¹ order dismissing an appeal.⁹² Likewise, an order by a probate court

directing an executor to turn over funds which he claims to hold as an individual is a final order reviewable by certiorari,⁹³ as is a decree of an orphans' court ordering a restatement of an executor's account, allowing exceptions, and referring the account to auditors.⁹⁴ Where a garnishment based on a judgment already obtained is disposed of by a finding against the traverse to the answer of the garnishee, amounting to a discharge of the garnishee, such finding is a final judgment reviewable by certiorari, although, pending the trial, additional garnishment summons was served on the garnishee.⁹⁵

(2) Intermediate Appellate Courts

A judgment of an intermediate appellate court is final, as to the right to certiorari, only when it disposes of the controversy and leaves nothing to be done below except to execute it.

A judgment or decree of an intermediate appellate court which disposes of the controversy and leaves nothing further to be done in the trial court except to carry the mandate of such appellate court into execution is a final adjudication of the cause in so far as review by certiorari is concerned.⁹⁶ Where, however, the intermediate appellate court reverses the judgment below and remands the cause for further proceedings, there is ordinarily no such final determination as will support a review by certiorari.⁹⁷ An exception to the foregoing rules is

76. U.S.—Chicago, etc., R. Co. v. Osborne, Iowa, 13 S.Ct. 281, 146 U.S. 354, 36 L.Ed. 1002—Meagher v. Minnesota Thresher Mfg. Co., Minn., 12 S.Ct. 876, 145 U.S. 608, 36 L.Ed. 834—Rice v. Sanger, Kan., 12 S.Ct. 664, 144 U.S. 197, 36 L.Ed. 403—McLish v. Roff, Ind.T., 12 S.Ct. 118, 141 U.S. 661, 35 L.Ed. 893.

77. N.J.—Harrison v. Sloan, 6 N.J. Law 410.

78. Minn.—State v. District Court of Jackson County, 159 N.W. 965, 134 Minn. 435.

79. Tenn.—Beeler v. Hall, 11 Humphr. 445.

80. Ga.—Reed v. V. H. Kriegshaber & Son, 160 S.E. 560, 44 Ga.App. 64.

Decision affirming judgment overruling motion for new trial was not reviewable by certiorari, where original verdict and judgment was against special plea of no partnership.—Reed v. V. H. Kriegshaber & Son, *supra*.

81. Iowa.—Lloyd v. Spurrier, 72 N.W. 638, 103 Iowa 744.

82. Mo.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335.

83. Ga.—Barnes v. Fleetwood, 63 S.E. 60, 5 Ga.App. 296.

84. N.Y.—Peo. v. Westchester County, 67 N.Y.S. 981, 57 App.Div. 135.

85. Or.—Southern Oregon Co. v. Coos County, 47 P. 352, 30 Or. 250.

86. N.J.—Cozens v. Dickinson, 3 N.J. Law 99.

87. W.Va.—Sherman Dist. Bd. of Education v. Hopkins, 19 W.Va. 84.

88. N.Y.—Weinstock v. Hammond, 200 N.E. 581, 270 N.Y. 64, reversing 283 N.Y.S. 776, 245 App.Div. 614.

89. N.Y.—Peo. v. Donohue, 22 Hun. 470.

90. N.J.—State v. Hanford, 11 N.J. Law 71.

91. N.Y.—Peo. v. Hannibal, 20 N.Y.S. 165, 65 Hun 414.

92. Mich.—Peo. v. Wayne County Ct. Judges, 1 Mich. 359.

93. Minn.—In re Martin's Estate, 235 N.W. 279, 182 Minn. 576.

94. N.J.—Johnson v. Eicke, 12 N.J. Law 316.

95. Ga.—Southern Pac. Co. v. Davidson-Paxon Co., 165 S.E. 862, 45 Ga.App. 719.

96. Fla.—Ulsch v. Mountain City Mill Co., 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 104 Fla. 418—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320.

Directing judgment

Judgment of circuit court reversing judgment of civil court of record and directing judgment for defendant constitutes final adjudication.—Ulsch v. Mountain City Mill Co., 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 103 Fla. 932, 104 Fla. 418.

Judgment of affirmance by the circuit court of an invalid judgment of a lower court may be quashed on certiorari.—Western Union Telegraph Co. v. O. H. Wright & Co., 84 So. 604, 79 Fla. 600.

97. Fla.—Perlman v. Ryden, 178 So. 911—Miami Poultry & Egg Co. v. City Ice & Fuel Co., 172 So. 82—Bringley v. C. I. T. Corporation, 160 So. 680, 119 Fla. 529—Grodin v. Railway Express Agency, 156 So. 476, 116 Fla. 378—Kilgore v. Larry Dimmitt Inc., 153 So. 138, 114 Fla. 69—Rifas v. Gross, 143 So. 600, 106 Fla. 708—Waddell v. McAllister, 122 So. 578, 97 Fla. 1054—Holmberg v. Toomer, 82 So. 620, 78 Fla. 116.

recognized in some jurisdictions where it appears from the record that the appellate court has violated statutory requirements,⁹⁸ or where it appears that the judgment of reversal amounts to a palpable miscarriage of justice or constitutes a substantial injury to the rights of petitioner,⁹⁹ or where it appears that a judgment of reversal contains an affirmative direction to the court below to proceed in violation of some essential requirement of law in the ultimate judgment which must be rendered pursuant to the appellate court's directions in its mandate.¹

An intermediate appeals court's judgment affirming a lower court's judgment on condition of a remittitur is not final, in the absence of a showing in the record that a remittitur has been entered.²

§ 21. Successive Writs

Successive or alias writs of certiorari are allowed in some jurisdictions.

While it has been held that a second writ cannot be allowed for the same purpose,³ it has also been held that a second writ may issue to bring in new parties,⁴ that, where the writ is improv-

erly directed, the court may order a new or supplementary writ to issue,⁵ and that as many writs may issue as are necessary to bring up the whole record.⁶ A second or alias writ will not be issued where the petitioner has failed to exercise due diligence in procuring the first to be issued and heard,⁷ or, it has been held, unless some extraordinary circumstance is shown, which will warrant its allowance.⁸

Where a certiorari has been dismissed for want of prosecution, a second writ should not be allowed to the prosecutor.⁹ Similarly, where the writ is dismissed on the merits, that is, for the reason that the petitioner therefor was not entitled to it, the judgment of dismissal is a bar to the subsequent issuance of another writ.¹⁰

Affirmance is a bar to the subsequent issuance of another writ, on the application of the prosecutor of the first writ, for the purpose of reviewing the same proceedings.¹¹

In *Georgia* it is the rule that, after a valid writ has been dismissed for informality, another may be awarded on timely application,¹² although the

Remand for new trial

Supreme court will not issue certiorari to judgment of reversal for new trial on writ of error from circuit court.—*Waddell v. McAllister*, 122 So. 578, 97 Fla., 1054.

93. Fla.—*Segall Investment Co. v. Rosedale Delicatessen*, 143 So. 441, 106 Fla. 578—*Miami Transit Co. v. Stephens*, 143 So. 325, 106 Fla. 353—*Butler v. Tunncliffe*, 140 So. 201, 104 Fla. 477—*Ulsch v. Mountain City Mill Co.*, 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 104 Fla. 418.

Reversal of new trial order

Circuit court's order reversing order of civil court of record granting new trial, even if warranted, may be quashed on certiorari when it does not comply with statutory requirements.—*Segall Investment Co. v. Rosedale Delicatessen*, 143 So. 441, 106 Fla. 578—*Miami Transit Co. v. Stephens*, 143 So. 325, 106 Fla. 353.

99. Fla.—*Miami Poultry & Egg Co. v. City Ice & Fuel Co.*, 172 So. 82—*Bringley v. C. I. T. Corporation*, 160 So. 680, 119 Fla. 529—*Ulsch v. Mountain City Mill Co.*, 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 104 Fla. 418—*Brundage v. O'Berry*, 134 So. 520, 101 Fla. 320.

No palpable miscarriage of justice is shown in reversal of judgment for stranger to action of replevin improperly made party thereto on motion of defendants, on ground that stranger was real party in interest.

—*Bringley v. C. I. T. Corporation*, 160 So. 680, 119 Fla. 529.

1. Fla.—*Grodin v. Railway Express Agency*, 156 So. 476, 116 Fla. 378—*Midland Motor Car Co. v. Willys-Overland, Inc.*, 132 So. 692, 101 Fla. 837.

2. Fla.—*Harrell v. Martin*, 154 So. 186, 114 Fla. 147.

Considered as reversal

In the absence of an affirmative showing in the record that a remittitur had been entered as directed, the judgment will be considered to be a reversal of the judgment of the inferior court in its entirety.—*Harrell v. Martin*, supra.

3. Miss.—*Williams v. Williams*, 34 Miss. 143.

11 C.J. p 131 note 29.

4. N.J.—*Citizens' Gas Light Co. v. State*, 44 N.J.Law 648—*State v. Newark*, 40 N.J.Law 92.

5. N.Y.—*Peo. v. McLean*, 80 N.Y. 254—*Starr v. Rochester*, 6 Wend. 564.

However, it has been held that an alias certiorari is unknown to the law.—*Slaght v. Robbins*, 13 N.J.Law 340.

6. Mass.—*Com. v. New Milford*, 4 Mass. 446.

11 C.J. p 131 note 32.

7. N.J.—*Tweddell v. Village of South Orange*, 112 A. 511, 95 N.J.Law 327.

11 C.J. p 131 note 33.

8. Tenn.—*Williams v. Greer*, 4 Hayw. 235.

It is insufficient to show new facts which might have been presented on the first application.—*Williams v. Greer*, supra.

9. N.J.—*Dowd v. Jones*, 35 A. 788, 59 N.J.Law 367.

10. Cal.—*Trenouth v. Superior Court of Santa Clara County*, 223 P. 951, 193 Cal. 330—*Snyder v. Plummer*, 162 P. 1040, 174 Cal. 204.

11 C.J. p 131 note 35.

Application for rehearing is the proper remedy.—*Trenouth v. Superior Court of Santa Clara County*, 223 P. 951, 193 Cal. 330—*Snyder v. Plummer*, 162 P. 1040, 174 Cal. 204.

Application to court in banc

(1) The supreme court in banc will entertain an application for the allowance of a writ of certiorari after the refusal of an allocatur by a single judge of the court, when the substantial rights of the party appear to be involved and the party is not barred by laches or some similar reason.—*Tweddell v. Village of South Orange*, 112 A. 511, 95 N.J.Law 327.

(2) The writ should not issue, however, on an application to that court raising the same questions which were raised on three prior applications to the same court or members thereof.—*Hance v. City of New Brunswick*, 146 A. 673, 7 N.J.Misc. 610.

11. N.J.—*State v. Jersey City Water Comrs.*, 30 N.J.Law 247.

12. Ga.—*Wood v. Fairfax Loan & Investment Co.*, 177 S.E. 260, 50

time has elapsed within which the original certiorari could issue,¹³ although, however, if the original petition was not presented within the required time and was thus properly dismissed, it cannot be revived by a second certiorari within the statutory period relating to the recommencement of a case after nonsuit or dismissal.¹⁴ On the other hand,

if the first petition for the writ is void for any reason, a renewal is properly refused;¹⁵ but to render the original petition void in this connection there must be something inherently defective in the petition itself, something precedent to the issuance of the writ.¹⁶

B. PARTICULAR GROUNDS FOR GRANT OR REFUSAL OF WRIT

§ 22. In General

- a. Matters of public concern
- b. Preservation of harmony in decisions
- c. Inability to obtain impartial trial
- d. Ruling on motion for change of venue
- e. Questions of fact and evidence
- f. Review of incidental proceeding
- g. Review of proceeding not involving property

a. Matters of Public Concern

The writ may lie to review determinations involving important public questions.

The writ has been granted to review matters of important public concern,¹⁷ even where another remedy is available.¹⁸ This is not, however, a universally accepted rule.¹⁹ It has been held that the writ will not lie for such a purpose, where delay will result, unless the proceeding was without jurisdiction or in gross violation of law.²⁰

It has been held that the supreme court should

take original jurisdiction to review the determinations of an inferior quasi-judicial tribunal only in cases involving questions of publici juris.²¹

Where the public interest would be prejudiced by the issuance of the writ, it may be refused, see *supra* § 14. Likewise, the court will not determine questions, even though they be of public interest, if such questions are moot, see *infra* § 32. The availability of the writ where important new questions are involved is considered *infra* § 33.

b. Preservation of Harmony in Decisions

Failure of an intermediate appellate court to follow the decisions of a higher court is reviewable by certiorari in some jurisdictions.

Failure of an intermediate appellate court to follow decisions of a higher court is sometimes held a ground for certiorari.²² Thus, in some jurisdictions the writ may be granted where the court in pronouncing judgment has ignored some previous decision of the higher court,²³ or where an ap-

Ga.App. 123—Allen v. McGuire, 174 S.E. 147, 49 Ga.App. 60—Gragg Lumber Co. v. Collins, 139 S.E. 84, 37 Ga.App. 76—Dillingham v. Eslinger, 122 S.E. 627, 32 Ga.App. 36—Singer Sewing Machine Co. v. W. M. Dacus & Co., 96 S.E. 8, 22 Ga.App. 297.

11 C.J. p 131 note 37.

Certiorari dismissed because premature

Ga.—Dillingham v. Eslinger, 122 S.E. 627, 32 Ga.App. 36.

Certiorari dismissed because of want of verification

Ga.—Singer Sewing Mach. Co. v. W. M. Dacus & Co., 96 S.E. 8, 22 Ga.App. 297.

13. Ga.—Mercer v. Davidson, 6 S.E. 175, 80 Ga. 495.

14. Ga.—Autrey & Peebles v. Carson Naval Stores Co., 115 S.E. 924, 29 Ga.App. 422.

15. Ga.—Wood v. Fairfax Loan & Investment Co., 177 S.E. 260, 50 Ga.App. 123—Fairfax Loan & Investment Co. v. Turner, 175 S.E. 267, 49 Ga.App. 300—Payne v. Manhattan Fruit & Produce Co., 108 S.E. 473, 27 Ga.App. 382—Sing-

er Sewing Mach. Co. v. W. M. Dacus & Co., 96 S.E. 8, 22 Ga.App. 297.

11 C.J. p 155 note 97.

16. Ga.—Singer Sewing Mach. Co. v. W. M. Dacus & Co., *supra*.

Want of valid bond

Ga.—Payne v. Manhattan Fruit & Produce Co., 108 S.E. 473, 27 Ga.App. 382.

Absence of assignment of error

Ga.—Wood v. Fairfax Loan & Investment Co., 177 S.E. 260, 50 Ga.App. 123.

Want of notice of sanction

Ga.—Singer Sewing Mach. Co. v. W. M. Dacus & Co., 96 S.E. 8, 22 Ga.App. 297.

17. Ga.—Fender v. Hodges, 144 S.E. 278, 166 Ga. 727, reversing 142 S.E. 753, 38 Ga.App. 78, conformed to 144 S.E. 676, 38 Ga.App. 78.

N.J.—City of Rahway v. Cleary, 159 A. 313, 10 N.J.Misc. 545, affirmed Rahway Valley Joint Meeting v. Cleary, 162 A. 590, 109 N.J.Law 348.

11 C.J. p 108 note 95.

18. N.J.—City of Rahway v. Cleary, *supra*.

19. Cal.—Hager v. Yolo County, 50 Cal. 473.

20. Mich.—Curran v. Norris, 25 N.W. 500, 58 Mich. 512.

21. Colo.—Clark v. Denver & I. R. R. Co., 239 P. 20, 78 Colo. 48.

22. Mo.—State ex rel Horspool v. Haid, 40 S.W.2d 611, 328 Mo. 327, conformed to Forsythe v. Horspool, App., 49 S.W.2d 687, and quashed State ex rel. Horspool v. Haid, 65 S.W.2d 923, 334 Mo. 196.

11 C.J. p 106 notes 69, 72.

One of functions of certiorari is to preserve harmony in laws as announced by court of appeals and make them consistent with supreme court rulings.—State ex rel. Horspool v. Haid, *supra*.

23. Colo.—Peo. v. Court of App., 82 P. 483, 34 Colo. 291—Peo. v. Court of App., 79 P. 1028, 33 Colo. 261.

Erroneous but not contrary to decisions

Where the supreme court decided that a petition stated a cause of action in mandamus, but expressly left the question as to whether the action could be maintained on the facts open to the trial court, a de-

pellate court fails to follow the rulings of the supreme court.²⁴ It has been held, however, that the commission of an error by an intermediate appellate court will not require the issuance of certiorari to review and revise the judgment of such court where it had reversed the judgment of the original court on other grounds not complained of.²⁵

c. Inability to Obtain Impartial Trial

Prejudice of the judge or members of an inferior tribunal is not generally considered a good ground for review by certiorari.

It has been held that the writ of certiorari may be granted on the ground that a fair and impartial trial cannot be had in the inferior tribunal.²⁶ It is doubtful, however, if this is a ground for the writ in most jurisdictions, at least unless the judge is so disqualified as perhaps to constitute a want or

excess of jurisdiction,²⁷ or unless the determination of the judge or members of the inferior tribunal is such as to be reviewable as being illegal or in excess of his or their authority.²⁸ Thus, it has been held that prejudice on the part of the judge or members of an inferior tribunal, or a suspicion of improper conduct on their part does not constitute a sufficient ground for the issuance of the writ.²⁹

d. Ruling on Motion for Change of Venue

There is some disharmony of opinion as to whether or not certiorari will lie to a ruling on a motion for change of venue.

It is the rule in some jurisdictions that certiorari is a proper remedy to review an order denying a change of venue to one entitled thereto,³⁰ at least when entitled thereto as a matter of right.³¹

cision by the court of appeals that the facts established that mandamus was not the proper remedy, although erroneous, is not reviewable by certiorari as contrary to the decision of the supreme court.—*People v. Court of Appeals*, 82 P. 433, 34 Colo. 291.

24. La.—*Brown Shoe Co. v. Hill*, 25 So. 634, 51 La. Ann. 920—*West v. De Moss*, 24 So. 325, 50 La. Ann. 1349.

Mo.—*State ex rel. State Highway Commission of Missouri v. Shain*, 102 S.W.2d 666, quashing record and remanding cause *State ex rel. State Highway Commission v. Lindley*, App., 96 S.W.2d 1065—*State ex rel. Horspool v. Haid*, 40 S.W.2d 611, 328 Mo. 327, conformed to *Forsythe v. Horspool*, App., 49 S.W.2d 687, and quashed *State ex rel. Horspool v. Haid*, 65 S.W.2d 923, 334 Mo. 196.

11 C.J. p 106 note 71.

Where court of appeals refuses to be guided, in clear case, by the well established jurisprudence, as defined and laid down by the supreme court, the writ lies to enforce uniformity of jurisprudence throughout the state.—*Brown Shoe Co. v. Hill*, 25 So. 634, 51 La. Ann. 920—*West v. De Moss*, 24 So. 325, 50 La. Ann. 1349.

25. Ala.—*Cox v. Stuart*, 157 So. 460, 228 Ala. 409, denying certiorari 157 So. 458, 26 Ala. App. 231.

26. U.S.—*Fowler v. Lindsey*, Conn., 3 Dall. 411, 1 L. Ed. 658.

As removal and change of venue

The writ may issue as original process to remove a cause and change the venue, when the superior court is satisfied that a fair and impartial trial will not otherwise be obtained.—*Fowler v. Lindsey*, supra.

Denial of motion to disqualify judge

It has been held that a denial of

a motion to disqualify the chairman of a state horse racing commission on the ground of prejudice or personal interest, and the refusal of the commission to hear evidence on such motion, is prejudicial error for which certiorari will lie in the absence of any other remedy; and that by failing to petition for a writ of prohibition to prohibit the chairman from sitting at the hearing a licensed racing association and its president did not waive their right to raise question of disqualification of chairman of state division of horse racing to sit at hearing of charges against them in proceeding for certiorari to review and quash record of such hearing.—*Narragansett Racing Ass'n v. Kiernan*, R.I., 194 A. 692.

27. Cal.—*Winning v. Board of Dental Examiners*, 300 P. 866, 114 Cal. App. 658.

N.J.—*Hudson Taxi Co. v. Niedzwicki*, 130 A. 647, 3 N.J. Misc. 1111.

28. N.J.—*New Jersey R., etc., Co. v. Suydam*, 17 N.J. Law 25.

29. Cal.—*Winning v. Board of Dental Examiners*, 300 P. 866, 114 Cal. App. 658.

N.J.—*Hudson Taxi Co. v. Niedzwicki*, 130 A. 647, 3 N.J. Misc. 1111.

Prejudice of members of board of dental examiners does not disqualify members from hearing proceedings to revoke dental license, nor constitute grounds for granting certiorari to review order of board revoking license.—*Winning v. Board of Dental Examiners*, 300 P. 866, 114 Cal. App. 658.

Objection that plaintiff's attorney was acting for judge of county in which case was tried, in that filing fees were paid out of deposit of judge with county clerk, and that judge was in reality practicing in

violation of statute, was not shown by evidence to have influenced judge sitting in case, and such impropriety cannot be raised by certiorari.—*Hudson Taxi Co. v. Niedzwicki*, 130 A. 647, 3 N.J. Misc. 1111.

30. Vt.—*Carpenter v. Central Vermont R. Co.*, 80 A. 657, 84 Vt. 538. Wash.—*State ex rel. Hand v. Superior Court of Gray's Harbor County*, 71 P.2d 24—*State ex rel. Gamble v. Superior Court for King County*, 66 P.2d 1135—*State v. Superior Court of Washington for Clarke County*, 164 P. 516, 96 Wash. 41.

Wis.—*State v. Circuit Court of Outagamie County*, 208 N.W. 490, 189 Wis. 629—*State ex rel. W. J. Taylor Co. v. Elliott*, 84 N.W. 149, 108 Wis. 163.

Final judgment

The denial of a change of venue has been held a final judgment so as to be reviewable on certiorari.—*Carpenter v. Central Vermont R. Co.*, 80 A. 657, 84 Vt. 538.

31. Wash.—*State ex rel. Hand v. Superior Court of Grays Harbor County*, 71 P.2d 24—*State ex rel. Gamble v. Superior Court for King County*, 66 P.2d 1135—*State v. Superior Court of Washington for Clarke County*, 164 P. 516, 96 Wash. 41.

Right independent of merits

(1) Where a party has a right, independent of merits of issues pending, to trial in a particular place, an extraordinary legal remedy, such as certiorari, is proper method of procedure to test such right in supreme court.—*State ex rel. Hand v. Superior Court of Grays Harbor County*, Wash., 71 P.2d 24—*State ex rel. Gamble v. Superior Court for King County*, Wash., 66 P.2d 1135—*State v. Superior Court of Washington for*

In other jurisdictions, the erroneous denial of motion for change of venue is not necessarily such an "illegality," see *infra* § 24 a, as will constitute a ground for review by certiorari.³² Thus, where the error complained of was merely an error in the determination of a disputed fact which the lower court had jurisdiction to decide, the writ will not lie.³³ If, however, in passing on such a motion the court imposes conditions not authorized by law, it acts illegally, and certiorari will lie to review it³⁴ where there is no appeal from such order.³⁵ Even this presupposes that the motion so overruled was proper under the statute pertaining thereto.³⁶

In still other jurisdictions, it is held that an order denying a change of venue is not final and cannot be reviewed by certiorari.³⁷

In a jurisdiction where the writ will only lie for excess of jurisdiction on great abuse of discretion, the granting of a motion for a change of venue by a court with jurisdiction of the action on a point

not involving discretion is not reviewable by certiorari.³⁸

e. Questions of Fact and Evidence

The writ will not lie to review questions of fact, but may lie where there has been no showing of facts necessary to jurisdiction.

As is shown *infra* § 172, the probative force or the weight and sufficiency of the evidence is not ordinarily reviewable on certiorari, hence the writ will not lie, in the absence of statutory provision to the contrary, for the purpose of reviewing conclusions of fact or rulings involving findings of fact.³⁹ This rule extends to writs sought to review questions of fact determined in intermediate appellate courts.⁴⁰ In some jurisdictions, however, a mistaken finding of fact induced by an error of law apparent of record or the finding of a fact contrary to law is correctable on certiorari.⁴¹ It has also been held that where the decision of the intermediate appellate court shows a misapplication of the law to the facts as a basis for the judg-

Clarke County, 164 P. 516, 96 Wash. 41.

(2) Claim for change of venue independent of merits of issues pending is "right" rather than "privilege" which is properly tested by extraordinary legal remedy, such as certiorari.—State ex rel. Gamble v. Superior Court for King County, *supra*.

32. Iowa.—Barry v. Black Hawk County Dist. Ct., 149 N.W. 449, 167 Iowa 306.

Fact of residence

33. Iowa.—McEvoy v. Cooper, 226 N.W. 13, 208 Iowa 649.

34. Iowa.—Barry v. Black Hawk County Dist. Ct., 149 N.W. 449, 167 Iowa 306.

35. Iowa.—Atchison, T. & S. F. Ry. Co. v. Mereshon, 165 N.W. 86, 181 Iowa 892.

36. Iowa.—Thornburg v. Mereshon, 249 N.W. 202, 216 Iowa 455.

No right to second motion

Certiorari will not lie to review the denial of a second change of venue filed after the answer, where the first motion for change of place of trial was overruled, where under the statutory procedure a second motion could not be filed after answer, and where certiorari could not issue for the denial of the first motion due to the expiration of the limitations period.—Thornburg v. Mereshon, 249 N.W. 202, 216 Iowa 455.

37. Idaho.—State v. Goode, 44 P. 640, 4 Idaho 730.

38. Colo.—People v. District Court of City and County of Denver, 211 P. 626, 72 Colo. 525.

39. Ala.—Ex parte Galloway, 96 So. 369, 209 Ala. 469, denying certiorari Day v. Galloway, 96 So. 365, 19 Ala.App. 130.—Ex parte Sloss-Sheffield Steel & Iron Co., 92 So. 458, 207 Ala. 219.—Ex parte Sansom, 87 So. 408, 205 Ala. 54, denying certiorari Sansom v. Covington County Bank, 87 So. 406, 17 Ala.App. 556.—Ex parte Acha Hermanos y Cia, 85 So. 265, 204 Ala. 85, denying certiorari Acha Hermanos y Cia v. Rosengrant, 84 So. 399, 17 Ala.App. 267.

Fla.—Robbins Holding Co. v. Morris, 179 So. 404.

Ga.—Staples v. Almand, 94 S.E. 280, 21 Ga.App. 281.

Iowa.—McEvoy v. Cooper, 226 N.W. 13, 208 Iowa 649.

La.—Llorens v. McCann, 175 So. 442, 187 La. 642, reversing 171 So. 481.—Barkett v. Booth, 99 So. 411, 155 La. 483.

Mass.—Murphy v. Justices of Municipal Court of Dorchester Dist. of City of Boston, 116 N.E. 969, 228 Mass. 12.

N.D.—State v. Frazier, 182 N.W. 545, 47 N.D. 314.

S.D.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.

Appropriate office of the writ of certiorari is to correct errors of law apparent on the face of the record, and it will not lie to review conclusions of fact unless such review is specially authorized by statute.—Ex parte Big Four Coal Mining Co., 104 So. 764, 213 Ala. 305.

No fact issue raised

Where an answer denying surety's right to injunction and to equitable

set-off raises only issues of law, the supreme court has jurisdiction to grant certiorari and supersedeas.—Cockrill v. People's Sav. Bank, 293 S.W. 996, 155 Tenn. 342.

40. Ala.—Birmingham Gas Co. v. Sanders, 162 So. 532, 230 Ala. 649, denying certiorari 162 So. 531, 26 Ala.App. 455.—Mobile Pure Milk Co. v. Coleman, 161 So. 829, 230 Ala. 432, certiorari denied 161 So. 826, 26 Ala.App. 402.—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 865, denying certiorari 156 So. 859, 26 Ala.App. 179.—Ex parte Harris Transfer & Warehouse Co., 106 So. 223, denying certiorari Cotton v. Harris Transfer & Warehouse Co., 106 So. 220, 21 Ala.App. 136.

Fla.—Ex parte Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, 174 So. 464, 128 Fla. 315.

La.—Llorens v. McCann, 175 So. 442, 187 La. 642, reversing, App., 171 So. 481.—C. H. Rice & Son v. Payne, 92 So. 395, 151 La. 949.

Permissible fact determination

Certiorari will not lie to quash a judgment of an intermediate appellate court affirming a judgment of a lower court which was simply the permissible result of a judicial determination of a disputed issue of fact.—Ex parte Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, 174 So. 464, 128 Fla. 315.

41. Miss.—Gulf R. Co. v. Adams, 38 So. 348, 85 Miss. 772.

ment of that court, the writ must issue unless it appears that the judgment is correct, notwithstanding the error.⁴²

The writ will not lie because of errors committed in passing on the admissibility of evidence, where the inferior court or tribunal has jurisdiction to do so,⁴³ and where it conducted its proceedings in the mode required by law⁴⁴ and had sufficient evidence before it to authorize the determination made.⁴⁵

Where a tribunal is clothed with authority and jurisdiction to act only on the existence of certain facts and it receives no evidence tending to show the existence of such facts, its action is reviewable by certiorari as being void for want of jurisdiction, where no right of appeal is available.⁴⁶ Similarly, where the power to make the order complained of depends on the existence of facts as to which there is no evidence whatever, the question is one of law subject to review by direct attack on a writ of certiorari.⁴⁷ Furthermore, where in the exigencies of the case such facts are required to be established by evidence of a particular kind and the showing made totally fails in this respect, the writ will lie.⁴⁸

f. Review of Incidental Proceeding

Certiorari does not lie to remove a proceeding in an action or suit which is merely incidental to it.

The writ will not lie to remove a proceeding in an action or suit which is but a part of and merely incidental to it.⁴⁹ It will not lie solely to review a question of the taxation of costs.⁵⁰

g. Review of Proceeding Not Involving Property

It is not necessary that property rights be involved.

In proper cases the writ will lie from a superior court to an inferior tribunal, irrespective of the question whether property rights are involved in the matter or not.⁵¹

§ 23. Want or Excess of Jurisdiction

- a. As ground for issuance of writ generally
- b. Excess of jurisdiction as ground
- c. What constitutes jurisdictional error
- d. Jurisdictional error as sole ground

a. As Ground for Issuance of Writ Generally

Want or excess of jurisdiction on the part of courts or quasi-judicial bodies is a good ground for the issuance of certiorari.

The writ of certiorari will lie to inquire into and review determinations made without jurisdiction or in excess of the jurisdiction conferred.⁵² This is

42. Ala.—Mobile Pure Milk Co. v. Coleman, 161 So. 329, 230 Ala. 432, denying certiorari 161 So. 326, 26 Ala.App. 402.

43. Cal.—Goodall v. Superior Court in and for Santa Barbara County, 174 P. 924, 37 Cal.App. 723.

N.Y.—People ex rel Delaware County v. State Tax Commission, 172 N.Y.S. 445, 184 App.Div. 691.

S.D.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.

Order based on conflict of evidence, being an error committed within court's jurisdiction, cannot be reviewed on writ of review.—Goodall v. Superior Court in and for Santa Barbara County, 174 P. 924, 37 Cal.App. 723.

44. N.Y.—People ex rel Delaware County v. State Tax Commission, 172 N.Y.S. 445, 184 App.Div. 691.

45. N.Y.—People ex rel Delaware County v. State Tax Commission, supra.

46. Cal.—Titcomb v. Superior Court in and for Santa Clara County, 29 P.2d 206, 220 Cal. 34—Osborne v. Baughman, 259 P. 70, 85 Cal.App. 224—In re Paulsen's Estate, 170 P. 855, 35 Cal.App. 654.

47. Cal.—Hotaling v. Superior Court, City and County of San Francisco, 217 P. 73, 191 Cal. 501, 29 A.L.R.

127—Goodall v. Superior Court in and for Santa Barbara County, 174 P. 924, 37 Cal.App. 723.

48. Where verified petition or affidavit on application for ex parte order for temporary custody of children does not allege jurisdictional fact of children's residence in county, ex parte orders based thereon, being void, will be annulled on certiorari.—Titcomb v. Superior Court in and for Santa Clara County, 29 P.2d 206, 220 Cal. 34.

49. Iowa.—Polk County v. State Dist. Ct., 110 N.W. 1054, 133 Iowa 710.

N.Y.—Peo. v. Corey, 19 Wend. 633—Hosmer v. Williams, 7 Cow. 494. 11 C.J. p 108 note 90.

50. Tenn.—Wright v. Eakin, 270 S.W. 992, 151 Tenn. 681.

51. Ill.—Bartunek v. Lastovken, 183 N.E. 333, 350 Ill. 380. 11 C.J. p 106 note 73.

52. U.S.—Pickwick-Greyhound Lines v. Shattuck, C.C.A.Kan., 61 F.2d 485.

Ala.—Ex parte Wilkey, 172 So. 111, 233 Ala. 375—Ex parte State ex rel. Rush, 171 So. 630, 233 Ala. 345—Ex parte Tulley, 149 So. 700, 227 Ala. 277—Fowler v. Fowler, 122 So. 444, 219 Ala. 457—Ex parte Big Four Coal Mining Co., 104 So. 746,

213 Ala. 305—Woodward Iron Co. v. Bradford, 90 So. 803, 606 Ala. 447—Woodward Iron Co. v. Bradford, 90 So. 803, 206 Ala. 447.

Ariz.—Du Vall v. Board of Medical Examiners of Arizona, 66 P.2d 1026—Chalmers v. Phelps, 53 P.2d 731, 47 Ariz. 64—State v. Superior Court of Maricopa County, 5 P.2d 192, 39 Ariz. 242.

Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939—Chevrolet Motor Co. v. Landers Chevrolet Co., 37 S.W.2d 873, 183 Ark. 669—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030—Brown & Hackney v. Stephenson, 248 S.W. 556, 157 Ark. 470—Martin v. Hargrove, 232 S.W. 596, 149 Ark. 383.

Cal.—Treat v. Superior Court in and for City and County of San Francisco, 62 P.2d 147, 7 Cal.2d 636—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384—King v. Superior Court in and for San Diego County, 56 P.2d 263, 112 Cal.App.2d 501—Kempton v. Appellate Division of Superior Court in and for Los Angeles County, 39 P.2d 846, 3 Cal.App.2d 374—Griffith v. Superior Court in and for Los Angeles County, 37 P.2d 142, 1 Cal.

- App.2d 670 — *Ellis v. Superior Court* in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552—*Faias v. Superior Court* in and for Alameda County, 24 P.2d 567, 133 Cal. App. 525—*Summers v. Industrial Accident Commission*, App., 24 P. 2d 366—*Sparks v. Pryor*, 22 P.2d 233, 131 Cal.App. 743—*Maple v. Allen*, 299 P. 571, 114 Cal.App. 109 —*Bayside Land Co. v. Dooley*, 284 P. 479, 103 Cal.App. 253—*Smith v. Superior Court* in and for Yuba County, 264 P. 573, 89 Cal.App. 177—*Osborne v. Baughman*, 259 P. 70, 85 Cal.App. 224—*Pacific Home Bldg. Realty Co. v. Daugherty*, 243 P. 473, 75 Cal.App. 623—*De Matei v. Superior Court* in and for Lake County, 239 P. 853, 74 Cal.App. 147 —*Security Ins. Co. v. Superior Court of California* in and for Marin County, 236 P. 335, 71 Cal. App. 701 — *Metzler v. Superior Court* in and for Humboldt County, 201 P. 139, 54 Cal.App. 59—*McConnell v. Superior Court* in and for Alameda County, 197 P. 680, 51 Cal.App. 744—*Lanterman v. Anderson*, 172 P. 625, 36 Cal.App. 472 —*Zierath v. Superior Court of California* in and for Los Angeles County, 171 P. 112, 35 Cal.App. 788 —*In re Paulson's Estate*, 170 P. 855, 35 Cal.App. 654—*Camm v. Justice's Court of Santa Rosa Tp.*, 170 P. 409, 35 Cal.App. 293.
- Colo.—*Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap*, 265 P. 94, 83 Colo. 360 —*State Board of Medical Examiners v. Spears*, 247 P. 563, 80 Colo. 588, 54 A.L.R. 1498, error dismissed *Spears v. State Board of Medical Examiners of State of Colorado*, 48 S.Ct. 158, 275 U.S. 508, 276 U.S. 588, 72 L.Ed. 398, 719—*People v. District Court of City and County of Denver*, 211 P. 626, 72 Colo. 525.
- D.C.—*Northern Pac. Ry. Co. v. Interstate Commerce Commission*, 23 F. 2d 221, 57 App.D.C. 318, certiorari denied 48 S.Ct. 205, 275 U.S. 572, 72 L.Ed. 433—*U. S. v. Latimer*, 44 App.D.C. 81—*Bates v. District of Columbia*, 8 D.C. 433.
- Fla.—*Robbins Holding Co. v. Morris*, 179 So. 404—*Shayne v. Pike*, 178 So. 903, motion denied 180 So. 382 —*Miami Poultry & Egg Co. v. City Ice & Fuel Co.*, 172 So. 82—*Pitts v. Pitts*, 162 So. 708, 120 Fla. 363 —*Segel v. Staiber*, 144 So. 875, 106 Fla. 946—*Whitlock v. American Central Ins. Co. of St. Louis*, 144 So. 412, 107 Fla. 13—*Des Roches & Watkins Towing Co. v. Third Nat. Bank*, 143 So. 768, 106 Fla. 446 —*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380—*State v. Simmons*, 140 So. 187, 104 Fla. 487—*Edwards v. Knight*, 139 So. 582, 104 Fla. 16, 143 So. 441, 104 Fla. 16—*Brundage v. O'Berry*, 134 So. 520, 101 Fla. 320—*Florida Motor Lines v. Railroad Com'rs*, 129 So. 876, 100 Fla. 538—*Atlantic Coast Line R. Co. v. Florida Fine Fruit Co.*, 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—*American Ry. Express Co. v. Weatherford*, 93 So. 740, 84 Fla. 264—*Haile v. Gardner*, 91 So. 376, 82 Fla. 355—*First Nat. Bank v. Gibbs*, 82 So. 618, 78 Fla. 118—*Harrison v. Frink*, 77 So. 663, 75 Fla. 22.
- Idaho.—*Beus v. Terrell*, 269 P. 593, 46 Idaho 635.
- Ill.—*Frye v. Hunt*, 5 N.E.2d 398, 365 Ill. 32—*Bartunek v. Lastovken*, 183 N.E. 333, 350 Ill. 380—*Brown v. Van Keuren*, 172 N.E. 1, 340 Ill. 118 —*Fisher v. McIntosh*, 115 N.E. 529, 277 Ill. 432—*Shilvock v. Retirement Board of Policemen's Annuity & Benefit Fund*, 1 N.E.2d 727, 285 Ill.App. 178—*Bachechi v. Inlander Paper Co.*, 252 Ill.App. 178—*Elishoff v. Murray*, 235 Ill.App. 438.
- Iowa.—*Home Owners' Loan Corporation v. District Court of Woodbury County*, 272 N.W. 416—*National Ben. Accident Ass'n v. Murphy*, 269 N.W. 15—*Independent School Dist. of Town of Ogden v. Samuelson*, 262 N.W. 169, 220 Iowa 170—*Adams v. Smith*, 250 N.W. 466, 216 Iowa 1365—*Denman v. Sawyer*, 232 N.W. 819, 211 Iowa 56—*Anderson v. Jester*, 221 N.W. 354, 206 Iowa 452 — *Sinnott v. District Court* in and for Clarke County, 207 N.W. 129, 201 Iowa 292—*Turner v. Woodruff*, 185 N.W. 910, 192 Iowa 848—*Mohr v. Civil Service Commission of City of Des Moines*, 172 N.W. 278, 186 Iowa 240.
- La.—*Peeples v. Land*, 160 So. 631, 181 La. 925—*Lavoy v. Tove Bros. Auto & Taxicab Co.*, 105 So. 292, 159 La. 209—*Succession of Macheca*, 84 So. 574, 147 La. 164—*City of Gretna v. Bailey*, 72 So. 996, 140 La. 363.
- Me.—*Miller v. Weisman*, 130 A. 504, 125 Me. 4.
- Mass.—*Marcus v. Board of Street Com'rs of City of Boston*, 147 N.E. 866, 252 Mass. 331.
- Mo.—*State ex rel. Aquamsi Land Co. v. Hostetter*, 79 S.W.2d 463, 336 Mo. 391, quashing *First Nat. Bank v. Aquamsi Land Co.*, App., 70 S.W.2d 90—*State ex rel. Thomas & Proetz Lumber Co. v. Bader*, 41 S.W.2d 168, 328 Mo. 253—*State ex rel. Barlow v. Holtcamp*, 14 S.W. 2d 646, 322 Mo. 258—*State ex rel. Davidson v. Caldwell*, 276 S.W. 631, 310 Mo. 397—*State ex rel. Lunsford v. Landon*, 265 S.W. 529, 304 Mo. 654—*State ex rel. Turner v. Penman*, 282 S.W. 498, 220 Mo.App. 193.
- Mont.—*White v. Corbett*, 52 P.2d 156, 101 Mont. 1—*State v. District Court of Second Judicial Dist.* in and for Silver Bow County, 19 P. 2d 220, 93 Mont. 439—*State v. District Court of Tenth Judicial Dist.* in and for Fergus County, 10 P. 2d 586, 92 Mont. 94—*State v. District Court of Third Judicial District* in and for Powell County, 278 P. 122, 85 Mont. 215—*State v. District Court of Second Judicial Dist.*, 272 P. 242, 83 Mont. 349—*State v. Dist. Court of Sixteenth Judicial Dist.* for Garfield County, 202 P. 387, 61 Mont. 427—*State v. District Court of Second Judicial Dist.* in and for Silver Bow County, 190 P. 295, 58 Mont. 90—*State v. City of Butte*, 188 P. 367, 57 Mont. 368—*State v. Mullendore*, 161 P. 949, 53 Mont. 109.
- Nev.—*State v. District Court of Seventh Judicial Dist.* in and for Mineral County, 273 P. 659, 51 Nev. 206, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330—*State v. Moran*, 176 P. 413, 42 Nev. 356—*Peacock v. Leonard*, 8 Nev. 84.
- N.J. — *Massachusetts Protective Ass'n v. Freund*, 181 A. 905, 116 N.J.Law 65 — *Dorman v. Ushe Building & Loan Ass'n*, 180 A. 413, 115 N.J.Law 337.
- N.Y.—*Peo. v. Metropolitan Bd. of Police*, 39 N.Y. 506—*People ex rel. Monjo v. State Tax Commission*, 217 N.Y.S. 669, 218 App.Div. 1—*Matter of Lauterjung*, 48 N.Y.Super. 308.
- N.D.—*State v. Frazier*, 182 N.W. 545, 47 N.D. 314—*Cofman v. Ousterhouse*, 168 N.W. 826, 40 N.D. 390, 18 A.L.R. 219—*State v. Pollock*, 160 N.W. 511, 35 N.D. 430.
- Okl.—*Walker v. Womack*, 72 P.2d 510—*Ramsey v. Commissioners of Payne County*, 300 P. 339, 149 Okl. 289—*School Dist. No. 20, Carter County v. Walden*, 293 P. 199, 146 Okl. 19—*Dancy v. Owens*, 253 P. 879, 126 Okl. 37—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250—*Harris v. District Court* in and for Nowata County, 173 P. 69, 68 Okl. 231—*Grady County v. Chickasha Cotton Oil Co.*, 164 P. 457, 63 Okl. 201.
- Or.—*Lechleidner v. Carson*, 68 P.2d 482, 156 Or. 482.
- Pa.—*In re Clarke*, 152 A. 92, 301 Pa. 321.
- Philippine. — *Springer v. Odlin*, 3 Philippine 348, 2 Off.Gaz. 327.
- Porto Rico.—*MONTALVO v. Nussa*, 20 Porto Rico 500.
- R.I.—*State v. Coleman*, 190 A. 791, 109 A.L.R. 787 — *Browning v. Browning*, 164 A. 508, 53 R.I. 112 —*Bishop v. Superior Court*, 144 A. 433, 50 R.I. 13—*Scotti v. District Court of Tenth Judicial District*, 109 A. 207, 42 R.I. 556—*Broley v. Superior Court*, 107 A. 104, 42 R.I. 253.
- S.D.—*Austin v. Eddy*, 172 N.W. 517, 41 S.D. 640.
- Tenn.—*Moore v. Chadwick*, 94 S.W.

the primary,⁵³ and indeed in some jurisdictions, as shown in subdivision d of this section, the sole, office of the writ. The writ is granted because of the wrongful assumption and exercise of an unlawful authority, even though no actual injustice has been done.⁵⁴

Threatened usurpation of jurisdiction. Until the tribunal has exceeded its jurisdiction, an application

for the writ is premature, and will generally be refused, for it will not lie to restrain the tribunal from a threatened usurpation of jurisdiction.⁵⁵

Courts. The fundamental rule stated at the beginning of this section applies to a want or excess of jurisdiction on the part of civil courts including, among others, those exercising intermediate appellate jurisdiction,⁵⁶ and to county,⁵⁷ juvenile,⁵⁸ and

2d 223, 170 Tenn. 233—Hicks v. Hicks, 79 S.W.2d 802, 168 Tenn. 539—Hagan v. Henry, 76 S.W.2d 994, 168 Tenn. 223—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450—State v. American Trust Co., 32 S.W.2d 1036, 161 Tenn. 570—Gilbreath v. Willett, 251 S.W. 910, 148 Tenn. 92, 28 A.L.R. 1147—Conners v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

Tex.—Johnson v. Coit, Civ.App., 48 S.W.2d 397.

Utah—Nielson v. Schiller, 66 P.2d 365—Ray v. Cox, 30 P.2d 1062, 83 Utah 499—Hallowel, Jones & Donald v. District Court for Utah County, 26 P.2d 543, 82 Utah 561.

Wash.—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.2d 133, 180 Wash. 587.

Wis.—State ex rel. Rasmussen v. Circuit Court for Kenosha County, 269 N.W. 265, 222 Wis. 628.

11 C.J. p 100 note 77—29 C.J. p 269 note 36.

Equity

It is well settled that, where the chancellor is acting in excess of his jurisdiction, the writ of certiorari will lie in the supreme court.—Gilbreath v. Willett, 251 S.W. 910, 148 Tenn. 92, 28 A.L.R. 1147.

Matter as to which jurisdiction not invoked

Court's jurisdiction and power, until invoked, lie dormant, and if court proceeds, in matter in which its jurisdiction has not been invoked, in summary manner, or in new course different from common law, proceedings are without jurisdiction and common-law certiorari is appropriate remedy to review and quash such proceedings.—Ex parte Wilkey, 172 So. 111, 233 Ala. 375.

Matter as to which jurisdiction exhausted

Employee is entitled to certiorari to quash order of circuit court requiring him to submit to an operation or lose compensation which court had by final judgment awarded to employee, since court exhausted its jurisdiction with respect thereto, in absence of motion to set aside judgment awarding compensation, or motion to grant new trial.—Ex parte

State ex rel. Rush, 171 So. 630, 233 Ala. 345.

In Georgia, it has been held that the question as to the jurisdiction of the court over the subject matter cannot properly be raised by petition for certiorari.—Hillyer v. Magruder, 103 S.E. 738, 25 Ga.App. 501.

53. Mo.—State ex rel. Turner v. Penman, 282 S.W. 498, 220 Mo.App. 193.

R.I.—State v. Coleman, 190 A. 791, 109 A.L.R. 787.

Object of certiorari is to curb excess of jurisdiction and to keep inferior courts and tribunals within their bounds. — Olson v. District Court of Salt Lake County, Utah, 71 P.2d 529, 112 A.L.R. 438.

54. Wis.—State v. Knight, 178 N.W. 253, 172 Wis. 138.

11 C.J. p 102 note 78.

55. R.I.—Chew v. Superior Court, 110 A. 605, 43 R.I. 194.

11 C.J. p 104 note 35, p 110 note 31.

Relief beyond jurisdiction

The question on certiorari to the circuit court, which refused to dismiss an action, is not whether certain of the relief sought was beyond its jurisdiction, but whether any of the relief sought is within its jurisdiction.—Davison v. Circuit Court of Kingsbury County, in Ninth Judicial Circuit, 173 N.W. 737, 42 S.D. 254.

No presumption of improper action

Where the record brought up by certiorari merely shows that the lower court denied petitioner's motion to dismiss the suit against him, it shows no action by the court in the case since such dismissal, and it cannot be presumed that the lower court will proceed without jurisdiction, so that the proper remedy was not certiorari.—Chew v. Superior Court, 110 A. 605, 43 R.I. 194.

56. Cal.—Kempton v. Appellate Division of Superior Court in and for Los Angeles County, 39 P.2d 846, 3 Cal.App.2d 374.

Mo.—State ex rel. Long v. Ellison, 199 S.W. 984, 272 Mo. 571, quashing record Clark v. Long, App., 196 S.W. 409.

Nev.—State v. Breen, 173 P. 555, 41 Nev. 516—Yowell v. District Court of Fourth Judicial Dist., in and for Elko County, 159 P. 632, 39 Nev. 423.

Tenn.—Milne v. Blair, 189 S.W. 685, 136 Tenn. 325.

11 C.J. p 102 note 79.

Correct determination immaterial

Supreme court will quash record of court of appeals on certiorari where amount involved exceeded its jurisdiction, regardless of whether it followed the last decisions of the supreme court.—State ex rel. Long v. Ellison, 199 S.W. 984, 272 Mo. 571, quashing record Clark v. Long, App., 196 S.W. 409.

Essential step omitted

Certiorari will lie to review erroneous assumption of jurisdiction by district court, where an essential statutory step was omitted on appealing to it from justice court.—Yowell v. District Court of Fourth Judicial Dist., in and for Elko County, 159 P. 632, 39 Nev. 423.

Necessity of excess of jurisdiction

Where petition for certiorari in district court of appeal alleged that respondent municipal court exceeded jurisdiction in granting judgment, but did not allege that superior court, also made a party respondent, exceeded its jurisdiction in affirming municipal court's judgment, writ could not be granted against superior court, the proceeding being attempt to obtain second review of municipal court's judgment on matters reviewed by court of competent appellate jurisdiction, and before the writ of certiorari can be granted there must have been an excess of jurisdiction by that court.—Kempton v. Appellate Division of Superior Court in and for Los Angeles County, 39 P.2d 846, 3 Cal.App.2d 374.

57. Ark.—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030.

Fla.—Pitts v. Pitts, 162 So. 708, 120 Fla. 363.

11 C.J. p 102 note 80.

58. D.C.—U. S. v. Latimer, 44 App. D.C. 81.

Excess not shown

Certiorari will not issue to judge of juvenile court on the ground of an excess of authority, where defendant was ordered to pay alimony to his child, to furnish a guaranty, or conditional bond, and in default in furnishing such bond to be held for further orders of the court.—State v. Clark, 78 So. 742, 143 La. 481.

probate courts.⁵⁹

Quasi-judicial bodies. This rule that a want or excess of jurisdiction is a ground for certiorari is not limited to courts or strictly judicial bodies, but includes those of a quasi-judicial nature.⁶⁰ It has even been held that, where a statutory tribunal acts without jurisdiction, the writ will lie to such action, even though nothing has been done thereunder.⁶¹ Among the boards and tribunals exercising quasi-judicial functions to which the general rule has been applied are boards of arbitration,⁶² boards of equalization,⁶³ boards of supervisors,⁶⁴ civil service commissioners,⁶⁵ common councils,⁶⁶ county commissioners,⁶⁷ drain commissioners,⁶⁸ fence viewers,⁶⁹ highway commissioners,⁷⁰ commissioners or boards to regulate dentistry,⁷¹ liquor control boards,⁷² police commissioners,⁷³ school trustees,⁷⁴ town or township boards,⁷⁵ and others of a similar nature.

In tribunals of special and limited jurisdiction the particular facts and circumstances on which their jurisdiction is based must appear on the face of the

proceedings, and if they do not thus appear certiorari will lie.⁷⁶

b. Excess of Jurisdiction as Ground

Excess or overreaching of jurisdiction is a good ground for review by certiorari.

Although "excess" of jurisdiction may be said to be different from "want" of jurisdiction, it is difficult to define, accurately and satisfactorily, what is an "excess" of jurisdiction, although it is often expressly declared a separate ground for the writ.⁷⁷ Indeed, by statute in some states excess of jurisdiction is the only ground mentioned.⁷⁸

Orders exceeding the powers of the court making them have been held to be in excess of jurisdiction and reviewable by the writ.⁷⁹ Furthermore, any departure from the recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there is an inceptive lack of power.⁸⁰ In the case of a tribunal exercising administrative or quasi-judicial powers, excess of jurisdiction has

59. Cal.—Johnson v. Superior Court of California, in and for Fresno County, 247 P. 249, 77 Cal.App. 599. Fla.—Pitts v. Pitts, 162 So. 708, 120 Fla. 363.
11 C.J. p 102 note 81.

60. Ariz.—Du Vall v. Board of Medical Examiners of Arizona, 66 P.2d 1026.

Cal.—Osborne v. Baughman, 259 P. 70, 85 Cal.App. 224—Bryant v. Board of Sup'rs of Orange County, 163 P. 341, 32 Cal.App. 495.
Okla.—Haddock v. Johnson, 194 P. 1077, 80 Okl. 250.

61. N.J.—Public Service Ry. Co. v. City of Camden, 112 A. 421, 95 N. J. Law 190.

62. Mo.—State ex rel. King v. Moreland, App., 189 S.W. 602.

63. Mo.—Ward v. Gentry County Bd. of Equal., 36 S.W. 648, 135 Mo. 309.
11 C.J. p 102 note 88.

64. Cal.—Van Wagener v. MacFarland, 208 P. 345, 58 Cal.App. 115.
11 C.J. p 102 note 86.

65. Ill.—Blake v. Lindblom, 80 N. E. 252, 225 Ill. 555.
11 C.J. p 102 note 92.

66. Del.—Rash v. Allen, 76 A. 370, 24 Del. 444.

Jurisdiction of common council

The writ lies to determine whether a city council has jurisdiction to hear and to determine a contested election case.—Rash v. Allen, supra.

67. N.M.—Frank A. Hubbell Co. v.

Gutierrez, 22 P.2d 225, 37 N.M. 309.

11 C.J. p 102 note 85.

68. Mich.—Bixby v. Goss, 20 N.W. 581, 54 Mich. 551—Grose v. Zierle, 18 N.W. 349, 52 Mich. 542—Null v. Zierle, 18 N.W. 348, 52 Mich. 540.

69. Iowa.—Sinnott v. District Court in and for Clarke County, 207 N. W. 129, 201 Iowa 292.

70. Ill.—Geneseo Highway Comrs. v. Harper, 38 Ill. 103.

71. Cal.—Osborne v. Baughman, 259 P. 70, 85 Cal.App. 224.
11 C.J. p 102 note 93.

72. N.J.—McBride v. Burnett, 178 A. 66, 118 N.J.Eq. 567.
N.Y.—Gifts by Wire v. Bruckman, 2 N.Y.S.2d 215, 253 App.Div. 350.

73. Ga.—Tibbs v. Atlanta, 53 S.E. 811, 125 Ga. 18.

74. Ill.—Miller v. Township 15, School Trustees, 88 Ill. 26—Potter v. School Trustees, 10 Ill.App. 343.

75. Mich.—School Dist. No. 1 Fractional of The Townships of Bethany and Pine River and City of St. Louis v. Joint Township Boards of Bethany and Pine River Tps., 207 N.W. 5, 233 Mich. 327.
11 C.J. p 102 note 87.

76. Ala.—Mayfield v. Tuscaloosa County Comrs., 41 So. 932, 148 Ala. 548.
11 C.J. p 102 note 83.

77. Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.
11 C.J. p 103 note 26.

Excess of jurisdiction defined

Excess of jurisdiction, as distinguished from absence of jurisdiction, means that an act, although within the general power of a tribunal or board, is not authorized and is invalid with respect to the particular proceeding because the conditions which alone authorize the exercise of the general power in respect of it are wanting.—Conners v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

78. Cal.—Griffith v. Superior Court in and for Los Angeles County, 37 P.2d 142, 1 Cal.App.2d 670—Maple v. Allen, 299 P. 571, 114 Cal.App. 109—Booth v. Superior Court of City and County of San Francisco, 254 P. 617, 81 Cal.App. 709.

Idaho.—Beus v. Terrell, 269 P. 593, 46 Idaho 635.

Mont.—State v. District Court of Third Judicial Dist. in and for Powell County, 278 P. 122, 85 Mont. 215.

Nev.—Degiovanni v. Public Service Commission of Nevada, 197 P. 582, 45 Nev. 74.

N.D.—Cofman v. Ousterhous, 168 N. W. 826, 40 N.D. 390, 18 A.L.R. 219.
11 C.J. p 103 note 27.

79. Mont.—State v. District Court of Fourth Judicial Dist., Ravalli County, 190 P. 133, 58 Mont. 50.
11 C.J. p 103 note 28.

80. Cal.—Langdon v. Superior Court in and for Riverside County, 223 P. 72, 65 Cal.App. 41.
11 C.J. p 104 note 34.

been held to include every decision, ruling, or order which materially affects the substantial rights of applicant for the writ, and which it is claimed was either made because of a wrong interpretation of the law, a failure to follow or apply the law, or without any competent evidence to support it, or against the undisputed credible evidence sustaining the burden of proof.⁸¹ Where a quasi-judicial body acts, not on a conflict of evidence, but in spite of any competent evidence, it exceeds its jurisdiction.⁸² A statutory order for the examination of books and papers has been held reviewable on the ground of excess of jurisdiction, where no proper showing is made to support the order.⁸³ An order arbitrarily causing the complaint to be stricken from the files on the ground that it improperly made the judge a party for the sole purpose of disqualifying him has been held reviewable on certiorari on this ground.⁸⁴

On the other hand, an order denying a motion to dismiss,⁸⁵ or an erroneous assumption of fact,⁸⁶ or an erroneous allowance of a motion to put a case on the jury calendar,⁸⁷ or a mere misconception of the law,⁸⁸ has been held not to constitute an excess of jurisdiction reviewable by certiorari. It has also been held that it cannot be said that the court has exceeded its jurisdiction, so as to authorize the writ, merely because it has erred in holding that service of summons in a particular manner, or on a

particular person, conferred jurisdiction over some other person by reason of the legal relationship existing, or alleged to have existed, between the two persons, or has erred in holding that certain conduct or statements of a party or his counsel in open court constituted a general appearance whereby the court acquired jurisdiction over the person.⁸⁹

c. What Constitutes Jurisdictional Error

- (1) In general
- (2) Want of service or notice
- (3) Original want of jurisdiction where case appealed
- (4) Divestiture of jurisdiction by dismissal of appeal

(1) In General

Jurisdictional error relating to either the parties or to the subject matter is reviewable.

Jurisdictional error may relate either to the person or to the subject matter.⁹⁰ It may consist of: (1) Want of notice or the absence of some preliminary proceeding necessary to give jurisdiction to the inferior court. (2) Want of jurisdiction in any court. (3) Want of jurisdiction of the particular court.⁹¹ Lack of jurisdiction is not shown by erroneous views, incorrect reasonings, or the erroneous admission of evidence,⁹² nor by failure to make out a cause of action.⁹³ So, defective pleadings are not jurisdictional,⁹⁴ and the writ will not lie to re-

81. Utah.—Board of Equalization of Kane County v. State Tax Commission of Utah, 50 P.2d 418, 88 Utah 219, rehearing denied 54 P.2d 1214, 88 Utah 228.

82. Cal.—Osborne v. Baughman, 259 P. 70, 85 Cal.App. 224.

83. Mont.—State v. Second Judicial Dist. Ct., 71 P. 602, 27 Mont. 441, 94 Am.S.R. 831.

84. Cal.—Younger v. Santa Cruz Superior Ct., 69 P. 485, 136 Cal. 632.

85. Cal.—Huntington Park Impr. Co. v. Los Angeles County Super. Ct., 121 P. 701, 17 Cal.App. 692.

86. Mont.—State v. Mullendore, 161 P. 949, 53 Mont. 109.

87. Cal.—Booth v. Superior Court of City and County of San Francisco, 254 P. 617, 81 Cal.App. 709.

88. Utah.—Hoffman v. Lewis, 87 P. 167, 31 Utah 179.

89. Utah.—Page v. Salt Lake City Commercial Nat. Bank, 112 P. 816, 38 Utah 440.

90. Ala.—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

Ariz.—City of Phoenix v. Greer, 29 P.2d 1062, 43 Ariz. 214.

Ark.—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030.

Fla.—E. B. Elliott Co. v. Turrentine, 151 So. 414, 113 Fla. 210.

Ill.—Shilvock v. Retirement Board of Police Annuity & Benefit Fund, 1 N.E. 727, 285 Ill.App. 178.

Pa.—Sechrist v. York R. Co., 26 Pa. Dist. 658—Gates v. Sawyer, 14 Pa. Dist. 87.

11 C.J. p 104 note 36.

Distinctions stated

(1) By "jurisdiction of the parties" is meant the presence in court of the parties whose rights are to be concluded or affected by the judgment rendered, and "jurisdiction of the subject matter" means jurisdiction of the nature of the action and the relief sought.—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

(2) Jurisdiction of the subject matter refers to the power to deal with the general abstract question, to hear the particular facts in any case relating to such question, and to determine whether or not they are sufficient to justify the exercise of that power.—City of Phoenix v. Greer, 29 P.2d 1062, 43 Ariz. 214.

91. D.C.—Bradshaw v. Earnshaw, 11 App.D.C. 495.

Jurisdiction held present

(1) Action against city for inju-

ries from police officer's negligence.—City of Phoenix v. Greer, 29 P.2d 1062, 43 Ariz. 214.

(2) Bill to set aside mortgage foreclosure and permit redemption.—Ex parte Kelly, 128 So. 443, 221 Ala. 339.

Jurisdiction shown precluding review

(1) Demand in superior and small claims court for money paid defendant under misrepresentation of facts under settlement agreement.—Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County, 37 P.2d 159, 1 Cal.App.2d 634.

(2) Petition for removal of minor's guardian.—Ex parte Cabaniss, 178 So. 1, 235 Ala. 181.

92. Cal.—Central Pac. R. Co. v. Placer County Bd. of Equalization, 43 Cal. 365.

11 C.J. p 104 note 38.

93. Cal.—Southern Pac. Co. v. Kern County Super. Ct., 150 P. 397, 404, 27 Cal.App. 240.

94. Ark.—St. Louis, etc., R. Co. v. State, 17 S.W. 806, 55 Ark. 200.

view the action of a judge in appointing a referee.⁹⁵ Likewise, the omission of a necessary party is not a jurisdictional defect.⁹⁶ A court does not exceed its jurisdiction so as to render its judgment reviewable by certiorari merely because it decides a case on an issue which was not involved, and hence the determination of collateral matters not involved cannot be said to be without the jurisdiction of the court.⁹⁷ Defects in a summons actually served or irregularities in the service have been held not to constitute jurisdictional error.⁹⁸ It has been held, however, that fatal defects in the summons which invalidate the process and prevent the attachment of jurisdiction over the person served therewith is reviewable by certiorari.⁹⁹ The correction of a judgment,¹ or the setting aside of a default,² by a court with authority to do so is not jurisdictional. The fact that a superior court may have committed error in reversing the judgment of a municipal court does not make it a jurisdictional error.³ The expiration of the statute of limitations, even if a good defense, does not deprive a quasi-judicial body of jurisdiction.⁴

On the other hand, certiorari will lie to judg-

ments or orders made by a trial court without authority so to act.⁵ There is a want of jurisdiction where the judge before whom the proceeding is heard is disqualified to sit.⁶ The making of an order by a lower court, after an appeal has been taken and a stay bond filed, is without jurisdiction.⁷ The unauthorized cancellation by one judge of an order made by another,⁸ the granting of an injunction beyond the court's power,⁹ and the unauthorized allowance of a continuance in a foreclosure suit under a mortgage moratorium act,¹⁰ have also been held to be jurisdictional errors in this connection. Moreover, the rendition of a decree or judgment after plaintiff has dismissed the suit may be reviewed.¹¹ The granting of a new trial solely on a ground not designated in the controlling statute, as shown by its order, is a jurisdictional error reviewable by the writ.¹² Furthermore, it has been held that a refusal to award costs where their allowance is mandatory under the statute is jurisdictional and reviewable by certiorari.¹³

Refusal to dismiss an appeal, where the appellate court is without jurisdiction, is reviewable.¹⁴

Fraud on jurisdiction. Certiorari has been held

95. Mich.—Woodin v. Phoenix, 2 N. W. 923, 41 Mich. 655, 32 Am.R. 172.

96. Ill.—Hine v. Roberts, 141 N.E. 166, 309 Ill. 439.

11 C.J. p 104 note 44.

97. Colo.—Peo. v. Court of App., 69 P. 606, 30 Colo. 8.

98. Ark.—St. Louis, I. M. & S. R. Co. v. State, 17 S.W. 806, 55 Ark. 200.

99. Utah.—Wasatch Livestock Loan Co. v. District Court in and for Uintah County, 46 P.2d 399, 86 Utah 422.

1. Erroneous "correction"

Iowa.—Snyder v. Fahey, 168 N.W. 117, 183 Iowa 1118.

2. Iowa.—Wagoner v. Ring, 240 N.W. 634, 213 Iowa 1123.

3. Cal.—Rio Grande Oil Co. v. Superior Court of Los Angeles County, 260 P. 557, 86 Cal.App. 187.

4. Cal.—Hartman v. Board of Chiropractic Examiners, App., 66 P.2d 705.

5. Ark.—Hilger v. J. R. Watkins Medical Co., 214 S.W. 49, 139 Ark. 400.

Particular orders or judgments held reviewable

(1) Amending judgment by substituting party.—E. B. Elliott Co. v. Turrentine, 151 So. 414, 113 Fla. 210.

(2) Compelling answer to petition and motion to transfer.—Phoenix Ins. Co. of Hartford, Conn., v. Fuller, 250 N.W. 499, 216 Iowa 1201.

(3) Distributing funds on foreclosure receivership.—Carlson v. J. G. Ruddle Properties, 38 P.2d 149, 2 Cal.2d 17.

(4) Granting new trial.—Quevedo v. Superior Court in and for San Bernardino County, 21 P.2d 998, 131 Cal.App. 698.

(5) Granting supersedeas.—Chalmers v. Phelps, 53 P.2d 731, 47 Ariz. 64.

(6) Penalizing sheriff of county in another circuit for refusing to serve summons.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478.

(7) Sale under void judgment.—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 659, 51 Nev. 206, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

(8) Vacating and setting aside findings.—Treat v. Superior Court in and for City and County of San Francisco, 62 P.2d 147, 7 Cal.2d 636.

(9) Vacation judgment.—Hilger v. J. R. Watkins Medical Co., 214 S.W. 49, 139 Ark. 400.

6. Mont.—State v. District Court of Fourth Judicial Dist., Ravalli County, 190 P. 133, 58 Mont. 50. 11 C.J. p 104 note 45.

Order for change of venue made by a judge against whom an affidavit of disqualification for imputed bias has been filed without calling in another judge is in excess of jurisdiction and may be annulled by writ

of review.—State v. District Court of Fourth Judicial Dist., Ravalli County, *supra*.

7. Cal.—Los Angeles City Water Co. v. Los Angeles County Super. Ct., 57 P. 216, 124 Cal. 385.

8. Iowa.—Denman v. Sawyer, 232 N.W. 819, 211 Iowa 56.

9. Tenn.—Hagan v. Henry, 76 S.W. 2d 994, 168 Tenn. 223.

Court's failure to rule on motion

In election contest, failure of circuit court to rule on motion to dissolve injunction restraining defendant from interfering with plaintiff's possession of office, after delay of nearly sixty days, was held not sufficient to defeat defendant's right to seek relief from injunction by petition for certiorari and supersedeas.—Hagan v. Henry, 76 S.W.2d 994, 168 Tenn. 223.

10. Iowa.—Home Owners' Loan Corporation v. District Court of Woodbury County, 272 N.W. 416.

11. Iowa.—Lyon v. Craig, 238 N.W. 452, 213 Iowa 36. 11 C.J. p 105 note 47.

12. Cal.—Diamond v. Superior Court of California in and for City and County of San Francisco, 210 P. 36, 189 Cal. 732.

13. Cal.—Bue v. Superior Court in and for Shasta County, 269 P. 553, 93 Cal.App. 147.

14. Ariz.—Terr. v. Doan, 60 P. 893, 7 Ariz. 89.

Cal.—Thomas v. Hawkins, 107 P. 578,

to lie where there was a fraud on the jurisdiction in an action on a usurious note.¹⁵

(2) Want of Service or Notice

Certiorari lies to review the question as to jurisdiction over the person by service and to review the court's jurisdiction to make *ex parte* orders without notice.

Certiorari lies to raise the question whether proper service has been made and jurisdiction acquired over the person.¹⁶ Actual notice received by a party to proceedings before an inferior statutory tribunal will, however, generally bar relief by certiorari, although it was not received in the form or through the channel provided by the statute.¹⁷

Where notice of the appointment of a receiver is required to be given after the appearance of defendant, an order appointing a receiver, made on *ex parte* application after the appearance of defendant in the action, has been held to be made without jurisdiction so as to be reviewable.¹⁸ An order vacating a judgment of dismissal without giving defendant notice thereof, as required by statute, is reviewable on the ground that it is void for want of jurisdiction.¹⁹ The dissolution of an injunction on defendant's application, without notice to plaintiff or any hearing, may be reviewed, as the court lacks the power to dissolve an injunction under such circumstances.²⁰ Where, however, a court has jurisdiction to correct its records, an objection to an order correcting the record, as being in excess of the court's jurisdiction because made *ex parte* without notice to petitioner, will not be reviewed by certiorari.²¹

(3) Original Want of Jurisdiction Where Case Appealed

The decisions are in conflict as to whether an original want of jurisdiction will warrant the issuance of the writ where the court to which the case was appealed has jurisdiction.

It has been held that want of jurisdiction in the court below is equally a want of it in the appellate court, so far as the right to the writ is concerned.²² It is the rule in other jurisdictions that the fact that the court in which the proceedings were originally instituted was without jurisdiction, or acted in excess of its jurisdiction, is not a ground for the writ where the court to which such proceedings were transferred had jurisdiction.²³

(4) Divestiture of Jurisdiction by Dismissal of Appeal

The erroneous dismissal of an appeal is not reviewable by certiorari as a jurisdictional error.

The dismissal of an appeal is not reviewable by certiorari because of error therein, since erroneously to dismiss an appeal is no more jurisdictional than erroneously to decide the merits of a cause.²⁴ Thus, a court, in dismissing an appeal from a justice on the ground that an undertaking has not been filed in a justice's court, does not exceed its jurisdiction so as to authorize a review by certiorari.²⁵ In other words, the improper divestiture of jurisdiction, such as an erroneous dismissal of an appeal, is not an excess of jurisdiction so as to be reviewable. In jurisdictions where the scope of the writ is very broad and not confined to jurisdictional questions, the writ has been held to lie where an appeal has been improperly dismissed,²⁶ or

12 Cal.App. 327 — *Bergevin v. Wood*, 105 P. 935, 11 Cal.App. 643.

15. Tenn.—*Dews v. Eastham*, 2 Yerg. 463.

16. Fla.—*Pitts v. Pitts*, 162 So. 708, 120 Fla. 363.

Mass.—*Hall v. Staples*, 44 N.E. 351, 166 Mass. 399—*Grace v. Newton Bd. of Health*, 135 Mass. 490.

Utah.—*Wasatch Livestock Loan Co. v. District Court in and for Uintah County*, 46 P.2d 399, 86 Utah 422. 11 C.J. p 105 note 49.

Invalid summons

Utah.—*Wasatch Livestock Loan Co. v. District Court in and for Uintah County*, *supra*.

17. Mass.—*Morrison v. Selectmen of Town of Weymouth*, 181 N.E. 786, 279 Mass. 486.

18. Idaho.—*Cummings v. Steele*, 59 P. 15, 6 Idaho 666.

19. Iowa.—*Owen v. Smith*, 136 N.W. 119, 155 Iowa 463.

20. La.—*State v. Monroe*, 23 So. 608, 50 La. Ann. 642.

21. Cal.—*Halpern v. Superior Court in and for Alameda County*, 212 P. 916, 190 Cal. 384.

22. Idaho.—*Nordyke, etc., Co. v. McConkey*, 64 P. 893, 7 Idaho 562. 11 C.J. p 105 note 53.

23. Cal.—*Meads v. Warne*, 23 P.2d 773, 133 Cal.App. 27—*De Matei v. Superior Court in and for Lake County*, 239 P. 853, 74 Cal.App. 147—*Bogmuda v. Young*, 207 P. 915, 58 Cal.App. 19. 11 C.J. p 105 notes 54, 55.

Submission to jurisdiction by appeal

(1) Certiorari will not lie to review an affirmation by a superior court of a judgment of the small claims court, since by appealing to the superior court petitioner submitted to jurisdiction of that court although small claims court had no jurisdiction.—*Meads v. Warne*, 23 P. 2d 773, 133 Cal.App. 27.

(2) Even if justice court had not acquired jurisdiction of defendants, they, by taking appeal from default judgment of the justice to superior court, submitted themselves to jurisdiction of superior court, so that its decision of affirmance was not without jurisdiction, relative to review by certiorari.—*De Matei v. Superior Court in and for Lake County*, 239 P. 853, 74 Cal.App. 147.

24. Cal.—*Buckley v. Fresno County Super. Ct.*, 31 P. 8, 96 Cal. 119, overruling *Carlson v. Alameda County Super. Ct.*, 11 P. 788, 70 Cal. 628. 11 C.J. p 105 note 56.

25. Utah.—*Hoffman v. Lewis*, 87 P. 167, 31 Utah 179.

26. N.J.—*State v. Tinsman*, 38 N.J. Law 210—*Lamberson v. Owen*, 14 N.J. Law 504—*Philhower v. Voorhees*, 12 N.J. Law 69—*Obert v. Whithead*, 9 N.J. Law 244.

where an appeal lawfully dismissed has been improperly reinstated.²⁷

d. Jurisdictional Error as Sole Ground

In some jurisdictions jurisdictional error is the sole ground for review by certiorari.

It is the rule in not a few states that certiorari will lie only where there is a want or an excess of jurisdiction in the proceedings sought to be reviewed.²⁸ As shown *infra* § 24, this is the rule in another group of states, subject to the exception, if it can be called an exception, that the writ also lies where the court or tribunal has acted "illegally" or irregularly; in still other states the scope of the writ is still wider.

§ 24. Illegality or Irregularity of Proceedings

- a. In general
- b. Errors or irregularities within jurisdiction

a. In General

In addition to jurisdictional error certiorari will lie in some states for illegality, irregular pursuit of authority, abuse of authority, failure to follow essential legal requirements, and the like.

While the review by certiorari is limited strictly to jurisdictional matters in many jurisdictions, see *supra* § 23 d, in many other states, by express statutory provision or by construction of the controlling statute, other irregularities and abuses by in-

27. N.J.—Howell v. Van Ness, 31 N.J.Law 443.

28. Cal.—Gladding v. Superior Court in and for Los Angeles County, 60 P.2d 357, 7 Cal.2d 403—Homan v. Board of Dental Examiners of California, 262 P. 324, 202 Cal. 593—Fickert v. Zemansky, 168 P. 891, 176 Cal. 443—King v. Superior Court in and for San Diego County, 56 P.2d 268, 12 Cal.App.2d 501—Griffith v. Superior Court in and for Los Angeles County, 37 P.2d 142, 1 Cal.App.2d 670—Sparks v. Pryor, 22 P.2d 233, 131 Cal.App. 743—Maple v. Allen, 299 P. 571, 114 Cal.App. 109—De Mund v. Superior Court in and for Los Angeles County, 291 P. 861, superseded on other grounds 2 P.2d 985—Bayside Land Co. v. Dolley, 284 P. 479, 103 Cal.App. 253—Smith v. Superior Court in and for Yuba County, 264 P. 573, 89 Cal.App. 177—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 93, 65 Cal.App. 790—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 91, 65 Cal.App. 34—Metzler v. Superior Court of California in and for Humboldt County, 201 P. 139, 54 Cal.App. 59—Lanternman v. Anderson, 172 P. 625, 36 Cal.App. 472—Camm v. Justice's Court of Santa Rosa Tp., 170 P. 409, 35 Cal. App. 293—Albers v. Superior Court in and for Humboldt County, 159 P. 453, 30 Cal.App. 772.

Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 269 P. 595, 46 Idaho 642—Beus v. Terrell, 269 P. 593, 46 Idaho 635.

Mont.—State v. District Court of Third Judicial Dist. in and for Powell County, 278 P. 122, 85 Mont. 215—State v. District Court of Sixteenth Judicial Dist. for Garfield County, 202 P. 387, 61 Mont. 427—State v. District Court of Second Judicial Dist. in and for

Silver Bow County, 190 P. 295, 58 Mont. 90—State v. Mullendore, 161 P. 949, 53 Mont. 109.

Nev.—Degiovanni v. Public Service Commission of Nevada, 197 P. 532, 45 Nev. 74—State v. Breen, 173 P. 555, 41 Nev. 516.

N.D.—Baker v. Lenhart, 195 N.W. 16, 17, 50 N.D. 30, quoting *Corpus Juris*—State v. Frazier, 182 N.W. 545, 47 N.D. 314—Cofman v. Ousterhous, 168 N.W. 326, 40 N.D. 390, 13 A.L.R. 219—State v. Pollock, 160 N.W. 511, 35 N.D. 430.

Okl.—Ramsey v. Commissioners of Payne County, 300 P. 389, 149 Okl. 289.

S.D.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.

11 C.J. p 103 notes 10–20.

Grossness of error immaterial

Cal.—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 93, 65 Cal.App. 790—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 91, 65 Cal. App. 34.

Acts of governor

(1) Certiorari will lie to review acts of the governor of the state only where he has exceeded his jurisdiction.—State ex rel. Olson v. Welford, 260 N.W. 593, 65 N.D. 522—State ex rel. Wehe v. Frazier, 182 N.W. 545, 47 N.D. 314.

(2) Where the governor has removed a commissioner of the Workmen's Compensation Bureau without a hearing as required, certiorari lies.—State v. Frazier, *supra*.

In Missouri

(1) The writ is limited to review of jurisdictional error (that is for want, excess, or "abuse" of jurisdiction) "or where there is no remedy by appeal or writ of error."—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654—11 C.J. p 103 note 24.

(2) It was held, however, that, where a state court sustains an application for the removal of a cause to a federal court, it is equivalent to a refusal to take any further action in the case, and that inasmuch as there is no appeal from the order, either to a state or to a federal court, certiorari lies to review the order, on the theory that the scope of review by certiorari is not limited entirely to a question of jurisdiction, but may comprehend an error appearing on the face of the record which cannot be reached by appeal or writ of error.—State v. Mosman, 133 S.W. 38, 231 Mo. 474.

In Utah

(1) It has been held that the court will inquire only as to questions relating to jurisdiction.—People's Bonded Trustee v. Wight, 272 P. 200, 72 Utah 587.

(2) However, although an absolute lack of "excess of jurisdiction" cannot be shown by one seeking the writ, it can still be issued in the sound discretion of the higher court.—Olson v. District Court of Salt Lake County, 71 P.2d 529, 112 A.L.R. 433.

In Wisconsin

(1) The rule stated in the above text seems to be in force in this state.—State v. Willcuts, 122 N.W. 1048, 140 Wis. 448—Gaster v. Whit-cher, 94 N.W. 787, 117 Wis. 668, 98 Am.S.R. 968.

(2) It has been held, however, that in ordinary cases where the writ goes to courts or inferior tribunals exercising judicial powers, it lies only to review jurisdictional error, but in respect of an officer having only quasi-judicial power who acts in proceedings of a summary character, out of the course of the common law, the writ will lie to inquire whether such person, having jurisdiction, has kept within, and has acted strictly according to, the law.—State v. Whitford, 11 N.W. 424, 54 Wis. 150.

ferior courts and tribunals are also included within the scope of review by the writ. Thus, the writ will lie to review inferior courts or tribunals exercising judicial functions where they have proceeded illegally,²⁹ or illegally and contrary to the course of procedure applicable to them,³⁰ or have not regu-

larly pursued their authority,³¹ or have greatly abused their authority,³² or have failed to proceed according to the essential requirements of justice and law,³³ or where the judgment is a palpable miscarriage of justice resulting in substantial injury to petitioner,³⁴ or where the procedure contains es-

29. Ala.—Ex parte Big Four Coal Mining Co., 104 So. 764, 213 Ala. 305.

Fla.—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320.

Ill.—Frye v. Hunt, 5 N.E.2d 398, 365 Ill. 32—Bartunek v. Lastovken, 183 N.E. 333, 350 Ill. 380—Brown v. Van Keuren, 172 N.E. 1, 340 Ill. 118—Fisher v. McIntosh, 115 N.E. 529, 277 Ill. 432—Shilvock v. Retirement Board of Policemen's Annuity & Benefit Fund, 1 N.E.2d 727, 285 Ill.App. 178.

Iowa.—National Ben. Accident Ass'n v. Murphy, 269 N.W. 15—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 883—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170—Main v. Ring, 260 N.W. 859, 219 Iowa 1270—Adams v. Smith, 250 N.W. 466, 216 Iowa 1365—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452—H. M. McCarthy Co. v. Dubuque District Court, 208 N.W. 505, 201 Iowa 912—Sinnott v. District Court in and for Clarke County, 207 N.W. 129, 201 Iowa 292—Davis v. District Court in and for Allamakee County, 192 N.W. 852, 195 Iowa 688.

Tenn.—Moore v. Chadwick, 94 S.W. 2d 223, 170 Tenn. 233—Hicks v. Hicks, 79 S.W.2d 802, 168 Tenn. 539—State v. American Trust Co., 32 S.W.2d 1036, 161 Tenn. 570—Gilbreath v. Willett, 251 S.W. 910, 148 Tenn. 92, 28 A.L.R. 1147—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428—Campbell v. Lee, 12 Tenn.App. 293.

11 C.J. p 106 note 62 [a].

On same plane

Illegality of action and excess of jurisdiction appear to be placed on the same plane.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

Matters held to constitute illegality

(1) Action contrary to mandatory duty.—State v. District Court of Jefferson County, 238 N.W. 290, 213 Iowa 822, 80 A.L.R. 339.

(2) Cancellation of second decree of disbarment on application to modify original decree.—Maxey v. Polk County District Court, 165 N.W. 1005, 182 Iowa 366.

(3) Denial of jury trial.—Timonds v. Hunter, 151 N.W. 961, 169 Iowa 598.

(4) Failure to take mandatory action on facts found or undisputed.—Dempsey v. Alber, 236 N.W. 86, 212

Iowa 1134, modified on other grounds and rehearing denied 238 N.W. 33.

(5) Order going beyond discretion and authority of court.—National Ben. Accident Ass'n v. Murphy, Iowa, 269 N.W. 15—Davis v. District Court in and for Allamakee County, 192 N.W. 852, 195 Iowa 688.

(6) Refusal of superior court to transfer cause to district court on motion of nonresident defendant.—Corn Belt Telephone Co. v. Superior Court of City of Oelwein, 164 N.W. 168, 180 Iowa 985.

(7) Revocation of teacher's certificate for cause not a legal cause.—Chatham v. Davis, 183 Ill.App. 506.

(8) Mere error is not.—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 883—Main v. Ring, 260 N.W. 859, 219 Iowa 1270.

(9) Error in judgment as to necessity of appointment of receiver is not.—M. H. McCarthy Co. v. Dubuque District Court, 208 N.W. 505, 201 Iowa 912.

30. Or.—Lechleidner v. Carson, 68 P. 2d 432, 156 Or. 636.

31. Ariz.—Du Vall v. Board of Medical Examiners of Arizona, 66 P. 2d 1026.

Colo.—Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap, 265 P. 94, 83 Colo. 360.

32. Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 83 Colo. 379—People v. District Court of City and County of Denver, 211 P. 626, 72 Colo. 525. Fla.—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320.

33. Fla.—Shayne v. Pike, 173 So. 903, rehearing denied Crichlow v. Equitable Life Assur. Soc., 180 So. 382—Segel v. Staiber, 144 So. 875, 106 Fla. 946—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380—Edwards v. Knight, 139 So. 582, 104 Fla. 16, adhered to 143 So. 441, 104 Fla. 16—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320—Florida Motor Lines v. Railroad Com'rs, 129 So. 876, 100 Fla. 538—Brinson v. Tharin, 127 So. 313, 99 Fla. 696—Security Finance Co. v. Gardener, 114 So. 232, 94 Fla. 549—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264—First Nat. Bank v. Gibbs, 82

So. 618, 78 Fla. 118—Ragland v. State, 46 So. 724, 55 Fla. 157.

Administrative body

Fla.—State ex rel. R. C. Motor Lines v. Florida Railroad Commission, 166 So. 840, 123 Fla. 345.

Certiorari will lie to review

(1) An essentially erroneous quo warranto judgment invalidating a statute for the organization of a city.—State v. Crawford, 140 So. 333, 104 Fla. 440.

(2) Common-law judgment improperly including attorney's fees.—Dickenson v. First Nat. Bank, 132 So. 835, 101 Fla. 1137.

(3) Order directing sheriff to retain money deposited with sheriff for appearance.—Young v. Stoutamire, Fla., 179 So. 797.

34. Fla.—Miami Poultry & Egg Co. v. City Ice & Fuel Co., 172 So. 82—Bringley v. C. I. T. Corporation, 160 So. 680, 119 Fla. 529—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264—First National Bank of Gainesville v. Gibbs, 82 So. 618, 78 Fla. 118.

Review of intermediate appellate court

(1) Under a statute providing that, where the circuit court has rendered a judgment in any case appealed from the civil court of record, it shall be competent for the supreme court, by certiorari or otherwise, to require any such case to be certified to the supreme court for review and determination with the same power and authority in the case as if it had been carried by writ of error to the supreme court, the supreme court will not quash appellate judgment of the circuit court unless the record discloses that circuit court exceeded its jurisdiction or did not proceed according to essential legal requirements, or that it violated established legal principles, or that its judgment is palpable miscarriage of justice, or that result is substantial injury to petitioner's legal rights, or that judgment is illegal or essentially irregular and violative of established legal principles resulting in prejudice to petitioner.—Miami Poultry & Egg Co. v. City Ice & Fuel Co., Fla., 172 So. 82—Bringley v. C. I. T. Corporation, 160 So. 680, 119 Fla. 529—Ulsch v. Mountain City Mill Co., 138 So. 433, 103 Fla. 932, rehearing denied 140 So. 218, 103 Fla. 932, 104 Fla. 418.

stantial defects or irregularities,³⁵ and there is no other adequate remedy, see *infra* § 37. To sum up the decisions in these states, it is believed that they all, or practically all, agree, at least in general, that this ground for the writ means merely an inquiry whether the form of proceeding legally applicable to the case was followed, and not whether the rulings of the court on the law and the evidence, and in the application of the law to the facts, were correct.³⁶ Furthermore, it is submitted that this so-called "illegality" or irregularity, while not distinctly referred to as such in other states, would be held at least in some states, if the occasion arose, to be embraced within the ground "excess" of jurisdiction,

using the word "excess" in a loose sense.³⁷

In some jurisdictions the scope of the writ is very broad, see *supra* § 9, and it has been held to lie for the correction of errors committed by the trial court.³⁸

b. Errors or Irregularities within Jurisdiction

The writ will not lie as a rule to correct errors in the exercise of legally existent jurisdiction.

Since it is the rule in most jurisdictions that certiorari cannot be used as a substitute for an appeal or writ of error, see Appeal and Error §§ 9, 17, it will not as a rule lie to correct errors in the exercise of jurisdiction legally existent,³⁹ except in-

(2) Supreme court in cases appealed from civil court of record to circuit court may entertain certiorari in case of palpable abuse of power, or misconduct or clear failure to consider evidence, or application of erroneous rule of law.—*Brundage v. O'Berry*, 134 So. 520, 101 Fla. 320.

(3) Where it appears *prima facie* from the entire record presented in an application for certiorari that plaintiff's negligence in a substantial manner contributed approximately to the injury for which damages were adjudged against defendant in the civil court of record, and judgment has been affirmed on appeal by the circuit court, and the case is one which under the law contributory negligence bars recovery, the supreme court may in its discretion issue a writ of certiorari to have the entire record brought up for review, since it appears *prima facie* that the lower courts did not observe the essential requirements of the law.—*American Ry. Express Co. v. Weatherford*, 93 So. 740, 84 Fla. 264.

35. Porto Rico.—*Montalvo v. Nussa*, 20 Porto Rico 500.

36. Ill.—*Hamilton v. Harwood*, 113 Ill. 154.

Or.—*Gainsey v. Klamath County Ct.*, 54 P. 539, 1089, 33 Or. 201.

37. Utah.—*Board of Equalization of Kane County v. State Tax Commission of Utah*, 50 P.2d 413, 88 Utah 219, rehearing denied 54 P.2d 1214, 88 Utah 228.

38. Ga.—*Payne v. Cheshire*, 108 S. E. 207, 27 Ga.App. 324—*Jones v. May*, 107 S.E. 897, 27 Ga.App. 152—*Masters v. Southern Express Co.*, 99 S.E. 144, 23 Ga.App. 642.

Certiorari is proper, but not exclusive, remedy to correct an error in a decision of a court of ordinary.—*Pierce v. Felts*, 92 S.E. 541, 146 Ga. 809.

Erroneous direction of verdict

A person against whom verdict

was directed having the right to insist by motion for new trial that the verdict was erroneously directed, may except by certiorari to the overruling of motion.—*Hopkins Inv. Co. v. Crawford*, 132 S.E. 925, 35 Ga.App. 331.

Erroneous nonsuit

Where plaintiff's evidence, as shown by the answer to the writ of certiorari, was sufficient to have carried the case to the jury, it was not error for superior court to sustain the certiorari, after a nonsuit, and to remand the case for a new trial.—*Turner v. Torphy*, 100 S.E. 644, 24 Ga.App. 222.

Judgment not warranted by evidence

(1) Where the petition for certiorari and the answer thereto showed that defendant admitted buying and receiving books, signing written contract for their purchase and failing to pay the price, certiorari to a judgment for defendant was properly sustained.—*Kendrick v. Bureau of Nat. Literature*, 94 S.E. 267, 21 Ga. App. 174.

(2) Where plaintiff's evidence was insufficient to establish prescriptive right to way and defendant's evidence established contrary, judge of superior court erred in refusing to sanction certiorari, wherein finding for plaintiff was alleged to be contrary to law and evidence.—*Hendricks v. Carter*, 94 S.E. 807, 21 Ga. App. 527.

Refusal of new trial

Certiorari may be employed to review a judgment refusing to grant a new trial.—*Farmers' & Merchants' Bank v. Willie*, 133 S.E. 44, 35 Ga. App. 202.

Certiorari properly overruled

In case of forcible entry and detainer, under Civ.Code 1910 § 5398, where the only issue was properly submitted to the jury, and there was evidence to authorize the verdict, it was not error for judge of superior court to overrule petition for certio-

rari.—*Sikes v. Edwards*, 95 S.E. 378, 22 Ga.App. 53.

No consolidation with equity petition

There being an adequate remedy at law by petition for certiorari for the correction of errors committed on the trial of a case in the city court of Pelham, such a pending petition could not be consolidated with a petition in equity to set the verdict aside for mistake.—*Gulf Refining Co. v. Miller*, 108 S.E. 25, 151 Ga. 721.

39. U.S.—*Harris v. Barber, D.C.*, 9 S.Ct. 314, 129 U.S. 366, 32 L.Ed. 697—*Pickwick-Greyhound Lines v. Shattuck, C.C.A.Kan.*, 61 F.2d 485.

Ariz.—*State v. Superior Court of Maricopa County*, 5 P.2d 192, 39 Ariz. 242.

Ark.—*Sharum v. Meriwether*, 246 S. W. 501, 156 Ark. 331.

Cal.—*Spanach v. Superior Court of Los Angeles County*, 50 P.2d 444, 4 Cal.2d 447—*In re Paulsen's Estate*, 178 P. 143, 179 Cal. 528—*Griffith v. Superior Court in and for Los Angeles County*, 37 P.2d 142, 1 Cal.App.2d 670—*Faia v. Superior Court in and for Alameda County*, 24 P.2d 567, 133 Cal.App. 525—*Pacific Home Bldg. Realty Co. v. Daugherty*, 243 P. 473, 75 Cal.App. 623—*De Matei v. Superior Court in and for Lake County*, 239 P. 853, 74 Cal.App. 147—*Security Ins. Co. v. Superior Court of California in and for Marin County*, 236 P. 335, 71 Cal.App. 701—*Paddon v. Superior Court of California in and for City and County of San Francisco*, 223 P. 93, 65 Cal. App. 790—*Paddon v. Superior Court of California in and for City and County of San Francisco*, 223 P. 91, 65 Cal.App. 34—*Langdon v. Superior Court in and for Riverside County*, 223 P. 72, 65 Cal. App. 41—*Metzler v. Superior Court of California in and for Humboldt County*, 201 P. 139, 54 Cal.App. 59—*McConnell v. Superior Court in and for Alameda County*, 197 P. 680, 51 Cal.App. 744—*Goodall v. Superior Court in and*

sofar as such errors constitute illegalities, abuses, or failure to follow legal procedure in those jurisdictions, see *supra* subdivision a of this section, where such matters as well as jurisdictional errors constitute good grounds for the issuance of the writ, and with the further exception of jurisdictions wherein the scope of review by certiorari is exceedingly broad. The foregoing rule does not apply, however, where the question involved is whether the court has legal authority to determine the matter before it.⁴⁰

§ 25. Proceedings Absolutely Void

The decisions are inharmonious as to whether the

writ will lie for proceedings or determinations which are absolutely void.

The question whether certiorari lies to review void proceedings or determinations has been variously decided in the different states.⁴¹ In some jurisdictions, this writ can be resorted to only when proceedings are absolutely null and void.⁴² In other jurisdictions the doctrine appears to be that, although a reversal of void proceedings or determinations by certiorari is not really essential, yet since it is one of the main purposes of the writ to keep inferior tribunals within the bounds of their jurisdiction, the writ will be granted as being the safer

- for Santa Barbara County, 174 P. 924, 37 Cal.App. 723—Camm v. Justice's Court of Santa Rosa Tp., 170 P. 409, 35 Cal.App. 293—Rubenstein v. Los Angeles County Super. Ct., 122 P. 820, 18 Cal.App. 128.
- Colo.—Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap, 265 P. 94, 83 Colo. 360.
- D.C.—Northern Pac. Ry. Co. v. Interstate Commerce Commission, 23 F.2d 221, 57 App.D.C. 318, certiorari denied 48 S.Ct. 205, 275 U.S. 572, 72 L.Ed. 433.
- Fla.—Des Rocher & Watkins Towing Co. v. Third Nat. Bank, 143 So. 768, 771, 106 Fla. 466, citing *Corpus Juris*—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380—Hamway v. Seaboard Air Line Ry. Co., 136 So. 628, 630, citing *Corpus Juris*.
- Idaho.—Beus v. Terrell, 269 P. 593, 46 Idaho 635—Mays v. District Court of Sixth Judicial Dist., in and for Butte County, 237 P. 700, 40 Idaho 798.
- Iowa.—Home Owners' Loan Corporation v. District Court of Woodbury County, 272 N.W. 416—Independent Order of Foresters v. Scott, 272 N.W. 68—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 833—Main v. Ring, 260 N.W. 859, 219 Iowa 1270—Adams v. Smith, 250 N.W. 466, 216 Iowa 1365—Dickson Fruit Co. v. District Court of Sac County, 213 N.W. 803, 203 Iowa 1028.
- La.—State ex rel. Tower v. Bell, 6 La.App. 245.
- Mont.—State ex rel. Tague v. District Court of First Judicial Dist. in and for Broadwater County, 47 P.2d 649, 100 Mont. 383—State ex rel. Murphy v. Second Judicial Dist. Court in and for Silver Bow County, 41 P.2d 1113, 99 Mont. 209—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 10 P.2d 586, 92 Mont. 94—State v. City of Butte, 188 P. 367, 57 Mont. 368.
- Nev.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317, 43 Nev. 128.
- Okl.—Walker v. Womack, 72 P.2d 510—Board of Com'rs of Carter County v. Woodford Consol. School Dist. No. 36, 25 P.2d 1057, 165 Okl. 227—Ramsey v. Commissioners of Payne County, 300 P. 389, 149 Okl. 289—Fortune v. Board of Com'rs of Osage County, 299 P. 875, 149 Okl. 260—Board of Com'rs of Okfuskee County v. School Dist. No. 27 of Okfuskee County, 293 P. 1078, 146 Okl. 267—School Dist. No. 20, Carter County, v. Walden, 293 P. 199, 146 Okl. 19—Harris v. District Court in and for Nowata County, 173 P. 69, 68 Okl. 231—Grady County v. Chickasha Cotton Oil Co., 164 P. 457, 63 Okl. 201.
- Or.—Lechleidner v. Carson, 68 P.2d 482, 156 Or. 636.
- R.I.—State v. Coleman, 190 A. 791, 109 A.L.R. 787—Browning v. Browning, 164 A. 508, 53 R.I. 112—Bishop v. Superior Court, 144 A. 433, 50 R.I. 13—Scotti v. District Court of Tenth Judicial Dist., 109 A. 207, 42 R.I. 556—Broley v. Superior Court, 107 A. 104, 42 R.I. 253.
- S.D.—Southwest Branch of Rural Reciprocal Telephone Co. v. Dakota Central Telephone Co., 220 N.W. 475, 53 S.D. 121—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640—State v. Chitty, 166 N.W. 633, 40 S.D. 164.
- Utah.—People's Bonded Trustees v. Wight, 272 P. 200, 72 Utah 537.
- 11 C.J. p 103 note 22.
- Certiorari will not lie to review**
- (1) Affirming judgment for costs in mechanic's lien suit before justice of the peace.—State v. Moran, 176 P. 413, 42 Nev. 356.
- (2) Appointment of receivers in foreclosure.—Beus v. Terrell, 269 P. 593, 46 Idaho 635.
- (3) Decision of administrative officers or board as to matter within jurisdiction.—Detroit & T. S. L. R. Co. v. Interstate Commerce Commission, 277 F. 535, 51 App.D.C. 133.
- (4) Determination of motion for new trial not properly presented.—McConnell v. Superior Court in and for Alameda County, 197 P. 680, 51 Cal.App. 744.
- (5) Direction of a verdict.—State v. McFadden, 182 P. 745, 43 Nev. 140.
- (6) Findings of special tribunal within its jurisdiction.—Binford v. Carline, 9 Tenn.App. 364.
- (7) Incorrect judgment on indemnity bond.—Security Ins. Co. v. Superior Court of California in and for Marin County, 236 P. 335, 71 Cal. App. 701.
- (8) Informalities in punishment for contempt by juvenile court.—Juvenile Court of District of Columbia v. Hughlett, 44 App.D.C. 59.
- (9) Mere errors in judgment.—Pickwick-Greyhound Lines v. Shattuck, C.C.A.Kan., 61 F.2d 485.
- (10) Vacation of order setting aside default.—State v. District Court of Eighth Judicial Dist. in and for Cascade County, 207 P. 1004, 64 Mont. 110.
- After affirmance by appellate court**
- (1) Mere errors, as such, must be corrected by appellate proceedings, jurisdiction to entertain which is vested in circuit court as primary court of appeal and not in supreme court on certiorari after case has been tried in civil court of record and affirmed on appeal to circuit court.—Florida East Coast Ry. Co. v. Anderson, 148 So. 553, 110 Fla. 290—Vanderpool v. Spruell, 139 So. 892, 104 Fla. 347.
- (2) Where order of civil court of record granting a new trial on the evidence is affirmed by circuit court on writ of error, and such order does not appear to be a "serious irregularity or illegality in procedure," writ of certiorari will not be granted to review affirmance.—Harrison v. Frink, 77 So. 663, 75 Fla. 22.
- ⁴⁰ Cal.—Rich v. Superior Court of California in and for Mendocino County, 161 P. 291, 31 Cal.App. 689.
- ⁴¹ Wyo.—Sheridan v. Cadle, 157 P. 892, 895.
- ⁴² Hawaii.—Aldrich v. First Judge Cir. Ct., 9 Hawaii 470.

course.⁴³ The fact that a void judgment might have been vacated and set aside on appeal has been held not to preclude the allowance of certiorari to quash it.⁴⁴ Since a judgment is not void if the court has jurisdiction of the parties and of the subject matter irrespective of whether the complaint states a cause of action or not, so long as it apprises defendant of the nature of plaintiff's demand, certiorari will not lie to a judgment as void on its face where a sufficient attempt has been made to state a cause of action.⁴⁵

In some few jurisdictions it has been held that certiorari will not lie to review or correct a void judgment by a court legally constituted⁴⁶ or a

judgment or order by persons without authority to exercise judicial power.⁴⁷

§ 26. Procedure Unknown to Common Law

Where other remedies are not provided certiorari will generally lie to review judicial proceedings of inferior courts or tribunals not according to the course of the common law.

It is a general rule of the common law that, when a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary way or in a course not according to the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari will lie.⁴⁸ Such review by certiorari not only

La.—State v. St. Paul, 28 So. 839, 104 La. 103.
11 C.J. p 109 note 14.

43. Ala.—Steady v. Wheeler, 78 So. 962, 201 Ala. 566.

Ark.—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030—Shofner v. County Board of Education, 296 S.W. 31, 174 Ark. 1180.

Iowa.—Turner v. Woodruff, 185 N.W. 910, 192 Iowa 848.

Mass.—Old Colony R. Co. v. Fall River, 18 N.E. 425, 147 Mass. 455.

Mich.—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266 Mich. 123—Lake Shore & Michigan Southern Ry. v. Hunt, 39 Mich. 469.

11 C.J. p 109 notes 16–25.

It has been held, however, that, if proceedings are merely void for want of jurisdiction, certiorari is not necessary; and in that case the writ was denied.—Locke v. Lexington, 122 Mass. 290.

Judgment not sustained by evidence
Mich.—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266 Mich. 123.

Judgment void for lack of service
Ala.—Steady v. Wheeler, 78 So. 962, 201 Ala. 566—Roddam v. Brown, 77 So. 403, 201 Ala. 109.

Judgment void on face
Ala.—Finney v. Baker, 78 So. 875, 201 Ala. 521.

Ark.—Sharum v. Meriwether, 246 S.W. 501, 156 Ark. 331.

Cancellation of municipal lease without notice

Ark.—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030.

44. Ark.—State v. Wilson, 27 S.W. 2d 106, 181 Ark. 683—City of Fayetteville v. Baker, 5 S.W.2d 302, 176 Ark. 1030—Browning v. Waldrup, 273 S.W. 1032, 169 Ark. 261—Shofner v. County Board of Education, 296 S.W. 31, 174 Ark. 1180—Patterson v. Adcock, 248 S.W. 904, 157 Ark. 186—Reed v. Bradford, 217 S.W. 11, 141 Ark. 201.

Judgment by special judge

Ark.—Reed v. Bradford, 217 S.W. 11, 141 Ark. 201.

Order of education board

Ark.—Shofner v. County Board of Education, 296 S.W. 31, 174 Ark. 1180.

"Void proceeding"

Order, in action to transfer foreclosure proceedings to superior court dissolving order to show cause unless tender be made into court, was held not "void proceedings," within the purview of a statute providing that a writ of review shall be granted, except by police or justice courts, where an inferior tribunal or officer, exercising judicial functions, exceeded their jurisdiction or "to correct any erroneous or void proceedings."—State v. Superior Court for King County, 10 P.2d 233, 167 Wash. 481.

45. Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

46. Ga.—Courson v. Land, 183 S.E. 360, 54 Ga.App. 534—Little v. McCalla, 93 S.E. 37, 20 Ga.App. 324—Sawyer v. Blakely, 58 S.E. 399, 2 Ga.App. 159.

11 C.J. p 110 note 27.

It has been held, however, that where a judgment for plaintiff was rendered by court without jurisdiction, the judge of the superior court did not err in sustaining certiorari and awarding final judgment for defendant.—Drake v. Davis, 116 S.E. 552, 29 Ga.App. 790.

47. Ga.—Little v. McCalla, 93 S.E. 37, 20 Ga.App. 324.

N.Y.—Long Island R. Co. v. Hylan, 148 N.E. 189, 240 N.Y. 199, reversing 206 N.Y.S. 239, 210 App. Div. 761—Fisene v. Bay Ridge Dist. Local Board, 294 N.Y.S. 595, 250 App.Div. 460—People v. Moore, 48 Hun 619, 1 N.Y.S. 405, 16 N.Y. St. 469.

11 C.J. p 110 notes 27, 28.

However, it has been held in earlier cases that void judgments of

courts-martial, or commissioners or trustees, may be considered as voidable and quashed by certiorari.—In re Bracket, 27 Hun, N.Y., 605—Fitch v. Kirkland Highway Comrs., 22 Wend., N.Y., 132—Striker v. Mott, 6 Wend., N.Y., 465.

No useful purpose served

Where a public body, to whom no judicial functions have been intrusted, has assumed to exercise such function, no review of propriety of its action by courts through certiorari would ordinarily serve any useful purpose, as attempted action of such body without power is void and may be attacked for want of jurisdiction at any time when attempt is made to enforce claims founded on such action. However, they will give no validity to attempted action of public body acting without jurisdiction.—Long Island R. Co. v. Hylan, 148 N.E. 189, 240 N.Y. 199, reversing 206 N.Y.S. 239, 210 App. Div. 761.

48. Del.—Thompson v. Thompson, 140 A. 697, 3 W.W.Harr. 593.

Mich.—In re Morgan, 176 N.W. 606, 209 Mich. 65.

N.J.—Levy v. Public Service Ry. Co., 98 A. 847, affirmed 103 A. 171, 91 N.J.Law 183—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J.Law 260—Knapp v. Kremer, 185 A. 771, 103 N.J.Law 227—State Board of Medical Examiners v. Buettel, 131 A. 89, 102 N.J.Law 74—Brown v. Christian, 117 A. 294, 97 N.J.Law 56—Jaudel v. Schoelzke, 112 A. 328, 95 N.J.Law 171.

N.H.—Huse v. Grimes, 2 N.H. 208.
Pa.—In re Franklin Film Mfg. Corp., 93 A. 623, 253 Pa. 422.

Wash.—State v. Smith, 208 P. 1, 120 Wash. 540.

Wis.—State v. Wisconsin Highway Commission, 198 N.W. 753, 183 Wis. 614.

11 C.J. p 98 note 58.

Judgment for attorney's fees

Judgment of district court for one

applies to jurisdiction to act,⁴⁹ but to excess of jurisdiction as well;⁵⁰ and it also extends to the manner in which the jurisdiction has been exercised when questions of law are involved,⁵¹ and to the ascertainment of whether the tribunal which made a determination of fact acted on any evidence which would warrant the conclusion reached.⁵² So, it has been held that certiorari will lie to tribunals which are called extra-ordinary and special in contradistinction to the ordinary and common courts established for the trial of criminal offenses and the determination of private rights.⁵³

Conversely, certiorari does not lie to review the decision of a court of record proceeding according to the course of the common law, since in such cases a review may be obtained by a writ of error or other adequate means.⁵⁴ Moreover, the mere enlargement or extension of the judicial powers of a court does not make the exercise of such powers subject to review by certiorari.⁵⁵

The general rule has been applied to proceedings under various attachment statutes,⁵⁶ to appeals in nisi prius courts from determinations of state moving picture censors,⁵⁷ to special discovery proceedings,⁵⁸ to proceedings to compel the delivery of the books and papers of a public officer to his successor,⁵⁹ to proceedings for trial of right to a garage keeper's lien,⁶⁰ and also to proceedings under landlord and tenant acts.⁶¹

Change of nature of proceedings. The fact that proceedings in their inception are summary in their

character and unknown to the common law does not authorize certiorari after an appeal to a higher court whereby the proceedings become according to the course of the common law so as to be reviewable by a writ of error.⁶² It seems also that, although the proceedings in their inception or early state are not in accordance with the ordinary form of the common law, nevertheless the subsequent steps may be in the ordinary common-law form, so as to be reviewable by writ of error and, therefore, to preclude a certiorari.⁶³

§ 27. Anticipated Wrong

Certiorari does not lie to prevent anticipated wrongs or injuries.

The office of certiorari is in no sense that of a restraining order, see *supra* § 4 c. Thus, the writ will not lie to prevent anticipated wrong or injury.⁶⁴ As shown *supra* § 23, it cannot be used to prevent a threatened excess of jurisdiction.

§ 28. Right to Office

- a. In general
- b. Appointment
- c. Removal, suspension, and reinstatement

a. In General

Ordinarily, certiorari will not lie where its only object is to determine the right to office.

Although there is authority to the contrary,⁶⁵ it appears to be the general rule that certiorari will

hundred dollars for attorney for services in suit against railway, settled by client out of court, based on a procedure entirely at variance with common law or the statutory procedure governing district courts, is subject to review by writ of certiorari.—*Levy v. Public Service Ry. Co.*, 98 A. 847, affirmed 103 A. 171, 91 N.J.Law 183.

Petition and summary process

Where the proceeding in a court is by petition and summary process, it does not act according to the course of the common law within the rule.—*Hagerty's Case*, 4 Watts, Pa. 305.

49. Mass.—*Marcus v. Board of Street Com'rs of City of Boston*, 147 N.E. 866, 252 Mass. 331.
Mich.—*In re Morgan*, 176 N.W. 606, 209 Mich. 65.
Wis.—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 183 Wis. 614.

Decision as to jurisdiction

Mass.—*Marcus v. Board of Street Com'rs of City of Boston*, 147 N.E. 866, 252 Mass. 331.

50. Wis.—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 183 Wis. 614.

51. Mich.—*In re Morgan*, 176 N.W. 606, 209 Mich. 65.

52. Wis.—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 183 Wis. 614.

53. Wis.—*State v. Lawler*, 79 N.W. 777, 103 Wis. 460.
11 C.J. p 99 note 59.

54. N.J.—*Eder v. Hudson County Circuit Court*, 140 A. 883, 104 N.J.Law 260.
11 C.J. p 99 note 60.

55. N.J.—*Eder v. Hudson County Circuit Court*, 140 A. 883, 104 N.J.Law 260.

56. N.J.—*Brown v. Christian*, 117 A. 294, 97 N.J.Law 56—*Jaudel v. Schoelzke*, 112 A. 328, 95 N.J.Law 171.
11 C.J. p 99 note 65.

57. Pa.—*In re Franklin Film Mfg. Corp.*, 98 A. 623, 253 Pa. 422.

58. Discovery proceedings

Wash.—*State ex rel. Bronson v. Su-*

perior Court For King County, 77 P.2d 997.

59. Wis.—*State v. Morgan*, 110 N.W. 245, 130 Wis. 293.

60. N.J.—*Knapp v. Kremer*, 135 A. 771, 103 N.J.Law 227.

61. Miss.—*Usher v. Moss*, 50 Miss. 208.

11 C.J. p 99 note 66.

62. Mich.—*Parker v. Coyland*, 4 Mich. 528.

11 C.J. p 99 note 67.

63. Pa.—*Com. v. Beaumont*, 4 Rawle 366.

64. Ill.—*Illinois Life Ins. Co. v. City of Chicago*, 244 Ill.App. 185.
N.J.—*Gurkin v. Civil Service Commission*, 194 A. 878.

N.D.—*Molander v. Swenson*, 210 N.W. 9, 54 N.D. 391.

R.I.—*Messier v. Healey*, 175 A. 828, 829, citing *Corpus Juris*.
11 C.J. p 110 note 30.

65. Wash.—*State v. Tallman*, 64 P. 759, 24 Wash. 426.

W.Va.—*Dryden v. Swinburne*, 20 W.Va. 89.

11 C.J. p 108 note 1.

not lie to try title to office, or where the determination of the right to office is the obvious and only object of the writ;⁶⁶ and this is so even though the parties to the writ consent.⁶⁷ In such cases, quo warranto is the proper remedy.

This rule is limited in one jurisdiction, however, by decisions which hold that collateral questions involving the legality of an election to office may be raised and determined in testing the validity of laws or resolutions adverse to the parties' rights.⁶⁸ Furthermore, it is the rule in that same jurisdiction that a public officer in full possession of his office may maintain certiorari to remove from his way a proceeding which he apprehends may be used unlawfully to eject him or disturb him in the tenure of his office.⁶⁹

Where appeal is inadequate

A judgment determining the right to an office will be reviewed by the supreme court by a writ of review when the regular appeal is inadequate by reason of the fact that the rights of petitioner to hold the office will have expired before an appeal can be determined.—*State v. Tallman*, 64 P. 759; 24 Wash. 426.

Constitutional warrant

Under a section of the constitution providing that the county court in all contested election cases shall judge of the election qualifications and returns of all county and district officers and another section which provides that the circuit court shall have supervisory control over all proceedings before the county courts by mandamus, prohibition, or certiorari, review by certiorari of decisions of inferior courts or tribunals, in a contest involving title to office is proper.—*Dryden v. Swinburne*, 20 W.Va. 89.

66. N.J.—*Gurkin v. Civil Service Commission*, 194 A. 878—*Cooper v. Town of Belleville*, 118 A. 332—*Wygant v. Hackensack Improvement Commission*, 98 A. 477, 89 N.J.Law 454.

11 C.J. p 108 note 2.

Quieting title

Certiorari will not lie to compel civil service commission to expunge records indicating temporary appointment of prosecutor and to have substituted some record indicating permanent appointment entitling prosecutor to civil service status, where there was no proceeding or threat of proceeding to oust prosecutor on foot, and writ was prosecuted as though it were bill in equity to quiet title.—*Gurkin v. Civil Service Commission*, N.J., 194 A. 878.

As mandamus to establish status

Certiorari is generally not available as a mandamus to establish stat-

us of officer.—*Gurkin v. Civil Service Commission*, supra.

67. N.J.—*Miller v. Washington*, 50 A. 341, 67 N.J.Law 167.

68. N.J.—*State v. Camden County*, 1 A. 515, 47 N.J.Law 454.
11 C.J. p 108 note 6.

Abolition of office by ordinance

Tax assessor elect, whose office was abolished by ordinance under statute authorizing township committee to create board of assessors and abolish office of township assessor, is entitled to certiorari to determine whether statute was constitutional in providing that statute should not be operative until accepted by ordinance.—*Eccles v. Township Committee of Egg Harbor Tp.*, 164 A. 872, 11 N.J.Misc. 180.

69. N.J.—*Von Nieda v. Bennett*, 184 A. 349, 116 N.J.Law 320, reversed on other grounds 187 A. 629, 117 N.J.Law 231, 106 A.L.R. 1320—*O'Neill v. City of Bayonne*, 124 A. 611, 99 N.J.Law 430—*Hawley v. Wyckoff*, 114 A. 536, 96 N.J.Law 288—*Murphy v. Board of Chosen Freeholders of Hudson County*, 104 A. 304, 92 N.J.Law 244, reversing *Murphy v. Freeholders of Hudson*, 102 A. 896, 91 N.J.Law 40.

11 C.J. p 108 note 6 [a].

Possession de jure et de facto required

(1) Certiorari to review the legality of corporate action in declaring office vacant and electing successor lies only if the prosecutor is in office de jure and de facto.—*Randolph v. City of Rahway*, 148 A. 793, 106 N.J.Law 296.

(2) Where another person not party to certiorari proceeding was occupying office, certiorari will not lie to determine validity of discharge of prosecutor, an exempt fireman.—*Kidd v. Grier*, 161 A. 49, 10 N.J.Misc. 866.

Sheriff's order discharging one

b. Appointment

Ordinarily, the validity of an appointment to an office is not reviewable by the writ.

The validity of an "appointment" of an officer does not ordinarily involve judicial action and hence is not reviewable by certiorari,⁷⁰ although when regarded as a judicial act it has been held that the writ might issue.⁷¹

c. Removal, Suspension, and Reinstatement

As a rule it is only where the removal of an officer is a judicial act that it is reviewable by the writ.

Where the removal of a public officer or employee is considered to be a judicial act, as is generally the case as to removals for cause after a hearing, it is reviewable by certiorari.⁷² Where, however, the

from the office of court attendant, to which he was appointed pursuant to Pub.L.1916 p 514, being a proceeding which such officer may apprehend will be unlawfully used to disturb him in his office, is reviewable by certiorari, since if the sheriff has no power to remove him, then the order doing so is a proceeding which the prosecutor may apprehend will be used unlawfully to disturb him and is thus reviewable by certiorari.—*Howley v. Wyckoff*, 114 A. 536, 96 N.J.Law 288.

Resolution impeding performance of duty

Certiorari, and not quo warranto, against a county board of elections is the appropriate remedy for a district election officer to remove an alleged illegal resolution of the board appointing to an office another in place of the prosecutor and thus impeding him in the performance of his public duty.—*Hartley v. County Board of Elections of Passaic County*, 107 A. 817, 93 N.J.Law 313.

70. Fla.—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

N.Y.—*In re Carp*, 166 N.Y.S. 243, 179 App.Div. 327, affirmed 117 N.E. 1063, 221 N.Y. 643.

11 C.J. p 109 note 9.

Appointment by court

The legality of the appointment by a court of members of a teachers' board has been held not reviewable by certiorari on the theory that it was not a judicial proceeding.—*State v. Harrison*, 41 S.W. 971, 43 S.W. 867, 141 Mo. 12.

71. N.Y.—*Adams v. Wheatfield*, 61 N.Y.S. 738, 46 App.Div. 466—*Wildy v. Washburn*, 16 Johns. 49—*Wood v. Peake*, 8 Johns. 68.

72. Ark.—*Warren v. McRae*, 264 S.W. 940, 165 Ark. 436—*Hall v. Bledsoe*, 189 S.W. 1041, 126 Ark. 125.
Fla.—*Sirmans v. Owen*, 100 So. 734, 87 Fla. 485.

As has been seen supra § 18 a, certiorari will not lie to correct a purely ministerial act, even though the performance thereof involves discretion.

Applications of rules. The principles heretofore stated in this section have been applied to acts of inferior courts involving discretion, such as the allowance or refusal of amendments;⁹⁴ the admission of attorneys to the bar;⁹⁵ decisions on motions for bills of particulars;⁹⁶ determination of the fitness of a guardian;⁹⁷ direction of a remittitur;⁹⁸ dismissal of an appeal;⁹⁹ granting or refusal of bail;¹ granting or refusing an injunction,² or fixing the amount of the bond therein;³ granting or refusal to grant a new trial;⁴ granting or refusing to vacate a judgment;⁵ requiring the production of books, papers, or documents;⁶ and the setting aside of a verdict.⁷ In like manner, the writ has not been allowed to review discretionary acts or inferior boards or tribunals as, for example, in the allowance or revocation of licenses.⁸

Order denying intervention, in action to quiet title, by persons claiming ownership, will warrant relief on application for writ of mandate treated as certiorari.—State v. Superior Court for Chelan County, supra.

94. Cal.—Ketchum v. Superior Ct., 4 P. 492, 65 Cal. 494—Kitts v. Nevada County Super. Ct., 62 Cal. 203.

N.C.—State v. Swepson, 83 N.C. 584.

95. Md.—State v. Johnston, 2 Harr. & M. 160.

96. R.I.—Union Mortg. Co. v. Rocheleau, 154 A. 658, 51 R.I. 345.

97. Nev.—Cornbleet v. Second Judicial Dist. Ct., 73 P.2d 828.

98. Tenn.—Provident Life & Accident Ins. Co. v. Rimmer, 12 S.W. 2d 365, 157 Tenn. 597.

99. Me.—Portland, etc., R. Co. v. Cumberland County Comrs., 64 Me. 505.

1. Mo.—State v. Madison County Ct., 37 S.W. 1126, 136 Mo. 323.

2. La.—United Gas Public Service Co. v. Arkansas-Louisiana Pipe Line Co., 147 So. 66, 176 La. 1024—State v. Rightor, 5 So. 416, 40 La. Ann. 852.

3. La.—Reynolds v. Louisiana Highway Commission, 111 So. 622, 163 La. 125.

4. Minn.—Cox v. Selover, 205 N.W. 691, 165 Minn. 50.

N.J.—Degenring v. Kimble, 180 A. 685, 115 N.J. Law 379—Caliepoulos v. Chagaris, 126 A. 471, 2 N.J. Misc. 998.

11 C.J. p 107 note 87.

First grant of new trial on certio-

rari will not be disturbed, regardless of the merit or absence of merit of special grounds in a petition for certiorari unless evidence demanded verdict.—Hurt v. Stewart, 174 S.E. 924, 49 Ga. App. 251.

5. Colo.—Pierce v. Hamilton, 135 P. 796, 55 Colo. 448.

Mich.—Van Renselaer v. Whiting, 12 Mich. 449—Detroit v. Jackson, 1 Dougl. 108.

6. Iowa.—Main v. Ring, 260 N.W. 859, 219 Iowa 1270—Fairbanks Morse & Co. v. District Court in and for Palo Alto County, 247 N.W. 203, 215 Iowa 703—Dunlap v. District Court of Greene County, 239 N.W. 541, 214 Iowa 389—Iowa Farm Credit Corporation v. Hutchison, 223 N.W. 271, 207 Iowa 453—Stagg v. First Nat. Bank, 212 N.W. 342, 203 Iowa 84—Davis v. District Court in and for Allamakee County, 192 N.W. 852, 195 Iowa 688.

Only for illegality or excess of jurisdiction

Where, under the controlling statute, it is discretionary with the court to order the production of material, books, and papers, insofar as the court confines its ruling within the discretion allowed by the statute certiorari will not lie, but if the order goes beyond such discretion and thereby becomes illegal, or if the court exceeds its jurisdiction the writ will lie to review such act.—Dunlop v. District Court of Greene County, 239 N.W. 541, 214 Iowa 389—Stagg v. First Nat. Bank, 212 N.W. 342, 203 Iowa 84—Davis v. District Court in and for Allamakee County, 192 N.W. 852, 195 Iowa 688.

§ 31. Matters Subsequent to Judgment

The writ will not ordinarily issue to review matters arising subsequent to the judgment, but when employed in lieu of audita querela this may be done.

Matters arising subsequently to judgment, which afford no ground of objection to its correctness at the time of its rendition, ordinarily furnish no ground for the writ;⁹ but it is otherwise where good grounds of objection were unknown until after judgment.¹⁰

As shown supra § 2 b (4), the writ is sometimes used in the place of an audita querela, to give relief to a party against whom a judgment has been rendered, for causes which have originated since the rendition thereof, such as the issuance of an execution on a judgment wholly or partly satisfied.¹¹ When so employed the writ will not lie to a matter which arose prior to the judgment.¹²

§ 32. Abstract Questions

Certiorari will not lie to review abstract, academic, moot, or dead questions.

7. N.J.—Caliepoulos v. Chagaris, 126 A. 471, 2 N.J. Misc. 998.
11 C.J. p 107 note 86.

8. Iowa.—Ebert v. Short, 201 N.W. 793, 199 Iowa 147.
11 C.J. p 107 note 82.

Severity of penalty

Whether the revocation of a plumber's license by the board of examiners for violations of an ordinance regulating plumbing is more severe penalty than the evidence justifies is not a question open for review by the court on certiorari.—Ebert v. Short, supra.

9. Ala.—Wheelock v. Wright, 4 Stew. & P. 163—Bobo v. Thompson, 3 Stew. & P. 385.
N.Y.—Peo. v. Forst, 114 N.Y.S. 209, 129 App. Div. 498.

After affirmance of justice judgment

It has been held that defendant, who has clearly recognized a provisional seizure of chattels on leased premises to satisfy the lessor's lien, is not entitled to certiorari where his contention that certain of the chattels were not seized was not made until after the district court, on appeal from the justice court, had held that the chattels had been seized and were subject to the lessor's lien and privilege.—Beale v. Martin, 160 So. 305, 181 La. 703.

10. N.Y.—Ayres v. Lawrence, 63 Barb. 454.
11 C.J. p 108 note 92.

11. Tenn.—Rogers v. Miller, 1 Swan 22—Rogers v. Ferrell, 10 Yerg. 253—Barnes v. State, 4 Yerg. 186.

12. Tenn.—Baker v. Penecost, 106 S.W.2d 220, 171 Tenn. 529.

Certiorari will not lie where there is nothing for it to review, as where the subject matter of the litigation has never existed or has ceased to exist and there is nothing on which a judgment of the reviewing court can operate.¹³ To justify the issuance of the writ, it must appear that the matter sought to be reviewed has at least some semblance of vitality, that is, as long as it stands it affects some right or interest of the party applying for the writ.¹⁴ The writ will not issue merely to give an opportunity to determine abstract, academic, hypothetical, or moot questions,¹⁵ even though such a determination would be of public interest.¹⁶ Accordingly, a judgment or order suspending¹⁷ or removing¹⁸ a person from public office will not be reviewed by certiorari after the expiration of the tenure or term of such officer, nor will the writ issue to review an order which has expired by its own terms,¹⁹ or which has been annulled by the court which made it.²⁰ Likewise, the writ does not lie to review the sentence of a court-martial reprimand-

ing an officer, after the reprimand has been administered, the court dissolved, and the sentence fully executed, the controversy having ceased to exist.²¹

The writ will not issue where it would not be beneficial or would be inadequate for the purpose for which it is sought, see *supra* § 12.

In deciding that the writ will not issue in a particular case, the court will not anticipate in what cases exceptional facts may call for its use.²²

Settlement. Where the subject matter of the litigation has been fully settled and adjusted so that the order sought to be reviewed is immaterial and abstract, certiorari will not issue.²³

§ 33. New or Difficult Questions

The writ has been allowed to determine new and important questions but this practice is not universal.

While in some cases the court has declined to grant the writ on the ground that new or difficult

13. Cal.—James v. Superior Court of California in and for Butte County, 169 P. 398, 35 Cal.App. 148.

La.—Phoenix Building & Homestead Ass'n v. Maloney, 164 So. 410, 183 La. 547.

Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Rosebud County, 235 P. 751, 73 Mont. 84.

N.J.—Loretto Realty Co. v. Bigelow, 133 A. 414, 103 N.J.Law 497, affirmed E. & M. Land Co. v. Board of Adjustments of City of Newark, 135 A. 916, 103 N.J.Law 487, 135 A. 917, 103 N.J.Law 487, and Loretta Realty Co. v. Biglow, 135 A. 918, 103 N.J.Law 497—Cordingley v. Borough of Mendham, 171 A. 158, 12 N.J.Misc. 331—E. & M. Land Co. v. Board of Adjustment of City of Newark, 133 A. 413, 4 N.J.Misc. 467, followed in 133 A. 414, 4 N.J.Misc. 469—Meyer v. City of Perth Amboy, 133 A. 397, 4 N.J.Misc. 464—Union County Development Co. v. Kaltenbach, 128 A. 396, 3 N.J.Misc. 341.

Wash.—State ex rel. Burnham v. Superior Court for Thurston County, 41 P.2d 155, 180 Wash. 519—State v. Superior Court of King County, 242 P. 1106, 137 Wash. 545.

14. Cal.—Sweetnam v. Board of Police Com'rs of City of Los Angeles, 208 P. 102, 56 Cal.App. 644. Wash.—State ex rel. Burnham v. Superior Court for Thurston County, 41 P.2d 155, 180 Wash. 519.

Every question previously settled

Where every material question raised by petitioner has been settled adversely to petitioner's contention

in a previous case, the writ will not lie.—Waltman v. Ortman, 170 So. 545, first case, 27 Ala.App. 269, certiorari denied 170 So. 545, second case 233 Ala. 170—Foley v. Armstrong, 170 So. 547, 27 Ala.App. 201, certiorari denied 170 So. 548, 233 Ala. 175.

15. Ariz.—Goldwater v. Superior Court in and for Maricopa County, 66 P.2d 233.

Cal.—Cunha v. Superior Court in and for Alameda County, 18 P.2d 340, 217 Cal. 249—Woodruff v. Superior Court in and for Los Angeles County, 44 P.2d 592, 6 Cal.App.2d 430—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349—James v. Superior Court of California in and for Butte County, 169 P. 398, 35 Cal. App. 148.

Iowa.—State v. Beem, 207 N.W. 361, 201 Iowa 373.

La.—Phoenix Building & Homestead Ass'n v. Maloney, 164 So. 410, 183 La. 547—New Orleans & N. E. R. Co. v. Bernich, 150 So. 860, 173 La. 153—General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co., 144 So. 608, 175 La. 392—State v. Barrett, 113 So. 789, 164 La. 124—Lemann v. Ascension Parish School Board, 103 So. 517, 153 La. 81.

Mich.—Callender v. Myers Regulator Co., 225 N.W. 617, 247 Mich. 337.

N.J.—Cordingley v. Borough of Mendham, 171 A. 158, 12 N.J.Misc. 331—Meyer v. City of Perth Amboy, 133 A. 397, 4 N.J.Misc. 464.

N.Y.—People ex rel. Hoesterey v. Taylor, 147 N.E. 223, 239 N.Y. 626, reversing 205 N.Y.S. 897, 210 App. Div. 196, which reversed 202 N.Y.

S. 7, 121 Misc. 718—Hall v. Hood, 201 N.Y.S. 498, 121 Misc. 572.

Okl.—Muse v. Long, 29 P.2d 51, 167 Okl. 159.

Wash.—State ex rel. Burnham v. Superior Court for Thurston County, 41 P.2d 155, 180 Wash. 519.

11 C.J. p 110 note 32.

16. N.Y.—People ex rel. Hoesterey v. Taylor, 147 N.E. 223, 239 N.Y. 626, reversing 205 N.Y.S. 897, 210 App.Div. 196, which reversed 202 N.Y.S. 7, 121 Misc. 718.

17. Okl.—Muse v. Long, 29 P.2d 51, 167 Okl. 159.

18. Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

19. Ariz.—Goldwater v. Superior Court in and for Maricopa County, 66 P.2d 233.

20. Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Rosebud County, 235 P. 751, 73 Mont. 84.

21. Wash.—State v. Mead, 100 P. 1033, 52 Wash. 533.

22. Fla.—Florida Motor Lines v. Railroad Commissioners, 129 So. 376, 100 Fla. 538.

23. Cal.—James v. Superior Court of California in and for Butte County, 169 P. 398, 35 Cal.App. 148.

Certiorari to annul order dissolving preliminary injunction in suit to enjoin sale of capital stock for payment of assessment, after assessment had been voluntarily paid and litigation thereby settled, will be discharged.—James v. Superior Court of California in and for Butte County, *supra*.

questions of law are involved,²⁴ in others it has issued for those reasons.²⁵

§ 34. Matters Not Appearing from Record

Common-law certiorari will not lie to review defects not appearing from the record.

Since the scope of the review under common-law certiorari is confined to the record, as is discussed infra § 157, it follows that the writ does not lie for the purpose of reviewing defects not appearing on the face of the record.²⁶ Conversely, certiorari is a proper remedy, and a speedy one, where it appears on the face of the record that the inferior court, board, or officer has proceeded without, or in excess of, its authority.²⁷ Errors committed in the admission of evidence which do not appear on the record, are not ordinarily reviewable.²⁸ It has been held that, if a judgment is rendered by one who is neither a de jure nor a de facto officer nor judge, the writ is properly denied on the theory that there is no record to review.²⁹

Certiorari is not intended to reach cases where the record may not speak the truth or where fraud or unlawful means were practiced in obtaining the judgment.³⁰

§ 35. Prior Adjudication

A prior adjudication will bar a review of the same matter by certiorari.

24. Cal.—Hager v. Yolo County, 50 Cal. 473.

25. Ga.—Central of Georgia Ry. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620, granting certiorari Yesbik v. Central of Georgia Ry. Co., 91 S.E. 274, 19 Ga.App. 252, affirmed 92 S.E. 527, 146 Ga. 769.
11 C.J. p 110 note 35.

Reason for rule

It is important that the appellate court which has the power to establish precedents binding on other courts should at the first opportunity determine a new and appropriate question so as to avoid any conflict between state and federal statutes. While applications for certiorari for this purpose is not to be regarded as merely a perfunctory proceeding, still where there is any doubt as to the correctness of the decision the writ should be granted that the whole question may be maturely considered and decided on full argument.—Central of Georgia Ry. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620, certiorari granted 91 S.E. 274, 19 Ga.App. 252, affirmed 92 S.E. 527, 146 Ga. 769.

Important questions

(1) Priority of liens under unrecorded bond for title and under subsequent security deed.—Fender v. Hodges, 144 S.E. 273, 166 Ga. 727, reversing 142 S.E. 753, 38 Ga.App.

78, and conformed to 144 S.E. 679, 38 Ga.App. 617.

(2) Judgment on bond conditioned on principal's payment of indebtedness contracted within specified period.—Independence Indemnity Co. v. Industrial Realty Co., 172 S.E. 38, affirming 168 S.E. 122, 46 Ga.App. 637.

(3) Master's responsibility for servant's negligence, where latter deviates from scope of business.—Bunch v. McLeskey, 161 S.E. 123, 173 Ga. 545, reversing 155 S.E. 536, 42 Ga.App. 139, and conformed to 161 S.E. 382, 44 Ga.App. 268.

26. Ala.—Fowler v. Fowler, 122 So. 444, 219 Ala. 457—Towns v. Malone, 116 So. 131, 217 Ala. 273—Kenedy v. T. R. Miller Mill Co., 75 So. 191, 16 Ala.App. 46.

Ark.—Patterson v. Adcock, 248 S.W. 904, 157 Ark. 186—Kenyon v. Gregory, 192 S.W. 887, 127 Ark. 525.

Ariz.—Blankenship v. Industrial Commission, 267 P. 203, 204, 34 Ariz. 2, quoting *Corpus Juris*.

Fla.—Lockwood v. L. & L. Freight Lines, 171 So. 236, 126 Fla. 474—United Mut. Life Ins. Co. v. Sholtz, 163 So. 690, 121 Fla. 260—Hamway v. Seaboard Air Line Ry. Co., 136 So. 628, 101 Fla. 1433.

Ill.—People v. Hartquist, 142 N.E. 475, 311 Ill. 127.

Me.—Jellerson v. Board of Police of

The writ will not issue where it appears that the same questions were previously submitted and adjudicated by a prior writ of certiorari to which the petitioner was a party,³¹ or on an appeal taken by him.³² An application for certiorari and prohibition will not be favorably entertained if it appears that the relator had himself previously submitted to the court the question of the illegality of the action he resists, by means of an injunction.³³ However, an adverse judgment on a rule to dissolve an injunction does not prejudice applicant's right to relief on his application to a higher court for a writ of certiorari and prohibition, since the first application is a prerequisite to his application to the higher court.³⁴

§ 36. Adequacy of Remedy by Certiorari

As is discussed in § 12, certiorari will not be allowed where it would not be beneficial or would be inadequate.

§ 37. Existence and Adequacy of Other Remedy in General

- a. Issuance because of want of other remedy
- b. Denial because of other remedy

City of Biddeford, 187 A. 713, 134 Me. 443.

R.I.—Dimond v. Marwell, 190 A. 683, 11 C.J. p 111 note 45.

27. Utah.—Higgs v. Burton, 197 P. 728, 58 Utah 99.

Jurisdiction appearing on face of record

The common-law writ of certiorari goes to the external regularity of proceedings, and, if it appears from face of record that court or body had jurisdiction of subject matter and person, inquiry ends.—Waltman v. Ortman, 170 So. 545, 233 Ala. 170, second case, denying certiorari 170 So. 545, 27 Ala.App. 269, first case—Foley v. Armstrong, 170 So. 547, 27 Ala.App. 201, certiorari denied 170 So. 548, 233 Ala. 175.

28. Ala.—Fellis v. Royal Harness, etc., Co., 54 So. 504, 170 Ala. 160.

29. Ala.—Fellis v. Royal Harness, etc., Co., supra.

30. Utah.—Higgs v. Burton, 197 P. 728, 58 Utah 99.

31. N.J.—State v. Jersey City, 30 N.J.Law 247.

32. R.I.—City of Newport v. Newport Water Corporation, 189 A. 851.

11 C.J. p 111 note 49.

33. La.—State v. Robinson, 38 La. Ann. 968.

34. La.—Liuzza v. Simms, 97 So. 470, 154 La. 339.

a. Issuance Because of Want of Other Remedy

The absence of another adequate remedy is a ground for the issuance of certiorari in an otherwise proper case.

In the absence of a statute which provides otherwise, certiorari will lie where no other adequate remedy exists.³⁵ Of course, this does not mean

that certiorari will lie merely because there is no other adequate or speedy remedy by which to review the proceedings, where it is otherwise not a proper case for the writ, as where the proceedings are not judicial in their nature.³⁶ Thus, subject to such limitation, the writ will lie when there is no adequate remedy by appeal³⁷ or writ of er-

35. Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 498—Harrell v. Martin, 154 So. 186, 114 Fla. 147—Florida Motor Lines v. Railroad Com'rs, 129 So. 876, 100 Fla. 538—Harry E. Prettyman, Inc., v. Florida Real Estate Commission, 109 So. 442, 92 Fla. 515.

Ill.—People v. Hartquist, 142 N.E. 475, 311 Ill. 127—Fisher v. McIntosh, 115 N.E. 529, 277 Ill. 432.

Iowa.—Bagley v. District Court in and for Cerro Gordo County, 254 N.W. 26, 218 Iowa 34.

Mass.—Wiggin v. National Fire Ins. Co., 170 N.E. 795, 271 Mass. 34.

Mich.—In re Brewer, 231 N.W. 89, 250 Mich. 450, affirming 228 N.W. 762, 250 Mich. 450.

Mo.—State ex rel. Barlow v. Holtcamp, 14 S.W.2d 646, 322 Mo. 253—State ex rel. Brown v. Board of Education of City of St. Louis, 242 S.W. 85, 294 Mo. 106—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo.App. 787.

Mont.—State v. District Court of Thirteenth Judicial Dist. in and for Carbon County, 242 P. 959, 75 Mont. 147.

Okl.—Dancy v. Owens, 258 P. 879, 126 Okl. 37—Oliver v. State, 251 P. 31, 32, 122 Okl. 66, citing *Corpus Juris*.

R.I.—Narragansett Racing Ass'n v. Kiernan, 194 A. 692.

S.D.—Lewis v. Board of Com'rs of Brown County, 182 N.W. 311, 44 S. D. 4.

Tenn.—State v. American Trust Co., 32 S.W.2d 1036, 161 Tenn. 570.

Utah.—Olson v. District Court of Salt Lake County, 71 P.2d 529, 112 A.L.R. 438—Nielson v. Schiller, 66 P.2d 365.

W.Va.—Reynolds Taxi Co. v. Hudson, 136 S.E. 833, 103 W.Va. 173—Humphreys v. County Court of Monroe County, 110 S.E. 701, 90 W. Va. 315.

11 C.J. p 99 note 70.

Organization proceedings of school district

The proceedings for the organization of a school district may be attacked for excess of jurisdiction or for illegality by the common-law writ of certiorari because no appeal or other mode of review is provided.—People v. Hartquist, 142 N.E. 475, 311 Ill. 127—Fisher v. McIntosh, 115 N.E. 529, 277 Ill. 432.

Illegal order as to depositions

(1) Certiorari was proper to test

legality of order to take depositions of defendants in equity case during term where order was not limited to matters necessary to petitioner's cause of action, since remedy by appeal was neither speedy nor adequate.—Bagley v. District Court in and for Cerro Gordo County, 254 N. W. 26, 218 Iowa 34.

(2) Certiorari would be granted to plaintiff, where trial court had erroneously issued order, the effect of which was to suspend any further proceedings until plaintiff submitted himself for purpose of having his deposition taken, although plaintiff had not been subpoenaed by defendant, since court did not regularly pursue authority conferred on it and plaintiff was without any remedy unless granted writ of certiorari, but would be required either to submit to order or cease prosecution of action.—Olson v. District Court of Salt Lake County, Utah, 71 P.2d 529, 112 A.L.R. 438.

36. Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318—Degiovanini v. Public Service Commission of Nevada, 197 P. 582, 584, 45 Nev. 74 quoting *Corpus Juris*.
11 C.J. p 100 note 76.

37. Ala.—Ex parte Cabaniss, 178 So. 1, 235 Ala. 181.

Ariz.—Lockwood v. Superior Court of Navajo County, 254 P. 232, 31 Ariz. 460.

Cal.—Stanton v. Superior Court in and for Los Angeles County, 261 P. 1001, 202 Cal. 478—Diamond v. Superior Court of California in and for City and County of San Francisco, 210 P. 36, 189 Cal. 732—Belmuto v. Superior Court in and for San Joaquin County, 6 P.2d 1007, 119 Cal. 590—Bottoms v. Superior Court in and for Madera County, 256 P. 422, 82 Cal.App. 764.

Fla.—Sweat v. Waldon, 167 So. 363, 123 Fla. 478—Harrell v. Martin, 154 So. 186, 114 Fla. 147—Harry E. Prettyman, Inc., v. Florida Real Estate Commission, 109 So. 442, 92 Fla. 515.

Idaho.—La Salle Extension University v. District Court of First Judicial Dist. for Shoshone County, 16 P.2d 1064, 52 Idaho 559.

Ill.—People v. Hartquist, 142 N.E. 475, 311 Ill. 127.

Mass.—Wiggin v. National Fire Ins. Co., 170 N.E. 795, 271 Mass. 34.

Minn.—Stebbins v. Friend, Crosby & Co., 238 N.W. 57, 184 Minn. 177.

Mo.—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo.App. 787.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.

Nev.—State v. Second Judicial Dist. in and for Washoe County, 226 P. 1106, 48 Nev. 53.

N.M.—In re Blatt, 67 P.2d 293, 110 A.L.R. 656.

N.C.—King v. Taylor, 124 S.E. 751, 183 N.C. 450.

Okl.—Oliver v. State, 251 P. 31, 122 Okl. 66.

Pa.—In re Moskovitz, 196 A. 498, 329 Pa. 183.

R.I.—Narragansett Racing Ass'n v. Kiernan, 194 A. 49.

S.D.—Lewis v. Board of Com'rs of Brown County, 182 N.W. 311, 44 S. D. 4—State v. McGee, 160 N.W. 1009, 38 S.D. 257.

Tenn.—Binford v. Carline, 9 Tenn. App. 364.

Wash.—State ex rel. Carr v. Superior Court for King County, 69 P.2d 1052, 190 Wash. 553—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.2d 133, 180 Wash. 587—State v. Shumway, 243 P. 76, 140 Wash. 43.
11 C.J. p 100 note 71.

Unauthorized appeal retained as certiorari

Where appeal was required to be dismissed because statute failed to afford that remedy, parties acquiesced, and question presented was of public interest, supreme court, of its own motion, retained cause as if presented on certiorari by which appellant was entitled to review.—Jackling v. State Tax Commission, 58 P.2d 1167, 40 N.M. 241.

Appeal limited to "aggrieved party"

(1) One whose rights were adversely adjudicated by interlocutory judgment, but in whose favor final decree was rendered could maintain certiorari where under the statute, only the aggrieved party may appeal.—Ruddell v. Sixth Judicial Dist. Court in and for Humboldt County, 17 P.2d 693, 54 Nev. 363.

(2) Rev.L.1912 § 5327, making an appeal available only to an aggrieved party, did not provide a remedy for defendant over whom court had not acquired jurisdiction by service

ror,³⁸ or otherwise.³⁹ For instance, where the statute provides no means for review of a final order, certiorari will lie.⁴⁰ Likewise, the inability to obtain adequate relief in equity may be ground.⁴¹ Furthermore, whenever there is no direct remedy provided for review, the writ of certiorari lies, even though some other remedy can be conceived as possible in the future.⁴²

Where in a statutory proceeding the legislature fails to provide for an appeal and the action of the tribunal is considered to be final for that reason, certiorari to inspect the record may issue.⁴³ However, in some jurisdictions, where the legislature

particularly states that no appeal shall be permitted, then the writ will not lie except for jurisdictional questions.⁴⁴

b. Denial Because of Other Remedy

(1) In general

(2) Limitations and exceptions to rule

(1) In General

Certiorari will not as a rule issue if there is another adequate remedy available.

As a general rule the writ of certiorari will not issue if there is another adequate remedy available to petitioner.⁴⁵ The rule is not without important

of process or appearance, upon court's denial of his motion to quash service of summons.—*State v. Second Judicial Dist. Court in and for Washoe County*, 226 P. 1106, 48 Nev. 53.

Orders and judgments held not appealable as regards right to writ

(1) Order of judge that mortgagee be enjoined from foreclosing by advertisement and requiring all proceedings to be brought in court.—*State v. McGee*, 160 N.W. 1009, 38 S.D. 257.

(2) Appointment of special administrator is appointed without production of evidence of death.—*In re Paulsen's Estate*, 170 P. 355, 35 Cal. App. 654.

(3) County commissioners' grant of franchise to build toll bridge.—*State v. Shumway*, 248 P. 76, 140 Wash. 43.

(4) Judgment in special proceedings to recover taxes erroneously and illegally charged and paid under protest.—*In re Blatt, N.M.*, 67 P.2d 293, 110 A.L.R. 656.

(5) Order granting new trial in an action tried by the court.—*Diamond v. Superior Court of California in and for City and County of San Francisco*, 210 P. 36, 189 Cal. 732.

(6) Orders and judgments not conforming to rules of procedure.—*Stanton v. Superior Court within and for Los Angeles County*, 261 P. 1001, 202 Cal. 478.—*Delmuto v. Superior Court in and for San Joaquin County*, 6 P.2d 1007, 119 Cal. 590.

(7) Order of superior court directing sheriff to postpone execution sale.—*Lockwood v. Superior Court of Navajo County*, 254 P. 232, 31 Ariz. 460.

(8) Order setting aside judgment entered after default in probate proceedings.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 272 P. 525, 83 Mont. 400.

(9) Order striking case from ca-

lendar.—*Stebbins v. Friend, Crosby & Co.*, 238 N.W. 57, 184 Minn. 177.

(10) Order vacating order which extended time to file answer.—*Bot-toms v. Superior Court in and for Madera County*, 256 P. 422, 82 Cal. App. 764.

(11) Summary judgment against sureties on bail bond.—*State v. District Court of Fourteenth Judicial District in and for Wheatland County*, 172 P. 540, 54 Mont. 577.

Special acts not in ordinary course

In general, statutory authority for appeals does not apply to proceedings under special acts not in the ordinary course of judicial procedure; the remedy being by certiorari.—*State v. Grayson*, 128 So. 573, 220 Ala. 12.

38. Fla.—*Shayne v. Pike*, 178 So. 903, motion denied 180 So. 382.—*Harrell v. Martin*, 154 So. 186, 114 Fla. 147.

Ill.—*Liska v. Chicago Rys. Co.*, 149 N.E. 469, 318 Ill. 570.

Mo.—*Village of Grandview v. McElroy*, 9 S.W.2d 829, 222 Mo.App. 787. Tenn.—*Binford v. Carline*, 9 Tenn. App. 364.

At common law a certiorari is said to lie in all cases where a writ of error does not.—*Huse v. Grimes*, 2 N.H. 208.

39. Ill.—*Fisher v. McIntosh*, 115 N.E. 529, 277 Ill. 432.

Okl.—*Oliver v. State*, 251 P. 31, 122 Okl. 66.

Denial of motion to dismiss appeal

Writ of review may be invoked to review district court orders denying motion to dismiss appeal from justice court and overruling plaintiff's demurrer.—*La Salle Extension University v. District Court of First Judicial Dist. for Shoshone County*, 16 P.2d 1064, 52 Idaho 559.

Exoneration from taxation

W.Va.—*Humphreys v. County Court of Monroe County*, 110 S.E. 701, 90 W.Va. 315.

Revoking designation of newspaper

S.D.—*Lewis v. Board of Com'rs of*

Brown County, 182 N.W. 311, 44 S.D. 4.

40. R.I.—*Narragansett Racing Ass'n v. Kiernan*, 194 A. 49.

11 C.J. p 100 note 72.

41. Ill.—*Southworth v. Ogle County Bd. of Education*, 37 N.E. 403, 238 Ill. 190.

42. Ill.—*De Kalb County Ct. v. Pogue*, 115 Ill.App. 391, affirmed 72 N.E. 906, 213 Ill. 302.

43. Pa.—*In re Twenty-First Senatorial District Nomination*, 126 A. 566, 281 Pa. 273.

44. Pa.—*In re Clarke*, 152 A. 92, 301 Pa. 321.—*In re Twenty-First Senatorial District Nomination*, 126 A. 566, 281 Pa. 273.

45. U.S.—*In re Ban*, D.C.N.Y., 21 F.2d 1009.

Cal.—*Burlingame v. Justice's Court of City of Berkeley*, 33 P.2d 669, 1 Cal.2d 71.—*Homan v. Board of Dental Examiners*, 262 P. 324, 202 Cal. 593.—*Highland Securities Co. v. Superior Court in and for Orange County*, 6 P.2d 116, 119 Cal. App. 107.—*Helbush v. Superior Court in and for City and County of San Francisco*, 278 P. 1062, 99 Cal.App. 501.

Colo.—*State Civil Service Commission of Colorado v. Cummings*, 265 P. 687, 83 Colo. 379.

D.C.—*U. S. ex rel. Eure v. Borden*, 80 F.2d 527, 65 App.D.C. 84.

Idaho.—*Beus v. Terrell*, 269 P. 593, 46 Idaho 635.—*Kootenai County v. State Board of Equalization of State of Idaho*, 169 P. 935, 31 Idaho 155.

Iowa.—*Morrison v. Patterson*, 267 N.W. 704, 221 Iowa 883.—*Winneshiek County State Bank v. Winneshiek District Court*, 197 N.W. 898, 198 Iowa 524.—*Travis v. District Court of Dallas County*, 192 N.W. 835, 199 Iowa 653.

La.—*Corell v. Vidrine*, 177 So. 233, 188 La. 343, vacating certiorari, App., 174 So. 121.

Mich.—*Rapid Ry. Co. v. Michigan Public Utilities Commission*, 196 N.W. 518, 225 Mich. 425.

exceptions, at least in some jurisdictions, as is shown in subdivision b (2) of this section.

Applications of rule. The general rule just stated precludes the granting of the writ, ordinarily, where another remedy is expressly provided by statute,⁴⁶ or where there is an adequate remedy by an action at law or in equity,⁴⁷ or by a defense in an action at law⁴⁸ or in equity,⁴⁹ or an adequate and more proper remedy by writ of habeas corpus,⁵⁰ injunction,⁵¹ mandamus,⁵² quo warranto,⁵³ or supersedeas.⁵⁴

(2) Limitations and Exceptions to Rule

Notwithstanding the existence of another remedy, certiorari may issue to prevent a failure of justice and in other cases within the discretion of the court where not restrained by statute. Another remedy which is merely concurrent or cumulative or is inadequate will not preclude a resort to certiorari. Further, in some states, although not in all, want or excess of jurisdiction or illegality may be reviewed by certiorari although there is another remedy available.

It has been broadly stated that an exception to the rule that the writ will not lie where there is another and adequate remedy, exists where its al-

Minn.—State v. Canfield, 208 N.W. 181, 166 Minn. 414.

Miss.—Board of Sup'rs of Marshall County v. Stephenson, 130 So. 684, reversed on other grounds 134 So. 142, 160 Miss. 372.

Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

Mont.—State v. District Court of Thirteenth Judicial Dist. in and for Carbon County, 242 P. 959, 75 Mont. 147—State v. District Court of Sixteenth Judicial Dist. for Garfield County, 202 P. 387, 61 Mont. 427.

Nev.—Mack v. District Court of Second Judicial District in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

N.J.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J.Law 302—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535.

N.Y.—In re Schroder, 187 N.Y.S. 680.

N.D.—Martin v. Ludowese, 184 N.W. 575, 48 N.D. 342—Cofman v. Ousterhaus, 168 N.W. 826, 40 N.D. 390, 18 A.L.R. 219.

Okl.—School Dist. No. 6 of McClain County v. Board of County Com'rs of McClain County, 236 P. 21, 108 Okl. 254.

Or.—Oregon City v. Clackamas County, 247 P. 772, 118 Or. 546—Chapman v. Hood River County, 178 P. 379, 91 Or. 92.

Philippine.—Springer v. Odlin, 3 Philippine 344, 2 Off.Gaz. 327.

Porto Rico.—Martinez v. Nussa, 20 Porto Rico 337.

R.I.—Conte v. Roberts, 192 A. 814—Cranston Loan Co. v. Byrne, 190 A. 464—Rose v. Standard Oil Co. of New York, 185 A. 251, reargument denied 188 A. 71—Chew v. Superior Court, 110 A. 605, 43 R. I. 194.

Utah.—Hallowel, Jones & Donald v. District Court for Utah County, 26 P.2d 543, 82 Utah 561.

Wash.—State v. Superior Court for King County, 2 P.2d 1095, 164 Wash. 515—Elsensohn v. Garfield County, 231 P. 799, 132 Wash. 229, 11 C.J. p 111 note 52.

Certiorari is an extraordinary writ and is not favored if there be any

other adequate form of relief.—Elsensohn v. Garfield County, 231 P. 799, 132 Wash. 229.

Other statements of principle

(1) The writ will lie only where no appeal or proceeding in error lies and the error cannot otherwise be corrected.—Consolidated School Dist. No. 8, Cimarron County, v. Wilder, 297 P. 280, 148 Okl. 91—Oliver v. State, 251 P. 31, 122 Okl. 66—School Dist. Number 6 of McClain County v. Board of County Com'rs of McClain County, 236 P. 21, 108 Okl. 254.

(2) The writ will lie only where there is no appeal nor, in the judgment of the court or judge to whom application is made, any other plain, speedy, or adequate remedy. N.D.—State v. Pollock, 160 N.W. 511, 35 N.D. 430.

Utah.—Nielson v. Schiller, 66 P.2d 365.

46. N.J.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J. Law 302.

R.I.—Rhode Island Rug Works v. General Baking Co., 128 A. 676—Edwin G. Baker & Son v. City Council of City of Cranston, 109 A. 423—Parker v. Superior Court, 100 A. 305, 40 R.I. 214.

Wash.—State v. Smith, 212 P. 1055, 123 Wash. 564.

Wis.—State ex rel. Waldorf v. Hill, 258 N.W. 361, 217 Wis. 59.

If a special tribunal has been provided by statute, redress must be sought there before the writ will be allowed.—Glazer v. Flemington, 91 A. 1068, 85 N.J.Law 384, affirming 81 A. 163, 81 N.J.Law 211—11 C.J. p 112 note 60.

47. Nev.—Nevada Lincoln Mining Co. v. District Court of Eighth Judicial Dist., 187 P. 1006, 43 Nev. 396.

N.J.—Pamrapau Corporation v. City of Bayonne, 196 A. 678, 119 N.J. Law 346—Harz v. Board of Commerce and Navigation, 196 A. 678, 119 N.J.Law 305—Langdon v. Borough of Netcong, 168 A. 642, 11 N.J.Misc. 852.

Or.—Oregon City v. Clackamas County, 247 P. 772, 118 Or. 546.

11 C.J. p 112 note 57.

Ultra vires ordinance

(1) If ordinance is ultra vires so that work would be public nuisance or tortious, certiorari will be denied because of remedy by indictment or civil action.—City of Millville v. Board of Education of City of Millville in Cumberland County, 134 A. 748, 100 N.J.Eq. 162, affirmed City of Millville v. Board of Education of City of Millville, 137 A. 916, 101 N.J. Eq. 303.

(2) One may not review by certiorari an ordinance pending in the common council for granting an unlawful side track franchise on a public highway, where he could have his remedy by action for damages or abatement by indictment, the consent being ultra vires the power of the city.—Seaman v. City of Perth Amboy, N.J.Sup., 116 A. 174.

48. Cal.—E. Clemens Horst Co. v. Railroad Commission of State of California, 166 P. 804, 175 Cal. 660. Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654, 11 C.J. p 112 note 58.

49. Wash.—Spoonier v. Seattle, 33 P. 963, 6 Wash. 370.

50. U.S.—In re Ban, D.C.N.Y., 21 F. 2d 1009—U. S. ex rel. Roman v. Rauch, D.C.N.Y., 253 F. 814.

51. R.I.—Messier v. Healey, 175 A. 328, 329, citing *Corpus Juris*, 11 C.J. p 112 note 56.

52. Idaho.—Kootenai County v. State Board of Equalization of State of Idaho, 169 P. 935, 31 Idaho 155.

La.—Hudson v. Skannal, 162 So. 1, 182 La. 324—State v. Thompson, 72 So. 844, 140 La. 141.

Me.—Rogers v. Brown, 181 A. 667, 134 Me. 88.

Mich.—Steele v. Sexton, 234 N.W. 436, 253 Mich. 32.

N.Y.—Dillon v. O'Shaughnessy, 226 N.Y.S. 37, 222 App.Div. 772.

11 C.J. p 112 note 54.

53. N.J.—Overman v. Manly Drive Co., Sup., 71 A. 1125.

11 C.J. p 112 note 55.

54. Cal.—Highland Securities Co. v. Superior Court in and for Orange County, 6 P.2d 116, 119 Cal.App. 107.

lowance is necessary to prevent a failure of justice.⁵⁵ It has also been held that the rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience, and discretion rather than a rule of law.⁵⁶ Thus the issuance of certiorari being within the discretion of the court empowered to issue it and to whom application is made, see *supra* § 10, it may not only be dismissed whenever another remedy is available, see *supra* subdivision b (1) of this section, but, in the absence of statutory provision to the contrary, the court may in the exercise of its sound discretion pass upon the questions submitted to it.⁵⁷ On the other hand, where it is provided by statute that certiorari will not lie where an appeal or other adequate remedy exists, the writ will not lie where such is the case.⁵⁸

Where the only limitation on the scope of certiorari to test the judgment of inferior tribunals is that there shall be some other mode of review by a particular court, a method of review by some other governmental agency therefor does not exclude the

certiorari jurisdiction of that court.⁵⁹

Remedy inadequate. Where the other available remedy is inadequate, and more expeditious and efficient relief can be afforded by certiorari, the writ may be granted, although another mode of redress is available.⁶⁰ This rule is specially applicable where the tribunal below was apparently without jurisdiction, or where errors or abuses going to the jurisdiction are complained of.⁶¹

An adequate remedy has been defined as "a remedy which is equally beneficial, speedy and sufficient, not merely a remedy which at some time in the future will bring about a revival of the judgment of the lower court complained of in the certiorari proceeding, but a remedy which will promptly relieve the petitioner from the injurious effects of that judgment and the acts of the inferior court or tribunal."⁶²

Remedy concurrent or cumulative. Certiorari will not be denied, where another available remedy is concurrent with that of certiorari, or cumulative thereto,⁶³ and for this reason the party aggrieved

55. Mich.—Rapid Ry. Co. v. Michigan Public Utilities Commission, 196 N.W. 518, 225 Mich. 425.

56. N.J.—Home Fuel Oil Co. v. Borough of Glen Rock, 192 A. 516, 118 N.J.Law 340.

Constitutional prerogative

The rule stated in the above text is particularly applicable in so far as the prerogative powers of a court to issue the writ are protected by the constitution from legislative changes.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J.Law 302.

57. N.J.—City of Rahway v. Cleary, 159 A. 813, 10 N.J.Misc. 545, affirmed Rahway Valley Joint Meeting v. Cleary, 182 A. 590, 109 N.J.Law 343.

Where mandamus available

Special certiorari, although not to be encouraged in such cases, generally will be sustained in a case involving an exceptional delay, although appropriate remedy was mandamus.—Equipment Corporation of America v. Primos Vanadium Co., 132 A. 360, 285 Pa. 432.

58. Cal.—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.App.2d 71.

Idaho.—Beus v. Terrell, 269 P. 593, 46 Idaho 635.

Iowa.—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 383.

Mont.—State v. District Court of Thirteenth Judicial Dist. in and for Carbon County, 242 P. 959, 75 Mont. 147.

Nev.—Mack v. District Court of Sec-

ond Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

N.Y.—In re Schroder, 187 N.Y.S. 680. Utah.—Hallowel, Jones & Donald v. District Court for Utah County, 26 P.2d 543, 32 Utah 561.

Wash.—State v. Superior Court for King County, 2 P.2d 1095, 164 Wash. 515.

59. W.Va.—State v. Martin, 163 S. E. 850, 112 W.Va. 174.

Appeal to administrative board or officer

Statutory provision authorizing an appeal by dismissed supervisor to the state superintendent of free schools, where board of education is not unanimous, is not exclusive of review of dismissal by circuit court on certiorari.—State v. Martin, 163 S.E. 850, 112 W.Va. 174.

60. Ala.—Fowler v. Fowler, 122 So. 444, 219 Ala. 457.

Iowa.—State v. District Court of O'Brien County, 179 N.W. 442, 189 Iowa 1167.

La.—Wheeler v. Wheeler, 167 So. 191, 184 La. 689—T. Hoffman-Olsen v. Northern Lumber Mfg. Co., 107 So. 593, 160 La. 839.

Mo.—State ex rel. Shartel v. Westhues, 9 S.W.2d 612, 320 Mo. 1093.

Nev.—Abell v. Second Judicial Dist. Court in and for Washoe County, 71 P.2d 111.

R.I.—McKenzie v. Rhode Island Hospital Trust Co., 122 A. 774, 45 R.I. 407.

Tenn.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428.

11 C.J. p 112 note 66.

61. Tenn.—Connors v. City of Knoxville, *supra*. 11 C.J. p 113 note 67.

62. Mo.—State v. Guinotte, 57 S.W. 281, 156 Mo. 513, 527, 50 L.R.A. 787.

63. Del.—Thompson v. Thompson, 140 A. 697, 3 W.W.Harr. 593.

N.Y.—People ex rel. Semenoff v. Nagle, 194 N.Y.S. 602, 118 Misc. 476. Or.—Lechliedner v. Carson, 68 P.2d 482, 156 Or. 636.

Tex.—Cozart v. Buch, Civ.App., 110 S.W.2d 962.

11 C.J. p 112 note 62.

Appeal, injunction, or certiorari available

Where order of board of county commissioners vacating and closing a highway, was void for noncompliance with Remington Comp.Stat. §§ 6503-6506, persons seeking to attack such proceedings, who are not record parties, but would be affected by vacation of highway, although they might have appealed under § 4076, may wait until their rights are actually invaded, in which case they would have recourse to either extraordinary writ of certiorari or extraordinary process of injunction, and where latter remedy pursued court will not hold that former should have been invoked.—Elsensohn v. Garfield County, 231 P. 799, 133 Wash. 229.

Habeas corpus an alternative

Under Civil Pract. Act art 77, writs of certiorari and habeas corpus to inquire into the cause of detention of persons in custody may be issued in the alternative to meet the

will not necessarily be precluded, because he may have a remedy by action,⁶⁴ although, where the party has an opportunity to litigate the question in an action,⁶⁵ or another adequate remedy exists, the court as a rule is reluctant to grant the writ, or at least will exercise great caution in so doing.⁶⁶

Jurisdictional errors and illegality. The general rule that the existence of another adequate remedy will preclude the issuance of certiorari has been held, in many states, to apply without exception to cases involving a want or excess of jurisdiction on the part of the inferior court or tribunal where an adequate appeal or writ of error⁶⁷ or other adequate remedy⁶⁸ is available to petitioner. On the

other hand, the general rule is modified in some states to permit the writ to issue where there is a want or excess of jurisdiction even though an appeal⁶⁹ or other review⁷⁰ lies. This rule may well be based on the theory that in a case involving want or excess of jurisdiction it is doubtful whether the remedy by appeal is ever adequate.⁷¹ Furthermore it has been held that where the trial court has no jurisdiction⁷² or has exceeded its jurisdiction⁷³ the remedies by appeal and certiorari are concurrent.

In some jurisdictions where illegality⁷⁴ or erroneous exercise of functions⁷⁵ are placed on the same plane as excess of jurisdiction the writ will

situation of the relator, and in some cases either may be resorted to after the failure of the other to accomplish the desired end.—*People ex rel. Semenoff v. Nagle*, 194 N.Y.S. 602, 118 Misc. 476.

Summary proceedings

While certiorari is a proper remedy to review proceedings of an inferior court not following the course of the common law, it is not the only remedy.—*Thompson v. Thompson*, 140 A. 697, 3 W.W.Harr., Del., 593.

64. N.Y.—*Peo. v. Westchester County*, 65 N.Y.S. 707, 53 App.Div. 339, distinguishing *Kennedy v. Queens County*, 62 N.Y.S. 276, 47 App.Div. 250.

11 C.J. p 112 note 63.

65. N.Y.—*Peo. v. New York Bd. of Health*, 33 Barb. 344, 12 Abb.Pr. 88, 20 How.Pr. 458.

66. Wash.—*Elsensohn v. Garfield County*, 231 P. 799, 132 Wash. 229, 11 C.J. p 112 note 65.

67. Ariz.—*Chalmers v. Phelps*, 53 P. 2d 731, 47 Ariz. 64—*City of Phoenix v. Greer*, 29 P.2d 1062, 43 Ariz. 214—*Miller v. Superior Court of Mohave County*, 185 P. 357, 21 Ariz. 61.

Cal.—*Erickson v. Municipal Court of City and County of San Francisco*, 29 P.2d 192, 219 Cal. 737—*Homan v. Board of Dental Examiners of California*, 262 P. 324, 202 Cal. 593—*Casner v. Superior Court in and for City and County of San Francisco*, App., 74 P.2d 298—*Griffith v. Superior Court in and for Los Angeles County*, 37 P.2d 142, 1 Cal. App.2d 670—*Camm v. Justice's Court of Santa Rosa Tp.*, 170 P. 409, 35 Cal.App. 293.

Me.—*Miller v. Weisman*, 130 A. 504, 125 Me. 4.

Mont.—*White v. Corbett*, 52 P.2d 156, 101 Mont. 1—*State v. District Court of Fifth Judicial Dist. in and for Madison County*, 221 P. 543, 69 Mont. 322—*State v. District Court of Sixteenth Judicial Dist.*

for Garfield County, 202 P. 387, 61 Mont. 427.

Nev.—*Mack v. District Court of Second Judicial Dist. in and for Washoe County*, Department No. 2, 258 P. 289, 50 Nev. 318.

11 C.J. p 103 notes 3-6.

It has been held, however, that an order of a district court which it is without jurisdiction to make is subject to review by a writ of review although the proceeding in which the order is made is appealable.—*State v. Second Judicial Dist. Ct.*, 46 P. 259, 18 Mont. 481.

Order suspending alimony

That the court, in making an order suspending payment of alimony and awarding custody of a minor child after judgment in an action for divorce, exceeded its jurisdiction, is insufficient to justify the issuance of a writ of certiorari since the order is appealable.—*State v. District Court of Fifth Judicial Dist. in and for Madison County*, 221 P. 543, 69 Mont. 322.

68. Colo.—*State Civil Service Commission of Colorado v. Cummings*, 265 P. 687, 83 Colo. 379.

Idaho.—*Beus v. Terrell*, 269 P. 593, 46 Idaho 635.

Mont.—*White v. Corbett*, 52 P.2d 156, 101 Mont. 1—*State v. District Court of Sixteenth Judicial Dist. for Garfield County*, 202 P. 387, 61 Mont. 427.

Nev.—*Mack v. District Court of Second Judicial Dist. in and for Washoe County*, Department No. 2, 258 P. 289, 50 Nev. 318.

11 C.J. p 112 note 61.

Where three concurring requisites are essential under the statute, namely: first, an excess of jurisdiction; second, absence of appeal; third, where in the judgment of the court there is no plain, adequate and speedy remedy; if any one of such essentials is missing the writ will not lie.—*Mack v. District Court of Second Judicial Dist. in and for*

Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

69. La.—*City of Gretna v. Bailey*, 72 So. 996, 140 La. 363.

N.J.—*Dorman v. Usbe Building & Loan Ass'n*, 180 A. 413, 115 N.J. Law 337.

Or.—*Lechliedner v. Carson*, 68 P.2d 482, 156 Or. 636.

Tenn.—*Connors v. City of Knoxville*, 189 S.W. 870, 136 Tenn. 423.

11 C.J. p 103 notes 98-1.

Want or excess of jurisdiction as ground for certiorari see *supra* § 23.

70. Ala.—*City of Birmingham v. Collins*, 78 So. 385, 201 Ala. 479, denying certiorari 77 So. 60, 16 Ala.App. 222.

Intermediate appellate court

In ordinary cases an appellee should have sought a review by the supreme court of the overruling of a motion in the court of appeals to dismiss the appeal; but as the question involved goes to the jurisdiction of the court of appeals the supreme court must consider such matter on certiorari by the appellant to review the subsequent judgment in the appellate court.—*City of Birmingham v. Collins*, *supra*.

71. Tenn.—*Connors v. City of Knoxville*, 189 S.W. 870, 136 Tenn. 423.

72. N.J.—*Dorman v. Usbe Building & Loan Ass'n*, 180 A. 413, 115 N.J. Law 337—*Ritter v. Kunkel*, 39 N. J. Law 259.

It has been held, however, that certiorari does not lie to circuit court exercising judicial functions in course of common law even though the court acted without jurisdiction, the proper remedy being by appeal after judgment.—*Eder v. Hudson County Circuit Court*, 140 A. 883, 104 N.J. Law 260.

73. Or.—*Lechliedner v. Carson*, 68 P.2d 482, 156 Or. 636.

74. Tenn.—*Connors v. City of Knoxville*, 189 S.W. 870, 136 Tenn. 423.

75. Or.—*Lechliedner v. Carson*, 68 P.2d 482, 156 Or. 636.

issue on such grounds despite the availability of an appeal.

§ 38. Remedy by Application in Original Proceeding

It appears to be the general rule that if the relief sought is obtainable by application in the court or tribunal of the original proceeding, and it has not been availed of, certiorari will not lie.

If the petitioner for the writ could have obtained the relief sought by an application to the court or tribunal in the original proceeding, but he has failed to make such an application, the writ does not lie.⁷⁶ Moreover a party is not entitled to the writ if he fails to exercise diligence in protecting his interests in the action or proceeding in question.⁷⁷ Thus the writ does not lie to review a judgment where no motion to set it aside or to quash it has been made,⁷⁸ nor to vacate an order which might be corrected by amendment in the lower court or tribunal.⁷⁹ Certiorari is not the proper remedy against a judgment or decree procured on false and fraudulent testimony, see *supra* § 34, a motion for a new trial being appropriate.⁸⁰ If, however, it is the absolute and imperative duty of the court below to take the action charged to have been neglected, it is not necessary that a formal application should have been made.⁸¹ The writ does not lie to set aside a proceeding by an incorporated political body, for alleged irregularity, until the remedy

within the organization is exhausted.⁸² Where a motion to dismiss a pending appeal from a layout of a highway underpass on the ground of the selectmen's lack of authority to make it may properly be made, certiorari will not lie.⁸³

An exception to the rule set out at the beginning of this section is to the effect that a person with a clear right to make a direct attack on a judgment or order of a judicial tribunal on the ground of lack of jurisdiction is not required first to seek relief from such judgment or order in the court which was without jurisdiction to make it.⁸⁴

In a jurisdiction where the scope of the writ is very broad, the right of certiorari may be exercised without moving for a new trial.⁸⁵

Consent judgment. It has been held that the writ of certiorari cannot be granted to review a judgment by consent, the apparent remedy being by motion to set aside the judgment and, if the motion is denied, a review of such denial by appeal or certiorari.⁸⁶

Rehearing. The failure to apply for a rehearing may bar the writ,⁸⁷ but a second application for a rehearing need not be made.⁸⁸

§ 39. Remedy by Appeal, Writ of Error, or Exceptions

a. In general

b. Adequacy of appeal

76. Cal.—*Smith v. Superior Court of Los Angeles County*, 27 P.2d 935, 136 Cal.App. 65.

La.—*State v. Clark*, 78 So. 742, 143 La. 481.

Mo.—*State ex rel. Kennedy v. Hogan*, 267 S.W. 619, 306 Mo. 580.

R.I.—*Scotti v. District Court of Tenth Judicial District*, 109 A. 207, 42 R.I. 556.

11 C.J. p 113 note 69.

Relator should have exhausted his remedies for relief in trial court before obtaining writs of certiorari against judge of juvenile court ordering him to give a guaranty bond to pay monthly sum for support of relator's child and in default of bond to be held for further orders of the court, etc.—*State v. Clark*, 78 So. 742, 143 La. 481.

Remedy by jury trial

Where district court had jurisdiction of case wherein the attorneys for the parties orally agreed in open court on a statement of facts sufficient to enable the court to apply the law, the action of the court in rendering its decision in such case on the day appointed was legal, and not subject to review by writ of certiorari, since party, aggrieved by decision had privilege of claiming a

jury trial within two days after decision was made.—*Scotti v. District Court of Tenth Judicial Dist.*, 109 A. 207, 42 R.I. 556.

77. Me.—*American Fisheries Co. v. Sanborn*, 119 A. 803, 122 Me. 561.

N.J.—*Hudson Taxi Co. v. Niedzwicki*, 130 A. 647, 3 N.J.Misc. 1111.

11 C.J. p 112 note 53.

Failure to except

Certiorari is properly denied where the questions attempted to be raised thereby could have been raised by exceptions.—*American Fisheries Co. v. Sanborn*, 119 A. 803, 122 Me. 561.

78. Ark.—*Pruitt v. International Order of Twelve, Knights and Daughters of Tabor*, 250 S.W. 331, 158 Ark. 437.

11 C.J. p 113 note 70.

79. Mich.—*Gratiot County v. Munson*, 122 N.W. 117, 157 Mich. 505.

80. Iowa.—*Miller v. Kramer*, 134 N.W. 538, 154 Iowa 523.

81. Tex.—*Connell v. Chandler*, 11 Tex. 249.

82. N.J.—*Lehman v. Hudson County Republican Committee*, 41 A. 718, 62 N.J.Law 574.

83. N.H.—*Hoban v. Bucklin*, 184 A. 362, 88 N.H. 73, modified on other grounds 186 A. 8, 88 N.H. 73.

84. Cal.—*Grinbaum v. Superior Court in and for City and County of San Francisco*, 221 P. 635, 192 Cal. 528—*Boca & L. N. Co. v. Superior Court of Lassen County*, 88 P. 715, 150 Cal. 147.

85. Ga.—*Farmers' & Merchants' Bank v. Willie*, 133 S.E. 44, 35 Ga. App. 202.

11 C.J. p 113 note 75.

86. N.C.—*King v. Taylor*, 124 S.E. 751, 188 N.C. 450.

87. Ala.—*Richardson v. State*, 112 So. 193, 215 Ala. 581, dismissing petition for certiorari 111 So. 202, 21 Ala.App. 639, reversed on other grounds 111 So. 204, 215 Ala. 318—*Birmingham Gas Co. v. Sanders*, 162 So. 532, 230 Ala. 649, denying certiorari 162 So. 531, 26 Ala.App. 455.

La.—*State v. Moore*, 143 So. 707, 175 La. 607, transferred 140 So. 516, 19 La.App. 364—*State v. Charles E. Wermuth Co.*, 140 So. 699, 19 La.App. 443, transferred 147 So. 692, 177 La. 83.

11 C.J. p 113 note 72.

88. La.—*Luckett & Hunter v. Texas & P. R. Co.*, 108 So. 405, 161 La. 175, reinstating 1 La.App. 434, and annulling 2 La.App. 752.

a. In General

Where there is a plain, speedy, and adequate remedy by appeal, writ of error, or exceptions, certiorari will not issue.

The writ of certiorari will not issue in those cases in which there is a plain, speedy, and adequate remedy by appeal,⁸⁹ writ of er-

89. Ala.—Byars v. Alabama Power Co., 172 So. 621, 233 Ala. 533—Morris v. McElroy, 122 So. 608, 219 Ala. 369, denying certiorari 122 So. 606, 23 Ala.App. 96—Ex parte Kelly, 128 So. 443, 221 Ala. 339—Fowler v. Fowler, 122 So. 444, 219 Ala. 457—Ex parte De Bardeleben Coal Co., 103 So. 548, 212 Ala. 533—Linch v. Scott, 93 So. 326, 18 Ala. App. 630.

Ariz.—Lockwood v. Superior Court of Navajo County, 254 P. 232, 31 Ariz. 460—State v. Superior Court of Cochise County, 249 P. 768, 30 Ariz. 620—Miller v. Superior Court of Mohave County, 185 P. 357, 21 Ariz. 61.

Ark.—Bird v. McCrory Special School Dist., 300 S.W. 370, 175 Ark. 724—Patterson v. Adcock, 248 S.W. 904, 157 Ark. 186—Brown & Hackney v. Stephenson, 248 S.W. 556, 157 Ark. 470—Kenyon v. Gregory, 192 S.W. 887, 127 Ark. 525.

Cal.—Gladding v. Superior Court in and for Los Angeles County, 60 P. 2d 857, 7 Cal.2d 408—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737—Pomper v. Superior Court in and for Los Angeles County, 216 P. 577, 191 Cal. 494—Snyder v. Plummer, 162 P. 1040, 174 Cal. 204—Hildebrand v. Superior Court in and for City and County of San Francisco, 159 P. 147, 173 Cal. 86—Blauth v. Superior Court in and for Sacramento County, App., 53 P.2d 1013—Faia v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal. App. 525—Mannix v. Superior Court in and for Sacramento County, 24 P.2d 507, 133 Cal.App. 740—Security-First Nat. Bank v. Superior Court of California in and for San Diego County, 23 P.2d 1055, 132 Cal.App. 683, recalled Security First Nat. Bank v. Superior Court in and for San Diego County, 25 P.2d 234, 134 Cal.App. 195—Belt Casualty Co. v. Superior Court in and for City and County of San Francisco, 19 P.2d 25, 129 Cal.App. 642—Hughson v. Superior Court in and for Alameda County, 8 P.2d 227, 120 Cal.App. 658—Pleaters' & Stitches' Ass'n v. Superior Court in and for Los Angeles County, 299 P. 555, 114 Cal.App. 35—Seaboard Surety Corporation of America v. Superior Court in and for Los Angeles County, 296 P. 633, 112 Cal. App. 248—Schnerr v. Superior Court in and for City and County of San Francisco, 295 P. 97, 111

Cal.App. 136—Bullard v. Superior Court in and for Los Angeles County, 288 P. 629, 106 Cal.App. 513—Helbush v. Superior Court in and for City and County of San Francisco, 278 P. 1062, 99 Cal.App. 501—Coley v. Superior Court in and for City and County of San Francisco, 264 P. 1110, 89 Cal.App. 330—Associated Credit Exchange of San Francisco v. Barnett, 259 P. 95, 85 Cal.App. 255—Mayer v. Superior Court of California in and for City and County of San Francisco, 257 P. 893, 84 Cal.App. 265—Booth v. Superior Court of City and County of San Francisco, 254 P. 617, 81 Cal.App. 709—Martin v. Miller, 224 P. 783, 65 Cal. App. 581—Hochheimer & Co. v. Superior Court in and for Kern County, 223 P. 564, 65 Cal.App. 206—Millsap v. Alderson, 219 P. 469, 63 Cal.App. 518—Luitweiler v. Superior Court of California in and for Los Angeles County, 202 P. 165, 54 Cal.App. 528—Candelas v. Superior Court in and for Merced County, 198 P. 86, 51 Cal.App. 128—Manoogian v. Superior Court in and for Imperial County, 192 P. 168, 48 Cal.App. 609—Wall v. Superior Court in and for Riverside County, 192 P. 134, 48 Cal.App. 564—Stensland v. Superior Court of California in and for San Diego County, 173 P. 549, 39 Cal.App. 172—Cline v. Superior Court in and for Los Angeles County, 169 P. 453, 35 Cal.App. 150.

D.C.—U. S. ex rel Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

Fla.—Amos v. Powell, 146 So. 195, 108 Fla. 139—Coslick v. Finney, 140 So. 216, 104 Fla. 394—Postal Telegraph-Cable Co. v. Broome, 126 So. 149, 99 Fla. 272.

Idaho.—State v. Adair, 287 P. 950, 49 Idaho 271—Beus v. Terrell, 269 P. 593, 46 Idaho 635—Malloy v. Keel, 250 P. 389, 43 Idaho 211.

Iowa.—Collins v. Cooper, 244 N.W. 858, 215 Iowa 99—Waterloo Canning Co. v. Municipal Court of Waterloo, 243 N.W. 287, 214 Iowa 1169—Samek v. Taylor, 213 N.W. 801, 203 Iowa 1064—M. H. McCarthy Co. v. Dubuque District Court, 208 N.W. 505, 201 Iowa 912.

La.—First Nat. Life Ins. Co. v. Bell, 140 So. 11, 174 La. 164—State v. Rabalais, 139 So. 8, 173 La. 927—Liberty Coffee Co. v. Alberti, 134 So. 748, 172 La. 572—Goff v. Barranco, 117 So. 749, 166 La. 647—Dill v. Lowery, 117 So. 748, 166 La. 645—Roussel v. Dalche, 105 So. 510, 159 La. 463—Brown v. Bacot, 94 So. 368, 152 La. 721—Dawson v.

Frazar, 90 So. 570, 150 La. 203—State ex rel. Parker v. Skinner, 86 So. 716, 148 La. 143—Teacle v. Hughes, 83 So. 457, 146 La. 195—New Orleans Silica Brick Co. v. John Thatcher & Son, 78 So. 729, 143 La. 442.

Me.—Miller v. Weisman, 130 A. 504, 125 Me. 4.

Mich.—In re Brewer, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450.

Minn.—Neumann v. Edwards, 178 N. W. 539, 146 Minn. 179—State v. Kane, 174 N.W. 884, 144 Minn. 225. Miss.—Shapleigh Hardware Co. v. Brumfield, 130 So. 93, 159 Miss. 175—Federal Credit Co. v. Zepernick Grocery Co., 120 So. 173, 153 Miss. 489.

Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, transferred 43 S.W.2d 1059, 226 Mo.App. 187—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580.

Mont.—State ex rel. Stimatz v. District Court of Second Judicial Dist., 74 P.2d 8—Shaffroth v. Lamere, 65 P.2d 610—State ex rel. Monteath v. Ninth Judicial Dist. Court in and for Glacier County, 37 P.2d 567, 97 Mont. 530—State v. District Court of Fifth Judicial Dist. in and for Madison County, 221 P. 543, 69 Mont. 322—State v. District Court of Eighth Judicial Dist. in and for Cascade County, 207 P. 1004, 64 Mont. 110—State v. District Court of Sixteenth Judicial Dist. for Garfield County, 202 P. 387, 61 Mont. 427—State v. District Court of Silver Bow County, 179 P. 497, 55 Mont. 560.

Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

N.J.—Neubauer v. McCutcheon, 118 A. 704, 98 N.J.Law 94—Koehler v. Passaic County Orphans' Court, 113 A. 914, 95 N.J.Law 259—Trout v. Paul, 99 A. 816, 90 N.J.Law 62—City of Rahway v. Cleary, 159 A. 813, 10 N.J.Misc. 545, affirmed Rahway Valley Joint Meeting v. Cleary, 162 A. 590, 109 N.J.Law 348—Standard Accident Ins. Co. of Detroit, Mich., v. Lloyd, 157 A. 657, 10 N.J.Misc. 28—Hudson Taxi Co. v. Neidzwcki, 130 A. 647, 3 N.J. Misc. 111.

N.Y.—Douglas v. Adel, 199 N.E. 35, 269 N.Y. 144, reversing 280 N.Y. S. 1005, 244 App.Div. 818, amendment of remittitur denied 2 N.E. 2d 679, 271 N.Y. 528—In re Haase, 200 N.Y.S. 419, 206 App.Div. 14, appeal dismissed Haase v. Common Council of City of Elmira, 142 N.E. 320, 236 N.Y. 650.

ror,⁹⁰ or exceptions.⁹¹

Exceptions and limitations. The exceptions heretofore considered, see supra § 37 b (2), to the rule that certiorari will not lie where another adequate remedy is available are in general applicable to the rule now under consideration. Thus, where, as is the case in some states, the remedy by appeal and that by certiorari are in certain cases concurrent or cumulative, a party may have certiorari, although he also has a remedy by appeal.⁹² The availability of certiorari in some jurisdictions, where the writ is sought on the ground of want or excess of jurisdiction or illegality despite the existence of a

right of appeal, is discussed supra § 37, b, (2). Some jurisdictions, following a policy of enlarging rather than restricting the functions of the writ, consider that the fact that the determination sought to be reviewed is appealable will not necessarily preclude the issuance of certiorari,⁹³ especially where the time within which an appeal must be taken has lapsed.⁹⁴

b. Adequacy of Appeal

Unless an available appeal is adequate, it will not preclude the issuance of certiorari.

As already stated in § 37 b (2), the existence of

N.D.—*Sell v. Davis*, 237 N.W. 307, 309, citing *Corpus Juris*—*Cofman v. Ousterhous*, 168 N.W. 826, 40 N.D. 390, 18 A.L.R. 219—*State v. Pollock*, 160 N.W. 511, 35 N.D. 430.

Okl.—*Consolidated School Dist. No. 8, Cimarron County*, 297 P. 280, 148 Okl. 91—*Oliver v. State*, 251 P. 31, 122 Okl. 66—*School Dist. Number 6 of McClain County v. Board of County Com'rs of McClain County*, 236 P. 21, 24, 108 Okl. 254, quoting *Corpus Juris*.

R.I.—*George v. Merewether, Inc.*, v. *Equi*, 165 A. 219, 53 R.I. 148—*Bishop v. Superior Court*, 144 A. 433, 50 R.I. 13—*Edwin G. Baker & Son v. City Council of City of Cranston*, 109 A. 423.

Utah.—*Hallowel, Jones & Donald v. District Court for Utah County*, 26 P.2d 543, 82 Utah 561—*Thomas v. District Court of Box Elder County*, 242 P. 343, 66 Utah 300—*MacFarlane v. Burton*, 228 P. 193, 64 Utah 41.

Wash.—*State ex rel. Barry v. Superior Court in and for Kings County*, 35 P.2d 1095, 179 Wash. 55—*State v. Bell*, 289 P. 27, 157 Wash. 696—*State v. Bell*, 289 P. 25, 157 Wash. 279—*State v. Superior Court of Thurston County*, 283 P. 1093, 155 Wash. 296—*State v. Superior Court for King County*, 247 P. 457, 139 Wash. 704—*State v. Superior Court for King County*, 234 P. 1017, 134 Wash. 90—*State v. Superior Court for Snohomish County*, 223 P. 1, 128 Wash. 468—*State v. Smith*, 212 P. 1055, 123 Wash. 564—*State v. Superior Court of Washington for Skagit County*, 179 P. 865, 106 Wash. 320, 11 C.J. p 113 note 78.

Approval or refusal of claim in guardianship proceedings is not reviewable by district court on certiorari, but only on appeal.—*Jones v. Silverman*, Tex.Civ.App., 84 S.W.2d 1013—*Bolton v. Baldwin*, Tex.Civ.App., 57 S.W.2d 957, error dismissed.

Intervention and appeal

Certiorari will not issue where pe-

tioner has remedy by intervention in receivership proceedings with right of appeal secured.—*Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2*, 258 P. 289, 50 Nev. 318.

Orders held appealable and not reviewable by certiorari

(1) Directing the return of money deposited with a supreme court commissioner in lieu of bail.—*Neubauer v. McCutcheon*, 118 A. 704, 98 N.J. Law 94.

(2) Restraining order.—*Luitwieler v. Superior Court of California in and for Los Angeles County*, 202 P. 165, 54 Cal.App. 528.

(3) Suspending payment of alimony and awarding the custody of a minor child, after judgment for divorce.—*State v. District Court of Fifth Judicial Dist. in and for Madison County*, 221 P. 543, 69 Mont. 322.

(4) Granting of new trials.—*New Orleans Silica Brick Co. v. John Thatcher & Son*, 78 So. 729, 143 La. 442.

(5) Modifying divorce decree, in so far as it awarded custody of minor child.—*State v. Smith*, 212 P. 1055, 123 Wash. 564.

(6) Compelling production of books of decedent.—*Trout v. Paul*, 99 A. 916, 90 N.J.Law 62.

90. Fla.—*Amos v. Powell*, 146 So. 195, 108 Fla. 139—*Des Rocher & Watkins Towing Co. v. Third Nat. Bank*, 143 So. 768, 106 Fla. 466—*Coslick v. Finney*, 140 So. 216, 104 Fla. 394.

Mich.—*In re Brewer*, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450.

Mo.—*State ex rel Palmer v. Eliff*, 58 S.W.2d 283, transferred 43 S.W. 2d 1059, 226 Mo.App. 187—*State ex rel Kennedy v. Hogan*, 267 S.W. 619, 306 Mo. 580.

Okl.—*Consolidated School Dist. No. 8, Cimarron County*, 297 P. 280, 148 Okl. 91.

W.Va.—*Carroll Hardwood Lumber*

Co. v. Kentucky River Hardwood Co., 119 S.E. 162, 94 W.Va. 392, 11 C.J. p 115 note 79.

91. Me.—*American Fisheries Co. v. Sanborn*, 119 A. 803, 122 Me. 561.

Mich.—*In re Brewer*, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450.

R.I.—*Rhode Island Rug Works v. General Baking Co.*, 128 A. 676—*Chew v. Superior Court*, 110 A. 605, 43 R.I. 194.

11 C.J. p 115 note 80.

92. Or.—*Lechleidner v. Carson*, 68 P.2d 482, 156 Or. 636.

Tenn.—*Conners v. City of Knoxville*, 189 S.W. 870, 136 Tenn. 428.

Tex.—*Cozart v. Buck*, Civ.App., 110 S.W.2d 962.

3 C.J. p 340 note 41—11 C.J. p 115 note 82.

93. N.Y.—*Citron v. O'Shea*, 277 N.Y. S. 892, 244 App.Div. 158.

Utah.—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372—*Herald-Republican Pub. Co. v. Lewis*, 129 P. 624, 42 Utah 188.

11 C.J. p 115 note 81.

Appeal precluding recourse to court

School teacher may bring certiorari to review determination of board of superintendents of board of education of New York denying teacher annual salary increment on ground that services were unsatisfactory, without first exhausting statutory remedy of appeal to commissioner of education, since, if teacher appealed to commissioner, his disposition would have precluded recourse to court.—*Citron v. O'Shea*, 277 N.Y.S. 892, 244 App.Div. 158.

94. Utah.—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372.

Dismissal after period

Where the writ was granted at a time when an appeal could have been taken, the writ will not be dismissed thereafter because of such reason.—*Rohwer v. First Judicial Dist. Ct.*, 125 P. 671, 41 Utah 279.

another remedy is not a bar unless it is an adequate remedy. Unless otherwise provided by statute this rule applies where there is another remedy by appeal or writ of error, but it is not an adequate remedy.⁹⁵

In some states the statute provides that certiorari or a writ of review may be granted in certain cases where there is no appeal, nor any plain, speedy, and adequate remedy. Under such a statute and those containing language substantially the same, it seems to be the general rule that the remedy by appeal must be adequate if it is to preclude certiorari,⁹⁶ and it would appear that the appeal must also be plain⁹⁷ and speedy.⁹⁸ On the other hand, the courts of some jurisdictions have construed the statute more literally and hold that the mere fact that an

order or judgment is appealable is determinative and the fact that the appeal does not afford a plain, speedy, and adequate remedy is immaterial.⁹⁹

Matters determining adequacy. The peculiar circumstances of the particular case may be considered as bearing on the question of the adequacy of the remedy by appeal.¹ It has been held that where one litigant has the opportunity to decide whether an appeal from a judgment in his favor will be adequate and is at liberty to pursue a course of conduct which might result in great injustice to the other before the latter's rights are determined, such remedy is inadequate and certiorari is available to the other litigant to review the judgment.² It is not necessary that the appeal be as advantageous or adequate in all particulars as the writ of certio-

95. Ala.—Fowler v. Fowler, 122 So. 444, 219 Ala. 457.

Iowa.—State v. District Court of O'Brien County, 179 N.W. 442, 189 Iowa 1167.

La.—Succession of Strange, 177 So. 579, 188 La. 478—Wheeler v. Wheeler, 167 So. 191, 184 La. 689—T. Hofman-Olsen v. Northern Lumber Mfg. Co., 107 So. 593, 160 La. 839—Lavoy v. Toye Bros. Auto & Taxicab Co., 105 So. 292, 159 La. 209.

Mo.—State ex rel. Shartel v. Westhues, 9 S.W.2d 612, 320 Mo. 1093.

Nev.—Abell v. Second Judicial Dist. Court, in and for Washoe County, 71 P.2d 111.

R.I.—MacKenzie v. Rhode Island Hospital Trust Co., 122 A. 774, 45 R.I. 407.

S.D.—State v. Circuit Court of Seventh Judicial Circuit within and for Pennington County, 246 N.W. 638, 61 S.D. 154.

Tenn.—Connors v. City of Knoxville, 189 S.W. 870, 136 Tenn. 428. 11 C.J. p 116 note 87.

Appeal not suspending execution

La.—Succession of Strange, 177 So. 579, 188 La. 478—T. Hofman-Olsen v. Northern Lumber Mfg. Co., 107 So. 593, 160 La. 839.

Orders as to custody of children reviewed

La.—Wheeler v. Wheeler, 167 So. 191, 184 La. 689.

Nev.—Abell v. Second Judicial Dist. Court, in and for Washoe County, 71 P.2d 111.

96. Utah.—Neilson v. Schiller, 66 P.2d 365.

Wash.—State ex rel. Meehan v. Superior Court for King County, 74 P.2d 1012—State ex rel. Turner v. Paul, 46 P.2d 1060, 182 Wash. 261—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.2d 133, 180 Wash. 587—State ex rel. Lundberg v. Superior Court for King County, 24

P.2d 76, 173 Wash. 657—State v. Kay, 4 P.2d 493, 164 Wash. 685—State v. Superior Court for King County, 2 P.2d 1095, 164 Wash. 515—State v. Superior Court for King County, 234 P. 1017, 134 Wash. 90—State v. Superior Court of King County, 213 P. 677, 124 Wash. 90—State v. Superior Court for King County, 206 P. 966, 120 Wash. 183—State v. Superior Court of Washington for King County, 199 P. 977, 116 Wash. 535—State v. Superior Court for Stevens County, 183 P. 384, 110 Wash. 559.

Notwithstanding the seeming purport of the language of the statute, providing that it must appear "that there is no appeal, nor in the judgment of the court any plain, speedy, and adequate remedy at law," it does not contemplate that the writ will issue only where there is no appeal, for it is clearly the rule that the writ may issue if the appeal is inadequate.—State v. Superior Court for King County, 234 P. 1017, 134 Wash. 90.

Appeal adequate to review order denying motion to abate action against foreign corporation on the ground that it has been dissolved for all purposes.—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.2d 133, 180 Wash. 587.

Appeal held to be inadequate

(1) Order fixing amount of supersedeas bond intended to stay proceedings on only part of judgment.—State ex rel. Lundberg v. Superior Court for King County, 24 P.2d 76, 173 Wash. 657.

(2) Denial of application to set aside appointment of one other than surviving spouse to administer community property.—State v. Superior Court of King County, 213 P. 677, 124 Wash. 90.

In Montana

(1) An extraordinary writ may issue, notwithstanding existence of

right of appeal, where right of appeal is obviously inadequate to afford proper relief.—State ex rel. Stimatz v. District Court of Second Judicial Dist., Mont., 74 P.2d 8.

(2) However, under a literal construction of the statute, it was formerly held that the appeal need not be speedy or adequate in order to preclude the issuance of the writ.—State v. Second Judicial Dist. Ct., 62 P. 320, 24 Mont. 494.

97. Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.

98. Utah.—Nielson v. Schiller, 66 P. 2d 365.

Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55.

Appeal is preferred to certiorari unless appeal is not plain, speedy, and adequate, and if certiorari is diligently sought.—State ex rel. Barry v. Superior Court in and for King County, supra.

Appeal held plain, speedy, and adequate

Utah.—Thomas v. District Court of Box Elder County, 242 P. 348, 66 Utah 300.

Appeal not adequate or speedy

Utah.—Nielson v. Schiller, 66 P.2d 365.

99. Cal.—Burlingame v. Juvenile Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71—State Board of Equalization v. Superior Court in and for Shasta County, 70 P.2d 482—Stoddard v. Superior Court, 41 P. 278, 108 Cal. 303—McCue v. Superior Court, 12 P. 615, 71 Cal. 545.

1. R.I.—Conte v. Roberts, 192 A. 814.

11 C.J. p 116 note 1.

2. La.—Wheeler v. Wheeler, 167 So. 191, 184 La. 689.

rari.³ The fact that an appeal will not lie directly from an order is not ordinarily considered to be a sufficient basis for the writ, where the party aggrieved has a remedy to review the order by an appeal from a final judgment in the case, unless such remedy is otherwise inadequate,⁴ although there is authority to the contrary.⁵ Similarly, where the effect of a decree modifying a prior decree and referring the case to a master is to leave the cause subject to future orders and decrees of the court, certiorari will not lie to quash the modifying decree, since if deemed aggrieved by the final decree to be rendered petitioner may appeal therefrom.⁶ Where despite the fact that an order may be reviewed on appeal from final judgment, there is nevertheless no adequate remedy by appeal because of exceptional circumstances, or the probability of irreparable harm, the writ will lie to review such order.⁷ Such a case is made where a party, in order to appeal, must first submit to an adverse judgment which will fix his status as a person of unsound mind, and which could not be superseded by bond or otherwise, and would deprive him of dominion of his property, and render it doubtful whether the proceeding could be reviewed at all if his death should occur before such review could be had.⁸ It has also been held that an appeal from a final judgment is not an adequate remedy for the denial of

a change of venue to which defendant was entitled.⁹

Certiorari as more expeditious. Ordinarily, the writ will not lie merely because the remedy by appeal is less prompt than by certiorari,¹⁰ and this is true even under a statute providing that the writ will lie only where there is no plain, adequate, or speedy remedy.¹¹ Thus, a delay caused by following the regular course of review by appeal will not alone warrant the allowance of the writ.¹² Such delay, however, when added to other reasons may bear considerable weight.¹³ Thus, the courts have allowed the writ where the delay incident to an appeal would deprive appellant of a substantial right.¹⁴

Ordinarily, a remedy by appeal is inadequate where the appeal cannot be heard in time to be of any avail.¹⁵ Thus, where a judgment involving an election cannot be heard on appeal until after the election day,¹⁶ or where in an action to determine the right to an office an appeal could probably not be determined before the time for which the office is claimed would expire,¹⁷ the appeals are inadequate.

As more convenient or less expensive. Certiorari will not lie merely because of the inconveniences and annoyances incidental to an appeal.¹⁸ Similarly, the writ will not lie merely because it

3. Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654, overruling State v. Guinotte, 57 S.W. 281, 156 Mo. 513, 50 L.R.A. 787 and note.

Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685—State v. Superior Court of Washington in and for King County, 186 P. 851, 109 Wash. 336.

Completeness or promptness

Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

4. Cal.—Pomper v. Superior Court in and for Los Angeles County, 216 P. 577, 191 Cal. 494.

Wash.—State v. Superior Court for King County, 234 P. 1017, 134 Wash. 90.

11 C.J. p 116 note 84.

5. Idaho.—Hay v. Hay, 232 P. 895, 40 Idaho 159.

Direct appeal required

The appeal mentioned in Comp.St. § 7243, whose existence prevents granting writ of review, can only be fairly construed to be a direct appeal from the order in question, and not an appeal from final judgment, in which order may be incidentally reviewed.—Hay v. Hay, supra.

6. R.I.—Bishop v. Superior Court, 144 A. 433, 50 R.I. 13.

7. R.I.—Conte v. Roberts, 192 A. 814—MacKenzie & Shea v. Rhode

Island Hospital Trust Co., 122 A. 774, 45 R.I. 407.
11 C.J. p 116 note 2.

Interlocutory order restraining police officials from enforcing gambling statute against persons maintaining "pin game" was reviewable by certiorari in view of the inadequacy of a right to a final appeal and the probability of irreparable harm.—Conte v. Roberts, R.I., 192 A. 814.

8. Iowa.—Timonds v. Hunter, 151 N.W. 961, 169 Iowa 598.

9. Iowa.—State v. District Court of O'Brien County, 179 N.W. 442, 189 Iowa 1167.

10. Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685—State v. Superior Court of Washington in and for King County, 186 P. 851, 109 Wash. 336.
11 C.J. p 116 note 97.

11. Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685—State v. Superior Court of Washington in and for King County, 186 P. 851, 109 Wash. 336.

Adequate but less speedy

The mere fact that an adequate appeal is less speedy than certiorari will not warrant the issuance of the writ.—Jones v. Paul, 105 P. 625, 56 Wash. 355.

12. Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685.

11 C.J. p 116 note 97.

13. Wash.—State v. Kay, supra.

14. Wash.—State v. Superior Court in and for King County, 186 P. 851, 109 Wash. 336.

15. Mo.—State ex rel. Shartel v. Westhues, 9 S.W.2d 612, 320 Mo. 1093.

11 C.J. p 116 note 94.

Building destroyed before appeal

If an order refusing a temporary injunction to restrain the destruction of plaintiff's building by the building inspector and the fire chief is appealable, certiorari may issue to review such order because the building would be destroyed before the appeal could be heard, so that such remedy would be ineffective.—State v. Superior Court for Snohomish County, 206 P. 362, 119 Wash. 631.

16. Mo.—State ex rel. Shartel v. Westhues, 9 S.W.2d 612, 320 Mo. 1093.

11 C.J. p 116 note 94 [a].

17. Wash.—State v. Kitsap County Super. Ct., 91 P. 4, 46 Wash. 616, 123 Am.S.R. 948, 12 L.R.A., N.S., 1010, 13 Ann.Cas. 870—State v. Tallman, 64 P. 759, 24 Wash. 426.

18. Wash.—State v. Superior Court

may be less expensive than an appeal,¹⁹ or because the expense of an appeal will be heavy and disproportionate to the recovery.²⁰ So, the fact that the profits of a business will have to go to pay the expenses of a receivership if an appeal is taken is not sufficient to make an appeal inadequate, especially if the corpus of the property is not depreciated, and if the status quo of the parties is not changed. In other words, the fact that if an appeal is taken a business will lose profits is not such a circumstance as to warrant the issuing of the writ.²¹ It has been held, however, that where petitioner does not have funds sufficient to prosecute an appeal that remedy may, under certain circumstances, be considered to be inadequate.²²

§ 40. Loss of Appeal or Other Remedy

A litigant who has lost the right to appeal or has failed to perfect an appeal by no fault of his own may, in a proper case, obtain a review by certiorari.

The mere fact that a litigant has not appealed or

has lost his right to appeal, as by negligently suffering the time to elapse within which an appeal might have been taken or a writ of error sued out, or has disregarded any other remedy to which he was entitled, where such neglect is not sufficiently excused,²³ or has inexcusably failed seasonably to perfect an appeal taken,²⁴ as by neglecting to furnish the security required by statute,²⁵ will not, as a rule, warrant the issuance of certiorari. This rule is apparently inapplicable in those states wherein the availability of an appeal will not preclude the issuance of certiorari, at least in so far as mere loss of the right to appeal by lapse of time for appeal is concerned.²⁶

It seems to be the general rule that in a proper case a party entitled to appeal or to pursue some other remedy, who has lost the right through inadvertence, accident, or mistake, may have a remedy by certiorari,²⁷ provided there is a showing of probable merits and freedom from fault.²⁸ The sufficiency of this excuse for fail-

of Washington in and for King County, 186 P. 851, 109 Wash. 336. 11 C.J. p 116 note 97.

No loss of substantial right

Writ of review will not issue at the instance of a city and its contractor for a street improvement to review judgment for plaintiffs in suit by protesting property owners to enjoin prosecution of the work, any delay incident to procedure by appeal not depriving relators of any substantial right, but merely causing inconvenience. — State v. Superior Court of Washington in and for King County, *supra*.

19. Mo.—State ex rel. Lunsford v. Landon, 265 S.W. 529, 304 Mo. 654.

20. Idaho.—Canadian Bank of Commerce v. Wood, 93 P. 257, 13 Idaho 794.

21. Wash.—State v. Spokane County Super. Ct., 68 P. 1052, 28 Wash. 584.

22. Wash.—State ex rel. Turner, 46 P.2d 1060, 182 Wash. 261.

Wife's right to appeal from order refusing temporary alimony, suit money, and attorney's fees pendente lite was inadequate, where wife did not have money to prosecute appeal, and hence wife could review order by certiorari.—State ex rel. Turner v. Paul, 46 P.2d 1060, 182 Wash. 261.

23. Ala.—Morrison v. Chambers, 103 So. 666, 212 Ala. 574.

Ark.—Kenyon v. Gregory, 192 S.W. 887, 127 Ark. 525.

Cal.—Falas v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal.App. 525.—Associated Credit Exchange of San Francisco v.

Barnett, 259 P. 95, 85 Cal.App. 255 —Butler v. Superior Court of California in and for Los Angeles County, 255 P. 548, 82 Cal.App. 322 —Shropshire v. Superior Court of State in and for Riverside County, 235 P. 655, 71 Cal.App. 418—Hochheimer & Co. v. Superior Court in and for Kern County, 223 P. 564, 65 Cal.App. 206.

Fla.—Mitchell v. Shields, 175 So. 524, 128 Fla. 536, certiorari denied Mitchell v. Supreme Court of State of Florida, 58 S.Ct. 124, rehearing denied 58 S.Ct. 270—Amos v. Powell, 146 So. 195, 108 Fla. 139.

Ill.—Perlman v. Marzano, 170 N.E. 264, 338 Ill. 109.

La.—Traina v. Agricultural Credit Ass'n, 117 So. 130, 166 La. 230.

Me.—American Fisheries Co. v. Sanborn, 119 A. 803, 122 Me. 561.

Mich.—In re Brewer, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450—In re Marxhausen's Estate, 225 N.W. 632, 247 Mich. 192—Safety Tag Patents Co. v. Michigan Tag Co., 202 N.W. 1005, 230 Mich. 84.

Minn.—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 200 N.W. 848, 161 Minn. 88.

Miss.—Federal Credit Co. v. Zepernick Grocery Co., 120 So. 173, 153 Miss. 489.

N.J.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J.Law 302—Hudson Taxi Co. v. Niedzwicki, 130 A. 647, 3 N.J.Misc. 1111.

N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—Baker v. Hare, 136 S.E. 113, 192 N.C. 788.

11 C.J. p 117 note 6.

Comptroller's failing to instruct state bank's liquidator to appeal, did not permit comptroller to invoke certiorari.—Amos v. Powell, 146 So. 195, 108 Fla. 139.

24. Mich.—Safety Tag Patents Co. v. Michigan Tag Co., 202 N.W. 1005, 230 Mich. 84. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

11 C.J. p 117 note 7.

25. N.C.—Bowen v. Fox, 5 S.E. 437, 99 N.C. 127.

11 C.J. p 117 note 8.

26. Utah.—Hilton Bros. Motor Co. v. District Court in and for Millard County, 25 P.2d 595, 82 Utah 372.

27. Ark.—Tilghman v. Russell, 251 S.W. 353, 158 Ark. 593—Brown & Hackney v. Stephenson, 248 S.W. 556, 157 Ark. 470.

Mich.—In re Brewer, 228 N.W. 762, 250 Mich. 450, affirmed 231 N.W. 89, 250 Mich. 450.

N.C.—In re Citizens Bank of Mt. Olive, 183 S.E. 410, 209 N.C. 216 —Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577 —King v. Taylor, 124 S.E. 751, 188 N.C. 450.

R.I.—McKenzie & Shea v. Rhode Island Hospital Trust Co., 122 A. 774, 45 R.I. 407.

Utah.—Hilton Bros. Motor Co. v. District Court in and for Millard County, 25 P.2d 595, 82 Utah 372. Wash.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

11 C.J. p 116 note 4.

28. Ark.—Bird v. McCrory Special School Dist., 300 S.W. 370, 175 Ark. 724.

ure to appeal in the regular way and permission for the petitioner to resort to the extraordinary rests more or less in the judicial discretion of the court.²⁹ Thus, the excuses of absence from the place of trial,³⁰ and ignorance of the time and place of trial,³¹ are to be determined by the peculiar circumstances of the particular case, and it would seem no settled rule can be laid down other than the fact that the court will not ordinarily deny the writ where a party would thus be deprived of substantial justice and remain without remedy.

Where a party has a remedy by a proceeding in chancery for the loss of his right of appeal by fraud, accident, or mistake and without fault on his part, he must seek relief there rather than by certiorari in a court with no original jurisdiction.³²

Loss of remedy by abolition of court. Where after judgment has been rendered in an inferior court such court is abolished by statute, thus cutting off review by writ of error from a superior court, certiorari has been held to lie to reach errors in the inferior court showing that it failed to proceed according to the essential requirements of law.³³

Loss through act of judge or court functionaries. Certiorari will lie where appellant is deprived of the benefits of an appeal duly taken, because of some error or act on the part of the judge or court officers,³⁴ and in some jurisdictions it would seem that this is the only exception where a party has failed

to perfect an appeal taken.³⁵ Thus, where defendant fails to perfect his appeal because of a delay on the part of the judge in settling the case on appeal,³⁶ or because of his omission so to do³⁷ on account of his retirement from office before such settlement,³⁸ or because the case as made up by him does not correctly set forth the ground of exceptions,³⁹ he is entitled to proceed by certiorari as a substitute for the lost right; and, except where the clerk has acted as the agent of appellant in the premises,⁴⁰ he will have the like right where he has sustained the loss of his remedy by appeal by reason of the negligence of the clerk in the performance of his official duties.⁴¹

It has also been held that, where a court permits an application for certiorari to be filed before the time for appeal or other review has expired but makes no order allowing or denying it until after such period has expired, it should, in the exercise of a fair discretion and particularly in a meritorious case, not deny the writ on the ground that petitioner had had a right of appeal.⁴²

Agent's neglect. Petitioner will be held responsible for the neglect of his agent; and when he trusts to another that which he should have done himself, and the trust proves to have been improperly placed, he must abide the consequences, and a certiorari will be denied.⁴³ Thus, error or neglect of counsel, whereby a petitioner fails to appeal, is not ground for certiorari, except under very exceptional circumstances.⁴⁴ Where, however, the attorneys are

N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.
11 C.J. p 117 note 5.

In absence of meritorious showing or reasonable grounds for asking for a review, it is immaterial that a party has not appealed, or has lost his right of appeal, even through no fault of his own.—In re Snelgrove, supra—State v. Angel, 140 S.E. 727, 194 N.C. 715.

No unreasonable exertion is required on the part of the petitioner, but only such careful attention and diligence in making his appeal as could reasonably be expected under the circumstances.

Colo.—Pee. v. Lake County Dist. Ct., 64 P. 194, 28 Colo. 218.

N.C.—Bayer v. Raleigh, etc., Air-Line R. Co., 34 S.E. 100, 125 N.C. 17—Skinner v. Maxwell, 67 N.C. 257.

29. N.C.—Hygenic Plate Ice Mfg. Co. v. Raleigh & A. Air-Line R. Co., 34 S.E. 100, 125 N.C. 17.

30. Iowa.—Rowley v. Baugh, 33 Iowa 201.
11 C.J. p 117 note 10.

31. N.M.—Terr. v. Valdez, 1 N.M. 548.
11 C.J. p 118 note 12.

32. **Failure to prepare transcript** Ark.—Road Improvement Dist. No. 4 of Prairie County v. Mobley, 233 S.W. 929, 150 Ark. 149.

33. Fla.—Segel v. Staiber, 144 So. 875, 106 Fla. 946—Salario v. Latin-American Bank, 139 So. 899, 104 Fla. 256.

34. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 67—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—Peoples Bank & Trust Co. v. Parks, 131 S.E. 637, 191 N.C. 263—Wachovia Bank & Trust Co. v. Miller, 130 S.E. 616, 190 N.C. 775.

35. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

Misunderstanding

Where appeal by Veterans' Administration from allowance of compensation for services rendered by attorney to incompetent veteran was not perfected due to some misunderstanding, certiorari is properly denied.—In re Snelgrove, supra.

36. N.C.—Hodges v. Lassiter, 94 N.

C. 294—Sparks v. Sparks, 92 N.C. 359—Simmons v. Dowd, 77 N.C. 155.

37. N.C.—Chauncey v. Chauncey, 68 S.E. 906, 153 N.C. 12—Murray v. Shanklin, 20 N.C. 345.

38. N.C.—Nicholls v. Dunning, 5 S. E. 409, 99 N.C. 82—Shelton v. Shelton, 89 N.C. 185.

39. N.C.—McDaniel v. King, 89 N.C. 29.

40. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

11 C.J. p 118 note 17.

41. N.C.—McConnell v. Caldwell, 51 N.C. 469.

42. Mich.—Rapid Ry. Co. v. Michigan Public Utilities Commission, 196 N.W. 518, 225 Mich. 425.

Utah.—Rohwer v. District Court of First Judicial Dist., 125 P. 671, 41 Utah 279.

43. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 67—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577.

11 C.J. p 119 note 33.

44. N.C.—Smith v. Miller, 71 S.E. 355, 155 N.C. 247.

11 C.J. p 119 note 34.

insolvent, and petitioner has no remedy other than by certiorari, the writ has been held to lie where the neglect relates to acts which the petitioner himself could not do.⁴⁵

Illness or death. Illness or incapacity of appellant of such a character as to prevent him from taking a timely appeal,⁴⁶ or from procuring others so to do,⁴⁷ or from perfecting an appeal taken by him,⁴⁸ or the death of the party intermediate the judgment and the expiration of the time within which an appeal might have been taken,⁴⁹ will ordinarily excuse the failure to pursue that remedy and entitle the party to the writ.

Ignorance of the law causing the loss of an available remedy will not ordinarily warrant the issuance of certiorari.⁵⁰ Still where a party has lost his right to a review by reliance on a statute which had not been challenged in any respect until after the certiorari proceeding was instituted, but which was thereafter held to be unconstitutional, the court may in its discretion issue the writ.⁵¹

Inability to furnish security. Inability to procure or furnish security, accidental⁵² or otherwise,⁵³ as where caused by illness⁵⁴ or poverty,⁵⁵ or a lack of acquaintance with eligible sureties,⁵⁶ has been held sufficient to excuse the omission in this respect.

Misconduct of adverse party. The writ will or-

dinarily lie if the right has been lost through the fraud, contrivance, or culpable conduct of the adverse party, or where applicant has been misled by such party.⁵⁷ Ordinarily, however, a certiorari will not be granted merely because the petitioner was not notified of the time and place of trial, or that a claim in offset would be filed;⁵⁸ or where, relying on an assurance that the case would be dismissed, he fails to exercise due diligence;⁵⁹ nor will he be entitled to the writ because of the loss of a good defense, by the fault of the adverse party.⁶⁰

§ 41. Recourse to or Pendency of Other Remedy

A resort to, or the pendency of, another proceeding wherein full redress is obtainable will ordinarily preclude the issuance of certiorari.

If the party aggrieved has elected another remedy under which he can obtain full redress he cannot resort to certiorari also;⁶¹ although it would seem that the rule is otherwise where the other remedy is inadequate to afford the relief sought.⁶² Similarly, since the writ will, as a rule, lie only to a final determination, see supra § 20, where the case is still pending in the court below where the error complained of, if any, may be corrected on the final hearing, the writ will not lie. It has also been held that the writ will not lie where a proceeding in equity for the same relief is pending between the identical parties,⁶³ or where a proceeding is pend-

45. N.C.—Bayer v. Raleigh, etc., Air-Line R. Co., 34 S.E. 100, 125 N. C. 17.

46. R.I.—MacKenzie & Shea v. Rhode Island Hospital Trust Co., 122 A. 774, 45 R.I. 407—Bennett v. Randall, 67 A. 525, 28 R.I. 360, 125 Am.S.R. 743.

11 C.J. p 118 note 19.

Insanity

Where it appears that at the time of the entry of the decree under review, and also during the period prescribed for taking an appeal from said decree, petitioner for the writ was insane and confined in an insane asylum, but at the time of filing the petition for certiorari he had been adjudged by competent authority to have been restored to reason, certiorari is a proper method of review.—Bennett v. Randall, supra.

47. Ill.—Horrell v. Horrell, 52 Ill. App. 477.

48. N.C.—Sharpe v. McElwee, 53 N. C. 115.

49. Tenn.—Napier v. Person, 7 Yerg. 299.

50. Me.—American Fisheries Co. v. Sanborn, 119 A. 803, 122 Me. 561. 11 C.J. p 118 note 12 [b].

Waiver of exceptions due to ignorance

A petition for certiorari is properly denied, where the questions attempted to be raised could have been raised by exceptions, and the fact that petitioner, through ignorance of law, waived the right to reserve the exceptions, would not aid him.—American Fisheries Co. v. Sanborn, supra.

51. Wash.—Kitsap County Transp. Co. v. Department of Public Works, 16 P.2d 828, 170 Wash. 396 —North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

52. N.C.—Collins v. Nall, 14 N.C. 224.

53. N.C.—Stickney v. Cox, 61 N.C. 495. 11 C.J. p 118 note 24.

54. N.C.—Sharpe v. McElwee, 53 N. C. 115.

55. Tenn.—Hale v. Landrum, 2 Humphr. 33. 11 C.J. p 118 note 26.

56. N.C.—Trice v. Yarborough, 26 N.C. 11. Tenn.—Roberts v. Cantrell, 3 Hayw. 219.

57. N.C.—Graves v. Hines, 11 S.E. 362, 106 N.C. 323.

11 C.J. p 118 notes 28, 29.

58. Tenn.—Porter v. Wheaton, 5 Yerg. 108.

59. Colo.—Austin v. Bush, 17 P. 501, 11 Colo. 198.

60. N.C.—Watts v. Boyle, 26 N.C. 331.

61. Ill.—Mikel v. Illinois Racing Commission, 10 N.E.2d 857, transferred 5 N.E.2d 472, 364 Ill. 640. Iowa.—Hammond v. Des Moines Municipal Court, 197 N.W. 628, 197 Iowa 511—Federal Cattle Loan Soc. v. Taylor, 183 N.W. 459, 191 Iowa 837.

La.—Succession of Harrison, 120 So. 617, 167 La. 977.

N.J.—Caruso v. City of Newark, 192 A. 430, 15 N.J.Misc. 476. 11 C.J. p 119 note 36.

Application to vacate

Iowa.—Federal Cattle Loan Soc. v. Taylor, 183 N.W. 459, 191 Iowa 837.

New trial

La.—White v. Louis, 90 So. 20, 149 La. 677.

62. Ill.—Southworth v. Ogle County School Dist. No. 1 Bd. of Education, 87 N.E. 403, 238 Ill. 190.

63. Ill.—Mikel v. Illinois Racing

ing in chancery which may dispose of the questions sought to be determined by the writ.⁶⁴ On the other hand, it has been held that the pendency of a suit in equity for the same relief,⁶⁵ or the fact that a suit has been instituted but has been dismissed for want of jurisdiction,⁶⁶ will not preclude the issuance of the writ. The right to the writ is not precluded by the institution or pendency of an action to annul a judgment rendered without jurisdiction.⁶⁷ The pendency of an action to cancel municipal aid bonds will not bar the right to review the proceedings by which their issue was authorized,⁶⁸ and a motion for a new trial made in the primary court will not preclude applicant who thereafter voluntarily dismisses it;⁶⁹ but a cause cannot be removed after arbitrators or referees have entered into consideration of the questions involved.⁷⁰ Where one party sues out habeas corpus and the other certiorari, and both writs are returned at the same time, preference will be given to the former.⁷¹

Appeal pending, dismissed, or abandoned. The

writ will not be granted when an appeal is pending from the same determination and the questions sought to be reviewed thereon are the same,⁷² even where the remedies are concurrent.⁷³ In some jurisdictions the taking of an ineffectual or inadequate appeal will not defeat the issuance of the writ;⁷⁴ nor will the applicant be precluded by the taking of an appeal which he has not prosecuted.⁷⁵ It has been held, however, that, where a review may be had either by appeal or by certiorari, and the appeal taken is finally dismissed⁷⁶ or dismissed for want of prosecution,⁷⁷ the writ is not available.

The pendency of an appeal to a court from the judgment of a tribunal vacating an office has been held not to affect the right of the ousted officer to bring certiorari to quash the removal and the appointment of his successor, where such tribunal had appointed another for the duration of petitioner's term, notwithstanding such appeal and the stay of proceedings effected by a bond approved by such tribunal.⁷⁸

III. PROCEEDINGS OF WHAT COURTS OR OFFICERS REVIEWABLE

§ 42. Inferior Court, Body, or Officer

Except where otherwise provided by statute, the proceedings of an inferior court or a tribunal, board, or officer acting in a judicial capacity, are subject to review by certiorari.

The proceedings subject to review by the writ of certiorari are generally those of an inferior court or tribunal.⁷⁹ Certiorari is not confined to a review of the proceedings of inferior courts, but ex-

Commission, App., 10 N.E.2d 857, transferred 5 N.E.2d 472, 364 Ill. 640.

64. N.J.—Caruso v. City of Newark, 192 A. 430, 15 N.J.Misc. 476.

65. Tenn.—Stuart v. Hall, 2 Overt. 178.

66. N.J.—Kingsland v. Gould, 6 N.J. Law 161.

67. La.—State v. Fowler, 16 So. 565, 47 La. Ann. 27.

68. N.Y.—Peo. v. Morgan, 65 Barb. 473, reversed on other grounds 55 N.Y. 587.

69. Ga.—Archie v. State, 25 S.E. 612, 99 Ga. 23.

70. N.J.—Whitehead v. Gray, 12 N. J. Law 36.

Pa.—Grubb v. Grubb, 2 Dall. 191, 1 L.Ed. 344.

71. Pa.—Steiner v. Fell, 1 Dall. 22, 1 L.Ed. 20.

72. Ill.—Sinclair v. Sinclair, 224 Ill. App. 130.

Or.—Kamm v. City of Portland, 285 P. 240, 132 Or. 311.

R.I.—Edwin G. Baker & Son v. City Council of City of Cranston, 109 A. 423.

11 C.J. p 119 note 45.

Propriety of certiorari need not be considered. — Christie v. Superior Court in and for City and County of San Francisco, 23 P.2d 757, 218 Cal. 423.

73. N.J.—Dorman v. Usbe Building & Loan Ass'n, 180 A. 413, 115 N. J. Law 337.

Or.—Kamm v. City of Portland, 285 P. 240, 132 Or. 311.

74. La. — Wachsen v. Commission Council of Lake Charles, 111 So. 177, 162 La. 823.

11 C.J. p 119 note 46.

Devolutive appeal does not bar right to certiorari and order for temporary injunction as it affords no adequate relief against ordinance void because ultra vires.—Wachsen v. Commission Council of Lake Charles, supra.

75. Pa.—Covert v. Harrower, 2 Just. L.R. 1.

Tex.—Poag v. Rowe, 16 Tex. 590.

76. Tex. — Robertson v. National Spiritualists' Ass'n of United States of America, Civ.App., 25 S. W.2d 889, error dismissed.

77. N.J.—Maguire v. Goldberger, 58 A. 167, 71 N.J. Law 173.

78. Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

79. Mass.—Lynch v. Crosby, 134 Mass. 313.

Or.—Kirkwood v. Washington County, 52 P. 568, 32 Or. 568.

11 C.J. p 132 note 40.

Federal courts see C.J.S. title Federal Courts §§ 204, 233, also 25 C. J. p 871 note 44—p 879 note 26, p 924 notes 53–58.

Review of justice of the peace courts see C.J.S. title Justices of the Peace § 243–245, also 35 C.J. p 859 note 17—p 862 note 39.

Appellate courts which within their jurisdictions are courts of last resort are not subject to review by certiorari.—State ex rel. Koenen v. Daus, Mo., 288 S.W. 14, quashing certiorari Koenen v. Terminal Railroad Ass'n, App., 280 S.W. 73.

Denial of inferiority by court

In South Carolina, a court at an early day refused to obey a writ of certiorari when issued by a federal court, on the ground that it was not inferior to the court which issued it.—Washington v. Huger, 1 Desauss. Eq. 360.

tends to all inferior tribunals and officers acting in a judicial capacity, except where it is otherwise provided by statute.⁸⁰ An inferior court, within the meaning of the rule, is one which is under the supervisory or appellate control of another, or one the jurisdiction of which is limited and confined to special subjects or branches of the law.⁸¹ A court may be an inferior court, notwithstanding it is a court of record.⁸² Although the remedy by common-law certiorari only extends to courts or boards required by law to keep a record or quasi record of their proceedings,⁸³ the writ is not confined to a review of proceedings of courts of record as distinguished from other courts.⁸⁴ Certiorari does not lie between courts of concurrent jurisdiction,⁸⁵ nor to courts having final jurisdiction on the matter involved in the proceeding.⁸⁶

Arbitrators. Since the use of certiorari is limited in application to inferior courts, boards, and tribunals created by law, a writ will not lie to remove the proceedings of arbitrators.⁸⁷

Nonexistent tribunals. Certiorari will not lie to a tribunal which has gone out of existence.⁸⁸ It has also been held that a constitutional provision empowering a superior court to correct errors in inferior judicatories of a permanent nature by writ

of certiorari has no application to the proceedings of a court called together for a temporary purpose, and existing only for the time of the trial.⁸⁹

§ 43. Chancery Courts

As a general rule, certiorari does not lie to review chancery proceedings.

Although in some jurisdictions a writ of certiorari properly lies to a court of chancery,⁹⁰ the writ does not, as a general rule, lie to review proceedings in a court of equity, under the reasoning that this is not to be deemed an inferior court which is not proceeding according to the course of the common law, within the rule allowing the writ.⁹¹

§ 44. Particular Courts or Judges

The particular courts and judges to which certiorari will lie, generally, include all inferior courts or bodies exercising a judicial function.

Circuit or district courts are inferior to supreme courts, so as to be reviewable by certiorari.⁹² So, also, the writ lies to a county court⁹³ or judge,⁹⁴ and such a county court is inferior as well to a circuit court.⁹⁵ Certiorari also lies to city courts,⁹⁶ courts of common pleas,⁹⁷ recorders' courts,⁹⁸ juvenile courts,⁹⁹ court commissioners,¹ and other in-

80. Miss.—Board of Sup'rs of Marshall County v. Stephenson, 130 So. 684, reversed on other grounds 134 So. 142, 160 Miss. 372.
11 C.J. p 132 note 41.

81. D.C.—U. S. v. West, 34 App. D.C., 12.

82. Mich.—Swift v. Wayne Cir. Judges, 31 N.W. 434, 64 Mich. 479.

83. Ala.—Nashville, C. & St. L. Ry. Co. v. Town of Boaz, 147 So. 195, 226 Ala. 441.

84. Idaho.—Gans v. Steele, 61 P. 286, 7 Idaho 143.

85. Ill.—Knudsen v. Houghton, 160 Ill.App. 440.

86. Fla.—City of Jacksonville Beach v. Waybright, 178 So. 401.

87. Okl.—Green-Boots Const. Co. v. State Highway Commission, 281 P. 220, 139 Okl. 108.
11 C.J. p 132 note 49.

88. Minn.—State v. Soldiers' Bonus Board of State of Minnesota, 202 N.W. 444, 162 Minn. 251.

Wash.—Weyerhaeuser Timber Co. v. Banker, 58 P.2d 285, 186 Wash. 332.—State ex rel. Northern Pac. R. Co. v. State Board of Equalization, 243 P. 793, 140 Wash. 243.—State ex rel. Case v. Mead, 100 P. 1033, 52 Wash. 533.

89. Ga.—Heard v. Heard, 18 Ga. 739.

90. Ark.—Axley v. Hammock, 50 S. W.2d 608, 185 Ark. 939.—Martin v.

Hargrove, 232 S.W. 596, 149 Ark. 333.

In Rhode Island, it has been held that, while a common-law certiorari will not lie to review proceedings in a court of equity, yet, in as much as the supreme court is not simply a court of common law, but has revisory jurisdiction on all questions of law and equity, and general supervision of "all" courts of inferior jurisdiction, its writ of certiorari to the superior court sitting in equity does not issue as a common-law writ, but as an extraordinary process appropriate to its revisory and supervisory powers.—Hyde v. Superior Ct., 66 A. 292, 28 R.I. 204—11 C.J. p 132 note 52.

91. Ohio.—Gilliland v. Sellers, 2 Ohio St. 223—Galloway v. Stopple, 1 Ohio St. 434.

R.I.—Hyde v. Superior Ct., 66 A. 292, 28 R.I. 204.

Wis.—Matter of Haney, 14 Wis. 417.
11 C.J. p 132 note 51.

92. Iowa.—Hamman v. Van Wageningen, 62 N.W. 795, 94 Iowa 399.
11 C.J. p 132 note 53.

Special or statutory tribunal

Certiorari is a proper remedy where a circuit court is sitting as a special or statutory tribunal in a special or statutory proceeding.—Goodman Warehouse Corporation v. Jersey City, 132 A. 503, 102 N.J.Law 294, affirmed 133 A. 919.

93. Mo.—State v. Johnson, 121 S.W. 780, 138 Mo.App. 306.

11 C.J. p 132 note 54.

94. Fla.—Security Finance Co. v. Gardener, 114 So. 232, 94 Fla. 549.
11 C.J. p 132 note 55.

95. Or.—Cole v. Marvin, 193 P. 828, 98 Or. 175.

11 C.J. p 132 note 56.

96. Ga.—Archie v. State, 25 S.E. 612, 99 Ga. 23.

11 C.J. p 132 note 57.

97. Ala.—Steadig v. Wheeler, 78 So. 962, 201 Ala. 566.

11 C.J. p 132 note 58.

In New Jersey, it has been held that a court of common pleas is a constitutional court of record, with jurisdiction over common-law actions, and its orders are not reviewable by certiorari.—Sonzogni v. Sansevere, 142 A. 417, 6 N.J.Misc. 675—Calliopoulos v. Chagaris, 126 A. 471, 2 N.J.Misc. 998.

98. N.C.—McPherson Drug Co. v. Norfolk Southern Ry. Co., 91 S.E. 606, 173 N.C. 87.

11 C.J. p 132 note 59.

99. Tenn.—State v. West, 201 S.W. 743, 139 Tenn. 522, Ann.Cas.1918D 749.—State v. Bockman, 201 S.W. 741, 139 Tenn. 422.

11 C.J. p 132 note 60.

1. Mich.—Peo. v. St. Clair Cir. Judge, 32 Mich. 95.

Wis.—Potter v. Frohbach, 112 N.W. 1087, 133 Wis. 1.

ferior courts, such as those established in lieu of justices of the peace.² An order of a justice of the supreme court is reviewable on certiorari allowed by the justice himself,³ and the writ lies to a justice of the supreme court to review judicial acts done in vacation.⁴

Certiorari will lie to review the action of inferior tribunals with respect to proceedings concerning insolvents, and poor or fraudulent debtors,⁵ and proceedings on the arrest of an alleged fraudulent debtor, where the record discloses errors reviewable.⁶

§ 45. — Probate and Orphans' Courts

Unless forbidden by statute, certiorari will lie, in a proper case, to review the orders and decrees of probate and orphans' courts and other like tribunals.

Except where expressly forbidden,⁷ certiorari lies to review the orders and decrees of probate and orphans' courts and other like tribunals, on which special jurisdiction has been conferred by statute, in a proper case, the same as the adjudications of other courts not proceeding according to the course of the common law.⁸

Generally, probate courts are "inferior courts" so far as circuit⁹ or district¹⁰ courts are concerned; and the fact that a part of the jurisdiction of a probate court is exempt from circuit court supervision does not prevent the former from being inferior to the circuit court.¹¹ However, in some jurisdictions, probate courts are not inferior to circuit or district courts but are courts of concurrent jurisdic-

tion, so that the writ does not lie from the latter to the former.¹²

The writ does not lie where there is an adequate remedy by appeal or otherwise,¹³ nor where the matter sought to be reviewed rests in the discretion of the probate court;¹⁴ and in some states the writ issues only when the court acts without jurisdiction or in excess of its jurisdiction.¹⁵ In other states, however, it seems that, if no appeal lies, such orders are reviewable on certiorari.¹⁶ In some jurisdictions, it is held that certiorari is a proper but not an exclusive remedy to correct an error in decision by a probate court.¹⁷

The writ also lies, it is held in some jurisdictions, to review an order of a circuit court setting aside an order of a probate court, on the theory that the proceeding is not according to the course of the common law, where the reversal of the order of the circuit court would carry with it the reinstatement of the order of the probate court.¹⁸ So, at least in jurisdictions following this view, certiorari lies to review the judgment of a circuit court affirming the order of a probate court construing a will.¹⁹

§ 46. Particular Board or Officers

In a proper case certiorari will lie to review the acts and orders of various boards or officers.

Certiorari lies, in a proper case, to review the actions of boards of supervisors,²⁰ boards of education,²¹ boards of equalization,²² boards of

2. Ala.—Birmingham Realty Co. v. City of Birmingham, 87 So. 840, 205 Ala. 278.

3. N.J.—Oetjen v. Hintemann, 106 A. 213, 91 N.J.Law 429.

4. Wis.—In re Booth, 3 Wis. 1.

5. N.J.—State v. Passaic Ct. of C. Pl., 38 N.J.Law 182.
11 C.J. p 134 note 76.

6. Pa.—Morch v. Raubitschek, 28 A. 369, 159 Pa. 559.

11 C.J. p 134 note 77.

7. N.J.—Brush v. Young, 28 N.J. Law 237.

11 C.J. p 133 note 64.

8. Ala.—Ex p. Roanoke, 23 So. 524, 117 Ala. 547.

11 C.J. p 133 note 65.

9. Mich.—Mitchell v. Bay Prob. Judge, 119 N.W. 916, 155 Mich. 550.

10. Tex.—Hurley v. Hirsch, Civ. App., 66 S.W.2d 387, error dismissed.

11. Mich.—Swift v. Wayne Cir. Judges, 31 N.W. 434, 64 Mich. 479.

12. Ill.—Schaeffer v. Burnett, 77 N. E. 546, 221 Ill. 315.

11 C.J. p 133 notes 68, 69.

13. Mich.—John Hancock Mut. L. Ins. Co. v. Hill, 65 N.W. 748, 108 Mich. 129.

11 C.J. p 133 note 70.

14. Mich.—Goss v. Stone, 29 N.W. 735, 63 Mich. 319.

11 C.J. p 133 note 71.

15. Ark.—Phelps v. Buck, 40 Ark. 219.

11 C.J. p 133 note 72.

16. Cal.—Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, 87 P.2d 69, 1 Cal.2d 749.

11 C.J. p 134 note 73.

17. Ga.—Pierce v. Felts, 92 S.E. 541, 146 Ga. 809—Seagraves v. Powell Co., 85 S.E. 760, 143 Ga. 577—Stephens v. Bell, 153 S.E. 99, 41 Ga.App. 353.

18. Mich.—Welch v. Van Auken, 43 N.W. 371, 76 Mich. 464.

19. Mich.—Glover v. Reid, 45 N.W. 91, 80 Mich. 228.

20. Iowa.—Riggs v. Board of Sup'rs of Van Buren County, 164 N.W. 359, 181 Iowa 178.

Miss.—Board of Sup'rs of Forrest

County v. Melton, 86 So. 369, 123 Miss. 615.

11 C.J. p 134 note 80.

21. Ark.—Park v. Rural Special School Dist. No. 26, 292 S.W. 697, 173 Ark. 514—Mitchell v. Directors of School Dist. No. 15, 239 S.W. 371, 153 Ark. 50.

Mo.—State v. Board of Education, 242 S.W. 85, 294 Mo. 106.
56 C.J. p 249 note 35.

22. Mo.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

61 C.J. p 748 note 80.

Not a tribunal

A state board of equalization, although its acts are judicial, has been held not to be a tribunal within the meaning of a constitutional provision limiting the superintending control of circuit courts over all inferior tribunals.—State ex rel. Gardner v. Hall, *supra*.

Common-law power not limited

A constitutional provision, limiting control of the circuit courts over certain inferior tribunals, does not limit the general common-law jurisdiction of circuit courts in certiorari.—State ex rel. Gardner v. Hall, *supra*.

health,²³ boards of municipal trustees,²⁴ real estate brokers' boards,²⁵ town boards,²⁶ state professional boards,²⁷ county commissioners,²⁸ drainage commissioners,²⁹ insurance commissioners,³⁰ road and street commissioners,³¹ public service commissioners,³² election officers,³³ liquor license officers,³⁴ school officers,³⁵ tax assessors,³⁶ the mayor of a city,³⁷ the city council,³⁸ clerk of a fire district,³⁹ and other public officials and tribunals exercising a judicial or quasi-judicial function.⁴⁰

On the other hand, the writ has been refused to review particular acts or orders of boards of elec-

tion,⁴¹ education,⁴² censors,⁴³ equalization,⁴⁴ or public utilities,⁴⁵ state professional boards,⁴⁶ war-time draft boards,⁴⁷ highway commission,⁴⁸ railroad commission,⁴⁹ fish and game commission,⁵⁰ state deposit guaranty commission,⁵¹ road commissioners,⁵² sewer district commissioners,⁵³ pilot commissioners,⁵⁴ commissioner of corporations,⁵⁵ liquor license officers,⁵⁶ the governor of a state,⁵⁷ state treasurer,⁵⁸ or the legislative or administrative acts of other public officers and tribunals.⁵⁹

The orders or acts of a nongovernmental body are not subject to review by certiorari.⁶⁰

23. N.Y.—Matter of Lauterjung, 48 N.Y.Super. 308.

24. Cal.—Bayside Land Co. v. Doley, 284 P. 479, 103 Cal.App. 253.

25. Wis.—State v. Grootemaat, 231 N.W. 628, 202 Wis. 155.

26. N.Y.—Sage v. Broderick, 173 N. E. 908, 255 N.Y. 19, affirming 230 N.Y.S. 904, 224 App.Div. 777. 63 C.J. p 213 note 14.

27. Fla.—State v. Simmons, 140 So. 187, 104 Fla. 487.

N.M.—State ex rel Board of Com'rs of State Bar v. Kiker, 261 P. 816, 817, 33 N.M. 6, citing *Corpus Juris*. 48 C.J. p 1104 note 55.

28. Ga.—Leathers v. Furr, 62 Ga. 421. 11 C.J. p 134 note 81.

29. Mich.—Clinton Tp. v. Teachoub, 111 N.W. 1052, 150 Mich. 124. 19 C.J. p 744 note 30.

30. N.H.—State v. Stevens, 99 A. 723, 78 N.H. 268, L.R.A.1917C 528.

31. Mass.—Marcus v. Board of Street Com'rs of City of Boston, 147 N.E. 866, 252 Mass. 331. 29 C.J. p 488 notes 46, 47, p 489 note 48.

32. Idaho.—Idaho Power, etc., Co. v. Blomquist, 141 P. 1083, 26 Idaho 222, Ann.Cas.1916E 282.

Miss.—Gulf, etc., R. Co. v. Adams, 38 So. 348, 85 Miss. 772.

33. Iowa.—Jones v. Fisher, 137 N. W. 940, 156 Iowa 582. 20 C.J. p 270 notes 31, 32.

34. R.I.—Greenough v. Warwick, 78 A. 262, 31 R.I. 559. 33 C.J. p 557 note 52.

35. Mo.—State v. Ross, 286 S.W. 726, 220 Mo.App. 388. 56 C.J. p 249 note 35.

36. Ill.—Jarman v. Board of Review of Schuyler County, 178 N.E. 91, 345 Ill. 248. 61 C.J. p 865 note 29.

37. N.Y.—Peo. v. Cooper, 21 Hun 517, affirming 58 How.Pr. 358.

38. Tenn.—Mayor and Board of Commissioners v. Croom, 1 Tenn. App. 420. 11 C.J. p 134 note 93.

39. R.I.—Stender v. Murphy, 152 A. 44.

40. Secretary of state

Under the provisions of the constitution and statutes of Mississippi, the circuit court has the jurisdiction to review by certiorari the action of the secretary of state in reference to the sufficiency and legality of a petition under an Initiative and Referendum Amendment.—Power v. Robertson, 93 So. 769, 130 Miss. 188.

41. S.C.—Ex p. Carson, 5 S.C. 117.

42. Miss.—Anderson v. Franklin County School Board, 146 So. 134, 164 Miss. 646—Board of Supervisors v. Stephenson, 130 So. 684, reversed on other grounds 134 So. 142, 160 Miss. 372. 56 C.J. p 249 note 37.

43. Tenn.—Binford v. Carline, 9 Tenn.App. 364.

44. Cal.—Standard Oil Co. of California v. State Board of Equalization, 59 P.2d 119, 6 Cal.2d 557.

45. Cal.—A. R. G. Bus Co. v. Board of Public Utilities of City of Los Angeles, 185 P. 386, 181 Cal. 508.

46. Cal.—Whitten v. California State Board of Optometry, 65 P.2d 1296—Hartman v. Board of Chiropractic Examiners, App., 66 P.2d 705.

47. U.S.—In re Kitzerow, D.C.Wis., 252 F. 865.

48. Wis.—State v. Wisconsin Highway Commission, 198 N.W. 753, 183 Wis. 614.

49. Miss.—Cumberland Telephone & Telegraph Co. v. State, 100 So. 378, 135 Miss. 835.

50. Cal.—Franco-Italian Packing Co. v. Fish and Game Commission, 243 P. 705, 75 Cal.App. 794—Southern California Fish Corporation v. Fish and Game Commission, 243 P. 705, 75 Cal.App. 792—Pacific Marine Products Co. v. Fish and Game Commission, 243 P. 705, 75 Cal. App. 791—Los Angeles Sea Food Packing Co. v. Fish and Game Commission, 243 P. 705, 74 Cal. App. 793—Stafford Packing Co. v. Fish and Game Commission, 243 P. 704, 75 Cal.App. 790—Van Camp

Sea Food Co. v. State Fish and Game Commission, 243 P. 702, 75 Cal.App. 764.

51. N.D.—State v. Sorlie, 212 N.W. 829, 55 N.D. 182—Bishop v. Depositors' Guaranty Fund Commission, 212 N.W. 828, 55 N.D. 178.

52. Pa.—Nobles v. Piolet, 16 Pa. Super. 386.

53. N.Y.—People ex rel. Desiderio v. Conolly, 144 N.E. 629, 238 N.Y. 326, reversing People ex rel. Desiderio v. Connolly, 201 N.Y.S 934, 207 App.Div. 886.

54. Ga.—Daniels v. Commissioners of Pilotage for Bar of Tybee, 93 S.E. 887, 147 Ga. 295.

55. Cal.—Dysart v. Daugherty, 62 P.2d 612, 17 Cal.App.2d 525—Schwab-Wilson Mach. Corporation v. Daugherty, 59 P.2d 1057, 15 Cal.App.2d 701.

56. Cal.—Knox v. Rainbow, 44 P. 175, 111 Cal. 539. 33 C.J. p 557 note 52.

57. Minn.—In re Marshall County, 179 N.W. 371, 146 Minn. 460.

58. Mass.—City of Chelsea v. Treasurer and Receiver General, 130 N. E. 397, 237 Mass. 422.

59. Fixing boundaries

Action by judge of county circuit court fixing the boundaries of a drainage district under a petition asking that the boundary lines be extended is not reviewable by certiorari.—State ex rel Manion v. Dawson, 225 S.W. 97, 284 Mo. 490.

60. Cal.—Hill-Tellman v. Musicians' Union of San Francisco, 227 P. 646, 67 Cal.App. 279.

Medical society has been held not a legal tribunal, so that its acts could be reviewed by certiorari.—Peo. v. Dutchess County Medical Soc., 32 N.Y.S. 415, 84 Hun 448.

Musicians' association

Certiorari was not proper remedy to review an order of a voluntary unincorporated musicians' association, imposing a fine on a former member.—Hill-Tellman v. Musicians' Union of San Francisco, 227 P. 646, 67 Cal.App. 279.

A court-martial has been held a "tribunal," the proceedings of which may be reviewed by certiorari,⁶¹ but there are decisions to the contrary holding that such proceedings cannot be reviewed by certiorari.⁶² It has also been held that errors and

injustice done in proceedings before an examining board convened under authority of an act of congress, enacted to provide for the promotion or retirement of army officers, cannot be corrected on certiorari.⁶³

IV. WHO MAY INSTITUTE PROCEEDINGS

§ 47. Right Confined to Parties

Generally, certiorari proceedings must be brought by one who was a party to the prior proceedings, but in a proper case may be brought by a person not a party but interested.

As a general rule, persons not parties to the record are not entitled to certiorari,⁶⁴ except perhaps in exceptional cases.⁶⁵ Ordinarily, the remedy of

a stranger to the record is to have himself made a party by moving to set aside the judgment or order, and, in case the order is not appealable, he may then resort to certiorari.⁶⁶ As an exception to this rule, it is generally recognized that a person with a personal interest in the subject matter of the proceeding may sue out the writ,⁶⁷ and that a person is interested so as to be entitled to the writ if he is a

Trade union

Certiorari was not available to member of trade union to review decision of union's appellate body sustaining a decision of a trial board of the union which found petitioning member guilty of charges preferred against him constituting cause for reprimand, fine, suspension, or expulsion.—*Pratt v. Rudisule*, 292 N. Y.S. 68, 249 App.Div. 305.

61. Tenn.—*Durham v. U. S.*, 4 Hayw. 54.

40 C.J. p 703 note 29.

62. Mass.—*Ex parte Dunbar*, 14 Mass. 393.

5 C.J. p 363 note 44 [a]—40 C.J. p 703 note 27.

63. U.S.—*Reaves v. Ainsworth*, 31 S.Ct. 230, 219 U.S. 296, 55 L.Ed. 225, affirming 28 App.D.C. 157.

64. Ala.—*Poyner v. Whiddon*, 174 So. 507, 234 Ala. 168—*Ex parte Ewart-Brewer Motor Co.*, 99 So. 836, 211 Ala. 191, denying certiorari *Ex parte Cunningham*, 99 So. 834, 19 Ala.App. 584.

Cal.—*Katenkamp v. Department of Finance, Division of State Lands*, 49 P.2d 897, 9 Cal.App.2d 343—*Faiaas v. Superior Court in and for Alameda County*, 24 P.2d 567, 133 Cal.App. 525.

Fla.—*United Mut. Life Ins. Co. v. Sholtz*, 163 So. 690, 121 Fla. 260.

Ga.—*Perry v. Zeigler*, 147 S.E. 590, 39 Ga.App. 404.

Iowa.—*Ash v. Board of Civil Service Commissioners*, 247 N.W. 264, 215 Iowa 908.

Nev.—*Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2*, 258 P. 289, 50 Nev. 318.

S.D.—*Crowell v. Circuit Court of Brookings County*, 209 N.W. 539, 50 S.D. 276.

11 C.J. p 134 note 98.

Guardian ad litem, appointed in partition proceedings, who was in no way a party to proceedings in probate, cannot question by certiorari

the orders made therein.—*Salomon v. Newby*, 238 N.W. 661, 210 Iowa 1023, overruled 232 N.W. 176.

Heir and guardian stood in the position of strangers to whom certiorari could not be granted to review an order of a superior court permitting claimant to enforce a dormant judgment against the estate.—*Faiaas v. Superior Court in and for Alameda County*, 24 P.2d 567, 133 Cal.App. 525.

Mortgagee

The mortgagee of the automobile not being a party to proceeding by which judgment was recovered against mortgagor was not entitled to writ of audita querela to quash levy of execution on automobile and could not, therefore, obtain writ of certiorari in lieu of audita querela for same purpose.—*Baker v. Penecost*, 106 S.W.2d 220, 171 Tenn. 529.

Stranger to election contest

Philippine.—*Abendan v. Llorente*, 10 Philippine 216, 6 Off.Gaz. 532.

Witnesses who were not parties to an action were not entitled to review an order requiring answers to certain interrogatories.—*Howe v. Superior Court of California in and for Sacramento County*, 274 P. 992, 96 Cal.App. 769.

65. Iowa.—*Ash v. Board of Civil Service Com'rs of City of Des Moines*, 247 N.W. 264, 215 Iowa 908.

Nev.—*Electrical Products Corporation v. Second Judicial Dist. Court in and for Washoe County*, 23 P.2d 501, 55 Nev. 8.

S.D.—*Crowell v. Circuit Court of Brookings County*, 209 N.W. 539, 50 S.D. 276.

11 C.J. p 134 note 99.

66. Cal.—*Faiaas v. Superior Court in and for Alameda County*, 24 P.2d 567, 133 Cal.App. 525.

11 C.J. p 135 note 1.

67. Ala.—*Poyner v. Whiddon*, 174 So. 507, 234 Ala. 168.

Municipal bondholders

Failure of city to invoke certiorari to review quo warranto judgment that amended charter did not confer authority upon city officials to issue bonds does not affect right of bondholder to obtain permissible review of judgment.—*State v. Crawford*, 140 So. 333, 104 Fla. 440.

Owner of adjacent uplands

Determination of commissioners of land office, conveying under statute the interest of the state in lands under navigable water to a village for a public park, with permission to the village to sell part of the land to another, may be reviewed on certiorari brought by the relators, who claimed that they were owners of the uplands and were alone entitled to conveyance of the land.—*People ex rel. Moenig v. Commissioners of Land Office*, 173 N.Y.S. 649, 186 App. Div. 139.

Party insured under accident policy

In suit against owner of automobile and its liability insurer for injuries caused by collision between defendant's automobile and truck on which plaintiff was riding, owner of automobile was held to have direct interest in liability of insurer on judgment rendered for plaintiff, and hence writ to review judgment declaring insurer not liable was properly granted to such owner.—*Jones v. Shehee-Ford Wagon & Harness Co.*, 163 So. 129, 183 La. 293, setting aside, App., 160 So. 161, reinstated 157 So. 309.

Questioning recovery by another

On certiorari to review judgment of court of appeals in interpleader action to determine claims to reward, relators, having been adjudged by court of appeals not entitled to any part of reward, were not entitled to question ruling granting reward to another claimant.—*State ex rel. Bennett v. Becker*, 76 S.W.2d 363, quashing *Bennett v. Gerk*, 61 S.W.2d 241, 230 Mo.App. 601.

party in form "or in substance" to the proceeding sought to be reviewed, so as to be concluded by the determination thereof.⁶⁸ A party is one "in substance" where the decision involves special, immediate, and direct injury to his interests.⁶⁹

Interested parties. As examples of persons not parties, but interested, who have been held entitled to the writ, may be mentioned creditors;⁷⁰ an attorney with a lien for services on a judgment in favor of one party;⁷¹ a person against whom a judgment is sought to be enforced;⁷² a person who has been ousted from his job by a decision of a civil service commission;⁷³ heirs or distributees dissatisfied with proceedings in the probate court;⁷⁴ any person interested in an estate which has been disposed of by the administrator under a void order;⁷⁵ the attorney general as representative of the people;⁷⁶ or a tenant in common injured by error of commissioners in partition.⁷⁷

A judge has such an interest in upholding the jurisdiction of his court over questions which the law has intrusted him with that he may resort to certiorari to maintain it.⁷⁸ However, it has been held incompetent for a justice of the peace, whose judicial act is sought to be reviewed or set aside, to sue out certiorari in his own right for the purpose of invalidating a ruling made by a superior court.⁷⁹

§ 48. — Proceedings Conducted without Regular Parties

Certiorari may be granted to persons bound by proceedings in which there are no parties.

68. Nev.—*Electrical Products Corporation v. Second Judicial Dist. Court*, in and for Washoe County, 23 P.2d 501, 503, 55 Nev. 8, citing *Corpus Juris*.

11 C.J. p 135 note 2.

69. Wis.—*State v. Anderson*, 109 N. W. 931, 130 Wis. 227—*State v. Drake*, 109 N.W. 982, 130 Wis. 152, 10 Ann.Cas. 860.

70. Nev.—*Electrical Products Corporation v. Second Judicial Dist. Court*, in and for Washoe County, 23 P.2d 501, 55 Nev. 8.

11 C.J. p 135 note 4.

71. Iowa.—*Grimes Sav. Bank v. Jordan*, 276 N.W. 71.

72. Cal.—*Clary v. Hoagland*, 5 Cal. 476.

73. Iowa.—*Ash v. Board of Civil Service Commissioners*, 247 N.W. 264, 215 Iowa 908.

74. Fla.—*Deans v. Wilcoxon*, 18 Fla. 531.

N.C.—*Perry v. Perry*, 4 N.C. 617.

Tex.—*Norris v. Duncan*, 21 Tex. 594. Wash.—*In re Sullivan*, 78 P. 945, 36 Wash. 217.

11 C.J. p 135 note 6.

75. Tex.—*Flanagan v. Pierce*, 27 Tex. 78.

76. Mo.—*State ex rel. Shartel v. Westhues*, 9 S.W.2d 612, 320 Mo. 1093.

77. Me.—*Dyer v. Lowell*, 30 Me. 217.

78. Mich.—*Flowers v. Command*, 175 N.W. 406, 208 Mich. 199.

Mo.—*State ex rel. Thompson v. Norton*, 191 S.W. 429, 269 Mo. 562.

11 C.J. p 135 note 9.

79. Iowa.—*Travis v. District Court of Dallas County*, 192 N.W. 835, 199 Iowa 653.

80. Cal.—*Elliott v. San Diego County Super. Ct.*, 77 P. 1109, 144 Cal. 501, 103 Am.S.R. 102.

11 C.J. p 135 note 10.

81. U.S.—*Russell v. Wheeler*, Ark., 21 F.Cas.No.12,164a, Hempst. 3.

11 C.J. p 135 note 11.

Complainant in hearing before state department

Person defrauded by real estate agent, being authorized to call latter to answer before state department and entitled to notice of its proceedings and judgment, is entitled to certiorari.—*Scheidecker v.*

It has been recognized that in proceedings where there are no formal parties and no appeal or other remedy for excess of jurisdiction, a review on certiorari is allowed to those who are substantially the parties, and who are bound by the proceedings.⁸⁰

§ 49. Parties Entitled, and Who Are Parties

Either party to a proceeding, in a proper case, is entitled to certiorari.

Either party to a proceeding is entitled to the writ in a proper case.⁸¹ Unless the judgment of the inferior tribunal is in favor of applicant in all particulars and to the fullest extent, he is not deprived of his right to the writ because he prevailed in the lower court in some particulars;⁸² but the writ has been denied where applicant therefor prevailed in the inferior court, but sought a review merely for the purpose of compelling his adversary to incur further costs.⁸³

Subject to these general rules, it has been held that certiorari cannot issue in a purely personal proceeding where the person in whose name application is made is dead;⁸⁴ that an intervener has the same right to the writ as the original parties;⁸⁵ that a petitioner for relief is ordinarily considered a party;⁸⁶ that a municipality may bring the proceedings,⁸⁷ if duly authorized;⁸⁸ and that a judge made a party in his official capacity may sue out the writ.⁸⁹

Where the right to certiorari is granted by statute to certain persons in a special proceeding, persons

Department of State, 273 N.Y.S. 737, 242 App.Div. 119, amended 275 N.Y.S. 530, 242 App.Div. 891.

82. N.Y.—*Bissell v. Marshall*, 6 Johns. 100.

11 C.J. p 135 note 12.

83. N.Y.—*Hughes v. Stickney*, 13 Wend. 280.

84. Mo.—*State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 310 Mo. 150.

85. Idaho.—*Gold Hunter Min., etc., Co. v. Holleman*, 27 P. 413, 2 Idaho, Hasb., 839.

86. N.Y.—*Peo. v. Wagner*, 7 Lans. 467, 1 Thomps. & C. 221.

Petitioner for local option election

A person signing a petition for a local option election has been held a party to a probate court proceeding calling the election and declaring the result.—*St. John v. Richter*, 52 So. 465, 167 Ala. 656.

87. N.Y.—*Peo. v. Wagner*, 7 Lans. 467, 1 Thomps. & C. 221.

88. Wis.—*State v. Manitowoc County*, 16 N.W. 617, 59 Wis. 15.

89. La.—*State Voorhies*, 23 So. 107, 49 La. Ann. 1717.

not coming within the statutory permission are not entitled to the writ.⁹⁰

§ 50. Interest and Injury Necessary

In order to be entitled to a writ of certiorari, a petitioner must have an interest in the proceeding to be reviewed and must have sustained injury from the prior ruling therein.

Irrespective of whether the petitioner was a party in the lower court or tribunal, he is not entitled to the writ unless he has an interest in the proceeding sought to be reviewed, and has sustained an injury from the ruling therein.⁹¹ Furthermore, the interest must be a substantial one,⁹² since certiorari issues only at the instance of persons having

actual grievances to redress.⁹³ Accordingly, one who has no interest in a controversy or record to be presented has no right to certiorari,⁹⁴ even though he is a party,⁹⁵ and it follows that one who has transferred all his interest is not entitled to the writ,⁹⁶ but an attempted partial assignment is no bar.⁹⁷

Some statutes authorize the writ to be granted to a person or party "beneficially interested," while in other statutes the words "persons aggrieved" are used; but both terms mean practically the same, and apparently do not affect this rule, independent of statute, that only one "interested" and "injured" can apply.⁹⁸

90. Orders of departmental commission

Under a statute providing that an order of a departmental commissioner may be reviewed by a person appearing of record and opposing the making of the order, a petitioner not appearing after notice is not entitled to certiorari.—Beck v. Ten Eyck, 294 N.Y.S. 541, 162 Misc. 5.

Registration commission's appeal from decree of common pleas court directing registration of voter, who had been convicted of intentionally interfering with inspector of registration in performance of his duties by quarter sessions court which failed to impose penalty of disfranchisement, was dismissible since statute does not give commission any standing to prosecute an appeal to an appellate court by certiorari or otherwise.—In re Moskowitz, 196 A. 498, 329 Pa. 133.

91. Cal.—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71.—In re Paulsen's Estate, 170 P. 855, 35 Cal.App. 654. Fla.—Emerson v. Hughson, 141 So. 877, 105 Fla. 558.

Mass.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

Mo.—State ex rel. Bennett v. Becker, 76 S.W.2d 363, 367, quashing Bennett v. Gerk, 61 S.W.2d 241, 230 Mo.App. 601, quoting *Corpus Juris*. Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439.

N.J.—Seaman v. City of Perth Amboy, 119 A. 278, 98 N.J.Law 174, affirming 116 A. 22, 97 N.J.Law 76. 11 C.J. p 136 note 21.

Deprivation of something which, except for the alleged illegal act, prosecutor would have received, is essential to his right to review act of public body.—Home Coal Co. v. Board of Education of City of Bayonne, 174 A. 580, 12 N.J.Misc. 728.

92. Mo.—State ex rel. Bennett v.

Becker, 76 S.W.2d 363, quashing Bennett v. Gerk, 61 S.W.2d 241, 230 Mo.App. 601.

S.D.—Crowell v. Circuit Court of Brookings County, 209 N.W. 539, 50 S.D. 276.

11 C.J. p 136 note 22.

Anticipated injury

City solicitor and members of city board of canvassers and registration have been held not entitled to certiorari to prevent mayor, board of aldermen, and common council from considering charges which might result in removing petitioners, and to quash records of respondents relating to proposed hearing, since hearing when held may result in no injury to petitioners.—Messier v. Healey, 175 A. 828, 55 R.I. 1.

Citizen and owner of realty

A resident citizen and owner of realty in the city, in which some of the lines of the railway company run, may prosecute writs of certiorari to review orders of board of public utility commissioners increasing rates of company.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

93. N.Y.—In re Carp, 166 N.Y.S. 243, 179 App.Div. 387, affirmed 117 N.E. 1063, 221 N.Y. 643.

94. Miss.—Dickson v. Town of Centreville, 128 So. 332, 157 Miss. 490.

95. Nev.—Electrical Products Corporation v. Second Judicial Dist. Court in and for Washoe County, 23 P.2d 501, 55 Nev. 8.

96. N.D.—Sanderson v. Winchester, 85 N.W. 988, 10 N.D. 85. 11 C.J. p 136 note 23.

97. Cal.—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

98. Party beneficially interested

(1) "Party beneficially interested," under statutes entitling such party to bring certiorari, need not be a party to the proceeding where the court acted without jurisdiction.—

State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439.

(2) It has, likewise, been held where the judgment inter partes is not sought to be reviewed.—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71.

(3) "Party beneficially interested" is not restricted to one who was original party or made party by order of court.—Electrical Products Corporation v. Second Judicial Dist. Court in and for Washoe County, 23 P.2d 501, 55 Nev. 8.

(4) An order requiring an assignment to plaintiff of a mortgage and subrogating him to rights of the mortgagee is not reviewable on certiorari on the petition of the mortgagor and of mortgagees under a subsequent mortgage.—Hildebrand v. Superior Court in and for City and County of San Francisco, 159 P. 147, 173 Cal. 86.

(5) Manager of a warehouse for the owner, who brought action for writ of review requiring police judge to certify transcript of record in search warrant proceeding under which three cases of opium were taken from the warehouse, was not a "party beneficially interested."—James v. Police Court of City and County of San Francisco, 178 P. 867, 39 Cal.App. 362.

(6) Other applications see 11 C.J. p 136 note 24 [c].

"Person aggrieved"

(1) Owner of multiple dwellings subject to taxation, having neither intervened nor attempted to intervene in proceedings in which housing board approved housing projects, was not "person aggrieved."—Mt. Hope Development Corporation v. James, 251 N.Y.S. 498, 233 App.Div. 284, affirmed 180 N.E. 252, 258 N.Y. 510.

(2) Where no rights of a petitioner have been finally determined by an action of a common council in de-

As illustrating persons interested and aggrieved may be mentioned the following: An insolvent against whom an order is made to account for certain property;⁹⁹ an administrator ordered to pay out money of the estate;¹ a property owner against whom an appropriation of land is made;² electors and landowners, to review a stock law election;³ the lowest bidder for a municipal contract, to review the award of the contract to another;⁴ a company, to review an order of the public service commission authorizing a rival to issue securities;⁵ and a widow, to review the final settlement of an administrator's account.⁶

Particular applications. An officer may have such an interest as to entitle him to the writ,⁷ but he is not entitled to the writ unless he has such an interest.⁸

A newspaper publisher, it has been held, may review a void designation of a rival paper as the official paper for certain publications,⁹ although under certain circumstances, such as where he might not be designated if the proceedings were set aside, his application may be denied.¹⁰ It has also been held that the action of a board of county supervisors in selecting an official newspaper for the county is not reviewable at the suit of the owner and publisher of a rival newspaper, on the theory that no injury would result unless the compensation allowed would be overcompensation.¹¹

The fact that one is the agent and attorney of the party beneficially interested does not attract to him the beneficial interest of his principal so that

he may bring a writ under a statute which provides that the application for the writ must be made by a party beneficially interested.¹²

Taxpayers may be so interested as to be entitled to the writ,¹³ but are not so interested in the action of the common council in seating a member;¹⁴ and the decisions are conflicting where the same injury is sustained by all taxpayers, as will be discussed in the section immediately following.

Grievances of others. Applicant must have grievances of his own, and must not base his right to the writ on the ground that the rights of others have been infringed.¹⁵ Accordingly, corporations are not entitled to the writ for the purpose of redressing injuries to stockholders, and, conversely, individual stockholders are not entitled to the writ in behalf of the corporation.¹⁶

§ 51. Persons Sustaining Injury in Common with Others

Generally, certiorari will not lie to one sustaining an injury in common with the public, unless special injury can be shown, although in some jurisdictions this rule has been modified to allow a review by an individual when the interests of the general public are affected.

It is a general rule that the writ is not available to an individual who has no direct or particular interest in the proceeding sought to be revised and who does not show that he will suffer a special injury beyond that which will affect him in common with the public or others similarly situated,¹⁷ and this rule is especially applicable where another suf-

clearing vacant the petitioner's position as water commissioner, the petitioner is not "aggrieved" by the determination.—*In re Haase*, 200 N. Y.S. 419, 206 App.Div. 14, appeal dismissed *Haase v. Common Council of City of Elmira*, 142 N.E. 320, 236 N. Y. 650.

(3) Under a statute authorizing department of state to hear and try complaints of real estate brokers' fraudulent practices, any victim thereof, permitted to call brokers to account before department, is a party to proceeding with right to certiorari as an aggrieved party.—*Scheidecker v. Department of State*, 273 N.Y.S. 737, 242 App.Div. 119, amended 275 N.Y.S. 530, 242 App.Div. 891.

(4) Other examples see 11 C.J. p 136 note 24 [a], [b].

99. *Idaho—Madison v. Piper*, 53 P. 395, 6 Idaho 137.

1. *Mont.—State v. Second Judicial Dist. Ct.*, 46 P. 259, 18 Mont. 481.

2. *N.J.—Seaman v. City of Perth Amboy*, 119 A. 278, 98 N.J.Law 174, affirming 116 A. 22, 97 N.J.Law 76.

3. *Ala.—Blount County Comrs. Ct. v. Whitby*, 39 So. 911, 145 Ala. 668 —*Blount County Comrs. Ct. v. Johnson*, 39 So. 910, 145 Ala. 553. 11 C.J. p 136 note 27.

4. *N.J.—McGovern v. Trenton*, 38 A. 636, 60 N.J.Law 402.

5. *N.Y.—Peo. v. Willcox*, 100 N.E. 705, 207 N.Y. 86, 45 L.R.A., N.S., 629, reversing 136 N.Y.S. 1031, 151 App.Div. 832.

6. *Tex.—Heffelfinger v. George*, 14 Tex. 569.

7. *Ala.—Clarke v. Jack*, 60 Ala. 271. *Mich.—Peo. v. Gladwin County*, 2 N. W. 904, 41 Mich. 647. 11 C.J. p 136 note 31.

8. *N.Y.—Peo. v. Cross*, 83 N.Y.S. 1083, 87 App.Div. 56. 11 C.J. p 137 note 32.

9. *N.Y.—Peo. v. Ford*, 112 N.Y.S. 130, 127 App.Div. 444.

10. *N.Y.—Peo. v. Raymond*, 115 N. Y.S. 275, 131 App.Div. 160.

11. *Iowa—Iowa News Co. v. Harris*, 17 N.W. 745, 62 Iowa 501.

12. *Mont.—State v. Napton*, 62 P. 636, 24 Mont. 450.

11 C.J. p 137 note 36.

13. *Mo.—State ex rel Consol. School Dist. No. 2 of Pike County v. Ingram*, App. 2 S.W.2d 113, 115, citing *Corpus Juris*.

N.Y.—People v. Taylor, 205 N.Y.S. 897, 899, 210 App.Div. 196, citing *Corpus Juris*.

S.C.—Rawl v. McCown, 81 S.E. 958, 97 S.C. 1.

11 C.J. p 137 note 37.

14. *N.J.—Wilson v. Camden*, 42 A. 837, 63 N.J.Law 200.

15. *N.J.—Unger v. Fanwood*, 55 A. 42, 69 N.J.Law 548.

11 C.J. p 137 note 40.

16. *N.J.—Snedeker v. Snedeker*, 30 N.J.Law 80—*Silk Mfg. Co. v. Campbell*, 27 N.J.Law 539.

17. *Ala.—Poyner v. Whiddon*, 174 So. 507, 234 Ala. 168.

Utah—McCarthy v. Public Service Commission of Utah, 77 P.2d 331. 11 C.J. p 137 note 42.

By state's attorney

(1) Where a writ of certiorari is

ficient remedy through public instrumentalities is available.¹⁸ This general rule has been modified, however, in many jurisdictions, so as to permit the suing out of the writ by persons whose interests are not distinguishable from the interest of the mass of the community, where the matter sought to be reviewed affects the public generally,¹⁹ or where private rights are invaded by persons clothed with authority to act, to prevent or redress public wrongs, especially if the enjoyment of public rights is threatened and public interests will thereby be subserved.²⁰ Certiorari to review the actions of

public officials will not lie in New Jersey in favor of prosecutors who have no personal or property interest to be specially and immediately affected by the action complained of,²¹ irrespective of the fact that such officials may have exceeded their power.²²

§ 52. Estoppel

A party may be held to have waived, or be estopped from asserting his right to certiorari by submitting or acquiescing in the jurisdiction, proceedings, or judgment of the court or tribunal.

A party may be estopped to avail himself of the writ, where he has invoked the jurisdiction,²³ has

asked in a case which does not involve a private right, and the injury is one affecting the public, it has been held that certiorari must be brought and prosecuted by a state's attorney or the attorney-general.—*Heppe v. Mooberry*, 183 N.E. 636, 350 Ill. 641.

(2) It has also been held that, on application for prerogative writ of supreme court by the state on relation of private individuals as taxpayers and electors, without first securing consent of attorney general, or his refusal to maintain action in state's behalf, concerning only the state, its sovereignty, franchises, or prerogatives, and where no right of relators or any citizen is immediately threatened, court may refuse to take jurisdiction.—*State v. State Board of Canvassers*, 172 N.W. 80, 44 N.D. 126.

(3) A private person may bring certiorari if he is one of the members of the public who are injuriously affected by the wrong of which complaint is made.—*Heppe v. Mooberry*, *supra*.

(4) Certiorari may be brought by legal voters residing in the territory involved where their rights are injuriously affected by proceedings to detach territory from one school district and attach it to another.—*Heppe v. Mooberry*, *supra*.

18. N.J.—*Jersey City v. State*, 22 A. 190, 53 N.J.Law 434, reversing 18 A. 586, 696, 52 N.J.Law 65—*State v. Hollinshead*, 2 A. 244, 47 N.J.Law 439—*State v. Holmdel Twp.*, 36 N.J.Law 79.
11 C.J. p 137 note 43.

19. Cal.—*Harpham v. Board of Sup'rs of Ventura County*, 182 P. 324, 41 Cal.App. 192.
11 C.J. p 138 note 44.

Enforcement of public duty

Petitioners, as citizens, taxpayers, and voters, are proper parties to enforce a public duty of attorney general and secretary of commonwealth in connection with initiative petitions, as provided for in the state constitution.—*Horton v. At-*

torney General, 169 N.E. 552, 269 Mass. 503.

20. N.J.—*State v. Williams*, 41 N.J. Law 332, 32 Am.R. 219.
11 C.J. p 138 note 45.

21. N.J.—*Downs v. Mayor and Common Council of City of South Amboy*, 185 A. 15, 116 N.J.Law 511—*Randolph v. Board of Chosen Freeholders of Union County*, 41 A. 960, 63 N.J.Law 155—*State v. Trenton*, 36 N.J.Law 79.
11 C.J. p 138 note 46.

Citizen and taxpayer

(1) Citizens and taxpayers of a municipality have sufficient status and interest to prosecute a review by writ of certiorari of ordinances and resolutions which tend to burden the taxing district with debt.—*Cooper v. Town of Belleville*, N.J. Sup., 118 A. 332—*Biddle v. Riverton*, 33 A. 279, 58 N.J.Law 289—*State v. Consumer's Water Co.*, 28 A. 573, 56 N.J.Law 422—*State v. Robbins*, 25 A. 471, 54 N.J.Law 566—*State v. Jersey City*, 34 N.J.Law 390.

(2) It has also been held that where prosecutor seeks by certiorari to review, as citizen and taxpayer, an ordinance by the mayor and common council, and his status as such has not been attacked by proofs or other proceedings prior to argument on final hearing, his qualifications are beyond attack.—*Jordan v. Borough of Dumont*, 143 A. 843, 105 N.J.Law 197, reversing 141 A. 12, 6 N.J.Misc. 311—*Lombardo v. Borough of Lodi*, 144 A. 123, 7 N.J.Misc. 72—*Jackson v. Gloucester City*, 141 A. 743, 6 N.J.Misc. 451.

(3) It has, likewise, been held that a citizen has the right to question by direct attack the validity of municipal action which may stand in the way of a prosecution for crime by the federal authorities.—*Wilson v. Commissioners of Jersey City*, Sup., 107 A. 797, reversed on other grounds *Wilson v. Board of Com'rs of Jersey City*, 109 A. 364, 94 N.J. Law 119.

Persons held to have special interest

(1) Where prosecutor owned real

property on the corner of two streets, and a railroad company having a line of tracks for convenience of adjoining landowners on the sidewalk within a few feet of prosecutor's property proposes to build a similar line on the sidewalk on the other side of the street, thus completely obstructing the approach to prosecutor's property along the sidewalks on both sides except over such tracks.—*Seaman v. City of Perth Amboy*, 116 A. 22, 97 N.J.Law 76, affirmed 119 A. 273, 98 N.J.Law 174.

(2) Where the surveyors of highways exceeded their jurisdiction, any person interested in the laying of the proposed road.—*State v. Hoffmeister*, 41 A. 722, 62 N.J.Law 565.

Persons held to have insufficient interest

(1) Abutting property owner seeking review of ordinance permitting manufacturer to maintain spur track in streets.—*Altschul v. Jersey City*, 151 A. 468, 8 N.J.Misc. 708.

(2) Unsuccessful bidder for city contract.—*Home Coal Co. v. Board of Education of City of Bayonne*, 174 A. 580, 12 N.J.Misc. 728.

Validity of ordinance affecting general public

(1) Such an ordinance cannot be challenged by certiorari unless the prosecutor shows some injury peculiar to himself.—*Wilson v. Borough of Sea Girt*, 139 A. 426, 5 N.J.Misc. 1042—11 C.J. p 138 note 46 [c].

(2) Accordingly, a writ of certiorari for the purpose of testing the validity of a city ordinance, requiring a license fee from contractors, cannot be maintained, in the absence of a showing of conviction of the prosecutor for violation thereof.—*Wilson v. Borough of Sea Girt*, *supra*.

22. N.J.—*Meyer v. City of Perth Amboy*, 133 A. 397, 4 N.J.Misc. 464.

23. Ala.—*Waltman v. Ortman*, 170 So. 545, 233 Ala. 170, second case, denying certiorari 170 So. 545, 27 Ala.App. 269, first case—*Foley v. Armstrong*, 170 So. 547, 27 Ala.

submitted himself thereto without objection,²⁴ or has acquiesced in,²⁵ or expressly consented to or sanctioned, the course of the proceedings.²⁶ Accordingly, a consent judgment,²⁷ a judgment by confession,²⁸ or a judgment voluntarily paid²⁹ cannot be reviewed by certiorari. However, a motion to vacate an order and a later consent to the set-

ting for hearing of a motion to modify the order, do not serve to estop a petitioner from seeking a writ of certiorari to set aside the modifying order.³⁰ A party seeking to have his case determined as if a writ of certiorari had been issued may not contend that certiorari was not a proper remedy.³¹

V. PROCEEDINGS AND DETERMINATION

A. JURISDICTION, PARTIES, AND CONDITIONS PRECEDENT

§ 53. Jurisdiction

Courts of general common-law jurisdiction have, in the absence of constitutional or statutory restrictions, the power to issue writs of certiorari in a proper case.

Courts exercising general common-law jurisdiction have, unless expressly inhibited by statute, the authority to issue a common-law writ of certiorari to inferior jurisdictions where the conditions under which the writ may issue, as discussed in §§ 6-41 supra, are present;³² a court which is vested with both common-law and chancery jurisdiction cannot, however, award the writ in the exercise

of its chancery jurisdiction.³³ Jurisdiction to issue a writ of certiorari cannot be conferred by consent of the parties.³⁴ The court, having acquired jurisdiction of the subject matter by a proper application, is not deprived thereof by a denial of the facts on which the application is based.³⁵ In the exercise of its jurisdiction in an original proceeding against a particular court or officer exercising judicial powers, the court cannot enjoin a stranger to the action or require acts of parties not before the court.³⁶

Venue. A general statute with reference to ven-

App. 201, certiorari denied 170 So. 548, 233 Ala. 175.

11 C.J. p 138 note 47.

24. Ark.—Sumerow v. Johnson, 19 S.W. 114, 56 Ark. 85.

Cal.—Mastick v. San Francisco Superior Ct., 29 P. 869, 94 Cal. 347.

Mich.—Brody v. Penn Tp. Bd., 32 Mich. 272.

11 C.J. p 138 note 48.

25. Mo.—State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S.W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., 223 S.W. 757.

11 C.J. p 138 note 49.

Objections not argued at a hearing on a petition for certiorari may be treated as waived.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

Waiver or estoppel by delay

Where no objection as to parties was made at the time when the writs of certiorari were allowed or when argument was had as to the granting of a stay, such objection is held to be waived and may not be made at a final hearing after the return of the writ has been made.—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587.

26. La.—State v. Judge First City Ct., 33 La. Ann. 15.

Mich.—Hart v. State Fire Marshal, 146 N.W. 169, 178 Mich. 609.

N.Y.—Peo. v. Weld, 6 N.Y.S. 173.

11 C.J. p 138 note 50.

Receiver of property

A petitioner for certiorari cannot

complain because of an order by the court that property be delivered to a certain attorney, where such attorney was designated by the petitioner as one to whom delivery might be made.—Highland Securities Co. v. Superior Court in and for Orange County, 6 P.2d 116, 119 Cal.App. 107.

27. Tenn.—Coley v. Family Loan Co., 80 S.W.2d 87, 163 Tenn. 631.

Substitute for unavailable appeal

Certiorari to review the entry of a consent judgment is a mere substitute for an appeal, and since a consent judgment is not reviewable by appeal, certiorari will not lie.—Coley v. Family Loan Co., supra.

Judgment erroneous in part

Petitioners for certiorari cannot attack judgment to which they consented and which they procured, even conceding it was erroneous in part.—Highland Securities Co. v. Superior Court in and for Orange County, 6 P.2d 116, 119 Cal.App. 107.

28. Wis.—State v. Braun, 245 N.W. 176, 209 Wis. 483.

Confession judgment releases errors and hence, cannot be carried up by appeal or certiorari.—State v. Braun, supra.

29. Cal.—Null v. Shasta County Superior Ct., 87 P. 392, 4 Cal.App. 207.

30. Nev.—Abell v. Second Judicial Dist. Court in and for Washoe County, 71 P.2d 111.

31. N.J.—Holloway v. Board of Com'rs of Borough of Haddonfield, 160 A. 682, 10 N.J.Misc. 704.

32. Ill.—Mason, etc., Special Drain-

age Dist. v. Griffin, 25 N.E. 995, 134 Ill. 330.

11 C.J. p 139 note 52.

Constitutional recognition of power to exercise superintending control over inferior tribunals embraces the right to have recourse to the extraordinary legal remedies of the common law, such as certiorari, to keep such inferior tribunals within the bounds of their proper jurisdiction.—State v. Anderson, Mo.App., 101 S.W.2d 530.

Self-executing provisions

A constitutional provision empowering designated courts to correct the errors of inferior tribunals by certiorari does not require legislation to give it effect.—Smith v. Joiner, 27 Ga. 65—Livingston v. Livingston, 24 Ga. 379.

33. Ark.—Berry v. Hardin, 28 Ark. 458.

Mass.—Brockton v. Plymouth County, 66 N.E. 427, 183 Mass. 42.

11 C.J. p 139 note 53.

34. Cal.—Standard Oil Co. of California v. State Board of Equalization, 59 P.2d 119, 6 Cal.2d 557—Jacobs v. Board of Dental Examiners, App., 75 P.2d 96.

Objections to the jurisdiction may be raised at any stage of the proceeding.—Clemmons v. Railroad Commission of State of California, 159 P. 713, 173 Cal. 254.

35. Okl.—School Dist. No. 20, Carter County, v. Walden, 293 P. 199, 146 Okl. 19.

36. U.S.—U. S. v. Elliott, D.C. Wash., 3 F.2d 496, affirmed, C.C.A., 5 F.2d 292.

ue has been held applicable to a proceeding for certiorari.³⁷

§ 54. — Power to Issue as Inherent or Statutory

While the power to issue the writ is inherent in the common-law jurisdiction of a proper court, it is usually expressly or by necessary implication conferred by constitutional and statutory provisions.

While it would seem that the power to issue a writ of certiorari in a proper case is inherent in courts of common-law jurisdiction, it is, in most states, expressly or impliedly conferred by constitutional and statutory provisions which are, in some instances, merely an affirmation of common-law powers.³⁸ Unless the authority is inherent or the jurisdiction is expressly or impliedly conferred by constitutional or statutory provisions, there is no power to issue the writ,³⁹ and where the provision is statutory the conditions imposed by the statute as a prerequisite to its existence must exist.⁴⁰

§ 55. — Power of Particular Courts

While the power to issue the writ of certiorari is in some instances conferred on all courts by constitutional or statutory provisions, ordinarily the particular courts which have such power are expressly designated.

In some states the statute or constitution confers the power to issue the writ on all courts, although a provision that the writ may be granted by "any court," etc., has been held to mean any court of

original jurisdiction.⁴¹ Ordinarily, however, the particular courts given the power to issue the writ are expressly designated and in some instances jurisdiction is conferred on clerks of courts, justices of the peace, etc. At common law, the rule was that the writ could be allowed only by the court in which the proceedings were to be heard, or by the judge or officer thereof, but the contrary practice has prevailed in Alabama for so many years as to have become settled in that state.⁴² A trial judge cannot grant or refuse certiorari against himself.⁴³

Federal courts. The jurisdiction of federal courts to issue writs of certiorari generally is treated in C.J.S. title Federal Courts § 14, also 25 C.J. p 699 notes 43-49. The authority of the supreme court of the United States to issue such writs is specifically treated in that title §§ 204, 233, also 25 C.J. p 871 note 44-p 879 note 26, p 924 notes 54-58; and the power of the circuit court of appeals, therein § 286, also 25 C.J. p 966 note 83.

State supreme court. The power of a court of last resort, or of general appellate jurisdiction, to issue a writ of certiorari in aid of its jurisdiction is usually present under the various constitutional and statutory provisions;⁴⁴ and it has been pointed out that some constitutional provisions vest the court with the same power and authority in the case as if it had been carried directly by appeal to that court.⁴⁵ The justices of such court have by authority of some statutes the power to issue the writ,

37. Against state board of equalization

Certiorari against a state board of equalization which resides and can be found only in the state capital must be brought in that county, under a statute requiring suits to be brought in the county where defendant resides or where plaintiff resides and defendant may be found, and, where it questions the validity of the action of the board in fixing the value of property for taxes, it cannot be brought in another county where the property taxed is located, as a suit whereby title to real estate may be affected, or for the enforcement of the lien of a special tax bill thereon and, although a local action, accrues at the state capital where the order complained of is made.—*State ex rel. Gardner v. Hall*, 221 S. W. 708, 282 Mo. 425.

38. Cal.—Department of Public Works of California, Division of Water Rights, v. Superior Court in and for Siskiyou County, 239 P. 1076, 197 Cal. 215.

39. Cal.—Standard Oil Co. of California v. State Board of Equalization, 59 P.2d 119, 6 Cal.2d 557. 11 C.J. p 139 note 56.

40. Mont.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 272 P. 525, 83 Mont. 400.

41. Cal.—*Miliken v. Huber*, 21 Cal. 166.

42. Ala.—*Adams v. Troy*, 1 Ala.App. 544.

43. La.—*Italian Homestead Ass'n v. Lewis*, 139 So. 769, 174 La. 94.

44. Mass.—*Merchants Mut. Casualty Co. v. Justices of Superior Court*, 197 N.E. 166, 291 Mass. 164. Mo.—*State ex rel. Gardner v. Hall*, 221 S.W. 708, 282 Mo. 425.

Power of particular appellate courts see C.J.S. title Courts §§ 314-485, also 15 C.J. p 1026 note 39-p 1127 note 17.

In Oregon, under the constitutional provision giving the supreme court original jurisdiction in mandamus, quo warranto, and habeas corpus proceedings, the mention of those proceedings is held to exclude all others, such as writ of review.—*State v. Kozier*, 247 P. 806, 118 Or. 556.

In Tennessee

(1) The supreme court has broad powers, inherent and statutory, respecting issuance of writs of certiorari to enforce its supervisory jurisdiction of inferior tribunals, and the supreme court or the court of appeals has the same jurisdiction to award a writ of certiorari, where appeal or writ of error does not lie, to correct errors of inferior courts, that the circuit court has in such cases to award the writ to correct errors of tribunals inferior to that court.—*Cockrill v. People's Sav. Bank*, 293 S.W. 996, 155 Tenn. 342.

(2) That petitioner erroneously applied to court of appeals for writs of certiorari and supersedeas instead of to the supreme court on the chancellor's denial of an injunction, which was the only relief sought by the bill, was disregarded as ill-advised and without effect in determining whether the supreme court had jurisdiction to entertain a petition for such writ.—*Cockrill v. People's Sav. Bank*, supra.

45. La.—*Llorens v. McCann*, 175 So. 442, 187 La. 642, reversing, App. 171 So. 481.

and a single justice acts, normally, as a single justice, and not as the court itself, in awarding and determining a rule to show cause why a writ of certiorari should not be allowed.⁴⁶

Higher courts of original jurisdiction. On account of the inconvenience and delay occasioned by repeated applications to the supreme courts, jurisdiction to grant the writ of certiorari has in many instances been conferred by express statutory enactment on the higher courts of original jurisdiction, which possess the same general power of superintending control over the lower courts of the state that is inherently vested in the court of last resort over all other courts. These courts, held to have power to issue the writ, include circuit courts,⁴⁷ district courts,⁴⁸ and superior courts,⁴⁹ which are all of the same general jurisdiction but called by different names in different states. In some states district or circuit courts are courts of concurrent jurisdiction with county or probate courts, in which case, as shown supra § 45, the former cannot review the proceedings of the latter by certiorari. However, if the jurisdiction is not concurrent the writ may issue.⁵⁰

County and probate courts. In some states the power of superintending control has been extended by statute to inferior courts of record, such as county or probate courts, giving them power to issue

the writ of certiorari in aid of such jurisdiction wherever it is shown that the tribunals over which they exercise this authority have exceeded the limits of their jurisdiction, or where no other method is provided for reviewing their decisions.⁵¹

Commissioners. The power to issue the writ may be conferred by the legislature on supreme court commissioners.⁵² In Michigan circuit court commissioners are given the power to issue the writ,⁵³ but not so as to interfere with the proceedings of circuit courts.⁵⁴

§ 56. — Limitations on Jurisdiction

The jurisdiction of a particular court may be limited by the amount in controversy or by the character of the proceeding as civil or criminal or as original or appellate.

If the jurisdiction of the court is restricted to criminal matters or proceedings, such limitation applies to writs of certiorari.⁵⁵ So, where a court has appellate jurisdiction only,⁵⁶ or can grant the writ only in aid of such jurisdiction, or of its supervisory powers,⁵⁷ it may only issue in that behalf.

A court restricted to the consideration of cases where the amount in controversy shall equal or exceed a specified sum has no jurisdiction to issue a writ of certiorari where the amount involved is less,⁵⁸ but unless so restricted, the jurisdiction does

46. N.J.—Tweddell v. Village of South Orange, 112 A. 511, 95 N.J. Law 327.

Discretion of single justice

Disposition of motions respecting petition for certiorari and return and for specification and auditor rested in discretion of single justice of supreme judicial court.—Mullen v. Board of Sewer Com'rs of Milton, 182 N.E. 641, 280 Mass. 531.

In Tennessee, the disposition of petition for certiorari to review determination of court of appeals is action of supreme court, not of one of its members.—Beard v. Beard, 14 S.W.2d 745, 158 Tenn. 437.

47. Fla.—State v. Simmons, 140 So. 187, 104 Fla. 487.

Ill.—Bartunek v. Lastovken, 183 N.E. 333, 350 Ill. 380.

Miss.—Power v. Robertson, 93 So. 769, 130 Miss. 188.

Mo.—State ex rel Gardner v. Hall, 221 S.W. 708, 282 Mo. 425—State ex rel Spencer v. Anderson, App., 101 S.W.2d 530.

Or.—State v. Kozer, 247 P. 806, 118 Or. 556.

11 C.J. p 140 note 66.

48. Iowa.—Ash v. Board of Civil Service Com'rs of City of Des Moines, 247 N.W. 264, 215 Iowa 908.

N.M.—Lea County State Bank v. McCaskey Register Co., 49 P.2d 577, 39 N.M. 454.

11 C.J. p 140 note 67.

49. Cal.—State Board of Chiropractic Examiners v. Superior Court of California in and for Los Angeles County, 255 P. 749, 201 Cal. 108.

Ill.—Bartunek v. Lastovken, 183 N.E. 333, 350 Ill. 380.

11 C.J. p 140 note 68.

50. Ala.—Ex p. Roanoke, 23 So. 524, 117 Ala. 547.

Minn.—State v. Willrich, 75 N.W. 123, 72 Minn. 165.

11 C.J. p 140 note 70.

Power of particular courts see Courts §§ 314-485, also 15 C.J. p 985 note 25—p 1007 note 10.

51. Ala.—Straughn v. Brake, 73 So. 371, 197 Ala. 683.

11 C.J. p 140 note 71.

Statutory or common-law writ

In Alabama, under Code § 5430, prescribing authority of judge of probate, such judge has authority to issue only statutory writ of certiorari, not a common-law certiorari.—Straughn v. Brake, supra.

52. Wis.—Smith v. Odell, 1 Pinn. 449.

53. Mich.—Peo. v. Chamblin, 113 N.W. 27, 149 Mich. 653—Atty.-Gen.

v. Montcalm County, 104 N.W. 792, 141 Mich. 590—Loder v. Littlefield, 39 Mich. 374.

11 C.J. p 140 note 73.

54. Mich.—Church v. Anti-Kalsomine Co., 78 N.W. 478, 119 Mich. 437.

55. Iowa.—Keniston v. Hewitt, 48 Iowa 679.

11 C.J. p 140 note 75.

56. Cal.—Milliken v. Huber, 21 Cal. 166.

11 C.J. p 140 note 76.

57. Ill.—Peo. v. Cook County Super. Ct., 84 N.E. 875, 234 Ill. 186, 14 Ann.Cas. 753.

Ind.T.—Walker v. Wantland, 47 S.W. 354, 2 Ind.T. 32.

11 C.J. p 140 note 77.

58. Ill.—McGinnis v. McGinnis, 124 N.E. 562, 289 Ill. 608, dismissing error 211 Ill.App. 249—Fehr Const. Co. v. Postl System of Health Building, 124 N.E. 315, 288 Ill. 634, affirming in part 209 Ill.App. 237—Barber v. Keiser's Estate, 116 N.E. 706, 279 Ill. 287.

La.—State v. Judges of Sixth Judicial Dist. Ct., 9 La. Ann. 522.

11 C.J. p 140 note 78.

Certificate as to amount is necessary.—Segal v. Chicago City Ry. Co., 171 N.E. 922, 339 Ill. 635, denying motion to set aside order dismissing

not depend on the amount in controversy, where the review does not embrace the merits of the cause, and the court is confined to questions of jurisdiction and the existence of other adequate remedies.⁵⁹

§ 57. — Conflict of Jurisdiction

Notwithstanding inferior courts have jurisdiction over lesser jurisdictions, higher courts may issue the writ, although ordinarily they will do so only when justice cannot be done otherwise.

If exclusive jurisdiction is vested in a particular court, it can be exercised only by that court,⁶⁰ but constitutional authority to inferior courts to remove causes from lesser jurisdictions will not exclude the authority of the superior courts to issue the writ.⁶¹ As a rule, a higher court of the state will not take jurisdiction where the application can be made to a lower court, unless for special reasons complete justice cannot otherwise be done,⁶² as where the case is of more than ordinary magnitude and importance, to prevent a denial of justice,⁶³ or where no application can be made to the lower court in time to prevent the consummation of the alleged wrong.⁶⁴ Under the English practice, the writ issued out of the king's bench to draw to it jurisdiction over cases which properly belonged to it or with which it had concurrent jurisdiction.⁶⁵

certiorari 256 Ill.App. 569—Dime Savings & Trust Co. v. Watson, 119 N.E. 285, 283 Ill. 276.

Distinct claims must be so considered in determining amount in controversy.—Fehr Const. Co. v. Postl System of Health Building, 124 N.E. 315, 288 Ill. 634, affirming in part 209 Ill.App. 237.

Equity

(1) Such restrictions apply to chancery cases where the object of the suit was the recovery of money and no other separate and independent relief was sought.—McGinnis v. McGinnis, 124 N.E. 562, 289 Ill. 608, dismissing error 211 Ill.App. 249 —Barber v. Keiser's Estate, 116 N.E. 706, 279 Ill. 287.

(2) Suit to remove fraudulent conveyances which would merely subject property to lien of plaintiff's judgment was solely for recovery of money within statute.—McGinnis v. McGinnis, supra.

(3) Where the decrees of the court below fixed the priority of lien claims against realty, and decreed foreclosure of trust deeds, the supreme court was held to have jurisdiction, although the individual amounts decreed were less than the jurisdictional amount.—Pittsburgh

Plate Glass Co. v. Kransz, 125 N.E. 730, 291 Ill. 84.

Judgment in trial court

The amount limit applies only to the judgment in the trial court and not to that of the appellate court.—Glove Brewing Co. v. American Malt-ling Co., 93 N.E. 300, 247 Ill. 622, reversing 152 Ill.App. 194.

59. Cal.—Winter v. Fitzpatrick, 35 Cal. 269.

60. Iowa.—Keniston v. Hewitt, 48 Iowa 679.

Me.—In re West Bath, 36 Me. 74. N.H.—In re Landaff, 34 N.H. 163. 11 C.J. p 140 note 81.

61. Tenn.—May v. Campbell, 1 Overt. 61.

62. Mo.—State ex rel Gardner v. Hall, 221 S.W. 708, 282 Mo. 425. 11 C.J. p 141 note 83.

63. Fla.—Halliday v. Jacksonville, etc., Plank Road Co., 6 Fla. 304. 11 C.J. p 141 note 84.

64. Wis.—May v. Keep, 2 Pinn. 301, 1 Chandl. 285.

65. Ark.—Auditor v. Davies, 2 Ark. 494. 11 C.J. p 141 note 87.

66. Mo.—State ex rel. Jacobs v. Trimble, 274 S.W. 1075, 310 Mo. 150.

§ 58. Parties

A relator or petitioner and a defendant or respondent are essential to a writ of certiorari.

There must be a petitioner or relator and a respondent or party or parties defendant in proceedings for certiorari.⁶⁶ One who has no interest in sustaining a judgment sought to be reviewed is not a necessary party.⁶⁷

§ 59. — Plaintiffs

In general the person aggrieved is the proper party plaintiff, the state being a proper party plaintiff only where such person cannot be himself the plaintiff or where the state or community has a right or interest in the subject matter. Whether persons may or should join as plaintiffs must, in general, be determined by the joint or several character of their interests in the controversy.

In matters of individual controversy the party seeking relief should be named as plaintiff,⁶⁸ but the state is properly plaintiff in those cases, and only in those cases, in which the individual for whose benefit the writ is sued out cannot, on legal principles, be himself the plaintiff, or where the state or the whole community have some rights or interest in the subject matter, not speculative or political, but direct and positive rights and interests which are to be affected one way or the other.⁶⁹ If a county is aggrieved it will be more formal to sue out the writ in its name, but commissioners who exercise its corporate powers may act.⁷⁰

Persons who may institute proceedings see supra §§ 47-52.

Living relator or petitioner is essential to the power to issue the writ.—State ex rel. Jacobs v. Trimble, supra.

67. Ga.—U. S. Fidelity & Guaranty Co. v. Lawrence, 190 S.E. 346, reversing 184 S.E. 922, 53 Ga.App. 111, conformed to 191 S.E. 474, 55 Ga.App. 771.

Principal on replevy bond has no interest in sustaining a judgment affirming a judgment against the principal and surety.—U. S. Fidelity & Guaranty Co. v. Lawrence, supra.

68. N.J.—Clarke v. Londrigan, 40 N.J.Law 310. 11 C.J. p 141 note 88.

69. N.J.—Morris Canal, etc., Co. v. State, 14 N.J.Law 411. 11 C.J. p 141 note 89.

Informality of applying for a writ of certiorari directly in the name of applicant, instead of in the name of the state on relation of applicant in accordance with the usual and proper procedure, is not fatal, where the petition otherwise discloses a right to the writ.—Davenport v. Sterling Lumber Co., 79 So. 215, 143 La. 671.

70. Pa.—Northampton County's App., 57 Pa. 452.

Persons severally affected. It is improper to join persons who are not jointly interested in the proceedings of which a review is sought, and whose interests are separate and distinct.⁷¹ Parties severally affected by the proceedings below must sue out separate writs, although there is but one act to be reviewed⁷² and but one record.⁷³ However, where two parties petition for writs of certiorari to review the same judgment, but the entire matter can be disposed of on one petition, the other will be denied.⁷⁴

Persons who have no ground of complaint should not be united with those who are entitled to the writ.⁷⁵ So, two or more who are not in privity cannot unite in one writ to review separate judgments against them;⁷⁶ nor can they unite where they seek similar, but not the same, relief.⁷⁷

If the determination is against several defendants, only one of whom appeared, the others may sue out the writ, but on its return should take a rule on the one who appeared to show cause why they may not prosecute without him.⁷⁸

Failure to join a garnishee is immaterial, where the time within which he might sue out the writ has expired.⁷⁹

Persons jointly affected. Persons jointly affected by the determination below must prosecute jointly,⁸⁰ unless there is a severance;⁸¹ but one may prosecute on showing that his codefendant is incapable of consenting or is absent from the state,⁸² and on a release of errors by one the proceeding may continue in the name of the other.⁸³

§ 60. — Defendants

While, strictly speaking, only the tribunal whose act it is sought to examine is a necessary defendant, other parties may and must be brought in if their rights are to be adjudicated.

Strictly speaking, the only proper respondent or defendant on a petition for a writ of certiorari to bring up and quash the proceedings of an inferior tribunal is the tribunal whose action is to be examined, although it is proper to permit counsel for parties having a private interest in maintaining the proceeding to appear by the permission and in the name of respondents to oppose the petition,⁸⁴ and

71. Minn.—Libby v. West St. Paul, 14 Minn. 248.

N.J.—Potter v. Orange, 40 A. 647, 62 N.J.Law 192.

Better practice

It is desirable as matter of practice that separate petitions for certiorari be filed where grounds for relief of various parties are not identical.—Messier v. Healey, 175 A. 828, 55 R.I. 1.

72. N.J.—State v. Kirby, 5 N.J.Law 982.

11 C.J. p 141 note 93.

Waiver

Where commissioners of land office treated relators' interests as joint, they could not complain that they joined in a single certiorari proceeding to review their determination.—People ex rel. Moenig v. Commissioners of Land Office, 173 N. Y.S. 649, 186 App.Div. 139.

73. N.J.—Morris Canal, etc., Co. v. State, 14 N.J.Law 411.

74. U.S.—Gompers v. U. S., App.D. C., 34 S.Ct. 693, 233 U.S. 604, 58 L.Ed. 1115, Ann.Cas.1915D 1044.

75. N.J.—State v. New Brunswick Street, etc., Comrs., 42 N.J.Law 510.

76. Ga.—Patterson v. Hendrix, 72 Ga. 204.

77. Iowa.—Woodworth v. Gibbs, 16 N.W. 287, 61 Iowa 398.

11 C.J. p 142 note 98.

78. N.J.—West v. Richards, 16 N. J.Law 455.

79. Pa.—Bloom v. Alexander, 5 Pa. Co. 554.

80. N.J.—Morris Canal, etc., Co. v. State, 14 N.J.Law 411.

11 C.J. p 142 note 2.

Joint defendants in civil action

Where there is a judgment against two defendants jointly, they not only may, but should, join in the application for the writ.—Otey v. Rogers, 26 N.C. 534—11 C.J. p 142 note 6.

81. N.J.—Cox v. Haines, 3 N.J.Law 261.

11 C.J. p 142 note 3.

82. N.Y.—Peo. v. Rensselaer, 11 Wend. 174.

11 C.J. p 142 note 6 [b].

83. N.J.—Van Houten v. Ellison, 2 N.J.Law 220.

84. Mass.—Marcus v. Commissioner of Public Safety, 150 N.E. 903, 255 Mass. 5.

Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

11 C.J. p 143 note 10.

The person or body to whom the writ should be directed is considered

infra § 105.

After termination of office

(1) Petition for certiorari cannot be maintained against a person named as an officer who has ceased to hold the office.—City of Chelsea v. Treasurer and Receiver General, 130 N.E. 397, 237 Mass. 422.

(2) Where the clerk of a village was clerk of a meeting of the town and village boards and turned over the records of the meeting to his

successor, the latter was a proper party to certiorari to review such proceedings.—State v. Cook, 137 N. W. 746, 150 Wis. 534.

County or other public corporation whose action is complained of, must be made defendant.—Oregon, etc., Sav. Bank v. Catlin, 15 P. 462, 15 Or. 342—11 C.J. p 143 note 13.

Respondent tribunal is real party respondent to a writ of certiorari.—Hilton v. Second Judicial District Court in and for Washoe County, 183 P. 317, 43 Nev. 128.

Judge is not proper party to proceeding for writ of certiorari to review order of superior court.—Benjamin Franklin Bond & Indemnity Corporation v. Schmidt, 22 P.2d 26, 39 Cal.App. 132.

Proper parties

The entire proceeding is leveled at the tribunal, board, or officer alleged to have exceeded the jurisdiction or authority conferred by law, and ordinarily these are to be deemed proper parties defendant of record.

Iowa.—Tod v. Crisman, 99 N.W. 686, 702, 123 Iowa 693, 702.

Mo.—State v. Public Service Commission of Missouri, 97 S.W.2d 116, 118, 339 Mo. 460, quoting *Corpus Juris*.

11 C.J. p 143 note 12.

State

(1) It has been held that the state cannot be made defendant in any case.—State v. Kirby, 5 N.J.Law 982.

(2) The writ cannot be issued against the state, when it is in no

the practice is likewise usual and proper to bring in all parties or other persons who are liable to be affected by the judgment in order that they may have an opportunity to be heard.⁸⁵ However, while it has been stated broadly in some jurisdictions that all persons interested and whose rights are directly affected or who are proper parties to the record sought to be annulled must be made defendants,⁸⁶ it has also been held that the presence of such parties is not necessary to the issuance of the writ although it may be regarded as necessary to the rendition of a judgment binding on them.⁸⁷ In other words, the rights of one not a party to the proceedings cannot be determined unless he is brought into court;⁸⁸ but, on the other hand, it is discretionary and not jurisdictional with the court as to whether parties who will be collaterally affected by the judgment shall be brought in before judgment is pronounced.⁸⁹ If the office of the writ is limited to an inquiry into the inferior jurisdiction, it is improper to join tribunals or officers exercising separate and distinct jurisdictions, or persons having no voice in the proceedings to be reviewed.⁹⁰ A municipality need not be joined as a defendant where a private nuisance is the only matter involved.⁹¹

wise a party to the proceeding below.—*Specht v. Com.*, 24 Pa. 103.

85. Utah.—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372.

Court should not place itself in position of adverse party, as if it had some personal interest in sustaining its judgment, or throw obstacles in the way to prevent a review of its proceedings.—*Hilton v. Second Judicial District Court in and for Washoe County*, 183 P. 317, 43 Nev. 128.

Partition

On certiorari to revise and correct proceedings partitioning a decedent's lands, purchasers from the partitioners are proper parties defendant.—*Reynolds v. Prestidge*, Tex.Civ.App., 228 S.W. 558.

86. Ark.—*Black v. Brinkley*, 15 S. W. 1030, 54 Ark. 372.
11 C.J. p 142 note 7.

87. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.
Nev.—*Hilton v. Second Judicial District Court in and for Washoe County*, 183 P. 317, 43 Nev. 128.

Successor in office

In certiorari, to quash record of civil service commission discharging relator from office, the present incumbent of such office was not a proper party.—*People v. Thompson*, 146 N.E. 478, 316 Ill. 11.

88. N.J.—*Cooper v. Town of Belleville*, N.J.Sup., 118 A. 332—*Towner v. Mansfield Tp. Board of Education*, 128 A. 602, 3 N.J.Misc. 448.

89. N.J.—*State v. Hudson County*, 39 N.J.Law 632.
11 C.J. p 143 note 8.

Instigator of original action

(1) One, at whose request fence viewers viewed a boundary line and ordered the adjoining landowner to contribute to the construction of a partition fence, was not a necessary party in certiorari proceedings, instituted by such adjoining landowner against the fence viewers to annul their action.—*Sinnott v. District Court in and for Clarke County*, 207 N.W. 129, 201 Iowa 292.

(2) Certiorari to review order releasing attached property did not fail because defendant and his wife, who petitioned for release, were not made parties, where wife made no appearance except to present affidavit when applying for release, and defendant made no claim to attached property.—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372.

90. Cal.—*Quinchard v. Alameda*, 45 P. 856, 113 Cal. 664.
11 C.J. p 143 note 14.

91. Ga.—*State Trust Co. v. Ray*, 54 S.E. 145, 125 Ga. 485.

92. N.J.—*MacFall v. Dover*, 57 A. 136, 70 N.J.Law 518.
11 C.J. p 143 note 18.

§ 61. — New Parties and Change of Parties

In the discretion of the court new parties may be added or there may be a substitution of parties.

It is generally held proper to allow new parties to be added;⁹² and in some jurisdictions the code provisions as to amendments have been held applicable to certiorari.⁹³ So, in the discretion of the court, others standing in the same relation as the original relators to the proceedings sought to be reviewed may be admitted to occupy the same position, although the time limited for suing out the writ has expired;⁹⁴ but it has been held that an application for leave to intervene in the proceeding on the eve of a final judgment comes too late.⁹⁵ Persons without interest in the matter pending on certiorari and not aggrieved by the determination to be reviewed cannot intervene.⁹⁶

It may be necessary to add new parties before the hearing, to enable the court to render a decision. Thus, where, pending certiorari against a municipal corporation, it is dissolved by quo warranto, and the municipal government passed into the control of a previously existing town corporation, the latter must be brought in before the hearing.⁹⁷

93. Mont.—*State v. Napton*, 62 P. 686, 24 Mont. 450.

N.Y.—*Peo. v. Roe*, 49 N.Y.S. 227, 25 App.Div. 107.

94. N.Y.—*Peo. v. Syracuse*, 59 N.Y. S. 763, 28 Misc. 95.

After remand

Where on certiorari to the supreme court a decree in favor of minority stockholders was modified, and the cause remanded, petitions for leave to intervene and to share in the benefits of the decree, filed in the supreme court by other minority stockholders, action on which was postponed to the hearing of the case on the merits, should be dismissed without prejudice to their right to apply in the lower court to intervene.—*Southern Pac. Co. v. Bogert*, N. Y. 39 S.Ct. 533, 250 U.S. 483, 63 L.Ed. 1099, modifying, C.C.A., *Bogert v. Southern Pac. Co.*, 244 F. 61, 156 C.C.A. 489, which affirmed, D.C., 226 F. 500, and in which certiorari granted 38 S.Ct. 190, 245 U.S. 668, 62 L.Ed. 539, leave to present petition granted 39 S.Ct. 492.

95. N.J.—*Macarone v. Board of Adjustment of Teaneck*, 153 A. 391, 9 N.J.Misc. 256.

96. N.Y.—*Colmes v. Fisher*, 271 N. Y.S. 379, 151 Misc. 222.

Trial judge

Colo.—*Lindsley v. City & County of Denver*, 196 P. 859, 69 Colo. 562.

97. N.J.—*Bowly v. Dover*, 44 A. 844, 64 N.J.Law 181.
11 C.J. p 143 note 23.

The real party in interest may be substituted as plaintiff for one who acted in his behalf.⁹⁸

§ 62. Conditions Precedent

Conditions precedent imposed by statute or rules of court must be complied with.

Requirements which are by statute or rule of court conditions precedent to the issue of the writ must be complied with.⁹⁹ Thus, where a rule of the supreme court provides that no application for

the writ will be considered, unless an application for rehearing has been made in the court of appeals and refused, the petition must show that a rehearing was applied for.¹ On proceedings relating to a sale of real property for taxes, where only the interest charge is in controversy, certiorari will not issue except on payment of the taxes admittedly due.² Bond or other security and payment of costs or fees as a condition precedent are considered in this Title, *infra* §§ 90-98.

B. TIME FOR TAKING PROCEEDINGS

§ 63. In General

A failure to make timely application may preclude the issuance of the writ.

As stated in § 20 *supra*, the general rule is that the writ does not lie until the proceedings are terminated. Thereafter, unreasonable delay or failure to

apply within the time limited by statute or established by the local practice is good ground for refusing the writ, in the absence of exceptional circumstances.³ As shown in succeeding sections of this Title, the court may refuse to grant the writ:

(1) Where the time to apply for the writ is fixed

98. Mont.—*State v. Napton*, 62 P. 686, 24 Mont. 450.
11 C.J. p 143 note 24.

99. Ga.—*Nilsen v. City of La Grange*, 191 S.E. 175, 55 Ga.App. 676, transferred 189 S.E. 511, 183 Ga. 742—*Standard Gas Products Co. v. Vismor*, 121 S.E. 854, 31 Ga. App. 418.

N.J.—*Allen v. Estell*, 161 A. 677, 10 N.J.Misc. 961.
11 C.J. p 143 note 93.

Motion for new trial

The right of certiorari may be exercised without moving for a new trial.—*Farmers' & Merchants' Bank v. Willie*, 133 S.E. 44, 35 Ga.App. 202.—*Young v. Broyles*, 85 S.E. 366, 16 Ga.App. 356.—*Marks v. State*, 68 S.E. 951, 8 Ga.App. 283.

Written exceptions

(1) Certiorari to review an order of the ordinary requiring a temporary administrator to pay over the assets to the guardian of a minor son was properly dismissed, where no written exceptions were taken as required by Civ.Code 1910 § 5181.—*Latimer v. Burtz*, 112 S.E. 912, 28 Ga.App. 691.

(2) A certiorari to a decision of an ordinary, not the court of ordinary, will not be dismissed because exceptions to the decisions were not tendered at the time in writing.—*Fortson v. Mattox*, 67 Ga. 282.—*Goldring v. Parrish*, 106 S.E. 743, 26 Ga. App. 495—11 C.J. p 143 note 98 [a].

Setting for oral argument

(1) A statute concerned with the review by the supreme court of judgments of the court of appeals and relating specifically to a review of cases that have been "finally determined" in the latter court, which provides that no certiorari shall be granted unless at the same time it

shall be set down for oral argument in the supreme court, does not prevent the issuance of certiorari, without argument of a case not "finally determined in the court of appeals," under another statute authorizing it to issue where an inferior tribunal has exceeded its jurisdiction or is acting illegally.—*Hicks v. Hicks*, 79 S.W.2d 802, 163 Tenn. 539.

(2) Affirmance by court of appeals of judgments without considering merits on ground that bill of exceptions could not be considered would not be treated as case "finally determined in the Court of Appeals," within statute providing for oral argument upon granted petitions of certiorari.—*Moore v. Chadwick*, 94 S.W.2d 499, 170 Tenn. 223.

1. La.—*Frellsen v. Ruddock Cypress Co.*, 32 So. 169, 108 La. 37.
11 C.J. p 143 note 99.

2. N.J.—*Daniel B. Frazier Co. v. Borough of Harvey Cedars*, 163 A. 128, 110 N.J.Law 163.

3. Ala.—*Robinson v. Beale*, 121 So. 428, third case, 219 Ala. 154, denying certiorari 121 So. 428, second case, 23 Ala. App. 42—*Ex parte Taylor*, 100 So. 331, 211 Ala. 282, dismissing petition for certiorari *Taylor v. State*, 99 So. 733, 19 Ala. App. 600—*Ullman Bros. v. State*, 79 So. 629, 202 Ala. 154—*Ex parte Mobile Light & R. Co.*, 75 So. 940, 200 Ala. 192.

Ga.—*Dunton v. Alexander*, 83 S.E. 519, 142 Ga. 659—*National Life & Accident Ins. Co. v. May*, 154 S.E. 652, 41 Ga.App. 719—*Autrey and Peebles v. Carson Naval Stores Co.*, 115 S.E. 924, 29 Ga.App. 422—*J. J. Bull & Son v. Armour Fertilizer Works*, 105 S.E. 616, 26 Ga. App. 151—*Clark v. Harper*, 93 S.E. 539, 20 Ga.App. 817.

Ill.—*Brant v. Chicago & A. R. Co.*, 123 N.E. 732, 294 Ill. 606, affirming 214 Ill.App. 126.

Mo.—*State ex rel Al. G. Barnes Amusement Co. v. Trimble*, 300 S. W. 1064, 318 Mo. 274—*State ex rel. Berkshire v. Ellison*, 230 S.W. 970, 287 Mo. 654.

Porto Rico.—*Hernandez v. Hutchinson*, 20 Porto Rico 484.

11 C.J. p 143 note 27—47 C.J. p 589 note 13 [b].

Application held timely

Ala.—*Baker Tow Boat Co. v. Langner*, 117 So. 915, 218 Ala. 34, reversing 117 So. 914, 22 Ala.App. 575—*Steady v. Wheeler*, 78 So. 962, 201 Ala. 566.

In Tennessee

(1) Application for the writ must be made to the first term of the court after the rendition of the judgment, or else some sufficient cause for the delay must be shown in the petition.—*City of Nashville v. Mason*, 11 Tenn.App. 344—11 C.J. p 143 note 27 [c].

(2) An application for extension of time in which to file petition for certiorari to review judgment of court of appeals does not require notice to adverse counsel.—*Woerner v. O'Neal Commission Co.*, 89 S.W.2d 162, 169 Tenn. 468.

Provision as to certified copy of opinion

Acts 1915 p 606, as to furnishing certified copy of the opinions of the court of appeals and giving notice within five days after the rendition of the decision to the attorneys, has no effect on Rule 42, 175 Ala. xx, as to time for making application for certiorari to review judgment of the court of appeals.—*Ex parte Mobile Light & R. Co.*, 75 So. 940, 200 Ala. 192.

by statute and such time has expired, *infra* § 64. (2) Where the time is regulated by the time to appeal or take out a writ of error, and such time has expired, *infra* § 65. (3) Where applicant has delayed for an unreasonable time, there being no statute limiting the time, and the circumstances are such as to warrant the denial of the writ because of such delay, *infra* § 66. A party's right to a writ of review cannot be cut off, however, by antedating an order or the entry thereof.⁴

A certiorari may be issued even after judgment executed, where a limited authority has been transcended by an inferior jurisdiction, in cases where no writ of error lies, for the purpose of quashing their proceedings.⁵

The writ cannot be objected to as premature, where an appeal has not been taken as the law requires, and where the transcript has been filed in the appellate court, where the ground for the writ is based on the want of some act which would make the appeal effective if taken, and where the time to take such action has passed, and cannot, under the law, be made effective thereafter.⁶

§ 64. Statutory and Constitutional Limitations

Where the matter is controlled by statutory or constitutional provisions, the certiorari proceedings should be instituted within the stipulated period or a valid extension thereof.

Special limitations are laid down by statute, in some of the states, which vary according to the proceeding sought to be reviewed or the nature of the tribunal whose judgment is objected to; and the court properly refuses to grant the writ where the application was made after expiration of the statutory time,⁷ even though the application had been previously sanctioned by the court.⁸

Effect as precluding defense of laches. Where the time for commencing proceedings is limited by statute, the right to apply at any time within the statutory period is absolute.⁹

Power to grant writ after expiration of time. While the wording of the particular statute is the important factor, yet it seems that, if the statute fixes a time within which the application "must" be made, the court has no jurisdiction to grant a writ after such time.¹⁰ However, it has been held that, if the inferior tribunal had no jurisdiction, the superior court can entertain a petition for certio-

4. Cal.—Bryant v. Superior Court in and for San Joaquin County, 61 P. 2d 483, 16 Cal.2d 556.

5. Md.—Riggs v. Green, 84 A. 343, 118 Md. 218.

6. Utah.—Hoffman v. Lewis, 87 P. 167, 31 Utah 179.

7. Ga.—Autrey & Peebles v. Carson Naval Stores Co., 115 S.E. 924, 29 Ga.App. 422—J. J. Bull & Son v. Armour Fertilizer Works, 105 S.E. 616, 26 Ga.App. 151.

Iowa.—Thornburg v. Mershon, 249 N.W. 202, 216 Iowa 455—Holcomb v. Franklin, 235 N.W. 474, 212 Iowa 1159.

N.J.—Crescent Hill v. Borough of Allendale, 192 A. 514, 118 N.J. Law 302—Sutton v. Maurice River Tp. in Cumberland County, 108 A. 182, 98 N.J.Law 504.

N.Y.—Dachs v. Ward, 258 N.Y.S. 141, 236 App.Div. 174, motion denied 258 N.Y.S. 1007, 236 App.Div. 764—Seacrest Farms v. Noyes, 299 N.Y.S. 812, 164 Misc. 369—Layman v. Persons, 233 N.Y.S. 217, 133 Misc. 661—Rogers v. Board of Trustees of Buffalo Police Pension Fund, 223 N.Y.S. 740, 130 Misc. 204—Gable v. Gilbert, 213 N.Y.S. 647, 126 Misc. 185.

Pa.—Streuber v. McFayden, 14 Pa. Dist. 242.

Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203—Schlosser Leather Co. v. Gil-

lespie, 6 S.W.2d 328, 157 Tenn. 166—Tennessee Cent. R. Co. v. Jenkins, 221 S.W. 189, 142 Tenn. 484—State Bank & Trust Co. v. Nashville Trust Co., 202 S.W. 68, 139 Tenn. 472.

Tex.—Wade v. Scott, Civ.App., 145 S.W. 675.

11 C.J. p 144 note 35, p 145 notes 37-43.

Time for applying for writ in federal courts see C.J.S. title Federal Courts § 204, also 25 C.J. p 872 note 59; § 277, also 25 C.J. p 953 notes 50-51.

In Illinois

"There is no statute of limitations which applies to common-law writs of certiorari."—School Directors of Dist. No. 175, Ogle County, v. School Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447, 451.

Reasonableness of limitation

In New Jersey, the supreme court recognizes statutory limitation of time to review court order by writ of certiorari to extent that it is reasonable in given case.—Pitsch v. Hopper, 194 A. 147, 15 N.J.Misc. 662.

Application held timely

N.Y.—Morgan v. Halleran, 280 N.Y.S. 897, 245 App.Div. 79.

Pa.—Streuber v. McFayden, 14 Pa. Dist. 242.

8. Ga.—J. J. Bull & Son v. Armour Fertilizer Works, 105 S.E. 616, 26 Ga.App. 151.

9. Ill.—Graff v. Smolensky, 35 Ill. App. 264.

N.J.—Reeves v. Jones, 66 A. 113, 74 N.J.Law 330.

Pa.—Wilkes-Barre v. Stewart, 11 Kulp 153.

In New York

(1) Early decisions, and some of the later ones, hold that a review of the action of a municipal body must be sought while it retains jurisdiction of the proceedings.—Osterhoudt v. Rigney, 98 N.Y. 222—11 C.J. p 145 note 49.

(2) But later decisions of the higher courts hold that, inasmuch as the statute which requires the writ to be procured and served within a stated time after the determination complained of is not solely a statute of limitations, but by implication grants the relator the time specified within which to procure the writ, it follows that, where, although the determining body has finally adjourned after making a disposition of the matter in question, it or its successor can subsequently obey an order of the court, the application within the statutory time is not barred by final adjournment of the determining body.—Feo. v. Sutphin, 59 N.E. 770, 166 N.Y. 163.

10. Or.—Southern Oregon Co. v. Coos County, 47 P. 852, 30 Or. 250. 11 C.J. p 145 note 51.

rari and quash the judgment, in spite of the fact that the petition was not filed within the statutory period;¹¹ and the pendency of a motion to dismiss the appeal has been deemed sufficient excuse for failing to file the application for certiorari within the required time.¹² Where the time is limited by a constitutional provision, the court is without jurisdiction to allow the writ after such time.¹³

What statute governs. The limitation is governed by the law in force at the time of the alleged illegal action.¹⁴ Where no limitation is fixed by an act creating a new court, a general act will govern;¹⁵ but where a statute points out a particular remedy for the particular wrong allegedly suffered by the petitioner that particular remedy should be followed within the time limited, notwithstanding a general certiorari statute permits the proceeding to be brought within a longer period of time.¹⁶ A limitation respecting the suing out of a certiorari to review a judgment is not applicable to proceedings to remove an inquisition.¹⁷

Running of statute. When the statute begins to

run from the determination below, a final determination is intended;¹⁸ from the time of a decree, the rendition of the decree and not the first day of the term;¹⁹ from the time the determination to be reviewed becomes final and binding, the date of a denial of rehearing, if any;²⁰ from the rendition of the final judgment complained of, that judgment and not a subsequent final judgment as to which the petition for certiorari does not complain;²¹ from confirmation of the action complained of, legal confirmation;²² from the rendition of the judgment of an appellate court, the date of its rendition and entry;²³ from the time a rehearing shall have been refused, when attorneys of record received notice of the decree refusing the rehearing;²⁴ from and after the trial, the day after the trial;²⁵ before the first day of the term at which the issue might be tried, the first term at which the cause might be regularly noticed for trial;²⁶ from the time a board has exceeded its jurisdiction, the time an assessment for a public improvement is made and not the time when the improvement is ordered;²⁷ and from the illegal action of a public board, the

11. Fla.—Palmer v. Johnson, 121 So. 466, 97 Fla. 479.

Mo.—State ex rel. Kerr v. Landwehr, 32 S.W.2d 83.

11 C.J. p 145 note 41 [a].

12. N.M.—Miller v. Oskins, 267 P. 62, 33 N.M. 345.

13. La.—Simoneaux v. Ramos Lumber, etc., Co., 50 So. 595, 124 La. 602—Aucoin v. Ramos Lumber, etc., Co., 50 So. 594, 124 La. 601.

11 C.J. p 145 note 46.

14. N.Y.—Peo. v. York, 62 N.Y.S. 662, 47 App.Div. 552.

15. Ga.—Miller v. State, 55 S.E. 405, 126 Ga. 558—Patillo v. State, 49 Ga. 172.

16. Building permits

Under Village Law § 179-b, as amended by L.1927 c 650, authorizing board of appeals to modify application of building regulations and requiring certiorari petition to review action by board of appeals to be presented to court within thirty days after filing of decision, certiorari proceeding to review decision of board revoking building permit must be brought within thirty-day limitation, or be barred, although the general provisions of Civ.Pract. Act § 1288 authorize certiorari within four months after determination to be reviewed becomes final.—Layman v. Persons, 233 N.Y.S. 217, 133 Misc. 661.

17. Pa.—Wilt v. Philadelphia, etc., Turnp. Co., 1 Brewst. 411.

18. N.Y.—Peo. v. Feitner, 64 N.Y.S. 675, 51 App.Div. 196—Peo. v.

Champlain, 53 N.Y.S. 739, 33 App. Div. 277.

11 C.J. p 145 note 56.

Decision of commissioner of education

N.Y.—Gable v. Gilbert, 213 N.Y.S. 647, 126 Misc. 185.

Highway proceedings

N.Y.—Peo. v. Dowling, 146 N.Y.S. 919, 84 Misc. 201, affirmed 148 N.Y.S. 1137, 164 App.Div. 911.

19. N.J.—Bray v. Deare, 11 N.J.Law 90.

20. N.Y.—New York Cent. R. Co. v. Public Service Commission, 144 N.E. 365, 238 N.Y. 132, reversing 201 N.Y.S. 928, 207 App.Div. 878, which affirmed 200 N.Y.S. 843, 121 Misc. 127.

Statute defining "final decree"

Under a statute providing that petition to review the court of appeals "shall be filed in the Supreme Court within forty-five days after final decree in the Court of Appeals, including decree upon any application to that court for a rehearing or for different or additional findings," the forty-five days are computed from the date decree is entered by the court of appeals on such application.—Houk v. Memphis Const. Co., 5 S.W.2d 472, 157 Tenn. 15.

Untimely petition to rehear

Where the rules require petitions for rehearing to be filed within ten days, and a petition to rehear was filed forty-four days after final judgment was entered without an extension of time, a fiat from the presiding judge being obtained on petition to rehear, but an adjudication being

expressly reserved, and the petition was subsequently dismissed, petition for certiorari could not be filed in the supreme court after more than ninety days, the time allowed for filing certiorari, has elapsed from the time of the final judgment of the court below, although not from the time of the dismissal of the petition to rehear.—Tennessee Cent. R. Co. v. Jenkins, 221 S.W. 189, 142 Tenn. 484.

Second denial of rehearing

Under a statute providing that certiorari to review judgment of the court of civil appeals shall not be issued after ninety days from final judgment, the statutory period runs from the date of the denial of the first petition for rehearing; and since a second petition for rehearing by the same party is not recognized by the rules of the appellate courts, such petition, when denied, cannot be availed of to extend the period.—State Bank & Trust Co. v. Nashville Trust Co., 202 S.W. 68, 139 Tenn. 472.

21. Ga.—Autrey & Peebles v. Carson Naval Stores Co., 115 S.E. 924, 29 Ga.App. 422.

22. N.J.—State v. Perth Amboy, 29 A. 587, 57 N.J.Law 106.

23. La.—Landry v. Ramos Lumber, etc., Co., 50 So. 593, 124 La. 599.

24. La.—Morning Star Baptist Church of East Baton Rouge v. Martina, 91 So. 404, 150 La. 951.

25. Ga.—Jones v. Smith, 28 Ga. 41.

26. N.Y.—McKinney v. Stoddard, 1 Den. 270.

27. Iowa.—Polk v. McCartney, 73 N.W. 1067, 104 Iowa 567.

time the first step is taken which will affect the complaining party injuriously.²⁸ Under a statute limiting the time to a specified period after the party applying shall have received, due notice of the proceeding sought to be reviewed, the time does not begin to run until written notice has been served on the party or his attorney; and actual notice does not take the place of such written notice.²⁹ A certiorari is brought when the petition is filed;³⁰ but it has been held that, where the application is commenced by an order to show cause the mere preparation of a petition, unaccompanied by any official action or notice to respondent, cannot be considered the institution of a proceeding to review by certiorari.³¹ The mere pendency of a petition for the writ does not suspend the running of time, where the petitioner has failed to give required timely notice of the sanction of the writ or of the time and place of hearing;³² and the mere suing out of the writ, without complying with the prerequisites to its issue, does not suspend the time.³³ So, where one party files a petition for a writ of certiorari, the filing of a cross-petition by another party does not extend the latter's time to apply for certiorari.³⁴

Extension of time. General statutes providing for the bringing of a new action in certain cases after the failure of a former action, and thereby extending the time to sue, have been held applicable to certiorari proceedings.³⁵ A provision authorizing the court to extend the time for filing the application does not authorize such an extension after

the original period has elapsed, however; the application to extend must be made before expiration of that period.³⁶

§ 65. Analogy to Appeals and Writs of Error

In absence of statute the time for filing writs of error and appeals is sometimes considered as controlling in certiorari proceedings.

In the absence of statute, the limitation determined on is often governed by analogy to the limitation on writs of error and appeals.³⁷ Such limitation, however, is merely a guide to the general limits of discretion, and not an inflexible rule;³⁸ but in order that a party may bring himself outside of this limitation, he must show circumstances which justify the delay in applying for the writ.³⁹ Thus, where it appeared that the complaining party was incompetent to manage his affairs, in ill health, and without financial means, it was held that the laches was excusable.⁴⁰

§ 66. Laches

In the absence of any limitation fixed by statutes or rules, the writ must be applied for within a reasonable time, and may be denied for laches.

Laches may be asserted as a defense to an application for certiorari,⁴¹ and where the question is not regulated by statute or the fixed procedure, it may be stated, as a general rule, that the writ must be applied for within a reasonable time, or it will be refused or dismissed if improvidently issued.⁴²

28. Iowa.—Jamison v. Louisa County, 47 Iowa 388.

29. Minn.—In re Judicial Ditch No. 2, Houston County, 202 N.W. 52, 163 Minn. 383.

30. Ga.—Hill v. Young, 43 S.E. 76, 116 Ga. 708—Barrett v. Devine, 60 Ga. 632.

31. N.Y.—Seacrest Farms v. Noyes, 299 N.Y.S. 812, 164 Misc. 369.

32. Ga.—O'Keefe v. Cotton, 27 S.E. 663, 102 Ga. 516.

33. Ga.—Carpenter v. Southern R. Co., 37 S.E. 186, 112 Ga. 152.

34. Ill.—Danford v. Watkins, 168 N.E. 912, 337 Ill. 222.

35. Ga.—Hill v. State, 42 S.E. 286, 115 Ga. 833—Hendrix v. Kellogg, 32 Ga. 435.

N.Y.—Peo. v. Snedeker, 94 N.Y.S. 319, 106 App.Div. 89, affirmed 75 N.E. 1133, 182 N.Y. 558.

36. Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203—Schlosser Leather Co. v. Gillespie, 6 S.W.2d 328, 157 Tenn. 166.

37. Cal.—Bryant v. Superior Court in and for San Joaquin County, 61 P.2d 483, 16 Cal.App.2d 556.

Idaho.—Pullman Co. v. State Board

of Equalization, 171 P. 260, 261, 31 Idaho 316, citing *Corpus Juris*.

Ill.—School Directors of Dist. No. 175, Ogle County, v. School Directors of Dist. No. 173, Ogle County, 245 Ill.App. 447.

Mo.—State ex rel. Baepfer v. State Board of Health of Missouri, 52 S.W.2d 743, 744, citing *Corpus Juris*.

R.I.—Sahagran v. Superior Court, 129 A. 813, 47 R.I. 85.

Wash.—State ex rel. Barry v. Superior Court in and for King County, 35 P.2d 1095, 179 Wash. 55—State v. Superior Court for King County, 10 P.2d 233, 167 Wash. 481—State v. Kuykendall, 236 P. 99, 134 Wash. 620.

11 C.J. p 146 note 70.

Void judgment

Ala.—Finney v. Baker, 78 So. 875, 201 Ala. 521.

38. Idaho.—Pullman Co. v. State Board of Equalization, 171 P. 260, 31 Idaho 316.

11 C.J. p 146 note 71.

39. Cal.—Smith v. Los Angeles County Super. Ct., 32 P. 322, 97 Cal. 348.

11 C.J. p 146 note 72.

40. Wash.—State v. Lincoln County Super. Ct., 83 P. 726, 41 Wash. 450.

41. Cal.—Bryant v. Superior Court in and for San Joaquin County, 61 P.2d 483, 16 Cal.App.2d 556—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal.App. 392.

Fla.—Young v. Stoutamire, 179 So. 797.

Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

Mo.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580.

N.J.—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535—Gadek v. Kugler, 141 A. 561, 6 N.J.Misc. 471.

42. Ark.—Pruitt v. International Order of Twelve, Knights and Daughters of Tabor, 250 S.W. 331, 158 Ark. 437—Brinkley Tp. Road Dist. v. Dixon Tp. Road Dist., 225 S.W. 225, 146 Ark. 167.

Cal.—McKeever v. Superior Court of California in and for San Mateo County, 259 P. 373, 85 Cal.App. 381—Reid v. Superior Court in and

There is no hard and fast rule by which to determine whether laches has barred the remedy,⁴³ but each case must depend on its own peculiar facts.⁴⁴ What period will constitute "a reasonable time," within the meaning of the rule laid down, is a question for the judicial discretion of the court in most

cases,⁴⁵ and its exercise of that discretion will not be revised, if not abused,⁴⁶ but no unreasonable diligence will be required.⁴⁷

Generally, lapse of time will not preclude the granting of the writ where the delay has resulted in no detriment,⁴⁸ but, if private injustice will re-

for Trinity County, 186 P. 634, 44 Cal.App. 349.

Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 688, 83 Colo. 379, citing **Corpus Juris**.

Idaho.—Pullman Co. v. State Board of Equalization, 171 P. 260, 31 Idaho 316.

Ill.—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531.

Mo.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 622, quoting **Corpus Juris**.

Mont.—Shaffroth v. Lamere, 65 P.2d 610, 611, citing **Corpus Juris**.

N.J.—Seaman v. Monmouth County, 191 A. 103, 15 N.J.Misc. 249—Cordingley v. Borough of Mendham, 171 A. 158, 12 N.J.Misc. 331—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535—In re Town of Harrison, 151 A. 215, 8 N.J.Misc. 506.

R.I.—Sahagran v. Superior Court, 129 A. 813, 47 R.I. 85. 11 C.J. p 146 note 74.

43. Cal.—Bryant v. Superior Court in and for San Joaquin County, 61 P.2d 483, 16 Cal.App.2d 556—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

N.J.—Seaman v. Monmouth County, 191 A. 103, 15 N.J.Misc. 249—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535.

44. Mont.—State ex rel. Thelen v. District Court of Nineteenth Judicial District in and for Toole County, 17 P.2d 57, 58, citing **Corpus Juris**.

N.J.—Seaman v. Monmouth County, 191 A. 103, 15 N.J.Misc. 249. 11 C.J. p 147 note 75.

Writ denied for laches

The writ has been denied because of laches in instances such as the following:

(1) The act of election commissioners in removing an incumbent from office, a delay of eight months.—Hudson v. Owens, 170 Ill.App. 283—Bach v. Owens, 170 Ill.App. 237.

(2) Judgment removing incumbent from office, delay of nine months after the rendition thereof, during which time his term of office expired.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal. App. 349.

(3) Judgment removing officer, delay of nearly nine months after discharge was not excused by claim re-

moved officer was waiting for commission to act on so-called rehearing petition.—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531.

(4) Judgment of civil service commission sustaining removal of penitentiary guard, delay of eleven months during which time another guard was appointed.—Drill v. Bowden, 132 A. 499, 4 N.J.Misc. 326.

(5) Discharge of highway department inspector by highway commission, delay of over a year.—Oliver v. New Jersey State Highway Commission, 153 A. 251, 9 N.J.Misc. 186.

(6) Proceedings of a civil service commission, a delay of one year.—Gay v. Chicago, 132 Ill.App. 22, affirmed 81 N.E. 1021, 228 Ill. 310—Moriarity v. Chicago, 131 Ill.App. 658.

(7) Purchase of a school site by the city, a delay of nearly a year and more than eight months after the money was expended.—Coward v. Bayonne, 51 A. 490, 67 N.J.Law 470.

(8) Municipal contract, a delay of over two years during which time most of the work had been done and paid for.—Allen v. Hunterdon County, 60 A. 36, 72 N.J.Law 116.

(9) Proceedings of selectmen granting a license to an oil company to erect certain storage tanks, delay of sixteen months.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

(10) Lease of property by borough as tenant on ground one of its owners was mayor of borough, delay of almost three years where no concealment of transaction was made.—Cordingley v. Borough of Mendham, 171 A. 158, 12 N.J.Misc. 331.

(11) Municipal grant of rights to a street car company, a delay of six years after knowledge.—Budd v. Camden, 54 A. 569, 69 N.J.Law 193.

(12) Ordinance defining the duty, and fixing the salary, of tax commissioners, a delay of eleven years.—Livelli v. Hoboken, 73 A. 77, 78 N.J. Law 245.

(13) Appointment of a guardian, a delay of over eight years.—Brown v. Warwick Probate Ct., 67 A. 527, 28 R.I. 370, 125 Am.S.R. 747.

45. N.J.—State v. Patterson, 39 N. J.Law 489.

11 C.J. p 147 note 76.

Certiorari to review judgment

(1) Under Rev.St.1919 § 1520, re-

quiring the clerk of the supreme court to certify a copy of the opinion to the circuit court within thirty days after filing, made applicable to the court of appeals by Const. art 6 § 15, thirty days after the denial of a rehearing is, in ordinary cases, a reasonable time for aggrieved parties to apply to the supreme court for a writ of certiorari to review a judgment of the court of appeals.—State ex rel. Al. G. Barnes Amusement Co. v. Trimble, 300 S.W. 1064, 318 Mo. 274—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654.

(2) As to laches in applying for certiorari to review a judgment and opinion of the court of appeals, the opinion was not a finality until after a motion for rehearing was overruled, but thereafter it was a finality so far as that court was concerned, unless it changed its opinion and judgment of its own motion. So, where an application for a writ of certiorari to review a judgment of the court of appeals was made more than a year after the opinion of the court of appeals was handed down, more than nine months after the denial of a rehearing, and some seven months after the mandate had gone down and been acted upon by the entry of the judgment directed by the court of appeals, and although it was claimed that the delay was due to an attempt by mandamus to compel the writing of the opinion below so as to state the facts, the application was barred by laches.—State ex rel. Berkshire v. Ellison, supra.

46. N.Y.—Peo. v. Cooper, 22 Hun 515.

47. Mo.—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654. 11 C.J. p 147 note 78.

48. Ala.—Byars v. Town of Boaz, 155 So. 383, 385, 229 Ala. 22, quoting **Corpus Juris**.

Cal.—Bryant v. Superior Court in and for San Joaquin County, 61 P. 2d 483, 16 Cal.App.2d 556—Security-First Nat. Bank v. Superior Court of California in and for San Diego County, 23 P.2d 1055, 132 Cal.App. 683, recalled Security-First Nat. Bank v. Superior Court in and for San Diego County, 25 P.2d 234, 134 Cal.App. 195—Donovan v. Board of Police Com'rs of City & County of San Francisco, 163 P. 69, 32 Cal.App. 392.

Ill.—Jackson v. Blair, 132 N.E. 221

sult from granting the writ after the delay, it will ordinarily be refused.⁴⁹ Thus, it will be refused where the party has, by reason of laches in not taking the objection at an earlier stage, permitted the adverse party to make large expenditures,⁵⁰ as for objects beneficial to the party seeking to quash the proceedings,⁵¹ and it may be refused where applicant speculating on the outcome of the proceedings sought to be reviewed, delays his application for certiorari until those proceedings prove disappointing to him.⁵²

Public detriment or inconvenience. Where a reversal of the proceedings sought to be reviewed would result in detriment or inconvenience to the public, or is calculated to derange the interests of society, a party is required to act speedily in mak-

ing his application, and any unreasonable delay in so doing will warrant the refusal or dismissal of the writ.⁵³ For instance, in case of public improvements unreasonable delay is fatal.⁵⁴

Expenditure of public money. Where the petitioner has slept on his rights, and postponed his application until the proceedings sought to be reviewed have been confirmed or carried into execution, and public money has been expended thereon, the writ will be denied,⁵⁵ although the mere fact that a salary has been paid does not establish laches barring certiorari to review resolutions granting the payment.⁵⁶

Want of knowledge as excuse. Want of knowledge may be an excuse for not moving promptly.⁵⁷

298 Ill. 605—Fisher v. McIntosh, 115 N.E. 529, 277 Ill. 432.

Mo.—State ex rel. Hancock v. Falkenhainer, 291 S.W. 466, 467, 316 Mo. 651, citing *Corpus Juris*.

Mont.—State ex rel. Thelen v. District Court of Nineteenth Judicial District in and for Toole County, 17 P.2d 57, 58, 93 Mont. 149, citing *Corpus Juris*.

N.J.—Mundy v. Raritan Tp., 144 A. 162, 7 N.J.Misc. 78.

11 C.J. p 147 note 79.

Delay held not fatal

(1) Delay of four months after order removing cause to federal court.—State ex rel. Hancock v. Falkenhainer, 291 S.W. 466, 316 Mo. 651.

(2) So a delay of thirteen months in applying to review a judgment, not attempted to be enforced in the meantime.—Lyons v. Green, 56 S.W. 1075, 68 Ark. 205.

(3) Where order creating road improvement district was entered Febr. 7, 1918, court did not abuse its discretion in quashing proceedings establishing the district on petition for certiorari filed Sept. 30, 1918, by owners contesting assessments, where at that time the amount of assessments of benefits had not been finally settled, the owners not being chargeable with unnecessary delay in filing petition.—Light v. Self, 214 S.W. 746, 138 Ark. 221—Light v. Self, 211 S.W. 746, 138 Ark. 221.

(4) Application for certiorari to review decision of court of appeals filed within thirty days after overruling of motion for rehearing, was held not too late, notwithstanding mandate had been transmitted to clerk of circuit court, there being no showing that judgment had in fact been entered in that court.—State ex rel. Scott v. Trimble, 272 S.W. 66, 308 Mo. 123, quashing record State ex rel. and to use of Clinkscales v. Scott, 261 S.W. 680, 216 Mo.App. 114.

(5) A world war veteran was held not guilty of laches so as to require dismissal of writ of certiorari to compel his reinstatement to position as bridge officer, where he was discharged by board of chosen freeholders on Jan. 2, conferences seeking reinstatement were held until meeting of board on May 14 when board still remained obdurate, and application for writ was made on May 23.—Seaman v. Monmouth County, 191 A. 103, 15 N.J.Misc. 249.

49. Ala.—Byars v. Town of Boaz, 155 So. 383, 229 Ala. 22.

Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349—Donovan v. Board of Police Com'rs of City & County of San Francisco, 163 P. 69, 32 Cal. App. 392.

Mo.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580.

N.J.—Porskievies v. Borough of Atlantic Highlands, 180 A. 236, 13 N.J.Misc. 586, rehearing denied 181 A. 144, 13 N.J.Misc. 747—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535—Mundy v. Raritan Tp., 144 A. 162, 7 N.J. Misc. 78.

11 C.J. p 147 note 80.

50. N.J.—Porskievies v. Borough of Atlantic Highlands, 180 A. 236, 13 N.J.Misc. 586, rehearing denied 181 A. 144, 13 N.J.Misc. 747—Parker v. Borough of Point Pleasant, 167 A. 217, 11 N.J.Misc. 535.

51. Mass.—Barnard v. Fitch, 43 Mass. 605.

52. N.J.—Clarke v. Lubin, 133 A. 405, 4 N.J.Misc. 518.

New trial

Where defendant did not apply for writs of certiorari to review action of trial court in granting new trials under District Court Act § 17, on ground of newly discovered evidence until after judgments in such new trials were rendered against him, he was not entitled to the writs, since

the court never favors a suitor in laches.—Clarke v. Lubin, *supra*.

Condemnation proceedings

Writ of certiorari to review order appointing commissioners should be dismissed, where it appeared that, after filing objections to appointment of commissioners, landowner elected not to continue with challenge to validity of proceeding, but appeared before commissioners to seek adequate award, and even after award took no steps until appeal to circuit court by highway commission.—Warmec Corporation v. State Highway Commission, 160 A. 766, 10 N.J. Misc. 791.

53. Ill.—Carroll v. Houston, 173 N. E. 657, 341 Ill. 531.

Mo.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580. N.J.—Weissinger v. Mayor and Council of Township of Teaneck, 162 A. 400, 10 N.J.Misc. 1093.

11 C.J. p 147 note 82.

Remarriage of divorced party

Mo.—State ex rel. Kennedy v. Hogan, 267 S.W. 619, 306 Mo. 580.

54. Ark.—Johnson v. West, 117 S. W. 770, 89 Ark. 604.

55. N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553—Rossi v. Board of Com'rs of City of Perth Amboy, 150 A. 395, 8 N.J.Misc. 465.

11 C.J. p 147 note 84.

56. N.J.—Cooper v. Town of Belleville, Sup., 118 A. 332.

57. Cal.—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

Mass.—Marcus v. Board of Street Com'rs of City of Boston, 147 N. E. 866, 252 Mass. 331.

Pa.—Rawlings v. Lewert, 9 Pa.Dist. & Co. 701—Streuber v. McFayden, 14 Pa.Dist. 242.

11 C.J. p 148 note 85.

Knowledge of agent

Applicant for certiorari is charge-

Thus, it is a good excuse that the judgment complained of was secretly rendered without notice or means of knowledge.⁵⁸

§ 67. Objections and Waiver Thereof

Objections to time of applying for the writ must be seasonably taken, and may be waived.

As shown *infra* § 135, a motion to dismiss or quash the writ is a proper method of objecting to the proceedings because not instituted within the

time limited. Laches in applying for the writ may be waived by appearance and pleading,⁵⁹ or by making a return;⁶⁰ and it has been said that a question as to the timeliness of the application is foreclosed by the issuance of the writ.⁶¹ The defense of laches in applying for certiorari to review municipal action must be urged promptly,⁶² but the failure of a municipality promptly to raise this question may be excused in a particular case on the grounds of public policy and expediency.⁶³

C. APPLICATION AND HEARING THEREON

§ 68. Necessity for Application

A formal application showing a *prima facie* case for relief is prerequisite to issue of certiorari except when sued out by the sovereign power or where the local practice is to the contrary.

Except when sued out by the sovereign power,⁶⁴ or in particular proceedings where the local practice is to the contrary,⁶⁵ certiorari will not issue of course, but an application by petition, affidavit, or other mode prescribed, showing *prima facie* a case for relief, is prerequisite to its issue.⁶⁶ The petition is the pleading, and its purpose is to set in motion the proceeding.⁶⁷ The same petition cannot serve as the basis for a second writ in the same case.⁶⁸ Furthermore, the necessity for an application is not waived by appearance.⁶⁹ A petition in error is not a substitute for a petition for a writ of certiorari.⁷⁰

Separate applications are necessary on behalf of defendant who seeks the review of two cases against him by different plaintiffs not in privacy,⁷¹

although by consent the cases were tried together.⁷² Likewise, on the application of one party, the adverse party to a proceeding cannot have errors reviewed.⁷³ So, where it is sought to review orders made by different courts in different cases by certiorari proceedings, a separate application for a writ of certiorari must be made for each court.⁷⁴

§ 69. Authority and Competency to Make Application

Questions relating to authority and competency to apply for certiorari are, together with questions as to who may institute the proceedings, considered *supra* §§ 47-52.

§ 70. Form and Contents of Applications

The petition must conform to the requirements of the local practice and with reasonable certainty allege all facts essential to establish the right to certiorari.

The application must conform to statutory requirements or rules of practice,⁷⁵ and particular

able with notice of finding of board of adjustment, where his agent was present at time finding was announced.—*Gadek v. Kugler*, 141 A. 561, 6 N.J.Misc. 471.

58. Pa.—*Hoffner v. Kottka*, 2 Pearson 360.

59. N.Y.—*Peo. v. Lantry*, 60 N.Y.S. 1009, 44 App.Div. 392.

N.C.—*Bowman v. Foster*, 33 N.C. 47. Tenn.—*Johnston v. Dew*, 5 Hayw. 224.

60. N.Y.—*Lovet v. Green*, 12 Johns. 204.

11 C.J. p 148 note 97.

61. Mo.—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record *Allen v. Best*, 279 S.W. 728, 220 Mo.App. 1041.

62. N.J.—*Weissinger v. Mayor and Council of Township of Teaneck*, 162 A. 400, 10 N.J.Misc. 1093—*Kays v. Town of Newton*, 140 A. 425, 6 N.J.Misc. 163.

Return of rule

Laches in applying for certiorari to review municipal action must be

raised on return of the rule.—*Dorsey Motors v. Davis*, 180 A. 396, 13 N.J.Misc. 620.

63. N.J.—*Weissinger v. Mayor and Council of Township of Teaneck*, 162 A. 400, 10 N.J.Misc. 1093.

64. Tenn.—*Beck v. Knabb*, 1 Overt. 55.

65. Pa.—*Matter of Pittsburgh*, 2 Watts & S. 320. 11 C.J. p 149 note 4.

66. D.C.—*Vicory v. Totaro*, 277 F. 546, 51 App.D.C. 144.

Mo.—*State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 1077, 310 Mo. 150, quoting *Corpus Juris*.

Philippine.—*U. S. v. Siatong*, 5 Philippine 463.

Tenn.—*Rhea County v. White*, 43 S. W.2d 375, 163 Tenn. 388.

11 C.J. p 149 note 5.

"Like the ordinary suit or action, the proceeding in certiorari is commenced by the filing of a petition or application in the proper court."

—*State ex rel. Jacobs v. Trimble*, *supra*.

Office of petition is to bring to the notice of the court the grounds on which the party seeks relief from the charge or execution complained of and to obtain the writs prayed for.—*City of Nashville v. Mason*, 11 Tenn.App. 344.

67. N.Y.—*Hall v. Hood*, 201 N.Y.S. 498, 121 Misc. 572.

68. Mich.—*Sherwood v. Arnold*, 45 N.W. 134, 80 Mich. 270.

69. Del.—*Newell v. Hampton*, 40 A. 469, 15 Del. 1.

70. Okl.—*In re Duncan*, 144 P. 374, 43 Okl. 691.

71. Ala.—*Davis v. Calhoun*, 24 Ala. 437.

11 C.J. p 149 note 9.

72. Ga.—*Haralson County v. Pittman*, 31 S.E. 183, 105 Ga. 513.

73. Tenn.—*Goetz v. Knoxville Power & Light Co.*, 290 S.W. 409, 154 Tenn. 545.

74. Porto Rico.—*Amadeo v. Rossy*, 21 Porto Rico 333.

75. Ga.—*Aycock v. Williams*, 189 S.

allegations of wrong or injustice which are required by statute must be made,⁷⁶ unless in a case where such averments are clearly inapplicable.⁷⁷ The application must disclose the ground on which the writ should be issued,⁷⁸ and must show that substantial justice demands it.⁷⁹ It must also set out with reasonable certainty,⁸⁰ but not necessarily such certainty as rebuts every conclusion to the contrary,⁸¹ all the facts essential to establish the right to certiorari,⁸² that is, the facts showing illegal action below and consequent injury,⁸³ so that the court may see, assuming the petition to be true, that

there is error.⁸⁴ Mere conclusions of law are insufficient.⁸⁵ Where it is impossible without such information to know whether the determination sought to be reviewed was error, the court should be informed of the nature of the suit, what the issues were,⁸⁶ and, as shown *infra* § 76, what the evidence was. So, it has been held that the application must show by whom the decision sought to be reviewed was rendered,⁸⁷ but the view has been taken that while good pleading requires the petition to name the judge or division of the court rendering the judgment sought to be reviewed, fail-

E. 841, 183 Ga. 800 dismissing certiorari *Williams v. Aycock*, 183 S. E. 628, 52 Ga.App. 386, transferred 179 S.E. 770, 180 Ga. 570.

La.—*Kuhn v. Breard*, 88 So. 552, 149 La. 59.

Philippine.—U. S. v. *Siatong*, 5 Philippine 463.

Tenn.—*Rhea County v. White*, 43 S. W.2d 375, 163 Tenn. 388—*Bray v. Blue Ridge Lumber Co.*, 289 S.W. 504, 154 Tenn. 342.

11 C.J. p 149 note 12.

Accompanying brief

Ala.—*Ex parte Edwards*, 80 So. 791, 202 Ala. 503, denying certiorari *Birmingham Waterworks Co. v. Edwards*, 81 So. 194, 16 Ala.App. 674.

Statement of notice

La.—*Kuhn v. Breard*, 88 So. 552, 149 La. 59.

Statement of substance of case

Tenn.—*Bray v. Blue Ridge Lumber Co.*, 289 S.W. 504, 154 Tenn. 342.

Separate argument and brief

Ga.—*Louisville & N. R. Co. v. Tomlin*, 132 S.E. 90, 161 Ga. 749, dismissing certiorari 127 S.E. 416, 33 Ga.App. 585.

76. Pa.—*Benner v. Ducoing*, 1 Browne 217.

11 C.J. p 149 note 13 [a].

77. Pa.—*Wilt v. Philadelphia, etc., Turnp. Co.*, 1 Brewst. 411.

11 C.J. p 149 note 14.

78. U.S.—*Gillis v. City of New York*, 56 S.Ct. 372, 296 U.S. 653, 80 L.Ed. 465, denying certiorari 280 N.Y.S. 793, 244 App.Div. 781.

Grounds sufficiently shown

Tenn.—*Clements v. Roberts*, 230 S. W. 30, 144 Tenn. 129, rehearing denied 231 S.W. 902, 144 Tenn. 152.

79. Me.—*Chavarie v. Robie*, 194 A. 404.

80. Cal.—*Ellis v. Superior Court in and for Riverside County*, 33 P. 2d 60, 138 Cal.App. 552.

Fla.—*Great American Ins. Co. v. Peters*, 141 So. 322, 105 Fla. 380.

11 C.J. p 149 note 15.

81. Tex.—*Jones v. Nold*, 22 Tex. 379—*McKensie v. Pitner*, 19 Tex. 135.

82. Fla.—*Great American Ins. Co. v. Peters*, 141 So. 322, 105 Fla. 380—*Ex parte Jones*, 110 So. 532, 92 Fla. 1015.

Idaho.—*Vaught v. District Court of Fourth Judicial Dist. in and for Camas County*, 260 P. 160, 44 Idaho 706.

La.—*Harris v. Geo. W. Signor Tie Co.*, 8 La.App. 213.

Me.—*Jellerson v. Board of Police of City of Biddeford*, 187 A. 713, 134 Me. 448.

Miss.—*Planters' Lumber Co. v. Griffin Chapel M. E. Church*, 124 So. 479, 157 Miss. 714.

Mo.—*State ex rel. Morrison v. Sims*, App., 201 S.W. 910.

Mont.—*State ex rel. Examining and Trial Board of Police Department of City of Butte v. District Court of Second Judicial Dist. in and for Silver Bow County*, 190 P. 295, 298, quoting *Corpus Juris*.

N.J.—*Feuchtbau v. Mayor and Township Committee of Woodbridge*, 172 A. 910, 12 N.J.Misc. 541—*State v. Height*, 171 A. 787, 12 N.J.Misc. 383.

N.Y.—*Hall v. Hood*, 201 N.Y.S. 498, 121 Misc. 572—*In re Schroder*, 187 N.Y.S. 680.

Or.—*Oregon City v. Clackamas County*, 247 P. 772, 118 Or. 546.

Tenn.—*Rhea County v. White*, 43 S. W.2d 375, 163 Tenn. 388—*Wilmington v. Jarvis*, 189 S.W. 366, 136 Tenn. 279.

Tex.—*Crenshaw v. Home Lumber Co.*, Civ.App., 296 S.W. 342.

11 C.J. p 150 note 17.

83. Fla.—*Great American Ins. Co. v. Peters*, 141 So. 322, 105 Fla. 380—*Medlin-Peacock Buick Co. v. Broward*, 135 So. 156, 101 Fla. 600—*Ex parte Jones*, 110 So. 532, 92 Fla. 1015.

Or.—*Chapman v. Hood River County*, 178 P. 379, 91 Or. 92.

Tex.—*Schwind v. Goodman*, Com. App., 221 S.W. 579, reversing *Goodman v. Schwind*, Civ.App., 186 S. W. 282.

11 C.J. p 150 note 19.

Illegality on face of record

A petition for certiorari to review

the proceedings and judgment of a court should make it appear that an illegal proceeding appears by the face of the record, of which complaint is made.—*Ex parte Jones*, 110 So. 532, 92 Fla. 1015—11 C.J. p 150 note 19 [a].

Illegality sufficiently shown

Specific allegation of illegality of the court of appeals' actions, as constituted of one regular judge and special judge, in a petition for a writ of certiorari, and a contention in the supporting suggestion that the court contravened the supreme court ruling in a certain case by thus proceeding, was held sufficient, although the relator did not cite such case in the petition, according to the letter of supreme court rules, rule 34.—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record *Allen v. Best*, 279 S.W. 728, 220 Mo.App. 1041.

84. Mont.—*State ex rel. Examining and Trial Board of Police Department of City of Butte v. District Court of Second Judicial Dist. in and for Silver Bow County*, 190 P. 295, 298, quoting *Corpus Juris*. 11 C.J. p 150 note 20.

Admissions may preclude issuance of writ.—*Castell Land & Harbor Co. v. Roberts*, 95 So. 421, 153 La. 115.

85. Ga.—*Wood v. Fairfax Loan & Investment Co.*, 177 S.E. 260, 50 Ga.App. 123.

Idaho.—*Vaught v. District Court of Fourth Judicial Dist. in and for Camas County*, 260 P. 160, 44 Idaho 706.

Mo.—*State ex rel. Morrison v. Sims*, App., 201 S.W. 910.

Tenn.—*Rhea County v. White*, 43 S. W.2d 375, 163 Tenn. 388.

Tex.—*Crenshaw v. Home Lumber Co.*, Civ.App., 296 S.W. 342.

11 C.J. p 150 note 18.

86. Ala.—*Ex parte Cox*, 76 So. 911, 200 Ala. 553, denying certiorari *De Bardeleben Coal Co. v. Cox*, 76 So. 409, 16 Ala.App. 172.

87. Ga.—*Freeman v. Eatonton*, 40 S. E. 698, 114 Ga. 528.

ure to do so does not invalidate an otherwise sufficient petition.⁸⁸ It is unnecessary to allege legal conclusions in addition to the facts,⁸⁹ or to make allegations with respect to issues not properly triable on certiorari.⁹⁰ Unless the statute so requires, paragraphs need not be numbered.⁹¹

If the application, although loosely drawn or somewhat obscure, discloses merits and that injustice has probably been suffered, the lack of precision may be disregarded.⁹² So, technical defects will be disregarded;⁹³ substantial compliance with the statutory requirements is sufficient.⁹⁴

Different proceedings cannot be brought up by the same petition.⁹⁵ However, a petition may embrace every exception taken on the trial, as it is not necessary to file a separate petition for every exception.⁹⁶ So, a petition to review the record of a board of education in several times locating, or attempting to locate, a schoolhouse site for the same schoolhouse on the same land is not objectionable as double because seeking to test the validity of several separate proceedings, where they all related to the same matter and land.⁹⁷ On petition for certiorari to revise and correct the probate orders in partition, there is no misjoinder of causes of action, although the right of petitioner under the will to land partitioned to others is asserted.⁹⁸

§ 71. — Entitling

The application should be entitled in accordance with

88. Ala.—*Steading v. Wheeler*, 78 So. 962, 201 Ala. 566.

Court composed of two judges

Ala.—*Steading v. Wheeler*, *supra*.

89. Dak.—*Champion v. Minnehaha County*, 41 N.W. 739, 5 Dak. 416.

90. Utah.—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372.

Time of appointing receiver

A petition was held not defective in failing to allege whether a receiver whose appointment was sought to be set aside was appointed before or after the commencement of petitioner's action, where petitioner's rights would be the same in either event.—*Blanco v. Ambler*, 3 Philippine 358, 2 Off.Gaz. 281.

91. Ga.—*Royal v. McPhail*, 25 S.E. 512, 97 Ga. 457.

92. Cal.—*Murray v. Mariposa County*, 23 Cal. 492.

Ga.—*Evans v. Forsyth*, 55 S.E. 490, 126 Ga. 589.

Tex.—*Jones v. Nold*, 22 Tex. 379—*Rollison v. Hope*, 18 Tex. 446.

93. Nev.—*State v. District Court of Seventh Judicial Dist. in and for*

Mineral County, 273 P. 659, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

11 C.J. p 150 note 26.

94. Nev.—*State v. District Court of Seventh Judicial Dist. in and for Mineral County*, *supra*.

Liberal rule in respect of a pleading in an action will be applied to a petition in certiorari proceeding, since the petition is in the nature of a pleading.—*People ex rel. Brooklyn Union Gas Co. v. Miller*, 1 N.Y.S.2d 246, 253 App.Div. 162.

95. Ala.—*Davis v. Calhoun*, 24 Ala. 437—*Creswell v. Greene County Comrs. Ct.*, 24 Ala. 282.

Mich.—*Dickinson v. Van Wormer*, 39 Mich. 141.

96. Ga.—*Odum v. Macon, etc., R. Co.*, 45 S.E. 619, 118 Ga. 792.

97. Ill.—*Southworth v. Ogle County School Dist. No. 131 Bd. of Education*, 87 N.E. 403, 238 Ill. 190.

98. Tex.—*Reynolds v. Prestidge*, Civ.App., 228 S.W. 358.

the local practice, although irregularities are not ordinarily fatal.

It has been held that the petition should be presented in the name of the party to the suit who is applicant, and by preserving the original caption of the suit.⁹⁹ However, the fact that the petition is not entitled in any court and does not contain the names of formal plaintiffs or defendants, is not fatal to the proceedings so as to invalidate the writ, where the petition contains all the essential requisites of the statute.¹ Under a statute abolishing the state writ of certiorari and providing for relief by certiorari order, certiorari proceedings should be entitled "In the Matter of the Application of" petitioner, instead of as "People of the State of . . . on the Relation of" petitioner;² but where the application in other respects substantially complies with the statute, it is not rendered fatally defective by the fact that it is entitled in the name of the state, on relation of the petitioner named, where the state has no interest in the matter,³ or by the fact that it is designated a petition instead of an application.⁴ An original action to review a judge's order is a "special proceeding" within a statute authorizing designation of the parties as plaintiff and defendant.⁵

§ 72. — Specification of Error

Ordinarily, the petition should clearly and specifically set forth the error relied on.

An assignment of errors relied on is generally

99. La.—*Donaldsonville Ice Co. v. Schlitz Brewing Co.*, 29 So. 114, 104 La. 360.

1. Or.—*Farrow v. Nevin*, 75 P. 711, 44 Or. 496.

2. N.Y.—*Multiplex Garages v. Walsh*, 210 N.Y.S. 178, 213 App. Div. 155, reversed without opinion *Ashley v. Walsh*, 150 N.E. 540, 241 N.Y. 527.

3. Nev.—*State v. District Court of Seventh Judicial Dist. in and for Mineral County*, 273 P. 659, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

N.Y.—*Multiplex Garages v. Walsh*, 210 N.Y.S. 178, 213 App.Div. 155, reversed *Ashley v. Walsh*, 150 N.E. 540, 241 N.Y. 527.

4. Nev.—*State v. District Court of Seventh Judicial Dist. in and for Mineral County*, 273 P. 659, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

5. Idaho.—*Shaw v. McDougall*, 58 P.2d 463, 56 Idaho 697.

necessary,⁶ and, as shown *infra* § 150, where the reviewing court is so restricted, matters not assigned as error in the petition will not be reviewed. Moreover, it has been held that a petition for certiorari which contains no proper assignment of errors is void.⁷ General allegations of error are ordinarily insufficient, and the particular errors complained of and relied on should distinctly be set

forth.⁸ However, at least in some states, a general assignment is sufficient where the error is apparent on the face of the proceeding.⁹ Where failure to follow a decision of a higher court is relied on as error, the conflict must be called to the attention of the court to which application for certiorari is made,¹⁰ but a court rule requiring that the petition shall concisely set out the issue pre-

6. Ga.—James v. Roberts, 191 S.E. 301, 55 Ga.App. 755—Green v. Patterson, 103 S.E. 437, 25 Ga.App. 374—Newsome v. Sheppard, 91 S.E. 915, 19 Ga.App. 525.

11 C.J. p 151 note 49.

Assignments not contained in petition see *infra* § 89.

7. Ga.—Wood v. Fairfax Loan & Investment Co., 177 S.E. 260, 50 Ga.App. 123—Richards v. Harvey, 129 S.E. 1, 34 Ga.App. 219—Partee v. Peters, 127 S.E. 660, 33 Ga.App. 694.

Requiring scrutiny of evidence

An assignment of error complaining of the judge's failure to instruct the jury as to the measure of damages depends on a scrutiny of the evidence, since the general rule requiring such instruction is subject to exception, as in a case where the damages found by the jury were so small as not to be unauthorized by the evidence in any event.—Briesenick v. Dimond, 142 S.E. 118, 165 Ga. 780, dismissing certiorari 134 S.E. 350, 35 Ga.App. 668.

8. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

Ga.—Berkeley Granite Corporation v. Covington, 190 S.E. 8, 183 Ga. 801, affirming Covington v. Berkeley Granite Corporation, 185 S.E. 386, 53 Ga.App. 269, conforming to answers to certified questions 184 S.E. 871, 182 Ga. 235—Herrin v. White, 173 S.E. 433, dismissing certiorari 166 S.E. 678, 46 Ga.App. 65—Clark v. Fire Ass'n of Philadelphia, 126 S.E. 387, 159 Ga. 567, dismissing certiorari 120 S.E. 14, 31 Ga.App. 3—Jones v. Pacific Fire Ins. Co., 125 S.E. 470, 159 Ga. 248, dismissing certiorari 119 S.E. 922, 31 Ga.App. 123—Wood v. Fairfax Loan & Investment Co., 177 S.E. 260, 50 Ga.App. 123—Feckoury v. Maloney, 149 S.E. 91, 40 Ga.App. 157—Cohen v. Pinkovitch, 149 S.E. 66, 40 Ga.App. 94—Davis v. Lee, 145 S.E. 110, 38 Ga.App. 667—Southland Loan & Investment Co. v. Truelove, 138 S.E. 336, 36 Ga.App. 750—Chan v. Judge, 134 S.E. 925, 36 Ga.App. 13—Partee v. Peters, 127 S.E. 660, 33 Ga.App. 694—Illinois Cent. R. Co. v. Banks, 122 S.E. 85, 31 Ga.App. 756—Walker v. State, 118 S.E. 478, 30 Ga.App. 618—Hicks v. Smith, 112 S.E. 295, 28 Ga.App. 594—Wall v.

Hawker Pottery Co., 108 S.E. 134, 27 Ga.App. 255—Stouffer v. Miszenheimer, 106 S.E. 560, 26 Ga.App. 554—Holcomb, Croft & Co. v. Finch, 103 S.E. 38, 25 Ga.App. 261—Starnes v. Bacon, 103 S.E. 39, 25 Ga.App. 260—Medlock v. Morgan County Bank, 99 S.E. 227, 23 Ga.App. 710—Bell v. Evans, 91 S.E. 787, 19 Ga.App. 469.

N.J.—Cardillo v. Borough of Bound Brook, 127 A. 792, 3 N.J.Misc. 249. Wash.—State v. Superior Court of Chelan County, 166 P. 791, 97 Wash. 472.

11 C.J. p 151 note 51.

Insufficiency of notice

Assignment of error on judgment abating nuisance, on ground that notice to defendant was insufficient, is incomplete where the notice served on defendant is not set forth either in form or in substance.—O'Quinn v. Mayor and Council of Homerville, 157 S.E. 109, 42 Ga.App. 628.

Failure to swear witnesses

Assignment of error, on the ground that none of the witnesses were legally sworn, is insufficient if not stating the oath was not administered or the nature of oath if administered.—O'Quinn v. Mayor and Council of Homerville, 157 S.E. 109, 42 Ga.App. 628.

Charge

Assignment complaining that charge was confusing, unintelligible, and incomplete could not be considered, where it failed to point out wherein charge was confusing, unintelligible, and incomplete.—Hill v. George, 170 S.E. 326, 47 Ga.App. 272.

Judgment not following verdict

Ga.—Starnes v. Bacon, 103 S.E. 39, 25 Ga.App. 260.

Overruling motion for new trial

(1) Petition excepting to overruling of motion for new trial must state plainly and distinctly grounds urged, general exception to overruling motion will not suffice, even though exceptions set forth alleged errors.—Wrenn v. Bowden, Ga.App., 193 S.E. 456—Atlanta & W. P. R. Co. v. F. Graham, Williams Brick Co., 138 S.E. 248, 36 Ga.App. 814—East River Nat. Bank v. Ellman, 136 S.E. 799, 36 Ga.App. 263—Reese v. Miller, 126 S.E. 904, 33 Ga.App. 442.

(2) Where error is assigned in a petition for certiorari on a ruling based on a motion for a new trial,

and the grounds of the motion are set forth in the petition, a general assignment of error that the court erred in so ruling is sufficient.—National Union Fire Ins. Co. v. Ozburn, 156 S.E. 305, 42 Ga.App. 393.

(3) Where a petition for certiorari to review a judgment overruling a motion for a new trial set forth the grounds of the motion and disclosed that one of them was that the court erred in directing the verdict because there were issues of fact for determination by the jury, a general assignment, then made in the petition, that the court erred in overruling the motion, was sufficient to bring into question the propriety of the court's action in directing the verdict.—Hopkins Inv. Co. v. Crawford, 132 S.E. 925, 35 Ga.App. 331.

Petition held sufficiently specific

Ga.—U. S. Fidelity & Guaranty Co. v. Lawrence, 190 S.E. 346, reversing 184 S.E. 922, 53 Ga.App. 111, conformed to 191 S.E. 474, 55 Ga.App. 771—Fender v. Hodges, 144 S.E. 278, 166 Ga. 727, reversing 142 S.E. 753, 38 Ga.App. 78, and conformed to 144 S.E. 679, 38 Ga.App. 617.

In Maine

(1) It is necessary that the petition should allege that the irregularities and errors specified appear by the record which it is sought to quash.—Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443—11 C.J. p 151 note 51 [h].

(2) Consequently, failure of allegation in the petition that alleged irregularities and errors appear in record, is fatal, since the issue involves the legal sufficiency of the record.—Jellerson v. Board of Police of City of Biddeford, *supra*.

(3) It is essential that the petition should clearly, definitely, and completely assign and set forth the claims of irregularity and error that appear in the record.—Chavarie v. Robie, 194 A. 404—Jellerson v. Board of Police of City of Biddeford, *supra*.

9. Miss.—Crowson v. Young, 126 So. 470—Board of Sup'rs of Calhoun County v. Young, 126 So. 469, 156 Miss. 644.

11 C.J. p 152 note 52.

10. Mo.—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, quashing

sented to the court below, and show how the conflicting ruling arose, does not require a statement of the facts in the case, but merely requires a statement of the issues presented, the rulings thereon, and wherein and in what manner the rulings conflict with the decisions of the higher court.¹¹ An application sufficiently raises the point to be considered where a memorandum attached to the application and referred to therein contains the point;¹² if the petition clearly states the grounds of complaint, the fact that it sets forth other immaterial grounds is unimportant.¹³ Matters dehors the record cannot be relied on as error.¹⁴

§ 73. — Showing Merits and Good Faith

Where required by the local practice the applicant must make a sufficient showing of merits and good faith.

In some jurisdictions applicant must show a *prima facie* case of merits,¹⁵ and in some states must show also his means of establishing them on another trial, so that it may appear that the determination complained of will probably be changed.¹⁶ Although an allegation of good faith is often inserted in the petition, it is not, where not required by statute, an indispensable allegation. If the facts stated show a meritorious case and a *prima facie*

right to the writ, good faith will, in the absence of anything to the contrary, be presumed. There is no rule of the common law which unconditionally requires an affirmative showing of good faith.¹⁷ Nevertheless, in some jurisdictions, it has been held at one time or another that an affidavit of good faith or of merits must be presented,¹⁸ and such an affidavit must contain the averments required by statute.¹⁹ It is sufficient, however, if it substantially conforms to the requirements of the statute.²⁰

§ 74. — Excusing Failure to Pursue Other Remedy

Ordinarily the application should present some sufficient reason for not resorting to appeal or other available remedy.

Except where appeal is a concurrent remedy,²¹ the application must present some sufficient reason for not resorting to appeal or to some other appropriate and available remedy,²² and, in case there is a remedy by appeal, it must state facts showing the inability to take or perfect an appeal in time,²³ or that the petitioner lost his right of appeal through some unavoidable casualty,²⁴ and not through his own want of diligence.²⁵ Likewise it has been held that some sufficient reason must be

record and remanding cause, App., 96 S.W.2d 1065—State ex rel. Smith v. Allen, 267 S.W. 843, quashing certiorari Smith v. Donk Bros. Coal & Coke Co., App., 260 S.W. 545—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S.W. 967.

11. Mo.—State ex rel. Nafziger Baking Co. v. Trimble, 247 S.W. 146.

12. La.—State v. Gordy, 108 So. 229, 161 La. 104.

13. N.Y.—Peo. v. McComber, 7 N.Y. S. 71.

14. Me.—Ross v. Ellsworth, 49 Me. 417.

Porto Rico.—Prada v. Rossy, 20 Porto Rico 181.

Ruling not shown by record

Ga.—Evans v. Caldwell, 190 S.E. 582, affirming 184 S.E. 440, 52 Ga.App. 475.

15. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

Tenn.—Willoughby v. Jarvis, 189 S.W. 366, 136 Tenn. 279.

Tex.—Schwind v. Goodman, Com. App., 221 S.W. 579, reversing Goodman v. Schwind, Civ.App., 186 S.W. 282.

11 C.J. p 152 note 55.

Allegations held insufficient

Allegation, in affidavit for certiorari to review judgment on note, that surety did not agree to extension without his consent and did not

give consent, was not allegation that extension was made discharging surety, and the allegations of the affidavit were, therefore, held insufficient to warrant the issuance of the writ.—Scott v. Tate, Tex.Civ.App., 28 S.W.2d 848.

Knowledge of facts

(1) That affidavit for certiorari made by applicant himself failed to state affiant had knowledge of facts stated therein was unobjectionable, since it will be presumed unless the contrary is shown by the affidavit itself that applicant has knowledge of the facts.—Lanning v. Yarbrough, Tex.Civ.App., 35 S.W.2d 211.

(2) The affidavit is not insufficient because it showed applicant was ignorant of some immaterial facts alleged therein.—Lanning v. Yarbrough, supra.

(3) Knowledge of facts authorizing applicant to make affidavit for certiorari need not be such as is based alone on the evidences of his own senses, such as sight or hearing.—Lanning v. Yarbrough, supra.

16. Tex.—Bodman v. Harris, 20 Tex. 31.

11 C.J. p 152 note 56.

17. Minn.—State v. Posz, 18 N.W. 1014, 106 Minn. 197.

18. Ga.—Talley v. Commercial Credit Co. of Georgia, 155 S.E. 907, 42 Ga.App. 337.

11 C.J. p 152 note 58.

19. Ga.—Talley v. Commercial Credit Co. of Georgia, supra.

Petition not filed for delay only

Where the statute so requires, the affidavit for certiorari must aver that the petition is not filed for delay only, and, where the affidavit does not contain this averment but avers that the petition is "filed in the case for the purpose of delay only," the petition will be dismissed.—Talley v. Commercial Credit Co. of Georgia, supra.

20. Ga.—Whitley v. Jackson, 129 S.E. 662, 34 Ga.App. 286.

11 C.J. p 152 note 59.

Affidavit of attorney

Affidavit, when made by petitioner's attorney, is not invalid because he makes affidavit that he himself verily believes that he has good cause for certiorari.—Whitley v. Jackson, supra.

21. Tex.—Poag v. Rowe, 16 Tex. 590.

11 C.J. p 151 note 40.

22. Colo.—Carlton v. Carlton, 96 P. 995, 44 Colo. 27.

11 C.J. p 151 note 38.

23. Ark.—St. Louis, etc., R. Co. v. McDermitt, 120 S.W. 831, 91 Ark. 112.

11 C.J. p 151 note 39.

24. Ark.—Tilghman v. Russell, 251 S.W. 353, 158 Ark. 593.

25. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

shown why the application is not made to a lower court of concurrent jurisdiction.²⁶

§ 75. — Sufficiency of Allegations in General

The allegations must sufficiently present a case cognizable for review, and when required by the circumstances, must particularly and specifically show performance of conditions precedent, the right to institute the proceedings, want of jurisdiction, and rendition of judgment.

Whether or not a cause brought for review presents a case cognizable for review on writ of certiorari must depend on the showing made in the individual petition.²⁷ The petition must be complete in itself, and omissions cannot be supplied by reference to the transcript.²⁸

Conditions precedent. The application must distinctly and specifically aver performance of conditions precedent,²⁹ such as the filing of a bond or the making of a pauper affidavit where this is required.³⁰

Right to institute proceeding. Applicant must

show that he occupies such a relation to the controversy as to entitle him to sue out the writ,³¹ and that he has interests which will be affected injuriously by the proceedings sought to be reviewed;³² but a failure to allege such facts in the application is not fatal where they are sufficiently shown by the judgment of the respondent court attached to, and made a part of, the application, and by respondent's answer.³³ He must show freedom from laches in applying for the writ in case no appeal lies.³⁴ Where the writ issues only in such case, the petition must show on its face that the petitioner has no other mode of review,³⁵ but, although an allegation in that regard may be defective, if the petition in its entirety discloses the absence of another remedy, that is sufficient.³⁶ It is unnecessary, however, to show that defendant applying for certiorari had no right of appeal where the personal judgment against him was rendered without service of summons.³⁷

Want of jurisdiction. If the application is based on want or excess of jurisdiction, such facts must be set out that the court may see that there is just

26. Cal.—Gallardo v. Hannah, 49 Cal. 136—Edwards v. Ryan, 45 Cal. 243.

27. Fla.—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600.

Petition held sufficient

Tex.—Reynolds v. Prestidge, Civ. App., 228 S.W. 353—Poole v. Pierce Fordyce Oil Ass'n, Civ.App., 209 S. W. 706.

Petition held insufficient to authorize certiorari to review judgment.—Midwest Investment & Finance Co. v. Jarvis Chevrolet Co., Ill.App., 8 N.E.2d 377.

28. Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 260 P. 160, 44 Idaho 706, citing *Corpus Juris*. 11 C.J. p 150 note 22.

Exhibits attached to petition

(1) Where a judgment and its date appeared in exhibits attached to petition for certiorari, and answer of trial judge stated that such exhibits were correct copies of the originals, it was not error to refuse to dismiss certiorari as failing to show a final judgment, or that application was made within the legal time.—Freedman v. Bush, 119 S.E. 421, 30 Ga.App. 757.

(2) Uncertainty may be clarified by reference to copy of order attached to petition.—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

29. Ga.—Nilsen v. City of La Grange, 191 S.E. 175, 55 Ga.App.

676 transferred 189 S.E. 511, 183 Ga. 742—Clay v. City of La Grange, 189 S.E. 863, 55 Ga.App. 239—Matthews v. City of Thomaston, 94 S.E. 631, 21 Ga.App. 496. 11 C.J. p 150 note 34.

Default judgment

Petition for certiorari, excepting to refusal to open default, and reciting that defendant made affidavit required by law to open default, when verified by the answer, sufficiently recited that the affidavit was filed.—Colley v. O. A. Smith Co., 119 S.E. 350, 30 Ga.App. 680.

30. Ga.—Nilsen v. City of La Grange, 191 S.E. 175, 55 Ga.App. 676 transferred 189 S.E. 511, 183 Ga. 742—Clay v. City of La Grange, 189 S.E. 863, 55 Ga.App. 239—Russell v. City of Columbus, 102 S.E. 381, 25 Ga.App. 16—Matthews v. City of Thomaston, 94 S.E. 631, 21 Ga.App. 496.

31. Tex.—Johnson v. Coit, Civ.App., 48 S.W.2d 397. 11 C.J. p 150 note 35.

Nonessential allegations

(1) Petition for certiorari showing that county court gave to widow testator's separate estate devised to petitioners need not, to show petitioners' interest in estate, negative that executors gave it to widow as, or sold it to her in lieu of, homestead.—Johnson v. Coit, supra.

(2) So, a petition filed by two devisees within two years after becoming of lawful age is good as to them, although not alleging that coplain-

tiff had acted within statutory time.—Johnson v. Coit, supra.

32. Fla.—Great American Ins. Co. v. Peters, 141 So. 322, 105 Fla. 380. 11 C.J. p 150 note 36.

33. Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.

34. N.C.—In re Snelgrove, 182 S.E. 335, 208 N.C. 670.

Renewal of application

Where a certiorari is applied for after the expiration of the statutory period from the date of the judgment complained of, the petition should show on its face that it is a renewal of a previously dismissed certiorari sued out within the proper time in the same cause, and that the renewal is within the statutory time from the date of the dismissal of the previous certiorari.—Sweat v. City of Atlanta, 174 S.E. 548, 49 Ga.App. 151—Smith v. City of Atlanta, 174 S.E. 171, 48 Ga.App. 853—Morris v. Battey, 121 S.E. 125, 31 Ga.App. 438.

35. Fla.—Rasco County v. Lang, 176 So. 430. 11 C.J. p 150 note 37.

36. Cal.—Ellis v. Superior Court in and for Riverside County, 33 P.2d 60, 138 Cal.App. 552.

37. Nev.—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 659, 51 Nev. 206, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

ground of complaint.³⁸ It is not sufficient merely to state the legal conclusion as to want or excess of jurisdiction.³⁹

Judgment. A petition for a certiorari as a writ of false judgment must show that a judgment was rendered;⁴⁰ and the nature and amount of the judgment and against whom it was rendered should be stated.⁴¹ The petition for a writ of certiorari to quash an order of the inferior court setting aside a judgment previously entered in the cause by the clerk of the court must set out a copy of the judgment so set aside.⁴²

§ 76. — Setting Out Evidence

The evidence must be substantially set out in the petition if the case requires a review of the evidence.

Where the reviewing court looks to the opinion of the court below alone for findings of fact, inclusion in the petition of recitals of evidence found in the record of that court is improper,⁴³ and, where the writ issues only to correct errors of law apparent on the face of the record when properly extended, matters purely evidentiary in nature have no proper place in the petition for the writ;⁴⁴ but all the evidence introduced below should substantially be set out if it is complained that the determination

was contrary to the evidence, and this is a ground for the writ,⁴⁵ or if the illegality complained of is not shown by the record proper and a statement of the facts and evidence in the case is necessary to inform the court what the case really was;⁴⁶ and the petition should allege that the facts recited as proved on the trial were all the facts proved.⁴⁷ The petition need not ordinarily set out verbatim the testimony of each witness, nor the exact contents of written instruments, however; it is generally sufficient if the petition gives the substance of the evidence from which it appears that injustice has been done.⁴⁸ On the other hand, plaintiff in certiorari need not make a brief of the evidence but may incorporate in his petition a stenographic transcript of the testimony set forth in questions and answers.⁴⁹

§ 77. — Records or Exhibits

Records or exhibits material to enable the court to judge of the propriety of issuing the writ should accompany or be made part of the application.

If a transcript of the record sought to be reviewed or a copy of the opinion or other papers or documents which are material to enable the court to judge of the propriety of issuing the writ is re-

38. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 260 P. 160, 44 Idaho, 706, quoting *Corpus Juris*, 11 C.J. p 151 note 42.

Want of service

Application for writ of certiorari to inquire into jurisdiction alleging judgment was rendered against corporation without service on proper officer stated facts sufficient to justify issuance of writ.—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 659, 51 Nev. 206, followed in 273 P. 661, 51 Nev. 214, and rehearing denied 275 P. 1, 51 Nev. 330.

Allegations held sufficient to present education commissioner's lack of jurisdiction of subject matter on appeal from school directors' decision.—Town School Dist. of Maidstone v. Dempsey, 156 A. 387, 103 Vt. 481.

39. Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 260 P. 160, 44 Idaho 706.

11 C.J. p 151 note 43.

40. N.C.—Ex p. Barton, 70 N.C. 134.

41. Tex.—Boyd v. Clark, 21 Tex. 426.

Parties to judgment

Petition for certiorari to review judgment of court of appeals affirming judgment against principal and surety on statutory replevy bond filed by defendant in attachment case was not dismissible because of recital in one paragraph of petition that plaintiff in trial court was specified person and defendants were surety and another corporation and recital in another paragraph that petition for certiorari was brought to review judgment in a case wherein surety alone was plaintiff in error and named person was defendant in error.—U. S. Fidelity & Guaranty Co. v. Lawrence, 190 S.E. 346, reversing 184 S.E. 222, 53 Ga.App. 111, conformed to 191 S.E. 474, 55 Ga.App. 771.

42. Fla.—Ex parte Jones, 110 So. 532, 92 Fla. 1015.

43. Ala.—Life & Casualty Ins. Co. of Tennessee v. Womack, 151 So. 880, 228 Ala. 70, denying certiorari 151 So. 881, 26 Ala.App. 6.

44. Mass.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

Evidentiary facts

A petition in certiorari proceeding is in the nature of a pleading, and only conclusions of fact need to be stated, and not the evidence necessary to support them.—People ex rel.

Brooklyn Union Gas Co. v. Miller, 1 N.Y.S.2d 246, 253 App.Div. 162.

Improper inclusion

In a statutory proceeding for writ of certiorari to set aside the decision of a court on a petition for review of the removal of a police officer by selectmen, inclusion in the petition of a transcript of the evidence taken at the hearing before the selectmen, as an exhibit, was improper, since certiorari merely brings to the supervising court errors of law.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

45. Ga.—Kelley v. Jones, 96 S.E. 181, 22 Ga.App. 444.

N.J.—Lyons v. Armstrong, 125 A. 565, 2 N.J.Misc. 710.

11 C.J. p 151 note 45.

46. Ala.—Ex parte Cox, 76 So. 911, 200 Ala. 553, denying certiorari De Bardelben Coal Co. v. Cox, 76 So. 409, 16 Ala.App. 172.

Fla.—In re Edwards, 130 So. 615, 100 Fla. 989.

11 C.J. p 151 note 46.

47. Tex.—Givens v. Blocker, 23 Tex. 633.

11 C.J. p 151 note 47.

48. Fla.—In re Edwards, 130 So. 615, 100 Fla. 989, citing *Corpus Juris*.

49. Ga.—Louisville & N. R. Co. v. Lovelace, 101 S.E. 718, 24 Ga.App. 616.

quired to accompany or to be made a part of the application, noncompliance with such requirement will invalidate the application;⁵⁰ and the fact that respondent in certiorari must certify the record does not relieve the petitioner, when possible, from setting it forth in, or annexing it to, his petition.⁵¹ If the petitioner cannot include or annex the record he should allege his reasons for his inability so to do.⁵² It has been held that all record evidence relied on should be brought before the court as exhibits in the shape of certified or authenticated copies, and not by mere recitals of its existence,⁵³ but there is authority holding that the record of the proceedings sought to be reviewed should not be attached as exhibits to the petition.⁵⁴

Allegation must show that the record, a review of which is asked, is necessarily inaccurate, since, if the writ is granted, the court must determine on the record whether or not the proceedings of the subordinate tribunal or officer exercising judicial powers or functions are legal and regular.⁵⁵

§ 78. — Aider by Reference

Reference to the record of the tribunal which it is sought to review will not ordinarily supply deficiencies in the application.

50. Ark.—Henson v. Braden, 1 S.W. 2d 70, 175 Ark. 1033.

Ga.—Neal v. Chitwood, 164 S.E. 162, 45 Ga.App. 212.

Me.—Chavarie v. Robie, 194 A. 404 —Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443.

N.C.—Baker v. Hare, 136 S.E. 113, 192 N.C. 788.

11 C.J. p 153 note 61.

Entire record

(1) On certiorari to quash opinion and judgment of court of appeals for conflict with supreme court decisions, the entire record should not be brought up by the petition for the writ, but under supreme court Rules, rule 34 the record should consist only of the petition and exhibits accompanying same, together with subsequent proceedings.—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536.

(2) A petition for certiorari to require the trustees of school districts to transmit for review a transcript of the proceedings for the consolidation of two school districts cannot be denied because the petitioner did not file with his petition a complete transcript of the records of the trustees, it being sufficient if the petition showed petitioner's right to the writ.—Ebeling v. Trustees of Schools of Tp. No. 7, Range No. 8, Jasper County, 121 N.E. 249, 285 Ill. 641.

Where the decision of an intermediate appellate court is sought to be reviewed, it is generally insufficient merely to refer to the record and briefs of such court for the statements of fact and assignments of error.⁵⁶

§ 79. — Prayer

A prayer for such remedy as the court deems proper is sufficient.

The fact that the petition does not specifically pray for a writ of certiorari does not affect the proceedings; a general prayer for such remedy as the court shall deem meet and proper is sufficient.⁵⁷

§ 80. — Signature and Verification

The application for certiorari is usually required to be signed and verified by oath of the applicant or his agent or attorney conversant with the facts.

The application must be properly signed,⁵⁸ but it is sufficient that the affidavit be properly signed.⁵⁹ In the absence of a statute requiring it, however, the application need not be signed by an attorney.⁶⁰

The application in certiorari proceedings is a pleading within statutes relating to verification of pleadings.⁶¹ It is generally held that it must be verified,⁶² and the verification usually assumes the

Issues presented by plea in abatement

Ga.—District Grand Lodge No. 18, Grand United Order of Odd Fellows v. Webb, 93 S.E. 259, 20 Ga. App. 601.

Writ of review cannot be issued on facts shown by judge's return in response to a rule to show cause on application for a writ of supervisory control or other proper writ without certification of record by clerk as required by statute.—State v. District Court of Fourth Judicial Dist. in and for Missoula County, 250 P. 609, 77 Mont. 214.

51. Me.—Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443.

52. Me.—Chavarie v. Robie, 194 A. 404—Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443.

53. Mich.—Hewitt v. Oakland County Probate Judge, 34 N.W. 248, 67 Mich. 1—Cronin v. Kalkaska County, 25 N.W. 393, 58 Mich. 448.

54. Or.—Gaston v. Portland, 84 P. 1040, 48 Or. 32.

55. Me.—Chavarie v. Robie, 194 A. 404.

56. Tenn.—Nashville v. Patton, 143 S.W. 1131, 125 Tenn. 361. 11 C.J. p 153 note 60.

57. Tenn.—City of Nashville v. Mason, 11 Tenn.App. 344. 11 C.J. p 153 note 64.

However, a bill to enjoin use of underpass pending appeal from its layout as highway was not maintainable as petition for certiorari and decree that layout be quashed, where bill sought no relief of that nature and town by which layout was made was not party to bill.—Hoban v. Bucklin, 184 A. 362, 88 N.H. 73, modified on other grounds 186 A. 8, 88 N.H. 73.

58. Ga.—Neal v. Fox, 39 S.E. 860, 114 Ga. 164.

11 C.J. p 153 note 65.

59. Ga.—Smith v. Whitaker, 148 S. E. 746, 40 Ga.App. 73.

La.—State v. Mullen, 107 So. 698, 160 La. 925.

11 C.J. p 153 note 66.

60. Nev.—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 661, 51 Nev. 214—State v. District Court of Seventh Judicial Dist. in and for Mineral County, 273 P. 659, 51 Nev. 206, rehearing denied 275 P. 1, 51 Nev. 330.

61. Nev.—Abell v. Second Judicial Dist. Court in and for Washoe County, 71 P.2d 111.

62. Cal.—Benjamin Franklin Bond & Indemnity Corporation v. Schmidt, 22 P.2d 26, 39 Cal.App. 132.

La.—Horvath v. Eppling, 113 So. 778, 164 La. 93, dismissing certiorari Horvath v. Eppling, 6 La.App. 682. Tenn.—Rhea County v. White, 43 S.

form of an affidavit.⁶³ Where a petition is filed without the required verification, the court has no power after expiration of the time for filing a verified petition to permit the petition to be verified.⁶⁴

In at least one jurisdiction it is held that, when two or more joint defendants against whom a judgment has been rendered apply for a writ, and the petition is verified by only one, he alone should be treated as plaintiff.⁶⁵ In other jurisdictions, however, it is held that the petition need not be subscribed and verified by all the persons on whose behalf it is presented.⁶⁶

Who may make affidavit. The affidavit may be made by the party himself,⁶⁷ even though a minor, if of sufficient discretion to understand an oath.⁶⁸ Ordinarily, however, while a stranger cannot make the affidavit⁶⁹ it need not be made by the party in-

dividually, but may be made by any person who is conversant with the facts, such as his agent⁷⁰ or attorney,⁷¹ and it is immaterial whether the attorney making the affidavit represented the applicant in the proceeding below.⁷²

§ 81. Presentation and Filing of Application

The petition must be presented and filed as required by the local practice.

The application for certiorari must be presented by the party seeking the writ or by his counsel,⁷³ and, if so required, the petition, affidavit, and accompanying papers must be filed with the clerk or other designated officer⁷⁴ before the hearing,⁷⁵ or within the time prescribed therefor by law.⁷⁶ A petition not filed within the prescribed period is void,⁷⁷ and an attempt to answer before it was filed

W.2d 375, 163 Tenn. 388—Drainage Dist. No. 4 of Madison County v. Askew, 196 S.W. 147, 138 Tenn. 136.

11 C.J. p 153 note 67.

Statute mandatory

Requirement that petition for certiorari shall be sworn to is mandatory and not merely directory or subject to the discretion of the court.—Horvath v. Eppling, 113 So. 778, 164 La. 93, dismissing certiorari Hovarth v. Eppling, 6 La.App. 682.

A petition which is wholly printed, including the signature to the petition, affidavit, and jurat, is not "duly sworn to," however within a statutory requirement.—Drainage Dist. No. 4 of Madison County v. Askew, 196 S.W. 147, 138 Tenn. 136.

Oath administered by adverse party

That petition against board of zoning appeals was verified by petitioner before his son, who was member of board of zoning appeals and one of defendants, was a mere irregularity and did not render petition void or deprive court of jurisdiction of proceeding.—Brewster v. Wendt, 274 N.Y.S. 428, 242 App.Div. 775.

Sufficient verification

(1) Under rule XVI section 2, affidavit on petition for certiorari should contain allegations that facts set forth are true and correct, but, where affidavit was accompanied by other proofs of compliance with the rule, affidavit, "to the best of affiant's knowledge and belief," is sufficient.—Kinchen v. Redmond, 100 So. 607, 156 La. 418.

(2) Other illustrations see 11 C. J. p 153 note 67 [c].

63. Tenn.—Drainage Dist. No. 4 of Madison County v. Askew, 196 S.W. 147, 138 Tenn. 136.
11 C.J. p 153 note 68.

Verification or corroboration by an-

swer of facts alleged in petition, as essential to review of assignment of error based thereon, see infra § 150.

Absence of signature to affidavit is not fatal.—Peffer v. Beatty, 18 Pa. Dist. 173.

64. Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203.

65. Ga.—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S.E. 373, 22 Ga.App. 89.
11 C.J. p 153 note 69.

66. N.Y.—Peo. v. Coleman, 41 Hun 307.
Tenn.—Dwiggins v. Robertson, 1 Overt. 81.
11 C.J. p 153 note 70.

67. Ga.—Bowers v. Kanaday, 21 S.E. 458, 94 Ga. 209.

68. Ga.—Bowers v. Kanaday, supra.
69. Pa.—Union Furniture Co. v. Housenick, 12 Pa.Dist. 594, 11 Kulp 122.

11 C.J. p 154 note 74 [c].
70. Tex.—Spinks v. Mathews, 15 S.W. 1101, 80 Tex. 373.
11 C.J. p 154 note 74.

71. Tenn.—Drainage Dist. No. 4 of Madison County v. Askew, 196 S.W. 147, 138 Tenn. 136.
11 C.J. p 154 note 75.

Absence of applicant

A writ of certiorari would not be set aside because verified by applicant's attorney rather than by applicant, where applicant was absent from county where attorney resided and attorney was better informed relative to facts of matter stated in application and statute permits verification of pleadings by attorney in such cases.—Abell v. Second Judicial Dist. Court in and for Washoe County, Nev., 71 P.2d 111.

In Louisiana

(1) According to section 5 of rule XIII, 171 La. xiii, a petition for a writ of review may be verified by the affidavit of either the petitioner or his attorney, and if the attorney makes the affidavit he need not swear or even aver that the petitioner is absent from the parish.—Pipes v. Gallman, 140 So. 40, 174 La. 257, annulling 135 So. 690, 18 La.App. 434, answers conformed to 136 So. 302, 173 La. 153—Jackson v. Petrie & McFarland, 138 So. 113, 173 La. 593, annulling 133 So. 476, 17 La.App. 500.

(2) Under the rule as it stood before, a petition, verified by counsel without showing petitioner's absence from parish, was improperly verified.—Haas v. Opelousas-St. Landry Bank & Trust Co., 119 So. 700, 167 La. 537, denying certiorari 119 So. 372, 9 La.App. 166.

72. Ga.—Ware v. Fambro, 67 Ga. 515.

73. Mont.—State v. Second Judicial Dist. Ct., 61 P. 309, 24 Mont. 238.
11 C.J. p 154 note 77.

74. Mich.—Peo. v. Judges Cass County Cir. Ct., 2 Dougl. 116.
11 C.J. p 154 note 78.

75. D.C.—Vicory v. Totaro, 277 F. 546, 51 App.D.C. 144.
11 C.J. p 154 note 79.

76. Ga.—Russell v. Kennington, 128 S.E. 581, 160 Ga. 467—Buehl v. Wheelless, 122 S.E. 628, 32 Ga.App. 22—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203—Flowers v. Thompson, 112 S.E. 528, 28 Ga.App. 595—Abercrombie v. Gurley, 94 S.E. 606, 21 Ga.App. 389.
11 C.J. p 154 note 80.

77. Ga.—Buehl v. Wheelless, 122 S.E. 628, 32 Ga.App. 22—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203.

cannot give it life.⁷⁸ In at least one jurisdiction, however it is not required that the petition should be filed before the order for the issuance of the writ is made, for the writ may be allowed by the court or judge thereof, and it is competent to apply directly to the judge for the writ and afterward file with the clerk of the court the petition accompanied by the order for the writ.⁷⁹

§ 82. Construction of Application

The petition is construed against the petitioner.

The petition is to be construed most strongly against the petitioner.⁸⁰

§ 83. Amendments and New Applications

a. Amendments

b. New application

78. Ga.—Kirkland v. Luke, *supra*.

79. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 138 P. 199, 95 Or. 668.

80. Ill.—Simpson v. Sligar, 239 Ill. App. 484.

11 C.J. p 154 note 81.

81. N.Y.—Ticknor v. Potter, 282 N. Y.S. 804, 246 App.Div. 556.

11 C.J. p 154 note 82.

Petition treated as amended

(1) A petition for writ of certiorari to a board of aldermen, "sitting as a board of canvassers," to quash its acceptance of the latter's official count of votes, was treated as if amended and directed to the board of aldermen sitting as such, where all interested parties joined issue on the merits.—Fortin v. Board of Aldermen of City of Woonsocket, R.I., 135 A. 360.

(2) Under Civil Pract.Act § 105, mistake in suing out writ of certiorari to review determination of board of appeals will be disregarded, and all necessary papers will be deemed amended, to conform to practice prescribed in § 1283, abolishing writ and providing for certiorari order.—Multiplex Garages v. Walsh, 210 N.Y.S. 178, 213 App.Div. 155, reversed without opinion Ashley v. Walsh, 150 N.E. 540, 241 N.Y. 527.

82. Tenn.—Steel v. West, 7 Humphr. 108.

83. Ala.—Ex parte Ewart-Brewer Motor Co., 99 So. 836, 211 Ala. 191, denying certiorari 99 So. 834, 19 Ala.App. 584.

Adding party

Ala.—Ex parte Ewart-Brewer Motor Co., 99 So. 836, 211 Ala. 191, denying certiorari Ex parte Cunningham, 99 So. 834, 19 Ala.App. 584.

84. Ga.—Brumelow Heating &

Plumbing Co. v. Atlanta Furniture Co., 146 S.E. 639, 640, 39 Ga.App. 72—Southland Loan & Investment Co. v. Truelove, 138 S.E. 336, 36 Ga.App. 750—East River Nat. Bank v. Ellman, 136 S.E. 799, 36 Ga.App. 263—Davis v. Cunningham, 120 S.E. 641, 31 Ga.App. 296—Barnard v. Durrence, 95 S.E. 372, 22 Ga.App. 8—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga. App. 397.

11 C.J. p 154 note 84.

"The petition for certiorari can not be amended, because the judge of the superior court has no jurisdiction to try any except the questions made in the petition as it stood when he sanctioned it."—Jones v. Gill, 48 S.E. 688, 689, 121 Ga. 93—Brumelow Heating & Plumbing Co. v. Atlanta Furniture Co., *supra*.

Adjudication in bankruptcy

It is not permissible for a plaintiff in certiorari to file in the superior court a plea of bankruptcy setting up that, after the sanction of his petition for certiorari, and after the issuance of the writ, he was adjudicated a bankrupt, and thereafter discharged, and that the judgment under consideration in the certiorari proceeding was duly scheduled and became discharged by the discharge in bankruptcy of the plaintiff in certiorari.—Brumelow Heating & Plumbing Co. v. Atlanta Furniture Co., 146 S.E. 639, 39 Ga.App. 72.

After reversal of judgment

Where superior court issued writ of certiorari, on hearing, annulled order of medical board revoking petitioner's license, and district court of appeal reversed judgment of superior court, superior court then properly refused to permit amendment of original petition for writ of certiorari or settle bill of exceptions,

a. Amendments

Although the application is not amendable in some states, in others amendments are permitted, subject to general rules as to amendments of pleadings.

In some states the petition is amendable,⁸¹ but even in such jurisdictions amendments should be granted with caution,⁸² and application therefor must be filed within the time prescribed by a controlling rule of court.⁸³ In other states it is held that the petition is not amendable,⁸⁴ and that aliunde proof is not admissible to correct material errors therein.⁸⁵ In any event, an amendment will not be granted if it will not render the petition sufficient to justify the writ.⁸⁶

A supplemental affidavit has been permitted to be filed for the purpose of explaining why the original was made by the attorney of the party, instead of by the party himself.⁸⁷

since no fact outside record of medical board was admissible before reviewing court for any purpose.—Rinaldo v. Superior Court in and for Los Angeles County, 59 P.2d 868, 15 Cal.App.2d 585.

In Texas

(1) The rule of the text seems to be recognized.—Norris v. Rhodes, 25 Tex. 625—Gunter v. Jarvis, 25 Tex. 581, 533—Hall v. Davison, Civ.App., 176 S.W. 642—McBurnett v. Lampkin, 101 S.W. 864, 45 Tex.Civ.App. 567—11 C.J. p 154 note 85.

(2) Thus, under the statutory provision requiring the issues on certiorari to the county court to be confined to the grounds of error specified in the application, the court properly refused petitioner permission to file trial amendment presenting additional grounds.—Lee v. Benzes, Tex.Civ.App., 209 S.W. 768.

(3) However, the addition of a seal to the jurat by the officer who administered the oath to the petitioner has been allowed.—Hall v. Magale, 1 Tex.A.Civ.Cas. § 852.

(4) Furthermore an original application for certiorari setting up certain orders of sale and seeking to have them annulled was amended by an allegation that one of the orders alleged in the original application had not in fact been made; and it was held that such amendment was an abandonment of the cause of action for relief from that order.—Schwind v. Goodman, Tex.Com.App., 221 S.W. 579, reversing Goodman v. Schwind, Civ.App., 186 S.W. 282.

85. Ga.—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga.App. 397.

86. Tex.—Oldham v. Sparks, 28 Tex. 425.

87. N.Y.—Dickson v. Seelye, 6 Johns. 327.

The general rules as to amendments of pleadings after limitations have run are applicable.⁸⁸ Thus an amendment to a petition may be allowed after the time to institute another proceeding has elapsed.⁸⁹

The applicant will not be precluded because of delay in moving to amend, where the respondent delayed the filing of the return, at which time the petitioner was first apprised of the insufficiency of his petition, and the respondent was not injured by the delay.⁹⁰

If an amendment is improperly allowed, the proper remedy is to move to quash the writ, and not to raise the question by an averment in the return.⁹¹

b. New Application

In a proper case a new application can be made after a futile attempt to obtain the writ.

It has been held that the right to the writ is not exhausted by a futile attempt to obtain one.⁹² Thus a new application for the writ may be entertained by the court where the prior application was denied merely because it was directed to the judge instead of to the court.⁹³

In Georgia a petition for certiorari is such a suit as can be renewed under the statutory provisions,⁹⁴ but a renewal is properly refused if the first petition for the writ⁹⁵ or the initial proceedings⁹⁶ are void, at least if not applied for within the statutory time.⁹⁷ A second petition for certiorari must show affirmatively that the first petition, which had been dismissed, was not a void suit, or that it was such

a valid suit as could be renewed,⁹⁸ and that the former certiorari was not dismissed on the merits.⁹⁹

§ 84. Defects, Objections, and Waiver

Defects in the application may, in a proper case, be pointed out by motion or demurrer, and are waived by failure to make seasonable and specific objections.

Although irregularities in the presentation of the application for the writ may be sufficient, under ordinary circumstances, to authorize its denial, the court may nevertheless determine a question of the jurisdiction of an intermediate appellate court.¹ A motion to dismiss a petition for certiorari must be made at the earliest opportunity,² and objections to the application have been held to be too late where made after the writ had issued and return thereon;³ in a proper case, as shown *infra* § 135, it is generally held that the writ may be dismissed on motion because of defects therein. Rules of court relating to the form of petitions for certiorari will be enforced without the necessity of calling the court's attention to violations of them by motions to strike;⁴ and a petition which contains matter of a scandalous nature irrelevant to the questions raised, and which apparently is inserted for the sole purpose of reflecting on the integrity of the respondent will be stricken from the files.⁵

Demurrer. In some jurisdictions the writ is allowed on a petition *ex parte*, the only answer to the writ being the return, and no demurrer will lie for any defect in the petition.⁶ In others, however, the

88. N.Y.—*Peo. v. McAdoo*, 110 N.Y. S. 140, 125 App.Div. 673.

11 C.J. p 154 note 90.

89. N.Y.—*Peo. v. Buffalo*, 114 N.Y. S. 1077, 62 Misc. 313.

90. N.Y.—*Peo. v. Feitner*, 63 N.Y. S. 1058, 58 App.Div. 343.

91. N.Y.—*Peo. v. McAdoo*, 110 N.Y. S. 140, 125 App.Div. 673.

92. Tex.—*Wilbur v. Lane*, 115 S.W. 298, 53 Tex.Civ.App. 249.

93. Cal.—*Richmond v. Los Angeles County Super. Ct.*, 98 P. 57, 9 Cal. App. 62.

94. Ga.—*Morris v. Battey*, 121 S.E. 125, 31 Ga.App. 438.

95. Ga.—*Talley v. Commercial Credit Co. of Georgia*, 161 S.E. 832, 173 Ga. 828, answer conformed to 162 S.E. 289, 44 Ga.App. 587—*Wood v. Fairfax Loan & Investment Co.*, 177 S.E. 260, 50 Ga.App. 123—*Morris v. Battey*, 121 S.E. 125, 31 Ga.App. 438.

11 C.J. p 144 note 28, p 155 note 97.

96. Ga.—*Morris v. Battey*, *supra*.

What renders proceedings void

To render the certiorari void with-

in the rule of the text, there must be something inherently defective in the petition, or proceedings; and failure in the answer sufficiently to verify the allegations contained in a petition for certiorari will render the proceedings subject to dismissal although the petition is not in itself so inherently defective as to be void.—*Morris v. Battey*, 121 S.E. 125, 31 Ga.App. 438.

97. Ga.—*Veazey v. Crawfordville*, 54 S.E. 817, 126 Ga. 89.

11 C.J. p 155 note 98.

98. Ga.—*Talley v. Commercial Credit Co. of Georgia*, 161 S.E. 832, 173 Ga. 828, answer conformed to 162 S.E. 289, 44 Ga.App. 587.

99. Ga.—*Veal v. Veal*, 166 S.E. 460, 46 Ga.App. 31.

1. Mo.—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record *Allen v. Best*, 279 S.W. 728, 220 Mo.App. 1041.

2. Tenn.—*City of Nashville v. Mason*, 11 Tenn.App. 344.

3. Iowa.—*Fehrman v. Sioux City*, 249 N.W. 200, 216 Iowa 286.

11 C.J. p 155 note 99.

Motion to recall writ of review

La.—*Laurent v. Unity Industrial Life Ins. Co.*, 179 So. 586, 189 La. 426.

4. Ill.—*People v. Miller*, 172 N.E. 63, 339 Ill. 637.

5. Cal.—*Hadley v. Railroad Commission of California*, 217 P. 520, 191 Cal. 577.

Allowable latitude not transcended

Consideration of a petition to review the refusal of two judges of the lower court to recuse themselves will not be denied because the petition refers to the proceedings as "unheard of, absurd, and ridiculous" or because it states that such two judges took part in a discussion at which a movement for plaintiff's recall was "hatched." Such words did not transcend the allowable latitude, although more parliamentary terms might have been used without loss of effectiveness.—*Johness v. Stoulig*, 92 So. 137, 151 La. 618.

6. Or.—*Fay v. City of Portland*, 195 P. 828, 99 Or. 490.

sufficiency of the petition for a writ of certiorari may be tested by demurrer,⁷ and where it is the established practice for the court to hear the whole case on the petition the demurrer may be filed with, or in addition to, the record of the proceedings.⁸

A demurrer to an application for a writ of certiorari may, it has been held, be treated as an answer,⁹ and an objection to joining a demurrer with the answer may be met by considering the demurrer as a motion to quash on the ground that the petition, conceding it to be true, does not present a meritorious case for certiorari.¹⁰

A demurrer to the petition can be predicated only on matters appearing therein,¹¹ and it is not a ground that the petition is not sufficiently specific, the remedy in such a case being a motion to make more definite and certain.¹²

A demurrer admits the allegations of fact contained in the petition¹³ and in testing the sufficiency of the petition such allegations will be taken as true.¹⁴ The effect of the demurrer, it has been held, is to adopt as the return to the writ, the facts alleged in the petition.¹⁵ Where only such proceedings can be reviewed in certiorari, a general demurrer to the petition for a writ raises the ques-

tion whether the proceedings sought to be reviewed are of a judicial character.¹⁶

In some jurisdictions, by rule of court, on overruling a demurrer to the petition, the writ will issue without leave to answer.¹⁷

Waiver. Defects or irregularities may be waived by failure to object seasonably¹⁸ or specifically to point out the defect;¹⁹ or, in some states, by filing an answer;²⁰ but the failure of the petitioner's affidavit to aver, as required by statute, that the petition was not filed for delay only will not be cured by the fact that the answer of the judicial officer whose judgment is challenged in the petition supports the allegations of the petition.²¹

§ 85. Notice of Application

When required by the local practice and not waived by the party entitled thereto, sufficient notice of the application or of intent to apply for the writ must be seasonably given.

The practice varies in the different states as to the necessity for notice of the application before issuance of the writ. Notice has been held necessary in some jurisdictions.²² In others, no notice is necessary,²³ while in still others the requirement of notice is discretionary with the court to whom

7. Cal.—Pacific Home Bldg. Realty Co. v. Daugherty, 243 P. 473, 75 Cal.App. 623.

Iowa.—Fehrman v. Sioux City, 249 N.W. 200, 216 Iowa 286.

After issuance of writ, demurrer to petition will not lie.—Fehrman v. Sioux City, supra.

A motion to dismiss a petition for the writ of certiorari is treated as a demurrer, where predicated upon grounds of demurrer.—Fehrman v. Sioux City, supra—11 C.J. p 155 note 2 [a].

8. Mass.—Irwin v. Justice of Municipal Court of Brighton Dist., 10 N.E.2d 92—Town of Webster v. Alcoholic Beverages Control Commission, 4 N.E.2d 302—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

9. Philippine.—Beech v. Crossfield, 12 Philippine 555.

10. Vt.—Davidson v. Whitehill, 89 A. 1031, 87 Vt. 499.

11. Iowa.—Collins v. Davis, 10 N.W. 643, 57 Iowa 256.

12. Wash.—Corbett v. Seattle Civ. Serv. Commn., 73 F. 1116, 33 Wash. 190.

13. U.S.—The Nancy II, C.C.A. Mass., 38 F.2d 182.

Cal.—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71;

14. Ark.—Warren v. McRae, 264 S. W. 940, 165 Ark. 436.

15. Cal.—Burlingame v. Justice's Court of City of Berkeley, 33 P.2d 669, 1 Cal.2d 71.

16. Cal.—Garin v. Pelton, 209 P. 377, 58 Cal.App. 672.

17. Cal.—Stewart v. San Diego County Super. Ct., 36 P. 100, 101 Cal. 594.

18. N.Y.—People ex rel. Hotel Astor v. Sexton, 287 N.Y.S. 746, 159 Misc. 280.

Tenn.—City of Nashville v. Mason, 11 Tenn.App. 344.

11 C.J. p 155 note 6.

Cure of defect

An omission in an accusation against a district attorney under Pen.Code §§ 758, 759, of the fact that accused was district attorney at the time of the alleged wrongful conduct, was entirely cured by an admission of accused's counsel, in his objection to the sufficiency of the accusation, to the effect that accused was district attorney at such time.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal. App. 349.

19. Tex.—Hail v. Magale, 1 Tex.A. Civ.Cas. § 852.

20. Ga.—Taylor v. Gay, 20 Ga. 77. 11 C.J. p 155 note 8.

21. Ga.—Talley v. Commercial Credit Co. of Georgia, 155 S.E. 907, 42

Ga.App. 337—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S.E. 373, 22 Ga.App. 89.

22. Ala.—Foley v. Armstrong, App. 170 So. 547, certiorari denied, Sup. 170 So. 658—Waltman v. Ortman, 170 So. 545, second case, denying certiorari, App., 170 So. 545, first case.

Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

11 C.J. p 155 notes 10–17.

In the Philippines cases of mandamus and prohibition take the form of an ordinary action, but on an application for a writ of certiorari, the practice is to issue an order to show cause.—Blanco v. Ambler, 3 Philippine 358.

In Tennessee

Supreme Court Rules, rule No. 10 (160 S.W. viii), providing for notice of filing of petition for certiorari and supersedeas to opposite counsel, is applicable only to final decrees or judgments and not to interlocutory orders or decrees rendered by inferior courts without or in excess of the jurisdiction, or where such courts acted illegally.—Clements v. Roberts, 230 S.W. 30, 144 Tenn. 129, rehearing denied 231 S.W. 902, 144 Tenn. 152.

23. Or.—Holmes v. Cole, 94 P. 964, 51 Or. 483.

11 C.J. p 155 note 20.

the application is made.²⁴ In some jurisdictions a notice of an intention to apply for the writ is required.²⁵

Waiver. The right to notice may be waived²⁶ as by appearance and going to a hearing on the merits,²⁷ unless the statute requiring notice is peremptory;²⁸ but waiver by the judge alone does not affect the right of the adverse party who is also entitled to notice.²⁹

Time, sufficiency, and service. The notice, when required, must be served within the time fixed by law,³⁰ and a notice of intention to apply for the writ must be given before the application is made.³¹ So far as its form and contents are concerned, the notice must comply with the local requirements; and verbal notice is not sufficient under a rule requiring written notice,³² although it has been held that notice given in open court to the presiding judge and opposing attorney and recorded in the minutes of the court is a substantial compliance therewith.³³ In the absence of statute or rule so providing, the notice need not be accompanied by a copy of the petition or of the record below.³⁴ It may be served by any person,³⁵ and, it seems, on the attorney who represented the adverse party in the proceedings sought to be reviewed;³⁶ but merely giving notice to counsel for such adverse party is insufficient where notice to the judge and

filing in the office of the clerk of the court is also required,³⁷ and it has been held that notice to show cause against the issuing of the writ must be given to the tribunal to which the writ, if granted, will be addressed, and that it is not sufficient to give notice merely to the adverse party before such tribunal.³⁸ It has also been held that it may be served in the same manner as an ordinary summons.³⁹ A requirement of proof of service means proof of delivery to the persons entitled to it, and mere proof of mailing is insufficient, especially where the date of mailing does not even appear.⁴⁰

§ 86. Answer to Application

While no answer to the application, as distinguished from an answer or return to the writ, is ordinarily required, this is not true where the practice of the court is to hear the whole case on the petition.

What is sometimes called an answer is merely, in effect, a return to the writ and where interposed after the issuance of the writ, it is governed by the rules relating to returns, whatever it may be called. Thus, in Georgia, the statute refers to the "answer" to the writ, but it is impossible to see wherein such "answer" is in anywise different from what is called the "return" in most of the other states. Such answer or return is considered in §§ 114-133 *infra*. In some states, however, an answer is filed to the petition, and that is what is herein treated.

In Iowa

(1) No notice is necessary, at least as to regular proceedings in an action in court.—*Brown v. Powers*, 125 N.W. 833, 146 Iowa 729—11 C.J. p 156 note 24.

(2) The writ must be served and proof of service made.—*Collins v. Powell*, 277 N.W. 477.

(3) Service of writ see *infra* § 107.

24. Idaho.—*Johnson v. Ensign*, 224 P. 73, 38 Idaho 615.

Nev.—*Hilton v. Second Judicial District Court in and for Washoe County*, 183 P. 317, 43 Nev. 128. 11 C.J. p 155 notes 21-22, p 156 note 23.

25. Ga.—*Murray v. Bleckley*, 118 S. E. 600, 30 Ga.App. 592.

In Louisiana

(1) The rule of court requiring the giving of notice of intention to apply for the writ and proof thereof must be substantially complied with.—*Spence v. Spence*, 107 So. 294, 160 La. 430—*State v. Fleckinger*, 90 So. 763, 150 La. 479—*Butcher v. Arceneaux*, 80 So. 603, 144 La. 397—11 C. J. p 156 note 25.

(2) Failure to give such notice, however, is not, of itself, ground for dismissal.—*Spence v. Spence*, *supra*.

(3) In view of Const. art 106 as

amended (see Act No. 137 of 1906, § 4), and Acts No. 89 of 1914, § 1, making district court clerk of parish where sessions are held clerk of court of appeal, and designating places where sessions are to be held, notice of intention to apply for writ of certiorari to such court under Supreme Court Rules, rule 16 § 2 (67 So. xi), requiring such notice to be filed in clerk's office of court of appeal, is properly filed with clerk of court of district where cause originated, although that was not where cause was heard by court of appeal or finally determined, since such clerk had custody of record and was to receive notice of rehearings.—*Antoine v. Eagle & British Dominions Ins. Co.*, 85 So. 238, 147 La. 554—*Dominick v. Detroit Fire & Marine Ins. Co.*, 85 So. 236, 147 La. 549.

26. La.—*Levert v. E. Gajan, Inc.*, 94 So. 416, 152 La. 843. 11 C.J. p 156 note 23.

27. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

La.—*Levert v. E. Gajan, Inc.*, 94 So. 416, 152 La. 843. 11 C.J. p 156 note 27.

28. Ga.—*Granade v. Wood*, 34 Ga. 120.

29. La.—*Levert v. E. Gajan, Inc.*, 94 So. 416, 152 La. 843.

30. Ga.—*Murray v. Bleckley*, 118 S. E. 600, 30 Ga.App. 592. 11 C.J. p 156 note 29.

Actual receipt required

Ga.—*Murray v. Bleckley*, 118 S.E. 600, 30 Ga.App. 592.

31. La.—*Levert v. E. Gajan, Inc.*, 94 So. 416, 152 La. 843.

32. La.—*Levert v. E. Gajan, Inc.*, *supra*. 11 C.J. p 156 note 30.

33. La.—*State v. Mullen*, 107 So. 698, 160 La. 925.

34. Ga.—*Johnson v. Martin*, 25 Ga. 268.

35. Vt.—*Lyman v. Burlington*, 22 Vt. 131.

36. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380. 11 C.J. p 156 note 33.

37. La.—*Butcher v. Arceneaux*, 80 So. 603, 144 La. 397.

38. Mass.—*Worcester, etc., R. Co. v. Railroad Com'rs.*, 118 Mass. 561.

39. W.Va.—*Dryden v. Swinburn*, 15 W.Va. 234.

40. La.—*Levert v. E. Gajan, Inc.*, 94 So. 416, 152 La. 843.

No answer is necessary, if no provision therefor exists.⁴¹ An answer filed to an original petition will suffice as an answer to an amended petition which is substantially the same.⁴²

Practice in Maine, Massachusetts, and Vermont. In Massachusetts "the uniform practice of the court is to hear the whole case on the petition,"⁴³ and the reply or defense to the petition for the writ is called an answer. This answer must include the record, and may contain other necessary facts,⁴⁴ and also extrinsic facts to show that substantial justice does not require the granting of the writ.⁴⁵ This answer may controvert the extrinsic facts alleged in the petition or allege other facts which avoid their effect.⁴⁶ However, an answer is insufficient where it raises issues of fact only,⁴⁷ or merely sets forth such matters as are deemed available as a defense, without a copy of the record.⁴⁸ So matters which "may" occur should not be included.⁴⁹ Members of a board having custody and control of the record must answer jointly and not separately.⁵⁰

The answer, when it states any facts, is in the nature, not of an allegation of a party, but of an official return, conclusive in all matters of fact, and must be signed by the members of the tribunal, and not by an attorney.⁵¹ When a question of law

only is intended to be raised on the allegations of the petition and the record annexed, an answer in the nature of a demurrer may be filed by attorney; but it must be the demurrer of the inferior officers or tribunal.⁵²

If extraneous facts are set up against the preliminary step of issuing the writ, the petitioner may answer them.⁵³

In Maine it is also the practice to hear the whole case on the petition for the writ, and the practice is for the respondent tribunal to file an answer under oath, setting out therein a copy of the record, and, if such record does not contain a full statement of the facts proved and the rulings thereon, so far as the points complained of in the petition are concerned, to supply such omissions in the answer; and such verified answer, being in the nature of a return, is conclusive in all matters of fact within its jurisdiction.⁵⁴ The practice here seems to be practically identical with that in Massachusetts.

In Vermont, as in Massachusetts and Maine, the practice also is to hear the merits of the case on the petition for the writ.⁵⁵ Where the hearing on the application for the writ is on the merits, the answer should embody the record where it is not sufficiently set forth in the petition.⁵⁶

41. Colo.—Morefield v. Koehn, 127 P. 234, 53 Colo. 367. 11 C.J. p 156 note 37.

42. Iowa.—Brown v. Ellis, 26 Iowa 85.

43. Mass.—Town of Webster v. Alcoholic Beverages Control Commission, 4 N.E.2d 302. 11 C.J. p 156 note 39.

44. Mass.—Tewksbury v. Middlesex County, 117 Mass. 563. 11 C.J. p 156 note 40.

Contents

A report of the evidence in support of the findings of fact in whole or in its different parts formed no proper part of return of respondents to a petition for a writ of certiorari to review abatement of assessment by county commissioners, would have been irregular, and would have been an unnecessary encumbrance of the record, and return was not demurrable because of its omission.—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.

Matters not in record

County commissioners can in their answer allege facts which were passed on by predecessors in entering order in controversy based on official information although such facts were not in record of board's

proceedings.—Boston & M. R. R. v. County Com'rs of Middlesex County, 131 N.E. 283, 239 Mass. 127.

45. Mass.—Haven v. Essex County, 29 N.E. 1083, 155 Mass. 467.—Tewksbury v. Middlesex County, 117 Mass. 563.—Mendon v. Worcester County, 5 Allen 13.

Motion to strike portions of answer is irregular way of raising for decision pure question of law, which should be done by demurrer or by objection to admission of evidence.—Boston & M. R. R. v. County Com'rs of Middlesex County, 131 N.E. 283, 239 Mass. 127.

Statement of issuable fact

Answer to petition by railroad against county commissioners to review order requiring repair of bridge, alleging that railroad 'obstructed highway within Rev.St.1836 c 39 §§ 66, 72, and St.1906 c 463 pt 2 § 115, stated issuable fact as well as one of law to which demurrer does not lie.—Boston & M. R. R. v. County Com'rs of Middlesex County, 131 N.E. 283, 239 Mass. 127.

46. Mass.—Fairbanks v. Fitchburg, 132 Mass. 42.—Chase v. Springfield, 119 Mass. 556.—Worcester, etc., R. Co. v. Railroad Comrs., 118 Mass. 561.

11 C.J. p 157 note 42.

47. Mass.—Chase v. Springfield, 119 Mass. 556.—Tewksbury v. Middlesex County, 117 Mass. 563.

Hearing on facts before single justice is warranted only where respondent sets up extraneous facts to show that writ is not justified.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

48. Mass.—Haven v. Essex County, 29 N.E. 1083, 155 Mass. 467.

49. Mass.—Fairbanks v. Fitchburg, 132 Mass. 42.

50. Mass.—Plymouth v. Plymouth County, 16 Gray 341.

51. Mass.—Warren v. Boston St. Comrs., 66 N.E. 412, 183 Mass. 119.—Worcester, etc., R. Co. v. Railroad Comrs., 118 Mass. 561.

52. Mass.—Worcester, etc., R. Co. v. Railroad Comrs., supra.

53. Mass.—Ward v. Newton, 63 N.E. 1064, 181 Mass. 432.

54. Me.—Levant v. Penobscot County, 67 Me. 429.

55. Vt.—Davidson v. Whitehill, 89 A. 1081, 87 Vt. 499. 11 C.J. p 157 note 50.

56. Vt.—Davidson v. Whitehill, supra. 11 C.J. p 157 note 51.

§ 87. Grounds for Resisting Application

The application may ordinarily be resisted on any ground showing that the case is not a proper one for the writ.

If notice is given, or an order to show cause is granted, the application may be resisted on the ground that the petition is insufficient, or that the court is without jurisdiction to issue the writ, or that there is an appeal, or a plain, speedy, and adequate remedy, or any other ground, if there is one, showing that it is not a proper case for the writ.⁵⁷ So, in view of the rules stated supra §§ 10-16 and infra § 88 b, matters bearing on the exercise of the discretion of the court to grant or refuse the writ may be urged. It has been held, however, that whether the relator, a third person, has alleged sufficient interest to entitle him to prosecute the appeal, or whether he has failed to perfect it by giving notice are matters which should be presented in a motion to dismiss the appeal, and cannot be considered in disposing of the application.⁵⁸

§ 88. Hearing on Application

- a. Practice in general
- b. Matters dehors the record
- c. Presumptions and burden of proof
- d. Decision on hearing
- e. Rehearing

a. Practice in General

While the practice is not uniform in all jurisdictions,

it is usual to allow or disallow the writ on inspection of the application.

Keeping in mind that what is here considered is the hearing on the application for the writ and not the hearing after the writ has been issued and the return made thereto, which is treated infra §§ 143-146, it may be stated that ordinarily the parties to be adversely affected do not appear and resist the issuance of the writ, and are not given an opportunity so to do; but after the writ has been issued they raise the objection that the case is not a proper one for the writ, or that the rules of procedure were not observed in procuring its issuance, by making a motion to supersede or quash the writ, which proceedings are treated in this Title infra §§ 134-142. The court usually allows the writ on an inspection of the petition or affidavit, and takes the same as true.⁵⁹ Counter affidavits, parol evidence, or even the record of the inferior tribunal, are not considered for the purpose of contradicting the petition or affidavit; and if the latter discloses merits the writ is allowed.⁶⁰ However, the court may hear the merits of the case on the petition and answer, may examine the record to determine the propriety of the proceedings below,⁶¹ or may await the return of the proceedings below, before taking any action on the merits,⁶² as where the petition is *ex parte* and presents a *prima facie* case,⁶³ but it has been held that questions of fact on which the jurisdiction depends will not be reviewed.⁶⁴

Reference. It has been held that, in its discre-

57. Idaho.—Johnson v. Ensign, 224 P. 73, 38 Idaho 615.

11 C.J. p 157 note 52.

58. La.—Zahn v. Unknown Owners, 98 So. 184, 154 La. 776.

59. Cal.—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal. App. 392.

Consideration of record

(1) On petition for certiorari to review judgment of court of appeals, supreme court may consider record.—Southern Building & Loan Ass'n v. Holmes, 149 So. 861, 227 Ala. 1, granting certiorari and reversing 149 So. 859, 25 Ala.App. 499, certiorari denied 149 So. 862, 227 Ala. 254.

(2) The supreme court will not, on application for certiorari to review decision of court of appeals, look to facts shown by bills of exceptions.—Ex parte Whorton, 106 So. 344, 214 Ala. 68, denying certiorari Whorton v. State, 106 So. 344, 21 Ala.App. 15.

(3) Certiorari will not issue to review decision of court of appeals on question involving recourse to disputed evidence or facts not disclosed

by opinion.—Box v. Metropolitan Life Ins. Co., 168 So. 220, 232 Ala. 447, denying certiorari, App. 168 So. 209, reversed 168 So. 216, 232 Ala. 1 and 168 So. 217, 232 Ala. 321.—New York Life Ins. Co. v. Sinquefeld, 163 So. 812, 231 Ala. 185, denying certiorari 163 So. 809, 26 Ala.App. 523.—Polytinsky v. Wilson, 111 So. 276, 215 Ala. 455, denying certiorari 111 So. 275, 21 Ala.App. 635.

(4) In an application for a writ of certiorari to review the affirmation by the circuit court of a judgment of the civil court of record, the court examines the petition and exhibits, not for the purpose of finally determining the questions presented, but only so far as is necessary to ascertain whether the petition and exhibits show *prima facie* that a question is presented that may properly be reviewed on certiorari in such cases.—American Ry. Express Co. v. Weatherford, 98 So. 820, 86 Fla. 626.

Matters previously adjudicated

Where plaintiff's application for review of a judgment of the court of appeals was rejected, and defendant's application allowed, the court will not pass a second time upon the

matters included in plaintiff's application on the hearing on defendant's application.—Gastauer v. Gastauer, 94 So. 897, 152 La. 958.

Supreme court's inquiry is limited on application for writ of certiorari to review district court's judgment to questions whether application is proper and district court or judge exceeded its or his jurisdiction.—State ex rel. Murphy v. Second Judicial Dist. Court in and for Silver Bow County, 41 P.2d 1113, 99 Mont. 209.

60. Colo.—Morefield v. Koehn, 127 P. 234, 53 Colo. 367.
11 C.J. p 157 note 56.

61. Ga.—Fallas v. Rushin, 115 S.E. 922, 29 Ga.App. 471.

62. U.S.—Ex p. Dugan, D.C., 2 Wall. 134, 17 L.Ed. 871.

63. Ga.—Scroggins v. State, 55 Ga. 380—Ruff v. Phillips, 50 Ga. 130—Sirmans v. Zucker Importing Co., 72 S.E. 190, 9 Ga.App. 789.

64. La.—State v. Watkins, 22 So. 326, 49 La. Ann. 1056.
11 C.J. p 157 note 60.

Writ of review

Jurisdictional facts are not prop-

tion, the court may order a reference to ascertain disputed facts.⁶⁵

b. Matters Dehors the Record

Matters dehors the record may be considered in passing on the application in some jurisdictions, but not in others.

In several of the states it seems to be the practice to hear the merits of the case on the petition for the writ, and practically to decide the whole case on the granting or refusing of the writ, by allowing affidavits to be read, or other evidence received, dehors the record, to show that justice and equity do not require the granting of the writ,⁶⁶ although not to contradict the record,⁶⁷ and it has been held that, where the ground of the application is the loss of a right to appeal, the court may consider an oral and disputed agreement to waive the provisions of the statute.⁶⁸ In some jurisdictions, however, the court will look only to the face of the record.⁶⁹ Thus it is held that the court will not receive affidavits or parol evidence for the purpose of contradicting the petition, or consider an issue raised thereon.⁷⁰

erly contested by a proceeding for a writ of review, the function of such writ being to bring the proceedings in the inferior court, including the evidence, before the court.—*Miller & Lux v. Board of Sup'rs of Madera County*, 208 P. 304, 189 Cal. 254.

65. N.Y.—*Peo. v. Cholwell*, 6 Abb. Pr. 151.

66. Mass.—*Warren v. Boston St. Comrs.*, 66 N.E. 412, 183 Mass. 119. 11 C.J. p 157 note 61, p 158 notes 62–64, 66.

Allegations of fact in petition for certiorari, not supported by facts shown in return of respondent, and not passed on by single justice, must be disregarded.—*Prusik v. Board of Appeal of Building Department of City of Boston*, 160 N.E. 312, 262 Mass. 451.

Opposing affidavits may be read in some jurisdictions.

N.Y.—*Saratoga, etc., R. Co. v. McCoy*, 5 How.Pr. 378—*People v. Queens County*, 1 Hill 195.

N.C.—*Vervell v. Trexler*, 5 N.C. 438—*Ledbetter v. Lofton*, 5 N.C. 184—11 C.J. p 158 note 68.

Where sufficiency of return is not questioned by petitioner, scope of inquiry was whether on face of return there were apparent errors of law of substantial nature requiring relief to prevent injustice.—*Newcomb v. Aldermen of Holyoke*, 171 N. E. 826, 271 Mass. 565.

In California

(1) The court to whom the petition is addressed may, it seems, in the exercise of its discretion, and for

the purpose of determining whether or not, despite the irregularities complained of, injustice may be done by the issuance of the writ, resort to evidence from without the record sought to be reviewed.—*Donovan v. Board of Police Com'rs of City and County of San Francisco*, 163 P. 69, 32 Cal.App. 392.

(2) Thus the evidence given in the court below, as well as the record, may be examined.—*McClatchy v. Sacramento County Super. Ct.*, 51 P. 696, 119 Cal. 413, 39 L.R.A. 691.

(3) The fact that defendants saw fit to make and file an answer to plaintiff's petition, unaccompanied by a return of the record, does not alter the situation.—*Donovan v. Board of Police Com'rs of City and County of San Francisco*, supra.

In Illinois extrinsic evidence may be heard.—*Sampson v. Chestnut Tp. Highway Comrs.*, 115 Ill.App. 443.

67. Mass.—*Charlestown v. Middlesex County*, 109 Mass. 270—*Mendon v. Worcester County*, 5 Allen 13.

68. N.C.—*Walton v. Pearson*, 82 N. C. 464. 11 C.J. p 158 note 71.

69. Ark.—*Axley v. Hammock*, 50 S. W.2d 608, 185 Ark. 939.

Tenn.—*Gillespie v. Martin*, 109 S.W. 2d 93.

Allegation as to bond

Where petition for certiorari alleges that bond was given as required by law and was duly sanctioned, and it does not affirmatively appear from the record that the allegation

When extrinsic evidence is introduced, on the hearing of the application for the writ, tending to show that substantial justice does not require proceedings to be quashed, then the petitioner may introduce like evidence in rebuttal.⁷¹

Renewal petition. Where reference is made in a renewal of a previously dismissed petition to the papers in the former certiorari on file in the same court in which the renewed certiorari is brought, the court in passing upon the truth of such averments relative to matter happening in the same superior court and subsequent to the trial in the court below may properly inspect the former record to verify the statements in the petition.⁷²

c. Presumptions and Burden of Proof

All material facts alleged and not put in issue are presumed true if not in conflict with the record; and the burden is on petitioner to establish his case and on the respondent to prove new matter set up in opposition.

All material facts alleged in the application for the writ are to be presumed true, where not denied or put in issue by an answer,⁷³ and all material

was untrue, the court erred in dismissing the certiorari on the ground that bond and security had not been given.—*Rice v. City of Moultrie*, 73 S.E. 585, 10 Ga.App. 454.

Whether the evidence below was such as is required by Act No. 170 of 1898, § 66, as a basis for the issuance of a writ of possession, is a matter affecting the merits, and is to be decided after hearing the case on appeal, and hence cannot be considered on application for writs of certiorari and prohibition to bring up the record on appeal.—*Zahn v. Unknown Owners*, 98 So. 184, 154 La. 776.

70. Ind.—*Citizens' St. R. Co. v. Heath*, 55 N.E. 744, 154 Ind. 363.

Matters not before trial judge

On hearing of application to supreme court for writs of certiorari, prohibition, and mandamus to compel district judge to reduce amount of suspensive appeal bond, supreme court will not consider affidavits and statements attached to a supplemental petition.—*Rosenthal-Brown Fur Co. v. Jones-Frere Fur Co.*, 103 So. 251, 157 La. 887.

71. Me.—*Levant v. Penobscot County*, 67 Me. 429.

Mass.—*Ward v. Newton*, 63 N.E. 1064, 181 Mass. 432.

72. Ga.—*Morris v. Battey*, 121 S.E. 125, 31 Ga.App. 438.

73. Ga.—*Walker v. Forehand*, 86 S. E. 940, 17 Ga.App. 361. 11 C.J. p 158 note 76.

Show cause order

Upon the hearing on return to an

facts alleged in the answer must be taken to be true,⁷⁴ except in so far as they conflict with the record.⁷⁵ It will not be presumed that the inferior court will exceed its jurisdiction.⁷⁶

The burden is on the petitioner to make out a clear case,⁷⁷ but if the respondent sets up new matter as a bar the burden is on him to prove such new matter.⁷⁸

d. Decision on Hearing

On the hearing of an application for a writ, the court decides merely whether to issue or refuse the writ.

On the hearing on the petition, the only question for the court to determine is whether in its discretion it will issue the writ,⁷⁹ and the same rule

applies where the hearing is on the return of an order to show cause why the writ should not issue.⁸⁰ The court should order the writ to issue if the application discloses a prima facie case⁸¹ or a fairly debatable question,⁸² but if upon an examination of the petition the judge finds it insufficient, he should disallow the writ;⁸³ and the issuance of an order and notice to show cause does not prevent a refusal of the writ if a proper showing is not made.⁸⁴ A petition should not be dismissed on account of insufficient assignments of error, if it contains one sufficient assignment.⁸⁵ In some jurisdictions refusal to sanction the writ, where the evidence is sought to be reviewed, is proper where there is some evidence to support the findings;⁸⁶

order to show cause why a writ of review should not issue, the allegations of the petition are taken to be true.—Johnson v. Ensign, 224 P. 73, 38 Idaho 615.

74. Ala.—Ferguson v. Jackson County, 65 So. 1028, 187 Ala. 645. Mass.—Weld v. Gas, etc., Comrs., 84 N.E. 101, 197 Mass. 556—Janvrin v. Poole, 63 N.E. 1066. 181 Mass. 463—Weed v. Boston, 51 N.E. 204, 172 Mass. 28, 42 L.R.A. 642. 11 C.J. p 158 note 77.

75. Mass.—Dickinson v. Worcester, 138 Mass. 555.

76. Cal.—Sayers v. San Francisco Super. Ct., 24 P. 296, 84 Cal. 642.

77. Me.—Chavarie v. Robie, 194 A. 404. 11 C.J. p 158 note 74.

Satisfaction of court

A petitioner in certiorari must establish to the satisfaction of the court to which application is made that substantial justice demands that the writ should issue.—Chavarie v. Robie, Me., 194 A. 404.

78. Cal.—Null v. Shasta County Super. Ct., 87 P. 392, 4 Cal.App. 207.

11 C.J. p 158 note 75.

79. Me.—Rogers v. Brown, 181 A. 667, 184 Me. 88.

Matters not argued

While supreme judicial court exercises its power to correct genuine errors of law, it will not discuss matters not regarded by counsel as worthy of argument.—Mullen v. Board of Sewer Com'rs of Milton, 182 N.E. 641, 280 Mass. 531.

Right to remedy

Where ultimate decision would be against petitioner, supreme court could state controlling substantive law without determining question of whether case was properly before it on petitions for mandamus and certiorari.—Sampson v. Treasurer and Receiver General, 184 N.E. 465, 282 Mass. 119.

80. Idaho.—Johnson v. Ensign, 224 P. 73, 38 Idaho 615.

81. Ga.—Smith v. McCranie, 82 S.E. 307, 14 Ga.App. 721. 11 C.J. p 158 note 82.

Petition good in part

Petition for certiorari, good in part, should be sanctioned.—Walker v. Industrial Stores Co., 140 S.E. 519, 37 Ga.App. 448.

82. N.J.—O'Brien v. Frey, 133 A. 172, 4 N.J.Misc. 477.

83. Or.—Holmes v. Cole, 94 P. 964, 51 Or. 483.

Correct result

Where court of appeals gave erroneous reasons for judgment, but reached correct result, petition for writ of certiorari will be denied.—Missouri State Life Ins. Co. v. Hardin, 78 S.W.2d 832, 168 Tenn. 340.

Void petition must be dismissed.—Nilsen v. City of La Grange, 191 S.E. 175, 55 Ga.App. 676, transferred 189 S.E. 511, 183 Ga. 742—Richards v. Harvey, 129 S.E. 1, 34 Ga.App. 219—Partee v. Peters, 127 S.E. 660, 33 Ga.App. 694—Buehl v. Wheelless, 122 S.E. 628, 32 Ga.App. 22—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203.

Want of meritorious assignment

(1) Where a petition for certiorari to review a judgment of a city court contained no meritorious assignment of error, the refusal of the superior court to sanction the petition was not error.—Gulf Refining Co. v. Miller, 114 S.E. 227, 29 Ga.App. 71, transferred 108 S.E. 28, 151 Ga. 727.

(2) Thus a petition for certiorari, containing no assignment of error on final judgment, but only complaining of rulings on trial is properly refused.—Cain v. Jett, 157 S.E. 225, 42 Ga.App. 597.

(3) So exceptions to verdict and judgment in petition for certiorari on ground of alleged disqualification of certain jurors presented no question for consideration where they did

not complain of any ruling of the trial judge.—Gulf Refining Co. v. Miller, supra.

84. Mo.—State ex rel. McCormack v. McPheeters, 178 S.W. 761.

85. Ga.—Wrenn v. Bowden, 193 S.E. 456—Hopkins Inv. Co. v. Crawford, 132 S.E. 925, 35 Ga.App. 331.

Direction of verdict

Petition for certiorari containing assignment of error to direction of verdict without taking of evidence was improperly dismissed, notwithstanding assignment of error based on overruling of motion for new trial did not state ground of motion.—Wrenn v. Bowden, Ga.App., 193 S.E. 456.

86. Ga.—Boswell v. Atlantic Coast Line R. Co., App., 192 S.E. 926—Blumberg v. Grant, 129 S.E. 144, 34 Ga.App. 253—Goodson v. Adams Grocery Co., 123 S.E. 748, 32 Ga.App. 419—Atlantic Coast Line R. Co. v. Bennett, 121 S.E. 706, 31 Ga.App. 626—Fulton Transfer & Storage Co. v. Levy, 121 S.E. 128, 31 Ga.App. 523—Cohen v. Arenson, 116 S.E. 658, 29 Ga.App. 723—Fineman v. Hardin, 116 S.E. 216, 29 Ga.App. 571—Huffman v. Carolina Portland Cement Co., 116 S.E. 25, 29 Ga.App. 439—Georgia Southern & F. Ry. Co. v. Converse, 116 S.E. 20, 29 Ga.App. 411—Fallas v. Rushin, 115 S.E. 922, 29 Ga.App. 471—Southeastern Mut. Fire Ins. Co. v. Williams, 114 S.E. 716, 29 Ga.App. 236—Howard v. Holland, 114 S.E. 549, 29 Ga.App. 186—Watkins v. Mathis, 112 S.E. 914, 28 Ga.App. 693—Coward v. West & Son, 111 S.E. 213, 28 Ga.App. 407—American Laundry Co. v. Hall, 109 S.E. 676, 27 Ga.App. 717—Banks v. Neely, 108 S.E. 837, 27 Ga.App. 428—Gresham v. Rubin, 108 S.E. 242, 27 Ga.App. 336—Wilson v. Clark, 106 S.E. 8, 26 Ga.App. 303—Oakes v. Stamper, 101 S.E. 714, 24 Ga.App. 595—Johns v. Jones, 99 S.E. 543, 23 Ga.App. 790—Bolton v.

but the petition should be sanctioned where the evidence demands a verdict for the petitioner.⁸⁷ Where the record of the respondents has been certified by them and included in their return to the petition, there is no occasion for the writ to issue to bring that record before the court.⁸⁸

The grant of leave for the writ to issue is not a judgment that the record below be quashed.⁸⁹ Furthermore, it seems that, if the writ is denied, it is improper to go further and to affirm the record sought to be quashed; and the denial of the writ will not have the effect of such an adjudication. In order that that adjudication be made, the writ must issue, and the record be attacked, before the court.⁹⁰ It has been held, however, that the rule that final judgment cannot be rendered where there is conflicting evidence on any material issue does not apply where the petition is overruled.⁹¹ The effect, under the stare decisis rule, of the refusal of the court of last resort to review a decision of a court of intermediate appeal by certiorari is considered in the C.J.S. title Courts § 198, also 15 C.J. p 923 notes 24-25.

e. Rehearing

Rehearing on a judgment refusing the writ will be

City of Newnan, 95 S.E. 472, 22 Ga. App. 15, transferred 94 S.E. 236, 147 Ga. 400.
11 C.J. p 158 note 85.

Ample evidence

Application for writ of certiorari to review jury finding on claim of property attached, on ground there was no evidence justifying finding that attachment debtor owned property, would be denied where there was ample evidence, particularly documentary evidence, supporting finding.—Moos v. O'Reilly, 173 A. 340, 12 N.J.Misc. 558.

Where the verdict and judgment were authorized under the law and the evidence, the trial judge did not err in overruling a certiorari.—Grove Mfg. Co. v. Salter, 106 S.E. 208, 26 Ga.App. 369.

87. Ga.—Atlantic Coast Line R. Co. v. Bennett, 121 S.E. 706, 31 Ga. App. 626.

Verdict wrongfully directed

Where evidence did not absolutely demand verdict directed for plaintiff, judge of superior court did not err in sustaining defendant's certiorari and granting new trial; petition for certiorari containing proper assignment of error on such direction of verdict.—J. J. Tolbert Estate, Inc., v. Kellis, 128 S.E. 204, 34 Ga. App. 49.

88. Mass.—Mullen v. Board of Sew-

er Com'rs of Milton, 182 N.E. 641, 280 Mass. 531.

89. Me.—Rogers v. Brown, 181 A. 667, 134 Me. 88.

90. Me.—Rogers v. Brown, supra. 11 C.J. p 158 note 84.

Questions not presented

Appellate court's refusal to issue certiorari was not adjudication on questions in record not presented to nor considered by appellate court. Thus it cannot be taken as an adjudication on right of party to have it, or on merits of controversy such as makes these questions res judicata.—State ex rel. Durafor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335.

91. Ga.—Stephens v. State, 84 S.E. 616, 16 Ga.App. 163.

92. N.C.—Williamson v. Boykin, 10 S.E. 87, 104 N.C. 100.

93. Ill.—Unbehahn v. Fader, 149 N. E. 773, 319 Ill. 250.

Inapplicable statute

A statute providing that, whenever any judgment shall have been rendered in the supreme court which upon further consideration is found to have been erroneously entered, the judges thereof are authorized, during vacation, to change the same without ordering a rehearing thereof, by entering a proper judgment in said cause has no application to a motion to set aside an order denying an application for a writ of cer-

granted only for good cause and on application seasonably made.

A judgment refusing certiorari as a substitute for an appeal will not be vacated so as to enable the petitioner to present additional affidavits which by due diligence he might have procured before the case was heard.⁹² In the absence of statute or rule authorizing the procedure, it has been held that the court is without jurisdiction to set aside an order denying an application for a writ of certiorari on motion made after the term.⁹³

§ 89. Assignment of Errors

Assignment of error apart from the application is ordinarily not necessary, but if required must be specific and timely.

In the sense that the term is used in appellate procedure generally, as distinguished from an assignment in the application for the writ, which is treated supra § 72, no assignment of errors is ordinarily necessary;⁹⁴ and even though a statute requires that an assignment of errors accompanies the application for the writ, if such application clearly states the errors relied upon, it is not necessary to encumber the record by attaching to the application an assignment of errors;⁹⁵ the petition for the writ of cer-

tiorari for the reason that it applies only to cases where the judgment actually rendered by the court has not been properly entered by the clerk, and does not authorize a change of the judgment, but only of the erroneous entry of the judgment.—Unbehahn v. Fader, supra.

94. Mich.—Com. v. Sheldon, 3 Mass. 183—Stokes v. Jacobs, 10 Mich. 290.

11 C.J. p 162 note 67.

Constitutional questions

In Alabama, although ordinarily the supreme court will review only questions presented by appropriate assignment of error, constitutional questions involved in a case before it for review will be considered whether or not raised or argued in the lower courts, provided the complaining party affords the essential data to advise the court in the premises.—Ex parte Hines, 87 So. 691, 205 Ala. 17, granting certiorari Hines v. McMillan, 87 So. 696, 17 Ala.App. 509.

In New Jersey it seems that the statute requires reasons to be filed by the prosecutor and that such reasons are separate from the application, and in effect an assignment of errors.—Brown v. Peterson, 38 N.J. Law 189—11 C.J. p 163 note 69.

95. La.—Haas v. Opelousas-St. Landry Bank & Trust Co., 119 So. 700, 167 La. 537, denying certiorari 119 So. 372, 9 La.App. 166.

tiorari may be regarded as in the nature of an assignment of errors, in the absence of any more formal assignment, after the record is returned.⁹⁶ However, as shown *infra* § 150, if by statute or the local practice, assignment of errors is required, failure to make a sufficient assignment will preclude consideration of the alleged error, at least in most jurisdictions.

Time for and sufficiency. The assignment, if required, must be made or filed within the time prescribed therefor,⁹⁷ but the time for filing may, it has been held, be extended without notice.⁹⁸ The assignment must specifically point out the particular error or errors relied on;⁹⁹ although it has been held that, if the alleged illegalities are appar-

ent on the face of the record, a general reason assigned for reversal is sufficient.¹ On certiorari to review the decision of an appellate court, the assignments must be made to the decree of that court, and not to the decree of the chancellor who originally tried the case.²

Contradicting return. The return cannot be contradicted by an assignment of errors.³

Cross assignments. In some jurisdictions the practice of cross assignments of error has never been adopted, and the respondent on review by certiorari cannot assign adverse rulings, and thus secure a consideration thereof by the court.⁴ In such jurisdictions the relator in certiorari may alone complain of adverse rulings.⁵

D. BOND OR OTHER SECURITY AND PAYMENT OF COSTS OR FEES

§ 90. Necessity for Security

No bond is necessary unless required by statute or by the court in the exercise of its discretion.

In the absence of statute, no bond or recognizance is necessary, or at least the requirement of security is discretionary.⁶ So, as it is discretionary with the court, under the rules stated *supra* §§ 10-16, to issue or not to issue the writ, the court may, in the exercise of its discretion, and it is nearly always a proper exercise of discretion, impose the

giving of a bond or recognizance for costs, and for the indemnification of defendant in certiorari, as the terms on which the writ shall be allowed; and in some states this has grown to be a settled, uniform practice.⁷ However, the general rule is that security is insisted on only when the insolvency of the party or his departure from the jurisdiction is apprehended.⁸

A bond, undertaking, or other security, when required by law, is a prerequisite to the issuance of the writ,⁹ and it is held that a writ issued in the

96. Mo.—State v. Powers, 68 Mo. 320.

97. Tenn.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177. 11 C.J. p 163 note 71.

Contemporaneously with petition

A statute providing for certiorari, and providing that it shall not be awarded except on petition duly sworn, accompanied by assignments of error and brief in support thereof, requires assignments of error and brief to be filed contemporaneously with petition.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177.—Willoughby v. Jarvis, 189 S.W. 366, 136 Tenn. 279.

98. N.J.—Royal Holding Co. v. City of Beverly, 128 A. 858, 1 N.J.Misc. 453.

99. N.J.—Compton v. Compton, 173 A. 101, 113 N.J.Law 171.—Weishaupt v. Weishaupt, 142 A. 341, 104 N.J.Law 465. 11 C.J. p 163 note 72.

Illegality of judgment

An assignment that the judgment below was illegal, erroneous, and unlawful in divers other respects is too general to be considered on certiorari.—Compton v. Compton, 173 A. 101, 113 N.J.Law 171.—Weishaupt v.

Weishaupt, 142 A. 341, 104 N.J.Law 465.

1. N.J.—Cardillo v. Borough of Bound Brook, 127 A. 792, 3 N.J. Misc. 249.

11 C.J. p 163 note 73.

2. Tenn.—Willoughby v. Jarvis, 189 S.W. 366, 136 Tenn. 279.

3. N.Y.—Haines v. Judges Westchester, 20 Wend. 625.

4. Minn.—Lading v. City of Duluth, 190 N.W. 981, 153 Minn. 464.

5. Minn.—Lading v. City of Duluth, *supra*.

6. Pa.—Sechrist v. York R. Co., 26 Pa.Dist. 658.

11 C.J. p 158 note 88.

7. Ala.—Webb v. McPherson, 38 So. 1009, 142 Ala. 540.—Payne v. Martin, 1 Stew. 407.—Childress v. McGehee, Minor 131.

11 C.J. p 159 note 92.

8. Ga.—Hunter v. Hunter, T.U.P. Charit. 303.

11 C.J. p 159 note 93.

9. N.J.—Daniel B. Frazier Co. v. Borough of Harvey Cedars, 168 A. 128, 110 N.J.Law 163.—Allen v. Estell, 161 A. 677, 10 N.J.Misc. 961.

11 C.J. p 159 note 94.

In Georgia

(1) It has been said that the filing

of a bond or the making of a pauper affidavit is a condition precedent to an application for certiorari.—Nilson v. City of La Grange, 191 S.E. 175, 55 Ga.App. 676, transferred 189 S.E. 511, 183 Ga. 742.—Clay v. City of La Grange, 189 S.E. 863, 55 Ga.App. 239.—E. H. Odum Bros. Co. v. Stovall, 112 S.E. 907, 28 Ga.App. 661.—Georgian Co. v. Sutton, 89 S.E. 601, 18 Ga.App. 507.

(2) Under this rule, refusal to sanction certiorari for failure to comply with the statute requiring such a bond is not error.—Chiles v. City of Atlanta, 179 S.E. 596, 51 Ga. App. 69.—Austin v. City of Newnan, 142 S.E. 304, 37 Ga.App. 821.

(3) In other cases it is said that filing such bond or making such affidavit is a condition precedent to the issuance of the writ.—Butters Mfg. Co. v. Starke, 169 S.E. 57, 46 Ga.App. 715.—Butters Mfg. Co. v. Fraley, 169 S.E. 55, 46 Ga.App. 712.—Souerby v. Orrell, 106 S.E. 211, 26 Ga.App. 369.—Metropolitan Life Ins. Co. v. Monroe, 106 S.E. 209, 26 Ga. App. 332.—Abercrombie v. Gurley, 94 S.E. 606, 21 Ga.App. 389.—11 C.J. p 159 note 94 [e] (1).

(4) And it has been pointed out that the filing of the bond is a con-

absence of the bond, undertaking, or other security required by statute is void.¹⁰

A nonresident applicant for the writ may be ruled to give security for costs, under statutes applicable to nonresident plaintiffs generally;¹¹ but it has been held that a statute providing that plaintiff may be ruled to give security for costs does not authorize a rule for costs at the instance of defendant, after the cause has been removed on the application of defendant.¹²

One or more bonds. While it has been held that it is improper to give but one bond to remove two cases tried at the same time,¹³ or cases between different parties on a writ sued out by one who was a defendant in each case,¹⁴ it has also been held that where the same defense exists to judgments obtained in a number of cases a single bond is unobjectionable.¹⁵

§ 91. — Application in Forma Pauperis

Where authorized by statute, a sufficient pauper's affidavit may be filed in lieu of the required bond.

It is sometimes provided by statute that no bond, recognizance, or security for costs shall be required

when the applicant for the writ shall make an affidavit of his inability, because of his property, to furnish the same; and, where this is the case, the writ may be issued without the giving of a bond where the applicant complies with the statutory provisions.¹⁶ However, a general statute enabling poor persons to prosecute or to defend suits free of costs, on affidavit of inability to pay the fees, has been held not applicable to certiorari, but only to such process as issued at the commencement of the suit.¹⁷ So, where a statute imperatively requires that no appeal shall be granted without security, and certiorari is issued as a substitute for an appeal, the writ cannot be prosecuted in forma pauperis.¹⁸ The application for leave to sue out the writ must contain sufficient information as to the applicant's poverty and the nature and extent of the claim to enable the court to exercise a sound discretion in the matter,¹⁹ and it has been held that the affidavit in forma pauperis is not amendable,²⁰ and cannot be made by an attorney.²¹ Furthermore, according to some authorities, if the affidavit does not substantially meet the requirements of the statute the writ is void.²²

dition precedent only to the issuance of the writ, and not to the sanction of the petition for certiorari.—*Gragg Lumber Co. v. Collins*, 139 S.E. 84, 87 Ga.App. 76—*Abercrombie v. Gurley*, supra—11 C.J. p 159 note 94 [e].

(5) It has been held that the bond may be executed or obtained at any time within three months from the date of the judgment complained of, and before the duly sanctioned petition for certiorari is presented to the clerk of the superior court in order that the writ of certiorari may issue thereon.—*Abercrombie v. Gurley*, supra.

(6) Moreover, the certiorari is valid as respects any requirement as to the giving and filing of the bond, where a valid legally required bond is filed prior to the issuance of the writ, notwithstanding the bond attached to the petition may be invalid.—*Gragg Lumber Co. v. Collins*, supra.

(7) So, where a second petition for certiorari is presented to the judge of the superior court for sanction within six months after the dismissal of a first petition, and where it appears in the second petition, by the certificate of the clerk of the superior court incorporated therein, that the legally required certiorari bond, with the approval thereon of the magistrate whose decision was sought to be reviewed, was duly filed with the clerk of the superior court prior to the issuance of the writ of certiorari upon the first petition, al-

though the bond attached to the first petition was invalid, in that it was not approved by the trial magistrate, it appears in the second petition for certiorari that the first petition was, in so far as the certiorari bond was concerned, a legal and valid petition.—*Gragg Lumber Co. v. Collins*, supra.

(8) Where a certiorari bond was insufficient because describing the obligee merely as M, administrator, with nothing to show who the actual principal was, the allowance of an amendment of the writ and answer of the trial judge properly to designate the defendant in certiorari as M, as administrator of G, did not give the superior court jurisdiction.—*Metropolitan Life Ins. Co. v. Monroe*, 106 S.E. 209, 26 Ga.App. 332.

10. Ga.—*Souerbry v. Orrell*, 106 S. E. 211, 26 Ga.App. 369.

11 C.J. p 159 note 95.

11. N.J.—*Scull v. Carhart*, 15 N.J. Law 430.

11 C.J. p 159 note 96.

12. Tex.—*Foreman v. Gregory*, 17 Tex. 193.

11 C.J. p 159 note 97.

13. Ala.—*Smith v. Hearne*, 2 Stew. & P. 81.

14. Ala.—*Davis v. Calhoun*, 24 Ala. 437.

15. Ala.—*Cooper v. Maddan*, 6 Ala. 431.

16. Ga.—*Le Bron v. Stewart*, 105 S. E. 650, 26 Ga.App. 133—*Belk v.*

Cannon, 91 S.E. 790, 19 Ga.App. 487.

11 C.J. p 159 note 98.

17. Tex.—*Holmes v. Holloway*, 21 Tex. 658.

18. N.C.—*Weber v. Taylor*, 66 N.C. 412—*Estes v. Hairston*, 12 N.C. 354—*Waller v. Broddie*, 2 N.C. 28.

19. Ga.—*Veal v. Veal*, 166 S.E. 460, 46 Ga.App. 31.

11 C.J. p 159 note 2.

Administrator

A pauper's affidavit by defendant sued as administrator which recited that "he" was unable to pay costs or give security, in his individual capacity without reference to the solvency or insolvency of the estate he represented was properly overruled.—*Veal v. Veal*, 166 S.E. 460, 46 Ga.App. 31.

20. Ga.—*Roberts v. Sellman*, 128 S. E. 694, 34 Ga.App. 171—*Davis v. Cunningham*, 120 S.E. 641, 31 Ga. App. 296.

11 C.J. p 160 note 3.

Appeal statute inapplicable

A statute providing that, where material words are omitted by accident or mistake in an affidavit to appeal in forma pauperis, such omission is amendable, does not apply to a pauper's affidavit made in a certiorari case.—*Davis v. Cunningham*, 120 S.E. 641, 31 Ga.App. 296.

21. Ga.—*Selma*, etc., R. Co. v. Tyson, 48 Ga. 351.

22. Ga.—*Roberts v. Sellman*, 128 S. E. 694, 34 Ga.App. 171—*Davis v.*

§ 92. Who May Take Security

The security may be taken by an officer authorized to receive it.

The security can be taken only by an officer duly authorized to receive it and not by one who has no authority in the premises.²³

§ 93. Form and Contents of Bond

The bond must substantially comply with the statutory requirements as to recitals and conditions, principal, obligee, amount of penalty, and sealing.

The bond is sufficient if it contains substantially the conditions which the statute requires; it need not be conditioned in the very words of the statute.²⁴ The bond should describe the judgment sought to be reviewed,²⁵ but this may be done by reference to the petition where the judgment is properly described therein;²⁶ and a slight inaccuracy as to the amount of the judgment is not fatal.²⁷ It should also recite from what court the writ was obtained, and be conditioned to perform the judgment of the reviewing court.²⁸ However, a condition to abide by the judgment of the court is equivalent to a condition to perform the judgment.²⁹ The obligee should be described with certainty.³⁰

The bond must be signed by the principal, the petitioner for certiorari.³¹ If there are two or more petitioners, not partners, it seems that all of them

should sign the bond.³² An attorney at law may sign the bond, in some states;³³ and a statute requiring that, before certiorari shall issue, the party applying therefor, or his agent or attorney, shall give bond requires the bond to be given by the party himself, or by an agent authorized to represent him in that particular case, or by an attorney authorized by the party to give the bond.³⁴ Where executed by an attorney in fact, his authority should appear in the record.³⁵

The penalty named in the bond should be in an amount sufficient to satisfy the statutory requirements.³⁶ Thus, where the statute requires the bond to provide security for all future costs and eventual condemnation money payable to the adverse party, it must ordinarily do so,³⁷ but where there is no eventual condemnation money, and plaintiff in certiorari has paid the accrued costs, a bond covering all future costs substantially complies with the statute.³⁸

A requirement of a bond in double the amount in controversy is satisfied by a bond in double the amount of the judgment sought to be revised,³⁹ and it has been held that the writ should not be dismissed because the penalty of the bond is less than that prescribed by the order for the writ.⁴⁰

A seal is essential,⁴¹ unless its use has been dispensed with by statute.⁴²

Cunningham, 120 S.E. 641, 31 Ga. App. 296.

11 C.J. p 160 note 5.

Affidavit held sufficient

An affidavit by one who has paid the costs in the court below is sufficient, although it does not state that he is unable to pay the costs.—*Le Bron v. Stewart*, 105 S.E. 650, 26 Ga.App. 133.

Affidavits held insufficient

(1) Affidavit which states that defendant is unable to pay the costs "and" to give the security required by law, instead of that she is unable to pay the costs "or" give security.—*Davis v. Cunningham*, 120 S.E. 641, 31 Ga.App. 296—11 C.J. p 160 note 5 [a] (1).

(2) Affidavit merely that affiant was "unable to give security as required by law."—*Roberts v. Sellman*, 128 S.E. 694, 34 Ga.App. 171.

(3) Affidavit stating merely that applicant for certiorari was unable to pay costs.—*Quinn v. O'Neal*, Ga. App., 194 S.E. 911.

(4) Affidavit alleging affiant believed she has good cause for certiorari.—*Garvin v. Ray*, 164 S.E. 677, 174 Ga. 905.

(5) Affidavit failing to state that affiant believes that he has a good cause for certiorari.—*Belk v. Cannon*, 91 S.E. 790, 19 Ga.App. 487.

23. Pa.—*Clark v. McCormack*, 2 Phila. 68.

11 C.J. p 160 note 9.

24. Ga.—*Hartsfield Co. v. Luddy*, 165 S.E. 452, 45 Ga.App. 507.

11 C.J. p 160 note 10.

25. Tex.—*Nelson v. Hart*, Civ.App., 23 S.W. 831.

26. Tex.—*Selligson v. Wilson*, 58 Tex. 369.

27. Tex.—*Hail v. Magale*, 1 Tex.A. Civ.Cas. § 852.

28. Ga.—*Johns v. Tifton*, 50 S.E. 941, 122 Ga. 734—*Johnson v. Hazlehurst*, 70 S.E. 258, 8 Ga.App. 841.

11 C.J. p 160 note 14.

29. N.C.—*Molton v. Hooks*, 10 N.C. 342.

30. Ga.—*Metropolitan Life Ins. Co. v. Monroe*, 106 S.E. 209, 26 Ga. App. 332.

31. Ga.—*Chiles v. City of Atlanta*, 179 S.E. 595, 51 Ga.App. 51.

32. Ga.—*Harwell v. Marshall*, 54 S.E. 93, 125 Ga. 451.

11 C.J. p 160 note 17.

33. Tex.—*McAlpin v. Finch*, 18 Tex. 831.

11 C.J. p 160 note 16.

34. Ga.—*Alabama Midland R. Co. v. Stevens*, 43 S.E. 46, 116 Ga. 790.

35. Ga.—*Harwell v. Marshall*, 54 S.

E. 93, 125 Ga. 451—*Southern Express Co. v. Wheeler*, 72 Ga. 210.

11 C.J. p 160 note 18.

36. Ga.—*Howard v. Boone*, 164 S.E. 470, 45 Ga.App. 356.

Amount held insufficient

Ga.—*Howard v. Boone*, 164 S.E. 470, 45 Ga.App. 356.

37. Ga.—*Hartsfield Co. v. Luddy*, 165 S.E. 452, 45 Ga.App. 507.

11 C.J. p 159 note 94 [d] (1).

38. Ga.—*Hartsfield Co. v. Luddy*, supra.

11 C.J. p 159 note 94 [d] (2).

Suit upon check

In suit upon check, there being no counterclaim, plaintiff's certiorari bond covering all future costs is sufficient, although not covering eventual condemnation money.—*Hartsfield Co. v. Luddy*, supra.

39. Tex.—*Davis v. Pinckney*, 20 Tex. 340—*King v. Longcope*, 7 Tex. 236.

11 C.J. p 160 note 20.

40. Ala.—*McClellan v. Allison*, 19 Ala. 671.

11 C.J. p 160 note 21.

41. Ala.—*Skinner v. McCarty*, 2 Port. 19.

42. Ga.—*King v. Cantrell*, 61 S.E. 144, 4 Ga.App. 263.

Tex.—*Courand v. Vollmer*, 31 Tex. 397.

§ 94. Sureties

The bond should ordinarily be signed by the sureties, the number and competency of whom is governed by the local practice.

Where the statute requires a party applying for certiorari to give bond and security, a bond not signed by any person or corporation as surety, but signed only by the principal, is insufficient.⁴³ The number of sureties, and who may be sureties, are matters of local practice. Ordinarily a surety on a claim bond cannot be a surety on a bond to obtain a review of the matter by certiorari.⁴⁴ If a rule of court forbids an attorney from becoming a surety, in harmony with the general rule stated in the title Attorney and Client § 45, a certiorari bond signed by an attorney as surety is not necessarily void, unless the rule of court or a statute so provides.⁴⁵ Statutory provisions as to exceptions to the sureties, and conditions precedent, must be followed.⁴⁶ If the name of the surety is signed by an attorney in fact, his authority must accompany the bond,⁴⁷ and if it does not do so, plaintiff in certiorari is properly refused permission to produce and file the power of attorney under which the attorney acted.⁴⁸

§ 95. Approval and Filing of Bond

The bond must be sufficiently approved by the proper officer and seasonably filed.

Under the law of some states the bond must be approved by the magistrate or judge of the court in which the case was originally tried before the issuance of the writ and failure to obtain such approval may render void the issuance of the writ,⁴⁹ although it has been held that approval of the bond

need not precede the sanction of the petition for certiorari.⁵⁰ A certificate of the trial magistrate that the plaintiff has paid all costs accrued and given bond as required by law is not a sufficient substitute for the written approval required by law.⁵¹ So approval by the clerk of court⁵² or by a commercial notary public⁵³ is insufficient; and the judge of the court to which application for the writ is made has no power to approve the bond by way of amendment.⁵⁴ It will be sufficient, however, if the bond duly executed and approved is incorporated in the record,⁵⁵ and the return of a bond as part of the proceedings in the case by the judge in response to the writ is equivalent to an approval of the bond by the judge.⁵⁶ A bond which shows on its face that it was executed and approved before rendition of the judgment assigned as error in the certiorari proceeding is fatally defective.⁵⁷ A bond defective on its face is not made valid by the approval of the proper authority.⁵⁸ The trial judge's approval of a certiorari bond is not a final adjudication which cannot be reviewed on motion to dismiss the certiorari for lack of a proper certiorari bond.⁵⁹

Unless the bond is filed within the time prescribed by statute, the writ cannot legally issue.⁶⁰ If the bond properly executed is incorporated in the record, however, it will be taken to have been filed in time.⁶¹

§ 96. Defects, Objections, and Waiver

Mere irregularities will not invalidate a bond, and they can be corrected or waived, but the contrary is true of substantial defects.

A recognizance will not be invalidated by mere

43. Ga.—Gleason v. Burgess, 167 S. E. 916, 46 Ga.App. 486.

44. Ga.—Woodliff v. Bloodworth, 49 S.E. 289, 121 Ga. 456.
11 C.J. p 160 note 24.

45. Del.—McLaughlin v. Sentman, 47 A. 1014, 18 Del. 565.
Ga.—Husband v. Georgia, etc., R. Co., 59 S.E. 326, 3 Ga.App. 157.

46. N.Y.—In re Faulkner, 4 Hill 30.

47. Ga.—Garrett v. City of Atlanta, 179 S.E. 597, 51 Ga.App. 69—American Nat. Ins. Co. v. Jordan, 105 S. E. 852, 26 Ga.App. 320—Seaboard Air Line Ry. v. Rosenbusch, 76 S. E. 1041, 12 Ga.App. 154—Anderson v. Southern Ry. Co., 70 S.E. 983, 9 Ga.App. 199.

48. Ga.—American Nat. Ins. Co. v. Jordan, 105 S.E. 852, 26 Ga.App. 320.

49. Ga.—Butters Mfg. Co. v. Starke, 169 S.E. 57, 46 Ga.App. 715—Butters Mfg. Co. v. Fraley, 169 S.E. 55, 46 Ga.App. 712—Souerby v. Orrell, 106 S.E. 211, 26 Ga.App. 369

—Southeastern Mut. Fire Ins. Co. v. Davidson, 102 S.E. 460, 25 Ga. App. 83—Daniel v. Citizens' Loan & Guarantee Co., 99 S.E. 226, 23 Ga.App. 684—Georgian Co. v. Sutton, 89 S.E. 601, 18 Ga.App. 507.
11 C.J. p 161 note 27.

50. Ga.—Sullivan v. Surrency, 82 S. E. 926, 15 Ga.App. 301.

51. Ga.—Butters Mfg. Co. v. Starke, 169 S.E. 57, 46 Ga.App. 715—Butters Mfg. Co. v. Fraley, 169 S.E. 55, 46 Ga.App. 712—Souerby v. Orrell, 106 S.E. 211, 26 Ga.App. 369.
11 C.J. p 161 note 27 [c] (2), (3).

52. Ga.—Georgian Co. v. Sutton, 89 S.E. 601, 18 Ga.App. 507.

53. Ga.—Southeastern Mut. Fire Ins. Co. v. Davidson, 102 S.E. 460, 25 Ga.App. 83.

54. Ga.—Hamilton v. Phenix Ins. Co., 33 S.E. 705, 107 Ga. 728.

55. Ga.—Kelly v. Jackson, 67 Ga. 274.

56. Ga.—Watson v. State, 11 S.E. 610, 85 Ga. 237.

57. Ga.—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga.App. 397.

58. Ga.—Chiles v. City of Atlanta, 179 S.E. 595, 51 Ga.App. 51.

59. Ga.—Gleason v. Burgess, 167 S. E. 916, 46 Ga.App. 486.

60. Ga.—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga.App. 397.
11 C.J. p 161 note 31.

Contemporaneously with petition

In Georgia, in certiorari proceeding in civil case, where no affidavit in forma pauperis is filed, the bond required must be filed at the same time when petition for certiorari is filed; otherwise, the writ must be dismissed on the hearing.—E. H. Odom Bros. Co. v. Stovall, 112 S.E. 907, 28 Ga.App. 661—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga. App. 397.

61. Ga.—Kelly v. Jackson, 67 Ga. 274.

irregularities⁶² which may be supplied by intendment;⁶³ and unless timely objection is taken the defect will be deemed waived.⁶⁴ Where, however, a writ was void because of failure to give a valid bond, the act of the agent who signed the bond could not be ratified, so as to render the void proceeding valid or affect the rights of the other party who had moved to dismiss the writ before the ratification.⁶⁵

A bond or the like which is defective because of irregularities is amendable,⁶⁶ or the defects may be cured by the substitution of a new bond;⁶⁷ but if the defect is substantial, in the absence of statutory authority therefor there can be no amendment⁶⁸ or new bond.⁶⁹ Under some circumstances, and where the applicant is not at fault, the omission of a bond may be supplied in the reviewing court.⁷⁰

§ 97. Liabilities on Bonds

Liability on the bond depends on the conditions thereof and the result of the certiorari proceedings.

A condition that the proceeding shall be prosecuted in the court above contemplates that it shall be prosecuted or followed up to a conclusion.⁷¹ Hence, if the certiorari is dismissed because of failure to prosecute it according to the rules and practice of the court, the condition is broken,⁷² but not if the dismissal is because the bond is void;⁷³ nor is it a defense that the writ was not allowed, where the principal had the benefit of a hearing and determination thereon.⁷⁴ However, a condition to prosecute with effect, or to perform the judgment rendered in the cause, is not broken by the dismissal of the writ for informality in granting it⁷⁵ or for

failure to comply with a rule requiring better security;⁷⁶ nor is the unsuccessful determination of present proceedings a breach of a condition to pay such costs and damages as may be recovered in any action thereafter brought.⁷⁷ A bond, given to stay the enforcement of a judgment pending a hearing upon certiorari, will be construed in the light of the circumstances, its purpose, and the statute authorizing it.⁷⁸

Where the writ is issued by a court which has no jurisdiction to issue it, judgment cannot be rendered on the bond, as it is an obligation which is not authorized by statute.⁷⁹

Extent of liability. A condition to abide by the judgment binds the surety to perform it and pay the sum recovered,⁸⁰ but the liability extends only to the amount of the penalty.⁸¹ A condition to pay damages and costs does not obligate the surety to pay the debt.⁸² So the sureties on a supersedeas bond are not liable for receivership expenses not incurred because of the writs.⁸³ An obligation by one to whom a judgment has been paid to restore, on reversal, the debt or damages for which the judgment was obtained, and costs, imposes no liability for the costs of reversal.⁸⁴

In determining whether the conditions of the bond have or have not been performed, and the extent of the obligation of the makers, the bond itself is to be looked to, and not the statutory requirements as to what the bond should contain, unless the bond is made in compliance with the statute.⁸⁵

As between surety on bond for writ and surety on appeal bond. As between the surety on a bond to procure the writ and the surety on appeal from the

62. Ala.—Davis v. Calhoun, 24 Ala. 455.

Del.—McLaughlin v. Sentman, 47 A. 1014, 18 Del. 565.

11 C.J. p 161 note 33.

63. Tenn.—Kincaid v. Sharp, 3 Head 150.

11 C.J. p 161 note 34.

64. Ala.—Cooper v. Maddan, 6 Ala. 431.

11 C.J. p 161 note 35.

65. Ga.—Alabama Midland R. Co. v. Stevens, 43 S.E. 46, 116 Ga. 790.

66. Tex.—Armstrong v. Anderson, Civ.App., 70 S.W.2d 801.

11 C.J. p 161 note 37.

67. Tex.—Armstrong v. Anderson, supra—Johnson v. Coit, Civ.App., 48 S.W.2d 397.

11 C.J. p 161 note 38.

68. Iowa.—Perry v. Benner, Morr. 340.

In Georgia a certiorari bond is not amendable.—Gleason v. Burgess,

167 S.E. 916, 46 Ga.App. 486—Carroll v. Inner Shoe Tire Co., 94 S.E. 643, 21 Ga.App. 397.

69. Tex.—Harris v. Parker, Civ. App., 46 S.W. 844.

70. N.C.—Rosseau v. Thornberry, 4 N.C. 326.

71. N.J.—Marryott v. Young, 33 N.J. Law 336.

11 C.J. p 161 note 42.

72. N.J.—Marryott v. Young, supra. 11 C.J. p 161 note 43.

73. Ga.—Bush v. Boykin, 73 S.E. 652, 137 Ga. 464—Climax v. Jeter, 76 S.E. 994, 12 Ga.App. 145.

74. Pa.—Patton v. Miller, 13 Serg. & R. 254.

75. Tenn.—Brown v. Newton, 6 Yerg. 436.

76. Tenn.—McIntosh v. Langtree, 6 Yerg. 316.

77. Tex.—Hopson v. Murphy, 4 Tex. 248.

78. Iowa.—Muscatine County v. Oliver, 139 N.W. 1105, 159 Iowa 417.

79. Tenn.—Turner v. Farley, 3 Yerg. 300—Taul v. Collinsworth, 2 Yerg. 579.

80. N.C.—Molton v. Hooks, 10 N.C. 342.

11 C.J. p 162 note 51.

81. Ala.—McKeen v. Nelms, 9 Ala. 507.

Tex.—Yates v. Collins, 19 Tex. 137.

82. Tenn.—Tipton v. Anderson, 8 Yerg. 221.

83. Tenn.—Brown v. Brown, 296 S. W. 356, 155 Tenn. 530.

84. N.Y.—Griffin v. Mortimer, 8 Wend. 538.

85. U.S.—Swanson v. Ball, Ark.T., 23 F.Cas.No.13,676a, Hempst. 39. Tenn.—Triplet v. Gray, 7 Yerg. 15. 11 C.J. p 162 note 55.

determination thereon the latter is primarily liable.⁸⁶

Release or discharge from liability. There is no liability on the bond if the party giving it is successful,⁸⁷ or the writ is dismissed for want of jurisdiction,⁸⁸ or is dismissed and the costs paid because of the election of the relator to appeal.⁸⁹ A statute permitting sureties for the prosecution or defense of any suit to obtain a release by requiring plaintiff to give counter security applies in favor of sureties on certiorari without regard to the status of the party.⁹⁰

Judgment. The court should not render summary judgment against the sureties unless it is authorized by statute so to do,⁹¹ but a summary judgment is proper where there is a statute conferring such power.⁹² So, where the practice is permitted by statute, judgment may be rendered against the principal and the surety at the same time⁹³ or on a new trial.⁹⁴ In a suit on a certiorari bond given by defendant in bail trover to obtain review of the bail trover action, where the property recovered therein, has not been produced to answer the judgment, the value of such property must be ascertained by proof.⁹⁵ A judgment in excess of the penalty may be amended on motion in the court below or in the appellate court.⁹⁶

A scire facias will not lie on a certiorari bond, unless directed by statute.⁹⁷

§ 98. Payment of Costs or Fees

Costs and fees must be paid and a certificate to that effect produced when required by statute or local practice as a condition precedent to issuance of the writ.

Although the certiorari statute is silent as to fees, the clerk of court is not required to annex a transcript in returning a writ of certiorari directed to the court unless the petitioner in serving the writ upon the clerk pays the fees prescribed by general law for the making of the transcript.⁹⁸ Furthermore, the cost of preparing a certified transcript of the record required to be attached to the petition for certiorari is not such an item of costs as will be relieved by a pauper's affidavit, but is merely an expense incident to the preparation of the application.⁹⁹ Statutes requiring the payment of fees in certain certiorari proceedings, or to certain persons, do not, however, require such payment in other certiorari proceedings or to other persons.¹

Where it is provided that before the writ shall issue the applicant shall produce and file with the petition a certificate from the officer whose decision or judgment is the subject matter of complaint, that all costs which may have accrued on the trial below have been paid, the failure to produce and file such a certificate will preclude right to the writ,²

86. Tenn.—Moore v. Lassiter, 16 Lea 630.

87. U.S.—Swanson v. Ball, Ark.T., 23 F.Cas.No.13,676a, Hempst. 39. Ga.—Western, etc., R. Co. v. Carder, 47 S.E. 930, 120 Ga. 460. 11 C.J. p 162 note 57.

88. Tenn.—Turner v. Farley, 3 Yerg. 299—Taul v. Collinsworth, 2 Yerg. 579.

89. Tex.—Landa v. Moody, Civ.App., 57 S.W. 51.

90. Tenn.—Kincaid v. Sharp, 3 Head 150. 11 C.J. p 162 note 60.

91. Iowa.—Hoskins v. Hotel Randolph Co., 221 N.W. 442, 206 Iowa 932.

11 C.J. p 162 note 61.

In Georgia

"If a certiorari, after being sanctioned by the judge of the superior court, be dismissed on the hearing before him for the reason that it does not properly appear that the cost has been paid, the judgment dismissing it is equivalent to holding that the proceeding is void, and, there being no legal writ before him, the court is therefore without jurisdiction to entertain the proceeding, for the purpose of rendering its own final decision in the case, including

judgment against the surety on the certiorari bond. But, since a judgment is thus rendered upon the question of the validity of the certiorari, the surety is liable together with his principal for the cost of that proceeding.—Ray v. Cruce, 94 S.E. 399, 21 Ga.App. 539.

92. Mich.—Knack v. Wayne Cir. Judge, 111 N.W. 161, 147 Mich. 485. 11 C.J. p 162 note 62.

93. Tenn.—Chambers v. Haley, Peck 159.

94. Miss.—Hudson v. Nalty, 55 Miss. 582. 11 C.J. p 162 note 64.

95. Ga.—Jones v. Funston, 99 S.E. 237, 23 Ga.App. 706.

96. Ala.—McKeen v. Nelms, 9 Ala. 507.

97. N.C.—Fox v. Steele, 4 N.C. 48.

98. Nev.—Dixon v. Second Judicial District Court in and for Washoe County, 133 P. 312, 43 Nev. 159.

99. Ga.—Ware v. Bleckley, 187 S.E. 401, 53 Ga.App. 508.

1. N.Y.—Brewster v. Wendt, 279 N.Y.S. 291, 244 App.Div. 489.

Fees payable to judge or clerk

A statute requiring payment of fees to judge or clerk for making return to certiorari order has no ap-

plication to a board or body, such as town board of zoning appeals, whose determination is sought to be reviewed.—Brewster v. Wendt, supra.

Orders substituted for writs

Provisions as to payment of fees for making returns in section of civil practice act relating to writs of habeas corpus and certiorari to inquire into cause of detention are not applicable generally to orders substituted for other state writs, such as certiorari order to review action of town board of zoning appeals.—Brewster v. Wendt, 279 N.Y.S. 291, 244 App.Div. 489.

2. Ga.—Mosley v. Carswell, 152 S.E. 856, 41 Ga.App. 267—Thoms v. John R. Thompson Co., 145 S.E. 533, 38 Ga.App. 779—Standard Gas Products Co. v. Vismor, 121 S.E. 854, 31 Ga.App. 418—Buchanan v. Satterwhite, 95 S.E. 309, 22 Ga. App. 95.

11 C.J. p 148 note 2.

Time for obtaining and filing

The certificate as to payment of costs in civil cases as prerequisites to writ of certiorari may, it has been held, be executed or obtained at any time within three months after judgment and before sanctioned petition is presented to clerk of superior

and so will the failure to pay the costs³ even though such a certificate is produced.⁴ The statute contemplates the costs which have accrued on the trial which resulted in the verdict or judgment with which the applicant is dissatisfied, and to which he excepts, and the certificate should have reference to the case as thus tried, and not to the case as made by the petition for certiorari.⁵ Moreover, a certificate made by the clerk of the court rendering the adverse decision does not comply with the positive requirements of the statute.⁶ While a certificate will be deemed sufficient when upon a fair interpretation it substantially meets the requirements of the

statute,⁷ it is insufficient when it does not speak the truth⁸ or when it is so drawn that to uphold it would have the effect, by construction, of rendering the meaning of the law in respect thereto vague and uncertain.⁹ So a certificate which shows that some of the costs were unpaid does not satisfy the mandatory provision of the statute.¹⁰ While the requirement of payment of costs as a condition precedent to the issuance of a writ of certiorari is primarily for the protection of the officers of the court, a party to the case may challenge the right of the other party to proceed without such proof.¹¹

E. THE WRIT

§ 99. Necessity for

Issuance of a writ of certiorari is necessary to the jurisdiction of the reviewing court, unless in a proper case issuance may be and has been waived.

The issuance of the writ, unless waived by the parties, is necessary to confer jurisdiction on the reviewing court, and no review will be undertaken until the writ has been issued or waived; and it is not sufficient simply that the writ has been granted and ordered to be issued.¹² Even when there is a transcript of the record attached to the petition for the writ, it is necessary that the writ should issue.¹³

The issuance of the writ may be waived by the parties, by expressly stipulating that the writ need not issue, or by appearing and proceeding to a hearing without objection.¹⁴ It has also been held that, where a certiorari has been granted by a court without jurisdiction, the parties may agree to transfer the proceeding to the proper tribunal with the like

effect as if it had been commenced in the latter court originally.¹⁵

§ 100. Duty of Applicant to Prepare

The applicant should prepare the writ.

It is the duty, not of the judge, but of applicant, to prepare the writ, and present it along with the affidavit for the writ.¹⁶ The attorney preparing the writ need not be the attorney who represented applicant in the court below.¹⁷

§ 101. Number of Writs

Different parts of the same proceeding may be brought up by one writ, but to review distinct determinations involving different interests or different parties, or official acts of different boards or officers not forming one official act, separate writs are necessary.

A writ is not multifarious because it brings up different parts of the same proceedings,¹⁸ but dis-

court that return may issue thereon.—*Abercrombie v. Gurley*, 94 S.E. 606, 21 Ga.App. 389—11 C.J. p 148 note 2 [b], [c].

Application for second writ

(1) In procuring a second writ of certiorari after a first writ in the same case has been dismissed, the second being a renewal of the first, it is not ordinarily necessary to produce or to file a new certificate as to the payment of costs.—*Standard Gas Products Co. v. Vismor*, 121 S.E. 854, 31 Ga.App. 418—11 C.J. p 148 note 2 [e].

(2) But where the certificate filed with the first petition is insufficient in a proceeding to procure a second writ as a renewal of the first, it is necessary to produce a new certificate.—*Standard Gas Products Co. v. Vismor*, supra.

3. Ga.—*Quinn v. O'Neal*, App., 194 S.E. 911—*Mosley v. Carswell*, 152 S.E. 856, 41 Ga.App. 267.

4. Ga.—*Mosley v. Carswell*, supra.

5. Ga.—*Standard Gas Products Co. v. Vismor*, 121 S.E. 854, 31 Ga.App. 418.

Certificate held insufficient

A certificate that the applicant for a writ of certiorari had paid all costs which have accrued in the petition for certiorari, so far as the municipal court was concerned is insufficient to meet the requirement of the statute.—*Standard Gas Products Co. v. Vismor*, supra.

6. Ga.—*Thoms v. John R. Thompson Co.*, 145 S.E. 533, 38 Ga.App. 779.

11 C.J. p 148 note 2 [a].

7. Ga.—*Whitley v. Jackson*, 129 S.E. 662, 34 Ga.App. 286—*Standard Gas Products Co. v. Vismor*, 121 S.E. 854, 31 Ga.App. 418.

11 C.J. p 148 note 2 [g].

8. Ga.—*Mosley v. Carswell*, 152 S.E. 856, 41 Ga.App. 267.

9. Ga.—*Standard Gas Products Co. v. Vismor*, 121 S.E. 854, 31 Ga.App. 418.

10. Ga.—*Buchanan v. Satterwhite*, 95 S.E. 309, 22 Ga.App. 95.

11. 11 C.J. p 148 note 2 [h].

12. Ark.—*McKay v. Jones*, 30 Ark. 148.

11 C.J. p 163 note 76.

To affirm record attached in petition for writ of certiorari, writ must issue and record attached must be before court.—*Rogers v. Brown*, 181 A. 667, 134 Me. 88.

13. Ark.—*McKay v. Jones*, 30 Ark. 148.

14. Ark.—*Nevada County v. Williams*, 81 S.W. 384, 72 Ark. 394. 11 C.J. p 163 note 78.

15. Iowa.—*Groves v. Richmond*, 8 N.W. 752, 56 Iowa 69.

16. N.Y.—*Peo. v. Albany C. Pl.*, 12 Wend. 263.

17. Ga.—*Ware v. Fambro*, 67 Ga. 515.

18. N.J.—*Crombie v. Engle*, 19 N.J. Law 82.

11 C.J. p 164 note 93.

tinct determinations¹⁹ involving different rights and interests, or in which the parties to the record are not the same, so that one judgment cannot be rendered, cannot be brought up by the same writ.²⁰

Where a return is sought of the records of the official acts of different officers, and their several acts do not form parts of one entire official act, it is proper to issue a separate writ to each officer whose act contributes to the completion of the proceeding complained of.²¹

§ 102. Allowance and Issuance

- a. Necessity
- b. Who may allow
- c. Order allowing writ
- d. Effect of allowance

a. Necessity

Except where the writ may issue of course, it must be issued by the court or, when issued by a duly authorized officer, must be allowed by the proper court or judge.

Except where the writ may issue of course,²² as where it is applied for by the attorney-general of the state,²³ the writ must be issued by the court or, when issued by the clerk or other duly authorized officer,²⁴ must be allowed by the proper court or judge.²⁵ A writ issued by authority of a judge is of the same effect as if issued by the judge himself.²⁶

b. Who May Allow

The writ may be allowed only by the court in which the proceedings are to be brought, or by a judge or officer thereof acting within his jurisdiction.

Only the court in which the proceedings are to be brought, or a judge, or an officer thereof, acting

within his jurisdiction may allow the writ.²⁷ As stated in C.J.S. title Judges § 48, also 33 C.J. p 968 notes 100-102, the writ may be issued by a judge at chambers or in vacation. An allowance by a judge disqualified by relationship is a nullity.²⁸ Where exclusive power to issue the writ is conferred by the constitution on the superior court, a statute authorizing a judge of an inferior court to grant the writ is unconstitutional.²⁹ Likewise, if commissioners have power to act only as to matters within their county, they cannot allow the writ where they do not reside within the county in which the judgment sought to be reviewed was rendered.³⁰

c. Order Allowing Writ

The sanction to the issuance of the writ is usually by indorsement on the petition or affidavit, or on the writ itself. The order must be in proper form, but need not prescribe the manner of service where this is controlled by statute.

The sanction of the court to the issuance of the writ is usually given by indorsement by the judge of an allocatur or fiat on the petition or affidavit, or on the writ itself.³¹ If a rule or order is entered, it must properly designate the parties.³² Failure to enter the allowance of the writ on the minutes of the court does not invalidate the writ.³³

Where the manner of service of the writ is prescribed by law, the order for its issuance need not prescribe the manner of its service nor recite the statute applicable thereto.³⁴

Imposing conditions. In granting the writ, the court has no authority to extend its operations,³⁵ or to change or alter the determination which is to be reviewed.³⁶ The court may, however, as a condition of granting the writ in matters of public importance, require prompt preparation and argu-

19. Ala.—Creswell v. Greene County, 24 Ala. 282.

11 C.J. p 164 note 94.

20. Ala.—Davis v. Calhoun, 24 Ala. 437.

21. N.Y.—Peo. v. Hill, 65 Barb. 170. 11 C.J. p 164 note 97.

22. N.J.—Ludlow v. Ludlow, 4 N.J. Law 451. 11 C.J. p 163 note 82.

In Pennsylvania

(1) With the exception of a special class of cases, the necessity of a special allocatur is dispensed with by statute.—Streuber v. McFayden, 14 Pa.Dist. 242—11 C.J. p 163 note 82 [a] (1).

(2) A special allocatur is required in case of disorderly conduct.—Rubel v. Paint Borough, 14 Pa.Dist. 117—11 C.J. p 163 note 82 [a].

In Washington, prior to the act of

March 13, 1895, the writ was, by statute, issued by the clerk as of course.—Leavitt v. Chambers, 47 P. 755, 16 Wash. 353.

23. Mo.—State ex rel. Shartel v. Skinker, 25 S.W.2d 472, 324 Mo. 955.

24. Mo.—Hopkins v. Seiger, 53 Mo. 232. 11 C.J. p 163 note 84.

25. Del.—Newell v. Hampton, 40 A. 469, 15 Del. 1. 11 C.J. p 163 note 85.

Failure to allow the writ as ground for quashing see infra § 135.

26. Ark.—Thorn v. Reed, 1 Ark. 480.

27. Idaho.—Johnson v. Ensign, 224 P. 73, 38 Idaho 615. 11 C.J. p 164 note 88.

28. Tex.—Fellrath v. Gilder, 1 Tex. A.Civ.Cas. § 1060.

29. Ga.—Kieve v. Ford, 36 S.E. 293, 111 Ga. 30.

30. N.Y.—Peo. v. Seneca, 6 Wend. 517.

31. N.Y.—Peo. v. Onondaga C. Pl., 7 Wend. 516. Indorsement see infra § 104 e.

32. N.Y.—Overseers of Poor v. Bishop, 2 How.Pr. 195. 11 C.J. p 164 note 99.

33. N.Y.—Peo. v. Stillings, 78 N.Y. S. 942, 76 App.Div. 143.

34. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

35. Ga.—Macon v. Shaw, 14 Ga. 162. 11 C.J. p 164 note 3.

36. Ga.—Gurr v. Gurr, 22 S.E. 304, 95 Ga. 559. 11 C.J. p 164 note 5.

ment,³⁷ and, where it entertains no doubt as to the correctness of the proceedings below, may annex as a condition that the writ shall not operate as a stay.³⁸

Revoking allowance. The allowance of the writ may be revoked.³⁹

d. Effect of Allowance

The allowance of the writ is not an adjudication of the merits involved.

The allowance of the writ is not an adjudication that there is illegality or that the party seeking the writ is entitled to it, and the granting of the writ does not even make a *prima facie* case.⁴⁰

Where proceedings to dismiss or dissolve a garnishment must be taken in the court where the suit is pending, the superior court has no original jurisdiction to dismiss or dissolve a garnishment, even though a writ of certiorari has been granted from proceedings in the suit, where plaintiff is not attempting to enforce the judgment pending determination of the certiorari,⁴¹ as the granting of the writ does not transfer the entire case to the superior court.⁴²

§ 103. Effect of Failure to Take Out after Allowance

The right to the writ may be lost by failure to take out the writ after its allowance.

Neglect to take out the writ within a reasonable time after its allowance will preclude the right to it.⁴³

§ 104. Form and Contents of Writ

a. In general

b. Title

c. The mandate

d. Signature, seal and teste; revenue stamps

e. Indorsement

a. In General

The writ should be in proper form, dated, showing the cause of complaint when necessary, and the interest of the prosecutor. In the absence of prejudice, it will be liberally construed.

The writ, it would seem, should set forth the names of the parties aggrieved, and the irregularities of which they complain,⁴⁴ setting out the cause of complaint,⁴⁵ unless this is made unnecessary by the terms of a particular statute.⁴⁶ The writ should also be dated,⁴⁷ and must show that the prosecutor is an interested party.⁴⁸

It is not necessary that the writ contain all the allegations of the petition,⁴⁹ nor the recitals of the application.⁵⁰ Failure of the writ to include a clause commanding the parties obtaining the judgment sought to be reviewed to appear before the court issuing it, does not affect its efficacy to remove the cause, nor the jurisdiction conferred.⁵¹

The fact that the form of the writ is erroneous is not fatal where, in response to it, defendant brings for review all facts before the court which were considered.⁵²

Where no prejudice has resulted from informalities in statements in a petition for certiorari and in the writ, the writ will be liberally construed and not held to the standard of precision of formal pleadings in actions at law and suits in equity.⁵³

b. Title

The title of the writ should state the names of the parties.

The names of the parties should be stated in the title of the writ,⁵⁴ applicant being named as plaintiff, and the persons interested in maintaining the proceedings, as defendants. A writ running in the name of the state, directed to the proper parties, and reciting the presentation of the affidavit on which it was granted, is not invalidated by the omission of the title.⁵⁵

37. N.J.—State v. Citizens' Tel. Co., 5 A. 274.

11 C.J. p 164 note 8.

38. N.Y.—Patchin v. Brooklyn, 13 Wend. 664.

11 C.J. p 164 note 9.

Effect of writ as supersedeas see infra §§ 108–113.

39. La.—Landry v. Labarre, 51 So. 697, 125 La. 714.

11 C.J. p 164 note 10.

40. N.J.—Tallon v. Hoboken, 36 A. 693, 59 N.J.Law 383, reversed on other grounds 37 A. 895, 60 N.J.Law 212.

11 C.J. p 170 note 15.

41. Ga.—Jones v. Crawford, 107 S. E. 69, 26 Ga.App. 707.

42. Ga.—Jones v. Crawford, supra.

43. Pa.—Brockway v. Tillotson, 6 Pa.Co. 31.

11 C.J. p 164 note 11.

44. N.Y.—Ex p. Albany, 23 Wend. 277.

11 C.J. p 165 note 13.

45. Minn.—State v. Posz, 118 N.W. 1014, 106 Minn. 197.

11 C.J. p 165 note 14.

46. Wash.—State v. Moore, 62 P. 769, 23 Wash. 276.

11 C.J. p 165 note 15.

47. N.J.—Sayres v. Ridway, 8 N.J.Law 373.

11 C.J. p 165 note 18.

48. Or.—Garrison v. Malheur County Ct., 101 P. 900, 54 Or. 269.

49. Minn.—State v. Posz, 118 N.W. 1014, 106 Minn. 197.

50. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

11 C.J. p 165 note 17.

51. Fla.—Great American Ins. Co. of New York v. Peters, supra.

52. Iowa.—Tuttle v. Hutchison, 151 N.W. 845, 173 Iowa 503.

53. Minn.—State v. Isanti County, 107 N.W. 730, 98 Minn. 84.

54. N.J.—Zeller v. Guttenberg, 83 A. 466, 81 N.J.Law 305.

11 C.J. p 165 note 21.

55. S.D.—Van den Bos v. Douglas County, 76 N.W. 935, 11 S.D. 190.

c. The Mandate

- (1) In general
- (2) Direction as to time and place of return

(1) In General

The writ should inform the lower tribunal that it is required to make a return; and the command of the writ is regulated in consonance with the purpose sought to be accomplished.

The writ should apprise the court or tribunal to which it is directed that such court or tribunal is required to make a return of its record,⁵⁶ and should properly describe the papers and records of which a return is desired.⁵⁷ The command of the writ may be regulated in consonance with the purpose sought to be accomplished, and may be such that it will bring up from the inferior tribunal only so much of the record as is necessary for the determination of the questions at issue by the reviewing court.⁵⁸ Failure to command a certification of the facts required will not be prejudicial if the material facts are certified.⁵⁹

The mandate must be liberally construed,⁶⁰ and vagueness in the command may be disregarded if the recitals of the writ express the desire of the court to be certified of matters specified.⁶¹

(2) Direction as to Time and Place of Return

In the absence of statute or rule of court the writ is made returnable to the court out of which it issued, at the time specified in the writ.

In the absence of statute or express rule on the subject,⁶² the writ, as a matter of course, is made returnable to the court out of which it issued, and

to the judicial district or department in which the proceeding to be reviewed was had,⁶³ and to the branch or part of the court designated by rule of court,⁶⁴ and it must state the time within which it is to be returned.⁶⁵ The time for the return may be fixed by the court.⁶⁶ In a jurisdiction in which the court issuing the writ has no rule day, the writ should not be made returnable to such a day.⁶⁷

d. Signature, Seal and Teste; Revenue Stamps

The writ should be signed, sealed, and properly attested; it is not original process within the meaning of a statute requiring stamps.

The writ should be sealed⁶⁸ and properly attested;⁶⁹ but it has been held sufficient that the writ be attested and sealed by the clerk of the court without being attested in the name of the judge.⁷⁰

A writ signed in the name of the clerk of court and sealed with a common seal by the attorney suing it out is, where such is a long established practice, as operative as if signed and sealed in the clerk's office.⁷¹

A writ of certiorari has been held not to be original process within the meaning of an act of congress requiring the stamping of "writs or other original process by which a suit is commenced."⁷²

e. Indorsement

A writ brought in the name of the state must show the name of the prosecutor, by indorsement or otherwise; and generally the allowance of the writ is indorsed thereon.

When brought and prosecuted in the name of the state, the name of the prosecutor in the writ must appear by indorsement on the writ or otherwise.⁷³ Generally, the allowance of the writ is indorsed

56. Iowa.—*Tod v. Crisman*, 99 N.W. 686, 123 Iowa 693.
11 C.J. p 165 note 24.

57. N.Y.—*Sweet v. Clinton Overseers of Poor*, 3 Johns. 23.

58. Mo.—*State ex rel. Union Biscuit Co. v. Becker*, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment *Spina v. Union Biscuit Co.*, App., 273 S.W. 428.—*State ex rel. Pedigo v. Robertson*, 181 S.W. 987.

59. Iowa.—*Richman v. Muscatine County*, 26 N.W. 24, 70 Iowa 627.
11 C.J. p 165 note 26.

60. N.J.—*Danenhower v. Lippincott*, 63 A. 868, 73 N.J.Law 486.

61. N.J.—*State v. Paterson*, 39 N.J.Law 489.

62. Mass.—*Boston, etc., R. Co. v. Hampden County*, 116 Mass. 73.
11 C.J. p 165 note 29.

63. N.Y.—*Peo. v. Kelly*, 35 Barb. 444, 13 Abb.Pr. 405.
11 C.J. p 165 note 30.

64. N.Y.—*Peo. v. Kelly*, 35 Barb. 444, 13 Abb.Pr. 405.
11 C.J. p 165 note 31.

65. Tex.—*Lindheim v. Davis*, 2 Tex. A.Civ.Cas. § 108.
11 C.J. p 165 note 32.

Next term

Where petition for certiorari is filed more than twenty days before next term of superior court, it should be made returnable to that term.—*Abercrombie v. Gurley*, 94 S.E. 606, 21 Ga.App. 339.

General term

It is proper to make the writ returnable at general term.—*People v. Kelly*, 35 Barb., N.Y., 444, 13 Abb.Pr. 405.

66. Mo.—*State ex rel. Plummer v. Gardner*, 234 S.W. 53, 290 Mo. 143.

67. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

68. Fla.—*Frisbee v. Timanus*, 12 Fla. 537.
11 C.J. p 166 note 33.

69. Fla.—*Frisbee v. Timanus*, supra.
11 C.J. p 166 note 34.

70. Wash.—*Corbett v. Seattle Civ. Serv. Commn.*, 73 P. 1116, 33 Wash. 190.

71. N.J.—*Seaman v. City of Perth Amboy*, 119 A. 278, 98 N.J.Law 174, affirming 116 A.; 22, 97 N.J.Law 76.

72. Minn.—*Pierce v. Huddleston*, 10 Minn. 131.

73. N.J.—*Overseers of Poor v. Overseers of Poor*, 13 N.J.Law 289.
11 C.J. p 166 note 37.

thereon,⁷⁴ but sometimes it is indorsed on the petition for the writ.⁷⁵

§ 105. To Whom Directed

- a. In general
- b. Effect of misdirection of writ

a. In General

The writ should be directed to named parties defendant or respondent, and should be addressed to the officer or tribunal having custody of the record sought to be reviewed.

The writ is to be directed to named parties defendant or respondent,⁷⁶ and should, since the object of the writ is to procure the transmission by an inferior tribunal of its record, or a copy thereof, to the court out of which the writ issues, for the purpose of enabling the latter court to inspect such record, be directed to the court, tribunal, board, or officer that is in legal contemplation of the custody of such record.⁷⁷ So, the writ should be directed to the person or persons whose acts are the subject of review,⁷⁸ or whose return is necessary to enable the court to determine the validity or regularity of the proceedings below.⁷⁹

Where no command is made as to them, the writ is not invalidated by the insertion in the body thereof of the names of interested persons.⁸⁰

Recording officers. When the record of the inferior tribunal's proceedings is transmitted to the county clerk for the purpose of recordation among the county's records, and the inferior tribunal remains, notwithstanding such recordation, the actual and legal custodian of the record, the writ should not be directed to the county clerk, but to the tribunal or board whose proceedings are to be reviewed.⁸¹

So, where the clerk of a city or town, although he has charge of the records of the city or town, is not the legal custodian thereof, but has custody merely as agent of the city or town, the writ should not be directed to him, but to the common council of the city or to the town.⁸² Where the review is sought of a record of a court which has been abolished, the writ is properly directed to the clerk of the court having legal custody of the records of the abolished court.⁸³

Inferior courts. When a judge has acted as the presiding officer of a court, and the action to be reviewed is that of the court, and not that of the judge acting officially out of court by virtue of his office, it has been held that the writ should be directed to the court, and not to the judge,⁸⁴ although, where the court has but one judge, and he has direction and control of the record, the writ may without prejudicial error be directed to him;⁸⁵ but if the proceeding was had before the judge as an officer it is properly directed to him.⁸⁶ If it is sought not only to revise the proceedings of inferior tribunals, but also to assail rights acquired by their action, the writ may be directed to persons claiming such rights.⁸⁷

Clerk of court. It follows from what has been said as to the direction of the writ to the court or judge that it should not be directed to the clerk; but authority for such practice is not wanting where the court is a court of record.⁸⁸

Judges. Where the writ is directed to a judge it is not sufficient to state merely his official title, but his individual name should be given also.⁸⁹

Court-martial. A certiorari to review the determination of a court-martial should be directed to the president of the court.⁹⁰

74. N.Y.—*Peo. v. Onondaga C. Pl.*, 7 Wend. 516.

11 C.J. p 166 note 38.

75. Fla.—*Deans v. Wilcoxon*, 18 Fla. 531.

11 C.J. p 166 note 39.

76. Mo.—*State ex rel. Jacobs v. Trimble*, 274 S.W. 1075, 310 Mo. 150.

77. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 325, 105 Fla. 380, quoting *Corpus Juris*.

11 C.J. p 166 note 41.

78. Cal.—*Lamb v. Schottler*, 54 Cal. 319.

11 C.J. p 166 note 42.

Form of direction

Writ of certiorari directed to "Hon. L. S. Nelson, as judge of the 13th Judicial District," was not erroneous on ground that it should

have been directed to "District Court of the 13th Judicial District."—*State v. Nelson*, 161 N.W. 714, 137 Minn. 265.

79. N.Y.—*Peo. v. Hill*, 65 Barb. 170.

80. N.J.—*Hutchinson v. Rowan*, 31 A. 224, 57 N.J.Law 530.

11 C.J. p 166 note 44.

81. N.J.—*State v. Browning*, 28 N.J. Law 556.

11 C.J. p 166 note 46.

82. Wis.—*State v. Lebanon Town Clerk*, 111 N.W. 1129, 132 Wis. 103.

11 C.J. p 166 note 47.

83. Fla.—*Salario v. Latin-American Bank*, 139 So. 899, 104 Fla. 256.

84. Cal.—*Richmond v. House*, App., 96 P. 908.

11 C.J. p 166 note 48.

85. Minn.—*State ex rel. Winona & St. Peter Land Co. v. Webber*, 37 N.W. 949, 38 Minn. 397.

Utah.—*In re Goddard's Estate*, 273 P. 961, 73 Utah 298.

Formal error only

If there is but a single judge a misdirection to him is at most a mere formal error which may be disregarded.—*In re Goddard's Estate*, 273 P. 961, 73 Utah 298—11 C.J. p 167 note 50.

86. N.Y.—*Peo. v. Kelly*, 35 Barb. 444, 13 Abb.Fr. 405.

11 C.J. p 166 note 49.

87. N.J.—*State v. New Brunswick*, 42 N.J.Law 510.

11 C.J. p 167 note 51.

88. Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

11 C.J. p 167 note 52.

89. Iowa.—*Chambers v. Lewis*, 9 Iowa 583.

90. N.Y.—*Matter of Leary*, 30 Hun 394.

Municipal boards and officers. Where the writ is sought to review the action of a municipal body or of municipal officers, it should be directed to the body or officers and not to a mere subordinate officer, although he may be in actual possession of the record,⁹¹ nor to the municipality.⁹² However, in a certiorari to review a budget adopted by a city, it has been held immaterial that the writ was directed to the city instead of the city clerk.⁹³ The writ should be directed to an official body in the individual names of its members, adding the name of their office.⁹⁴ If the direction states the corporate name of a public body with such sufficient accuracy as to leave no doubt of its identity, misnomer will not invalidate the writ.⁹⁵

A writ cannot properly be directed to several officers who perform several acts for a common purpose,⁹⁶ or to officers having no joint or common duties but acting independently of each other;⁹⁷ but separate writs must run to each to bring up the particular matters with which each respectively is concerned.⁹⁸

Officer whose term has expired. The writ should not be directed to an officer whose term of office has expired, when the office is a continuing one and the records remain in the office in the custody of the incumbent.⁹⁹ There are decisions, however, which hold that the writ is properly addressed to an officer whose term has expired, but who is able to make a valid return;¹ but it would seem that the writ should be directed to an officer whose term of office has expired only when a return is sought of matters that are not regularly kept of record in the office.²

Effect of loss of control over record. Where the inferior tribunal has transmitted its record to an-

other tribunal, the writ should be directed to the tribunal having custody of the record at the time of the issuance of the writ.³

b. Effect of Misdirection of Writ

Misdirection may invalidate the writ, in whole or in part, unless amended or unless the defect is waived.

A writ may be invalidated by a misdirection,⁴ so that nothing can be removed by it,⁵ in which case, as seen in § 135, it should be superseded or quashed, unless an amendment is allowed, infra § 106; and this is so, although the parties to whom the writ is improperly directed attempt to make a return;⁶ but the objection is available to the adverse party alone.⁷

Where the writ is directed to proper parties and also to improper parties, it should not be superseded or quashed in toto. The practice is to supersede or quash the writ as to the parties improperly joined, or, on motion, to strike out such improper parties.⁸

Waiver of objections. Misdirection may be waived,⁹ as by making a proper return¹⁰ or submitting to a hearing on the merits.¹¹ Thus, where the proper officer having the keeping of the record makes return to the writ, the misdirection is waived, and the writ should not be superseded or quashed, at least on the motion of third persons.¹² So, after appearance and return, a misnomer of the officer to whom the writ is directed should be disregarded.¹³

§ 106. Defects, Objections, and Amendments

- a. In general
- b. Amendments

a. In General

Defects in the writ may be taken advantage of by motion or application to supersede, and may be waived.

91. N.J.—*Young v. Crane*, 51 A. 482, 67 N.J.Law 453.

11 C.J. p 167 note 55.

92. Wis.—*State v. Milwaukee*, 57 N. W. 45, 86 Wis. 367.

93. N.J.—*Royal Holding Co. v. City of Beverly*, 128 A. 853, 1 N.J.Misc. 453.

94. N.Y.—*Peo. v. Public Park Comrs.*, 97 N.Y. 37, 11 C.J. p 167 note 57.

95. N.Y.—*Peo. v. New York, etc., Bridge*, 37 N.Y.S. 168, 1 App.Div. 186.

96. N.Y.—*Peo. v. Hill*, 65 Barb. 170, 11 C.J. p 167 note 60.

97. Cal.—*Quinchard v. Alameda*, 45 P. 856, 113 Cal. 664, 11 C.J. p 167 note 61.

98. N.J.—*Manufacturers' Land, etc., Co. v. Camden*, 73 A. 77, 78 N.J. Law 247, affirming 79 A. 286, 73 N. J.Law 77.

99. Mich.—*Peo. v. Brennan*, 44 N.W. 618, 79 Mich. 362, 365.

N.D.—*Matter of Evingston*, 49 N.W. 733, 2 N.D. 184, 33 Am.S.R. 763, 11 C.J. p 167 note 63.

1. Dak.—*Champion v. Minnehaha County*, 41 N.W. 739, 5 Dak. 416, 11 C.J. p 167 note 64.

Return by ex official see infra § 117 a (4).

2. N.Y.—*Peo. v. Peabody*, 6 Abb.Pr. 228, 11 C.J. p 168 note 65.

3. S.C.—*State v. Moore*, 32 S.E. 700, 54 S.C. 556, 11 C.J. p 168 note 66.

4. Wis.—*State v. McGovern*, 76 N. W. 593, 100 Wis. 666, 11 C.J. p 168 note 67.

5. N.J.—*Morris Canal, etc., Co. v. State*, 14 N.J.Law 411.

6. Wis.—*State v. Everett*, 79 N.W. 421, 103 Wis. 269, 11 C.J. p 168 note 71.

7. Pa.—*Com. v. McAllister*, 1 Watts 307, 26 Am.D. 70, 11 C.J. p 168 note 72.

8. N.J.—*State v. New Brunswick St., etc., Comrs.*, 42 N.J.Law 510, 11 C.J. p 168 note 73.

9. Cal.—*Fraser v. Freelon*, 53 Cal. 644, 11 C.J. p 168 note 74.

10. Mich.—*Wilson v. Gifford*, 50 N. W. 392, 41 Mich. 417, 11 C.J. p 168 note 75.

11. N.Y.—*Peo. v. Brooklyn*, 49 Barb. 136, 11 C.J. p 168 note 76.

12. Pa.—*Com. v. McAllister*, 1 Watts 307, 26 Am.D. 70, 11 C.J. p 168 note 77.

13. N.Y.—*Peo. v. Rochester*, 50 N.Y. 525, 11 C.J. p 168 note 78.

Various formal defects, which relate to the form and contents of the writ, have been considered in § 104, and defects in the direction of the writ have been discussed in § 105, from the viewpoint of the propriety of the direction. Defects in the writ should be taken advantage of by motion¹⁴ or by application to supersede, the latter of which may be made before the filing of the return.¹⁵ Although issuance of the writ by the clerk instead of the court is irregular, such irregularity may be waived by the adoption or recognition of the writ throughout the proceedings by the parties and the court.¹⁶

b. Amendments

Formal defects in the writ may be cured by amendment.

Formal defects in the writ may be amended,¹⁷ as where the writ has improperly been entitled or indorsed,¹⁸ and when necessary it may be amended by supplying an omitted title,¹⁹ or correcting errors in the designation of the parties,²⁰ in the name of the party to whom the writ is directed,²¹ or in the time when,²² or designation of the place where, the writ is returnable;²³ by striking out that which relates to matters improperly required to be returned;²⁴ by correctly showing the nature of the action below;²⁵ by substituting a proper,²⁶ or supplying an omitted,²⁷ seal; by adding the sanction of the judge who granted it;²⁸ and by inserting the date,²⁹ or correcting the error of the clerk as to the date,³⁰

of the teste. An amendment may be permitted, although a term elapses between the teste and the return.³¹ So, in a proper case, an amendment may be allowed *nunc pro tunc*.³²

§ 107. Service

- a. In general
- b. Mode of service
- c. Appending other papers
- d. Objections and waiver thereof

a. In General

In general the writ must be served, on or before the return day, and within the time fixed by statute.

In most jurisdictions the writ, when granted, must be served.³³ The service must be made on or before the return day,³⁴ and within the time required by statute.³⁵ The delivery of a writ lawfully issued, after verdict, but before judgment is entered, will not vitiate it or prevent its subsequent operation.³⁶

Where the statutes so permit, the time for service may be extended.³⁷

b. Mode of Service

Service of the writ is by delivery to the person to whom directed by a proper officer.

The writ should be served by delivery, to the person to whom it is directed,³⁸ of the original writ

14. Mont.—State v. District Court, 190 P. 295, 298, 58 Mont. 90, quoting *Corpus Juris*.

11 C.J. p 170 note 13.

15. N.Y.—Ball v. Warren, 16 How. Pr. 379.

11 C.J. p 170 note 14.

16. Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 681, 310 Mo. 397.

Filing of return to writ of certiorari by respondents constitutes general appearance to action on merits and waives any defects in issuance of writ.—State ex rel. Davidson v. Caldwell, *supra*.

17. N.Y.—Peo. v. Feitner, 57 N.Y. S. 1062, 40 App.Div. 620.

11 C.J. p 169 note 97.

18. N.J.—State v. Justice, 24 N.J. Law 413.

11 C.J. p 169 note 98.

19. S.D.—Van den Bos v. Douglas County, 76 N.W. 935, 11 S.D. 190.

20. Pa.—Reid v. Wood, 102 Pa. 312.

11 C.J. p 169 note 1.

21. N.Y.—Peo. v. Cholwell, 6 Abb. Pr. 151.

11 C.J. p 169 note 2.

22. Mich.—Dyer v. Montieth, 1 Mich.N.P. 125.

23. N.Y.—Peo. v. Cook, 17 N.Y.S. 546, 62 Hun 303.

11 C.J. p 169 note 3.

24. N.Y.—Peo. v. Feitner, 57 N.Y. S. 1062, 40 App.Div. 620.

25. N.Y.—Knapp v. Palmer, 1 Cal. 486.

11 C.J. p 169 note 5.

26. N.Y.—Peo. v. Steuben Court, 5 Wend. 103.

27. N.Y.—Peo. v. Herkimer, etc., R. Co., 6 N.Y.Civ.Proc. 297.

28. Ga.—McDonald v. Cousins, 23 Ga. 227.

29. N.Y.—Brink v. Fulton, 1 Cow. 41.

11 C.J. p 169 note 9.

30. Ga.—Neal v. Neal, 50 S.E. 929, 122 Ga. 804.

31. N.Y.—Kissam v. Morris, 2 Wend. 259.

11 C.J. p 169 note 11.

32. N.Y.—Peo. v. Cook, 17 N.Y.S. 546, 62 Hun 303.

11 C.J. p 169 note 12.

33. Ga.—Glenn v. State, 50 S.E. 371, 122 Ga. 593.

11 C.J. p 168 note 79.

Supreme court had no jurisdiction in certiorari proceedings to review proceedings and orders of superior

court, where there was no service of writ on the superior court, no acceptance of such service, and no waiver thereof by a special appearance made in supreme court. Code 1935, § 11088.—Collins v. Powell, Iowa, 277 N.W. 477.

Writ ineffective until served

Certiorari writ issued against county superintendent in his absence, and in county other than specified in notice, bound him only from service on him.—School Dist. No. 20, Carter County v. Walden, 293 P. 199, 146 Okl. 19.

34. N.J.—State v. New Brunswick St., etc., Comrs., 37 N.J.Law 394.

11 C.J. p 168 note 80.

35. Ga.—Carter v. Cross, 128 S.E. 590, 34 Ga.App. 149.

11 C.J. p 168 note 81.

36. N.J.—Delancy v. Lawrence, 11 N.J. Law 25.

11 C.J. p 168 note 82.

37. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

Extension by judge

Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, *supra*.

38. Fla.—Great American Ins. Co.

and not by delivery of a copy,³⁹ and this is what is meant by a statute providing that the writ should be served "according to the direction thereof."⁴⁰ The writ need not in all cases be served on all the parties to whom directed.⁴¹ The writ should, it has been held, be served by an officer charged by law with the execution of process, the same as a summons,⁴² but it has been held not necessary that it be served by an officer authorized to make service of process,⁴³ and mere delivery to the person to whom it is directed,⁴⁴ or service in any manner whereby such person may reasonably be made aware of its requirement will be sufficient.⁴⁵

Service on Sunday has been held a nullity.⁴⁶

Municipalities, courts, or boards. Proper service on a county may be had by delivering the writ to the county clerk who, by admitting service in his official capacity, binds the county.⁴⁷

When the writ is addressed to a court, service on the clerk of the court is sufficient.⁴⁸

When directed to a board having more than one member, the writ may be served on the chairman of such board, especially where such service is recognized as sufficient, and return is made.⁴⁹

of New York v. Peters, 141 So. 322, 325, 105 Fla. 380, citing *Corpus Juris*.

11 C.J. p 168 note 83.

Nonresident

It is competent for the legislature to provide that service of a writ of review shall be by delivering to a nonresident personally a copy of the writ.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

Parties obtaining judgment

Failure to serve copy of writ of certiorari on parties obtaining judgment sought to be reviewed is not jurisdictional defect.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

On opposing party

Court had no jurisdiction to review secretary of state's decision canceling trade-mark, where writ was not served on opposing party.—Maizels v. Kozer, 276 P. 277, 129 Or. 100—11 C.J. p 168 note 83 [c].

39. Wis.—State v. Fond du Lac, 35 Wis. 37.
11 C.J. p 169 note 84.

40. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

41. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

42. Mo.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425.

43. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 329, 105 Fla. 380, citing *Corpus Juris*.

N.J.—State v. Dwyer, 41 N.J. Law 93.
11 C.J. p 168 note 83 [d].

44. Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.

45. N.J.—State v. Dwyer, 41 N.J. Law 93.

46. Mich.—Anderson v. Birce, 3 Mich. 280.

47. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

48. Utah.—J. B. Colt Co. v. District Court of Fifth Judicial Dist. in and for Millard County, 269 P. 1017, 72 Utah 281.

49. N.Y.—Peo. v. Webb, 21 N.Y.S. 298.

11 C.J. p 169 note 87.

50. Mich.—Parman v. Boards of School Inspectors, 12 N.W. 910, 49 Mich. 63.
11 C.J. p 169 note 88.

51. Mich.—Whistler v. Lenawee County, 39 Mich. 303.

52. N.Y.—Mott v. Rush Highway Comrs., 19 Wend. 640.

53. N.Y.—Peo. v. Perry, 16 Hun 461.

c. Appending Other Papers

Pertinent papers may be appended to the writ and served therewith.

It is proper to append to the writ and to serve therewith the papers on which it was granted, to inform the person served of the nature of the return required of him;⁵⁰ but the failure so to do will not excuse a proper return of that for which the writ plainly calls.⁵¹ A copy of the order of allowance should be served with the writ, or at least the writ should have the allowance indorsed thereon.⁵²

The petition for the writ need not, it is held in New York, be served on the officer to whom it is directed, in the absence of any statutory requirement to that effect,⁵³ but the contrary is held in Michigan.⁵⁴

d. Objections and Waiver Thereof

Defective service may be objected to by motion to supersede. Failure to serve in time is ground for dismissal. Defective service may be waived.

It has been held that the proper remedy for an improper service is to move to supersede the writ. A motion to quash in the absence of a return is irregular.⁵⁵ Failure to serve the writ in due time, where required by statute, has been a ground for dismissal.⁵⁶ However, a defective service is waived by appearance and response to the writ.⁵⁷

54. Mich.—Nightingale v. Simmons, 33 N.W. 414, 66 Mich. 528.

55. Wis.—State v. Fond du Lac, 35 Wis. 37.

Disregard of distinction between motions to quash and motions to supersede see *infra* § 134.

56. Ga.—Carter v. Cross, 128 S.E. 590, 34 Ga.App. 149.

Minn.—In re County Ditches Nos. 20, 38, 41, 49, and 53, and Judicial Ditch No. 19, Murray County, 206 N.W. 718, 165 Minn. 493.

11 C.J. p 169 note 95.

Exception

While failure to serve writ of certiorari on judge fifteen days previous to court to which return is to be made is cause for dismissal, unless failure to serve it was not fault of plaintiff therein, it will not be dismissed, unless it clearly appears that there actually was such failure.—Carter v. Cross, 128 S.E. 590, 34 Ga.App. 149—11 C.J. p 168 note 79 [d] (1), p 169 note 95 [a].

57. Iowa.—Tuttle v. Hutchison, 151 N.W. 845, 173 Iowa 503.

Mont.—State v. Napton, 62 P. 686, 24 Mont. 450.

11 C.J. p 169 note 96.

Special appearance to attack jurisdiction may be made by superior court in proceedings in supreme court to review proceedings without conferring jurisdiction, where writ was not served on superior court.

F. SUPERSEDEAS

§ 108. Writ as Stay

- a. General Rule
- b. Statutory Provisions
- c. Security

a. General Rule

The writ of certiorari takes the record out of the custody of the inferior tribunal, leaves nothing there to be prosecuted or enforced by execution, and operates as a stay of execution in the absence of any statute modifying or abrogating the common-law rule.

At common law, the writ of certiorari takes the record out of the custody of the inferior tribunal, and leaves nothing there to be prosecuted or enforced by execution, and thus, ipso facto, operates as a stay of execution.⁵⁸ This rule has been brought down to modern times and prevails universally except where it has been abrogated or modified by statute.⁵⁹

Where, under the terms of a statute an appeal from an interlocutory order does not of itself operate as a stay of further proceedings, the issuance of a writ of certiorari to review an order of

an appellate court rendered on an appeal from such an interlocutory order will not effect a stay of further proceedings in the lower court.⁶⁰

The powers of the inferior tribunal are none the less suspended after the service of the writ because, in fact, a transcript of the record, instead of the original, has been sent up.⁶¹

Special clause in the writ. Although the certiorari of itself operates as a supersedeas, it is nevertheless proper to insert a special clause in the writ directing it to operate as a supersedeas.⁶²

b. Statutory Provisions

In some states by statute the writ does not effect a stay, but the court may grant a stay, or, where the statute so provides a writ of supersedeas in aid of the certiorari may be issued on proper application.

While in some states the common-law rule that the writ operates as a stay is reiterated by statute, in others, by statute, the writ does not operate as a stay, but the court granting the writ is authorized to direct a stay,⁶³ and the mere filing of a petition

and superior court did not accept service of writ.—*Collins v. Powell*, Iowa, 277 N.W. 477.

58. N.Y.—*People ex rel. Brooklyn City R. Co. v. Public Service Commission of State of New York for First Dist.*, 181 N.Y.S. 790, 110 Misc. 509.

11 C.J. p 170 note 17.

59. U.S.—*Orth v. Steger*, D.C.N.Y., 258 F. 625.

Ariz.—*City of Phoenix v. Rodgers*, 34 P.2d 385, 44 Ariz. 40.

Fla.—*State ex rel. Tullidge v. Driskell*, 158 So. 277, 117 Fla. 717—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

Ga.—*Equitable Life Assur. Soc. of U. S. v. Culp*, 127 S.E. 225, 159 Ga. 874—*Dixon v. Sable*, 95 S.E. 240, 241, 147 Ga. 623, citing *Corpus Juris*.

Minn.—*Aylmer v. New Hampshire Sav. Bank*, 262 N.W. 257, 195 Minn. 661.

Mo.—*State ex rel. Berkshire v. Ellison*, 230 S.W. 970, 237 Mo. 654.

N.J.—*E. M. Harrison Market v. Town of Montclair*, 147 A. 502, 105 N.J.Eq. 222.

Pa.—*Rodgers v. Tranter*, 167 A. 900, 110 Pa.Super. 84, supplementing 167 A. 481, 110 Pa.Super. 84—*Emlenton Water Co. v. Kelly*, 10 Pa. Dist. & Co. 453—*Collins v. Kramer*, 14 Pa.Dist. 153.

11 C.J. p 170 note 19.

Attack on statute

Certiorari brought to contest an

election under Act April 25, 1911, P. L. p 462, and Act April 7, 1914, P.L. p 170, relating to commission form of government on the ground the acts were unconstitutional, does not suspend the working of the acts so as to prevent the commissioners from becoming the governing body of the city.—*Devlin v. Wilson*, 96 A. 42, 88 N.J.Law 180.

In action to restrain unfair competition on ground of defendant's insolvency, where court denied injunction and plaintiff sought writ of review, he was entitled to supersedeas to preserve status quo, since otherwise irreparable injury might result.—*State v. Superior Court for King County*, 163 P. 765, 95 Wash. 258.

Effect on remittitur

Where, within time prescribed by law, petition for certiorari is filed, mandate of court of appeals is held up pending disposition of certiorari by supreme court, and where certiorari is granted, remittitur is stayed until disposition thereof by supreme court.—*McRae v. Boykin*, 187 S.E. 271, 54 Ga.App. 158, conforming to *Boykin v. McRae*, 185 S.E. 246, 182 Ga. 252, reversing *McRae v. Boykin*, 179 S.E. 535, 50 Ga.App. 866.

60. U.S.—*Hanssen v. Pusey & Jones Co.*, D.C.Del., 286 F. 707, petition for rehearing and intervention denied *Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co.*, 292 F. 861, certiorari denied 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.

In federal courts

A writ of certiorari from the supreme court of the United States to a circuit court of appeals to review an order of that court entered on an appeal from an interlocutory order in the district court appointing a receiver does not stay further proceedings in the district court, since the appeal from its order did not, under the statute, so operate; but, the district court may, of its own motion, suspend further proceedings pending the decision of the supreme court on the certiorari.—*Hanssen v. Pusey & Jones Co.*, D.C.Del., 286 F. 707, petition for rehearing and intervention denied *Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co.*, 292 F. 861, certiorari denied 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.

61. N.Y.—*Patchin v. Brooklyn*, 13 Wend. 664.

62. Ala.—*John v. State*, 1 Ala. 95.

63. N.Y.—*In re Iroquois Natural Gas Co.*, 176 N.Y.S. 474.

11 C.J. p 170 note 22.

Certiorari to review public utility commissioners' order, requiring railroad to build underpass, does not carry stay ex proprio vigore.—*Lehigh Valley R. Co. v. Board of Public Utility Com'rs*, 137 A. 442, 5 N.J. Misc. 559.

Grant or denial

(1) Under Code Civ.Proc. § 2131, giving court granting writ of certiorari discretionary power to stay execution of determination to be reviewed, public service commission's

for certiorari will not operate as a stay where a statutory provision requires a writ of supersedeas in aid of the certiorari where a stay is desired.⁶⁴ Under such a provision the writ of supersedeas in aid of certiorari must be applied for after reasonable notice to the adverse party, and may be applied for with the petition for certiorari or separately; but if made separately the petition for supersedeas should show an intent to file a petition for certiorari within the time allowed. On such application the writ of supersedeas will ordinarily issue on terms or bond prescribed,⁶⁵ and when issued operates to vacate the judgment under review.⁶⁶

The issuance of a statutory writ of certiorari in Alabama has the effect of annulling the judgment of the inferior court and removing the cause to the higher court to be tried de novo with all the proceedings before the issuance of the writ intact.⁶⁷

c. Security

In some jurisdictions to effect a stay security is or may be required.

It has been held in Pennsylvania that, where the writ is in substance a writ of error, it will not operate as a supersedeas, unless bail is given.⁶⁸ So, in Iowa the court or judge granting the writ can require a bond.⁶⁹

On certiorari, to review a proceeding to extend time for redemption from foreclosure, plaintiff may be required to file a supersedeas bond or pay the

clerk of the lower court the monthly payments required to be paid defendant as a condition for extension in default of the bond.⁷⁰

§ 109. Commencement and Termination of Stay

The writ operates as a stay when, and not until, it is delivered to the one to whom directed. Duration of the stay may be fixed by statute, and in some instances continues until the cause is remitted or the supersedeas discharged.

The writ takes effect as a supersedeas on its being delivered to the officer to whom it is directed.⁷¹ It follows that mere notice of a petition for the writ does not operate as a supersedeas,⁷² and that the mere recital in a supersedeas of a certiorari is insufficient to suspend the proceedings.⁷³ When the duration of a stay is fixed by statute a stay for a longer period cannot be ordered.⁷⁴

It is held in New Jersey that, although the writ is dismissed, the inferior court is without authority to proceed, until the cause is remitted or the supersedeas discharged.⁷⁵ On the other hand, in Georgia it is held that the inferior court may proceed after the dismissal or overruling of the certiorari, before any order or mandate from the superior court is filed with the inferior court.⁷⁶

§ 110. Extent of Stay

a. In general

b. Collateral proceedings

order fixing rates for natural gas will be stayed pending review thereof on writ of certiorari, where application was made on notice under Public Service Commissions Law § 23 subd. 2.—*In re Iroquois Natural Gas Co.*, 176 N.Y.S. 474.

(2) In view of Labor Law § 20, as amended by L.1913 c 492, requiring the completion of the flooring or the filling in between the floors, or the laying of the underflooring on each story as the building progresses, and Building Code § 195, containing similar provisions as to flooring, and where an order of the building superintendent under Greater New York Charter §§ 406, 411, prohibiting relator, a subcontractor, from proceeding with skeleton steel work to the height of seven stories on a building in which no floors had been filled in, had been affirmed by the board of appeals without modifying it as permitted by § 719, a restraining order in relator's certiorari would be denied.—*People ex rel. Levering & Garrigues Co. v. Leo*, 184 N.Y.S. 118, 112 Misc. 325.

Stay of mandate pending application
Timely application must be made

to court of appeals for stay of mandate pending application for certiorari for conflict of decisions.—*State ex rel. Al. G. Barnes Amusement Co. v. Trimble*, 300 S.W. 1064, 318 Mo. 274.

64. Tenn.—*Red Top Cab Co. v. Gar-sides*, 298 S.W. 263, 155 Tenn. 614.—*Scales v. James*, 9 Tenn.App. 306.

65. Tenn.—*Red Top Cab Co. v. Gar-sides*, 298 S.W. 263, 155 Tenn. 614.

66. Tenn.—*Rhea County v. White*, 43 S.W.2d 375, 163 Tenn. 388.

67. Ala.—*Waltman v. Ortman*, 170 So. 545, second case, 233 Ala. 170, denying certiorari 170 So. 545, 27 Ala.App. 269, first case—*Foley v. Armstrong*, 170 So. 547, 27 Ala.App. 201, certiorari denied, 170 So. 548, 233 Ala. 175.

Before writ issued

Issuance of writ of garnishment by inferior civil court in action in assumpsit before defendant's petition for statutory certiorari was granted by circuit court is within civil court's jurisdiction.—*Waltman v. Ortman*, 170 So. 545, second case, 233 Ala. 170, denying certiorari 170 So. 545, 27 Ala.App. 269, first case—

Foley v. Armstrong, 170 So. 547, 27 Ala.App. 201, certiorari denied 170 So. 548, 233 Ala. 175.

68. Pa.—*Meany v. Cannon*, 11 Pa. Dist. 25.

11 C.J. p 170 note 24.

69. Iowa.—*State v. Buchanan County Dist. Ct.*, 50 N.W. 677, 84 Iowa 167.

Bond as condition to grant of writ see supra §§ 90-97.

70. Minn.—*Aylmer v. New Hampshire Sav. Bank*, 262 N.W. 257, 195 Minn. 661.

71. N.Y.—*Case v. Shepherd*, 2 Johns. Cas. 27.

11 C.J. p 170 note 26.

72. Mass.—*In re Adams*, Petitioner, 10 Pick. 273.

73. N.J.—*McWilliams v. King*, 32 N. J.Law 21.

74. N.Y.—*Bergemann et al. v. State Liquor Authority*, 291 N.Y.S. 696, 249 App.Div. 737.

75. N.J.—*State v. Adams*, 24 A. 482, 54 N.J.Law 506.

76. Ga.—*Equitable Life Assur. Soc. of U. S. v. Culp*, 127 S.E. 225, 159 Ga. 874.

11 C.J. p 171 note 30.

- c. Parties affected
- d. Correction of record

a. In General

Service of the writ operates as a supersedeas merely to suspend proceedings and does not prevent any proceedings not inconsistent with the dormant character of the determination so far as its enforcement is concerned.

The service of the writ acts as a supersedeas merely to suspend proceedings. The proceedings below are not reversed by the stay, but are merely suspended until the further action of the reviewing court;⁷⁷ and notwithstanding the supersedeas or stay, the judgment or order may be given in evidence or any other proceedings may be taken not inconsistent with the dormant character of the determination so far as its enforcement is concerned.⁷⁸ Furthermore, it has been held that the writ will not prevent the filing of a supplemental opinion;⁷⁹ the issuance of a dispossession warrant;⁸⁰ the giving of notice of the entry of judgment or of an order, so as to set to time running within which to settle a bill of exceptions;⁸¹ the holding of a new election under a law other than that under which the determination to be reviewed was had;⁸² or an action in an independent although incidental proceedings;⁸³ nor will the writ affect matters outstanding and not removed by it.⁸⁴

The writ, as a supersedeas, never has a retrospective action.⁸⁵

b. Collateral Proceedings

Collateral proceedings are not stayed.

The writ of certiorari operates as a supersedeas on the further prosecution of the proceedings removed for review only, and does not stay collateral proceedings.⁸⁶ Thus, the pendency of certiorari proceedings to review a decree in a suit does not operate as a stay in another suit involving the same subject matter between one of the parties to the first suit and a third person.⁸⁷

c. Parties Affected

The writ as a supersedeas affects only the inferior tribunal and the parties to the proceeding.

The suspensory power of the writ operates on the court and parties directly connected with the proceedings,⁸⁸ and also on those concerned in the matter who have notice of the writ.⁸⁹ On the other hand, the writ does not operate as a stay on any other than the inferior tribunal and the parties.⁹⁰

d. Correction of Record

After service of the writ the inferior tribunal may not alter its record or decree.

After the certiorari has been served on the inferior tribunal, the latter is powerless to alter its record or decree even for the purpose of correcting mistakes, unless the record itself furnishes the means of making the correction, or the error is a mistake in the arithmetic of the court. Such correction should be made, if at all, for the purpose of enabling the court to obey the command to send up the record, which means the correct and true record.⁹¹

77. Okl.—School Dist. No. 20, Carter County, v. Walden, 293 P. 199, 146 Okl. 19.
11 C.J. p 171 note 31.

Effect on injunction

A preliminary writ issued by supreme court on application for writ of certiorari, following grant by district court of preliminary injunction against the public service commission, does not vacate the injunction so as to permit the commission to proceed, but merely preserves the existing status.—Crowell & Spencer Lumber Co. v. Louisiana Public Service Commission, 102 So. 866, 157 La. 676.

On removal of officers

Certiorari proceeding to review removal of school district officer did not give district court jurisdiction to restore removed officer prior to hearing of response to writ, and such order was void.—School Dist. No. 20, Carter County v. Walden, 293 P. 199, 146 Okl. 19.

78. Wis.—State v. Burnell, 78 N.W. 425, 102 Wis. 232.
11 C.J. p 171 note 32.

79. Pa.—Leister's App., 11 A. 387, 7 Pa.Cas. 509.

80. N.Y.—Launitz v. Dixon, 7 N.Y. Super. 249.

81. Wis.—State v. Burnell, 78 N.W. 425, 102 Wis. 232.
11 C.J. p 171 note 35.

82. N.J.—State v. Simon, 22 A. 120, 53 N.J.Law 550.

83. N.Y.—Ashworth v. Wrigley, 1 Paige 301.
11 C.J. p 171 note 37.

84. Pa.—Com. v. Kistler, 24 A. 216, 149 Pa. 345.
11 C.J. p 171 note 38.

85. Ga.—Johns v. McBride, 112 S.E. 831, 28 Ga.App. 686.
11 C.J. p 171 note 39.

86. Me.—State v. Madison, 63 Me. 546.

87. U.S.—Manners v. Famous Play-

ers-Lasky Corporation, D.C.N.Y., 262 F. 811.

88. Pa.—Com. v. Kistler, 24 A. 216, 149 Pa. 345.
11 C.J. p 171 note 41.

89. N.J.—State v. Lambertville, 46 N.J.Law 59.

90. Pa.—Com. v. Kistler, 24 A. 216, 149 Pa. 345.
11 C.J. p 171 note 43.

Members of school board

Certiorari proceeding to review removal of school district officer does not vest district court with jurisdiction to enjoin other members from acting as members of school board.—School Dist. No. 20, Carter County, v. Walden, 293 P. 199, 146 Okl. 19.

91. Ala.—Nashville, C. & St. L. Ry. Co. v. Town of Boaz, 147 So. 195, 226 Ala. 441.
Mo.—State ex rel. Adler v. Ossing, 79 S.W.2d 255, 256, 336 Mo. 386, quoting *Corpus Juris*.
11 C.J. p 171 note 44.

§ 111. Stay Independent of Writ

- a. In general
- b. Proceedings after judgment

a. In General

In a proper case a stay may be granted or obtained independently of the writ, as on application for the writ or where the writ does not operate as a stay.

As shown in § 108, in the absence of a statute to the contrary, the writ of certiorari is of itself, proprio vigore, a supersedeas, but independently of the writ of certiorari further proceedings in the trial court may be stayed either by the trial court or the higher court, pending determination of an application for certiorari, or where in the particular case the writ of certiorari does not effectuate a stay. In a proper case a trial court may postpone further proceedings pending decision on a writ of certiorari which was not effective as a stay of proceedings in the trial court.⁹² In like manner, where authorized by statute, the court before which the application for the writ is pending may suspend or modify the decision of the lower court pending the application for the writ of certiorari.⁹³ Under a proper rule of court the filing with a court of notice of intention to apply to the higher court for writs of certiorari and review may be sufficient to suspend further proceedings in the lower court, at least for the time allowed for the filing of the application for the writ.⁹⁴ In New Jersey, it has been the practice for the "superior" court to issue

a writ of supersedeas along with and to accompany the writ of certiorari, but it has been there regarded as essential that the supersedeas be supported by the writ of certiorari.⁹⁵ This writ of supersedeas, however, when issued, is merely a cautionary measure, intended as a notice that unless further proceedings are stopped liability will be incurred.⁹⁶

b. Proceedings after Judgment

Proceedings after judgment may be stayed by writ of supersedeas or independent order. Execution may be stayed by the trial court pending determination of an application for certiorari; but after execution has issued certiorari will not effect a stay, but a formal supersedeas or order is required.

Proceedings subsequent to the judgment may be stayed by a writ of supersedeas or by an independent order,⁹⁷ as may the enforcement of a municipal resolution, until its validity is determined.⁹⁸ However, where the writ of certiorari is effective as a stay, the refusal to grant a stay will not change the effect of the writ.⁹⁹

In a proper case, a bond may be required as a prerequisite to granting a stay order after judgment.¹

Execution may be stayed by the trial court to await the determination of an application for a certiorari. When such a stay is granted the court must be satisfied of the good faith of applicant and must provide for sufficient security and a prompt presentation of the petition of the writ.²

92. U.S.—*Hanssen v. Pusey & Jones Co.*, D.C.Del., 286 F. 707, petition for rehearing and intervention denied, C.C.A., *Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co.*, 292 F. 861, certiorari denied 44 S. Ct. 36, 263 U.S. 703, 68 L.Ed. 517.

93. U.S.—*Magnum Import Co. v. Coty*, 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922.

United States supreme court

(1) Petition to suspend or modify decree of the circuit court of appeals pending application to the supreme court for a writ of certiorari should in the first instance be made to the circuit court of appeals. While the circuit court of appeals may, in its discretion, facilitate an application to the supreme court for a writ of certiorari by withholding its mandate or suspending its decree, this is a matter wholly within its discretion, and refusal to do so involves no disrespect for the supreme court.—*Magnum Import Co. v. Coty*, supra.

(2) When the circuit court of appeals refuses to withhold its mandate or suspend its decree pending application to the supreme court for writ of certiorari, it requires an extraor-

dinary showing before the supreme court will grant a stay, and, even after it has granted the writ of certiorari, a clear case and a decided balance of convenience must exist.—*Magnum Import Co. v. Coty*, supra.

(3) Under Judicial Code § 262, Comp.St. § 1239, authorizing issuance of writs necessary for exercise of jurisdiction, the supreme court has jurisdiction to suspend or modify order or decree of the circuit court of appeals pending application for writ of certiorari in trade-mark case, which it has jurisdiction to review under § 240, Comp.St. § 1217, and § 128, as amended by Act Jan. 28, 1915 § 2, Comp.St. § 1120.—*Magnum Import Co. v. Coty*, supra.

94. La.—*Fundenberg v. Southern Pub. Co.*, 73 So. 850, 140 La. 745—*Conner v. Southern Pub. Co.*, 73 So. 849, 140 La. 745—*Voss v. Southern Pub. Co.*, 73 So. 849, 140 La. 744—*Hussey v. Southern Pub. Co.*, 73 So. 849, 140 La. 744—*Salittes v. Southern Pub. Co.*, 73 So. 847, 140 La. 739.

95. N.J.—*McWilliams v. King*, 32 N.J.Law 21.
11 C.J. p 171 note 48.

Outstanding process

As stated in this case, which denied the practice in that state, it seems that by the common-law practice, where a warrant or other process issued before the receipt of the writ of certiorari, it should be superseded at once by the tribunal to which the writ is addressed.—*McWilliams v. King*, 32 N.J.Law 21—11 C.J. p 171 note 47.

96. N.J.—*Kingsland v. Gould*, 6 N. J.Law 161.

97. La.—*State v. St. Paul*, 28 So. 973, 104 La. 203.
11 C.J. p 171 note 51.

98. Wis.—*Gaertner v. Fond du Lac*, 34 Wis. 497.

99. N.Y.—*Conover v. Devlin*, 24 Barb. 636, 26 Barb. 429, 5 Abb.Pr. 182, 14 How.Pr. 348.

1. Iowa.—*Hoskins v. Hotel Randolph Co.*, 221 N.W. 442, 206 Iowa 932.

2. U.S.—*Orth v. Steger*, D.C.N.Y., 258 F. 625.
11 C.J. p 171 note 50.

In a jurisdiction wherein the writ of certiorari does not operate as a stay, but to accomplish this it is necessary to obtain a writ of supersedeas in aid of the certiorari, execution may issue on a judgment within the time allowed therefor, notwithstanding a petition for certiorari, unless within that time application is made for a writ of supersedeas in aid of the certiorari. The application for supersedeas should be made before execution issues, as supersedeas will not discharge the lien of an execution on land.³

When the certiorari is allowed after an execution has been issued on the judgment of the inferior court, such execution is not superseded, and the sheriff may proceed with the levy. It has been held that a formal supersedeas or order is necessary, in such a case, to stay proceedings.⁴

§ 112. Vacation of Supersedeas

Whether, having allowed the writ, the court can order that it shall not operate as a stay is doubtful.

It is doubtful whether the court, having allowed the writ, has power to make an order that the writ shall not operate as a stay. It would seem that the inferior court would be powerless to proceed, notwithstanding the vacation of the stay,⁵ and that the only course is to vacate the writ of certiorari, which, as shown in § 135, may always be done when it has been allowed improvidently.

§ 113. Liability for Disobedience of Supersedeas

To proceed in spite of the supersedeas is a contempt of court, and a trespass for which damages may be had.

Further proceedings by the officers to whom the writ is directed constitute a contempt of court, and a trespass for which they are liable in damages,⁶ and persons who violate the supersedeas, even though not parties to the writ, are punishable where they have acted as agents of the ones named therein.⁷

G. RETURN OR ANSWER

§ 114. Nature and Distinctions

The return, sometimes called an answer, is a formal transcript of the record, or so much of it as the writ requires, and a statement, where proper or necessary, of relative matters not appearing in the record. It is the only proper pleading of respondent to the writ, and even though called an answer is not to be confused with an answer as in pleading, or an answer to an application for the writ.

The court, board, or tribunal to which the writ of certiorari is directed, in obedience to the command of the writ, makes a formal transcript of its record, or such portion thereof as is designated in the writ; and in addition to such transcript, when required so to do, or when it is otherwise permissible and expedient, it makes a statement of such matters relative to its proceedings as are not contained in its record, and transmits the same to the court issuing the writ. Such transcript and statement are called the return, and such return is the only pleading on the part of

defendant.⁸ Occasionally, the return is called the answer, as is the case in Georgia under the statute there in force, but in the sense in which the term is used in pleading, no answer is made in proceedings by certiorari, but the hearing is had on the writ and the return as previously defined, the return constituting both answer and evidence.⁹ However, as already pointed out supra § 86, in some states, on application for the writ, what is called an answer is interposed, but this is to be distinguished from a return or answer "after" the issuance of the writ, although governed, more or less, by the same rules.

§ 115. Necessity of

Generally, a formal return is necessary before the reviewing court will consider the proceedings or determination below; but in a proper case the court may dispense with the necessity of a formal return, and it has been affirmed and denied that the parties may waive the requirement.

3. Tenn.—Red Top Cab Co. v. Gar-sides, 298 S.W. 263, 155 Tenn. 614.—Scales v. Jones, 9 Tenn.App. 306. 11 C.J. p 171 note 31 [b].

4. Wis.—State v. County Board of Sup'rs of Sheboygan County, 216 N.W. 144, 194 Wis. 456. 11 C.J. p 172 notes 54, 55.

5. N.Y.—Conover's Case, 5 Abb.Pr. 182. 11 C.J. p 172 note 56.

6. N.J.—McQuade v. Emmons, 38 N.J.Law 397. 11 C.J. p 172 note 58.

7. Cal.—Marblehead Land Co. v. Su-

perior Court in and for Los Angeles County, 213 P. 718, 60 Cal. App. 644.

State highway officials, proceeding with the construction of a highway across land, the proceedings for the condemnation of which are sought to be reviewed, are punishable for contempt in violating the supersedeas, although not parties to the writ of review.—Marblehead Land Co. v. Superior Court in and for Los Angeles County, supra.

8. Or.—Roethler v. Cummings, 165 P. 355, 84 Or. 442.

9. Cal.—Jones v. Police Court of

City of Alhambra, 260 P. 919, 86 Cal.App. 332—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal. App. 392.

11 C.J. p 172 note 59.

Return as answer

Return to writ of review constitutes answer and evidence, case being heard thereon, unless, on motion, additional or amended return is made.—Jones v. Police Court of City of Alhambra, 260 P. 919, 86 Cal. App. 332—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal.App. 392—11 C.J. p 172 note 59 [a].

A formal legal return is generally a prerequisite to the jurisdiction of the court to review the proceedings or determination below,¹⁰ and until it is made the court will not render any judgment or make any order except for the purpose of enforcing obedience to the writ and compelling the making of a return;¹¹ but it has been held that, to avoid a failure of justice, the cause may be heard without a formal return, as where the justice to whom the writ was directed has died before making a return.¹² So, where the court below was improperly organized because one of the judges had no power to sit, it is proper to grant the writ and at once remand the case so that it may be heard and disposed of in the lower court conformably to the statute, instead of holding the case on the docket for ultimate decision on the merits, and in such a case the record of the writ will be allowed to stand as a return.¹³

Where no return is made the record cannot be supplied by a stipulation by the attorneys of the parties which purports to set forth the facts,¹⁴ nor by a paper signed by them and purporting to give a history of the action.¹⁵ Where no return is made, the court is without jurisdiction, notwithstanding defendant files an answer, when there is no certified copy of the proceedings sought to be reviewed, or an agreed statement of facts relating thereto, before the court.¹⁶ On application for certiorari and prohibition, where no return is made, the averments of the application must be accepted as true.¹⁷

Waiver. There are holdings to the effect that a return may be waived by the parties to the writ,¹⁸ but a mere nominal party to the proceedings who

is simply the custodian of the record cannot waive the necessity of a return.¹⁹

§ 116. Who May and Should Compel

The prosecutor of the writ has the duty to see that a return is made.

Although it is the duty of the officers to whom the writ is directed to prepare their return, and although they may be compelled summarily to make a return, it is incumbent on the prosecutor of the writ rather than the party adverse to him to see that the return is made, and to invoke the aid of the court to compel compliance with the mandate of the writ;²⁰ and it even has been said that defendant should not be permitted to compel the making of a return.²¹

§ 117. Who May Make or Prepare

- a. Who may make
- b. Who may prepare

a. Who May Make

The return should be made only by the court or officer who is custodian of the record and to whom the writ is properly directed. Unofficial or unauthorized returns cannot be received.

The return should be made by the officer to whom the writ is directed.²² It should not, however, be made by a person to whom the writ is improperly directed, and if made by such person will be disregarded.²³ The reviewing court cannot receive an unofficial or unauthorized return,²⁴ a return made by a person incompetent to accept service,²⁵ or a voluntary return of a state of facts made without legal authority.²⁶

10. Cal.—Pacific Home Bldg. Realty Co. v. Daugherty, 243 P. 473, 75 Cal.App. 623—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal. App. 392.

11 C.J. p 172 note 63.

Submission before return premature

Where no return is made, and there is no evidence that the writ was ever served, and the record of the court below is incomplete in material matters, submission of the case in certiorari is premature.—Mason v. District Court of Black Hawk County, Iowa, 227 N.W. 517.

Answer as return

A return, and not an answer, should be made although an answer may be treated as a return if sufficient for that purpose.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

11. N.Y.—Peo. v. McCraney, 21 How.Pr. 149.

12. N.Y.—Seymour v. Webster, 1 Cow. 168.

11 C.J. p 172 note 65.

13. U.S.—William Cramp, etc., Ship, etc., Bldg. Co. v. International Curtiss Mar. Turbine Co., Pa., 33 S.Ct. 722, 228 U.S. 645, 57 L.Ed. 1003.

14. N.J.—Pierson v. Klahre, 43 A. 569.

11 C.J. p 173 note 68, p 179 note 62.

15. N.J.—State v. Ocean Grove Camp Meeting Assoc., 32 A. 695, 58 N.J.Law 123.

16. Cal.—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal. App. 392.

17. La.—Phoenix Building & Homestead Ass'n v. Maloney, 151 So. 427, 178 La. 353.

18. W.Va.—Cushwa v. Lamar, 32 S. E. 10, 45 W.Va. 326.

11 C.J. p 173 note 67.

19. Wis.—State v. Lien, 87 N.W. 1113, 112 Wis. 282.

20. Ala.—Petition of Curtis, 81 So. 145, 16 Ala.App. 653.

N.J.—Edwards & Christ Co. v. H. L. Regan, Inc., 128 A. 797, 3 N.J.Misc. 476.

11 C.J. p 173 note 70.

21. N.Y.—Marsh v. Eastman, 3 Cow. 58.

22. W.Va.—Bee v. Seaman, 15 S.E. 173, 38 W.Va. 381.

11 C.J. p 173 note 72.

23. Mich.—Roberts v. Cottrellville Highway Comrs., 24 Mich. 182.

11 C.J. p 173 note 73.

24. N.J.—Moore v. Hamilton, 24 N. J.Law 532.

11 C.J. p 179 note 58.

25. Wis.—State v. Everett, 79 N.W. 421, 103 Wis. 269.

26. N.J.—Moore v. Hamilton, 24 N. J.Law 532.

A return by a party to the cause, the record of which is sought to be reviewed, has no place in the proceedings and serves no purpose, and is properly stricken on motion.²⁷

Where jurisdiction of the proceedings and the custody of the records thereof are transferred to another court, the court before which the proceedings were instituted cannot return the record, although the writ was improperly directed to it.²⁸

Inferior courts. On certiorari to bring up the record of an inferior court, the return should be made by the court²⁹ or the judge to whom the writ is directed.³⁰ In California, however, it is held that the return should be made by the clerk.³¹

If a return is made by a clerk, he, in preparing the return, acts under the direction of the court.³² So, if the object is to correct the record brought up by a writ of error, the writ may be responded to by the clerk, although directed to the court.³³

The return should be made by at least a quorum of the court as constituted at the time the writ was applied for,³⁴ and when the object is to supply facts not shown by the record, the return should be made by all the magistrates who took part in the trial.³⁵

Public boards and officers. The board or body whose determination is sought to be reviewed and which retains or controls the record must make the return.³⁶ When the writ is directed to a board, the return should not be made by individual members thereof,³⁷ although it would seem that it is sufficient if a majority of the members of the board concur in making the return.³⁸

Custodian of the record. The return should be made by the officers or persons who are the legal

custodians of the record sought to be reviewed, and cannot be made by anyone else.³⁹ It follows that it is a sufficient return that respondent has in good faith parted with control of the record sought to be produced.⁴⁰

Ex-officials. An officer before whom the cause was tried, or before whom the proceedings were conducted, cannot make return after he has retired from office, where the office is a continuing one and such retired officer is no longer the custodian of the record,⁴¹ unless a personal return is desired.⁴² He may, however, return that which was done by him while in office,⁴³ and officers of a continuous body who succeed those whose action is sought to be reviewed may make a return, provided they control the record,⁴⁴ while the return may be made by their predecessors in office if the record is still in their custody.⁴⁵

b. Who May Prepare

A return may be prepared by anyone if properly sanctioned by the tribunal to which the writ is directed.

If a return is sanctioned by the court or tribunal to which the writ is directed, it is immaterial by whose hand it was actually made.⁴⁶

Whether attorney may make return. An answer in the nature of a demurrer to the petition, when allowable, supra § 86, may be made by attorney;⁴⁷ but a return, or an answer which contains allegations and denials of matters of fact and which partakes of the nature of a return, cannot be made and signed by counsel.⁴⁸ In New York, however, it has been held that a return is not objectionable, although drawn by the attorney for the respondent, but the rule is stricter where it is drawn by the attorney for the party suing out the writ.⁴⁹

27. Mo.—State ex rel. Johnson v. Arnold, 297 S.W. 59, 317 Mo. 858.

28. Mass.—Com. v. Winthrop, 10 Mass. 177.

29. Mich.—Stevens v. Ottawa Probate Judge, 118 N.W. 17, 154 Mich. 509.
11 C.J. p 173 note 77.

30. Mich.—Stevens v. Ottawa Probate Judge, 118 N.W. 17, 154 Mich. 509.
11 C.J. p 173 note 78.

31. Cal.—Onesti v. Freelon, 61 Cal. 625.
11 C.J. p 173 note 79.

32. N.J.—Mann v. Drost, 18 N.J. Law 336.

33. U.S.—Stewart v. Ingle, D.C., 9 Wheat. 526, 6 L.Ed. 151.

34. Mo.—State v. Souders, 69 Mo. App. 472.
11 C.J. p 173 note 82.

35. Ga.—Marchman v. Todd, 15 Ga. 25.

36. Wis.—State v. Manitowoc, 66 N.W. 702, 92 Wis. 546.
11 C.J. p 173 note 84.

37. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.
11 C.J. p 173 note 85.

38. N.Y.—Peo. v. Cholwell, 6 Abb. Pr. 151.
11 C.J. p 173 note 86.

39. N.J.—State v. Rowan, 31 A. 224, 57 N.J. Law 530.
11 C.J. p 173 note 74.

40. S.C.—State v. Moore, 32 S.E. 700, 54 S.C. 556.

41. W.Va.—Bee v. Seaman, 15 S.E. 173, 36 W.Va. 381.
11 C.J. p 174 note 88.

42. Mich.—Whistler v. Willson, 39 Mich. 121.

43. N.Y.—Conover v. Devlin, 15 How.Pr. 470.

11 C.J. p 174 note 90.

44. Mass.—Collins v. Holyoke, 15 N.E. 908, 146 Mass. 298.

45. N.Y.—Peo. v. Stillings, 78 N.Y. S. 333, 75 App.Div. 569.

46. N.J.—Smick v. Opdycke, 12 N.J. Law 347.
11 C.J. p 174 note 92.

47. Mass.—Chase v. Springfield Bd. of Aldermen, 119 Mass. 556.
11 C.J. p 174 note 93.

48. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.
11 C.J. p 174 note 94.

49. N.Y.—Smith v. Johnston, 30 How.Pr. 374.
11 C.J. p 174 note 95.

§ 118. Time for Return

The time for return is frequently regulated by statute. Return should be made not later than the day on which the writ is returnable, but in a proper case an extension of time may be allowed.

The return should be made not later than the day on which the writ is returnable, although it may be made at any time during such day, in the absence of statutory provisions to the contrary.⁵⁰ The time and place of the return may be fixed by the court in its discretion.⁵¹ When so required by statute, the return must be filed on the first day of the term to which the writ is returnable,⁵² unless further time is given.⁵³ In a proper case, it has been held that an extension of time may be granted,⁵⁴ in which case, of course, the return must be made not later than the day to which the time has been extended.⁵⁵ After adjournment of the term to which the writ was returnable, a grant of further time in which to file an answer or return is improper.⁵⁶

While a return may be made before the return day, no jurisdiction is conferred thereby until the return day.⁵⁷

The writ of certiorari cannot properly be answered until after sanction of the petition or issuance of the writ.⁵⁸

§ 119. Annexation to Writ, and Filing

The return should be properly attached to the writ, and filed.

It is not proper to transmit the return to the reviewing court as a loose and fragmentary paper, but it should be properly attached, by wafers or otherwise, to the writ,⁵⁹ and filed.⁶⁰

§ 120. Formal Matters

A return should be signed and sealed, but verification is unnecessary.

The return should purport to be a return,⁶¹ and should be signed⁶² by all members when addressed to a board,⁶³ and sealed;⁶⁴ but it need not be verified.⁶⁵ A return signed by the members of a board is presumed to be under their official oaths, without further affidavit.⁶⁶

Where a return includes a transcript of the testimony given at the hearing in the proceeding sought to be reviewed, the transcript need not be signed by the witnesses who gave the testimony.⁶⁷

§ 121. Contents in General

- a. General statement
- b. Unauthorized or irrelevant matter
- c. Certification of new matter

a. General Statement

The return must contain everything commanded by the writ or required by the practice, and must disclose something on which the reviewing court can act and pass on the legality of the proceedings below. Only one judgment may be returned under one writ.

The return must contain everything commanded by the writ or required by the practice.⁶⁸ It is suf-

50. Mo.—Hill v. Young, 3 Mo. 327.

51. N.Y.—In re Call, 272 N.Y.S. 149, 151 Misc. 649.

52. Ga.—Carroll v. Upchurch, 104 S.E. 16, 25 Ga.App. 646—Henry v. American Ry. Express Co., 104 S.E. 16, 25 Ga.App. 646.

11 C.J. p 174 note 96 [a].

Effect of local practice

Where the answer to the writ of certiorari was not filed at the term to which it was returnable, and no order was made directing magistrate to answer, the petition for certiorari, on motion of defendant on certiorari, should be dismissed on that ground, although answer was filed before the case was reached in order for a hearing, and a local practice permitted such delay in the filing of such answers.—Henry v. American Ry. Express Co., *supra*.

53. Ga.—Carroll v. Upchurch, 104 S.E. 16, 25 Ga.App. 646.

54. N.J.—Kirby v. Coles, 14 N.J. Law 576.

11 C.J. p 174 note 98.

55. Wash.—State v. Pacific County Super. Ct., 89 P. 479, 46 Wash. 169.

56. Ga.—Carroll v. Upchurch, 104 S.E. 16, 25 Ga.App. 646.

It is duty of plaintiff in certiorari during the first term to discover that no answer has been filed, and to take an order requiring it to be filed within some specified time, in view of Civ.Code 1910 § 5195.—Carroll v. Upchurch, *supra*.

57. N.Y.—Hochstrasser v. Wolgrove, 2 Hill 386—Sawyer v. Wood, 18 Wend. 681.

58. Ga.—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203—Henry v. American Ry. Express Co., 104 S.E. 16, 25 Ga.App. 646.

Premature answer

A certificate by the magistrate, admitting the truth of the allegations in the petition for certiorari, entered on or attached to the petition before it has been sanctioned or the writ of certiorari has been issued, cannot be considered as an answer to the writ, and the magistrate is without authority to answer certiorari until the issuance of the writ.—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203—Henry v. American Ry. Express Co., 104 S.E. 16, 25 Ga.App. 646.

59. W.Va.—Cushwa v. Lamar, 32 S.E. 10, 45 W.Va. 326.

11 C.J. p 179 note 66.

60. Mo.—State v. St. Louis, 67 Mo. 113.

11 C.J. p 179 note 67.

61. W.Va.—Cushwa v. Lamar, 32 S.E. 10, 45 W.Va. 326.

11 C.J. p 174 note 1.

62. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

11 C.J. p 174 note 2.

63. Mass.—Byfield v. City of Newton, *supra*.

64. Pa.—Sechrist v. York R. Co., 26 Pa.Dist. 658.

11 C.J. p 174 note 3.

65. Ga.—Goodwin v. State, 191 S.E. 287, 288, 55 Ga.App. 748, citing *Corpus Juris*.

11 C.J. p 174 note 4.

66. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

67. Ill.—McCarthy v. Geary, 229 Ill. App. 414.

68. Ga.—Stouffer v. Missenheimer, 106 S.E. 560, 26 Ga.App. 554.

11 C.J. p 174 note 5.

ficient if it is confined to the matters specified in the writ,⁶⁹ and it is insufficient if it does not comply with the mandate of the writ.⁷⁰ It must show, in a court proceeding, the rendition of a judgment.⁷¹ It must also disclose something on which the reviewing court can act.⁷² It should contain specific statements of fact, and not conclusions or opinions,⁷³ and must be sufficient to enable the reviewing court to pass on the legality of the proceedings below.⁷⁴ A mere statement, in narrative form, of the history of the case is not a proper return to the writ.⁷⁵

It is permissible and proper to set forth in the return extrinsic facts to show that substantial justice does not require that the proceedings to be reviewed be quashed.⁷⁶

Exceptions. The exceptions taken should be returned, where reviewable on certiorari.⁷⁷

Distinct determinations. Two or more judgments cannot be returned under one writ,⁷⁸ but a return is not objectionable because certifying two distinct final determinations made in the same proceedings.⁷⁹

b. Unauthorized or Irrelevant Matter

- (1) In general
- (2) Striking out

(1) In General

Unauthorized or irrelevant matter should not be included in the return.

Great liberality is allowed officers and boards in making returns, as to the facts on which they based their action,⁸⁰ but the return should not include

matters not commanded to be returned,⁸¹ or not required by the practice,⁸² matters not appearing on the face of the record,⁸³ or matter which is neither a part of the record nor of the proceedings to be reviewed.⁸⁴ So, it has been held that a certificate as to what has occurred before the judge of the lower court prior to and after trial, made merely at the request of the prosecutor's attorney, and not called for by any rule of the court issuing the writ, will not be considered.⁸⁵

Reference in the return to a controversy growing out of a case not before the court and in no way connected with the issues presented is not irrelevant or immaterial when it appears in connection with respondent's assertion of a fact and denial of an allegation of relator in his application for certiorari.⁸⁶

(2) Striking Out

Immaterial matters or matters *dehors* the record may be stricken from the return, but the better practice is merely to disregard such matters on the review of the return. Such matters, if informative, may be permitted to remain.

It has been held that immaterial matter or matter *dehors* the record may be stricken out on application⁸⁷ or on the hearing⁸⁸ as surplusage; it is generally regarded as better practice that matters in the return which are merely irrelevant should not be stricken out, but should be disregarded on the review of the return,⁸⁹ for the reason that there is danger of striking out portions of the return that are properly contained in it, and no possible harm can result from surplusage which is dis-

69. Mo.—State v. Patterson, 129 S. W. 894, 229 Mo. 364.
11 C.J. p 174 note 7.

70. N.Y.—Peo. v. Troy, 99 N.Y.S. 1045, 114 App.Div. 354, modified on other grounds 79 N.E. 1113, 186 N. Y. 548.
11 C.J. p 174 note 8.

71. Ga.—Thompson v. Becham, 58 S.E. 311, 2 Ga.App. 84.
11 C.J. p 174 note 9.

72. Wash.—State v. Superior Court of Washington for King County, 210 P. 360, 122 Wash. 234.
11 C.J. p 174 note 10.

73. N.Y.—People ex rel. Parry v. Walsh, 202 N.Y.S. 48, 121 Misc. 631, affirmed 205 N.Y.S. 945, 209 App.Div. 389.
11 C.J. p 175 note 11.

74. N.J.—State v. Pietroniro, Sup., 50 A. 451.
11 C.J. p 175 note 12.

75. Cal.—James v. Police Court of City and County of San Francisco, 178 P. 867, 39 Cal.App. 362.

76. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46. Allegations in answer to petition see supra § 86.

77. Minn.—Minnesota Cent. R. Co. v. McNamara, 13 Minn. 508.
11 C.J. p 178 note 52.

78. Ala.—Smith v. Hearn, 2 Stew. & P. 81.

79. Ala.—Miller v. Jones, 80 Ala. 89.

80. N.Y.—People ex rel. Helvetia Realty Co. v. Leo, 183 N.Y.S. 37, affirmed 185 N.Y.S. 949, 195 App. Div. 887, affirmed 132 N.E. 912, 231 N.Y. 619.

81. Mich.—Stevens v. Ottawa Probate Judge, 118 N.W. 17, 154 Mich. 509.
11 C.J. p 178 note 55.

82. N.J.—Parish v. New Domestic Sewing Mach. Co., 48 A. 998, 66 N. J.Law 159.

83. Ala.—Nashville, C. & St. L. Ry. Co. v. Town of Boaz, 147 So. 195, 226 Ala. 441.

84. N.J.—Spencer v. Bartine, 63 A. 870, 73 N.J.Law 362.
11 C.J. p 178 note 57.

85. N.J.—Mechler v. Fialk, 82 A. 330, 82 N.J.Law 450, affirmed 86 A. 401.

86. La.—Reynolds v. Louisiana Highway Commission, 111 So. 622, 163 La. 125.

87. Idaho.—Vollmer v. Vollmer, 266 P. 677, 46 Idaho 97.
Iowa.—Dunlop v. District Court of Greene County, 239 N.W. 541, 214 Iowa 389.
11 C.J. p 181 note 3.

Arguments of counsel

In certiorari proceeding, mere argument of counsel should be stricken from return.—Dunlop v. District Court of Greene County, *supra*.

88. N.Y.—Peo. v. Orange County, 21 N.Y.S. 298.

89. Ala.—Nashville, C. & St. L. Ry. Co. v. Town of Boaz, 147 So. 195.
11 C.J. p 181 note 5.

regarded.⁹⁰ So, if it tends to inform the court of the proceedings, irresponsive or irrelevant matter which is returned may be permitted to remain.⁹¹ At any event, the court cannot strike out parts of a return, where to do so would leave part of what remains imperfect and meaningless, since the court thereby indirectly itself makes a return.⁹² Matters which are proper subjects of return will not, of course, be stricken,⁹³ nor will the transcript of testimony be stricken because not showing the witnesses were sworn, when the findings of the tribunal whose acts are under review show they were sworn.⁹⁴

c. Certification of New Matter

Matter not of record may in a proper case be required to be certified in the return.

If the reviewing court desires to be informed of the facts on which the inferior jurisdiction acted, and which are not technically of record, it may require the certification of such facts in the return.⁹⁵ If the petitioner desires to raise points not appearing on the record, it is necessary to make a motion that the respondent be ordered to certify the material facts in addition to the record disclosed by the answer or return.⁹⁶

§ 122. Statement of Contents and of Obedience to Writ

Obedience to a writ must be shown by the return,

and when necessary it should state that all required matters are returned.

The return must show that it is made in obedience to a writ duly issued,⁹⁷ which should accompany it;⁹⁸ and where so required by the local practice, should contain a statement to the effect that all the acts and proceedings below, or those referred to in the writ, are returned.⁹⁹

§ 123. Record

The return should consist of a full and complete transcript of the record, or proceedings and orders in the nature of a record, of the inferior tribunal.

Where the rules of the common law are adhered to, the writ brings up, and the return can only properly include, the record, or proceedings and orders in the nature of a record, on which the determination which is the subject of review was made,¹ and the return should consist of a full and complete transcript of the record of the proceedings of which a review is sought, since the trial is had by an inspection of the record as returned, and not on any issue of fact.²

§ 124. — What Constitutes

The record, in the case of a court, generally consists of the process, pleadings, verdict, and judgment; and the record as it existed at the time of issuance or service of the writ is the record to be certified.

On certiorari to review the action of a court, the record to be returned generally consists of the process, pleadings, verdict, and judgment.³ The facts

90. Ala.—Cook v. Walker County Comrs. Ct., 59 So. 433, 178 Ala. 394.

91. Ill.—McCarthy v. Geary, 229 Ill. App. 414.
11 C.J. p 181 note 7.

92. N.Y.—Peo. v. Williams, 124 N.Y. S. 328, 140 App.Div. 58, reversed on other grounds 93 N.E. 1129, 200 N.Y. 525.

93. N.Y.—Smith v. Johnston, 30 How.Pr. 374.

94. Ill.—McCarthy v. Geary, 229 Ill. App. 414.

95. Cal.—Los Angeles v. Young, 50 P. 534, 118 Cal. 295, 62 Am.S.R. 234.
11 C.J. p 179 note 64.

96. Mass.—Tileston v. Boston St. Comrs., 65 N.E. 380, 182 Mass. 325.

97. Ark.—Marshall v. Ramsauer, 30 Ark. 532.

11 C.J. p 175 note 13.

98. Ark.—McKay v. Jones, 30 Ark. 148.

11 C.J. p 175 note 14.

99. W.Va.—Cushwa v. Lamar, 32 S. E. 10, 45 W.Va. 226.
11 C.J. p 175 note 15.

1. Ala.—Nashville, C. & St. L. Ry.

Co. v. Town of Boaz, 147 So. 195, 196, 226 Ala. 441, citing *Corpus Juris*.

Me.—Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443.

Mo.—State ex rel. Johnson v. Arnold, 297 S.W. 59, 317 Mo. 858—State ex rel. Shaw State Bank v. Pfeffle, 293 S.W. 512, 220 Mo.App. 676.

Mont.—State v. District Court in and for Silver Bow County, 272 P. 553, 83 Mont. 377.

11 C.J. p 175 note 18.

Answer to writ of review cannot be considered, record, duly certified, being only permissible return.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, supra.

2. Cal.—Metzler v. Superior Court of California in and for Humboldt County, 201 P. 139, 54 Cal.App. 59.
N.J.—Hartigan v. Hudson County Park Commission, 158 A. 118, 10 N.J.Misc. 43.

11 C.J. p 175 note 16.

3. N.Y.—Prindle v. Anderson, 19 Wend. 391, affirmed 23 Wend. 616.
11 C.J. p 176 note 19.

Judgment roll in proceeding in certiorari consists of copy of judgment signed by clerk entered on or attached to writ and return.—Security First Nat. Bank of Los Angeles v. Board of Sup'rs of Riverside County, 15 P.2d 200, 127 Cal. App. 115.

Opinion

(1) On certiorari to quash opinion of court of appeals as contravening controlling decision of supreme court, opinion of court of appeals constitutes the record.—State ex rel. Taylor v. Daves, Mo., 281 S.W. 398, quashing writ of certiorari Taylor v. Security Ben. Ass'n of Topeka, Kan., App., 270 S.W. 132.

(2) Supreme court should go to opinion of court of appeals for facts.—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment Spina v. Union Biscuit Co., App., 273 S.W. 428.

Secret knowledge of trial judge

What trial judge secretly knew, as result of telephone conversation with husband charged with contempt, did not become part of record.—Mason v. District Court of Black

found by the inferior tribunal are part of the record.⁴

Where there is technically no record, the written proceedings and orders, or a history of the proceedings and the written orders which are in the nature of records, are to be certified.⁵

As of what time. The record as it existed at the time when the writ was issued⁶ or when the writ was served⁷ is the record which must be certified and returned by the person or officer having custody or control of such record. A transcript of the evidence is not subsequent proceedings or matters dehors the record, even though made and certified after service of the writ, where such transcript was prepared by the stenographic reporter from his shorthand notes taken at the time of the hearing.⁸ A garnishee's answer, filed after certiorari was issued is properly certified to the reviewing court.⁹ In a proper case, an amended abstract of the record may be filed after the return, and when so done in conformity to a court order, will not be stricken.¹⁰

§ 125. — Jurisdictional Facts

The return must show the jurisdiction of the lower tribunal.

A return from an inferior judicatory or depository of specially delegated and limited powers must affirmatively show jurisdiction. Nothing is intended to be within the jurisdiction except that which is expressly averred so to be;¹¹ and the return must present such facts, or proof of such facts, as will enable the reviewing court to determine the jurisdiction,¹² as where the jurisdiction of an in-

ferior tribunal depends on a fact to be proved before itself,¹³ although it has been held that omitted matters necessary to show jurisdiction may be supplied by extrinsic evidence.¹⁴ It is not necessary that the jurisdiction of the inferior tribunal appear on the face of any special paper so long as it appears somewhere in the record.¹⁵

§ 126. — Evidence

Ordinarily, the evidence forms no part of the record, but must be returned when the law or the writ so requires. Evidence of facts on which the jurisdiction of the inferior tribunal depends should be returned, and so in a review of a summary conviction under a penal statute, or where the scope of review has been extended.

Unless by statute or under the circumstances hereinafter referred to, the evidence on which the inferior jurisdiction based its determination forms no part of the record and should not be returned;¹⁶ but where the law requires the inferior tribunal to reduce the evidence taken before it to writing,¹⁷ or the writ so commands,¹⁸ the evidence may properly be returned.

On questions of jurisdiction. The main office of the writ being to confine the actions of inferior tribunals and boards within the limits of their delegated powers, the reviewing court must reexamine their decisions on all questions on which their jurisdiction depends, whether of law or of fact,¹⁹ and the evidence touching the facts on which the jurisdiction of the inferior court or tribunal depends must be returned, to enable the reviewing court to examine the same and to determine whether jurisdiction was lawfully assumed.²⁰

Hawk County, 229 N.W. 168, 209 Iowa 774.

4. Ala.—Baker Tow Boat Co. v. Langner, 117 So. 915, 218 Ala. 34, reversing 117 So. 914, 22 Ala.App. 575.

11 C.J. p 175 note 18 [b].

5. Cal.—Central Pac. R. Co. v. Placer County Bd. of Equalization, 34 Cal. 352.

6. Ala.—Nashville, C. & St. L. Ry. Co. v. Town of Boaz, 147 So. 195, 226 Ala. 441.

11 C.J. p 176 note 21.

7. Mont.—In re Harney, 74 P. 1080, 29 Mont. 370.

11 C.J. p 176 note 22.

8. Ill.—Buttimer v. Geary, 229 Ill. App. 524—McCarthy v. Geary, 229 Ill.App. 414.

9. Ala.—Waltman v. Ortman, 170 So. 545, second case, 233 Ala. 170, denying certiorari 170 So. 545, 27 Ala.App. 269, first case—Foley v. Armstrong, 170 So. 547, 27 Ala.

App. 201, certiorari denied 170 So. 548, 233 Ala. 175.

10. Iowa.—Roberts v. Fuller, 229 N.W. 163, 210 Iowa 956.

11. Ill.—Frye v. Hunt, 5 N.E.2d 898, 365 Ill. 32—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269—Hahnemann Hospital v. Industrial Board of Illinois, 118 N.E. 767, 282 Ill. 316.

11 C.J. p 176 note 23.

12. Cal.—Bryant v. Board of Sup'rs of Orange County, 163 P. 341, 32 Cal.App. 495.

11 C.J. p 176 note 24.

13. N.Y.—Peo. v. Knowles, 47 N.Y. 415.

11 C.J. p 176 note 25.

14. Me.—South Berwick v. York County, 56 A. 623, 98 Me. 108.

11 C.J. p 176 note 26.

15. Mo.—State ex rel. Morrison v. Sims, App., 201 S.W. 910.

16. Ill.—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531.

Mass.—Marinelli v. Board of Appeal of Building Department of City of Boston, 175 N.E. 479, 275 Mass. 169.

Miss.—Federal Credit Co. v. Zepernick Grocery Co., 120 So. 173, 153 Miss. 489.

11 C.J. p 176 note 27.

17. Nev.—State v. Washoe County Bd. of Equalization, 7 Nev. 83.

18. Mich.—Traverse City, etc., R. Co. v. Seymour, 45 N.W. 826, 81 Mich. 378, 379.

11 C.J. p 176 note 29.

19. N.Y.—Peo. v. Goodwin, 5 N.Y. 568.

20. Cal.—Bryant v. Board of Sup'rs of Orange County, 163 P. 341, 32 Cal.App. 495.

Ill.—Frye v. Hunt, 5 N.E.2d 898, 365 Ill. 32—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531—Cord v. Coffin, 226 Ill.App. 326.

11 C.J. p 177 note 31.

To review summary conviction under penal statute. A common-law writ of certiorari to review a summary conviction under a penal statute brings up, not only questions affecting the jurisdiction of the magistrate, but also the question whether there was any evidence to warrant the conviction. In such cases the evidence must appear on the face of the record.²¹ The evidence given in a *qui tam* action should not be returned, however, as such action is not a summary prosecution.²²

Where scope of review extended. If in addition to the right to ascertain whether the inferior tribunal proceeded regularly and within its jurisdiction, the court is also authorized to review errors, in addition to the record in its strict sense, there may be returned such rulings and decisions of legal questions, together with the facts and evidence relative thereto, as may be necessary to enable the reviewing court to see that there was proof, and that the proof was sufficient to support the determination and to justify the action below.²³ Where a review of the evidence on which the inferior court or tribunal acted is authorized, the evidence should be returned,²⁴ since the power to review on the merits confers, as a necessary incident to the proper exercise of such power, the right to require the inferior tribunal to return on the certiorari such parts of the proceedings as are material to the examination of the case on its merits.²⁵ When it is expressly required by statute that the evidence shall be returned, such statute is not complied with

unless all the evidence is returned;²⁶ and there should be a certificate or satisfactory showing that all the evidence is returned;²⁷ but where the return sets forth the evidence in detail, it is sufficient, although there is no express statement that there was no other evidence.²⁸

Method of returning evidence. The evidence should be returned as reduced to writing at the time when it was taken, and it is not proper to make a statement, based on affidavits of bystanders, as to what was testified to,²⁹ and sending up a stenographic transcript of the testimony in compliance with a statutory provision is a sufficient return of the evidence.³⁰

Evidence improperly returned. Where the evidence is improperly directed to be returned, the inferior tribunal or board should disregard such command and refuse to return the evidence.³¹ If it is improperly returned the proper course is to disregard it.³²

§ 127. — Statements Contained in Application

Ordinarily, statements contained in the application for the writ are improper as part of the return.

Matters stated in the petition or affidavit on which the writ was granted are not proper as a part of the return.³³ The return should contain a complete history of the proceedings in itself, and should not merely adopt as true statements in the petition

Where evidence not recorded

On review of proceedings of county board of supervisors in creating storm water district, although evidence before board was not recorded, it should make as full a return thereof as possible, where question raises its jurisdiction.—*Bryant v. Board of Sup'rs of Orange County*, 163 P. 341, 32 Cal.App. 495.

21. N.Y.—*Mullins v. Peo.*, 24 N.Y. 399.
11 C.J. p 177 note 32.

22. Pa.—*Carlisle v. Baker*, 1 Yeates 471.

23. Ga.—*Norris v. Sibert & Robinson*, 186 S.E. 199, 53 Ga.App. 440.
11 C.J. p 177 note 34.

Trial judge's answer to petition for certiorari filed in superior court should contain evidence in case or adopt in whole or in part statement of evidence contained in petition, and original papers in case may not be sent up, but trial judge should either approve copies of pleadings and record contained in petition for certiorari or attach to his answer copies thereof and certify them as true

and correct.—*Norris v. Sibert & Robinson*, supra.

Grounds for determination

(1) Legal evidence, findings, and determination are necessary on certiorari when petition is denied, so that reviewing tribunal will know what facts were found and on what evidence and on what determination rests.—*Daley v. Byrne*, 295 N.Y.S. 452, 250 App.Div. 666.

(2) Where project of constructing school building was abandoned, grounds for determination by board of education of amount due for architect's services must appear in record, and mere claim of exercise of discretion and judgment is insufficient.—*People ex rel. Berg v. Board of Education of City of Utica*, 210 N.Y.S. 686, 213 App.Div. 357.

24. N.J.—*Montwid v. Montwid*, 167 A. 761, 11 N.J.Misc. 648—*Hampton v. New Jersey Real Estate Commission*, 150 A. 231, 3 N.J.Misc. 383.
11 C.J. p 177 note 35.

25. N.Y.—*Benjamin v. Benjamin*, 5 N.Y. 383.

26. Ariz.—*Farish v. Young*, 153 P. 845.

11 C.J. p 177 note 37.

27. Minn.—*State v. St. John*, 50 N.W. 200, 47 Minn. 315.

11 C.J. p 177 note 38.

28. N.Y.—*Orcutt v. Cahill*, 24 N.Y. 578.

29. Nev.—*State v. Washoe County Bd. of Equalization*, 7 Nev. 83.

11 C.J. p 177 note 40.

30. N.J.—*City of Bridgeton v. Zellers*, 124 A. 520, 100 N.J.Law 33, affirmed *City of Bridgeton v. Corsen*, 127 A. 924, 101 N.J.Law 204—*City of Bridgeton v. Jones*, 127 A. 924, 101 N.J.Law 205, and *City of Bridgeton v. Zellers*, 127 A. 924, 101 N.J.Law 206.

31. N.Y.—*Ex p. Albany*, 23 Wend. 277.

32. N.Y.—*Peo. v. Metropolitan Police Bd.*, 16 Abb.Pr. 337, 25 How.Pr. 79, affirmed 40 Barb. 626, 16 Abb.Pr. 473, 26 How.Pr. 152, affirmed 39 N.Y. 506.

11 C.J. p 177 note 42.

33. S.D.—*Kirby v. McCook County Cir.Ct.*, 71 N.W. 140, 10 S.D. 33.

11 C.J. p 177 note 43.

or affidavit for the writ,³⁴ although an answer under the Georgia practice, adopting the petition, with the exception of the assignments of error, is regarded as sufficient,³⁵ and exhibits incorporated in the petition for the writ do not constitute a transcript of the record and proceedings so as to amount to a proper return.³⁶

§ 128. — Bills of Exceptions

Bills of exceptions, if part of the record, should be included in the return.

Bills of exceptions which have been signed, sealed, and made a part of the record should be included in the return;³⁷ but a bill of exceptions, as a part of the return, is improper where not a part of the record.³⁸

§ 129. — Original or Copies

A transcript, rather than the original record, may be returned, unless return of the original is required.

Although the command of the writ is that the record of the inferior court or tribunal shall be sent up, it is not necessary to send up the record itself, but a transcript should be returned,³⁹ unless there is an unmistakable command, made to suit the exigencies of the particular case, that the record itself shall be sent up and not a transcript, in which case the writ must be obeyed literally.⁴⁰ However, unless for some special cause shown, the court will not require the return of the original record.⁴¹

Where the certiorari is in the nature of a writ of error, the record itself is to be sent up, to the end that the judgment of the court may conclude it;⁴² but where the object is not to affect the record itself, or where the court awarding the writ cannot hold plea of the record, only the tenor thereof need be certified.⁴³

§ 130. Defects, Objections, and Waiver

Defects and errors in the return may be corrected on motion, or in any manner provided by statute, and may be waived.

Errors in the return may be corrected on motion⁴⁴ of either party or by the court on its own motion,⁴⁵ and a demurrer is improper,⁴⁶ as is a replication challenging parts of the return.⁴⁷ An immaterial variance may be disregarded.⁴⁸

The insufficiency of a return in form or substance may be waived by failure to make timely objection⁴⁹ or to take steps to correct it.⁵⁰

A motion for judgment on the pleadings and return admits the correctness of the substantive facts pleaded in the return,⁵¹ and the orders shown therein.⁵²

In Georgia a statute provides for the filing of exceptions to the return (called an answer) and defects in the answer must be objected to in this manner.⁵³ The statutes also provide for a traverse of the truth of the answer or return, which is to be made in the manner and form provided by the stat-

34. Ga.—Star Glass Co. v. Longley, 64 Ga. 576.

11 C.J. p 178 note 44.

35. Ga.—Flanders v. Wood, 38 S.E. 975, 113 Ga. 635—Davis v. Rhodes, 37 S.E. 169, 112 Ga. 106—King v. Walsh, 173 S.E. 435, 48 Ga.App. 741—Carroll v. Georgia Power Co., 171 S.E. 208, 47 Ga.App. 518—Cooper v. Meaders, 169 S.E. 685, 47 Ga.App. 89—Hunter v. Lissner, 58 S.E. 54, 1 Ga.App. 1.

36. Cal.—James v. Police Court of City and County of San Francisco, 178 P. 867, 39 Cal.App. 362.

37. Fla.—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

11 C.J. p 178 note 45.

38. N.J.—Spencer v. Bartine, 63 A. 870, 73 N.J.Law 362.

39. Me.—Jellerson v. Board of Police of City of Biddeford, 187 A. 713, 134 Me. 443.

11 C.J. p 178 note 47.

40. Mich.—Patterson v. Calhoun, 108 N.W. 351, 144 Mich. 416.

11 C.J. p 178 note 48.

41. N.J.—Morrel v. Fearing, 20 N.J. Law 670.

42. N.J.—State v. Browning, 28 N. J.Law 556.

11 C.J. p 178 note 50.

43. N.J.—Morris Canal, etc., Co. v. State, 14 N.J.Law 411.

11 C.J. p 178 note 51.

44. Cal.—Roe v. San Francisco Superior Ct., 60 Cal. 93.

11 C.J. p 179 note 68.

45. Ala.—Cook v. Walker County Comrs. Ct., 59 So. 483, 178 Ala. 394.

46. Ala.—Cook v. Walker County Comrs. Ct., supra.

11 C.J. p 179 note 70.

47. Mass.—Mullen v. Board of Sewer Comrs of Milton, 182 N.E. 641, 230 Mass. 531.

48. N.Y.—Peo. v. Robertson, 26 How.Pr. 90.

11 C.J. p 179 note 71.

49. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

11 C.J. p 180 note 77.

Hearing on merits as waiver

The fact that a return to a petition for writ of certiorari to quash proceedings of a board of aldermen

was not properly signed by all the members, and that there were other informalities, were defects of form, which were waived by going to a hearing on the merits.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

50. N.Y.—Peo. v. Brady, 63 N.Y.S. 1089, 50 App.Div. 372.

11 C.J. p 180 note 78.

51. Mo.—State ex rel. U. S. Bank v. Gehner, 5 S.W.2d 40, 319 Mo. 1048—State ex rel. Jones v. Smiley, 300 S.W. 459, 217 Mo. 1283.

52. Mo.—State ex rel. Jones v. Smiley, supra.

53. Ga.—Baggs—Langford Motor Co. v. Lewis, 129 S.E. 16, 34 Ga.App. 205.

11 C.J. p 179 note 72.

Incomplete answer

Answer to certiorari having failed to verify only errors which authorized sustaining writ, there was no error in refusing oral motion to strike answer and require respondent to reanswer, nor in dismissing petition.—Macris v. Tsipouras, 134 S. E. 621, 35 Ga.App. 671.

ute, at the first term and before the hearing.⁵⁴ The office and purpose of the exceptions to the answer and of a traverse thereto are to perfect the answer so as to present to the reviewing court what actually occurred on the trial.⁵⁵ Such exceptions must specify the defects in the return,⁵⁶ must not be argumentative, or critical of respondent's motives and conduct in failing to answer differently,⁵⁷ and notice of their filing must be given the opposing party before the case is called.⁵⁸ Where the answer apparently included everything relating to the case within the knowledge of the trial judge, it is not improper to refuse to permit exceptions.⁵⁹

If both exceptions and a traverse are filed in the same case, the court should act on the exceptions before disposing of the traverse.⁶⁰ A so-called traverse which on its face is really exceptions is properly stricken.⁶¹ Where a traverse raises an issue as to what was the material evidence on the

trial, that issue should be determined before sustaining or overruling the certiorari, as may be done where questions of fact are involved and the evidence is conflicting.⁶²

§ 131. Amended or Further Return

- a. In general
- b. Grounds
- c. Motion
- d. Effect

a. In General

Generally a defective return, so long as the defects are not fatal, may be amended or a further return allowed or required.

When the return is informal, improperly made, or insufficient, the practice is not to dismiss the writ,⁶³ but to allow or to require an amended or further return to be made.⁶⁴

54. Ga.—Nixon v. Growers' Finance Corporation, 157 S.E. 119, 42 Ga. App. 642.

11 C.J. p 180 note 75.

Either party may traverse trial judge's answer to petition for certiorari filed in superior court.—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440.

Correction of clerical error

In view of Civ.Code 1910 § 5709, where, by inadvertent clerical error, date of filing in superior court of answer of trial judge to writ of certiorari was incorrectly written by him and signed by clerk of superior court, entry of filing could be corrected so as to speak truth, and testimony of trial judge and clerk of superior court, appearing voluntarily, was admissible to show uncontroverted facts, without filing of traverse to clerk's entry of filing.—Brown v. Johnson-Brown Co., 126 S.E. 550, 33 Ga.App. 419.

Matter not traversable

(1) Statement of trial judge that he could not verify truth of paragraphs in writ, because he did not recollect them.—Macris v. Tspourses, 134 S.E. 621, 35 Ga.App. 671.

(2) If the judge states in his answer that he cannot remember the testimony adduced at the trial, an exception or traverse to the answer is of no avail.—Hicks v. Lindsey, 97 S.E. 101, 22 Ga.App. 674—Gilmore v. Georgian Co., 88 S.E. 416, 17 Ga.App. 735.

55. Ga.—Smith v. M. & J. Rosenberg Corporation, 162 S.E. 411, 44 Ga.App. 586—Dailey v. York, 145 S.E. 470, 38 Ga.App. 762—Etheridge v. Taylor, 137 S.E. 641, 36 Ga.App. 609.

56. Ga.—Macris v. Tspourses, 134 S.E. 621, 35 Ga.App. 671.

11 C.J. p 180 note 73.

Insufficient grounds for reversal

Exceptions to answer of municipal court judge to defendant's petition for certiorari as insufficiently verifying certain allegations of fact in petition present no ground for reversal of superior court's judgment overruling certiorari, where judge treated allegations as properly verified facts.—Spielberger v. W. H. Hall & Co., 126 S.E. 552, 33 Ga.App. 406, transferred. 126 S.E. 391, 159 Ga. 511.

57. Ga.—Macris v. Tspourses, 134 S.E. 621, 35 Ga.App. 671.

58. Ga.—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440.

11 C.J. p 180 note 74.

Effect of failure to give notice

Where incomplete and insufficient answer was made by trial judge to petition for certiorari filed in superior court and exceptions thereto were filed by plaintiff in certiorari, but no notice of exceptions was given to opposite party before case was called in its order for hearing, petition for certiorari is dismissible.—Norris v. Sibert & Robinson, supra.

59. Ga.—Rice v. Ray & McArthur, 93 S.E. 43, 20 Ga.App. 391.

60. Ga.—Clander v. Baggett, 79 S.E. 179, 13 Ga.App. 333.

61. Ga.—Macris v. Tspourses, 134 S.E. 621, 35 Ga.App. 671.

62. Ga.—Hanna v. Jamison, 123 S.E. 150, 32 Ga.App. 375.

63. Ala.—Cook v. Walker County Comrs. Ct., 59 So. 483, 178 Ala. 394.

11 C.J. p 180 note 79.

64. Cal.—Coombs v. Industrial Ac-

cident Commission of California. 245 P. 445, 76 Cal.App. 565—Jamez v. Police Court of City and County of San Francisco, 178 P. 867, 39 Cal.App. 362.

Ill.—Lumbermen's Mut. Casualty Co. v. Industrial Commission, 135 N.E. 756, 303 Ill. 364.

Iowa.—Roberts v. Fuller, 229 N.W. 163, 210 Iowa 956.

N.J.—Hampton v. New Jersey Real Estate Commission, 150 A. 231, 8 N.J.Misc. 388.

N.Y.—Sullivan v. Board of Estimate and Apportionment of City of New York, 298 N.Y.S. 962, 164 Misc. 63.

Utah.—Higgs v. Burton, 197 P. 728, 58 Utah 99.

11 C.J. p 180 note 81.

Incomplete answer

Plaintiff in certiorari may have answer to certiorari petition perfected, if answer is not complete.—Nixon v. Growers' Finance Corporation, 157 S.E. 119, 42 Ga.App. 642.

Approval of amended return

Motion for order approving filing of amended return setting out transcript and exhibits, although not required, is not improper, in view of peculiar record.—Roberts v. Fuller, 229 N.W. 163, 210 Iowa 956.

Correction by lower court only

Correction of the record certified up by the court, board, or tribunal to whom the writ is directed must be made by requiring the court or officer to correct it. If any part of the record which is being challenged has been lost or destroyed, it may be supplied or restored in the court where it originated, in accordance with the rules of procedure in such case, and not in the court to which it is certified.—Higgs v. Burton, 197 P. 728, 58 Utah 99.

Generally a return which is not fatally defective may be amended,⁶⁵ and time may be allowed for that purpose,⁶⁶ or the court of review may suspend its action to permit a proper amendment to be made.⁶⁷ Where an answer of the trial judge states that he cannot remember the facts of the case, he cannot be required to answer more fully.⁶⁸

The fact that the term of office of the officer making the return has expired does not preclude an order for a further return,⁶⁹ nor prevent the ex-official from making the necessary corrections;⁷⁰ and a supplemental return may properly be made by the new officers of a continuing body.⁷¹

If, after a further return has been ordered, the terms of the writ are materially modified, the return made and all subsequent proceedings will be canceled and the order for a further return falls.⁷²

Discretion of court. A motion for a further and more specific return is addressed to the discretion of the court.⁷³ The time at which an amended return may be filed is largely a matter of discretion for the court.⁷⁴

Number of returns. Further returns may be directed until neither party can object.⁷⁵

Amendment by lower tribunal. The lower tribunal may amend its record before the return day of the writ and the actual removal of the record, to make it complete,⁷⁶ provided, as shown supra § 110, the amendment does not materially change the record.

Amendment by striking out. It seems that the party making the return may amend it, by leave of court, by striking out certain allegations therein.⁷⁷

b. Grounds

An amended or further return may be allowed or required to supply matters omitted from the original return. Amendments will not be allowed to contradict the original return or to bring up unnecessary matters; but a further return may be ordered to eliminate immaterial matter.

The omission of any necessary particulars from the return will authorize the court to allow an amendment thereto or to compel a further return.⁷⁸ Thus, where the seal is omitted from the return,⁷⁹ where the title of the cause is erroneous,⁸⁰ where the verification, if required, is omitted,⁸¹ where the return is evasive,⁸² where it does not contain words showing that it was made in obedience to the writ,⁸³ or where it does not purport to contain all of the acts and proceedings of the inferior board or tribunal, as required by the command of the writ,⁸⁴ it is proper either to allow an amendment or to direct a further return. An amended return may be filed when a transcript of the evidence could not be obtained within the time when the return was required to be made.⁸⁵ Where the petitioner wishes to raise facts not of record, and which are suggested by the petition, he should move that defendant be ordered to certify such material facts in addition to the record.⁸⁶

Amendment to contradict return. An amendment will not be allowed where it is in effect an attempt

65. Ala.—Cook v. Walker County Comrs. Ct., 59 So. 483, 178 Ala. 394.

11 C.J. p 180 note 84.

66. N.J.—Mann v. Drost, 18 N.J. Law 336.

11 C.J. p 181 note 85.

67. La.—State v. Rost, 27 So. 365, 52 La. Ann. 984.

68. Ga.—Cunningham v. City of Atlanta, 141 S.E. 214, 37 Ga. App. 634.

69. N.Y.—Peo. v. O'Toole, 130 N.Y.S. 567, 146 App. Div. 133.

70. Ga.—Phillips v. Atlanta, 13 S.E. 201, 87 Ga. 62.

71. N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App. Div. 373.

72. N.Y.—Peo. v. Feitner, 57 N.Y.S. 1062, 40 App. Div. 620.

73. Mich.—Mann v. Tyler, 23 N.W. 314, 56 Mich. 564.
11 C.J. p 182 note 22.

74. Iowa.—Rafferty v. Town of Clermont, 164 N.W. 199, 180 Iowa 1391.

After receiving evidence

That court received amended return to writ of certiorari does not show abuse of discretion on ground that it was too late, where oral testimony as to only new allegation in amended return was admissible.—Rafferty v. Town of Clermont, supra.

75. N.C.—State v. Reid, 18 N.C. 377, 28 Am.D. 572.

76. Me.—Lord v. Cumberland County, 75 A. 126, 105 Me. 556, 18 Ann. Cas. 665.

11 C.J. p 181 note 87.

77. Iowa.—Lehigh Sewer Pipe, etc., Co. v. Lehigh, 136 N.W. 934, 156 Iowa 386.

78. Mo.—State v. Springer, 35 S.W. 589, 134 Mo. 212.

11 C.J. p 181 note 89.

True situation not shown

If parties believe that record, as certified, does not show the true situation, the proper course is to obtain amended return.—Mercado v. Superior Court of Pima County, Ariz., 77 P.2d 810.

79. N.J.—State v. Newark, etc., Turnp. Co., 3 N.J. Law 126.

80. N.Y.—Dexter v. Hoover, 2 Cow. 526.

81. Ga.—Love v. Bush, 94 S.E. 626, 21 Ga. App. 436.

11 C.J. p 181 note 92.

On oral objection, where no exceptions to answer of magistrate to writ of certiorari were filed in writing before case was called in its order, as required by Civ. Code § 5196, the court, under § 5197, properly ordered it returned to magistrate after he had retired from office, to be verified by his affidavit and returned to court.—Love v. Bush, supra.

82. Me.—Chapman v. York County, 9 A. 728, 79 Me. 267.

11 C.J. p 181 note 93.

83. Mo.—Hill v. Young, 3 Mo. 337.

84. N.Y.—Peo. v. MacLean, 19 N.Y.S. 548, 61 N.Y. Super. 458.

85. Iowa.—Roberts v. Fuller, 229 N.W. 183, 210 Iowa 956.

86. Mass.—Tileston v. Boston St. Comrs., 65 N.E. 380, 182 Mass. 325.

on affidavits to traverse the return and to seek, through the medium of an order, an adjudication that the return is not true in fact, and a requirement that the lower tribunal state the contrary of what they have already certified.⁸⁷

Unnecessary matters. An amended or further return will not be allowed or ordered for the purpose of bringing up matters as to which a return is unnecessary,⁸⁸ when the court is satisfied that its judgment would be the same with or without a further return, and that a further return would be idle,⁸⁹ or when the return already made is sufficiently full and complete and does not appear to be defective.⁹⁰ So a further return cannot be required as to a matter concerning which the writ did not require any return.⁹¹ Likewise, a further return should not be allowed or ordered as to matters not of record and involving the operation of the minds of the returning officers.⁹²

A further return may be ordered to eliminate immaterial matters.⁹³

c. Motion

The sanction of the court must be obtained for an amendment or a further return on timely and proper motion.

An amendment of the return after it has been made and filed is allowable only under the sanction of the court issuing the writ.⁹⁴ So, if an additional return is sought, the party desiring such addi-

tional return must obtain an order specifying the particulars in respect of which a further return is required.⁹⁵

Who may move. The amendment or further return may be obtained on the motion of either party;⁹⁶ but the party who sues out the writ is entitled to rely on the return made if he chooses so to do, and, if jurisdictional facts are omitted from the return, it is incumbent on defendant to procure a further return.⁹⁷ In a proper case the court may order a further return of its own motion against objection.⁹⁸ However, the reviewing court cannot itself amend the return by adding a recital that certain evidence was considered.⁹⁹

Time for application. Amendments must be sought promptly,¹ although in Massachusetts they have been allowed at the hearing.² In Georgia, however, it has been held error to allow an amendment during the hearing.³

The motion for a further return must specify the particulars in which the return already made is deficient,⁴ and it would seem that such motion should be supported by affidavit showing the amendment desired,⁵ or the incompleteness of the return.⁶

d. Effect

Where a further return is made, it alone is to be considered. When no further return is made, obscurities in the return will receive no consideration.

87. S.D.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.
11 C.J. p 181 note 96.

Further return properly refused

On certiorari to review proceedings of county superintendent in the matter of consolidating certain school districts, where return showed a substantial compliance with statutory requirements precedent to entry of final order of consolidation, court did not err in refusing to require superintendent to make further return to alleged facts not of record, which might have the effect of showing that her original return was false, in that notices of election were not signed by her as superintendent.—Austin v. Eddy, 172 N.W. 517, 41 S.D. 640.

88. Ga.—Baird v. Smith, 52 S.E. 655, 124 Ga. 251.
11 C.J. p 181 note 97.

Where no decision on merits

On certiorari to review town's rejection of claim solely for lack of jurisdiction, order requiring service of an amended return with all the evidence and documents with return is error.—Village of Elmira Heights v. Lynch, 225 N.Y.S. 257, 221 App. Div. 719, reversing 221 N.Y.S. 337, 129 Misc. 379.

Investigator's report

On certiorari to review order making allowances to experts for services performed in summary investigation into financial affairs of municipality, motion to compel filing of investigator's report as part of proceeding on certiorari was denied.—North Bergen Tp. v. Gough, 154 A. 113, 107 N.J.Law 424.

89. Cal.—Stumpf v. San Luis Obispo County, 63 P. 663, 131 Cal. 364, 82 Am.S.R. 350.
11 C.J. p 181 note 98.

90. Wis.—State v. Oconomowoc, 80 N.W. 942, 104 Wis. 622.
11 C.J. p 181 note 99.

91. N.Y.—Peo. v. Greene, 92 N.Y. S. 1112, 103 App.Div. 393.

92. Iowa.—Storie v. District Court in and for Lucas County, 216 N.W. 25, 204 Iowa 847.
N.Y.—Peo. v. York, 80 N.Y.S. 300, 78 App.Div. 432, affirmed 66 N.E. 1115, 174 N.Y. 533.

93. N.Y.—Pearson v. Brace, 227 N.Y.S. 631, 131 Misc. 663.

94. Mo.—State v. St. Louis, 67 Mo. 113.
11 C.J. p 182 note 10.

95. N.J.—Spencer v. Bartine, 63 A. 870, 73 N.J.Law 362, affirmed 67 A. 599, 74 N.J.Law 816.

96. Ga.—Tyner v. Leake, 44 S.E. 812, 117 Ga. 990.
11 C.J. p 182 note 15.

97. Mich.—Wight v. Warner, 1 Dougl. 384.

98. Mich.—Gordon v. Sibley, 26 N.W. 485, 59 Mich. 250.
11 C.J. p 182 note 17.

99. N.Y.—Peo. v. O'Toole, 130 N.Y. S. 567, 146 App.Div. 133.

1. N.Y.—Rue v. Sprague, 1 Johns. 493.
11 C.J. p 182 note 12.

2. Mass.—Lincoln v. Boston St. Comrs., 57 N.E. 356, 176 Mass. 210.
11 C.J. p 182 note 13.

3. Ga.—Pitts v. Simpson Grocery Co., 83 S.E. 1102, 15 Ga.App. 617.

4. Ga.—Daniels v. State, 44 S.E. 818, 118 Ga. 18.
11 C.J. p 182 note 19.

5. Ala.—Perryman v. Burgster, 6 Port. 99.
11 C.J. p 182 note 20.

6. Ga.—Harris v. Nichols, 26 Ga. 413.

When a second return is made, the first return becomes an absolute nullity and cannot be looked to in order to supply deficiencies in the second return.⁷ Where a trial judge, in response to rules to certify, has made contradictory certificates, the final certificate must be taken as truly stating what occurred with regard to the trial.⁸

Effect of failure to procure. If a return is obscure as to a particular fact, and no further return is sought, no consideration will be given to the return on that point.⁹

§ 132. Refusal to Make Return, and Remedies Therefor

The officer or person required to make a return or further return may be compelled to do so, and be punished for refusal. Nonpayment of fees provided for making of return is ground for refusal to make a return.

A judicial officer or other person who refuses to obey the mandate of the writ, or an order requiring a further return, may be compelled so to do,¹⁰ and may also be punished for the disobedience,¹¹ as for a contempt.¹² The application to compel a return must show the delivery of the writ and a refusal to obey it after a reasonable time,¹³ but

a petition to punish as for contempt need not aver illegality in the proceedings sought to be reviewed.¹⁴

A board or officer may refuse to make a return until the fees provided by law for making the same are paid,¹⁵ and a copy of the return should not be ordered supplied to the petitioner unless the petitioner pays for it.¹⁶

§ 133. False Returns

In general the remedy for the making of a false return is by action against the officer making it.

If a false return is made, the only remedy is by action against the officer who made it,¹⁷ and not by motion to correct it,¹⁸ or for an order for a further return,¹⁹ except where this is allowed by statute;²⁰ but an action is not maintainable unless injury has been actually suffered in consequence of such falsity.²¹

The complaint in an action for making a false return should distinctly show by its averments that the return was false, and that the injury complained of was sustained by reason of such falsity.²²

H. DISMISSAL OR QUASHING OF WRIT

§ 134. Distinction between Quashal and Supersedeas

A writ of certiorari generally may be superseded before a return has been made to the writ, but may be dismissed or quashed only after such return. Overruling is practically the same as dismissing certiorari.

The terms "quashal" and "dismissal" are used interchangeably; but a distinction has been made between quashing or dismissing the writ and superseding it, in that the writ is quashed or dismissed only after the return has been made, while it is superseded before the return.²³ In other words, ac-

7. N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App. Div. 373.

11 C.J. p 182 note 24.

8. N.J.—Perth Amboy City Market v. Baum, 99 A. 333, 89 N.J.Law 614.

9. Mich.—De Myer v. McGonegal, 32 Mich. 120.

10. N.Y.—Overseers of Poor v. Overseers of Poor, 2 Cow. 575.

11 C.J. p 182 note 27.

11. N.Y.—Peo. v. Brooklyn, 5 How. Fr. 314.

11 C.J. p 182 note 28.

12. Ga.—Pittman v. Hagins, 16 S.E. 659, 91 Ga. 107.

11 C.J. p 182 note 29.

13. N.J.—Smith v. Somers, 16 N.J. Law 456.

14. Ga.—Pittman v. Hagins, 16 S.E. 659, 91 Ga. 107.

15. Cal.—I. X. L. Lime Co. v. Santa Cruz Super. Ct., 76 P. 973, 143 Cal. 170.

11 C.J. p 182 note 26.

16. N.Y.—Sullivan v. Board of Estimate and Apportionment of City of New York, 298 N.Y.S. 962, 164 Misc. 63.

Condition precedent

In certiorari proceeding to review determination of the board of estimates and apportionment of city of New York denying the petitioner's application for disability retirement as member of New York City employees' retirement system, application to direct respondent to furnish petitioner with copies of return filed by the medical board with the clerk of court would be denied unless petitioner paid for copies to be furnished, since, under the Civil Practice Act, payment for copy to be furnished to the petitioner is a condition precedent.—Sullivan v. Board of Estimate and Apportionment of City of New York, supra.

17. N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App. Div. 373.

11 C.J. p 183 note 33.

18. N.Y.—Peo. v. Gillon, 9 N.Y.S. 243, 18 N.Y.Civ.Proc. 109.

11 C.J. p 183 note 34.

19. Mich.—Mann v. Tyler, 23 N.W. 314, 56 Mich. 564.

20. N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App. Div. 373.

21. N.Y.—Rector v. Clark, 78 N.Y. 21.

11 C.J. p 183 note 36.

22. N.Y.—Rector v. Clark, supra.

23. N.Y.—Peo. v. Feitner, 63 N.Y.S. 319, 30 Misc. 247, affirmed 63 N.Y.S. 532, 49 App.Div. 385, affirmed 57 N.E. 624, 163 N.Y. 384.

Wis.—State v. Oconomowoc, 80 N.W. 942, 104 Wis. 622.

11 C.J. p 183 note 38.

Where respondent has not made return upon the writ of certiorari, and it has been shown from the petition that the record sought to be certified is correct, the proper order is not for quashal or dismissal, but that the writ be superseded.—King v. Board of Canvassers and Regis-

cording to this distinction, after the return of the writ the proper practice is to move to quash or dismiss the writ;²⁴ but, although the writ has been served, if it has not been returned, it is not before the court and cannot be quashed, and the proper practice is to move to supersede it,²⁵ and this is the remedy for defective service of a writ.²⁶ These distinctions, however, are for the most part disregarded by the courts, and, as will be noted hereafter in § 139, there is a conflict in the decisions as to whether a motion to quash or dismiss may or must be made before or after the return.

The overruling of a certiorari is generally practically the same as the dismissal thereof.²⁷

§ 135. Grounds

- a. In general
- b. Writ improvidently granted
- c. Insufficiency of petition or affidavit
- d. Failure to give notice
- e. Failure to allow writ
- f. Premature application for, or issuance of, writ
- g. Erroneous direction of writ and improper parties
- h. Want or insufficiency of bond
- i. Absence or insufficiency of return or answer
- j. Failure to prosecute
- k. Delay in suing out or issuing writ
- l. Remedy unavailing; moot question

a. In General

Material defects and irregularities with respect to the application for, and granting of, a writ of certiorari may constitute grounds for the dismissal or quashing of the writ.

Some of the asserted grounds for dismissing the writ on motion, such as defects in the writ, as stated supra § 106, and failure to serve the writ, as stated supra § 107, have already been noticed; and failure to serve notice of the time and place of hearing, as required in some states, as ground for dismissal, is hereafter considered in § 144.

The writ may be dismissed or quashed when in the progress of the cause facts appear which would have defeated the application,²⁸ or where the record presents no question of jurisdiction, palpable abuse of power by the court, or serious misconduct in the findings and consequent material injury to the petitioner.²⁹ On the other hand, the writ will not be dismissed on grounds already considered and passed on in allowing it,³⁰ or where the return discloses matter which, if presented, would have induced its issue,³¹ or because of alleged errors in the proceedings with reference to which no question was raised in the trial court.³²

Failure to comply with a statute, or rule or order of court, requiring the service and filing of printed abstracts, briefs, and arguments has been held sufficient ground for dismissal,³³ as has also a failure to comply with a statute requiring a copy of the pleadings to be filed with the application for

tration of City of Providence, 105 A. 372, 42 R.I. 41.

24. Fla.—*Salario v. Latin-American Bank*, 139 So. 899, 104 Fla. 256. Motion to quash generally see infra § 139.

25. Fla.—*Salario v. Latin-American Bank*, supra. 11 C.J. p 183 note 99.

26. Wis.—*State v. Fond du Lac*, 35 Wis. 37.

27. Ga.—*Walker v. State*, 118 S.E. 478, 30 Ga.App. 618—*Whitfield County v. Hogan*, 87 S.E. 1087, 17 Ga.App. 685.

28. Ill.—*People v. Burdette*, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill.App. 365. 11 C.J. p 183 note 46.

29. Fla.—*Hamway v. Seaboard-Air Line Ry. Co.*, 136 So. 628, 101 Fla. 1483—*Edwards v. Knight*, 132 So. 459, 100 Fla. 1704—*American Ry. Express Co. v. Weatherford*, 93 So. 740, 84 Fla. 264.

30. N.J.—*State v. New Brunswick*, 38 N.J.Law 320. 11 C.J. p 183 note 44.

31. N.J.—*State v. Newark, etc., Turnp.*, 2 N.J.Law 318.

32. Ga.—*Southern Pac. Co. v. Davidson-Faxon Co.*, 165 S.E. 862, 45 Ga. App. 719.

33. Iowa.—*Eller v. Hunter*, 209 N.W. 281—*Touche v. Franklin*, 207 N.W. 337, 201 Iowa 480—*Rock v. Utterback*, 207 N.W. 327.

Mo.—*State ex rel. Consolidated School Dist. No. 8 of Newton County v. Cox*, 18 S.W.2d 61, 323 Mo. 43, dismissing certiorari *Boswell v. Consolidated School Dist. No. 8 of Newton County, App.*, 10 S.W.2d 665—*State ex rel. Egan v. Trimble*, 291 S.W. 468—*State ex rel. Hirsch v. Allen*, 274 S.W. 353, dismissing certiorari *State v. Hirsch, App.*, 260 S.W. 557—*State ex rel. Kansas City v. Ellison*, 219 S.W. 90, 280 Mo. 595—*State v. Robertson*, 181 S.W. 987—*State ex rel. McClain v. Burney, App.*, 26 S.W.2d 814.

N.J.—*Ketschke v. Borough of Woodbridge, Sup.*, 146 A. 47.

Abstract held sufficient

Mo.—*State ex rel. Hayward v. Haid*, 51 S.W.2d 79, 330 Mo. 686, quash-

ing *Hayward v. Ham, App.*, 29 S.W.2d 243—*State ex rel. and to Use of Gagnepain v. Daues, Mo.*, 15 S.W.2d 815, quashing *Gagnepain v. Levee Dist. No. 1 of Perry County, App.*, 7 S.W.2d 285, conformed to, 28 S.W.2d 1116—*Rozier v. Levee Dist. No. 1 of Perry County, App.*, 7 S.W.2d 288, reversed on other grounds, *App.*, 28 S.W.2d 1116.

Original certiorari proceeding must be dismissed, in absence of printed abstract, although court may get required information from other papers, and respondent did not complain.—*State ex rel. Consolidated School Dist. No. 8 of Newton County v. Cox*, 18 S.W.2d 61, 323 Mo. 43, dismissing certiorari *Boswell v. Consolidated School Dist. No. 8 of Newton County, App.*, 10 S.W.2d 665.

Transcript not containing bill of exceptions

Certiorari to review circuit court's judgment, affirming judgment of lower court, should be quashed, where transcript contained no authenticated bill of exceptions.—*Emerson v. Hughson*, 141 So. 877, 105 Fla. 558—*Myer-Kotkin v. Walker*, 134 So. 538, 101 Fla. 455.

the writ.³⁴ On the other hand, it has been held not sufficient ground for dismissal to fail to comply with a rule of court requiring the petition to be accompanied by the briefs in the lower court, for the convenience and information of the court,³⁵ or requiring a copy of defendant's exceptions, or the reasons of the lower court for refusing a rehearing, to be attached;³⁶ or to fail to serve or file an abstract, as required, where the case is continued with the consent of respondent,³⁷ or the relator is granted leave to amend.³⁸ So also, failure to furnish defendant with a printed brief in the lower court has been held insufficient ground for dismissal, where the petition sets forth all the law and the facts, and cites all decisions bearing on the matter.³⁹

Acquiescence in, or compliance with, determination below. The writ will not be dismissed on the ground of the relator's acquiescence in the determination below, where that fact is disputed;⁴⁰ nor will it be dismissed on the ground that the determination or order sought to be reversed has been complied with, where some measures of relief may be afforded by a reversal,⁴¹ or such compliance was involuntary.⁴² Where the grounds for dismissal of the writ in particular cases are specified by statute, other grounds are not available.⁴³

Confirmation of proceedings by statute. The writ will be quashed where the irregularities in the pro-

ceedings of the inferior tribunal have been cured by statute, although the writ was issued before the enactment of the statute;⁴⁴ or, where a curative statute is enacted, the court instead of quashing the writ may give the prosecutor leave to discontinue.⁴⁵

Death of interested person. The death of a person who is interested in the proceedings under review, but who is not a party, is not ground for dismissal.⁴⁶

Former adjudication. The prior determination of the same question on a former writ is a sufficient reason for dismissal.⁴⁷

Misdescription of judgment. Failure of the judgment sent up to answer the description in the writ is not ground for quashal, since an alias writ should be allowed.⁴⁸

Multifariousness. It is ground for quashal that the writ was sued out to review two distinct adjudications.⁴⁹

Public policy or public inconvenience. The writ may be dismissed in the interest of justice, where public policy so requires, or where public inconvenience will result from a reversal of the determination complained of.⁵⁰

Trivial objections. The writ will not be dismissed or quashed because of unintentional irregularities or defects which do not affect the result,⁵¹

34. La.—Spizale v. Lacroix, 55 So. 672, 128 La. 1053.

35. La.—Pipes v. Gallman, 140 So. 43, 174 La. 265, annulling 135 So. 692, 18 La.App. 437.

36. La.—Hatten v. Haynes, 144 So. 483, 175 La. 743, affirming, App., 142 So. 286.

37. Mo.—State ex rel. Randall v. Shain, 108 S.W.2d 122.

A writ of certiorari to quash record and opinion of court of appeals will not be dismissed because relators failed to serve on respondents or file with clerk complete abstract of record in time required by supreme court rules, where case was continued with respondents' consent, and relators complied with all rules prior to subsequent hearing.—State ex rel. Randall v. Shain, supra.

38. Mo.—State ex rel. Hayward v. Haid, 51 S.W.2d 79, 330 Mo. 686, quashing Hayward v. Ham, App., 29 S.W.2d 243.

39. La.—Ducre v. Milner, 144 So. 610, 173 La. 897, setting aside, App., 141 So. 617, annulling 140 So. 158, rehearing denied 142 So. 618, conformed to 146 So. 734.

40. Mich.—Crawford v. Scio, etc., Tp. Board, 22 Mich. 405.

41. Wash.—State v. Moore, 62 P. 769, 23 Wash. 276.

42. Mass.—Com. v. Hall, 8 Pick. 440. 11 C.J. p 186 note 6.

43. Tex.—Huebsch Mfg. Co. v. Coleman, Civ.App., 113 S.W.2d 639.

44. N.Y.—Peo. v. McDonald, 69 N. Y. 362, affirming 4 Hun 187. 11 C.J. p 187 note 13.

45. Me.—Madison v. County Comrs., 34 Me. 592.

46. Pa.—Com. v. McAllister, 1 Watts 307, 26 Am.D. 70.

47. N.J.—State v. Jersey City, 30 N.J.Law 247.

Original certiorari void, dismissal of second

Where original certiorari was dismissed for want of statutory notice of sanction, it was void ab initio, and petitioner was not entitled to renew it; therefore dismissal of a second certiorari before return term was not error.—Brackett v. Sebastian, 89 S.E. 1102, 18 Ga.App. 525.

48. Tenn.—Lima v. Pinkston, 1 Overt. 344.

49. Ala.—Creswell v. Greene County Comrs. Ct., 24 Ala. 282. 11 C.J. p 185 note 75.

50. Ill.—Deslauries v. Soucie, 78 N. E. 799, 222 Ill. 522, 113 Am.S.R. 432, affirming 122 Ill.App. 81. 11 C.J. p 186 note 7.

Certiorari held not dismissible on ground no question of general public concern was involved.—Seaboard Air Line Ry. Co. v. Benton, 165 S.E. 593, 175 Ga. 491, reversing 159 S.E. 717, 43 Ga.App. 495, and conformed to 166 S.E. 219, 45 Ga.App. 832.

51. R.I.—McLyman v. Pontbriand, 163 A. 882.

As to time returnable

The writ will not be dismissed for failure of the clerk to make it returnable to the ensuing term of court.—Lindheim v. Davis, 2 Tex.A. Civ.Cas. § 108.

Failure of judge to indicate official character

Where recitals in bill of exceptions show that judge acted in his official capacity, his failure to attach words indicative of official character did not render judgment dismissing certiorari void.—Russell v. Kennington, 128 S.E. 531, 160 Ga. 467.

such as that it was dated later than the day on which it issued,⁵² or was improperly indorsed or entitled in the name of the state,⁵³ or that relator's brief did not include a fair and concise statement of facts, where it shows what the issues were.⁵⁴ A mere discrepancy between the copy of the notice of the granting of the writ attached to the petition and the notice served on the attorney has been held not ground.⁵⁵ Failure to pay the docket fee is not ground for setting aside an order granting the writ.⁵⁶

b. Writ Improvidently Granted

A writ of certiorari may be superseded or dismissed or quashed on the ground that it was improvidently granted.

The writ may be superseded or quashed because improvidently granted,⁵⁷ especially where the petitioner joins in the motion to dismiss.⁵⁸ It may be dismissed or quashed where it clearly appears that discretion in granting the writ has been improperly exercised,⁵⁹ or where the papers on which the order of certiorari was granted are insufficient in law upon their face,⁶⁰ or where it appears that the prosecutor had no such interest as entitled him to sue it out,⁶¹ or that he had a remedy by appeal, and failed to resort to it as he should have done,⁶² or where substantial justice has been done, even though some irregularity of procedure has occurred, and entry of

a regular and proper judgment will have the same result, as affects the rights of the certiorari petitioner.⁶³ The fact that the writ has been duly issued is immaterial, especially in those cases in which it has been issued on an ex parte application.⁶⁴

Want of jurisdiction to grant. A writ which the court had no jurisdiction to issue should be dismissed,⁶⁵ as where the writ has been improperly allowed by the judge out of court,⁶⁶ or by a judge other than the one to whom the application is addressed,⁶⁷ or where the case is one of which the court is without jurisdiction.⁶⁸ However, the granting of the writ by a judge of another circuit than that in which the case is pending is not ground for dismissal where the judge of the latter circuit certifies that he was absent at the time.⁶⁹

Appeal pending. It has been held ground for quashal that an appeal was pending at the time of the issuance of the writ.⁷⁰

c. Insufficiency of Petition or Affidavit

Insufficiency of the petition for the writ, or of the supporting affidavit, may constitute ground for the dismissal or quashing of the writ.

Insufficiency of the petition for the writ, in that its allegations do not show that the petitioner is entitled to the writ, is ground for quashing the writ.⁷¹

52. N.J.—*Mitchell v. Morris Canal, etc., Co.*, 31 N.J.Law 99.

53. N.J.—*State v. Justice*, 24 N.J.Law 413—*Reading Tp. v. Dilley*, 24 N.J.Law 209—*State v. Morris Canal, etc., Co.*, 14 N.J.Law 411—*State v. Hanford*, 11 N.J.Law 71—*State v. Kirby*, 5 N.J.Law 982.

54. Mo.—*State ex rel. Gosselin v. Trimble*, 41 S.W.2d 801, 328 Mo. 760, quashing certiorari *Gosselin v. Yellow Cab Co.*, App., 29 S.W.2d 186.

55. Ga.—*American Bonding, etc., Co. v. Adams*, 52 S.E. 622, 124 Ga. 510.

56. La.—*Wisdom v. Bille*, 45 So. 554, 120 La. 700.

57. Fla.—*Ferlita v. Figarrota*, 145 So. 605, 106 Fla. 578.

Ga.—*Carter v. Atlanta Life Ins. Co.*, 179 S.E. 80, 180 Ga. 419, dismissing certiorari 171 S.E. 729, 47 Ga.App. 838—*Gormley v. Public Indemnity Co.*, 178 S.E. 154, 180 Ga. 140, dismissing certiorari *Public Indemnity Co. v. Gormley*, 171 S.E. 151, 47 Ga.App. 684.

Iowa.—*Johnson v. Herring*, 271 N.W. 175—*Price v. Town of Earlham*, 157 N.W. 238, 175 Iowa 576. N.J.—*Sullivan v. Borough of Ramsey, Sup.*, 139 A. 886, reversed on

other grounds 143 A. 364, 105 N.J.Law 142.

N.Y.—*People ex rel. Brooklyn Heights R. Co. v. Public Service Commission of the First Dist.*, 166 N.Y.S. 825, 101 Misc. 10. Wis.—*Hauser v. State*, 33 Wis. 678. 11 C.J. p 183 note 51.

58. Colo.—*People v. District Court of Second Judicial District in and for City and County of Denver*, 179 P. 808, 66 Colo. 49.

Confession of erroneous issuance Colo.—*People v. District Court of Second Judicial Dist. in and for City and County of Denver*, 179 P. 808, 66 Colo. 49.

59. Ark.—*Flournoy v. Payne*, 28 Ark. 87.

11 C.J. p 184 note 52. Discretion as to grant of writ see supra §§ 10-16.

60. N.Y.—*Reed v. Board of Standards and Appeals of City of New York*, 174 N.E. 301, 255 N.Y. 126, affirming 243 N.Y.S. 263, 230 App. Div. 21, affirming 244 N.Y.S. 413, 138 Misc. 187.

61. Mich.—*Morse v. Williams*, 52 N.W. 629, 92 Mich. 250. 11 C.J. p 184 note 53.

Who may institute certiorari proceedings see supra §§ 47-52.

62. Iowa.—*Price v. Town of Earlham*, 157 N.W. 238, 175 Iowa 576. 11 C.J. p 184 note 54.

63. Fla.—*Ferlita v. Figarrota*, 145 So. 605, 106 Fla. 578.

64. N.Y.—*Peo. v. Sturgis*, 80 N.Y.S. 194, 39 Misc. 448. 11 C.J. p 184 note 55.

65. Ala.—*Winn v. Freele*, 19 Ala. 171.

66. N.Y.—*Peo. v. McDonald*, 2 Hun 70.

67. Tenn.—*Duggan v. McKinney*, 7 Yerg. 21. 11 C.J. p 184 note 61.

What court or officer may allow writ see supra § 102.

68. Miss.—*Board of Sup'rs of Forrest County v. Melton*, 86 So. 369, 123 Miss. 615.

69. Ga.—*Prescott v. Carter*, 76 Ga. 103.

70. N.M.—*In re Henriques*, 21 P. 80, 5 N.M. 169.

N.C.—*Williams v. Williams*, 71 N.C. 427.

11 C.J. p 184 note 59. Appeal as precluding granting of writ see supra § 41.

71. Ga.—*Nilsen v. City of La Grange*, 191 S.E. 175, 55 Ga.App. 676, transferred 189 S.E. 511, 183 Ga. 742.

as where it contains no adequate or legal assignment of error;⁷² or does not state the case as presented on argument;⁷³ and this rule also applies where an amendment to the petition has been improperly allowed.⁷⁴ Where, however, sufficient grounds for the issuance of the writ are alleged, it is not ground for a quashal that other grounds are set out which are not sufficient for such purpose;⁷⁵ and separate and distinct writs will not be dismissed because they were issued on one petition, where there has been no attempt to consolidate them.⁷⁶ Furthermore, irregularities in suing out the writ or defects in the petition will not authorize a dismissal where a trial de novo is to be had,⁷⁷ or where the applicant has not been ruled to perfect it.⁷⁸

The fact that the petition is not sufficiently supported by affidavit, as required by statute, is ground for dismissal or quashing of the writ.⁷⁹ However, on motion to dismiss the writ because of the

insufficiency of the affidavit, the petition may be cured by an answer which shows that the statements in the petition are true;⁸⁰ and the writ will not be dismissed because of the insufficiency of the affidavit where it substantially complies with the statute, and no specific objection is made thereto.⁸¹

d. Failure to Give Notice

Failure to give notice, as required by statute or rule of court, as to the application for the writ may constitute ground for dismissal.

Failure to give, as required by statute or rule of court, notice of intention to apply for the writ,⁸² or to serve notice of the date of the filing of the petition, together with a copy of the petition and brief, on opposing counsel,⁸³ or to make a rule on the opposite party to show cause against the issuance of the writ,⁸⁴ have been held grounds for dismissal, unless the objection has been waived by appearance or otherwise.⁸⁵

La.—State v. Fleckinger, 90 So. 768, 150 La. 479.

N.Y.—People ex rel. Hunter Arms Co. v. Foster, 288 N.Y.S. 295, 247 App.Div. 619.

Or.—Holmes v. Cole, 94 P. 964, 51 Or. 483.

11 C.J. p 184 note 56.

Failure to aver filing of bond or affidavit

Ga.—Nilsen v. City of La Grange, 191 S.E. 175, 55 Ga.App. 676, transferred 189 S.E. 511, 183 Ga. 742.

If the writ has been inadvertently issued the adverse party is not precluded thereby from questioning the sufficiency of the petition.—Holmes v. Cole, 94 P. 964, 51 Or. 483.

72. Ga.—Richards v. Harvey, 129 S. E. 1, 34 Ga.App. 219—Freedman v. Bush, 119 S.E. 421, 80 Ga.App. 757.

73. U.S.—Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234, dismissing petition for certiorari Currie v. Davis, 126 S.E. 119, 130 S.C. 408.

74. N.Y.—Pao v. McAdoo, 110 N.Y. S. 140, 125 App.Div. 673.

75. La.—Brown v. Union Indemnity Co., 105 So. 918, 159 La. 641, 54 A. L.R. 1439, annulling 2 La.App. 505. N.Y.—People v. McComber, 7 N.Y.S. 71.

Presenting question of law as well as one of fact

Ga.—Louisville & N. R. Co. v. Lovelace, 101 S.E. 718, 24 Ga.App. 616.

76. Tenn.—Kennedy v. Farnsworth, 3 Humphr. 242.

77. Ala.—Wright v. Hurt, 9 So. 386, 92 Ala. 591—Van Eppes v. Smith, 21 Ala. 317.

78. Pa.—Peffer v. Beatty, 18 Pa. Dist. 173.

79. Ga.—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S.E. 373, 22 Ga.App. 89.

La.—Horvath v. Eppling, 113 So. 778, 164 La. 93, dismissing certiorari Hovarth v. Eppling, 6 La.App. 682.

Additional affidavit

On motion to quash the writ because the affidavit therefor was made by attorney, instead of in person, plaintiff may show by affidavit why the original affidavit was made by attorney, although thirty days have elapsed since the rendition of the judgment by the lower court.—Flanagan v. Murphy, 2 Wend., N.Y., 291.

Petition by company verified by individual

Where petition was in name of company, and verified by affidavit of an individual of the company that it was not filed for delay only, dismissal as to company and sustaining as to individual was proper.—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S.E. 373, 22 Ga. App. 89.

80. Ga.—Taylor v. Gay, 20 Ga. 77.

Defect not cured by answer

Where the answer of a magistrate, although verifying statements of fact in the petition for certiorari, does not establish that it was not filed for delay only, as required by statute, the certiorari is subject to dismissal as to any plaintiffs in certiorari failing to make such affidavit.—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S.E. 373, 22 Ga.App. 89.

81. Tex.—Seeligson v. Wilson, 58 Tex. 369.

82. La.—State v. Fleckinger, 90 So. 768, 150 La. 479.

Failure to serve notice of time and place of hearing as ground see *infra* § 144.

As not rendering proceeding moot

Where certiorari is applied for within the time prescribed by law, the proceeding is not rendered moot and subject to dismissal merely because the petitioner failed to give notice of his intention to certiorari the case, and did not obtain the certiorari until the opposite party had given bond for the property.—Smith v. Whitaker, 148 S.E. 746, 40 Ga. App. 73.

83. Ga.—Seaboard Air Line Ry. v. Brewton, 102 S.E. 439, 150 Ga. 37, reversing 99 S.E. 226, 23 Ga.App. 621.

Failure to serve brief

Under a rule of court, providing that notice of date of filing petition for certiorari, together with copy of petition and brief, if any, shall be served on counsel for respondent, a petition served on respondent, which petition fully set out grounds and authorities relied on, will not be dismissed for failure to serve any brief or argument.—Seaboard Air Line Ry. v. Brewton, 102 S.E. 439, 150 Ga. 37, reversing 99 S.E. 226, 23 Ga. App. 621.

84. Mass.—Com. v. Downing, 6 Mass. 72.

Failure to give notice of time and place of hearing see *infra* § 144. Notice of application see *supra* § 85.

85. Ala.—U. S. Health, etc., Ins. Co. v. Hill, 62 So. 954, 9 Ala.App. 222. La.—State v. Fleckinger, 90 So. 768, 150 La. 479.

Loss or waiver of right generally see *infra* § 137.

e. Failure to Allow Writ

Issuance of the writ without being specially allowed may constitute ground for dismissal.

It is ground for quashing the writ that it was issued without being specially allowed,⁸⁶ except where the objection is waived by defendant voluntarily appearing without excepting to the writ because of such issuance,⁸⁷ and except where the writ is a matter of right.⁸⁸ The court, however, may refuse to quash the proceedings for the want of allowance of the writ, if on examination it is apparent that it would have been allowed, or will be allowed, on a new application.⁸⁹

f. Premature Application for, or Issuance of, Writ

The writ may be quashed because of a premature issuance thereof; but not because of a premature prior application.

The writ should be quashed where it was improperly issued while the proceedings sought to be reviewed were pending, and before the rendition of judgment.⁹⁰ The pendency of a prior application for the writ, prematurely made, is not ground for quashal.⁹¹

g. Erroneous Direction of Writ and Improper Parties

A writ directed to, or joined in by, improper parties may be dismissed or quashed as to such parties.

Where the writ is directed to improper parties defendant, it should be dismissed,⁹² except where the

defect has been cured by an affidavit, accompanying the writ, which properly describes the respondent, and by a return actually being made.⁹³

Where, however, the writ is addressed to an improper party as well as to the proper party, it will not be quashed except as to the improper party.⁹⁴ So also the joinder of parties who are not entitled to the writ with parties who are entitled to it as parties plaintiff is not ground for dismissal, since the defect may be reached by motion to strike out the parties improperly joined;⁹⁵ and, if each has a right to prosecute the certiorari, the remedy is to supersede the writ before the return is filed;⁹⁶ nor will the writ be quashed because directed to an unnecessary party, if no command is made of him.⁹⁷ Moreover, the writ will not be quashed because the officers to whom it is directed are given a wrong official designation.⁹⁸

If no motion is made to supersede or quash the writ, the question of improper parties plaintiff cannot be first urged at the hearing by a motion for judgment on the pleadings,⁹⁹ and error in omitting to join a necessary party as relator is waived where no objection is made thereto until after a hearing on the merits.¹

h. Want or Insufficiency of Bond

Want or insufficiency of a certiorari bond may constitute ground for dismissing or quashing the writ.

Where no bond has been given in compliance with the order allowing the writ, or as required by statute,² where a writ of error bond has been given, in-

16. Mich.—Young v. Kelsey, 9 N.W. 453, 46 Mich. 414.

Wash.—Leavitt v. Chambers, 47 P. 455, 16 Wash. 353.

1 C.J. p 184 note 64.

Necessity for allowance see supra § 102.

17. Tenn.—Shields v. Greene County, 2 Coldw. 60.

Loss or waiver of right generally see infra § 137.

18. Pa.—In re Young, 9 Pa. 215.

19. Pa.—In re Thirty-fourth St., 81 Pa. 27.

20. Mich.—Detroit Western Transit, etc., R. Co. v. Backus, 12 N.W. 861, 48 Mich. 582.

1 C.J. p 184 note 67.

Necessity for final determination before issuance of writ see supra § 20.

Petition assigning error on final judgment

Where the petition contains an assignment of error on a final judgment, such as the overruling of plaintiff's motion for a new trial, the writ is not dismissible, although

a judgment directing a verdict sustaining defendant's plea of tender and limiting plaintiff's recovery to the amount tendered is not a final one.—Guaranty Life Ins. Co. of Savannah v. Bell, 156 S.E. 319, 42 Ga. App. 415.

21. Mich.—Rowe v. Rowe, 28 Mich. 353.

22. Wis.—State v. Weinfurther, 66 N.W. 702, 92 Wis. 546.

11 C.J. p 184 note 68.

To whom writ directed see supra § 105.

23. Mich.—Wilson v. Gifford, 50 N.W. 392, 41 Mich. 417.

24. Dak.—Champion v. Minnehaha County, 41 N.W. 739, 5 Dak. 416.

N.J.—Mattia v. City of Newark, 196 A. 202, 119 N.J.Law 268.

11 C.J. p 185 note 69.

25. N.J.—State v. Kirby, 5 N.J.Law 982.

N.Y.—Peo. v. Cheetham, 45 Hun 6.

11 C.J. p 185 note 70.

Technical irregularity

Where defendant is made a party to certiorari by the garnishee to re-

view a judgment against the garnishee in favor of plaintiff, error in permitting the name of defendant to be stricken out, while technically irregular, does not affect the merits.—Mitchell v. Great Atlantic, etc., Tea Co., 68 S.E. 343, 7 Ga.App. 824.

26. N.Y.—Peo. v. Feitner, 63 N.Y. S. 319, 30 Misc. 247, affirmed 63 N.Y.S. 532, 49 App.Div. 335, affirmed 57 N.E. 624, 163 N.Y. 384.

27. N.J.—State v. Rowan, 31 A. 224, 57 N.J.Law 530.

11 C.J. p 185 note 72.

28. N.J.—State v. Morris Canal, etc., Co., 14 N.J.Law 411.

29. Mo.—State v. Shocklee, 141 S.W. 614, 237 Mo. 460.

30. N.Y.—Peo. v. McLean, 80 N.Y. 254.

Loss or waiver of right generally see infra § 137.

31. Ga.—Metropolitan Life Ins. Co. v. Monroe, 106 S.E. 209, 26 Ga.App. 332.—Georgian Co. v. Sutton, 89 S.E. 601, 18 Ga.App. 507.

32. Tex.—Cotton v. Gammon, 4 Tex. 83.

Although good as a common-law

stead of a certiorari bond,³ where the bond is not filed until after the time limited for the allowance of the writ,⁴ where a bond is not given with two sureties as required by statute,⁵ where the surety's name was signed by an attorney in fact whose authority did not accompany the bond,⁶ or where an order to supply a lost bond is not complied with,⁷ the writ will be dismissed. The writ will not be dismissed, however, for a clerical error in the date of the bond;⁸ nor for defects in the condition of the bond where it is permissible to amend the bond,⁹ unless the party in whose favor the writ is issued fails or refuses, when required to do so, to make a good bond;¹⁰ nor should the writ be quashed for insufficiency of the bond in amount without giving the petitioner an opportunity to amend the bond.¹¹

Acceptance of security in open court. On motion to dismiss the writ because of the insufficiency of the bond in that it was not properly signed and sealed, the court may decline to dismiss, and accept security offered in open court.¹²

Approval of bond. The writ may be dismissed on the ground that the certiorari bond has not been approved by the proper officer;¹³ but the writ should not be dismissed for failure of the clerk to

approve a bond which has been filed and acted on, and which the judge has approved.¹⁴

Description of judgment. On motion to dismiss the writ because the bond does not properly describe the judgment, the bond may be aided by the petition for the writ and the transcript.¹⁵

1. Absence or Insufficiency of Return or Answer

The writ may be dismissed for a failure to file a return or answer within the time limited therefor; but not for a mere incorrectness or insufficiency therein.

Failure to file a return or answer within the time limited therefor may be ground for dismissing the writ,¹⁶ especially where the petitioner takes no steps to procure a return,¹⁷ but not where it is filed during the first term and before a motion to dismiss is made.¹⁸

Where an answer is properly filed, its incorrectness or insufficiency is no ground for the dismissal of the petition,¹⁹ but the proper remedy for the party complaining is by exception to the answer, as explained supra § 130, and the filing of such exception by plaintiff in certiorari does not constitute an admission that no legal answer has been filed so as to justify a dismissal of his petition.²⁰ If, however,

obligation, if an instrument is void as a statutory bond, defendant in certiorari may have the writ dismissed when the bond does not comply with the statutory requirements.—*Metropolitan Life Ins. Co. v. Monroe*, 106 S.E. 209, 26 Ga.App. 332. Necessity for bond see supra §§ 90, 91.

3. Tenn.—*Love v. Hall*, 3 Yerg. 408.
4. Ga.—*Baker v. McDaniel*, 13 S.E. 130, 87 Ga. 18.

5. Tex.—*Mays v. Lewis*, 4 Tex. 1.
6. Ga.—*American Nat. Ins. Co. v. Jordan*, 105 S.E. 852, 26 Ga.App. 320.

7. Tex.—*Johnson v. McKissack*, 20 Tex. 160.

8. Tex.—*Crenshaw v. Home Lumber Co.*, Civ.App., 296 S.W. 342.

9. Ala.—*Davis v. Calhoun*, 24 Ala. 455.

Mo.—*Gossett v. Devorss*, 73 S.W. 731, 98 Mo.App. 641.

11 C.J. p 185 note 83.
Power to amend bond see supra § 96.

10. Ala.—*Davis v. Calhoun*, 24 Ala. 455.

11. Ala.—*McClellan v. Allison*, 19 Ala. 671.

Ill.—*Hoare v. Harris*, 14 Ill. 35.
Pa.—*Commonwealth v. Sprout*, 14 Pa.Dist. 356.

Tex.—*Smith v. Wilson*, 15 Tex. 132.

12. Tenn.—*Lima v. Pinkston*, 1 Overt. 344.

13. Ga.—*Southeastern Mut. Fire Ins. Co. v. Davidson*, 102 S.E. 460, 25 Ga.App. 83—*Georgian Co. v. Sutton*, 89 S.E. 601, 18 Ga.App. 507.

Certiorari issued before trial judge approved the bond may properly be dismissed.—*Butters Mfg. Co. v. Starke*, 169 S.E. 57, 46 Ga.App. 715—*Butters Mfg. Co. v. Fraley*, 169 S.E. 55, 46 Ga.App. 715.

Judicial officer before whom case tried

Where a writ has issued, it is proper, on the call of the case for trial, to dismiss the petition when it nowhere appears from the record that the bond has been approved by the judicial officer before whom the case was tried.—*Southeastern Mut. Fire Ins. Co. v. Davidson*, 102 S.E. 460, 25 Ga.App. 83.

14. Mo.—*Gossett v. Devorss*, 73 S.W. 731, 98 Mo.App. 641.

Tex.—*Nelms v. Draub*, Civ.App., 22 S.W. 995.

11 C.J. p 185 note 87.

15. Tenn.—*Lima v. Pinkston*, 1 Overt. 344.

Tex.—*Seeligson v. Wilson*, 58 Tex. 369—*Nelson v. Hart*, Civ.App., 23 S.W. 831, distinguishing and criticizing *McMahan v. Chambers*, 38 Tex. 277.

16. Ala.—*Petition of Curtis*, 81 So. 145, 16 Ala.App. 653.

Ga.—*Mathis v. City of Nashville*, 175 S.E. 384, 49 Ga.App. 309—*Mathis*

v. City of Nashville, 175 S.E. 383, 49 Ga.App. 309—*Allen v. McGuire*, 174 S.E. 147, 49 Ga.App. 60—*Jones v. Warlick*, 138 S.E. 914, 37 Ga. App. 56—*Mertins v. Gavalos*, 111 S.E. 684, 28 Ga.App. 438.

Mich.—*Harrington v. Otsego County Board of Sup'rs*, 184 N.W. 396, 216 Mich. 104.

11 C.J. p 185 note 89.

17. Ga.—*Fain v. Shy*, 42 S.E. 94, 115 Ga. 765—*Mathis v. City of Nashville*, 175 S.E. 384, 49 Ga.App. 309—*Mathis v. City of Nashville*, 175 S.E. 383, 49 Ga.App. 309.

Mich.—*Harrington v. Otsego County Board of Sup'rs*, 184 N.W. 396, 216 Mich. 104.

Failure to apply for additional time or require answer

Ga.—*Mertins v. Gavalos*, 111 S.E. 684, 28 Ga.App. 438.

18. Ga.—*Harrison v. May*, 49 S.E. 728, 121 Ga. 816—*Sutton v. State*, 48 S.E. 342, 120 Ga. 865—*Carter v. Cross*, 128 S.E. 590, 34 Ga.App. 149.

As ground for contempt but not dismissal

Ga.—*Carter v. Cross*, 128 S.E. 590, 34 Ga.App. 149.

19. Ga.—*Marchman v. Brown*, 85 S.E. 99, 143 Ga. 335—*Baggs-Langford Motor Co. v. Lewis*, 129 S.E. 16, 34 Ga.App. 205.

20. Ga.—*Baggs-Langford Motor Co. v. Lewis*, supra.

notice of such exceptions is not given to the opposite party before the case is called in its order for hearing, certiorari may be dismissed on the ground that no sufficient answer has been made by the trial judge and because of the lack of such notice.²¹

j. Failure to Prosecute

Failure to prosecute the writ with due diligence may be ground for its quashal.

The writ may be quashed for failure to prosecute it with due diligence,²² even after a return is filed,²³ as where there is inexcusable delay in bringing on the argument,²⁴ or failure to file reasons for reversal as required by rules of court,²⁵ or, where it is plaintiff's duty to furnish the record to be reviewed, he fails to use due diligence in having a complete record made out;²⁶ but this rule does not apply where the petitioner has acted in good faith in the belief that he has fully performed his duty, and the transcript is not annexed to the writ because of his failure to pay fees.²⁷

k. Delay in Suing Out or Issuing Writ

Failure to sue out or issue the writ within a reasonable, or the proper, time may be ground for quashing it.

Where the applicant for the writ has been guilty of unreasonable delay in suing out the writ, it gen-

erally will be quashed;²⁸ but where it has been allowed and duly prosecuted it will be presumed that the question of delay was considered on the application, and the writ will not thereafter be dismissed for delay in applying for it.²⁹ Likewise the writ will be quashed where it has not been sued out until after the time limited by statute for its issuance;³⁰ and the statute of limitations need not be set up in an answer,³¹ and, in some jurisdictions, it cannot be urged in the return.³² A failure to file the petition within the required time after judgment, however, has been held not to warrant quashing certiorari to review proceedings in an intermediate court on appeal from a lower court.³³

Delay in issuing writ. It is a ground that the writ was not issued within the proper time after its allowance;³⁴ but not where the failure to issue the writ within the proper time after its allowance was occasioned by the fault of the opposite party.³⁵

l. Remedy Unavailing; Moot Question

The writ may be dismissed where the remedy sought becomes unavailing, or the question involved becomes a moot one.

Although properly begun, a writ may be dismissed, if the remedy thereby sought has become unavailing,³⁶ or if the question involved has become merely a moot one.³⁷ A writ to review an order

21. Ga.—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440.

22. Ill.—People v. Burdette, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill.App. 365.

Nev.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312, 43 Nev. 159. 11 C.J. p 186 note 92.

Failure to file abstract or brief
Iowa.—Finch v. Newby, 191 N.W. 978.

23. Ill.—People v. Burdette, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill.App. 365.

24. N.J.—Shepherd v. Sliker, 31 N.J.Law 422.

Excusable delay
N.J.—Rogers v. McGowan, 140 A. 670, 6 N.J.Misc. 261.

Sufficiency of excuse
That case was not noticed for trial at proper term was sought to be excused only on grounds that prosecutor desired to strike from return testimony at trial before town council, on ground that stenographer was not designated as required by statute, but evidence had in fact been taken by a court reporter and properly certified as correct, a motion to strike testimony was properly denied, in view of unsubstantial and highly technical nature of grounds, and motion to strike was not sufficient ex-

cuse for failure to notice case for argument.—Darcy v. Town of Westfield, 129 A. 428, 3 N.J.Misc. 651. Notice of hearing see infra § 144.

25. N.J.—Bell v. Bergen Tp. Overseers of Poor, 14 N.J.Law 131.

26. Cal.—James v. Police Court of City and County of San Francisco, 178 P. 867, 39 Cal.App. 362.

Although clerk required to return transcript

Nev.—Dixon v. Second Judicial District Court in and for Washoe County, 183 P. 312, 43 Nev. 159.

27. Nev.—Dixon v. Second Judicial District Court in and for Washoe County, supra.

28. Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 688, 83 Colo. 379, citing **Corpus Juris**.

11 C.J. p 186 note 96. Reasonable time for applying for writ see supra § 66.

29. N.J.—State v. Manning, 40 N.J.Law 461.

30. Ga.—Hudson v. Higgins, 164 S.E. 688, 45 Ga.App. 358—Jones v. Warlick, 138 S.E. 914, 37 Ga.App. 56.

La.—W. J. Martinez & Bros. v. Murray, 90 So. 366, 149 La. 982. Or.—Southern Oregon Co. v. Coos County, 47 P. 852, 30 Or. 250. 11 C.J. p 186 note 97.

Statutory time for suing out writ see supra § 64.

Failure to serve within required time

Where a magistrate, whose decision is sought to be reviewed by certiorari, was not served with the petition within the legally required time, and such failure is not shown to have been due to no negligence or fault of plaintiff in certiorari, a motion to dismiss may properly be sustained.—Jones v. Warlick, 138 S.E. 914, 37 Ga.App. 56.

31. Or.—Southern Oregon Co. v. Coos County, 47 P. 852, 30 Or. 250.

32. N.Y.—Peo. v. MacLean, 19 N.Y.S. 56, 64 Hun 205. 11 C.J. p 186 note 99.

33. Fla.—Edwards v. Knight, 132 So. 459, 100 Fla. 1704.

34. Iowa.—Snyder v. Roper, Morr. 229.

Neglect to take out writ in reasonable time after allowance as precluding right see supra § 103.

35. Ga.—Hopkins v. Suddeth, 18 Ga. 518.

11 C.J. p 186 note 2.

36. N.J.—State v. Reed, 31 N.J.Law 133.

37. Cal.—Eiseman v. Daugherty, 215 P. 1032, 61 Cal.App. 733. Ga.—Hoard v. Jordan, 99 S.E. 144, 145, 23 Ga.App. 656, citing **Corpus**

in an action will be quashed where the action itself has been dismissed, so as to terminate the controversy,³⁸ or where the order of the lower court is revoked on application of the party on whose motion it was made,³⁹ or where it appears that petitioner consented to the vacation of the order sought to be reviewed,⁴⁰ or where the court or board to which the writ is issued has been abolished,⁴¹ or where the relator in certiorari has obtained adequate relief in another action.⁴² So also, where injunction proceedings sought to be reviewed are terminated or become unenforceable after the writ is issued, the writ should be dismissed.⁴³ Where the return to the writ shows that the writ has served its purpose it will be recalled.⁴⁴

§ 136. Who May Dismiss

The writ may be dismissed at the instance of one of the parties; or in a proper case the court may dismiss of its own motion.

The court may quash or dismiss the writ on the motion of either party.⁴⁵ As in other proceedings, plaintiff in certiorari may dismiss or discontinue,⁴⁶ and the writ will be dismissed on his motion, on his suggesting to the court that he has released his interest in the subject matter in dispute.⁴⁷ Leave to appear specially for the purpose of making a motion to quash the writ may be granted defendant without the reasons being set out in writing, unless plaintiff objects in which case the reasons for the application should be set forth in a petition.⁴⁸

Dismissal by court on own motion. If at any time the court is advised that the writ has improperly been issued, it may in the exercise of its discretion dismiss the writ on its own motion without any application for dismissal being made by either party,⁴⁹ as where it appears that the proceeding is void,⁵⁰ that the writ was not applied for within a reasonable time,⁵¹ or that the question involved has become moot.⁵² It has been held that, although a

Juris—City of Savannah v. Monroe, 95 S.E. 731, 22 Ga.App. 190.

Iowa.—McGrath v. District Court of Adams County, 217 N.W. 823, 205 Iowa 191.

La.—Miller v. Molony, 103 So. 162, 157 La. 811.

11 C.J. p 187 note 9.

Controversies held not moot

U.S.—Wayne United Gas Co. v. Owens-Illinois Glass Co., W.Va., 57 S.Ct. 382, 300 U.S. 131, 81 L. Ed. 557, reversing, C.C.A., 84 F.2d 965, certiorari granted 57 S.Ct. 41, 299 U.S. 528, 81 L.Ed. 389.

Ga.—Johns v. McBride, 112 S.E. 831, 28 Ga.App. 686.

Custody of minor children

Where, on appeal in a divorce action, the court determined that plaintiff was entitled to a divorce and remanded the cause with directions to make orders with reference to the custody of minor children, matters presented on writ of certiorari in a subsequent proceeding to determine the custody of such minor children became moot.—McGrath v. District Court of Adams County, 217 N.W. 823, 205 Iowa 191.

Expiration of term of office

Where writ of certiorari was sought to prevent suspension of county commissioner from office pending trial on accusation, but commissioner's term of office had expired before certiorari case was reached on merits, questions presented are moot.—Muse v. Long, 29 P.2d 51, 167 Okl. 159.

Return of seized property

Certiorari to review action of court in ordering return of copper boilers and cans seized under a search warrant presents only a moot question where the property has

been returned and the person to whom it was returned is not a party to the proceeding.—Hammond v. Des Moines Municipal Court, 197 N.W. 628, 197 Iowa 511.

Abstract questions as not ground for certiorari see supra § 32.

38. Iowa.—Blodgett v. Brennan, 123 N.W. 946.

La.—Foster v. Shreveport, 68 So. 134, 136 La. 1087.

Nev.—State v. Nevada Third Judicial Dist. Ct., 71 P. 664, 27 Nev. 58.

Wash.—State v. Pierce County Superior Court, 91 P. 568, 47 Wash. 35.

39. La.—Tyson v. Spearman, 174 So. 269, 187 La. 223.

40. Cal.—Vignaut v. Superior Court of Sacramento County, 191 P. 1112, 48 Cal.App. 554.

41. Wis.—State v. Rosenthal, 191 N. W. 562, 179 Wis. 243.

42. Mo.—State ex rel. Pitcairn v. Shain, 106 S.W.2d 902, dismissing certiorari State ex rel. Pitcairn v. Public Service Commission of Missouri, App., 100 S.W.2d 636, transferred 90 S.W.2d 392, 338 Mo. 180, reversed State ex rel. Wabash Ry. Co. v. Shain, 106 S.W.2d 898, 341 Mo. 19, mandate conformed to State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367.

43. La.—Broussard v. Democratic Executive Committee of Evangeline Parish, 146 So. 313, 176 La. 620.

11 C.J. p 187 note 11.

Injunctions in election proceedings

La.—Porter v. Conway, 159 So. 725, 181 La. 487.—Broussard v. Democratic Executive Committee of

Evangeline Parish, 146 So. 313, 176 La. 620.

44. La.—St. Bernard Trappers Ass'n v. Michel, 109 So. 917, 161 La. 1106.

45. Ark.—Flournoy v. Payne, 28 Ark. 87.

46. Ill.—Joliet, etc., R. Co. v. Barrows, 24 Ill. 562.

11 C.J. p 187 note 18.

47. Ohio.—Lewis v. Lewis, 15 Ohio 715.

48. Del.—McLaughlin v. Sentman, 47 A. 1014, 18 Del. 565.

49. Fla.—Fidelity & Casualty Co. of New York v. Plumbing Department Store, 157 So. 506, 117 Fla. 119.—Ferlita v. Figarota, 145 So. 605, 106 Fla. 578.

Ill.—People v. Burdette, 120 N.E. 519, 520, 285 Ill. 48, reversing 207 Ill.App. 365, citing **Corpus Juris**—People ex rel. Oberhart v. Durkin, App., 1 N.E.2d 882, 885, citing **Corpus Juris**.

La.—State v. Fleckinger, 90 So. 768, 150 La. 479.

N.J.—State v. Jersey City Water Com'rs, 30 N.J.Law 247.

11 C.J. p 187 note 21.

50. Ga.—Standard Gas Products Co. v. Vismor, 121 S.W. 854, 31 Ga. App. 418.

Payment of costs not shown

Ga.—Standard Gas Products Co. v. Vismor, supra.

51. Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 83 Colo. 379.

Delay in suing out writ as ground for dismissal generally see supra § 135 k.

52. La.—Miller v. Molony, 103 So. 162, 157 La. 811.

Moot question as ground for dismissal generally see supra § 135 l.

motion for dismissal has been made, the court may dismiss for reasons other than those alleged in the motion,⁵³ but there is also authority to the contrary.⁵⁴

§ 137. Loss or Waiver of Right

The right to quash or dismiss a writ of certiorari may be lost or waived by a failure to move in the matter with diligence, or by taking some action inconsistent with the existence of the right.

The right to quash or dismiss may be lost or waived by failure to move with diligence;⁵⁵ but not where the motion is acted on with due diligence, and the delay is partly caused by the court being in vacation.⁵⁶ Where a party aggrieved has a right of review, and the only question is as to the form of the remedy, a motion to dismiss will be denied where not made promptly, but instead after the opposing party has gone to the expense of preparing for the hearing of the cause.⁵⁷

The right to a dismissal, however, is not lost by permitting a motion for an amended return.⁵⁸ Furthermore, a waiver of notice of the sanction of the writ and of the time and place of hearing will not deprive a party of his right to dismiss, if that right has been reserved.⁵⁹ The making of a return does not waive the right to move to dismiss the writ on the ground that the party prosecuting it is not an interested party;⁶⁰ but the answer or return may cure a defect in the petition, as a ground of dismissal, by setting out evidence which the petition failed to set out.⁶¹ Where the petition is void, as by reason of its not being filed within the

statutory time, the pendency of a traverse to a void answer will not preclude a dismissal.⁶² The nonobservance of a statute or rule, requiring the filing of an abstract of record, as explained supra § 135 a, as a ground for dismissal, cannot be waived.⁶³

§ 138. Dismissal by Stipulation

The writ may be dismissed on a stipulation of the parties to that effect.

Where the parties stipulated that the proceedings should be dismissed, the dismissal will not be refused merely on the protest of an attorney for one of the parties whom the record does not show will be injured by the dismissal.⁶⁴ An agreement for dismissal, however, made by commissioners individually without any resolution of the board authorizing the agreement is not binding.⁶⁵ A dismissal of the writ on stipulation is not an adjudication that certiorari is plaintiff's only remedy.⁶⁶

§ 139. Motion

- a. In general
- b. Time for motion
- c. Motion papers

a. In General

The proper remedy to supersede or to dismiss or quash a writ of certiorari is by a motion to supersede or a motion to dismiss or quash the writ, in the court of the district to which the writ is returnable.

The proper remedy in a case where the writ should be superseded or quashed is respectively

53. Ala.—Independent Pub. Co. v. American Press Assoc., 15 So. 947, 102 Ala. 475.

Ga.—Hudson v. Higgins, 164 S.E. 688, 45 Ga.App. 358.

Tex.—O'Brien v. Dunn, 5 Tex. 570.

54. Dak.—Champion v. Minnehaha County Bd. of Comrs., 41 N.W. 739, 5 Dak. 416.

55. Ga.—Southern Pac. Co. v. Davidson-Paxon Co., 165 S.E. 862, 45 Ga. App. 719.

Mo.—State v. Shocklee, 141 S.W. 614, 237 Mo. 460.

Pa.—Cooke v. Reinhart, 1 Rawle 317.

Tenn.—City of Nashville v. Mason, 11 Tenn.App. 344.

Waiver:

As to omitting to join necessary party see supra § 135 g.

Of:

Failure to give notice see supra § 135 d.

Objection to issuance of writ without allowance thereof see supra § 135 e.

56. Tex.—Crenshaw v. Home Lumber Co., Civ.App., 296 S.W. 342.

Action after return term

Where a motion to dismiss was filed at the first term of court to which it was returnable, it was not thereafter waived because it was not considered until later, in view of the fact that the delay was partly caused by the vacation of the court.—Crenshaw v. Home Lumber Co., supra.

57. Mich.—Moinet v. Burnham, 106 N.W. 1126, 143 Mich. 489.

58. N.Y.—Peo. v. McDonald, 2 Hun 70.

59. Ga.—Industrial Aid Assoc. v. Carlyle, 37 S.E. 990, 112 Ga. 689.

60. Or.—Garrison v. Malheur County Ct., 101 P. 900, 54 Or. 269.

61. Ga.—Kelley v. Jones, 96 S.E. 181, 22 Ga.App. 444.

Too late to dismiss

Where judge of superior court sanctioned petition for certiorari to review judgment of ordinary, and ordinary in his answer set out evidence given before him, failure of petition to set out evidence was supplied, and at the hearing it was too

late to dismiss petition for such defect.—Kelley v. Jones, 96 S.E. 181, 22 Ga.App. 444.

62. Ga.—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203.

63. Mo.—State ex rel. Egan v. Trimble, 291 S.W. 468.

A rule of court authorizing the waiver of objections to abstracts does not permit respondent to waive the failure to print and file an abstract as a ground for dismissal.—State ex rel. Consolidated School Dist. No. 8 of Newton County v. Cox, 18 S.W.2d 61, 323 Mo. 43, dismissing certiorari Boswell v. Consolidated School Dist. No. 8 of Newton County, App., 10 S.W.2d 665.

64. Mich.—Buchanan v. Moore, 71 N.W. 1116, 113 Mich. 555.

65. Ill.—McManus v. McDonough, 107 Ill. 95.

66. N.Y.—Village of Elmira Heights v. Town of Horseheads, 250 N.Y.S. 50, 140 Misc. 147, affirmed 254 N.Y.S. 418, 234 App.Div. 270, affirmed 184 N.E. 70, 260 N.Y. 507.

by a motion to supersede or by a motion to dismiss or quash,⁶⁷ even though the statute makes no provision for such a motion.⁶⁸ Where, under the local practice, an order of certiorari is substituted for the writ, a motion to vacate the order is the proper procedure.⁶⁹ After the issuance of the writ the proper procedure is by motion for the dismissal or quashal of the writ,⁷⁰ and not by demurrer to the petition, as noted supra § 84, or by objection to the jurisdiction of the court.⁷¹

A motion to quash the writ for insufficiency of the petition is tantamount to a demurrer to the petition,⁷² and brings the sufficiency of the application into question;⁷³ and a demurrer filed with the answer may be treated as a motion to quash.⁷⁴ On the other hand an exception to the petition for the writ is equivalent to a motion to dismiss, and a judgment for defendant on such an exception is practically the same as a dismissal;⁷⁵ although it is not the preferred practice to object to the sufficiency of the petition for the writ by exceptions, but a motion should be made to dismiss.⁷⁶

Demurrer to the return. The writ may be quashed for insufficiency of the petition therefor on de-

murrer to the return,⁷⁷ under the familiar rule that demurrer may be ousted because of the insufficiency of his own pleading, as explained in the C.J.S. title Pleading § 262, also 49 C.J. p 443 note 55 et seq.

Where made. A motion to dismiss should be made in the district to which the writ is returnable,⁷⁸ in the court having jurisdiction thereof;⁷⁹ except that to save delay it may be directed to be made in another district in which the court is sitting.⁸⁰ It has been held that the motion may be made at chambers.⁸¹

Notice of motion. Proper notice of the motion should be given to the adverse party.⁸²

b. Time for Motion

The motion, generally, should be made not later than the term of court to which the writ is returnable; and, according to local practice, may be made either before or after the return day of the writ.

The time when the motion may be made is largely governed by the local practice,⁸³ although it should be made at the earliest opportunity.⁸⁴ It is generally held that it must be made not later than the term of court to which the writ is returnable,⁸⁵

67. Iowa.—Fehrman v. Sioux City, 249 N.W. 200, 216 Iowa 286.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400.

N.Y.—City of Albany v. Town of Coeymans, 2 N.Y.S.2d 735, 253 App. Div. 436.

Or.—Fay v. City of Portland, 195 P. 828, 99 Or. 490.
11 C.J. p 187 note 29.

68. Mont.—State v. District Court of Second Judicial District in and for Silver Bow County, 272 P. 525, 82 Mont. 400.—State ex rel. Examining and Trial Board of Police Department of City of Butte v. District Court of Second Judicial District in and for Silver Bow County, 190 P. 295, 58 Mont. 90, distinguishing Garrison v. Richardson, 101 P. 900, 54 Or. 269.

69. N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126.—People ex rel. Hunter Arms Co. v. Foster, 238 N.Y.S. 295, 247 App. Div. 619.

70. Iowa.—Fehrman v. Sioux City, 249 N.W. 200, 216 Iowa 286.—Tuttle v. Hutchison, 151 N.W. 844, 173 Iowa 503.

Or.—Fay v. City of Portland, 195 P. 828, 99 Or. 490.

71. Iowa.—Tuttle v. Hutchison, 151 N.W. 845, 173 Iowa 503.

72. Iowa.—Consolidated Independent School Corporation of St. Anthony, Marshall County v. Shutt,

201 N.W. 335, 338, 199 Iowa 111, citing *Corpus Juris*.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126, affirming 243 N.Y.S. 263, 230 App.Div. 21, affirming 244 N.Y.S. 413, 138 Misc. 187.

11 C.J. p 187 note 30.

Motion held demurrer in effect

Motion to quash certiorari for want of jurisdiction and right to relief prayed on face of petition was in effect a demurrer.—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo.App. 787.

73. Tex.—American Bankers' Ins. Co. v. Flowers, Civ.App., 64 S.W.2d 806.

74. Vt.—Davidson v. Whitehill, 89 A. 1081, 87 Vt. 499.

75. Tex.—Ellett v. Moore, 6 Tex. 243.

76. Tex.—Ellett v. Moore, supra.

77. Wis.—State v. Timme, 36 N.W. 325, 70 Wis. 627.

78. N.Y.—Peo. v. Cooper, 57 How. Pr. 463.

11 C.J. p 188 note 36.

79. N.J.—Santangelo v. Civil Service Commission of New Jersey, 167 A. 193, 11 N.J.Misc. 532.

11 C.J. p 188 note 36 [a].

Member of court sitting alone is without jurisdiction to dismiss the writ, after a return has been made to the court in banc.—Santangelo v. Civil Service Commission of New Jersey, supra.

In New York

(1) Motion to vacate order of certiorari on ground that petition failed to state facts sufficient to warrant granting of orders could properly be made at special term at which orders of certiorari were granted.—People ex rel. Hunter Arms Co. v. Foster, 238 N.Y.S. 295, 247 App.Div. 619.

(2) Supreme court, appellate division, however, would retain jurisdiction of motion to vacate order of certiorari granted at special term without notice to respondents and made returnable at appellate division in first instance.—People ex rel. Hunter Arms Co. v. Foster, supra.

80. Pa.—Ewing v. Filley, 43 Pa. 384.

81. D.C.—Maxwell v. Creswell, 10 D.C. 374.

82. N.J.—State v. Applicants, 3 N. J.Law 505.

11 C.J. p 189 note 67.

83. La.—Bloomfield v. Thompson, 64 So. 853, 134 La. 923.

11 C.J. p 188 note 38.

84. Tenn.—Chappel v. Jones, 8 Humphr. 107.—City of Nashville v. Mason, 11 Tenn.App. 344.

85. Tex.—Scott v. Tate, Civ.App., 28 S.W.2d 848.

11 C.J. p 188 note 39.

As fixing limitation of time for filing motion

Statute authorizing adverse party to move to dismiss certiorari at first

at least if the application is based on mere irregularities in connection with the issuance of the writ,⁸⁶ and this rule applies although the cause has been continued;⁸⁷ and so, although the writ is returned before the return day.⁸⁸ Furthermore, the fact that a motion is made and overruled at the return term does not authorize a supplemental motion, embracing additional grounds, to be made at a succeeding term.⁸⁹

Where, however, the ground for dismissal is that the writ has been improvidently issued, it may be dismissed after the return term,⁹⁰ and even after entering on the merits of the cause,⁹¹ especially where the writ is issued without a hearing on the understanding that opposing counsel reserves the right to raise objection to the remedy on the hearing on the return of the writ.⁹² Oftentimes, if not generally, however, such a dismissal, on the hearing, is by the court of its own motion.⁹³ Moreover, the rule that the motion to dismiss must be made at the return term does not apply where the grounds on which it is based have arisen after the return term,⁹⁴ or where the moving party did not have earlier notice of the writ or removal of the cause.⁹⁵ Generally, a motion to quash is too late where not made until after the submission of the case.⁹⁶

Before or after return. Whether the motion may or must be made before the return is variously decided in different states. It has been held that the motion may be made before the return of the writ,⁹⁷ and that it cannot be made after the return.⁹⁸ On the other hand, it has been held that the motion may be made after the return,⁹⁹ and that it cannot be heard before a return.¹ In accordance with the distinction noted in § 134, it has been held that, while both motions may be based on the same grounds, yet a motion to supersede may be made before the writ is returned, while a motion to quash can be made only after the return.² Where the motion to dismiss the petition is made after a return, it is in effect a motion for judgment on the pleadings.³

In New York, although the earlier decisions are somewhat conflicting, it is now held that the motion must be made before the return day, where it is in the nature of a demurrer to the petition,⁴ as where it appears on the face of the writ that it is insufficient in law, and that it does not lie to review the acts complained of;⁵ or that it may be made, on the papers on which it was granted or on additional affidavits, either before or after the return there-to.⁶

Before return term. Where the writ has been actually returned, a motion may be made and the

term of court to which it is returnable fixes limitation of time for filing motion; and proceedings for certiorari cannot be dismissed on motion filed after expiration of that term.—*Scott v. Tate*, Tex.Civ.App., 28 S.W.2d 848—11 C.J. p 188 note 39 [a].

86. Ala.—*Smith v. Hearne*, 2 Stew. & P. 81.

11 C.J. p 188 note 40.

87. Tex.—*Burns v. Bishop*, Civ.App., 29 S.W. 83.

11 C.J. p 188 note 40 [a].

88. N.Y.—*Hochstrasser v. Wolgrove*, 2 Hill 386—*Sawyer v. Wood*, 18 Wend. 631.

89. Tex.—*Gulf, etc., R. Co. v. Conner*, 2 Willson, Civ.Cas.Ct.App. § 109.

90. Ark.—*Randle v. Williams*, 18 Ark. 380.

N.J.—*State v. New Brunswick*, 38 N.J.Law 320—*State v. Blauvelt*, 34 N.J.Law 261—*State v. Ten Eyck*, 18 N.J.Law 373—*Haines v. Champion*, 18 N.J.Law 49.

91. Ark.—*Flournoy v. Payne*, 28 Ark. 87.

11 C.J. p 188 note 43.

92. Nev.—*Chapman v. Justice Court of Tonopah Tp., Nye County*, 86 P. 552, 99 P. 1077, 29 Nev. 154.

93. Ark.—*Flournoy v. Payne*, 28 Ark. 87.

Ill.—*People v. Burdette*, 120 N.E. 519, 285 Ill. 48, reversing 207 Ill. App. 365.

Dismissal by court on own motion generally see supra § 136.

94. Tex.—*Johnson v. McKissack*, 20 Tex. 160.

Failure to supply lost bond

A motion to dismiss, based on the failure of plaintiff in certiorari to comply with an order to supply a lost bond, may be entertained after the return term.—*Johnson v. McKissack*, 20 Tex. 160.

95. Tenn.—*Gardner v. Barger*, 4 Heisk. 668.

11 C.J. p 188 note 40 [b].

96. Ala.—*U. S. Health, etc., Ins. Co. v. Hill*, 62 So. 954, 9 Ala.App. 222.

97. Ill.—*Deslauries v. Soucie*, 78 N.E. 799, 222 Ill. 522, 113 Am.S.R. 432, affirming 122 Ill.App. 81.

Mo.—*State ex rel. Gardner v. Harris*, 227 S.W. 818, 286 Mo. 262—*State v. Fraker*, 68 S.W. 576, 168 Mo. 445.

Wash.—*Spooner v. Seattle*, 33 P. 963, 6 Wash. 370.

98. Ill.—*Kusel v. Chicago*, 121 Ill. App. 469—*School Directors v. School Trustees*, 91 Ill.App. 96.

99. Utah.—*Crosby v. Probate Ct.*, 5 P. 552, 3 Utah 51.

11 C.J. p 189 note 50.

1. Ala.—*Byars v. Town of Boaz*, 155 So. 383, 229 Ala. 22—*St. John v. Richter*, 52 So. 465, 167 Ala. 656.

2. Wis.—*State v. Milwaukee County*, 16 N.W. 21, 58 Wis. 4—*State v. Fond du Lac*, 35 Wis. 37.

3. Iowa.—*Pricit v. Earlham*, 157 N.W. 238.

4. N.Y.—*Reed v. Board of Standards and Appeals of City of New York*, 174 N.E. 301, 255 N.Y. 126, affirming 243 N.Y.S. 263, 230 App. Div. 21, affirming 244 N.Y.S. 413, 138 Misc. 187.

11 C.J. p 189 notes 55, 56.

Motion to quash writ to review assessment will be denied where it is made after the return is filed.—*People ex rel. Glen Head Realty Co. v. Garland*, 131 N.Y.S. 180, 72 Misc. 413.

5. N.Y.—*Peo. v. Buffalo*, 109 N.Y.S. 991, affirmed 111 N.Y.S. 924, 127 App.Div. 851, reversed on other grounds 96 N.E. 466, 193 N.Y. 249.

6. N.Y.—*City of New York v. Nixon*, 183 N.Y.S. 6, 111 Misc. 224—*People ex rel. Brooklyn Heights R. Co. v. Public Service Commission of the First District*, 166 N.Y.S. 825, 101 Misc. 10.

writ quashed, although it is not returnable until the next term of court.⁷

Want of prosecution may be taken advantage of by a motion to dismiss made at any time.⁸

c. Motion Papers

The motion should specify the particular grounds relied on for dismissal or quashal; and should be in the form required for motions in general.

The motion papers should be in the form required for motions in general, as explained in C.J.S. title *Motions and Orders* § 10, also 42 C.J. p 476 note 1—p 479 note 46, and should specify the particular grounds relied on for dismissal or quashal;⁹ and should be made either on the papers on which the writ was granted or on additional affidavits.¹⁰ The motion may be denied where it is not properly entitled.¹¹

Signature. The motion papers must be signed by the proper party.¹² However, an objection that a motion to dismiss is not signed must be made before the court acts on the motion, or else it will be waived.¹³

§ 140. Hearing and Determination of Motion

- a. In general
- b. Conclusiveness of petition and writ
- c. Extrinsic evidence
- d. Determination

a. In General

On the hearing of the motion, the court may gener-

ally consider the petition for the writ, the writ, the motion papers, and other matters of record before it.

On the motion coming on for hearing, the court or judge has before it the petition for the writ, the writ, the motion papers, and the return if one has been made. If the record has been returned, it may be referred to and considered in determining the merits of the motion,¹⁴ and consideration of the motion ordinarily should be confined to such record.¹⁵ If the writ commands a certification of a full, true, and complete transcript of all the records, the court is not authorized to pass on a motion to dismiss or quash, without having the entire record before it;¹⁶ but it has been held that the reviewing court is not deprived of its jurisdiction because of a deficiency in the record if the petition has attached to it, as exhibits, copies of the proceedings, and the return in the clerk's office also has such copies.¹⁷ In considering the sufficiency of an affidavit on a motion to dismiss, the affidavit should not be strictly construed.¹⁸

In some states the merits of the writ will not be heard on a motion to quash;¹⁹ and it has been held that only the petition will be considered on such a motion,²⁰ and that where it appears on the face of an order for certiorari that it is insufficient in law, and that a review by certiorari does not lie, the court may quash the order on the moving papers alone.²¹

On the hearing of the motion, the question may be raised and decided whether the petitioner should have pursued some other remedy.²²

7. Tex.—*Scott v. Tate*, Civ.App., 28 S.W.2d 848.

Wis.—*Hauser v. State*, 33 Wis. 678.

8. N.J.—Anonymous, 16 N.J.Law 394.

9. Ill.—*Carroll v. Houston*, 173 N.E. 657, 341 Ill. 531.

Tenn.—*City of Nashville v. Mason*, 11 Tenn.App. 344.

11 C.J. p 189 notes 62, 63.

Defect in bond

A general motion to dismiss the writ does not reach a defect in the bond, but the particular objection should be specifically pointed out.—*Hoare v. Harris*, 14 Ill. 85.

10. N.Y.—*City of New York v. Nixon*, 183 N.Y.S. 6, 111 Misc. 224.—*People ex rel. Brooklyn Heights R. Co. v. Public Service Commission of the First District*, 166 N.Y. S. 825, 101 Misc. 10.

11. N.Y.—*Peck v. Witbeck*, 2 How. Pr. 70.

12. N.Y.—*Peo. v. McClellan*, 94 N.Y. S. 1107, 107 App.Div. 272., 35 N.Y. Civ.Proc. 86.

14 C.J.S.—18

Signature by counsel

A motion to quash a writ to review an act of a city board of estimate and apportionment in directing the taking of land for a public purpose, is sufficiently signed by the corporation counsel as such, and not as attorney for the board.—*People v. McClellan*, supra.

13. Tex.—*Flanagan v. Smith*, 21 Tex. 493.

14. Tex.—*Darby v. Davidson*, 27 Tex. 432.

11 C.J. p 189 note 63.

Hearing:

After issuance of writ and return thereto see infra §§ 143–145.

On application for writ see supra § 88.

15. Wis.—*State v. Thorne*, 87 N.W. 797, 112 Wis. 81, 55 L.R.A. 956.

11 C.J. p 189 note 69.

16. Ill.—*Shilvock v. Retirement Board of Policemen's Annuity & Benefit Fund*, 1 N.E.2d 727, 285 Ill.App. 178.

17. Mich.—*Pierce v. Boyle*, 218 N. W. 756, 242 Mich. 149.

18. Tex.—*Seeligson v. Wilson*, 58 Tex. 369—*Lanning v. Yarbrough*, Civ.App., 35 S.W.2d 211.

19. Cal.—*Onesti v. Freelon*, 61 Cal. 625.

11 C.J. p 189 note 71.

20. Or.—*Oregon City v. Clackamas County*, 247 P. 772, 118 Or. 546—*Holmes v. Cole*, 94 P. 964, 51 Or. 483.

Only petition for writ need be examined on principles analogous to those on a motion for a judgment on the pleadings, in order to ascertain whether the petitioner has made out a prima facie case for the issuance of the writ.—*City of New York v. Nixon*, 183 N.Y.S. 6, 111 Misc. 224.

21. N.Y.—*Caulwal Const. Co. v. Burwell*, 240 N.Y.S. 456, 136 Misc. 259.

22. N.Y.—*People ex rel. Hunter Arms Co. v. Foster*, 288 N.Y.S. 295, 247 App.Div. 619.

Mandamus

Question whether petitioners in certiorari proceeding have mistaken remedy and should have applied for

b. Conclusiveness of Petition and Writ

The allegations of a petition for certiorari, and of the writ, will, ordinarily, be taken as true, on a motion to dismiss the writ.

On a motion to dismiss an application for certiorari, the sufficiency of the petition is tested by the same principles as are used in testing the sufficiency of a pleading demurred to.²³ Accordingly, on a motion to dismiss the petition or to quash the writ, the allegations of the petition are admitted by the motion and considered to be true,²⁴ in so far as they are well pleaded;²⁵ and this rule applies even after a return,²⁶ unless contradicted by the record.²⁷ A general motion is in the nature of a general demurrer, and no question of imperfection in the form of the petition arises thereon.²⁸ Where respondent does not challenge the status of the prosecutor until the argument of the cause, matters of fact on which such status depends will be taken as admitted on a motion then made for the dismissal of the writ.²⁹

Order of certiorari. It has been held that on a motion to vacate an order of certiorari, heard on the order and return, the court need not accept the petition as true,³⁰ but that the facts stated in the petition together with the inferences to be drawn therefrom will be viewed in their most favorable light.³¹

Writ. The allegations of the writ will also be taken to be true,³² and with the return will be considered as conclusively establishing the facts stated therein.³³

c. Extrinsic Evidence

On motion to dismiss the writ for insufficiency of the petition, evidence dehors the record is, generally, inadmissible to disprove the allegations of the petition, although it may be admitted under other circumstances.

On a motion to dismiss because of the insufficiency of the petition, its allegations, as stated supra § 140 b, are taken as true, and, generally, it is not permissible to read affidavits or other extrinsic evidence to disprove such allegations;³⁴ and it has been held that it is not proper to regard the facts stated by the justice in his transcript in opposition to those set out and sworn to in the petition.³⁵ However, under some circumstances, as where facts showing that the writ was improperly issued are not apparent from an inspection of the record, matters dehors the record may be considered,³⁶ and in some states affidavits or other extrinsic evidence is proper to aid the court in the exercise of its discretion.³⁷ It has been held that the testimony of both parties on an application to quash a writ of attachment which was returned with the writ may be considered, and the facts deducible therefrom determined.³⁸ Affidavits may be read on the motion, by agreement of the parties.³⁹

relief by mandamus rather than by certiorari is question which may be raised and decided on motion to vacate order of certiorari on ground that petition failed to state facts sufficient to warrant granting of orders.—People ex rel. Hunter Arms Co. v. Foster, supra.

23. Tex.—Huebsch Mfg. Co. v. Coleman, Civ.App., 113 S.W.2d 639—Lanning v. Yarbrough, Civ.App., 35 S.W.2d 211.

24. Ill.—Brown Bros. Garage & Tire Co. v. Backes, 239 Ill.App. 340. N.Y.—People ex rel. Erie R. Co. v. State Tax Commission, 153 N.E. 884, 246 N.Y. 322, reversing 217 N.Y.S. 929, 217 App.Div. 811, affirming 218 N.Y.S. 281, 128 Misc. 142, and reversed on other grounds 223 N.Y.S. 367, 221 App.Div. 200, reversing 214 N.Y.S. 503, 127 Misc. 13.—People ex rel. Three Four Three Realty Corporation v. Byrne, 268 N.Y.S. 778, 149 Misc. 669. Tex.—American Bankers' Ins. Co. v. Flowers, Civ.App., 64 S.W.2d 806—Lanning v. Yarbrough, Civ.App., 35 S.W.2d 211. 11 C.J. p 190 note 74.

25. Ill.—Schmitt v. Edward Hines Lumber Co., 124 Ill.App. 319. Mo.—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo.App. 787.

26. Or.—Gaston v. Portland, 84 P. 1040, 48 Or. 32.

27. Tenn.—Wilson v. Moss, 7 Heisk. 417.

28. Ill.—Schuchman v. Jefferson County Highway Comrs., 52 Ill. App. 497.

29. N.J.—Rehill v. East Newark, 63 A. 81, 73 N.J.Law 220, affirmed 63 A. 1116, 74 N.J.Law 849.

30. N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126, affirming 243 N.Y.S. 263, 230 App. Div. 21, affirming 244 N.Y.S. 413, 133 Misc. 187.

31. N.Y.—Ticknor v. Potter, 282 N. Y.S. 804, 246 App.Div. 556.

32. Colo.—Small v. Bischelberger, 4 P. 1195, 7 Colo. 563.

33. Wis.—State v. McGovern, 76 N. W. 593, 100 Wis. 666.

34. N.J.—Rehill v. East Newark, 63 A. 81, 73 N.J.Law 220, affirmed 63 A. 1116, 74 N.J.Law 849.

Wis.—State v. Thorne, 87 N.W. 797, 112 Wis. 81, 55 L.R.A. 956. 11 C.J. p 190 notes 79, 85.

35. Tex.—Hearn v. Foster, 21 Tex. 401—Richers v. Helmcamp, 1 Tex. App.Civ.Cas. § 683.

36. Ill.—Moweaqua Coal Min. &

Mfg. Co. v. Industrial Commission, 153 N.E. 678, 322 Ill. 403. 11 C.J. p 190 note 83.

Burden of proof to show compliance

On motion to dismiss certiorari, because written notice of the sanction of the writ and of the time and place of hearing was not given, as required by statute, the burden is on plaintiff in certiorari to show compliance with such provision.—Ivey v. City of Warrenton, 113 S.E. 114, 23 Ga.App. 749.

That writ was applied for in time cannot be shown by aliunde proof.—Landrum v. Moss, 57 S.E. 965, 1 Ga. App. 216.

37. Me.—Hayford v. Bangor, 66 A. 731, 102 Me. 340, 11 L.R.A., N.S., 940. 11 C.J. p 190 note 84.

Public detriment and inconvenience

Extrinsic evidence is admissible to show that public detriment and inconvenience might result from quashing the original proceedings.—Deslauries v. Soucie, 78 N.E. 799, 222 Ill. 522, 113 Am.S.R. 432.

38. N.J.—State v. Spring Lake, 32 A. 77, 58 N.J.Law 136. 11 C.J. p 190 note 72.

39. Tenn.—Ezell v. Holloway, 2 Baxt. 15.

d. Determination

The court should determine, from the facts presented, whether or not the writ should be dismissed or quashed, and, if in its discretion, it grants or denies the motion, it should make an order accordingly.

On a motion to dismiss the writ, the court must first determine whether it appears from the petition that a prima facie case is established which would, under any possible interpretation of the facts as therein alleged, warrant the appellate court in answering questions made by the petitioner in the affirmative.⁴⁰ If it is apparent that the inferior tribunal acted within its jurisdiction and proceeded regularly, the writ will be quashed, especially if a further hearing would necessarily result in an affirmation of the determination below.⁴¹ So, if the writ fails to show facts which would justify any action other than that taken below, it is properly quashed, when its insufficiency in that respect is brought to the attention of the court;⁴² and the writ should also be dismissed where the material facts stated in the petition are contradicted by the return;⁴³ but it should not be dismissed, after proper allowance and issue, unless justice clearly demands that course.⁴⁴ The motion may be denied, and an amendment allowed, without prejudice to the right to renew the motion on the amended petition.⁴⁵

Discretion of court. Since the issuance of the writ is to a great extent discretionary, as stated supra §§ 10-16, a motion to quash is generally addressed to the discretion of the court, and will be granted or denied accordingly.⁴⁶ Where, however, the petition is void, the court has power only to dismiss it and enter judgment for costs on the certiorari bonds, and a judgment against the petitioner and his sureties for the amount recovered below is erroneous,⁴⁷ and error in refusing to dismiss the writ, in such a case, renders further proceedings in the case nugatory.⁴⁸ Where two cases are consolidated but the motion to dismiss is entitled, num-

bered, and filed in one case, while the brief in opposition to the motion is entitled, numbered, and filed in the record of the other case, the court may, of its own motion, order the redocketing of both cases to correct the error.⁴⁹

Order of dismissal. In the absence of statute, the court on granting a motion to dismiss, generally, should merely order the dismissal of the writ and give judgment for costs against the prosecutor of the writ, and should not enter a new judgment;⁵⁰ but where on a motion to dismiss on the ground of moot questions, plaintiff's sole reply is that such dismissal might affect his rights in another case, the court, in sustaining the motion, may expressly provide that the judgment shall be without prejudice to plaintiff in certiorari in any other case;⁵¹ and where the certiorari presents only a question of law, the superior court should terminate it by a final judgment.⁵²

Nunc pro tunc order. An order denying a motion to dismiss a writ may be entered nunc pro tunc on renewal of the motion at a subsequent term on the same ground;⁵³ and a nunc pro tunc order quashing the writ may be entered from the minutes kept by the judge and the clerk at the time the original order was directed to be entered.⁵⁴

Reasons assigned by court. Where the writ is properly quashed, it is immaterial that wrong reasons are given by the court therefor,⁵⁵ or that good grounds are considered insufficient;⁵⁶ and the court may dismiss the writ on grounds other than those assigned in the motion, as stated supra § 136.

Retention of writ to prevent delay. Where quashing would simply remit the parties to another proceeding and result in useless delay, the writ may be retained for a hearing.⁵⁷

§ 141. Procedendo

In the absence of statute, the court, on dismissing

40. N.Y.—City of New York v. Nixon, 183 N.Y.S. 6, 111 Misc. 224.

41. Md.—Lancaster v. State, 44 A. 1039, 90 Md. 211.
11 C.J. p 190 note 86.

42. Wis.—State v. Lien, 84 N.W. 422, 108 Wis. 316.

43. Tenn.—Edde v. Cowan, 1 Sneed 290.

44. Mich.—Willson v. Gifford, 4 N. W. 170, 42 Mich. 454.
11 C.J. p 190 note 88.

45. N.Y.—Peo. v. Buffalo, 114 N.Y. S. 1077, 62 Misc. 818.

46. Ill.—McArdle v. Chicago City Service Commn., 159 Ill.App. 464.

N.Y.—People ex rel Brooklyn Heights R. Co. v. Public Service Commission of the First Dist., 166 N.Y.S. 825, 101 Misc. 10.
11 C.J. p 191 note 97.

47. Ga.—Kirkland v. Luke, 117 S.E. 259, 30 Ga.App. 203.

48. Ga.—Gleason v. Burgess, 167 S. E. 916, 46 Ga.App. 486.

49. La.—Decoy v. First Nat. Life Ins. Co., 167 So. 172, 184 La. 632.

50. Tex.—Hopson v. Murphy, 1 Tex. 314.
11 C.J. p 191 note 92.

51. Ga.—City of Savannah v. Monroe, 95 S.E. 731, 22 Ga.App. 190.

52. Ga.—Central of Georgia R. Co.

v. Willingham, 70 S.E. 199, 8 Ga. App. 817.

53. Ga.—Fuller v. Arnold, 64 Ga. 599.

54. Ill.—Funkhouser v. Coffin, 221 Ill.App. 14, affirmed 183 N.E. 649, 301 Ill. 257.

55. Ala.—Lamar v. Marshall Comrs. Ct., 21 Ala. 772.

Ga.—Hudson v. Higgins, 164 S.E. 688, 45 Ga.App. 318.

Tex.—O'Brien v. Dunn, 5 Tex. 570.

56. Minn.—Bunday v. Dunbar, 5 Minn. 444.

57. N.Y.—Peo. v. Public Park Comrs., 66 How.Pr. 293, reversed on other grounds 97 N.Y. 37.

or quashing the writ of certiorari should award a writ of procedendo.

Except where the practice is changed by statute requiring the court, on dismissal, to enter judgment for the amount of the judgment below,⁵⁸ the court on dismissing or quashing a writ of certiorari, instead of rendering a new judgment, should award a writ of procedendo,⁵⁹ which is a notification to the inferior court that the supersedeas has been vacated, and an authorization to proceed with the execution of its judgment.⁶⁰

§ 142. Effect of Dismissal

After dismissal of the writ it, generally, can have no operation or effect on the original proceedings.

After dismissal of the writ it can have no operation or effect on the original proceedings,⁶¹ the dismissal leaves the judgment of the inferior tribunal in full force.⁶² Where, however, the time for trial of the original proceeding has, in the meantime, expired, the court in dismissing the writ on the ground that no cause therefor existed, may extend the time for trial.⁶³

I. HEARING AND REHEARING

§ 143. In General

The determination complained of by certiorari should not be reviewed without a hearing on the writ before a competent court, the time, place, and scope of such hearing being governed, generally, by the local practice.

The determination complained of, by certiorari, should not be reviewed without a hearing;⁶⁴ and, where certiorari is presented within the time provided by law, it is error to dismiss it without hearing the merits.⁶⁵ Accordingly, after certiorari is issued and the record brought up, the superior court may hear the case when the facts call for judicial intervention, although there is other adequate relief;⁶⁶ and, although the question involved has become a moot one, if the matter of costs remains to be adjudicated and depends on the merits, the superior court will consider the case.⁶⁷

The hearing should be before a court or judge

of competent jurisdiction in the case,⁶⁸ and, where the jurisdiction of a particular court of such hearing is exclusive, jurisdiction thereof by another court cannot be conferred by consent.⁶⁹

On such hearing, in some states, nothing can be considered but the petition and the answer.⁷⁰ Where the record of the inferior court which issued the writ is returned, the trial should be had on the record;⁷¹ and it is generally improper to form and try any issues of fact,⁷² or to consider any evidence relating to the original proceeding as heard on the trial.⁷³ In other states, however, the practice is to hear the merits of the case and practically to decide the whole case on the granting or refusing of the writ,⁷⁴ and evidence of extrinsic facts alleged in the return may be admitted, unless the facts are not controverted.⁷⁵ In such states the petition-

58. Tenn.—Roddy v. Bacon, 3 Coldw. 253—Mallett v. Hutchison, 1 Head 558.

59. Ill.—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158, affirming 249 Ill.App. 516—Chicago, etc., R. Co. v. Fell, 22 Ill. 333. 11 C.J. p 191 note 99.

60. Ill.—Darmstaedter v. Armour, 17 Ill.App. 285.

Necessity of vacation of supersedeas to authorize inferior court to proceed see supra § 109.

"Procedendo" generally see 50 C.J. p 424 note 57—p 425 note 62.

61. Ga.—Loeb v. Mangum, 67 S.E. 882, 134 Ga. 335. 11 C.J. p 191 note 2.

Necessity of vacation of supersedeas to authorize inferior court to proceed supra § 109.

62. Miss.—Standifer v. Bush, 16 Miss. 383.

63. N.D.—Albrecht v. Zimmerly, 136 N.W. 240, 23 N.D. 337.

64. N.C.—Anonymous, 2 N.C. 421—Dawsey v. Davis, 2 N.C. 323. 11 C.J. p 191 note 4.

Hearing on:

Application for writ see supra § 88 a.

Motion to dismiss or quash see supra § 140.

65. Ga.—Planters' Fertilizer Co. v. Smith, 93 S.E. 1018, 21 Ga.App. 167.

66. Mo.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335.

67. Tenn.—State v. Howard, 201 S.W. 139, 139 Tenn. 73.

68. N.Y.—People ex rel. Martin v. Westchester County, 65 N.Y.S. 707, 53 App.Div. 339.

11 C.J. p 191 note 5.

Superior court judge may hear and determine certiorari in vacation as well as term time, and in a county other than that in which the case is pending.—Lewallen v. Dalton Auto & Machinery Co., Ga.App., 195 S.E. 305.

69. N.Y.—People ex rel. Martin v. Westchester County, 65 N.Y.S. 707, 53 App.Div. 339.

70. Ga.—Gildea v. Hill, 41 S.E. 492, 115 Ga. 136—Powell v. A. J. Fowler & Son, 129 S.E. 13, 34 Ga.App. 186—Planters' Fertilizer Co. v.

Smith, 93 S.E. 1018, 21 Ga.App. 167.

71. Ill.—Murphy v. Houston, 250 Ill.App. 385, 388.

"The superior tribunal, upon an inspection of the record alone, determines whether the inferior tribunal has exceeded its jurisdiction or has otherwise proceeded in violation of the law."—Murphy v. Houston, supra.

72. Ill.—Murphy v. Houston, supra. Mich.—Lickly v. Bishopp, 114 N.W. 69, 150 Mich. 256.

73. Ill.—Murphy v. Houston, 250 Ill. App. 385.

74. Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied Fonda v. City of St. Albans, 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 257 U.S. 666, 66 L.Ed. 425—Davidson v. Whitehill, 89 A. 1081, 37 Vt. 499. Hearing on application see supra § 88.

75. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46—Dickinson v. Worcester, 138 Mass. 555.

er may attack the jurisdiction of the inferior tribunal, and may, if necessary, introduce evidence to support his contention.⁷⁶

Stipulated case. The hearing may be had on a stipulated case, provided all persons whose rights are to be determined are parties thereto.⁷⁷

Consolidation of writs. Separate writs involving the same rights and interests may be consolidated on the hearing and all issues tried at the same time.⁷⁸

Time and place of hearing. The time of the hearing may be fixed by notice,⁷⁹ by the local practice,⁸⁰ or by the order of the court.⁸¹ It may be had at the time and place the order to show cause is returnable⁸² or on the return day of the writ,⁸³ but, unless by consent, not before.⁸⁴ Under some statutes any disposition on the merits of a certiorari is premature until a traverse has been properly disposed of; and a judgment on the certiorari in advance of a disposition of the traverse is void.⁸⁵ The failure, however, of the court to hear and determine the certiorari within a given period cannot operate to deprive the petitioner of any substantial right, especially where the court's delay is not at-

tributable to any fault of the petitioner.⁸⁶

Transfer of hearing. Under a statute authorizing the superior court to transfer for hearing, from one division of the court to another, cases which the court has not had time to decide before adjourning in a particular division, where the court is unable to consider and decide a certiorari proceeding before the end of its sitting, it may grant a transfer of the hearing to another division, in order to secure an earlier disposition of the case, and such a transfer may be made, although the parties do not consent thereto.⁸⁷

Decision on hearing. On such hearing the submission, on the petition for certiorari and demurrers thereto, may be set aside to permit an amendment of the petition.⁸⁸ Where the decision of the inferior court affirmatively shows a misapplication of the law as to the facts as found by the court, but the judgment is correct notwithstanding such error, the superior court may render an opinion correcting such error, although certiorari is denied;⁸⁹ but in denying certiorari to review certain orders the court need not express an opinion as to the validity of the orders,⁹⁰ and denying the petition

On certiorari to quash proceeding of board

Where return to petition for a writ of certiorari to quash proceedings of a board of aldermen in taking land by eminent domain alleged extrinsic facts to show that substantial justice did not require that the proceedings be quashed, evidence might have been admissible, if such facts were disputed; but, if not controverted, the hearing rightly may have proceeded on the footing that they were true.—*Byfield v. City of Newton*, 141 N.E. 658, 247 Mass. 46.

Burden of proof

Petitioner for certiorari to quash town selectmen's proceeding granting oil company license to erect storage tanks had burden of proving, by evidence outside record, if necessary, selectmen were without jurisdiction.—*Morrison v. Selectmen of Town of Weymouth*, 181 N.E. 786, 279 Mass. 486.

76. Mass.—*Marcus v. Board of Street Com'rs of City of Boston*, 147 N.E. 866, 252 Mass. 331.

77. N.J.—*Caruso v. City of Newark*, 192 A. 430, 15 N.J.Misc. 476.

Necessary parties omitted

In certiorari proceeding to review action of city relating to granting of construction permit to individual defendant, state of case which was stipulated by prosecutor and city without consent of individual defendant was insufficient to permit necessary determination of rights of

all parties to writ requiring dismissal of petition.—*Caruso v. City of Newark*, 192 A. 430, 15 N.J.Misc. 476.

78. Tex.—*Thompson v. Dodge*, Civ. App., 210 S.W. 586, error refused.

Involving estate

The district court did not err in consolidating writs of certiorari to review orders of the county court appointing an administrator to collect inheritance tax, approving the contract between the administrator and the attorney for the estate, ordering sale of a small part of the land belonging to the estate to pay the attorney's retaining fee, etc.—*Thompson v. Dodge*, supra.

79. Ga.—*Lanier v. Ratcliff*, 22 S.E. 289, 95 Ga. 549—*Folsom v. State*, 74 S.E. 939, 11 Ga.App. 199.

Notice of hearing generally see infra § 144.

80. Tenn.—*Hamilton v. Archer*, 1 Overt. 368.
11 C.J. p 191 note 7.

81. Ga.—*Mundy v. Martin*, 44 Ga. 195.

Next term

Where, on the filing of a traverse to the return by a county judge, the judge of the superior court decided not to hear the case in vacation, but by a formal order directed it and the traverse to be sent to the next term for trial by the jury, this was held to import a judicial order assigning the cause to a jury trial.—*Mundy v. Martin*, supra.

82. N.Y.—*Peo. v. Nichols*, 79 N.Y.

532, 58 How.Pr. 200, reversing 18 Hun 530, 57 How.Pr. 467.

83. Ga.—*Lanier v. Ratcliff*, 22 S.E. 289, 95 Ga. 549.

84. Ga.—*Brown v. Smith*, 24 Ga. 418.

Pa.—*Ewing v. Thompson*, 43 Pa. 372.

85. Ga.—*Chandler v. Baggett*, 79 S.E. 179, 13 Ga.App. 333—*Georgia, etc., R. Co. v. Sizer*, 60 S.E. 1026, 4 Ga.App. 126.

86. Ga.—*City of Savannah v. Monroe*, 96 S.E. 500, 22 Ga.App. 285.

87. Tenn.—*Provident Life & Accident Ins. Co. v. Prieto*, 76 S.W.2d 314, 168 Tenn. 126.

88. Cal.—*Frazee v. Railroad Commission of California*, 201 P. 921, 185 Cal. 690.

Where petition not sufficiently definite

Cal.—*Frazee v. Railroad Commission of California*, 201 P. 921, 185 Cal. 690.

89. Ala.—*Mobile Pure Milk Co. v. Coleman*, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402.

90. Cal.—*Manoogian v. Superior Court in and for Imperial County*, 192 P. 168, 48 Cal.App. 609.

As affecting third party

In denying certiorari to review orders directing payments by a special administrator which had been already made, the appellate court will not express its opinion for the benefit of the lower court as to the va-

without an opinion is not to be deemed an approval of all the statements of law by the inferior court.⁹¹ Where, under the local practice, order of certiorari has been substituted for writ thereof, if the petition, although for a writ, contains all the necessary averments for an order of certiorari, the writ should be vacated and the order granting it amended so as to provide for the issuance of an order of certiorari, and the title, proceeding, petition, and all necessary papers may be amended to conform to the proper practice.⁹²

A continuance may be granted in a proper case.⁹³

§ 144. Notice of Hearing

Notice of the time and place of the hearing must generally be given, as required by statute or rule of court.

Notice, as required by statute or rule of court, must be given of the time and place of the hearing,⁹⁴ but failure to give notice may be cured by

an appearance,⁹⁵ or excused because of the action of the adverse party.⁹⁶ It has been held that the notice cannot be served until after the return day mentioned in the writ.⁹⁷

Notice of sanction of writ and of hearing. Under some statutes, plaintiff in certiorari is required to give notice to the opposite party in interest of the sanction of the writ and also of the time and place of hearing, at least ten days before the sitting of the court to which the writ is returnable.⁹⁸ Failure to give such notice renders the entire proceeding void, where proper exception is taken,⁹⁹ and the writ must be dismissed therefor,¹ if not served before the expiration of the time prescribed,² unless such notice is waived,³ or its giving is prevented by an unavoidable cause.⁴

The notice, to be sufficient, must be at least, in substantial compliance with the statute.⁵ It must be served on the proper persons,⁶ and where a mu-

lidity of those orders, which would affect the rights of the special administrator who was not a party to the proceedings for certiorari.—*Mannogian v. Superior Court in and for Imperial County*, supra.

91. Ala.—*Mobile Pure Milk Co. v. Coleman*, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402.

92. N.Y.—*People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor*, 237 N.Y.S. 456, 247 App.Div. 405.

93. Ga.—*Glenn v. State*, 50 S.E. 371, 122 Ga. 593.

11 C.J. p 191 note 14.

94. Ala.—*Waltman v. Ortman*, 170 So. 545, 546, 233 Ala. 170, citing *Corpus Juris*.

N.J.—*Fishblatt v. Atlantic City*, 78 A. 217, 80 N.J.Law 269, affirming 78 A. 125, 78 N.J.Law 134.

11 C.J. p 191 note 15.

95. N.Y.—*Peo. v. New York County*, 18 Hun 530, 57 How.Pr. 467, reversed on other grounds 79 N.Y. 582, 58 How.Pr. 200.

N.C.—*Walton v. Avery*, 2 N.C. 405. Ohio.—*Redick v. Patterson*, Tapp. 191.

96. N.Y.—*Sergeants v. Baker*, 1 How.Pr. 9.

97. Mich.—*Miles v. Goffinet*, 16 Mich. 230.

98. Ga.—*Mathis v. Timmons, McWhite & Co.*, 89 S.E. 1097, 18 Ga. App. 629.

11 C.J. p 192 note 19.

99. Ga.—*Morrison v. Brown*, 94 S. E. 85, 21 Ga.App. 217.

11 C.J. p 192 note 20.

1. Ga.—*Darby v. City of Ball Ground*, 137 S.E. 120, 53 Ga.App.

700—*Devane v. Williams*, 174 S.E. 184, 49 Ga.App. 82—*Federal Life Ins. Co. v. Hurst*, 148 S.E. 614, 39 Ga.App. 807—*Mathis v. Timmons, McWhite & Co.*, 89 S.E. 1097, 18 Ga.App. 629.

11 C.J. p 192 note 21.

Any other determination nugatory

Where it appears that statutory requirement for giving notice of sanction of certiorari has not been complied with, determination other than dismissal of certiorari is nugatory.—*Devane v. Williams*, 174 S.E. 184, 49 Ga.App. 82.

2. Ga.—*Bunn v. Henderson*, 39 S. E. 78, 113 Ga. 609.

11 C.J. p 192 note 22.

3. Ga.—*Federal Life Ins. Co. v. Hurst*, 148 S.E. 614, 39 Ga.App. 807—*Mathis v. Timmons, McWhite & Co.*, 89 S.E. 1097, 18 Ga.App. 629.

11 C.J. p 192 note 23.

By appearing and filing exceptions to answer of magistrate, objections that the written notice of sanction of writ of certiorari was not filed in time are waived.—*Mathis v. Timmons, McWhite & Co.*, supra—*People's Bank of Oliver v. Ash*, 89 S.E. 441, 18 Ga.App. 315—*Atlanta Wood-ware Co. v. Franklin*, 75 S.E. 9, 11 Ga.App. 245.

Loss or waiver of right to dismissal or quashing of writ see supra § 137.

4. Ga.—*Southern R. Co. v. Carr*, 45 S.E. 409, 118 Ga. 355—*Federal Life Ins. Co. v. Hurst*, 148 S.E. 614, 39 Ga.App. 807.

5. Ga.—*Ware v. Fambro*, 67 Ga. 515. 11 C.J. p 192 notes 21 [a], 24.

Notice designating nonexistent term of court as time of hearing is not a compliance with the statute.—

Baker v. Livingston, 179 S.E. 595, 51 Ga.App. 10—*Baker v. Alexander*, 179 S.E. 594, 51 Ala.App. 8.

Service of copy of proceedings

Defendant in certiorari being entitled only to written notice of sanction of writ and time and place of hearing under the statute, and not to service of copy of proceedings, it is immaterial that copy of proceedings served on him showed as surety on certiorari bond a name different from that appearing as surety thereon of record.—*Whitley v. Jackson*, 129 S.E. 662, 34 Ga.App. 286.

6. Ga.—*Fuller v. Yetter*, 148 S.E. 751, 40 Ga.App. 58—*Jackson v. McCracken*, 72 S.E. 67, 9 Ga.App. 668.

On attorney

Where defendant in certiorari was represented in the trial court by a firm of attorneys, but by no particular attorney alone, notice of sanction of a petition for certiorari served on one of the firm is "service" on the attorney for defendant in certiorari, within the meaning of the statute prescribing the person on whom service shall be made.—*Fuller v. Yetter*, 148 S.E. 751, 40 Ga.App. 58.

Ex officio justice and constable

Where a notary public and ex officio justice of the peace trying a case issued an execution for costs for the use of himself and the constable, and a claim to the property levied on was tried before the justice of the peace of the district, notice of the sanction of the writ of certiorari and of the time and place of hearing, should have been given to the notary public and constable, instead of the justice of the peace.—*Keen v. Justice Court*, 1600 Dist. G. M., 112 S.E. 912, 28 Ga.App. 699.

nicipality is to be served the notice may be served on the mayor.⁷ If notice is served by mail, it must reach the party to be served within the ten days.⁸ A notice by telegram, where properly delivered, has been held sufficient.⁹

The notice may be established on the hearing of the petition for certiorari, by proper proof, otherwise than by an acknowledgment of service or other proof of notice appearing in the petition itself.¹⁰

Acknowledgment and waiver. An entry on a petition for certiorari, after sanction thereof, acknowledging service of notice of the sanction of the writ and waiving further notice constitutes an acknowledgment of notice of sanction of the writ, and also waiver of notice of the time and place of hearing,¹¹ and where such acknowledgment and waiver is made more than ten days before the sitting of the court, as required by the statute, it is error to dismiss the certiorari for want of notice.¹² However, there is no such acknowledgment and waiver of no-

tice where such entry is made on the petition before it is sanctioned.¹³ Acknowledgment of legal service of the sanction of the writ, without referring to the time and place of hearing is insufficient to prevent dismissal of the certiorari on motion.¹⁴

The certificate of service must be dated¹⁵ and verified.¹⁶ A traverse of the sheriff's return of service of such notice is a nullity if the sheriff is not made a party thereto.¹⁷

§ 145. Briefs

Briefs should be filed within the time prescribed by statute or rule of court.

Briefs required by statute or rule of court must be filed within the time therein specified,¹⁸ or, in the absence of such requirement, in the time for filing briefs in ordinary appeals.¹⁹ A statutory provision that certiorari shall not be awarded except on a petition duly sworn, and accompanied by assignments of error and a brief in support thereof,

Notice to sheriff

Where defendant to an action in a city court traverses the sheriff's entry of service, and the issue is found against the traverse, and thereupon defendant sues out a writ of certiorari, designating as the adverse parties thereto plaintiff in the original action and the sheriff, it is necessary that notice of the sanction of the writ of certiorari and of the time and place of hearing the same be given to the sheriff, and, in default of such notice to him, the certiorari will be dismissed, on motion of the other defendant therein.—Georgia, etc., R. Co. v. McElroy, 35 S.E. 297, 110 Ga. 316.

7. Ga.—Martin v. Tifton, 63 S.E. 1132, 6 Ga.App. 16.

Notice held insufficient

In certiorari against a city, leaving the petition and writ of certiorari at the office of the mayor of the city, and serving the solicitor general with a copy in the case, is not a giving of notice of the time and place of hearing as required by statute.—Darby v. City of Ball Ground, 187 S.E. 120, 53 Ga.App. 700.

8. Ga.—Butler v. Farley, 25 S.E. 853, 99 Ga. 631—Rollins v. Speer, 64 S.E. 280, 6 Ga.App. 74.

Sending of registered letter containing notice of the sanction of a writ of certiorari and of the hearing, addressed to defendant and delivered at his home and receipted for by his son, who delivered it to defendant's wife, who lost it without opening it, was not sufficient notice.—Wilber Stock Food Co. v. Wesley, 80 S.E. 677, 14 Ga.App. 179.

9. Ga.—Western Union Tel. Co. v.

Bailey, 42 S.E. 89, 115 Ga. 725, 61 L.R.A. 933.

10. Ga.—McAllister v. State, 3 S.E. 163, 77 Ga. 599—McDaniel v. Farmers' & Merchants' Bank, 142 S.E. 178, 37 Ga.App. 782.

Written acknowledgment of service signed by attorney for defendant in certiorari, reciting that the written notice required by statute has been made, is sufficient.—McDaniel v. Farmers' & Merchants' Bank, 142 S.E. 178, 37 Ga.App. 782.

11. Ga.—Asher v. Cape, 22 S.E. 41, 95 Ga. 31—Burns v. Bibb Brokerage Co., 155 S.E. 493, 42 Ga.App. 259—Bell v. Macon Finance Co., 155 S.E. 493, 42 Ga.App. 258—Flood v. Empire Inv. Co., 155 S.E. 492, 42 Ga.App. 257.

Unauthorized acknowledgment and waiver

The clerk of the board of councilmen of a city had no authority to acknowledge service for the city of a notice of the sanction of a writ of certiorari and waive further notice, especially where the waiver of service was not in writing.—Ivey v. City of Warrenton, 113 S.E. 114, 28 Ga.App. 749.

12. Ga.—Burns v. Bibb Brokerage Co., 155 S.E. 493, 42 Ga.App. 259—Bell v. Macon Finance Co., 155 S.E. 493, 42 Ga.App. 258—Flood v. Empire Inv. Co., 155 S.E. 492, 42 Ga.App. 257.

13. Ga.—Suggs v. Mutual Inv. Co., 155 S.E. 534, 42 Ga.App. 260.

14. Ga.—Alley v. Elliott-Madison Co., 96 S.E. 342, 22 Ga.App. 497.

15. Ga.—Hardy v. Miller, 41 S.E. 255, 115 Ga. 107.

16. Ga.—Hardy v. Miller, supra.

17. Ga.—Ivey v. City of Warrenton, 113 S.E. 114, 28 Ga.App. 749.

18. Ala.—Ex parte Locklear, 37 So. 712, 205 Ala. 236, dismissing petition for certiorari Locklear v. State, 37 So. 703, 17 Ala.App. 597. Tenn.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177. 11 C.J. p 192 note 31.

Filing held insufficient

No brief was filed with petition for certiorari as required by Sup.Ct. Pract. Rules, rule 42, 193 Ala. xiv, xv, 77 South. vii, where there was simply an indorsement on the petition, "We hereby respectfully refile our briefs heretofore filed both on the direct appeal to the Court of Appeals and also upon a motion for the rehearing in said court, and we will not inflict upon this court another brief in the premises."—Ex parte Locklear, 37 So. 712, 205 Ala. 236, dismissing petition for certiorari Locklear v. State, 37 So. 703, 17 Ala.App. 597.

19. Wash.—State v. Moore, 31 P. 713, 5 Wash. 205.

Rule of court not applicable

A rule of court providing that, on the final hearing of any application for an original writ, each side shall furnish written or printed copies of their points and authorities, applies only on the final hearing on the application for the writ, and on the final hearing on the merits of a writ of certiorari, briefs must be filed in the time prescribed for the filing of briefs in ordinary appeals.—State ex rel. Gilbert v. Moore, 31 P. 713, 5 Wash. 205.

Briefs on appeal generally see Appeal and Error §§ 1311-1345.

requires the assignments of error and brief to be filed contemporaneously with the petition.²⁰ The writ, however, will not be rescinded for a failure to file a brief within a given period, where there is no law or rule of court imposing such a penalty.²¹ Reasons not argued in the brief will be regarded as waived or abandoned.²²

A party having a private interest to maintain the proceeding sought to be quashed by certiorari may be permitted to file a brief and argue in opposition to the petition.²³

§ 146. Rehearing

A rehearing may be granted where the proceeding has been improperly determined or disposed of.

A rehearing may usually be granted,²⁴ and should be granted where the proceeding has been improperly dismissed,²⁵ or where a party thereto has not been given an opportunity to present his evidence.²⁶ A rehearing, however, should not be granted to permit new questions to be raised;²⁷ especially where such questions are raised after the expiration of the period for the issuance of certiorari;²⁸ nor should

it be granted to permit questions, previously raised, to be presented anew,²⁹ nor because of the discovery of new evidence,³⁰ nor where the court has no jurisdiction to hear the cause anew.³¹ So, also, a reinstatement after a decision on the merits will not be allowed for the purpose of permitting the defeated party to take fresh proofs.³² A certiorari petition will not be remanded for amendment, on a petition for a rehearing.³³ The unsuccessful party cannot complain because the inferior court has complied with the determination above without affording him an opportunity for a rehearing.³⁴

On a rehearing the cause must be submitted on the record as it was on the former submission, although several affidavits have been filed since the rehearing was granted,³⁵ and the prior decision will be adhered to where all debatable questions have been there disposed of.³⁶

The pendency of an application for rehearing after decision prevents the judgment from becoming final; and, even though the rehearing is granted in terms restricting it to particular issues, the whole case remains under the court's control.³⁷

20. Tenn.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177.

21. La.—Eureka Homestead Soc. v. Clark, 83 So. 190, 145 La. 917.

22. N.J.—Gross v. Board of Com'rs of Jersey City, 122 A. 203, 98 N.J. Law 703.

23. Mass.—Marcus v. Commissioner of Public Safety, 150 N.E. 903, 255 Mass. 5.

24. Mich.—Hirsh v. Fisher, 101 N. W. 48, 138 Mich. 95.

25. Tex.—Gulf, etc., Co. v. Cannon, 31 S.W. 498, 88 Tex. 312.

26. N.Y.—Moore v. Harvey, 260 N. Y.S. 142, 236 App.Div. 815.

27. Ga.—Atlanta Coach Co. v. Cobb, 174 S.E. 131, affirming 168 S.E. 126, 46 Ga.App. 633.

Vt.—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied Fonda v. City of St. Albans, 42 S. Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 257 U.S. 666, 66 L.Ed. 425.

Reargument

Petitioner who successfully contended that supreme court on certiorari should consider board's rulings as to validity of only ten ballots, although other ballots were in supreme court's custody, is not entitled to reargument, requested almost one month after decision,

where reargument was sought as to considerable number of such other ballots and not as to any of the ten ballots.—Heffernan v. Board of Canvassers of City of Warwick, R.I., 177 A. 142, denying reargument 175 A. 660.

Question as to rights as exclusive licensee of patent under contracts, will not be considered when raised for the first time on a petition for a rehearing of a writ of certiorari.—Independent Wireless Telegraph Co. v. Radio Corporation of America, N. Y., 46 S.Ct. 224, 270 U.S. 84, 70 L.Ed. 481, denying rehearing 46 S.Ct. 166, 269 U.S. 459, 70 L.Ed. 357, which affirms, C.C.A., Radio Corporation of America v. Independent Wireless Telegraph Co., 297 F. 521.

28. Tenn.—Shaw v. Shaw, 280 S.W. 23, 152 Tenn. 552, denying rehearing 277 S.W. 898, 152 Tenn. 360.

29. Vt.—City of St. Albans v. Avery, 114 A. 31, 95 Vt. 249, certiorari denied Fonda v. City of St. Albans, 42 S.Ct. 51, 257 U.S. 640, and error dismissed 42 S.Ct. 54, 257 U.S. 666, 66 L.Ed. 425.

Signature by attorney in fact; reinstatement

Where a certiorari was dismissed by the judge of the superior court because the surety's name was signed by an attorney in fact whose au-

thority did not accompany the bond, he properly refused to reinstate it on an application accompanied by the signed power of attorney.—American Nat. Ins. Co. v. Jordan, 105 S.E. 852, 26 Ga.App. 320.

30. Ga.—Marchman v. Todd, 15 Ga. 25.

31. Ala.—Ex p. Madison Turnp. Co., 62 Ala. 93.

32. N.J.—Garretson v. Barker, 48 A. 514, 66 N.J. Law 158.

33. Tenn.—Fort v. Dixie Oil Co., 95 S.W.2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1260, 170 Tenn. 183, certiorari denied Dixie Oil Co. v. Fort, 57 S.Ct. 121, 299 U.S. 595, 81 L.Ed. 439—Fort v. Hammett Oil Co., 95 S.W.2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1264, 170 Tenn. 195—Fort v. Hudson, 95 S.W.2d 931, 170 Tenn. 464, denying rehearing 93 S.W.2d 1263, 170 Tenn. 192, certiorari denied Hudson v. Fort, 57 S. Ct. 121, 299 U.S. 595, 81 L.Ed. 439.

34. La.—State v. St. Paul, 28 So. 839, 104 La. 103.

35. Iowa.—Lewis v. Brennan, 120 N.W. 332, 141 Iowa 585.

36. N.J.—City of Newark v. Parker, 195 A. 519, 119 N.J. Law 226, affirming 195 A. 296, 119 N.J. Law 225.

37. La.—Bloomfield v. Thompson, 64 So. 853, 134 La. 923.

J. REVIEW ON CERTIORARI

§ 147. Scope and Extent in General

The scope and extent of the review on certiorari is largely dependent on local practice or statute, the important questions to be considered, generally, being: Whether the review is limited to jurisdictional questions; whether questions of fact are reviewable; whether matters outside the record may be considered; and whether statements in the return or record are conclusive. On certiorari to quash a conflicting opinion of an inferior appellate court, the reviewing court generally is limited to the determination of such conflict.

There is much confusion with regard to the scope of review on certiorari. This is caused: (1) By a conflict between the decisions in different states, induced to some extent by statutory provisions; (2) by the fact that early decisions in particular states have been to some extent abrogated by later statutes; and (3) for the reason that in several states the language of the decisions is so obscure that it is practically impossible to state what is the rule therein. The important questions to be considered, as stated in following sections, are: (1) Whether the review is limited to jurisdictional questions, *infra* § 151; (2) whether questions of fact are reviewable, *infra* § 172; (3) whether matters outside the record can be considered, *infra* §§ 157-164; and (4) whether statements in the return or record are conclusive, *infra* §§ 165-169.

The reviewing court may, in a proper case, dispose of all relevant matters;³⁸ but it will not review a matter which was not finally determined in the lower court,³⁹ or which has become an abstract or moot question;⁴⁰ nor need it consider matters not necessary to a proper determination.⁴¹ Where two cases are consolidated, and the court renders separate findings and judgments, this will be regarded as being at most misprision or inadvertence, and the reviewing court will consider the case as though there were a single set of findings and one judgment.⁴²

The scope of the review depends largely on the statute involved.⁴³ The reviewing court, generally, will not review the case as if before it on broad appeal;⁴⁴ and, on the other hand, the fact that there is no right of appeal generally does not enlarge the scope of review on certiorari or writ of review.⁴⁵ Where, however, a statute is merely silent on the question of appeal, a review may be had in the broadest sense of certiorari;⁴⁶ and under some statutes, where certiorari is granted by the supreme court to review a judgment of an inferior appellate court, the cause proceeds as if pending on writ of error.⁴⁷

38. R.I.—*Conte v. Roberts*, 192 A. 814.

39. La.—*Rembert v. Fenner & Beane*, 177 So. 247, 188 La. 385, affirming, App., 175 So. 116—*Builiard v. New Orleans Terminal Co.*, 171 So. 78, 185 La. 924, setting aside, App., 166 So. 640, conformed to 174 So. 659.

Final determination as prerequisite to issuance of writ see *supra* § 20.

40. Iowa.—*Mason v. District Court of Black Hawk County*, 229 N.W. 168, 209 Iowa 774.

Mich.—*Barron v. Belongy*, 200 N.W. 944, 229 Mich. 201—*Blickle v. Board of Education of City of Grand Rapids*, 177 N.W. 385, 210 Mich. 196.

N.J.—*City of North Wildwood v. Coney*, 124 A. 515, 100 N.J.Law 38.

Okl.—*Thatcher v. Miller*, 300 P. 403, 149 Okl. 296.

Where case presents merely abstract question of right or law which does not rest on existing facts, and where action by the reviewing court would be futile, the court will not decide questions thus presented.—*Barron v. Belongy*, 200 N.W. 944, 229 Mich. 201.

Abstract questions as ground for issuing writ see *supra* § 32.

Moot questions on motion to dismiss or quash see *supra* § 135.

41. Colo.—*People v. Montrose County Dist. Ct.*, 155 P. 386, 60 Colo. 569.

42. Cal.—*Stanton v. Superior Court within and for Los Angeles County*, 261 P. 1001, 202 Cal. 473.

43. Pa.—*In re Incorporation of Elkland Leather Workers' Ass'n*, 198 A. 13, 330 Pa. 78.

As limited to jurisdiction

Where a statute does not permit an appeal, or where it states that the decision of the court below is final, the review is generally limited to jurisdiction.—*In re Incorporation of Elkland Leather Workers' Ass'n*, *supra*. Review as limited to matters of jurisdiction in general see *infra* § 151.

44. Tenn.—*Cochran v. Garth*, 40 S. W.2d 1023, 163 Tenn. 59, 76 A.L.R. 1413—*Brenizer v. Nashville, C. & St. L. Ry.*, 8 S.W.2d 1099, 156 Tenn. 479, denying rehearing 3 S. W.2d 1053, 156 Tenn. 479.

Tex.—*Fleaur v. Switzer*, Civ.App., 109 S.W.2d 239.

Case which should have been transferred

Where the appeal involved jurisdictional questions, so that jurisdiction thereof was in the supreme court, it will, on certiorari to review the decree of the court of civil appeals, which erroneously refused to

transfer the cause as required by Acts 1909 c 192, consider the case as on appeal.—*Going v. Going*, 256 S.W. 890, 148 Tenn. 522, 31 A.L.R. 633.

Certiorari distinguished from appeal see *supra* § 4.

45. Utah.—*People's Bonded Trustee v. Wight*, 272 P. 200, 72 Utah 587.

46. Pa.—*In re Incorporation of Elkland Leather Workers' Ass'n*, 198 A. 13, 330 Pa. 78—*Grime v. Department of Public Instruction*, 188 A. 337, 324 Pa. 371—*Appeal of Geary*, 175 A. 544, 316 Pa. 342.

Under a nonprofit corporation law, conferring on court of common pleas of county in which registered office of corporation is to be located exclusive jurisdiction in granting charters to nonprofit corporations without provision for appeal, review of decree in proceeding for incorporation thereunder was not intended to be restricted to narrowest scope of review by certiorari.—*In re Incorporation of Elkland Leather Workers' Ass'n*, 198 A. 13, 330 Pa. 78.

47. Ill.—*Freitag v. Union Stock Yard, etc., Co.*, 104 N.E. 901, 262 Ill. 551.

As limited by constitutional provision

Under a constitutional provision authorizing the legislature to provide for review by appeal or writ of

On certiorari to an intermediate appellate court, the reviewing court ordinarily considers only questions treated by the intermediate court,⁴⁸ and its review does not extend to irregularities or errors of the original trial court, as explained *infra* § 152.

Collateral matters. The reviewing court is confined to an inquiry into the regularity of the particular proceedings brought up by the writ, and acts done by any other tribunal than that to which the writ issued, proceedings subsequent to or collateral with those which are complained of, and proceedings in which the petitioner for the writ is not interested, should be disregarded.⁴⁹ It is not concerned with the judgment as affecting parties who do not apply for relief;⁵⁰ and, where the writ

brings up for review the removal of the relator from office, the validity of the appointment of his successor will not be considered.⁵¹

Certiorari to quash conflicting opinion in inferior appellate court. On certiorari to quash the opinion of an inferior appellate court because of its being in conflict with a previous decision of the supreme court, except as to the question of jurisdiction,⁵² the sole inquiry of the supreme court is whether the rulings and conclusions of law in the opinion of the inferior court, on the same or a similar state of facts as found by it and on the issue as stated by it, conflict with and contravene the last previous controlling decision of the supreme court.⁵³ On such review, the supreme court is concerned only with

error, a statute making judgments of an inferior court final, unless a majority of the judges thereof grant a certificate of importance and appeal, or unless the higher court, by certiorari or otherwise, requires the case to be certified for review, contemplates, not a review of such a judgment by certiorari, but that the application for such a writ is to enable the higher court to determine whether the case ought to be reviewed, and that where the writ is awarded the review is by writ of error.—*Freitag v. Union Stock Yard, etc., Co.*, *supra*.

Power to rule on assignments of error

(1) Under a constitutional provision authorizing supreme court to require by certiorari, etc., any case to be certified from court of appeals for review as if carried by writ of error to supreme court, the supreme court on certiorari has jurisdiction to rule upon the several assignments of error made by bill of exceptions.—*Gulf Paving Co. v. City of Atlanta*, 99 S.E. 374, 149 Ga. 114, reversing 96 S.E. 392, 22 Ga.App. 374, conformed to 99 S.E. 538, 24 Ga.App. 4.

(2) On certiorari to the court of appeals, assignment of error complaining of affirmance on defendant's cross bill need not be decided, when it is held that the court erred in reversing judgment for defendant on the main bill.—*Globe & Rutgers Fire Ins. Co. v. Smyly*, 117 S.E. 819, 155 Ga. 547, reversing *Smyly v. Globe & Rutgers Fire Ins. Co.*, 113 S.E. 220, 28 Ga.App. 776, conformed to 118 S.E. 766, 30 Ga.App. 620.

48. Ala.—*Cranford v. National Surety Corporation*, 166 So. 721, 231 Ala. 636, reversing 166 So. 719, 27 Ala.App. 126—*Pool v. Hart*, 132 So. 59, 222 Ala. 232, denying certiorari 132 So. 58, 24 Ala.App. 103—*Hardy v. First Nat. Bank*, 122 So. 702, 219 Ala. 435, denying certiorari 122 So. 701, 23 Ala.App. 190—

Ballard v. State, 121 So. 502, 219 Ala. 222, second case, denying certiorari 121 So. 502, 23 Ala.App. 50, first case.

Fla.—*Florida East Coast Ry. Co. v. George*, 107 So. 266, 91 Fla. 72.

49. Minn.—*Young v. Penn Mutual Life Ins. Co.*, 256 N.W. 906, 192 Minn. 446.

N.J.—*Mechler v. Fialk*, 82 A. 330, 82 N.J.Law 273, affirmed 86 A. 401, 84 N.J.Law 406.

Utah.—*Riggins v. District Court of Salt Lake County*, 51 P.2d 645, 89 Utah 183—*Hilton Bros. Motor Co. v. District Court in and for Millard County*, 25 P.2d 595, 82 Utah 372.

Wash.—*State v. Superior Court of Spokane County*, 143 P. 455, 82 Wash. 37.

11 C.J. p 193 note 47.

Order of trial court denying new trial in proceedings for extension of time to redeem from mortgage foreclosure sale could not be reviewed on certiorari issued prior thereto to review original order denying extension.—*Young v. Penn Mut. Life Ins. Co.*, 256 N.W. 906, 192 Minn. 446.

Prior order

On certiorari to review an order annexing territory to a school district, the inquiry will be confined to the order sought to be reviewed and will not be extended to a prior order under which defendants claimed a legal annexation.—*State v. Thursty-Butte Special School Dist. No. 37 in McHenry County*, 178 N.W. 787, 45 N.D. 555.

50. La.—*D. H. Holmes Co. v. Morris*, 177 So. 417, 188 La. 431, 114 A.L.R. 905, modifying *D. H. Holmes Co. v. Van Ryper*, App., 173 So. 584—*Babst v. Hartz*, 108 So. 871, 161 La. 427.

Writ granted to one party

Where writ of certiorari or review is granted at instance of one party to suit to consider a complaint of a judgment of the court of appeal, an

opposing party who has not applied for writ of review cannot have the judgment amended for his benefit, but judgment of supreme court will be confined to complaint of party at whose instance the writ of review was granted.—*D. H. Holmes Co. v. Morris*, 177 So. 417, 188 La. 431, 114 A.L.R. 905, modifying *D. H. Holmes Co. v. Van Ryper*, App., 173 So. 584.

51. N.J.—*State v. Millville*, 21 A. 568, 53 N.J.Law 362.

11 C.J. p 193 note 48.

52. Mo.—*State ex rel. Commonwealth Trust Co. v. Reynolds*, 213 S.W. 804, 278 Mo. 695.

53. Mo.—*State ex rel. and to Use of Heuring v. Allen*, Sup., 112 S.W. 2d 843, quashing opinion and record *Heuring v. Central States Life Ins. Co. of St. Louis*, 87 S.W.2d 661, 230 Mo.App. 42—*State ex rel. Kinealy v. Hostetter*, 104 S.W.2d 303, 340 Mo. 965, quashing certiorari in *re Flynn's Estate*, App., 95 S.W.2d 1208, transferred 92 S.W.2d 671, 338 Mo. 522—*State ex rel. Sirkin & Needles Moving Co. v. Hostetter*, 101 S.W.2d 50, 340 Mo. 211—*State ex rel. S. S. Kresge Co. v. Shain*, 101 S.W.2d 14, 340 Mo. 145—*State ex rel. Metropolitan Life Ins. Co. v. Allen*, 100 S.W.2d 487, 339 Mo. 1156, quashing certiorari *Young v. Metropolitan Life Ins. Co.*, 84 S.W.2d 1065, 229 Mo.App. 323—*State ex rel. Kansas City Life Ins. Co. v. Allen*, 85 S.W.2d 886, 337 Mo. 770—*State ex rel. Missouri Mut. Ass'n v. Allen*, 78 S.W. 2d 862, 336 Mo. 352, quashing, App., 60 S.W.2d 402—*State ex rel. Continental Ins. Co. of City of New York v. Becker*, 77 S.W.2d 100, 336 Mo. 59, quashing *Weiss v. Continental Ins. Co.*, App., 61 S.W. 2d 392—*State ex rel. Bennett v. Becker*, 76 S.W.2d 363, 335 Mo. 1177, quashing *Bennett v. Gerk*, 61 S.W.2d 241, 230 Mo.App. 601—*State ex rel. St. Louis Public Service Co. v. Becker*, 66 S.W.2d 141, 334 Mo. 115, quashing certiorari *Berryman*

rulings actually made, either expressly or by necessary implication, by the inferior court,⁵⁴ and it is limited in its review, as stated *infra* § 158, to the facts and issues appearing or referred to in the

v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032—State ex rel Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76, quashing certiorari Blackwill v. Franke, App., 49 S.W.2d 211—State ex rel Sears, Roebuck & Co. v. Haid, 60 S.W.2d 43, 332 Mo. 706, quashing Wells v. Sears, Roebuck & Co., App., 51 S.W.2d 136—State ex rel Sears, Roebuck & Co. v. Haid, 60 S.W.2d 41, 332 Mo. 701, quashing Cook v. Sears, Roebuck & Co., App., 51 S.W.2d 134—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292, quashing certiorari Hankins v. St. Louis-San Francisco Ry. Co., App., 31 S.W.2d 596—State ex rel. Silverforb v. Smith, Sup., 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo.App. 675—State ex rel. Schroeder & Tremayne v. Haid, 41 S.W.2d 789, 328 Mo. 807, quashing certiorari Cushulas v. Schroeder & Tremayne, 22 S.W.2d 872, 225 Mo.App. 567—State ex rel American Surety Co. of New York v. Haid, 30 S.W.2d 100, 325 Mo. 949, quashing certiorari Wellston Trust Co. v. American Surety Co., of New York, 14 S.W.2d 23, 224 Mo.App. 241—State ex rel. Weisheyer v. Haid, Sup., 26 S.W.2d 939—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 20 S.W.2d 46, 323 Mo. 458, denying quashal of opinion and judgment Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 20 S.W.2d 299, 224 Mo.App. 371—State ex rel Kansas City v. Trimble, Sup., 20 S.W.2d 20, 21—State ex rel. Kansas City v. Trimble, 20 S.W.2d 17, 322 Mo. 360, denying quashal of opinion State ex rel Lindsay v. Trimble, 20 S.W.2d 7, 225 Mo.App. 139—State ex rel. Noe v. Cox, 19 S.W.2d 695, 323 Mo. 520, denying quashal of opinion Schroll v. Noe, App., 297 S.W. 999—State ex rel. American School of Osteopathy v. Daues, 18 S.W.2d 487, 322 Mo. 991, quashing certiorari Noren v. American School of Osteopathy, 2 S.W.2d 215, 223 Mo.App. 278, which affirmed 298 S.W. 1061—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478, 323 Mo. 9, quashing opinion Simmons v. Kroger Grocery & Baking Co., App., 6 S.W.2d 1023—State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, quashing opinion Dean v. Dean, App., 1 S.W.2d 235, and conformed to 15 S.W.2d 1116—State ex rel. Security Ins. Co. v. Trimble, 300 S.W. 812, 318 Mo. 173—State ex rel Bradley v. Trimble, 289 S.W. 922, 316 Mo. 97, quashing certiorari Smith v. Nicholson, 289 S.W.

349, 221 Mo.App. 428—State ex rel. Utz v. Daues, Sup., 237 S.W. 606, quashing certiorari Utz v. Mayes, App., 267 S.W. 59—State ex rel. Travelers' Indemnity Co. v. Daues, 285 S.W. 479, 315 Mo. 22, quashing certiorari Kistenmacker v. Travelers' Indemnity Co., App., 273 S.W. 125—State ex rel Tummons v. Cox, 282 S.W. 694, 313 Mo. 672, quashing certiorari Tummons v. Stokes, App., 274 S.W. 528—State ex rel Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 396, quashing certiorari Jepson v. Shaw Transfer Co., 243 S.W. 370, 211 Mo.App. 366—State ex rel Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo. App. 353—State ex rel Missouri State Life Ins. Co. v. Allen, 243 S.W. 839, 295 Mo. 307—State ex rel Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766—State ex rel Mann v. Trimble, 232 S.W. 100, 290 Mo. 661—State ex rel American Packing Co. v. Reynolds, 230 S.W. 642, 287 Mo. 697, quashing certiorari Heckfuss v. American Co., App., 224 S.W. 99—State ex rel. Metropolitan St. R. Co. v. Ellison, Sup., 224 S.W. 820, quashing certiorari Quirk v. Metropolitan St. Ry. Co., App., 210 S.W. 106—State ex rel Abbott v. Bradley, Sup., 223 S.W. 98—State ex rel Bush v. Sturgis, 221 S.W. 91, 281 Mo. 598, 9 A.L.R. 1315—State ex rel Boatmen's Bank v. Reynolds, 218 S.W. 337, 281 Mo. 1, quashing record Boatmen's Bank v. Temple Place Realty Co., 213 S.W. 900, 202 Mo. App. 57—State ex rel Kansas City Theological Seminary v. Ellison, Sup., 216 S.W. 967—State ex rel Smith v. Reynolds, Sup., 216 S.W. 773, quashing certiorari German-American Bank v. Smith, App., 208 S.W. 878—State ex rel Commonwealth Trust Co. v. Reynolds, 213 S.W. 804, 278 Mo. 695—State ex rel Wabash Ry. Co. v. Ellison, Sup., 204 S.W. 396, quashing certiorari McGolderick v. Wabash Ry. Co., 200 S.W. 74, 200 Mo.App. 436—State ex rel Quercus Lumber Co. v. Robertson, Sup., 197 S.W. 79, quashing certiorari Allen v. Quercus Lumber Co., App., 190 S.W. 86.

Reason for rule

In such proceedings the supreme court exercises superintending control over the inferior appellate courts for the purpose of maintaining uniformity in the law as announced by those courts with the decisions of the supreme court.—State ex rel Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76, quashing cer-

tiorari Blackwill v. Franke, App., 49 S.W.2d 211—State ex rel Silverforb, Sup., 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo.App. 675.

Decisions held not conflicting

Mo.—State ex rel. Fulton Iron Works v. Allen, Sup., 239 S.W. 583, quashing certiorari Ferguson v. Fulton Iron Works, App., 259 S.W. 811—State ex rel. Smith v. Reynolds, Sup., 216 S.W. 773 quashing certiorari German-American Bank v. Smith, App., 208 S.W. 878—State ex rel Wabash Ry. Co. v. Ellison, Sup., 204 S.W. 396, quashing certiorari McGolderick v. Wabash Ry. Co., 200 S.W. 74, 200 Mo.App. 436.

Where no previous decision on the matter

Supreme court never having construed provisions in life insurance policy sued on with reference to question whether it was thirty-year life or term policy, it is immaterial, on certiorari to quash court of appeals opinion, whether latter is correct.—State ex rel. Security Mut. Life Ins. Co. v. Allen, 267 S.W. 379, 305 Mo. 607, quashing certiorari, 1923, Howell v. Security Mut. Life Ins. Co., App., 253 S.W. 411.

54. Mo.—State ex rel. Sirkin & Needles Moving Co. v. Hostetter, 101 S.W.2d 50, 340 Mo. 211—State ex rel. Silverforb v. Smith, Sup., 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo.App. 675—State ex rel. Metropolitan Life Ins. Co., v. Daues, Sup., 297 S.W. 951, quashing certiorari Hickey v. Metropolitan Life Ins. Co., App., 270 S.W. 388.

Illustrations and arguments in support of the inferior court's rulings need not be considered by the supreme court.—State ex rel F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155, quashing certiorari Buhrkuhl v. F. T. O'Dell Const. Co., App., 95 S.W.2d 843.

Inadvertent statement

Inadvertence of the inferior court in stating that there was personal service cannot be made the basis of quashing any part of its record on certiorari, where it based no argument and no conclusion on any distinction between personal and constructive service, and the conclusion it reached could not be affected by any difference between the two kinds of service.—State ex rel Hayes v. Ellison, Mo., 191 S.W. 49.

Questions not presented to, or decided by, the inferior court will not be considered.—State ex rel Silverforb v. Smith, Sup., 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo.App. 675—

opinion of the inferior court.

The scope of the supreme court's inquiry is limited to the question of a conflict between the opinion of the inferior court, under examination, and previous controlling decisions of the supreme court,

either as to a general principle or rule of law, or as to a ruling on a similar state of facts.⁵⁵ It is not concerned with the correctness or incorrectness of the inferior court's decision,⁵⁶ and cannot review error assigned in the findings of fact by the appel-

State ex rel Noe v. Cox, 19 S.W.2d 695, 323 Mo. 520, denying quashal of opinion Schroll v. Noe, App., 297 S.W. 999—State ex rel. Locke v. Trimble, Mo., 298 S.W. 782—State ex rel. Utz v. Daues, Mo., 287 S.W. 606, quashing certiorari Utz v. Mayes, App., 267 S.W. 59—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597—State ex rel Continental Life Ins. Co. of Kansas City v. Allen, 262 S.W. 43, 303 Mo. 608, modifying Braham v. Pioneer Life Ins. Co. of America, App., 253 S.W. 786—State ex rel. Agricultural Ins. Co. of Wattertown, N. Y., v. Allen, Mo., 254 S.W. 194—State ex rel. Schwepker v. Daues, Mo., 253 S.W. 968.

Ruling by necessary implication

When opinion of court of appeals necessarily rests on a finding or determination by such court, whether discussed or not, which must have been consistent with opinion rendered, or no judgment of character rendered could have been legally rendered, court of appeals must be held to have considered the question whether it discussed it or not, since it is necessarily and unavoidably involved in decision reached.—State ex rel. Boeving v. Cox, 276 S.W. 869, 310 Mo. 367, quashing opinion Petty v. Boeving, 264 S.W. 66, 216 Mo.App. 271.

55. Mo.—State ex rel. Ocean Accident & Guarantee Corporation v. Hostetter, Sup., 108 S.W.2d 17—State ex rel Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155, quashing certiorari Buhrkuhl v. F. T. O'Dell Const. Co., App., 95 S.W.2d 843—State ex rel. Tunget v. Shain, 101 S.W.2d 1, 340 Mo. 434—State ex rel. Himmelsbach v. Becker, 85 S.W.2d 420, 337 Mo. 341, quashing certiorari Parsons v. Himmelsbach, App., 68 S.W.2d 841—State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1, quashing Weddle v. St. Joseph Ry., Light, Heat & Power Co., App., 47 S.W.2d 1098—State ex rel Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81,

224 Mo.App. 16, affirmed 46 S.W.2d 268, 226 Mo.App. 752—State ex rel. Koenen v. Daues, Sup., 288 S.W. 14, quashing certiorari Koenen v. Terminal Railroad Ass'n, App., 280 S.W. 73—State ex rel. John Hancock Mut. Life Ins. Co., of Boston, Mass. v. Allen, 267 S.W. 832, 306 Mo. 197, quashing certiorari Cradick v. John Hancock Mut. Life Ins. Co., of Boston, Mass., App., 256 S.W. 501—State ex rel. Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766—State ex rel Continental Ins. Co. v. Reynolds, Sup., 235 S.W. 88, quashing certiorari American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 208 Mo.App. 87—State ex rel Calhoun v. Reynolds, 233 S.W. 483, 289 Mo. 506, quashing certiorari State ex rel. Priest v. Calhoun, 226 S.W. 329, 207 Mo.App. 149—State ex rel Brotherhood of American Yeoman v. Reynolds, 229 S.W. 1057, 287 Mo. 169, reversing Wilson v. Brotherhood of American Yeoman, App., 223 S.W. 992—State v. Ellison, 181 S.W. 998, 266 Mo. 423.

Construction of instrument

On certiorari to quash opinion of court of appeals for conflict, where court of appeals found employer's indemnity policy ambiguous and construed it, it was for supreme court to determine whether substantial reason for doubt and uncertainty with respect to the meaning of the instrument existed.—State ex rel. Ocean Accident & Guarantee Corporation v. Hostetter, Mo., 108 S.W. 2d 17.

Construction of statute

(1) An opinion of the court of appeals construing a statute and giving it a certain force and effect cannot be called in question by certiorari to the supreme court, unless the supreme court has in some case on similar facts given the same statute a definite construction which the court of appeals in the instant case refuses to follow, since the proper construction of any statute is as much within the province of the court of appeals as of the supreme court.—State ex rel. and to Use of Heuring v. Allen, Sup., 112 S.W.2d 843, quashing opinion and record Heuring v. Central States Life Ins. Co. of St. Louis, 87 S.W.2d 661, 230 Mo.App. 42.

(2) The supreme court has no authority to decide whether an auto-

matic loan provision of life policy sued on was in conflict with non-forfeiture statute or whether such provision conflicted with extent provision, where court of appeals had jurisdiction of the appeal, since such questions would have to be decided in that court.—State ex rel. and to Use of Heuring v. Allen, supra.

Where facts not similar

Misapplication by court of appeals of rules announced in supreme court decisions does not constitute error cognizable on certiorari in the supreme court, where the facts are in no way analogous to the facts in supreme court cases.—State ex rel Calhoun v. Reynolds, 233 S.W. 483, 289 Mo. 506, quashing certiorari State ex rel Priest v. Calhoun, 226 S.W. 329, 207 Mo.App. 149.

56. Mo.—State ex rel. Ocean Accident & Guarantee Corporation v. Hostetter, Sup., 108 S.W.2d 17—State ex rel. Sirkin & Needles Moving Co. v. Hostetter, 101 S.W.2d 50, 340 Mo. 211—State ex rel Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76, quashing certiorari Blackwill v. Franke, App., 49 S.W.2d 211—State ex rel Burger v. Trimble, 55 S.W.2d 422, 331 Mo. 748, quashing certiorari Burgher v. Niedorp, App., 50 S.W.2d 174—State ex rel St. Louis-San Francisco Ry. Co. v. Haid, 37 S.W.2d 437, 327 Mo. 217, quashing error Seidel v. St. Louis-San Francisco Ry. Co., App., 18 S.W.2d 126—State ex rel. Brenner v. Trimble, 32 S.W.2d 760, 326 Mo. 702—State ex rel. American Surety Co. of New York v. Haid, 30 S.W.2d 100, 325 Mo. 949, quashing certiorari Wellston Trust Co. v. American Surety Co. of New York, 14 S.W.2d 23, 224 Mo.App. 241—State ex rel. Fichtner v. Haid, 22 S.W.2d 1045, 324 Mo. 130, quashing certiorari Fichtner v. Mohr, 16 S.W.2d 739, 223 Mo.App. 752—State ex rel. Security Ben. Ass'n v. Cox, 9 S.W.2d 953, 321 Mo. 130, quashing certiorari Spencer v. Security Benefit Ass'n, App., 297 S.W. 989—State ex rel. Utz v. Daues, Sup., 287 S.W. 606, quashing certiorari Utz v. Mayes, App., 267 S.W. 59—State ex rel. Tummons v. Cox, 282 S.W. 694, 313 Mo. 672, quashing certiorari Tummons v. Stokes, App., 274 S.W. 528—State ex rel. Greer v. Cox, Sup., 274 S.W. 373, quashing certiorari Smith v. Green, 257 S.W. 829, 216 Mo.App. 155—State ex rel Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari

late court;⁵⁷ and, in the absence of a conflict, it is bound by the inferior court's rulings on questions of law, whether right or wrong, but not by its ruling as to the dissimilarity of the facts in its decision from those in previous decisions of the supreme court, or as to certain evidence being contrary to physical laws and facts of universal knowledge.⁵⁸ In determining conflicts, the decisions must be read and understood in the light of the facts and questions presented;⁵⁹ but it is not the province of the supreme court to reconcile alleged inconsistencies in the inferior court's decision, where the matters complained of are not necessary to the decision of issues there presented and joined.⁶⁰

The supreme court also is not concerned with any conflict between the opinion of the inferior court and the opinions of other like courts or of courts of

a foreign jurisdiction.⁶¹ No question concerning the correctness of a controlling opinion of the supreme court which the inferior court's decision has followed can be reviewed;⁶² nor will supreme court decisions subsequent to the opinion under review be considered, since there can be no conflict with such decisions.⁶³

Ordinarily it is for the relator to point out conflicts, not for the reviewing court to search for them;⁶⁴ but where the supreme court has acquired jurisdiction it may consider conflicts not suggested by the relator and may, of its own motion, point out conflicts,⁶⁵ and is not limited to the determination of a conflict with a case cited, but may determine whether there is a conflict with the last previous ruling as to any case.⁶⁶ The supreme court, however, is not concerned with mere possible

Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766—State ex rel Calhoun v. Reynolds, 233 S.W. 483, 289 Mo. 506, quashing certiorari State ex rel Priest v. Calhoun, 226 S.W. 329, 207 Mo.App. 149—State ex rel Quercus Lumber Co. v. Robertson, Sup., 197 S.W. 79, quashing certiorari Allen v. Quercus Lumber Co., App., 190 S.W. 86.

Construction of instrument

(1) Supreme court cannot construe contract involved independently and declare appellate court erred in its construction.—State ex rel. American Surety Co. of New York v. Haid, 30 S.W.2d 100, 325 Mo. 949, quashing certiorari Wellston Trust Co. v. American Surety Co. of New York, 14 S.W.2d 23, 224 Mo.App. 241.

(2) Supreme court has no authority to construe policy involved for purpose of determining whether court of appeals' opinion is right or wrong, although it does have right to determine whether language of policy is unambiguous for purpose of deciding whether court of appeals' opinion violates controlling decisions of supreme court.—State ex rel Metropolitan Life Ins. Co. v. Allen, 85 S.W.2d 469, 337 Mo. 525, denying quashal of opinion Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826, 228 Mo.App. 649.

57. Mo.—State ex rel. Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766.

58. Mo.—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913.

59. Mo.—State ex rel Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing certiorari Citizens'

Sec. Bank of Englewood v. Gatewood, App., 36 S.W.2d 426.

60. Mo.—State ex rel. Tonnar v. Bland, 25 S.W.2d 462, 324 Mo. 987.

61. Mo.—State ex rel Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1156, quashing certiorari Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo. App. 823—State ex rel Cox v. Trimble, 279 S.W. 60, 312 Mo. 322—State ex rel Mann v. Trimble, 232 S.W. 100, 290 Mo. 661—State ex rel American Packing Co. v. Reynolds, 230 S.W. 642, 287 Mo. 697, quashing certiorari Heckfuss v. American Co., App., 224 S.W. 99.

Opinions of the supreme court alone are determinative of the issue raised on certiorari to quash a conflicting opinion.—State ex rel. Ely & Walker Dry Goods Co. v. Cox, 73 S.W.2d 743, 335 Mo. 596, quashing Kenser v. Ely & Walker Dry Goods Co., 48 S.W.2d 167, 226 Mo.App. 1016.

62. Mo.—State ex rel Continental Life Ins. Co. of Kansas City v. Allen, 262 S.W. 43, 303 Mo. 608, modifying Brabham v. Pioneer Life Ins. Co. of America, App., 253 S.W. 786—State ex rel. St. Louis Brewing Ass'n v. Reynolds, Sup., 226 S.W. 579, quashing certiorari Lampe v. St. Louis Brewing Ass'n, 221 S.W. 447, 204 Mo. App. 373.

63. Mo.—State ex rel Kansas City v. Trimble, Sup., 20 S.W.2d 20, 21—State ex rel Kansas City v. Trimble, 20 S.W.2d 17, 322 Mo. 360, denying quashal of opinion State ex rel Lindsay v. Trimble, 20 S.W. 2d 7, 225 Mo.App. 139.

64. Mo.—State ex rel Quercus Lumber Co. v. Robertson, Sup., 197 S.W. 79, quashing certiorari Allen v. Quercus Lumber Co., App., 190 S.W. 86.

65. Mo.—State ex rel. Kansas City

Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065—State ex rel. Gordon v. Trimble, 300 S.W. 475, 318 Mo. 341—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing opinion Vulgamott v. Payne, App., 245 S.W. 592.

Partial attack of opinion

Although the relator advances no reason sufficient to justify the questioning of part of an opinion, and although the conclusion reached by the court in such part of the opinion logically justifies its judgment, without regard to other questions, it is the supreme court's duty to examine other assailed portions of the opinion.—State ex rel. Hayes v. Ellison, Mo., 191 S.W. 49.

66. Mo.—State ex rel Security Ins. Co. v. Trimble, 300 S.W. 812, 318 Mo. 173—State ex rel. Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo.App. 1041.

Cases not cited in brief

That cases with which court of appeals' opinion conflicts were not cited in briefs filed on certiorari to quash opinion is not material.—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion

conflicts of decisions, but there must be an actual conflict between statements of general principles of law clearly intended as such, or between rulings necessary to the matter presented for decision.⁶⁷

A party who did not apply for the writ, but who was required by the opinion to consent to a remittitur as a condition to affirmance, may suggest that such provision conflicts with the decisions of the supreme court.⁶⁸

§ 148. Matter Which Should Have Been Urged by Motion

Matters which should have been urged by motion in the lower court, and were not, have been held not reviewable.

It has been held that certain matters which could be raised by a motion to dismiss the writ before hearing, if not so urged, will be disregarded on the hearing.⁶⁹ Thus it has been held that the objection that the officer granting the writ was not such an officer as had authority to grant it must be raised by a motion to dismiss and cannot be considered on the hearing.⁷⁰

Motion for new trial. A motion for a new trial,

which is overruled, presents nothing for decision on certiorari, unless it alleges submissible fact questions;⁷¹ and it has been held that error, if any, in overruling a plea in abatement, which is not made the subject of a motion for a new trial is not reviewable on certiorari.⁷² A motion for a new trial, however, has been held not necessary to review the lower court's action on evidence not bearing on issues submitted to the jury.⁷³

§ 149. Questions or Objections Not Raised in Original Proceeding

Objections not raised or decided in the lower court ordinarily will not be considered on review, except as to questions of public policy or jurisdiction.

The rule applicable to appellate procedure generally, that objections not raised in the lower court cannot be relied on in the appellate court; as announced in the title Appeal and Error § 228 et seq, governs the review on certiorari; and, as a general rule, questions not raised or ruled on below, or alleged erroneous action as to which no objection was made, cannot be presented to, or considered by, the reviewing court.⁷⁴ This rule applies

Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709.

67. Mo.—State ex rel Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing certiorari Citizens' Sec. Bank of Englewood v. Gatewood, App., 36 S.W.2d 426.

Misapplication of res judicata doctrine held not reviewable

Mo.—State ex rel. Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing certiorari Citizens' Sec. Bank of Englewood v. Gatewood, App., 36 S.W.2d 426.

68. Mo.—State ex rel St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S. W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., App., 223 S.W. 757.

69. Cal.—Rigdon v. San Diego, 157 P. 513, 30 Cal.App. 107, 11 C.J. p 193 note 49.

70. Mich.—Tweddle v. Judge Grand Rapids Super. Ct., 96 N.W. 22, 134 Mich. 237.

71. Ga.—O'Neal v. Lide, 164 S.E. 110, 45 Ga.App. 235.

72. Tenn.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177.

73. Tenn.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376—Carpenter v. Wright, 13 S.W.2d 51, 158 Tenn. 289.

Assignment of error in excluding evidence of accord and satisfaction and withholding such issue from the jury is available to defendant on certiorari, although his motion for a

new trial is not considered on the merits because not filed within the time permitted by rules of court.—Hibernia Bank & Trust Co. v. Boyd, 48 S.W.2d 1084, 164 Tenn. 376.

74. U.S.—Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578, reversing Koske v. Delaware, L. & W. R. Co., 142 A. 43, 194 N.J.Law 627, certiorari granted Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 13, 278 U.S. 586, 73 L.Ed. 521—New York Dock Co. v. The Poznan, N.Y., 47 S.Ct. 482, 274 U.S. 117, 71 L.Ed. 955, reversing, C.C.A., The Poznan, 9 F. 2d 838, which reversed, D.C., 297 F. 345, certiorari granted New York Dock Co. v. The Poznan, 46 S.Ct. 106, 269 U.S. 547, 70 L.Ed. 405.

Ala.—Pool v. Hart, 132 So. 59, 222 Ala. 232, denying certiorari 132 So. 58, 24 Ala.App. 103—Messer v. State, 129 So. 97, 221 Ala. 379, denying certiorari 129 So. 96, 23 Ala. App. 536—La Rue v. Loveman, Joseph & Loeb, 127 So. 241, 220 Ala. 2, mandate conformed to 127 So. 240, 23 Ala.App. 317, certiorari denied 127 So. 243, 220 Ala. 677—City of Birmingham v. Norwood, 126 So. 619, 220 Ala. 497, denying certiorari 126 So. 616, 23 Ala.App. 443—Ex parte Strawbridge, 77 So. 356, 201 Ala. 62, denying certiorari State v. Strawbridge, 76 So. 479, 16 Ala.App. 195.

Ga.—Gulf Refining Co. v. Miller, 108 S.E. 25, 151 Ga. 721—Bolton v.

City of Newman, 94 S.E. 236, 147 Ga. 400, transferred 95 S.E. 472, 22 Ga.App. 15—Duren v. City of Thomasville, 53 S.E. 814, 125 Ga. 1—Southern Pac. Co. v. Davison-Paxon Co., 165 S.E. 862, 45 Ga.App. 719—O'Quinn v. Mayor and Council of Homerville, 157 S.E. 109, 42 Ga.App. 628—Payne v. Cheshire, 108 S.E. 207, 27 Ga.App. 324—Jones v. May, 107 S.E. 897, 27 Ga. App. 152—Macon Canning Co. v. Roberts, 105 S.E. 734, 26 Ga.App. 147—Masters v. Southern Express Co., 99 S.E. 144, 23 Ga.App. 642.

Ill.—Bodenweiser v. Department of Registration and Education, 179 N. E. 462, 347 Ill. 115.

Iowa.—Winneshiek County State Bank v. Winneshiek District Court, 197 N.W. 898, 198 Iowa 524.

La.—Succession of Seeger, 107 So. 113, 160 La. 290—Shalley v. New Orleans Public Service, 105 So. 606, 159 La. 519, affirming 1 La.App. 770—Hanna v. Otis, 92 So. 360, 151 La. 851.

Mich.—West Bloomfield Tp. v. Detroit United R. Co., 109 N.W. 258, 146 Mich. 198, 117 Am.S.R. 628—Moinet v. Burnham, Stoepel & Co., 106 N.W. 1126, 143 Mich. 489.

Mo.—State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W.2d 862, 336 Mo. 352, quashing Macan v. Missouri Mut. Ass'n, App., 60 S. W.2d 402—State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S. W. 449, 211 Mo.App. 353.

to objections, not raised or ruled on below, as to the constitutionality of a statute,⁷⁵ the form of the remedy,⁷⁶ the competency of witnesses,⁷⁷ the admissibility of evidence,⁷⁸ that there was a failure of proof,⁷⁹ or that there was a variance between

the allegations and the proof.⁸⁰

An exception pendente lite to preliminary rulings is not necessary to an assignment of error thereon in the petition for certiorari;⁸¹ nor is an exception to the judgment or decree necessary for this pur-

Mont.—State ex rel. Stimat v. District Court of Second Judicial Dist., 74 P.2d 8.

Nev.—Doolittle v. Eighth Judicial Dist. Court, 15 P.2d 684, 54 Nev. 319.

N.J.—Newark Fire Ins. Co. v. State Board of Tax Appeals, 193 A. 912, 118 N.J.Law 525—Atlantic Broadcasting Co. v. Wayne Tp., 162 A. 631, 109 N.J.Law 442—Ribnik v. McBride, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J. Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327—Allen v. City of Patterson, 123 A. 384, 99 N.J.Law 489—Lindabury v. Clinton Tp. in Hunterdon County, 106 A. 465, 93 N.J.Law 96, dismissing certiorari 106 A. 463, 93 N.J. Law 37.

N.Y.—Executive Service Corporation v. Quigley, 243 N.Y.S. 772, 229 App.Div. 852—West Side Mortgage Co. of New York v. Leo, 174 N.Y. S. 451.

Tenn.—Milligan v. Greeneville College, 2 S.W.2d 90, 156 Tenn. 495.

Tex.—Mathews v. Autry, Civ.App., 65 S.W.2d 798.

11 C.J. p 193 note 52.

As basis for quashing record

Contentions not presented to or decided by the court of appeals cannot be made the basis of a ruling quashing its record on certiorari, on the ground its opinion is in conflict with controlling decisions of the supreme court.—State ex rel. City of St. Joseph v. Ellison, Mo., 223 S.W. 671, quashing certiorari Bradford v. City of St. Joseph, App., 214 S.W. 281.

As to signature to judgment

Plaintiff in error who invoked jurisdiction of court of appeals on ground that circuit court had entered final judgment could not, on opponent's certiorari proceeding in supreme court, predicate any rights on fact, not objected to before, that minute entry containing final judgment was not signed until later.—Southern Continental Telephone Co. v. Alley, 72 S.W.2d 555, 167 Tenn. 561.

Defect in pleading or proceeding

Whether complaint states no cause of action because of failure to show that suit was brought within statutory period will not be considered on certiorari, where such defect was not pleaded or brought to attention of courts below, nor to that of Supreme Court in opposing petition for

certiorari.—Lynch v. U. S., Ga., 54 S.Ct. 840, 292 U.S. 571, 78 L.Ed. 1434, reversing, C.C.A., 67 F.2d 490, certiorari granted 54 S.Ct. 641, 292 U.S. 616, 78 L.Ed. 1474—Wilner v. U. S., 54 S.Ct. 840, 292 U.S. 571, 78 L.Ed. 1434, reversing, C.C.A., 68 F.2d 442, certiorari granted 54 S.Ct. 641, 292 U.S. 617, 78 L.Ed. 1475.

Defense of void contract

Defense that contract sued on by foreign corporation was void because plaintiff was unlawfully doing business in state not raised by answer or demurrer, is waived and cannot be considered for the first time on certiorari.—J. B. Colt Co. v. District Court of Fifth Judicial Dist. in and for Millard County, 269 P. 1017, 72 Utah 281.

Questions raised for the first time in briefs of counsel for plaintiff in error will not be considered on review.—Payne v. Cheshire, 108 S.E. 207, 27 Ga.App. 324.

Validity of judgment

On certiorari and rule to show cause why proceedings in execution of a judgment should not be restrained, the question of the validity or invalidity of the judgment, which has not been passed on by the district court, cannot be brought up.—Marine Bank & Trust Co. v. Shaffer, 92 So. 353, 151 La. 331.

75. Ala.—Foley v. Armstrong, 170 So. 547, 27 Ala.App. 201, certiorari denied 170 So. 548, 233 Ala. 175—Waltman v. Ortman, 170 So. 545, 233 Ala. 170, second case, denying certiorari 170 So. 545, 27 Ala.App. 269, first case.

Ga.—Edwards v. McNair & Sellers, 110 S.E. 280, 152 Ga. 486, transferred 114 S.E. 814, 29 Ga.App. 237—Bolton v. City of Newman, 94 S.E. 236, 147 Ga. 400, transferred 95 S.E. 472, 22 Ga.App. 15—Brackett v. City of Atlanta, 179 S.E. 584, 51 Ga.App. 92.

Ill.—Hoffman v. Sears Community State Bank, 191 N.E. 280, 356 Ill. 598.

Mich.—Grand Rapids Bedding Co. v. Grand Rapids Furniture Temple Co., 188 N.W. 538, 218 Mich. 486.

Certiorari statute

Constitutionality of act relating to bringing of certiorari must be raised in trial court.—Loftin v. Southern Sec. Co., 136 S.E. 163, 36 Ga.App. 201.

Constitutionality of statute as subject of review generally see infra § 156.

76. N.J.—Ribnik v. McBride, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J. Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327.

N.Y.—Executive Service Corporation v. Quigley, 243 N.Y.S. 772, 229 App. Div. 852.

Mandamus

In certiorari, although mandamus was proper remedy to compel issuance of license, judgment of trial court correct on merits will be affirmed, in absence of objection at trial to form of remedy.

N.J.—Ribnik v. McBride, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J. Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327.

N.Y.—Executive Service Corporation v. Quigley, 243 N.Y.S. 772, 229 App. Div. 852.

77. Mass.—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.

N.Y.—People v. Sanders, 3 Hun 16.

Expert witness

Mass.—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.

78. Ala.—Box v. Metropolitan Life Ins. Co., 168 So. 217, 232 Ala. 321, reversing 168 So. 209, 27 Ala.App. 21, reversed on other grounds 168 So. 216, 232 Ala. 1, certiorari denied 168 So. 220, 232 Ala. 447.

Mo.—State ex rel. Bowdon v. Allen, 85 S.W.2d 63, 337 Mo. 260, quashing certiorari Bowdon v. Metropolitan Life Ins. Co., App., 78 S.W. 2d 474.

Tenn.—M. Lewis & Sons v. Illinois Cent. R. Co., 259 S.W. 903, 150 Tenn. 94.

11 C.J. p 194 npte 54.

Rulings on evidence as subject of review see infra § 151.

79. N.J.—Dare v. Moore, 1 N.J.Law 111.

N.Y.—Jenks v. Smith, 1 N.Y. 90.

11 C.J. p 194 note 55.

80. N.J.—Butts v. French, 42 N.J. Law 397.

81. Ga.—Nalley & Co. v. Moore, 181 S.E. 429, 51 Ga.App. 718.

Overruling demurrer and denying motion

Ga.—Nalley & Co. v. Moore, supra.

pose,⁸² unless required by statute.⁸³

Modifications of rule. The general rule that objections not raised below will not be considered on review is subject to the modifications that errors complained of will be considered on review on certiorari, although not raised below, where they involve questions of public policy,⁸⁴ or a rule of substantive law,⁸⁵ or, generally, where they go to the jurisdiction of the lower court,⁸⁶ although there is also authority to the contrary.⁸⁷ Questions or objections not raised below may also be examined so far as may be necessary to ascertain that no error was committed by the lower court so plain or apparent as to warrant its consideration on such a state of the record.⁸⁸ A void judgment may be attacked on certiorari although the point invalidating it is raised for the first time in the petition for certiorari.⁸⁹

The claim of exclusive federal jurisdiction will not be recognized as a basis for review by certiorari unless the question has been raised in the trial

court and presented as a basis of the writ, where the state appellate tribunal is circumscribed in its discussion of the case to errors appearing on the record, unless the question presented is one dealing with the jurisdiction of the court or general policy of the state.⁹⁰

Questions considered in intermediate court. Where the questions were considered in an intermediate appellate court as sufficiently presenting the questions of law argued, the reviewing court will not refuse to consider them on the ground that they were not sufficiently presented and pressed in the trial court.⁹¹

§ 150. Errors Not Assigned or Urged in Argument or Brief

The reviewing court, ordinarily, will consider only such errors as are properly assigned and presented.

The reviewing court will consider only such errors as are properly assigned and presented with

82. Iowa.—Coffey v. Gamble, 91 N. W. 813, 117 Iowa 545—Bardes v. Hutchinson, 85 N.W. 797, 113 Iowa 610.

Failure to object to the form of the order sustaining the certiorari at the time of the passage of the order does not preclude defendant in certiorari from excepting to the order as being erroneous.—Keough v. Georgia Power Co., 149 S.E. 435, 40 Ga.App. 336.

83. Ga.—Burdett v. Burdett, 61 S.E. 121, 130 Ga. 514—Morris v. Morris, 74 Ga. 826.

84. N.J.—Ribnik v. McBride, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J.Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327—Allen v. City of Patterson, 123 A. 884, 99 N.J.Law 439. N.Y.—Executive Service Corporation v. Quigley, 243 N.Y.S. 772, 229 App. Div. 852.

85. Tenn.—Deaver v. J. C. Mahan Motor Co., 43 S.W.2d 199, 163 Tenn. 429.

As to rights of parties

The rights of the parties must be adjudicated, on review, pursuant to a written contract repudiating prior representations, notwithstanding a failure to object to the competency of evidence as to such representations, and the court below found that such representations were made.—Deaver v. J. C. Mahan Motor Co., supra.

86. Mo.—State ex rel Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo.App. 1041.

Nev.—State ex rel. Smith v. Sixth

Judicial Dist. Ct. in and for Humboldt County, 73 P.2d 502—Jahn v. Sixth Judicial Dist. Ct. in and for Humboldt County, 73 P.2d 499.

N.J.—Ribnik v. McBride, 137 A. 437, 103 N.J.Law 708, affirming 133 A. 870, 4 N.J.Misc. 623, and reversed on other grounds 48 S.Ct. 545, 277 U.S. 350, 72 L.Ed. 913, 56 A.L.R. 1327—Allen v. City of Patterson, 123 A. 884, 99 N.J.Law 439.

N.Y.—Executive Service Corporation v. Quigley, 243 N.Y.S. 772, 229 App. Div. 852.

Vt.—Town School District of Maidstone v. Dempsey, 156 A. 387, 103 Vt. 481.

11 C.J. p 194 note 59.

Contravention of ruling of higher court

The question of the lower court's contravention of a supreme court ruling by proceeding with one regular judge and one special judge, agreed on by the parties to replace a recused judge, is solely one of jurisdiction, and is timely raised in the petition for a writ of certiorari on the ground of illegality of the court's actions as so constituted.—State ex rel Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo. App. 1041.

Judgment pronounced without authority is void and its invalidity may be raised for first time on certiorari.—Kaufman v. Smathers, 166 A. 453, 111 N.J.Law 52, reversing Kaufman v. Smather, 160 A. 500, 10 N.J.Misc. 671.

Jurisdiction of commissioner

That education commissioner's lack of jurisdiction of subject matter

was not raised before commissioner did not preclude raising question on certiorari.—Town School Dist. of Maidstone v. Dempsey, 156 A. 387, 103 Vt. 481.

Review as limited to matters of jurisdiction see *infra* § 151.

87. La.—State v. Sawyers, 54 So. 136, 127 La. 885—State v. Judges Ct. of App., 22 So. 972, 50 La. Ann. 26.

Utah.—Sammis v. Marks, 252 P. 270, 69 Utah 26.

88. U.S.—New York Dock Co. v. The Poznan, N.Y., 47 S.Ct. 482, 274 U.S. 117, 71 L.Ed. 955, reversing, C. C.A., The Poznan, 9 F.2d 838, which reversed, D.C., 297 F. 345, certiorari granted New York Dock Co. v. The Poznan, 46 S.Ct. 106, 269 U.S. 547, 70 L.Ed. 405.

As to appointment and qualification of guardian

That one resisting removal as guardian failed to raise point that petitioner did not show appointment and qualification does not preclude him from raising that point on certiorari to review judgment of ordinary denying removal, which was attacked as contrary to evidence.—Martin v. Moore, 93 S.E. 223, 20 Ga. App. 569.

89. Ga.—Parker v. Bond, 170 S.E. 331, 47 Ga.App. 318.

90. N.J.—Kennedy v. Coon, 106 A. 210, 91 N.J.Law 100, affirmed Coon v. Kennedy, 103 A. 207, 91 N.J.Law 598, error dismissed 39 S.Ct. 146, 248 U.S. 457, 63 L.Ed. 358.

91. Ala.—Baker Tow Boat Co. v. Langner, 117 So. 915, 218 Ala. 34, reversing 117 So. 914, 22 Ala.App. 575.

reasonable certainty,⁹² although they are apparent of record;⁹³ or, where so restricted, it will consider only the alleged errors set forth in the application

or petition for the writ,⁹⁴ and verified in the answer of the trial judge.⁹⁵

A party respondent to a petition for certiorari

92. U.S.—Sonzinsky v. U. S., Ill., 57 S.Ct. 554, 300 U.S. 506, 81 L.Ed. 772, affirming, C.C.A., 86 F.2d 486, certiorari granted 57 S.Ct. 491, 300 U.S. 648, 81 L.Ed. 860—Camp v. Gress, Va., 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997, modifying 244 F. 121, 156 C.C.A. 549, certiorari granted 38 S.Ct. 14, 245 U.S. 655, 62 L.Ed. 533.

Del.—Discount and Credit Corporation v. Ehrlich, 187 A. 591, 593, 7 W.W.Harr. 561, citing *Corpus Juris*.

Ga.—O'Neal v. Lide, 164 S.E. 110, 45 Ga.App. 235—Cusic v. Holland Furnace Co., 159 S.E. 882, 43 Ga. App. 770.

Ill.—Alexander Lumber Co. v. Kellerman, 192 N.E. 913, 358 Ill. 207, affirming 271 Ill.App. 571—Hoffman v. Sears Community State Bank, 191 N.E. 280, 356 Ill. 598—Hogg v. Hohmann, 162 N.E. 209, 330 Ill. 589.

Mo.—State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo. App. 353—State ex rel. United Rys. Co. of St. Louis v. Allen, Sup., 240 S.W. 117.

N.J.—Montwid v. Montwid, 167 A. 761, 11 N.J.Misc. 648—Lipman v. Board of Education of City of Bayonne, 142 A. 654, 6 N.J.Misc. 706—Nagengast v. Board of Education of City of Bayonne, 142 A. 654, 6 N.J.Misc. 703—Cadogan v. Board of Education of City of Bayonne, 142 A. 653, 6 N.J.Misc. 705—Cardillo v. Borough of Bound Brook, 127 A. 792, 3 N.J.Misc. 249.

R.I.—New York, N. H. & H. R. Co. v. Superior Court for Kent County, 99 A. 582, 39 R.I. 560.

Tenn.—Lillard v. Tolliver, 285 S.W. 576, 154 Tenn. 304—Kerr v. Raines, 256 S.W. 246, 148 Tenn. 501.

11 C.J. p 162 note 68, p 194 note 61.

As to rulings on evidence

Assignments of error, in motion for new trial, stating as grounds that the court "allowed incompetent evidence to go to the jury," that the court "declined to let competent proof tendered by plaintiff go to the jury," that the court "declined to charge the jury the several requests tendered by plaintiff," but not specifically pointing out the errors, were insufficient and could not be considered.—Kerr v. Raines, 256 S.W. 246, 148 Tenn. 501.

93. Del.—Cunningham v. Dixon, 41 A. 519, 15 Del. 163.

N.J.—New Jersey R., etc., Co. v. Suydam, 17 N.J.Law 25—Griffith

v. West, 10 N.J.Law 350—State v. Kirby, 5 N.J.Law 982.

Pa.—Curran v. Atkinson, 1 Ashm. 51.

94. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331, affirming in part, C.C.A., 61 F.2d 934, reversing, D.C., 1 F.Supp. 809, certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467—Republic of France v. French Overseas Corporation, N. Y., 48 S.Ct. 516, 277 U.S. 323, 72 L.Ed. 901, affirming, C.C.A., The Malcolm Baxter, Jr., 20 F.2d 304, which reversed, D.C., 55 F.2d 312, and certiorari granted Republic of France v. French Overseas Corporation, 48 S.Ct. 114, 275 U.S. 517, 72 L.Ed. 402—U. S. v. Biwabik Mining Co., Ohio, 38 S.Ct. 462, 247 U.S. 116, 62 L.Ed. 1017, certiorari granted U. S. v. Biwabik Mining Co., 38 S.Ct. 11, 245 U.S. 648, 62 L.Ed. 520, and reversing Biwabik Mining Co. v. U. S., 242 F. 9, 154 C.C.A. 601—Great Northern R. Co. v. U. S., Minn., 28 S.Ct. 313, 208 U.S. 452, 52 L.Ed. 567.

Ala.—Simpson v. State, 106 So. 898, 214 Ala. 176, denying certiorari 106 So. 898, 21 Ala.App. 201.

Ga.—Mitchell v. Owen, 127 S.E. 122, 159 Ga. 690, reversing 121 S.E. 699, 31 Ga.App. 649—McRae v. Boykin, 187 S.E. 271, 54 Ga.App. 158, conforming to Boykin v. McRae, 185 S.E. 246, 182 Ga. 252, reversing McRae v. Boykin, 179 S.E. 535, 50 Ga.App. 866—Hinton v. Equitable Loan Co., 155 S.E. 101, 41 Ga.App. 815—National Life & Accident Ins. Co. v. May, 154 S.E. 652, 41 Ga. App. 719—Lewis v. Standard Co., 135 S.E. 101, 36 Ga.App. 16—Freedman v. Bush, 119 S.E. 421, 30 Ga. App. 757—Fowler v. King, 116 S. E. 54, 29 Ga.App. 500—Lowenstein v. Johnston, 98 S.E. 111, 23 Ga. App. 261.

Mich.—Griggs v. De Young, 172 N. W. 433, 205 Mich. 627.

S.C.—Smith v. Saye, 125 S.E. 269, 130 S.C. 20.

Tenn.—Melton v. Donnell, 114 S.W. 2d 49—Deaver v. J. C. Mahan Motor Co., 43 S.W.2d 199, 163 Tenn. 429—Louisville & N. R. Co. v. Anderson, 15 S.W.2d 753, 159 Tenn. 55—Brenizer v. Nashville, C. & St. L. Ry., 8 S.W.2d 1099, 156 Tenn. 479, denying rehearing 3 S.W.2d 1053, 156 Tenn. 479—Richmond Screw Anchor Co. v. E. W. Minter Co., 300 S.W. 574, 156 Tenn. 19—Brown v. Brown, 296 S.W. 356, 155 Tenn. 530—Lillard v. Tolliver, 285 S.W. 576, 154 Tenn. 304.

Tex.—George v. First Nat. Bank, Civ.App., 67 S.W.2d 324, error refused—Hurley v. White, Civ.App.,

66 S.W.2d 393—McAllen v. Wood, Civ.App., 201 S.W. 433, error refused.

11 C.J. p 162 note 68 [a], p 194 note 62.

Assignment of error on refusal of requested charge cannot be considered on certiorari to superior court, where charge is not included in petition, attached exhibits, or answer of trial judge, and where latter answers in effect that request was covered by general charge.—J. J. Bull & Son v. Carpenter, 124 S.E. 381, 32 Ga.App. 637.

Necessity of setting out errors in application see *supra* § 72.

95. Ga.—Taft Co. v. Smith, 37 S.E. 424, 112 Ga. 196—Beavers v. Casells, 192 S.E. 249, 56 Ga.App. 146—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440—Ralls v. Jones, 149 S.E. 291, 40 Ga.App. 218—Powell v. A. J. Fowler & Son, 129 S.E. 14, 34 Ga.App. 186—Powell v. A. J. Fowler & Son, 129 S.E. 13, 34 Ga.App. 186—Reese v. Miller, 126 S.E. 904, 33 Ga.App. 442—Bell v. Georgia Military College, 124 S.E. 52, 32 Ga.App. 527, conforming to answers to certified questions 124 S.E. 50, 153 Ga. 539—Bailey v. Miller Hardware & Furniture Co., 119 S.E. 428, 30 Ga. App. 786—Freedman v. Bush, 119 S.E. 421, 30 Ga.App. 757—Cochran v. Anderson, 118 S.E. 450, 30 Ga. App. 427—Lowenstein v. Johnston, 98 S.E. 111, 23 Ga.App. 261—Louisville & N. R. Co. v. Tate, 91 S.E. 883, 19 Ga.App. 507—Hesterly v. Ingram, 89 S.E. 1049, 18 Ga.App. 532.

11 C.J. p 194 note 62 [b].

Agreement between counsel or litigants is not a legal substitute for verification of petition for certiorari by answer of trial magistrate.—Powell v. A. J. Fowler & Son, 129 S.E. 13, 34 Ga.App. 186.

As to existence of judgment

Where in application for certiorari error is assigned on alleged judgment, and judge in answer does not adopt as true or verify allegations in application but sends up attached to answer a verified copy of proceedings in his court, and it is shown therein that judgment complained of was in fact rendered, procedure is a sufficient verification of existence of judgment; but where the judge stated in answer that true copies of proceedings were certified as true and sent up, but record failed to show that copies of proceedings were attached to answer, existence of alleged judgment was not verified, and hence nothing was pre-

cannot raise a question on review unless he petitions for relief and assigns error on the point;⁹⁶ and where such a party does not petition for certiorari he cannot question the correctness of a part of the judgment or decree which is not challenged.⁹⁷

The rule, however, that the reviewing court will consider only errors which have been properly assigned and presented, is inapplicable on a trial de novo in the reviewing court,⁹⁸ although, as stated *infra* § 170, it must confine its inquiry to the

grounds of attack stated in the petition. So, when necessary to the furtherance of justice, the court will notice substantial error, although it was not made the subject of objection or exception,⁹⁹ as where it is apparent that the inferior tribunal or officer had no jurisdiction,¹ or had exceeded its jurisdiction,² or that the aggrieved party had no opportunity to object.³

Points not urged in argument or brief. Matters not referred to or urged in the arguments or briefs of counsel will not be considered;⁴ and where the

sent to superior court for decision.—*Beavers v. Cassells*, 192 S.E. 249, 56 Ga.App. 146.

Negative reference not verification

Since exceptions in petition for certiorari were not alleged to have been grounds of oral motion for new trial, and since uncertainties and ambiguities in answer cannot be resolved in favor of petitioner, bare negative reference in answer to certain specified grounds as not having been urged cannot be taken by implication as verification and positive affirmation that other exceptions were actually urged.—*Reese v. Miller*, 126 S.E. 904, 33 Ga.App. 442.

Sufficiency of verification

(1) Allegations of petition for certiorari are not verified by magistrate's answer which ignores or expressly denies them.—*Partridge v. Wilkerson*, 163 S.E. 303, 45 Ga.App. 65.—*New Zealand Ins. Co. v. Brewer*, 116 S.E. 922, 29 Ga.App. 610.

(2) Allegations in petition for certiorari as to giving of charges limiting the issue to particular question were not verified by answer, stating that court did not remember the charge verbatim, but remembered that he made it clear that such question was gist of contentions.—*Cochran v. Anderson*, 118 S.E. 450, 30 Ga.App. 427.

(3) A petition for certiorari was sufficiently verified by an answer which adopted the magistrate's answer to a former petition, complaining of the same rulings and containing the same statements, where no exception was taken to the superior court's order allowing such irregular answer.—*Georgia, R., etc., Co. v. High*, 82 S.E. 932, 15 Ga.App. 243.

96. Tenn.—*Hutsell v. Citizens' Nat. Bank*, 64 S.W.2d 188, 166 Tenn. 598.—*Independent Life Ins. Co. v. Hunter*, 63 S.W.2d 668, 166 Tenn. 498.—*Tri-State Fair v. Rowton*, 204 S.W. 761, 140 Tenn. 304, L.R.A. 1918F 657.—*Taylor v. National Union Fire Ins. Co.*, 203 S.W. 830, 140 Tenn. 150.—*Cincinnati, etc., R. Co. v. Brock*, 178 S.W. 1115, 132 Tenn. 477.

Acquiescence in judgment

Where defendant, who appealed to district court, acquiesced in its judgment overruling appellee's motion to dismiss appeal and does not ask any relief on appellee's certiorari, supreme court need not consider correctness of rejecting defendant's demand that suit be dismissed because abandoned.—*Reagan v. Louisiana Western R. Co.*, 79 So. 328, 143 La. 754.

Facts conceded to be true

Where plaintiff in *ieri facias*, in his petition for certiorari, set out grounds of affidavit of illegality, and alleged that they involved only issues of law, and on that ground assigned error in overruling its motion to strike grounds of affidavit and in sustaining affidavit, judge of superior court was authorized to consider that grounds of affidavit were conceded to be true.—*Bellinger v. Mutual Ben. Industrial Life Ins. Ass'n*, 98 S.E. 119, 23 Ga.App. 245.

97. U.S.—*Federal Trade Commission v. Pacific State Paper Trade Ass'n*, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534, reversing in part, C.C.A., *Pacific States Paper Trade Ass'n v. Federal Trade Commission*, 4 F.2d 457, certiorari granted *Federal Trade Commission v. Pacific States Paper Trade Ass'n*, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534.

98. Tex.—*Linch v. Broad*, 6 S.W. 751, 70 Tex. 92.

99. Miss.—*Crowson v. Young*, 126 So. 470—*Board of Sup'rs of Calhoun County v. Young*, 126 So. 469, 156 Miss. 644.
11 C.J. p 194 note 65.

Record showing notice of exception

Court of appeals' holding that oral charge was erroneous would not be disturbed by supreme court on ground that bill of exceptions did not show that exception was reserved before jury retired, where court of appeals' opinion stated that record showed that at conclusion of charge counsel gave notice of exception.—*Cable-Burton Piano Co. v. Thomas*, 152 So. 468, 228 Ala. 112, denying certiorari 152 So. 466, 26 Ala.App. 26.

1. N.Y.—*People v. Robertson*, 26 How.Pr. 90.

11 C.J. p 194 note 66.

Jurisdiction of chancery court

Where chancery court overruled demurrer raising question of jurisdiction to grant certain relief, under proper assignment of error in court of civil appeals, jurisdiction of chancery court may be there passed on.—*Goodman v. Palmer*, 195 S.W. 165, 137 Tenn. 556.

2. Cal.—*Mastick v. San Francisco County Super. Ct.*, 29 P. 869, 94 Cal. 347.

Miss.—*Crowson v. Young*, 126 So. 470—*Board of Sup'rs of Calhoun County v. Young*, 126 So. 469, 156 Miss. 644.

3. W.Va.—*Burke v. Monroe County*, 4 W.Va. 371.

4. U.S.—*Alexander v. Cosden Pipe Line Co., Okl.*, 54 S.Ct. 292, 290 U.S. 484, 78 L.Ed. 452, reversing in part, C.C.A., 63 F.2d 663, certiorari granted 54 S.Ct. 48, 290 U.S. 608, 78 L.Ed. 532.—*Erie R. Co. v. Collins, N.Y.*, 40 S.Ct. 450, 253 U.S. 77, 64 L.Ed. 790, affirming 259 F. 172, 170 C.C.A. 240, which affirmed, D.C., *Collins v. Erie R. Co.*, 245 F. 811, certiorari granted 39 S.Ct. 490, 250 U.S. 637, 63 L.Ed. 1183.—*Great Northern R. Co. v. U. S., Minn.*, 28 S.Ct. 313, 208 U.S. 452, 52 L.Ed. 567.

Nev.—*Doolittle v. Eighth Judicial Dist. Court*, 15 P.2d 684, 54 Nev. 319.

N.J.—*Turner v. Passaic Pension Commission*, 163 A. 282, 10 N.J. Misc. 1270, 112 N.J.Law 476.—*MacEvoy v. Borough of Bergenfield*, 140 A. 581, 6 N.J.Misc. 211.

S.D.—*John Morrell & Co. v. American Ry. Express Co.*, 187 N.W. 724, 45 S.D. 399.

11 C.J. p 194 note 69.

Assignment in affidavit for certiorari, not argued or referred to in briefs, will not be considered.—*Maki v. School Dist. of Wakefield Tp.*, 209 N.W. 840, 235 Mich. 689.

Reasons filed in certiorari proceeding and not argued are abandoned.—*De Marmon v. Borough of Roselle*, 152 A. 656, 8 N.J.Misc. 904.

petition for certiorari and assignments of error contain no testimony supporting their contentions, relief cannot be granted, where the brief in support of the assignments of error has been stricken because filed too late.⁵

§ 151. Limitation to Matters of Jurisdiction and Regularity of Proceeding

- a. General rule
- b. Minority rule
- c. Rulings on evidence
- d. Rulings on pleadings

5. Tenn.—Town of Morristown v. Love, 22 S.W.2d 769, 160 Tenn. 177.

6. Cal.—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—Luckey v. Superior Court in and for Los Angeles County, 237 P. 450, 209 Cal. 360—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384—Fuller v. Board of Medical Examiners, 59 P.2d 171, 14 Cal.App.2d 734—Los Angeles County v. Industrial Accident Commission, 56 P.2d 577, 13 Cal. App.2d 69—Karz v. Department of Professional and Vocational Standards, 54 P.2d 35, 11 Cal.App.2d 554—Blue v. Division of Corporations, Department of Investments, 48 P.2d 80, 8 Cal.App.2d 485—Rinaldo v. Board of Medical Examiners of State of California, 42 P.2d 724, 5 Cal.App.2d 345—Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County, 37 P.2d 159, 1 Cal.App.2d 634—Coffman v. California State Board of Architectural Examiners, Northern California, 19 P.2d 1002, 130 Cal. App. 343—Winning v. Board of Dental Examiners, 300 P. 866, 114 Cal.App. 658—Maple v. Allen, 299 P. 571, 114 Cal.App. 109—Engelhardt v. Superior Court in and for the City and County of San Francisco, 269 P. 758, 93 Cal.App. 320—Smith v. Superior Court in and for Yuba County, 264 P. 573, 89 Cal.App. 177.

Colo.—Public Utilities Commission of Colorado v. City of Loveland, 289 P. 1090, 87 Colo. 556—Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap, 265 P. 94, 83 Colo. 360—Lindsley v. City and County of Denver, 196 P. 859, 69 Colo. 562—State Board of Medical Examiners v. Boullis, 195 P. 325, 69 Colo. 361.

Idaho.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 269 P. 595, 46 Idaho 642—Beus v. Terrell, 269 P. 593, 46 Idaho 635—

Mays v. District Court of Sixth Judicial Dist., in and for Butte County, 237 P. 700, 40 Idaho 798—Hay v. Hay, 232 P. 895, 40 Idaho 159.

Mo.—State ex rel Kennedy v. Remmers, 101 S.W.2d 70, 340 Mo. 126—State ex rel. Horton v. Clark, 9 S. W.2d 635, 320 Mo. 1190.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439—State v. Board of Com'rs of Big Horn County, 273 P. 290, 83 Mont. 540.

Nev.—State v. Sixth Judicial Dist. Court in and for Humboldt County, 1 P.2d 105, 53 Nev. 343—State v. Justice Court of Reno Tp., Washoe County, 207 P. 1105, 46 Nev. 133—Dixon v. Second Judicial Dist. Court of Nevada in and for Washoe County, 190 P. 352, 44 Nev. 98—Nevada Lincoln Mining Co. v. District Court of Eighth Judicial Dist., 187 P. 1006, 43 Nev. 396.

N.M.—In re Blatt, 67 P.2d 293, 41 N. M. 269, 110 A.L.R. 656.

Okl.—Board of Com'rs of Carter County v. Woodford Consol. School Dist. No. 36, 25 P.2d 1057, 165 Okl. 227—Smith v. Wells, 4 P.2d 734, 153 Okl. 25—Ramsey v. Commissioners of Payne County, 300 P. 389, 149 Okl. 289—Fortune v. Board of Com'rs of Osage County, 299 P. 875, 149 Okl. 260—Argabright v. Christison, 286 P. 347, 142 Okl. 243—Coon v. Robinett, 274 P. 669, 135 Okl. 114—Harris v. District Court in and for Nowata County, 173 P. 69, 68 Okl. 231.

Pa.—Grime v. Department of Public Instruction, 188 A. 337, 324 Pa. 371—Appeal of Geary, 175 A. 544, 316 Pa. 342—In re Phillips, 169 A. 762, 313 Pa. 461—In re Washington Party Nominations, 85 A. 873, 237 Pa. 567.

S.D.—Davison v. Circuit Court of Kingsbury County, in Ninth Judicial Circuit, 173 N.W. 737, 42 S.D. 254.

Utah.—Ray v. Cox, 30 P.2d 1062, 83

a. General Rule

Review on certiorari, in most states, is generally limited to questions relating to the jurisdiction, or proper exercise of the jurisdiction, of the inferior tribunal.

On a writ of certiorari the review, in most states, in the absence of statutory or judicial enlargement of the functions of the common-law writ, will be confined to questions disclosed by the record relating to the jurisdiction of the inferior tribunal, or the proper and regular exercise of such jurisdiction,⁶ at the time the order or judgment complained of was made,⁷ in a proceeding in which the writ of certiorari may be used,⁸ and, under some statutes,

Utah 499—MacFarlane v. Burton, 228 P. 193, 64 Utah 41.

11 C.J. p 195 note 70.

As to disbarment decree

On certiorari by disbarred attorney to review action of district court in reinstating original decree of disbarment and in refusing further to modify it, etc., sole question is whether judges exceeded their authority.—Maxey v. Polk County District Court, 165 N.W. 1005, 182 Iowa 366.

Jurisdiction of commissioners

On certiorari to review the action of a board of county commissioners, the only questions for determination are as to whether, on the record presented, the commissioners acquired jurisdiction to proceed to a hearing, and whether if they had jurisdiction, they exceeded it in making the order complained of.—State v. Board of Com'rs of Big Horn County, 273 P. 290, 83 Mont. 540.

Ruling releasing property from attachment is not reviewable on certiorari except to the extent to which jurisdictional questions may be involved.—Ray v. Cox, 30 P.2d 1062, 83 Utah 499.

7. Iowa.—Dickson Fruit Co. v. District Court of Sac County, 213 N. W. 803, 203 Iowa 1028.

Order vacating judgment

On certiorari to review the action of a district court in vacating a default judgment, the supreme court is concerned, not with the trial court's jurisdiction at the time of the original judgment, but with its jurisdiction when the order vacating the judgment was made.

Iowa.—Dickson Fruit Co. v. District Court of Sac County, supra.

N.J.—Palansky v. Reich, 164 A. 701, 11 N.J.Misc. 106, affirmed 168 A. 297, 11 N.J.Law 241.

8. Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439.

Judicial nature of proceedings reviewable on certiorari see supra § 17.

where a right of appeal is not given.⁹ Under this general rule the action of the inferior tribunal sought to be reviewed is generally final and conclusive on every question, except questions of jurisdiction.¹⁰

It is obvious, however, that where certiorari is permitted to issue on grounds other than those affecting the existence or exercise of jurisdiction, as announced supra §§ 23, 24, the review is not confined strictly to jurisdictional questions.¹¹ Stated in another way, the rule in most states is that the reviewing court cannot review mere errors of law, where the court has jurisdiction and is not acting in excess of its jurisdiction.¹² Excess of jurisdiction is to be distinguished from errors of law or fact committed by the inferior tribunal within the limits of its jurisdiction;¹³ and mere errors or irregularities in arriving at the result and making the order complained of,¹⁴ such as an order relating to the dismissal of an appeal, as stated supra § 23, or an order vacating another order,¹⁵ are generally not reviewable on certiorari, where the court acted

within its jurisdiction, provided the jurisdictional facts appear.¹⁶ This rule also precludes the review of mere errors of an inferior "appellate" court,¹⁷ and limits the scope of the review to the consideration of questions relating to the jurisdiction of the "appellate" court.¹⁸

Effect of appearance. If a party has submitted his person to the jurisdiction of a court, on appeal, he cannot thereafter, by certiorari, question the jurisdiction of that court to determine the appeal.¹⁹

b. Minority Rule

Review on certiorari, in some states, extends to the determination of illegalities or irregularities, and includes a review of errors or issues of law.

In some states, either by virtue of statutory provisions or by local practice, a review on certiorari is not limited to questions relating to the jurisdiction of the inferior court, but also extends to the determination of whether, in the rendition of the judgment or order reviewed, there was illegality or irregularity, by the inferior tribunal, prejudicial to the complaining party.²⁰ It involves a limited re-

9. Cal.—Garvin v. Chambers, 232 P. 696, 195 Cal. 212.

10. Cal.—Fuller v. Board of Medical Examiners, 59 P.2d 171, 14 Cal. App.2d 734—Winning v. Board of Dental Examiners, 300 P. 866, 114 Cal.App. 658.

Iowa.—Adams v. Smith, 250 N.W. 466, 216 Iowa 1365.

Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 50 Nev. 318.

Such defenses as limitation statutes cannot be considered or made bases for affirmative relief.—State Ins. Fund v. Hunt, 17 P.2d 354, 52 Idaho 639.

Conclusiveness of return or record see infra §§ 165-169.

11. Mo.—State v. Mosman, 133 S.W. 38, 231 Mo. 474.

11 C.J. p 195 note 72.

12. Okl.—Argabright v. Christison, 286 P. 347, 142 Okl. 243—Coon v. Robinett, 274 P. 669, 135 Okl. 114. Pa.—In re Springdale Tp. Election Recount, 161 A. 73, 307 Pa. 312.

Utah.—MacFarlane v. Burton, 228 P. 193, 64 Utah 41.

11 C.J. p 195 note 73.

13. Idaho.—Beus v. Terrell, 269 P. 593, 594, 46 Idaho 635.

"Such an error does not constitute an excess of jurisdiction. If it did, every error committed by the court in the course of judicial investigation would be an excess of jurisdiction."—Beus v. Terrell, supra.

14. Ark.—Hilger v. J. R. Watkins

Medical Co., 214 S.W. 49, 139 Ark. 400.

Cal.—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—Winning v. Board of Dental Examiners, 300 P. 866, 114 Cal.App. 658—Engelhardt v. Superior Court in and for the City and County of San Francisco, 269 P. 758, 93 Cal.App. 320—Smith v. Superior Court in and for Yuba County, 264 P. 572, 89 Cal.App. 177. Colo.—Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap, 265 P. 94, 83 Colo. 360. Idaho.—Beus v. Terrell, 269 P. 593, 46 Idaho 635.

Iowa.—Adams v. Smith, 250 N.W. 466, 216 Iowa 1365.

Mo.—State ex rel. Brince v. Franklin, 283 S.W. 712, 220 Mo.App. 232.

Okl.—Smith v. Wells, 4 P.2d 734, 153 Okl. 25—Ramsey v. Commissioners of Payne County, 300 P. 389, 149 Okl. 289—Fortune v. Board of Com'rs of Osage County, 299 P. 875, 149 Okl. 260—Argabright v. Christison, 286 P. 347, 142 Okl. 243. Utah.—MacFarlane v. Burton, 228 P. 193, 64 Utah 41.

11 C.J. p 196 note 76.

Procedural errors, not involving or going to the jurisdiction or excess of jurisdiction cannot be reviewed on certiorari.—State ex rel. Meyer v. Schlottzauer, 286 S.W. 82, 315 Mo. 347.

Removal of officer

If inferior tribunal had jurisdiction to hear and determine case and proceeded legally, court cannot review order removing officer on

ground it acted wrongfully.—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531.

15. Cal.—Tinn v. U. S. District Atty., 84 P. 152, 148 Cal. 773, 113 Am.S.R. 354.

16. Cal.—Smith v. Superior Court in and for Yuba County, 264 P. 573, 89 Cal.App. 177.

Determination of jurisdictional facts on review see infra § 162.

17. Cal.—Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County, 37 P.2d 159, 1 Cal.App.2d 634.

Colo.—People v. Court of Appeals, 82 P. 483, 34 Colo. 291.

18. Cal.—Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County, 37 P.2d 159, 1 Cal.App.2d 634—Brune v. Superior Court in and for City and County of San Francisco, 297 P. 566, 113 Cal.App. 21—Wood v. Superior Court of California in and for Alameda County, 248 P. 784, 78 Cal.App. 551—De Matei v. Superior Court in and for Lake County, 239 P. 853, 74 Cal.App. 147.

19. Cal.—American Law Book Co. v. Santa Clara County Super. Ct., 128 P. 921, 164 Cal. 327.

20. Ala.—Ex parte Big Four Coal Mining Co., 104 So. 764, 213 Ala. 305.

Fla.—Tamiari Trail Tours v. Railroad Commission, 174 So. 451, 128 Fla. 25—Jones v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 137 So. 839, 103 Fla. 737—Brinson v. Tharin, 127 So. 313, 99 Fla. 696—

view of the proceedings of the inferior court,²¹ and may include substantial errors of procedure calculated to materially injure the complaining party.²²

The scope of the writ has been so enlarged in

some states as to authorize a review of mere errors or issues of law,²³ and, in some cases, is limited to a review of such errors or issues,²⁴ especially where

Florida East Coast Ry. Co. v. George, 107 So. 266, 91 Fla. 42—American Ry. Express Co. v. Weatherford, 98 So. 820, 86 Fla. 626.

Ill.—Heppe v. Mooberry, 183 N.E. 636, 350 Ill. 641—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531. See Braucher v. Board of Examiners of Architects of the State of Illinois, 209 Ill.App. 455.

Iowa.—Holcomb v. Franklin, 235 N.W. 474, 212 Iowa 1159.

Appellate court affirming trial court

(1) Supreme court cannot say on certiorari proceeding, after verdict has been approved by trial judge and affirmed by circuit court, that circuit court affirming judgment arrived at on disputed facts did not proceed in accordance with essential requirements of law.—Atlantic Coast Line R. Co. v. Farris & Co., 149 So. 561, 111 Fla. 412.

(2) Where appellate court affirmed judgment solely on ground that abstract was insufficient, supreme court on certiorari was limited to review of correctness of judgment of appellate court, under Appellate Court Rules, rule 4.—Shumway v. Shumway, 192 N.E. 578, 357 Ill. 477.

Motives of inferior tribunal

Under a statute authorizing the issuance of the writ when the inferior tribunal is alleged to have exceeded its jurisdiction or to have otherwise acted illegally, the court, in inquiring into the action of a board of equalization in ordering the reduction of an assessment, will not review the motives of the board in making such reduction.—Polk County v. Des Moines, 30 N.W. 614, 70 Iowa 351.

In Pennsylvania

Where an appeal is expressly denied by statute or the action of the lower court is made final, the supreme court's appellate review on certiorari is limited to questions of jurisdiction and those relating to the regularity of the proceedings.—Grime v. Department of Public Instruction, 188 A. 337, 324 Pa. 371—Appeal of Geary, 175 A. 544, 316 Pa. 342—Plains Tp. Appeal, 56 A. 60, 206 Pa. 556—In re Duff's Private Road, 66 Pa. 459.

Illegal action of court as ground for certiorari see supra §§ 9, 23.

21. Fla.—Brundage v. O'Berry, 134 So. 520, 101 Fla. 320—Brinson v. Tharin, 127 So. 313, 99 Fla. 696.

On certiorari to review resolutions of township committee, the court could consider only the regularity of

the proceedings, and not the motives which actuated the committee.—Weed v. Bergen County, N.J.Sup., 85 A. 329.

22. Fla.—Edwards v. Knight, 139 So. 532, 104 Fla. 16, adhered to 143 So. 441, 104 Fla. 16—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—Brinson v. Tharin, 127 So. 313, 99 Fla. 696—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

23. Ala.—Kugle v. Harpe, 176 So. 617, 234 Ala. 494, remanding cause 176 So. 616, 27 Ala.App. 566—Life & Casualty Ins. Co. of Tennessee v. Womack, 151 So. 880, 228 Ala. 70, denying certiorari 151 So. 881, 26 Ala.App. 6—Blackwood v. Maryland Casualty Co., 150 So. 180, 227 Ala. 343, denying certiorari 150 So. 179, 25 Ala.App. 308—Ex parte Hale, 142 So. 589, 225 Ala. 267, denying certiorari Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111.

11 C.J. p 196 notes 80–87, p 197 notes 90–94.

Conclusions of law of chancellor and court of appeals are not binding on supreme court.—Hutsell v. Citizens' Nat. Bank, 64 S.W.2d 188, 166 Tenn. 598.

In mandamus case

Where a mandamus case was submitted in the circuit court on the petition and the return to the rule nisi, the questions presented by an appeal to the court of appeals were questions of law reviewable by the supreme court on the record on certiorari to the court of appeals.—Lee v. Cunningham, 176 So. 477, 234 Ala. 639, reversing 176 So. 475, 27 Ala. App. 461.

Regularity of marks on ballot

Whether mark placed on ballots by a voter conformed to the statutory requirements for a legal ballot is a question of law, rather than of fact, and is one proper to be reviewed in a proceeding by certiorari.—Sylvestre v. Board of Aldermen of City of Woonsocket, 111 A. 881, 43 R.I. 492—Rice v. Westerly, 85 A. 553, 35 R.I. 117.

24. Ala.—Loveman, Joseph & Loeb v. Himrod, 147 So. 163, 226 Ala. 342, denying certiorari 147 So. 164, 25 Ala.App. 350.

Ark.—Hall v. Bledsoe, 189 S.W. 1041, 126 Ark. 125.

Me.—Jellerson v. Board of Police of

City of Biddeford, 187 A. 713, 134 Me. 443.

Mass.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477—Prusik v. Board of Appeal of Building Department of City of Boston, 160 N.E. 312, 262 Mass. 451—Blankenburg v. Commonwealth, 157 N.E. 693, 260 Mass. 369—Commissioner of Public Works of City of Quincy v. Judge of District Court of East Norfolk, 155 N.E. 431, 258 Mass. 444—Bradley v. Board of Zoning Adjustment of City of Boston, 150 N.E. 892, 255 Mass. 160—Filocon v. City Council of Brockton, 147 N.E. 670, 252 Mass. 218—Coolidge v. Bruce, 144 N.E. 397, 249 Mass. 465—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.

Mich.—In re Brewer, 231 N.W. 89, 250 Mich. 450, affirming 228 N.W. 762, 250 Mich. 450.

Or.—Stowe v. Ryan, 296 P. 857, 135 Or. 371—Cooper v. Bogue, 180 P. 103, 92 Or. 122, denying rehearing 179 P. 658, 92 Or. 122—Roethler v. Cummings, 165 P. 355, 84 Or. 442.

R.I.—Diamond v. Marwell, 190 A. 683.

W.Va.—Copley v. Trent, 188 S.E. 138, 117 W.Va. 768.

11 C.J. p 196 notes 80–87, p 197 notes 90–94.

Authority of commissioner

The question of law whether the state insurance commissioner may contract for audit of county books without assurance that county will pay therefor, so as to render the county liable for the expense, in view of L.1913 p 545, as to audits, may properly be raised by writ of review directed to the order of the county court disallowing the claim.—Berridge v. Marion County, 159 P. 628, 81 Or. 391.

In personal injury action, under Illinois Pract.Act §§ 121, 122, making judgments of the appellate court final as to the facts in a law action, the supreme court, on certiorari to the appellate court, is limited to a review of questions of law.

Ill.—Liska v. Chicago Rys. Co., 149 N.E. 469, 318 Ill. 570—Mattice v. Klawans, 143 N.E. 866, 312 Ill. 299, reversing 228 Ill.App. 126, and certiorari denied 46 S.Ct. 637, 271 U. S. 685, 70 L.Ed. 1151.

Where inferior tribunal has exceeded its jurisdiction, a question of law only is presented for review on certiorari.—Dickey v. Civil Service Commission, 205 N.W. 961, 201 Iowa 1135.

the facts are undisputed.²⁵ Error of law, within the meaning of this rule, may include a misapplication of the law, by the inferior court, to the facts as found by it;²⁶ and it has been held that, on certiorari to an appellate court, the supreme court, ordinarily, will not review the ruling of the appellate court in its application of the law to the facts, since it involves a finding of fact,²⁷ and on this theory will not review the court of appeals on the question of the application of the doctrine of error without injury, where the record does not state the facts, as announced *infra* § 157, but where the facts are determined by the appellate court and set out in its opinion, and affirmatively show a misapplication of the law to the facts, it presents a misconception of the law of the case, an error of law, and it is the duty of the supreme court in its supervisory capacity to review and correct it.²⁸

In New York a statutory order of certiorari, which supersedes the writ of certiorari, brings up for review the jurisdiction and method of procedure and determination of the inferior body on proceedings completed and terminated.²⁹

In South Carolina it has been held that only ju-

risdictional questions can be reviewed where the writ is issued from the supreme court, but that other than jurisdictional errors may be reviewed where the writ is issued by the court of common pleas.³⁰

In Texas, under Revised Statutes 1925, art 939, on certiorari to the county court, in probate matters, the district court is limited to determining whether the county court committed error,³¹ and relief is granted only when it is made to appear that the proceeding is void, or that some substantial wrong and injustice to the estate has been done.³²

In Wisconsin, where the writ is to review the determination of an inferior court or tribunals, the record can be inspected only to ascertain whether such court acted within its jurisdiction for the reason that other errors may be corrected by writ of error or appeal;³³ but where the writ is issued to a subordinate tribunal exercising quasi-judicial powers in a proceeding of a summary character and from whose determination there is no appeal, the review will extend, not only to whether the subordinate officer or board acted within its jurisdiction, but also to whether or not it acted according to law.³⁴

Where statute merely silent as to appeal

Under a Nonprofit Corporation Law of 1933, vesting exclusive jurisdiction in granting charters in court of common pleas of county where registered office of corporation was to be located, without a provision for appeal, omission of provision for right of appeal could not be ignored and review was limited to review on certiorari to determine whether error at law had been committed.—*In re Incorporation of Elkland Leather Workers' Ass'n*, 198 A. 13, 330 Pa. 78.

25. Ga.—*Lewis v. Clayton Bicycle Co.*, 132 S.E. 925, 35 Ga.App. 339. Pa.—*In re Dorrance's Estate*, 163 A. 303, 309 Pa. 151, certiorari denied *Dorrance v. Commonwealth of Pennsylvania*, 53 S.Ct. 222, 287 U. S. 660, 77 L.Ed. 570, and affirmed *In re Dorrance's Estate*, 172 A. 900.

Evidence not set forth in petition

Where defendant's only evidence was in support of a special plea in bar, setting up a discharge in bankruptcy, and where the petition for certiorari did not set forth the evidence, except with reference to the special plea, the question of law involved by the undisputed facts relative thereto as certified by the trial court is the only question which the reviewing court is authorized to pass on.—*Lewis v. Clayton Bicycle Co.*, 132 S.E. 925, 35 Ga.App. 339.

26. Ala.—*Life & Casualty Ins. Co.*

of Tennessee *v. Womack*, 151 So. 880, 228 Ala. 70, denying certiorari 151 So. 881, 26 Ala.App. 6.

27. Ala.—*Mobile Pure Milk Co. v. Coleman*, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402.—*Vest v. Night Commander Lighting Co.*, 139 So. 297, 224 Ala. 213, denying certiorari 139 So. 295, 24 Ala.App. 549.

Review of questions of fact generally see *infra* § 172.

28. Ala.—*Hill Grocery Co. v. Ligon*, 164 So. 219, 231 Ala. 141, reversing 164 So. 216, 26 Ala.App. 584.—*Mobile Pure Milk Co. v. Coleman*, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402.—*Armstrong v. Blackwood*, 151 So. 602, 227 Ala. 545, reversing 151 So. 601, 25 Ala.App. 585.—*Campbell v. State*, 112 So. 902, 216 Ala. 295, denying certiorari 112 So. 901, 22 Ala.App. 22.—*Postal Telegraph-Cable Co. v. Minderhout*, 71 So. 91, 195 Ala. 420.

Supreme court must determine whether the court of appeals has misapplied the law to the facts stated in its opinion.—*Home Ins. Co. v. Pettit*, 143 So. 839, 225 Ala. 487, reversing 143 So. 837, 25 Ala.App. 234.—*Fairbanks, Morse & Co. v. Dees*, 126 So. 624, 220 Ala. 41, granting certiorari 126 So. 622, 23 Ala.App. 326, second certiorari denied 126 So. 621, 220 Ala. 604.

29. N.Y.—*People ex rel. Three Four Three Realty Corporation v. Byrne*, 268 N.Y.S. 778, 149 Misc. 669.

Discharge from public service

Under Civil Service Law § 22, as amended by L.1920 c 833, giving the remedy of certiorari to review the removal of an honorably discharged war veteran from public service, the sufficiency of the charges to justify his removal may be reviewed.—*People ex rel. Davis v. Sayer*, 200 N.Y. S. 134, 205 App.Div. 562.

Prior conflicting decisions see 11 C.J. p 197 note 95.

30. S.C.—*State v. Fort*, 24 S.C. 510.—*Ex p. Childs*, 12 S.C. 111.—*State v. Steuart*, 5 Strobb. 29.—*Beckner v. Graham*, 1 Rice 44.

31. Tex.—*Johnson v. Coit*, Civ.App., 48 S.W.2d 397.

Order reviewable

Where an order of the county judge vesting the entire control of community property and the right of sale in the surviving husband is invalid, such order constitutes "proceedings of the county court," which the district court is authorized by statute to review by certiorari.—*Williams v. Steele*, 108 S.W. 155, 101 Tex. 382.

32. Tex.—*Comstock v. Lomax*, Civ. App., 135 S.W. 135.

33. Wis.—*State v. Grootemaat*, 231 N.W. 623, 202 Wis. 155.—*State v. Whitman*, 220 N.W. 929, 196 Wis. 472.—*State v. Wisconsin Highway Commission*, 198 N.W. 753, 183 Wis. 614.

11 C.J. p 195 note 70, p 197 note 98.

34. Wis.—*State v. Grootemaat*, 231 N.W. 623, 202 Wis. 155.

c. Rulings on Evidence

Rulings on the admissibility or rejection of evidence are, in most states, not reviewable.

In accordance with the rules stated above, § 151 a, b, in most states the review of rulings on the admission or rejection of testimony is not permissible,³⁵ unless such ruling amounts to a patent abuse of discretion.³⁶ In other states, however, such rulings may be reviewed.³⁷

In New York, rulings on the admissibility of evidence have been held not reviewable,³⁸ and it would seem that this is the proper rule, notwithstanding a statutory provision authorizing the court to determine whether "any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator."³⁹ Where, however, a review is sought of the rulings of the lower court in admitting or rejecting evidence as to facts which are jurisdictional, it has been held that the court will inquire into the correctness of such rulings.⁴⁰

Burden of proof. The reviewing court will refuse to review rulings made by the inferior tribunal on the burden of proof.⁴¹

d. Rulings on Pleadings

Rulings on pleadings are, generally, not subject to review on certiorari.

The general rule is that the court will not inquire into the correctness of the inferior court's rulings on the pleadings.⁴² However, it has been held that a pleading made the basis of a ruling in an opinion of an appellate court may be considered, by the supreme court, on certiorari to quash the opinion.⁴³

§ 152. Merits of Cause

Unless authorized by constitutional or statutory provision, the court, on certiorari, cannot review the cause on its merits.

Except where the scope of the review under the common-law writ has been enlarged by constitutional or statutory provision,⁴⁴ the court cannot, on re-

Contra *State v. Wisconsin Real Estate Brokers' Board*, 211 N.W. 292, 192 Wis. 396.

11 C.J. p 197 note 98.

Statute not enlarging functions of writ

A statutory provision that "the action of the board shall stand until otherwise directed" by court does not enlarge the functions of certiorari so far as the review is concerned, but provides that the determination of the board shall not be stayed by the writ.—*State v. Groote-maat*, 231 N.W. 628, 202 Wis. 155.

35. Cal.—*Horstmyer v. Trial Board of City of Sacramento*, 69 P.2d 1021, 21 Cal.App.2d 533.

Iowa.—*Winneshiek County State Bank v. District Court of Allamakee County*, 212 N.W. 391, 203 Iowa 1277—*Finn v. Winneshiek Dist. Ct.*, 123 N.W. 1066, 145 Iowa 157.

Mo.—*State ex rel Silverforb v. Smith*, Sup., 43 S.W.2d 1054, quashing certiorari *Durst v. Townes*, 31 S.W.2d 583, 224 Mo.App. 675—*State ex rel Olsen v. Allen*, Sup., 253 S.W. 1012, quashing certiorari *Olsen v. Supreme Council of Royal Arcanum*, App., 237 S.W. 889.

Mont.—*State v. Second Judicial Dist. Ct.*, 70 P. 981, 27 Mont. 280.

Nev.—*Cornbleet v. Second Judicial Dist. Ct.*, 73 P.2d 828.

Pa.—*In re Twenty-First Senatorial District Nomination*, 126 A. 566, 281 Pa. 273.

11 C.J. p 197 note 1.

Not jurisdictional requisite

In certiorari proceeding to review an order appointing a guardian ad litem of an insane person, the receiving of evidence as to the fitness of

the guardian is not a jurisdictional requisite and therefore is not reviewable.—*Cornbleet v. Second Judicial Dist. Ct.*, Nev., 73 P.2d 828.

Overruling of exceptions or objections to interrogatories filed with the pleading, on the ground that they are incompetent, immaterial, and irrelevant, cannot be reviewed in an original certiorari proceeding, where the court has jurisdiction and its ruling, even if erroneous, is not illegal.—*Winneshiek County Bank v. District Court of Allamakee County*, 212 N.W. 391, 203 Iowa 1277.

Examination of evidence to determine jurisdiction see *infra* § 172.

36. Pa.—*In re Incorporation of Elkland Leather Workers' Ass'n*, 198 A. 13, 330 Pa. 78.

Order refusing to admit evidence in proceeding for incorporation of nonprofit corporation could not be disturbed by reviewing court, unless refusal to admit evidence amounted to patent abuse of discretion, equivalent to violation of deep-seated public policy or law, where trial court substantially stated that it would grant charter with all offered evidence of record.—*In re Incorporation of Elkland Leather Workers' Ass'n*, *supra*.

Review of discretionary acts in general see *infra* § 153.

37. Mass.—*Haven v. Essex County*, 29 N.E. 1083, 155 Mass. 467.

11 C.J. p 197 notes 2-6.

38. N.Y.—*People v. Hair*, 29 Hun 125.

11 C.J. p 197 note 7.

39. N.Y.—*People v. Ontario County Ct. of Sess.*, 45 Hun 54, 57.

40. N.Y.—*People v. Van Alstyne*, 32

Barb. 131, affirmed 3 Keyes 395.

11 C.J. p 197 note 10.

41. N.Y.—*People v. First Judge of Columbia*, 2 Hill 398.

11 C.J. p 197 note 9.

42. Iowa.—*Holcomb v. Franklin*, 235 N.W. 474, 212 Iowa 1159.

S.D.—*Davison v. Circuit Court of Kingsbury County*, in Ninth Judicial Circuit, 173 N.W. 737, 42 S.D. 254.

11 C.J. p 198 note 11.

Demurrer to affidavit in contempt proceedings not going to jurisdiction will not be considered.—*Ex parte Pope*, 158 So. 767, 26 Ala.App. 246, citing *Corpus Juris*.

Motion to set aside order

Original certiorari is not available to review rulings on motion to vacate and set aside previous order as entered without authority of law.—*Holcomb v. Franklin*, 235 N.W. 474, 212 Iowa 1159.

Refusal to dismiss

The point urged that no reason appeared in the complaint in the circuit court why the receiver of a corporation, made defendant, would or should not bring the action, does not go to the question of jurisdiction of that court, and therefore may not be considered on certiorari complaining of such court's refusal to dismiss the action.—*Davison v. Circuit Court of Kingsbury County*, in Ninth Judicial Circuit, 173 N.W. 737, 42 S.D. 254.

43. Mo.—*State ex rel. Silverforb v. Smith*, Sup., 43 S.W.2d 1054, quashing certiorari *Durst v. Townes*, 31 S.W.2d 583, 234 Mo.App. 675.

44. La.—*State ex rel. Williams v. City of New Orleans*, 141 So. 460,

view of a final determination, consider the merits of the controversy,⁴⁵ questions on the merits which are dependent on facts not in the record,⁴⁶ or the merits of the primary proceedings out of which the particular determination sought to be reviewed arose,⁴⁷ as on review of the decision of an appellate court.⁴⁸

In reviewing proceedings had on appeal the regularity of the acts of the tribunal before which the

cause was instituted ordinarily should not be considered,⁴⁹ irrespective of whether defendant's appearance in the lower court was general or special.⁵⁰ Thus, where a trial on appeal is de novo, the writ brings up for review merely the judgment on the appeal, and not the proceedings of the court from which the appeal was taken.⁵¹ On certiorari to quash the opinion of an appellate court, because of conflict with decisions of the supreme court, the record cannot be reviewed on the merits.⁵²

174 La. 785, reversing 137 So. 643, 19 La.App. 466.

Same power as on appeal

Under a constitutional provision giving the supreme court the same power to review on certiorari as on appeal, it may, in a mandamus case, take the whole case and render judgment on the merits, even though it decides that mandamus was not plaintiff's proper remedy.—*State ex rel Williams v. City of New Orleans*, supra.

Whether suspensive appeal should be granted from order granting preliminary injunction is only question that can be decided on certiorari and mandamus to compel granting of such appeal.—*Blanchard v. Haber*, 112 So. 509, 163 La. 627.

Prejudice to parties' rights

The right, under Remington Code 1915 § 1110, to transfer foreclosure proceedings from the sheriff to the superior court, is unqualified, and a refusal to enjoin the sheriff, where necessary, amounts to a denial of a rule of law, prejudicially affecting relator's rights, within § 1010 subd. 3, providing that one of the questions involving the merits to be determined on a certiorari hearing is "whether in making the determination any rule of law affecting the rights of the parties thereto has been violated."—*State v. Superior Court of Washington for King County*, 199 P. 977, 118 Wash. 535.

45. Ala.—*Byars v. Town of Boaz*, 155 So. 383, 229 Ala. 22.

Colo.—*State Board of Medical Examiners v. Spears*, 247 P. 563, 79 Colo. 538, 54 A.L.R. 1498, error dismissed *Spears v. State Board of Medical Examiners of State of Colorado*, 48 S.Ct. 158, 275 U.S. 503, 276 U.S. 588, 72 L.Ed. 398, 719.

Fla.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380—*Ulsch v. Mountain City Mill Co.*, 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932—*Hamway v. Seaboard Air Line Ry. Co.*, 136 So. 628, 101 Fla. 1483—*Florida East Coast Ry. Co. v. George*, 107 So. 266, 91 Fla. 72.

Mo.—*State ex rel. Kennedy v. Remmers*, 101 S.W.2d 70, 340 Mo. 126—

State ex rel. Hoyt v. Shain, 93 S.W.2d 992, 338 Mo. 1208, quashing opinion in part *Lampton Realty Co. v. Hoyt*, App., 80 S.W.2d 249, conformed to 99 S.W.2d 145, 231 Mo.App. 143.

11 C.J. p 198 note 12.

Merits of reconventional demand

The question whether there is any merit in reconventional demand pleaded in supplemental answer and whether it was abandoned by filing of original answer without pleading it, are matters to be disposed of by district judge in his final judgment, and not by supreme court on application for writs of certiorari and prohibition to prevent rejection of the amended or supplemental answer.—*Southern Iron & Equipment Co. v. Cardwell Stave Co.*, 97 So. 332, 154 La. 109.

On certiorari for lack of jurisdiction, review cannot be had on the merits.—*State ex rel Brenner v. Trimble*, 32 S.W.2d 760, 326 Mo. 702—11 C.J. p 198 note 12 [a].

"Supervisory jurisdiction of the court on certiorari is restricted to an examination into the external validity of the proceedings had in the lower tribunal. It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case."—*Byars v. Town of Boaz*, 155 So. 383, 229 Ala. 22.

46. Ill.—*Doolittle v. Galena, etc., R. Co.*, 14 Ill. 381.

11 C.J. p 198 note 13.

47. Hawaii.—*Aldrich v. Judge First Cir. Ct.*, 9 Hawaii 470.

11 C.J. p 198 note 14.

48. Mo.—*State v. Smith*, 73 S.W. 211, 173 Mo. 398—*State ex rel. Lindsay v. Kansas City*, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed *State ex rel. Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20, 322 Mo. 368.

N.J.—*Obert v. Whitehead*, 9 N.J.Law 244.

External validity of proceedings

On certiorari to an appellate court, the supreme court is limited to an examination into the external validity of the appellate court's proceed-

ings, and does not extend to the intrinsic correctness of the judgments, where the record presented shows that a cause of action existed, and also shows that the court of original jurisdiction had jurisdiction of the parties and of the subject matter, and that jurisdiction was acquired by the appellate court in accordance with the law.—*Florida East Coast Ry. Co. v. George*, 107 So. 266, 91 Fla. 72.

49. Cal.—*De Matei v. Superior Court in and for Lake County*, 239 P. 853, 74 Cal.App. 147.

11 C.J. p 198 note 16.

On certiorari to annul judgment of superior court affirming on appeal justice's default judgment, attack on jurisdiction over defendants cannot extend to the justice court.—*De Matei v. Superior Court in and for Lake County*, supra.

Irregularities or errors of small claims court cannot be examined in reviewing proceedings in superior court on appeal from small claims court, since writ of certiorari, being directed to review of superior court proceedings, is limited to acts of that court.—*Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County*, 37 P.2d 159, 1 Cal.App.2d 634.

50. Cal.—*De Matei v. Superior Court in and for Lake County*, 239 P. 853, 74 Cal.App. 147.

51. N.J.—*Moore v. Johnson*, 34 A. 396, 58 N.J.Law 586—*Vannoy v. Givens*, 23 N.J.Law 201.

52. Mo.—*State ex rel. Schrowang v. Hostetter*, 85 S.W.2d 417, 337 Mo. 522, denying quashal of opinion *Schrowang v. Von Hoffmann Press, App.*, 75 S.W.2d 649.

Construction of lease

In certiorari to review record of court of appeals for conflict with supreme court decision, supreme court cannot consider question of correct construction of written release by court of appeals, which promulgated rule not in conflict with prior supreme court decision.—*State ex rel. Caraker v. Becker*, 62 S.W. 2d 899, 333 Mo. 400.

However, on certiorari to an appellate court to review the record presented by writ of error to review a judgment of a lower court, the action of the court of original jurisdiction may be reviewed.⁵³

§ 153. Discretionary Acts

The inferior court's exercise of discretion will not be reviewed, unless the discretion has been abused.

If the inferior court or tribunal did not transcend its authority, acts done by it in the exercise of its discretion are not the subject of review, unless that discretion has been abused,⁵⁴ as where there has been an abuse of discretion which is likely to result in a miscarriage of justice.⁵⁵

§ 154. Validity of Existence of Municipal Boards or Officers

Unless authorized by statute, the validity of the existence of a municipal board or officer will not be reviewed, on a review of the action of such board or officer.

On proceedings to review the action of a municipality or of a public board, unless authorized by statute, the court has no power to inquire into or determine its legal existence.⁵⁶ If, however, it

is so empowered, the authority to appoint the board, its own judicial qualification to act as it did, and the manner in which it exercised its functions are open to inquiry.⁵⁷

§ 155. Title to Land

Questions of title to land, arising in the proceeding, ordinarily, cannot be reviewed.

Questions of title to land which may have arisen in the proceeding cannot ordinarily be tried.⁵⁸

§ 156. Constitutionality of Statute

The constitutionality of a statute may be reviewed where it is properly in issue; but, ordinarily, will not be reviewed if the question is not jurisdictional.

The constitutionality of a statute, affecting the rights of a party, and properly raised as an issue in the case may be reviewed on certiorari.⁵⁹ However, it is generally otherwise where the question is not jurisdictional,⁶⁰ especially where the facts do not bring the case within the statute,⁶¹ or where the ground of attack on the constitutionality of the statute is not argued in the prosecutor's brief.⁶² Where the review is limited by statute to the reg-

53. Fla.—Florida East Coast Ry. Co. v. George, 107 So. 266, 91 Fla. 42.

54. Colo.—Lindsley v. City and County of Denver, 196 P. 859, 69 Colo. 562—State Board of Medical Examiners v. Boulls, 195 P. 325, 69 Colo. 361.

Fla.—Brinson v. Tharin, 127 So. 313, 99 Fla. 696.

Ga.—Thompson v. Lawrence, 121 S.E. 255, 31 Ga.App. 552.

Pa.—In re Incorporation of Elkland Leather Workers' Ass'n, 198 A. 13, 330 Pa. 78.

Utah.—Lund v. Third Judicial Dist. Court in and for Salt Lake County, 62 P.2d 278, 90 Utah 433.

11 C.J. p 198 note 18.

Discretion as to granting interlocutory decree

Where interlocutory decree is granted on bill and affidavits, without answer, reviewing court will consider only whether discretion was properly exercised.—Farrington v. T. Tokushige, Hawaii, 47 S.Ct. 406, 273 U.S. 284, 71 L.Ed. 646, affirming, C. C.A., 11 F.2d 710, certiorari granted 47 S.Ct. 99, 273 U.S. 677, 71 L.Ed. 835.

Refusal to set aside verdict on ground that preponderance of evidence shows defendant to be free from negligence and plaintiff to be guilty of contributory negligence, and that plaintiff failed to sustain burden of proof, is an exercise of court's discretion, and cannot be reviewed on certiorari.—Hudson Taxi

Co. v. Niedzwcki, 130 A. 647, 3 N.J. Misc. 1111.

Right to punish for contempt

Contention that right to forfeit appearance bond excluded right of the judge to punish accused for contempt for not appearing for trial on day set, based on facts appearing on face of record, may be considered by supreme court on certiorari to review judgment.—State v. Jordy, 108 So. 229, 161 La. 104.

Question on appeal in nature of certiorari from order dismissing application for incorporation of labor club is whether trial court abused its discretion.—In re Incorporation of Philadelphia Labor's Non-Partisan League Club, 196 A. 22, 328 Pa. 465.

Matters of discretion as ground for writ see supra § 30.

55. Fla.—Edwards v. Knight, 139 So. 582, 104 Fla. 16, adhered to 143 So. 441, 104 Fla. 16.

56. N.Y.—People v. Yonkers Board of Health, 24 N.Y.S. 629, 71 Hun 84, affirmed 35 N.E. 320, 140 N.Y. 1, 37 Am.S.R. 522, 23 L.R.A. 481. 11 C.J. p 193 note 19.

57. N.J.—State v. Clinton Tp., 39 N.J.Law 656. 11 C.J. p 198 note 20.

58. N.J.—Cadmus v. Bayonne, 39 A. 678, 61 N.J.Law 494—Jersey City v. State, 30 N.J.Law 521.

Tex.—Schwind v. Goodman, Com. App., 221 S.W. 579, reversing Good-

man v. Schwind, Civ.App., 186 S.W. 282.

Order recited in deed

On certiorari by wards to review sale of ward's land on application of guardian, it cannot be determined whether or not an order of a certain date recited in deed to purchaser was in fact never made.—Schwind v. Goodman, supra.

59. Utah.—Mill v. Brown, 88 P. 609, 31 Utah 473, 120 Am.S.R. 935. 11 C.J. p 198 note 22.

Validity of ordinance

Court, on certiorari to review action of township authorities refusing to grant building permit, reviewed question whether zoning ordinance was reasonable exercise of municipal legislative power although writs did not in terms bring up the zoning ordinance where facts and proof offered principally concerned validity of ordinance.—Dorsey Motors v. Davis, 180 A. 396, 13 N.J.Misc. 620. Necessity of objection as to constitutionality being raised in lower court see supra § 149.

60. Nev.—Mack v. District Court of Second Judicial Dist. in and for Washoe County, Department No. 2, 258 P. 289, 290, 50 Nev. 318, citing *Corpus Juris*. 11 C.J. p 199 note 23.

61. N.J.—Forgerson v. Newark Bd. of Health, 45 A. 783, 64 N.J.Law 484.

62. N.J.—Turner v. Passaic Pension Commission, 163 A. 282, 10 N.J. Misc. 1270, 112 N.J.Law 476.

ularity of the inferior tribunal's acts, the constitutionality of the statute on which it bases its authority cannot be reviewed;⁶³ nor can the question of the constitutionality of a statute be reviewed at the instance of a party who did not apply for a writ of review.⁶⁴

§ 157. Review Confined to Record

As a general rule, the reviewing court may review only matters appearing in the record returned in obedience to the writ, and cannot consider matters dehors the record, unless so authorized by statute or local practice.

Except where otherwise prescribed by statute or authorized by the local practice,⁶⁵ it is the general rule that, in ascertaining whether or not the inferior court or tribunal had jurisdiction and proceeded regularly in making the determination complained of, the reviewing court will not consider matters dehors the record, but is confined to the consideration of the record returned by the inferior tribunal, in obedience to the writ, by which the error, if any, must appear,⁶⁶ that is, the answer, return, or record made and certified by the tribunal

63. Idaho.—Weiser Nat. Bank v. Washington County, 164 P. 1014, 30 Idaho 332.

64. La.—Foley v. National Life & Accident Ins. Co., 162 So. 798, 183 La. 49, annulling, App., 156 So. 35.

Constitutionality of statute making life policy nonforfeitable, which statute is attacked by insurer, is not reviewable in an action on the policy, where the writ of review is issued at the instance of plaintiff only.—Cryer v. National Life & Accident Ins. Co., 162 So. 804, 183 La. 67, annulling, App., 156 So. 34.—Williams v. National Life & Accident Ins. Co., 162 So. 803, 183 La. 64, annulling, App., 156 So. 34.—Foley v. National Life & Accident Ins. Co., 162 So. 798, 183 La. 49, annulling, App., 156 So. 35.—Succession of Watson v. Metropolitan Life Ins. Co., 156 So. 29, rehearing refused 156 So. 590, annulled 162 So. 790, 183 La. 25.

65. Wis.—State v. O'Brien, 230 N.W. 59, 201 Wis. 356.

In New Hampshire

(1) Under the practice in this state, the inquiry on certiorari is not confined to the record in the court below.—Broderick v. Hunt, 89 A. 302, 77 N.H. 139.

(2) Where errors of law are reviewable by certiorari, if the record is silent on the subject, the errors may be otherwise shown.—Dinsmore v. Manchester, 81 A. 533, 76 N.H. 187.

66. Ala.—Ex parte Woodward Iron Co., 99 So. 97, 211 Ala. 74.—Ex parte Pope, 158 So. 767, 26 Ala. App. 232.

Ariz.—Mercado v. Superior Court of Pima County, 77 P.2d 810, 811, citing *Corpus Juris*.

Ark.—Prager v. Wootton, 30 S.W.2d 845, 182 Ark. 37.—Cazort v. Road Improvement Dist. No. 3 of Johnson County, 299 S.W. 1014, 175 Ark. 570.—Hilger v. J. R. Watkins Medical Co., 214 S.W. 49, 139 Ark. 400.—Hall v. Bledsoe, 189 S.W. 1041, 126 Ark. 125.

Cal.—Rinaldo v. Superior Court in and for Los Angeles County, 59 P.2d 368, 15 Cal.App.2d 585.—Coffman v. California State Board of

Architectural Examiners, Northern California, 19 P.2d 1002, 130 Cal. App. 343.—Melick v. Superior Court of California in and for Los Angeles County, 269 P. 746, 93 Cal. App. 189.—Miller v. Superior Court in and for City and County of San Francisco, 258 P. 614, 84 Cal.App. 605.—Coombs v. Industrial Accident Commission of California, 245 P. 445, 76 Cal.App. 565.—Lanterman v. Anderson, 172 P. 625, 36 Cal.App. 472.

Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380.—Harrison v. Frink, 77 So. 663, 75 Fla. 22.

Ga.—Bolton v. City of Newman, 94 S.E. 236, 147 Ga. 400, transferred 95 S.E. 472, 22 Ga.App. 15.—Guaranty Life Ins. Co. of Savannah v. Bell, 156 S.E. 319, 42 Ga.App. 415.

Ill.—Heppe v. Mooberry, 183 N.E. 636, 350 Ill. 641.—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269.—Hahne-mann Hospital v. Industrial Board of Illinois, 118 N.E. 767, 282 Ill. 316.—Bachechi v. Inlander Paper Co., 252 Ill.App. 178.—People v. Finn, 247 Ill.App. 53.

Iowa.—Dickey v. Civil Service Commission, 205 N.W. 961, 201 Iowa 1135.

La.—Hanna v. Otis, 92 So. 360, 151 La. 851.

Me.—Chavarie v. Robie, 194 A. 404.

Mass.—Newcomb v. Aldermen of Holyoke, 171 N.E. 826, 271 Mass. 565.—Prusik v. Board of Appeal of Building Department of City of Boston, 160 N.E. 312, 262 Mass. 451.—Blankenburg v. Commonwealth, 157 N.E. 693, 260 Mass. 369.

Miss.—Federal Credit Co. v. Zepernick Grocery Co., 121 So. 114, 153 Miss. 494, opinion corrected on suggestion of error 121 So. 858, 153 Miss. 498.

Mo.—State ex rel. Kennedy v. Remmers, 101 S.W.2d 70, 340 Mo. 126.—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391, quashing First Nat. Bank v. Aquamsi Land Co., App., 70 S.W. 2d 90.—State ex rel. Adler v. Ossing, 79 S.W.2d 255, 336 Mo. 386.—State ex rel. Chase v. Calvird, 24 S.W.2d 111, 324 Mo. 439.—State ex rel. Horton v. Clark, 9 S.W.2d 635,

320 Mo. 1190.—State ex rel. McCune v. Carter, 214 S.W. 180, 279 Mo. 304.—State ex rel. Spencer v. Anderson, App., 101 S.W.2d 530.—State ex rel. Shaw State Bank v. Pfeifle, 293 S.W. 512, 220 Mo.App. 676.—State ex rel. Brince v. Franklin, 283 S.W. 712, 220 Mo.App. 232.—State ex rel. Pollard v. Brasher, 201 S.W. 1150, 200 Mo.App. 117.

Mont.—State v. Stewart, 297 P. 476, 89 Mont. 257.

N.J.—Lindabury v. Clinton Tp. in Hunterdon County, 106 A. 465, 93 N.J.Law 96, dismissing certiorari 106 A. 463, 93 N.J.Law 37.—Crane Co. v. Royer, 144 A. 115, 7 N.J. Misc. 49.—Long v. Daly, 141 A. 787, 6 N.J.Misc. 495, affirmed 144 A. 588, 105 N.J.Law 492.

N.Y.—Kiehm v. Board of Education of City of Utica, 196 N.Y.S. 789, 203 App.Div. 245.

Okl.—Board of Com'rs of Okfuskee County v. School Dist. No. 27 of Okfuskee County, 293 P. 1078, 146 Okl. 267.

Pa.—McCauley v. Imperial Woolen Co., 104 A. 617, 261 Pa. 312.—Ristau, for Use of Ristau, v. Crew Levick Co., 167 A. 800, 109 Pa. Super. 357.—Wood v. Industrial Health, Accident & Life Ins. Co., 163 A. 391, 107 Pa.Super. 338.—Lamparter v. Conestoga Transportation Company, 28 Pa.Dist. & Co. 635, 45 Lanc.Rev. 342.—Futer v. Futer, 12 Pa.Dist. & Co. 96.—City of Scranton v. Evans, 5 Pa.Dist. & Co. 219.—Borough of Tamaqua v. Morgans, 24 Pa.Co. 10.

R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.—New York, N. H. & H. R. Co. v. Superior Court for Kent County, 99 A. 582, 39 R.I. 560.

S.C.—Whisonant v. Belue, 121 S.E. 360, 127 S.C. 483.

S.D.—Southwest Branch of Rural Reciprocal Telephone Co. v. Dakota Central Telephone Co., 220 N. W. 475, 53 S.D. 121.

Utah.—Ogden City Corporation v. Industrial Commission, 69 P.2d 261, 92 Utah 423.

Wis.—State v. O'Brien, 230 N.W. 59, 201 Wis. 356.—State v. Whitman, 220 N.W. 928, 196 Wis. 472.—State v. Cary, 211 N.W. 284, 192 Wis.

whose proceedings are under review;⁶⁷ but the review may extend to the whole of the record.⁶⁸ A statement in the nature of a pleading in answer to averments in the affidavit for the writ, where not a return, cannot be considered.⁶⁹

It is not permissible, for the purpose either of

determining the merits of the controversy or proceeding, or of showing what transpired before the inferior tribunal, and either for impeaching or supporting the record, to hear extraneous evidence,⁷⁰ or to read affidavits,⁷¹ except to the extent that it is permitted by statute,⁷² and except that, under

433, error dismissed *State of Wisconsin ex rel. Berger v. Carey*, 49 S.Ct. 6, 278 U.S. 661, 73 L.Ed. 568—*State v. Byrne Bros. Co.*, 201 N.W. 372, 185 Wis. 237.

11 C.J. p 199 note 26.

Matters in pais are not within the purview of the writ.—*Harrison v. Frink*, 77 So. 663, 75 Fla. 22.

Statements in briefs

(1) Certiorari petitioner cannot ignore record, nor predicate error or illegality on mere assertions in brief.—*Hale v. Ring*, 245 N.W. 704, 215 Iowa 446.

(2) Statements contained in briefs, other than those shown by return, cannot be considered.—*Siebk v. Township Committee of Chester Tp. in Burlington County*, 132 A. 341, 4 N.J.Misc. 226.

Stipulations of counsel setting forth the proceedings at the trial, but which are not taken in response to a rule of court, will not be considered on the review on certiorari.—*Frascella v. New Jersey Bd. of Medical Examiners*, N.J.Sup., 79 A. 1063—*State v. Jordan*, 53 A. 207, 68 N.J.Law 605.

Situation presented to trial court

A verdict must be considered in view of situation presented to trial court, and, if erroneous on theory and proofs presented, it cannot be sustained.—*State Board of Medical Examiners v. Baker*, 160 A. 339, 10 N.J.Misc. 668.

67. Minn.—*State v. Duluth*, 147 N.W. 820, 125 Minn. 425.

Miss.—*Dickson v. Town of Centreville*, 128 So. 332, 157 Miss. 490.

Mont.—*Shaffroth v. Lamere*, 65 P. 2d 610, 104 Mont. 175.

Pa.—*City of Easton v. Cericola*, 18 Pa.Dist. 196.

Docket as record

Certiorari would not lie to have alleged alteration in judgment set aside, although return showed that "copy of Envelope" contained notation that judgment was for prosecutor, and post card from clerk of court stated that judgment would be entered for prosecutor, where docket showed no entry of judgment for prosecutor, where docket is, by statute, court's record.—*Continental Adjustment Corporation v. Melko*, 193 A. 711, 15 N.J.Misc. 590.

Facts set up in the official answers of the tribunal are the only facts outside of the original record on which petitioners in certiorari can

rely in support of their contention.—*Inhabitants of Weston v. Board of Railroad Commrs.*, 91 N.E. 303, 205 Mass. 94.

In Georgia the answer of the trial judge, in certiorari, determines what occurred at the trial, and, if not traversed or objected to, is the only source from which the facts and rulings can be ascertained by the reviewing court.—*Beavers v. Cassells*, 192 S.E. 249, 56 Ga.App. 146—*Adams v. Bishop*, 166 S.E. 460, 46 Ga.App. 32—*Smith v. M. & J. Rosenberg Corporation*, 162 S.E. 411, 44 Ga.App. 586—*Nixon v. Growers' Finance Corporation*, 157 S.E. 119, 42 Ga.App. 642—*Cunningham v. City of Atlanta*, 141 S.E. 214, 37 Ga.App. 634—*Etheridge v. Taylor*, 137 S.E. 641, 36 Ga.App. 609—*Kilpatrick v. Smith*, 123 S.E. 35, 32 Ga.App. 44.

68. Cal.—*Hotaling v. Superior Court, City and County of San Francisco*, 217 P. 73, 191 Cal. 501, 29 A.L.R. 127.

La.—*Stieffell v. Valentine Sugars*, 179 So. 6, 183 La. 1091, reversing, App., 175 So. 425.

Pa.—*Sterrett v. MacLean*, 143 A. 189, 293 Pa. 557—*In re Independence Party Nomination*, 57 A. 344, 208 Pa. 108.

69. Mont.—*State v. Yellowstone County Thirteenth Judicial Dist. Ct.*, 146 P. 539, 50 Mont. 259.

70. Ariz.—*Mercado v. Superior Court of Pima County*, 77 P.2d 810. Cal.—*Swanson v. City of Orange*, 275 P. 889, 97 Cal.App. 344.

Mass.—*Prusik v. Board of Appeal of Building Department of City of Boston*, 160 N.E. 312, 262 Mass. 451.

Mo.—*State ex rel. Rutledge v. Public Service Co.*, 289 S.W. 785.

N.J.—*Lindabury v. Clinton Tp. in Hunterdon County*, 106 A. 465, 93 N.J.Law 96, dismissing certiorari 106 A. 463, 93 N.J.Law 37—*State Board of Medical Examiners v. Morrison*, 159 A. 92, 10 N.J.Misc. 314.

Wis.—*State v. O'Brien*, 230 N.W. 59, 201 Wis. 356.

11 C.J. p 200 note 28.

Testimony taken by the attorney general without order is not usable over objection on return of certiorari.—*State Board of Medical Examiners v. Morrison*, 159 A. 92, 10 N.J.Misc. 314.

In New Hampshire, where the record, if defective, may be supplied by

other evidence, evidence is not admissible to supply a defective action of the lower tribunal.—*Broderick v. Hunt*, 89 A. 302, 77 N.H. 139.

Whether enactment is fairly referable to police power is to be determined on its face, or to be shown aliunde, except on certiorari where it cannot be shown aliunde.—*State ex rel. Kennedy v. Remmers*, 101 S.W. 2d 70, 340 Mo. 126.

On hearing on application for writ see supra § 88.

71. Ariz.—*Mercado v. Superior Court of Pima County*, 77 P.2d 810.

Cal.—*Dolan v. Superior Court of California in and for City and County of San Francisco*, 190 P. 469, 47 Cal.App. 235.

11 C.J. p 200 note 29.

Affidavits for and against the allowance of the writ have spent their force when the writ is allowed, and cannot be considered on the review.—*Remington v. Lauter Piano Co.*, 168 A. 447, 11 N.J.Misc. 827—*Linzmayr v. Baird*, 136 A. 510, 5 N.J. Misc. 362.

Affidavits in support of an application for order for support, pending hearing on petition to modify divorce decree, cannot be considered by reviewing court on certiorari, where they were not included in statement of facts or bill of exceptions and were not, by certificate of trial judge, made part of record.—*State ex rel. Lucas v. Superior Court for King County*, 74 P.2d 888, 193 Wash. 74.

On certiorari to review an order granting new trial, which showed it was made too late, an affidavit of counsel that the order was in fact made on an earlier date cannot be considered, where respondent court and judge stand on the order, especially where another order, made at the same time, shows that the new trial was granted on that date, and not on an earlier date.—*Dolan v. Superior Court of California in and for City and County of San Francisco*, 190 P. 469, 47 Cal.App. 235.

72. Ark.—*Hall v. Bledsoe*, 189 S.W. 1041, 126 Ark. 125.

Depositions

Statute authorizes order to take depositions on certiorari to review order of public utility commissioners.—*Eastern New Jersey Power Co. v. Board of Public Utility Com'rs*, 140 A. 253, 6 N.J.Misc. 118.

Statute permitting oral proof in

some local practice, where the inferior court fails or is unable to respond to a rule to certify the facts or proceedings, the testimony or affidavits of witnesses may be resorted to.⁷³ So, also, the reviewing court will not hear depositions, although they were taken to be used in the lower court, since they form no part of the record,⁷⁴ particularly where they were filed after the order or judgment complained of was entered.⁷⁵

Record or opinion in appellate court. A review on certiorari of the decision of an appellate court has been held to be, not of the record or judgment therein, but of the opinion of that court on questions which it shows, considers, and passes on;⁷⁶

and, where the appellate court has applied the doctrine of error without injury, its decision will be reviewed only where the opinion contains a full statement of the facts;⁷⁷ but, where the facts are undisputed, the reviewing court may examine the record for a more complete understanding of the features treated.⁷⁸

On certiorari to quash the opinion of an appellate court, as being in conflict with a previous decision of the supreme court, the latter court, in determining the conflict, is limited to a review of the facts and issues as they appear in the opinion of the appellate court,⁷⁹ or in any pleading, instruction, written instrument, or other part of the record re-

certiorari proceedings directed to board of appeals did not extend to writ directed to city manager.—*State v. O'Brien*, 230 N.W. 59, 201 Wis. 356.

On certiorari to review an order of the board of education changing school districts, the circuit court is not bound by the record made before the board, but other evidence is admissible to acquaint the court fully of all the matters presented to the inferior tribunal.—*Acree v. Patterson*, 240 S.W. 33, 153 Ark. 188.

73. N.J.—*Genuario v. DeGaudenzio*, 44 A. 950, 64 N.J.Law 157—*Conover v. Bird*, 28 A. 428, 56 N.J.Law 228. 11 C.J. p 200 note 29 [b].

74. Me.—*Pike v. Herriman*, 39 Me. 52. 11 C.J. p 200 note 30.

75. Iowa.—*Independent Order of Foresters v. Scott*, 272 N.W. 68.

76. Ala.—*Great Atlantic & Pacific Tea Co. v. Donaldson*, 156 So. 865, 229 Ala. 276, denying certiorari 156 So. 859, 26 Ala.App. 179—*Cable-Burton Piano Co. v. Thomas*, 152 So. 468, 228 Ala. 112, denying certiorari, 152 So. 466, 26 Ala.App. 26—*Life & Casualty Ins. Co. of Tennessee v. Wornack*, 151 So. 880, 228 Ala. 70, denying certiorari 151 So. 881, 26 Ala.App. 6—*Waldrop v. State*, 136 So. 736, 223 Ala. 413 (second case) denying certiorari 136 So. 736, 24 Ala.App. 338 (first case)—*La Rue v. Loveman, Joseph & Loeb*, 127 So. 243, 220 Ala. 677, denying certiorari 127 So. 240, 23 Ala.App. 317, which conformed to mandate 127 So. 241, 220 Ala. 2.

Where no opinion is filed by the court of appeals, in disposing of the case, nothing is presented for review.—*Jones v. State*, 143 So. 837, 225 Ala. 398, denying certiorari 143 So. 836, 25 Ala.App. 221—*Rogers v. State*, 134 So. 813, 223 Ala. 53, denying certiorari 134 So. 813, 24 Ala.App. 227—*Cofield v. City of Anniston*, 124 So. 916, 226 Ala. 697, denying certiorari 124 So. 920, 23 Ala.App. 616—

Lawson v. State, 122 So. 467, 219 Ala. 461, denying certiorari 122 So. 466, 23 Ala.App. 96.

77. Ala.—*Liberty Nat. Life Ins. Co. v. Collier*, 154 So. 118, 228 Ala. 3, reversing 154 So. 116, 26 Ala. App. 75, and certiorari denied 154 So. 119, 228 Ala. 4—*Armstrong v. Blackwood*, 151 So. 602, 227 Ala. 545, reversing 151 So. 601, 25 Ala. App. 585—*Baumhauer v. Liquid Carbonic Corporation*, 135 So. 427, 223 Ala. 244—*Campbell v. State*, 112 So. 902, 216 Ala. 295, denying certiorari 112 So. 901, 22 Ala.App. 22—*Postal Telegraph-Cable Co. v. Minderhout*, 71 So. 91, 195 Ala. 420.

Affidavit set out in opinion

On certiorari to review opinion of court of appeals in case of interpleader, supreme court will not look beyond facts stated in affidavit of original defendant supporting its right to interplead, set out in opinion.—*Ex parte A. Z. Bailey Grocery Co.*, 77 So. 373, 201 Ala. 79, denying certiorari *H. C. Schrader Co. v. A. Z. Bailey Grocery Co.*, 74 So. 749, 15 Ala.App. 647.

Where there is no review of facts, in the opinion of the appellate court, nor separate treatment of any questions argued relating to the proof, and the opinion is interpreted as holding that, if any error intervened in relation to any such question, it was without injury, the supreme court will not review the decision.—*Tennessee, A. & G. Ry. v. Cardon*, 177 So. 173, 235 Ala. 53, denying certiorari 177 So. 171, 27 Ala.App. 585—*Cable-Burton Piano Co. v. Thomas*, 152 So. 468, 228 Ala. 112, denying certiorari 152 So. 466, 26 Ala.App. 26. Review of harmless error in general see *infra* § 173.

78. Ala.—*Cranford v. National Surety Corporation*, 166 So. 721, 231 Ala. 636, reversing 166 So. 719, 27 Ala. App. 126—*Fairbanks Morse & Co. v. Dees*, 126 So. 621, 220 Ala. 604.

Where agreed case was made and

filed in trial court, and thereafter certified to court of appeals, question presented was one of law arising on record, and supreme court, in reviewing decision of court of appeals, could look to record in connection with opinion of court of appeals.—*Hood v. State*, 162 So. 543, 230 Ala. 343, reversing 162 So. 541, 26 Ala. App. 507.

79. Mo.—*State ex rel. Kansas City Southern Ry. Co. v. Shain*, 105 S.W.2d 915, 340 Mo. 1195, quashing *Adams v. Kansas City Southern Ry. Co.*, App., 83 S.W.2d 913—*State ex rel. Tunget v. Shain*, 101 S.W.2d 1, 340 Mo. 434—*State ex rel. Superior Mineral Co. v. Hostetter*, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion *Woodruff v. Superior Mineral Co.*, 70 S.W.2d 1104, 230 Mo.App. 616—*State ex rel. Fidelity & Deposit Co. of Maryland v. Allen*, Sup., 85 S.W.2d 455, quashing *Naylor Special Road Dist. of Ripley County v. Fidelity & Deposit Co.*, App., 75 S.W.2d 436—*State ex rel. Himmelsbach v. Becker*, 85 S.W.2d 420, 337 Mo. 341, quashing certiorari *Parsons v. Himmelsbach*, App., 68 S.W.2d 841—*State ex rel. Bowdon v. Allen*, 85 S.W.2d 63, 337 Mo. 260, quashing certiorari *Bowdon v. Metropolitan Life Ins. Co.*, App., 78 S.W.2d 474—*State ex rel. Missouri Mut. Ass'n v. Allen*, 78 S.W.2d 862, 336 Mo. 352, quashing, App., 60 S.W.2d 402—*State ex rel. Bennett v. Becker*, 76 S.W.2d 363, 335 Mo. 1177, quashing *Bennett v. Gerk*, 61 S.W.2d 241, 230 Mo.App. 601—*State ex rel. Kurz v. Bland*, 64 S.W.2d 638, 333 Mo. 941, quashing certiorari *Kurz v. Greenlease Motor Car Co.*, App., 52 S.W.2d 498—*State ex rel. Silverforb v. Smith*, Sup., 43 S.W.2d 1054, quashing certiorari *Durst v. Townes*, 31 S.W.2d 583, 224 Mo.App. 675—*State ex rel. Horspool v. Haid*, 40 S.W.2d 611, 328 Mo. 327, conformed to *Forsythe v. Horspool*, App., 49 S.W.2d 687, and quashed *State ex rel. Horspool v. Haid*, 65 S.W.2d

ferred to in such opinion;⁸⁰ and can consider only | that part of the record that pertains to the ques-

923, 334 Mo. 196—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, affirmed 46 S.W.2d 268, 226 Mo. App. 752—State ex rel. St. Louis-San Francisco Ry. Co. v. Haid, 37 S.W.2d 437, 327 Mo. 217, quashing error Seidel v. St. Louis-San Francisco Ry. Co., App., 18 S.W. 2d 126—State ex rel. Valentine Coal Co. v. Trimble, 23 S.W.2d 1028, 325 Mo. 277, quashing certiorari Cotter v. Valentine Coal Co., 14 S.W.2d 660, 222 Mo.App. 1138—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 20 S.W. 2d 46, 323 Mo. 458, denying quashal of opinion and judgment Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 20 S.W.2d 299, 224 Mo.App. 371—State ex rel. Vesper-Buick Automobile Co. v. Daus, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157, quashing part of opinion Lanham v. Vesper-Buick Automobile Co., App., 6 S.W.2d 995—State ex rel. National Ammonia Co. v. Daus, 10 S.W.2d 931, 320 Mo. 1234, quashing certiorari Turley v. National Ammonia Co., App., 299 S.W. 53—State ex rel. English v. Trimble, 9 S.W.2d 624, 320 Mo. 1113—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Burton v. Allen, 278 S.W. 772, 312 Mo. 111, quashing opinion in part Burton v. Newark Fire Ins. Co., App., 263 S.W. 539, conformed to 284 S.W. 865—State ex rel. Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766—State ex rel. Continental Ins. Co. v. Reynolds, 235 S.W. 88, 290 Mo. 362, quashing certiorari American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 208 Mo.App. 87—Ford v. Ellison, 230 S.W. 637, 287 Mo. 683—State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S.W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., 223 S.W. 757—State ex rel. Dunham v. Ellison, 213 S.W. 459, 273 Mo. 649, reversing Griggs v. Dunham, App., 204 S.W. 573—State ex rel. Quercus Lumber Co. v. Robertson, Sup., 197 S.W. 79, quashing certiorari Allen v. Quercus Lumber Co., App., 190 S.W. 86—State v. Ellison, 173 S.W. 690, 263 Mo. 509—State v. Reynolds, 165 S.W. 729, 257 Mo. 19.

Briefs

The supreme court will not look to briefs of counsel filed in appellate

court to determine whether contention was raised in appellant's original brief or in reply brief, where such matter is not mentioned in opinion of court of appeals.—State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W.2d 862, 336 Mo. 352, quashing, App., 60 S.W.2d 402.

Bill of exceptions as printed in the abstract will not be inquired into for the facts.—State ex rel. Dunham v. Ellison, 213 S.W. 459, 278 Mo. 649, reversing Griggs v. Dunham, App., 204 S.W. 573.

Evidence not appearing in the opinion cannot be considered by the reviewing court.—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597—State ex rel. Greer v. Cox, 274 S.W. 373, 308 Mo. 573, quashing certiorari Smith v. Greer, 257 S.W. 829, 216 Mo.App. 155—State ex rel. John Hancock Mut. Life Ins. Co. of Boston v. Allen, 267 S.W. 832, 306 Mo. 197, quashing certiorari Cradick v. John Hancock Mut. Life Ins. Co. of Boston, Mass., App., 256 S.W. 501—State ex rel. Dowell v. Allen, Mo., 250 S.W. 580, quashing certiorari Ford v. Dowell, App., 243 S.W. 366—State ex rel. Missouri Public Utilities Co. v. Cox, 250 S.W. 551, 298 Mo. 427, quashing Book v. Missouri Public Utilities Co., App., 242 S.W. 433—State ex rel. Missouri State Life Ins. Co. v. Allen, 243 S.W. 839, 295 Mo. 307—State ex rel. American Central Ins. Co. v. Reynolds, 232 S.W. 683, 289 Mo. 382, quashing certiorari Hayden v. American Cent. Ins. Co., App., 221 S.W. 437—State ex rel. Dick & Bros. Quincy Brewery Co. v. Ellison, 229 S.W. 1059, 287 Mo. 139, quashing record Vaughn v. William F. Davis & Sons, App., 221 S.W. 782—State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S.W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., App., 223 S.W. 757—State ex rel. McNulty v. Ellison, 210 S.W. 881, 278 Mo. 42—State ex rel. Metropolitan St. Ry. Co. v. Ellison, Mo., 208 S.W. 443—State ex rel. Shawhan v. Ellison, 200 S.W. 1042, 273 Mo. 218, quashing certiorari Shawhan v. Shawhan Distillery Co., 197 S.W. 369, 195 Mo.App. 445—State ex rel. St. Regis Realty & Investment Co. v. Reynolds, Mo., 200 S.W. 1039.

"Facts," to which the supreme court is limited, within the meaning of the rule stated in the text, comprise the record before the court of appeals, the evidence, documentary and oral, the instructions, and the pleadings, so far as recited in the

opinion.—State ex rel. Horspool v. Haid, 40 S.W.2d 611, 328 Mo. 327, conformed to Forsythe v. Horspool, App., 49 S.W.2d 687, and quashed State ex rel. Horspool v. Haid, 65 S.W.2d 923, 334 Mo. 196.

Questions not reviewable

(1) Whether the abstract of the record is complete or whether evidence not considered in the opinion was properly or improperly admitted, ruling of the court of appeals on the former appeal, and whether the facts on the first appeal are the same as on the second.—State ex rel. Olsen v. Allen, Mo., 253 S.W. 1012, quashing certiorari Olsen v. Supreme Council of Royal Arcanum, App., 237 S.W. 889.

(2) Whether opinion conflicted with statute where question was neither mentioned nor raised in opinion.—State ex rel. Govro v. Hostetter, Mo., 107 S.W.2d 22.

Statement as to what issues were raised by the pleadings does not show facts as basis for determining conflict.—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, affirmed 46 S.W.2d 268, 226 Mo.App. 752.

80. Mo.—State ex rel. Fidelity & Deposit Co. of Maryland v. Allen, Sup., 85 S.W.2d 455, quashing Naylor Special Road Dist. of Ripley County v. Fidelity & Deposit Co., App., 75 S.W.2d 436—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment Spina v. Union Biscuit Co., App., 273 S.W. 428—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Raleigh Inv. Co. v. Allen, 242 S.W. 77, 294 Mo. 214, quashing certiorari Raleigh Inv. Co. v. Cureton, App., 232 S.W. 766—State ex rel. Continental Ins. Co. v. Reynolds, 235 S.W. 88, 290 Mo. 362, quashing certiorari American Paper Products Co. v. Continental Ins. Co., 225 S.W. 1029, 208 Mo. App. 87.

Matter incorporated in the opinion by reference, such as pleadings, instruction, documents, etc., as a part of the subject matter of the ruling, may be treated and examined as a part of the opinion by the reviewing court.—State ex rel. Levine v. Trimble, 8 S.W.2d 927, 320 Mo. 526—State ex rel. Locke v. Trimble, Mo., 298 S.W. 782—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment Spina v. Union

tion of conflict of opinion.⁸¹ For the purpose of discovering the conflict, if any, the supreme court will treat the facts stated in the appellate court's decision as true,⁸² but it will not so accept facts stated in a motion for a rehearing, inasmuch as the truth of such facts can be proved only by the record, which the court will not examine.⁸³

§ 158. — Papers Used on Application

Unless authorized by statute, the petition or papers on which the writ was granted ordinarily cannot be considered on review.

In the absence of statute or local practice otherwise, the reviewing court generally cannot, where the record is before it, consider the petition or papers on which the writ was granted,⁸⁴ particularly

Biscuit Co., App., 273 S.W. 428—State ex rel. Hirsch v. Allen, Mo., 274 S.W. 353, dismissing certiorari State v. Hirsch, App., 260 S.W. 557—State ex rel. John Hancock Mut. Life Ins. Co. of Boston v. Allen, 267 S.W. 832, 306 Mo. 197, quashing certiorari Cradick v. John Hancock Mut. Life Ins. Co. of Boston, Mass., App., 256 S.W. 501—State ex rel. Vulgamott v. Trimble, 253 S.W. 1014, 300 Mo. 92, quashing opinion Vulgamott v. Payne, App., 245 S.W. 592—State ex rel. Seibel v. Trimble, 253 S.W. 215, 299 Mo. 164, quashing certiorari Price v. Seibel, App., 253 S.W. 212—State ex rel. Western Automobile Ins. Co. v. Trimble, 249 S.W. 902, 297 Mo. 659—State ex rel. Vogt v. Reynolds, 244 S.W. 929, 295 Mo. 375, quashing record Vogt v. United Rys. Co. of St. Louis, App., 226 S.W. 75—State ex rel. Kansas City v. Ellison, 220 S.W. 498, 281 Mo. 667, quashing record Barnett v. Kansas City, App., 214 S.W. 240—State ex rel. Hayes v. Ellison, Mo., 191 S.W. 49.

Answer

Where the opinion refers to the answer in the case and makes it a part of the basis for its ruling, the supreme court may consider the answer as fully set forth in the opinion, and may examine the record to ascertain the contents of the answer.—State ex rel. Talbott v. Shain, 66 S.W.2d 826, 334 Mo. 617—State ex rel. National Council of Knights and Ladies of Security v. Trimble, 239 S.W. 467, 292 Mo. 371.

Contract

Reference in the opinion to a contract makes such contract as much a part of the opinion as if fully written out therein for the purpose of review.—State ex rel. Western Automobile Ins. Co. v. Trimble, 249 S.W. 902, 297 Mo. 659—State ex rel. Studebaker Corporation of America v. Trimble, 247 S.W. 119, 295 Mo. 667.

Correlative facts on which the court of appeals based its ruling can be referred to only as aids in more clearly understanding the court's decision.—Ford v. Ellison, 230 S.W. 637, 287 Mo. 683.

Instructions not referred to

(1) Instructions not set out, discussed, or referred to in the opinion cannot be considered by the supreme court.—State ex rel. Locke v. Trimble, Mo., 298 S.W. 732—State ex rel.

John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. City of St. Joseph v. Ellison, Mo., 223 S.W. 671, quashing certiorari Bradford v. City of St. Joseph, App., 214 S.W. 281.

(2) Instruction not referred to cannot be considered by supreme court, although relator claimed instruction had been condemned by supreme court in prior decision and, on appeal to court of appeals, had allegedly assigned instruction as error.—State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115, quashing certiorari Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032.

(3) Proposition that instruction undertaking to cover whole case must cover defenses as well as plaintiff's theory is not before supreme court on certiorari to quash opinion of court of appeals which contains no discussion of instruction from that standpoint.—State ex rel. Major v. Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386, quashing certiorari Major v. Host, App., 263 S.W. 466.

(4) Instructions referred to, but not specifically pointed out, and not complained of by relator, cannot be examined.—State ex rel. Horspool v. Haid, 40 S.W.2d 611, 328 Mo. 327, conformed to Forsythe v. Horspool, App., 49 S.W.2d 687, and quashed State ex rel. Horspool v. Haid, 65 S.W.2d 923, 334 Mo. 196.

Letter made basis of ruling may be considered by supreme court as if fully set forth in former court's opinion on certiorari to quash such opinion as conflicting with supreme court's prior decisions.—State ex rel. Mutual Life Ins. Co. of Baltimore v. Shain, 98 S.W.2d 690, 339 Mo. 621, conformed to King v. Mutual Life Ins. Co. of Baltimore, App., 105 S.W.2d 994.

Reference to another case

Statement of court of appeals that another case was almost identical with case at bar is not statement from which supreme court could determine facts of case under review.—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing

opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo. App. 16, affirmed 46 S.W.2d 268, 226 Mo.App. 752.

81. Mo.—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536.

82. Mo.—State ex rel. Presnell v. Cox, 250 S.W. 374—State ex rel. St. Louis-San Francisco Ry. Co. v. Reynolds, 233 S.W. 219, 289 Mo. 479, quashing judgment and opinion Martin v. St. Louis-San Francisco Ry. Co., App., 227 S.W. 129—State ex rel. City of Webster Groves v. Reynolds, Sup., 223 S.W. 12, quashing certiorari City of Webster Groves to Use of McMahon v. Reber, App., 212 S.W. 38. Conclusiveness of record in general see infra §§ 165-169.

83. Mo.—State ex rel. McNulty v. Ellison, 210 S.W. 881, 278 Mo. 42.

84. Ariz.—Mercado v. Superior Court of Pima County, 77 P.2d 810. Cal.—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal.App. 392.

Miss.—Dickson v. Town of Centreville, 128 So. 332, 157 Miss. 490—Board of Sup'rs of Forrest County v. Melton, 86 So. 369, 123 Miss. 615. Mo.—State ex rel. Durafor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335—State ex rel. Chase v. Calvird, 24 S.W.2d 111, 324 Mo. 429.

S.C.—Whisonant v. Belue, 121 S.E. 360, 127 S.C. 483.

11 C.J. p 200 note 32.

Petition and counter-affidavits

Allegations in a verified petition for certiorari to review the entry nunc pro tunc of an order amending an order granting a new trial, and the counter-affidavits of the judge to the true order originally made by the court, cannot be considered where the record stated that the order as originally entered was not correct, and the amendment was made so that the entry would conform to the true order.—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384.

Unverified suggestions

Ruling and record of appellate court on petition for certiorari cannot be brought to attention of supreme court by unverified suggestions in opposition to petition for

in regard to irrelevant matter in the petition.⁸⁵ It has been held that allegations in the petition are not to be taken as true as part of the record, on the hearing, unless verified by the answer or by the record sent up in connection therewith,⁸⁶ and that allegations in a petition, denied by the answer, which is not traversed, present nothing for consideration on review.⁸⁷ Where, however, the allegations of the petition are admitted to be true, and the only question before the lower appellate court was whether the facts alleged warranted the judgment, the case may be reviewed, although it was tried de novo in the appellate court and the evidence was not reduced to writing.⁸⁸

Transcript attached to petition. A transcript of, or extracts from, the record of the inferior tribunal attached to, or contained in, the petition or affidavit for the writ will not be considered.⁸⁹ It has been held, however, that the reviewing court may look to a bill of exceptions accompanying the petition for certiorari to review a decree, not stating the substance of the evidence.⁹⁰

In New York it is expressly provided by statute that the hearing must be, except as otherwise provided, on the writ and return, "and the papers upon which the writ was granted." Under this statute, if the return to the writ meets all the allegations of the writ and of such papers and traverses them, the hearing must be confined to the return.⁹¹ If, however, the return to the writ admits the facts stated in the writ, or the papers, on which the writ

was granted, or is silent as to them, such facts become important and must be considered on the hearing,⁹² not to impeach or contradict the return,⁹³ but to establish facts as to which the return is silent.⁹⁴ In other words, allegations in the petition which are admitted or not controverted by the return are to be accepted as true.⁹⁵ Moreover, if the denials in the return consist of conclusions of law, the court will consider the petition as well as the return.⁹⁶ Such a statute will not authorize the consideration of additional affidavits.⁹⁷

§ 159. — Matters Not Regularly Appearing of Record

Matters which do not regularly appear of record, and of which a record is not required, may be shown by proof aliunde.

It is permissible to show aliunde the record matters which do not regularly appear therein, and of which the inferior tribunal is not required to keep a record,⁹⁸ although it has been held that such proof can be taken only on motion therefor.⁹⁹ Where the writ is allowed ex parte, on the return thereto, such matters, other than those properly inquirable into by the writ, may be shown to the court, as would, if shown in the first instance, have induced the court to refuse the writ.¹

§ 160. — Evidence to Show Nature of Action

The reviewing court may consider proof outside

certiorari.—*State ex rel Duraflor Products Co. v. Pearcy*, 29 S.W.2d 88, 325 Mo. 335.

85. Mo.—*State ex rel. Smith v. Williams*, 275 S.W. 534, 310 Mo. 267.

Irrelevant matter in the petition will be cast aside on certiorari to quash the record of the probate court in granting an appeal to the circuit court, where a full record of the probate court touching the matter is before the reviewing court.—*State ex rel. Smith v. Williams*, supra.

86. Ga.—*Driver v. Partridge*, 176 S. E. 660, 49 Ga.App. 560—*Partridge v. Wilkerson*, 163 S.E. 303, 45 Ga. App. 65—*Etheridge v. Taylor*, 137 S.E. 641, 36 Ga.App. 609—*New Zealand Ins. Co. v. Brewer*, 116 S.E. 922, 29 Ga.App. 773—*Rice v. Ray & McArthur*, 93 S.E. 43, 20 Ga.App. 391—*Finkelstein v. Ingram*, 91 S. E. 787, 19 Ga.App. 483.

11 C.J. p 200 note 33.

Effect of stipulation

A stipulation that the answer, when not in conflict with the petition, shall be taken as true, and the petition, when not in conflict with the answer, shall be taken as true,

cannot be acted on by the reviewing court, since this involves a comparison of two different statements, and tends to create confusion and conflict.—*Central of Georgia R. Co. v. Potter*, 47 S.E. 924, 120 Ga. 343.

Verification by answer as necessary to consideration of errors assigned in petition see supra § 150.

87. Ga.—*Peck v. Calhoun*, 145 S.E. 528, 38 Ga.App. 764.

88. La.—*C. H. Rice & Son v. Payne*, 92 So. 395, 151 La. 949.

89. Ark.—*Dicus v. Bright*, 23 Ark. 107.

11 C.J. p 201 note 34.

90. Ala.—*Ex parte Sloss-Sheffield Steel & Iron Co.*, 92 So. 453, 207 Ala. 219—*Armour & Co. v. White*, 128 So. 119, 23 Ala.App. 515.

91. N.Y.—*People v. Wurster*, 44 N. E. 298, 149 N.Y. 549, reversing 36 N.Y.S. 160, 91 Hun 233.

11 C.J. p 201 note 35.

92. N.Y.—*People v. Wurster*, supra—*People v. Brooklyn*, 12 N.E. 641, 106 N.Y. 64—*People ex rel. Helvetia Realty Co. v. Leo*, 183 N.Y.S. 37, affirmed 185 N.Y.S. 949, 195 App.Div. 887, affirmed 132 N.E. 912,

231 N.Y. 619—*West Side Mortgage Co. of New York v. Leo*, 174 N.Y. S. 451.

11 C.J. p 201 note 36.

93. N.Y.—*People v. Davis*, 38 Hun 43.

94. N.Y.—*People v. French*, 25 Hun 111, 10 Abb.N.Cas. 418.

95. N.Y.—*People v. Sutphin*, 59 N.E. 770, 166 N.Y. 163—*Zurich General Accident & Liability Ins. Co., Limited, of Zurich, Switzerland, v. Board of Sup'rs of Sullivan County*, 257 N.Y.S. 142, 235 App.Div. 473.

11 C.J. p 201 note 39.

96. N.Y.—*People v. Wurster*, 35 N. Y.S. 86, 89 Hun 7, affirmed 42 N.E. 725, 147 N.Y. 716.

97. N.Y.—*People v. York*, 61 N.Y. S. 400, 45 App.Div. 503—*People v. Dains*, 38 Hun 43—*People v. Murray*, 35 N.Y.S. 463, 14 Misc. 177.

98. Me.—*Chapman v. York County Com'rs*, 9 A. 728, 79 Me. 267.

11 C.J. p 201 note 42.

99. Del.—*Cullen v. Lowery*, 2 Del. 459.

1. N.J.—*State v. Woodward*, 9 N.J. Law 21.

the record, in determining the nature of the action, pleadings, defenses, and the like.

Under some circumstances, as where the jurisdiction or scope of relief is doubtful, it has been held that the court may hear proof of facts not disclosed by the record, to show the nature of the action, the pleadings, defense, or the like.² In determining the scope of a bill and the relief thereunder, the court may consider the pleadings and proceedings in an earlier suit, the nature of which is disclosed in the opinion and decree in that suit and pleaded in the later suit.³

§ 161. — Principles on Which Inferior Tribunal Acted

The principles on which the inferior tribunal proceeded may be determined from matters dehors the record.

An exception to the rule that matters dehors the record are not receivable has been recognized by hearing evidence to show the principles on which the inferior tribunal proceeded.⁴

§ 162. — Jurisdictional Facts

Matters dehors the record cannot be considered, by the reviewing court, to supply jurisdictional facts as to the inferior tribunal; but such matters may be considered to show want of jurisdiction, not apparent from

the record, or to protect the reviewing court's own jurisdiction.

Want of jurisdiction, apparent on the face of the record, may be noticed by the reviewing court on its own motion;⁵ and, if it arises from matters not appearing in any way on the proceedings, it may be shown aliunde.⁶ Jurisdictional facts, however, must generally be determined from the face of the return,⁷ and, if they do not appear from the return, they cannot be supplied aliunde,⁸ unless it is otherwise provided by statute.⁹ So, when jurisdictional facts do not appear from the record, they cannot be supplied by assertions made in the return.¹⁰

In determining the sufficiency of a complaint to give jurisdiction, the greatest liberality of construction will be indulged; and, if it states facts giving such jurisdiction, it will be held sufficient notwithstanding other irrelevant or immaterial facts are stated or the law violated is inaccurately cited.¹¹

In New York the statute authorizes the court to permit either party to produce affidavits or other written proof relating to any alleged error of fact, or any other question of fact essential to the jurisdiction of the body or officer to make the determination to be reviewed; but the statute limits the right to present affidavits or other proof to a fact which affects the jurisdiction of the body or officer whose

2. Del.—Cullen v. Lowery, 2 Del. 459.

A proceeding in rem against a vessel by an injured seaman must be treated by the supreme court, as one to enforce liability prescribed by the Jones Act § 33, 46 U.S.C.A. § 638, where it was so treated by the petitioner's proctor at the original trial, the application for certiorari spoke of it as based on such section, and the evidence would not support recovery on any other ground.—Plamals v. The Pinar Del Rio, N.Y., 48 S.Ct. 457, 277 U.S. 151, 72 L.Ed. 827, affirming, C.C.A., The Pinar Del Rio, 16 F.2d 984, certiorari granted Plamals v. The Pinar Del Rio, 47 S.Ct. 766, 274 U.S. 733, 71 L.Ed. 1330.

Change of action

Where, after a plea to an action of debt, the summons is changed so as to read in trover, the irregularity may be shown by depositions.—Castner v. Fanning, 3 Kulp., Pa., 17.

3. U.S.—Independent Coal & Coke Co. v. U. S., Utah, 47 S.Ct. 714, 274 U.S. 640, 71 L.Ed. 1270, affirming, C.C.A., U. S. v. Carbon County Land Co., 9 F.2d 517, certiorari granted Independent Coal & Coke Co. v. U. S., 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 774.

4. N.J.—New Jersey R., etc., Co. v. Suydam, 17 N.J.Law 25.

5. S.C.—Goggans v. State Board of Education, 130 S.E. 645, 133 S.C. 133.

6. Okl.—Board of Com'rs of Okfuskee County v. School Dist. No. 27, of Okfuskee County, 293 P. 1078, 146 Okl. 267.

R.I.—Slefkln v. Board of Aldermen of Central Falls, 99 A. 261, 39 R. I. 525.

11 C.J. p 201 note 46.

Review of evidence to determine jurisdictional fact see infra § 172.

7. Mo.—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Ingram, App., 2 S.W.2d 113.

Jurisdiction of board

The reviewing court must determine from the face of the return, made by a respondent board of arbitration, whether it acted within, or in excess or abuse of, its jurisdiction, in ordering a school district to take over the territory of another school district.—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Ingram, supra.

8. Ala.—Cook v. Walker County Comrs. Ct., 59 So. 433, 178 Ala. 394.

Mo.—State ex rel. Adler v. Ossing, 79 S.W.2d 255, 336 Mo. 386.

Pa.—Barnett v. Fisher, 5 Pa.Dist. 277.

On certiorari to review proceedings of board of limited jurisdiction, involving question whether facts presented conferred jurisdiction, review is strictly limited to facts before board.—Security-First Nat. Bank v. Board of Sup'rs of Riverside County, 26 P.2d 862, 135 Cal. App. 208.

9. Iowa.—Lerch v. Short, 185 N.W. 129, 192 Iowa 576.

11 C.J. p 202 note 49.

Jurisdiction or illegality

Under a statute authorizing the writ to be issued where the inferior tribunal has exceeded its jurisdiction, or is otherwise acting illegally, as explained supra § 9, evidence dehors the return may be considered to determine whether or not the tribunal whose act is brought in question had jurisdiction or otherwise acted illegally.—Lerch v. Short, supra.

10. Mich.—McGregor v. Gladwin County, 37 Mich. 388—Harbaugh v. Martin, 30 Mich. 234.

11. Cal.—Homan v. Board of Dental Examiners of California, 262 P. 324, 202 Cal. 593.

action is sought to be reviewed.¹² Such a statute is inapplicable where the return states the facts.¹³

Jurisdiction of reviewing court. The reviewing court, although it must try the case on the record presented to the lower court, may consider matters transpiring after the cause is heard in the lower court, to protect its jurisdiction and prevent its being trifled with or rendered ineffectual.¹⁴

§ 163. — Fraud, Partiality, Etc.

Evidence dehors the record may be heard to show fraud, partiality, corruption, or extortion.

It has been held that evidence dehors the record is permissible to show fraud, partiality, corruption, or extortion.¹⁵ To prevent injustice, depositions are admissible to show that the record is false.¹⁶

§ 164. — Matters Improperly Returned

Matters returned which do not properly constitute a part of the record should be disregarded.

Where the inferior tribunal returns matters which do not properly constitute a part of the record and which, therefore, ought not to have been incorporated in the return, such surplusage will be

disregarded, and cannot be considered.¹⁷ The reviewing court will disregard, for example, matters which have been voluntarily incorporated in the return without any order to return them;¹⁸ but, where the command is vague, if the writ expresses the desire of the court to be informed of the matter returned, such matter may be considered, although not specifically commanded.¹⁹ The reviewing court also will not look to affidavits and other papers attached to the return which do not properly constitute a part of the record,²⁰ fragmentary papers accompanying the return which are not properly authenticated or certified,²¹ or matters contained in an unofficial or unauthorized return.²²

Facts contained in an additional return erroneously compelled;²³ a new record, or new matter, voluntarily attached by the inferior court to the return previously made;²⁴ statements in the return as to proceedings had in a case other than that under review;²⁵ matters returned as derived from the statement of others,²⁶ or which are based on recollection, and not alleged as facts,²⁷ cannot be considered by the reviewing court.

Evidence improperly sent up by the inferior court in its return will not be considered.²⁸

12. N.Y.—*People v. Partridge*, 91 N. Y.S. 258, 99 App.Div. 410, affirmed 73 N.E. 1130, 180 N.Y. 542.

11 C.J. p 202 note 51.

13. N.Y.—*People v. Vanderpoel*, 54 N.Y.S. 436, 35 App.Div. 73.

14. Tenn.—*Cockrill v. People's Sav. Bank*, 293 S.W. 996, 155 Tenn. 342.

15. Okl.—*Board of Com'rs of Okfuskee County v. School Dist. No. 27 of Okfuskee County*, 293 P. 1078, 146 Okl. 267.

Pa.—*City of Scranton v. Evans*, 5 Pa.Dist. & Co. 219.

11 C.J. p 202 note 52.

Change or interlineation

Proof may be heard that exceptions taken to the decision of the inferior court had been interlined and materially changed after they were signed and certified.—*Smith v. Joiner*, 27 Ga. 65.

16. Pa.—*City of Scranton v. Evans*, 5 Pa.Dist. & Co. 219.

17. Ala.—*Nashville, C. & St. L. Ry. Co. v. Town of Boaz*, 147 So. 195, 226 Ala. 441.

N.J.—*Essex County v. Civil Service Commission of New Jersey*, 121 A. 695, 98 N.J.Law 671.

11 C.J. p 202 note 53.

Amendment to sheriff's return

On certiorari issued to test whether circuit court's jurisdiction was acquired through proper service of summons, amendment to sheriff's return which was made after return to writ of certiorari could not be con-

sidered.—*State ex rel. Adler v. Os-sing*, 79 S.W.2d 255, 336 Mo. 386.

Where irrelevant matter is submitted as part of the return, the proper practice is not to strike out such matter from the return, but to disregard it on the hearing on the return made.—*People ex rel. Helvetia Realty Co. v. Leo*, 183 N.Y.S. 37, affirmed 185 N.Y.S. 949, 195 App.Div. 887, affirmed 132 N.E. 912, 231 N.Y. 619.

18. N.J.—*Smart v. North Hudson County R. Co.*, 48 A. 790, 66 N.J. Law 156.

11 C.J. p 202 note 54.

19. N.J.—*State v. Paterson*, 39 N.J. Law 489, reversed on other grounds 40 N.J.Law 186.

20. N.J.—*Siebke v. Township Committee of Chester Tp. in Burlington County*, 132 A. 341, 4 N.J.Misc. 226.

N.Y.—*Matter of Eightieth St.*, 16 Abb.Pr. 169, affirmed 17 Abb.Pr. 324.

Wis.—*State v. Roberts*, 58 N.W. 409, 87 Wis. 292.

21. Minn.—*State v. St. John*, 50 N. W. 200, 47 Minn. 315.

22. Mich.—*Roberts v. Cottrellville Highway Comrs.*, 24 Mich. 182.

N.J.—*State v. Howell*, 24 N.J.Law 519.

Wis.—*State v. Everett*, 79 N.W. 421, 103 Wis. 269.

23. N.Y.—*People v. Wheeler*, 21 N. Y. 82.

24. N.Y.—*Lynch's Case*, 9 Abb.N. Cas. 69.

New matter not stricken out

Where petitioners do not move to strike from the return new matter submitted as a part thereof, such new matter must be regarded as forming a part of the return and included in the papers in which the proceeding is to be determined; but, where such matter formed no part of the evidence on which the decision was based, it should be disregarded by the court.—*People ex rel. Helvetia Realty Co. v. Leo*, 183 N.Y. S. 37, affirmed 185 N.Y.S. 949, 195 App.Div. 887, affirmed 132 N.E. 912, 231 N.Y. 619.

Supplemental return

On certiorari to review sufficiency of city clerk's certificate as to requisite number of signatures to an initiative petition, a supplemental return, containing a new certificate, made after the writ issued, cannot be considered.—*Gabbert v. Perry*, 173 P. 412, 36 Cal.App. 690.

25. N.Y.—*Allen v. Horton*, 7 Johns. 23.

26. N.Y.—*Mosely v. Landon*, 2 Johns. 193.

27. N.Y.—*Lawton v. Cambridge Highway Comrs.*, 2 Cal. 179.

28. Mo.—*State ex rel. School Dist. No. 18, Tp. 51, RG. 34, of Platte County v. Sexton*, 132 S.W. 11, 151 Mo.App. 517.

11 C.J. p 202 note 63.

The opinion of the lower court, where not a proper part of the return, cannot be considered;²⁹ but, where, in a summary proceeding, a review on the merits is not permissible, and a mere inspection of the docket shows nothing, the reviewing court may look to the opinion, as well as the action of the court, to see whether it exceeded its jurisdiction or its proper legal discretion.³⁰

§ 165. Conclusiveness and Effect of Return or Record

Facts found below and returned are, ordinarily, to be taken as true and conclusive, and cannot be contradicted by evidence dehors the record.

In the absence of objection to the sufficiency of the return, as a general rule, matters of fact, within the jurisdiction of the inferior tribunal, which are found in such tribunal and returned, are to be

taken as true and conclusive, in the reviewing court and, in the absence of statutory authority therefor, cannot be contradicted by evidence dehors the record;³¹ neither can such evidence be considered to supplement the record;³² nor can an issue of fact be made up in the revisory court to supply omissions in the record or to control its recitals.³³ The general rule applies although the return is not in accord with the facts, and regardless of good faith.³⁴ Where the writ directs that all things touching and concerning a judgment shall be certified, and the return states that all have been certified, if anything else is needed, it should be brought up by proper proceedings for that purpose.³⁵

In accordance with the general rule, if the statements in the application for the writ conflict with the return, the latter governs.³⁶ The return cannot be contradicted by the affidavit of a third per-

29. N.J.—State Commercial Dime Bldg., etc., Assoc. v. Pietroniro, Sup., 50 A. 451.

Pa.—McCauley v. Imperial Woolen Co., 104 A. 617, 261 Pa. 312.

30. Pa.—In re Franklin Film Mfg. Corp., 98 A. 623, 253 Pa. 422—In re Krickbaum, 70 A. 852, 221 Pa. 521—In re Independence Party Nomination, 57 A. 344, 208 Pa. 108.

31. U.S.—Hallenbeck v. Leimert, Ill., 55 S.Ct. 687, 295 U.S. 116, 79 L.Ed. 1339, reversing, C.C.A., 72 F. 2d 480, certiorari granted 55 S.Ct. 406, 294 U.S. 699, 79 L.Ed. 1236.

Ark.—Prager v. Wootton, 30 S.W.2d 845, 182 Ark. 37.

Cal.—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384.

Ill.—Frye v. Hunt, 5 N.E.2d 398, 365 Ill. 32—Heppe v. Mooberry, 183 N.E. 636, 350 Ill. 641—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269—Wiswell v. Simpson, 144 N.E. 463, 313 Ill. 49.

Iowa.—Hale v. Ring, 245 N.W. 704, 215 Iowa 446—Storie v. District Court in and for Lucas County, 216 N.W. 25, 204 Iowa 847—Rafferty v. Town of Clermont, 164 N.W. 199, 180 Iowa 1391—Cooley v. District Court of Polk County, 163 N.W. 625, 180 Iowa 740.

Mass.—Merchants Mut. Casualty Co. v. Justices of Superior Court, 197 N.E. 166, 291 Mass. 164—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486—Newcomb v. Aldermen of Holyoke, 171 N.E. 826, 271 Mass. 565—Whitney v. Judges of Dist. Court of Northern Berkshire, 171 N.E. 648, 271 Mass. 448—Marcus v. Board of Street Com'rs of City of Boston, 147 N.E. 866, 252 Mass. 331—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.

Mo.—State ex rel. Spencer v. Anderson, App., 101 S.W.2d 530.

Mont.—State v. District Court of Tenth Judicial Dist. in and for Fergus County, 10 P.2d 586, 92 Mont. 94.

N.J.—Schubert v. District Court of Third Judicial Dist. of Bergen County, 159 A. 615, 10 N.J.Misc. 414.

N.Y.—Reed v. Board of Standards and Appeals of City of New York, 174 N.E. 301, 255 N.Y. 126, affirming 243 N.Y.S. 263, 230 App.Div. 21, affirming 244 N.Y.S. 413, 138 Misc. 187—People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor, 287 N.Y.S. 456, 247 App. Div. 405—Zurich General Accident & Liability Ins. Co., Limited, of Zurich, Switzerland v. Board of Sup'rs of Sullivan County, 257 N.Y.S. 142, 235 App.Div. 473—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App.Div. 373—People ex rel. Helvetia Realty Co. v. Leo, 183 N.Y.S. 37, affirmed 185 N.Y.S. 949, 195 App.Div. 887, affirmed 132 N.E. 912, 231 N.Y. 619—West Side Mortgage Co. of New York v. Leo, 174 N.Y.S. 451.

Or.—Roethler v. Cummings, 165 P. 355, 84 Or. 442.

Pa.—In re Incorporation of Elkland Leather Workers' Ass'n, 198 A. 13, 330 Pa. 78.

Utah.—Higgs v. Burton, 197 P. 728, 58 Utah 99.

11 C.J. p 206 note 82.

As primarily controlling

The return to the writ is the primary source of information, and is primarily controlling as to the facts.—Genuario v. DeGaudenzio, 44 A. 950, 64 N.J.Law 157—Linzmayr v. Baird, 136 A. 510, 5 N.J.Misc. 362.

As to presence of quorum of board

In certiorari to review order of

board of medical examiners revoking license of the petitioner to practice medicine, where the record recital was that a quorum of the board was present on the hearing, petitioner could not make a showing that one of the board absented himself for a time from the session.—Lanterman v. Anderson, 172 P. 625, 36 Cal.App. 472.

On controverted points

Where matters leading to order sought to be reviewed by certiorari are in dispute, witnesses being divided and reputable, trial judge's return will be accepted on all controverted points.—State v. Superior Court of Lewis County, 227 P. 849, 130 Wash. 464.

Return of public trustees to writ questioning constitutionality of statute in its taxation features must be taken as true in its statement of facts.—City of Chelsea v. Treasurer and Receiver General, 130 N.E. 397, 237 Mass. 422.

Conclusiveness of statement in opinion of appellate court see supra § 157.

32. Del.—In re Ceresini, 189 A. 443.

33. Ala.—Independent Pub. Co. v. American Press Assoc., 15 So. 947, 102 Ala. 475.

34. Ill.—Heppe v. Mooberry, 183 N.E. 636, 350 Ill. 641.

N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App.Div. 373.

Or.—Roethler v. Cummings, 165 P. 355, 84 Or. 442.

35. N.J.—Morley v. McDonald, 114 A. 147, 96 N.J.Law 22.

36. N.Y.—People ex rel. Helvetia Realty Co. v. Leo, 183 N.Y.S. 37, affirmed 185 N.Y.S. 949, 195 App. Div. 887, affirmed 132 N.E. 912, 231 N.Y. 619.

11 C.J. p 206 note 84.

son³⁷ or of the petitioner;³⁸ nor can it be impeached or qualified except by an amended return certified by the court below.³⁹ A respondent judge cannot complain that the reviewing court accepts the record below which respondent has certified as a part of his return.⁴⁰ The deposition of a single judge is insufficient to contradict the recitals of an order made by the whole court;⁴¹ and likewise a return by a majority of a board cannot be contradicted by a separate return of a minority of the board.⁴²

However, allegations in the return, which are mere conclusions, are not binding.⁴³ The return, also, is not necessarily conclusive as to statements that do not go to the merits, but are made merely by way of excuse for delay.⁴⁴ Moreover, the opinion of the lower court, where contradicted by other portions of the record, is not conclusive.⁴⁵

Certificate of clerk. The record cannot be contradicted by the certificate of the clerk of the court;⁴⁶ but where the clerk of the trial court certifies on the return that certain pages of the transcript are not a part of the record, and there is nothing in the record tending to contradict the certificate, it will be taken as correct.⁴⁷

Contradiction by predecessor in office. A return by the legal custodian of the record cannot be contradicted by his predecessor in office who entertained the proceedings;⁴⁸ nor is the conclusiveness of such a return affected by the fact that it impeaches the decision of the former official.⁴⁹

Want of authority to make return. Where no claim is made that a return of a public board signed by its president is unauthorized, or was not made by the direction of a majority of the board, evidence aliunde will not be received to show that the return was not in fact the return of the board.⁵⁰

Effect of statutes. Although the rule as to the conclusiveness of the return may be changed by statute, and in some states has been, to some extent so changed, it would seem that the court will not consider matters dehors the record, unless authority so to do is conferred in unmistakable terms. Thus, it has been held that a statute authorizing the court to proceed and to give judgment in the cause, as the right of the matter may appear, without regarding technical or formal omissions or defects in the proceedings, does not confer on the court the power to consider extraneous evidence; and a statute providing that the records of the inferior tribunal shall be conclusive as far as the same extend does not deprive the record, as returned of its conclusiveness.⁵¹

§ 166. — As to Jurisdiction of Inferior Tribunal

A return showing jurisdiction of the inferior court is conclusive on that question.

Where the return shows that the inferior tribunal has jurisdiction the same is conclusive, and an assignment of want of jurisdiction is not permissible.⁵²

37. La.—State v. Barksdale, 22 So. 966, 50 La. Ann. 55.
N.Y.—Peo. v. York, 61 N.Y.S. 400, 45 App.Div. 503.

38. Cal.—Borchard v. Ventura County, 77 P. 508, 144 Cal. 10.
Iowa.—Hatlestad v. Hardin County Ct., 114 N.W. 628, 137 Iowa 146.

39. N.J.—Glassman v. Essex County Juvenile Court, 154 A. 722, 9 N.J.Misc. 519.
Amendment of return see supra § 131.

40. Iowa.—Adams County v. Maxwell, 212 N.W. 152, 202 Iowa 1327.

41. N.J.—Parsell v. State, 30 N.J. Law 530.

42. N.Y.—People v. Eno, 68 N.E. 868, 176 N.Y. 513.

43. Ill.—Forgan v. Gordon Motor Finance Co., 183 N.E. 462, 350 Ill. 445.

Me.—Andrews v. King, 77 Me. 224.
N.Y.—People v. Blood, 105 N.Y.S. 20, 120 App.Div. 614—People v. Westchester County, 102 N.Y.S. 402, 116 App.Div. 844.

Answer adopting allegations of

fact of a paragraph of the petition, adopts only the facts set forth therein, and not a conclusion of law that the verdict was contrary to law and the evidence.—Southeastern Mut. Fire Ins. Co. v. Williams, 114 S. E. 716, 29 Ga.App. 236.

44. Mich.—Burnett v. Scully, 23 N. W. 50, 56 Mich. 374.

45. Mo.—State v. Ellison, 176 S.W. 11.

46. Ga.—E. H. Odom Bros. Co. v. Stovall, 112 S.E. 907, 28 Ga.App. 661.

As to filing of bond

Where the record showed that a bond on certiorari was filed after the petition was filed and sanctioned, and the writ ordered issued, it cannot be contradicted by the certificate of deputy clerk of court that the date of filing and sanction was erroneously entered, and that the correct date was the same date the bond was filed.—E. H. Odom Bros. Co. v. Stovall, supra.

47. Ark.—Crittenden Inv. Co. v. Whitman, 196 S.W. 937, 130 Ark. 76.

48. N.D.—In re Evingston, 49 N.W. 733, 2 N.D. 184, 33 Am.S.R. 768.

49. N.Y.—People ex rel. Abell v. Clarkson, 228 N.Y.S. 176, 223 App. Div. 373.

Former trustees

The conclusive effect of a supplemental return made by village trustees in a certiorari proceeding to review the action of former trustees is not affected by the fact that it impeaches the decision of former trustees.—People ex rel. Abell v. Clarkson, supra.

50. Wis.—Nehrling v. State, 88 N. W. 610, 112 Wis. 637.

51. Ark.—Hickey v. Matthews, 43 Ark. 341.
11 C.J. p 207 note 95.

52. Ill.—Bachechi v. Inlander Paper Co., 252 Ill.App. 178.

N.Y.—People v. Powers, 19 Abb.Pr. 99—Haines v. Westchester County, 20 Wend. 625.

Board's record showing it found the jurisdictional fact of presence of a quorum on the hearing must prevail on certiorari to annul its order in the proceeding before it.—Jordan

§ 167. — Statements in Return Dehors the Record

The record, ordinarily, cannot be contradicted or controlled by statements in the return.

It is a settled rule that the record cannot be controlled or contradicted in any particular by statements in the return, even when it is sought to support the regularity of the proceedings;⁵³ and if such statements are in conflict with the record they must be disregarded.⁵⁴ A statement in the return as to matters of fact is not conclusive, where the return includes as a part thereof all of the testimony and proceedings before commissioners, which show that the statement is not supported by any evidence.⁵⁵ If, however, statements made in the return as to matters which do not regularly appear of record are proper, such assertions are taken as true.⁵⁶

§ 168. — Traverse of Return under Authority of Statute

A return or answer which is not traversed or excepted to, as authorized by statute, is conclusive and true as to allegations thereof.

v. Alderson, 192 P. 170, 48 Cal.App. 547.

Constable's return of service of writ, giving the lower court jurisdiction, which is regular on its face cannot be contradicted on certiorari.—Holly v. Travis, 110 A. 230, 267 Pa. 136, reversing 71 Pa.Super. 527—Altenberg v. Shreve Chair & Lumber Co., 1 Pa.Dist. & Co. 472.

53. Iowa.—Cooley v. District Court of Polk County, 163 N.W. 625, 180 Iowa 740.

Wis.—Cassidy v. Millerick, 9 N.W. 165, 52 Wis. 379.

11 C.J. p 207 note 97.

As to time of hearing

Where a decree duly entered distinctly recites that there was a hearing on a day named and a decree entered on that day, it is not overcome by return to a writ of certiorari, saying that hearing occurred at a different time.—Cooley v. District Court of Polk County, 163 N.W. 625, 180 Iowa 740.

54. Iowa.—Cooley v. District Court of Polk County, supra.

55. N.Y.—People v. Public Serv. Commn., 88 N.E. 261, 195 N.Y. 157.

56. Mass.—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

11 C.J. p 207 note 99.

57. Ga.—Beavers v. Cassells, 192 S. E. 249, 56 Ga.App. 146, affirmed, Sup., 196 S.E. 716—Wadsworth v. Olive, 186 S.E. 590, 53 Ga.App. 539—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440—Martin

v. State, 158 S.E. 803, 43 Ga.App. 334—Brown v. State, 145 S.E. 485, 38 Ga.App. 682—Millam v. Wilkerson, 126 S.E. 303, 33 Ga.App. 343—New Zealand Ins. Co. v. Brewer, 116 S.E. 922, 29 Ga.App. 773—Howard v. Holland, 114 S.E. 549, 29 Ga. App. 186—McConnell v. State, 88 S.E. 408, 17 Ga.App. 752—Thomas v. State, 67 S.E. 894, 7 Ga.App. 637.

As to truth of allegations of petition

Where the answer stated that all the allegations of the petition were not true without specifying those that were untrue and did not verify the allegation that the damage sued for was to growing crops, the contention that the magistrate was without jurisdiction was not sustained.—Evans v. Williams, 106 S.E. 321, 26 Ga.App. 412.

Disqualification of trial judge

Where petition for certiorari alleged that trial judge was disqualified to preside because he had been of counsel in obtaining judgment in pursuance of which execution had been issued and levy made, to which levy, affidavit of illegality had been filed by defendant in execution, trial judge's answer stating that he had taken judgment on note merely as favor to plaintiff's counsel, which answer was not traversed or objected to, was conclusive on question of disqualification.—Beavers v. Cassells, 192 S.E. 249, 56 Ga.App. 146, affirmed, Sup., 196 S.E. 716.

Error in admitting evidence

Where answer to certiorari setting out evidence, but showing no ruling

Under some statutes, the return or answer may be traversed, or matters not contained in it may be supplied, as announced supra § 131; but if it is not traversed or excepted to, as so authorized, it is conclusive as to the allegations thereof, and the reviewing court is bound to accept it as true.⁵⁷

§ 169. — References

The reviewing court, in a proper case, may appoint a referee to ascertain the truth of the facts stated in the return, or to take evidence and make findings.

The court, in the absence of statutory authority, will not order a reference for the purpose of ascertaining the truth of matters of fact stated in the return, unless under peculiar circumstances, and for strong reasons, it deems it advisable so to do;⁵⁸ but when authorized by statute so to do, the court may appoint a referee to take evidence and to make findings of facts,⁵⁹ and in such case the common-law doctrine that the return is conclusive is abrogated.⁶⁰ If the relator refuses to testify on the reference, the case may be sent back to the referee to give the relator an opportunity to purge himself of contempt.⁶¹

on its admissibility, was not traversed or excepted to, allegations of error in admitting evidence over objection cannot be considered.—Howard v. Holland, 114 S.E. 549, 29 Ga. App. 186.

Refusal to dismiss case

Where answer stating that no motion to dismiss was made, was not traversed, assignments of error complaining of the alleged refusal to dismiss the case could not be considered.—Axson v. Seals, 114 S.E. 719, 29 Ga.App. 142.

58. N.Y.—People v. Ryken, 6 Hun 625.

11 C.J. p 207 note 8.

59. N.Y.—People v. Smith, 24 Hun 66, affirmed 85 N.Y. 628—People v. Zaller, 15 N.Y.S. 684.

Conclusiveness of report

Where, on certiorari to review the action of the board of supervisors in auditing the relator's claim, the relator moves for a further return, the fact that the board by resolution consent to the appointment of a referee to take testimony and report on such claim by the special term, and that the referee's finding is approved by the supreme court, is not a submission of the question of arbitration, and hence the report of the referee is not conclusive on the board.—People ex rel. Martin v. Westchester County, 65 N.Y.S. 707, 53 App.Div. 339.

60. N.Y.—People v. Smith, 24 Hun 66, affirmed 85 N.Y. 628.

61. N.Y.—People v. Moore, 4 N.Y.S. 773, 53 Hun 13.

§ 170. Mode of Trial, and Trial De Novo

A trial de novo may be had only where, and to the extent that, it is authorized by statute.

In the absence of statutory authority therefor, a case on certiorari cannot be tried de novo in the reviewing court;⁶² nor is there a right to trial by jury.⁶³

Under some statutes, however, either by express provision of the statute, or by virtue of the fact that the scope of the review is enlarged to be as on appeal, the reviewing court on certiorari, may try the case de novo;⁶⁴ and under some statutes such a trial may be had in all cases of certiorari,⁶⁵ but under others it may be had only where the writ is used as a substitute for an appeal.⁶⁶

On such trial de novo the procedure is the same as in cases tried de novo on appeals.⁶⁷ The case must be tried on its merits, without reference to errors in procedure in the lower court;⁶⁸ questions as to what evidence was heard by the lower court and as to effect of its order are immaterial,⁶⁹ and the judgment below is no evidence of any fact on

the new trial;⁷⁰ but the reviewing court must confine its inquiry to the grounds of attack stated in the application for the writ.⁷¹

Burden of proof. On certiorari, the burden is on the moving party to prove the merits of his cause by a preponderance of the evidence,⁷² and to show plainly, distinctly, and affirmatively the irregularity or error alleged.⁷³ On certiorari to quash the opinion of an appellate court as being in conflict with a previous decision of the supreme court, the burden is on the relator to point out the previous decisions of the supreme court which he claims are contravened or impugned by the opinion of the appellate court.⁷⁴

§ 171. Presumptions

The reviewing court may indulge all natural presumptions and proper conclusions arising from the record, and make every lawful intendment in favor of the determination and the regularity of the proceedings below.

The court may indulge all natural presumptions and proper conclusions arising from the record.⁷⁵

62. Iowa.—*Dempsey v. Alber*, 236 N. W. 86, 212 Iowa 1134, modified on other grounds and rehearing denied 238 N.W. 33.

Mo.—*State ex rel. Dunham v. Ellison*, 213 S.W. 459, 278 Mo. 649, reversing *Griggs v. Dunham*, App., 204 S.W. 573.

N.M.—*Lea County State Bank v. McCaskey Register Co.*, 49 P.2d 577, 39 N.M. 454.

11 C.J. p 209 note 17.

A trial de novo is not authorized by a statute allowing evidence dehors the record to be introduced on the hearing for the purpose of determining whether the evidence offered and received was sufficient to sustain the action of the tribunal reviewed.—*Hall v. Bledsoe*, 139 S.W. 1041, 126 Ark. 125.

63. Ill.—*Sanitary Dist. of Chicago v. Industrial Board of Illinois*, 118 N.E. 475, 282 Ill. 182.

Need not submit propositions of law
On certiorari to review determination of inferior tribunal, there is no right to trial by jury, judgment depending on inspection of return, and hence petitioner need not submit propositions of law to court.—*Sanitary Dist. of Chicago v. Industrial Board of Illinois*, supra.

64. Tenn.—*Rhea County v. White*, 43 S.W.2d 375, 163 Tenn. 388—*Staples v. Brown*, 85 S.W. 254, 113 Tenn. 639—*Binford v. Carline*, 9 Tenn.App. 364.

11 C.J. p 209 notes 18–27.

Trial de novo on certiorari to justice of the peace see C.J.S. title Jus-

tices of the Peace § 264, also 35 C.J. p 382 notes 49–54.

65. Tex.—*Linch v. Broad*, 6 S.W. 751, 70 Tex. 92.

11 C.J. p 209 note 21.

66. Tenn.—*Staples v. Brown*, 85 S.W. 254, 113 Tenn. 639—*Scholze v. Anderson*, 12 Tenn.App. 637.

11 C.J. p 209 notes 23, 24.

67. Miss.—*Board of Sup'rs of Forrest County v. Melton*, 86 So. 369, 123 Miss. 615.

Tex.—*Moore v. Hardison*, 10 Tex. 467.

68. Tex.—*Gulf, C. & S. F. Ry. Co. v. Lemons*, Civ.App., 152 S.W. 1189, reversed on other grounds, 206 S.W. 75, 109 Tex. 244, 5 A.L.R. 943.

69. Tex.—*Gulf, C. & S. F. Ry. Co. v. Lemons*, supra.

70. Tex.—*Kalteyer v. Wipff*, Civ. App., 49 S.W. 1055.

71. Tex.—*Wilson v. Fisher*, 105 S.W.2d 304, certiorari denied 58 S.Ct. 264—*Mathews v. Autry*, Civ.App., 65 S.W.2d 798—*Gulf, C. & S. F. Ry. Co. v. Lemons*, Civ.App., 152 S.W. 1189, reversed on other grounds 206 S.W. 75, 109 Tex. 244, 5 A.L.R. 943.

Errors not set forth in application as not subject to review generally see supra § 150.

72. N.J.—*Christie v. Mayor and Council of City of Garfield*, 177 A. 883, 13 N.J.Misc. 331.

Tex.—*Mathews v. Autry*, Civ.App., 65 S.W.2d 798.

Burden of proof as to abolition of office held not sustained

N.J.—*Van Saun v. Township Com-*

mittee of Pequannock Tp., 150 A. 770, 8 N.J.Misc. 486.

Presumptions see infra § 171.

73. Ga.—*Coclin v. Taylor*, 137 S.E. 852, 36 Ga.App. 577—*Reese v. Miller*, 126 S.E. 904, 33 Ga.App. 443—*Cochran v. Anderson*, 118 S.E. 450, 30 Ga.App. 427.

Me.—*Jellerson v. Board of Police of Biddeford*, 187 A. 713, 134 Me. 443.

N.C.—*In re Veasey*, 146 S.E. 599, 196 N.C. 662.

As to amendment of verdict

Petitioner has the burden, on certiorari to quash an amendment of a verdict for him, to show that the basis of the amendment was not in accordance with the proceedings in the trial court, where he relied on such ground for vacating the amendment.—*Needham v. Licht*, 181 A. 219, 55 R.I. 326.

74. Mo.—*State ex rel. Tunget v. Shain*, 101 S.W.2d 1—*State ex rel. Gatewood v. Trimble*, 62 S.W.2d 756, 333 Mo. 207, quash certiorari *Citizens' Sec. Bank of Englewood v. Gatewood*, App., 36 S.W.2d 426—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S.W. 967.

75. Cal.—*Mash v. Superior Court of California in and for City and County of San Francisco*, 219 P. 742, 192 Cal. 258.

La.—*Dunkelberg Farms v. Mayes*, 129 So. 372, 170 La. 861.

Mo.—*State ex rel. Ball v. State Board of Health*, 26 S.W.2d 773, 325 Mo. 41.

If nothing appears to the contrary it will be presumed that the return is complete,⁷⁶ and every intendment will be made in its favor,⁷⁷ but there is no presumption that the entire record is shown by an abstract which does not purport to contain the

entire record.⁷⁸

Every lawful intendment will also be made in favor of the determination⁷⁹ and the regularity of the proceedings below,⁸⁰ or of waiver of irregularity

Tex.—Lanning v. Yarbrough, Civ. App., 35 S.W.2d 211.

Wash.—State ex rel. National Surety Co. v. Superior Court of King County, 41 P.2d 133, 180 Wash. 587.

11 C.J. p 208 note 8.

Assumption of fact

Where the court of appeals, in an opinion under review, assumed that defendant was a fraternal benefit association without making an express finding to that effect, the supreme court can adopt the same assumption.—State ex rel. National Council of Knights and Ladies of Security v. Trimble, 239 S.W. 467, 292 Mo. 371.

Existence of ordinance

On certiorari to review resolution abolishing office of borough recorder appointed by resolution, it cannot be assumed in absence of proof that there is an ordinance providing for recorder's appointment or defining his duties.—Grippio v. Mayor and Council of Kenilworth, 171 A. 494, 12 N.J.Misc. 335.

76. Mo.—State v. Ellison, 182 S.W. 996, 266 Mo. 604.

11 C.J. p 208 note 9.

All material evidence contained in answer

Where application for writ does not state all material evidence on point as to which evidence is claimed to be insufficient to warrant conclusion, as required by Supreme Court Rules, rule 26 subd 4, and petitioner files no reply to answer purporting to supply much omitted evidence, Supreme Court may assume that all material evidence on such point is contained in answer.—City of San Bernardino v. Industrial Accident Commission, 227 P. 924, 67 Cal.App. 612.

Facts on issue

Where the inferior court did not state conclusion, but undertook to state facts themselves, presumption prevailed that facts stated were all facts on issue.—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, affirmed 46 S.W. 2d 268, 226 Mo.App. 752.

On certiorari to quash opinion of court of appeals, the supreme court must assume opinion correctly states nature of case, contents of petition, and relief sought.—State ex rel. Kilkenny v. Daues, Mo., 289 S.W. 550, quashing certiorari Kilkenny v. Kil-

kenny, 279 S.W. 184, 220 Mo.App. 535.

77. N.J.—Gory v. Jackson, 74 A. 658, 76 N.J.Law 387—Brown v. Board of Fire and Police Com'rs of City of Paterson, 169 A. 661, 11 N.J.Misc. 943.

78. Iowa.—La Forge v. Cooter, 264 N.W. 268, 220 Iowa 1258.

79. Cal.—Brune v. Superior Court in and for City and County of San Francisco, 297 P. 566, 113 Cal. App. 21.

Iowa.—La Forge v. Cooter, 264 N.W. 268, 220 Iowa 1258.

Mo.—State ex rel. Tunget v. Shain, 101 S.W.2d 1—State ex rel. Shartel v. Skinker, 25 S.W.2d 472, 324 Mo. 955—State ex rel. Kilkenny v. Daues, 289 S.W. 550, quashing certiorari Kilkenny v. Kilkenny, 279 S.W. 184, 220 Mo.App. 535—State ex rel. Schaffer v. Allen, 253 S.W. 768, 28 A.L.R. 1270—School Dist. Nos. 18, 19, 29, 30, Webster County v. Yates, 142 N.W. 791, 161 Mo.App. 107.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 19 P.2d 220, 93 Mont. 439.

N.J.—Massachusetts Protective Ass'n v. Freund, 181 A. 905, 116 N.J.Law 65.

11 C.J. p 208 note 10.

Official decision of mayor

On certiorari to review mayor's revocation of license, presumption is that official decision is correct.—State v. City of Milwaukee, 240 N.W. 847, 207 Wis. 199, 79 A.L.R. 281.

Refusal to direct verdict

In passing upon the action of trial judge in refusing to grant directed verdict for plaintiff, court must take that view of the evidence most favorable to the denial.—Kerr v. Raines, 256 S.W. 246, 148 Tenn. 501.

Removal of default

The reviewing court must presume that the lower court removed a default only upon a showing of a sufficient legal cause therefor.—Dimond v. Marwell, R.I., 190 A. 683.

80. Ala.—Ex parte E. C. Payne Lumber Co., 87 So. 876, 205 Ala. 259, conformed to Simpson v. E. C. Payne Lumber Co., 87 So. 876, 17 Ala.App. 665.

Cal.—Traders' Credit Corporation v. Superior Court in and for Alameda County, 296 P. 99, 111 Cal.App. 663.

Mo.—State ex rel. Shartel v. Skinker, 25 S.W.2d 472, 324 Mo. 955.

Pa.—Lamparter v. Conestoga Transportation Co., 28 Pa.Dist. & Co. 635, 45 Lanc.L.Rev. 342.

Tenn.—Hardcastle v. National Clothing Co., 191 S.W. 524, 137 Tenn. 64.

11 C.J. p 208 note 11.

As to motion being kept alive

Where motion for new trial was granted more than twenty days after entry of judgment, silent acquiescence of plaintiff in such an order and subsequent stipulations by plaintiff with adversary party that case be tried on a day certain would authorize the assumption in the supreme court that the motion for a new trial was kept alive by stipulation or court order, motion for new trial having been made before the expiration of the twenty days.—Miller v. Superior Court of Mohave County, 185 P. 357, 21 Ariz. 61.

As to regularity and sufficiency of instructions

Where answer of trial judge set up that requested charge was covered by general charge, superior court, and appellate court on bill of exceptions from its judgment, must assume that requested charge was sufficiently covered by other instructions.—J. J. Bull & Son v. Carpenter, 124 S.E. 381, 32 Ga.App. 637.

Presentation of issue

(1) Where appellate court's opinion reviewed for conflict in decisions did not state pleadings or issues, it will be presumed that contested issue was properly presented.—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 20 S.W.2d 46, 323 Mo. 458, denying quashal of opinion and judgment Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 20 S.W. 2d 299, 224 Mo.App. 371.

(2) The supreme court, in reviewing opinion of court of appeals, will assume, in absence of contrary showing, that trial court, in submitting issues of negligence to jury, submitted them as specifically as they are alleged in the petition.—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597.

Service of petition

Filing of answer to petition for certiorari by former magistrate raised presumption that service of petition had been duly effected, and dispensed with necessity for legal proof thereof.—Love v. Bush, '94 S. E. 626, 21 Ga.App. 436.

ties;⁸¹ and uncertainties or ambiguities in the answer or return will be construed, if reasonably possible, to sustain the verdict and judgment.⁸² Such presumption of regularity in the proceedings under the review is not confined to proceedings of courts, but is also indulged in favor of the action of municipal bodies.⁸³ It will also be presumed that evidence, if not returned, was adduced and was competent, relevant, and sufficient to warrant the determination made.⁸⁴

Presumption as to jurisdiction. Where the record is silent as to jurisdictional facts, the judgment of a court of general jurisdiction will be upheld by a presumption that the facts existed, until the contrary is shown by an exhibition of the whole record,⁸⁵ and that the court proceeded within its jurisdiction.⁸⁶ It is otherwise, however, as to inferior courts and boards.⁸⁷

Interest of petitioner. After the allowance of a

writ the status of a prosecutor as interested in the matter will be presumed in the absence of proof to the contrary.⁸⁸

§ 172. Questions of Fact

- a. In general
- b. Weight and sufficiency of evidence
- c. Examination of evidence to determine jurisdiction

a. In General

As a general rule, questions or findings of fact in the lower court are not reviewable on certiorari, although such review may be permitted by statute or local practice.

The general rule is that, in the absence of statute or local practice otherwise, questions or findings of fact, in the inferior tribunal, are not reviewable on certiorari,⁸⁹ and that evidence which is made a part of the record cannot be examined to determine

That objection was sufficiently and timely made

On certiorari to quash opinion of court of appeals, supreme court must presume, in absence of anything in such opinion to contrary, that particular contention was sufficiently and timely made before court of appeals.—*State ex rel. Missouri Mut. Ass'n v. Allen*, 78 S.W.2d 862, 336 Mo. 352, quashing, App., 60 S.W.2d 402.

81. *Ariz.*—*Miller v. Superior Court of Mohave County*, 185 P. 357, 21 *Ariz.* 61.

Silent acquiescence of plaintiff in an order, made more than twenty days after entry of judgment, granting defendant's motion for a new trial, and stipulation by plaintiff with adversary party setting a day certain for trial, would authorize the supreme court on appeal to assume that plaintiff was willing to waive, and did waive, error of court in granting such a motion after twenty days without time being extended.—*Miller v. Superior Court of Mohave County*, supra.

82. *Ga.*—*Akins v. Craig*, 158 S.E. 632, 43 Ga.App. 363—*Ralls v. Jones*, 149 S.E. 291, 40 Ga.App. 218—*Coclin v. Taylor*, 137 S.E. 852, 36 Ga.App. 577—*Reese v. Miller*, 126 S.E. 904, 33 Ga.App. 609—*Cochran v. Anderson*, 118 S.E. 450, 30 Ga. App. 427—*New Zealand Ins. Co. v. Brewer*, 116 S.E. 922, 29 Ga.App. 773.

Introduction of evidence

Statement by court, in answer to certiorari, that probation officer's reports were not incorporated in testimony should be construed to show reports were duly introduced.—*Akins*

v. Craig, 158 S.E. 632, 43 Ga.App. 363.

83. *Mo.*—*State ex rel. Ball v. State Board of Health*, 26 S.W.2d 773, 325 Mo. 41—*School Dists. Nos. 18, 19, 29, 30, Webster County, v. Yates*, 142 S.W. 791, 161 Mo.App. 107.

R.I.—*State v. Newport*, 28 A. 347, 18 R.I. 381.

Board of education

On certiorari proceedings, presumption exists that state board of education gave due consideration to all grounds of appeal to it from action of county board of education in awarding contracts for transportation of pupils.—*Hutto v. State Board of Education*, 162 S.E. 751, 165 S.C. 37.

Legality of meeting

On certiorari to review record of board of health, presumption exists under record, in the absence of evidence to contrary, that board meeting was legally convened.—*State ex rel. Ball v. State Board of Health*, 26 S.W.2d 773, 325 Mo. 41—*State ex rel. Johnson v. Clark*, 232 S.W. 1031, 288 Mo. 659.

84. *Mich.*—*Petition of State Highway Com'r*, 233 N.W. 172, 252 Mich. 116.

Mo.—*State ex rel. State Highway Commission of Missouri v. Haid*, 59 S.W.2d 1057, 332 Mo. 606, quashing certiorari *State ex rel. State Highway Commission of Missouri v. Caruthers*, App., 51 S.W.2d 126—*State ex rel. Weddle v. Trimble*, 52 S.W.2d 864, 331 Mo. 1, quashing *Weddle v. St. Joseph Ry., Light, Heat & Power Co.*, App., 47 S.W.2d 1093.

N.J.—*Greenbaum v. Higgins*, 147 A. 722, 7 N.J.Misc. 1012.

N.M.—*In re Blatt*, 67 P.2d 293, 110 A.L.R. 656.

R.I.—*Bishop v. Superior Court*, 144 A. 433, 50 R.I. 13.
11 C.J. p 208 note 13.

In the absence of findings as to its character, where the testimony is not before the court, it must be assumed that the evidence was competent, relevant, and sufficient.—*McCaughey v. Imperial Woolen Co.*, 104 A. 617, 261 Pa. 312.

85. *Iowa.*—*Main v. Ring*, 260 N.W. 859, 219 Iowa 1270.

Mo.—*State ex rel. Northwestern Nat. Ins. Co. v. Trimble*, 20 S.W.2d 46, 323 Mo. 458, denying quashal of opinion and judgment *Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 20 S.W.2d 299, 224 Mo.App. 371.

R.I.—*Colagiovanni v. District Court of Sixth Judicial Dist.*, 133 A. 1, 47 R.I. 323.

11 C.J. p 208 note 14.

86. *Cal.*—*Brune v. Superior Court in and for City and County of San Francisco*, 297 P. 566, 113 Cal.App. 21.

87. *Ill.*—*Frye v. Hunt*, 5 N.E.2d 398, 365 Ill. 32.

11 C.J. p 209 note 15.

88. *N.J.*—*Streeper v. Auditorium Kennel Club*, 180 A. 212, 13 N.J. Misc. 584—*Bergen Bus Line v. Hackensack Improvement Commission*, 132 A. 296, 4 N.J.Misc. 167.
11 C.J. p 209 note 16.

89. *Ala.*—*Hill Grocery Co. v. Ligon*, 164 So. 219, 231 Ala. 141, reversing 164 So. 216, 26 Ala.App. 584—*Blackwood v. Maryland Casualty Co.*, 150 So. 180, 227 Ala. 343, denying certiorari 150 So. 179, 25 Ala.App. 308—*Ex parte Big Four*

whether or not it justified the findings on which the decision or judgment was made;⁹⁰ nor will rulings on questions of fact, within the inferior tribunal's jurisdiction, be reviewed.⁹¹ A finding or

decision of the inferior tribunal, within its jurisdiction, on facts supported by competent and substantial evidence, is binding on the reviewing court and will not be reviewed by it,⁹² particularly where

Coal Mining Co., 104 So. 764, 213 Ala. 305.
Ark.—Martin v. Hargrove, 232 S.W. 596, 149 Ark. 383.
Cal.—People ex rel. McGroarty v. City of Los Angeles, 50 P.2d 101, 9 Cal.App.2d 431—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 93, 65 Cal.App. 790—Paddon v. Superior Court of California, in and for City and County of San Francisco, 223 P. 91, 65 Cal. App. 34.
Fla.—Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 111 Fla. 556.
Ga.—Bell v. Macon Finance Co., 155 S.E. 493, 42 Ga.App. 258.
Ill.—Lowe v. Huckins, 190 N.E. 683, 356 Ill. 360—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195—Frey v. City of Chicago, 162 N.E. 139, 330 Ill. 640, reversing 246 Ill.App. 172—Richardson v. Riley, 162 N.E. 123, 331 Ill. 49.
Iowa.—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 883—Adams v. Smith, 250 N.W. 466, 216 Iowa 1365—Dickey v. Civil Service Commission, 205 N.W. 961, 201 Iowa 1135—Ebert v. Short, 201 N.W. 793, 199 Iowa 147.
La.—Llorens v. McCann, 175 So. 442, 187 La. 642, reversing, App., 171 So. 481—Simpson v. First Nat. Life Ins. Co., 167 So. 178, 184 La. 649—Decoy v. First Nat. Life Ins. Co., 167 So. 172, 184 La. 632—Baumgarden v. Aiken, 99 So. 870, 155 La. 1058—Francez v. Francez, 94 So. 203, 152 La. 666.
Mass.—Walsh v. Justice of Dist. Ct. of Springfield, 9 N.E.2d 555—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477—Blankenburg v. Commonwealth, 157 N.E. 693, 260 Mass. 369—Commissioner of Public Works of City of Quincy v. Judge of District Court of East Norfolk, 155 N.E. 431, 258 Mass. 444—Bradley v. Board of Zoning Adjustment of City of Boston, 150 N.E. 892, 255 Mass. 160—Coolidge v. Bruce, 144 N.E. 397, 249 Mass. 465—Inhabitants of Town of Westport v. County Com'rs of Bristol County, 141 N.E. 591, 246 Mass. 556.
Mich.—In re School Dist. No. 6, Paris and Wyoming Tps., Kent County, 278 N.W. 792, 284 Mich. 132—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266

Mich. 123—In re Brewer, 231 N.W. 89, 250 Mich. 450, affirming 228 N.W. 762, 250 Mich. 450—Partch v. Baird, 199 N.W. 692, 227 Mich. 660, affirmed 203 N.W. 405, 230 Mich. 615—People v. Swanson, 185 N.W. 844, 217 Mich. 103.
Minn.—State v. Canfield, 208 N.W. 181, 166 Minn. 414.
Mo.—State ex rel. Shartel v. Skinner, 25 S.W.2d 472, 324 Mo. 955.
N.J.—Clarke v. Lubin, 133 A. 405, 4 N.J.Misc. 518.
N.Y.—Jones v. Loughman, 288 N.Y.S. 44, 247 App.Div. 416—People ex rel. Berg v. Board of Education of City of Utica, 210 N.Y.S. 686, 213 App.Div. 357.
N.D.—Peterson v. Points, 275 N.W. 367—Lincoln Addition Improvement Co. v. Lenhart, 195 N.W. 33, 50 N.D. 25—Baker v. Lenhart, 195 N.W. 16, 50 N.D. 30.
Pa.—In re Incorporation of Elkland Leather Workers' Ass'n, 198 A. 13—In re Dorrance's Estate, 163 A. 303, 309 Pa. 151, certiorari denied Dorrance v. Commonwealth of Pennsylvania, 53 S.Ct. 222, 287 U.S. 660, 77 L.Ed. 570, and affirmed In re Dorrance's Estate, 172 A. 900.
R.I.—Di Iorio v. Easton, 167 A. 137, 53 R.I. 429—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344—Baur v. Town Council of Narragansett, 99 A. 11, 39 R.I. 500.
S.C.—McKnight v. Smith, 189 S.E. 361, 182 S.C. 373—Smith v. Saye, 125 S.E. 269, 130 S.C. 20.
Utah.—Pincok v. Kimball, 228 P. 221, 64 Utah 4.
11 C.J. p 203 note 65.

A constitutional provision giving the supreme court revisory and appellate jurisdiction to review the proceedings of inferior tribunals, which by its terms provides only for a review of questions of law and equity, does not authorize a review of findings of fact on certiorari.—Sylvestre v. Board of Aldermen of City of Woonsocket, 111 A. 381, 43 R.I. 492.

Where case was tried de novo in city court and, on appeal, in court of appeal, and testimony was not reduced in either court, and statement of facts was not agreed on and filed in record, question of fact could not be determined by Supreme Court.—Decoy v. First Nat. Life Ins. Co., 167 So. 172, 184 La. 632.

90. Ala.—Kelly v. State, 176 So. 807, reversing 176 So. 806, 27 Ala. App. 584—Wunderlich v. Southern Const. Co., 174 So. 318, 234 Ala.

178, denying certiorari 174 So. 317, 27 Ala.App. 458.
Ill.—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269.
11 C.J. p 203 note 66.

Evidence not objected to for incompetency

R.I.—Bishop v. Superior Court, 144 A. 433, 50 R.I. 13.

Counsel fees

An allowance for counsel fees in actions of partition being warranted by statute, the supreme court cannot, on certiorari, inquire whether the amount allowed is excessive, where it is not permitted to pass on the evidence inducing the action of the lower court because the facts were not brought up by writ of error.—Laird v. Walkinshaw, Pa., 15 A. 398.

91. R.I.—Coggeshall v. Harbor Commission, 146 A. 482, 50 R.I. 175.

Review of rulings on:

Burden of proof see supra § 151 c.
Evidence see supra § 151 c.

Abuse of power

In certiorari proceedings, superior court's duty is to ascertain whether there has been a palpable abuse of power to determine controverted facts.—City of Jacksonville Beach v. Waybright, Fla., 178 So. 401.

92. Ala.—Hill Grocery Co. v. Ligon, 164 So. 219, 231 Ala. 141, reversing 164 So. 216, 26 Ala.App. 584—Reichert Milling Co. v. George, 162 So. 402, 230 Ala. 589, denying certiorari 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3—Birmingham Clay Products Co. v. White, 145 So. 663, 226 Ala. 89—Armour & Co. v. White, 128 So. 119, 23 Ala.App. 515.

Cal.—Garvin v. Chambers, 232 P. 696, 195 Cal. 212—Fuller v. Board of Medical Examiners, 59 P.2d 171, 14 Cal.App.2d 734—Los Angeles County v. Industrial Accident Commission, 56 P.2d 577, 13 Cal.App. 2d 69—Karz v. Department of Professional and Vocational Standards, 54 P.2d 35, 11 Cal.App.2d 554.

Ill.—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269.

Mich.—Steele v. Sexton, 234 N.W. 436, 253 Mich. 32.

Nev.—Covington v. Second Judicial Dist. Court in and for Washoe County, 50 P.2d 517, 56 Nev. 313.

N.J.—Massachusetts Protective Ass'n v. Freund, 181 A. 905, 116 N.J.Law 65—Hudson Taxi Co. v. Niedzwicki, 130 A. 647, 3 N.J.Misc. 1111.

R.I.—Budlong v. District Court of Sixth Judicial Dist., 132 A. 613, 47 R.I. 232—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

the finding or decision has been concurred in by the trial court and an intermediate appellate court,⁹³ or where it is against a party who does not bring certiorari.⁹⁴

In accordance with the general rule, the reviewing court cannot review and correct a mistake of fact, or an erroneous conclusion from the facts, made by the inferior court,⁹⁵ unless palpable error has been committed,⁹⁶ as where an erroneous rule of law was observed in making the finding,⁹⁷ or there was serious misconduct involved in the find-

ing, and material injury resulted to the petitioner therefrom.⁹⁸ Findings of fact may be considered, however, so far as they concern fundamental questions,⁹⁹ such as whether they were sufficient to sustain the lower court's action.¹

Under the local practice, in some states, on certiorari to an appellate court, the supreme court will accept the findings or conclusions of fact made by the appellate court, from the evidence stated in its opinion, and will not review disputed questions or conclusions of fact,² or the application of the

Tenn.—Bray v. Blue Ridge Lumber Co., 289 S.W. 504, 154 Tenn. 342.
Tex.—Mathews v. Autry, Civ.App., 65 S.W.2d 798.
11 C.J. p 204 note 71.

Commissioner's finding as to reasonable value of wharfage, supported by evidence and confirmed by court, should not be disturbed.—New York Dock Co. v. The Poznan, N.Y., 47 S.Ct. 482, 274 U.S. 117, 71 L.Ed. 955, reversing, C.C.A., The Poznan, 9 F.2d 338, which reversed, D.C., 297 F. 345, certiorari granted New York Dock Co. v. Steamship Poznan, 46 S.Ct. 106, 269 U.S. 547, 70 L.Ed. 405.

Jury's verdict, supported by material evidence and approved by trial judge, is conclusive of facts on certiorari.—Provident Life & Accident Ins. Co. v. Rimmer, 12 S.W.2d 365, 157 Tenn. 597.

93. U.S.—Boehmer v. Pennsylvania R. Co., N.Y., 40 S.Ct. 409, 252 U.S. 496, 64 L.Ed. 680, certiorari granted 39 S.Ct. 10, 248 U.S. 554, 63 L.Ed. 419, affirming 252 F. 553, 165 C.C.A. 3.

Ill.—Barnett v. Caldwell Furniture Co., 115 N.E. 389, 277 Ill. 286.

Tenn.—Potts v. Coffman, 240 S.W. 783, 146 Tenn. 282—Allen v. Effer, 235 S.W. 67, 144 Tenn. 685.
11 C.J. p 204 note 71 [a].

Conclusion by two independent tribunals who examined facts and heard testimony should not be lightly disturbed, when amply supported by testimony.—Adam Black & Sons v. Court of Common Pleas, Hudson County, 150 A. 672, 8 N.J.Misc. 442.

Concurrent findings of chancellor and court of appeals as to controverted facts are binding on supreme court.—Hutsell v. Citizens' Nat. Bank, 64 S.W.2d 188, 166 Tenn. 598.

94. Tenn.—Tennessee Roofing & Tile Co. v. Ely, 21 S.W.2d 398, 159 Tenn. 628.

95. Colo.—State Board of Medical Examiners v. Spears, 247 P. 563, 79 Colo. 588, 54 A.L.R. 1498, error dismissed Spears v. State Board of Medical Examiners of State of Colorado, 48 S.Ct. 158, 275 U.S. 508, 72 L.Ed. 398, 719.

Ill.—Feingold v. Feingold, 177 N.E. 381, 345 Ill. 203.

Minn.—In re Judicial Ditch No. 2, Houston County, 204 N.W. 318, 163 Minn. 383.

Okl.—Coon v. Robinett, 274 P. 669, 135 Okl. 114.

Pa.—In re Dorrance's Estate, 163 A. 303, 309 Pa. 151, certiorari denied Dorrance v. Commonwealth of Pennsylvania, 53 S.Ct. 222, 287 U.S. 660, 77 L.Ed. 570, and affirmed In re Dorrance's Estate, 172 A. 900.

Whether there was mistake in order of court was question of fact to be determined by trial court, and will not be interfered with on appeal or certiorari, in absence of showing to contrary in record.—In re Judicial Ditch No. 2, Houston County, 204 N.W. 318, 163 Minn. 383.

96. Ill.—Feingold v. Feingold, 177 N.E. 381, 345 Ill. 203.

97. Fla.—Western Union Telegraph Co. v. Michel, 163 So. 86, 120 Fla. 511—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

98. Fla.—Western Union Telegraph Co. v. Michel, 163 So. 86, 120 Fla. 511—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

99. Pa.—Appeal of Walker, 144 A. 288, 294 Pa. 385.

1. Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 269 P. 595, 46 Idaho 642.

2. Ala.—Kugle v. Harpe, 176 So. 617, 234 Ala. 494, remanding cause 176 So. 616, 27 Ala.App. 566—Wunderlich v. Southern Const. Co., 174 So. 318, 234 Ala. 178, denying certiorari 174 So. 317, 27 Ala.App. 458—Wilson v. Cowart, 167 So. 604, 232 Ala. 170, denying certiorari, App., 167 So. 602—Payne v. Boutwell, 164 So. 755, 231 Ala. 311,

denying certiorari 164 So. 753, 26 Ala.App. 573—Reichert Milling Co. v. George, 162 So. 402, 230 Ala. 589, denying certiorari, App., 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3—Mobile Pure Milk Co. v. Cloeman, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402—Ex parte Hale, 142 So. 589, 225 Ala. 267, denying certiorari Hale v. Southern Ry. Co., 142 So. 587, 25 Ala.App. 111—Brotherhood Ins. Co. v. Harris, 138 So. 295, 224 Ala. 28, denying certiorari 138 So. 292, 24 Ala.App. 395—Tucker v. State, 129 So. 291, first case, 221 Ala. 412, denying certiorari 129 So. 291, second case, 23 Ala.App. 542—Fairbanks Morse & Co. v. Dees, 126 So. 621, 220 Ala. 694, denying certiorari 126 So. 622, 23 Ala.App. 326, second certiorari denied 126 So. 621, 220 Ala. 604—Frick Co. v. Monroe, 123 So. 262, 220 Ala. 1, denying certiorari and correcting opinion 123 So. 260, 23 Ala.App. 244—Wood v. Hacker, 121 So. 441, 219 Ala. 139, denying certiorari 121 So. 437, 23 Ala.App. 12—Douglass v. Orman, 119 So. 605, 218 Ala. 563, denying certiorari 119 So. 601, 22 Ala.App. 518—Rochester-Hall Drug Co. v. Bowden, 118 So. 674, 218 Ala. 242, reversing 118 So. 671, 22 Ala.App. 624—Boien Bros. v. Miller, 117 So. 462, 218 Ala. 12, denying certiorari 116 So. 508, 22 Ala.App. 476—Thomasson v. State, 110 So. 564, 215 Ala. 315, denying certiorari, 110 So. 563, 21 Ala.App. 562—Ex parte State ex rel. Attorney General, 110 So. 475, 215 Ala. 299, denying certiorari Perkins v. State, 110 So. 474, 21 Ala.App. 576—Seaboard Air Line Ry. Co. v. Savage, 108 So. 620, 214 Ala. 639, denying certiorari 108 So. 619, 21 Ala.App. 338—Ex parte Towle, 106 So. 60, 213 Ala. 129, granting certiorari Cleveland v. State, 106 So. 58, 21 Ala.App. 161—Ex parte Patt, 89 So. 432, 206 Ala. 196, denying certiorari Patt v. Welsch, 89 So. 94, 18 Ala.App. 82—Ex parte E. C. Payne Lumber Co., 87 So. 876, 205 Ala. 259, conforming to Simpson v. E. C. Payne Lumber Co., 87 So. 876, 17 Ala.App.

facts to the law;³ but it will review the rulings of the appellate court to ascertain whether it has correctly determined the legal conclusions from the facts found by it and stated in its opinion, or has properly applied the law to such facts, on the theory that this presents a question of law.⁴

On certiorari to review and quash the opinion of a court of appeals as being in conflict with previous decisions of the supreme court, the supreme court, in determining the question of conflict, is bound by the conclusion of the court of appeals as to the facts,⁵ but is not bound by that court's con-

665—Petition of Locascio, 87 So. 704, 205 Ala. 86, denying certiorari Locascio v. Barber, 87 So. 703, 17 Ala.App. 595—Ex parte Commonwealth Life Ins. Co. of Louisville, Ky., 86 So. 522, 204 Ala. 560, denying certiorari Commonwealth Life Ins. Co. of Louisville, Ky., v. Roy, 86 So. 520, 17 Ala.App. 434—Ex parte Bennett, 86 So. 109, 204 Ala. 390, denying certiorari Tannehill v. Bennett, 86 So. 108, 17 Ala.App. 315—Ex parte Gray, 86 So. 96, 204 Ala. 358, denying certiorari Gray v. Burdette, 86 So. 95, 17 Ala.App. 432—Ex parte McNeil, 85 So. 569, 204 Ala. 81, granting certiorari North Alabama Traction Co. v. McNeil, 85 So. 568, 17 Ala.App. 317—Ex parte Central of Georgia Ry. Co., 82 So. 345, 203 Ala. 248, denying certiorari Central of Georgia Ry. Co. v. Faust, 82 So. 36, 17 Ala. App. 96—Ex parte Brilliant Coal Co., 82 So. 161, 203 Ala. 131, denying certiorari Brilliant Coal Co. v. Sparks, 81 So. 185, 16 Ala.App. 665—Ex parte Shelby, 81 So. 567, 202 Ala. 625—Morgagne v. State, 77 So. 322, 200 Ala. 689, L.R.A.1918E 948, reversing 74 So. 862, 16 Ala.App. 26—Ex parte Addington, 76 So. 6, 200 Ala. 414.

As based on evidence

Supreme court will not review court of appeals on its finding of facts, either as to tendencies of evidence or upon effect of evidence in considering giving or refusing of affirmative charge by trial court, or weight of evidence on review of ruling on motion for new trial.—Mobile Pure Milk Co. v. Coleman, 161 So. 829, 230 Ala. 432, denying certiorari 161 So. 826, 26 Ala.App. 402.

As question for jury

The court of appeal's determination that a question of fact was for the jury under the evidence, and that the trial court did not err in refusing the general affirmative charge for defendant on such question, is not reviewable by the supreme court on certiorari.—Ex parte Sovereign Camp, W. O. W., 87 So. 620, 205 Ala. 316, denying certiorari Sovereign Camp W. O. W. v. Dennis, 87 So. 616, 17 Ala.App. 642.

"Facts of the case," with which supreme court will deal in case brought from court of appeal by writ of review, are facts that were proved or admitted, not deductions or conclusions as to duty of parties, or negligence.—Llorens v. McCann,

175 So. 442, 187 La. 642, reversing, App., 171 So. 481.

Inferences from facts

(1) On certiorari supreme court will not review court of appeals with respect to its inferences from proved facts, unless those facts raise presumption of law, which is not given that effect by that court.—Reichert Milling Co. v. George, 162 So. 402, 230 Ala. 589, denying certiorari 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3.

(2) The fact that the court of appeals, in affirming the judgment of the trial court, required a remittitur is not a concession that the verdict was the result of passion and prejudice.—State ex rel. Blando v. Haid, Mo., 60 S.W.2d 38, quashing certiorari Vitale v. Blando, App., 52 S.W. 2d 24.

Litigant's only remedy to correct fact findings which are against the weight of the evidence or which do not sufficiently state the facts is a resort to the court of appeals for a correction of its findings.—Payne v. Boutwell, 164 So. 755, 231 Ala. 311, denying certiorari 164 So. 753, 26 Ala.App. 573.

Rebuttal of presumption

Finding of court of appeals that evidence was sufficient to rebut presumption of negligence of manufacturer of sack of flour bought for ultimate consumer is conclusive on certiorari, since finding was a conclusion of fact from evidence and not assertion of a legal principle or its application to facts.—Reichert Milling Co. v. George, 162 So. 402, 230 Ala. 589, denying certiorari 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3.

3. Ala.—Rochester-Hall Drug Co. v. Bowden, 118 So. 674, 218 Ala. 242, reversing 118 So. 671, 22 Ala.App. 624—Ex parte Commonwealth Life Ins. Co. of Louisville, Ky., 86 So. 522, 204 Ala. 560, denying certiorari Commonwealth Life Ins. Co. of Louisville, Ky., v. Roy, 86 So. 520, 17 Ala.App. 434.

4. Ala.—Cranford v. National Surety Corporation, 166 So. 721, 231 Ala. 636, reversing, App., 168 So. 719—Payne v. Boutwell, 164 So. 755, 231 Ala. 311, denying certiorari 164 So. 753, 26 Ala.App. 573—Reichert Milling Co. v. George, 162 So. 393, 230 Ala. 3, conformed to 162 So. 383, 26 Ala.App. 417, certiorari denied 162 So. 402, 230 Ala.

589—Craft v. Standard Accident Ins. Co., 123 So. 271, 220 Ala. 6, granting certiorari 123 So. 265, 23 Ala.App. 246—Frick Co. v. Monroe, 123 So. 262, 220 Ala. 1, denying certiorari and correcting opinion 123 So. 260, 23 Ala. 244—Rochester-Hall Drug Co. v. Bowden, 118 So. 674, 218 Ala. 242, reversing 118 So. 671, 22 Ala.App. 624.

Contrary earlier cases.—Ex parte Gray, 86 So. 96, 204 Ala. 358, denying certiorari Gray v. Burdette, 86 So. 95, 17 Ala.App. 432—Ex parte Barrett Bros. Shipping Co., 72 So. 259, 196 Ala. 655—Ex parte Stevenson, 53 So. 992, 177 Ala. 384.

5. Mo.—State ex rel. Golloday v. Shain, 110 S.W.2d 719, quashing Myers v. Golloday, App., 104 S.W. 2d 1007—State ex rel. Hoyt v. Shain, 93 S.W.2d 992, 338 Mo. 1208, quashing in part Lampton Realty Co. v. Hoyt, App., 80 S.W.2d 249, conformed to 99 S.W.2d 145—State ex rel. Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76, quashing certiorari Blackwill v. Franke, App., 49 S.W.2d 211—State ex rel. Sei v. Haid, 61 S.W.2d 950, quashing certiorari Sei v. A. Guthrie & Co., App., 50 S.W.2d 664—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W. 2d 806, 323 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, affirmed 46 S.W.2d 268, 226 Mo. App. 752—State ex rel. Arndt v. Cox, 38 S.W.2d 1079, 327 Mo. 790, quashing certiorari, Arndt v. Frye, App., 20 S.W.2d 920—State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, quashing opinion Dean v. Dean, App., 1 S.W.2d 235, and opinion conformed to 15 S.W.2d 1116—State ex rel. Al. G. Barnes Amusement Co. v. Trimble, 300 S.W. 1064, 318 Mo. 274—State ex rel. Locke v. Trimble, 298 S.W. 782—State ex rel. Kilkenny v. Daues, 289 S.W. 550, quashing certiorari Kilkenny v. Kilkenny, 279 S.W. 184, 220 Mo. App. 535—State ex rel. Koenen v. Daues, 288 S.W. 14, quashing certiorari Koenen v. Terminal Railroad Ass'n, App., 280 S.W. 73—State ex rel. Chicago & A. R. Co. v. Allen, 236 S.W. 868, 291 Mo. 206, quashing certiorari Wagner v. Chicago & A. R. Co., 232 S.W. 771, 209

clusion reached by applying the law to the facts, where it had reached a different conclusion in applying the law to a similar state of facts.⁶

Findings based on personal knowledge and inspection. The rule that the findings of fact will not be reviewed applies with peculiar force where the findings are based, either in whole or in part, on personal knowledge and inspection.⁷

As authorized by constitutional or statutory provision. In some states, by virtue of constitutional or statutory provisions, the reviewing court may review the evidence and inquire into matters of fact.⁸ Such statutes either are applicable to certiorari in general or are special in their application and provide that the powers of the court as to the extent of the review shall be enlarged when the writ is sued out from or to certain courts or in special designated cases,⁹ such as in equity cases.¹⁰ The usual purport of such statutes is that the court shall, without regarding technical omissions, imperfections, or defects which did not affect the merits, determine disputed questions of fact as well as of law, or that the court shall inquire whether there was any competent proof of all the facts necessary to be proved, and dispose of the case as law and justice may require.¹¹ Furthermore, as has been held, where a finding of fact is simply a

deduction from other facts reported for review, and the ultimate fact in question is purely the result of reasoning, the reviewing court may judge of its correctness and draw its own conclusions from the facts reported.¹² It has been held, however, that a statute authorizing the court to enter such judgment as the court below should have rendered, or to make such order, judgment, or decree as law and justice require, does not enlarge the authority of the court so as to enable it to review the evidence.¹³

b. Weight and Sufficiency of Evidence

- (1) General rule
- (2) Limitation of rule

(1) General Rule

As a general rule, the weight and sufficiency of the evidence as to the facts on which the lower court's decision or finding was based, will not be reviewed.

Where no jurisdictional fact is in dispute, the review on certiorari, as a general rule, does not extend to the consideration of the probative force of conflicting testimony, and, therefore, where there is some evidence, the weight and sufficiency thereof as to the facts on which the determination below was based, ordinarily, will not be considered.¹⁴ In any event the weight and sufficiency of the evi-

Mo.App. 121—State ex rel. Commonwealth Trust Co. v. Reynolds, 213 S.W. 804, 278 Mo. 695.

Supreme court cannot substitute its own judgment on the facts for that of court of appeals, but is concerned only with conflict between opinion of court of appeals and opinions of supreme court.—State ex rel. Sei v. Haid, 61 S.W.2d 950, 332 Mo. 1061, quashing certiorari Sei v. A. Guthrie & Co., App., 50 S.W.2d 664.

6. Mo.—State ex rel. Golloday v. Shain, 110 S.W.2d 719, quashing, Myers v. Golloday, App., 104 S.W.2d 1007.

7. Iowa.—Jordan v. Hayne, 36 Iowa 9.

N.Y.—People v. Dolge, 45 Hun 310, 12 N.Y.St. 431, affirmed 18 N.E. 483, 110 N.Y. 680—Peo. v. Morgan, 65 Barb. 473, 1 Thomps. & C. 101, reversed on other grounds 55 N.Y. 587.

8. La.—Davenport v. Adler, 26 So. 836, 52 La. Ann. 263.

W.Va.—Copley v. Trent, 188 S.E. 138.

Under a constitutional provision giving the supreme court, on certiorari, the same power and authority to review a decision of the court of appeals as if the case had been carried to the supreme court directly by appeal, the supreme court, once the writ of review is granted and the

case is brought up, has the same jurisdiction to determine as to its facts, as well as the law applicable thereto, as it would were the case directly appealable.—Davenport v. Adler, 26 So. 836, 52 La. Ann. 263.

In Pennsylvania, although the reviewing court may review evidence, it can only determine whether there has been error of law committed.—In re Incorporation of Elkland Leather Workers' Ass'n, Pa., 198 A. 13.

9. N.J.—State v. Block, 44 A. 208, 63 N.J. Law 508.
11 C.J. p 203 note 68 [a].

10. Ill.—Feingold v. Feingold, 177 N.E. 881, 345 Ill. 203.
Utah.—Benson v. Rozzelle, 39 P.2d 1113, 85 Utah 582.

In Tennessee

(1) Under a statute making the findings of the chancellor and court of appeals, to the extent that they concur, conclusive, if there is evidence to support them, on the supreme court, a review of facts in a case presented to the supreme court on certiorari is only permissible to extent that findings of the chancellor and court of appeals are contradictory.—Cooley v. East & West Ins. Co., 61 S.W.2d 656, 166 Tenn. 405—Miller v. Kendrick, 285 S.W. 51, 153 Tenn. 596.

(2) Where the chancellor's finding is not appealed from, nor concurrent finding made by court of appeals, supreme court need not read evidence to determine facts relied on.—Edington v. Kreis-Keener Shoe Co., 283 S.W. 987, 153 Tenn. 323.

In Washington, under Remington Rev.St. § 391, the supreme court will pass on a question of fact, in an action for equitable relief, only where the evidence is brought up by a statement of facts, and not by a bill of exceptions.—State ex rel. Northeast Transp. Co. v. Superior Court of King County, Wash., 77 P.2d 1012.

11. W.Va.—Copley v. Trent, 188 S.E. 138.

12. Pa.—In re Dorrance's Estate, 163 A. 303, 309 Pa. 151, certiorari denied Dorrance v. Commonwealth of Pennsylvania, 53 S.Ct. 222, 287 U.S. 660, 77 L.Ed. 570, and affirmed In re Dorrance's Estate, 172 A. 900.

13. Mass.—Farmington River Water Power Co. v. Berkshire County, 112 Mass. 206.

14. U.S.—Stringfellow v. Atlantic Coast Line R. Co., Fla., 54 S.Ct. 175, 290 U.S. 322, 78 L.Ed. 339, reversing, C.C.A., 64 F.2d 173, certiorari granted 54 S.Ct. 50, 290 U.S. 608, 78 L.Ed. 532, certiorari granted Atlantic Coast Line R. Co.

dence will not be reviewed where the reviewing court orders a new trial on another ground.¹⁵

Credibility of witnesses. In accordance with the general rule against a review of the weight and sufficiency of the evidence, the reviewing court, ordinarily, will not inquire into the credibility of the witnesses.¹⁶ It has been held, however, that the court in passing on certiorari, where questions

of fact are involved and the evidence is conflicting, may, in its discretion pass on the credibility of the witnesses.¹⁷

(2) Limitation of Rule

The evidence may be reviewed, in some states, for the purpose of ascertaining whether the lower court's finding is supported by any evidence, or whether it is clearly against the weight of the evidence.

v. Stringfellow, 54 S.Ct. 52, 290 U. S. 608, 78 L.Ed. 532.
 Ala.—Wunderlich v. Southern Const. Co., 174 So. 318, 234 Ala. 178, denying certiorari 174 So. 317, 27 Ala.App. 453—Peck v. Henderson, 118 So. 262, 218 Ala. 233, denying certiorari 118 So. 258, 22 Ala.App. 541—Bolen Bros. v. Miller, 117 So. 462, 218 Ala. 232, denying certiorari 116 So. 508, 22 Ala.App. 476—New River Coal Co. v. Files, 109 So. 360, 215 Ala. 64.
 Cal.—Garvin v. Chambers, 232 P. 696, 195 Cal. 212—Fuller v. Board of Medical Examiners, 59 P.2d 171, 14 Cal.App.2d 734—Los Angeles County v. Industrial Accident Commission, 56 P.2d 577, 13 Cal. App.2d 69—Karz v. Department of Professional and Vocational Standards, 54 P.2d 35, 11 Cal.App.2d 554—Rinaldo v. Board of Medical Examiners of State of California, 42 P.2d 724, 5 Cal.App.2d 345—Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County, 37 P.2d 159, 1 Cal. App.2d 634—Horstmyer v. Trial Board of City of Sacramento, App., 69 P.2d 1021—Shepherd v. Board of Sup'rs of San Joaquin County, 30 P.2d 573, 137 Cal.App. 421—Winning v. Board of Dental Examiners, 300 P. 866, 114 Cal. App. 653—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal. App. 392.
 Fla.—Robbins Holding Co. v. Morris, 179 So. 404—City of Jacksonville Beach v. Waybright, 178 So. 401—Blue Belt Fertilizer Co. v. Pullen, 169 So. 615, 125 Fla. 164—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567—Seven Seas v. Buckholtz, 163 So. 567, 121 Fla. 205—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145—Hamway v. Seaboard Air Line Ry. Co., 136 So. 623, 101 Fla. 1483—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.
 Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378—Heppie v. Mooberry, 183 N.E. 636, 350 Ill. 641—Crocher

v. Abel, 180 N.E. 852, 348 Ill. 269—Carroll v. Houston, 173 N.E. 657, 341 Ill. 531—Hughes v. Board of Appeals of City of Chicago, 156 N. E. 350, 325 Ill. 109—Liska v. Chicago Rys. Co., 149 N.E. 469, 318 Ill. 570—Schlatter v. Triebel, 120 N.E. 289, 284 Ill. 412, affirming 208 Ill.App. 504—Hahnemann Hospital v. Industrial Board of Illinois, 118 N.E. 767, 282 Ill. 316.
 Mich.—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266 Mich. 123—McComb v. City Council of Lansing, 250 N.W. 326, 264 Mich. 609—Story & Clark Piano Co. v. Ottawa Circuit Judge, 179 N.W. 254, 212 Mich. 1—McDonald v. Hall, 159 N.W. 358, 193 Mich. 50.
 Minn.—In re Mason, 181 N.W. 570, 147 Minn. 383.
 Mo.—State ex rel. Horton v. Clark, 9 S.W.2d 635, 320 Mo. 1190.
 Nev.—Cornbleet v. Second Judicial Dist. Ct., 73 P.2d 823—Covington v. Second Judicial Dist. in and for Washoe County, 50 P.2d 517, 56 Nev. 313.
 N.J.—Central Pennsylvania Quarry Stripping & Construction Co. v. Court of Common Pleas of Hudson County, 169 A. 712, 112 N.J. Law 22—Sallmann v. Borough of North Arlington, 160 A. 33, 10 N. J. Misc. 538.
 N.D.—Peterson v. Points, 275 N.W. 367, 67 N.D. 631—State ex rel. Olson v. Welford, 260 N.W. 593, 65 N.D. 522—Lincoln Addition Improvement Co. v. Lenhart, 195 N. W. 33, 50 N.D. 25—Baker v. Lenhart, 195 N.W. 16, 17, 50 N.D. 30, citing *Corpus Juris*—Mogaard v. Robinson, 187 N.W. 142, 147, 48 N.D. 859, citing *Corpus Juris*.
 Pa.—Appeal of Walker, 144 A. 288, 294 Pa. 385—In re Mark, 176 A. 254, 115 Pa.Super. 256.
 R.I.—Hanna v. Board of Aldermen of City of Pawtucket, 173 A. 358, 54 R.I. 392—Di Iorio v. Easton, 167 A. 137, 53 R.I. 429—Browning v. Browning, 164 A. 508, 53 R.I. 112, citing *Corpus Juris*—Bishop v. Superior Court, 144 A. 433, 50 R.I. 13.
 11 C.J. p 204 note 70.
 "The writ cannot be used for the purpose of determining whether or not the evidence was sufficient, in the opinion of the reviewing court, to support the particular decision complained of, provided the inferior

tribunal or board had jurisdiction and the record discloses substantial evidence to support the decision."—Fuller v. Board of Medical Examiners, 59 P.2d 171, 175, 14 Cal.App.2d 734—Winning v. Board of Dental Examiners, 300 P. 866, 114 Cal.App. 653.

Ruling or finding on weight of evidence

(1) Ruling of court of appeals that evidence did not support replication to plea in abatement, so that verdict on affirmative charge for defendant was proper, is not reviewable by supreme court on certiorari.—Box v. Metropolitan Life Ins. Co., 168 So. 220, 232 Ala. 447, denying certiorari, 168 So. 209, 27 Ala.App. 21, reversed 168 So. 216, 232 Ala. 1, and 168 So. 217, 232 Ala. 321.

(2) Finding of court of appeals that there was sufficient evidence to take case to jury will not be reviewed by supreme court on certiorari.—Williams v. State, 133 So. 737, 222 Ala. 534, denying certiorari 133 So. 736, 24 Ala.App. 225—Russo v. State, 133 So. 926, 24 Ala.App. 680, two cases—Raley v. State, 133 So. 925, 24 Ala.App. 676.

Supreme court cannot consider transcript of evidence to pass on the preponderance of evidence as to findings of fact made by the inferior court, the record of whose proceedings is before the reviewing court.—Baur v. Town Council of Narragansett, 99 A. 11, 39 R.I. 500.

15. Ga.—Georgia Power Co. v. Puckett, 182 S.E. 384, 181 Ga. 386, reversing 179 S.E. 234, 50 Ga.App. 720, vacated 182 S.E. 623, 52 Ga. App. 127.

16. Ill.—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269.

Mich.—People v. Swanson, 185 N.W. 844, 217 Mich. 103—Carver v. Chapell, 37 N.W. 879, 70 Mich. 49.
 Minn.—In re Mason, 181 N.W. 570, 147 Minn. 383.

Nev.—Covington v. Second Judicial Dist. Court in and for Washoe County, 50 P.2d 517, 56 Nev. 313.
 N.J.—Independence v. Pompton, 9 N. J. Law 209.

17. Ga.—Brown v. Mosteller, 182 S. E. 519, 181 Ga. 457—Connally Realty Co. v. Nalley, 143 S.E. 786, 38 Ga.App. 292—Atlantic Coast Line R. Co. v. Thomas, 77 S.E. 13, 12 Ga.App. 209.

In some states, however, either by statute or the established local practice, a review of the evidence is permissible for the purpose of determining whether the finding or decision of the inferior tribunal is supported by any competent evidence or whether it is so clearly against the weight of the evidence that it would not be permitted to stand if it were the verdict of a jury,¹⁸ a review of the evidence, in such cases, being permitted on the theory, where not affected by statute, that the error or question is one of law.¹⁹ The weight and sufficiency of the evidence may also be reviewed where there is no competent evidence on which the finding or decision is based;²⁰ or where, if there is evidence, it is so inherently improbable as to constitute no evidence

at all;²¹ or where there is only evidence illegally admitted, and the conclusions of the judge are founded on such illegal evidence;²² or where the finding clearly indicates that the evidence was not duly considered, or an erroneous rule of law was applied to the evidence;²³ or where the weight of the evidence is the sole ground on which the review is rested.²⁴

In Georgia, the superior court has original discretion, where questions of fact are involved and the evidence is conflicting, in reviewing the evidence.²⁵

In New York, while earlier cases supported the general rule that the weight or sufficiency of the

18. Ala.—Paramount Coal Co. v. Williams, 108 So. 7, 214 Ala. 394.

Fla.—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

Idaho.—Vaught v. District Court of Fourth Judicial Dist. in and for Camas County, 269 P. 595, 46 Idaho 642.

Ill.—Overstreet v. Illinois Power & Light Corporation, 190 N.E. 676, 356 Ill. 378—Crocher v. Abel, 180 N.E. 852, 348 Ill. 269.

Minn.—In re Mason, 181 N.W. 570, 147 Minn. 383.

Pa.—Appeal of Walker, 144 A. 288, 294 P. 385—Sterrett v. MacLean, 143 A. 189, 293 Pa. 557—In re Mark, 176 A. 254, 115 Pa.Super. 256.

R.I.—Hanna v. Board of Aldermen of City of Pawtucket, 173 A. 358, 54 R.I. 392—Di Iorio v. Easton, 167 A. 137, 53 R.I. 429—Browning v. Browning, 164 A. 508, 53 R.I. 112—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

S.C.—McKnight v. Smith, 189 S.E. 361, 182 S.C. 378—Smith v. Saye, 125 S.E. 269, 130 S.C. 20.

Tenn.—Tennessee Roofing & Tile Co. v. Ely, 21 S.W.2d 398, 159 Tenn. 628.

11 C.J. p 204 note 73.

Under moratorium act

The scope of review on certiorari under a Moratorium Act, providing for a speedy review, to prevent a miscarriage of justice, is more comprehensive than in ordinary cases, and supreme court, under such statute, will determine whether there is any substantial competent evidence to sustain trial court's findings.—Peterson v. Points, N.D., 275 N.W. 867.

Withdrawing case from jury

An assignment that the chancellor erred in withdrawing case from jury at close of all the evidence presents the same question presented by as-

signment, on appeal in error in action at law, that trial court erred in sustaining motion for directed verdict, which presents question of law and not question of fact, and hence, on certiorari, supreme court examines all evidence in record to determine whether court of appeals properly decided such question of law.—Lincoln County Bank v. Maddox, Tenn.App., 114 S.W.2d 821.

In Michigan

The court will review the evidence only to ascertain and determine whether a total absence of testimony on a material fact leaves the findings or verdict destitute of evidential support, and not to see whether the findings or verdict are against the great weight of the evidence.—People v. Swanson, 185 N.W. 844, 217 Mich. 103—Story & Clark Piano Co. v. Ottawa Circuit Judge, 179 N.W. 254, 212 Mich. 1.

19. Ala.—Paramount Coal Co. v. Williams, 108 So. 7, 214 Ala. 394. La.—C. H. Rice & Son v. Payne, 92 So. 395, 151 La. 949.

Minn.—State v. Buckham, 121 N.W. 217, 108 Minn. 8.

Pa.—In re Incorporation of Elkland Leather Workers' Ass'n, 198 A. 13.

R.I.—Hanna v. Board of Aldermen of City of Pawtucket, 173 A. 358, 54 R.I. 392—Fainardi v. Dunn, 128 A. 207, 46 R.I. 344.

S.C.—State v. State Canvassers, 68 S.E. 676, 86 S.C. 451.

Tenn.—Lincoln County Bank v. Maddox, App., 114 S.W.2d 821—Ray v. Crain, 80 S.W.2d 113, 18 Tenn.App. 603.

Review of questions of law in general see supra § 151.

20. Cal.—Rinaldo v. Board of Medical Examiners of State of California, 42 P.2d 724, 5 Cal.App.2d 345. N.J.—Somers v. Wescoat, 49 A. 462, 66 N.J.Law 551.

Tenn.—Ray v. Crain, 80 S.W.2d 113, 18 Tenn.App. 603.

21. Cal.—Winning v. Board of Den-

tal Examiners, 300 P. 866, 114 Cal. App. 658.

22. N.J.—Somers v. Wescoat, 49 A. 462, 66 N.J.Law 551.

23. Fla.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567—Western Union Telegraph Co. v. Michel, 163 So. 86, 120 Fla. 511—American Ry. Exp. Co. v. Fegenbush, 144 So. 320, 107 Fla. 145—Medlin-Peacock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 384, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 93 So. 740, 84 Fla. 264.

Before supreme court, can look into sufficiency of evidence, there must be some showing that circuit court enforced wrong view of law in reviewing case on evidence and that it applied such wrong rule of law to its own appellate consideration and weighing of evidence and that case is one where legal sufficiency of evidence to warrant particular judgment appealed from was appropriately raised and presented on appeal to circuit court as ground for reversal.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

24. N.J.—City of Asbury Park v. Knight, 186 A. 721, 14 N.J.Misc. 706.

25. Ga.—Brown v. Mosteller, 182 S.E. 519, 181 Ga. 457—Connally Realty Co. v. Nalley, 143 S.E. 786, 38 Ga.App. 292.

"The function of a judge of the superior court, in reviewing the evidence upon certiorari, is very similar to that which he exercises in reviewing the evidence upon a motion for a new trial. . . . It is an original discretion, and with it is coupled the right to pass upon the credibility of the witnesses."—Brown v. Mosteller, supra—Atlantic Coast Line R. Co. v. Thomas, 77 S.E. 13, 14, 12 Ga.App. 209.

evidence is not reviewable,²⁶ under the express provisions of the Civil Practice Act § 1304, the rule now is that the sufficiency of the evidence is reviewable;²⁷ but the only question to be determined, if there is any competent proof of the facts necessary to be proved, is whether there is such a preponderance of proof against the facts found that a verdict affirming the existence of such facts would be set aside by the court as against the weight of the evidence.²⁸

Necessity that all of evidence be before court. In any event, the sufficiency of evidence to support a finding cannot be reviewed unless all the evidence is before the reviewing court.²⁹

c. Examination of Evidence to Determine Jurisdiction

The sufficiency of the evidence may be reviewed in determining jurisdictional facts.

26. N.Y.—*People v. New York Fire Comrs.*, 2 N.E. 613, 100 N.Y. 82. 11 C.J. p 205 note 76.

27. N.Y.—*Jones v. Loughman*, 288 N.Y.S. 44, 247 App.Div. 416. 11 C.J. p 205 note 77.

Under Civil Service Law § 22, as amended by L.1920 c 833, the remedy of certiorari to review the removal of honorably discharged war veterans from the public service extends to the sufficiency of the evidence to justify dismissal.—*People ex rel. Davis v. Sayer*, 200 N.Y.S. 134, 205 App.Div. 562.

28. N.Y.—*Jones v. Loughman*, 288 N.Y.S. 44, 247 App.Div. 416—*People ex rel. Berg v. Board of Education of City of Utica*, 210 N.Y.S. 686, 213 App.Div. 357—*People ex rel. Delaware County v. State Tax Commission*, 172 N.Y.S. 445, 184 App.Div. 691. 11 C.J. p 205 note 78.

Determination of board of education as to amount due architect for services in submitting plans for school building is conclusive, if supported by evidence; but it may be modified or annulled by appellate division in interest of justice, if it is contrary to, or not justified by, evidence.—*People ex rel. Berg v. Board of Education of City of Utica*, 210 N.Y.S. 686, 213 App.Div. 357.

29. Mass.—*New York Cent., etc., R. Co. v. Middlesex County*, 108 N.E. 506, 220 Mass. 569. Mich.—*In re Phillips*, 117 N.W. 630, 154 Mich. 139.

N.J.—*New Jersey Produce Co. v. Gluck*, 74 A. 443, 79 N.J.Law 115.

30. Cal.—*Titcomb v. Superior Court in and for Santa Clara County*, 29 P.2d 206, 220 Cal. 34—*Hotaling v. Superior Court, City and County*

of San Francisco, 217 P. 73, 191 Cal. 501, 29 A.L.R. 127—*Miller & Lux v. Board of Sup'rs of Madera County*, 208 P. 304, 189 Cal. 254—*In re Paulsen's Estate*, 178 P. 143, 179 Cal. 528—*Rinaldo v. Board of Medical Examiners of State of California*, 42 P.2d 724, 5 Cal.App. 2d 345—*Los Angeles Bond & Securities Co. v. Superior Court in and for Los Angeles County*, 37 P. 2d 159, 1 Cal.App.2d 634—*Security-First Nat. Bank v. Board of Sup'rs of Riverside County*, 26 P.2d 862, 135 Cal.App. 208—*Mannix v. Superior Court in and for Sacramento County*, 24 P.2d 507, 133 Cal. App. 740—*Winning v. Board of Dental Examiners*, 300 P. 866, 114 Cal.App. 658—*Miller v. Superior Court in and for City and County of San Francisco*, 258 P. 614, 84 Cal.App. 605—*Miller v. Superior Court in and for Los Angeles County*, 217 P. 817, 63 Cal.App. 1.

Fla.—*Western Union Telegraph Co. v. Michel*, 163 So. 86, 120 Fla. 511—*Atlantic Coast Line R. Co. v. Florida Fine Fruit Co.*, 112 So. 66, 98 Fla. 161, 113 So. 384, 93 Fla. 161, 171—*American Ry. Express Co. v. Weatherford*, 93 So. 740, 84 Fla. 264.

Idaho.—*Mays v. District Court of Sixth Judicial Dist., in and for Butte County*, 237 P. 700, 40 Idaho 798—*Hay v. Hay*, 232 P. 895, 40 Idaho 159.

Ill.—*Crocher v. Abel*, 180 N.E. 852, 855, 348 Ill. 269, citing *Corpus Juris*—*Carroll v. Houston*, 173 N.E. 657, 341 Ill. 531—*Hahneemann Hospital v. Industrial Board of Illinois*, 118 N.E. 767, 282 Ill. 316.

N.J.—*Compton v. Compton*, 173 A. 101, 113 N.J.Law 171.

N.D.—*Peterson v. Points*, 275 N.W. 867—*Lincoln Addition Improve-*

As an exception to the general rule that the sufficiency of the evidence will not be reviewed, the sufficiency of the evidence may be inquired into in determining whether jurisdictional facts were or were not proved, or whether the lower tribunal had exceeded its jurisdiction.³⁰ This exception arises out of the most important office and function of the writ—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunals as to the sufficiency of the evidence to establish jurisdictional facts was not reviewable, certiorari would be of no avail as a remedy against an assumption of jurisdiction. For the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it may require a return to be made of the evidence on which such facts are based.³¹ Where, however, the question of jurisdiction is determined by an inferior tribunal board, or officer whose jurisdiction

ment Co. v. Lenhart, 195 N.W. 33, 50 N.D. 25—*Baker v. Lenhart*, 195 N.W. 16, 50 N.D. 30.

Pa.—*Appeal of Walker*, 144 A. 288, 294 Pa. 385—*In re Mark*, 176 A. 254, 115 Pa.Super. 256.

R.I.—*De Iorio v. Easton*, 167 A. 137, 53 R.I. 429—*Browning v. Browning*, 164 A. 508, 53 R.I. 112—*Fainardi v. Dunn*, 128 A. 207, 46 R.I. 344.

Utah.—*Board of Equalization of Kane County v. State Tax Commission of Utah*, 50 P.2d 418, 88 Utah 219, rehearing denied 54 P. 2d 1214, 88 Utah 228—*Pincock v. Kimball*, 228 P. 221, 64 Utah 4.

Sole purpose of review

On certiorari, the evidence adduced on the hearing before an inferior board or tribunal of limited jurisdiction may be brought up to the reviewing court for the sole purpose of determining whether the finding of a jurisdictional fact by such board or tribunal is sustainable by the evidence, and if there be no evidence to sustain such decision, it must be annulled.—*Garvin v. Chambers*, 232 P. 696, 195 Cal. 212.

In absence of evidence to support lower court's fact findings giving lower court jurisdiction, lower court has no jurisdiction to decide issue.—*Crocher v. Abel*, 180 N.E. 852, 348 Ill. 269.

Review as limited to matters of jurisdiction in general see *supra* § 151.

31. Cal.—*Stumpf v. San Luis Obispo County*, 63 P. 663, 131 Cal. 364, 82 Am.S.R. 350.

Ill.—*Carroll v. Houston*, 173 N.E. 657, 341 Ill. 531.

11 C.J. p 205 note 80.

Necessity for return of evidence generally see *supra* § 125.

of a proceeding is challenged on evidence aliunde the record, and on evidence justifying a conclusion for or against such jurisdiction, the court entertaining the proceedings on writ of review cannot interfere with the conclusion reached, it being the result of the exercise of a necessary discretion vested in all tribunals, boards, and officers exercising judicial functions;³² but where the evidence before the inferior tribunal does not establish jurisdictional facts, a finding of such facts does not preclude an inquiry by the reviewing court as to whether the finding is supported by the evidence.³³

§ 173. Harmless Error

Harmless errors may be disregarded on review.

Mere technical irregularities or formal errors not affecting the merits of the case and by which the complaining party was not prejudiced may be disregarded, on the review.³⁴ Thus, where a court correctly denies a motion to modify a decree, the fact that its refusal is based on wrong reasons is immaterial.³⁵

K. DETERMINATION AND DISPOSITION OF CAUSE

§ 174. In General

Unless otherwise provided, the general rule is that judgment on certiorari should be that the writ or the proceedings below be quashed or affirmed.

Unless otherwise provided, the judgment on certiorari should be that the writ or the proceedings

below be quashed, or that they be affirmed,³⁶ and a reviewing court has no power to annul, modify, or revoke any action of the inferior tribunal where it has regularly pursued its authority, no matter how erroneous the decision may be.³⁷ Also, it has been held that the reviewing court has no power to

32. Cal.—Imperial Water Co. v. Imperial County, 120 P. 780, 162 Cal. 14.

11 C.J. p 206 note 81.

33. Cal.—Security-First Nat. Bank v. Board of Sup'rs of Riverside County, 26 P.2d 862, 135 Cal.App. 208.

As to power of board

When board has power to act only on given facts, and there is no evidence to show existence of those facts, finding that facts do exist cannot foreclose inquiry by court under writ of certiorari.—Smith v. Board of Police Com'rs of City of Los Angeles, 36 P.2d 670, 1 Cal.App.2d 292.

34. Ala.—Cable-Burton Piano Co. v. Thomas, 152 So. 468, 228 Ala. 112, denying certiorari 152 So. 466, 26 Ala.App. 26.

Ga.—Bullard v. Rolader, 110 S.E. 16, 152 Ga. 369, affirming 107 S.E. 548, 26 Ga.App. 742—Peck v. Calhoun, 145 S.E. 528, 38 Ga.App. 764.

Nev.—State v. McFadden, 182 P. 745, 43 Nev. 140.

11 C.J. p 208 note 6.

In filing abstract

On certiorari to review a judgment of a court of appeals, the fact that relators filed what they called a separate abstract of the record, which was the abstract of record used in the Court of Appeals, and which was the same as the abstract made a part of return of the Court of Appeals as required, could not prejudice respondents and cannot be complained of by them.—State ex rel. Seibel v. Trimble, 253 S.W. 215, 299 Mo. 164, quashing certiorari Price v. Seibel, App., 253 S.W. 212.

Motion to strike or demur

Whether an amended plea, wholly

failing to state a permissible defense, is eliminated, on motion to strike or on demurrer, is immaterial, where both are filed.—Hodges v. Lamar, 161 So. 81, 119 Fla. 566.

Overruling demurrers

Whether the overruling of demurrers to special counts should be regarded as harmless on the theory that the evidence conclusively showed that plaintiff was entitled to recover on the common counts or on the theory that the verdict should be referred to the common counts, although the evidence was in conflict, involves an inquiry of fact which the supreme court will not make on certiorari to review a judgment of the court of appeals.—Ex parte E. C. Payne Lumber Co., 87 So. 876, 205 Ala. 259, conformed to Simpson v. E. C. Payne Lumber Co., 87 So. 876, 17 Ala.App. 665.

35. Iowa.—Lewis v. Brennan, 120 N.W. 332, 141 Iowa 585.

36. Ala.—Townes v. Malone, 116 So. 131, 217 Ala. 273.

Ark.—Bertig Bros. v. Independent Gin Co., 228 S.W. 392, 147 Ark. 581. Colo.—State Civil Service Commission of Colorado v. Cummings, 265 P. 687, 83 Colo. 379.

Fla.—Tamiami Trail Tours v. Railroad Commission, 174 So. 451, 128 Fla. 25—Bringley v. C. I. T. Corporation, 160 So. 680, 119 Fla. 529—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380—Ulsch v. Mountain City Mill Co., 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932—Florida Motor Lines v. Railroad Com'rs, 129 So. 876, 100 Fla. 538—Pick v. Adams, 123 So. 547, 98 Fla. 140—

Atlantic Shell Co. v. Welded Steel Products Co., 122 So. 787, 98 Fla. 6—American Ry. Express Co. v. Weatherford, 98 So. 820, 86 Fla. 626—First Nat. Bank v. Gibbs, 82 So. 618, 78 Fla. 118.

Ill.—Elshoff v. Murray, 235 Ill.App. 488.

Iowa.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170.

Mich.—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266 Mich. 123.

Mo.—Schmohl v. Travelers' Ins. Co., 197 S.W. 60, answering certified questions, App., 189 S.W. 597.

Tenn.—City of Knoxville v. Connors, 201 S.W. 133, 139 Tenn. 45.

11 C.J. p 209 note 28.

Giving effect to void judgment

While it is proper to dismiss a writ of certiorari whereby it was sought to review a void judgment, order of dismissal is invalid in so far as it attempted to give effect to such judgment.—Little v. McCalla, 93 S.E. 37, 20 Ga.App. 324.

Whether certiorari is proper remedy may be determined.—Morrison v. Patterson, 267 N.W. 704, 221 Iowa 883—Samek v. Taylor, 213 N.W. 801, 203 Iowa 1064—Dickson Fruit Co. v. District Court of Sac County, 213 N.W. 803, 203 Iowa 1028.

37. Cal.—Fuller v. Board of Medical Examiners, 59 P.2d 171, 14 Cal. App.2d 734—Crow v. Board of Sup'rs of Stanislaus County, 27 P. 2d 655, 135 Cal.App. 451, hearing denied, Sup., 28 P.2d 906—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

Affirmance in part or modification see infra §§ 177, 178.

enter a judgment on the merits of the controversy,³⁸ nor to direct the respondent to enter any particular order or judgment.³⁹ However, in some jurisdictions, the reviewing court has the power to enter a final judgment under some circumstances, as shown *infra* § 179.

Although a judgment of dismissal amounts practically to an affirmance, it is not strictly regular where an affirmance is intended,⁴⁰ but very respectable authorities are found to support the dismissal or quashal of the writ instead of the affirmance of the proceedings under review, and in some states the dismissal or quashal of the writ is imperative where there is no ground for the writ.⁴¹ Sometimes the court will quash the writ and affirm the proceedings,⁴² and this has been held proper practice,⁴³ but even where it is irregular such a judgment has been held not prejudicial.⁴⁴

Performance of duty of inferior tribunal

Fixing a date for submission of a proposed charter to the voters is a duty of the charter commission, which will not be performed by the supreme court on certiorari in mandamus proceedings, when passing upon the validity of prior proceedings of the commission.—*Harvey v. City Commission of City of Port Huron*, 196 N.W. 379, 225 Mich. 368.

38. Fla.—*Tamiami Trail Tours v. Railroad Commission*, 174 So. 451, 128 Fla. 25.

Dismissal of writ as final on merits

In certiorari proceedings a written finding reciting, "A re-examination of the record and of the case, is convincing that no error affirmatively appears such as requires a reversal. For that reason the writ of certiorari may be dismissed," was a final judgment on the merits.—*Hartz v. Wayne Cir. Judge*, 129 N.W. 15, 164 Mich. 35, 36.

Judgment is neither reversed nor affirmed on certiorari.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 330—*Ulsch v. Mountain City Mill Co.*, 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932.

39. Fla.—*Tamiami Trail Tours v. Railroad Commission*, 174 So. 451, 128 Fla. 25—*Ulsch v. Mountain City Mill Co.*, 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932.

Mo.—*State ex rel. Hoyt v. Shain*, 93 S.W.2d 992, 338 Mo. 1208, quashing opinion in part *Lampton Realty Co. v. Hoyt*, App., 80 S.W.2d 246, conformed to 99 S.W.2d 145—*State ex rel. Long v. Ellison*, 199 S.W. 984, 272 Mo. 571, quashing

record *Clark v. Long*, App., 196 S.W. 409—*Schmohl v. Travelers' Ins. Co.*, 197 S.W. 60, answering certified questions, App., 189 S.W. 597—*State ex rel. Lindsay v. Kansas City*, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed *State ex rel. Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20, 322 Mo. 368, 20 S.W.2d 20 (first and third case) and 20 S.W.2d 21 (three cases).

N.Y.—*Clark v. Smith*, 294 N.Y.S. 106, 250 App.Div. 233.

R.I.—*Carpenter v. Town Council of Town of Warwick*, 124 A. 100, 45 R.I. 494.

Utah.—*Sammis v. Marks*, 252 P. 270, 69 Utah 26.

Inferior tribunal adjourned

On certiorari to an inferior tribunal, the court should not enter a judgment outlining what the inferior tribunal should find, where such tribunal has adjourned.—*State v. Mullendore*, 161 P. 949, 58 Mont. 109.

Remand with directions see *infra* § 181.

40. Nev.—*State v. Washoe County*, 6 Nev. 104.

In Wisconsin

(1) In some early cases it was held reversible error to render a judgment of dismissal instead of affirming the proceedings.—*Owens v. State*, 27 Wis. 456—*Morse v. Spees*, 25 Wis. 543—*McNamara v. Spees*, 25 Wis. 539.

(2) However, in a later case it was stated that it is now well settled that, when the return to the writ shows the proceedings were with full jurisdiction and regularity, it may be quashed.—*State v. Daubner*, 87 N.W. 802, 111 Wis. 671.

Ordinarily, relief cannot be granted on entirely new grounds not presented by the applicant.⁴⁵

Treated as writ of error. In some cases a writ of certiorari improperly sued out will be treated as a writ of error and judgment entered accordingly.⁴⁶

Time of entry of judgment. In at least one jurisdiction, it is the practice in the supreme court that judgment in extraordinary and prerogative writs is entered only at such time as is specially ordered by the court.⁴⁷

§ 175. Affirmance

The writ should be dismissed or the proceedings affirmed where the reviewing court decides in favor of the respondent or where there is nothing on which the court can act.

The writ should be dismissed or the judgment affirmed where the reviewing court decides in favor of respondent,⁴⁸ as when no error appears in the

41. Ill.—*Elshoff v. Murray*, 235 Ill. App. 488.

11 C.J. p 210 note 33.

42. N.Y.—*Peo. v. Morgan*, 65 Barb. 473, reversed on other grounds 55 N.Y. 587.

43. Ark.—*Bertig Bros. v. Independent Gin Co.*, 228 S.W. 392, 147 Ark. 581.

44. Wis.—*State v. Oconomowoc*, 80 N.W. 942, 104 Wis. 622.

45. Porto Rico.—*Rio v. The Municipal Court*, 16 Porto Rico 773, 776.

"It is a questionable practice in certiorari cases generally, though possibly circumstances may exist when it would be justified, for the court to refuse the relief sought on one ground and to grant it on entirely different grounds not presented by the applicant and on which the record is silent."—*Rio v. The Municipal Court*, *supra*.

46. Mich.—*Custer Tp. v. Dawson*, 144 N.W. 862, 178 Mich. 367.

47. Mass.—*Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 160 N.E. 427, 262 Mass. 477.

48. Fla.—*American Ry. Express Co. v. Weatherford*, 98 So. 320, 86 Fla. 626.

Ga.—*Parker v. Harling*, 176 S.E. 921, 50 Ga. 50—*Adams v. Bishop*, 166 S.E. 460, 46 Ga.App. 32—*Fowler v. King*, 116 S.E. 54, 29 Ga.App. 500—*Pritchard v. Mayor and Aldermen of Savannah*, 97 S.E. 556, 23 Ga.App. 87.

Miss.—*Board of Sup'rs of Forrest County v. Melton*, 86 So. 369, 123 Miss. 615.

11 C.J. p 210 note 37.

Affirming original judgment

(1) Under Civ.Code 1910 § 5662,

record.⁴⁹ Where an inferior court failed to follow the last expressions of the court of last resort on a question, the court of last resort will sustain the opinion of the inferior court where it concludes that such court was right in so doing,⁵⁰ and dismissal of the certiorari where there was no error in the judgment complained of has been held proper notwithstanding the dismissal was based on a provision of a statute subsequently declared invalid.⁵¹ The judgment should be affirmance or dismissal of the writ where there is nothing on which the court can act;⁵² when it is impossible to pass intelligently upon the questions presented without exploring the transcript;⁵³ where no necessity exists for an examination of the questions involved;⁵⁴ where the proceedings sought to be reviewed are ended, leaving nothing to be determined;⁵⁵ where any judgment the reviewing court might make would be ineffectual⁵⁶ as to the real parties in interest;⁵⁷

where it is apparent that the inferior tribunal had jurisdiction and proceeded regularly;⁵⁸ or where the review is of the evidence and it is sufficient.⁵⁹ So judgment will be affirmed without consideration of the questions involved, where a statute enacted after the decision in the lower tribunal takes away all subject of controversy.⁶⁰ Likewise the judgment will be affirmed where the prosecutor has failed to proceed within a reasonable time after the filing of the return.⁶¹

§ 176. Reversal

The record or proceedings below will be quashed where it appears that the tribunal below was without jurisdiction or proceeded irregularly, but immaterial errors do not require a reversal or quashal.

The record, or the proceedings below, should be quashed or vacated where it appears that the tribunal below was without jurisdiction or proceeded irregularly.⁶² Thus, where the judgments in ac-

where default judgment is improperly set aside, on certiorari proper judgment is to sustain original judgment.—*Daniel v. Citizens' Loan & Guarantee Co.*, 99 S.E. 226, 23 Ga. App. 684.

(2) Where court of appeals erred in reversing judgment of circuit court, supreme court will affirm judgment of circuit court where no reversible error appears on the technical record.—*Southern Continental Telephone Co. v. Alley*, 72 S.W.2d 555, 187 Tenn. 561.

49. Ala.—*Busby v. State*, 93 So. 372, 13 Ala.App. 549, certiorari denied *Ex parte Busby*, 93 So. 922, 208 Ala. 696.

Ga.—*Gray v. Jennings*, 190 S.E. 444, 55 Ga.App. 434—*Etheridge v. Taylor*, 137 S.E. 641, 36 Ga.App. 609. Mo.—*State ex rel Hanna v. Ross*, App., 286 S.W. 726.

N.J.—*McCrosson v. Civil Service Commission of New Jersey*, 174 A. 548, 113 N.J.Law 406, affirming *McCrosson v. Civil Service Commission*, 171 A. 553, 12 N.J.Misc. 365—*Naples v. Civil Service Commission*, 171 A. 519, 12 N.J.Misc. 377, affirmed *Naples v. Civil Service Commission of New Jersey*, 174 A. 547, 113 N.J.Law 426—*Sallmenn v. Borough of North Arlington*, 160 A. 33, 10 N.J.Misc. 538.

50. Mo.—*State ex rel. Kirby v. Trimble*, 32 S.W.2d 569, 326 Mo. 675, quashing certiorari *Brady v. Kirby*, 22 S.W.2d 52, 224 Mo.App. 184—*State ex rel. Woodson v. Trimble*, 287 S.W. 626, quashing certiorari to set aside opinion and judgment *Woodson v. Leo-Greenwald Vinegar Co.*, 272 S.W. 1084, 220 Mo.App. 831—*State ex rel. Thomas v. Daues*, 283 S.W. 51, 314 Mo. 13, 45 A.L.R. 1466, affirming

Thomas v. Chicago, R. I. & P. Ry., App., 271 S.W. 862.

51. Ga.—*Bentley v. Anderson-McGriff Hardware Co.*, 188 S.E. 286, 54 Ga.App. 478, transferred 184 S.E. 297, 181 Ga. 813.

52. Ga.—*Powell v. A. J. Fowler & Son*, 129 S.E. 13, 34 Ga.App. 186—*Bailey v. Miller Hardware & Furniture Co.*, 119 S.E. 428, 30 Ga.App. 786.

Mo.—*State ex rel. Calhoun v. Reynolds*, 233 S.W. 483, 289 Mo. 506, quashing certiorari *State ex rel. Priest v. Calhoun*, 226 S.W. 329, 207 Mo.App. 149.

N.J.—*Davison v. Breslau*, 157 A. 449, 9 N.J.Misc. 1204—*New Jersey State Department of Health v. Hauser*, 157 A. 439, 9 N.J.Misc. 1202.

11 C.J. p 210 note 38.

Insufficiency of return

If the facts relied on for reversal of a judgment of the common pleas do not, on certiorari, appear in the return or in any manner entitling the supreme court to consider them, the judgment must be affirmed.—*State v. Voorhees*, N.J., 43 A. 571.

53. Ark.—*Henson v. Braden*, 1 S.W. 2d 70, 175 Ark. 1033.

54. R.I.—*Carpenter v. Town Council of Town of Warwick*, 124 A. 100, 45 R.I. 494.

11 C.J. p 210 note 39.

No meritorious assignments

Where petition to review judgment of court of appeals contains no meritorious assignments of error, writ must be dismissed.—*Middlebrooks v. Pugh*, 175 S.E. 16, 179 Ga. 64, dismissing certiorari *Pugh v. Middlebrooks*, 171 S.E. 160, 47 Ga.App. 528—*Parks v. Rheinberger*, 95 S.E. 322, 22 Ga.App. 54.

55. Iowa.—*State v. Waterloo Sav. Bank*, 39 Iowa 706.

56. R.I.—*Carpenter v. Town Council of Town of Warwick*, 124 A. 100, 45 R.I. 494.

57. Nev.—*State v. Washoe County*, 45 P. 529, 23 Nev. 247.

58. Cal.—*Horstmyer v. Trial Board of City of Sacramento*, App., 69 P. 2d 1021—*Los Angeles County v. Industrial Accident Commission*, 56 P.2d 577, 13 Cal.App.2d 69—*Karz v. Department of Professional and Vocational Standards*, 54 P.2d 35, 11 Cal.App.2d 554—*Brune v. Superior Court in and for City and County of San Francisco*, 297 P. 566, 113 Cal.App. 21—*Reid v. Superior Court in and for Trinity County*, 186 P. 634, 44 Cal.App. 349. Fla.—*Whitlock v. American Central Ins. Co. of St. Louis*, 144 So. 412, 107 Fla. 13.

Ga.—*Reagan v. Bethlehem Lodge*, No. 401, 157 S.E. 885, 43 Ga.App. 36.

11 C.J. p 210 note 42.

59. Ga.—*Parker v. Harling*, 176 S.E. 921, 50 Ga.App. 50.

11 C.J. p 210 note 43.

60. U.S.—*Dinsmore v. Southern Express Co.*, Ga., 22 S.Ct. 45, 183 U.S. 115, 46 L.Ed. 111.

61. N.J.—*Ferrell v. Rodgers*, 1 N. J.Law 265.

Quashal of writ for failure to prosecute with due diligence see *supra* § 135.

62. Cal.—*Miller & Lux v. Board of Suprs of Madera County*, 208 P. 304, 189 Cal. 254.

Fla.—*Ulsch v. Mountain City Mill Co.*, 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 218, 103 Fla. 932, 104 Fla. 418—*Seaboard Air-*

tions tried together are inconsistent, the judgment should be one of reversal.⁶³

However, there can be no reversal or quashal for immaterial errors,⁶⁴ or in the absence of error justifying recourse to the writ,⁶⁵ and a constitutional provision providing that a judgment should not be reversed in the absence of a miscarriage of jus-

tice has been held to apply to an application for a writ of certiorari after the trial of a case.⁶⁶ Also, there can be no reversal on the theory that the matter is *res judicata*, where relating to facts arising subsequently to the former adjudication;⁶⁷ and a reversal is not proper unless the want of jurisdiction or error is manifest rather than merely doubtful.⁶⁸

Line Ry. Co. v. Wells, 131 So. 777, 100 Fla. 1631.
Ga.—Borochoff v. National Casualty Co., 146 S.E. 916, 39 Ga.App. 319.
Me.—Dow v. True, 19 Me. 46.
Mo.—State ex rel. City of Macon v. Trimble, 12 S.W.2d 727, 321 Mo. 671, quashing opinion Downey v. City of Macon, 6 S.W.2d 63, 222 Mo.App. 845—State ex rel. Maclay v. Cox, 10 S.W.2d 940, 320 Mo. 1218, quashing certiorari McClay v. Missouri Pac. Ry. Co., App., 299 S.W.2d 626.
N.J.—Veale v. Nichols, 171 A. 548, 12 N.J.Misc. 343.
Okl.—Bowling v. Hepburn, 249 P. 925, 121 Okl. 275—Jones v. Hepburn, 249 P. 924, 121 Okl. 276—King v. Hepburn, 249 P. 924, 121 Okl. 275—Swan v. Hepburn, 249 P. 923, 121 Okl. 277—Barnett v. Hepburn, 249 P. 921, 121 Okl. 268.
Pa.—Wanke v. Michael, 6 Pa.Dist. & Co. 40.
R.I.—Narragansett Racing Ass'n v. Kiernan, 194 A. 692.
11 C.J. p 210 note 47.

Intermediate judgment

(1) Circuit court's appellate judgment can be quashed only where it has exceeded its jurisdiction, or did not proceed according to the essential requirements of the law, or violated established principles of law, or the judgment reversing the civil court of record is a palpable miscarriage of justice, or the result is a substantial injury to the legal rights of the petitioner, or the judgment sought to be reviewed is illegal or essentially irregular and violative of established principles of law, which have resulted in prejudice and material harm to the petitioner.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567—Ulrich v. Mountain City Mill Co., 138 So. 483, 103 Fla. 932, rehearing denied 140 So. 213, 103 Fla. 932, 104 Fla. 418.

(2) Such a judgment cannot be quashed on certiorari for merely erroneous rulings on the law and the evidence.—Florida East Coast Ry. Co. v. Anderson, 148 So. 553, 110 Fla. 290—Des Rocher & Watkins Towing Co. v. Third Nat. Bank, 143 So. 768, 106 Fla. 466.

(3) Alleged erroneous charges, to warrant quashing on certiorari of judgment of circuit court affirming judgment of civil court of record,

must be of such character that determination of cause in accordance with charges would not be in accordance with essential requirements of law.—Vanderpool v. Spruell, 139 So. 892, 104 Fla. 347.

(4) Mere error in particular charge given does not warrant quashing on certiorari of judgment of circuit court affirming judgment of civil court of record.—Vanderpool v. Spruell, supra.

(5) Mere errors in giving of abstract or inappropriate charges do not warrant quashing of judgment.—Florida East Coast Ry. Co. v. Anderson, supra—Vanderpool v. Spruell, supra.

Misapprehension of law

Where the harmless error doctrine has been applied under a misapprehension of the law and this appears on the face of the opinion, the court will reverse the inferior court and remand the case to that court for further consideration.—Liberty Nat. Life Ins. Co. v. Collier, 154 So. 118, 228 Ala. 3, reversing 154 So. 116, 26 Ala.App. 75, and certiorari denied 154 So. 119, 228 Ala. 4.

Determination against evidence

(1) On certiorari to review action of board of education, appellate division in certiorari proceeding may reverse determination of board of education, if against preponderance of evidence.—Berg v. Board of Education of City of Utica, N. Y., 229 N. Y.S. 715, 224 App.Div. 286.

(2) Where all evidence is against findings of real estate brokers' board, its decision will be reversed.—State v. Wisconsin Real Estate Brokers' Board, 206 N.W. 863, 188 Wis. 632.

Writ perpetuated

A writ of certiorari granted pending action on a devolutive appeal was perpetuated where plaintiff's possessory action was dismissed on the merits.—Brooks v. City of Shreveport, 106 So. 710, 160 La. 104—McGlothlin v. City of Shreveport, 106 So. 708, 160 La. 101.

Original judgment

The court in reversing a judgment founded on another judgment cannot reverse the original judgment, although it is undoubtedly erroneous.—Bordine v. Service, 16 N.J.Law 47.

63. U.S.—Stringfellow v. Atlantic Coast Line R. Co., Fla., 54 S.Ct.

175, 290 U.S. 322, 78 L.Ed. 339, reversing, C.C.A., 64 F.2d 173, certiorari granted 54 S.Ct. 50, 290 U.S. 608, 78 L.Ed. 532, certiorari granted Atlantic Coast Line R. Co. v. Stringfellow, 54 S.Ct. 52, 290 U.S. 608, 78 L.Ed. 532.

Both judgments should be reversed U.S.—Stringfellow v. Atlantic Coast Line R. Co., supra.

64. N.J.—Schubert v. District Court of Third Judicial Dist. of Bergen County, 159 A. 615, 10 N.J.Misc. 414.

R.I.—Fortin v. Board of Aldermen of City of Woonsocket, 135 A. 380.

65. Mo.—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065—State ex rel. Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing certiorari Citizens' Sec. Bank of Englewood v. Gatewood, App., 36 S.W.2d 426—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 323 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 v. Cooper, App., 28 S.W.2d 334—State ex rel. Harrington v. Trimble, 31 S.W.2d 783, 326 Mo. 623—State ex rel. Winters v. Trimble, 290 S.W. 115, 315 Mo. 1295, quashing certiorari, App., Winters v. Reserve Loan Life Ins. Co., 290 S.W. 109, 221 Mo.App. 519—State ex rel. Cox v. Trimble, 279 S.W. 60, 312 Mo. 322—State ex rel. American Press v. Allen, 256 S.W. 1049, quashing certiorari Stubbs v. American Press, App., 254 S.W. 105—State ex rel. Seibel v. Trimble, 253 S.W. 215, 299 Mo. 164, quashing certiorari Price v. Seibel, App., 253 S.W. 212—State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S.W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., App., 223 S.W. 757—State ex rel. Pelligreen Const. Co. v. Reynolds, 214 S.W. 369, 279 Mo. 493.

66. Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

67. La.—Perrin v. Crescent City Stockyard, etc., Co., 44 So. 513, 119 La. 873.

68. N.J.—State v. Frech, 18 A. 354, 51 N.J.Law 501, 502.

§ 177. Affirmance in Part

Where distinct determinations or matters are each independent of the other, the court may quash, reverse, or correct one part and affirm as to the residue, but not where the several parts of the proceedings are connected and dependent on each other.

Where distinct determinations are presented for review, or the legal and illegal matters are each independent of the other, the court may quash, reverse, or correct such part or parts of the proceedings as are illegal and affirm as to the residue which are legal.⁶⁹ Thus, where in an action for debt judgment is rendered against joint defendants on the individual contract of only one of the defendants, the court will order the amendment of the judgment.⁷⁰ So where judgment is given for the recovery of a debt and also for the enforcement of a lien, and so much of the judgment as enforces the lien is in excess of the lower court's jurisdiction, the whole judgment will not be reversed, but only the portion enforcing the lien.⁷¹

However, where the several parts of the proceedings are so connected and dependent on each other that one part cannot be quashed without leaving the other incomplete or more extensive than it should be, the whole of the proceedings in all its separate parts must be set aside.⁷² Thus, where an award is incapable of severance and is erroneous as

to certain items of damages, it should be set aside in its entirety.⁷³

Judgment against tort-feasors. Where in trover there is a total lack of evidence as to one of two defendants, it has been held that a judgment against them both should be reversed in toto, and not merely as to the one against whom there is no proof;⁷⁴ and this is so in trespass against two defendants.⁷⁵

§ 178. Modification

Where the power exists, the court may correct or modify the judgment or determination.

If the court has power to correct or modify the judgment or determination complained of, it may do so, and need not reverse absolutely;⁷⁶ and it has been held that the reviewing court may modify an order complained of without passing on the question whether it is void or simply voidable.⁷⁷ However, if a judgment is void for want of jurisdiction, the court on certiorari has no authority to modify or reduce it in amount or otherwise.⁷⁸

§ 179. Power to Render New Judgment

In some jurisdictions, by virtue of statute or otherwise, final judgment may be rendered in a proper case by the reviewing court on certiorari.

While generally the reviewing court has no pow-

69. Ga.—*Sellers v. McNair*, 157 S. E. 373, 376, 42 Ga.App. 731, citing *Corpus Juris*.

Mo.—*State ex rel. St. Louis Basket & Box Co. v. Reynolds*, 224 S.W. 401, 284 Mo. 372, affirming *Probst v. St. Louis Basket & Box Co.*, App., 207 S.W. 891.

Vt.—*City of St. Albans v. Avery*, 114 A. 31, 95 Vt. 249, certiorari denied *Fonda v. City of St. Albans*, 42 S. Ct. 51, 257 U.S. 640, 66 L.Ed. 408, and error dismissed 42 S.Ct. 54, 257 U.S. 666, 66 L.Ed. 425. 11 C.J. p 211 note 50.

Conflict with previous opinions

Upon certiorari this court may say that decision of court of appeals conflicts in certain particulars with previous opinions of this court, and still affirm judgment, where there is good reason in law for so doing.—*State ex rel. American Mfg. Co. v. Reynolds*, 194 S.W. 878, 270 Mo. 589, affirming, App., *American Mfg. Co. v. Alt*, 184 S.W. 1167, 1169, certiorari denied *American Mfg. Co. v. Reynolds*, 38 S. Ct. 10, 245 U.S. 650, 62 L.Ed. 531, and error dismissed *State of Missouri ex rel. American Mfg. Co. v. Reynolds*, 38 S.Ct. 189, 245 U.S. 635, 62 L.Ed. 523. Modification see *infra* § 178.

70. N.J.—*State v. Cook*, 24 A. 758, 54 N.J.Law 513.

71. Wis.—*Shafer v. Hogue*, 35 N.W. 928, 70 Wis. 392.

72. Fla.—*American Ry. Exp. Co. v. Fegenbush*, 144 So. 320, 107 Fla. 145.

11 C.J. p 211 note 53.

73. N.J.—*New Jersey R., etc., Co. v. Suydam*, 17 N.J.Law 25.

74. N.Y.—*Sheldon v. Quinlen*, 5 Hill 441.

75. N.Y.—*Richards v. Walton*, 12 Johns. 434.

76. Cal.—*Fuller v. Board of Medical Examiners*, 59 P.2d 171, 14 Cal. App.2d 734.

Mo.—*State ex rel. St. Louis Basket & Box Co. v. Reynolds*, 224 S.W. 401, 284 Mo. 372, affirming *Probst v. St. Louis Basket & Box Co.*, App., 207 S.W. 891. 11 C.J. p 211 note 57.

Only as to excess of jurisdiction

A court's statutory power to modify an inferior tribunal's proceedings on certiorari can be exercised only to change the inferior tribunal's action in excess of its jurisdiction.—*Fuller v. Board of Medical Examiners*, 59 P.2d 171, 14 Cal.App.2d 734.

In damage suits, the supreme court will not amend the judgment as to the amount, except in rare cases where the amount allowed is manifestly too small or too large.—

Jones v. Shehee-Ford Wagon & Harness Co., 163 So. 129, 183 La. 293, setting aside, App., 160 So. 161, on rehearing reinstated 157 So. 309.

As to party not complaining

In reviewing the judgment of a lower court on certiorari at the instance of one of the parties to the suit, the court will not amend the judgment to his prejudice and to the advantage of the party who has not complained.—*Brown v. Tauzin*, 168 So. 502, 185 La. 86, annulling, App., 163 So. 764—*Foley v. National Life & Accident Ins. Co.*, 162 So. 798, 183 La. 49, annulling, App., 156 So. 35—*Succession of Watson v. Metropolitan Life Ins. Co.*, 156 So. 29, rehearing refused 156 So. 590, annulled 162 So. 790, 183 La. 25.

Affirmance in part see *supra* § 177.

In the absence of answer

A judgment, brought before the supreme court by writ of review to a court of appeal, cannot be amended at the suggestion, by brief, of the counsel representing the interest adverse to that of applicant for the writ.—*Toussant v. National Life & Accident Ins. Co. of Nashville, Tenn.*, 86 So. 415, 147 La. 977.

77. Cal.—*Baker v. Shasta County Super. Ct.*, 12 P. 685, 71 Cal. 583.

78. Cal.—*Will v. Sinkwitz*, 39 Cal. 570.

er to render a new judgment such as the inferior tribunal should have rendered but can only remand for further proceedings or a new trial,⁷⁹ in some jurisdictions, by statute or otherwise, final judgment may be rendered by the reviewing court, without remanding the cause, in a proper case.⁸⁰ However, it has been held that the power to enter up a new judgment is limited to the judgment that could and should have been rendered by the lower court.⁸¹

Where trial de novo. Where provision is made for a trial de novo, the cause stands in the reviewing court as if it had originated there, and a judgment of dismissal, or on the merits, may be rendered as in other cases;⁸² and if the trial is de novo an order cannot be reversed because made by a judge disqualified to sit, since the matter must be

retried on the merits as if an original suit.⁸³

In Georgia the form of the judgment is regulated by statute; and thereunder it is the duty of the court to render final judgment if an error of law which must finally govern the case is found,⁸⁴ as where the court below was without jurisdiction of the subject matter,⁸⁵ or where the case involves both law and facts, when there is no dispute as to the facts.⁸⁶ Also, when the finding of the trial court should be and is sustained and the certiorari overruled, there is no error in rendering final judgment,⁸⁷ and, when a certiorari bond has been given, this is the better procedure.⁸⁸ However, it is not proper to render final judgment if a question of fact is involved which makes it necessary for a new trial.⁸⁹ Also, if a certiorari, after being sanc-

79. Iowa.—National Ben. Accident Ass'n v. Murphy, 269 N.W. 15—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170.

Mich.—Carroll v. City Commission of Grand Rapids, 253 N.W. 240, 266 Mich. 123.

11 C.J. p 211 note 60.

80. U.S.—Cole v. Ralph, Nev., 40 S. Ct. 321, 252 U.S. 286, 64 L.Ed. 567, reversing Ralph v. Cole, 249 F. 81, 161 C.C.A. 133, certiorari granted 39 S.Ct. 8, 248 U.S. 553, 63 L.Ed. 418.

Miss.—Board of Sup'rs of Forrest County v. Melton, 86 So. 369, 123 Miss. 615.

N.J.—New Jersey State Board of Optometrists v. S. S. Kresge Co., 181 A. 152, 115 N.J.Law 495, modifying 174 A. 353, 113 N.J.Law 287—Tennor v. Indiana Parts Depots, 142 A. 421, 6 N.J.Misc. 578.

W.Va.—Snodgrass v. Board of Education of Elizabeth Independent Dist., 171 S.E. 742, 114 W.Va. 305—Humphreys v. County Court of Monroe County, 110 S.E. 701, 90 W.Va. 315.

11 C.J. p 211 note 61.

Correction of error

Petitioners may be granted such relief as will correct apparent error of law.—Worthen v. Kingsbury, 149 A. 869, 84 N.H. 304.

Relief warranted by record

Where a petition for a writ is not proper to secure the relief sought, the court, having all the facts before it, may give appropriate relief warranted by the record.—Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, 37 P.2d 84, 1 Cal.2d 784, 96 A.L.R. 775.

Subsequent events requiring new judgment

Where subsequent events have rendered the relief granted unavailing, the reviewing court may ren-

der a new judgment giving proper relief.—Canal Constr. Co. v. Schlickum, 102 N.W. 737, 139 Mich. 246.

Dismissal in trial court as to codefendant

Where case was dismissed as to a codefendant in the trial court, an upper court, on certiorari to an inferior appellate court, has no jurisdiction to render any judgment as to the codefendant.—Brown v. Tauzin, 168 So. 502, 185 La. 86, annulling, App., 163 So. 764.

Writ denied

Where defendant did not complain of the action of the court of civil appeals in remanding a cause for a new trial, on reversing a judgment for plaintiff, the latter's petition for certiorari will merely be denied, although he was not entitled to recover.—Buford v. Louisville & N. R. Co., 240 S.W. 759, 146 Tenn. 262.

81. W.Va.—Snodgrass v. Board of Education of Elizabeth Independent Dist., 171 S.E. 742, 114 W.Va. 305.

11 C.J. p 212 note 62.

82. Miss.—Board of Sup'rs of Forrest County v. Melton, 86 So. 369, 123 Miss. 615.

11 C.J. p 212 note 66.

Certifying action taken

District court, on certiorari to review probate matters, must make such orders as probate court should have made and certify its action for probate court's observance.—Hurley v. White, Civ.App., 66 S.W.2d 393.

83. Tex.—Jirou v. Jirou, Civ.App., 136 S.W. 493.

84. Ga.—Davis v. Moore, 171 S.E. 166, 47 Ga.App. 579—Barker v. Conrad, 145 S.E. 498, 38 Ga.App. 684.

11 C.J. p 212 note 63.

Undisputed evidence

Where the undisputed evidence makes a question of law, it is not error for the court, in sustaining the

certiorari, to render final judgment.—Wilson v. Citizens' & Southern Bank, 99 S.E. 239, 23 Ga.App. 654.

85. Ga.—Dorsey v. Miller, 31 S.E. 736, 105 Ga. 88.

86. Ga.—Reddy-Waldhauer-Moffett, Co. v. Cranman, 153 S.E. 616, 41 Ga.App. 563—Longshore v. Collier, 140 S.E. 636, 37 Ga.App. 450.

87. Ga.—Pittman v. Alexander, 91 S.E. 910, 19 Ga.App. 475.

11 C.J. p 212 note 65 [b].

88. Ga.—Pittman v. Alexander, supra—Bailey v. Ware & Harper, 91 S.E. 275, 19 Ga.App. 255.

89. Ga.—Strickland v. Strickland, 139 S.E. 529, 164 Ga. 771—Tyler v. National Life & Accident Ins. Co., 172 S.E. 747, 48 Ga.App. 338—Davis v. Moore, 171 S.E. 166, 47 Ga.App. 579—Smith v. J. J. Williamson & Sons, 159 S.E. 912, 43 Ga.App. 702—A. A. Scott & Son v. Newberry, 156 S.E. 641, 42 Ga.App. 432—Keough v. Georgia Power Co., 149 S.E. 435, 40 Ga.App. 336—Terrell v. Brandt, 142 S.E. 460, 37 Ga.App. 760—Ziegler v. Perry, 141 S.E. 426, 37 Ga.App. 647—Butler v. Pickens, 141 S.E. 218, 37 Ga.App. 621—Grinstead v. City of Hawkinsville, 105 S.E. 707, 26 Ga.App. 204—Travis v. Sams, 99 S.E. 239, 23 Ga.App. 713—Pittman v. Alexander, 91 S.E. 910, 19 Ga.App. 475—Williams v. Stocks, 91 S.E. 228, 19 Ga.App. 123.

11 C.J. p 212 note 65.

Decision constituting denial of new trial

Where superior court denied new trial in overruling plaintiff's certiorari, brought to review judgment of appellate division reversing judgment of Atlanta municipal court refusing defendant new trial, denial constituted effort to render final judgment against plaintiff, and was improper because questions of fact were involved.—Tyler v. National

tioned by the judge of the superior court, is dismissed on the hearing before him for the reason that it does not properly appear that costs have been paid, the judgment dismissing it is equivalent to holding that the proceeding is void, and, there being no legal writ before him, the court is therefore without jurisdiction to entertain the proceeding for the purpose of rendering its own final decision in the case, including judgment against the surety on the certiorari bond.⁹⁰

§ 180. Statement of Findings and Conclusions

In some jurisdictions the court is required to state the facts found and the conclusions of law thereon.

If the court is required to state the facts found and the conclusions of law thereon, it cannot dis-

miss on the merits without stating such facts and conclusions.⁹¹

§ 181. Remand

While a case will not be remanded where no further proceedings can be taken, in a proper case the determination may be remitted for modification or correction or for further proceedings.

In some jurisdictions, in a proper case, the determination may be remitted for modification or correction,⁹² or for further proceedings,⁹³ with directions or instructions to the court below.⁹⁴ Thus, where there has been no determination on the merits,⁹⁵ where the judgment is found to be erroneous and the evidence is insufficient to establish the basis of a judgment that will do justice between the parties,⁹⁶ where a judgment is reversed

Life & Accident Ins. Co., 172 S.E. 747, 48 Ga.App. 338.

Where the evidence demands a verdict for plaintiff in certiorari, it should be sustained, but it is error to render a final judgment in his favor.—Tuten v. Towles, 136 S.E. 537, 36 Ga.App. 328—11 C.J. p 212 note 65 [a].

In possessory warrant cases the statute confers upon the judge the power to remand the case or give final judgment and direction therein as he may see fit.—Burch v. Holliday, 172 S.E. 581, 48 Ga.App. 237—Whitworth v. Carter, 147 S.E. 904, 39 Ga.App. 625—11 C.J. p 212 note 65 [c].

90. Ga.—Ray v. Cruce, 94 S.E. 899, 21 Ga.App. 539.

91. N.Y.—People v. Buffalo, 57 N.Y. S. 263, 39 App.Div. 651, affirmed 54 N.E. 1094, 159 N.Y. 571 mem.—People v. Buffalo, 57 N.Y.S. 261, 39 App.Div. 245.

In West Virginia it has been held the duty of the court, where further proceedings are necessary, to remand the cause to the inferior tribunal with distinct decisions on the points involved.—Alderson v. Kanawha County, 9 S.E. 863, 32 W.Va. 454.

92. Mich.—Leach v. Davy, 165 N.W. 927, 199 Mich. 378.
11 C.J. p 212 note 69.

Neither affirmance nor reversal proper

Where director of corporation was refused permission to inspect records, and brought mandamus to compel inspection which was granted, and defendants then brought certiorari, and the director failed of reelection, it was proper to remand the cause, for amendment of the answer to show such changed condition, in which relator was not entitled to inspection.—Leach v. Davy, supra.

93. U.S.—Cole v. Ralph, Nev., 40 S.

Ct. 321, 252 U.S. 286, 64 L.Ed. 567, reversing Ralph v. Cole, 249 F. 81, 161 C.C.A. 133, certiorari granted 39 S.Ct. 8, 248 U.S. 553, 63 L.Ed. 418.

Mich.—Leach v. Davy, 165 N.W. 927, 199 Mich. 378.

11 C.J. p 212 note 70.

To find facts

Error of court of appeals in summarily affirming decree of chancellor, now out of office, for absence from record of finding of facts by him, requires remand to such court by supreme court on certiorari for determination of case, irrespective of finding of facts, by chancellor.—Hicks v. Hicks, 79 S.W.2d 802, 168 Tenn. 539.

Remand at subsequent term

Superior court may sustain certiorari and remand case at subsequent term, after court of appeals reversed overruling of certiorari.—Tuten v. Towles, 136 S.E. 537, 36 Ga.App. 328.

94. U.S.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932, certiorari granted 58 S.Ct. 120.

11 C.J. p 212 note 70.

Scope of hearing after remand

Where United States supreme court granted certiorari after second appeal in equity cause and remanded cause to district court with direction to vacate its decree, to permit amendment of pleadings, and to retry cause on issues thus presented because of error in order made on first appeal, district court properly set its prior decrees aside, permitted filing of amended pleadings, and set case down for hearing de novo, as against contention that hearing should have been limited to matters which had occurred after first appeal.—Duke Power Co. v. Greenwood County, supra.

95. U.S.—Grant v. A. B. Leach & Co., Ohio, 50 S.Ct. 107, 280 U.S. 351, 74 L.Ed. 470, reversing, C.C.

A., A. B. Leach & Co. v. Grant, 27 F.2d 201, certiorari granted Grant v. A. B. Leach & Co., 49 S.Ct. 37, 278 U.S. 593, 73 L.Ed. 525, amended 50 S.Ct. 236, 281 U.S. 689, 74 L.Ed. 1119.

Ala.—Box v. Metropolitan Life Ins. Co., 168 So. 217, 232 Ala. 321, reversing 168 So. 209, 27 Ala.App. 21, reversed on other grounds 168 So. 216, 232 Ala. 1, certiorari denied 168 So. 220, 232 Ala. 447.

Ill.—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90—O'Connor v. Evanston High School Dist., 120 N.E. 518, 235 Ill. 120, reversing O'Connor v. High School Board of Education of Evanston, 209 Ill.App. 247.

La.—Buckley v. Thibodaux, 159 So. 603, 181 La. 416, annulling, App., 156 So. 79—Capital City Auto Co. v. Folse, 92 So. 300, 151 La. 689.

Questions of fact

Wherever an issue is made by the pleadings, and evidence must be introduced to maintain the issue, controverted questions of fact are involved in the case which include not only evidentiary facts, but ultimate facts, even though there be no conflict in the testimony, or the evidence may be embodied in a stipulation of facts, and, since the supreme court is precluded from reviewing controverted questions of fact presented by contentions of the parties in their pleadings, where the appellate court has erroneously reversed on one branch of the case without considering certain controverted issues of fact, the supreme court must remand the cause to the appellate court to consider questions of fact involved.—Armstrong Paint & Varnish Works v. Continental Can Co., 133 N.E. 711, 301 Ill. 102, reversing 220 Ill.App. 90.

96. La.—Schwing Lumber & Shingle Co. v. Beckman, 86 So. 555, 147 La. 1091.

for an error not decisive of the merits,⁹⁷ or where the inferior tribunal has not proceeded according to law,⁹⁸ the reviewing court will remand the case. Also, the lower court, after its opinion has been quashed on certiorari as being in conflict with the decisions of the supreme court, has been held to have jurisdiction to dispose of the case on the merits,⁹⁹ and when an appellate court quashes the judgment on certiorari of an intermediate court, it has been held that the cause is again remitted to that court, which may render another judgment not in conflict with the holding of the appellate court,¹ and a petition seeking a new trial and permission to plead should be presented to that court.² However, the quashing of an opinion of a lower court does not necessarily call for a retrial in such court, and if the submission is set aside after the opinion is quashed, the parties may be given time for reargument, and a statement in the lower court's opinion that the case was again submitted after the former opinion was quashed, conclusively shows that the former submission was set aside.³

Under statutes in some jurisdictions, where the answer of the trial judge states that he cannot or

does not remember or recollect what occurred on the trial of the case, it is the duty of the judge on certiorari to forthwith order a new trial in the lower court;⁴ and where a justice or ordinary dies before answering a certiorari served, the judge who granted the certiorari must order a new trial in the court below.⁵

Reversal for formal and minor irregularities. When the reversal is neither because of excess of jurisdiction nor for the reason that the form of proceeding legally applicable to the case was not followed, but because the court failed to exercise jurisdiction,⁶ or because the court entered judgment in improper form or made an order which is incomplete,⁷ the practice is to remand the case; and the cause will be remanded where the court has made some erroneous order or ruling which does not affect the regularity of the entire proceedings.⁸

Where no further proceedings can be taken, the case will not be remanded.⁹

When remand effective. It has been held that, when the record of the cause has been remitted to the lower tribunal by the reviewing court, the former has authority to proceed therein, although the

97. Ga.—Strickland v. Strickland, 139 S.E. 529, 164 Ga. 771, 11 C.J. p 212 note 71.

98. Ill.—Frey v. City of Chicago, 162 N.E. 139, 330 Ill. 640, reversing 246 Ill.App. 172.

Obviating variance

Where the reviewing court could not say, as a matter of law, that the plaintiff may not obviate a variance in the record and make such proof as would entitle her to recover, it will remand the case to the appellate court with directions to remand the case to the trial court for a new trial.—Frey v. City of Chicago, *supra*.

99. Mo.—State ex rel. Lindsay v. Kansas City, 20 S.W.2d 7, 225 Mo. App. 139, certiorari quashed State ex rel. Kansas City v. Trimble, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20, 322 Mo. 363.

1. Fla.—Ulsch v. Mountain City Mill Co., 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932.

Judgment not in conflict

Judgment of circuit court reversing judgment of civil court of record, and remanding cause for new trial, was held not in conflict with decision of supreme court in certiorari proceeding holding that judgment of circuit court reversing judgment of civil court of record with directions to enter judgment for defendant should be quashed.—State

ex rel. Ulsch v. Gibbs, 143 So. 772, 106 Fla. 927.

2. Fla.—Ulsch v. Mountain City Mill Co., 140 So. 218, 103 Fla. 932, 104 Fla. 418, denying rehearing 138 So. 483, 103 Fla. 932.

3. Mo.—State ex rel. Kansas City v. Trimble, 20 S.W.2d 17, 322 Mo. 360, denying quashal of opinion State ex rel. Lindsay v. Trimble, 20 S.W.2d 7, 225 Mo.App. 139—State ex rel. Kansas City v. Trimble, 20 S.W.2d 20, 21, 322 Mo. 363.

4. Ga.—Orr v. State, 189 S.E. 540, 55 Ga.App. 150.

Prior to the statute (1) where the answer of the trial judge stated that he could not remember the facts or what occurred at the trial, the certiorari was overruled.—Smith v. Johnson, 119 S.E. 916, 31 Ga.App. 45 —Hicks v. Lindsey, 97 S.E. 101, 22 Ga.App. 674—Gilmore v. Georgian Co., 88 S.E. 416, 17 Ga.App. 759—11 C.J. p 200 note 33 [a] (1).

(2) Where an assignment of errors is answered by the judge's statement that he can not verify the truth of any paragraphs, because he does not recollect them sufficiently, the rule that the judge hearing certiorari can do nothing but overrule it will not be different merely because the trial was stenographically reported, where neither party obtained a transcript, since the judge cannot be required to obtain a transcript at the cost of the parties.—Macris v. Tsipourses, 134 S.E. 621, 35 Ga.App. 671.

5. Ga.—Crine v. Morton Salt Co., 174 S.E. 347, 178 Ga. 754, answers conformed to 174 S.E. 723, 49 Ga. App. 150.

Statute applicable to justices' and ordinaries' courts only

Provision of amended statute that, in cases pending on certiorari from court of justice or ordinary who dies before answering certiorari served, judge who granted certiorari must order new trial in court below, was held applicable to justices' and ordinaries' courts only, notwithstanding caption of amending act declared intention to include other courts, where amending act did not embody such intention in its statement, of how act should read when amended.—Crine v. Morton Salt Co., *supra*.

6. W.Va.—Dryden v. Swinburn, 15 W.Va. 234.

7. N.J.—Doremus v. Howard, 28 N.J.Law 390.

8. Ala.—Liberty Nat. Life Ins. Co. v. Collier, 154 So. 118, 228 Ala. 3, reversing 154 So. 116, 26 Ala.App. 75, and certiorari denied 154 So. 119, 228 Ala. 4, 11 C.J. p 212 note 74.

9. Ark.—Taylor v. Bay St. Francis Drainage Dist., 284 S.W. 770, 171 Ark. 285.

Dismissal

As circuit court could only reverse void order, on reversal of its order dismissing complaint, remand is unnecessary.—Taylor v. Bay St. Francis Drainage Dist., *supra*.

formal order to remit has not been filed with its clerk.¹⁰

§ 182. Restitution

In a proper case the reviewing court may order restitution on annulling the proceedings below.

On annulling the proceedings below, the reviewing court may order restitution to a relator who has suffered by the illegal action,¹¹ but where a fine and costs have been voluntarily paid by defendant before the issuance of a writ of certiorari, he is not entitled to a writ of restitution.¹² Of course, where money has been collected on a judgment before reversal on certiorari, but subsequently the money is refunded, a writ of restitution should not issue.¹³

§ 183. Effect of Judgment

The decision of the reviewing court is the law of the case, and an affirmance establishes the rights of the parties as originally found, while on reversal the whole case falls. Dismissal of the writ in the discretion of the court is not res judicata as to the validity of the proceedings; and as to persons not parties the decision is not conclusive.

The decision of the court on certiorari is the law of the case;¹⁴ and a judgment in certiorari proceedings quashing the record of a civil service commission discharging an employee has been held self-executing, and requires no process of any kind

to enforce it.¹⁵

An affirmance of the adjudication complained of establishes the rights of the parties as originally found,¹⁶ and the determination stands as of the time when made.¹⁷ However, the rulings of the court on certiorari with respect to an order of the lower court, requiring a party to produce documents for inspection have been held not binding on the materiality of such documents when they are offered in evidence and the lower court has an opportunity to inspect them.¹⁸

On reversal, the whole case falls,¹⁹ as well as incidental proceedings dependent thereon,²⁰ and, at least in one jurisdiction, setting aside municipal proceedings concludes the right of the matter as against respondents and furnishes record evidence precluding them from setting up the nullified proceedings against either the prosecutor or the state.²¹ However, in determining the general liability of a municipality, the court does not adjudicate the sufficiency of the particular claim presented.²²

A judgment that the opinion and record brought up for review are quashed has been held to quash only the judgment, opinion, and record of the intermediate appellate court, such being the only one subject to review on the writ of certiorari;²³ and where a new trial is granted by the trial court after

10. N.J.—Stokes v. Hardy, 62 A. 1002, 73 N.J.Law 255.

Nunc pro tunc order

Where the prosecutor had no opportunity to move to remit the record, that a new return might be made to a second writ obtained after dismissal of the first writ for informality, an order for remittitur may be entered nunc pro tunc.—State v. Gantly, N.J., 34 A. 984.

11. Utah.—Board of Education of Alpine School Dist., Utah County v. Board of Education of Salt Lake City, 219 P. 542, 547, 62 Utah 302, quoting *Corpus Juris*.

11 C.J. p 213 note 76.

12. Pa.—Com. v. Gipner, 12 A. 306, 118 Pa. 379.

13. N.J.—Sharp v. Moore, 3 N.J.Law 521.

14. Ala.—Ex parte E. C. Payne Lumber Co., 87 So. 876, 205 Ala. 259, conformed to Simpson v. E. C. Payne Lumber Co., 87 So. 876, 17 Ala.App. 665.

Iowa.—Pittington v. Herring, 264 N. W. 712, 220 Iowa 1375.

Tenn.—Ray v. Nanney, App., 114 S. W.2d 51.

Demurrer free from error

The ruling of the supreme court on certiorari to review a judgment of the court of appeals that no ques-

tion as to the failure of a count to allege a valuable consideration for defendant's acceptance of a non-negotiable order was raised because the demurrer contained no objection that the consideration was not averred was tantamount to a decision that the overruling of the demurrer was free from error.—Ex parte E. C. Payne Lumber Co., 87 So. 876, 205 Ala. 259, conformed to Simpson v. E. C. Payne Lumber Co., 87 So. 876, 17 Ala.App. 665.

Erroneous order not appealed

Erroneous order dismissing custodian of public buildings as one of defendants in proceedings by former janitor foreman of state house to obtain reinstatement, where not appealed from, was "law of case," precluding janitor foreman from reasserting action against custodian.—Pittington v. Herring, 264 N.W. 712, 220 Iowa 1375.

15. Ill.—People v. Thompson, 146 N. E. 473, 316 Ill. 11.

16. Pa.—Ewing v. Thompson, 43 Pa. 372.

17. Pa.—Chambersburg and Bedford Turnpike Road Co. v. Bedford County, 12 Pa.Dist. 331.

11 C.J. p 213 note 83.

18. Iowa.—Main v. Ring, 260 N.W. 859, 219 Iowa 1270.

19. Mich.—Van Dyke v. Doughty, 140 N.W. 627, 174 Mich. 627.

11 C.J. p 213 note 85.

Effect on prior proceedings

Iowa.—Brooker v. Ludlow, 185 N.W. 60, 192 Iowa 553.

20. La.—State v. Judge Civ. Dist. Ct., 34 La. 741.

Revival of arrest

On reversal of a decision discharging defendant from arrest the remand does not revive the arrest or the warrant therefor.—Dusenbury v. Kelley, 85 N.Y. 383.

Contempt citation not quashed

On quashing on certiorari of record of bill of complaint against police officials to enjoin enforcement of gambling statute against possessors of pin game machines and restraining order issued therein, prayer to quash citation for contempt of restraining order was not granted where it appeared that, on disavowal of intention to act contemptuously, citation for contempt would be quashed by court by which it was issued.—Conte v. Roberts, R.I., 192 A. 814.

21. N.J.—Specht v. Central Pass. R. Co., Sup., 68 A. 785.

22. N.Y.—People v. Clinton, 51 N. Y.S. 115, 28 App.Div. 478.

23. Mo.—State ex rel. Kansas City

an appellate court on certiorari quashed the judgment of the trial court in so far as it exceeded the verdict, it was held that such quashal by the appellate court does not preclude trying issues raised by the pleadings or other issues raised by additional pleadings filed by permission of the trial court.²⁴ A judgment on certiorari annulling a decision which set aside a default judgment without application or hearing has been held not an adjudication that the default judgment might not be set aside at all, but only that it had been set aside in an improper manner;²⁵ and a judgment on certiorari which reversed a decision of a lower court that a particular statute of limitations was applicable has been held not to adjudicate the question of whether the applicable statute was tolled until the appointment and qualification of an administrator.²⁶ Also, where a demurrer was sustained on appeal on grounds which were held insufficient, on certiorari, to defeat recovery, it is open to the lower court to deal with the claim that the petition is barred by limitations.²⁷ Where certiorari is dismissed because the proceedings were not filed within the required time, the petition and writ are invalid, and there is no case pending which can be recommenced within the statutory period for recommencing dismissed cases.²⁸

As to persons not parties to the litigation on certiorari, the judgment is not conclusive,²⁹ and where the judgment of an intermediate appellate court was reversed by a higher court on a petition for certiorari to which only one of two defendants was a party, the judgment of such intermediate court in so far as it related to the codefendant of the petitioner for certiorari was not affected by the judgment of the higher court.³⁰ However, if the matter is one of general public interest, the re-

versal inures to the benefit of all persons similarly affected as well as to those who sued out the writ.³¹

Res judicata. Since the dismissal of the writ rests in the sound discretion of the court, it is not in subsequent proceedings *res judicata* as to the validity of the proceedings which were sought to be reviewed,³² and a determination denying a certiorari does not become *res judicata* so as to work an estoppel, where the record fails to show the ground or grounds alleged by a petitioner in his application for the writ or the answer of respondent, and the point in litigation is not apparent nor the reasons for the denial of the writ.³³ The affirmance in a subsequent suit against the prosecutor of the writ is *res judicata* as to the validity of the proceedings.³⁴

Successive writs. The effect of the judgment, as a bar to subsequent applications for the writ, has already been noticed in § 21.

§ 184. Amendment of Judgment

The judgment may be amended in a proper case.

That the judgment of the reviewing court may be amended in a proper case does not admit of doubt, but the amendment may be denied because of laches.³⁵

Amendment of own judgment by inferior tribunal. A writ of certiorari stays the proceedings in the inferior tribunal as shown supra § 108 et seq., and also tolls the term of court so far as jurisdiction of the inferior court over the case is concerned, but such court may, after the term at which its decision was rendered and in accordance with the ruling of the appellate court, modify, change, amend, and revise its decision while the case is still pending in that court.³⁶

v. Trimble, 20 S.W.2d 17, 322 Mo. 360, denying quashal of opinion State ex rel. Lindsay v. Trimble, 20 S.W.2d 7, 225 Mo.App. 139—State ex rel. Kansas City v. Trimble, 20 S.W.2d 20, 21, 322 Mo. 368.

24. Okl.—Fidelity Land Credit Co. v. Campbell, 249 P. 311, 121 Okl. 159.

25. Iowa.—Western Fruit & Candy Co. v. McFarland, 179 N.W. 57, 189 Iowa 717.

26. Ga.—Patellis v. King, 182 S.E. 808, 52 Ga.App. 118.

27. U.S.—Ward v. Board of County Com'rs of Love County, Okl., 40 S.Ct. 419, 253 U.S. 17, 64 L.Ed. 751, reversing Board of Com'rs of Love County v. Ward, 173 P. 1050, 68 Okl. 287, in which certiorari granted Ward v. Board of Com'rs of Love County, 39 S.Ct. 12, 248 U.S. 556, 63 L.Ed. 419.

28. Ga.—Butters Mfg. Co. v. Sims, 171 S.E. 162, 47 Ga.App. 648.

29. Cal.—Reagan v. Bahrs, 104 P. 589, 11 Cal.App. 234.

N.J.—Citizens' Gas Light Co. v. State, 44 N.J.Law 648.

30. Ga.—U. S. Fidelity & Guaranty Co. v. Lawrence, 191 S.E. 474, 55 Ga.App. 771, conforming to, 190 S. E. 346, 184 Ga. 83, reversing 184 S. E. 922, 53 Ga.App. 111.

31. N.J.—Bergen v. State, 32 N.J. Law 490.

32. N.Y.—People v. Kingston, 4 N. E. 348, 101 N.Y. 82.

33. Me.—Ford v. Erskine, 83 A. 455, 109 Me. 164.

34. N.J.—North River Meadow Co. v. Christ Church, 22 N.J.Law 424, 53 Am.D. 258.

35. La.—Groves & Rosenblath v. Atkins, 107 So. 316, 160 La. 489. 11 C.J. p 213 note 92.

Agreed damages omitted by oversight

Agreed damages, omitted from decree on certiorari by oversight of supreme court, will be allowed by amendment without rehearing.—Groves & Rosenblath v. Atkins, supra.

To remand case

Where supreme court had granted certiorari to review lower court's quashing of distress warrants for taxes, and entered decree quashing lower court's writs but neglected to remand proceedings to lower court, supreme court will, under statute, amend its decree to require further proceedings below consistent with the opinion, particularly proceedings for restitution of goods taken from sheriff when distress warrants were quashed.—Fort v. Dixie Oil Co., Tenn., 101 S.W.2d 692.

36. Ga.—McRae v. Boykin, 187 S.E.

§ 185. Compliance with Judgment

An inferior tribunal must follow a mandate issued on certiorari.

Where a judgment of reversal is at once complied with, the relator cannot complain of a failure to wait until the time for a rehearing had elapsed;³⁷ and where the writ is dismissed, and the entry of a void judgment secured by defendant's counsel, it is not error to enter up a proper judgment within a reasonable time after the void judgment is declared a nullity.³⁸ If the certiorari to review an injunction order is sustained, it is proper for the lower court to reopen the original cause and to hear further testimony;³⁹ but the jurisdiction of the court

deciding the certiorari to issue a particular mandate cannot be inquired into by the lower court.⁴⁰

Where a mandate is issued on certiorari, the inferior tribunal must follow it,⁴¹ and while an opinion of a lower court adopting its quashed opinion so far as not inconsistent with the upper court's decision on certiorari has been held unusual, objections thereto were dismissed.⁴²

In some jurisdictions, where a judgment by an intermediate appellate court is reversed by a higher court on certiorari, the intermediate court must vacate its former judgment and enter judgment in accordance with that of the higher court.⁴³

L. REVIEW OF JUDGMENT IN CERTIORARI PROCEEDING

§ 186. Right of Review, Appellate Jurisdiction, and Decisions Reviewable

- a. In general
- b. Discretionary action
- c. Finality of determination
- d. Amount in controversy

a. In General

In the absence of statutory provisions to the con-

trary, a court's determination on certiorari may generally be reviewed by the tribunal possessing appellate jurisdiction over such court.

A court's determination on certiorari may generally be reviewed by the tribunal, if any, possessing appellate jurisdiction over such court,⁴⁴ unless it is otherwise provided by statute.⁴⁵

Review of decisions in certiorari proceedings brought to review a judgment of a justice of the

271, 54 Ga.App. 158, conforming to *Boykin v. McRae*, 185 S.E. 246, 182 Ga. 252, reversing *McRae v. Boykin*, 179 S.E. 535, 50 Ga.App. 866.

37. La.—*State v. St. Paul*, 28 So. 839, 104 La. 103.

38. Ga.—*Thompson v. Dean*, 84 S. E. 205, 15 Ga.App. 757.

39. Iowa.—*McNiel v. Muscatine County Dist. Ct.*, 156 N.W. 358.

40. Mo.—*Iba v. Chicago, etc., R. Co.*, 182 S.W. 135, 192 Mo.App. 297.

41. Ala.—*Ex parte E. C. Payne Lumber Co.*, 87 So. 876, 205 Ala. 259, conformed to *Simpson v. E. C. Payne Lumber Co.*, 87 So. 876, 17 Ala.App. 665.

Mo.—*Benanti v. Security Ins. Co. of New Haven, Conn.*, 9 S.W.2d 673, 222 Mo.App. 763.

Decision of court as law of case see supra § 183.

42. Mo.—*State ex rel. Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, denying quashal of opinion *State ex rel. Lindsay v. Trimble*, 20 S.W.2d 7, 225 Mo.App. 139—*State ex rel. Kansas City v. Trimble*, 20 S.W.2d 20, 21, 322 Mo. 363.

43. Ga.—*Georgia Power Co. v. Puckett*, 182 S.E. 623, 52 Ga.App. 127, vacating 179 S.E. 284, 50 Ga. App. 720, reversed on other grounds 182 S.E. 384, 181 Ga. 386—*Ocean Accident & Guarantee Corporation v. Farr*, 179 S.E. 841, 51 Ga.App. 147, conforming to 178

S.E. 728, 180 Ga. 266, reversing 169 S.E. 684, 47 Ga.App. 110—*Wardlaw v. Executive Committee of Baptist Convention*, 179 S.E. 163, 50 Ga.App. 519, conforming to *Executive Committee of Baptist Convention v. Wardlaw*, 178 S.E. 155, vacating *Wardlaw v. Executive Committee of Baptist Convention*, 170 S.E. 830, 47 Ga.App. 595—*Johnson v. Thompson-Starrett Co.*, 164 S.E. 910, 45 Ga.App. 395, conforming to *Thompson-Starrett Co. v. Johnson*, 163 S.E. 745, 174 Ga. 656, reversing *Johnson v. Thompson-Starrett Co.*, 157 S.E. 363, 42 Ga.App. 739.

Mo.—*Ulmann v. Union Pac. R. Co.*, App., 35 S.W.2d 647—*Universal Paper Products Co. v. R. E. Funsten Co.*, App., 6 S.W.2d 1020, conforming to opinion *State ex rel. R. E. Funsten Co. v. Becker*, 1 S.W.2d 103, 318 Mo. 516, quashing opinion *Universal Paper Products Co. v. R. C. Funsten Co.*, App., 285 S. W. 516.

Matters not reversed

Court of appeals' ruling that evidence authorized verdict, not considered on certiorari to supreme court, which reversed case on another ground, was adhered to in conforming opinion of court of appeals.—*Gaines v. Brown*, 165 S.E. 454, 45 Ga. App. 525, conforming to 164 S.E. 806, 175 Ga. 66, reversing 162 S.E. 722, 44 Ga.App. 630.

44. Wis.—*State v. Mitchell*, 245 N.

W. 640, 210 Wis. 381, 86 A.L.R. 1361.

11 C.J. p 216 note 41.

As exclusive remedy

Where there is a judgment on the merits of a certiorari, if it was erroneous, the remedy is by writ of error and not by renewal of the action by a second certiorari.—*Smith v. J. M. Walkeen Millinery Co.*, 76 S.E. 992, 12 Ga.App. 119.

45. Order of zoning boards

(1) A circuit court's order on certiorari to review the action of the board of zoning appeals was held not reviewable by the supreme court on appeal or writ of error, since the proceedings are controlled by statute, which does not authorize a review of the judgment of the court of record reviewing the decision of the board of appeals, and since the writ of certiorari is a special statutory writ and the proceeding is not a suit in equity or a proceeding at law within *Pract. Act* § 91—*Phelps v. Board of Appeals of City of Chicago*, 156 N.E. 826, 325 Ill. 625—*Petition of Forbes*, 146 N.E. 448, 316 Ill. 141.

(2) The statute governing appeals from the board of zoning appeals to the circuit and superior courts makes no provision for an appeal from those courts, and it follows that no appeal lies to the appellate court unless the general provision of the Code of Civil Procedure is applicable, and we find nothing in the

peace see C.J.S. title Justices of the Peace § 266, also 35 C.J. p 886 notes 13, 14.

Grounds. The only proper ground of appeal from a judgment of a court which has reviewed a judgment on certiorari has been held to be that the reviewing court erred in giving judgment for respondent instead of appellant.⁴⁶

Joinder. If two cases, although tried together by consent of counsel, are between different parties, one writ of error is insufficient, as was one petition for certiorari.⁴⁷

b. Discretionary Action

In cases where an order in certiorari proceedings is discretionary with the lower court, there is a conflict of authority as to whether such orders are reviewable on appeal or writ of error.

In some jurisdictions an order granting or refusing or quashing a common-law certiorari is so far discretionary with the lower court that it is not reviewable on appeal or error,⁴⁸ at least in certain

courts.⁴⁹ In other jurisdictions, it seems that, notwithstanding the discretionary nature of the act, the determination is reviewable to discover whether there has been an abuse of discretion,⁵⁰ and this rule is so declared by statute in some jurisdictions.⁵¹

However, where the order in the certiorari proceeding was not made in the exercise of its discretion by the lower court, the order is appealable.⁵² Thus, if the granting of the writ is a matter of right, as it is under some statutes relating to particular matters, an appeal lies.⁵³ Also, although the granting of the writ is discretionary, when the writ has once been granted and the record certified in obedience thereto, the questions arising on such record must be determined according to fixed rules of law, and such determination is reviewable by a writ of error.⁵⁴

c. Finality of Determination

Generally, an appeal or writ of error will not lie unless there has been a final judgment or order in the certiorari proceeding.

Civil Code authorizing this appeal.—*Luten v. Schmidt*, 163 N.E. 536, 88 Ind.App. 134.

In Pennsylvania

(1) By statute, the judgment of the court of common pleas is final on all proceedings removed by certiorari to such court, and no writ of error can issue thereon.—*Palmer v. Lacock*, 107 Pa. 346—*Silvergood v. Storrick*, 1 Watts 532—*Allegheny L. & T. Co. v. Gundling*, 33 Pa.Super. 621—*Fry v. Spatz*, 29 Pa.Super. 592—*Phoenix Iron Works Co. v. Mullen*, 25 Pa.Super. 547—*Alexander v. Goldstein*, 13 Pa.Super. 518—*Crumley v. Crescent Coal Co.*, 13 Pa.Super. 231—*Carroll v. Barnes*, 11 Pa.Super. 590.

(2) The provision of the statute extends to "every judgment or proceeding of that court on writs of certiorari . . . whether as regards reversal, costs, executions, or any other matter."—*Silvergood v. Storrick*, 1 Watts 532, 533.

46. N.J.—*Burhans v. City of Paterson*, 123 A. 883, 99 N.J.Law 490—*Lundy v. George Brown & Co.*, 108 A. 252, 93 N.J.Law 469, affirming 106 A. 362, 93 N.J.Law 107.

47. Ga.—*Haralson County v. Pittman*, 31 S.E. 183, 105 Ga. 513.

48. N.J.—*Post v. Anderson*, 163 A. 622, 111 N.J.Law 303, dismissing appeal 163 A. 666, 11 N.J.Misc. 1—*Daniel B. Frazier Co. v. Long Beach Tp.*, Ocean County, 164 A. 278, 110 N.J.Law 221, dismissing appeal 161 A. 51, 10 N.J.Misc. 747.
3 C.J. p 554 note 61—p 597 note 3 [f]
—11 C.J. p 217 notes 45, 47–49.

Rule to show cause

Dismissal of rule to show cause why writ of certiorari should not issue is not appealable notwithstanding stipulation of parties that determination of court on hearing on rule should operate as final determination on merits, as the parties cannot thus deprive the supreme court of its discretion.—*Pennsylvania R. Co. v. Board of Public Utility Com'rs of New Jersey*, 184 A. 842, 116 N.J.Law 527, dismissing appeal 180 A. 551, 13 N.J.Misc. 766.

Dismissal because improvidently granted

An order dismissing the writ on the ground that it was improvidently granted, because of the laches of the prosecutor, is discretionary so as not to be reviewable by a writ of error.—*Atlantic City Water Works Co. v. Read*, 15 A. 10, 50 N.J.Law 665—*State v. Jersey City*, 43 N.J.Law 862.

49. N.Y.—*People ex rel. Dawley v. Wilson*, 133 N.E. 45, 232 N.Y. 12, reversing 189 N.Y.S. 585, 198 App. Div. 158, reargument denied 134 N.E. 563, 232 N.Y. 540.
11 C.J. p 217 note 45.

50. D.C.—*Billings v. Field*, 36 App. D.C. 16.

Ill.—*Board of Supervisors v. Maagoon*, 109 Ill. 142.
N.C.—*Perry v. Whitaker*, 77 N.C. 102.

Discretion regulated by precedent

It has been held that, while the granting of the writ is discretionary, yet the discretion is regulated by precedent and established principle, and if such discretion is in any case abused the grant or refusal of the writ may be reviewed by appeal or error.—*Michaelson v. Cautley*, 32

S.E. 170, 45 W.Va. 533—*Welch v. Wetzel County Ct.*, 1 S.E. 337, 29 W. Va. 63.

When discretion interfered with see *infra* § 197.

51. Ala.—*Ex p. Montgomery*, 64 Ala. 463.

Tenn.—*Bob v. State*, 2 Yerg. 173—*Lawson v. Scott*, 1 Yerg. 92.

Prior to the statute, the order was not appealable where discretionary.—*Carter v. Douglass*, 2 Ala. 499.

52. N.Y.—*People ex rel. Dawley v. Wilson*, 133 N.E. 45, 232 N.Y. 12, reversing 189 N.Y.S. 585, 198 App. Div. 158, reargument denied 134 N.E. 563, 232 N.Y. 540.

11 C.J. p 217 note 45 [c].

All facts one way

The denial of certiorari where all the facts tend to favor the issuance of the writ is subject to review, as in such circumstances the principle of judicial discretion has no application.—*Brown v. City Council of City of Long Beach*, Cal.App., 258 P. 693.

Dismissal as matter of law

Where the order dismissing certiorari is silent as to the reason, but the opinion indicates it was dismissed as a matter of law and not in the exercise of discretion, the order is appealable.—*People ex rel. Dawley v. Wilson*, 133 N.E. 45, 232 N.Y. 12, reversing 189 N.Y.S. 585, 198 App.Div. 158, reargument denied 134 N.E. 563, 232 N.Y. 540.

53. N.Y.—*Matter of Corwin*, 32 N.E. 16, 135 N.Y. 245.

54. Tenn.—*City of Knoxville v. Connors*, 201 S.W. 133, 139 Tenn. 45.

11 C.J. p 218 note 71.

In many jurisdictions an appeal will not lie unless there has been a final judgment or order.⁵⁵ This finality of the judgment refers to the judgment rendered in the certiorari proceeding and not to that of the judgment excepted to in the petition for certiorari.⁵⁶

In accordance with this rule, an appeal will not lie from an order refusing to quash a writ;⁵⁷ from an order allowing a writ;⁵⁸ from an order sustaining a demurrer to the petition for the writ,⁵⁹ where the petitioner for certiorari did not elect to stand on his petition;⁶⁰ from the refusal to grant a motion to dismiss a petition for the writ;⁶¹ from an order denying a motion for reargument of a motion to vacate the writ;⁶² from an order denying an application made on the hearing;⁶³ from an order overruling a motion for a new trial of a traverse of the answer;⁶⁴ from an order denying a motion to require amendment of the return⁶⁵ or directing a further return;⁶⁶ or from an order di-

recting the clerk to send up a transcript of the record and proceedings.⁶⁷ So, an order not only reversing an order quashing a writ of certiorari but also reinstating the writ and remitting the proceedings to the court entertaining the certiorari for a determination on the merits is not an order finally determining a special proceeding, and hence is not appealable.⁶⁸

On the other hand, an order quashing a writ,⁶⁹ an order denying or overruling the writ,⁷⁰ where no issue of fact was tendered,⁷¹ or an order made on a motion to supersede a writ,⁷² or on a motion to dismiss the certiorari⁷³ has been held a final judgment or order and appealable if otherwise an appeal lies.

d. Amount in Controversy

The right of review of a judgment or order in a certiorari proceeding is sometimes dependent on the amount in controversy.

55. N.Y.—*Factory Mut. Liability Ins. Co. of America v. Van Schaick*, 182 N.E. 185, 259 N.Y. 571, dismissing appeal *Factory Mut. Liability Ins. Co. of America v. Behan*, 253 N.Y.S. 562, 233 App.Div. 614. 3 C.J. p 554 notes 61, 63—11 C.J. p 217 note 58.

"Judgment" treated as "order"

Determination in certiorari proceeding, although styled as a judgment, should be treated as a final order within statute granting right of appeal except in cases where law specifically prohibits review.—*People ex rel. Schick v. Marvin*, 283 N.Y.S. 203, 246 App.Div. 71, reversed on other grounds 2 N.E.2d 634, 271 N.Y. 219.

56. Ga.—*Columbus Heating & Ventilating Co. v. Upchurch*, 163 S.E. 301, 45 Ga.App. 16.

Dismissal because lower judgment not final held final judgment

Superior court's judgment dismissing certiorari because judgment which certiorari excepted to was not "final" is "final judgment," reviewable by court of appeals on direct bill of exceptions.—*Columbus Heating & Ventilating Co. v. Upchurch*, 163 S.E. 301, 45 Ga.App. 16.

57. Iowa.—*Riley v. Board of Trustees of Policemen's Pension Fund*, 222 N.W. 403, 207 Iowa 177. 11 C.J. p 217 note 59.

Necessity of determination

Matters in dispute in certiorari proceeding to review order denying police pension must be determined by trial court before appeal can be taken.—*Riley v. Board of Trustees of Policemen's Pension Fund*, supra.

58. S.D.—*Campbell v. Common Council of City of Watertown*, 195 N.W. 442, 46 S.D. 574.

59. Cal.—*Tyler v. City Council of Huntington Park*, 276 P. 355, 97 Cal.App. 724.

60. Iowa.—*Fehrman v. Sioux City*, 249 N.W. 200, 216 Iowa 236.

61. N.C.—*Perry v. Whitaker*, 77 N. C. 102.

62. N.Y.—*Rubel Corporation v. Moss*, 295 N.Y.S. 353, 251 App.Div. 723.

63. N.Y.—*Peo. v. McNamara*, 45 N. Y.S. 456, 18 App.Div. 17.

64. Ga.—*Du Vall v. Brogden*, 51 S. E. 404, 123 Ga. 411.

65. Wis.—*State v. Oconomowoc*, 80 N.W. 942, 104 Wis. 622.

66. N.Y.—*Matter of Larson*, 96 N.Y. 381, reversing 31 Hun 539.

Remedy by motion

Where certain directions contained in a writ of certiorari were not pertinent to the grievances alleged therein, the remedy is by a motion to modify, and not by an appeal from the order for a further return.—*Peo. v. Feitner*, 56 N.Y.S. 93, 37 App. Div. 362.

Discretionary

Where, on a writ of review of proceedings of a justice of the peace, the case had been determined by the circuit court, a motion by the defeated party to open the judgment so as to require the justice to make a more complete return to the writ will be treated as a motion for a new trial, denial of which is not reviewable except in case of manifest abuse of discretion.—*White v. Brown*, 101 P. 900, 54 Or. 7.

67. N.C.—*Farmers' Nat. Bank v. Burns*, 12 S.E. 252, 107 N.C. 465.

68. N.Y.—*Peo. v. Barker*, 49 N.E. 775, 155 N.Y. 308.

69. Ill.—*Funkhouser v. Coffin*, 133 N.E. 649, 301 Ill. 257, affirming 221 Ill.App. 14.

11 C.J. p 213 notes 67, 68.

Dismissal of petition not necessary

An order quashing a writ of certiorari is final and appealable without dismissal of the petition.—*Funkhouser v. Coffin*, 133 N.E. 649, 301 Ill. 257, affirming 221 Ill.App. 14.

70. Ga.—*Columbus Heating & Ventilating Co. v. Upchurch*, 163 S.E. 301, 45 Ga.App. 16—*United Cigar Stores Co. v. Georgia Ry. & Power Co.*, 107 S.E. 781, 27 Ga.App. 198.

Suit dismissed on general demurrer

Where the suit was dismissed on general demurrer and plaintiff's certiorari was overruled in the superior court, the judgment overruling the certiorari was a final disposition of the case, and one from which a bill of exceptions would lie to the court of appeals.—*United Cigar Stores Co. v. Georgia Ry. & Power Co.*, supra.

71. Cal.—*Brown v. Superior Court of California in and for Los Angeles County*, 234 P. 409, 70 Cal.App. 732.

72. Wis.—*State v. Mitchell*, 245 N. W. 640, 210 Wis. 381, 86 A.L.R. 1361—*State v. Haugen*, 169 N.W. 555, 168 Wis. 253.

Motion identical with demurrer

Since the function of a motion to supersede a writ of certiorari is identical with that of a demurrer to a pleading, in that it presents the question whether there is a ground of relief stated, the order on such motion is appealable.—*State v. Haugen*, supra.

73. Ga.—*Fairfax Loan & Investment Co. v. Turner*, 175 S.E. 267, 49 Ga.App. 300.

In some states a review cannot be had unless the amount necessary to confer jurisdiction upon the appellate court is involved,⁷⁴ but in other states review may be had irrespective of the amount involved in the controversy.⁷⁵

187. Mode of Review; Appeal or Error

To review judgments or orders in certiorari proceedings, resort may be had to an appeal in some jurisdictions while in others a writ of error has been held proper.

In some jurisdictions appeal may be resorted to for the review of the determination made on certiorari proceedings,⁷⁶ while in others resort may be had to a writ of error.⁷⁷

Cal.—Bienenfeld v. Fresno Milling Co., 22 P. 1113, 82 Cal. 425.

1 C.J. p 218 note 72.

Ill.—Hyslop v. Finch, 99 Ill. 171.

Porto Rico.—American R. Co. v. Municipal Ct., 16 Porto Rico 227, 232.

Ala.—Mills v. Court of Com'rs of Conecuh County, 85 So. 564, 204 Ala. 40.

1 C.J. p 218 note 69.

Other remedy

Appeal is not appropriate where there is an available remedy by motion.—Peo. v. Feitner, 56 N.Y.S. 93, 7 App.Div. 362.

U.S.—Harris v. Barber, D.C., 9 S.Ct. 314, 129 U.S. 366, 32 L.Ed. 697.

Va.—Humphreys v. County Court of Monroe County, 110 S.E. 701, 90 W.Va. 315.

1 C.J. p 218 note 70.

When writ is quashed for error apparent on its face error will not lie, or there is nothing to be brought up on a record.—Peo. v. New York, How.Pr., N.Y., 90.

Cal.—Jacobs v. Board of Dental Examiners, App., 75 P.2d 96—Jordan v. Alderson, 192 P. 170, 43 Cal. App. 547.

Ga.—Martin v. Davison-Paxon Co., 180 S.E. 750, 50 Ga.App. 470—Anderson v. West Lumber Co., 179 S.E. 788, 51 Ga.App. 333, rehearing denied 180 S.E. 361, 51 Ga.App. 333—Southern Pac. Co. v. Davison-Paxon Co., 165 S.E. 862, 45 Ga. App. 719—O'Quinn v. Mayor and Council of Homerville, 157 S.E. 109, 42 Ga.App. 628—Connally Realty Co. v. Nalley, 143 S.E. 786, 38 Ga.App. 292—Zeigler v. Perry, 141 S.E. 426, 37 Ga.App. 647—Jones v. May, 107 S.E. 897, 27 Ga.App. 152—Whiddon v. Atlantic Coast Line R. Co., 94 S.E. 617, 21 Ga.App. 377.

1.—Heppe v. Meoberry, 183 N.E. 636, 350 Ill. 641.

Minn.—Sjoberg v. City of Minne-

apolis, 267 N.W. 374, 197 Minn. 406.

Miss.—Adams v. Board of Sup'rs of Union County, 170 So. 634, 177 Miss. 403.

Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397—State ex rel. Plummer v. Gardner, 234 S.W. 53, 290 Mo. 143.

N.J.—Trenton & Mercer County Traction Corporation v. City of Trenton, 119 A. 31, 98 N.J.Law 297, affirming Trenton & Mercer Traction Corporation v. Same, 116 A. 321, 97 N.J.Law 84—Franklin v. City of Millville, 119 A. 29, 98 N.J.Law 262, affirming Franklin v. Horton, 116 A. 176, 97 N.J.Law 25.

N.Y.—People ex rel. Moenig v. Commissioners of Land Office, 173 N.Y. S. 649, 186 App.Div. 139.

Tenn.—City of Nashville v. Mason, 11 Tenn.App. 344.

11 C.J. p 218 notes 80, 81.

Want of jurisdiction

(1) It has been held that, on appeal from a judgment of the county court, on certiorari, in a case in which it had no jurisdiction to grant the writ, the supreme court will render judgment dismissing the writ, although the want of jurisdiction was not objected to in the county court.—Winn v. Freele, 19 Ala. 171.

(2) Where an objection to a writ of certiorari went to the jurisdiction of the superior court, in that the writ was issued by a husband, against whom no judgment had been entered, to review a judgment against his wife, such objection might properly be raised in the appellate court for the first time.—Okerlind v. Fyke, 90 Ill.App. 192.

(3) The failure to object in superior court to appropriateness of writs of certiorari and prohibition to review action of board of dental examiners in revoking practitioners' licenses was not a waiver of right to object on appeal, since, if that were the case, jurisdiction could be conferred by the parties, and that

§ 188. Presentation and Reservation in Lower Court of Grounds of Review

Generally, questions not raised and properly preserved for review in the trial court or in the certiorari proceeding will not be noticed on appeal.

The general rules governing all appeals and writs of error as to preserving questions for review by objections, exceptions, etc., in the lower court are applicable; and generally questions of whatever nature, not raised and properly preserved for review in the trial court or in the certiorari proceeding, will not be noticed on appeal.⁷⁸ Thus, in some jurisdictions, sometimes by virtue of statutory provisions, questions not referred to in the petition for certiorari will not be considered.⁷⁹ However, the

cannot be done.—Jacobs v. Board of Dental Examiners, Cal.App., 75 P.2d 96.

Specific objection necessary

Where it does not appear what objection was made to a bond, and it is not alleged in motion to dismiss certiorari, wherein bond was deficient, no question is raised for review.—Abercrombie v. Gurley, 94 S.E. 606, 21 Ga.App. 389.

Objection as to parties

Individuals sued and answering as members of township board, in certiorari to quash ouster of constable and appointment of successor, cannot question regularity of proceeding for failure to join township as party defendant on appeal from judgment for relator.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

Defects in pleading

Court of appeals cannot consider motion to dismiss certiorari based on defects in pleadings or alleged errors in proceeding regarding which no question was raised in trial court.—Southern Pac. Co. v. Davison-Paxon Co., 165 S.E. 862, 45 Ga.App. 719.

Opinion testimony

Testimony of witness that he considered place sought to be abated a public nuisance, although opinion unsupported by facts, could not be challenged for first time on review where not objected to at trial.—O'Quinn v. Mayor and Council of Homerville, 157 S.E. 109, 42 Ga.App. 628.

79. Ga.—Hill v. George, 170 S.E. 326, 47 Ga.App. 272—Hutchings v. Roquemore, 139 S.E. 216, 164 Ga. 637—Continental Aid Ass'n v. Hand, 97 S.E. 206, 22 Ga.App. 726—Buchanan v. Satterwhite, 95 S.E. 309, 22 Ga.App. 23.

11 C.J. p 218 notes 82–84—44 C.J. p 747, note 81 [b].

Knowledge of statute presumed

Petitioner for certiorari is conclusively presumed to know of statute preventing grant of certiorari

making of a motion to quash or dismiss the writ has been held not necessary to present for review the objection that the writ was not applied for within the statutory time after judgment.⁸⁰

§ 189. Parties

An appeal may be prosecuted by a party named in the writ, but persons not parties to the certiorari proceeding are not proper or necessary parties to a bill of exceptions excepting to the judgment therein. An appeal may be prosecuted by, and in the name of, a court.

An appeal may be prosecuted by a party named in the writ,⁸¹ or on his decease pending an appeal, his personal representatives may be substituted.⁸² On the other hand, it would seem that a person who has not such interest as entitles him to bring certiorari cannot take an appeal or sue out a writ of error to review a determination in certiorari;⁸³ but a person who is denied leave to intervene as a taxpayer in a certiorari proceeding may appeal or bring a writ of error to review such ruling.⁸⁴ Where the proceeding is prosecuted by a nominal party who is the attorney for the real party in interest, such objection being one which could be cured by amendment, the court on appeal will treat it as if the amendment was made.⁸⁵

Parties to certiorari are proper parties to a bill of exceptions excepting to the judgment therein,⁸⁶ and conversely, one not a party to certiorari is not a proper or necessary party to such a bill of excep-

tions,⁸⁷ and should not be made a party to the bill even on his own application.⁸⁸

Court. It has been held that an appeal may be prosecuted by, and in the name of, a court.⁸⁹

§ 190. Requisites and Proceedings for Transfer of Cause

The necessity of permission and other prerequisites to appeal is a matter of local statutory regulation.

In some jurisdictions, the decision of an appellate court annulling the determination of a quasi-judicial body is treated by a higher court as a reversal, and permission to appeal is not necessary where the order of certiorari is returnable in the first instance in such appellate court, and in such a case a motion for permission to appeal will be denied.⁹⁰

§ 191. — Time of Taking and Notice

The appellant must comply with statutory provisions and rules of court as to the time of taking the appeal and the giving of notice thereof.

The appeal must be taken within the time prescribed by statute, the provisions of which cannot be altered or extended by the parties.⁹¹ Conversely, an appeal or proceeding in error taken or commenced before the right to take the same has accrued is premature and will be dismissed for want of jurisdiction;⁹² and the certification of a certiorari proceeding on agreement of the parties, be-

and must raise question of unconstitutionality in petition, although question did not appear until trial judge's decision.—*Hutchings v. Roquemore*, 139 S.E. 216, 164 Ga. 637.

Rehearing after statute held invalid

Where a statute abolishing the writ of certiorari from certain courts was not questioned or passed on in the certiorari proceeding, an appellate court will not, on rehearing, reverse its former decision upholding the denial of the writ, notwithstanding the supreme court in the interim has held such statute invalid.—*Anderson v. West Lumber Co.*, 180 S.E. 361, 51 Ga.App. 333, denying rehearing 179 S.E. 738, 51 Ga.App. 333.

80. W.Va.—*Morgan v. Ohio River R. Co.*, 19 S.E. 588, 39 W.Va. 17.

81. Okl.—*Board of Com'rs of Carter County v. Woodford Consol. School Dist. No. 36*, 25 P.2d 1057, 1061, 165 Okl. 227, citing *Corpus Juris*.

11 C.J. p 218 note 74.

82. N.Y.—*Peo. v. Brooklyn*, 12 N.E. 179, 105 N.Y. 674.

83. Ill.—*Peo. v. Lower*, 98 N.E. 557, 254 Ill. 306.

Taxpayer

A taxpayer cannot sue out a writ

to review the determination in certiorari, where the question involved, in reviewing the record of civil service commissioners, is whether one person or another occupied an office created by law, and the civil service commissioners and the corporation counsel have abandoned their appeal from the judgment.—*Peo. v. Lower*, 98 N.E. 557, 254 Ill. 306.

84. Ill.—*Peo. v. Lower*, supra.

85. Mich.—*White v. Palmer*, 206 N.W. 539, 233 Mich. 32.

86. Ga.—*Greenwood v. Greenwood*, 163 S.E. 317, 44 Ga.App. 847.

Temporary administrator, defendant in certiorari, was proper party defendant to bill of exceptions excepting to judgment overruling petition for certiorari, notwithstanding he was not administrator when judgment was rendered, or when bill of exceptions was sued out.—*Greenwood v. Greenwood*, supra.

87. Ga.—*Zeigler v. Perry*, 141 S.E. 426, 37 Ga.App. 647.—*Dillin v. United Roofing & Supply Co.*, 129 S.E. 573, 34 Ga.App. 316.

Mich.—*Singer v. Nicol*, 248 N.W. 601, 263 Mich. 221.

Trial court commissioner

Where losing party sought cer-

tiorari to review circuit court commissioner's judgment, and, on commissioner's motion, certiorari was denied, whereupon such party appealed, making commissioner appellee, appeal was dismissed, successful parties in proceedings before commissioner being only persons interested in upholding judgment.—*Singer v. Nicol*, 248 N.W. 601, 263 Mich. 221.

88. Ga.—*Dillin v. United Roofing & Supply Co.*, 129 S.E. 573, 34 Ga.App. 316.

89. Ala.—*De Kalb County Comrs. Ct. v. Wilborn*, 46 So. 585, 155 Ala. 192.

Parties who complain of an adjudication of their proceedings as a court may appeal in the name of the court.—*Lowndes County Comrs. Ct. v. Bowie*, 34 Ala. 461.

90. N.Y.—*Albano v. Hammond*, 196 N.E. 594, 267 N.Y. 590.

91. Ala.—*Lusk v. Capehart*, 30 So. 31, 129 Ala. 599.

N.Y.—*Peo. v. Ketor*, 3 How.Pr., N.S., 210.

Porto Rico.—*Leon v. Brusi*, 21 Porto Rico 423.

92. Ga.—*Sellers v. McNair*, 157 S.E. 373, 42 Ga.App. 731.

ore the writ was ordered to issue, has been held premature.⁹³

Notice of appeal must be in the form prescribed by statute.⁹⁴

§ 192. Supersedeas

Generally, an appeal from a decision on certiorari does not act as a supersedeas, but compliance with statutory provisions therefor is necessary.

In the absence of statutory provision to the contrary, an appeal from a decision on certiorari does not of itself act as a supersedeas,⁹⁵ and the party appealing, in order to obtain a supersedeas, must comply with the law authorizing the supersedeas.⁹⁶ It has been held that a writ of supersedeas will not issue from the supreme court to stay a judgment of the lower court in certiorari proceedings, pending an appeal, where it appears that the controversy will have ceased at the time of the hearing of the appeal in regular course.⁹⁷ The appeal will not be dismissed because an appeal bond contains language making it in form both an appeal and a supersedeas

bond, where no stay was permissible, but it is evident that the purpose of the bond was merely to perfect the appeal.⁹⁸

Summary review. While the lower court is without power to render judgment until exceptions, taken and allowed under statutes providing for summary review, are disposed of,⁹⁹ an order for judgment pending a bill of exceptions was held permissible on certiorari to show that the petitioners did not desire to amend the petition.¹

§ 193. Record and Assignment of Errors

- a. Assignment of errors
- b. Record

a. Assignment of Errors

Generally questions not raised by a proper assignment of errors will not be considered on appeal.

The assignment of errors must specify the particular matter relied on,² and questions not raised by a proper assignment of errors will ordinarily not be considered.³ However, the importance of con-

93. Me.—Rogers v. Brown, 181 A. 667, 134 Me. 88.

Proper time

Cases should be disposed of at nisi prius and should not be sent to law court on report, at request of parties except at such stage or on such stipulation that decision of question may in one alternative at least supersede further proceedings.—Rogers v. Brown, *supra*.

94. Mont.—State v. Gallatin County Justice Ct., 78 P. 498, 31 Mont. 258.

95. Ill.—People v. Thompson, 146 N. E. 473, 316 Ill. 11.

N.J.—Handwerk v. Town of Guttenberg, 105 A. 226, 92 N.J. Law 181, 11 C.J. p 219 note 88.

96. Ga.—Equitable Life Assur. Soc. of U. S. v. Culp, 127 S.E. 225, 159 Ga. 874.

Right to injunction on failure to obtain supersedeas

Where party against whom judgment is rendered fails on taking case from superior court to court of appeals to obtain supersedeas under Civ. Code 1910 § 6165, plaintiff in judgment can proceed to enforce it, and defendant would not be entitled to injunction to prevent its enforcement until disposition of case by court of appeals or until termination of garnishment proceedings instituted against defendant by plaintiff's creditors, nor to prevent plaintiff from inducing creditors to institute garnishment proceedings against defendant.—Equitable Life Assur. Soc. of U. S. v. Culp, *supra*.

97. Wash.—State v. Bremerton, 73 P. 477, 32 Wash. 508.

98. Wash.—State v. White, 82 P. 907, 40 Wash. 560, 2 L.R.A., N.S., 563.

99. Mass.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

1. Mass.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, *supra*.

Remains in abeyance

Order for judgment entered pending exceptions, which showed petitioners did not desire to amend, took effect only in case first bill of exceptions should be overruled.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, *supra*.

2. Ga.—Behn v. McIntyre, 164 S.E. 903, 45 Ga.App. 446.

Multifariousness

Assignment of error in appeal from determination on certiorari in overruling exceptions, stating numerous, varied, and distinct objections to trial court's charge is multifarious, and need not be considered.—Mathews v. Autry, Tex. Civ. App., 65 S.W.2d 798.

Assignments held sufficient

(1) In general.—Cusic v. Holland Furnace Co., 159 S.E. 882, 43 Ga.App. 770—Flood v. Empire Inv. Co., 133 S.E. 60, 35 Ga.App. 266—Farmers' & Merchants' Bank v. Willie, 133 S.E. 44, 35 Ga.App. 202.

(2) Alleging that the court erred in overruling the petition and denying it on each of the grounds stated

therein, and that the court should have sustained it, was sufficient to present for review the questions of law made by the petition and answer.—Buchman v. Rogers, 113 S.E. 230, 29 Ga.App. 62.

(3) An assignment that judge of superior court erred in dismissing certiorari sufficiently showed that the ruling was excepted to.—Hines v. Porter, 106 S.E. 16, 26 Ga.App. 178.

(4) Error in striking out the transcript of evidence given at hearing against a police officer before a civil service commission is sufficiently raised by an assignment that the lower court "erred in quashing the proceedings of the Civil Service Commission, as set forth in the return."—Buttimer v. Geary, 229 Ill. App. 524.

(5) Assignment that judgment was contrary to law and evidence was held equivalent of saying court erred in rendering judgment.—Leathers v. Waters, 134 S.E. 806, 35 Ga.App. 757.

(6) Assigning error to the overruling of certiorari as contrary to the law and the evidence, on the ground that under the law applicable and under the evidence the court should have sustained the certiorari and erred in overruling it, and in refusing to sustain it, is sufficiently specific.—Chandler v. Reeves, 105 S.E. 724, 26 Ga.App. 167.

(7) Other illustrations see 11 C.J. p 219 note 91 [a].

3. Ga.—Slaton v. Hinman, 100 S.E. 24, 24 Ga.App. 64—Continental Aid

struing a particular statute has been held to warrant consideration on the merits of an appeal from a judgment on certiorari, notwithstanding a non-compliance with rules requiring a specific statement of the errors assigned;⁴ and in at least one jurisdiction, where the cause is removed by writ of error, it has been held that special assignments of error are not required, but those stated in the affidavit for the writ will be deemed sufficient.⁵

b. Record

- (1) In general
- (2) Bill of exceptions
- (3) Petition for writ as part of record
- (4) Evidence
- (5) Conclusiveness of statements

(1) In General

Generally, the appellate court will consider only matters shown by the record proper or presented by a bill of exceptions, etc., embodied in the record on appeal.

In those states in which an appeal may be taken in cases of certiorari, the appellate court will confine itself to an examination of the record, and matter not appearing thereon will not be considered;⁶

and it is essential to the jurisdiction of the appellate court that the record show that the writ was issued and a return made,⁷ and if the record is incomplete and does not show a final verdict or judgment, no review can be had.⁸ So, where errors are not affirmatively shown, the court will not look beyond the record to discover errors not apparent therein,⁹ nor will the court go behind the return to the writ to review proceedings not stated therein.¹⁰ The appellate court will not treat that as a return to the writ which the trial court did not so treat,¹¹ and an amended return filed after the submission of the case and not shown to have been considered below cannot be considered,¹² and the appellate court will disregard conclusions of fact in the return, where not within the scope of the terms of the writ.¹³

(2) Bill of Exceptions

Ordinarily, the record should contain a proper bill of exceptions to authorize a review of the alleged errors.

While it has been held that a bill of exceptions is not necessary if error appears on the face of the proceedings,¹⁴ ordinarily, to authorize a review of

Ass'n v. Hand, 97 S.E. 206, 22 Ga. App. 726—Morrison v. Brown, 94 S.E. 85, 21 Ga.App. 217.
11 C.J. p 219 note 91.

Reasoning of lower court

On appeal from a decision on certiorari, error may be assigned on the record only and not on the reasoning in the opinion of the court below.—Burhans v. City of Paterson, 123 A. 883, 99 N.J.Law 490.

Reasons filed below

On the argument in appeal in certiorari reliance may be had on the reasons filed in the court below and brought up with the record.—Burhans v. City of Paterson, supra.

Assignments insufficient

(1) Supreme court Rules, rule 15, and Rev.St.1919 § 1511, requiring specific statement of errors assigned, are not complied with by grouping under title of assignment of errors such specifications as invalidity, fatal misdirection, and unavailability of writ of certiorari, waiver thereof by relator, pendency of another suit by relator, etc.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

(2) Grounds of appeal, alleging error in admission of incompetent testimony and exclusion of competent testimony, were too general and indefinite.—State ex rel. Horton v. Clark, 9 S.W.2d 635, 320 Mo. 1190.

No error assigned

On objections to certiorari bond and affidavit presented in brief, where no error is assigned thereon

in bill of exceptions, and no judgment overruling objection to affidavit and bond is complained of, court of appeals, under Civ.Code 1910 § 6203, cannot determine sufficiency of affidavits and bond in record.—Morrison v. Brown, 94 S.E. 85, 21 Ga.App. 217.

4. Mo.—State ex rel Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

5. Mich.—Lickly v. Bishopp, 114 N.W. 69, 150 Mich. 256.
11 C.J. p 219 note 92.

6. Ga.—Macris v. Tsipourses, 134 S.E. 621, 35 Ga.App. 671—Whiddon v. Atlantic Coast Line R. Co., 94 S.E. 617, 21 Ga.App. 377—Lucky Bros. v. Phillips, 93 S.E. 43, 20 Ga. App. 416.

Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.
N.J.—Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J.Law 202 dismissing appeal Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653.

11 C.J. p 219 note 93.

Proffered amendment to exceptions
In answer of trial judge in certiorari, which was not by order made part of record, nor brought to attention of court of appeals in any other way, cannot be considered.—Macris v. Tsipourses, 134 S.E. 621, 35 Ga.App. 671.

Judgment not on merits

In view of Code Civ.Proc. § 1077, it has been held that a judgment in certiorari would be treated as a dismissal of petition, and not final determination on merits, the judgment

roll showing neither return nor writ.—Donovan v. Board of Police Com'rs of City and County of San Francisco, 163 P. 69, 32 Cal.App. 392.

Amendment of pleading and admission of evidence

Where answer of magistrate to petition for certiorari to which no traverse or exception was filed did not show petitioner's objections to allowance of amendment of plea or to admission of evidence, appellate court could not say that trial court erred in allowing amendment or in admitting evidence.—Sparks v. Yatesville Gin Co., 95 S.E. 1021, 22 Ga.App. 324.

7. Ala.—Hooper v. Town of Albertville, 79 So. 156, 16 Ala.App. 482.

8. Ga.—Jessey v. Dean, 50 S.E. 139, 122 Ga. 371.

9. Ala.—Independent Pub. Co. v. American Press Assoc., 15 So. 947, 102 Ala. 475.

11 C.J. p 220 note 97.

10. N.Y.—People v. New York Fire Comrs., 73 N.Y. 437.

11. Ill.—Deslauries v. Soucie, 122 Ill.App. 81, affirmed 78 N.E. 799, 222 Ill. 522.

12. Mich.—Nelson v. Hillen, 129 N.W. 717, 164 Mich. 507.

13. Minn.—De Rochebrume v. Southeimer, 12 Minn. 78.

14. Ala.—Mills v. Court of Com'rs of Conecuh County, 85 So. 564, 204 Ala. 40.

Void order so appearing

On appeal from a decree in certiorari refusing to vacate a part of an

alleged errors, the record should contain a proper bill of exceptions.¹⁵

Embodying a petition for the writ in the bill of exceptions is treated *infra* this section, subdivision b (3).

Amendment. Where the judgment excepted to expressly recited that the certiorari was overruled, a proposed amendment to the bill of exceptions reciting that the certiorari was erroneously dismissed should be allowed, although it is not necessary.¹⁶

(3) Petition for Writ as Part of Record

A petition for the writ should be embodied in the bill of exceptions or verified as a part thereof.

It seems that the petition for the writ is not a part of, and should not be included in, the record,¹⁷ and where the court refuses to sanction the petition, it should be embodied in a bill of exceptions

or verified as a part thereof by the judge who refused to sanction it.¹⁸

(4) Evidence

The record should contain a statement of the substance of the evidence.

It has been held that the record on appeal in a certiorari proceeding must contain a statement of the substance of the evidence.¹⁹ However, a statute permitting a court to take evidence on certiorari to a quasi-judicial body does not make such evidence a part of the record, and such evidence is not before the reviewing court without a bill of exceptions.²⁰

(5) Conclusiveness of Statements

Undisputed statements will be taken as true, but statements in the return to the writ will be taken as true where in conflict with the statements of the petition for the writ or in conflict with the findings of fact by the reviewing court.

order of the county commissioners' court on the ground that it was void, there was no occasion for a bill of exceptions, where the order, if void, so appeared on the face of the proceedings.—*Mills v. Court of Com'rs of Conecuh County*, *supra*.

15. Ga.—*Jennings v. State*, 144 S.E. 147, 38 Ga.App. 454—*Leathers v. Waters*, 134 S.E. 806, 35 Ga.App. 757.

11 C.J. p 220 note 1.

Motion to quash writ and the ruling of the court thereon should be set forth in the bill of exceptions.—*Southern R. Co. v. Graham*, 58 So. 672, 4 Ala.App. 393—11 C.J. p 169 note 49.

When tendered

The bill of exceptions must be tendered within the time allowed by statute or court rule after the decision on certiorari.—*Jennings v. State*, 144 S.E. 147, 38 Ga.App. 454.

Expressly excepting to judgment

Where an assignment in the bill of exceptions charged that the judgment was erroneous, it is not necessary that the bill of exceptions expressly except to, and complain of, the judgment.—*Leathers v. Waters*, 134 S.E. 806, 35 Ga.App. 757.

Single bill

Where a money rule proceeding was brought by one judgment creditor and another judgment creditor intervened, a single bill of exceptions to a judgment, dismissing certiorari to review a decision making the rule absolute by two separate orders, has been held sufficient.—*Shouse v. Gober*, 167 S.E. 316, 46 Ga. App. 231.

16. Ga.—*Flood v. Empire Inv. Co.*, 133 S.E. 60, 35 Ga.App. 266.

17. Ga.—*Hightower v. Davis*, 102 S.E. 34, 24 Ga.App. 689.

4 C.J. p 169 notes 48, 50—11 C.J. p 220 note 2.

18. Ga.—*Herrington v. City of Valdosta*, 192 S.E. 927, 56 Ga.App. 489—*Charles v. Bishop*, 117 S.E. 275, 30 Ga.App. 242—*Hightower v. Davis*, 102 S.E. 34, 24 Ga.App. 689—*Stansell v. City of Conyers*, 94 S.E. 62, 21 Ga.App. 124—*Wiggins v. City of Cordele*, 87 S.E. 826, 17 Ga. App. 541.

11 C.J. p 220 note 3.

Entry and signing order on petition

The fact that the court enters and signs on the petition for certiorari an order refusing the writ does not constitute such petition a part of the record, and a certified copy of it cannot be brought to the reviewing court as a portion of such record.—*Herrington v. City of Valdosta*, 192 S.E. 927, 56 Ga.App. 489—*Charles v. Bishop*, 117 S.E. 275, 30 Ga.App. 242—11 C.J. p 220 note 3 [a] (1).

Verification sufficient

Certification by judge that bill of exceptions containing exact copy of petition was true is sufficient verification of petition for certiorari.—*Farmers' & Merchants' Bank v. Willie*, 133 S.E. 44, 35 Ga.App. 202.

Ordering petition made part of record

An order that the refused petition for certiorari be filed and made a part of the record does not make it part of the record, but the petition must be incorporated in a bill of exceptions or verified as a part thereof.—*Wiggins v. City of Cordele*, 87 S.E. 826, 17 Ga.App. 541—4 C.J. p 169 note 51.

Insufficient identification

An unsanctioned petition for cer-

tiorari, not incorporated in the bill of exceptions but specified or sent up as a part of the record, is not sufficiently identified by the mere attaching to the bill of exceptions, and following the judge's certificate, of the paper which purports to be original petition or a copy thereof, with the order refusing sanction.—*Hightower v. Davis*, 102 S.E. 34, 24 Ga. App. 689.

No answer in record

(1) Where there is no answer in the record, the allegations of the petition are not verified.—*Central of Georgia Ry. Co. v. Griffin*, 115 S.E. 276, 29 Ga.App. 357.

(2) On review of judgment rendered by superior court on certiorari, where no answer to the writ is in the record, and in response to order to send up certified copy the clerk certifies that the answer is not in his office, the judgment cannot be reversed, in the absence of any motion to establish a copy of the lost record.—*Central of Georgia Ry. Co. v. Griffin*, *supra*.

19. N.J.—*Freudenreich v. Mayor and Council of Borough of Fairview*, 176 A. 162, 114 N.J.Law 290.

Transcript of evidence before tribunal

In proceeding to review resolution of borough's governing body dismissing prosecutor as policeman, where trial justice at argument permitted prosecutor, without objection by defendant-appellant, to supply transcript of testimony taken before governing body, such transcript is part of record on appeal.—*Freudenreich v. Mayor and Council of Borough of Fairview*, *supra*.

20. Ill.—*Hughes v. Board of Appeals of City of Chicago*, 156 N.E. 350, 325 Ill. 109.

The statements in the return to the writ of certiorari must be taken as true where in conflict with the statements of the petition for the writ,²¹ or in conflict with findings of fact by the reviewing court;²² but the facts stated in the application for the writ will be taken as true where not disputed.²³ Also, extrinsic facts set forth in the return will be considered as found to be true where the bill of exceptions contains no recital of evidence,²⁴ and a recital of the judge in his order dismissing the petition for certiorari will be taken as true where the record fails to show anything to the contrary.²⁵

§ 194. Scope and Extent of Review in General

The appellate court will only consider errors which are presented and urged before it and which have been properly preserved for review.

While it has been held in some jurisdictions that the only question to be reviewed on appeal or error is the jurisdiction of the court or tribunal whose proceedings are sought to be reviewed by certiorari,²⁶ it has also been held that after final judgment in the certiorari proceeding, any errors committed by the court in the final judgment, or in ruling adversely to the appellant on interlocutory matters prior to the final judgment, can all be corrected on appeal,²⁷ and a motion to quash a writ of certiorari brought to review a judgment which was alleged to be fraudulently obtained, being an admission that the judgment was fraudulently obtained, the court on appeal can inquire into such judgment

and the manner in which it was acquired.²⁸ However, the appellate court will only consider the errors which are presented and urged before it,²⁹ and specially pointed out,³⁰ and the review is also confined to matters or objections urged below, as shown supra § 188, and affidavits or evidence not shown by the record to have been read below, or there acted on, will not be considered.³¹ The court must ascertain the facts from the answer to the writ,³² and extraneous matter in the return made on the writ must be disregarded on appeal.³³

Where a judgment of dismissal was rendered after a hearing on the petition for certiorari, questions which might have been determined on demurrer could be decided on appeal, such questions being presented on a motion to dismiss;³⁴ and where an incidental point was left open by the lower court and the parties on appeal fully presented arguments and requested a decision, the appellate court has held that it could deal with such question as an incident of the main controversy.³⁵ Also, where the ultimate decision would be adverse to the petitioner, the appellate court has assumed in his favor that the case made by the allegations of the petition was before the court for consideration, irrespective of procedural questions involved.³⁶

While the appellate court will pass on the merits where a defect in the certiorari proceedings was not called to the attention of the court below,³⁷ where the lower court did not consider the assignments of error,³⁸ and the only ruling made by the

21. D.C.—Carver v. O'Neal, 11 App. D.C. 353.
- N.Y.—People v. Van Brunt, 90 N.Y.S. 845, 99 App.Div. 564.
- 11 C.J. p 220 note 6.
22. Mich.—Gorham v. Johnson, 122 N.W. 181, 157 Mich. 433.
23. Tex.—Reed v. Sieckenius, Civ. App., 65 S.W. 487.
24. Mass.—Byfield v. City of Newton, 141 N.E. 658, 247 Mass. 46.
25. Ga.—Norris v. Sibert & Robinson, 186 S.E. 199, 53 Ga.App. 440.
26. Wis.—Brandies v. Robinson, 45 Wis. 464.
- 11 C.J. p 221 note 9.
27. Iowa.—Riley v. Board of Trustees of Policemen's Pension Fund, 222 N.W. 403, 207 Iowa 177.
- N.Y.—Freeman v. Ogden, 40 N.Y. 105.
28. Mo.—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo. App. 787.
29. Ga.—Burley v. Lindstrom, 161 S.E. 152, 44 Ga.App. 250.
- N.D.—State v. Johnson, 278 N.W. 241, 242, quoting *Corpus Juris*—State ex rel. Claver v. Broute, 197 N.W. 871, 878, 50 N.D. 753, citing

Corpus Juris—Brissman v. Thistlethwaite, 192 N.W. 85, 86, 49 N. D. 417, citing *Corpus Juris*.
11 C.J. p 221 note 10.

30. Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.
11 C.J. p 221 note 11.

Indefinite and incomplete

A contention based on a statement of facts which is so indefinite and incomplete that the court is unable to determine the merits of the contention without regard to the briefs will be disregarded.—Burley v. Lindstrom, 161 S.E. 152, 44 Ga.App. 250. Assignment of errors see supra § 193 a.

31. Or.—Berridge v. Marion County, 159 P. 628, 81 Or. 391.
11 C.J. p 220 note 5.

32. Ga.—Central of Georgia Ry. Co. v. Griffin, 115 S.E. 276, 29 Ga.App. 357.

33. Mont.—State ex rel. Wentworth v. Baker, 53 P.2d 440, 101 Mont. 226.

34. Cal.—Pacific Home Bldg. Realty Co. v. Daugherty, 243 P. 473, 75 Cal.App. 623.

35. N.Y.—Suffolk County v. Water Power & Control Commission, 199 N.E. 41, 269 N.Y. 158, modifying 281 N.Y.S. 523, 245 App.Div. 62.

Legal existence of public body

Where county attacked jurisdiction of state water power and control commission to render decision consenting to creation of county water authority subsequent to resolution whereby county supervisors rescinded resolution creating water authority, and such attack incidentally involved attack on legal existence of water authority, which intervened in county's certiorari proceeding wherein question of legal existence of authority was left open by appellate division, and parties on appeal fully presented arguments and requested decision, court of appeals could deal with such question as incident of main controversy.—Suffolk County v. Water Power and Control Commission, supra.

36. Mass.—Town of Webster v. Alcoholic Beverages Control Commission, 4 N.E.2d 302.

37. Ga.—Covin v. Cairo Banking Co., 112 S.E. 732, 28 Ga.App. 597.

38. Ala.—Box v. Metropolitan Life

court below was to quash and dismiss the writ on ground of lack of jurisdiction,³⁹ or to deny the issuance of the writ⁴⁰ on technical objections,⁴¹ the merits of the case cannot be considered on appeal; and on appeal from a refusal of the writ, no determination can be made as to the validity of matters on which the proceedings sought to be reviewed are founded.⁴² Also, if the appeal is from an order denying a motion for a further return, the merits of the controversy are not reviewable.⁴³

Petition filed too late. Where a petition for certiorari was not filed within the required time, the only question for review on appeal was error in reversing the judgment denying a new trial.⁴⁴

Subsequent appeals. A decision on a matter on a prior appeal is the law of the case on all subsequent appeals and will not be reconsidered or re-adjudicated therein.⁴⁵

§ 195. Waiver of Errors

A party may be precluded from assigning error by admissions made in the proceedings or by conduct constituting a waiver thereof.

On a writ of error, where the record is complete and the case has been heard without objection, any irregularity in notifying defendants of the proceed-

ings must be considered as waived.⁴⁶ So, admissions made in the certiorari proceedings may preclude assigning error in connection therewith;⁴⁷ and where dismissal of a petition in certiorari was acquiesced in by the filing of a renewal suit in certiorari before the tendering of a bill of exceptions in the former suit, the right of exception has been regarded as relinquished and the writ of error must be dismissed.⁴⁸ However, an exception to a refusal to dismiss the writ has been held not waived by proceeding to argue on the merits.⁴⁹

§ 196. Presumptions

In the absence of a showing to the contrary, everything necessary to uphold the proceedings in the lower court will be presumed.

The ordinary presumptions on appeals and writs of error in general are applicable,⁵⁰ and everything necessary to uphold the lower court's jurisdiction and the correctness of its proceeding and decision will be presumed, in the absence of a showing to the contrary.⁵¹ Thus, it will be presumed that the certiorari proceedings were regular,⁵² that all the evidence was returned where the writ so commanded,⁵³ that all the facts on which the inferior tribunal acted are disclosed by the record,⁵⁴ and

Ins. Co., 168 So. 217, 232 Ala. 321, reversing 168 So. 209, 27 Ala.App. 21, reversed on other grounds 168 So. 216, 232 Ala. 1, certiorari denied 168 So. 220, 232 Ala. 447.

39. Or.—Holland-Washington Mortgage Co. v. County Court of Hood River County, 188 P. 199, 95 Or. 668.

40. Cal.—Brown v. City Council of City of Long Beach, 258 P. 693.

41. N.Y.—People ex rel. Moenig v. Commissioners of Land Office, 173 N.Y.S. 649, 186 App.Div. 139.

42. N.Y.—People v. Long Island City, 76 N.Y. 20.

43. N.Y.—People v. Gilon, 9 N.Y.S. 690.

44. Ga.—Nixon v. Growers' Finance Corporation, 157 S.E. 119, 42 Ga. App. 642.

45. Tenn.—City of Knoxville v. Connors, 201 S.W. 133, 139 Tenn. 45.

46. Ga.—Morrison v. Brown, 94 S. E. 85, 21 Ga.App. 217.
11 C.J. p 221 note 24.

47. Ga.—McCorkel v. J. J. Whitten & Son, 107 S.E. 97, 26 Ga.App. 707.
Ill.—Fisher v. McIntosh, 115 N.E. 529, 277 Ill. 432.
11 C.J. p 221 note 25.

48. Ga.—Hall v. Alford, 131 S.E. 95, 34 Ga.App. 753.

49. Minn.—Bunday v. Dunbar, 5 Minn. 444.

50. N.D.—State ex rel. Claver v. Broute, 197 N.W. 871, 873, 50 N. D. 753, citing *Corpus Juris*—Brissman v. Thistlethwaite, 192 N.W. 85, 86, 49 N.D. 417, citing *Corpus Juris*.

51. Ga.—New Zealand Ins. Co. v. Brewer, 116 S.E. 922, 29 Ga.App. 773.

Ill.—Bartunek v. Lastovken, 183 N. E. 333, 350 Ill. 380.

Mich.—Snow v. Perkins, 2 Mich. 238.
4 C.J. p 1082 note 21 [a].

Uncertainties in answer

Since presumptions always favor verdict and judgment and burden is on him who alleged error to show it, uncertainties and ambiguities in answer to writ of certiorari as made by trial judge must be construed favorably to judgment and to judgment refusing new trial therefrom.—Reese v. Miller, 126 S.E. 904, 33 Ga.App. 442.—New Zealand Ins. Co. v. Brewer, 116 S.E. 922, 29 Ga.App. 773.

Objections not sustained below

In certiorari to review action of permanent road commission of a county, in declaring result of road bond election, the court, on appeal from decree affirming validity of election, after eliminating votes cast in certain precincts, will assume that objections made to the entire election, such as noncompliance with Civ.Code 1922 §§ 215, 220, were not sustained, and will not consider such

objections.—Smith v. Saye, 125 S.E. 269, 130 S.C. 20.

Jurisdictional facts alleged

On appeal from order quashing certiorari to review county court order excluding land from village, court of appeals must presume that petition recited all necessary jurisdictional facts.—Village of Grandview v. McElroy, 9 S.W.2d 829, 222 Mo.App. 787.

Sufficient facts found

On certiorari to review grant of license to keep inn and tavern in township, it must be assumed by supreme court that court of common pleas on evidence justifying it found that locus in quo contained picnic or recreation ground acre in extent, rendering proper issuance of the license under Act April 8, 1913, Pub. L. p 574.—Deck v. Bell, 102 A. 829, 90 N.J.Law 96, 91 N.J.Law 322.

52. Ga.—Morrison v. Brown, 94 S.E. 85, 21 Ga.App. 217.
11 C.J. p 221 note 16.

Waiver of notice

Where no attack is made in the bill of exceptions as to the want of notice of the proceedings, the court will presume that the lower court had before it a sufficient written waiver of notice.—Morrison v. Brown, *supra*.

53. Minn.—State v. Ramsey County Probate Ct., 85 N.W. 917, 83 Minn. 58.

54. Wis.—State v. Wisconsin Real

that a sufficient reason existed for dismissing the writ, where the bill of exceptions does not show the reason.⁵⁵ On appeal from an order denying the writ, where the matter stands in a situation similar to that presented by a demurrer to the complaint, all the material facts well pleaded in the petition for the writ must be presumed to be true,⁵⁶ and where the record contains no formal return to the alternative writ, other than a demurrer, it must be considered as adopting the allegations of the petition as a return and as a part of the judgment roll.⁵⁷ If the return does not deny the allegations in the writ and the application therefor, the right to sue out the writ will be conclusively presumed;⁵⁸ and, in the absence of the writ, if the parties submitted their case without objection, it will be presumed that the writ was waived or lost.⁵⁹

If a motion to dismiss the writ is based on two grounds, but the order granting it does not state on which ground it is based, it will be presumed that it was granted on both grounds.⁶⁰ However, it has been held that the mere granting of the writ does not raise the presumption, on appeal, that a good excuse was shown for not applying for the writ within the statutory time.⁶¹

Where the writ is denied by the lower court, the legitimate inference, in the absence of evidence to the contrary, is that the writ was denied because the court was satisfied with the decision below,⁶² and in some jurisdictions, the statutory presumption

as to a reversal being on the facts rather than on the law is applicable.⁶³

§ 197. Discretion of Lower Court

A decision of a court in the exercise of its discretion, where reviewable, will not be interfered with except where an abuse of discretion is clearly shown.

As already stated in § 186 b, discretionary rulings are not appealable in some states; and where an appeal or writ of error is proper, it is the invariable rule that discretionary matters will not be reviewed or interfered with except where an abuse of discretion is clearly shown.⁶⁴ So, if the court has discretion as to the judgment to be rendered on certiorari, such discretion will not be reviewed on appeal or error unless violative of law or the evidence is strongly against it.⁶⁵

Review where disputed questions of fact are also involved is treated *infra* § 198.

§ 198. Questions of Fact

The findings or decision of the lower court on certiorari will not be disturbed on appeal where based on disputed questions of fact and there is competent or substantial evidence to sustain them.

On appeal from a judgment rendered on certiorari, the appellate court will not disturb the findings of the lower court on disputed questions of fact where they are based on competent or substantial evidence,⁶⁶ nor will the court consider evidence which might have supported some finding

Estate Brokers' Board, 206 N.W. 863, 188 Wis. 632.

55. Ill.—West Chicago St. R. Co. v. Becker, 57 Ill.App. 533.

56. Cal.—Brown v. City Council of City of Long Beach, App., 258 P. 693.

57. Cal.—Bayside Land Co. v. Dolley, 284 P. 479, 103 Cal.App. 253.

58. Mo.—State v. McDavid, 84 Mo. App. 47.
11 C.J. p 221 note 19.

59. Ala.—Turnly v. Stinson, 1 Ala. 456.

60. Cal.—Onesti v. Freelon, 61 Cal. 625.

61. W.Va.—Morgan v. Ohio River Co., 19 S.E. 538, 39 W.Va. 17.

62. S.C.—American Surety Co. of New York v. Royall, 158 S.E. 127, 160 S.C.-1.

63. N.Y.—People v. Barker, 59 N.E. 137, 151, 165 N.Y. 305.

64. Ga.—Puckett v. Meeks, 88 S.E. 750, 18 Ga.App. 40.

W.Va.—Michaelson v. Cantley, 32 S.E. 170, 45 W.Va. 533.

"If a court grants the writ when by law it should clearly not have been granted, a reviewing court will so declare, and order the writ quashed; but if the lower court refuses the writ a clear case of capricious, arbitrary or wilfully perverse exercise of the discretion must be made to warrant the interference of an appellate tribunal. We are not to substitute our judicial discretion for that of the court of first instance."—Butler v. Harrison, 124 Ill. App. 367, 372.

65. Ga.—Burch v. Holliday, 172 S.E. 531, 48 Ga.App. 237—Thaxton v. Fain, 157 S.E. 886, 43 Ga.App. 125.
11 C.J. p 221 note 30.

Misconception of law

While a judge may remand the case or give final judgment on certiorari even where the evidence is in conflict in possessory warrant cases, as shown *supra* § 179, it is the contemplation of the law that he shall exercise a discretion, and where it appears that he has rendered final judgment on a misconception of law and not in the exercise of the discretion vested in him, the judgment will be reversed and remanded for

further consideration by him.—Whitworth v. Carter, 147 S.E. 904, 39 Ga.App. 625.

66. N.J.—Dana College v. State Board of Tax Appeals, 189 A. 620, 117 N.J.Law 530, affirming 184 A. 412, 14 N.J.Misc. 303—Ziegler v. City Council of Hackensack, 176 A. 324, 114 N.J.Law 186, affirming 174 A. 199, 113 N.J.Law 215—Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J.Law 202, dismissing appeal Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653—Angelotti v. Town of Montclair, 162 A. 565, 109 N.J.Law 360—Kohn v. Tilt, 134 A. 658, 103 N.J.Law 110.

W.Va.—Snodgrass v. Board of Education of Elizabeth Independent Dist., 171 S.E. 742, 114 W.Va. 305.
11 C.J. p 221 note 31.

Finding contrary to evidence

Where evidence is all one way and finding is to contrary, question becomes one of law, reviewable in such proceeding, and decision of inferior tribunal without evidence to support its finding cannot be upheld.—Smith v. Board of Police Com'rs of City of Los Angeles, 36 P.2d 670, 1 Cal. App.2d 292.

which was not made, unless it also supports the finding actually made.⁶⁷

Thus, in *Georgia*, where no legal questions are involved other than the sufficiency of the evidence, it is uniformly held that the overruling or refusing of a certiorari, on the ground that the evidence is sufficient to support the judgment excepted to, will not be disturbed if there is any evidence supporting such judgment.⁶⁸ Also, unless the judgment rendered is absolutely demanded by the evidence, a decision on certiorari granting a first new trial will not be disturbed,⁶⁹ even though error be involved.⁷⁰ So, the second grant of a new trial will not be reversed where the evidence is overwhelming against the verdict,⁷¹ or where there were errors which in

a close case may have been injurious to the losing party.⁷² So, where a petition for certiorari presents questions of law and of fact, and the judge of the superior court sustains the certiorari generally and grants a new trial, the judgment will not be reversed, where no abuse of discretion is shown.⁷³

§ 199. Harmless Error

Harmless errors will be disregarded by the court on appeal.

Mere formal or trivial errors, or errors which do not affect the substantial rights of the parties, will be disregarded.⁷⁴

67. Cal.—*Smith v. Board of Police Com'rs of City of Los Angeles*, supra.

68. Ga.—*Jett v. Gordon*, 133 S.E. 346, 52 Ga.App. 370—*Cohen v. Saffer*, 160 S.E. 130, 43 Ga.App. 746—*White Provision Co. v. Brown*, 150 S.E. 857, 40 Ga.App. 674—*Faggart v. Rowe*, 126 S.E. 731, 33 Ga.App. 423—*Adams Tailoring Co. v. Thomas*, 122 S.E. 246, 31 Ga.App. 787—*Atlantic Coast Line R. Co. v. Bennett*, 121 S.E. 706, 31 Ga.App. 626—*Head v. Strozier*, 118 S.E. 757, 30 Ga.App. 674—*Wilson v. Martin*, 109 S.E. 294, 27 Ga.App. 549—*Crawford v. Jones*, 108 S.E. 807, 27 Ga.App. 448—*Venable v. S. W. Bacon Produce Co.*, 106 S.E. 797, 26 Ga.App. 725—*Golding v. Parrish*, 106 S.E. 743, 26 Ga.App. 495—*Hines v. Malone*, 105 S.E. 37, 25 Ga.App. 781—*Central of Georgia Ry. Co. v. Payne*, 101 S.E. 695, 24 Ga.App. 638—*Taylor v. Keller*, 99 S.E. 10, 23 Ga.App. 571—*Martin v. Moore*, 93 S.E. 223, 20 Ga.App. 569—*Logan v. Daniel*, 91 S.E. 918, 19 Ga.App. 535.

11 C.J. p 222 notes 32, 33.

No error of law

Refusal to sanction petition for certiorari is not error as matter of law, where judgment for petitioner was not demanded and no error of law was committed.—*Shepherd v. Swain*, 157 S.E. 339, 42 Ga.App. 741.

69. Ga.—*Watson v. Independent Banner of Love Soc.*, 187 S.E. 897, 54 Ga.App. 370—*Peacock v. American Plant Co.*, 175 S.E. 262, 49 Ga.App. 267—*McWhorter v. Stein*, 171 S.E. 583, 47 Ga.App. 838—*Freeman v. Franklin*, 170 S.E. 321, 47 Ga.App. 265—*Smith v. J. J. Williamson & Sons*, 159 S.E. 912, 43 Ga.App. 702—*Hartsfield Co. v. Ray*, 157 S.E. 111, 42 Ga.App. 637—*Sunbeam Heating Co. v. Mason*, 155 S.E. 769, 42 Ga.App. 265—*Smith v. Whitaker*, 148 S.E. 746, 40 Ga.App. 73—*Connally Realty Co. v. Nalley*,

143 S.E. 786, 38 Ga.App. 292—*National Union Fire Ins. Co. v. Ozburn*, 143 S.E. 623, 38 Ga.App. 276—*Zeigler v. Perry*, 141 S.E. 426, 37 Ga.App. 647—*Folds v. Harris*, 129 S.E. 664, 34 Ga.App. 445—*Thompson v. Lawrence*, 121 S.E. 255, 31 Ga.App. 552—*Daniell & Beutell v. McRee*, 120 S.E. 448, 31 Ga.App. 210—*Maynard v. American Ry. Express Co.*, 115 S.E. 35, 29 Ga.App. 329—*Izlar v. Western Union Telegraph Co.*, 113 S.E. 42, 29 Ga.App. 12—*Flowers v. Thompson*, 112 S.E. 528, 28 Ga.App. 595—*Darley v. Williams*, 111 S.E. 83, 28 Ga.App. 323—*McCall v. Stubbs*, 111 S.E. 63, 28 Ga.App. 308—*Murray v. Stribling*, 110 S.E. 761, 28 Ga.App. 211—*Arrington v. Turner*, 110 S.E. 747, 28 Ga.App. 270—*Maner v. Clark Stewart Co.*, 109 S.E. 178, 27 Ga.App. 553—*Nickajack Milling & Grain Co. v. International Vegetable Oil Co.*, 106 S.E. 300, 26 Ga.App. 473—*Bingham v. Haines*, 102 S.E. 923, 25 Ga.App. 136—*Charles W. Tway Co. v. Hedenberg*, 101 S.E. 199, 24 Ga.App. 520—*Tomberlin v. Barber*, 101 S.E. 196, 24 Ga.App. 484—*Georgia Grocery Co. v. Brunson*, 101 S.E. 130, 24 Ga.App. 484—*Eichholz v. Le Roche*, 100 S.E. 722, 24 Ga.App. 281—*Parker v. Bridges*, 95 S.E. 321, 22 Ga.App. 58—*Taylor v. Mutual Benefit Industrial Life Ins. Ass'n of Georgia*, 92 S.E. 1012, 20 Ga.App. 236, conforming to answers to certified questions 92 S.E. 47, 146 Ga. 660.

11 C.J. p 222 notes 34–36.

Judgment equivalent to grant of new trial

Judgment sustaining certiorari excepting to judgment affirming denial of new trial was equivalent to first grant of new trial.—*Hartsfield Co. v. Ray*, 157 S.E. 111, 42 Ga.App. 637.

Decision based on question of law

Unless the verdict was absolutely demanded by the evidence, the first grant of a new trial will not be disturbed although based on a question

of law in the determination of which it was unnecessary to consider the evidence.—*Johns v. McBride*, 112 S.E. 831, 28 Ga.App. 686.

Refusal of continuance

Although the evidence might have demanded the judgment, the granting of certiorari, because of the refusal of a continuance, will not be reversed since the error in refusing the continuance rendered further proceedings nugatory.—*Connally Realty Co. v. Nalley*, 143 S.E. 786, 38 Ga.App. 292.

70. Ga.—*Gresham v. Lee*, 112 S.E. 524, 28 Ga.App. 576, conforming to answer to certified questions, 111 S.E. 404, 152 Ga. 829.

No jurisdiction to grant on particular ground

A judgment on certiorari reversing the judgment and granting a first new trial will be affirmed where the verdict and judgment were not demanded as a matter of law, although the judge had no jurisdiction to grant a new trial on the ground that the verdict and judgment were contrary to the weight of the evidence, and although it was error to grant it on the ground that they were unsupported by evidence.—*Gresham v. Lee*, supra.

71. Ga.—*Loudermilk v. Stephens*, 55 S.E. 956, 126 Ga. 782.

72. Ga.—*Faulkner v. Snead*, 49 S.E. 747, 122 Ga. 28.

73. Ga.—*Goodman v. Butler*, 47 S.E. 910, 119 Ga. 54.

74. Ga.—*Dailey v. York*, 145 S.E. 470, 38 Ga.App. 762—*Blumberg v. Grant*, 129 S.E. 144, 34 Ga.App. 253—*Pheps v. Belle Isle*, 116 S.E. 217, 29 Ga.App. 571.

Iowa.—*Riggs v. Board of Sup'rs of Van Buren County*, 164 N.W. 359, 181 Iowa 178.

Mo.—*State ex rel. Plummer v. Gardner*, 234 S.W. 53, 290 Mo. 143.

Tex.—*Schwind v. Goodman*, 221 S.W. 579, reversing *Goodman v. Schwind*, Civ.App., 186 S.W. 282.

§ 200. Determination and Disposition of Cause

- a. Affirmance
- b. Reversal
- c. Quashing or dismissing appeal
- d. Rendering new judgment

a. Affirmance

Generally where no injustice has been done to appellant the judgment of the lower court on certiorari will be affirmed.

Where it appears that no injustice has been done to appellant, the judgment of the lower court will be affirmed,⁷⁵ as, for example, where the court correctly dismisses the writ, but for a wrong reason;⁷⁶ and, if any of the objections taken to the proceedings were such as to warrant the decision on certiorari, it will not be reversed.⁷⁷ Also, where the record is so incomplete that the court cannot consider the case, the judgment of the lower court overruling the certiorari must stand.⁷⁸ On affirm-

ance the appellate court may authorize an application below to vacate the determination appealed from and to amend the writ;⁷⁹ or it may direct the lower court to correct a formal error in its order;⁸⁰ but it has no power to require a further return.⁸¹

b. Reversal

Where the erroneous grant or denial of certiorari is prejudicial, the appellate court will reverse the judgment of the lower court.

While it is not a ground for reversal that a proper judgment was reached in an irregular way,⁸² or that a correct decision was based on erroneous reasoning,⁸³ where the writ of certiorari has been erroneously awarded, the appellate court may give judgment of dismissal,⁸⁴ or it may reverse the judgment and order the inferior court to quash the writ.⁸⁵ Also, where the writ has erroneously been overruled or dismissed, or a verdict on the merits rendered erroneously, the appellate court will render judgment of reversal,⁸⁶ and, where judgment

Wash.—State v. Stratton, 185 P. 610, 108 Wash. 485.
11 C.J. p 222 note 40.

Errors held harmless

(1) That court on writ of review made findings of fact and adopted conclusions of law not required.—Oregon City v. Clackamas County, 247 P. 772, 118 Or. 546.

(2) Revoking order of sanction on petition for certiorari, where judge could properly have refused sanction.—Butters Mfg. Co. v. Sims, 171 S.E. 162, 47 Ga.App. 648.

(3) The premature dismissal of a petition for certiorari, where the petition, which was in renewal of a dismissed petition, was filed more than six months after dismissal of former petition.—Brackett v. Sebastian, 89 S.E. 1102, 18 Ga.App. 525—Brown v. Seals, 86 S.E. 277, 17 Ga. App. 4.

(4) Overruling of certiorari, instead of dismissing it.—Whitfield County v. Hogan, 87 S.E. 1087, 17 Ga. App. 685.

(5) Other illustrations see 11 C.J. p 222 note 40 [a].

75. Ark.—Graves v. McConnell, 257 S.W. 1041, 162 Ark. 167.

Ga.—McDonald v. Georgia Federation of Labor, 173 S.E. 662, 178 Ga. 313—Cohn v. Rogers, 183 S.E. 818, 52 Ga.App. 533—Anderson v. West Lumber Co., 179 S.E. 738, 51 Ga.App. 333, rehearing denied 180 S.E. 361, 51 Ga.App. 333—Greenwood v. McGee, 173 S.E. 468, 48 Ga.App. 578—Taylor v. Georgia Power Co., 161 S.E. 669, 44 Ga. App. 326—Fleckoury v. Maloney, 149 S.E. 91, 40 Ga.App. 157—Holloman v. Southland Loan & Invest-

ment Co., 138 S.E. 862, 37 Ga.App. 10—Hutchinson v. Dobbins, 123 S.E. 905, 32 Ga.App. 211—Standard Gas Products Co. v. Vismor, 121 S.E. 854, 31 Ga.App. 418—Walker v. State, 118 S.E. 478, 30 Ga.App. 618—Hines v. Porter, 106 S.E. 16, 26 Ga.App. 178—Hays v. Hay's, 99 S.E. 230, 23 Ga.App. 689—Matthews v. City of Thomaston, 94 S.E. 631, 21 Ga.App. 496.

Mo.—Hunter Land & Development Co. v. Jackson, 243 S.W. 436, 210 Mo.App. 548.

N.J.—Burhans v. City of Paterson, 123 A. 883, 99 N.J.Law 490.
11 C.J. p 222 note 41.

Exceptions not dismissible

Bill of exceptions from judgment of superior court dismissing or overruling certiorari is not dismissible, although judgment is based on writ of which superior court had no jurisdiction, but proper disposition is to affirm judgment.—Martin v. Davison-Paxon Co., 180 S.E. 750, 50 Ga. App. 470.

No error committed

That child within juvenile court's jurisdiction when committed arrived at age at which juvenile court could not entertain proceeding for custody did not require reversal of judgment refusing certiorari to review commitment.—Shepherd v. Swain, 157 S.E. 339, 42 Ga.App. 741.

76. Ga.—Cohn v. Rogers, 183 S.E. 818, 52 Ga.App. 533—Anderson v. West Lumber Co., 179 S.E. 738, 51 Ga.App. 333, rehearing denied 180 S.E. 361, 51 Ga.App. 333—Hudson v. Higgins, 164 S.E. 688, 45 Ga. App. 358—Adams v. Morris, 151 S.E. 59, 40 Ga.App. 598—Lewis v. Standard Co., 135 S.E. 101, 36 Ga.

App. 16—Chan v. Judge, 134 S.E. 925, 36 Ga.App. 13—Merchants' Miners' Transp. Co. v. Gable Singer, 127 S.E. 807, 33 Ga.App. 743—Flynn v. City of East Point, 90 S.E. 372, 18 Ga.App. 729.
11 C.J. p 222 note 42.

77. Mich.—Bigalow v. Barre, 1 Mich. 1.

78. Ga.—Powell v. A. J. Fowler Son, 129 S.E. 14, 34 Ga.App. 186.

79. N.Y.—Peo. v. Roe, 49 N.Y.S. 22 25 App.Div. 107.

80. Ga.—Atlantic Coast Line R. Co. v. Peters, 124 S.E. 815, 32 Ga.App. 791.

81. Mich.—Wight v. Warner, Dougl. 384.

82. Ga.—Hutchinson v. Dobbins, 1 S.E. 905, 32 Ga.App. 211.
11 C.J. p 223 note 49.

83. U.S.—Newman v. Lynchburg Inv. Corp., App.D.C., 35 S.Ct. 47 236 U.S. 692, 59 L.Ed. 792.

84. Tenn.—Rhea County v. White, 43 S.W.2d 375, 163 Tenn. 388.
11 C.J. p. 222 note 46.

85. Ark.—Patterson v. Adcock, 2 S.W. 904, 157 Ark. 186.

Order of trial court not affirmed

Although the supreme court w order the writ of certiorari quash on an appeal where its issuance w not proper, it will not order the lo er court to affirm the order of t trial court where such order was n a judgment, but merely a minister act, such as an order declaring stock law to be in effect.—Patters v. Adcock, 248 S.W. 904, 157 Ark. 186.
86. Ala.—Independent Pub. Co. American Press Assoc., 15 So. 9 102 Ala. 475—Memphis, etc., R. (

for one party is demanded and the error complained of is an error of law which must finally govern the case and no question of fact is involved which makes a new trial necessary, the appellate court will direct the inferior court to sustain the certiorari and enter a final judgment.⁸⁷ Where the lower court, on certiorari, did not determine disputed questions of fact, the upper court, on reversal, may remand the case to the lower court for a consideration of such questions;⁸⁸ but on reversal of a dismissal of the writ, the case will not be remanded where further prosecution of the certiorari is useless.⁸⁹

Remand by intermediate appellate court necessary. Where a judgment overruling certiorari to a ruling of a trial court eliminating a defensive plea is reversed on appeal, and the remittitur was made the judgment of the intermediate court, such court cannot render final judgment for the defendant unless it was shown without dispute that no issue of fact existed or would exist in the trial court as to the eliminated defensive matter,⁹⁰ nor could such intermediate court direct that, if the evidence were substantially the same at the next trial, a verdict be rendered for defendant, as plaintiff would not be precluded from introducing all available legal evidence to meet the stricken defense at a retrial and such court could not determine that there would be no such evidence.⁹¹

c. Quashing or Dismissing Appeal

In a proper case the appeal may be quashed or dismissed.

In some states the appeal may be quashed or dismissed in a proper case.⁹² Thus, where no proper record is brought up on appeal, the appeal will be dismissed;⁹³ and where the court erroneously refused to dismiss the certiorari a writ of error to the overruling of the certiorari will be dismissed.⁹⁴

d. Rendering New Judgment

On appeal in some jurisdictions the appellate court may render final judgment in a proper case.

In some jurisdictions, sometimes by virtue of statutory provisions, on appeal or error to review the dismissal of a certiorari, a final judgment may be rendered.⁹⁵ Thus, where the whole record is before the court on appeal from a judgment setting aside the writ, it has been held that it should be looked into to determine what judgment should be rendered on the merits;⁹⁶ and it has been held that if the irregularity in the judgment does not affect the merits the court will not reverse, but will substitute the proper determination.⁹⁷ However, where certiorari was inappropriately sought, the reviewing court has no power to give relief warranted by the record.⁹⁸

v. Brannum, 11 So. 468, 96 Ala. 461.

Ark.—Gregg v. Hatcher, 125 S.W. 1007, 94 Ark. 54, 27 L.R.A., N.S., 138, 12 Ann.Cas. 982.

11 C.J. p 223 note 47.

87. Ga.—Rogers v. Echols, 179 S.E. 131, 50 Ga.App. 711.

88. N.J.—Harman v. Reed, 155 A. 145, 108 N.J.Law 191, reversing 150 A. 218, 8 N.J.Misc. 340.

44 C.J. p 747 note 81 [a].

89. Ala.—St. John v. Richter, 52 So. 465, 167 Ala. 656.

90. Ga.—Murphy v. Drum & Bugle Corps, 190 S.E. 67, 55 Ga.App. 293.

91. Ga.—Murphy v. Drum & Bugle Corps, supra.

92. Fla.—Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville, 171 So. 819. 11 C.J. p 223 note 52.

Where case becomes moot

Motion to dismiss writ of error

to review judgment quashing writ of certiorari to review board of adjustments' action in granting permit to restaurant owner to replace frame building with brick building in residence district would be granted, where city had amended ordinance so as to remove property from residence district, and permit could have been granted under ordinance as originally enacted.—Tau Alpha Holding Corporation v. Board of Adjustments of City of Gainesville, Fla., 171 So. 819.

93. N.J.—Ford Motor Co. v. Fernandez, 176 A. 152, 114 N.J.Law 202, dismissing appeal Fernandez v. Ford Motor Co., 174 A. 223, 12 N.J.Misc. 653.

94. Ga.—Souerby v. Orrell, 106 S.E. 211, 26 Ga.App. 369.

95. Mass.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

N.J.—Harman v. Reed, 155 A. 145, 108 N.J.Law 191, reversing 150 A. 218, 8 N.J.Misc. 340—Jordan v. Borough of Dumont, 143 A. 843, 105 N.J.Law 197, reversing 141 A. 12, 6 N.J.Misc. 311.

11 C.J. p 223 note 53.

Case ripe for final judgment

Case presented by exception to order overruling demurrer to petition for certiorari, was ripe for final judgment, where subsequent order excepted to was to remain in abeyance and take effect only in case first bill of exceptions should be overruled.—Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 160 N.E. 427, 262 Mass. 477.

96. Wis.—State v. Milwaukee County, 16 N.W. 21, 53 Wis. 4.

97. Ga.—Harvey v. Jewell, 10 S.E. 631, 84 Ga. 234.

98. Cal.—Jacobs v. Board of Dental Examiners, App., 75 P.2d 96.

M. COSTS

§ 201. At Common Law

Generally at common law costs were not recoverable.

As in other proceedings, costs are not ordinarily recoverable on certiorari at common law, and hence cannot be awarded unless there is statutory authority therefor.⁹⁹ In one jurisdiction, however, independent of statute, in analogy to writs of error, costs were assessed at an early day against plaintiffs on the affirmance of the proceedings reviewed;¹ but it was also held that, if the proceedings below were quashed, plaintiff was not entitled to costs, independent of statute, on the theory that if a writ of error is sustained it is unjust to subject the defendant to pay costs because of the errors of the inferior court or tribunal,² although the successful party, on issuance of a writ of restitution, is entitled to the costs on that writ.³

§ 202. By Statute

- a. In general
- b. Discretion
- c. Persons liable and persons entitled
- d. Procedure to tax

a. In General

Statutes now generally permit the recovery of costs by the successful party in certiorari proceedings, but the case must be within the letter and intent of the statute.

The allowance of costs in certiorari proceedings is now commonly regulated by statutes which generally permit their recovery by the prevailing party,⁴ but to authorize such a recovery the case must be clearly within the terms of the statute, and, when the case is not within the letter and intent of the statute, costs will not be allowed.⁵

Whether certiorari is an action or a special pro-

ceeding is discussed in § 2, and statutes relating to costs in "actions" have been held inapplicable in some jurisdictions,⁶ but in other jurisdictions the contrary has been held.⁷ In any event, it is undoubtedly true that, if one statute relating to costs governs special proceedings and another governs actions, the former authorizes and controls costs in certiorari.⁸

Public question. Under some statutes, where a public question was involved, the decision will be without costs.⁹

On voluntary dismissal. Where, on service of a certiorari, the successful party dismisses the action, it is a confession of error, and the costs of the certiorari will be awarded the petitioner, without regard to whether the case was a proper one for certiorari.¹⁰

Division of costs. Under some statutes a division of costs among the respective parties has been held proper where the court set aside only a portion of the order which was brought up on certiorari.¹¹

Amount. While costs in excess of the amount specified cannot be allowed,¹² where no special provision for the amount of costs to be allowed has been made, the sums allowable on a special proceeding should be awarded,¹³ or the amount recoverable in an action at issue on a question of law,¹⁴ including the necessary disbursements in the proceedings.¹⁵ Generally, only the costs of the reviewing court are awarded.¹⁶

Additional costs. Sometimes, by statute, on dismissal of the writ or affirmance of the judgment below, the court may award interest in addition to costs;¹⁷ but a statute permitting additional costs

99. D.C.—*Fraser v. District of Columbia*, 18 D.C. 150.

11 C.J. p 214 note 99.

1. N.J.—*Aller v. Shurts*, 17 N.J. Law 188.

11 C.J. p 214 note 1.

2. N.J.—*Stiers v. Stiers*, 20 N.J. Law 52.

3. N.J.—*Hann v. McCormick*, 4 N. J. Law 126.

4. La.—*Carey v. Green*, 147 So. 491, 177 La. 32, annulling, App., 144 So. 185, and reinstating, App., 141 So. 402.

11 C.J. p 214 note 3.

Petition not contested

Under Rev.St. c 102 § 114, allowing costs against any party who appears and undertakes to maintain or object to the certiorari proceedings, the complainant should have no costs

on the petition when the writ is granted without opposition or objection.—*Stetson v. Penobscot County Comrs.*, 72 Me. 17.

5. Pa.—*Atkinson v. Crossland*, 4 Watts 450.

11 C.J. p 214 note 4.

6. Me.—*Stetson v. Penobscot County*, 72 Me. 17.

11 C.J. p 214 notes 8, 9.

7. S.C.—*Smith v. Saye*, 127 S.E. 568, 131 S.C. 378.

11 C.J. p 214 note 10.

8. Mont.—*State ex rel. Young v. District Court of Twelfth Judicial Dist.*, 58 P.2d 1243, 102 Mont. 487.

11 C.J. p 214 note 11.

9. Mich.—*In re School Dist. No. 6, Paris and Wyoming Tps., Kent County*, 278 N.W. 792, 284 Mich. 132.

10. Nev.—*State v. Jones*, 71 P. 664, 27 Nev. 58.

11. Ala.—*Mills v. Court of Com'rs of Conecuh County*, 85 So. 564, 204 Ala. 40.

12. Ga.—*DeBow v. Vicksburg, S. & P. Ry.*, 104 S.E. 201, 150 Ga. 519.

13. N.Y.—*Peo. v. Van Alstyne*, 3 Abb.Dec. 575, 3 Keyes 35.

14. N.Y.—*Peo. v. Gower*, 44 How.Pr. 26.

15. S.C.—*Smith v. Saye*, 127 S.E. 568, 131 S.C. 378.

11 C.J. p 216 note 30.

16. Ga.—*Haire v. McCardle*, 33 S. E. 683, 107 Ga. 775.

17. Tenn.—*Roddy v. Bacon*, 3 Coldw. 253—*Marshall v. Hill*, 8 Yerg. 101. 11 C.J. p 216 note 32.

n specified cases, where a gross sum is taxable as costs, or on certiorari against a public officer, is inapplicable to certiorari generally, although a stated sum is allowed as costs,¹⁸ and statutory provisions authorizing the award of damages, where it appears to the court that an "appeal" was taken merely for delay, have been held not to include certiorari proceedings.¹⁹

*The losing party cannot recover back the costs paid, although he may finally succeed in the lower court.*²⁰

On certiorari to court of limited jurisdiction. The subject of costs on certiorari to a court of limited jurisdiction is treated in the C.J.S. title Costs §§ 386-403, also 15 C.J. p 290 note 27-p 296 note 42.

b. Discretion

In some jurisdictions the award of costs is discretionary, and they will not be awarded to a party who has unnecessarily sued out the writ, or where he has included matter in the record which was clearly not required for proper presentation of the question.

In many jurisdictions the allowance of costs is discretionary.²¹ In such case they may be refused to a successful party who has unnecessarily sued out the writ instead of pursuing other available remedies,²² or where the award will entail hardship,²³ nor will they be awarded against plaintiff, when a material error is corrected.²⁴ So the court may require the successful party to pay the costs of print-

ing the record where most of the matter which was included at his instance was clearly not required for a proper presentation of the question submitted;²⁵ and if neither party prevails, there being a cross writ, each party must pay his own costs.²⁶

Correction of error after issuance of the writ. The right to costs is not taken away by the correction of the error complained of after the issuance of the writ.²⁷

c. Persons Liable and Persons Entitled

Generally the inferior tribunal and its members are not liable for costs, the general practice being to tax costs against the real respondents in interest.

Officers, such as county commissioners, highway commissioners, tax assessors, and the like have been held not liable for costs on the quashal of their proceedings, unless they have acted corruptly or with intention to oppress;²⁸ and in such a case the costs may be awarded against the persons²⁹ or political subdivision³⁰ on whose behalf such board acted. Furthermore, costs cannot be taxed against a court,³¹ and a statute authorizing costs in certiorari proceedings is to be construed as meaning that the costs shall be taxed for or against the real party in interest,³² and it seems to be the practice to tax costs against the real respondents in interest, although they were not cited in, and the writ was directed only to the court or tribunal whose action is sought to be reviewed.³³ A penal statute relating to costs has been held not to authorize a trial

18. N.Y.—*Peo. v. Hempstead Town Auditors*, 59 N.Y.S. 10, 42 App.Div. 250—*Cheney v. Windsor*, 5 Den. 96.

19. Ala.—*Childs v. Crawford*, 8 Ala. 731.

20. Ga.—*Walker v. Hillyer*, 61 S.E. 8, 130 Ga. 466.

21. Utah.—*State v. Ritchie*, 91 P. 24, 32 Utah 381.

11 C.J. p 215 note 14.

22. Mich.—*Adams v. Abram*, 38 Mich. 302.

11 C.J. p 215 note 15.

23. Ill.—*Arnold v. Tharpe*, 9 Ill.App. 357.

Mass.—*Ex p. Cushman*, 4 Mass. 565.

N.J.—*State v. Reed*, 31 N.J.Law 133.

11 C.J. p 215 note 16.

24. Ga.—*Paulk v. Tanner*, 32 S.E. 99, 106 Ga. 219.

Amount reduced
Where the judgment complained of is reduced in amount, the party bringing the writ may have his costs in the court above.—*Clayton v. McMakin*, Tex.Civ.App., 136 S.W. 568.

25. U.S.—*Stevens v. The White City*, N.Y., 52 S.Ct. 347, 285 U.S. 195, 76 L.Ed. 699, affirming, C.C.

A., *The White City*, 48 F.2d 557, reversing, D.C., *The Drifter*, 35 F. 2d 1006, and certiorari granted *Stevens v. The White City*, 52 S.Ct. 21, 284 U.S. 602, 76 L.Ed. 517—*Texas & P. Ry. Co. v. Leatherwood, Tex.*, 39 S.Ct. 517, 250 U.S. 478, 63 L.Ed. 1096.

26. U.S.—*La Bourgogne v. La Compagnie Generale Transatlantique*, N. Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973.

27. Nev.—*Birchfield v. Harris*, 9 Nev. 382.

Consent to correction of error

Where a party resorts to a certiorari to correct the errors of an inferior tribunal, the consent of the other party to make the correction will not authorize dismissal of the certiorari and a judgment for costs against the applicant therefor.—*Western, etc., R. Co. v. Greeson*, 68 Ga. 180.

28. Iowa.—*Coffey v. Gamble*, 94 N. W. 936, 134 Iowa 754—*Tiedt v. Carstensen*, 19 N.W. 885, 64 Iowa 131.

11 C.J. p 215 note 20.

29. Iowa.—*Sinnott v. District Court in and for Clarke County*, 207 N. W. 129, 201 Iowa 292—*Riggs v. Board of Sup'rs of Van Buren County*, 164 N.W. 359, 181 Iowa 173.

11 C.J. p 215 note 21.

30. N.Y.—*People v. Schodack Highway Com'rs*, 27 How.Pr. 158—*People v. Flake*, 14 How.Pr. 527.

Wis.—*Oshkosh v. State*, 18 N.W. 324, 59 Wis. 425.

Indemnity of board

Under a statute permitting an award of costs against any party who maintains or objects to the proceedings, costs may be awarded against county commissioners who may obtain indemnity from the county.—*Stetson v. Penobscot County*, 72 Me. 17.

31. Cal.—*Corrigan v. Superior Court in and for Solano County*, 236 P. 364, 72 Cal.App. 333.

32. Minn.—*State v. Rock County Probate Ct.*, 69 N.W. 609, 908, 67 Minn. 51.

33. Minn.—*State v. Rock County Probate Ct.*, supra.

court to assess the costs of a transcript of a stenographer against the public treasury in a civil case between private parties.³⁴ In any event, it would seem that an inferior court or tribunal should not be charged with costs, where the excess of jurisdiction arises from a mere honest mistake of judgment, but that the costs in all such cases should be taxed against the person who is responsible for the illegal act or the excess of jurisdiction by procuring it to be done;³⁵ and this is so although the persons in interest are not parties to the record in the certiorari proceedings.³⁶

Amicus curiæ. Disbursements of an attorney, whose brief for clients not parties to the certiorari proceeding was received only as a brief of *amicus curiæ*, have been held not taxable against the parties to the proceeding.³⁷

Court as entitled to costs. While a statute providing for the taxation of costs in favor of the prevailing party of such items as witness fees and other necessary expenses has been held not to authorize the awarding of such costs to a court which was the respondent, for the reason that the court itself cannot make any disbursements and therefore cannot collect any,³⁸ under a statute providing for the recovery of costs when a decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for review, it has been held that the inferior court could recover the costs of the preparation and certification of its return.³⁹

d. Procedure to Tax

Unless otherwise provided by statute, the procedure

to tax costs in certiorari proceedings is the same as in other civil cases.

In taxing the costs, the procedure undoubtedly is the same as in other civil cases, unless it is otherwise provided by statute,⁴⁰ and if the amount is required to be fixed by the court the clerk cannot tax any costs without an order from the court so to do.⁴¹ It follows that, where a judgment of reversal makes no provision as to costs, a special application should be made therefor;⁴² and if the real persons in interest are not parties to the certiorari proceeding, but they are liable for costs because of their interest, the proper practice would seem to be to bring them in by proper notice on motion to tax the costs in the proceeding.⁴³

An application to the appellate court to tax attorney's fees as costs cannot be considered where no judgment was rendered and the adverse party is not before the court.⁴⁴

§ 203. Motion Costs

With regard to the right to costs on motions in certiorari proceedings, the general rules as to costs on motions are applicable.

In so far as the right to costs on motions to quash the writ is concerned, the general rules as to costs on motions are applicable.⁴⁵ Thus, where a motion to quash a writ of certiorari is denied pending amendments removing the grounds of such motion, such denial should be without costs;⁴⁶ but petitioners in certiorari who allow a misnomer of parties to appear in the printed record, although they are correctly named in the original, will be held responsible for costs of a motion to dismiss based on the defect of parties apparent in the printed record.⁴⁷

CERTISSIMUM ENIM EST, EX ALTERIUS CONTRACTU NEMINEM OBLIGARI.¹

CERTITUDO. Law Latin, certainty.²

CERT MONEY or **COMMON FINE.** In old Eng-

lish law, a certain sum of money which the residents in a leet paid to the lord of the leet, otherwise called "head money," "head silver," or "certum letæ"; a sum of money paid by the inhabitants of a manor to their lord, towards the charge of holding

34. Ga.—Macris v. Tsipourses, 134 S.E. 621, 35 Ga.App. 671.

35. Iowa.—Coffey v. Gamble, 94 N.W. 936, 134 Iowa 754.

11 C.J. p 215 note 25.

36. Iowa.—Coffey v. Gamble, 94 N.W. 936, 134 Iowa 754—Tiedt v. Carstensen, 19 N.W. 841, 64 Iowa 131.

11 C.J. p 215 note 26.

37. N.Y.—Colmes v. Fisher, 271 N.Y.S. 379, 151 Misc. 222.

38. S.D.—Kirby v. McCook County Cir. Ct., 72 N.W. 461, 10 S.D. 196.

39. Mont.—State ex rel. Young v. District Court of Twelfth Judicial Dist., 58 P.2d 1243, 102 Mont. 487.

40. Iowa.—Coffey v. Gamble, 94 N.W. 936, 134 Iowa 754.

41. N.Y.—Peo. v. Hempstead Town Auditors, 59 N.Y.S. 10, 42 App. Div. 250.

42. N.Y.—Peo. v. Robinson, 25 How. Pr. 345.

43. Iowa.—Coffey v. Gamble, 94 N.W. 936, 134 Iowa 754.

44. Iowa.—Garrett v. Bishop, 84 N.W. 923, 113 Iowa 23.

45. N.Y.—Peo. v. Buffalo, 114 N.Y.S. 1077, 62 Misc. 313.

46. N.Y.—Peo. v. Buffalo, supra.

47. Mich.—Fitch v. Manitou County Bd. of Auditors, 94 N.W. 952, 131 Mich. 178.

1. A maxim meaning "It is very certain, indeed, that no person is to be obligated by the contract of another."—Adams Gloss., citing Justinian Cod. iv, 12 const 3 fin.

2. Adams Gloss.

a court leet; also money paid yearly by the residents of several manors to the lords thereof, for the certain keeping of the leet (pro certo letæ); and sometimes to the hundred.³

CERTUM EST, MALÆ FIDEI [MALA FIDE] POSSESSORES OMNES FRUCTUS SOLERE CUM IPSA RE PRÆSTARE, BONÆ FIDEI [BONA FIDE] VERO EXTANTES, POST LITIS AUTEM CONTESTATIONEM UNIVERSOS.⁴

CERTUM EST QUOD CERTUM REDDI POTEST.⁵

CERURA. A mound, fence, or inclosure.⁶

CERVISARI. In Saxon law, tenants who were bound to supply drink for their lord's table.⁷

CERVISIA. See Cerevisa, Cerevisia, or Cervisia ante p 107 note 65.

CERVISIARIUS. In old records, an alehouse keeper; a beer or ale brewer.⁸

CERVUS. Latin, a stag or deer.⁹

CESACIÓN A DIVINIS. In Spanish ecclesiastical law, a penalty by which divine offices, or worship, is suspended in a certain locality.¹⁰

CESAREVITCH or CESAREWITCH. Originally, a title introduced in Russia in 1799 by Paul I (1754-1801) for his second son, the Grand Duke

Constantine; afterward the title of the czar's eldest son, or the heir apparent to the Russian throne.¹¹

CESAREVNA. In Imperial Russia, the title of the wife of the cesarevitch, or heir apparent.¹²

CESE. In Spanish law, a notation in the lists of those drawing official salaries or stipends to the effect that from a specified date the same will cease.¹³

CESIÓN. In Spanish law, the assignment or transfer of something to another ("cesionario").¹⁴

CESIONARIO. In Spanish law, an assignee.¹⁵

CESS. As a noun, an assessment or tax, which in Ireland, was anciently applied to an exaction of victuals, at a certain rate, for soldiers in garrison. As a verb, in old English law, to cease, stop, determine, fail.¹⁶

CESSANTE CAUSA, CESSAT EFFECTUS.¹⁷

CESSANTE PRIMITIVO, CESSAT DERIVATIVUS.¹⁸

CESSANTE RATIONE LEGIS, CESSAT BENEFICIUM LEGIS.¹⁹

CESSANTE RATIONE LEGIS CESSAT IPSA LEX.²⁰

CESSANTE STATU PRIMITIVO, CESSAT DERIVATIVUS.²¹

3. Black L.D.

4. A maxim meaning "It is certain that possessors in bad faith are wont to take upon themselves (answer) for all the fruits, together with the property itself, while those of good faith take to themselves every thing, except after the beginning of a suit."—Adams Gloss., citing Justinian Cod. iii, 32 const. 22.

5. A maxim meaning "That is sufficiently certain which can be made certain."—Broom Leg.Max.

Applied in State v. McKay, 155 S. W. 396, 249 Mo. 249, 266, Ann.Cas. 1914D 97—11 C.J. p 223 note 1 [a].

6. Black L.D.

7. Black L.D., citing Cowell.

8. Black L.D., citing Blount L.D.

9. Black L.D.

10. Escriche Diccionario.

11. Black L.D.

12. Black L.D.

13. Escriche Diccionario.

14. Escriche Diccionario.

11 C.J. p 223 notes 5, 7, p 224 notes 8-11.

Cesión de arrendamiento—assignment of lease.—Semidey v. Central Aguirre, 7 Porto Rico Fed. 572, 596.

Cesión de acciones—the assignment or transfer of a credit, debt, right or action.—Lopez v. Alvarez, 9 Philippine 28, 33.

15. Black L.D.

16. Black L.D.

17. A maxim meaning "The cause ceasing, the effect ceases also."—Burrill L.D.

Applied in White v. Meday, 2 Edw. N.Y., 485, 489.

11 C.J. p 224 note 12 [a].

18. A maxim meaning "The primitive ceasing, the derivative ceases."—Adams Gloss., citing Wharton L. Lex.

19. A maxim meaning "The reason of the law ceasing, the benefit of the law ceases."—Adams Gloss., citing Coke Litt. p 78b and Wingate Max. p 19 § 7.

20. A maxim meaning "The reason of the law ceasing, the law itself also ceases."—Black L.D.

Applied in

U.S.—Cleve v. Craven Chemical Co.,

C.C.A.N.C., 18 F.2d 711, 714, 52 A. L.R. 980.

Ky.—Wermeling v. Wermeling, 5 S. W.2d 893, 897, quoting Corpus Juris.

Pa.—McCann v. Barr, 19 Pa.Co. 669, 670—In re Loan Assn., 19 Pa.Co. 504, 506—Com. v. Hutchinson, 19 Pa.Co. 360, 361—Calkins v. Levering, 3 Pa.Dist. & Co. 720, 721.

W.Va.—Cook v. Citizens' Ins. Co. of Missouri, 143 S.E. 113, 115, quoting Corpus Juris.

11 C.J. p 224 note 15 [b].

Other forms of the maxim

(1) "Cessante ratione, cessat quoque lex."—Shultz v. Sutter, 3 Mo. App. 137, 142.

(2) "Cessat ratio, cessat etiam lex."—Orr v. U. S. Bank, 1 Ohio 36, 44, 13 Am.D. 538.

21. A maxim meaning "The derived estate ceases on the determination of the original estate."—Broom Leg. Max.

Applied in Orndoff v. Turman, 2 Leigh 200, 254, 29 Va. 200, 254, 21 Am.D. 608—11 C.J. p 224 note 16 [a].

CESSARE. Law Latin, to cease, stop, or stay.²²

CESSA REGNARE, SI NON VIS JUDICARE.²³

CESSATION. Defined by Webster as a ceasing or discontinuance, and employed in the following phrases: "Cessation from labor,"²⁴ "cessation of business,"²⁵ "cessation of dealings,"²⁶ "cessation of employment,"²⁷ "cessation of occupation [or operations],"²⁸ "cessation of state of war,"²⁹ "cessation of work,"³⁰ "notice of cessation,"³¹ and "temporary cessation of proceedings."³²

CESSAT QUIDEM CONDUCTIO, QUUM TURPITUR DATUR.³³

CESSAVIT PER BIENNIUM. Literally "He has ceased for two years."³⁴ In practice, an obsolete writ which could formerly have been sued out when the defendant had for two years ceased or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not on his lands sufficient goods or chattels to be distrained; it also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do.³⁵

CESSE. As a noun, an assessment or tax. As a verb, a tenant of land was said "to cesse" when he neglected or ceased to perform the services due to the lord.³⁶

CESSER. Neglect; a ceasing from, or omission to do, a thing; the determination of an estate; the "cesser" of a term, annuity, or the like, takes place when it determines or comes to an end.³⁷

CESSET EXECUTIO. In practice, a stay of execution, or an order for such stay; the entry of such stay on record.³⁸

CESSET PROCESSUS. In practice, a stay of proceedings entered on the record on an issue; also the entry on record of a stay of the proceedings.³⁹

CESSIO. Latin, a cession, a giving up or relinquishment, a surrender, or an assignment.⁴⁰

Cessio actionum cedendarum. An assignment of actions to be granted. In the civil law, a surety might, before paying his liability as surety, require the creditor to assign to him his actions, either for the purpose of compelling his cosureties to refund to him the shares respectively due by them, or to enforce the payment from the principal debtor.⁴¹

Cessio bonorum. A giving up, assigning, or cession of goods or property. In Roman law, the surrender of all a debtor's property to and for the benefit of his creditors, by which, under the law "de cessio bonorum," he obtained an exemption of his person from imprisonment and also from all remote corporal punishment.⁴²

In modern jurisprudence, the surrender of an in-

22. Black L.D.

23. A maxim meaning "Cease to reign, if you will not adjudicate."—Adams Gloss., citing Hobart p 155.

24. Cal.—Robison v. Mitchel, 114 P. 984, 159 Cal. 581.

25. Wis.—Fritchett v. Herman Farmers' Mut. Ins. Co. of Dodge County, 230 N.W. 706, 707, 201 Wis. 521.

26. W.Va.—Smith v. Zumbro, 24 S. E. 653, 41 W.Va. 623, 635.

27. "Momentary withdrawal" con-
trasted

"A momentary withdrawal from active work is not necessarily a cessation of employment."—Hoard v. Sears, Roebuck & Co., 188 A. 269, 271, 122 Conn. 185.

28. Wis.—Fritchett v. Herman Farmers' Mut. Ins. Co. of Dodge County, 230 N.W. 706, 708, 201 Wis. 521.

29. Alaska.—Afric v. Alaska United Gold Mining Co., 6 Alaska 540, 544. "Armistice" distinguished see Armistice 6 C.J.S. p 342 note 56.

30. Md.—Bower & Kaufman v. Bothwell, 136 A. 892, 894, 152 Md. 392.

31. Cal.—Robison v. Mitchel, 114 P. 984, 159 Cal. 581.

32. N.D.—State v. West, 223 N.W. 705, 706, 57 N.D. 652.

"Adjournment" distinguished see Adjournment 2 C.J.S. p 48 note 36.

33. A maxim meaning "A condition sometimes ceases [is void] when it is given basely, dishonestly, corruptly."—Adams Gloss., citing 1 Story Eq.Jur. § 299 note 2.

34. Bouvier L.D.

35. Black L.D.

As precursor of distress

"Distresses seem to have originated from two more ancient remedies of the common law. By the process of gavellet and cessavit the landlord could seize the land itself for rent in arrear, and hold it until payment was made. These processes have been obsolete for ages, and exist only in the memory of legal antiquaries. When they fell into disuse, distresses appear to have arisen, whereby instead of seizing the land, the lord seized all the movables upon the land, and held them until he received payment. In process of time, he was authorized by statute to make sale of them, and in this way we have the modern distraint. As it is not an execution for debt, the goods of the tenant have never

been held to be protected by any of the exemption laws which put the property of a debtor beyond the reach of his creditors."—Emig v. Cunningham, 62 Md. 458, 461.

36. Black L.D.

37. Black L.D.

Cesser, proviso for

Where terms for years are raised by settlement, it is usual to introduce a proviso that they shall cease when the trusts end. This proviso generally expresses three events: First, The trusts never arising; Second, their becoming unnecessary or incapable of taking effect; Third, the performance of them.—Black L.D.

38. Black L.D.

39. Adams Gloss.

40. Black L.D.
Cessio diei—the assigning of a day, the approach of a term.—Adams Gloss.

Cessio nominis—an assigning, transferring of a debt, claim, demand, bond, or note.—Adams Gloss.

41. Adams Gloss.

42. Adams Gloss., citing Justinian Cod. vii, 71 const. 8.

solvent's estate and effects to his creditors for their benefit.⁴³ Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment.⁴⁴

Cessio in jure. A cession in or according to law; a legal cession or giving up; a cession in court.⁴⁵ In Roman law, a fictitious suit, in which the person who was to acquire the thing claimed (*vindicabat*) the thing as his own, the person who was to transfer it acknowledged the justice of the claim, and the magistrate pronounced it to be the property (*addicebat*) of the claimant.⁴⁶

CESSION. The act of ceding; a yielding or giving up; surrender; relinquishment of property or rights.⁴⁷ In a particular connection, the word has been construed as meaning the apportionment of fixation of an amount.⁴⁸

In the civil law, an assignment, the act by which a party transfers property to another;⁴⁹ and, more specifically, the surrender or assignment of property for the benefit of one's creditors.⁵⁰

In ecclesiastical law, a giving up or vacating a benefice, by accepting another without a proper dispensation.⁵¹

In public law, the assignment, transfer, or yielding up of territory by one state or government to another.⁵²

Cession of goods. The surrender of property; the relinquishment that a debtor makes of all his property to his creditors, when he finds himself unable to pay his debts.⁵³

CESSIONARY. In Scotch law, an assignee.⁵⁴

Cessionary bankrupt. One who gives up his estate to be divided among his creditors.⁵⁵

CESSION DES BIENS. In French law, the surrender which a debtor makes of all his goods to his creditors, when he finds himself in insolvent circumstances.⁵⁶

CESSIT PROCESSUS. Law Latin, the process or proceeding has ceased.⁵⁷

CESSMENT. An assessment or tax.⁵⁸

CESSOR. One who ceases or neglects so long to perform a duty that he thereby incurs the danger of the law.⁵⁹

CESSURE. Law French, a receiver, or a bailiff.⁶⁰

C'EST. French, literally "It is," or "that is."⁶¹

C'est à saver. Law French, it is to-wit; it is to be known; that is to say.⁶²

C'est ascavoir. Another form of the phrase "c'est à saver."⁶³

C'EST LE CRIME QUI FAIT LA HONTE, ET NON PAS L'ÉCHAFAUD.⁶⁴

CESTUI QUE TRUST. The beneficiary of an estate, held in trust, see C.J.S. title Trusts § 5, also 65 C.J. p 217 notes 75-82.

CESTUI QUE USE. In the old law of real property, a person to whose use, that is, for whose benefit, lands or other hereditaments were held by another person. The modern equivalent is the "cestui que trust."⁶⁵

CESTUI QUE VIE. He whose life is the measure of the duration of an estate.⁶⁶

CESTUY QUE DOIT INHERITER AL PERE DOIT INHERITER AL FILS.⁶⁷

43. Adams Gloss., citing 1 Kent Comm. pp. 422, 427.

44. Bouvier L.D.

45. Adams Gloss.

46. Black L.D., citing Sanders Justinian Inst., 5th ed., pp 89, 122.

47. Black L.D.

48. So construed in a contract

"The words 'cede' and 'cession,' occurring in the contract, evidently mean the apportionment of fixation of the amount of reinsurance to be accepted by the reinsurer, and do not mean a transference of the risk to the reinsurer, in the sense that the insurer divests itself of the risk and burdens the reinsurer with same."—Moseley v. Liverpool & London & Globe Ins. Co., 61 So. 428, 430, 104 Miss. 326, 338.

49. Bouvier L.D.

50. Black L.D.

51. Black L.D., citing 1 Blackstone Comm. p 392.

52. U.S.—Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, Porto Rico, 28 S.Ct. 737, 742, 210 U.S. 296, 52 L.Ed. 1068—U. S. v. Chaves, N.M., 16 S. Ct. 57, 59, 159 U.S. 452, 40 L.Ed. 215.

11 C.J. p 225 note 30 [a].

53. Black L.D.

54. Black L.D.

55. Black L.D.

56. Black L.D.

57. Adams Gloss.

58. Black L.D.

59. Black L.D.

60. Black L.D.

61. Edgren & Burnet French D.

62. Adams Gloss.

63. Adams Gloss.

Generally written as one word, "cestascavoir, cestascavoir."—Black L.D.

64. A French maxim meaning "It is the offense which causes the shame, and not the scaffold."—Black L.D.

65. Sweet L.D.

66. 1 Washburn Real Prop., 6th ed., § 221.

See also, C.J.S. title Estates § 31, and 21 C.J. p 939 note 42.

67. A French maxim meaning "He who would have been heir to the father of the deceased shall also be heir of the son."—Black L.D., citing 2 Blackstone Comm. pp. 239, 250.

**CESTUY QUE VOIT PRENDES AVANTAGE
DE UN CONDITION DOIT ESTRE PARTY
OU PRIVY AL CEO.**⁶⁸

CF. See Abbreviations 1 C.J.S. p 276 note 5.

C. F. & I. See Abbreviations 1 C.J.S. p 276 note 5.

C. G. S. SYSTEM. See Abbreviations 1 C.J.S. p 276 note 5.

CH. See Abbreviations 1 C.J.S. p 276 note 5 in Pocket Parts.

CHACE. Law French, a chase or hunting ground.⁶⁹

CHACEA. In old English law, a station of game, more extended than a park, and less than a forest; also the liberty of chasing or hunting within a certain district; also the way through which cattle are driven to pasture, otherwise called a "droveway."⁷⁰

CHACEABLE. Law French, that may be chased or hunted.⁷¹

CHACEA EST AD COMMUNEM LEGEM.⁷²

CHACER. Law French, to drive, compel, or oblige; also to chase or hunt.⁷³

CHACURUS. Law Latin, a horse for the chase, or a hound, dog, or courser.⁷⁴

CHAFER. The name applied to a covering of old material over the hatchway of a vessel;⁷⁵ a third cover, ordinarily an old one, used for the purpose of protecting the others from wear and not with a view of affording additional security save as it may so serve.⁷⁶

CHAFEWAX. Formerly, an officer in the English

chancery whose duty was to prepare wax to seal the writs, commissions, and other instruments thence issuing.⁷⁷

CHAFFERS. An ancient term for goods, wares, and merchandise; hence the word "chaffering," which is yet used for buying and selling, or beating down the price of an article.⁷⁸

CHAFFERY. Traffic; the practice of buying and selling.⁷⁹

CHAIN. Primarily, a series of links or rings, connected or fitted into one another; and so, derivatively, a series of things linked together.⁸⁰

As an engineer's, or surveyor's measure of twenty-two yards length, see C.J.S. title *Weights and Measures* § 1, also 11 C.J. p 225 note 43.

Chain of title. The succession of deeds or other instruments by which one traces his title back to its original source; the successive conveyances, commencing with the patent from the government, each being a perfect conveyance of the title down to and including the conveyance to the present holder.⁸¹

Chain of transfer. A term said to be sometimes used interchangeably or synonymously with "claim of transfer."⁸²

Other phrases: "Chain of circumstances,"⁸³ and "consecutive chain of transfer;"⁸⁴ also, adjectively, "chain stitching,"⁸⁵ and "chain stitch machine."⁸⁶

CHAIR. Defined by Webster as a movable seat with a back, intended for one person.

Phrases: "Barber's chair,"⁸⁷ and "dentist's chair;"⁸⁸ also "chairs sufficient for the use of the family."⁸⁹

68. A French maxim meaning "He who will take advantage of a condition ought to be party or privy to it."—Adams Gloss., citing Littleton § 34.

69. Black L.D.

70. Black L.D.

71. Black L.D.

72. A maxim meaning "A chase is by common law."—Black L.D.

73. Black L.D.

74. Black L.D.

75. U.S.—The Hyades, N.Y., 124 F. 58, 59, 59 C.C.A. 424.

76. U.S.—The Hyades, D.C.N.Y., 118 F. 85, 86.

77. Black L.D.

78. Black L.D.

79. Black L.D.

80. Century D.

11 C.J. p 225 note 44, p 226 note 45.

81. Ill.—Capper v. Poulsen, 152 N. E. 587, 588, 321 Ill. 480—Payne v. Markel, 89 Ill. 66, 69.

N.J.—Maturi v. Fay, 126 A. 170, 173, 96 N.J.Eq. 472.

Tex.—Havis v. Thorne Inv. Co., Civ. App., 46 S.W.2d 329, 332, quoting Corpus Juris.

82. Tex.—Finch v. Trent, 22 S.W. 132, 134, 3 Tex.Civ.App. 568.

83. Wash.—State v. Myers, 40 P. 626, 12 Wash. 77, 81.

11 C.J. p 225 note 44 [a].

Use of metaphor criticized

Colo.—Clare v. People, 10 P. 799, 9 Colo. 122, 123.

84. "Consecutive written transfers" equivalent

Tex.—Finch v. Trent, 22 S.W. 132, 134, 3 Tex.Civ.App. 568.

85. "Lock stitching" distinguished
Buono v. Yankee Maid Dress Corporation, C.C.A.N.Y., 77 F.2d 274, 276.

86. U.S.—Buono v. Yankee Maid Dress Corporation, supra.

87. Tenn.—Terry v. McDaniel, 53 S. W. 732, 103 Tenn. 415, 46 L.R.A. 559.

88. Ga.—Burt v. Stocks Coal Co., 46 S.E. 828, 119 Ga. 629, 630, 100 Am.S.R. 203.

89. Ga.—Burt v. Stocks Coal Co., supra.

HAIRMAN. A name given to the presiding officer of an assembly, public meeting, convention, deliberative or legislative body, board of directors, committee, etc.⁹⁰

Chairman of committees of the whole house. In English parliamentary practice, in the commons, his officer, always a member, is elected by the house on the assembling of every new parliament. When the house is in committee on bills introduced by the government, or in committee of ways and means, or supply, or in committee to consider preliminary resolutions, it is his duty to preside.⁹¹

HALDER. See *Celdra* ante p 60 note 76.

HALDRON.

As a measure of capacity used in measuring coal see C.J.S. title *Weights and Measures* § 1, also 11 C.J. p 226 notes 53, 54.

HALK. A soft mineral substance consisting almost entirely of carbonate of lime.⁹² The word, as used in court practice, means a rough representation such, for instance, as a witness might make in outline upon a blackboard in the presence of the jury as illustrating his evidence, and not arising to the dignity of a scientifically accurate representation. It may be pictorial, mechanical, or in sketch;⁹³ and it has been held that an engraving from a book may be good as a "chalk," provided its connection with such book is not adverted to or unduly emphasized.⁹⁴

Phrases: "Go to the jury as a 'chalk'" and "offered as a chalk,"⁹⁵ and "permitted the jury to see it merely as a 'chalk.'"⁹⁶

HALLENGE.

As a Noun

Primarily, act of calling to account;⁹⁷ hence a summons or invitation given by one person to another to engage in a personal combat, or a request to fight a duel.⁹⁸ In military language, the act of sentry in demanding the countersign from those who appear at his post.⁹⁹ In its legal sense, the

word may be defined generally as an objection or exception calling into question the capability of a person for a particular function, the existence of a right, or the sufficiency or validity of an instrument.¹

As the formal, technical objection or exception to either grand or petit jurors, see the C.J.S. title *Grand Juries* §§ 23-30, also 28 C.J. p 788 note 47-p 794 note 39, and the C.J.S. title *Juries* §§ 247-285, also 35 C.J. p 358 note 89-p 419 note 51; and as a questioning of a person's right to vote, see the C.J.S. title *Elections* § 209, also 20 C.J. p 178 note 43-p 179 note 62.

Phrases: "Challenge for cause," see the C.J.S. title *Juries* § 268, also 35 C.J. p 381 note 52-p 382 note 73, "challenge for principal cause," see the C.J.S. title *Juries* § 247, also 35 C.J. p 381 notes 53, 54, "challenge of the accuracy of a statement,"² "challenge propter affectum," see the C.J.S. title *Juries* § 247, also 35 C.J. p 381 notes 53, 55, "challenge to the array," see the C.J.S. titles *Grand Juries* § 29, also 28 C.J. p 788 note 50-p 789 note 66, and *Juries* § 261, 35 C.J. p 374 note 41-p 381 note 51, "challenge to the favor," see the C.J.S. title *Juries* § 247, 35 C.J. p 381 notes 53, 55, "challenge to the panel," see the C.J.S. titles *Grand Juries* § 29, also 28 C.J. p 788 note 50-p 789 note 66, and *Juries* § 261, 35 C.J. p 374 note 41-p 381 note 51, "challenge to the poll," see the C.J.S. titles *Grand Juries* § 30, also 28 C.J. p 789 note 67-p 792 note 4, and *Juries* § 247, also 35 C.J. p 358 notes 90-2 and p 381 note 52-p 382 note 73, "challenge to the sufficiency of a pleading,"³ and "peremptory challenge," see the C.J.S. titles *Grand Juries* § 30, also 28 C.J. p 792 note 5, and *Juries* § 280, also 35 C.J. p 405 note 39-p 419 note 51.

As a Verb

Primarily the meaning of the word is to call one out to answer for something, hence formally directing the attention of some one to a matter that requires his action or decision;⁴ also to call in question, to dispute, put into dispute, put in question, or render doubtful.⁵ In what may be described as

0. Black L.D.

1. Black L.D.

2. U.S.—U. S. v. Tiffany, C.C.N.Y., 117 F. 367.

3. Mass.—Everson v. Casualty Co. of America, 94 N.E. 459, 461, 208 Mass. 214.

4. N.H.—Ordway v. Haynes, 50 N. H. 159, 164.

1 C.J. p 226 note 56.

95. N.H.—Ordway v. Haynes, 50 N. H. 159, 164.

96. Mass.—Everson v. Casualty Co. of America, 94 N.E. 459, 461, 108 Mass. 214.

97. Webster New Int. D.

98. Ind.—State v. Perkins, 6 Blackf. 20.

Ky.—Com. v. Tibbs, 1 Dana 524. See also C.J.S. title *Duelling* § 1, and 19 C.J. p 828 note 59-p 831 note 47.

99. Adams Gloss.

1. Black L.D.

2. N.J.—State v. Lang, 68 A. 210, 214, 75 N.J.Law 502.

3. Motion to quash bill of particulars held not such challenge W.Va.—Adkins v. Wayne County Court, 119 S.E. 284, 285, 94 W.Va. 460.

4. N.J.—State v. Lang, 68 A. 210, 214, 75 N.J.Law 502.

5. N.J.—Petition of Clee, 196 A. 476, 480, 119 N.J.Law 310—In re

its legal sense, the word has been defined as meaning to object or except to, prefer objections to a person, right, or instrument, to call formally into question the capability of a person for a particular function, or the existence of a right claimed, or the sufficiency or validity of an instrument.⁶

Phrases: "‘Challenge’ a man,"⁷ and "‘challenge’ the result of the election."⁸

CHAMBER.

As a Noun

—*In the Singular.* A compartment or inclosed space; also a hollow or cavity;⁹ a room or apartment in a house; a private repository,¹⁰ a sleeping apartment.¹¹ Sometimes the word is used to designate a court, a commission, or an association of persons habitually meeting together in an apartment, for example, "star chamber," "chamber of deputies," "chamber of commerce."¹²

Chamber of accounts. In French law, a sovereign court of great antiquity which took cognizance of and registered the accounts of the king's revenue; nearly the same as the English court of exchequer.¹³

Chamber of commerce. A board or association to promote the commercial interests of a locality, a country, or the like; a society of the principal merchants and traders of a city who meet to promote the general trade and commerce of the place.¹⁴ A "chamber of commerce" has been compared with a "board of trade," see Board 11 C.J.S. p 370 note 18, and both compared with and distinguished from

a "business league," see Business 12 C.J.S. p 804 notes 61, 62.

"Coking chamber." A semi-cylindrical or tubular retort [in a Paris gas-retort], which lies horizontally across the furnace structure, and holds several hundred pounds of coal, in the process of producing coke.¹⁵

Widow's chamber. A portion of the effects of a deceased person, reserved for the use of his widow, and consisting of her apparel and the furniture of her bed-chamber, is called in London the "widow's chamber."¹⁶

Other phrases: "Entirely inclosed within the covered chamber" and "internal recess or chamber."¹⁷

—*Chambers [of judge].* Any place in which a judge hears motions, signs papers, or does other business pertaining to his office, when he is not holding a session of court, or the private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court and it has been said that, for the purpose of jurisdiction, the chambers of a judge are wherever he happens to be, in his circuit or district, when the exigencies of the case call for the transaction of chamber business;¹⁸ and that the word may be used interchangeably with "vacation."¹⁹

Phrases: "At chambers,"²⁰ "at his chambers,"²¹ "in chambers,"²² "in the judge's chambers,"²³

Hunt, 191 A. 437, 454, 15 N.J.Misc. 331.

6. Black L.D.

7. N.J.—State v. Lang, 68 A. 210, 214, 75 N.J.Law 502.

"Call a man out" synonymous see Call 12 C.J.S. p 884 note 14.

8. N.J.—Petition of Clee, 196 A. 476, 480, 119 N.J.Law 310—In re Hunt, 191 A. 437, 454, 15 N.J.Misc. 331.

9. U.S.—Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., C.C.A.Mich., 230 F. 120, 131.

10. Black L.D.

11. Mass.—Cotting v. Boston, 87 N. E. 205, 201 Mass. 97, 101.

12. Black L.D.

13. Black L.D.

14. U.S.—Retailers Credit Ass'n of Alameda County v. Commissioner of Internal Revenue, C.C.A.Cal., 90 F.2d 47, 51, quoting *Corpus Juris*—Crooks v. Kansas City Hay Dealers' Ass'n, C.C.A.Mo., 37 F.2d 83, 85, quoting *Corpus Juris*—Northwestern Municipal Ass'n v. U. S., D.C.Minn., 22 F.Supp. 18, 22.

15. U.S.—Otto Coking Co. v. Koppers Co., C.C.A.Del., 258 F. 122, 130.

16. Black L.D.

17. U.S.—Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., C.C.A.Mich., 230 F. 120, 130.

18. U.S.—In re Neagle, C.C.Cal., 39 F. 833, 855, 5 L.R.A. 78.

Colo.—Kirby v. Chicago, etc., R. Co., 116 P. 150, 51 Colo. 82, 86.

Ga.—Morehead v. Allen, 63 S.E. 507, 510, 131 Ga. 807.

Kan.—In re Verdigris Conservancy Dist., 289 P. 966, 968, 131 Kan. 214.

Minn.—Hoskins v. Baxter, 66 N.W. 969, 64 Minn. 226, 229.

Ohio.—Pittsburg, etc., R. Co. v. Hurd, 17 Ohio St. 144, 146.

Okl.—Atchison, T. & S. F. Ry. Co. v. Long, 251 P. 486, 491, 122 Okl. 86, quoting *Corpus Juris*.

11 C.J. p 227 note 71.

Not necessarily within territorial limits
"When the order is one which may be made at the chambers of the judge, it is not necessary that it be made within the territorial limits

of the division in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and is authorized to be, engaged in performing his judicial duties."—Wheeler v. Taft, C.C.A.La., 261 F. 978, 980.

19. Ga.—Chapman v. Chattooga Oil-Mill Co., 96 S.E. 579, 580, 22 Ga. App. 446.

20. Ga.—Durham v. Dowling, 163 S. E. 503, 174 Ga. 557.

11 C.J. p 227 note 71 [b] (2).

21. Ga.—Morehead v. Allen, 63 S.E. 507, 510, 131 Ga. 807.

Mass.—Commonwealth v. McLaughlin, 122 Mass. 449.

22. Ga.—Morehead v. Allen, 63 S.E. 507, 510, 131 Ga. 807.

"In open court" or "in term time" contrasted

Ga.—Chapman v. Chattooga Oil-Mill Co., 96 S.E. 579, 580, 22 Ga. App. 446.

23. Ga.—Morehead v. Allen, 63 S.E. 507, 510, 131 Ga. 807.

"judge at chambers,"²⁴ and "orders at chambers."²⁵

In international law, the word has been defined as portions of the sea cut off by lines drawn from one promontory to another, or included within lines extending from the point of one cape to the next, situated on the seacoast of the same nation, and which are claimed by that nation as asylums for merchant vessels, and exempt from the operations of belligerents;²⁶ also parts of the ocean included within lines drawn from promontory to promontory, or perhaps from points a league distant from each.²⁷

As an Adjective

Chamber deacons. In old English law, certain poor Irish scholars, clothed in mean habit, and living under no rule; also beggars banished from England. The word is sometimes spelled "chamberdekins."²⁸

Chamber survey. A draft on paper of a pretended survey.²⁹

Other phrases: "Chamber acid,"³⁰ and "chamber business," see Business 12 C.J.S. p 776 note 2-p 777 note 6; also "chambers orders."³¹

CHAMBERLAIN. Keeper of the chamber; also, the name of several high officers of state in England, as the lord great chamberlain of England, lord chamberlain of the household, chamberlain of the exchequer, the treasurer.³²

CHAMBERLARIA. Chamberlainship, the office of a chamberlain.³³

CHAMBIUM. Law Latin, in old English law, change, or exchange.³⁴

CHAMBRE. A French word meaning a chamber, a room in the upper story of a building, or a sleeping room.³⁵

CHAMFER. A small gutter or furrow; a groove; a slope or bevel produced by cutting off the edge of anything originally right-angled.³⁶

CHAMOTTE. A mixture of fire clay and burnt pottery, old crucibles and the like, used for making fire bricks, crucibles, pipes, etc.³⁷ A species of specially pure calcined clay which must be silicate of alumina, and which, by reason of its properties, is peculiarly adapted for the chemical and mechanical actions and results necessary in order to produce an acid-proof, unshrinkable composition.³⁸

CHAMPAGNE. A word defined by the Century Dictionary as an effervescent wine; a kind of brisk, sparkling wine from Champagne, France, which has been held included within the terms "liquor,"³⁹ and "wine."⁴⁰

CHAMPART. A share or division of the profits of land; a part of the crop annually due to the landlord by bargain or custom.⁴¹ In French law, the grant of a piece of land by the owner to another, on condition that the latter would deliver to him a portion of the crops.⁴²

CHAMPARTOR or CHAMPERTOR. One who makes or brings pleas or suits, or causes them to be

24. S.C.—Appleby v. South Carolina, etc., R. Co., 36 S.E. 109, 53 S.C. 33, 35.

11 C.J. p 227 note 71 [c].

Meaning of phrase

"A judge at chambers" is simply a judge of a court of record acting out of court."

Ga.—Chapman v. Chattooga Oil-Mill Co., 96 S.E. 579, 580, 22 Ga.App. 446.

Wis.—Frawley v. Cosgrove, 53 N.W. 689, 690, 83 Wis. 441—Whereatt v. Ellis, 27 N.W. 630, 28 N.W. 333, 65 Wis. 639, 644.

Wyo.—Huhn v. Quinn, 128 P. 514, 21 Wyo. 51, 54.

25. N.D.—Travelers' Ins. Co. v. Weber, 50 N.W. 703, 2 N.D. 239, 244, 245.

26. Black L.D.

27. U.S.—Findlay v. The William, D.C.Pa., 9 F.Cas.No.4,790, 1 Pet. Adm. 12, 29.

28. Black L.D.

29. A practice at an early date in Pennsylvania

Surveyors often made drafts on

paper of pretended surveys and returned them to the land office as duly surveyed, instead of going into the fields and establishing the lines and marking corners upon the ground, and these false and fraudulent pretenses of surveys never made were called "chamber surveys."—Schraeder Mining & Mfg. Co. v. Packer, Pa., 9 S.Ct. 385, 129 U.S. 688, 696, 32 L.Ed. 760.

30. Md.—Davison Chemical Co. of Baltimore County v. Baugh Chemical Co. of Baltimore County, 104 A. 404, 407, 133 Md. 203, 3 A.L.R. 1.

31. N.D.—Travelers' Ins. Co. v. Weber, 50 N.W. 703, 2 N.D. 239, 245.

32. Black L.D.

Similar definition

"The receiver of the rents and revenues of a city."—Burrill L.D.

In some American cities, the title of an officer corresponding to "treasurer."—Black L.D.

33. Black L.D.

34. Black L.D.

35. Pa.—Wusthoff v. Dracourt, 3 Watts 240, 242.

11 C.J. p 228 note 87.

Chambre depente—a name anciently given to St. Edward's chamber, called the "Painted Chamber," destroyed by fire with the houses of parliament.—Black L.D.

36. U.S.—Syracuse Chilled Plow Co. v. Robinson, C.C.N.Y., 35 F. 502, 503, quoting Webster D.

37. U.S.—Panzl v. Battle Island Paper & Pulp Co., D.C.N.Y., 132 F. 607, 609

38. U.S.—Panzl v. Battle Island Paper Co., N.Y., 138 F. 48, 50, 70 C. C.A. 474.

11 C.J. p 228 note 92.

39. N.C.—Kizer v. Handleman, 50 N. C. 428, 429.

40. U.S.—DeBary v. Arthur, N.Y., 93 U.S. 420, 422, 23 L.Ed. 936.

41. Adams Gloss., citing 4 Blackstone Comm. p 135.

42. Black L.D.

moved or brought, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gains or of the land in dispute.⁴³

CHAMPARTY. The original spelling of the word "champerty."⁴⁴

CHAMP DE MAI and CHAMP DE MARS. See Campus 12 C.J.S. p 891 note 67.

CHAMPERT. In old English law, a share or division of land; champerty. In old Scotch law, a gift or bribe, taken by any great man or judge from any person, for delay of just actions, or furthering wrongous [wrongful] actions, whether it be lands or any goods movable.⁴⁵

CHAMPERTOUS. Affected with, or of the nature of, champerty.⁴⁶

^{43.} Vt.—In re Aldrich, 86 A. 801, 802, 86 Vt. 531.

See generally C.J.S. title Champerty and Maintenance post.

^{44.} N.Y.—Small v. Mott, 22 Wend. 403, 405.

See also C.J.S. title Champerty and Maintenance § 1.

^{45.} Black L.D.

^{46.} Black L.D.

See also generally C.J.S. title Champerty and Maintenance post.

CHAMPERTY AND MAINTENANCE

This Title includes officious intermeddling in a suit between others by assisting either party to carry it on, with or without an agreement to divide the subject of the litigation in the event of success; agreements for such division, or for the purchase of property held adversely, conveyances of such property, and agreements for the purchase of pretended titles or rights of action for the purpose of suing thereon; and criminal responsibility for unlawful maintenance of suits.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. IN GENERAL

§ 1. Definitions and Elements

- a. Champerty
- b. Maintenance

a. Champerty

Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.

At common law champerty is defined to be a bargain by the terms of which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at his own expense, or to aid in so doing, in consideration of receiving, in the event of success, some part of the land, property, or money recovered or deriving some benefit therefrom.¹ To constitute champerty it is essential

that there be an agreement and undertaking² by one person to defray, in whole or in part, the expenses of another's suit³ and by the latter person to divide with the former the fruits of the litigation in the event it proves successful.⁴ It is not material at what time a person becomes a party to a champertous contract; if he becomes a party to it at any stage of its execution, he will, in contemplation of law, be deemed to have been a party to it from its inception.⁵ While it is not essential that there be an action pending at the time the contract is entered into,⁶ it is essential that a suit be contemplated; an agreement which does not provide for the prosecution or defense of a suit may be fraudulent, or for some other reason illegal, but it cannot be champertous.⁷ Conversely, it is sufficient that there is an action pending or contemplated when the bargain is entered into.⁸

1. Ky.—*Wilhoit's Adm'x v. Richardson*, 236 S.W. 1025, 193 Ky. 559.

Other definitions

(1) The unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of it. U.S.—*U. S. v. Call*, C.C.A.Fla., 287 F. 520.

Ga.—*Gowen v. New Orleans Naval Stores*, 120 S.E. 776, 157 Ga. 107.

Mass.—*Sherwin Williams Co. v. J. Mannos & Sons*, 191 N.E. 438, 287 Mass. 304—*Holdsworth v. Healey*, 144 N.E. 386, 249 Mass. 436.

11 C.J. p 232 note 2.

(2) A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense.—*Whisman v. Wells*, 266 S.W. 897, 206 Ky. 59—11 C.J. p 232 note 3.

(3) An agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail—the champertor to carry on the suit at his own expense.

Del.—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442—*Gibson v. Gillespie*, 152 A. 589, 4 W.W.Harr. 331.

Vt.—*D'Amato v. Donatoni*, 168 A. 564, 105 Vt. 496.

11 C.J. p 232 note 3 [a] (7).

(4) A bargain to divide the proceeds of a litigation between plaintiff and the party supporting the litigation.—*Smyth v. Klauder*, C.C.A. Pa., 52 F.2d 109, certiorari denied *Klauder v. Smyth*, 52 S.Ct. 199, 284

U.S. 681, 76 L.Ed. 575, quoting 3 *Williston Contracts* § 1711.

(5) A proceeding by which a person having no legitimate interest in a suit bargains to aid in carrying on its prosecution or defense by furnishing money or personal services, in consideration of his receiving, in the event of his success, a share of the matter in suit.—*Cummings Oil & Gas Co. v. Barnsdell's Estate*, 41 Pa. Co. 120, quoting *Webster New Int. D.*

(6) The act of assisting plaintiff or defendant in a legal proceeding in which the person giving the assistance has no valuable interest, on agreement that, if the suit is successful, its proceeds shall be divided between plaintiff or defendant, as the case may be, and the assisting person.—*Cummings Oil & Gas Co. v. Barnsdell's Estate*, supra, quoting *Rapalje & L. L.D.*

(7) Further definitions see 11 C.J. p 232 note 3 [a].

Direct or collateral champerty

A distinction is to be made between direct and collateral champerty in that collateral champerty is exterior to the suit and, although affording a motive for carrying on the litigation, is not directly involved in it as matter for decision or adjudication in the pending controversy.—*Reed v. James*, 11 S.E. 401, 84 Ga. 380.

2. Intention and concurrence of minds

(1) In determining whether contract is champertous, the intention is controlling and there should be no strained interpretation to impute illegal purpose.—*Clancy v. Kelly*, 166 N.W. 583, 182 Iowa 1207.

(2) However, champerty cannot be predicated on the mere intention of one person to commit an act of champerty; there cannot be a champertous act, or an act partaking of the nature of champerty, without the concurrence of at least two minds.—*Adams v. Buford*, 6 Dana, Ky., 406. 11 C.J. p 234 note 24.

3. Ga.—*Clark v. Harrison*, 184 S.E. 620, 182 Ga. 56.

Vt.—*D'Amato v. Donatoni*, 168 A. 564, 105 Vt. 496.

11 C.J. p 234 note 17.

According to some decisions, however, an agreement to defray the expenses of the contemplated litigation is not necessary.

Ind.—*Scobey v. Ross*, 13 Ind. 117.

Mass.—*Ackert v. Barker*, 131 Mass. 436—*Lathrop v. Amherst Bank*, 9 Metc. 489.

11 C.J. p 234 note 22.

4. Ga.—*Clark v. Harrison*, 184 S.E. 620, 182 Ga. 56.

11 C.J. p 234 note 16.

5. Minn.—*Gammons v. Gulbranson*, 80 N.W. 779, 78 Minn. 21.

6. Ky.—*Roberts v. Yancey*, 21 S.W. 1047, 94 Ky. 243, 15 Ky.L. 10, 42 Am.S.R. 357.

11 C.J. p 233 note 13.

7. Vt.—*D'Amato v. Donatoni*, 168 A. 564, 105 Vt. 496.

11 C.J. p 233 note 14.

8. Mass.—*Sherwin Williams Co. v. J. Mannos & Sons*, 191 N.E. 438, 287 Mass. 304.

Intervention proceedings satisfy the rule, as, although they are not antagonistic to the stakeholder, they are antagonistic to other claimants of the fund.—*Sherwin Williams Co. v. J. Mannos & Sons*, 191 N.E. 438, 287 Mass. 304.

b. Maintenance

Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.

Maintenance is an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it;⁹ an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right.¹⁰ It is of the essence of maintenance that there should be a suit or an antagonistic proceeding between parties, which, according to some authorities, must actually be pending;¹¹ and it is further necessary that assistance is to be rendered in the litigation;¹² but it is not necessary that defendant be deprived of any just ground of defense.¹³

§ 2. Distinction between Champerty and Maintenance

Champerty is maintenance with the additional feature of an agreement for the payment of compensation or personal profit from the subject matter of the suit.

Champerty is a species of maintenance,¹⁴ but differs therefrom in that it involves compensation¹⁵ or personal profit¹⁶ to be paid or derived from the thing sued for, or a part thereof, and a bargain or agreement therefor.¹⁷

§ 3. Origin and History

Rules against champerty and maintenance existed under the early law; and such rules have survived to a

varying extent in many, although not all, jurisdictions; but, while the principles may remain, there is a marked tendency to lessen the rigor and inflexibility of their application and temper the severity of their results.

Existing laws as to champerty and maintenance have come from the far past.¹⁸ As noted in an American decision, by the Roman law it was a species of *crimen falsi* to enter into any confederacy or to do any act to support another's lawsuit, by money, witnesses, or patronage.¹⁹ Also, as stated in American decisions, the various statutes enacted in England concerning champerty and maintenance were in substance merely declaratory of the common law, the fundamental principles of the law on this subject being well established prior to the statutes.²⁰ The offense has always been considered as one against public justice,²¹ and as having a manifest tendency to oppression;²² and the general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation²³ which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law.²⁴ The power of influential persons to whom rights of action were transferred in order to obtain their support and favor in suits brought to assert those rights was the cause of the rigid doctrine of the early common law.²⁵

The court of chancery in the main followed the courts of law in treating champerty and maintenance in all its forms as illegal, and went further in some respects, giving relief against, or refusing to enforce, transactions not strictly involving cham-

9. U.S.—*Sampliner v. Motion Picture Patents Co.*, N.Y., 255 F. 242, 247, 168 C.C.A. 202, affirming, D.C., 243 F. 277, and rehearing denied 259 F. 152, 170 C.C.A. 220, 7 A.L.R. 234, reversed on other grounds 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240, quoting 4 Blackstone Comm. p. 135.

N.C.—*Smith v. Hartsell*, 63 S.E. 172, 150 N.C. 71, 22 L.R.A., N.S., 203. 11 C.J. p. 233 note 6.

10. Del.—*Gibson v. Gillespie*, 152 A. 589, 4 W.W.Harr. 331. 11 C.J. p. 233 note 7.

11. U.S.—*Fletcher v. Ellis*, Super.Ct. Ark., 9 F.Cas.No.4,863a, Hempst. 300.

12. Mass.—*Joy v. Metcalf*, 37 N.E. 671, 161 Mass. 514. 11 C.J. p. 233 note 10.

13. Me.—*Atkinson v. Runnells*, 60 Me. 440. 11 C.J. p. 233 note 11.

14. U.S.—*Sampliner v. Motion Picture Patents Co.*, N.Y., 255 F. 242, 168 C.C.A. 202, affirming, D.C., 243 F. 277, and rehearing denied 259 F.

152, 170 C.C.A. 220, 7 A.L.R. 234, reversed on other grounds 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240.

Del.—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442. 11 C.J. p. 231 note 1.

15. Ky.—*Whisman v. Wells*, 266 S. W. 897, 206 Ky. 59.

16. U.S.—*Sampliner v. Motion Picture Patents Co.*, N.Y., 255 F. 242, 168 C.C.A. 202, affirming, D.C., 243 F. 277, and rehearing denied 259 F. 152, 170 C.C.A. 220, 7 A.L.R. 234, judgment reversed on other grounds 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240. 11 C.J. p. 234 note 27 [a].

17. U.S.—*Sampliner v. Motion Picture Patents Co.*, supra. 11 C.J. p. 234 note 27, 28.

18. N.Y.—*People v. Ladew*, 143 N. E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

19. N.Y.—*Thallhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am.D. 308. 11 C.J. p. 234 note 29.

20. Ind. — *Mount v. Montgomery*

County, 80 N.E. 629, 168 Ind. 661, 14 L.R.A., N.S., 483.

11 C.J. p. 235 note 31.

Common name of English statute

The English statute, 32 Hen. VIII c. 9, is commonly called "the Bill of Bracery and buying of titles."—*Cain v. Monroe*, 23 Ga. 82.

21. N.Y.—*Thallhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am.D. 308.

22. Mass.—*Thurston v. Percival*, 1 Pick. 415.

23. Ill.—*Dealers' Bottle Exch. v. Schaffer*, 224 Ill.App. 411.

Ky.—*Wilhoit's Adm'x v. Richardson*, 236 S.W. 1025, 1027, 193 Ky. 559. 11 C.J. p. 235 note 34.

24. Del.—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442. 11 C.J. p. 235 note 35.

25. Del.—*Hannigan v. Italo Petroleum Corporation of America*, supra. Iowa.—*Wright v. Meek*, 3 G.Green. 472.

Mo.—*Curry v. Dahlberg*, 110 S.W.2d 742, 748, citing *Corpus Juris*. 11 C.J. p. 235 note 36.

perty or maintenance, but savoring of it.²⁶

The courts of the states of the United States having the English common law as a basis of their systems of jurisprudence differ as to the extent to which the principles of the common law and the provisions of the early English statutes should be deemed to have been introduced into their respective systems; in some of the states the common-law doctrine seems to have been accepted by the courts in general;²⁷ in others it has never been adopted or become a part of their system of jurisprudence;²⁸ and in still others, if ever accepted, it was accepted and exists only in part or has been superseded or modified by local legislation.²⁹ At any rate, in jurisdictions where the common-law doctrine has survived, the reasons which induced a strict application are now so far abated that the modern application is not so rigorous or inflexible, nor is it always attended by the same result, as under the early common law. The tendency of the

decisions is to depart from the severity of the old law and at the same time to preserve the principle which tends to defeat the mischief to which the old law was directed.³⁰

§ 4. What Law Governs

With some exceptions, the law of the state in which a contract is to be performed is to be applied in determining whether or not the contract is champertous.

The question as to whether a contract is champertous or not is as a general rule governed by the law of the state in which the contract is to be performed;³¹ but, where the court is without information as to where the contract was made or is to be performed, it may be constrained to apply the general rules of the common law.³² It has been denied that a court is required by any rule of comity to enforce a contract entered into in another state where such contract, if entered into in the state of the forum, would not only be champertous but the entering into it would be criminal.³³

II. CONTRACTS AND CONVEYANCES PROHIBITED

§ 5. Assignments of Rights of Action

Apart from statute, the taking, in good faith and for a valuable consideration, of a transfer or assignment of a right of action is not champerty; and subsequent litigation for the collection of the claim, or the protection of the thing, assigned is not maintenance.

While, as stated in the C.J.S. title Assignments

§ 3, at the early common law the assignment of choses in action was regarded as violative of the rule against champerty and maintenance, it is now the accepted doctrine that the bona fide purchaser or assignee of a mere right of action is not guilty of champerty or maintenance,³⁴ except in cases

26. U.S.—Gregerson v. Imlay, C.C. N.Y., 10 F.Cas.No.5,795, 4 Blatchf. 503.

11 C.J. p 235 note 37.

27. U.S.—U. S. v. Call, C.C.A.Fla., 287 F. 520.

Ill.—Dealers' Bottle Exch. v. Schaffer, 224 Ill.App. 411.

Kan.—Billings v. Aldrich, 3 P.2d 639, 643, 133 Kan. 475, citing *Corpus Juris*.

Mo.—Curry v. Dahlberg, 110 S.W.2d 742, rehearing denied 112 S.W.2d 345.

Pa.—Cummings Oil Gas Co. v. Barnsdell's Estate, 41 Pa. Co. 120.

11 C.J. p 236 note 40.

28. U.S.—Smyth v. Klauder, C.C.A. Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575—Rhinehart v. Victor Talking Mach. Co., D.C.N.J., 261 F. 646.

Ariz.—Strahan v. Haynes, 262 P. 995, 33 Ariz. 128.

Conn.—Sleeping Giant Park Ass'n v. Connecticut Quarries Co., 160 A. 291, 115 Conn. 70—Rulnick v. Shulman, 136 A. 865, 106 Conn. 66—Perry v. M. M. Puklin Co., 123 A. 28, 100 Conn. 104.

N.J.—Lloyd W. Casner, Inc. v. Hartshorne, 177 A. 890, 13 N.J. Misc. 295.

Tex.—Yellow Cab Co. v. McCloskey, Civ.App., 32 S.W.2d 1042, error dismissed—Edmonds v. White, Civ. App., 247 S.W. 585, 586, citing *Corpus Juris*—McCloskey v. San Antonio Traction Co., Civ.App., 192 S.W. 1116, error refused.

11 C.J. p 236 note 42.

29. U.S.—Royal Oak Drain Dist., Oakland County, v. Keesee, C.C.A. Mich., 87 F.2d 786—Chicago Bank of Commerce v. McPherson, C.C.A. Mich., 62 F.2d 393, affirming, D.C., 2 F.Supp. 110, certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

Del.—Hannigan v. Italo Petroleum Corporation of America, 178 A. 589, 6 W.W.Harr. 442.

Mich.—National Adjusting Ass'n v. Dallavo, 234 N.W. 485, 253 Mich. 239.

W.Va.—Currence v. Ralphsnyder, 151 S.E. 700, 108 W.Va. 194.

11 C.J. p 236 notes 41, 42 [a].

30. Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

Ill.—Dealers' Bottle Exch. v. Schaffer, 224 Ill.App. 411—Employers' Liability Assur. Corp. of London, England v. Kelly-Atkinson Const. Co., 195 Ill.App. 620.

Ohio.—Athens & Pomeroy Coal &

Land Co. v. Tracy, 153 N.E. 240, 22 Ohio App. 21, affirmed Tracy v. Athens & Pomeroy Coal & Land Co., 152 N.E. 641, 115 Ohio St. 298. Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267.

Wash.—Clifford v. Wilcox, 27 P.2d 722, 175 Wash. 513.

11 C.J. p 235 notes 38, 39, p 236 note 43.

"Practically none of the ancient reasons for the law against the making of champertous contracts, exist in modern times." — Hannigan v. Italo Petroleum Corporation of America, 178 A. 589, 592, 6 W.W.Harr. (Del.) 442.

31. Va.—Roller v. Murray, 59 S.E. 421, 107 Va. 527.

11 C.J. p 272 note 88.

Conveyance of land adversely held is governed by the *lex loci rei sitæ*. —Giddings v. Eastman, Clarke (N.Y.) 19—11 C.J. p 272 note 89.

32. U.S.—Rhinehart v. Victor Talking Mach. Co., D.C.N.J., 261 F. 646.

33. S.D.—Hudson v. Sheafe, 171 N.W. 326, 41 S.D. 475.

34. Ala.—Commercial Casualty Ins. Co. v. Isbell Nat. Bank, 134 So. 810, 223 Ala. 48.

11 C.J. p 237 note 45.

where the rule has been changed by statute, *infra* §§ 8-10, or except, in some jurisdictions, where the cause of action assigned arose *ex delicto*, *infra* § 6.

An assignment of a claim is not rendered illegal by the mere fact that litigation is necessary for collection,³⁵ nor will the fact that it may become necessary for the assignee to institute legal proceedings to protect the thing assigned from unjust claims brought against it invest the transaction with the character of maintenance.³⁶ Indeed, an assignment for the express purpose of bringing suit may not be champertous; an assignment of the causes of action of several adjoining landowners to one person for the purpose of bringing one action for the determination of the issues involved is not open to the objection of champerty.³⁷ Also, the assignment of a claim to a collection agent with the intent that the assignee will bring suit thereon will not be declared illegal and void as against public policy where the right of a collection agent to take an assignment of a claim and bring suit thereon in his own name has been long recognized in the state, both by statute and by decisions, and where, although there is a statute forbidding an attorney from buying any evidence of debt or thing in action, with intent to bring suit thereon, there is no similar provision as to collection agents.³⁸

However, a transfer may be champertous in nature where it is merely temporary and colorable and not in good faith³⁹ or where there is no consideration therefor other than a promise of the transferee to pay the transferor a part of any recovery

that may be obtained.⁴⁰

The acquisition, by assignment or transfer, of a further interest in the subject matter of a suit, by a person who already has an interest therein is considered *infra* § 26.

§ 6. — Particular Rights Assigned

There is some divergence of authority as to the champertous character of the assignment of a bare right of action arising *ex delicto*. Other rights or titles may be assigned without violating the rules against champerty and maintenance.

The assignment of a cause of action arising *ex delicto* is regarded by some,⁴¹ although not by other,⁴² courts as champertous. Also, the assignment of a bare right to file a bill in equity for a fraud committed on the assignor is void, being contrary to public policy and savoring of the character of maintenance;⁴³ but a bill by the purchaser of a mortgagor's equity of redemption to set aside a foreclosure sale because of fraud does not come within this rule,⁴⁴ the transfer of an interest to which a right to sue is incident not being objectionable;⁴⁵ and in some states the champerty doctrine has not been adopted.⁴⁶

An action by a bona fide assignee or transferee of an equitable title is not open to the objection of champerty or maintenance, even though there is a contest by the holder of the legal title.⁴⁷

The acquisition of an execution by transfer after levy and pending advertisement of the property levied on for sale is not champertous, despite the fact that another person lays claim to the execution.⁴⁸

35. Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267.

36. Conn.—Rogers v. Hendrick, 82 A. 586, 85 Conn. 260.

S.C.—Fraser v. Charleston, 18 S.C. 533.

37. N.Y.—Blashfield v. Empire State Tel., etc., Co., 18 N.Y.S. 250.

38. Cal.—Cohn v. Thompson, 16 P. 2d 864, 128 Cal.App. 783.

Assignment of claim for collection is valid.—Carson, Pirie, Scott & Co. v. Long, 257 N.W. 815, 219 Iowa 444.

39. Ala.—McCart v. Smith, 77 So. 967, 16 Ala.App. 387.

40. Ala.—Folmar v. Beall, -85 So. 540, 204 Ala. 298.

41. Ala.—Commercial Casualty Ins. Co. v. Isbell Nat. Bank, 134 So. 810, 223 Ala. 48.

Ind.—Gerdink v. Meginnis, 126 N.E. 499, 73 Ind.App. 39.

Purpose of assignment

The assignment of a cause of action for a personal tort is champertous when made for the purpose of enabling the assignee to use his personal influence in its prosecution.—

Campbell v. Dexter, 17 App.D.C. 454.

42. Ohio.—Athens & Pomeroy Coal & Land Co. v. Tracy, 153 N.E. 240, 22 Ohio App. 21, affirmed Tracy v. Athens & Pomeroy Coal & Land Co., 152 N.E. 641, 115 Ohio St. 298. 11 C.J. p 238 notes 56, 57.

43. Kan.—Flick v. Murdock, 225 P. 119, 115 Kan. 862.

11 C.J. p 238 note 53. Assignment of right to sue separate and distinct from property right see C.J.S. title Assignments § 35 b.

44. Miss.—Houston v. National Mut. Bldg., etc., Assoc., 31 So. 540, 80 Miss. 31, 92 Am.S.R. 565.

Transfer by bankruptcy trustee to bankrupt mortgagor

Bankruptcy trustee's transfer to bankrupt of rights of redemption in respect of property sold under a mortgage executed by the bankrupt is not champertous in that the right

of action to have the foreclosure sale vacated arose out of a tort and is nonassignable, where the alleged tort was committed against the bankrupt before his adjudication, and as against the mortgagee, the case stands as though bankruptcy had not intervened.—De Merville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204.

45. Ala.—Powe v. Payne, 94 So. 587, 208 Ala. 527.

Kan.—Flick v. Murdock, 225 P. 119, 115 Kan. 862.

46. Tex.—Edmonds v. White, Civ. App., 247 S.W. 585.

47. U.S.—Baker v. Whiting, C.C. Me., 2 F.Cas.No.787, 3 Sumn. 475.

Ala.—Davis v. Williams, 25 So. 704, 121 Ala. 542—Gandy v. Fortner, 24 So. 425, 119 Ala. 303—Gilman v. Jones, 5 So. 785, 7 So. 48, 87 Ala. 691, 4 L.R.A. 113.

48. Ga.—Colter v. Livingston, 114 S.E. 430, 154 Ga. 401.

§ 7. — Effect of Indemnity against Costs

An agreement of the assignee of part of a cause of action to pay the costs is not obnoxious where he gives some other substantial consideration or where, prior to, and independent of, the assignment, he had an interest in the subject matter. In the absence of these features, the agreement is champertous according to the common-law rule; but this rule is no longer in force in some states.

At common law the assignment of part of a cause of action in consideration of the payment of the costs of the suit was void as champerty and maintenance;⁴⁹ but it is said that this rule no longer obtains.⁵⁰ At any rate, an assignment under an agreement that the assignee will enforce or collect the note or claim at his own expense and pay the assignor a share of the proceeds is not champertous where the assignee gives some other substantial consideration,⁵¹ or where, prior to, and independent of, the assignment and agreement, he had a real and proper interest in the cause of action on the note or claim and, therefore, is not a mere volunteer.⁵²

§ 8. — Special Statutory Provisions in General

By force of statute, the taking by a corporation of an assignment of a claim for the purpose of bringing suit thereon may be unlawful.

When prohibited by statute, the taking by a corporation of assignments for the purpose of bringing suits on claims which prove otherwise uncollectable is unlawful.⁵³

§ 9. — Purchase of Litigious Rights by Public Officers

To render applicable a statute prohibiting the pur-

chase by public officers connected with courts of justice of litigious rights within the jurisdiction of the tribunal in which they exercise their functions, it is essential that a right be purchased by an officer or employee of a court and that the right be actually involved in a pending contested suit.

A statute providing that public officers connected with courts of justice, such as judges, advocates, attorneys, clerks, and sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages, and interest, will, when applicable, be accorded effect;⁵⁴ but, being in restraint of individual right, it must be strictly interpreted and applied only to the parties intended to be reached.⁵⁵ Its application does not extend to a purchase of a claim by a person who is not an officer or employee of the court;⁵⁶ and a right is not litigious merely because it may give rise to litigation, or because a lawsuit is apparently necessary to enforce it; there must be a suit actually pending,⁵⁷ which actually involves the right in question,⁵⁸ and there must be a contest in the suit.⁵⁹ Promissory notes are not rendered litigious by being transferred for a low price.⁶⁰

§ 10. — Purchase by Attorney of Claim with Intent to Sue Thereon

The application of a statute making it unlawful for an attorney to buy a chose in action with intent to bring an action thereon is restricted to cases where an attorney purchases a chose in action for the sole or primary purpose of bringing an action thereon in the state for his own benefit.

A statute making it unlawful for an attorney to buy, or to be in any manner interested in buying,

49. Va.—Roller v. Murray, 59 S.E. 421, 107 Va. 527.
11 C.J. p 238 note 60.

50. N.Y.—O'Farrell v. Martin, 292 N.Y.S. 581, 161 Misc. 353.

51. Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267.

52. Del.—Gibson v. Gillespie, 152 A. 589, 4 W.V.Harr. 331.

53. N.Y.—Bennett ex rel. New York County Lawyers Ass'n v. Supreme Enforcement Corporation, 293 N.Y.S. 870, 250 App.Div. 265.

Prior to amendment of statute, so as to deal directly with the taking of an assignment for the purpose of bringing suit, an assignment of a claim to a corporation, without solicitation on its part, for the sole purpose of commencing an action on the claim was not illegal, no apparent evil resulting therefrom.—Water-town Business Men's Ass'n v. Green, 198 N.Y.S. 871, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 832.

54. La.—Stafford v. National Fire Ins. Co. of Hartford, 114 So. 78, 164 La. 409—Seagull Gasoline Co. v. Tieuel, 141 So. 422, 19 La.App. 642.
11 C.J. p 239 note 62.

55. La.—Swords v. Cortinas, 4 La. App. 145, 146.

Purpose of statute

"Article 2447 was enacted for the purpose of protecting possessors of litigious rights against the influence of judicial officers who might take advantage of their position to induce these possessors to transfer their rights to them at a sacrifice on false representations as to their value, or chances of success, or recovery, or as to the justice they might expect from the courts; and also to prevent these officers after they had acquired these rights, from unjustly influencing the courts against the defendants or debtors. It will therefore be seen that the article was passed in the interest of the trans-

feror and plaintiff creditor and of the defendant and debtor, and not of the transferee."—Swords v. Cortinas, supra.

56. La.—Gilkesson-Sloss Commn. Co. v. Bond, 11 So. 220, 44 La. Ann. 841.

11 C.J. p 239 note 63.

57. La.—McClung v. Atlas Oil Co., 87 So. 515, 148 La. 674—Villere v. Forman, 2 La.App., Orleans, 83.
11 C.J. p 239 note 64.

Purchase of claim after final judgment is not the purchase of a litigious claim.—Saint v. Martel, 47 So. 413, 122 La. 93—11 C.J. p 239 note 66.

58. U.S.—Mohawk Oil Co. v. Layne, D.C.La., 270 F. 851.

59. La.—Sanders v. Ditch, 34 So. 860, 110 La. 884.
11 C.J. p 239 note 65.

60. La.—Bernheim v. Pessou, 79 So. 23, 143 La. 609.

a chose in action with the intent, and for the purpose, of bringing an action thereon is a legislative recognition of the impropriety of allowing an attorney, who has it in his power to encourage or frown on litigation, to acquire control of claims and nurse to life and activity one which might otherwise be disposed of without litigation or oppression; and its aim is to prevent attorneys from oppressing debtors and making costs.⁶¹ It is in effect an adoption of the common-law rule,⁶² hereinafter enunciated in § 14. As stated in the C.J.S. title Attorney and Client § 46, such a statute is valid, but is strictly construed. It is accorded effect when,⁶³ and only when,⁶⁴ it is applicable.

The intent with which the purchase is made or the assignment is taken is controlling;⁶⁵ it is essential to the application of the statute not only that the purchase be made with the intent, and for the purpose, of bringing suit on the purchased claim,⁶⁶ but also that this be the sole,⁶⁷ or at least the primary, and not the incidental or contingent,⁶⁸ pur-

pose; and, furthermore, the intent must be to bring suit for the benefit of the attorney⁶⁹ in a court other than a justice's court,⁷⁰ or a court of another state.⁷¹

Even though an attorney has taken an assignment of a claim with the purpose denounced by the statute, and his assignee, a layman, has knowledge thereof, the latter has good title, the right of enforcement in him having none of the mischief sought to be prevented by the statute.⁷²

§ 11. Assignments or Transfers of Chattels in Adverse Possession

It is against the public policy of some, but not of other, states to sell or assign a chattel in the adverse possession of a third person.

Where personal property is in the adverse possession of a third person claiming it as his own, the sale or assignment of such chattel, even by the real owner, is against public policy and void in a number of jurisdictions;⁷³ and the rule is the same whether

61. Mich.—Stieler v. Pearson, 244 N. W. 507, 260 Mich. 374.

N.Y.—Watertown Business Men's Ass'n v. Green, 198 N.Y.S. 871, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 832.

S.D.—Hudson v. Sheaf, 171 N.W. 320, 324, 41 S.D. 475, quoting *Corpus Juris*.

11 C.J. p 239 note 75.

62. U.S.—Smyth v. Klauder, C.C.A. Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.

S.D.—Hudson v. Sheafe, 171 N.W. 320, 324, 41 S.D. 475.

63. S.D.—Hudson v. Sheafe, *supra*, quoting *Corpus Juris*.

11 C.J. p 239 note 74, p 240 note 94.

Statute applies to

(1) Equitable, as well as legal, actions.—Baldwin v. Latson, 2 Barb. Ch.N.Y., 306—11 C.J. p 240 note 79.

(2) Purchases made at a judicial sale.—Mann v. Fairchild, 3 Abb. Dec.N.Y., 152, 2 Keyes 106, affirming 14 Barb. 548.

(3) A transfer taken in the name of another person.—Browning v. Marvin, 2 N.E. 635, 100 N.Y. 144.

64. U.S.—Chicago Bank of Commerce v. McPherson, C.C.A.Mich., 62 F.2d 893, affirming, D.C., 2 F. Supp. 110, certiorari denied 53 S. Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

Statute does not apply to

(1) A purchase by a layman.—Irwin v. Curie, 64 N.E. 161, 171 N.Y. 409.

(2) A purchase of a claim on which suit has been instituted and is pending.—Smyth v. Klauder, C.C.A.Pa.,

52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575—11 C.J. p 240 note 82.

(3) The purchase of chattels.—Van Dewater v. Gear, 47 N.Y.S. 503, 21 App.Div. 201.

(4) The purchase of stock in a corporation.—Ramsey v. Gould, 57 Barb.N.Y., 398, 3 Abb.Pr.N.S., 174, 39 How.Pr. 62.

(5) A loan of money by an attorney, and the taking of a note as security.—Chenango Bank v. Hyde, 4 Cow.N.Y., 567.

(6) The assignment of an allowed claim against the estate of decedent to secure an attorney for compensation for his services.—In re Cummins, 77 P. 479, 143 Cal. 525.

(7) A purchase of a mortgage and foreclosure by advertisement and sale.—Hall v. Bartlett, 9 Barb.N.Y., 297.

65. U.S.—The President Arthur, D. C.N.Y., 25 F.2d 999.

S.D.—Hudson v. Sheafe, 171 N.W. 320, 324, 41 S.D. 475, quoting *Corpus Juris*.

66. Mich.—Stieler v. Pearson, 244 N. W. 507, 260 Mich. 374.

11 C.J. p 240 note 94.

Other purposes

(1) The statute is not applicable to the purchase of a judgment for the purpose of collecting it by execution.—Brotherson v. Consalus, 26 How.Pr.N.Y., 213—11 C.J. p 240 note 39.

(2) Also, the statute does not apply to the purchase of a demand which the attorney believes has been allowed by an administrator, with intent to institute special proceed-

ings for the purpose of compelling the administrator to account.—Tilden v. Aitkin, 55 N.Y.S. 735, 37 App.Div. 28, 29 N.Y.Civ.Proc. 28.

67. N.Y.—Nadal v. City of New York, 269 N.Y.S. 379, 150 Misc. 400.

11 C.J. p 239 note 76.

68. U.S.—The President Arthur, D. C.N.Y., 25 F.2d 999.

11 C.J. p 240 note 77.

69. N.Y.—Oldmixon v. Severance, 104 N.Y.S. 1042, 119 App.Div. 821.

Convenience or avoidance of expense and multiplicity of suits

(1) The statute does not apply where claims are assigned to an attorney's clerk as a matter of convenience for the purpose of bringing suit on them, there being no solicitation on the part of the attorney.—Tuller v. Arnold, 33 P. 445, 98 Cal. 522.

(2) Also, the statute does not apply where mechanics' liens are assigned to an attorney for collection and to avoid expense and a multiplicity of suits.—Smedley v. Dregge, 59 N.W. 411, 101 Mich. 200.

70. N.Y.—Brotherson v. Consalus, 26 How.Pr. 213—Goodell v. Peo., 5 Park Cr. 206.

71. Conn.—Roe v. Jerome, 18 Conn. 138.

72. N.Y.—Beers v. Washbond, 83 N. Y.S. 993, 86 App.Div. 582.

11 C.J. p 240 note 92.

73. Ala.—Richards v. Montgomery, 160 So. 706, 230 Ala. 307.

5 C.J. p 852 note 32—11 C.J. p 240 note 99.

Sale of goods in adverse possession of another generally see C.J.S. ti-

he sale is voluntary and direct, or involuntary and indirect as the result of conversion and the subsequent satisfaction of the tort.⁷⁴ In some jurisdictions, however, this doctrine is not recognized.⁷⁵ Even in jurisdictions where such assignment is considered champertous otherwise, if the possession of the third person was derived from and held in subordination to that of the owner, as in the case of a bailment, such owner may sell or assign the chattel, and his vendee will have the right to sue for its recovery on the wrongful withholding of possession.⁷⁶ Further, where the assignor conveyed an equitable interest before the adverse possession commenced, and afterward transfers the legal title to his assignee, the transfer is valid.⁷⁷ In a particular case a claimant may not have such actual, exclusive, adverse possession as will bring the case within the rule against maintenance.⁷⁸

§ 12. — Judicial Sales

A judicial sale, or sale by an officer under legal process, of property in adverse possession is not within the rule against maintenance.

The rule against maintenance, where the property in question is in adverse possession at the time of the sale, does not apply to a judicial sale or to a sale made by a public officer under legal process.⁷⁹

§ 13. Contracts between Attorney and Client in General

A contract between attorney and client is champertous where it is the result of an act prohibited by statute or where it provides that the attorney shall personally bear the costs and expenses of litigation; but it is not champertous where it is nothing more than a loan of money to the client or an agreement for payment of reasonable compensation for the attorney's services.

While champerty is not confined to attorneys, it

arises more frequently in contracts between attorney and client than in contracts between laymen.⁸⁰ A contract between attorney and client is champertous where it provides that the attorney shall bear or pay the costs or expenses of a suit or proceeding to enforce the client's rights,⁸¹ or where it is the result of an act prohibited by statute,⁸² such as the solicitation, by the attorney or his employee, of the client to engage the attorney to prosecute a claim for damages for negligence,⁸³ or the giving, or promising to give, a valuable consideration as an inducement or consideration for the placing of a demand in the hands of the attorney for the purpose of bringing suit or making demand thereon.⁸⁴ Also, any agreement between a creditor and his attorney by which either is to collect from the debtor, under the guise of attorney's fees, more than the attorney is to receive for his services is champertous.⁸⁵

On the other hand, a mere agreement between attorney and client for the payment by the latter to the former of reasonable compensation for the former's services is not champertous;⁸⁶ a contract between attorney and client is not champertous because it grows out of an offer of the attorney to defend the client in litigation already commenced;⁸⁷ and it is neither against public policy nor champertous for an attorney to lend his client money after the relationship of attorney and client already exists, and the loan forms no part of the inducement to bring about that relationship or to induce the client to engage in litigation, and there is no contract of indemnity against the client's liability for costs.⁸⁸

In some states the fiduciary relationship of attorney and client is deemed to preclude the application of conditions governing ordinary mercantile

the Sales § 13, also 55 C.J. p 66 notes 97, 98.

74. Ala.—Pope v. Union Warehouse Co., 70 So. 159.

11 C.J. p 241 note 1.

75. Colo.—Belcoe v. Heffelfinger, 50 P.2d 784, 97 Colo. 490.

11 C.J. p 241 note 2.

76. Ala.—Foster v. Goree, 5 Ala. 424.

77. Ala.—Alabama State Bank v. Barnes, 2 So. 349, 82 Ala. 607.

78. Ala.—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., 75 So. 568, 200 Ala. 120.

79. Ala.—Griffin v. Dauphin, 31 So. 849, 133 Ala. 543.

11 C.J. p 241 note 6.

80. U.S.—Smyth v. Klauder, C.C.A. Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.

81. U.S.—U. S. v. Call, C.C.A.Fla., 287 F. 520.

Mass.—Sherwin Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 287 Mass. 304.

N.Y.—In re Gilman's Adm'x, 167 N. E. 437, 251 N.Y. 265, reversing 232 N.Y.S. 754, 225 App.Div. 774.

82. Tex.—Broadway v. Miller, Civ. App., 288 S.W. 627.

83. N.J.—Peraino v. De Mayo, 177 A. 692, 13 N.J.Misc. 233.

Contrary view

Although an attorney may be disbarred under the statutory code of ethics for soliciting business, or may be prosecuted for barratry for soliciting business in violation of statute, the attorney's contract with client, fixing compensation to be received, when entered into without fraud, deception, or misrepresentation on the part of the attorney, and

with the attorney and client dealing with each other at arm's length, is not against public policy.—Beck v. Boucher, 195 P. 996, 114 Wash. 574.

84. Ala.—Fall v. Gulf States Steel Co., 87 So. 612, 205 Ala. 148.

Miss.—Harrell v. Daniel & Greene, 118 So. 899, 151 Miss. 761.

N.Y.—In re Gilman's Adm'x, 167 N. E. 437, 251 N.Y. 265, reversing 232 N.Y.S. 754, 225 App.Div. 774.

85. Ala.—Hamilton v. Burgess, 170 So. 348, 233 Ala. 4, reversing 170 So. 346, 27 Ala.App. 272.

86. Ala.—Farrell v. Betts & Betts, 81 So. 138, 16 Ala.App. 663.

87. Iowa.—State v. American Bonding & Casualty Co., 237 N.W. 360, 212 Iowa 1052.

88. Mo.—Mytton v. Missouri Pac. R. Co., App., 211 S.W. 111.

bargaining in determining whether the agreement between them is champertous;⁸⁹ but in other states statutes have the effect of abolishing in part the common-law doctrine of champerty and maintenance relating to contracts for compensation between attorney and client and are intended to place the attorney, as to his contracts with his clients, on the same footing and with the same freedom of contract as other persons in the business world.⁹⁰

§ 14. — Assignments or Purchases of Subject Matter of Suit

There is champerty where an attorney acquires, by purchase or absolute assignment, the res of a suit from his client with the intent to carry on the litigation at his own expense and for his own benefit; but there is no champerty where an attorney takes from his client an assignment of an interest in the subject matter of a suit as security for payment for his services or in payment of a precedent debt or services actually rendered, or where, after final judgment, he acquires an interest in property which was in controversy.

It is a general rule that it is champerty for an attorney to purchase, or take an absolute assignment of, the res of a suit from his client with the intent to carry on the litigation at his own expense and for his own benefit.⁹¹ On the other hand, it is not champerty for a client to assign to his attorney an interest in the subject matter of the suit as security for payment for his services,⁹² or in payment of a precedent debt or for services actually rendered;⁹³

and, unless it is provided otherwise by statute,⁹⁴ an attorney may, after final⁹⁵ judgment, properly acquire a part of, or an interest in, property which was in controversy, but is no longer in litigation.⁹⁶ An attorney who has been dismissed after performing considerable work in prosecuting a claim, but before its final disposition, and who, by reason of a valid and nonchampertous contract for a contingent fee, has an interest in the subject matter of the suit may purchase the interest of plaintiff and thereafter prosecute the suit himself without being guilty of champerty or maintenance.⁹⁷ Where, in a partition suit, there is no contention as to the title of plaintiff and his right to demand partition, a deed from him to his attorney is not champertous.⁹⁸

§ 15. — Agreements Not to Settle or Compromise

In many, although not all, states a contractual provision against compromise or settlement without the consent of the attorney is champertous and void; and according to some, but not other, decisions the entire contract is invalidated by the provision.

Except in a few jurisdictions,⁹⁹ a contract with an attorney, in which it is agreed that the attorney shall prosecute the claim and receive a fee from the amount to be recovered and that the claim shall not be compromised or settled without the consent of the attorney, is champertous and void.¹ As stat-

89. Mass.—*Sherwin Williams Co. v. J. Mannos & Sons*, 191 N.E. 438, 287 Mass. 304.

90. Mont.—*Coleman v. Sisson*, 230 P. 532, 71 Mont. 435.

91. U.S.—*Sampliner v. Motion Picture Patents Co.*, N.Y., 255 F. 242, 168 C.C.A. 202, affirming, D.C., 243 F. 277, and rehearing denied 259 F. 152, 170 C.C.A. 220, 7 A.L.R. 234, reversed on other grounds 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240.

Mass.—*Sherwin Williams Co. v. J. Mannos & Sons*, 191 N.E. 438, 287 Mass. 304.—*Smith v. Weeks*, 147 N.E. 676, 252 Mass. 244.

11 C.J. p 246 note 35.
Statutory adoption of rule see supra § 10.

92. Ark.—*Johnson v. Missouri Pac. R. Co.*, 214 S.W. 17, 21, 139 Ark. 507, citing *Corpus Juris*.

Ky.—*Roberts v. Allen*, 50 S.W.2d 965, 244 Ky. 353.

Mass.—*Smith v. Weeks*, 147 N.E. 676, 252 Mass. 244.

Or.—*Craig v. Maher*, 74 P.2d 396, 11 C.J. p 246 note 36, p 247 note 37.

93. U.S.—*Sampliner v. Motion Picture Patents Co.*, N.Y., 255 F. 242, 248, 168 C.C.A. 202, quoting *Corpus Juris*.

Ala.—*W. T. Rawleigh Co. v. Timmerman*, 87 So. 372, 205 Ala. 233.

S.D.—*Hudson v. Sheafe*, 171 N.W. 320, 324, 41 S.D. 475, citing *Corpus Juris*.

11 C.J. p 247 notes 42, 43.

94. Conn.—*Rogers v. Hendrick*, 82 A. 536, 85 Conn. 260.

95. La.—*State v. Nix*, 66 So. 230, 135 La. 311.

96. Ky.—*Morgan v. Big Woods Lumber Co.*, 249 S.W. 329, 198 Ky. 88.

11 C.J. p 247 note 39.

Assignment in accordance with preceding champertous contract

An assignment of a portion of a judgment recovered to an attorney for services rendered is not rendered invalid by the fact that the assignment is made in accordance with a champertous contract entered into before judgment was rendered.—*Ross v. Chicago, etc., R. Co.*, 8 N.W. 644, 55 Iowa 691.

97. U.S.—*Smyth v. Klauder*, C.C.A. Pa., 52 F.2d 109, certiorari denied *Klauder v. Smyth*, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.

98. Ind.—*Lind v. Douglas*, 148 N.E. 497, 83 Ind.App. 380.

99. Tex.—*Lane v. Mitchell*, Civ.

App., 289 S.W. 195.—*Wichita Falls Electric Co. v. Chancellor & Bryan*, Civ.App., 229 S.W. 649, error refused.

Under statute

(1) Under some statutes, such a contract may be upheld.—*Oklahoma Coal Co. v. Hays*, 176 P. 931, 71 Okl. 248—11 C.J. p 247 note 45.

(2) A fortiori, a contract which requires only that the client shall consult and advise with his attorney before effecting any compromise will not be held invalid.—*Spaulding v. Beidleman*, 160 P. 1120, 60 Okl. 183.

1. U.S.—*Purvis v. U. S.*, C.C.A. Ark., 61 F.2d 992.—*Jones v. Pettingill*, Porto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied *Pettingill v. Jones*, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536.

Ill.—*Filipiak v. Zintak*, 264 Ill.App. 392.—*Barnes v. Barnes*, 225 Ill.App. 68.—*Limbach v. Vihon*, 210 Ill.App. 73.

Ky.—*Proctor v. Louisville & N. R. Co.*, 233 S.W. 736, 192 Ky. 330.

Mich.—*Nichols v. Waters*, 167 N.W. 1, 201 Mich. 27.

Ohio.—*Hawke v. Baltimore & O. S. W. R. Co.*, 9 Ohio App. 195.

11 C.J. p 247 notes 44, 45 [b].

ed in the C.J.S. title Attorney and Client § 186 b (2), such a contractual provision is generally regarded as against public policy. Whether the entire contract is rendered void is a matter as to which there is a conflict of authority; in some jurisdictions such a stipulation invalidates the whole contract, being regarded as inseparable and as the inducement on which the contract was entered into,² while in other jurisdictions it is held that such a stipulation may be disregarded without vitiating the entire contract,³ but even in the latter jurisdictions the entire contract is invalid where it contains several other objectionable features, the bare contract of employment and the fixing of the fee are inextricably involved with, and dependent on, the objectionable features, and to expurgate from the contract all of the objectionable features would so far change its tenor and effect that it cannot be assumed that it would have been entered into at all by the parties in such form.⁴ A valid contract to give an attorney a certain per cent of any amount recovered is not rendered invalid by another contract between the parties binding the client not to settle without the attorney's consent.⁵

§ 16. — Contracts with Political Body

According to the features thereof, a contract between an attorney and a political body may or may not be champertous.

The contract of an attorney with a state or other political body for a fee contingent on the amount recovered is not champertous⁶ where there is no agreement by the attorney to pay any part of the court costs;⁷ but it is otherwise where the attorney assumes the burden of carrying on the litigation and paying the costs and expenses thereof at his own peril; and the court will not hesitate to declare the contract illegal and void where, during the

pendency of the litigation, the attorney resigned the office of state's attorney and abandoned the prosecution of the claim in that capacity, for which he could not be paid anything except his regular salary, in order to accept an appointment as private attorney and receive a reward and compensation that otherwise he would not have received as state's attorney in the performance of his official duty.⁸ There is no champerty or maintenance where there is no contract of employment, the attorney acting as an officer of the state under appointment as a special attorney general, and where there is no recovery to be shared, an injunction only being sought in the suit.⁹

§ 17. Contracts with Attorneys for Contingent Fees

Apart from statute, a contract between attorney and client which merely provides for a contingent fee and does not embrace any additional obnoxious feature is generally not considered as champertous.

Effect will, of course, be accorded applicable statutory provisions under which agreements between clients and attorneys whereby the latter are to conduct the litigation and to receive as their compensation a certain percentage of the thing recovered in case of success, and nothing in case they were unsuccessful, are either champertous¹⁰ or lawful,¹¹ as the case may be. As appears in the C.J.S. title Attorney and Client § 186 b (1), agreements between attorney and client for contingent fees, when fair and reasonable as to the client and when not procured by fraud or imposition, are generally deemed valid as against objections other than those of champerty; and, in the absence of an applicable statute condemning them and without some additional feature, they are generally considered as not champertous per se;¹² but there are decisions to

Penalty for dismissal without consent

A provision of a contract requiring the client to pay the attorney a stipulated minimum sum as a penalty for dismissing the action without the attorney's consent, when the client receives nothing for such dismissal, is void.—Hall v. Orloff, 194 P. 296, 49 Cal.App. 745.

2. Ohio.—Davy v. Aetna L. Ins. Co., 85 N.E. 1123, 78 Ohio St. 441—Davy v. New York Fidelity, etc., Ins. Co., 85 N.E. 504, 78 Ohio St. 256, 125 Am.S.R. 694, 17 L.R.A., N.S., 443.

3. Ark.—Buckeye Cotton Oil Co. v. Winn, 229 S.W. 734, 148 Ark. 654—Sizer v. Midland Valley R. Co., 217 S.W. 6, 141 Ark. 369, explaining and distinguishing Davis v. Web-

ber, 49 S.W. 822, 66 Ark. 190, 74 Am.S.R. 81, 45 L.R.A. 196.

11 C.J. p 248 note 47.

4. Ky.—Proctor v. Louisville & N. R. Co., 233 S.W. 736, 192 Ky. 330.

5. Iowa.—Barthell v. Chicago, etc., R. Co., 116 N.W. 813, 138 Iowa 638.

6. Ill.—Peo. v. Parker, 83 N.E. 282, 231 Ill. 478, affirming 126 Ill.App. 538.

Pa.—Williams v. Philadelphia, 57 A. 578, 208 Pa. 232.

11 C.J. p 248 note 49.

7. Ky.—Commonwealth, for Use and Benefit of Clay County v. Sizemore, 108 S.W.2d 733, 269 Ky. 722.

8. N.D.—Stark County v. Mischel, 173 N.W. 817, 42 N.D. 332, 6 A. L.R. 174.

9. Ga.—Clark v. Harrison, 184 S.E. 620, 186 Ga. 56.

10. Ky.—Rogers v. Samples, 268 S.W. 799, 207 Ky. 150—Wilhoit's Adm'x v. Richardson, 236 S.W. 1025, 193 Ky. 559.

Me.—Hinckley v. Giberson, 151 A. 542, 129 Me. 308.

11 C.J. p 245 note 30.

11. N.Y.—In re Fitzsimons, 66 N.E. 554, 174 N.Y. 15, reversing 79 N.Y.S. 194, 77 App.Div. 345, 12 N.Y. Ann.Cas. 250.

11 C.J. p 245 note 31.

12. U.S.—Chicago Bank of Commerce v. McPherson, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F. Supp. 110, certiorari denied 53 S. Ct. 596, 289 U.S. 736, 77 L.Ed. 1484—Smyth v. Klauder, C.C.A.Pa., 52 F.2d 109, certiorari denied Klauder

the contrary.¹³ As hereinafter noted in § 18, a contingent fee contract, which is not champertous in and of itself, may become champertous, at least in a majority of jurisdictions, by the insertion therein of an undertaking by the attorney to pay, or save the client harmless from, costs and expenses.

Claims against government. Contracts between attorneys and their clients to prosecute, before the proper authorities—auditors, boards, committees, commissioners, departments, and the like—claims against the government, or, before boards of arbitration, claims against other countries, and to receive therefor fees conditioned on success or agreed percentages on the amount recovered are not con-

tracts to conduct litigation in the courts in the ordinary sense and are not champertous.¹⁴

§ 18. — Where Attorney Defrays Costs

In most jurisdictions a contract for a contingent fee is considered champertous where it embodies an agreement that the attorney shall pay, or protect the client from payment of, the costs and expenses of the litigation.

Except in some jurisdictions,¹⁵ a contract between attorney and client by which the former agrees, in consideration of having a part of the money or thing recovered, to support at his own expense the litigation of the latter, or to indemnify the latter against costs and charges, is regarded as champertous,¹⁶ except where the attorney has an interest in the subject matter of the suit.¹⁷

v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.

Cal.—Gomez v. Superior Court in and for Los Angeles County, 24 P. 2d 856, 134 Cal.App. 19.

Minn.—Parker v. Fryberger, 214 N.W. 276, 171 Minn. 384.

Vt.—D'Amato v. Donatoni, 168 A. 564, 105 Vt. 496, quoting *Corpus Juris*.

Contract for fee equal to specified percentage of the amount recovered or the value of the thing recovered is not champertous, as presumably the fee is to be paid out of a fund independent of, and distinct from, the thing in litigation or the funds sought to be recovered.—Ratliff v. Sinberg, 79 S.W.2d 717, 253 Ky. 203—Wilhoit's 'Adm'x v. Richardson, 236 S.W. 1025, 193 Ky. 559.

Varying fee

Attorney's contract for compensation on contingent fee basis varying with whether case is settled, tried in district court, or appealed, is not champertous.—Clancy v. Kelly, 166 N.W. 583, 182 Iowa 1207.

13. Mass.—Sherwin Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 287 Mass. 304—Holdsworth v. Healey, 144 N.E. 386, 249 Mass. 436.

In action for divorce

Ala.—Farrell v. Betts & Betts, 81 So. 188, 16 Ala.App. 668.

Recognized exceptions

"Of course, if the attorney has a personal interest in the thing sought to be recovered . . . or if the action does not involve a suit or antagonistic proceeding. . . . or is of a commercial nature . . . the fact that payment is contingent on success and is to be a share of the proceeds will not render the agreement champertous."—Sherwin Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 442, 287 Mass. 304.

Fee not wholly contingent

An agreement to pay an attorney a retainer in a specific amount and one third of the sum received in settlement is not champertous where there is no agreement or understanding that the attorney shall prosecute the claim at his own expense or that he shall look alone for the payment of his fees to the amount recovered and that his services shall not constitute a debt against the client.—Walsh v. White, 175 N.E. 499, 275 Mass. 247.

14. D.C.—Wardman v. Leopold, 85 F.2d 277, 66 App.D.C. 111, 106 A.L.R. 1487, certiorari denied 57 S.Ct. 33, 299 U.S. 570, 81 L.Ed. 420. 11 C.J. p 244 note 21.

15. U.S.—Smyth v. Klauder, C.C.A. Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.

Ark.—Johnson v. Missouri Pac. R. Co., 214 S.W. 17, 21, 139 Ark. 507, quoting *Corpus Juris*.

N.J.—Lloyd W. Casner, Inc., v. Hartshorne, 177 A. 890, 13 N.J. Misc. 295.

11 C.J. p 243 note 14.

16. U.S.—Watkins v. Sedberry, Tenn., 43 S.Ct. 411, 261 U.S. 571, 67 L.Ed. 802, reversing decree, C.C.A., Stokes v. Sedberry, 275 F. 894, in which certiorari is granted 42 S.Ct. 187, 257 U.S. 633, 66 L.Ed. 407—U. S. v. Call, C.C.A.Fla., 287 F. 520—Sun Life Assur. Co. of Canada v. Casanova, Porto Rico, 260 F. 449, 171 C.C.A. 275—Jones v. Pettingill, Porto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied Pettingill v. Jones, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536.

D.C.—Merlaud v. National Metropolitan Bank of Washington, D.C., 84 F.2d 238, 65 App.D.C. 385, certiorari denied Merlaud v. National Metropolitan Bank, 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430.

Ga.—Sapp v. Davids, 168 S.E. 62, 176 Ga. 265, 85 A.L.R. 1361.

Kan.—Judy v. Atchison, T. & S. F. Ry. Co., 205 P. 1116, 111 Kan. 46.

Mass.—Sherwin Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 287 Mass. 304—Holdsworth v. Healey, 144 N.E. 386, 249 Mass. 436.

Mo.—Mytton v. Missouri Pac. R. Co., App., 211 S.W. 111.

N.Y.—In re Tunncliffe, 195 N.Y.S. 449, 202 App.Div. 69—In re Lattourelle's Estate, 257 N.Y.S. 266, 143 Misc. 351.

N.D.—Stark County v. Mischel, 173 N.W. 817, 42 N.D. 332, 6 A.L.R. 174.

11 C.J. p 241 notes 8, 9.

A retainer agreement giving an attorney thirty-three and one-third per cent of any recovery, if including disbursements in such percentage, is champertous. Penal L. § 274.—In re Lessig's Estate, 1 N.Y.S.2d 566, 165 Misc. 706.

Contract for prosecution of claim against government

Ind.—Coquillard v. Bearss, 21 Ind. 479, 83 Am.D. 362.

Statutes not changing rule

An attorney is not given the right to contract to pay costs by statutes which permit him to make a contract for a contingent fee, or which provide that the compensation shall be "governed by agreement, express or implied, which is not restrained by law."—Taylor v. Perkins, 157 S.W. 122, 171 Mo.App. 246.

17. Mass.—Reed v. Chase, 130 N.E. 257, 238 Mass. 83.

Interest in judgment appealed from

Where a judgment has been recovered, of which the attorney and the client under their agreement each owns one half, an agreement by the attorney to pay the costs of appeal in event of reversal, in consideration of the interest on the judgment and statutory damages, is not against public policy.—Grace v. Floyd, 61 So. 694, 104 Miss. 613.

An agreement for the payment of costs out of the amount of the contingent fee otherwise payable is not champertous where it is construed to be nothing more than the fixing of the fee at a sum equal to a specified part of the amount recovered, less costs.¹⁸

§ 19. — Where Client Defrays Costs

An ordinary contingent fee contract, not containing any undertaking by the attorney to pay costs and expenses or to indemnify the client against payment, is generally considered not to be champertous.

Where the attorney does not undertake to support the litigation at his own expense, or to indemnify the client against costs and charges, but merely agrees to render the ordinary services of an attorney, in consideration of receiving a percentage of the money or a part of the thing recovered, the agreement is considered, in the majority of jurisdictions, as not being champertous.¹⁹ There are decisions, however, to the effect that such an arrangement is champertous.²⁰

§ 20. — Where Costs Are Advanced as a Loan

It is not champerty for an attorney to loan his client money for payment of costs.

It is neither against public policy nor champertous for an attorney to loan his client money with which to pay costs of suit, nor to advance money necessary to carry on the suit as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repay-

ment, and there is no contract of indemnity against the client's liability to pay costs.²¹ Indeed, the claim of an attorney for such advances is one favored by the law and protected as far as practicable by a lien implied by the law itself in his favor.²²

§ 21. — Where Fee Is Lien on Judgment

An agreement of the client to pay the attorney a certain fee to be retained by the attorney out of the money collected is not champertous.

Under statutes prohibiting attorneys from contracting for contingent fees it has been held that a contract by an attorney to conduct a suit, the client agreeing to pay him a certain amount to be retained by the attorney out of the money when collected, is not champertous.²³

§ 22. Contracts between Laymen in General

In most jurisdictions it is champerty for a person who is without interest in a suit, and is not a party or an attorney or relative of a party, to intrude and speculate in the litigation by agreeing to defray the expenses, or to give aid and support in the preparation and prosecution, of the suit in consideration of a share of the recovery or the proceeds thereof.

By the common law, and in most of the states which have adopted the common law or enacted statutes on the subject, an agreement by a third person, other than an attorney or relative of a party, to defray the expenses of a suit in which he has no interest, or to give substantial support in aid thereof, in consideration of a share of the recovery or the proceeds thereof, is champertous, it being an intrusion in litigation for the mere purpose of speculation;²⁴

18. Ky.—Wood-Heck v. Roll, 208 S. W. 768, 183 Ky. 128.

19. Minn.—Parker v. Fryberger, 214 N.W. 276, 171 Minn. 384—Hoy v. Nichols, 212 N.W. 530, 170 Minn. 191.

Ohio.—Healy v. Robinson, 11 Ohio N.P., N.S., 329.

Tex.—Broadway v. Miller, Civ.App., 288 S.W. 627.

Vt.—D'Amato v. Donatoni, 168 A. 564, 105 Vt. 496.
11 C.J. p 243 note 17.

Clemency of law

This principle, it has been said, "is in line with the clemency of the law that exempts the poor litigant from giving security for costs."—Stevens v. Sheriff, 90 P. 799, 76 Kan. 124, 126, 11 L.R.A., N.S. 1153.

20. Ala.—Brindley v. Brindley, 25 So. 751, 121 Ala. 429.
11 C.J. p 243 note 15, p 244 note 19.

21. Ill.—Moore v. New York, C. & St. L. R. Co., 245 Ill.App. 8.
Iowa.—Clancy v. Kelly, 166 N.W. 583, 182 Iowa 1207.
11 C.J. p 245 note 32.

22. N.H.—Christie v. Sawyer, 44 N. H. 298.

23. N.H.—Christie v. Sawyer, supra. 11 C.J. p 246 note 34.

24. D.C.—Merlaud v. National Metropolitan Bank of Washington, D. C., 84 F.2d 238, 65 App.D.C. 385, certiorari denied Merlaud v. National Metropolitan Bank, 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430.

Ky.—Woods v. White, 69 S.W.2d 349, 253 Ky. 263—Whisman v. Wells, 266 S.W. 897, 206 Ky. 59—Wilhoit's Adm'x v. Richardson, 236 S.W. 1025, 193 Ky. 559.

Mass.—Weinberg v. Magid, 189 N.E. 110, 285 Mass. 237—Reed v. Chase, 130 N.E. 257, 238 Mass. 83.

Mich.—Young v. Young, 162 N.W. 993, 196 Mich. 316.

Minn.—Hackett v. Hammel, 241 N. W. 68, 185 Minn. 387, citing *Corpus Juris*.

Mo.—Curry v. Dahlberg, 110 S.W.2d 742, 749, citing *Corpus Juris*.

Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267—Cummings Oil & Gas Co. v. Barnsdell's Estate, 41 Pa.Co. 120—In re McIl-

wain's Estate, 27 Pa.Dist. & Co. 619.

11 C.J. p 248 note 50, p 249 note 52, p 251 note 65.

Layman to obtain refunds from railroad

Contract to solicit shippers to employ layman to obtain refunds from railroads by which layman was to transact legal business and conduct litigation in their behalf in both federal and state courts held void as a contract to engage and assist in champerty.—Curry v. Dahlberg, Mo., 110 S.W.2d 742, rehearing denied 112 S.W.2d 345 citing *Corpus Juris*.

Lease of land recovered

A lease for a sum of money, which was inconsiderable or nominal as compared with the value of the interest acquired under the lease, the real consideration being that the lessee, by bringing suit for injunction, would litigate the title with persons in possession of the land and pay all costs and expenses, and in event of success have the right to turpentine the timber while lessor should have the land, was cham-

but in some jurisdictions such contracts have been sustained.²⁵ The majority rule does not, of course, apply where the facts do not bring the case within it.²⁶

§ 23. — Agreement to Furnish Evidence

An agreement by a person without prior interest in a claim or controversy becomes champertous or contrary to public policy when, instead of being confined to the furnishing of information already possessed by such person or to mere accounting work or an unrestricted search for bona fide witnesses and legitimate evidence, it contemplates litigation and, for a share of the recovery, calls for the procurement of evidence essential to success.

Whether or not an agreement to furnish evidence or information is champertous or against public policy turns largely on the facts and circumstances of the particular case; and it is said that no one rule or statement is determinative of the question.²⁷

A contract may be champertous or contrary to public policy where it contemplates litigation and the promotion or influencing thereof, as where, for a share of the recovery or for compensation contingent on the successful outcome of the suit, a person agrees to collect, procure, and furnish evidence of a particular character or such evidence as is necessary to win the case; such a contract is objectionable in that it holds out an inducement or temptation to commit fraud or perjury or to pro-

cure others to do so.²⁸

On the other hand, although compensation is contingent on the amount eventually collected or recovered, an agreement is not champertous or against public policy where its object and tendency is not to promote successful litigation, but merely to place a person in possession of the true facts concerning his affairs and accounts,²⁹ as where the informant merely agrees to turn over information already possessed by him, as distinguished from gathering information thereafter that will produce litigation,³⁵ or where he is to search for bona fide witnesses and legitimate evidence, not restricted to a particular kind to accomplish a certain result,³¹ or he is to find property of a judgment debtor on which execution may be levied,³² or he is merely to perform work of an accounting nature and litigation is not contemplated.³³ The foregoing is especially true where the person supplying information does not obligate himself to give any testimony³⁴ and it does not appear that he will be a necessary witness or, if he does testify, that his testimony will be of sufficient weight and materiality to characterize the contract as one intended to influence litigation.³⁵ Moreover, a mere agreement or understanding that a person already interested in a controversy may qualify or be called as a witness does not invalidate a contract.³⁶

perious.—*Gowen v. New Orleans Naval Stores Co.*, 120 S.E. 776, 157 Ga. 107.

25. Or.—*Brown v. Bigne*, 28 P. 11, 21 Or. 260, 28 Am.S.R. 752, 14 L.R. A. 745.

11 C.J. p 249 note 51.

Under statute

Miss.—*Calhoun County v. Cooner*, 118 So. 706, 152 Miss. 100.

26. Unobjectionable transactions

(1) A transaction between a third person and heirs and devisees was held not champertous where all that appeared was that, after the will was sustained, the third person purchased the interests of the devisees and heirs for a cash consideration and agreed to pay the fee of contestees' attorneys, which had been adjudged a lien on the land, and there was no showing that the conveyances were made in consideration of services to be rendered by him in aiding in the prosecution or defense of the will contest or that it was agreed that any part of the property involved was to be taken or received by him for such services.—*Columbus Mining Co. v. Combs*, 26 S.W.2d 26, 233 Ky. 476.

(2) In an action for breach of a contract to purchase a motortruck, the trial court properly refused to dismiss an answer and counterclaim

for money paid plaintiff, although another truck company, when selling defendant a truck, "agreed to assume the responsibility should any trouble arise from the cancellation of" plaintiffs' truck order where there was no showing that the other truck company did anything to stir up strife and quarrels between plaintiff and defendant or to assist and maliciously advise or assist defendant to prosecute his defenses or counterclaim.—*Rathmann v. Schwanz*, 175 N.W. 812, 170 Wis. 459.

(3) A contract between dairy and milk truck drivers' union, providing that dairy, and not union, should pay costs of order restraining driver from "stripping his route" in violation of his agreements with dairy and union, did not violate maintenance statute.—*Western-United Dairy Co. v. Nash*, 12 N.E.2d 47, 293 Ill.App. 162.

27. Kan.—*Stewart v. Fourth Nat. Bank*, 39 P.2d 918, 141 Kan. 175.

28. Wis.—*Miller v. Anderson*, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529.

11 C.J. p 249 note 53.

Contract obligating one party to bring lawsuit is void where the other party to the contract has no interest in the suit or the property involved except a fee for procuring

evidence contingent on the result of the suit.—*Gross v. Campbell*, 160 N.E. 852, 118 Ohio St. 285, affirming judgment 160 N.E. 511, 26 Ohio App. 460.

Where a physician is to testify, his contract for a percentage of the recovery is champertous or against public policy.

Mass.—*Weinberg v. Magid*, 189 N.E. 110, 285 Mass. 237.

Wis.—*Miller v. Anderson*, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529.

29. Wis.—*Miller v. Anderson*, supra.

30. Kan.—*Stewart v. Fourth Nat. Bank*, 39 P.2d 918, 141 Kan. 175.

Mass.—*Kaplan v. Suher*, 150 N.E. 9, 254 Mass. 180, 42 A.L.R. 1142.

11 C.J. p 249 note 55.

31. Ohio.—*Gross v. Campbell*, 160 N.E. 852, 118 Ohio St. 285.

32. Mich.—*Hickey v. Baird*, 9 Mich. 32.

33. Wis.—*Miller v. Anderson*, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529.

34. Mass.—*Kaplan v. Suher*, 150 N.E. 9, 254 Mass. 180, 42 A.L.R. 1142.

35. Wis.—*Miller v. Anderson*, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529.

36. N.Y.—*Small v. Mott*, 22 Wend. 403.

§ 24. — Benevolent Aid

Assistance of a poor person in litigation without speculation in the outcome is not champerty or maintenance.

It is not maintenance for a person to furnish assistance, in money or otherwise, to a poor man to enable him to carry on his suit.³⁷ However, such a transaction must be entered into with the view of subserving the ends of justice alone, and if it is turned to the purpose of speculation by a stipulation for a share of the verdict or judgment it will amount to champerty.³⁸

§ 25. — Employment of Nonprofessional Agents

An agent may be employed in good faith without violation of the rules against champerty and maintenance.

There may be no champerty or maintenance where there is no officious intermeddling in a lawsuit or purpose of stirring up strife or litigation, but merely an employment in good faith of an agent, trustee, or other representative to attend to, or to aid and assist, or act for, the principal in, the investigation, collection, compromise, settlement, or enforcement of a claim, even though the agent is to

pay, or indemnify against, costs and expenses or is to share in the amount collected or recovered.³⁹

§ 26. — Effect of Interest

Champerty or maintenance cannot properly be charged against a person who has, or reasonably supposes that he has, an interest in the subject matter of a suit of another and such interest existed prior to, and was acquired otherwise than through, an agreement for the promotion of the suit.

Where a person promoting the suit of another has any interest whatever, legal or equitable, in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor according to the nature and extent of his interest. It is accordingly a principle that any interest whatever in the subject matter of the suit is sufficient to exempt a party giving aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to the party who has such an interest to participate in the suit of another.⁴⁰ Indeed, one may lawfully agree to promote a suit where he has reasonable grounds to believe himself interested, although in fact he is not interested.⁴¹ While the interest which will exempt a person from champ-

Vt.—Dorwin v. Smith, 35 Vt. 69.
11 C.J. p 249 note 57.

37. Utah.—In re Evans, 62 P. 913,
22 Utah 366, 83 Am.S.R. 794, 53 L.
R.A. 952.

11 C.J. p 249 note 53.

The law extends its charity to the charitable and compassionate and will not pronounce it maintenance for one to aid his poor friend and thus to assist in protecting him from what he deems an oppression or a wrong.—Gilman v. Jones, 5 So. 785, 7 So. 48, 87 Ala. 691, 4 L.R.A. 113—11 C.J. p 250 note 59.

38. Minn.—Johnson v. Great Northern R. Co., 151 N.W. 125, 128 Minn. 365.

11 C.J. p 250 note 61.

39. Mo.—Behnke v. Rathsam, App., 209 S.W. 976.

Wash.—Clifford v. Wilcox, 27 P.2d 722, 175 Wash. 513.

11 C.J. p 250 note 62.

Contracts between laymen generally see supra § 22.

Quasi-corporate trust arrangement

A trust arrangement, quasi-corporate in form, does not violate a champerty statute where, although the trustee is to be paid in shares of the capitalized property involved, he is, to earn his compensation, to perform a variety of services, of which the prosecution of a suit, if one is brought, may be but a small part, and he is to pay nothing on

account of any expense involved except in the remote way of depreciation of his interest by the raising of expense money on the security of the whole property.—W. C. Belcher Land Mortg. Co. v. Hazard Coal Corporation, C.C.A.Ky., 15 F.2d 481.

40. Conn.—City of Bridgeport v. Equitable Title & Mortgage Co., 138 A. 452, 106 Conn. 542.

Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331—Eshleman v. Keenan, Ch., 181 A. 655.

Mass.—Reed v. Chase, 130 N.E. 257, 238 Mass. 33.

Okl.—Worrell v. Roxana Petroleum Corporation, 291 P. 47, 144 Okl. 297.

11 C.J. p 251 notes 63, 66 [a].

Particular persons or corporations held to have sufficient interest

(1) Assignor who has retained a contingent interest.—Finlen v. Heinze, 73 P. 123, 28 Mont. 548.

(2) Guarantor. — Bartholomew County v. Jameson, 36 Ind. 154.

(3) Holder of an equitable or reversionary interest.—Gowen v. Nowell, 1 Me. 292.

(4) Landlord.
Ind.—Quigley v. Thompson, 53 Ind. 317.

Nev.—Gruber v. Baker, 23 P. 858, 20 Nev. 453, 9 L.R.A. 302.

(5) Liability or casualty insurance company.—Employers' Liability Assur. Corp. of London, England, v.

Kelly-Atkinson Const. Co., 195 Ill. App. 620—11 C.J. p 233 note 61, p 252 note 71.

(6) Licensee under a patent.—Davis v. A. H. Reid Creamery & Dairy Supply Co., C.C.Pa., 137 F. 157, affirmed 195 F. 80, 115 C.C.A. 112.

(7) Mortgagee.
Ind.—Quigley v. Thompson, supra.
Iowa.—Cooley v. Osborne, 50 Iowa 526.

(8) Surety.—Cooley v. Osborne, supra.

(9) Vendor who has retained a lien.—Hall v. Deaton, 68 S.W. 672, 24 Ky.L. 314.

(10) Vendor with warranty.—Williamson v. Sammons, 34 Ala. 691—11 C.J. p 252 note 77.

(11) It is recognized that a sufficient interest may arise from the relation of master and servant.—Quigley v. Thompson, 53 Ind. 317.

(12) The original owners of property assessed for taxes in their names, have a real, although indirect, interest in the outcome of a suit to foreclose tax liens and their participation in the suit does not violate any recognized principle of public policy.—City of Bridgeport v. Equitable Title & Mortgage Co., 138 A. 452, 106 Conn. 542.

41. Mass.—Reed v. Chase, 130 N.E. 257, 238 Mass. 33.

ty or maintenance must have existed or been acquired in some way other than through the contract for the promotion of the suit,⁴² a person having such a preëxisting interest in the subject matter of the suit may, without being guilty of maintenance, buy the interest of plaintiff or defendant pendente lite and thereafter prosecute or defend the suit himself⁴³ or, without violating the law, he may take an assignment of a chose in action to strengthen his own interest.⁴⁴

Creditors, stockholders, bondholders, or other persons having a common interest in the subject matter of a suit may properly unite their interests and take concerted action either by prosecuting or defending together or by agreeing that one or a committee shall sue or defend for the benefit of all.⁴⁵

Party of record. While a statute directed against a contract by a person not a party of record to a suit to render services or assistance in the suit for a share of the recovery, does not apply, generally speaking, to a contract by a party of record, it does apply to a contract made by a person in his individual capacity where he is a party of record only in a representative capacity.⁴⁶

§ 27. — Effect of Relationship

Provided he does not do so for the purpose of speculation, a kinsman of a suitor may render aid in the prosecution or defense of a suit without being guilty of champerty or maintenance.

A person who is related by ties of consanguinity or affinity to either of the parties to a suit may

rightfully assist in the prosecution or defense of such suit either by furnishing counsel or by contributing to the expense thereof;⁴⁷ but the reason for the rule ceases and the rule is not applicable where a kinsman meddles in or maintains the suit for the purpose of personal speculation or profit.⁴⁸ Otherwise stated, relationship by blood or marriage may justify maintenance,⁴⁹ but not champerty.⁵⁰

§ 28. Contracts to Procure Claims for Collection

A contract between an attorney and a layman whereby, in consideration of a share of the attorney's fee or something else of value, the layman undertakes, to procure the employment of the attorney by a third person to collect a claim or prosecute a suit is champertous or contrary to public policy.

Both under statute and otherwise, a contract between an attorney and a layman whereby, for a share of the attorney's fee or some other valuable consideration, the layman is to procure the employment of the attorney by a third person to collect a claim or prosecute a suit is champertous or against public policy.⁵¹ The fact that such person's compensation is made contingent on his success is generally held to be an additional reason for holding the contract illegal, as it places the agent under an inducement to use corrupt means, if necessary, to accomplish the desired result.⁵² In some instances, however, the court may not find it necessary to condemn the contract or arrangement in question, as where the champerty, if any, is in another contract between the attorney and client,⁵³ the contract in question is not the one between the attorney and

Okl.—Worrell v. Roxana Petroleum Corporation, 291 P. 47, 144 Okl. 297. 11 C.J. p 253 note 80.

42. Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267. 11 C.J. p 251 note 64.

43. Ala.—Thompson v. Marshall, 36 Ala. 504, 76 Am.D. 328. 11 C.J. p 237 note 48.

44. Ky.—Blackerby v. Holton, 5 Dana 520.

45. U.S.—Royal Oak Drain Dist., Oakland County, v. Keefe, C.C.A. Mich., 87 F.2d 786. 11 C.J. p 251 note 67.

"Copyright Protection Bureau," organized by moving picture producers for mutual prevention of infringements, which brings suits for infringement on behalf of producers whose copyright has been infringed, the producers underwriting the proceeds of a suit being paid into the general fund of the bureau to the credit of the producer affected, does not operate barratrously, so as to preclude recovery in an infringement

action, despite the fact that the producers agreed not to interfere in an action for infringement once it had been commenced by the bureau.—Vitaphone Corporation v. Hutchinson Amusement Co., D.C.Mass., 19 F.Supp. 359, remanded with instructions Hutchinson Amusement Co. v. Vitaphone Corporation, 93 F.2d 176.

46. Ky.—Wilhoit's Adm'x v. Richardson, 236 S.W. 1025, 193 Ky. 559.

47. Wis.—Wallach v. Rabinowitz, 200 N.W. 646, 135 Wis. 115. 11 C.J. p 253 note 83.

48. Wis.—Wallach v. Rabinowitz, supra. 11 C.J. p 253 note 84.

The motive must be a desire to benefit the relative, as distinguished from a motive of self-interest.—Barker v. Barker, 14 Wis. 131.

49. N.C.—Wright v. Cain, 93 N.C. 296. 11 C.J. p 265 note 11.

50. Ky.—Howard v. Howard, 29 S. W. 285, 96 Ky. 445. 11 C.J. p 265 note 12.

51. Ky.—Chreste v. Louisville Ry. Co., 191 S.W. 265, 173 Ky. 486.

Mo.—State ex rel. McKittrick v. C. S. Dudley & Co., 102 S.W.2d 895.

N.J.—Ready v. National State Bank of Newark, 190 A. 76, 117 N.J.Law 554, affirming 179 A. 636, 13 N.J. Misc. 517.

N.Y.—Mendelson v. Gogolick, 276 N. Y.S. 158, 243 App.Div. 115, citing Corpus Juris.

Okl.—Brown v. Durham, 53 P.2d 551, 175 Okl. 500.

Pa.—Waychoff v. Waychoff, 163 A. 670, 309 Pa. 300, 86 A.L.R. 190.—Morgan v. Doe, 16 Pa.Dist. & Co. 314.

6 C.J. p 738 note 69—11 C.J. p 254 note 86.

52. Pa.—Spalding v. Ewing, 24 A. 219, 149 Pa. 375, 34 Am.S.R. 608, 15 L.R.A. 727, reversing 9 Pa.Co. 471.

11 C.J. p 254 note 87.

53. Mo.—Kelerher v. Henderson, 101 S.W. 1083, 203 Mo. 498.

11 C.J. p 254 note 89.

he layman, but is one between such layman and another layman and is being attacked by the creditors of the first layman,⁵⁴ the attorney was employed in a case involving customs duties by a customs house broker who was himself authorized to practice and appear before the customs court and was an attorney in fact, authorized to retain counsel for the client,⁵⁵ or where, without any arrangement for a division of fees, an investigator employed by the attorney on a per diem basis procured a formal contract of employment of the attorney by a client who had been previously persuaded or influenced by other clients to employ the attorney.⁵⁶

The solicitation of employment for an attorney is created infra § 35; and the enforceability of contracts which are champertous, or are alleged to be champertous, is discussed infra § 37.

§ 29. Aiding in Criminal Prosecutions

It is not maintenance for a citizen to contribute to the payment of the lawful expenses of a criminal prosecution.

4. Minn.—*Schlecht v. Schlecht*, 209 N.W. 883, 168 Minn. 168.

5. U.S.—*Brooks v. Mandel-Witte Co.*, C.C.A.N.Y., 54 F.2d 992, certiorari denied *Mandel-Witte Co. v. Brooks*, 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

6. Ill.—*Moore v. New York, C. & St. L. R. Co.*, 245 Ill.App. 8.

7. Ill.—*Brush v. Carbondale*, 82 N.E. 252, 229 Ill. 144, 10 Ann.Cas. 121.

11 C.J. p 268 note 61.

38. Conn.—*Palmer v. Uhl*, 151 A. 355, 112 Conn. 125.

Ky.—*Rader v. Howell*, 54 S.W.2d 914, 246 Ky. 261—*Lykins v. Keeton*, 28 S.W.2d 472, 234 Ky. 421—*Irvin v. Mumford*, 13 S.W.2d 520, 227 Ky. 525—*Stephens v. Justice*, 10 S.W.2d 465, 226 Ky. 45—*Curry v. Cox*, 271 S.W. 700, 208 Ky. 653—*Riggsby v. Montgomery*, 271 S.W. 564, 208 Ky. 524—*Tennis Coal Co. v. Henseley*, 250 S.W. 509, 198 Ky. 616—*Gilbert v. Carter*, 225 S.W. 143, 189 Ky. 476.

Tenn.—*Kitchen-Miller Co. v. Kern*, 91 S.W.2d 291, 170 Tenn. 10—*Pope v. Craft*, 1 Tenn.App. 356.

1 C.J. p 254 note 90, p 255 notes 94, 95.

Corpus Juris is cited in

Del.—*Hannigan v. Italo-Petroleum Corporation of America*, 178 A. 589, 592, 6 W.W.Harr. 442.

Kan.—*Colver v. McInturff*, 212 P. 88, 90, 112 Kan. 604.

Foundation and design of doctrine

"The common-law doctrine . . . was founded partly upon the peculiar nature of livery of seisin under the ancient common law, and partly upon

on considerations of public policy. The doctrine was designed to prevent trafficking in dormant titles, thereby causing vexatious and unwarranted litigation against those properly in adverse possession. . . . The doctrine was established, not for offense, but for the defense of lawful possessory rights." —*Farrington v. Greer*, 113 So. 722, 725, 94 Fla. 457.

Purpose of statutes is to discourage litigation, by prohibiting one who has a doubtful title and who is not willing to sue on his title from selling it to another, and thus encourage strife.—*Perry v. Wilson*, 208 S.W. 776, 183 Ky. 155.

Lack of possession, or taking of rents and profits, by grantor for one year

(1) Under some statutes the buying or selling of a pretended right or title in or to land is prohibited unless the grantor, or those under whom he claims, have been in possession, or have taken the rents and profits, for the space of one year before the conveyance.

U.S.—*Langley v. Stondall Land & Investment Co.*, C.C.A.N.D., 264 F. 474.

Okl.—*International Land Co. v. Smith*, 229 P. 601, 103 Okl. 101—*Duncan v. Kelley*, 229 P. 425, 103 Okl. 74—*Sanders v. Leforce*, 219 P. 925, 93 Okl. 123—*Foley v. Brown*, 204 P. 267, 85 Okl. 1—*Youngblood v. Ross*, 162 P. 494, 63 Okl. 41.

(2) Such statutes came into existence to allay the social unrest consequent on the activities of litigiously inclined persons who were prone to purchase dormant causes of action

Any citizen may lawfully contribute to the payment of the lawful expenses of a criminal prosecution and the act will not subject him to the charge of maintenance.⁵⁷ Whether the private employment of an attorney to aid the official attorney in a criminal prosecution is against public policy is considered in the C.J.S. title Contracts § 227, also 13 C.J. p 450 notes 57, 58.

§ 30. Conveyances of Land Held Adversely

In some, but not in other, jurisdictions it is champerty to convey lands adversely possessed by a third person.

Both at common law and under statutes which are declaratory of the common law or adopt it with some modifications, a conveyance of land which at the time of the conveyance is possessed adversely by a third person is champertous⁵⁸ and, as shown infra §§ 39, 40, is void, at least as to the person in possession. In a number of jurisdictions the rule is not in force, it either being regarded as obsolete⁵⁹ or having been abrogated by statute,⁶⁰

and engage in the disputes of other persons.—*Warner v. Wickizer*, 160 P. 885, 61 Okl. 200.

(3) These statutes are similar to an early English statute which has been regarded as not initiating any new policy or as prohibiting what was before permitted, but as merely affirming the common-law doctrine and adding a greater penalty.

Del.—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442.

N.Y.—*People v. Ladew*, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

11 C.J. p 255 note 91.

(4) The purpose of the English statute was to discourage corruption in the court or the use of influence by great persons who might oppress the poor.—*People v. Ladew*, supra.

(5) "The object of the statute, as well as of the common law, was, doubtless, to prevent the buying up of controverted legal titles, which the owner did not think it worth his while to pursue, upon mere speculation; so that in fact, it might properly be deemed the mere purchase of a law-suit."—*Baker v. Whiting*, C.C. Me., 2 F.Cas.No.787, 3 Sumn. 475.

59. N.M.—*Gurule v. Duran*, 149 P. 302, 20 N.M. 348, L.R.A.1915F 648. 11 C.J. p 256 note 96.

60. Ala.—*Grayson v. Muckleroy*, 124 So. 217, 220 Ala. 132—*Bowers v. Yancey*, 85 So. 704, 204 Ala. 423—*Reichert v. Jerome H. Sheip, Inc.*, 85 So. 267, 204 Ala. 86.

Miss.—*Hamilton v. City of Jackson*, 127 So. 302, 157 Miss. 284. 11 C.J. p 256 note 97.

but, in some of the jurisdictions wherein it has been annulled by statute, it was in force at one time either as a part of the common law⁶¹ or as a statutory rule,⁶² and in such jurisdictions it may still be resorted to in determining the validity of conveyances made prior to its abrogation. While it has been said that statutes abrogating the common-law rule as to alienations will be liberally construed by the courts,⁶³ it has also been held that a statute making a conveyance of lands adversely held by another champertous is valid, it being within the power of the state to enact and not affecting any right under the federal constitution,⁶⁴ but that such a statute is harsh,⁶⁵ drastic,⁶⁶ and penal in nature,⁶⁷ and should be given a strict, rather than a liberal or enlarged, construction.⁶⁸

§ 31. — Nature and Elements of Adverse Possession

- a. In general
- b. Actual possession
- c. Open and notorious possession
- d. Exclusive possession
- e. Hostile possession
- f. Time and duration of possession
- g. Good faith
- h. Extent of possession

a. In General

The possession of a third person which will render

a conveyance champertous is of the same nature and character and comprises the same elements, with the exception of duration for the period prescribed by the statute of limitations, as the adverse possession which results in the acquisition of title.

A rule, either common-law or statutory, making a conveyance of lands adversely possessed by a third person champertous obviously is not applicable where, at the time of the conveyance, there is no adverse possession by a third person,⁶⁹ as where, at such time, the grantor⁷⁰ or the grantee⁷¹ himself is in possession, or, as shown *infra* § 31 e, where, although a third person is in possession, his possession is not adverse or hostile.

As stated *infra* § 31 f, it is not necessary, to render a deed champertous, that the adverse possession of a third person continue for the period of time prescribed by the statute of limitations. With this exception and provided, as indicated *infra* § 31 f, the requisite possession exists at the time of the conveyance, the adverse possession which will render a conveyance champertous embraces the same elements as the adverse possession which results in the acquisition of title. In other words, it is necessary and sufficient that the possession be of such nature and character that, if continued for the statutory period, it would ripen into title.⁷² A more guarded statement sometimes made by the courts is that the adverse possession which will render a conveyance champertous must at least be such pos-

61. Ala.—Lyons v. Taylor, 166 So. 15, 231 Ala. 600—Findlay v. Hardwick, 160 So. 338, 230 Ala. 197—Grayson v. Muckleroy, 124 So. 217, 220 Ala. 182.

11 C.J. p 256 note 97 [a] (3), [c] (2), [f] (2), [g] (3), [h] (5).

62. Wis.—Chase v. Dearborn, 21 Wis. 57—Peabody v. Leach, 13 Wis. 657.

63. Ky.—Aldridge v. Kincaid, 2 Litt. 390.

64. Ky.—Begley v. Erasmie, 265 S. W. 333, 205 Ky. 240, error dismissed, Begley v. Erasmie, 47 S. Ct. 342, 273 U.S. 655, 71 L.Ed. 825.

65. Ky.—Fordson Coal Co. v. Wells, 53 S.W.2d 564, 245 Ky. 291.

66. Ky.—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 806.

67. Ky.—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139.

68. N.Y.—People v. Ladew, 143 N. E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

11 C.J. p 263 note 91 [a].

69. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 861, 215 Ala. 12, citing *Corpus Juris*.

Ky.—Harkins v. Keith, 102 S.W.2d 5, 267 Ky. 353—Perry v. Thomas, 24 S.W.2d 603, 232 Ky. 781—Pio-

neer Coal Co. v. Asher, 11 S.W.2d 116, 226 Ky. 488—Thornbury v. Virginia Iron, Coal & Coke Co., 287 S.W. 698, 216 Ky. 434—Louisville & N. R. Co. v. Letcher County Coal & Improvement Co., 243 S.W. 45, 195 Ky. 297.

70. Ky.—Forman v. Gault, 32 S.W. 2d 977, 236 Ky. 213—General Refractories Co. v. Morrison, 279 S. W. 651, 212 Ky. 411.

11 C.J. p 255 note 95 [e], p 263 note 3, p 265 note 21.

Conveyance after entry by grantor
Mass.—Knox v. Jenks, 7 Mass. 488—Oakes v. Marcy, 10 Pick. 195—Warner v. Bull, 13 Metc. 1.

Va.—Birthright v. Hall, 3 Munf. 536, 17 Va. 536.

11 C.J. p 263 note 99.

71. Ky.—Webb v. Webb, 255 S.W. 137, 200 Ky. 488.

Confirmation or perfection of title
There is no champerty where a person in possession confirms or perfects his title by purchasing the rights of other persons and taking conveyances or releases.
Mass.—Snow v. Orleans, 126 Mass. 453.

Vt.—Catlin v. Kidder, 7 Vt. 12.

Va.—Wilcox v. Calloway, 1 Wash. 38, 1 Va. 38.

11 C.J. p 267 note 53, p 268 notes 56–58.

72. Ala.—Williams v. Muckelroy, 129 So. 476, 221 Ala. 531—Grayson v. Muckleroy, 124 So. 217, 220 Ala. 182.

Conn.—Palmer v. Uhl, 151 A. 355, 112 Conn. 125—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.

Ky.—Edwards v. Clark, 88 S.W.2d 914, 261 Ky. 749—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402—Doupree v. Walker, 72 S.W.2d 732, 255 Ky. 30—Pioneer Coal Co. v. Asher, 35 S.W.2d 235, 237 Ky. 254—Lanham v. Huff, 14 S.W. 2d 402, 228 Ky. 139—Perry v. Wilson, 208 S.W. 776, 183 Ky. 155—Combs v. Adams, 207 S.W. 691, 182 Ky. 762—George T. Staggs Co. v. Frankfort Modes Glass Works, 194 S.W. 333, 175 Ky. 330.

11 C.J. p 256 note 99, p 257 note 3.

What law governs

The question whether there is such possession by a third person as renders a deed champertous must be determined by the law of adverse possession as it exists at the time of the execution of the deed.—Grayson v. Muckleroy, 124 So. 217, 220 Ala. 182.

session as is required to create title;⁷³ and it is held or stated in a few cases that a possession which is sufficient, if continued long enough, to vest title under the statutes of limitation may not, in some instances, be sufficient to avoid a deed for champerty.⁷⁴

It has been declared that, while there are certain fundamental rules to be followed, there are so many elemental facts entering into the determination of the question of whether there is such adverse possession as authorizes the application of a champerty statute that each case must be determined on its own facts.⁷⁵

b. Actual Possession

Actual possession by a third person of the land conveyed is necessary to render a deed champertous.

The possession of a third person which will avoid a deed for champerty must be actual possession;⁷⁶ a mere constructive possession,⁷⁷ or a mere claim under color of title,⁷⁸ will not suffice. To satisfy the requirement of actual possession *pedis possessio*, or actual residence on the land, is not necessary.⁷⁹ Cultivation of the land, although sufficient,⁸⁰ is not essential⁸¹ to actual possession. Likewise, while inclosure and occupation of the land are sufficient,⁸² inclosure is not necessary⁸³ where there is a claim to a well-marked or well-de-

fined boundary.⁸⁴ However, the adverse possession must be manifested by some act or fact sufficient to indicate to others that the person claiming to have possession has, in fact, possession.⁸⁵ A taking of possession and an improvement of the land is sufficient for that purpose;⁸⁶ and this may be done either in person or by a tenant, the possession of the latter being by operation of law the possession of the former.⁸⁷ Occupation by claimant, evidenced by working trees for turpentine, has been held to be within the provisions of a statute prohibiting an administrator from selling lands held adversely to the estate.⁸⁸

On the other hand, a mere entry, although it may give possession for some purposes, does not constitute actual possession such as will invalidate a conveyance of land made at any time after the entry and while there is no person or thing on the land indicating actual possession.⁸⁹ Also, such possession as is necessary to invoke a champerty statute is not shown by sporadic acts of ownership⁹⁰ or by acts of incomplete dominion.⁹¹ Particular acts held not to constitute actual possession include: The mere cutting of timber;⁹² the occasional cutting and removal of hay from unoccupied lands under a permit from one claiming title adverse to the true owner;⁹³ the survey of land and

73. Ky.—Fordson Coal Co. v. Mills, 27 S.W.2d 382, 234 Ky. 64.

74. Ky.—Travis v. Bruce, 189 S.W. 939, 172 Ky. 390.
11 C.J. p 257 note 5.

75. Ky.—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139.

76. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 853, 861, 215 Ala. 12, citing *Corpus Juris*.
Conn.—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.

Ky.—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402—Prewitt v. Bull, 27 S.W.2d 399, 234 Ky. 18
—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 306
—Pioneer Coal Co. v. Asher, 11 S.W.2d 116, 226 Ky. 488.

N.Y.—John T. Clark Realty Co. v. Harris, 2 N.Y.S.2d 137, 253 App. Div. 325.

11 C.J. p 257 note 6.

77. Ky.—Deupree v. Walker, 72 S.W.2d 732, 255 Ky. 30—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139
—Kentucky Union Co. v. Hevner, 275 S.W. 513, 210 Ky. 121.

N.Y.—Ostrander v. Bell, 192 N.Y.S. 262, 199 App.Div. 304.
11 C.J. p 257 note 7.

78. Ky.—Brown v. White, 156 S.W. 96, 153 Ky. 452.

79. Tenn. — Green v. Cumberland

Coal, etc., Co., 72 S.W. 459, 110 Tenn. 35.

11 C.J. p 257 note 9.

80. Ky.—Rader v. Howell, 54 S.W.2d 914, 246 Ky. 261.

81. Tenn. — Green v. Cumberland Coal, etc., Co., 72 S.W. 459, 110 Tenn. 35.

82. Ky.—Turner v. Turner, 35 S.W.2d 289, 237 Ky. 257.

83. Ky.—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747
—Rader v. Howell, 54 S.W.2d 914, 246 Ky. 261.
11 C.J. p 257 note 11.

84. Ky.—Le Moyne v. Neal, 164 S.W. 964, 158 Ky. 316.

Necessity

In at least one state there must be a holding, possession, and claim to a well-defined or well-marked boundary.—Deupree v. Walker, 72 S.W.2d 732, 255 Ky. 30—Pioneer Coal Co. v. Asher, 11 S.W.2d 116, 226 Ky. 488.

Nature of marking of boundaries to which the holding extends is unimportant so long as it is well defined.—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747.

Effect of marked or defined boundary on extent of possession see *infra* § 31 h.

85. Ky.—Pioneer Coal Co. v. Asher, 11 S.W.2d 116, 226 Ky. 488.
11 C.J. p 257 note 13.

86. Ky.—Lillard v. McGee, 3 J.J. Marsh 549.

Tenn.—Green v. Cumberland Coal, etc., Co., 72 S.W. 459, 110 Tenn. 35.

87. N.D.—Cotton v. Horton, 132 N.W. 225, 22 N.D. 1.
11 C.J. p 257 note 15.

88. Ga.—Guthrie v. Bullock, 84 S.E. 59, 143 Ga. 17.

89. Ky.—Cardwell v. Sprigg, 1 B. Mon. 369.

90. Ky.—Fordson Coal Co. v. Collins, 104 S.W.2d 985, 268 Ky. 331
—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747.

91. Ky.—Kash v. Lewis, 6 S.W.2d 1098, 224 Ky. 679.

92. Ky.—Bolin v. Buckhorn Coal & Lumber Co., 278 S.W. 154, 211 Ky. 847.

Cutting and removing timber at intervals

Tenn.—Gernt v. Floyd, 174 S.W. 267, 131 Tenn. 119.

11 C.J. p 258 note 17.

93. N.D.—D. S. B. Johnston Land Co. v. Mitchell, 151 N.W. 23, 29 N.D. 510—State Finance Co. v. Beck, 109 N.W. 357, 15 N.D. 374.

the filing of a map;⁹⁴ the making of temporary camps on the land;⁹⁵ the setting up of a "hot dog" stand and allowing its use;⁹⁶ the possession and occupancy of a structure projecting over land of another, but not touching it;⁹⁷ the maintenance of a structure over a passway without affecting the surface of the way or the use thereof;⁹⁸ the posting of notices against trespassers along a part of two of the boundary lines of a large tract of uninclosed and unoccupied forest land and employing watchers to keep trespassers off the tract.⁹⁹

c. Open and Notorious Possession

Possession by a third person which is so open, visible, and notorious as to raise a presumption or implication of notice of possession under a claim of title hostile to that of the true owner is necessary to render a deed champertous in the absence of actual knowledge or notice of possession under such a claim.

In the absence of actual knowledge or notice thereof, the possession of a third person which will render a deed champertous must be open, notorious, and visible¹ to such an extent that notice to the true owner,² and, according to some decisions, notice to the purchaser³ or an inquirer or intending purchaser,⁴ will be presumed or implied. The requirement is not complied with by occupancy which is not sufficient to put anyone on inquiry as to the occupant's right in the land.⁵ Mere fugitive acts of ownership exercised at intervals will not suffice.⁶ Where, however, there is such open, notorious, and visible possession that notice of occupancy under a hostile claim may be implied, actual notice to the grantor is not necessary;⁷ and, according to some decisions, actual knowledge on the part of the

grantee is not necessary;⁸ but some authorities maintain the contrary view.⁹

Filing notice. Where, by virtue of a statute in force at the time of the execution of a deed claimed to be champertous, a person in possession without color of title or bona fide claim of inheritance is denied the right to claim adverse possession unless he gives notice of such adverse possession and claim by filing in the office of the probate judge of the county in which the lands are situated a written declaration setting forth his claim and describing the real estate of which he claims to be in adverse possession, an occupant who is within the statute and has not complied with it is not in a position to invoke the doctrine of champerty in avoidance of the conveyance in question.¹⁰

d. Exclusive Possession

To render a conveyance champertous, the possession of a third person must be exclusive.

Exclusiveness is an essential element of the adverse possession of a third person which will render a conveyance champertous.¹¹

e. Hostile Possession

The possession by a third person which will render a conveyance champertous must be hostile or adverse; it must be under a claim of title or ownership; but, unless required by statute, it need not be under color of title.

To render the conveyance champertous the possession must be hostile or adverse and not permissive or amicable. A valid conveyance may be made of land in the possession of a third person, if his possession is not adverse to the grantor.¹² Claim

94. N.Y.—Archibald v. New York Cent., etc., R. Co., 52 N.E. 567, 157 N.Y. 574, affirming 37 N.Y.S. 336, 1 App.Div. 251, 37 N.Y.S. 1143, 2 App.Div. 617.

Filing of map

N.Y.—Kiowa Realty Co. v. Molenaar, 165 N.Y.S. 131, 98 Misc. 694.

95. N.Y.—Saranac Land, etc., Co. v. Roberts, 88 N.E. 753, 195 N.Y. 303, affirming 109 N.Y.S. 547, 125 App. Div. 333.

96. Ky.—Kash v. Lewis, 6 S.W.2d 1098, 224 Ky. 679.

97. Conn.—Norwalk Heating, etc., Co. v. Vernam, 55 A. 168, 75 Conn. 662, 664, 96 Am.S.R. 246.

11 C.J. p 258 note 21.

98. Conn.—Goodwin v. Bragaw, 86 A. 668, 87 Conn. 31.

99. N.Y.—Marsh v. Ne-ha-sa-ne Park Assoc., 42 N.Y.S. 996, 18 Misc. 314, reversed on other grounds 49 N.Y.S. 384, 25 App.Div. 34.

1. U.S.—Reed v. Atchison, C.C.A. Okl., 276 F. 838.

Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 853, 861, 215 Ala. 12, citing *Corpus Juris*.

Ky.—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139.

2. Ky.—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747—Travis v. Bruce, 189 S.W. 939, 172 Ky. 390.

11 C.J. p 258 note 29.

3. Ky.—Krauth v. Hahn, 65 S.W. 18, 139 Ky. 607, 23 Ky.L. 1261—Mayes v. Kenton, 64 S.W. 728, 23 Ky.L. 1052.

4. Ky.—Fordson Coal Co. v. Wells, 53 S.W.2d 564, 245 Ky. 291—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 806.

5. Ky.—Phillips v. Hopkins, 271 S.W. 1075, 208 Ky. 769.

6. Ky.—Mayes v. Kenton, 64 S.W. 728, 23 Ky.L. 1052.

7. Miss.—Cassedy v. Jackson, 45 Miss. 397, explaining and limiting Sessions v. Reynolds, 15 Miss. 130.

11 C.J. p 258 note 34.

8. Ala.—Hoyle v. Mann, 41 So. 835, 144 Ala. 516.

N.Y.—Jackson v. Demont, 9 Johns. 55, 6 Am.D. 259.

9. Miss.—Sessions v. Reynolds, 8 Miss. 139.

Tenn.—Sewell v. Draughn, Ch.App. 44 S.W. 210.

Vt.—Buckmaster v. Needham, 22 Vt. 617.

10. Ala.—Williams v. Muckelroy, 129 So. 476, 221 Ala. 531—Grayson v. Muckleroy, 124 So. 217, 220 Ala. 182.

11. U.S.—Reef v. Atchison, C.C.A. Okl., 276 F. 838.

Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 853, 861, 215 Ala. 12, citing *Corpus Juris*.

Conn.—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.

Ky.—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402—Brown v. Martin, 39 S.W.2d 243, 239 Ky. 146.

11 C.J. p 256 note 99.

12. Ala.—St. Clair Springs Hotel Co.

of title or ownership is, of course, essential to hostile possession, since in the absence thereof the possession would not be adverse;¹³ but, unless required by an applicable statute in force at the time,¹⁴ color of title in the person holding land adversely to the grantor thereof is not necessary to render the deed champertous.¹⁵ While, in case color of title is required by statute, the title must be one which would sustain the claim, if valid,¹⁶ it is unnecessary that the title be valid.¹⁷

f. Time and Duration of Possession

The requisite adverse possession must exist at the time of the conveyance claimed to be champertous; but it need not have existed for the period prescribed by the statute of limitations or for any other specific length of time.

It is not essential that the adverse possession should have continued for the period requisite to give title by adverse possession or for any specific length of time in order to make a sale and conveyance of land possessed by another champertous;¹⁸ it is necessary and sufficient that the requisite adverse possession exist at the time of the convey-

ance¹⁹ and also, as indicated *infra* § 33 a, at the time of a contract to convey where the conveyance is executed in performance of the contract.

g. Good Faith

The authorities are conflicting on the question whether adverse possession, to render a deed champertous, must be in good faith.

The decisions are not in accord on the question whether the adverse possession which renders a deed champertous must be in good faith, some holding it not necessary,²⁰ while others hold it essential.²¹

h. Extent of Possession

The area of land to which adverse possession extends and renders a champerty statute applicable is determined according to principles analogous to those applied in determining the extent of the land to which title is acquired by adverse possession.

Where a third person has actual possession of part of a tract of land, a deed to the whole tract is champertous to, and only to, the extent of the acreage actually possessed by the third person,²²

- v. Balcomb, 108 So. 858, 861, 215 Ala. 12, citing *Corpus Juris*.
Ky.—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402—Roy v. Roy, 54 S.W.2d 362, 246 Ky. 36—Fordson Coal Co. v. Wells, 53 S.W.2d 564, 245 Ky. 291—Green v. Hammons, 22 S.W.2d 422, 232 Ky. 59—Ellis v. Sparks, 235 S.W. 199, 215 Ky. 316—Layne v. Norman, 221 S.W. 869, 188 Ky. 317—Virginia Iron, Coal & Coke Co. v. Combs, 216 S.W. 846, 186 Ky. 261.
Okl.—McKoy v. Keel, 18 P.2d 277, 161 Okl. 258—Huseman v. Rauch, 15 P.2d 60, 159 Okl. 296.
11 C.J. p 259 note 42.

Mistake

The rule making a deed void as against adverse claimant does not apply in the case of a mere encroachment or overlap of a building resulting from a mistake as to the boundary line.—Hancoy Holding Co. v. Lambright, 133 So. 631, 101 Fla. 128.

13. U.S.—Reed v. Atchison, C.C.A. Okl., 276 F. 888.
Ky.—Deupree v. Walker, 72 S.W.2d 732, 255 Ky. 30.
11 C.J. p 259 note 43.

Possession must be under a claim of right
Conn.—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.

Compliance with rule

The taking of possession of land by the disseisor, managing the land as his own property, and taking rents, is of itself an assertion of title by the disseisor and satisfies the requirements of the rule.—Sear-

- les v. De Ladson, 70 A. 589, 81 Conn. 133.
14. N.Y.—People v. Ladew, 170 N.Y.S. 196, 102 Misc. 595.
11 C.J. p 259 note 48.
15. Ala.—Gerald v. Hayes, 87 So. 351, 205 Ala. 105.
Ky.—Deupree v. Walker, 72 S.W.2d 732, 255 Ky. 30—Begley v. Erasme, 265 S.W. 833, 205 Ky. 240, error dismissed Begley v. Erasme, 47 S.Ct. 342, 273 U.S. 655, 71 L.Ed. 825—Blalock v. Darnell, 229 S.W. 1039, 191 Ky. 258.
11 C.J. p 259 note 47.
16. N.Y.—Fish v. Fish, 39 Barb. 513.
11 C.J. p 260 note 49.

Purported conveyance of freehold estate

The color of title must purport to convey a freehold estate adverse to that under which the grantor in the champertous deed asserts his right to possession.—Gross v. Welwood, 90 N.Y. 638—11 C.J. p 260 note 51.

Description

A deed containing a description, the lines of which do not close, cannot be the basis of an adverse possession under a claim of title founded on a written instrument.—Green v. Horn, 101 N.E. 430, 207 N.Y. 489.
17. N.Y.—People v. Ladew, 170 N.Y.S. 196, 102 Misc. 595.
11 C.J. p 260 note 50.

18. Ky.—Fordson Coal Co. v. Collins, 104 S.W.2d 985, 268 Ky. 331—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747—Phillips v. American Ass'n, 82 S.W.2d 456, 259 Ky. 402.

- Tenn.—Kitchen-Miller Co. v. Kern, 91 S.W.2d 291, 170 Tenn. 10.
11 C.J. p 259 note 38.
19. Ky.—Edwards v. Clark, 88 S.W.2d 914, 261 Ky. 749—Marley v. Baumer, 63 S.W.2d 919, 250 Ky. 682—Jones v. O'Connell, 35 S.W.2d 290, 237 Ky. 219—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 806—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139—Pioneer Coal Co. v. Asher, 11 S.W.2d 116, 226 Ky. 438—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79—Roark v. Hogg, 292 S.W. 465, 219 Ky. 78—Spicer v. Terry, 291 S.W. 727, 218 Ky. 448.
Tenn.—Ferguson v. Prince, 190 S.W. 548, 136 Tenn. 543.
11 C.J. p 257 note 6, p 259 note 39.

Abandonment of possession prior to conveyance

Where the actual possession of defendant, if any, and that of his immediate vendor, was abandoned before plaintiff obtained his deed, the defense of champerty is unavailable.—Lanham v. Huff, 14 S.W.2d 402, 228 Ky. 139.

20. Ala.—Bernstein v. Ames, 75 Ala. 241—Vandiveer v. Stickney, 75 Ala. 225.
21. N.Y.—Lambert v. Huber, 50 N.Y.S. 793, 22 Misc. 462—Livingston v. Peru Iron Co., 9 Wend. 511.
22. Ky.—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 806.
11 C.J. p 260 note 54.

Inclosure by intruder

Champerty statutes can be invoked in support of an intruder's claim to

unless he has color of title to the whole tract, in which case he is deemed to be in possession of, and the deed is champertous as to, all land within the boundary described in the paper constituting his color of title,²³ or unless, according to the rule obtaining in one state, he has a well-marked or well-defined boundary and he claims to that boundary, in which case a champerty statute applies to all land inclosed by that boundary.²⁴ Possession of one lot or tract, or of part thereof, does not extend beyond the boundary thereof to an adjoining lot or tract, so as to render a conveyance of the latter champertous, where clearings, inclosures, or other indicia of possession do not extend onto the adjoining land.²⁵

§ 32. — Application of Rules to Particular Holdings of Real Estate

A person in possession of real property may have such a status or interest, or bear such a relation to the true owner or owners, that his possession is not adverse within the meaning of the law relating to champertous conveyances.

Possession of land by or under a person having a life estate, a dower or quarantine right, or other limited or contingent right, interest, or estate therein is not such adverse possession as will render champertous a conveyance by the remainderman, heir, or other owner.²⁶ The existence of an easement in land is not such adverse possession by the servient tenant as to prevent the owner of the

dominant tenement from conveying the right of soil.²⁷ Also, possession by a person who is estopped to deny the title of the actual owner is not such a holding as will affect a deed made by such owner.²⁸

Possession by the state,²⁹ by a public officer,³⁰ or by Indians existing as an independent nation³¹ is not of that adverse character which will render a conveyance champertous.

The possession of a bankrupt is not adverse to the trustee or assignee in bankruptcy,³² the possession of the former owner or of his grantee after a judicial, execution, or tax sale of his land is not adverse to the purchaser,³³ and the possession of a mere trespasser is not adverse to the title of the true owner,³⁴ within the meaning of the law of champerty. A joint possession with another person is not adverse to the other person.³⁵

Possession of surface after severance of title to minerals or caves. Where, by prior conveyance or reservation, the title to minerals has been severed from title to the surface of land, a conveyance of the minerals is not rendered champertous by another person's possession of the surface, as possession of the surface is not possession of the minerals or, if it is, it is only in trust for the benefit of the owner of the minerals and hence is amicable, rather than hostile or adverse.³⁶ A like rule obtains where

land only to the extent of whatever inclosure, if any, he had made at the time of the conveyance.—*Fordson Coal Co. v. Collins*, 104 S.W.2d 985, 268 Ky. 331.

23. Ky.—*Lawhorn v. Hicks*, 56 S.W.2d 996, 247 Ky. 205.—*Pioneer Coal Co. v. Asher*, 35 S.W.2d 285, 237 Ky. 254.—*Fordson Coal Co. v. Marcum*, 268 S.W. 289, 206 Ky. 624.

Tenn.—*Kitchen-Miller Co. v. Kern*, 91 S.W.2d 291.—*Allis v. Hunt*, 294 S.W. 509, 155 Tenn. 155.
11 C.J. p 260 note 55.

Even though only a portion is inclosed, possession under a recorded deed extends to the outside boundaries as defined in the deed and is adverse so as to render a deed by a person out of possession champertous.—*Rader v. Howell*, 54 S.W.2d 914, 246 Ky. 261.

24. Ky.—*Le Moyné v. Litton*, 167 S.W. 912, 159 Ky. 652.

25. Ky.—*Stephenson Lumber Co. v. Hurst*, 83 S.W.2d 48, 259 Ky. 747.—*Elk Horn Coal Corporation v. Jacks Creek Coal Co.*, 43 S.W.2d 13, 240 Ky. 769.

Shack on city lot or lots

The occupation of a shack on one or more city lots cannot be regarded

as actual, or even constructive, possession of adjoining city lots which have no relation in appearance or occupation with the property actually occupied.—*Kiowa Realty Co. v. Mole-naor*, 165 N.Y.S. 131, 98 Misc. 694.

26. Ala.—*St. Clair Springs Hotel Co. v. Balcomb*, 108 So. 853, 215 Ala. 12.

Ky.—*Mart's Ex'r v. Potts*, 12 S.W.2d 278, 227 Ky. 125.—*Williams v. Williams*, 10 S.W.2d 477, 226 Ky. 13.

Tenn.—*Knox v. Keith*, 9 Tenn.App. 614.

11 C.J. p 260 note 59.

27. Ky.—*Kevil v. Wilford*, 104 S.W. 348, 31 Ky.L. 1000.

11 C.J. p 266 note 38.

28. Ky. — *Middleton v. Commonwealth*, 254 S.W. 754, 200 Ky. 237.—*Travis v. Bruce*, 139 S.W. 939, 172 Ky. 390.

11 C.J. p 261 note 60.

Estoppel by judgment or admission of paramount title

Ky.—*Green v. Hammons*, 22 S.W.2d 422, 232 Ky. 59.—*Tennis Coal Co. v. Sackett*, 190 S.W. 130, 172 Ky. 729, Ann.Cas.1917E 629.

11 C.J. p 261 notes 60 [a], 69, 70.

29. N.Y.—*Ostrander v. Bell*, 192 N.Y.S. 262, 199 App.Div. 304.

11 C.J. p 257 note 6 [a].

30. Ark.—*Merrick v. Hutt*, 15 Ark. 331.

Ind.—*Winstandley v. Stipp*, 32 N.E. 302, 132 Ind. 548.—*Ft. Wayne, etc., R. Co. v. Mellett*, 92 Ind. 535.

N.Y.—*Meigs v. Roberts*, 59 N.Y.S. 215, 42 App.Div. 290, reversing 54 N.Y.S. 214, 24 Misc. 668.

31. N.Y.—*Jackson v. Hudson*, 3 Johns. 375, 3 Am.D. 500.

11 C.J. p 262 note 83.

32. Ky.—*Buckler v. Rogers*, 53 S.W. 529, 54 S.W. 848, 21 Ky.L. 1265.

33. Ky.—*Colony Coal & Coke Corporation v. Olinger*, 95 S.W.2d 597, 264 Ky. 775, citing *Corpus Juris*.
11 C.J. p 261 note 62, p 264 notes 8, 9.

34. N.Y.—*Willey v. Greenfield*, 71 N.Y.S. 1046, 64 App.Div. 220.
11 C.J. p 262 note 87.

35. Ky.—*Layne v. Norman*, 221 S.W. 869, 188 Ky. 317.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S.W. 846, 186 Ky. 261.

36. Ky.—*Smith v. Graf*, 82 S.W.2d 461, 259 Ky. 456.—*Franklin Fluorspar Co. v. Hosick*, 39 S.W.2d 665, 239 Ky. 454.—*Farmer v. R. C. Tway Coal Co.*, 264 S.W. 743, 204 Ky. 356.—*Hoskins v. Northern Lee Oil*

caves are separately owned.³⁷

Possession by mortgagor or vendor. Ordinarily, the possession of land by a mortgagor or vendor, or those holding under him, after the execution of the mortgage or conveyance, is not adverse to the mortgagee or the grantee, so as to avoid conveyances made by the latter.³⁸ Possession of the grantor is consistent with, and not hostile to, the title which he has conveyed;³⁹ it is deemed to be the possession of either a tenant or trustee of the grantee; and only an explicit disclaimer of such a relation and a notorious assertion of right in himself will change the character of such possession, and render the grantee's conveyance to a third party champertous.⁴⁰

However, the rule that possession by the vendor after his conveyance is deemed to be amicable to the title he conveyed does not extend to adjoining land which he did not convey; and a subsequent conveyance of such adjoining land by the vendee, when it is possessed by the vendor, is champertous.⁴¹ Also, it has been said that possession by the grantor of a part of the land conveyed may be so adverse to the grantee as to invalidate a conveyance by the latter to a third person of the part so held adversely.⁴² After payment of the debt secured by a mortgage the possession of the mortgagor will be deemed so far adverse to the grantor as to avoid a conveyance made by the latter.⁴³

Possession by tenant or licensee. The possession of a tenant or licensee is presumptively not adverse to his lessor or licensor,⁴⁴ and can become so only

by a clear and unequivocal disclaimer brought to the notice of him under whom he holds.⁴⁵ An attornment by a tenant to a stranger, without the consent of the landlord under whom he entered and not pursuant to any judicial decision, is void, and the holding of a tenant so attorned will be treated as the possession of the person under whom he entered;⁴⁶ but where the landlord's right has been terminated by execution sale subsequent to the lease, the law terminates the tendency and justifies the tenant in attorning to the execution purchaser without waiting for eviction.⁴⁷ It has been held that a champerty statute does not apply, in case of a tenant claiming adverse possession, until his title is matured by adverse holding for the period of time required by the statute of limitations.⁴⁸

Possession by tenant in common or his grantee. The possession of a tenant in common is not presumed to be, nor ordinarily regarded as, adverse to his cotenant;⁴⁹ but it may be so in fact,⁵⁰ even though the cotenant is an infant;⁵¹ and possession under a deed given by a tenant in common or joint tenant is adverse to the other tenant.⁵²

Possession by vendee under executory contract. According to the weight of authority, the possession of a vendee holding under an executory contract of purchase is not adverse to that of his vendor until he has performed the conditions of the contract or repudiated his vendee's title,⁵³ the possession of the vendee being in law that of the vendor;⁵⁴ and until performance the vendor may make a valid deed of conveyance effectual as against the

& Gas Co., 240 S.W. 377, 194 Ky. 628.

Okl.—Barker v. Campbell-Ratcliff Land Co., 167 P. 468, 64 Okl. 249, L.R.A.1918A 487.

11 C.J. p 258 note 24.

37. Ky.—Cox v. Colossal Cavern Co., 276 S.W. 540, 210 Ky. 612.

38. Ky.—Middleton v. Commonwealth, 254 S.W. 754, 200 Ky. 237.

Okl.—Wolverine Oil Co. v. Parks, 193 P. 624, 79 Okl. 318.

11 C.J. p 261 note 63.

39. Ky.—Behrens v. Crawford, 108 S.W. 283, 32 Ky.L. 1281.

40. Okl.—Wolverine Oil Co. v. Parks, 193 P. 624, 79 Okl. 318.

Possession by privies of vendor

Where a vendor has remained in possession, his privies, succeeding to such possession, before they can assert adverse possession or avoid a conveyance of the land by the vendee as champertous, must make open demonstration of their claim sufficient to give notice to the actual owner of the adverse character of

their holding, and such as reasonably to put a purchaser on notice thereof.—Travis v. Bruce, 189 S.W. 939, 172 Ky. 390.

41. Ky.—Mitchell v. Scottow, 60 S.W.2d 971, 249 Ky. 391.

42. Vt.—Robinson v. Douglass, 2 Alk. 364.

43. N.Y.—Lane v. Shears, 1 Wend. 433.

44. Ky.—Terry v. Johnson, 140 S.W. 541, 145 Ky. 395.

11 C.J. p 261 note 73.

45. N.Y.—Church v. Schoonmaker, 22 N.E. 575, 115 N.Y. 570, affirming 42 Hun 225.

11 C.J. p 262 note 74.

46. Ky.—Turner v. Thomas, 13 Bush 518.

47. Ala.—Griffin v. Dauphin, 31 So. 849, 133 Ala. 543.

48. Ky.—Smith v. Seaton, 1 Ky.Op. 494.

49. Ky.—Hazard Coal Corporation v. Getaz, 29 S.W.2d 573, 234 Ky. 817.

11 C.J. p 261 note 71.

50. Okl.—Wirick v. Nance, for Use and Benefit of Wimbish, 62 P.2d 997, 178 Okl. 180.

51. Okl.—Wirick v. Nance, for Use and Benefit of Wimbish, supra.

52. Ala.—Berry v. Tennessee, etc., R. Co., 33 So. 8, 134 Ala. 618.

11 C.J. p 261 note 72.

53. S.D.—Fitzgerald v. Miller, 63 N.W. 221, 7 S.D. 61.

11 C.J. p 262 note 77.

Analogous situation

The possession of a person who has assigned a survey and had a patent issued to the assignee as security, and who is looking to the patentee for title, is, until the debt is paid, amicable, rather than adverse, to the patentee and does not invalidate a conveyance from the patentee to a third person; it is analogous to a holding under a bond for title.—Elk Horn Coal Corporation v. Jacks Creek Coal Co., 43 S.W.2d 13, 240 Ky. 769.

54. N.D.—Schneller v. Plankinton, 98 N.W. 77, 12 N.D. 561.

vendee.⁵⁵ There are, however, decisions which apparently hold the contrary;⁵⁶ and in any event after the vendee has received a conveyance his possession becomes adverse.⁵⁷

Holding obtained by fraud. In some states possession under a deed procured by fraud is not regarded as adverse, so as to render a subsequent deed champertous;⁵⁸ but in another state, wherein the law of champerty is statutory and contains no exception rendering it inapplicable where the adverse holding is accomplished by fraud, fraud is regarded as immaterial in a case involving a violation of the champerty statute.⁵⁹

§ 33. — Alienations and Contracts Prohibited

- a. Purpose and tendency
- b. Form and nature
- c. Subject matter
- d. Parties
- e. During pendency of litigation

a. Purpose and Tendency

An alienation is prohibited only when it has a tendency to stir up litigation or is within the spirit and policy of a champerty statute and not when it is made in performance of a duty or obligation to convey which arose prior to adverse possession by a third person or by operation of law.

Generally speaking any alienation which has a tendency to stir up litigation or is within the spirit of a champerty statute is prohibited.⁶⁰ Conversely, an alienation not within the spirit and policy of

a champerty statute will be upheld wherever possible, unless it is clearly and manifestly within its terms.⁶¹ Champerty statutes are construed not to bar conveyances by grantors under legal or equitable duty or obligation to convey where such duty or obligation arose prior to adverse possession by a third person, or by operation of law, as no litigious intent is imputable in either case and the statutes are not intended to abrogate nonchampertous rights.⁶² Accordingly, where the continued existence of a corporation and its continued ownership of real estate would be contrary to the constitution and laws of the state, and it is in the bona fide process of dissolution, a conveyance made by it, in the accomplishment of such dissolution and division of assets, of land to one stockholder is not champertous, even though the land is adversely possessed by a third person;⁶³ a deed to land in the adverse possession of a third person is not invalid where it is executed in performance of a lawful contract entered into when the land was not so held;⁶⁴ and a deed is not invalid where it is executed to correct mistakes in a conveyance made before the commencement of the adverse possession.⁶⁵

Conveyance with consent of occupant. Where a person holding lands adversely assents to a conveyance or mortgage thereof to a third person, the transaction is not champertous.⁶⁶

b. Form and Nature

A reconveyance or quitclaim deed may be champertous, and so may a mortgage, in some states, and certain classes of contracts. The passage of title by devise

55. Fla.—Smith v. Klay, 36 So. 54, 47 Fla. 216.

56. Ala.—Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200. Ga.—Heard v. Phillips, 31 S.E. 216, 101 Ga. 691, 44 L.R.A. 369.

57. Fla.—Smith v. Klay, 36 So. 54, 47 Fla. 216.

N.Y.—Towle v. Remsen, 70 N.Y. 303 —Jackson v. Johnson, 5 Cow. 74, 15 Am.D. 433.

58. Ky.—Daniel v. McHenry, 4 Bush 277.

N.Y.—McMahon v. Allen, 35 N.Y. 403, 3 Abb.Pr., N.S., 74, 32 How.Pr. 313, reversing 34 Barb. 56, 12 Abb. Pr. 275—Moody v. Moody, 16 Hun 189—Livingston v. Peru Iron Co., 9 Wend. 511.

11 C.J. p 262 note 88.

59. Okl.—Wirick v. Nance, for Use and Benefit of Wimbish, 62 P.2d 997, 178 Okl. 180.

60. Conn.—Sherwood v. Waller, 20 Conn. 262.

11 C.J. p 262 note 90.

61. Okl.—Flesher v. Callahan, 122 P. 489, 32 Okl. 283.

11 C.J. p 263 note 91.

62. Okl.—Warner v. Wickizer, 160 P. 885, 61 Okl. 200.

63. Okl.—Warner v. Wickizer, supra.

64. Ky.—Campbell v. Embry, 95 S. W.2d 20, 264 Ky. 536—Bolton v. Sears, 78 S.W.2d 914, 915, 257 Ky. 676, citing *Corpus Juris*—Kentucky Union Co. v. Hevner, 275 S. W. 513, 210 Ky. 121.

N.Y.—People v. Ladew, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

11 C.J. p 266 note 30.

Matters requisite to application of rule

(1) It is only when a deed is made to carry into effect a prior understanding or contract, made when the land was not adversely held, that the deed is not champertous as to those having adverse possession at the time of its execution.—Day v. Hicks, Ky., 124 S.W. 805.

(2) In one case, wherein it was said that the rule contemplates an enforceable contract, that is, a written contract, it was held that, regardless of whether the contract was in writing or parol, the deed

in question was champertous, there having been adverse possession not only at the time of the execution of the deed, but also prior to the making of the contract to purchase.—Wallace v. Neal, 11 S.W.2d 1002, 227 Ky. 30.

Principle does not apply to foreclosure sale by the trustee under a deed of trust, as the purchaser under such a sale has no interest until he buys at the sale.—Knox v. Keith, 9 Tenn.App. 614.

65. N.Y.—Coleman v. Manhattan Beach Impr. Co., 94 N.Y. 229, affirming 26 Hun 525.

11 C.J. p 266 note 32.

Inclusion of additional land

A deed given in lieu of a prior deed is within a champerty statute to the extent that it includes additional property in the possession of a third person under an adverse claim.—Howard v. Howard, 38 S.W.2d 441, 238 Ky. 533.

66. Ky.—Small v. Drabell, 7 Ky.Op. 181.

Tenn.—McIntire v. Patton, 9 Humphr. 447.

11 C.J. p 267 note 46.

descent, or by conveyance under decree of court or pursuant of a judicial or official sale, is not champertous.

A quitclaim deed by a person out of possession such an alienation as is prohibited where the land held adversely by a third person.⁶⁷ Also, a conveyance may be champertous,⁶⁸ but is held not to be so where it conveys nothing, as where, by reason of champerty or some other cause, the original conveyance was void.⁶⁹ A mortgage or assignment thereof while the real property mortgaged is adversely held by a third person is champertous,⁷⁰ except in jurisdictions wherein a mortgage is held not to be a conveyance⁷¹ or the giving of a mortgage on land adversely held by another is expressly authorized by statute.⁷²

Neither at common law nor under statute does a rule prohibiting sales or conveyances of lands adversely held by a third person apply to the passage of title by descent⁷³ or devise⁷⁴ or to judicial or official sales or conveyances executed in pursuance thereof or under a decree of court.⁷⁵ However, the champerty statute has been held to apply in the case of a religious corporation making a conveyance pursuant to an order of court obtained on its application.⁷⁶ A court of chancery has no general power to order a sale of property adversely claimed on

the application of one of the contestants;⁷⁷ and a title which is champertous remains so notwithstanding a judicial sale.⁷⁸

Contracts. An agreement is champertous where the consideration therefor is a conveyance of land adversely held,⁷⁹ a share of the proceeds of a sale of land so held,⁸⁰ or a share of the land itself on its recovery.⁸¹ On the other hand, an agreement to buy land and to convey an undivided interest to another who is then to bring suit for its recovery and to pay his share of the costs is not champertous.⁸² Similarly, a purchase of land under an agreement whereby the purchaser is to pay a certain price, if he can recover it from those in adverse possession, the proceedings to be instituted in the purchaser's name and at his expense, is valid.⁸³

c. Subject Matter

Any right, title, or interest in land may constitute the subject matter of a prohibited conveyance thereof when the land is held adversely by a third person.

During adverse possession by a third person, a conveyance of standing timber,⁸⁴ an estate in solid minerals,⁸⁵ a life estate,⁸⁶ or the right of dower⁸⁷ or curtesy,⁸⁸ may be champertous; but it is otherwise as to a sale or conveyance of equitable inter-

7. Ky.—Frasure v. Northern Coal & Coke Co., 225 S.W. 479, 189 Ky. 574.
8. N.Y.—Ruocchio v. Golod, 262 N.Y.S. 98, 237 App.Div. 912.
9. Okl.—Anicker v. Harrison, 256 P. 39, 125 Okl. 21.
1 C.J. p 267 note 54.
10. Tenn.—Gass v. Malony, 1 Humphr. 452.
11. Ga.—Martin v. Flowers, 8 Leigh 158, 35 Va. 158.
1 C.J. p 267 note 55.
12. Ky.—Arrington v. Sizemore, 43 S.W.2d 699, 241 Ky. 171—Holliday v. Tennis Coal Co., 288 S.W. 773, 215 Ky. 551.
13. Tenn.—Knox v. Keith, 9 Tenn. App. 614.
1 C.J. p 267 note 49.
14. Conn.—Harral v. Levery, 50 Conn. 46, 47 Am.R. 608—Leonard v. Bosworth, 4 Conn. 421.
1 C.J. p 267 note 50.
15. N.D.—State Finance Co. v. Halstenson, 114 N.W. 724, 17 N.D. 145.
16. Tenn.—Knox v. Keith, 9 Tenn. App. 614.
1 C.J. p 267 note 47.
17. N.Y.—People v. Ladew, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.
1 C.J. p 267 note 48.
18. Ga.—Williamson v. Key, 176 S. E. 373, 179 Ga. 502.
19. Ky.—Chapman v. Hounshell, 79 S.W.

20. 2d 685, 258 Ky. 214—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416—Wilson v. Chappell, 51 S.W.2d 669, 244 Ky. 521—Fordson Coal Co. v. Mills, 27 S.W.2d 382, 234 Ky. 64—Lashley v. Duvall, 11 S.W.2d 708, 226 Ky. 685—Golden v. Blakeman, 3 S.W.2d 1095, 223 Ky. 517—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 193 Ky. 38—Anderson v. Daugherty, 207 S.W. 474, 182 Ky. 800.
21. N.Y.—People v. Ladew, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.
22. Okl.—Drennan v. Harris, 161 P. 781, 67 Okl. 313, rehearing denied 170 P. 500, 67 Okl. 313.
23. Tenn.—Knox v. Keith, 9 Tenn.App. 614.
11 C.J. p 263 note 4, p 264 note 5—35 C.J. p 11 note 54.
24. N.Y.—Christie v. Gage, 71 N.Y. 189, affirming 2 Thomps. & C. 344.
25. Mich.—Earl v. Jacobs, 142 N. W. 1079, 177 Mich. 163.
Property of decedent see C.J.S. title Executors and Administrators § 551, also 24 C.J. p 565 note 8—p 566 note 15.
26. Ky.—Anderson v. Daugherty, 207 S.W. 474, 182 Ky. 800.
27. Ind.—Martin v. Pace, 6 Blackf. 99.
28. Ky.—Breckinridge v. Moore, 3 B.Mon. 629.

29. N.Y.—Witter v. Blodget, 4 N.Y.Leg. Obs. 263—Vallett v. Parker, 6 Wend. 615—Whitaker v. Cone, 2 Johns.Cas. 58.
11 C.J. p 263 note 95 [a].
30. N.Y.—Belding v. Pitkin, 2 Caines 147.
31. Ga.—Johnson v. Hilton, 23 S.E. 841, 96 Ga. 577.
32. Ill.—Burton v. Perry, 34 N.E. 60, 146 Ill. 71.
11 C.J. p 263 note 95.
33. Mo.—Moore v. Ringo, 32 Mo. 468.
34. Ill.—Torrence v. Shedd, 112 Ill. 466.
35. N.C.—Nichols v. Bunting, 10 N.C. 86.
11 C.J. p 263 note 98.
36. Ky.—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747.
37. Ky.—Elkhorn Coal Corporation v. Bradley, 288 S.W. 326, 216 Ky. 599.
38. U.S.—Webster v. Gilman, C.C. Me., 29 F.Cas.No.17,335, 1 Story 499.
39. **Assignment of lease for lives**
N.Y.—Mosher v. Yost, 33 Barb. 277.
40. Ky.—Bridgewater v. Byassee, 93 S.W. 35, 29 Ky.L. 377—Kinsolving v. Pierce, 18 B.Mon. 782.
11 C.J. p 266 note 33.
41. N.Y.—Vrooman v. Shepherd, 14 Barb. 441.

ests,⁸⁹ easements, incorporeal hereditaments, or rights appurtenant to land.⁹⁰

Indian lands. The alienation of restricted Indian lands is controlled by congressional enactments, as stated in the C.J.S. title Indians § 54, also 31 C.J. p 513 note 82-p 516 note 12, and is not subject to state statutes against champerty.⁹¹

d. Parties

With a few exceptions under the law of particular states, a sale or conveyance, during adverse possession by a third person, may be champertous when made by an administrator, a patentee, a tenant in common, other than to another tenant in common, and a trustee, other than to the cestui que trust; but it is not champertous when made by or to the state or by an infant after disaffirmance of a prior conveyance.

Administrator. Under the express prohibition of some statutes, an administrator cannot lawfully sell property held adversely to the estate by a third person.⁹² Such a prohibition, even if applicable to sales by executors, does not extend to a sale by executors to whom the testator devised property in trust with authority to sell.⁹³

Corporation and individual. Where a champerty statute is intended to apply both to the seller and the purchaser, the fact that there may be a technical difficulty in punishing a corporation which executed an instrument does not relieve an individual who received the instrument from the statutory punishment, penalty, or forfeiture.⁹⁴

Infant after disaffirmance. According to some decisions one who is in possession of lands as a purchaser from an infant does not hold adversely to the infant within the meaning of the law against champerty and his possession does not render void a conveyance by the infant to another after he attains majority;⁹⁵ but there are decisions to the contrary.⁹⁶ Of course if the elder grantee has never been in possession, the second conveyance is valid.⁹⁷

Nonresident. Under a statute providing that a conveyance by a nonresident shall not be void when at the time of such conveyance the lands are not adversely held under deed, devise or inheritance, a nonresident may lawfully convey lands held adversely at the time of the sale where the possession is a mere naked possession without title;⁹⁸ but a sale by a nonresident is champertous where the lands are held adversely under color of title,⁹⁹ such as a chancery decree vesting title.¹

Patentees. The purchase by a junior patentee of the title of the elder patentee to lands held adversely to the latter is champertous.²

Purchaser at judicial or official sale. Except where the conveyance is to one for whom he purchased,³ a conveyance by a purchaser at a judicial, execution, or tax sale is champertous when it is made during adverse possession by a third person,⁴

89. Va.—Allen v. Smith, 1 Leigh 231, 28 Va. 231.

11 C.J. p 266 note 39.

Equity of redemption

N.Y.—People v. Ladew, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

11 C.J. p 266 note 40.

90. N.Y.—People v. Ladew, supra. 11 C.J. p 266 note 37.

Oil and gas rights

A champerty law is not applicable to an oil and gas lease, or a conveyance of oil and gas rights, which is construed to be merely the grant of an exclusive license or an incorporeal hereditament.

U.S.—Guffey-Gillespie Oil Co. v. Wright, C.C.A.Okl., 281 F. 787—Etchen v. Cheney, Okl., 235 F. 104, 148 C.C.A. 598.

Okl.—Janeway v. Whitaker, 233 P. 197, 106 Okl. 83—State v. Welch, 184 P. 786, 16 Okl.Cr. 485.

91. Okl.—Jenson v. Ward, 41 P.2d 255, 171 Okl. 279—Denney v. Akers, 247 P. 34, 117 Okl. 274—Bowling v. Beaver, 229 P. 501, 102 Okl. 286, error dismissed 46 S.Ct. 17, 269 U.S. 527, 70 L.Ed. 395—Culp v. Bronaugh, 224 P. 175, 97 Okl. 198—Clark v. Sharum, 217 P. 445, 91

Okl. 273—Sells v. Butts, 190 P. 863, 79 Okl. 36—Sells v. Mooney, 190 P. 863, 79 Okl. 35—Sells v. Mooney, 190 P. 861, 79 Okl. 34—Canfield v. Jack, 188 P. 1040, 78 Okl. 127, certiorari denied Canfield v. Cornelius, 40 S.Ct. 536, 253 U.S. 493, 64 L.Ed. 1029—Sanders v. Melson, 174 P. 755, 73 Okl. 33—Thompson v. Riddle, 171 P. 331, 69 Okl. 115—Hammett v. Montgomery, 170 P. 689, 67 Okl. 235—Nivens v. Adams, 170 P. 473—Morrow Indian Orphans' Home v. McClendon, 166 P. 1101, 64 Okl. 205—Miller v. Grayson, 166 P. 1077, 64 Okl. 122, affirming 165 P. 133—Stoval v. State, 187 P. 815, 17 Okl.Cr. 677—Pitt v. State, 180 P. 333, 16 Okl.Cr. 15.

11 C.J. p 255 note 95 [b] (2).

Conveyance by person other than allottee or his heirs is not within the rule.—McCormick v. Stonebraker, 270 P. 1098, 133 Okl. 34.

92. Ga.—Williamson v. Key, 176 S.E. 373, 179 Ga. 502—Driggers v. Moore, 137 S.E. 14, 163 Ga. 754—Booth v. Young, 99 S.E. 836, 149 Ga. 276—Youmans v. Edenfield, 137 S.E. 238, 36 Ga.App. 529—Edenfield v. Rountree, 126 S.E. 731, 33 Ga. App. 444.

93. Ga.—Chattanooga Iron & Coal Corporation v. Shaw, 122 S.E. 597, 157 Ga. 869.

94. Conn.—Emerson v. Goodwin, 9 Conn. 422.

95. Ky.—Miller v. Edwards, 220 S.W. 1056, 187 Ky. 327.

11 C.J. p 265 note 14.

96. Ga.—Harrison v. Adcock, 8 Ga. 63—Harris v. Cannon, 6 Ga. 382. N.C.—Murray v. Shanklin, 20 N.C. 357.

97. N.Y.—Jackson v. Burchin, 14 Johns. 124.

98. Tenn.—Hardwick v. Beard, 10 Heisk. 659—McCoy v. Williford, 2 Swan 641.

99. Tenn.—Whitesides v. Martin, 7 Yerg. 384.

1. Tenn.—Bleidorn v. Pilot Mountain Coal, etc., Co., 15 S.W. 737, 89 Tenn. 166, 204—Saylor v. Stewart, 2 Heisk. 510.

2. Ky.—Bowling v. Roark, 24 S.W. 4, 15 Ky.L. 499.

3. Okl.—Webb v. Ketcham, 12 P.2d 191, 157 Okl. 294.

11 C.J. p 264 note 7 [a].

4. Ala.—Ebrinstein v. Humes, 60 Ala. 532, 31 Am.R. 52.

11 C.J. p 264 note 7.

at not when it is made during continued possession by the former owner whose title was divested by the sale, or by some one claiming under him,⁵ and, according to the rule stated *supra* § 32, such possession is not adverse to the purchaser.

Tenant in common or coparcener. Conveyances by tenants in common or coparceners of land adversely held by their cotenants are, according to the weight of authority, champertous, where it is shown by certain and satisfactory evidence that the tenant in possession has, by specific and unequivocal acts, renounced his allegiance to his cotenants.⁶ Likewise, a conveyance made by a tenant in common while the land is adversely held by a grantee of his cotenant is invalid.⁷ According to some authorities, however, the possession of a tenant in common of land, who has ousted his cotenant and holds adversely to him, will not impair a conveyance by the cotenant of his share.⁸ At any rate, there is no champerty in the absence of acts equivalent to ouster;⁹ and a conveyance by one tenant in common to his cotenant of his undivided interest in and held adversely is not champertous.¹⁰

Trustee and cestui que trust. When a trust relation subsists between the parties, a conveyance by either that merges the legal and equitable estates is valid, although the land is in the actual adverse possession of a third person.¹¹ On the other hand, a conveyance by the trustee to a third person is champertous where at the time of the conveyance there is a holding of the property by the cestui que trust which is in fact adverse to the trustee.¹²

The state. The common-law rule and the stat-

utes making conveyances of land held adversely champertous do not apply to conveyances made by the state, since the state is incapable of being dis-seized;¹³ and it has been held that a statute, making it a misdemeanor to sell a title to land unless the grantor has been in possession or has taken the rents and profits thereof for a year before the covenant to convey was made, does not apply where the title of the grantor comes directly from the state;¹⁴ but it seems that a grant by one state may be champertous as to another state;¹⁵ and the fact that a champertous conveyance is made by the executive officers of a state will not purge it of that vice, as being an act of the state, since only an exercise of legislative power can accomplish that result.¹⁶ An amendment of a statute so as to make it inapplicable to grants to the state, directly or by mesne conveyance, provides for a transfer of title and not merely for a change in procedure, and therefore must be construed as prospective only.¹⁷

e. During Pendency of Litigation

A conveyance of land while it is in litigation may be champertous under statute, but not otherwise when bona fide.

By virtue of statute, the taking of a conveyance of land may be prohibited when the land is in litigation, the grantor is out of possession, and the grantee has knowledge of the pendency of the suit and the grantor's lack of possession.¹⁸ In the absence of statute, a bona fide conveyance of land in dispute made by plaintiff after the commencement of the suit is not void for champerty or maintenance.¹⁹

1. Ky.—Colony Coal & Coke Corporation v. Olinger, 95 S.W.2d 597, 264 Ky. 775.

2. Penn.—Allemannia Fire Ins. Co. v. York, 65 S.W.2d 838, 16 Tenn.App. 167.

3. 1 C.J. p 264 note 10.

4. Ky.—Miller v. Edwards, 220 S.W. 1056, 187 Ky. 827.

5. 1 C.J. p 265 note 26.

6. Ky.—Adkins v. Whalin, 7 S.W. 912, 87 Ky. 153, 10 Ky.L. 17, 12 Am.S.R. 470.

7. Y.—Jackson v. Smith, 13 Johns. 406.

8. Ind.—Elliott v. Frakes, 90 Ind. 389—Patterson v. Nixon, 79 Ind. 251.

9. Okl.—Longfellow v. Byrne, 174 P. 745, 68 Okl. 314.

10. Ky.—Nelson v. Gregory, 91 S.W.2d 29, 262 Ky. 740—Moore v. Pauley, 61 S.W.2d 1106, 250 Ky. 156—Alexander v. Duncan, 57 S.W.2d 58, 247 Ky. 422—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228

Ky. 806—Perry v. Wilson, 203 S.W. 776, 183 Ky. 155.

Okl.—Smith v. Braley, 184 P. 586, 76 Okl. 220.

11 C.J. p 265 note 29.

11. Okl.—Warner v. Wickizer, 160 P. 885, 61 Okl. 200.

11 C.J. p 266 note 41.

Deed by trustee to cestui que trust
Ky.—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 88.

12. Ky.—Cyrus v. Holbrook, 106 S.W. 300, 32 Ky.L. 466.

13. N.Y.—Saranac Land, etc., Co. v. Roberts, 109 N.Y.S. 547, 125 App. Div. 333, affirmed 88 N.E. 753, 195 N.Y. 303.

11 C.J. p 265 note 22.

14. N.Y.—Meigs v. Roberts, 59 N.Y.S. 215, 42 App.Div. 290, reversing 54 N.Y.S. 214, 24 Misc. 668, and reversed on other grounds 56 N.E. 838, 162 N.Y. 371, 76 Am.S.R. 322.

15. N.Y.—Woodworth v. Janes, 2

Johns.Cas. 417—Whitaker v. Cone, 2 Johns.Cas. 58.

16. N.Y.—People v. New York, 10 How.Pr. 289, reversed on other grounds 28 Barb. 240, 17 How.Pr. 56.

17. N.Y.—People v. Ladew, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

Contrary view People v. Ladew, 170 N.Y.S. 196, 102 Misc. 595.

18. Okl.—Cox v. Fowler, 283 P. 995, 141 Okl. 110—Warner v. Wickizer, 160 P. 885, 61 Okl. 200.

11 C.J. p 267 notes 43, 45.

Knowledge by grantee of pendency of the suit is essential to avoidance of the deed.—Hammett v. Montgomery, 170 P. 689, 67 Okl. 235.

19. Ky.—Pond Creek Coal Co. v. Hatfield, 16 S.W.2d 442, 228 Ky. 806—Frasure v. Northern Coal & Coke Co., 225 S.W. 479, 189 Ky. 574.

11 C.J. p 266 note 42.

§ 34. — Validity or Invalidity of Title of Grantor or Adverse Claimant

The champertous character of a conveyance does not turn on the validity or invalidity of the title of the grantor or of the occupant.

The validity or the invalidity of the title of the grantor or of the person in possession is immaterial.²⁰ The possession of the vendor is the fact on which the question of a violation of the rule turns.²¹

§ 35. Other Champertous Transactions

The solicitation of claims by or for an attorney, the furnishing of attorneys by a layman, the division of an attorney's fee with a layman, and other transactions wherein a person interferes officiously for the purpose of increasing or continuing litigation may be within the condemnation of the principles of champerty or maintenance or statutes specifically dealing therewith.

Any contract which in its nature tends to increase litigation, multiply contentions, unsettle the peace and quiet of a community, set one neighbor against another, give one litigant an advantage over another, or induce witnesses or parties to resort to perjury or subornation of perjury or to the commission of any other crime or offense against the laws of the commonwealth, is champertous and against

public policy.²² Conversely, a contract or agreement will not be within the condemnation of the principles of champerty or maintenance unless the interference by the person charged therewith is clearly officious and for the purpose of stirring up strife or continuing litigation.²³

Soliciting legal business or furnishing attorneys. While a statute prohibiting attorneys from personally soliciting claims, or certain classes of claims, for the purpose of collection or bringing suit thereon, or forbidding laymen to solicit employment for attorneys or engage in the business of furnishing attorneys or counsel to render legal services, is a valid police regulation not violative of any constitutional restriction,²⁴ and, when applicable, will be accorded effect;²⁵ it is not retroactive,²⁶ and, being penal in nature, will be strictly construed.²⁷ The solicitation of employment as constituting barratry is considered in the C.J.S. title Barratry § 2 a.

Division of fee. An attorney may not properly assign an interest in his fee to, or agree to divide the fee with, another person, unless such other person is an attorney,²⁸ or the fee is for services of a nonlegal character.²⁹

III. OPERATION AND EFFECT AND OBJECTIONS

§ 36. Prohibited Contracts in General

Regardless of its form, an agreement which is champertous in fact is void.

It is generally considered that a champertous contract or agreement is void.³⁰ There is authority to the effect that the purchase of a litigious right in

20. N.Y.—*People v. Ladew*, 170 N.Y.S. 196, 102 Misc. 595.
11 C.J. p 268 note 59.

21. Tenn.—*Bledsoe v. Rogers*, 3 Sneed 466.

22. Ky.—*Wilhoit's Adm'x v. Richardson*, 236 S.W. 1025, 193 Ky. 559.

23. Okl.—*Worrell v. Roxana Petroleum Corporation*, 291 P. 47, 144 Okl. 297.

Reduction of litigation

A corporation, organized for the purpose of conducting an exchange or clearing house whereby milk bottles coming into the possession of persons not the owners might be recovered, collected, and forwarded to the dealers whose names or labels appeared thereon, was not guilty of champerty or maintenance in bringing replevin against a junk dealer to recover such bottles in his possession, as such suit, instead of fostering litigation, tended to reduce lawsuits, and its objective, the recovery of lost or stolen property, was lawful.—*Milk Dealers' Bottle Exch. v. Schaffer*, 224 Ill.App. 411.

24. Mich. — *Hightower v. Detroit Edison Co.*, 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509—*Kelley v. Boyne*,

214 N.W. 316, 239 Mich. 204, 53 A.L.R. 273.

Neb.—*Chicago, B. & Q. R. Co. v. Davis*, 197 N.W. 599, 111 Neb. 737.

N.Y.—*People v. Meola*, 184 N.Y.S. 353, 193 App.Div. 487, 38 N.Y.Cr. 532.

Tex.—*Ex parte McCloskey*, 199 S.W. 1101, 82 Tex.Cr. 531, affirmed *McCloskey v. Tobin*, 40 S.Ct. 806, 252 U.S. 107, 64 L.Ed. 481.

25. Mich. — *Hightower v. Detroit Edison Co.*, 247 N.W. 97, 262 Mich. 1, 86 A.L.R. 509.

N.Y.—*Mendelson v. Gogolick*, 276 N.Y.S. 158, 161, 243 App.Div. 115, citing *Corpus Juris*—In re *Wellington's Estate*, 276 N.Y.S. 946, 154 Misc. 271, modification denied 289 N.Y.S. 1005, 160 Misc. 383—In re *Lynch's Estate*, 276 N.Y.S. 939, 154 Misc. 260.

Prior to amendment, the statute of one state applied only to attorneys and not to laymen.—*McCloskey v. San Antonio Traction Co.*, Tex. Civ.App., 192 S.W. 1116, error refused.

26. N.Y.—*Sadden v. Sebring*, 182 N.Y.S. 1.

27. N.Y. — *Watertown Business*

Men's Ass'n v. Green, 198 N.Y.S. 871, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 832.

Recommendation of, or willingness to recommend, an attorney on inquiry by a third person falls short of the solicitation denounced by statute.—*People v. Levy*, 50 P.2d 509, 8 Cal.App.2d 763.

28. Ill.—*Aldrich v. Aldrich*, 260 Ill. App. 333.

N.Y.—*Baldwin v. Lev*, 297 N.Y.S. 963, 163 Misc. 929.

11 C.J. p 244 notes 20, 21 [c].

29. Cal.—*Jones v. Rutherford*, 67 P. 2d 92, 8 Cal.2d 603.

30. U.S.—*U. S. v. Call*, C.C.A.Fla., 287 F. 520.

Ala.—*Hamilton v. Burgess*, 170 So. 346, 347, 27 Ala.App. 272, reversed on other grounds 170 So. 348, 233 Ala. 4, citing *Corpus Juris*.

Del.—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442.

D.C.—*Merlaud v. National Metropolitan Bank of Washington*, D. C., 84 F.2d 238, 65 App.D.C. 385, certiorari denied *Merlaud v. National Metropolitan Bank*, 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430.

violation of a statute is a nullity;³¹ but the nullity is relative in the sense that only one whose right is violated can invoke it;³² and the view has been taken that, even if an assignment is champertous, the trustee in a deed from the assignor which is subsequent to, and independent of, the assignment and which recognizes the obligation, is in no position to raise the question of champerty.³³

Where, by reason of its consideration or the matters contemplated by it, an agreement is in fact champertous, the courts will not allow its effect as a champertous agreement to be defeated by the form of contract adopted.³⁴ Whether an invalid provision against settlement by a client without the consent of his attorney vitiates the entire contract between attorney and client or may be rejected and the remainder of the contract preserved is discussed supra § 15.

The conflict of authority as to the effect of the interest of plaintiff's attorney in the suit, by reason of a contract for a contingent fee or otherwise, on the right or privilege of plaintiff to sue in forma pauperis is discussed in the C.J.S. title Costs § 148, also 15 C.J. p 234 notes 82-86.

§ 37. — As between Parties

A champertous contract may be rescinded by the parties.

Ky.—Rogers v. Samples, 268 S.W. 799, 207 Ky. 150.

Mo.—Mytton v. Missouri Pac. R. Co., App., 211 S.W. 111.

Wis.—Miller v. Anderson, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529. 11 C.J. p 268 note 63.

31. La.—Illg & Valentino v. Regan, 116 So. 673, 166 La. 70.

32. La.—Swords v. Cortinas, 4 La. App. 145.

33. Ill.—Aldrich v. Aldrich, 260 Ill. App. 333.

34. Ala.—Hamilton v. Burgess, 170 So. 346, 27 Ala.App. 272, reversed on other grounds 170 So. 348, 233 Ala. 4.

Mass.—Sherwin Williams Co. v. J. Mannos & Sons, 191 N.E. 438, 287 Mass. 304.

Mo.—Mytton v. Missouri Pac. R. Co., App., 211 S.W. 111. 11 C.J. p 269 note 84.

Court may go outside of writing to determine the true nature of the agreement.—Hudson v. Sheafe, 171 N.W. 320, 41 S.D. 475.

35. La.—Illg & Valentino v. Regan, 116 So. 673, 166 La. 70.

36. Nev.—Harwood v. Carter, 222 P. 280, 47 Nev. 334.

37. Wis.—Blixt v. Janowiak, 188 N.W. 89, 177 Wis. 175. 11 C.J. p 270 note 77.

Stare decisis

The rule that the claim or counterclaim of a party to an action must be dismissed, where it appears that such party has a champertous agreement with his attorney or some third person, has been so long recognized in the state that it will not be overruled, although it is contrary to the weight of authority in other jurisdictions.—Blixt v. Janowiak, supra.

Rescission of champertous agreement during trial

Where it appeared at the trial that plaintiffs had a champertous agreement with their attorneys made in another state, where such agreement did not bar recovery against defendants, but that their local attorneys had no knowledge thereof, it was not an abuse of the trial court's discretion to permit the rescission by the parties of that champertous agreement and the substitution therefor of a proper agreement without dismissing the action, the only effect of which would have been to cause delay incident to commencing a new action.—Blixt v. Janowiak, supra.

38. U.S.—New York Phonograph Co. v. National Phonograph Co., C.C. N.Y., 119 F. 544.

The parties to a champertous contract may rescind it, reconvey property transferred thereunder or thereby, and thus place matters in the same position as before the contract was entered into,³⁵ or they may cancel the contract and enter into a new and valid contract.³⁶ As stated infra § 47, the parties to the contract have no cause of action thereon, but, for services rendered, there may be a recovery on quantum meruit.

§ 38. — As to Defendant

Subject to statutory provisions stating the rights of defendant, a suit will be dismissed because of champerty only when the champerty is in an assignment or other agreement which is the basis of plaintiff's claim and is directly involved in the action, and not when the champerty is in a collateral agreement between plaintiff and his attorney or plaintiff and another layman.

Although a contrary view has been taken,³⁷ the rule is well settled that the fact that there is a champertous contract in relation to the prosecution of the suit between plaintiff and his attorney, or between plaintiff and another layman, in no wise affects the obligation of defendant to plaintiff; it is the champertous contract and not the right of action itself which the contract avoids, and, therefore, defendant cannot avail himself of the champertous agreement as a defense to the action.³⁸ However,

Ala.—Reichert v. Jerome H. Sheip, Inc., 85 So. 267, 268, 204 Ala. 86, citing *Corpus Juris*.

Ark.—Heyden v. Kennedy, 234 S.W. 162, 150 Ark. 359—Sims v. Stovall, 191 S.W. 954, 127 Ark. 186.

Minn.—Winders v. Illinois Cent. R. Co., 223 N.W. 291, 177 Minn. 1, reargument denied 226 N.W. 213, 177 Minn. 1.

Miss.—Calhoun County v. Cooner, 118 So. 706, 152 Miss. 100.

Mo.—Powell v. Bowen, 214 S.W. 142, 279 Mo. 280, set aside and cause reinstated April 1, 1920, case reargued May 10, 1920, and on May 18, 1920, former opinion again adopted.

Okl.—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29.

Pa.—Bedell v. Oliver H. Bair Co., 158 A. 651, 104 Pa.Super. 146.

Tenn.—Staub v. Sewanee Coal, Coke & Land Co., 205 S.W. 320, 140 Tenn. 505.

Tex.—Yellow Cab Co. v. McCloskey, Civ.App., 82 S.W.2d 1042, error dismissed—Kurz v. Soliz, Civ.App., 231 S.W. 424.

W.Va.—Harness v. Baltimore & O. R. Co., 103 S.E. 866, 86 W.Va. 284—Harrison v. Harman, 102 S.E. 224, 85 W.Va. 538.

11 C.J. p 270 note 78.

Corpus Juris is cited with approv-

where a champertous assignment, purchase, or agreement is not collateral to the claim sued on, but is the basis or foundation of plaintiff's suit, a judgment of dismissal or nonsuit should be rendered, even though defendant is a stranger to the champertous contract.³⁹

Plaintiff will not be permitted, by a claim of champerty, to defeat a meritorious defense, such as payment.⁴⁰ Where, by stipulation in a note and mortgage, the debtor is to pay the fee of the attorney for the creditor, but the creditor and the attorney enter into a champertous agreement to split the fee, any money exacted from the debtor under this arrangement in excess of what the attorney actually receives is the property of the debtor and is recoverable by him as for money had and received.⁴¹

A code provision that a party against whom a litigious right has been transferred may be released from liability by paying to the transferee the real price of the transaction, together with interest from its date, may, when applicable, be taken advantage

of;⁴² but it refers to conventional sales and not to judicial sales⁴³ or gratuitous transfers.⁴⁴

The provisions of the statute can be invoked only by the party to the suit against whom the right is to be exercised. The vendor of a litigious right has no standing to complain of the transfer.⁴⁵ However, the statutory provisions are not limited to the protection of defendant, but are available to plaintiff where he is the party against whom a litigious right has been transferred.⁴⁶ It seems that where both of the present parties to an action are assignees of the original litigants and each acquired an alleged litigious right, neither can claim the privilege provided by the statute.⁴⁷

To be effective, an election to exercise the option conferred by the statute must be made in due time and without unnecessary delay;⁴⁸ it can be made only during the continuation of the litigation;⁴⁹ but just how far short of final judgment one may go before seeking to avail himself of the provisions of the statute depends largely on the facts of the case.⁵⁰

al in *Perry v. M. M. Puklin Co.*, 123 A. 28, 30, 100 Conn. 104.

Where defendant is protected against possibility of double recovery, he is not concerned with what is to become of the money which may be recovered of him, or with who is to pay the costs and expenses of the litigation.—*Tarrant American Sav. Bank v. Smokeless Fuel Co.*, 172 So. 603, 233 Ala. 507.

Conspiracy or bad faith

It has been indicated that the suit should be dismissed if the void contract with a third person relating thereto was executed with full knowledge of its contents and the suit was filed as the result of a conspiracy to bleed defendant and not by reason of a good faith grievance.—*Young v. Young*, 162 N.W. 993, 196 Mich. 316.

39. U.S.—*Jones v. Pettingill*, Porto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied *Pettingill v. Jones*, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536.

Del.—*Hannigan v. Italo-Petroleum Corporation of America*, 181 A. 4, 7 W.W.Harr. 180—*Hannigan v. Italo Petroleum Corporation of America*, 178 A. 589, 6 W.W.Harr. 442—*Gibson v. Gillespie*, 152 A. 589, 4 W.W.Harr. 331.

N.Y.—*Watertown Business Men's Ass'n v. Green*, 198 N.Y.S. 871, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 832.

S.D.—*Hudson v. Sheafe*, 171 N.W. 320, 41 S.D. 475.
Tenn.—*Staub v. Sewanee Coal, Coke*

& Land Co., 205 S.W. 320, 140 Tenn. 505.

W.Va.—*Irons v. Croft Hat & Notion Co.*, 104 S.E. 111, 86 W.Va. 685.

Wis.—*Wallach v. Rabinowitz*, 200 N.W. 646, 185 Wis. 115.

11 C.J. p 240 note 93, p 271 notes 80-83.

On intervention by plaintiff's attorney, after his client has settled with defendant, to recover his fee or obtain a lien therefor, champerty on his part is a defense.

Ala.—*Fail v. Gulf States Steel Co.*, 87 So. 612, 205 Ala. 148.

Minn.—*Anker v. Chicago Great Western R. Co.*, 167 N.W. 278, 140 Minn. 63.

40. Ky.—*Caldwell v. Shepherd*, 6 T.B.Mon. 389.

11 C.J. p 271 note 79.

41. Ala.—*Hamilton v. Burgess*, 170 So. 348, 233 Ala. 4, reversing 170 So. 346, 27 Ala.App. 272.

42. La.—*Langston v. Shaw*, 85 So. 624, 147 La. 644.

8 C.J. p 611 note 94 [b]—11 C.J. p 239 note 67.

43. La.—*Bluefields SS. Co. v. Lala Ferreras Cangelosi SS. Co.*, 63 So. 96, 133 La. 424.

44. La.—*Independent Ice, etc., Mfg. Co. v. Anderson*, 30 So. 272, 106 La. 95.

45. La.—*Saint v. Martel*, 47 So. 413, 122 La. 93—*Kuck v. Johnson*, 38 So. 559, 114 La. 781—*Lane v. Cameron*, 36 La. Ann. 773.

46. La.—*Langston v. Shaw*, 85 So. 624, 147 La. 644.

47. U.S.—*Mohawk Oil Co. v. Layne*, D.C.La., 270 F. 851, 855.

In other words, "just as the purchaser of a litigious right does not succeed to the absolute and unqualified right of his author to prosecute the litigation to final judgment, neither does he succeed to the right of such author to rid himself of the claim of the assignee of the other original litigant."—*Mohawk Oil Co. v. Layne*, supra.

48. U.S.—*Mohawk Oil Co. v. Layne*, supra.

49. U.S.—*Mohawk Oil Co. v. Layne*, supra.

11 C.J. p 239 note 69.

50. U.S.—*Mohawk Oil Co. v. Layne*, supra.

Party may not await result of changing conditions on value of the thing in dispute and then seek to avail himself of this provision of the law. Particularly is this true of rights under an oil lease which, in the lapse of a short time, may prove to be of fabulous value or of no worth at all.—*Mohawk Oil Co. v. Layne*, supra.

On acquisition of knowledge of transfer

The party against whom the litigious right has been transferred must pay or tender the price as soon as he has been made acquainted with the transfer in order to take advantage of the provision. — *Duson v. Dupré*, 33 La. Ann. 1131.

Before rescission

Where the party against whom the litigious right has been trans-

§ 39. Conveyances of Land Held Adversely

The authorities differ as to whether a champertous conveyance is wholly void or void only as to the person in possession.

According to some authorities, a champertous conveyance of land held adversely by a third person at the time of the conveyance is void⁵¹ absolutely⁵² and for all purposes,⁵³ and even against strangers,⁵⁴ notwithstanding the sale is fair and bona fide.⁵⁵ Where part of the land included in a deed is possessed adversely and the deed is champertous to that extent, it is void pro tanto;⁵⁶ but according to other authorities the conveyance, although void and inoperative, as indicated infra § 40, as to the person in possession and his privies, is valid as to all other persons,⁵⁷ including, as stated infra § 41, the parties to the deed. A conveyance of land adversely possessed by a third person is, of course, not void for champerty in a state

where, at the time of the conveyance, the common law relating to champertous conveyances does not obtain and there is no statute making the conveyance champertous.⁵⁸ Also, where there is no adverse possession by a third person, there is, as stated supra § 31 a, e, no champerty in the conveyance, and obviously the deed is not invalid because of champerty.⁵⁹ Again, although the grantor has been ousted, if the grantee was entitled to the conveyance under a prior contract with the grantor, the deed is valid.⁶⁰

§ 40. — As to Person in Possession

A champertous conveyance is void as to the person in adverse possession and his privies.

In all jurisdictions wherein, under the law in force at the time, a conveyance of lands held adversely by a third person is champertous, it is void as to the person in possession and his privies,⁶¹

ferred does not tender the price before the sale of the litigious right is rescinded by the parties thereto, the action may proceed, the litigious right itself not having been destroyed by the unlawful sale thereof.—*Illg & Valentino v. Regan*, 116 So. 673, 166 La. 70.

51. Conn.—*Palmer v. Uhl*, 151 A. 355, 112 Conn. 125.
Ga.—*Driggers v. Moore*, 137 S.E. 14, 163 Ga. 754—*Booth v. Young*, 99 S.E. 886, 149 Ga. 276.
Ky.—*Moore v. Pauley*, 61 S.W.2d 1106, 250 Ky. 156—*Kentucky Union Co. v. Cornett*, 58 S.W.2d 655, 248 Ky. 360—*Elk Horn Coal Corporation v. Jacks Creek Coal Co.*, 43 S.W.2d 13, 240 Ky. 769—*Chrisman v. Greer*, 39 S.W.2d 676, 239 Ky. 373—*Jones v. O'Connell*, 35 S.W.2d 290, 237 Ky. 219—*Kentucky Union Co. v. Gilliam*, 31 S.W.2d 388, 235 Ky. 316—*Pioneer Coal Co. v. Asher*, 11 S.W.2d 116, 226 Ky. 488—*Cridler v. Kentenia-Catron Corporation*, 283 S.W. 117, 214 Ky. 353—*Colson's Adm'r v. Johnson*, 271 S.W. 1033, 208 Ky. 684—*Curry v. Cox*, 271 S.W. 700, 208 Ky. 653—*Riggsby v. Montgomery*, 271 S.W. 564, 208 Ky. 524—*Begley v. Erasme*, 265 S.W. 333, 205 Ky. 240, error dismissed *Begley v. Erasme*, 47 S.Ct. 342, 273 U.S. 655, 71 L.Ed. 825—*Irwin v. Westwood Real Estate & Development Co.*, 255 S.W. 546, 200 Ky. 760.
N.Y.—*Michael Shanley Co. v. Beery*, 272 N.Y.S. 568, 242 App.Div. 648.
Tenn.—*Scott v. Mangrum*, 7 Tenn. App. 437.
11 C.J. p 255 note 95 [a] (1).

Covenant of warranty in champertous deed is void.—*Asher v. Pioneer Coal Co.*, 26 S.W.2d 543, 233 Ky. 661.

Matter not validating deed

A conveyance of land, which was void at the time it was executed because the land was then in the adverse possession of defendant under a color of title without knowledge of forgery by his grantor, was not validated by defendant subsequently acquiring knowledge of the forgery in his chain of title.—*Tennis Coal Co. v. Henseley*, 250 S.W. 509, 198 Ky. 616.

52. N.Y.—*People v. Ladew*, 143 N.E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.
53. Tenn.—*Kitchen-Miller Co. v. Kern*, 91 S.W.2d 291, 170 Tenn. 10, 11 C.J. p 274 note 98.
54. Tenn.—*Scott v. Mangrum*, 7 Tenn.App. 437.
55. Tenn.—*Kitchen-Miller Co. v. Kern*, 91 S.W.2d 291, 170 Tenn. 10.
56. Conn.—*Milardo v. Branciforte*, 145 A. 573, 109 Conn. 693.
Ga.—*Youmans v. Edenfield*, 137 S.E. 288, 36 Ga.App. 529—*Edenfield v. Rountree*, 126 S.E. 781, 33 Ga.App. 444.
Ky.—*Marley v. Baumer*, 63 S.W.2d 919, 250 Ky. 682—*Mitchell v. Scot-tow*, 60 S.W.2d 971, 249 Ky. 391—*Dotson v. Pinson*, 47 S.W.2d 58, 242 Ky. 640—*Caddell v. Lovitt*, 32 S.W.2d 989, 236 Ky. 181—*Howind v. Scheben*, 25 S.W.2d 57, 233 Ky. 139—*Peters v. Hendricks*, 9 S.W.2d 1076, 225 Ky. 722—*Moren v. Houston*, 2 S.W.2d 667, 222 Ky. 785—*Coombs Land Co. v. Gross*, 288 S.W. 289, 216 Ky. 648.
11 C.J. p 272 note 90 [a].

57. U.S.—*Reed v. Atchison, C.C.A.* Okl., 276 F. 888.
Fla.—*Farrington v. Greer*, 113 So. 722, 94 Fla. 457.
Mass.—*St. Patrick's Religious, Edu-*

- cational & Charitable Ass'n v. Hale, 116 N.E. 407, 227 Mass. 175.
Okl.—*Miller v. Grayson*, 165 P. 133, affirmed 166 P. 1077, 64 Okl. 122.
58. Mich.—*Wagar v. Bowley*, 62 N.W. 293, 104 Mich. 38.
11 C.J. p 273 note 92.
59. Okl.—*Bowen v. Thompson*, 249 P. 1109, 120 Okl. 5.
11 C.J. p 273 note 93.
60. Conn.—*Harrall v. Leverty*, 50 Conn. 46, 47 Am.R. 608.
61. U.S.—*Reed v. Atchison, C.C.A.* Okl., 276 F. 888.
Ala.—*Findlay v. Hardwick*, 160 So. 336, 230 Ala. 197—*Gerald v. Hayes*, 87 So. 351, 205 Ala. 105.
Fla.—*Hancoy Holding Co. v. Lambright*, 133 So. 631, 101 Fla. 128—*Milton v. Danford*, 130 So. 435, 100 Fla. 761, 71 A.L.R. 586—*Morris v. McCaskill Inv. Co.*, 118 So. 490, 92 Fla. 1045—*Farrington v. Greer*, 113 So. 722, 94 Fla. 457, citing *Corpus Juris*—*Watkins v. Emmer-son*, 102 So. 10, 88 Fla. 86—*Berry v. Perdido Realty Co.*, 93 So. 171, 84 Fla. 134—*Bunch v. High Springs Bank*, 89 So. 121, 81 Fla. 450.
Ga.—*Edenfield v. Rountree*, 126 S.E. 731, 33 Ga.App. 444.
Ind.—*Bastin v. Myers*, 144 N.E. 425, 82 Ind.App. 325.
Ky.—*Martin v. White*, 197 S.W. 1079, 177 Ky. 653.
Mass.—*St. Patrick's Religious, Edu-cational & Charitable Ass'n v. Hale*, 116 N.E. 407, 227 Mass. 175.
Okl.—*Pryer v. Mahoney*, 65 P.2d 974, 179 Okl. 426—*Davis v. Manhard*, 45 P.2d 1095, 172 Okl. 85—*Slyman v. Alexander*, 259 P. 224, 126 Okl. 232—*Hurie v. Quigg*, 247 P. 677, 121 Okl. 80—*International Land Co. v. Smith*, 229 P. 601, 103 Okl. 101—*Sanders v. Leforce*, 219 P.

even though the conveyance is made in good faith and for a valuable consideration.⁶² As against the person in adverse possession, no right or title is passed or transmitted from the grantor to the grantee by the deed; title remains in the grantor,⁶³ and may be subsequently purchased from him by the adverse possessor⁶⁴ during the pendency of a suit against such possessor by the grantor for the benefit of the champertous grantee.⁶⁵ However, a champertous deed is void as to the disseisor only by reason of his actual seisin, and his holding adversely to the title of the grantor; the disseisor will be permitted to dispute the true title only so long as his disseisin continues; if he abandons his former possession, such abandonment will inure to the grantee and give the latter seisin; and if the grantee peaceably, lawfully, and without fraud or force, or the display thereof, enters under the deed and obtains possession of the land, even against the wishes of the disseisor, the grantee may avail himself of the title of the grantor obtained through the deed and by uniting that title with his own possession thus acquired may thereby complete in himself a title which will be good as against the former disseisor who is without title and is now out of possession.⁶⁶

The person in possession may waive the effect of champerty in a deed;⁶⁷ and where, at the time of the sale, he disclaims any interest in the property, he is estopped to question the deed.⁶⁸

§ 41. — As between the Parties

There is a division of authority on the question

925, 93 Okl. 128—Culver v. Diamond, 167 P. 223, 64 Okl. 271—Miller v. Grayson, 165 P. 133, affirmed 166 P. 1077, 64 Okl. 122—Youngblood v. Ross, 162 P. 494, 63 Okl. 41—Warner v. Wickizer, 160 P. 885, 61 Okl. 200.

Tenn.—Pope v. Craft, 1 Tenn.App. 356.

11 C.J. p 272 note 90.

Conveyance is void as between grantee and person in adverse possession

Okl.—Duncan v. Kelley, 229 P. 425, 103 Okl. 74—Foley v. Brown, 204 P. 267, 85 Okl. 1.

62. Ky.—Meade v. Ratliff, 118 S.W. 271, 133 Ky. 41, 134 Am.S.R. 467.

63. Ala.—Sylacauga Lodge, No. 200, F. & A. M., v. McGhee, 81 So. 689, 17 Ala.App. 52.

Conn.—Palmer v. Uhl, 151 A. 355, 112 Conn. 125.

Fla.—Bunch v. High Springs Bank, 89 So. 121, 81 Fla. 450—Vincent v. Hines, 84 So. 614, 79 Fla. 564.

Okl.—Wirick v. Nance, for Use and Benefit of Wimbish, 62 P.2d 997, 178 Okl. 180—Brady v. McCrory,

233 P. 734, 108 Okl. 40—Lackey v. Wagner, 213 P. 742, 89 Okl. 48—Miller v. Grayson, 165 P. 133, affirmed 166 P. 1077, 64 Okl. 122.

11 C.J. p 274 note 99.

64. Okl.—Pryer v. Mahoney, 65 P.2d 974, 179 Okl. 426—Davis v. Manhard, 45 P.2d 1095, 172 Okl. 85.

65. Okl.—Wirick v. Nance, for Use and Benefit of Wimbish, 62 P.2d 997, 178 Okl. 180—Brady v. McCrory, 233 P. 734, 108 Okl. 40—International Land Co. v. Smith, 229 P. 601, 103 Okl. 101—Lackey v. Wagner, 213 P. 742, 89 Okl. 48—Miller v. Grayson, 165 P. 133, affirmed 166 P. 1077, 64 Okl. 122.

66. Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

67. Okl.—Hutchison v. Brown, 167 P. 624, 66 Okl. 250.

68. Ky.—Irvin v. Mumford, 13 S.W. 2d 520, 227 Ky. 525.

69. Fla.—Berry v. Perdido Realty Co., 93 So. 171, 84 Fla. 134.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232—Culver v. Diamond, 167 P. 223, 64 Okl. 271—

whether a champertous conveyance is operative or inoperative between the parties thereto.

As between the grantor and the grantee and persons standing in legal privity with them, a champertous conveyance is, according to some authorities, valid and operative to pass title,⁶⁹ it being good at least by way of estoppel;⁷⁰ and, as a consequence of this doctrine, if the grantee buys in the adverse title, a purchaser from him cannot complain of the title.⁷¹ According to other authorities, however, a champertous conveyance has been held or stated to be of no effect between the parties and does not pass title to the grantee.⁷²

Rescission. As champertous conveyances are often made in the best of faith and the purchaser pays a valuable consideration therefor, it is just and proper that the parties should be allowed to rescind and put themselves in statu quo.⁷³

§ 42. — Acquisition of Title after Enactment of Permissive Statute

After the enactment of a statute permitting a conveyance despite adverse possession, a grantee in a prior void deed may acquire a valid title.

A title acquired by the grantee in a conveyance which was void by reason of an adverse possession, after the enactment of a statute permitting such conveyances, is valid.⁷⁴

§ 43. Objections

See *infra* §§ 44 and 45. Examine Pocket Parts for later cases.

Warner v. Wickizer, 160 P. 885, 61 Okl. 200.

11 C.J. p 274 note 95.

70. Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

Tenn.—Ferguson v. Prince, 190 S.W. 548, 136 Tenn. 543—Knox v. Keith, 9 Tenn.App. 614.

11 C.J. p 274 note 96, p 277 note 28.

71. Ky.—Meade v. Ratliff, 118 S.W. 271, 133 Ky. 411, 134 Am.S.R. 467.

11 C.J. p 274 note 97.

72. Conn.—Tierney v. Second Ecclesiastical Soc. of North Canaan, 130 A. 286, 103 Conn. 332.

Ga.—Youmans v. Edenfield, 137 S.E. 288, 36 Ga.App. 529—Edenfield v. Rountree, 126 S.E. 731, 33 Ga.App. 444.

Tenn.—Scott v. Mangrum, 7 Tenn. App. 437.

11 C.J. p 274 note 98.

73. Ky.—Doyle v. Cornett, 219 S.W. 1059, 187 Ky. 584.

74. Ky.—Meredith v. Kennedy, Litt. Sel.Cas. 516.

Mass.—McLoud v. Mackie, 56 N.E. 714, 175 Mass. 355.

§ 44. — Prohibited Contracts Generally

The authorities differ on the question whether an objection or defense that the contract sued on is champertous must, to be available, be pleaded.

In some jurisdictions an objection or defense that the contract sued on is champertous need not be pleaded,⁷⁵ but may be considered by the court of its own motion,⁷⁶ or on a suggestion first made during the reception of evidence at the trial.⁷⁷ In other jurisdictions the defense must be pleaded;⁷⁸ it cannot be introduced under the general issue, unless notice of such defense has been filed with the plea.⁷⁹ As stated in the C.J.S. title Pleading § 529, also 49 C.J. p 802 note 60, it is not available under a general denial; and it cannot be raised after judgment, as in a suit in equity to subject effects of defendant to the judgment.⁸⁰

§ 45. — Conveyances of Land Held Adversely

In some states the defense of champerty in a conveyance must be specially pleaded; but under the statutes of other states it may be proved under the general issue.

It has been held that in an action to recover possession of land, the defense that the conveyance to plaintiff was void for champerty must be especially pleaded and is waived by failure to set it up;⁸¹ but in some states, by virtue of express statutory provisions, champerty in a conveyance may be proved and relied on under the general issue, without being expressly or specially pleaded, in an action to recover the title or possession of land adversely held.⁸² A party may not at the same time assert that a deed is in trust and that it is champertous.⁸³

IV. REMEDIES

§ 46. Prohibited Contracts in General

See *infra* §§ 47–49. Examine Pocket Parts for later cases.

§ 47. — Right of Action

The courts will not aid either party to a champertous contract by enforcing or canceling the contract or by compelling a restoration of property parted with or money paid out under the agreement; but reasonable compensation for services rendered may be recovered on quantum meruit in the same manner as if the champertous agreement had never existed; and at common

law maintenance may be redressed by an action for damages.

A champertous agreement cannot form the basis of a cause of action between the parties thereto;⁸⁴ the courts will not enforce⁸⁵ or cancel⁸⁶ the agreement, or supervise the division of profits thereunder;⁸⁷ and, according to the weight of authority, they will not compel the restoration of property parted with or money paid out under the agreement.⁸⁸ In some cases, however, involving champertous contracts between attorney and client, the

75. U.S.—General Film Co. v. Sampliner, Ohio, 252 F. 443, 164 C.C.A. 367.

11 C.J. p 271 note 85.

76. U.S.—Jones v. Pettingill, Porto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied Pettingill v. Jones, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536.

77. Wis.—Decker v. Becker, 128 N.W. 67, 143 Wis. 542.

78. Okl.—Ewart v. Boettcher, 50 P. 2d 676, 174 Okl. 460.

Or.—In re Faling's Estate, 228 P. 321, 829, 113 Or. 6, modified on other grounds 231 P. 148, 113 Or. 6, citing *Corpus Juris*.

11 C.J. p 272 note 86.

79. Mich.—Randall v. Baird, 33 N.W. 506, 66 Mich. 312.

Utah.—Potter v. Ajax Min. Co., 61 P. 999, 22 Utah 273.

30. Tenn.—Long v. Page, 10 Humphr. 540—Hunt v. Lyle, 8 Yerg. 142—Markham v. Townsend, 2 Tenn. Ch. 713.

11 C.J. p 271 note 84.

31. N.Y.—Ten Eyck v. Whitbeck, 66 N.Y.S. 921, 55 App.Div. 165, affirmed 62 N.E. 1101, 170 N.Y. 564.

32. Ky.—Oliver v. Muncy, 89 S.W. 2d 617, 282 Ky. 164—Edwards v.

Clark, 88 S.W.2d 914, 261 Ky. 749—Stephenson Lumber Co. v. Hurst, 83 S.W.2d 48, 259 Ky. 747—Dotson v. Pinson, 47 S.W.2d 58, 242 Ky. 640—Arrington v. Sizemore, 43 S.W.2d 699, 241 Ky. 171—Howard v. Howard, 38 S.W.2d 441, 238 Ky. 533—Jones v. O'Connell, 35 S.W.2d 290, 237 Ky. 219—Coombs Land Co. v. Gross, 288 S.W. 289, 216 Ky. 648—Kentina-Puckett Corporation v. Simpson, 244 S.W. 699, 196 Ky. 246—Reynolds v. Binion, 197 S.W. 641, 177 Ky. 189.

11 C.J. p 275 note 3.

Only person in adverse possession is given the right to rely on the statute without pleading the facts.—Pioneer Coal Co. v. Asher, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 833, 212 Ky. 286.

83. Okl.—Davis v. Travis, 52 P.2d 72, 175 Okl. 21.

84. Ala.—Hamilton v. Burgess, 170 So. 348, 233 Ala. 4, reversing 170 So. 346, 27 Ala.App. 272.

Wis.—Bilxt v. Janowiak, 188 N.W. 89, 177 Wis. 175.

85. U.S.—U. S. v. Call, C.C.A.Fla., 237 F. 520.

D.C.—Merlaud v. National Metropolitan Bank of Washington, D.C.,

84 F.2d 238, 65 App.D.C. 385, certiorari denied Merlaud v. National Metropolitan Bank, 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430.

N.Y.—Mendelson v. Gogolick, 276 N.Y.S. 158, 243 App.Div. 115.

Pa.—Ames v. Hillside Coal & Iron Co., 171 A. 610, 314 Pa. 267—Cummings Oil & Gas Co. v. Barnsdell's Estate, 41 Pa.Co. 120.

Wis.—Miller v. Anderson, 196 N.W. 869, 183 Wis. 163, 34 A.L.R. 1529—Ellis v. Frawley, 161 N.W. 364, 165 Wis. 381.

11 C.J. p 242 note 10, p 254 note 88, p 263 note 63 [a], p 269 note 65.

Where judgment has been rendered enforcing champertous contract, it may be attacked as void for champerty in a collateral proceeding by one not a party or privy to the judgment.—Godfrey v. Com., 21 S.W. 1047, 15 Ky.L. 3—11 C.J. p 269 note 66.

86. D.C.—Roller v. Murray, 46 App.D.C. 246.

87. Okl.—Brown v. Durham, 53 P. 2d 551, 175 Okl. 500.

88. D.C.—Roller v. Murray, 46 App.D.C. 246.

Mo.—Williams v. Powell, App., 209 S.W. 607.

11 C.J. p 269 note 75.

attorney has been compelled to refund all the money collected under the agreement, less the necessary costs which he has expended;⁸⁹ and there may be circumstances apart from the champerty which entitle a client to equitable relief against the attorney with whom she entered into the champertous agreement, as where the client was ignorant and illiterate and the attorney was her brother-in-law and she looked to him for advice and guidance.⁹⁰

On the other hand, while a contrary doctrine is maintained by some decisions,⁹¹ according to the weight of authority, where an agreement between attorney and client is void for champerty, but the agreement and the services of the attorney are not otherwise illegal, the attorney may recover on quantum meruit fair and reasonable compensation for services rendered by him, in the same manner as if the champertous agreement had never existed.⁹² It has further been held that, if the client is insolvent and a suit at law would be fruitless, equity will take jurisdiction and decree compensation out of the property recovered.⁹³ In estimating the attorney's recovery, the jury should not take into consideration the compensation agreed on⁹⁴ further than to limit it to that amount,⁹⁵ the illegal agreement constituting no criterion as to the amount of the recovery.⁹⁶ Where a contract of retainer is rescinded as champertous at the instance of the client, and a reasonable fee is fixed by the court, the attorney cannot be required to perform additional services without further charge.⁹⁷

As stated supra § 38, a champertous contract does not prevent the maintenance of a suit against a

stranger to the contract unless the suit is founded on the contract.

An action will lie at common law to recover damages for maintenance.⁹⁸

§ 48. — Pleading and Evidence

To allege champerty or maintenance adequately and effectively, a pleading must show the elements thereof and its connection with the suit or the claim sued on. Champerty will not be presumed, but must be proved by competent and cogent evidence.

In an action for maintenance it is necessary to allege in the declaration or complaint the pendency of a suit, and to specify the court in which it is pending, together with time, place, and circumstances, so as to show the maintenance.⁹⁹

A particular petition may be so worded as not to show on its face that plaintiff has been willfully guilty of any act or combination of acts denounced by statute as barratry.¹

The necessity of pleading champerty as a defense is discussed supra § 44. A plea of champerty is insufficient where it does not clearly show that the champertous agreement is the basis of plaintiff's claim.²

The burden of proving champerty, when it is interposed as a defense, is on defendant.³ Where defendant claims that the transaction is within a statutory prohibition, he has the burden of showing that the case is within the statute,⁴ and plaintiff has the burden of showing that the case is within a statutory exception.⁵ A contract will be presumed to be lawful, rather than champertous.⁶ Also,

89. Mass.—Ackert v. Barker, 131 Mass. 436.

N.H.—Butler v. Legro, 62 N.H. 350, 13 Am.S.R. 573.

90. Ky.—Rogers v. Samples, 268 S.W. 799, 207 Ky. 150.

91. Me.—Orino v. Beliveau, 113 A. 260, 120 Me. 550.

11 C.J. p 269 note 67.

One attorney has been denied recovery from another attorney for the value of services performed after the solicitation of cases for the latter on the ground that the services were rendered in carrying out the invalid contract and could not be separated therefrom.—Ellis v. Frawley, 161 N.W. 364, 165 Wis. 381.

92. U.S.—Watkins v. Sedberry, Tenn., 43 S.Ct. 411, 261 U.S. 571, 67 L.Ed. 802, reversing, C.C.A., Stokes v. Sedberry, 275 F. 894, certiorari granted 42 S.Ct. 187, 257 U.S. 633, 66 L.Ed. 407.

Ala.—Farrell v. Betts & Betts, 81 So. 188, 16 Ala.App. 668.

Ky.—Rogers v. Samples, 268 S.W. 799, 207 Ky. 150.

Ohio.—Brown v. Bruner, 10 Ohio App. 314.

Or.—In re Faling's Estate, 228 P. 821, 113 Or. 6, modified on other grounds 231 P. 143, 113 Or. 6.

11 C.J. p 269 notes 68, 69.

93. Ky.—Rust v. Larue, 4 Litt. 411, 14 Am.D. 172.

94. Ala.—Holloway v. Lowe, 1 Ala. 246.

95. Ala.—Hamilton v. Burgess, 170 So. 348, 233 Ala. 4, reversing 170 So. 346, 27 Ala.App. 272.

11 C.J. p 269 note 72.

96. Ark.—Davis v. Webber, 49 S.W. 822, 66 Ark. 190, 74 Am.S.R. 81, 45 L.R.A. 196.

W.Va.—Dorr v. Camden, 46 S.E. 1014, 55 W.Va. 226, 65 L.R.A. 348.

11 C.J. p 269 note 73.

97. N.Y.—McCoy v. Gas Engine, etc., Co., 137 N.Y.S. 591, 152 App. Div. 642, affirmed 102 N.E. 1106, 208 N.Y. 631.

98. U.S.—Fletcher v. Ellis, Super.Ct. Ark., 9 F.Cas.No. 4,863a, Hempst. 300—Goodyear Dental Vulcanite Co. v. White, C.C.N.Y., 10 F.Cas. No. 5,602, 2 N.J.Law J. 150.

11 C.J. p 275 note 7.

99. U.S.—Fletcher v. Ellis, Super.Ct. Ark., 9 F.Cas.No.4,863a, Hempst. 300—Goodyear Dental Vulcanite Co. v. White, C.C.N.Y., 10 F.Cas. No.5,602, 2 N.J.Law J. 150.

11 C.J. p 275 note 12.

1. Tex.—Tunstill v. Grisham, Civ. App., 228 S.W. 272.

2. Del.—Hannigan v. Italo Petroleum Corporation of America, 178 A. 589, 6 W.W.Harr. 442.

3. Ky.—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 88.

4. N.Y.—Watertown Business Men's Ass'n v. Green, 193 N.Y.S. 871, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 832.

5. S.D.—Hudson v. Sheafe, 171 N.W. 320, 41 S.D. 475.

6. Ky.—Morgan v. Big Woods Lum-

champerty will not be inferred without strong proof.⁷ The admissibility of evidence is governed by the rules relating to civil actions in general.⁸

§ 49. — Questions of Law and Fact and Instructions

Questions of fact should be determined as such, under proper instructions, and not as matters of law.

Where champerty is interposed as a defense, or as ground for dismissal of the action, questions of fact, such as the question of good faith, should be determined by the trier of facts;⁹ and, if the action is tried before a jury, proper instructions relating to the defense may be given.¹⁰ A contract will not be held champertous as a matter of law where, on its face, it does not indicate champerty and there is testimony which, if accepted as true, shows that there is no champerty or anything akin thereto in the contract.¹¹

§ 50. Conveyances of Land Held Adversely

See *infra* §§ 52-60. Examine Pocket Parts for later cases.

ber Co., 249 S.W. 329, 198 Ky. 33.

11 C.J. p 276 note 15.

7. Ky.—Payne v. Munger, 1 Ky.Op. 388.

Evidence held sufficient

(1) To establish the champertous character of a contract.—Chreste v. Louisville Ry. Co., 191 S.W. 265, 173 Ky. 486—11 C.J. p 276 note 16 [a].

(2) To sustain a finding that an attorney's contract of employment was not champertous and void.—Scharmann v. Union Pac. Ry. Co., 175 N.W. 554, 144 Minn. 290.

(3) To sustain a finding that the attorney for defendant in a prior suit did not agree to pay costs, in case the defense failed, so as to render his contract of employment champertous.—Jones v. Jones, 63 S.W.2d 146, 333 Mo. 478, 90 A.L.R. 219.

(4) To show that an assignment was made for the purpose of suing on the claim.—Watertown Business Men's Ass'n v. Green, 193 N.Y.S. 371, 120 Misc. 509, affirmed 203 N.Y.S. 958, 208 App.Div. 332.

(5) To show that an attorney did not buy a note as a means of oppression or annoyance so as to make the purchase unlawful.—Stieler v. Pearson, 244 N.W. 507, 260 Mich. 174.

Evidence held insufficient

(1) To prove champerty.—Payne v. Munger, 1 Ky.Op. 388.

(2) To sustain a finding that a layman, acting as agent of intervener, a lawyer, did not solicit plaintiff to employ intervener as his attorney in a personal injury action.—Anker v. Chicago Great Western R. Co., 167 N.W. 278, 140 Minn. 63.

(3) To establish that the note and trust deed sued on by an attorney were purchased by him with the intention of bringing suit thereon.—Crawford v. Engler, 21 P.2d 460, 131 Cal.App. 374.

(4) To show that an attorney had abandoned the practice of law, so as to be permitted to purchase a note with the intent of bringing suit thereon.—Stieler v. Pearson, 244 N.W. 507, 260 Mich. 374.

8. Evidence held admissible

In a proceeding to determine an attorney's right, under a contract with his client alleged to be champertous because of an agreement to pay costs to a portion of the proceeds of a judgment, the testimony of another attorney that, on being consulted by such client and requested to pay costs of the proposed action, he had refused so to do was admissible.—Taylor v. Perkins, 170 S.W. 409, 183 Mo.App. 204.

Evidence held inadmissible

Evidence as to the ability of plain-

§ 51. — Between the Parties in General

Remedies between the parties to a champertous conveyance are considered in the next two sections.

§ 52. — Action on Covenants

No action is maintainable on the covenants in a champertous and void conveyance.

A grantee in a conveyance which is champertous and void has no right of action on the covenants contained therein.¹²

§ 53. — Equitable Remedies

Subject to certain limitations, equitable remedies are sometimes allowed between the parties to champertous conveyances.

Although there are cases holding the contrary,¹³ a rescission of a conveyance or of a contract to convey will be decreed in chancery, where it is void for champerty and maintenance, although the parties are in *pari delicto*; adverse possession alone is sufficient cause for rescission.¹⁴ Similarly, restoration may be compelled where, after a decree rescinding a contract, the vendee surrenders to the vendor, which decree is subsequently reversed and the original contract confirmed.¹⁵ Also, according to some authorities, a grantee in a champertous

tiff in a personal injury suit to pay for the services of a physician is not relevant to the issue as to whether or not the contract with his attorney was champertous.—Beckles v. Boston El. R. Co., 101 N.E. 145, 214 Mass. 311.

9. Wis.—Wallach v. Rabinowitz, 200 N.W. 646, 135 Wis. 115.

10. Instruction held to be in proper form

Ky.—Chreste v. Louisville Ry. Co., 191 S.W. 265, 173 Ky. 486.

11. Minn.—Holloway v. Dickinson, 163 N.W. 791, 137 Minn. 410, affirmed Dickinson v. Stiles, 38 S.Ct. 415, 246 U.S. 631, 62 L.Ed. 908.

12. U.S.—Edgemont Coal Co. v. Asher, D.C.Ky., 298 F. 1000.

Ky.—Pioneer Coal Co. v. Asher, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 833, 212 Ky. 286.

Tenn.—Kitchen-Miller Co. v. Kern, 91 S.W.2d 291, 170 Tenn. 10.

11 C.J. p 276 note 19.

Dictum to contrary see Farrington v. Greer, 113 So. 722, 94 Fla. 457.

13. Ala.—Sellers v. Knight, 64 So. 329, 185 Ala. 96.

Tenn.—Ruffin v. Johnson, 5 Heisk. 604.

14. Ky.—Bryant v. Hill, 9 Dana 67 —Williams v. Carter, 3 Dana 198.

11 C.J. p 276 note 21.

15. Ky.—Castleman v. Combs, 7 T.B.Mon. 273.

deed, who, at the time he took the deed, had no knowledge of the adverse possession, may, in equity, maintain a suit against the grantor for recovery of the purchase price;¹⁶ but he may do so only within the period of time prescribed by the statute of limitations;¹⁷ and, unless induced by fraudulent representation or concealment, his ignorance of the adverse possession does not prevent the running of the statute.¹⁸ According to other authorities, a court of equity will not interfere either to compel the vendor to refund the purchase money, or to enjoin him from prosecuting his action for it against the vendee, but will leave the parties to their remedies, if any, at law,¹⁹ unless the vendor has made fraudulent representations in regard to the property at the time of sale.²⁰

An action to foreclose a mortgage which was given while the property mortgaged was held adversely by a third person cannot be maintained until the mortgagor has actually recovered possession.²¹

§ 54. — As against Occupant in General

The party to a champertous deed who has the title and right of entry requisite to the maintenance of an action of ejectment against the adverse occupant is the grantor and not the grantee; but in most jurisdictions the grantor may sue for the benefit of the grantee.

On performance of such conditions precedent as may obtain in the particular state, such as the abandonment or rescission of the champertous contract,²² the grantor in a champertous conveyance

may maintain in his own name an action of ejectment or other action to recover possession of the land from the adverse occupant.²³ This he may do in his own behalf;²⁴ or, in most jurisdictions, for the benefit of the grantee;²⁵ but where the conveyance is deemed void as between the parties, as well as against the person in adverse possession, no action lies for the benefit of the grantee.²⁶ On the other hand, an action to recover possession from the person holding it adversely may not be brought in the name of the grantee alone;²⁷ and in some states it may be brought only in the name of the grantor and not in the name of the grantee;²⁸ but under the jurisprudence of other states it may be brought in the names of both.²⁹

Unless the grantee is authorized by a statute in force at the time to sue in the name of the grantor as a matter of course and without obtaining the consent of the grantor,³⁰ the permission of the grantor is requisite to the bringing of a suit by the grantee in the name of the grantor and he cannot be compelled by the grantee to grant such permission or bring suit himself.³¹

§ 55. — Defenses

The defenses available may vary in different classes of actions between different parties.

It is no defense to an action for the recovery of land adversely held that plaintiff has previously made a champertous conveyance of it; such an unlawful conveyance is only a defense where it is itself the foundation of the action;³² but, under a

16. Tenn.—Kitchen-Miller Co. v. Kern, 91 S.W.2d 291, 170 Tenn. 10.

17. Tenn.—Kitchen-Miller Co. v. Kern, supra.

18. Tenn.—Kitchen-Miller Co. v. Kern, supra.

19. Ky.—Miller v. Mulvey, 7 Ky.L. 40.

N.Y.—Woodworth v. Janes, 2 Johns. Cas. 417.

11 C.J. p 276 note 23.

20. Ky.—Miller v. Mulvey, 7 Ky.L. 40.

21. N.Y.—Mackenzie v. Augimeri, 205 N.Y.S. 462, 210 App.Div. 156—Second Nat. Bank v. Calvert, 274 N.Y.S. 393, 152 Misc. 884.

11 C.J. p 276 note 25 [c].

22. Ky.—Holliday v. Tennis Coal Co., 286 S.W. 773, 215 Ky. 551—Doyle v. Cornett, 219 S.W. 1059, 187 Ky. 584.

11 C.J. p 277 notes 30 [a], 32.

23. Conn.—Morehouse v. Wood, 105 A. 349, 93 Conn. 113.

Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

Ky.—Begley v. Erasme, 265 S.W.

833, 205 Ky. 240, error dismissed Begley v. Erasme, 47 S.Ct. 342, 273 U.S. 655, 71 L.Ed. 825.

Okl.—Drennan v. Harris, 170 P. 500, 67 Okl. 313, denying rehearing 161 P. 781, 67 Okl. 313—Buell v. U. Par-har-ha, 159 P. 507, 60 Okl. 79, 11 C.J. p 277 note 30.

24. Conn.—Palmer v. Uhl, 151 A. 355, 112 Conn. 125.

25. Conn.—Palmer v. Uhl, supra—Morehouse v. Wood, 105 A. 349, 93 Conn. 113.

Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232—Harjo v. Owensby, 169 P. 875, 66 Okl. 315—Miller v. Grayson, 165 P. 133, affirmed 166 P. 1077, 64 Okl. 122.

11 C.J. p 277 note 27.

26. Ky.—Le Moyné v. Neal, 181 S. W. 1119, 168 Ky. 292.

Wis.—Wentworth v. Abbetts, 46 N. W. 1044, 78 Wis. 63.

11 C.J. p 277 note 26.

27. Okl.—Cox v. Fowler, 283 P. 995, 141 Okl. 110.

28. Fla.—M. & M. Auto Parts Co. v. Riddle, 136 So. 437, 102 Fla. 598—Milton v. Danford, 130 So. 435, 100 Fla. 761, 71 A.L.R. 586—Tilman v. Niemira, 127 So. 855, 99 Fla. 833—Farrington v. Greer, 113 So. 722, 94 Fla. 457.

Ga.—Driggers v. Moore, 137 S.E. 14, 163 Ga. 754.

Ky.—Campbell v. Schorr, 5 S.W.2d 278, 224 Ky. 1—Dowell v. Dillon, 199 S.W. 6, 178 Ky. 581.

11 C.J. p 262 note 82, p 274 note 99, p 276 note 25.

29. Okl.—Crawford v. Le Fevre, 61 P.2d 196, 177 Okl. 508.

30. Privilege is not transferable and it may be exercised only by the first grantee and not by a grantee from him.—People v. Ladew, 143 N. E. 238, 237 N.Y. 413, reversing 197 N.Y.S. 937, 204 App.Div. 903.

31. Conn.—Palmer v. Uhl, 151 A. 355, 112 Conn. 125.

32. Okl.—Culver v. Diamond, 167 P. 223, 64 Okl. 271.

11 C.J. p 277 note 33.

tatute providing that an action of ejectment may be brought in the name of the real owner to recover the title to, or possession of, the land, even though plaintiff may have obtained his title by a conveyance from a grantor not in possession where, pending an action of ejectment, plaintiff executes a conveyance of the land in controversy, defendant may avail himself of such fact in defense of the action.³³

In an action by two plaintiffs to establish joint ownership with defendants, the fact that the deed held by one plaintiff is champertous is not a defense against the claim of the other plaintiff whose title, if any, was inherited.³⁴

The grantee may set up, as against the grantor suing for the purchase price, that the deed does not pass title.³⁵

§ 56. — Rights of Occupant in General

The fact of champerty does not authorize a person in adverse possession to sue in equity to avoid a deed or, after he has lost possession, to bring an action of ejectment.

The person in possession of land cannot sustain a bill in equity for the avoidance of a deed executed to another by a person claiming adversely to the tenant, on the ground that the deed is void in consequence of his adverse possession.³⁶ Also, although there may have been champerty, a former occupant without title may not, after he has lost possession in a lawful manner, bring an action of ejectment against the person in possession.³⁷

§ 57. — Action for Penalty

A statutory penalty for selling or purchasing a pretended title is not recoverable from a person who sold or purchased land without knowledge of adverse possession thereof.

A person who sells or purchases land without knowledge that there is a subsisting adverse possession is not liable to a statutory penalty for selling or purchasing a pretended title.³⁸

§ 58. — Rights of Third Persons

Champerty in a conveyance or contract cannot be complained of by third persons without title, interest, or possession.

Third persons who have neither title to, nor possession of, the property involved and no interest in a champertous transaction, cannot be heard to object to a conveyance or contract on the ground that it is tainted with champerty.³⁹

§ 59. — Pleading and Evidence

The party who relies on champerty to defeat a deed has the burden of proving it by clear and convincing evidence. The invalidity of the conveyance need not be pleaded by the grantor in an action by him against the adverse occupant.

An action against a person in adverse possession may be brought by the grantor in a champertous conveyance without pleading the invalidity of the conveyance.⁴⁰ When it has been apprehended that a deed might be attacked on the ground of an adverse holding at the time it was made, not infrequently counts on the title of the grantor and of the grantee have been inserted in the declaration, so that if the suit should fail as to the one it might succeed as to the other.⁴¹ Whether the adverse occupant, in an action against him by the grantee, must plead champerty specially, in order to take advantage of it, is discussed in § 45 supra.

Ordinarily, the burden of proving that a deed in claimant's chain of title is void for champerty, on the ground that it was executed by the grantor when the land was adversely held, is on him who relies on such fact;⁴² every presumption is in favor of a possession in subordination to the title of the true owner.⁴³ In the absence of evidence of knowledge of a pending suit affecting the property on the part of the vendee or of a record of his conviction for violating a statute making it an offense to take a conveyance from a person not in possession while the land is the subject of controversy by suit, the

Action in name of grantor for benefit of grantee

1. Okl.—McGrath v. Rorem, 252 P. 418, 123 Okl. 163.
2. Ala.—Burnett v. Roman, 68 So. 353, 192 Ala. 188.
3. Ky.—Mounce v. Hargis, 278 S. W. 107, 211 Ky. 761.
4. Ga.—Edenfield v. Rountree, 126 S.E. 731, 33 Ga.App. 444.
5. N.Y.—Keneda v. Gardner, 4 Hill 469.
6. 1 C.J. p 278 note 35.
7. Fla.—Farrington v. Greer, 113 So. 722, 94 Fla. 457.
8. 1 C.J. p 278 note 36.

9. Conn.—Sherwood v. Barlow, 19 Conn. 471.
10. Me.—Varrell v. Holmes, 4 Me. 163.
11. Mass.—Brinley v. Whiting, 5 Pick. 348.
12. N.Y.—Pepper v. Haight, 20 Barb. 429.
13. 11 C.J. p 278 note 37.
14. Ky.—Travis v. Bruce, 189 S.W. 939, 172 Ky. 390.
15. 11 C.J. p 278 note 40.

Corpus Juris is cited in Harrison v. Harman, 102 S.E. 224, 225, 85 W. Va. 538.

16. Tenn.—Witt v. Siler, 12 Tenn. App. 116.
17. 11 C.J. p 277 note 31.
18. Ga.—Pitts v. McWhorter, 3 Ga. 5, 46 Am.D. 405.
19. N.Y.—Jackson v. Leggett, 7 Wend. 377.
20. Tenn.—Augusta Mfg. Co. v. Vertrees, 4 Lea 75.
21. 11 C.J. p 277 note 29.
22. Ala.—Wainwright v. Marbury Lumber Co., 90 So. 315, 206 Ala. 559.
23. 11 C.J. p 278 note 41.
24. N.Y.—Jackson v. Sharp, 9 Johns. 163; 6 Am.D. 267.
25. 11 C.J. p 258 note 27.

presumption is that he had no such knowledge,⁴⁴ but, on the other hand, it will be presumed that the seller of land knew whether or not a third person was in adverse possession of it, and the burden is on him to prove the contrary.⁴⁵ A party who, to defeat a plea of champerty in a deed, claims that the deed, although executed during adverse possession, was executed in pursuance of a contract to convey, entered into prior to adverse possession, has the burden of showing the prior contract or satisfactorily accounting for its loss.⁴⁶

The facts necessary to render a conveyance champertous must be established by clear and convincing evidence.⁴⁷

§ 60. — Questions of Law and Fact and Instructions

Controverted questions of fact should be submitted

44. Okl.—*Bilby v. Brockman*, 155 P. 257, 55 Okl. 714—*Jennings v. Brown*, 94 P. 557, 20 Okl. 294.

45. N.Y.—*Etheridge v. Cromwell*, 8 Wend. 629—*Lane v. Shears*, 1 Wend. 433.

46. Ky.—*Wallace v. Neal*, 11 S.W.2d 1002, 227 Ky. 30.

47. Ky.—*Phillips v. American Ass'n*, 82 S.W.2d 456, 259 Ky. 402—*Fordson Coal Co. v. Wells*, 53 S.W.2d 564, 245 Ky. 291—*Fordson Coal Co. v. Mills*, 27 S.W.2d 382, 234 Ky. 64—*Pond Creek Coal Co. v. Hatfield*, 16 S.W.2d 442, 228 Ky. 806—*Lanham v. Huff*, 14 S.W.2d 402, 228 Ky. 139—*Comb v. Virginia Iron, Coal & Coke Co.*, 245 S.W. 896, 197 Ky. 476—*Miller v. Edwards*, 220 S.W. 1056, 187 Ky. 827.

11 C.J. p 258 note 26.

Failure to show character of possession

A quitclaim deed by the record owner of land, who was out of possession, cannot be deemed champertous, where the character of the possession at the time of the execution of the deed is not shown.—*Pines v. Traktman*, 178 N.Y.S. 90, 189 App. Div. 904, 109 Misc. 680.

Evidence held sufficient

(1) To establish champerty. Ky.—*Smith v. Bryant*, 86 S.W.2d 1022, 260 Ky. 820—*Jones v. O'Connell*, 35 S.W.2d 290, 237 Ky. 219. Okl.—*Davis v. Manhard*, 45 P.2d 1095, 172 Okl. 85.

(2) To sustain verdict for plaintiff in action defended on the ground of champerty.—*Weber v. Teague*, 149 S.W. 963, 149 Ky. 681.

(3) To establish that defendants held possession of land for the use and benefit of, and not adverse to, heirs of an Indian allottee.—*McKoy v. Keel*, 18 P.2d 277, 161 Okl. 258.

(4) To show that one in possession

of land when it was conveyed to another was claiming under a deed.—*Begley v. Erasme*, 265 S.W. 833, 205 Ky. 240, error dismissed *Begley v. Erasme*, 47 S.Ct. 342, 273 U.S. 655, 71 L.Ed. 825.

(5) To show that defendant had been in actual possession of land under claim of title during the time when plaintiff's predecessor claimed to have obtained title, and when plaintiff purchased at bankruptcy sale of such predecessor's interest in the land.—*Anderson v. Daugherty*, 207 S.W. 474, 182 Ky. 800.

Evidence held insufficient

(1) To establish that deed executed to plaintiff conveying land which had been more or less unoccupied for several years prior thereto, and which had been used as free range for stock by people living in neighborhood, was in violation of champerty laws.—*Street v. Dexter*, 77 P.2d 707, 182 Okl. 360.

(2) To show that conveyance was champertous.

U.S.—*Wells v. Fitzgerald*, C.C.A.Ky., 297 F. 586.

Ky.—*Fordson Coal Co. v. Mills*, 27 S.W.2d 283, 234 Ky. 64.

(3) To show actual possession.—*Saranac Land, etc., Co. v. Roberts*, 109 N.Y.S. 547, 125 App.Div. 333, affirmed 88 N.E. 753, 195 N.Y. 303.

(4) To establish a claim that, at the date of a conveyance, plaintiffs were holding adversely under oral contracts.—*Comb v. Virginia Iron, Coal & Coke Co.*, 245 S.W. 896, 197 Ky. 476.

Agreed statement of facts held not to show champerty

Okl.—*Hutchison v. Brown*, 167 P. 624, 66 Okl. 250.

To avoid a deed

(1) To avoid deed because it was executed in violation of statute mak-

ing the buying of land held in adverse possession a misdemeanor, there must be evidence showing that at time of execution of deed grantor had not taken rent from lands conveyed for space of one year and that lands were held adversely to grantor by party seeking to avoid deed, or those under whom he claimed. It must be shown that grantee had knowledge of pendency of suit affecting land conveyed by deed at time of execution thereof.—*Courtney v. Worley*, 74 P.2d 370, 181 Okl. 399.

(2) A deed was not champertous and void under statutes, where there was no showing that grantor had not collected rents within a year preceding execution of deed, and where it was not shown that grantee knew of pendency of suit at time of execution of deed.—*Courtney v. Worley*, supra.

48. Ky.—*Pioneer Coal Co. v. Asher*, 35 S.W.2d 285, 237 Ky. 254—*Davis v. Davis*, 277 S.W. 1025, 211 Ky. 711—*Bialock v. Darnell*, 229 S.W. 1039, 191 Ky. 258.

49. Ky.—*Oliver v. Muncy*, 89 S.W.2d 617, 262 Ky. 164—*Deupree v. Walker*, 72 S.W.2d 732, 255 Ky. 30.

50. Ky.—*Cherry Bros. v. Tennessee Cent. Ry. Co.*, 299 S.W. 1099, 222 Ky. 79—*Tennis Coal Co. v. Sackett*, 190 S.W. 130, 172 Ky. 729, Ann. Cas.1917E 629.

11 C.J. p 275 note 4.

Whether there was open and notorious possession or not is a question for the determination of the jury.—*Cardwell v. Sprigg*, 1 B.Mon., Ky., 369, 7 Dana 36.

51. Ky.—*Meade v. Ratliff*, 118 S.W. 271, 133 Ky. 411, 134 Am.S.R. 467.

52. Ky.—*Irvin v. Mumford*, 13 S.W. 2d 520, 227 Ky. 525.

53. Ky.—*Baley v. Deakins*, 5 B.Mon. 159.

An instruction dealing with a disclaimer of title fails to require the jury to believe that the vendee the person in possession is erroneous where it made the purchase in reliance on the disclaimer.⁵⁴

V. CRIMINAL RESPONSIBILITY

61. Offenses

Not only is champerty a common-law offense, but champerty or maintenance or some particular form thereof is a statutory offense in some jurisdictions.

Champerty is an offense at common law;⁵⁵ and champerty or maintenance or some particular form thereof is an offense when it is within the application of a criminal statute of the jurisdiction where it is committed;⁵⁶ but, of course, a statute defining the crime of champerty must be applicable before a person may properly be found guilty of a violation thereof.⁵⁷

The gist of the offense, whether champerty or

maintenance, is an officious intermeddling in a suit which in no way belongs to the intermeddler.⁵⁸

§ 62. Prosecution and Punishment

To convict under a statute, a case within the statute must be alleged in the indictment or information and established by the evidence.

In a prosecution for a statutory offense, it is necessary for the state to allege⁵⁹ and prove a case within the application of the statute; and where the evidence is wholly insufficient, defendant's demurrer to the evidence or motion to direct a verdict in his favor should be sustained.⁶⁰ A criminal intent will not be presumed.⁶¹

CHAMPION. A combatant, a fighter, or one who engages in any contest; especially in ancient times, one who contended in single combat in behalf of another's honor, or rights, or sometimes, of his own; now one who acts or speaks in behalf of a person, or a cause; a defender or an advocate.¹

Champion of the king or queen. An ancient officer, whose duty it was to ride armed cap-a-pie, into Westminster Hall at the coronation, while the king was at dinner, and, by the proclamation of a herald, make a challenge "that, if any man shall deny the king's title to the crown, he is there ready to defend it in single combat." The king drank to him, and

sent him a gilt cup covered, full of wine, which the champion drank, retaining the cup as his fee.²

Another phrase: "Self-constituted champion of the red light."³

CHANCE.

As a Noun

It has been said that strictly or philosophically there is no such thing as chance;⁴ but the word is commonly understood to imply an absence of explainable or controllable causation,⁵ or a lack of knowledge;⁶ and, while it has not been adopted or defined as a law term, is not technical, and must be deemed used in a popular sense,⁷ it has never-

4. Ky.—Irvin v. Mumford, 13 S.W. 2d 520, 227 Ky. 525.

5. Cal.—Maryland Casualty Co. v. Fidelity & Casualty Co. of New York, 236 P. 210, 71 Cal.App. 492.

6. Del.—Hannigan v. Italo Petroleum Corporation of America, 178 A. 589, 6 W.W.Harr. 442.

1 C.J. p 278 notes 43, 44.

6. Del.—Hannigan v. Italo Petroleum Corporation of America, supra.

7. Me.—Hinckley v. Giberson, 151 A. 542, 129 Me. 308.

1 C.J. p 278 note 45, p 279 note 48.

Engaging in business of soliciting employment for lawyer

N.Y.—People v. Meola, 184 N.Y.S. 353, 193 App.Div. 487, 38 N.Y.Cr. 532.

7. Okl.—Stovall v. State, 187 P. 815, 17 Okl.Cr. 677—Pitt v. State, 180 P. 383, 16 Okl.Cr. 15.

Knowledge of the facts on the part of the purchaser is essential to constitute the statutory offense of buying lands of which the grantor has

not been in possession and the rents of which he has not taken for one year before the conveyance.—Belcher v. Belcher, 119 N.Y.S. 144, 134 App. Div. 726.

58. Okl.—Worrell v. Roxana Petroleum Corporation, 291 P. 47, 144 Okl. 297.
11 C.J. p 279 note 49.

59. Intent

Prior to an amendment of the New York statute so as to make intent an essential element of the offense, it was not necessary that an indictment for the purchase by an attorney of a chose in action should allege with what intent the claim was bought.—People v. Walbridge, 3 Wend., N.Y., 120—People v. Walbridge, 6 Cow., N.Y., 512.

Information held sufficient

Okl.—Pitt v. State, 180 P. 383, 16 Okl.Cr. 15.

60. Okl.—Stovall v. State, 187 P. 815, 17 Okl.Cr. 677—Pitt v. State, 180 P. 383, 16 Okl.Cr. 15.

Evidence held sufficient as to one count and insufficient as to another
Cal.—People v. Levy, 50 P.2d 509, 3 Cal.App.2d 763.

61. Cal.—Bulkeley v. State Bank, 8 P. 643, 68 Cal. 80.

1. La.—Egan v. Signal Pub. Co., 74 So. 558, 558, 140 La. 1069, quoting Webster New Int. D.

2. Black L.D.

3. La.—Egan v. Signal Pub. Co., 74 So. 558, 558, 140 La. 1069.

4. N.Y.—People v. Lavin, 71 N.E. 753, 179 N.Y. 164, 168, 66 L.R.A. 601, 1 Ann.Cas. 165.

5. Cal.—Mirabito v. San Francisco Dairy Co., 35 P.2d 513, 515, 1 Cal. 2d 460.

6. U.S.—Dillingham v. McLaughlin, N.Y., 44 S.Ct. 362, 363, 264 U.S. 370, 68 L.Ed. 742.

11 C.J. p 279 note 6 [a].

7. Mont.—Gordon v. Trevarthan, 34 P. 185, 186, 13 Mont. 387, 40 Am. S.R. 452.

theless been specifically defined as meaning an accident, casualty, fortuity, fortune or luck, or possibility, an event not calculated upon, an event without an assigned cause, an unexpected occurrence, hazard, risk, or the result or issue of uncertain and unknown conditions or forces, neither understandingly brought about by one's act nor preestimated by one's understanding, something that befalls, as the result of unknown or unconsidered forces, the unknown or undefined cause of events that to us are uncertain or not subject to calculation.⁸ In a particular connection, as when speaking of awards made by lot or chance, it has been held that tickets evidencing a participation in the scheme,⁹ and also registration numbers in a book when used in lieu of such tickets,¹⁰ constitute "chances." The word has been contrasted with, or distinguished from, "accident," see *Accident* 1 C.J.S. p 429 note 39, "design,"¹¹ and "doubt."¹²

Other phrases: "Beyond all reasonable chance of mistake,"¹³ "by lot, chance or drawing,"¹⁴ "'chance' at a prize,"¹⁵ "chance of prices," see C.J.S. title *Gaming* § 1, "game of chance," see C.J.S. title *Gaming* § 1, also 27 C.J. p 968 note 11-p 969 notes 17, 20-24, "last clear chance," see C.J.S. title *Negligence* § 136, also 45 C.J. p 984 note 82-p 988 note 3, "lot or chance,"¹⁶ "mixed game of chance and skill," see C.J.S. title *Gaming* § 1, also 27 C.J. p 969 note 19, "property sold or disposed of by chance,"¹⁷ and "resort to the determination of chance."¹⁸

As an Adjective

Chance-medley or *Chaud-medley*. A casual meeting or affray,¹⁹ a sudden affray;²⁰ a self-defense whereby a man protects himself from assault and the like, in the course of a sudden broil or quarrel, by killing him who assaults him; the accidental killing of a man in self-defense in a sudden encounter.²¹

Other phrases: "Chance bargain," see *Bargain* 9 C.J.S. p 1541 note 38, "chance policeman," see C.J.S. title *Municipal Corporations* § 568, and "chance verdict," see C.J.S. titles *New Trial* § 58, also 46 C.J. p 157 note 27-p 158 note 30, and *Trial* § 472, also 64 C.J. p 1033 note 8-p 1034 note 16, p. 1035 note 25-p 1037 note 37.

CHANCEL. In ecclesiastical law, the part of a church in which the communion table stands; it belongs to the rector or the impropiator.²²

CHANCELLOR. As the name given in some states to the judge or presiding judge of the court of chancery, see C.J.S. title *Judges* § 2, also 11 C.J. p 285 notes 39, 40.

The term is also used in some of the dioceses of the Protestant Episcopal Church in the United States to designate a member of the legal profession who gives advice and counsel to the bishop and other ecclesiastical authorities.²³ An officer bearing this title is to be found in some countries of

Wash.—*Goodman v. Cody*, 1 Wash. Terr. 329, 335, 34 Am.R. 808.
11 C.J. p 279 note 6 [a].

8. U.S.—*Public Clearing House v. Coyne*, Ill., 24 S.Ct. 789, 795, 194 U.S. 497, 48 L.Ed. 1092.

Cal.—*People v. Rehm*, 57 P.2d 238, 240, quoting *Corpus Juris*—*Mirabito v. San Francisco Dairy Co.*, 35 P.2d 513, 515, 1 Cal.2d 460.

Ga.—*Russell v. Equitable Loan & Security Co.*, 58 S.E. 881, 885, 129 Ga. 154, 12 Ann.Cas. 129, quoting *Webster Int. D.*

Ill.—*People v. Monroe*, 182 N.E. 439, 442, 349 Ill. 270, 85 A.L.R. 605.

Ohio.—*Stevens v. Cincinnati Times-Star Co.*, 73 N.E. 1058, 1060, 72 Ohio St. 112, 106 Am.S.R. 586.

Pa.—*Holt v. Wood*, 14 Pa.Co. 499, 501.

11 C.J. p 279 notes 2-6, p 280 notes 7-19.

9. Ala.—*Salomon v. State*, 27 Ala. 26, 30.

10. Tex.—*City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 699.

11. Ga.—*Russell v. Equitable Loan*

& Security Co., 58 S.E. 881, 885, 129 Ga. 154, 12 Ann.Cas. 129.

11 C.J. p 279 note 3 [a].

12. Ala.—*Bonner v. State*, 18 So. 226, 107 Ala. 97, 107.

13. "Beyond a reasonable doubt" contrasted

Ala.—*Bonner v. State*, 18 So. 226, 107 Ala. 97, 107.

11 C.J. p 279 note 2 [a].

14. U.S.—*Public Clearing House v. Coyne*, Ill., 24 S.Ct. 789, 795, 194 U.S. 497, 48 L.Ed. 1092.

15. Tex.—*City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 699.

16. U.S.—*Public Clearing House v. Coyne*, Ill., 24 S.Ct. 789, 795, 194 U.S. 497, 48 L.Ed. 1092.

Ohio.—*Stevens v. Cincinnati Times-Star Co.*, 73 N.E. 1058, 1060, 72 Ohio St. 112, 148, 106 Am.S.R. 586.

17. Conn.—*State v. Dorau*, 198 A. 573, 577, 124 Conn. 160.

18. Cal.—*Mirabito v. San Francisco Dairy Co.*, 35 P.2d 513, 515, 1 Cal. 2d 460—*Dixon v. Pluns*, 33 P. 268, 269, 98 Cal. 384, 35 Am.S.R. 180, 20 L.R.A. 698.

Mont.—*Gordon v. Trevathan*, 34 P.

185, 186, 13 Mont. 337, 40 Am.S.R. 452.

19. *Adams Gloss.*

20. *Black L.D.*

21. 4 *Blackstone Comm.* p 184.

Self-defense distinguished

It has been said that, strictly speaking, "chance-medley" is the killing of a man in a casual affray in self-defense, while "chaud-medley" is a homicide committed in the heat of an affray and while under the influence of passion; and so the two terms have been mutually distinguished, although it has also been said that the distinction is of no great importance.—*Black L.D.*

Misadventure distinguished

Black L.D., citing 4 *Blackstone Comm.* p 184.

11 C.J. p 280 note 22 [a].

22. *Black L.D.*

23. *Black L.D.*

Chancellor of a diocese

In ecclesiastical law, the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him.—*Black L.D.*, citing 1 *Blackstone Comm.* p 382 and 2 *Stephen Comm.* p 672—11 C.J. p 285 note 42 [a].

rope, and is generally invested with extensive political authority.²⁴

In England, besides being the designation of the chief judge of the court of chancery, the term is used as the title of several judicial officers attached to bishops or other dignitaries and to the universities.²⁵

In Scotch practice, the foreman of an assize or jury.²⁶

Chancellor of a cathedral. In English ecclesiastical law, one of the "quatuor personæ," or four chief dignitaries of the cathedrals of the old foundation. The duties assigned to the office by the statutes of the different chapters vary, but they are chiefly of an educational character, with a special reference to the cultivation of theology.²⁷

Chancellor of a university. As a governing officer of a university, see C.J.S. title Colleges and universities § 16, also 11 C.J. p 285 note 43.

In English law, the official head of a university.²⁸

Chancellor of the duchy of Lancaster. An officer who presides over the court of the duchy to judge and determine controversies relating to lands held of the king in right of the duchy of Lancaster.²⁹

Chancellor of the exchequer. In England, an officer who formerly sat in the court of exchequer and, with the rest of the court, ordered things for the king's benefit.³⁰

Chancellor of the order of the garter. An officer who seals the commissions and the mandates of the chapter and assembly of the knights, keeps the register of their proceedings, and delivers their acts

under the seal of their order.³¹

Chancellor's courts in the two universities. In English law, courts of local jurisdiction, resembling borough courts, in and for the two universities of Oxford and Cambridge in England.³²

Lord high chancellor. In England, the lord high chancellor is the highest judicial officer of the realm, and in point of precedency ranks above every temporal lord; he is also keeper of the great seal, a privy counsellor, and prolocutor of the house of lords.³³

Vice chancellor. In English law, a judge of the court of chancery, acting as assistant to the lord chancellor, and holding a separate court, from whose judgment an appeal lay to the chancellor.³⁴

CHANCER. To adjust according to the principles of equity, as would be done by a court of chancery.³⁵

As to the power of a bankruptcy court to chancer a bond see C.J.S. title Bankruptcy § 20, also 7 C.J. p 26 note 51 [b].

CHANCERY. A court formerly existing in England and still existing in several of the United States which possesses an extensive equity jurisdiction.³⁶ As a system of equitable jurisprudence see the C.J.S. title Equity § 1, also 21 C.J. p 22 note 1-p 31 note 66.

Chancery jurisdiction. As the judicial power to hear and determine all cases wherein the law by reason of its universality cannot afford relief, see the C.J.S. title Equity § 7 et seq., also 21 C.J. p 31 et seq.

Other phrases: "Chancery case,"³⁷ "chancery

1. Black L.D.

2. Black L.D.

3. Black L.D.

4. Black L.D.

5. Black L.D.

6. Bouvier L.D.

7. Cowell L.D.

8 C.J. p 285 note '46.

9. Black L.D.

10. Black L.D.

11. Adams Gloss.

Description and history of office

He is appointed by the delivery of the king's great seal into his custody. He may not be a Roman Catholic. He is a cabinet minister, privy counsellor, and prolocutor of the house of lords by prescription, but not necessarily, although usually, a peer of the realm, and vacates his office with the ministry by which

he was appointed. To him belongs the appointment of all justices of the peace throughout the kingdom. Being, in the earlier periods of English history, usually an ecclesiastic, (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience, visitor, in right of the crown, of the hospitals and colleges of royal foundation, and patron of all the crown livings under the value of twenty marks per annum in the king's books. He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses, and all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the supreme court of judicature, of which he is the head.—Black L.D.

34. Black L.D.

35. Me.—Brett v. Murphy, 14 A. 934, 80 Me. 358.

Vt.—James v. Smith, 1 Tyler 128, 136.

36. Bouvier L.D.

11 C.J. p 285 notes 49, 50.

37. Ohio.—Squire v. Bates, 5 N.E.2d 690, 691, 132 Ohio St. 161—Warner v. Mutual Bldg. & Inv. Co., 190 N.E. 143, 145, 128 Ohio St. 37—Oglesbee v. Miller, 181 N.E. 26, 27, 125 Ohio St. 223—Union Trust Co. v. Lessovitz, 171 N.E. 849, 851, 122 Ohio St. 406—McBride v. University Club, 146 N.E. 804, 805, 112 Ohio St. 69—In re Gurnea's Estate, 146 N.E. 308, 309, 111 Ohio St. 715—Forest City Inv. Co. v. Haas, 143 N.E. 549, 550, 110 Ohio St. 188—Gearhart v. Richardson, 142 N.E. 890, 892, 109 Ohio St. 418—In re Hawke, 140 N.E. 583, 585, 107 Ohio St. 341—Wagner v. Armstrong, 113 N.E. 397, 400, 93 Ohio St. 443—

cause,"³⁸ "chancery clerk's office,"³⁹ "chancery guardianship,"⁴⁰ "chancery proceeding [or proceedings],"⁴¹ and "chancery receiver," see the C.J.S. title Receivers § 1, also 11 C.J. p 286 note 53.

CHANGE.

As a Noun

An alteration, modification, or substitution of one thing for another;⁴² and in this sense the word has been contrasted with, or distinguished from, "establishment,"⁴³ "renovations," "repairs,"⁴⁴ and "technical alteration [of an instrument]," see C.J.S. title Alteration of Instruments § 46 a.

In another sense, bills, or gold or silver coins, or some of each, of lesser denominations, in amount of equal value.⁴⁵

In still another sense, as a contraction of "exchange," a fixed place where merchants meet, at certain hours, for the transaction of business with each other, subject to such general rules or understanding as they think proper to be governed by.⁴⁶

Phrases: "Change in,"⁴⁷ "change in compensation,"⁴⁸ "change in condition [or conditions],"⁴⁹ "change in decree,"⁵⁰ "change in interest,"⁵¹ "change in interest and possession,"⁵² "change in interest or title,"⁵³ "change in interest, title, or possession,"⁵⁴ "change in interest, title, possession, and use,"⁵⁵ "change in management,"⁵⁶ "change in occupancy,"⁵⁷ "change in or extension of . . . business,"⁵⁸ "change in [or of] possession,"⁵⁹ "change in the nature of its business,"⁶⁰ "change in the nature of the . . . interest,"⁶¹ "change in title,"⁶² "change of beneficiary,"⁶³ "change of character,"⁶⁴

In re Arrasmith's Estate, 7 N.E.2d 826, 827, 54 Ohio App. 391—Somers v. De Ran, 4 N.E.2d 267, 269, 53 Ohio App. 37—City Loan & Savings Co. v. Kyler, 198 N.E. 503, 504, 50 Ohio App. 390—Kochs v. Kochs, 197 N.E. 255, 256, 49 Ohio App. 327—Levenson v. Wolfson, 182 N.E. 111, 116, 42 Ohio App. 318—Colby v. Price, 177 N.E. 382, 39 Ohio App. 198.

33. Ohio.—Wasserstrom v. Folt, 181 N.E. 815, 124 Ohio St. 675.

39. Miss.—Johnson v. Board of Sup'rs of Yazoo County, 74 So. 321, 322, 113 Miss. 435.

40. N.Y.—In re De Saulles, 167 N.Y. S. 445, 453, 101 Misc. 447.

41. Ill.—Alexander Lumber Co. v. Kellerman, 192 N.E. 913, 916, 358 Ill. 207—Schwind v. Forester, 6 N.E.2d 898, 899, 289 Ill.App. 172.

Tenn.—Sloan v. Sloan, 295 S.W. 62, 64, 155 Tenn. 422.

42. U.S.—Cross v. Nee, D.C.Mo., 18 F.Supp. 589, 594.

Minn.—National Surety Co. v. Erlar, 220 N.W. 543, 546, 175 Minn. 14.

N.M.—Territory v. State Eastern R. Co., 110 P. 852, 15 N.M. 591, 597.

43. Iowa.—Jenkins v. State Highway Commission, 218 N.W. 258, 259, 205 Iowa 523.

44. Mass.—William A. Doe Co. v. City of Boston, 160 N.E. 262, 263, 262 Mass. 458.

45. Ill.—Murphy v. Peo., 104 Ill. 528, 535—Fishback v. Brown, 16 Ill. 74.

46. N.Y.—White v. Brownell, 2 Daly 329, 356, 4 Abb.Pr.N.S., 162.

47. Colo.—Hill v. Capitol Life Ins. Co., 14 P.2d 1006, 1008, 91 Colo. 300.

48. Ohio.—State ex rel. Boyd v. Tracy, 190 N.E. 463, 466, 128 Ohio St. 242.

49. U.S.—Pillsbury v. Alaska Packers Ass'n, C.C.A.Cal., 85 F.2d 758,

760—Bay Ridge Operating Co. v. Lowe, D.C.N.Y., 14 F.Supp. 230, 281—Atlantic Coast Shipping Co. v. Golubiewski, D.C.Md., 9 F.Supp. 315, 317, 318.

Ga.—Travelers' Ins. Co. v. Hurt, 167 S.E. 175, 176, 176 Ga. 153.

Mo.—State ex rel. Sei v. Haid, 61 S.W.2d 950, 953, 332 Mo. 1061—Winschel v. Stix, Baer & Fuller Dry Goods Co., App., 77 S.W.2d 488, 491.

Okl.—Commonwealth Mining Co. v. Atterberry, 22 P.2d 78, 79, 163 Okl. 294—Noble Drilling Co. v. Link, 17 P.2d 971, 972, 161 Okl. 238.

As affecting award under compensation laws, see the C.J.S. title Workmen's Compensation Acts § 854, also 71 C.J. p 1438 note 93—p 1445 note 87.

50. Held to mean a modification of or addition to decree with respect to subject matter which it decided.—Schneider v. Schneider, 125 So. 91, 92, 155 Miss. 621.

51. U.S.—Surratt v. Fire Ass'n of Philadelphia, C.C.A.S.C., 43 F.2d 467, 471.

52. Mich.—Contract & Investment Co. v. Home Ins. Co. of New York, 278 N.W. 69, 72, 283 Mich. 238.

53. U.S.—Royal Ins. Co. v. Bailey, C.C.A.Ky., 35 F.2d 916, 919.

Mo.—Terminal Ice & Power Co. v. American Fire Ins. Co., 194 S.W. 722, 725, 196 Mo.App. 241—Terminal Ice & Power Co. v. American Fire Ins. Co., App., 187 S.W. 564, 567.

54. Ga.—Hurley v. Girard Fire & Marine Ins. Co., 176 S.E. 785, 49 Ga.App. 823.

Wis.—De Keyser v. National Liberty Ins. Co. of America, 257 N.W. 673, 675, 216 Wis. 566, 97 A.L.R. 766.

55. Iowa.—McVay v. Western Grain Dealers' Fire Ins. Co., 252 N.W. 548, 549, 218 Iowa 402.

56. Wash.—Nearhoff v. Home Ins.

Co. of New York, 293 P. 427, 429, 162 Wash. 269.

57. Iowa.—Danelis v. Farm Property Mut. Ins. Ass'n of Des Moines, 239 N.W. 24, 25, 213 Iowa 352.

58. Tex.—James Contracting Co. v. Home Life & Accident Co., Civ. App., 245 S.W. 1004, 1008.

59. Ark.—American Ins. Co. v. Rector, 290 S.W. 367, 369, 172 Ark. 767.

Mo.—Hopson v. Pregge, 228 S.W. 859, 860, 206 Mo.App. 28—Terminal Ice & Power Co. v. American Fire Ins. Co., 194 S.W. 722, 724, 196 Mo.App. 241—Terminal Ice & Power Co. v. American Fire Ins. Co., App., 187 S.W. 564, 567.

Mont.—Brown v. Federal Surety Co., 3 P.2d 647, 652, 91 Mont. 389.

N.J.—Evans v. London Assur. Corporation, 151 A. 618, 616, 107 N.J.Law 183.

N.D.—Veum v. Stefferud, 196 N.W. 104, 105, 50 N.D. 371.

60. Mass.—Teale v. Rockport Granite Co., 112 N.E. 497, 498, 224 Mass. 20.

61. N.D.—Anderson v. U. S. Fire Ins. Co., 222 N.W. 609, 612, 57 N.D. 462.

62. Wash.—Richardson v. Superior Fire Ins. Co., 74 P.2d 192, 193, 192 Wash. 553.

63. Iowa.—Ehlerman v. Bankers' Life Co., 200 N.W. 408, 409, 199 Iowa 417.

Mass.—Goldman v. Moses, 191 N.E. 873, 874, 287 Mass. 393.

Mo.—Ryan v. Woman's Ben. Ass'n of Maccabees, 237 S.W. 224, 227, 209 Mo.App. 515.

Tenn.—Huttsell v. Citizens' Nat. Bank, 64 S.W.2d 188, 190, 166 Tenn. 598.

Wis.—First Wisconsin Nat. Bank of Milwaukee v. Roehling, 269 N.W. 677, 679.

64. U.S.—Monnier v. U. S., D.C.N.Y., 16 F.2d 812, 814.

change of circumstance [or circumstances],"⁶⁵ change of classification,"⁶⁶ "change of compensation,"⁶⁷ "change of condition [or conditions],"⁶⁸ change of condition or circumstances,"⁶⁹ "change of domicile,"⁷⁰ "change of existing lines and location,"⁷¹ "change of interest,"⁷² "change of judge,"⁷³ change of location,"⁷⁴ "change of occupation,"⁷⁵ change of ownership,"⁷⁶ "change of possession,"⁷⁷ change of residence,"⁷⁸ "change of residence or domicile,"⁷⁹ "change of site,"⁸⁰ "change of title,"⁸¹ change of title or interest,"⁸² "change of title or possession,"⁸³ "change of venue," see the C.J.S.

title Venue § 126 et seq, also 67 C.J. p 132 note 74 et seq, "change of vocation,"⁸⁴ "material change [in written instrument]," see the C.J.S. title Alteration of Instruments § 4 et seq, "material change of grade,"⁸⁵ and "modification or change,"⁸⁶ also "changes for safety, economy, and utility,"⁸⁷ "changes in course,"⁸⁸ "changes in the work,"⁸⁹ "make whatever changes are necessary,"⁹⁰ and "renovations and changes."⁹¹

As a Verb

—Present Tense. In its transitive use, the verb

. Iowa.—Alburtus v. Alburtus, 160 N.W. 830, 831, 178 Iowa 1124.
 ab.—In re Bartlett's Estate, 190 N. W. 869, 108 Neb. 681, 25 A.L.R. 39.
 yo.—Johnston v. Laird, 52 P.2d 1219, 1222, 48 Wyo. 532.
 U.S.—Nörumbega Co. v. Bennett, D.C.N.Y., 3 F.Supp. 500, 501.
 Ky.—Bright v. Russell, 33 S.W. 2d 643, 236 Ky. 567.
 e C.J.S. title Officers §§ 94-97, also 46 C.J. p 1020 note 6-p 1027 note 5.
 Cal.—Los Angeles County Flood Control Dist. v. Wright, 2 P.2d 168, 173, 213 Cal. 335—Hill v. General Petroleum Corporation, 16 P.2d 1035, 1039, 128 Cal.App. 284.
 id.—Pettiford v. United Department Stores, 196 N.E. 342, 345, 100 Ind. App. 471.
 o.—Hassell v. C. J. Reineke Lumber Co., App., 54 S.W.2d 758, 760.
 C.—Smith v. Swift & Co., 194 S. E. 106, 108, 212 N.C. 608.
 kl.—Derr v. Weaver, 57 P.2d 1153, 1154, 177 Okl. 100.
 a.—Allen v. Mottley Const. Co., 170 S.E. 412, 414, 160 Va. 375.
 s ground for reopening and reviewing compensation award see C.J.S. title Workmen's Compensation Acts, § 854, also 71 C.J. p 1438 note 93-p 1445 note 87.
 Mass.—Bennett v. Brown, 110 N.E. 266, 222 Mass. 283.
 Y.—Liss v. United States Fidelity & Guaranty Co., 169 N.Y.S. 1027, 1028, 103 Misc. 253.
 U.S.—Swift & Co. v. Licklider, C.C.A.W.Va., 7 F.2d 19, 21.
 id.—Croop v. Walton, 157 N.E. 275, 278, 199 Ind. 262, 53 A.L.R. 1386.
 a.—Succession of Hausmann, 112 So. 408, 410, 163 La. 537.
 o.—In re Ozias' Estate, App., 29 S. W.2d 240, 243—Finley v. Finley, App., 6 S.W.2d 1006.
 eb.—Mudge v. Mudge, 196 N.W. 706, 111 Neb. 403.
 Y.—In re Fischer's Estate, 271 N. Y.S. 101, 108, 151 Misc. 74.
 e C.J.S. title Domicile § 13, also 19 C.J. p 423 note 39-p 426 note 53.
 Pa.—In re State Highway Route No. 72, 108 A. 820, 821, 265 Pa. 369.

72. Ind.—Automobile Underwriters v. White, 191 N.E. 335, 337, 207 Ind. 228.
 Mont.—Libby Lumber Co. v. Pacific States Fire Ins. Co., 255 P. 340, 344, 79 Mont. 166.
 Tex.—London Assur. Corporation v. Dean, Civ.App., 231 S.W. 624, 625.
 Va.—Sands v. Bankers' Fire Ins. Co., 191 S.E. 657, 663.
 73. Nev.—State ex rel. Warren v. Sixth Judicial District Court in and for Humboldt County, 61 P.2d 6, 8.
 74. Va.—Matthews v. Codd, 142 S.E. 383, 384, 150 Va. 166.
 75. U.S.—Elkins v. Aetna Life Ins. Co. of Hartford, Conn., D.C.Tex., 26 F.2d 277, 278.
 Tex.—Business Men's Assur. Co. of America v. Bradley, Civ.App., 275 S.W. 622, 623.
 Wash.—Goodell v. Northwestern Mut. Acc. Ass'n, 226 P. 266, 268, 130 Wash. 55.
 76. U.S.—Conrad & Co. v. Commissioner of Internal Revenue, C.C.A., 50 F.2d 576, 578.
 Iowa.—Guaranty Life Ins. Co. v. Farmers Mut. Ins. Ass'n of Washington County, 278 N.W. 913, 917—Union Central Life Ins. Co. v. Franklin County Farmers Mut. Ins. Ass'n, 270 N.W. 398, 401.
 Md.—Royal Ins. Co. v. Drury, 132 A. 635, 638, 150 Md. 211, 45 A.L.R. 582.
 N.J.—Employers' Fire Ins. Co. v. Ritter, 164 A. 426, 428, 112 N.J.Eq. 418.
 Ohio.—Union Central Life Ins. Co. v. Clinton Mut. Ins. Ass'n, 199 N. E. 223, 226, 51 Ohio App. 20.
 Tenn.—Phoenix Mut. Life Ins. Co., for Use of First Nat. Bank, v. Aetna Ins. Co., 59 S.W.2d 517, 519, 166 Tenn. 126.
 77. Ga.—Neely v. Sheppard, 196 S.E. 452, 458, 185 Ga. 771.
 78. Kan.—Roberts v. Robertson, 254 P. 1026, 1027, 123 Kan. 222.
 Ky.—Commonwealth v. Ott, 4 S.W. 2d 417, 419, 223 Ky. 612.
 79. U.S.—U. S. v. Knight, D.C.Mont., 291 F. 129, 132.

Ark.—McGill v. Miller, 37 S.W.2d 639, 690, 183 Ark. 585—State v. Red Oak Trust & Savings Bank, 267 S.W. 566, 567, 167 Ark. 234.
 See C.J.S. title Domicile § 13, also 19 C.J. p 423 note 39-p 426 note 53.
 80. Kan.—Griebel v. School Dist. No. 6 of Rooks County, 203 P. 718, 719, 110 Kan. 317.
 81. Pa.—Gold v. Commercial Casualty Ins. Co., 188 A. 360, 361, 124 Pa. Super. 181.
 82. Ga.—National Ben. Franklin Fire Ins. Co. v. Hurley, 176 S.E. 780, 781, 49 Ga.App. 815.
 Miss.—Osler v. Atlas Assur. Co., 90 So. 185, 127 Miss. 511.
 83. Ga.—Hurley v. Girard Fire & Marine Ins. Co., 183 S.E. 548, 549, 181 Ga. 583.
 W.Va.—Bowling v. Continental Ins. Co., 103 S.E. 285, 286, 86 W.Va. 164, 17 A.L.R. 376—Bronson v. New York Fire Insurance Co., 63 S.E. 283, 64 W.Va. 494, 19 L.R.A., N.S., 643, 16 Ann.Cas. 868.
 84. Tex.—Southern Travelers' Ass'n v. Boyd, Civ.App., 1 S.W.2d 446, 449.
 85. Tenn.—Knox County v. Lemarr, 97 S.W.2d 659, 661, 20 Tenn.App. 258.
 86. Minn.—National Surety Co. v. Erler, 220 N.W. 543, 546, 175 Minn. 14.
 87. Iowa.—Jenkins v. State Highway Commission, 218 N.W. 258, 260, 205 Iowa 523.
 88. Iowa.—Harding v. Board of Sup'rs of Osceola County, 237 N. W. 625, 630, 213 Iowa 560.
 89. Mass.—Dahlstrom Metallic Door Co. v. Evatt Const. Co., 152 N.E. 715, 718, 256 Mass. 404.
 90. U.S.—International Silver Co. v. Oneida Community, C.C.A.N.Y., 93 F.2d 437, 441.
 91. "Repairs" not synonymous
 Mass.—William A. Doe Co. v. City of Boston, 160 N.E. 262, 263, 262 Mass. 453.

has been defined as meaning to alter or make different, to exchange, to put one thing in the place of another, or to render something essentially different from what it was, even to loss of identity or the substitution of one thing for another.⁹² Intransitively, to come to pass from one state or place to another.⁹³

In particular connections, and always taking into account the context and circumstances of its use, "change" has been held to be equivalent to, or interchangeable or synonymous with, "alter," see *Alter* 3 C.J.S. p 898 note 87, and "vacate,"⁹⁴ has been held to be broader than, and hence distinguished from, "alter," "amend," and "modify,"⁹⁵ and has also been distinguished from "establish."⁹⁶

Phrases: "Change, amend, or extend the charter,"⁹⁷ "change his occupation,"⁹⁸ "change its scope or object,"⁹⁹ "change the venue,"¹ and "modify, amend, alter, or change,"² also "changes its course,"³ and also "changing the grade of the sidewalk."⁴

—**Changed.** The past tense or past participle of the verb "change" which, it has been said, implies active design, deliberate action, rather than unconscious alteration due to forgetfulness.⁵

Phrases: "Changed condition [or conditions],"⁶

"changed his occupation,"⁷ "changed" his testimony,"⁸ "changed occupation,"⁹ "repealed, altered, or changed,"¹⁰ and "until 'thereafter changed.'"¹¹

CHANGER. An officer formerly belonging to the king's mint, in England, whose business was chiefly to exchange coin for bullion brought in by merchants and others.¹²

CHANNEL. It has been said that the word is a generic term applicable to any watercourse, whether a river, creek, slough, or canal;¹³ and that its precise meaning depends upon the context in which it is used,¹⁴ two lines of definitions being generally recognized, the one, employed in boatmen's parlance, as meaning the course where the water is deepest and the navigation safest; the other, in geographical usage, designating the depression of a bed, below permanent banks, wherein waters flow and which may be sometimes full and sometimes not.¹⁵ With reference to matters of navigation see the C.J.S. titles *Collision* § 2, *Navigable Waters* § 20, also 11 C.J. p 287 notes 68-77; and as applied to watercourses of a nonnavigable character see the C.J.S. title *Waters* § 41, also 11 C.J. p 287 note 78- p 288 note 88.

Phrases: "Channel of a river,"¹⁶ "flood channel"

92. U.S.—*Cross v. Nee*, D.C.Mo., 18 F.Supp. 589, 594.

Dak.—*Territory v. Scott*, 20 N.W. 401, 3 Dak. 357, 432.

Mass.—*William A. Doe Co. v. City of Boston*, 160 N.E. 262, 263, 262 Mass. 458.

11 C.J. p 286 note 57, p 287 notes 58, 60.

93. Dak.—*Territory v. Scott*, 20 N.W. 401, 3 Dak. 357, 432, quoting Webster D.

94. Mo.—*Morris v. Karr*, 114 S.W.2d 962, 963—*State ex rel. Tummons v. Cox*, 282 S.W. 694, 696, 313 Mo. 672—*Tummons v. Stokes*, App., 274 S.W. 528, 529.

95. U.S.—*Cross v. Nee*, D.C.Mo., 18 F.Supp. 589, 594.

96. Iowa.—*Jenkins v. State Highway Commission*, 218 N.W. 258, 260, 205 Iowa 523.

Mo.—*Berglar v. University City*, App., 190 S.W. 620, 623.

97. S.C.—*Lancaster v. Town Council of Brookland*, 158 S.E. 233, 235, 160 S.C. 150.

98. Kan.—*Jaques v. Order of United Commercial Travelers of America*, 180 P. 200, 202, 104 Kan. 612.

"Changing his occupation" means engaging in another employment as a usual business.—*Union Health &*

Accident Co. v. Anderson, 180 P. 81, 82, 66 Colo. 195.

99. Wash.—*State v. Howell*, 181 P. 37, 38, 106 Wash. 542.

1. Mo.—*State ex rel. Cone v. Bruce*, 55 S.W.2d 733, 736, 227 Mo.App. 631.

2. U.S.—*Cross v. Nee*, D.C.Mo., 18 F.Supp. 589, 594.

3. Tex.—*Spears Dairy v. Bohrer*, Civ.App., 54 S.W.2d 872, 875.

4. Mo.—*Berglar v. University City*, App., 190 S.W. 620, 623.

5. Pa.—*Boyer v. Pitt Pub. Co.*, 188 A. 203, 204, 324 Pa. 154.

6. Conn.—*Kowalski v. New York, N. H. & H. R. Co.*, 164 A. 653, 655, 116 Conn. 229, 86 A.L.R. 957.

Ind.—*Jackson Hill Coal & Coke Co. v. Gregson*, 150 N.E. 398, 399, 84 Ind.App. 170.

7. U.S.—*Elkins v. Aetna Life Ins. Co. of Hartford, Conn.*, D.C.Tex., 26 F.2d 277, 278.

8. "Switched" his testimony" substantially equivalent

"Saying that a witness 'changed' his testimony is not wholly different from the more vernacular statement that he 'switched' his testimony."—*Boyer v. Pitt Pub. Co.*, 188 A. 203, 204, 324 Pa. 154.

May imply perjury

"It cannot be declared as a matter

of law that a prominent head line on the front page of a newspaper, captioning an article dealing with a sensational trial of public interest and alleging that the 'star witness' 'changed' his testimony, was incapable of being construed by the general reader . . . as implying perjury rather than merely a lapse of memory."—*Boyer v. Pitt Pub. Co.*, 188 A. 203, 204, 324 Pa. 154.

9. U.S.—*Indemnity Ins. Co. of North America v. Sloan*, C.C.A.Md., 68 F.2d 222, 224.

10. Pa.—*Wallace v. Blair*, 1 Grant 75, 79.

11. U.S.—*Michigan Cent. R. Co. v. Michigan Public Utilities Commission*, D.C.Mich., 271 F. 319, 323.

12. Black L.D.

13. Cal.—*McKissick Cattle Co. v. Alsaga*, 182 P. 793, 797, 41 Cal. App. 380.

14. Iowa.—*Dunleith, etc., Bridge Co. v. Dubuque County*, 8 N.W. 443, 55 Iowa 558, 564.

15. Tenn.—*State v. Muncie Pulp Co.*, 104 S.W. 437, 119 Tenn. 47, 74. 11 C.J. p 287 notes 77 [a], 80 [a].

16. U.S.—*U. S. v. Hutchings*, D.C. Okl., 252 F. 841, 844.

"Branch" of a river" distinguished see *Branch* 11 C.J.S. p 765 note 17.

"low water channel,"¹⁷ "main channel,"¹⁸ "d-channel," "middle of the main channel," and "middle thread of the channel,"¹⁹ and "widest channel," see the C.J.S. title Waters § 41, also 11 p. 288 note 88.

As an Adjective

Channel bars. Vertical iron bars extending from floor to the ceiling of a building in front of an elevator shaft, designed to hold the fire bricks making the final wall of the shaft.²⁰

CANTER. The chief singer in the choir of a cathedral.²¹

CHANCERY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors.²²

CHAPEL. A small church.²³

CHAPELRY. The precinct and limits of a chapel; same thing to a chapel as a parish is to a church.²⁴

CHAPERON. A hood or bonnet, anciently worn by the Knights of the Garter, as part of the habit of that order; also a little escutcheon fixed in the forehead of horses drawing a hearse at a funeral.²⁵

CHAPITRE. A summary of matters to be inquired of or presented before justices in eyre, justices of the peace, or of the peace, in their sessions; also articles delivered by the justice in his charge to the next.²⁶

CHAPLAIN. An ecclesiastic who performs divine service in a chapel; but it more commonly means one who attends upon a king, prince, or other per-

son of quality, for the performance of clerical duties in a private chapel. In more modern application, a clergyman officially attached to a ship of war, to an army, or regiment, or to some public institution, for the purpose of performing divine service.²⁷

CHAPLET. As employed in the phrase "rosaries, chaplets, and similar articles of religious devotion," "chaplets" was held not to include crucifixes.²⁸

CHAPMAN. An itinerant vendor of small wares.²⁹

Petty chapman. A word analogous to, and sometimes defined in the same terms as, a hawk or peddler, being a person traveling from town to town with goods and merchandise for sale.³⁰

CHAPTER. In ecclesiastical law, a congregation of ecclesiastical persons in a cathedral church, consisting of canons, or prebendaries, whereof the dean is the head, all subordinate to the bishop, to whom they act as assistants in matters relating to the church, for the better ordering and disposing of the things thereof, and the confirmation of such leases of the temporality and offices relating to the bishopric, as the bishop shall make from time to time.³¹

CHAR. To reduce wood to a coal by burning.³² The term has been distinguished from "to scorch or discolor by heat."³³

CHARACTER.

Personal Attributes

—In General. In what may be called its abstract, primary sense, the word has been defined as meaning the aggregate of the moral qualities which belong to and distinguish an individual person, the

Okl.—*Cole v. Missouri, etc., Ry.* Co., 94 P. 540, 20 Okl. 227, 231, 12 L.R.A.N.S., 268.

U.S.—*St. Louis, etc., Packet Co. v. Keokuk, etc., Bridge Co.*, C.C. Iowa, 31 F. 755, 757.

U.S.—*Iowa v. Illinois*, 13 S.Ct. 39, 147 U.S. 1, 12, 37 L.Ed. 55. C.J. p 287 note 77 [a].

N.Y.—*Hartman v. Clarke*, 93 N.Y.S. 314, 104 App.Div. 62, 63.

Black L.D.

Black L.D.

N.Y.—*In re Atkinson's Will*, 197 N.Y.S. 831, 832, 120 Misc. 186.

Private chapels

so called from their freedom of exemption from all ordinary jurisdiction.—Black L.D.

Private chapels

chapels owned by private persons, used by themselves and their

families, are called "private," as opposed to chapels of ease, which are built for the accommodation of particular districts within a parish, in ease of the original parish church.—Black L.D., citing 2 Stephen Comm. p 745.

Proprietary chapels

In English law, those belonging to private persons who have purchased or erected them with a view to profit or otherwise.—Black L.D.

Public chapels or chapels of ease

In English law, chapels founded at some period later than the church itself. They were designed for the accommodation of such of the parishioners as in course of time had begun to fix their residence at a distance from its site; and chapels so circumstanced were also described as "chapels of ease," because built in aid, or ease, of the original

church.—Black L.D., citing Stephen Comm. p 151.

24. Black L.D.

25. Black L.D.

26. Black L.D.

27. Black L.D.

28. U.S.—*See U. S. v. Closson Co.*, 12 Ct.Cust.App. 470, 471.

29. Black L.D.

30. Pa.—*Fisher v. Patterson*, 13 Pa. 335, 338.

See C.J.S. title Hawkers and Peddlers § 1, also 29 C.J. p 219 note 1-p 223 note 45.

31. Black L.D.

32. N.C.—*State v. Sandy*, 25 N.C. 570, 574.

"Bone char" see 11 C.J.S. p 513 note 6.

33. N.C.—*State v. Hall*, 93 N.C. 571, 573.

general result of one's distinguishing attributes,³⁴ the peculiar qualities impressed by nature or habit on a person which distinguish him from others,³⁵ the principles and motives that control the life, or the stamp impressed by nature, education, and habit;³⁶ and, more specifically, as disposition, independence, individuality, moral quality, resolution, or strength of mind;³⁷ also as meaning morality³⁸ or personal virtue.³⁹ The word is also used to designate a statement or testimonial given to a servant, on the termination of his employment, showing the character of work performed while in the service.⁴⁰ It has been said that "character" is distinguished from "disposition;"⁴¹ and is seldom used as synonymous with "mere inclination" or "propensity," or even "secret habit."⁴²

—In Jurisprudence. It has been said that in legal parlance, the term "character" has a dual meaning. It may refer to a person's private life, about which the public may have no knowledge, or it may mean the character a person enjoys by reputation;⁴³ and whether it will be given one or the other meaning will, of course, depend on the circumstances of its use in the particular case, for context and intent must generally be resorted to in the interpretation.⁴⁴ In particular connections, or for some purposes, as where it is sought to show what a per-

son's character is with especial reference to a specific trait, it has been said that the text writers and the adjudged cases generally speak of "conduct" and "character" as convertible terms, and that such language is accurate enough for all practical purposes;⁴⁵ and hence "character," in the sense in which the term is used in jurisprudence, or when properly made the subject of inquiry in courts of justice, is frequently employed as referring to one's reputation in the neighborhood, or common report;⁴⁶ and has been defined as meaning the estimate attached to the individual by the community, not the real qualities of the individual as conceived by the witness. In other words it is not what the individual really is, but what he is held, or reputed, to be generally in the society and community in which he moves and resides, the estimate, individual or general, put upon a person, or the reputation, or the general credit which a man has obtained in public opinion, since the actual character of a person is not exactly ascertainable by any process of human inquiry; and so in such cases, "character" and "reputation" have been said to be equivalent, interchangeable, or even synonymous.⁴⁷ In other cases, however, it has been held that, strictly speaking, "character" and "reputation" are not synonymous but distinct, for a man may have a good character,

34. Cal.—Joost v. Sullivan, 43 P. 896, 111 Cal. 286, 295, quoting Black L.D.

35. Ga.—Cox v. Strickland, 28 S.E. 655, 101 Ga. 482, quoting Webster D.

Ohio.—Burns v. State, 79 N.E. 929, 930, 75 Ohio St. 407.

36. Mo.—Harrison v. Lakenan, 88 S. W. 53, 189 Mo. 581, 601, quoting Webster Int. D.

37. Mo.—Harrison v. Lakenan, supra.

38. Okl.—Warkentin v. Kleinwachter, 27 P.2d 160, 163, 166 Okl. 213.

39. N.Y.—People v. Kenyon, 5 Park. Cr. 254, 270.

40. Okl.—Dickinson v. Perry, 181 P. 504, 510, 75 Okl. 25.

See also C.J.S. title Master and Servant § 45, and 39 C.J. p 90 notes 81-91.

41. Ala.—Hussey v. State, 6 So. 420, 87 Ala. 121, 130.

Pa.—Commonwealth v. Webb, 97 A. 189, 192, 252 Pa. 187.

42. N.Y.—Safford v. People, 1 Park. Cr. 474, 478.

43. Minn.—Lydiard v. Daily News Co., 124 N.W. 985, 110 Minn. 140, 145, 19 Ann.Cas. 985.

44. Colo.—H. L. Shaffer & Co. v. Prosser, 62 P.2d 1161, 1163, 99 Colo. 335.

45. "Character" indicated by conduct

"If there be a metaphysical distinction between character and conduct, we know of no authority in law for admitting evidence of conduct where evidence of character would be excluded. Character or reputation is generally regarded as the voice of the community, but that is just what the conduct of the individual makes it. 'The speech of the people,' as it is most descriptively called, is suggested by the general tenor of the conduct, so that to prove the one is in effect to prove the other; and the rule of law that would exclude character excludes conduct. . . . But where any distinction is taken it is for the purpose of saying that the evidence must relate to reputation and not conduct."—Zitzer v. Merkel, 24 Pa. 408, 410.

46. U.S.—Knode v. Williamson, W. Va., 17 Wall. 586, 588, 21 L.Ed. 670.

Ala.—Way v. State, 46 So. 273, 155 Ala. 52, 63.

Me.—Phillips v. Kingfield, 19 Me. 375, 379, 36 Am.D. 760.

N.H.—Matthews v. Huntley, 9 N.H. 146, 148.

Pa.—Wike v. Lightner, 11 Serg. & R. 198, 199.

Vt.—Powers v. Leach, 26 Vt. 270, 278.

11 C.J. p 289 note 40-p 290 note 41.

47. U.S.—Knode v. Williamson, W. Va., 17 Wall. 586, 588, 21 L.Ed. 670.

Ala.—Garrison v. State, 116 So. 705, 217 Ala. 322—Glover v. State, 76 So. 300, 301, 200 Ala. 334—Garrison v. State, 116 So. 706, 708, 22 Ala.App. 444.

Colo.—H. L. Shaffer & Co. v. Prosser, 62 P.2d 1161, 1163, 99 Colo. 335.

Conn.—Creer v. Active Automobile Exch., 121 A. 888, 889, 99 Conn. 266.

Ga.—Clarke v. State, 183 S.E. 92, 52 Ga.App. 254.

Iowa.—State v. Egan, 13 N.W. 730, 59 Iowa 636, 637.

Md.—World v. State, 50 Md. 49, 56.

Mich.—People v. Nemer, 187 N.W. 315, 317, 218 Mich. 163.

Minn.—Lydiard v. Minneapolis Daily News Co., 124 N.W. 985, 110 Minn. 140, 145, 19 Ann.Cas. 985.

Neb.—Berneker v. State, 59 N.W. 372, 40 Neb. 810, 816.

Nev.—State v. Pearce, 15 Nev. 188, 190.

Or.—State v. Leabo, 249 P. 363, 120 Or. 160.

Pa.—Kimmel v. Kimmel, 3 Serg. & R. 336, 338, 8 Am.D. 655.

Tex.—Rogers v. State, 70 S.W.2d 188, 189, 126 Tex.Cr. 39—Richardson v. State, 253 S.W. 273, 278, 94 Tex.Cr. 616.

et have a bad reputation, or vice versa; and their use as synonyms is inaccurate or, at least, careless, in that such use fails to recognize that "character," strictly speaking, means that which a person is really, while "reputation" means what a person is estimated, said, supposed, or thought, to be by others.⁴⁸ Character is internal, reputation external; one is the substance and the other the shadow.⁴⁹ "Character" signifies the reality, and "reputation" merely what is reputed or understood from report to be the reality about a person or thing.⁵⁰ "Character" means what a man is morally, and consists of the qualities which constitute the individual, including natural and acquired tastes; and these have been held to constitute one's actual, or real, character.⁵¹ Reputation, the qualities one is supposed to possess, may be termed one's estimated, or reputed, character in contradistinction to his real character.⁵²

Chaste character. It has been said that the term is not limited alone to unlawful sexual intercourse, but means purity of mind and innocence of heart;⁵³ actual personal virtue, not merely reputation or good name.⁵⁴

Good moral character. The words are general in their application but they include all the elements essential to make up such a character; among these are common honesty and veracity, especially in all professional intercourse,⁵⁵ although it has been held that the highest degree of moral excellence is not required;⁵⁶ and the term has been defined as meaning a character that measures up as good among the people of the community in which the person lives, or that is up to the standard of the average citizen;⁵⁷ that status which attaches to a man of good behavior and upright conduct.⁵⁸

As one of the qualities required of an applicant for admission to a particular status see the C.J.S. titles Aliens § 127, Attorney and Client § 7 b, and Intoxicating Liquors § 135, also 33 C.J. p 541 notes 9-13.

Reputed character. The slow-spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves,⁵⁹ the equivalent of "reputation;"⁶⁰ and distinguished from "real character."⁶¹

Other phrases: "Actual character,"⁶² "character or reputation,"⁶³ "general character,"⁶⁴ "general

8. U.S.—Sloan v. U. S., C.C.A.Mo., 31 F.2d 902, 906.
Cal.—State v. Ridgeway, 265 P. 349, 350, 89 Cal.App. 615.
Colo.—H. L. Shaffer & Co. v. Prosser, 62 P.2d 1161, 1163, 99 Colo. 335.
Ill.—People v. Hicks, 199 N.E. 368, 370, 362 Ill. 238—People v. Belcastro, 190 N.E. 301, 303, 356 Ill. 144 quoting *Corpus Juris*—People ex rel. Aken v. Puffer, 8 N.E.2d 198, 203, 290 Ill.App. 196.
Ind.—Bills v. State, 119 N.E. 465, 187 Ind. 721.
Iowa.—State v. Bell, 221 N.W. 521, 523, 206 Iowa 816—State v. Pickett, 210 N.W. 782, 783, 202 Iowa 1321, citing *Corpus Juris*—State v. Poston, 203 N.W. 257, 258, 199 Iowa 1073.
Mo.—State v. Foster, 225 S.W. 671, 672—State v. Cook, 207 S.W. 831, 832—State v. Taylor, 183 S.W. 299, 301, 267 Mo. 41.
N.H.—Curtice v. Dixon, 68 A. 587, 74 N.H. 386, 393—State v. Lapage, 57 N.H. 245, 296, 24 Am.R. 69.
N.Y.—Safford v. People, 1 Park.Cr. 474, 478.
Ohio.—Burns v. State, 79 N.E. 929, 930, 75 Ohio St. 407.
Or.—In re Weinstein, 42 P.2d 744, 747, 150 Or. 1—State v. Sing, 229 P. 921, 928, 114 Or. 267.
Pa.—Hopkins v. Tate, 99 A. 210, 212, 255 Pa. 56—Commonwealth v. Webb, 97 A. 189, 192, 252 Pa. 187

—Commonwealth v. Calvery, 198 A. 450, 451, 130 Pa.Super. 575.
R.I.—State v. Wilson, 1 A. 415, 416, 15 R.I. 180.
11 C.J. p 289 notes 19, 26-34.
49. Ga.—Clarke v. State, 183 S.E. 92, 52 Ga.App. 254.
N.Y.—In re Capozzi, 289 N.Y.S. 869, 872, 160 Misc. 200.
11 C.J. p 289 notes 21, 36.
50. Fla.—Fine v. State, 70 So. 379, 381, 70 Fla. 412.
Miss.—Stegall v. Stegall, 119 So. 802, 803, 151 Miss. 875.
Or.—State v. Leabo, 249 P. 363, 120 Or. 160.
11 C.J. p 289 notes 20, 38.
51. U.S.—In re Spenser, C.C.Or., 22 F.Cas.No.13,234, 5 Sawy. 195, 197, 7 Centr.L.J. 84, 85.
Ark.—Biddle v. Riley, 176 S.W. 134, 118 Ark. 206, 219, L.R.A.1915F 992.
Ill.—U. S. v. Hrasky, 88 N.E. 1031, 240 Ill. 560, 563, 130 Am.S.R. 288, 16 Ann.Cas. 279.
N.Y.—In re Capozzi, 289 N.Y.S. 869, 872, 160 Misc. 200.
Or.—State v. Leabo, 249 P. 363, 120 Or. 160—Leverich v. Frank, 6 Or. 212, 213.
52. Cal.—In re Vandiveer, 88 P. 993, 4 Cal.App. 650, 654.
Ga.—Moore v. Dozier, 57 S.E. 110, 128 Ga. 90.
53. Iowa.—State v. Wilcoxen, 206 N. W. 260, 261, 200 Iowa 1250—Boak v. State, 5 Iowa 430, 432—State v. Andre, 5 Iowa 389, 395.

54. Mich.—People v. Mills, 54 N.W. 488, 491, 94 Mich. 630.
Mo.—State v. Foster, 225 S.W. 671, 672—State v. Cook, 207 S.W. 831, 833.
N.Y.—People v. Nelson, 46 N.E. 1040, 1041, 153 N.Y. 90, 60 Am.S.R. 592—Kenyon v. People, 26 N.Y. 203, 207, 84 Am.D. 177.
55. Wis.—In re O——, 42 N.W. 221, 73 Wis. 602, 618.
11 C.J. p 290 note 44.
56. U.S.—In re Hopp, D.C.Wis., 179 F. 561, 562, 563.
57. U.S.—In re Hopp, supra.
N.Y.—In re Capozzi, 289 N.Y.S. 869, 872, 160 Misc. 200.
58. U.S.—In re Spenser, C.C.Or., 22 F.Cas.No.13,234, 5 Sawy. 195, 196.
59. Ga.—Moore v. Dozier, 57 S.E. 110, 128 Ga. 90, 97.
Ind.—Wright v. Crawfordville, 42 N. E. 227, 142 Ind. 636, 642.
60. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 889, 99 Conn. 266.
61. Ind.—Wright v. Crawfordville, 42 N.E. 227, 142 Ind. 636, 642.
62. Iowa.—State v. Andre, 5 Iowa 389, 395.
63. Or.—State v. Sing, 229 P. 921, 928, 114 Or. 267.
64. Pa.—Wike v. Lightner, 11 Serg. & R. 198, 199.
Tex.—Rogers v. State, 70 S.W.2d 188, 126 Tex.Cr. 39—Richardson v.

character or reputation,"⁶⁵ "general moral character,"⁶⁶ "good character,"⁶⁷ "moral character,"⁶⁸ "previous chaste character," see the C.J.S. titles Rape § 7, also 52 C.J. p 1011 note 51-p 1013 note 7, and Seduction § 37, also 57 C.J. p. 53 note 65-p 55 note 98, "public character,"⁶⁹ and "real character,"⁷⁰ also, adjectively, "character card."⁷¹

Status or Condition

Quality of conduct with respect to a certain office or duty; quality, position, rank, or capacity.⁷² In a legal sense the word is used as signifying the personal, official, or special capacity in which a party sues or is sued.⁷³

Phrases: "In character of,"⁷⁴ and "in the character or under the name of."⁷⁵

Word of Classification or Description

As used in a special sense the term may denote account or description;⁷⁶ and has been defined or employed as meaning the class or division to which something belongs;⁷⁷ kind,⁷⁸ or nature.⁷⁹

Phrases: "Business of an interstate character," see Business 12 C.J.S. p 784 note 97, "business of a strictly local character," see Business 12 C.J.S. p 784 note 13, "business of the same general character," see Business 12 C.J.S. p 786 note 85, "char-

acter of injury,"⁸⁰ "character of land,"⁸¹ "general character of the work,"⁸² "is of a character which will,"⁸³ "moral character of his act,"⁸⁴ "nature, character, or origin of the . . . claim,"⁸⁵ "notorious character of the premises,"⁸⁶ and "of the character and kind of this defendant."⁸⁷

CHARACTERISTIC CURVE. In describing an instrument for converting alternating electric currents into continuous currents, the term has been defined as meaning a curve plotted between voltage applied to the detector and the current through the detector, resulting from the application of the voltage.⁸⁸

CHARBON. A disease caused by the infliction upon the body of putrid animal matter containing poisonous bacillus anthrax; also called "anthrax," or "malignant pustule."⁸⁹

CHARCOAL. A black, porous, tasteless, inodorous substance, burning without smoke or flame, obtained by the imperfect combustion of organic matter, as, of wood in a kiln from which air is excluded.⁹⁰

CHARGE.

As a Noun

—In the Singular. It has been said that "charge" is a word of very general and varied use;⁹¹ that

State, 253 S.W. 273, 277, 94 Tex.Cr. 616.

65. Iowa.—State v. Bell, 221 N.W. 521, 524, 206 Iowa 816.

66. Iowa.—State v. Ferguson, 270 N.W. 874, 881.

67. Cal.—In re Vandiveer, 88 P. 993, 994, 4 Cal.App. 650.

"Good reputation" contrasted
Iowa.—State v. Poston, 203 N.W. 257, 258, 199 Iowa 1073.

68. "Good reputation based on behavior" distinguished
U.S.—In re Hopp, D.C.Wis., 179 F. 561, 562.

69. U.S.—Corliss v. E. W. Walker Co., C.C.Mass., 64 F. 280, 282, 31 L.R.A. 283.

70. Ind.—Wright v. Crawfordville, 42 N.E. 227, 142 Ind. 636, 642.

71. Okl.—Dickinson v. Perry, 181 P. 504, 510, 75 Okl. 25.

72. Mo.—Harrison v. Lakenan, 88 S. W. 53, 189 Mo. 581, 601, quoting Webster Int. D.

73. N.Y.—Safford v. People, 1 Park. Cr. 474, 478.

74. U.S.—Jersey City Gas-Light Co. v. United Gas Impr. Co., C.C.N.J., 46 F. 264, 266.

"By way of" equivalent see By 12 C. J.S. p 871 note 12.

75. La.—State v. Blue, 64 So. 411, 414, 134 La. 561.

76. Cal.—Joost v. Sullivan, 43 P. 896, 111 Cal. 286, 295, quoting Webster D.

77. La.—Jackson State Nat. Bank of Jackson, Miss., v. Merchants' Bank & Trust Co. of Jackson, Miss., 149 So. 539, 541, 177 La. 975.

78. Tex.—Thompson v. State, 28 S. W.2d 153, 155, 115 Tex.Cr. 530.

79. La.—Jackson State Nat. Bank of Jackson, Miss. v. Merchants' Bank & Trust Co. of Jackson, Miss., 149 So. 539, 541, 177 La. 975.

Mo.—Harrison v. Lakenan, 88 S.W. 53, 189 Mo. 581, 601.

80. Mo.—David v. City of St. Louis, 96 S.W.2d 353, 356, 339 Mo. 241, 106 A.L.R. 849.

81. N.Y.—In re Lake Secor Development Co., 252 N.Y.S. 809, 812, 141 Misc. 913.

82. Cal.—Joost v. Sullivan, 43 P. 896, 111 Cal. 286, 293.
11 C.J. p 289 note 18.

83. U.S.—U. S. v. Steene, D.C.N.Y., 263 F. 130, 134.

"Was well calculated to" equivalent see Calculate 12 C.J.S. p 881 note 46.

84. U.S.—Ritter v. New York Mut. L. Ins. Co., C.C.Pa., 69 F. 505, 506.

85. La.—Jackson State Nat. Bank of Jackson, Miss. v. Merchants' Bank & Trust Co. of Jackson, Miss., 149 So. 539, 541, 177 La. 975.

86. R.I.—State v. Wilson, 1 A. 415, 416, 15 R.I. 180.

87. "Reputation" not involved
"The 'character' and 'kind' of man he [defendant] is, are but inferences based on facts, wholly distinct things from 'reputation,' which latter necessarily involves what people say of the person under discussion."—Thompson v. State, 28 S.W.2d 153, 155, 115 Tex.Cr. 530.

88. U.S.—Marconi Wireless Telegraph Co. of America v. De Forest Radio Telephone & Telegraph Co., D.C.N.Y., 236 F. 942, 946.

89. N.Y.—Bacon v. U. S. Mutual Acc. Assoc., 25 N.E. 399, 123 N.Y. 304, 313, 20 Am.S.R. 748, 9 L.R.A. 617.

90. See 11 C.J. p 290 note 48.
"Blood charcoal" see Blood 11 C.J.S. p 366 notes 23, 24.

"Bone black" distinguished see Bone 11 C.J.S. p 513 note 5.

91. Colo.—Page v. Elwell, 253 P. 1059, 1061, 81 Colo. 73.

Pa.—Reese v. Pennsylvania R. Co., 19 A. 72, 74, 131 Pa. 422, 17 Am.S. R. 818, 6 L.R.A. 529.

W.Va.—Duling Bros. v. City of Huntington, 196 S.E. 552, 554.

its legal acceptance, it has a very broad meaning;⁹² and that its meaning must be determined by the associations and circumstances surrounding use.⁹³

It has been defined in general as meaning a burden, load, or weight;⁹⁴ any burden or exactness;⁹⁵ any onerous condition;⁹⁶ that which is laid on, or which can be borne or taken by, a person or thing;⁹⁷ hence, derivatively, duty, obligation, office, oversight, responsibility, or trust;⁹⁸ and, more specifically, a burden, duty, obligation, or task laid imposed upon a person or thing;⁹⁹ an obligation directly bearing upon the individual person or thing to be affected, and appointing, or binding, him to the discharge of the duty or satisfaction of a claim imposed;¹ an obligation imposed on a person or estate;² a responsibility peculiar to the person or thing affected and authoritatively imposed;³ special assessment on land;⁴ also a lien, encumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.⁵

In another sense, custody or care of any person, place, or thing, although not necessarily including custody, control, or restraint;⁶ also an undertaking to keep the custody of another person's goods.⁷

In what may be deemed a commercial sense, the

price required or demanded for service rendered, or (less usually) for goods supplied;⁸ and while, in its strict use in bookkeeping parlance, the word may be defined as meaning a transaction involving, or a bookkeeping entry belonging to, but one side of an account, it has been held that, in a particular connection, it is not to be thus narrowly construed as referring exclusively to a credit transaction, but that it must be given its primary meaning of the creation of or recognition of an obligation, and may thus be applied or may refer to a cash transaction.⁹

As defined by the American Institute of Electrical Engineers, and as understood by electrical technicians, the word "charge" signifies the conversion of electrical energy into chemical energy within a cell or storage battery.¹⁰

In Scotch law, the command of the king's letters to perform some act, as a charge to enter heir; also a messenger's execution, requiring a person to obey the order of the king's letters, as a charge on letters of horning, or a charge against a superior.¹¹

In particular connections or contexts, and applying the various definitions above indicated for the word, "charge" has been held equivalent to, or synonymous with, "accusation,"¹² "care,"¹³ "count,"¹⁴ "custody,"¹⁵ "indictment," "information," or "pre-

1. U.S.—First Trust Co. of Omaha v. Allen, C.C.A.Neb., 60 F.2d 812, 816.
2. nn.—McLoughlin v. Shaw, 111 A. 62, 64, 95 Conn. 102.
3. Y.—Darling v. Rogers, 22 Wend. 483, 491.

4. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

5. Ohio.—Sage v. Vinton County Comrs., 92 N.E. 24, 25, 82 Ohio St. 186.

6. —United Shoe Machinery Co. v. First, 26 Pa. Dist. 401, 408, affirmed 70 Pa. Super. 324.

7. Ariz.—Federal Land Bank of Berkeley v. Warner, 23 P.2d 563, 566, 42 Ariz. 201.

8. U.S.—In re Ah Fong, C.C.Cal., 1 F.Cas.No.102, 3 Sawy. 144, 158.

9. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

10. Ill.—People v. Gould, supra.

11. Conn.—McLoughlin v. Shaw, 111 A. 62, 64, 95 Conn. 102.

12. Y.—Adirondack Core & Plug Co. v. New York Cent. R. Co., 258 N.Y.S. 916, 935, 144 Misc. 558.

13. Kan.—Felix v. Wallace County, 12 P. 667, 62 Kan. 832, 837, 84 Am.S.R. 424.

14. Y.—Merchants Exch. Nat. Bank v.

Commercial Warehouse Co., 49 N. Y. 635, 639.

15. 11 C.J. p 291 note 69.

16. 2. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, 908.

17. 3. U.S.—Ex parte Tsunetaro Machida, D.C.Wash., 277 F. 239, 241.
N.Y.—Merchants Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635, 639.

18. 4. W.Va.—Duling Bros. Co. v. City of Huntington, 196 S.E. 552, 554.

19. 5. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, 908—In re Interborough Consol. Corporation, C.C.A.N.Y., 288 F. 334, 349, 32 A. L.R. 932.

20. Md.—Abramson v. Horner, 80 A. 907, 912, 115 Md. 232.

21. Mont.—State v. Board of Com'rs of Cascade County, 296 P. 1, 13, 89 Mont. 37.

22. Pa.—Richardson v. Warden, 28 Pa. Dist. 970, 971, quoting *Corpus Juris*.

23. W.Va.—Mack v. Prince, 21 S.E. 1012, 40 W.Va. 324, 326.
11 C.J. p 292 notes 74-76.

24. 6. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

25. 7. Me.—State v. Clark, 29 A. 984, 86 Me. 194, 195.

26. 8. Pa.—Reese v. Pennsylvania R. Co., 19 A. 72, 131 Pa. 422, 435, 17 Am.S.R. 818, 6 L.R.A. 529.

27. Wis.—Usiak v. Kubiak, 225 N.W. 168, 169, 198 Wis. 600.
11 C.J. p 291 note 64.

28. 9. Wis.—Usiak v. Kubiak, supra.

29. 10. U.S.—Elliott Works v. Frisk, D. C.Iowa, 58 F.2d 820, 822.

30. 11. 11 C.J. p 293 notes 92, 93.

31. 12. Iowa.—U. S. v. Ross, Morr. 164, 166.

Not necessarily written

"An accusation can be made by word of mouth as well as in writing, and, in whatever form made, certainly constitutes a charge."—Commonwealth v. McLain, 8 Pa. Dist. & Co. 765, 766.

32. 13. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

33. 14. La.—State v. Thornton, 77 So. 634, 636, 142 La. 797.

34. N.M.—State v. Puckett, 50 P.2d 964, 965, 39 N.M. 511.

35. 15. U.S.—Randazzo v. U. S., C.C.A. Mo., 300 F. 794, 797.

36. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

37. Me.—State v. Clark, 29 A. 984, 86 Me. 194, 195.

38. N.Y.—In re Boulware's Will, 258 N. Y.S. 522, 144 Misc. 235.

sentment,"¹⁶ "instructions," see C.J.S. title Trial § 266, also 11 C.J. p 293 note 87 [a], and generally 64 C.J. p 510 note 2 et seq, "liability,"¹⁷ "management," or "office,"¹⁸ "rate,"¹⁹ and "trust;"²⁰ and has been compared or contrasted with, and distinguished from, "advice," see Advice 2 C.J.S. p 892 note 55, "commission,"²¹ "compensation,"²² "control,"²³ "interest in land,"²⁴ "legacy,"²⁵ "lien," see C.J.S. title Liens § 1, also 11 C.J. p 292 note 74 [a], and "trust," or "devise in trust," see the C.J.S. title Trusts § 2, also 11 C.J. p 292 note 78 [b].

As an accusation of criminality or as the first step in a criminal prosecution, see the C.J.S. titles Criminal Law § 303, also 11 C.J. p 291 notes 66, 67, and Indictments and Informations §§ 6, 48, 81, also 31 C.J. p 562 note 48 [d], p 613 notes 98-5, and p 641 notes 73-76; as a term of equity pleading and practice see the C.J.S. title Equity §§ 212, 532, also 11 C.J. p 292 notes 79-81; as a final address of a judge to a trial jury see the C.J.S. title Trial § 266, also 11 C.J. p 292 note 82-p 293 note 90 and 64 C.J. p 510 note 2 et seq; as employed in courts-martial see the C.J.S. title Army and Navy § 56 c (1); and as used in the law of wills see the C.J.S. title Wills § 1311, also 11 C.J. p 292 note 78.

Charge and discharge. Under the former system of equity practice, this phrase was used to characterize the usual method of taking an account before a master. After the plaintiff had presented his "charge," a written statement of the items of account for which he asked credit, the defendant filed

a counterstatement, called a "discharge," exhibiting any claims or demands he held against the plaintiff. These served to define the field of investigation, and constituted the basis of the report.²⁶

Public charge. In the sense of an expense, the term has been held to mean a money charge upon, or an expense to, the public for support and care; when used with reference to a person who has become a public charge, it has been held to mean one for whom support and care are actually provided at the expense of the public, and not one who is being cared for at the expense of his relatives.²⁷ The phrase has been also employed as meaning a person committed to the custody of a department of the government by due process of law.²⁸

Other phrases: "All taxes, charges, etc., now due or to become due,"²⁹ "annual charge" and "apportioned charge,"³⁰ "carrying charge" or "carrying charges" see Carry 13 C.J.S. p 1765 note 61, "charge against . . . [city's] general credit,"³¹ "charge against realty,"³² "charge against the general fund,"³³ "charge and control,"³⁴ "charge for administration,"³⁵ "charge for admission" and "charge for rent of personal property,"³⁶ "charge for storage,"³⁷ "charge for transportation,"³⁸ "charge in the nature of a tax,"³⁹ "charge made in reference to trade or profession,"⁴⁰ "charge of administration,"⁴¹ "charge of crime,"⁴² "charge of the state,"⁴³ "charge or control,"⁴⁴ "charge or debt,"⁴⁵ "charge or expense for preservation, maintenance, or care of trust estate,"⁴⁶ "charge upon

16. Md.—State v. Kiefer, 44 A. 1043, 90 Md. 165, 173.

11 C.J. p 291 note 67 [a].

17. N.Y.—Bancroft v. Winspear, 44 Barb. 209, 214.

11 C.J. p 291 note 69 [a].

18. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

19. Pa.—Borough of Mechanicsburg v. Valley Rys., 165 A. 541, 542, 109 Pa.Super. 48.

20. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

21. Ariz.—Federal Land Bank of Berkeley v. Warner, 23 P.2d 563, 566, 42 Ariz. 201.

22. Ohio.—Sage v. Vinton County, 92 N.E. 24, 25, 82 Ohio St. 186, 189. Pa.—United Shoe Machinery Co. v. Hirst, 26 Pa.Dist. 401, 408.

23. U.S.—Randazzo v. U. S., C.C.A. Mo., 300 F. 794, 797.

24. Mont.—State v. Board of Com'rs of Cascade County, 296 P. 1, 13, 89 Mont. 37.

25. Conn.—Goodwin v. Chaffee, 4 Conn. 163, 166.

Tex.—Cairns v. Smith, Civ.App., 49 S.W. 728, 733.

26. Black L.D.

27. U.S.—Ex parte Kirchmiriantz, D.C.Cal., 283 F. 697, 698.

28. U.S.—Ex parte Britten, D.C. Wash., 293 F. 61, 62—Ex parte Horn, D.C.Wash., 292 F. 455, 457 —Ex parte Tsunetaro Machida, D. C.Wash., 277 F. 239, 241.

29. Iowa.—Coffin v. Younker, 195 N. W. 591, 593, 196 Iowa 1021.

30. Pa.—Borough of Mechanicsburg v. Valley Rys., 165 A. 541, 542, 109 Pa.Super. 48.

31. Ala.—State ex rel. Radcliff v. City of Mobile, 155 So. 872, 876, 229 Ala. 93.

32. Mo.—Riley v. Akin, 45 S.W.2d 122, 124, 226 Mo.App. 735.

33. Ala.—State ex rel. Radcliff v. City of Mobile, 155 So. 872, 876, 229 Ala. 93.

34. Md.—Anne Arundel County v. Duckett, 20 Md. 468, 477, 83 Am.D. 557.

35. Ariz.—Federal Land Bank of Berkeley v. Warner, 23 P.2d 563, 566, 42 Ariz. 201.

36. U.S.—U. S. v. Koller, D.C.Wash., 287 F. 418, 420.

37. N.Y.—People v. Chatlos, 246 N. Y.S. 325, 328, 138 Misc. 539.

38. Pa.—Reese v. Pennsylvania R. Co., 19 A. 72, 74, 131 Pa. 422, 17 Am.S.R. 818, 6 L.R.A. 529.

39. U.S.—Mayor and City Council of Baltimore v. Williams, C.C.A.Md., 61 F.2d 374, 376.

40. Ga.—Stanley v. Moore, 173 S.E. 190, 43 Ga.App. 704.

41. Mass.—Wilder Grain Co. v. Felker, 5 N.E.2d 207, 208, 108 A.L.R. 385.

42. U.S.—Collins v. Traeger, C.C.A. Cal., 27 F.2d 842, 846.

43. Minn.—Stearns County v. Township of Fair Haven, 279 N.W. 707, 710.

44. U.S.—Chicago, I. & L. R. Co. v. Hackett, Ill., 33 S.Ct. 581, 584, 228 U.S. 559, 57 L.Ed. 966.

11 C.J. p 290 note 63 [b] (1).

45. Fla.—In re Warren's Estate, 142 So. 885, 886, 106 Fla. 163.

46. Cal.—Boyle v. Superior Court in and for Los Angeles County, 31 P. 2d 828, 137 Cal.App. 672.

land,"⁴⁷ "charge upon the effect of the evidence,"⁴⁸ "commission or charge,"⁴⁹ "date of the last charge,"⁵⁰ "in charge,"⁵¹ "lawful charge, control, or custody,"⁵² "likely to become a public charge," see Aliens §§ 92, 94 d, (10), "person in charge of defendant's ways, works, and machinery,"⁵³ "person in charge or control,"⁵⁴ "proper charge against the estate,"⁵⁵ "rate, fare, or charge,"⁵⁶ "reasonable charge,"⁵⁷ "rental charge,"⁵⁸ "retired in their 'charge,'"⁵⁹ "to have charge of,"⁶⁰ and "without charge to the county."⁶¹

—In the Plural. It has been said that the word "charges" has, from familiar use, the precision of a technical term;⁶² and it has been defined as meaning expenses⁶³ which have been incurred with relation either to a transaction or to a suit;⁶⁴ also liability;⁶⁵ and, more specifically, interest payable in respect of a mortgage.⁶⁶ In a different sense, an accusation made in a legal manner, of illegal con-

duct, either of omission or commission, by the person charged.⁶⁷

"Charges" as constituting an accusation upon which a criminal prosecution is based, see the C.J.S. title Criminal Law § 119, also 11 C.J. p 295 note 23; and as an accusation of official misconduct, see the C.J.S. titles Municipal Corporations § 514, also 43 C.J. p 668 notes 17-27, and Officers § 66, also 46 C.J. p 994 notes 30-38.

The word "charges" in a particular connection has been held equivalent to, or synonymous with, "conditions,"⁶⁸ and has been distinguished from "debts."⁶⁹

Phrases: "Administration charges,"⁷⁰ "charges against . . . estate,"⁷¹ "charges and credits,"⁷² "charges and expenses of the town,"⁷³ "charges forward,"⁷⁴ "charges of alleged facts,"⁷⁵ "charges or any part thereof,"⁷⁶ "debts and charges,"⁷⁷ "deemed to be charges thereon,"⁷⁸ "fees and charges,"⁷⁹

47. U.S.—Ex parte Horn, D.C.Wash., 292 F. 455, 457—Ex parte Tsunetaro Machida, D.C.Wash., 277 F. 239, 241.

48. Ala.—Evers v. State, 129 So. 785, 786, 24 Ala.App. 55.

49. Ariz.—Federal Land Bank of Berkeley v. Warner, 23 P.2d 563, 566, 42 Ariz. 201.

50. Need not be a credit transaction but the "charge" may be one satisfied or discharged by immediate payment in cash.

N.Y.—Adirondack Core & Plug Co. v. New York Cent. R. Co., 258 N.Y.S. 916, 934, 144 Misc. 558.

Wis.—Usiak v. Kubiak, 225 N.W. 168, 169, 198 Wis. 600.

51. N.Y.—Poole v. American Linseed Co., 103 N.Y.S. 1047, 119 App. Div. 136, 137.

11 C.J. p 290 note 63 [b] (9), (10). "In his charge" equivalent to "in the care of" see Care 12 C.J.S. p 1145 note 43.

52. U.S.—Randazzo v. U. S., C.C.A. Mo., 300 F. 794, 797.

53. Ind.—Holliday, etc., Co. v. O'Donnell, 90 N.E. 24, 26, 44 Ind. App. 647.

54. Mass.—Steffe v. Old Colony R. Co., 30 N.E. 1137, 156 Mass. 262, 264.

11 C.J. p 290 note 63 [b] (1)-(7).

55. Fla.—In re Warren's Estate, 142 So. 885, 106 Fla. 163.

56. Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 430, 210 Wis. 644.

57. N.J.—Long Branch Comm'n v. Tintern Manor Water Co., 62 A. 474, 478, 70 N.J.Eq. 71.

Pa.—Brymer v. Butler Water Co., 36 A. 249, 179 Pa. 231, 36 L.R.A. 260.

58. Wis.—Nekoosa-Edwards Paper Co. v. Public Service Commission, 246 N.W. 428, 430, 210 Wis. 644.

59. Ill.—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

60. As implying merely "care"

"To have charge of" does not necessarily imply more than to care for or to have the care of."—People v. Gould, 178 N.E. 133, 148, 345 Ill. 288.

61. Me.—Royal v. Evans, 122 A. 569, 570, 123 Me. 217.

62. Conn.—Goodwin v. Chaffee, 4 Conn. 163, 166.

Tex.—Cairns v. Smith, Civ.App., 49 S.W. 728, 733.

63. Kan.—Labette County Com'rs v. Peterson, 235 P. 848, 850, 118 Kan. 560.

11 C.J. p 295 note 18.

64. See 11 C.J. p 295 note 19.

What term includes

(1) "The . . . word [charges] . . . merely comprises the expenses incurred in the settlement of an estate."

Conn.—Goodwin v. Chaffee, 4 Conn. 163, 166.

Tex.—Cairns v. Smith, Civ.App., 49 S.W. 728, 733.

(2) Expenses of administration held included.—First Trust Co. of Omaha v. Allen, C.C.A.Neb., 60 F.2d 812, 816.

65. N.Y.—Bancroft v. Winspear, 44 Barb. 209, 214.

66. Eng.—Copland v. Bartlett, 6 C. B. 18, 27, 60 E.C.L. 18, 136 Reprint 1157.

67. Ky.—Tompert v. Lithgow, 1 Bush 176, 180.

68. La.—Voinche v. Marksville, 50 So. 662, 124 La. 712, 716.

69. U.S.—First Trust Co. of Omaha v. Allen, C.C.A.Neb., 60 F.2d 812, 816.

70. U.S.—First Trust Co. of Omaha v. Allen, C.C.A.Neb., 60 F.2d 812, 817.

71. U.S.—Nichols v. Leach, C.C.A. Mass., 50 F.2d 787, 791—Randolph v. Craig, D.C.Tenn., 267 F. 993, 996. Tex.—Pace v. Eoff, Com.App., 48 S. W.2d 956, 963.

Phrase held not to include "expenses of its administration."—Crooks v. Harrelson, C.C.A.Mo., 35 F. 2d 416, 418.

72. Mo.—State ex rel. Waterworth v. Clark, 204 S.W. 1090, 1092, 275 Mo. 95.

73. Wis.—Town of Humboldt v. Schoen, 163 N.W. 177, 178, 165 Wis. 541.

74. Pa.—United Shoe Machinery Co. v. Hirst, 26 Pa.Dist. 401, 408.

75. "Mere comments" distinguished Mo.—Conrad v. Allis-Chalmers Mfg. Co., 73 S.W.2d 438, 448, 228 Mo. App. 817.

76. Pa.—Philadelphia, B. & W. R. Co. v. Quaker City Flour Mills Co., 127 A. 845, 846, 282 Pa. 362.

77. U.S.—First Trust Co. of Omaha v. Allen, C.C.A.Neb., 60 F.2d 812, 816.

Fla.—In re Warren's Estate, 142 So. 885, 886, 106 Fla. 163. 11 C.J. p 295 note 18 [a].

78. N.Y.—Moller v. People's Nat. Bank of Brooklyn, 180 N.E. 87, 89, 258 N.Y. 373.

79. Ariz.—Federal Land Bank of Berkeley v. Warner, 23 P.2d 563, 566, 42 Ariz. 201.

"reasonable charges of selling,"⁸⁰ "return charges,"⁸¹ "tolls, fees, rents, or charges,"⁸² and "under charges."⁸³

As a Verb

—**Present Tense.** To burden, to commission for a certain purpose, to intrust as a task or duty, or trust, and to lay on or impose as a load or burden,⁸⁴ or as a tax, duty, or trust;⁸⁵ to overload.⁸⁶ In another sense, to accuse, to ascribe the responsibility of, or to impute.⁸⁷ In yet another sense, to fix or demand a price for a thing or service,⁸⁸ hence to bill,⁸⁹ to demand or require;⁹⁰ but when used in connection with a sum of money it has been held to mean more than a mere demand which has not yet been acceded to or judicially enforced.⁹¹ In particular connections, "charge" has been held synonymous with "load,"⁹² has been compared with "accept,"⁹³ and has been distinguished from "mortgage."⁹⁴

Phrases: "Charge and accuse,"⁹⁵ "charge her separate estate," see C.J.S. title Husband and Wife § 315, also 11 C.J. p 292 note 76 [a], "charge or accept,"⁹⁶ and "sell, convey, charge, and dispose of."⁹⁷

—**Charged.** The word is not limited to a debit entry in an account book, but may be used in the sense of "imposing a duty upon;"⁹⁸ and when applied to firearms it has been held to mean "loaded."⁹⁹

In criminal proceedings, the word may have dif-

ferent meanings, according to the subject matter and the context.¹ It is frequently used in a limited sense,² as referring to a formal complaint, information, or indictment and so mere rumors and common talk that a party has committed a felony have been held insufficient to fill the measure required by the word "charged;"³ and in common parlance it signifies the formal commencement of a criminal proceeding by the filing or returning of the accusatory paper in the regular course of judicial proceedings, see the C.J.S. title Criminal Law § 303, also 16 C.J. p 286 note 74 et seq, and 11 C.J. p 294 notes 4-6. In a fuller and more accurate sense the expression may include also the responsibility for the crime itself, and may be applicable to one who has been convicted and is serving a sentence, see the C.J.S. titles Criminal Law § 79, also 16 C.J. p 119 note 80, and 11 C.J. p 294 notes 7, 8, and Extradition § 9, also 25 C.J. p 256 note 47-p 257 note 53. The term is used sometimes to define the status of a prisoner after he has been placed in the hands of the jury for trial, which, in England, was always done immediately after the jury were sworn and before the bill of indictment was read or any of the testimony heard,⁴ in this sense, therefore, meaning that the jury was charged with the fate of the prisoner, and not with the testimony or law of the case.⁵ In particular connections, "charged" has been held equivalent to, or interchangeable or synonymous with, "alleged,"⁶ "imposed,"⁷ and "stated,"⁸ and distinguished from "accused,"⁹ "imput-

80. Eng.—Hill v. Pannifer, [1904] 1 K.B. 811, 813.

81. Pa.—United Shoe Machinery Co. v. Hirst, 26 Pa.Dist. 401, 408.

82. W.Va.—Duling Bros. v. City of Huntington, 196 S.E. 552, 554.

83. N.Y.—Ewald v. Medical Society of New York County, 128 N.Y.S. 886, 889, 144 App.Div. 82.

84. N.Y.—People v. Angle, 47 Hun 183, 189, quoting Webster D. and Worcester D.

85. U.S.—Ex parte Horn, D.C.Wash., 292 F. 455, 457—Ex parte Tsunetaro Machida, D.C.Wash., 277 F. 239, 241.

86. N.Y.—People v. Angle, 47 Hun 183, 189, quoting Webster D. and Worcester D.

87. **Need not be in writing**
Pa.—Commonwealth v. McLain, 8 Pa. Dist. & Co. 765, 766.

88. Fla.—State v. Atlantic Coast Line R. Co., 37 So. 652, 48 Fla. 114, 127.

89. U.S.—George M. Jones Co. v. Canadian Nat. Ry. Co., D.C.Mich., 14 F.2d 852, 855.

90. N.C.—Hines v. Wilmington, etc.,

R. Co., 95 N.C. 434, 440, 59 Am.R. 250.

91. Fla.—Benson v. First Trust & Savings Bank, 134 So. 493, 496, 105 Fla. 135.

92. Ill.—People v. Limeberry, 131 N. E. 691, 696, 298 Ill. 355.

93. Fla.—Benson v. First Trust & Savings Bank, 134 So. 493, 496, 105 Fla. 135.

94. Conn.—McLoughlin v. Shaw, 111 A. 62, 64, 95 Conn. 102.

95. Mass. — Commonwealth v. O'Brien, 12 Cush. 84, 90.

96. Fla.—Benson v. First Trust & Savings Bank, 134 So. 493, 496, 105 Fla. 135.

97. Conn.—McLoughlin v. Shaw, 111 A. 62, 64, 95 Conn. 102.

98. Colo.—Page v. Elwell, 253 P. 1059, 1061, 81 Colo. 73.

99. Ill.—People v. Limeberry, 131 N. E. 691, 696, 298 Ill. 355.

1. Or.—State v. Ju Nun, 97 P. 96, 98 P. 513, 53 Or. 1, 10.

2. Ark.—State v. Jones, 120 S.W. 154, 91 Ark. 5, 8, 18 Ann.Cas. 293.
Conn.—Drinkall v. Spiegel, 36 A. 830, 68 Conn. 441, 447, 36 L.R.A. 486.

3. Cal.—People v. Garnett, 61 P. 1114, 1115, 129 Cal. 364—People v. Shawn, 13 P.2d 866, 868, 125 Cal. App. 55.

As comprehending any accusatory proceeding

"Charged" has been construed in its broad signification as including any proceeding which a state may see fit to adopt by which a formal accusation is made against an alleged criminal.—Renner v. Renner, 181 A. 191, 198, 13 N.J.Misc. 749.

4. Tenn.—Ward v. State, 1 Humphr. 253, 260.

11 C.J. pp 294, 295 notes 9, 10.

5. Va.—Dillon v. Commonwealth, 12 Gratt. 689, 702, 53 Va. 689, 702, 65 Am.D. 264.

11 C.J. p 295 note 12.

6. Ga.—Seaboard Air Line R. Co. v. Peoples, 77 S.E. 12, 12 Ga.App. 206, 207.

7. N.Y.—Moller v. People's Nat. Bank of Brooklyn, 180 N.E. 87, 89, 258 N.Y. 373.

8. Ala.—Chappell v. State, 100 So. 75, 76, 19 Ala.App. 648.

9. Cal.—People v. Shawn, 13 P.2d 866, 868, 125 Cal.App. 55.

ed," and "suspected."¹⁰

Phrases: "Charged off,"¹¹ "charged or arrested,"¹² "charged or . . . entrusted" and "charged or entrusted [by law],"¹³ "charged to such heir,"¹⁴ "charged with,"¹⁵ "charged with a maritime lien,"¹⁶ "charged with crime,"¹⁷ "charged with gun powder,"¹⁸ "'charged' with his deliverance,"¹⁹ "charged with liability,"²⁰ "charged with or found guilty of the crime,"²¹ "charged with the care of a child," see *Care* 12 C.J.S. p 1145 note 36, "charged with the support of a child,"²² "'charged' . . . with treason, felony or other crime,"²³ "charged with unlawful sealing,"²⁴ "guilty 'as charged,'"²⁵ "imposed or charged,"²⁶ "is charged,"²⁷ "plainly and specifically charged,"²⁸ and "stands charged by indictment."²⁹

—**Charging.** The present participle of charge.

Charging order. In English practice, an order allowed by statute to be granted to a judgment creditor that the property of the judgment debtor in governing stock, or in the stock of any public company in England, corporate or otherwise, shall stand charged with the payment of the amount for which judgment shall have been recovered with interest; an order obtained from a court or judge under English statutes, binding the stocks or bonds of a judg-

ment debtor with the judgment debt.³⁰

Other phrases: "Charging a jury," see the C.J.S. title *Trial* § 266 et seq, also 11 C.J. p 295 note 25, and 64 C.J. p 510 note 2 et seq, "charging and collecting of illegal fees,"³¹ and "charging lien," see C.J.S. title *Attorney and Client* § 211.

CHARGEABLE. The word, in its ordinary acceptation as applicable to the imposition of a duty or burden, frequently signifies capable of being charged, liable to, proper to, or subject to be charged;³² yet it also carries the meaning of accountable, amenable, or responsible;³³ and in a particular connection, it has been defined as meaning actually receiving support.³⁴ "Chargeable" has been distinguished from "delinquent."³⁵

Phrases: "Chargeable to a town,"³⁶ "chargeable to the plaintiff,"³⁷ "chargeable with gross negligence,"³⁸ and "chargeable with the sums so advanced."³⁹

CHARGEANT. Weighty; heavy; penal; expensive.⁴⁰

CHARGE D'AFFAIRES or CHARGE DES AFFAIRES. See the C.J.S. title *Ambassadors and Consuls* § 1.

10. Porto Rico.—*People v. Ramos*, 18 Porto Rico 954, 959, 960.

11. U.S.—*American Cigarette & Cigar Co. v. Bowers*, C.C.A.N.Y., 92 F.2d 596, 598—*Stephenson v. Commissioner of Internal Revenue*, C. C.A., 43 F.2d 348, 351—*Brown v. U. S.*, D.C.Pa., 19 F.Supp. 825, 826.

12. Cal.—*People v. Shawn*, 13 P.2d 866, 868, 125 Cal.App. 55.

13. Ind.—*Springer v. State*, 196 N.E. 97, 99, 209 Ind. 322.

14. Colo.—*Page v. Elwell*, 253 P. 1059, 1061, 81 Colo. 73.

15. Ark.—*State v. Jones*, 120 S.W. 154, 91 Ark. 5, 8, 18 Ann.Cas. 293.

Cal.—*People v. Serrano*, 11 P.2d 81, 82, 123 Cal.App. 339.

Conn.—*Drinkall v. Spiegel*, 36 A. 830, 68 Conn. 441, 447, 36 L.R.A. 486.

N.J.—*Renner v. Renner*, 181 A. 191, 198, 13 N.J.Misc. 749.

16. U.S.—*Galban Lobo & Co.*, S. A. v. U. S., D.C.N.Y., 235 F. 665.

17. Conn.—*Cappola v. Platt*, 192 A. 156, 157, 123 Conn. 38.

Mo.—*Rummerfeld v. Watson*, 70 S. W.2d 895, 898, 335 Mo. 71.

Wash.—*State v. Remann*, 4 P.2d 866, 869, 165 Wash. 92, 78 A.L.R. 412.

Person convicted

The phrase "one 'charged with a crime'" held to include a person convicted and confined for the pur-

pose of satisfying the judgment.—*Bailey v. Commonwealth*, 254 S.W. 897, 898, 200 Ky. 271.

18. Ill.—*People v. Limeberry*, 131 N.E. 691, 696, 298 Ill. 355.

19. Ky.—*Keith v. Commonwealth*, 247 S.W. 42, 44, 197 Ky. 362.

Utah.—*State v. Whitman*, 74 P.2d 696, 697.

20. "Attachable by foreign process," contrasted

U.S.—*Galban Lobo & Co.*, S. A., v. U. S., D.C.N.Y., 235 F. 665.

21. Neb.—*Heyen v. State*, 210 N.W. 165, 167, 114 Neb. 783.

22. Tenn.—*Madison v. State*, 42 S. W.2d 209, 163 Tenn. 198.

23. N.J.—*Renner v. Renner*, 181 A. 191, 198, 13 N.J.Misc. 749.

24. U.S.—*U. S. v. Peterson*, C.C.A. Cal., 28 F.2d 669, 671.

25. "Guilty 'as stated'" may be interchangeable

Ala.—*Chappell v. State*, 100 So. 75, 76, 19 Ala.App. 648.

26. N.Y.—*Moller v. People's Nat. Bank of Brooklyn*, 180 N.E. 87, 89, 258 N.Y. 373.

27. Ohio.—*Beeghly v. Public Utilities Commission*, 135 N.E. 641, 643, 104 Ohio St. 158.

28. Fla.—*Baumgartner v. Joughin*, 143 So. 436, 107 Fla. 858.

29. Tex.—*Ex parte Walton*, 112 S. W.2d 467, 468, 133 Tex.Cr. 534.

30. See 11 C.J. p 296 notes 29, 30.

31. Cal.—*Rose v. Superior Court In And For Imperial County*, 252 P. 765, 769, 80 Cal.App. 739.

32. Ga.—*Capers v. Martin*, 188 S.E. 465, 466, 54 Ga.App. 555, quoting *Corpus Juris*.

Vt.—*Walbridge v. Walbridge*, 46 Vt. 617, 625.

"Chargeability" and "liability" synonymous

La.—*Nichols v. Tall Timber Lumber Co. of Louisiana*, App., 145 So. 691, 693.

33. Ga.—*Capers v. Martin*, 188 S.E. 465, 466, 54 Ga.App. 555, citing *Corpus Juris*.

34. Conn.—*Ridgefield v. Fairfield*, 46 A. 245, 73 Conn. 47.

11 C.J. p 293 note 94 [a].

35. Minn.—*Gillfillan v. Chatterton*, 37 N.W. 583, 38 Minn. 335, 336.

36. Conn.—*Ridgefield v. Fairfield*, 46 A. 245, 73 Conn. 47.

37. La.—*Nichols v. Tall Timber Lumber Co. of Louisiana*, App., 145 So. 691, 693.

38. Ga.—*Capers v. Martin*, 188 S.E. 465, 466, 54 Ga.App. 555.

39. R.I.—*Hodges v. Hodges*, 9 R.I. 32, 34.

40. Black L.D.

CHARGE TO ENTER HEIR. A writ in Scotch law commanding a person to enter heir to his predecessor within forty days, otherwise an action to be raised against him as if he had entered.⁴¹

CHARIOT. A half coach with four wheels, used for convenience and pleasure.⁴²

CHARITABLE. In its usual and ordinary sense, the word has been held to mean pertaining to almsgiving or the relief of the poor, springing from, or intended for, charity; pertaining to or characterized by charity, benevolence, and kindness; also eleemosynary.⁴³ It has been said that the word "charitable" is frequently thought to mean simply the giving of alms, the relief of the poor, and the care of the sick and distressed, who are unable, through poverty, adequately to care for themselves, but that the word really has a wider meaning than this; and, in this broader sense, describes all the kindly inclinations which men ought to bear toward one another, and which prompt them to promote the general welfare, without respect to poverty or riches, class or condition, and free from all invidious distinctions; and so as used in this general sense has a wide application to gifts proceeding from true benevolence for any purpose favorable to one's fellow men,⁴⁴ and may under some circumstances include all kinds of private benefactions.⁴⁵ "Philanthropic" is not essentially different, nor widely variant, from "charitable;"⁴⁶ and while in a popular sense, the words "educational" and "charitable" are distinguishable, under some circumstances "charitable" may include "educational."⁴⁷

In its legal sense, as employed in the law of charities, see the C.J.S. title Charities § 1, and as used with reference to the exemption of property from taxation, see the C.J.S. title Taxation § 282, also 61 C.J. p 455 notes 20-23.

Phrases: "Charitable and benevolent . . . institutions" and "charitable and benevolent purposes."

es."⁴⁸ "charitable association, corporation, institution or society," see the C.J.S. title Charities § 2, "charitable, benevolent, or religious purposes" and "charitable, benevolent, or religious society,"⁴⁹ "charitable contributions" within Federal Revenue Acts, see the C.J.S. title Internal Revenue § 45, "charitable funds" and "charitable gift," see the C.J.S. title Charities § 1, "charitable institution," as exempt from sales tax, see the C.J.S. title Licenses § 31, and as entitled to property tax exemption, see the C.J.S. title Taxation § 282, also 61 C.J. p 452 note 67-p 455 note 15, "charitable legacies," see the C.J.S. title Wills § 1164, also 69 C.J. p 984 note 20 [a], "charitable, literary or educational purposes" within Revenue Act, see the C.J.S. title Internal Revenue § 45, "charitable organization," see the C.J.S. title Charities § 2, "charitable person,"⁵⁰ "charitable purposes" as used generally in the law of Charities, see the C.J.S. title Charities §§ 12-23, as used in Revenue Acts permitting deductions from estate and income taxes of bequests or gifts for such purposes see the C.J.S. title Internal Revenue §§ 45 and 82, also 33 C.J. p 315 notes 13-16, within tax exemption laws see the C.J.S. title Taxation § 282, 61 C.J. p 455 note 25, with reference to restrictions on testamentary disposition for such purposes see the C.J.S. title Wills §§ 108-110, also 68 C.J. p 534 note 51-p 564 note 82-89, "charitable trust" defined generally see the C.J.S. title Charities § 1, and as affected or not by the legal principles governing perpetuities see the C.J.S. title Perpetuities §§ 30, 31, also 48 C.J. p 986 note 60-p 989 note 74, and §§ 68, 69, also 48 C.J. p 1025 note 69-p 1026 note 81, "Charitable Trusts Acts," see the C.J.S. title Charities § 55, "charitable use," see the C.J.S. title Charities § 1, "Charitable Uses Act," see the C.J.S. title Charities § 6, "public and charitable institutions,"⁵¹ "public charitable association,"⁵² "public charitable societies,"⁵³ "public charitable trust,"⁵⁴ and "public charitable use."⁵⁵

41. Black L.D.

42. Ohio.—Cincinnati, etc., Turnp. Co. v. Neil, 9 Ohio 11, 13.

43. Cal.—Collier v. Lindley, 266 P. 526, 528, 203 Cal. 641.

44. Ill.—In re Graves, 89 N.E. 672, 242 Ill. 23, 27, 134 Am.S.R. 302, 24 L.R.A.N.S., 283, 17 Ann.Cas. 137.

N.Y.—People v. New York Soc., etc., 56 N.E. 1004, 162 N.Y. 429, 436—Hamburger v. Cornell University, 166 N.Y.S. 46, 48, 99 Misc. 564, reversed on other grounds 172 N.Y. S. 5, 184 App.Div. 403, affirmed 123 N.E. 868, 226 N.Y. 625—Matter of Moore, 122 N.Y.S. 828, 66 Misc. 116, 120—People v. Fitch, 39 N.Y. S. 926, 16 Misc. 464, 465.

"Benevolent" compared see Benevolent 10 C.J.S. p 343 notes 15-18.

44. N.Y.—Hamburger v. Cornell University, 199 N.Y.S. 369, 372, 204 App.Div. 664.

Pa.—Taylor v. Hoag, 116 A. 826, 273 Pa. 194, 21 A.L.R. 946—Barnes Foundation v. Keely, 164 A. 117, 119, 108 Pa.Super. 203.

45. U.S.—Michigan Trust Co. v. U.S., D.C.Mich., 21 F.Supp. 482, 484.

46. Mass.—Thorpe v. Lund, 116 N.E. 946, 949, 227 Mass. 474, Ann.Cas. 1918B 1204—Rotch v. Emerson, 105 Mass. 431, 434.

47. Minn.—State v. Board of Control, 88 N.W. 533, 541, 85 Minn. 165.

48. Iowa.—Readlyn Hospital v. Hoth, 272 N.W. 90, 93.

49. S.D.—In re Scottish Rite Tem-

ple Ass'n, 252 N.W. 626, 627, 62 S.D. 204.

50. Mass.—Gill v. Atty.-Gen., 83 N.E. 676, 197 Mass. 232, 237.

11 C.J. p 303 note 56.

51. Mich.—Sault Ste. Marie Hospital v. Chippewa County Treasurer, 177 N.W. 297, 298, 209 Mich. 684.

52. La.—Rady v. New Orleans Fire Ins. Patrol, 52 So. 491, 492, 126 La. 273, 139 Am.S.R. 511.

N.H.—Carter v. Eaton, 73 A. 643, 645, 75 N.H. 560.

53. N.H.—Carter v. Eaton, supra.

54. Conn.—Averill v. Lewis, 138 A. 815, 818, 106 Conn. 582.

55. Kan.—Treadwell v. Beebe, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

CHARITIES

This Title includes gifts, devises, bequests, and trusts for purposes regarded as charitable uses; their validity, operation, and effect in general, and application to them of doctrine of cy pres; organization, franchises, and powers of charitable corporations and associations; rights, powers, and liabilities of such corporations and associations or of trustees of charities, or of the donors, and of beneficiaries; judicial control and protection of charitable societies and charities; and remedies relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. ORIGIN, NATURE, AND DEVELOPMENT**§ 1. Definitions and Distinctions**

- a. Charity
- b. Charitable gift
- c. Charitable trust
- d. Charitable use
- e. Public charity and public trust
- f. Private charities or trusts distinguished

a. Charity

In its legal sense a charity may be broadly defined as a gift for general public use; in its ordinary sense the term "charity" is employed as meaning benevolence, philanthropy, or goodwill or relief or alms to the poor.

A precise and complete definition of a legal charity, it has been said, is hardly to be found in the books.¹ As stated in *Corpus Juris*, which statement has been cited and quoted with approval, the word "charity" has a well known and acknowledged meaning broad enough to include every gift for a general public use. Indeed, the word has been shortly and tersely defined as a gift to the public for a public use which extends to the poor as well as to the rich.² In the legal sense a charity may be more fully defined, as it was by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen, Mass., 539, 556, as "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons,

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| <p>1. Mass.—<i>Jackson v. Phillips</i>, 14 Allen 539, 555.</p> <p>2. Ariz.—<i>Southern Methodist Hospital and Sanatorium of Tucson v. Wilson</i>, 46 P.2d 118, 125, 45 Ariz. 507.</p> <p>Del.—<i>New Castle Common v. Megginson</i>, 77 A. 565, 24 Del. 361, Ann. Cas.1914A 1207.</p> <p>Ill.—<i>People v. Y. M. C. A.</i>, 6 N.E.2d 166, 169, 365 Ill. 118—<i>Congregational Sunday School & Publishing Soc. v. Board of Review</i>, 125 N.E. 7, 10, 290 Ill. 108.</p> | <p>Iowa.—<i>Heald v. Johnson</i>, 216 N.W. 772, 773, 204 Iowa 1067.</p> <p>Kan.—<i>Nuns of Third Order of St. Dominic v. Younkens</i>, 235 P. 869, 371, 118 Kan. 554, quoting <i>Corpus Juris</i>.</p> <p>N.J.—<i>Noice v. Schnell</i>, 137 A. 582, 585, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572 and certiorari denied <i>Allison v. Schnell</i>, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.</p> <p>Ohio.—<i>Rea v. Griffin</i>, 21 Ohio N.P., N.S., 129, 137.</p> <p>Or.—<i>Hamilton v. Corvallis General</i></p> | <p>Hospital Ass'n, 30 P.2d 9, 14, 146 Or. 168.</p> <p>Tenn.—<i>Baptist Hospital v. City of Nashville</i>, 3 S.W.2d 1059, 1060, 156 Tenn. 589.</p> <p>Tex.—<i>Scott v. All Saints Hospital</i>, Civ.App., 203 S.W. 146, 148, citing <i>Corpus Juris</i>.</p> <p>Utah.—<i>Sessions v. Thomas Dee Memorial Hospital Ass'n</i>, 51 P.2d 229, 234, 89 Utah 222—<i>William Budge Memorial Hospital v. Maughan</i>, 3 P.2d 258, 263, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516.</p> |
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11 C.J. p 299 notes 1, 2.

either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."³

While usually the word "charity" implies a gift in some form,⁴ in its widest sense it denotes all the good affections which men ought to bear toward one another, and in that sense it embraces what is generally understood by benevolence, philanthropy, and good will.⁵ In its more restricted and common

3. U.S.—Gossett v. Swinney, C.C.A. Mo., 53 F.2d 772, 777, affirming, D.C., Irwin v. Swinney, 44 F.2d 172, certiorari denied Gossett v. Swinney, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, 865, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459—Bok v. McCaughan, C.C.A. Pa., 42 F.2d 616, 619—Michigan Trust Co. v. U. S., D.C.Mich., 21 F.Supp. 482, 484.
Cal.—In re Huebner's Estate, 15 P.2d 768, 769, 127 Cal.App. 244.
Colo.—In re Schleier's Estate, 13 P. 2d 273, 274, 91 Colo. 172.
Conn.—Mitchell v. Reeves, 196 A. 785; 123 Conn. 549.
Fla.—Jordan v. Landes on Behalf of State, and ex rel. Goodwin, 175 So. 241, 246.
Ill.—Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13, 17, 290 Ill. 205—In re Scanlan's Estate, 230 Ill.App. 505, 511.
Iowa.—Heald v. Johnson, 216 N.W. 772, 778, 204 Iowa 1067.
Kan.—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 871, 118 Kan. 554, quoting *Corpus Juris*.
Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 693, 238 Ky. 620.
Me.—In re Clark's Estate, 159 A. 500, 501, 131 Me. 70—Smith v. Relief Ass'n of Portland Fire Department, 149 A. 23, 25, 128 Me. 417—Bates v. Schillinger, 145 A. 395, 398, 128 Me. 14.
Mass.—Boston Symphony Orchestra v. Board of Assessors of City of Boston, 1 N.E.2d 6, 9—Peirce v. Attwill, 125 N.E. 609, 234 Mass. 389.
Mich.—Scarney v. Clarke, 275 N.W. 765, 767, 282 Mich. 56.
Mo.—Buckley v. Monck, App., 187 S.W. 31, 33.
Neb.—Allebach v. City of Friend, 226 N.W. 440, 441, 118 Neb. 781.
Nev.—Bruce v. Young Men's Christian Ass'n, 277 P. 798, 799, 51 Nev. 372.
N.J.—Noice v. Schnell, 137 A. 582, 585, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738—New Jersey Title Guarantee & Trust Co. v. Smith, 108 A. 16, 18, 90 N.J.Eq. 386—Hewitt v. Camden County, 146 A. 881, 882, 7 N.J.Misc. 528.
N.C.—Barden v. Atlantic Coast Line

Ry. Co., 67 S.E. 971, 975, 152 N.C. 318, 49 L.R.A., N.S., 801.
Pa.—In re Archambault's Estate, 162 A. 801, 802, 308 Pa. 549—Betts v. Young Men's Christian Ass'n of Erie, 83 Pa.Super. 545, 550—In re Barnwell's Estate, 29 Pa.Dist. 317, 318, affirmed 112 A. 535, 269 Pa. 443.
Vt.—In re Downer's Estate, 142 A. 78, 80, 101 Vt. 167.
11 C.J. p 300 note 3.
The text definition in part or in substantially the same language is given in
Cal.—In re Dol's Estate, 187 P. 423, 431, 132 Cal. 159—Hallinan v. Prindle, App., 62 P.2d 1075, 1081—Baker v. Board of Trustees of Leland Stanford Junior University, 23 P.2d 1071, 1072, 133 Cal.App. 243—In re Bartlett's Estate, 10 P. 2d 126, 127, 122 Cal.App. 375—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 433.
Del.—Hutton v. St. Paul Brotherhood of People's Church of Dover, 178 A. 584, 20 Del.Ch. 413.
Ill.—People v. Y. M. C. A., 6 N.E. 2d 166, 169, 365 Ill. 118—Farmers' & Mechanics' Bank v. Griffith, 185 N.E. 854, 856, 352 Ill. 323—Ashmore v. Newman, 183 N.E. 1, 9, 350 Ill. 64—Summers v. Chicago Title & Trust Co., 167 N.E. 777, 335 Ill. 564—Morgan v. National Trust Bank of Charleston, 162 N.E. 888, 890, 331 Ill. 182—School of Domestic Arts & Sciences v. Carr, 153 N.E. 669, 671, 322 Ill. 562—People v. Thomas Walters Chapter of Daughters of American Revolution, 142 N.E. 566, 567, 311 Ill. 304—Jansen v. Godair, 127 N.E. 97, 100, 202 Ill. 364—Congregational Sunday School & Publishing Soc. v. Board of Review, 125 N.E. 7, 9, 290 Ill. 108—Skinner v. Northern Trust Co., 123 N.E. 289, 290, 288 Ill. 229.
Mo.—Newton v. Newton Burial Park, 34 S.W.2d 113, 326 Mo. 901—In re Rahn's Estate, 291 S.W. 120, 128, 316 Mo. 492, 51 A.L.R. 877, certiorari denied 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.
Neb.—Stork v. Schmidt, 261 N.W. 552, 554, 129 Neb. 311.
N.C.—Whitsett v. Clapp, 158 S.E. 183, 185, 200 N.C. 647.
Okla.—Phillips v. Chambers, 51 P.2d 303, 306, 174 Okl. 407.
Pa.—In re Lawson's Estate, 107 A. 376, 378, 264 Pa. 77.
Tenn.—Baptist Hospital v. City of Nashville, 3 S.W.2d 1059, 1060, 156 Tenn. 589.

Other definitions

(1) "Any gift not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a charity."

U.S.—Gossett v. Swinney, C.C.A. Mo., 53 F.2d 772, 776, 777, affirming, D.C., Irwin v. Swinney, 44 F.2d 172, and certiorari denied Gossett v. Swinney, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282—Irwin v. Swinney, D.C. Mo., 44 F.2d 172, 174.
Mo.—Burrier v. Jones, 92 S.W.2d 885, 890, 338 Mo. 679.
11 C.J. p 300 note 3 [a].

(2) "A gift designed to promote the public good by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, and any gift for a beneficial public purpose not contrary to any declared policy of the law, is a charity."

U.S.—St. Louis Union Trust Co. v. Burnet, C.C.A. Mo., 59 F.2d 922, 928—Gossett v. Swinney, supra.
Mo.—State v. Academy of Science, 13 Mo.App. 213, 216.

4. Absence of gainful return

"Charity" implies the bestowal of goods or money, rendition of services, or awarding of privileges free to recipient without gainful return.—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554, 556, 101 Wash. 487.

5. Neb.—Allebach v. City of Friend, 226 N.W. 440, 441, 118 Neb. 781.
Vt.—In re Downer's Estate, 142 A. 78, 80, 101 Vt. 167.
11 C.J. p 300 note 5.

In biblical usage

"In the thirteenth chapter of first Corinthians the revised version uses the word 'love' in defining the third of the three cardinal virtues, which, in King James' version read 'Faith, Hope and Charity.'"—Bok v. McCaughan, C.C.A. Pa., 42 F.2d 616, 619.

Active goodness

(1) "Charity is active goodness. It is doing good to our fellow men. It is fostering those institutions which are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind."
Iowa.—First M. E. Church of Ft. Madison, Iowa, v. Donnell, 81 N.W. 171, 110 Iowa 5, 46 L.R.A. 858.
Mich.—Bruce v. Central Methodist

sense it means relief or alms to the poor.⁶ Neither of these meanings is precisely descriptive, however, of the sense in which the courts use the term in applying the law relating to charities;⁷ in the legal sense it has a much wider significance than in common speech,⁸ it is not confined to mere almsgiving or the relief of poverty and distress, but extends to the improvement and promotion of the happiness of man.⁹

A charity has been said to be simply an active, express trust;¹⁰ but this definition leaves something to be desired, as it fails to take into account the indefiniteness of beneficiaries which distinguishes charitable trusts from private trusts, considered below in § 39.

The words "benevolence" and "charity" do not under all circumstances have the same meaning,¹¹ and, while charity may be benevolence,¹² or any

Episcopal Church, 110 N.W. 951, 147 Mich. 230, 11 Ann.Cas. 150, 10 L.R.A., N.S., 74—Allen v. Duffy, 4 N.W. 427, 431, 43 Mich. 1, 38 Am. R. 159.

(2) Similarly expressed.—Baptist Hospital v. City of Nashville, 3 S. W.2d 1059, 1060, 156 Tenn. 539.

Benevolence and want of private profit

"The idea which is back of all the definitions of charity, we think, may well be described as 'an act or feeling of benevolence.' It is based primarily upon the motive behind the act, which is that of benefit to another, without private profit to the donor."—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, Ariz., 77 P.2d 458, 461.

Love or affection

(1) "Charity, derived from the Latin 'caritas,' originally meant love."—Bok v. McCaughn, C.C.A.Pa., 42 F.2d 616, 618, 619.

(2) "Charity means such unselfish things as are wont to be done by those who are animated by the virtue of love."—Koehler v. Lewellyn, D.C.Pa., 44 F.2d 654, 655—Bok v. McCaughn, supra.

(3) "Charity" is defined as "Christian love."—Boruch v. SS. Peter & Paul's Orthodox Russian Church, 166 A. 723, 111 N.J.Law 116, quoting Webster New Int.D.

6. Ga.—Tharpe v. Central Georgia Council of Boy Scouts of America, 196 S.E. 762, 764, 185 Ga. 810, 116 A.L.R. 373.

Neb.—Allebach v. City of Friend, 226 N.W. 440, 441, 118 Neb. 781.

Vt.—In re Downer's Estate, 142 A. 78, 80, 101 Vt. 167.

11 C.J. p 300 note 6.

"Alms" and "charity" are synonymous

Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 77 P.2d 458, 461.

Relief of needy

(1) "Charity" is a gift to promote the welfare of others in need."—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 871, 118 Kan. 554—Mason v. Zimmerman, 106 P. 1005, 1008, 81 Kan. 799.

(2) "Charity" is a gift to promote the welfare of others; an institu-

tion for the help of the needy.—In re Hiteman's Estate, 180 N.Y.S. 880, 883, 110 Misc. 617.

(3) "Charity" may have a colloquial meaning of unselfish aid to the needy, including gifts to particular individuals.—Eagan v. Commissioner of Internal Revenue, C.C.A.Ga., 43 F.2d 881, 883.

(4) "Charity, as generally and commonly understood, has to do with gifts to the poor and needy, and steps taken to relieve distress and suffering on the part of those unable to help themselves."—Gossett v. Swinney, C.C.A.Mo., 53 F.2d 772, 776, affirming, D.C., Irwin v. Swinney, 44 F.2d 172, and certiorari denied Gossett v. Swinney, 52 S.Ct. 497, 286 U. S. 545, 76 L.Ed. 1282.

(5) "To relieve the wants of the helpless, the needy, or the indigent is charity."—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554, 556, 101 Wash. 487.

(6) "Whatever is bestowed gratuitously on the needy or suffering for their relief."—Webster D., quoted in Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, Ariz., 77 S.W.2d 458, 461.

7. Wyo.—State v. Laramie County, 55 P. 451, 8 Wyo. 104.

11 C.J. p 300 note 7.

8. U.S.—Gossett v. Swinney, C.C.A. Mo., 53 F.2d 772, 773, affirming, D. C., Irwin v. Swinney, 44 F.2d 172, and certiorari denied Gossett v. Swinney, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282—Eagan v. Commissioner of Internal Revenue, C.C.A. Ga., 43 F.2d 881, 883.

Iowa.—Heald v. Johnson, 216 N.W. 772, 773, 204 Iowa 1067.

Minn.—County of Hennepin v. Brotherhood of Gethsemane, 8 N.W. 595, 596, 27 Minn. 460, 38 Am.R. 298.

Tenn.—Baptist Hospital v. City of Nashville, 3 S.W.2d 1059, 1060, 156 Tenn. 539.

Wash.—In re Rust's Estate, 12 P. 2d 396, 398, 168 Wash. 344—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554, 556, 101 Wash. 487.

11 C.J. p 300 note 8.

9. U.S.—Eagan v. Commissioner of Internal Revenue, C.C.A.Ga., 43 F. 2d 881, 883.

Ill.—People v. Y. M. C. A. of Chicago, 6 N.E.2d 166, 169, 365 Ill. 118—People v. Rockford Masonic Temple Bldg. Ass'n, 181 N.E. 428, 431, 348 Ill. 567, 83 A.L.R. 768—People v. Freeport Masonic Temple, 179 N.E. 672, 347 Ill. 180—School of Domestic Arts & Sciences v. Carr, 153 N. E. 669, 671, 322 Ill. 562—Congregational Sunday School & Publishing Soc. v. Board of Review, 125 N.E. 7, 10, 290 Ill. 108.

Mass.—Boston Symphony Orchestra v. Board of Assessors of City of Boston, 1 N.E.2d 6, 10—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204—Little v. Newburyport, 96 N.E. 1032, 210 Mass. 414, Ann.Cas.1912D 425.

Mich.—Bruce v. Henry Ford Hospital, 236 N.W. 813, 814, 254 Mich. 394.

Nev.—Bruce v. Young Men's Christian Ass'n, 277 P. 798, 799, 51 Nev. 372.

N.Y.—Stearns v. Association of the Bar of the City of New York, 276 N.Y.S. 390, 394, 154 Misc. 71.

N.D.—State ex rel. Skeffington v. Seigfried, 168 N.W. 62, 64, 40 N. D. 57, citing *Corpus Juris*.

11 C.J. p 300 note 8.

Welfare of others

"A charity is a gift to promote the welfare of others."—Hastings v. Long, 11 Pa.Dist. 370, 371—11 C.J. p 300 note 5 [a] (2).

10. N.Y.—Levy v. Levy, 83 N.Y. 97, 134.

11 C.J. p 301 note 13.

11. N.Y.—People v. Powers, 41 N.E. 432, 147 N.Y. 104, 35 L.R.A. 502.

7 C.J. p 1140 note 87 [b].

12. U.S.—Irwin v. Swinney, D.C. Mo., 44 F.2d 172, 174.

7 C.J. p 1140 note 87 [b], p 1141 note 4—11 C.J. p 300 note 9.

"Benevolent" and "charity"

In a case in which the term "benevolent" was apparently used in the sense of "benevolence," it was said that "benevolent" includes "charity" with which it is frequently used synonymously.—State v. Texas Mut. Life Ins. Co. of Texas, Tex.Civ.App., 51 S.W.2d 405, 410.

act of kindness or benevolence,¹³ all benevolence is not necessarily charity, as the term is a broader one than "charity."¹⁴

Charitable funds. Funds supplied from the gift of the crown, or from the gift of the legislature, or from private gift, for any legal, public, or general purpose, are charitable funds.¹⁵ On the other hand, a fund collected by rates and assessments, being in no respect derived from bounty or charity, is not a charitable one.¹⁶

b. Charitable Gift

A charitable gift may be broadly defined as a gift for a public purpose, either local or general.

In the argument of a famous case, one of counsel defined a charitable or pious gift to be whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.¹⁷ This definition has been quoted or stated substantially, although not necessarily

adopted, in many cases.¹⁸ A charitable gift has been otherwise defined so as to include every gift for a public purpose, whether local or general, although not a charitable use within the common and narrow sense of those words,¹⁹ a gift to general public use which extends to the poor as well as to the rich,²⁰ and in greater detail as one for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.²¹

c. Charitable Trust

A charitable trust is one the purpose or object of which is within the legal definition of the term "charity."

The definitions of a charitable trust are frequently identical with, or similar to, the definitions of a charity which have been given in subdivision a of this section,²² and such a trust has been stated to

13. Ill.—In re Graves, 89 N.E. 672, 242 Ill. 23, 27, 134 Am.S.R. 302, 24 L.R.A., N.S., 283, 17 Ann.Cas. 137.

14. R.I.—Pell v. Mercer, 14 R.I. 412, 443.

7 C.J. p 1140 note 87 [a], [b], p 1141 note 4.

"Benevolent" and "charity"

(1) In a case in which the term "benevolent" was apparently used in the sense of "benevolence," it was said that that "benevolent" is a broader term than "charity."—State v. Texas Mut. Life Ins. Co. of Texas, Tex.Civ.App., 51 S.W.2d 405, 410.

(2) "Charity" in its legal sense implies giving without consideration or expectation of return, whereas "benevolent" is applied to any act which is prompted by or has for its object the well being of others.—State v. Texas Mut. Life Ins. Co. of Texas, supra.

15. R.I.—Webster v. Wiggin, 31 A. 824, 828, 19 R.I. 73, 28 L.R.A. 510, citing Atty.-Gen. v. Heelis, 2 Sim. & St. 61, 1 Eng.Ch. 67, 57 Reprint 270.

16. Mass.—Coe v. Washington Mills, 21 N.E. 966, 149 Mass. 543—Atty.-Gen. v. Federal St. Meeting-House, 3 Gray 1.

17. Argument of Mr. Binney in Vidal v. Girard, Pa., 2 How., U.S., 127, 11 L.Ed. 205.

18. U.S.—Gimbel v. Commissioner of Internal Revenue, C.C.A., 54 F. 2d 780, 781—Bok v. McCaughn, C. C.A.Pa., 42 F.2d 616, 619.

Colo.—In re Schleier's Estate, 13 P. 2d 273, 274, 91 Colo. 172.

Iowa.—Sisters of Mercy of Cedar

Rapids v. Lightner, 274 N.W. 86, 92—Chapman v. Newell, 125 N.W. 324, 326, 146 Iowa 415.

Mass.—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, 1918B 1204.

N.Y.—Hamburger v. Cornell University, 199 N.Y.S. 369, 373, 204 App. Div. 664.

Ohio.—Palmer v. Oiler, 131 N.E. 362, 363, 102 Ohio St. 271.

11 C.J. p 301 note 16.

19. Pa.—Fire Ins. Patrol v. Boyd, 15 A. 553, 555, 120 Pa. 624, 644, 6 Am.S.R. 745, 1 L.R.A. 417, quoting British Museum v. White, 2 Sim. & St. 594, 1 Eng.Ch. 594, 57 Reprint 473.

20. Iowa.—Sisters of Mercy of Cedar Rapids v. Lightner, 274 N.W. 86, 92—Chapman v. Newell, 125 N.W. 324, 326, 146 Iowa 415.

21. U.S.—Bok v. McCaughn, C.C.A. Pa., 42 F.2d 616, 619.

Mass.—Jackson v. Phillips, 14 Allen 539, 556.

22. Definitions following the definition of "charity"

(1) A gift to a general public use, which extends to the rich, as well as to the poor.

U. S.—Perin v. Carey, Ohio, 24 How. 465, 506, 16 L.Ed. 701—Hoehler v. Lewellyn, D.C.Pa., 44 F.2d 654, 655—Bok v. McCaughn, C.C.A.Pa., 42 F.2d 616, 619.

N.J.—Noice v. Schnell, 137 A. 582, 585, 101 N.J.Eq. 252, 52 A.L.R. 965. R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

(2) A charitable trust is a gift for the benefit of persons, either by bringing their hearts and minds un-

der the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers.

Cal.—In re Coleman, 138 P. 992, 167 Cal. 212, 214, Ann.Cas.1915C 532.

Me.—Bates v. Schillinger, 145 A. 395, 398, 128 Me. 14.

11 C.J. p 301 note 21 [a] (2).

(3) A charitable trust or charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals.

Cal.—Collier v. Lindley, 266 P. 526, 528, 203 Cal. 641—People v. Cogswell, 45 P. 270, 271, 113 Cal. 129, 138, 35 L.R.A. 269.

Mo.—In re Rahn's Estate, 291 S.W. 120, 128, 316 Mo. 492, 51 A.L.R. 877, certiorari denied Martin v. Ahrens, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

(4) Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied.

N.H.—Carter v. Whitcomb, 69 A. 779, 74 N.H. 482, 17 L.R.A., N.S., 733.

N.J.—Noice v. Schnell, 137 A. 582,

be one which is created for the purpose of carrying out one or more of the objects within the scope of a charity as so defined.²³ Any trust which comes within an approved definition of a charity and which is for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust.²⁴ This implication of public utility is contained in most of the definitions which have been attempted,²⁵ although a charitable trust has been defined as simply an indefinite or uncertain trust, a trust without a beneficiary.²⁶

The terms "public trust" and "charitable trust" have substantially the same meaning.²⁷

d. Charitable Use

"Charitable use" is a term used as synonymous with "charity" or "charitable trust" and also as meaning "charitable purpose."

585, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied *Allison v. Schnell*, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

23. Ill.—*Northwestern University v. Wesley Memorial Hospital*, 125 N. E. 13, 290 Ill. 205.

24. Ill.—*Hoeffer v. Clogan*, 49 N.E. 527, 171 Ill. 462, 63 Am.S.R. 241 and note, 40 L.R.A. 730.

Mo.—*Newton v. Newton Burial Park*, 34 S.W.2d 118, 121, 326 Mo. 901.

Okl.—*Phillips v. Chambers*, 51 P.2d 303, 306, 174 Okl. 407.

25. N.Y.—*In re MacDowell*, 112 N. E. 177, 178, 217 N.Y. 454, L.R.A. 1916E 1246—*Matter of Rockefeller's Estate*, 165 N.Y.S. 154, 158, 177 App.Div. 786, affirmed 119 N.E. 1074, 223 N.Y. 563.

Definitions including idea of public utility

(1) A gift to a general public use.—*In re Coleman*, 138 P. 992, 993, 167 Cal. 212, Ann.Cas.1915C 583—*Lenon's Estate*, 92 P. 870, 871, 152 Cal. 327, 125 Am.S.R. 58, 14 Ann.Cas. 1024.

(2) One which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever.

Mo.—*Newton v. Newton Burial Park*, 34 S.W.2d 118, 121, 326 Mo. 901.

R.I.—*Webster v. Wiggan*, 31 A. 824, 828, 19 R.I. 73, 99, 28 L.R.A. 510.

(3) Gift for a general public use, to be applied consistent with existing laws, for the benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint.—*Taylor v.*

Hoag, 116 A. 826, 273 Pa. 194, 21 A. L.R. 946—*Barnes Foundation v. Keeley*, 164 A. 117, 119, 108 Pa.Super. 203.

(4) The term "charitable trust" may be applied to almost anything that tends to promote the well-doing and well-being of social man where neither law nor public policy forbids.—*In re Thompson's Estate*, 127 A. 446, 448, 282 Pa. 30.

(5) A trust for the benefit of a definite section of the public is a charitable trust.—*Young Women's Christian Ass'n v. Portsmouth*, 192 A. 617, 619, 89 N.H. 40—*Roberts v. Corson*, 107 A. 625, 626, 79 N.H. 215, 5 A.L.R. 1172, citing *Corpus Juris*.

(6) A charitable trust is constituted by a donation in trust for establishing or carrying on an institution dedicated to the welfare of the public or of some definite class or part of it.—*In re Graham's Estate*, 218 P. 84, 85, 63 Cal.App. 41.

(7) The word "charitable" in the expression "charitable trusts" is "understood in a very large sense, comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and for any other useful and public purpose, as well as donations for pious or religious objects."—*People v. Fitch*, 47 N.E. 983, 988, 154 N.Y. 14, 38 L.R.A. 591, reversing 42 N.Y.S. 1131, 12 App.Div. 581, affirming 39 N.Y.S. 926.

(8) "Every public trust, although benefiting the rich and the poor alike, is a charitable trust."—*Gossett v. Swinney*, C.C.A.Mo., 53 F.2d 772, 776, affirming, D.C., *Irwin v. Swinney*, 44 F.2d 172, and certiorari de-

According to some cases, the words "charitable use" have acquired a special legal significance,²⁸ and they are to be interpreted, not according to their popular meaning, but in the light of the decisions under which their meaning has been developed.²⁹ While it has been asserted that the words "charitable use" mean, and have always meant, a charitable trust,³⁰ and that, in legal contemplation, "charity" and "charitable use" are convertible terms,³¹ it has also been held that "charitable use" means the same thing as "charitable purpose";³² and the courts frequently employ the term in the latter sense, as appears in § 12.

e. Public Charity and Public Trust

A public charity or trust is one for the benefit of the public at large or some substantial and indefinite portion of it.

A public charity has been defined as a gift to a public object,³³ and as whatever is gratuitously done or given in relief of the public burdens or in

nied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

26. N.Y.—*Levy v. Levy*, 33 N.Y. 97, 107.

11 C.J. p 301 note 19.

27. Mo.—*Buchanan v. Kennard*, 136 S.W. 415, 421, 234 Mo. 117, 37 L.R.A.N.S., 993, Ann.Cas.1912D 50.

11 C.J. p 302 note 36.

Synonymous terms

(1) "Public trusts and charitable trusts may be considered in general as synonymous expressions."—*Black L.D.* sub verb. "trust."

(2) Public trusts are frequently termed "charitable trusts."—*Smith v. Relief Ass'n of Portland Fire Department*, 149 A. 23, 25, 128 Me. 417—*Brooks v. Belfast*, 38 A. 222, 90 Me. 318, 329—*Doyle v. Whalen*, 32 A. 1022, 87 Me. 414, 425, 31 L.R.A. 118.

28. N.Y.—*Matter of Davis*, 137 N. Y.S. 427, 77 Misc. 72.

Pa.—*Price v. Maxwell*, 28 Pa. 23—*Amole's Est.*, 32 Pa.Super. 636.

29. N.Y.—*Matter of Davis*, 137 N. Y.S. 427, 77 Misc. 72.

Pa.—*Price v. Maxwell*, 28 Pa. 23.

11 C.J. p 301 note 26.

30. N.Y.—*In re Cunningham's Will*, 136 N.Y.S. 922, 926, 76 Misc. 120.

31. N.Y.—*Owens v. Methodist Episcopal Church Missionary Soc.*, 14 N.Y. 380, 385, 67 Am.D. 160.

32. Pa.—*In re Channon's Estate*, 28 Pa.Dist. 479, 483, affirmed 109 A. 756, 266 Pa. 417.

33. Kan.—*Troutman v. De Boissiere Odd Fellows' Home, etc., Assoc.*, 71 P. 286, 66 Kan. 1, 11.

Or.—*Vestal v. Pickering*, 267 P. 821, 824, 126 Or. 553, citing *Corpus Juris*.

advancement of the public good,³⁴ and every charity which is extensive in its object may, in a certain sense, be called a public charity.³⁵ A "public charity" has also been defined in the same terms as those employed in defining a "charity."³⁶ The phrase "public charity" is not confined to mere almsgiving or to the relief of poverty and distress, but has a wider significance and embraces the improvement and promotion of the happiness of man.³⁷

A public trust is one in which the public at large, or some undetermined portion of it, has a direct interest or property right, or in which the beneficiaries cannot be ascertained with certainty.³⁸

All charities which are recognized as such within the meaning of the law of charitable uses are in some sense public,³⁹ and every public trust, although benefiting the rich and the poor alike, is a charitable trust,⁴⁰ and the terms "public trust" and "charitable trust" have substantially the same meaning, as shown above in subdivision c of this section.

The word "public," when used in connection with a charity, refers to the purpose and intent of the trust as being for the benefit of the public in general, or of some object so general and indefinite in

its character as to be deemed of common benefit, and not to the method of its execution. A charitable or public trust may be distributed in private and by a private hand.⁴¹ Neither does the word "public" refer to the source from which the funds are derived, so as to make public subscription a test.⁴²

A gift is a public charity when there is a benefit to be conferred upon the public at large or some portion thereof, or on an indefinite class of persons, as shown below in § 12. Such a gift need not be open to every one in a community, however. By the designation of a class in the community, a charity becomes public, as shown below in § 37.

f. Private Charities or Trusts Distinguished

Public or charitable trusts are distinguishable from private trusts, on the grounds, among others, that the rule against perpetuities does not in general apply to a public or charitable trust and that uncertainty as to beneficiaries does not in general affect the validity of a public or charitable trust.

Generally speaking, charities are either public or private.⁴³ The line of distinction which determines where a private charity ends and a public one begins is at times difficult to locate, and this difficulty has caused much of the apparent want of harmony which prevails among the decisions on this

34. Pa.—Episcopal Academy v. Philadelphia, 25 A. 55, 150 Pa. 565, 573—Goesser v. Voris, 41 Pa.Co. 504, 507.

11 C.J. p 301 note 32.

35. Hawaii.—Oahu R. Co. v. Brown, 8 Hawaii 163, 165.

Mr. Binney's definition

The definition given by Mr. Horace Binney in his argument in the case of Vidal v. Girard, Pa., 2 How.U.S., 127, 11 L.Ed 205, "whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish," has been quoted as a definition of a public charity.—Noice v. Schnell, 137 A. 582, 585, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

36. Me.—Bates v. Schillinger, 145 A. 395, 398, 128 Me. 14—Bills v. Pease, 100 A. 146, 147, 116 Me. 98, L.R.A.1917D 1060.

Mo.—Robinson v. Crutcher, 209 S.W. 104, 105, 277 Mo. 1.

Ohio.—Central Pub. House of Reformed Church in U. S. v. Flury, 157 N.E. 794, 25 Ohio App. 214, affirmed Flury v. Central Pub. House of Reformed Church in U. S., 160 N.E. 679, 118 Ohio St. 154.

Vt.—In re Downer's Estate, 142 A. 78, 80, 101 Vt. 167.
11 C.J. p 300 notes 3, 4.

37. Ill.—Carlstrom v. Frackelton, 263 Ill.App. 250, 259.

38. Mo.—Holman v. Renaud, 125 S. W. 843, 845, 141 Mo.App. 899.

Other definitions

(1) "One for the benefit either of the public at large or some portion of it answering to a particular description, as a public charity."—Trenton Sav. Fund Soc. v. Wytham, 145 A. 462, 463, 104 N.J.Eq. 271, reversed on other grounds 148 A. 622, 106 N.J.Eq. 93, quoting Bouvier L. D. sub verb. "trust."

(2) "A trust for the benefit of a definite section of the public"—Young Women's Christian Ass'n v. Portsmouth, 192 A. 617, 619, 89 N.H. 40—Roberts v. Corson, 107 A. 625, 626, 79 N.H. 215, 5 A.L.R. 1172.

(3) "Those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals in which the cestui que trustent may be a portion or class of a public community."—Smith v. Relief Ass'n of Portland Fire Department, 149 A. 23, 25, 128 Me. 417—Brooks v. Belfast, 38 A. 222, 90 Me. 318, 329—Doyle v. Whalen, 32 A. 1022, 87 Me. 414, 425, 31 L.R.A. 118.

39. Ala.—Burke v. Roper, 79 Ala. 138.

Conn.—Eliot's App., 51 A. 553, 74 Conn. 536.

Me.—Doyle v. Whalen, 32 A. 1022, 87 Me. 414, 31 L.R.A. 118.

Pa.—Philadelphia v. Fox, 64 Pa. 169. 11 C.J. p 301 note 33.

Essential elements of a public charity are that it is not confined to privileged individuals but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character.

Me.—Doyle v. Whalen, 32 A. 1022, 87 Me. 414, 425, 31 L.R.A. 118.

N.Y.—Hamburger v. Cornell University, 199 N.Y.S. 369, 372, 204 App.Div. 664.

40. Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 140, 37 L. R.A.N.S., 993, Ann.Cas.1912D 50. 11 C.J. p 302 note 36.

41. Mass.—Bullard v. Chandler, 21 N.E. 951, 149 Mass. 532, 5 L.R.A. 104.

11 C.J. p 302 note 37.

"A charity may be public though administered by a private corporation."—Oahu R. Co. v. Brown, 8 Hawaii 163, 165.

42. Eng.—Shaw v. Halifax Corp., 1915, 2 K.B. 170.
11 C.J. p 302 note 38.

43. Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 140, 37 L.R. A.N.S., 993, Ann.Cas.1912D 50.

subject.⁴⁴ As respects their existence and validity, public or charitable trusts are distinguished from other trusts⁴⁵ in two particulars: (1) Charitable trusts are not, in general, within the rule against perpetuities, as shown in the C.J.S. title Perpetuities § 30, also 48 C.J. p 986 note 60. In fact a charitable trust contemplates perpetuity.⁴⁶ (2) Charitable trusts are further distinguished from ordinary trusts by the uncertainty of their beneficiaries, that is, a charitable or public trust or a public charity begins only when uncertainty in the recipient begins, and in the case of a public charity it is immaterial that the beneficiaries are indefinite or not ascertained, as shown below in § 39,⁴⁷ or that the trustee is uncertain or incapable of taking, as shown below in §§ 25, 27. A gift or bequest for the benefit or aid of defined persons is not in general a public charity, but a private trust only, as indicated below in § 39. In regard to the administration and enforcement of charitable, as distinguished from private, trusts, different rules apply, such as the one allowing the court to apply the gift cy pres, as shown below in § 52, and the one allowing the state, through the attorney-general, to interpose for the purpose of seeking the proper administration and enforcement of the trust, as shown below in § 58.

§ 2. Charitable Societies and Institutions

- a. General considerations
- b. Religious organizations; young men's christian associations, etc.
- c. Cemetery associations or corporations
- d. Educational institutions or organizations
- e. Hospitals

a. General Considerations

Briefly stated, the test in determining whether or

not a particular organization, is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit, or private advantage.

It is frequently important to determine whether or not a particular corporation, association, society, or other institution is a charitable institution, in view of the facts that such institutions are usually exempt, to some extent at least, from liability for the torts of their servants, as shown below in § 75, that such institutions are generally subject to visitation, as shown below in §§ 53 to 57, and that a rule different from that applicable to other institutions or corporations frequently applies in the distribution of assets on dissolution, as shown below in § 77. So, also, questions as to what institutions are charitable institutions within the meaning of statutory provisions exempting such institutions from taxation frequently arise, and are considered in the C.J.S. title Taxation § 282, also 61 C.J. p 452 note 75—p 456 note 42, § 1161, 61 C.J. p 1679 note 98—p 1680 note 13. The exemption of charitable institutions from assessment for municipal improvements is considered in the C.J.S. title Municipal Corporations § 1342, also 44 C.J. p 540 note 53—p 541 note 64.

The test of a charity and the test of a charitable organization,⁴⁸ or the test of a charitable gift or use and the test of a charitable corporation,⁴⁹ generally speaking, are in law the same; but some cases draw a distinction between organizations which may receive charitable gifts or bequests and those which are exempt from taxation, and confine the latter class to a much smaller number.⁵⁰

A charitable institution has been defined as one for the relief of a certain class of persons, either by alms, education, or care,⁵¹ a corporate body or establishment instituted and organized for public

44. Kan.—Washburn College v. O'Hara, 90 P. 234, 75 Kan. 700.

45. U.S.—Bauer v. Myers, C.C.A. Kan., 244 F. 902, 911.
Me.—Doyle v. Whalen, 32 A. 1022, 87 Me. 414, 31 L.R.A. 118.
Or.—Pennoyer v. Wadhams, 25 P. 720, 20 Or. 274, 11 L.R.A. 210.

46. Ala.—Moseley v. Smiley, 55 So. 143, 171 Ala. 593.
Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 37 L.R.A., N.S., 993, Ann.Cas.1912D 50.
N.Y.—Matter of Cunningham, 136 N.Y.S. 922, 76 Misc. 120.
11 C.J. p 370 notes 17, 20.

47. Necessity of certainty in designation of beneficiary of private trust see C.J.S. title Trusts § 45, also 65 C.J. p 271 note 54.

48. Ill.—Congregational Sunday

School & Publishing Soc. v. Board of Review, 125 N.E. 7, 290 Ill. 108.
Utah.—Sessions v. Thomas Dee Memorial Hospital Ass'n, 51 P.2d 229, 234, 89 Utah 222, citing *Corpus Juris*—William Budge Memorial Hospital v. Maughan, 3 P.2d 253, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516.

49. N.Y.—Matter of Beekman's Estate, 134 N.E. 183, 232 N.Y. 365—In re Kennedy's Estate, 269 N.Y.S. 136, 240 App.Div. 20—Matter of Rockefeller's Estate, 165 N.Y.S. 154, 177 App.Div. 786, affirmed 119 N.E. 1074, 223 N.Y. 563—Matter of Altman, 149 N.Y.S. 601, 87 Misc. 255.
11 C.J. p 303 note 62.

50. N.J.—Young Men's Christian Assoc. v. Paterson, 39 A. 655, 61

N.J.Law 420, affirmed 45 A. 1092, 64 N.J.Law 361.

N.Y.—Matter of McCormick, 127 N.Y.S. 493, 71 Misc. 95.

51. N.Y.—Utica Trust, etc., Co. v. Thompson, 149 N.Y.S. 392, 402, 87 Misc. 31, 47.

"Charity" in institutional sense

(1) A charity in the institutional sense is an organization or institution engaged in the free assistance of the poor, incapacitated, distressed. —Young Men's Christian Ass'n of Germantown v. City of Philadelphia, 187 A. 204, 209, 323 Pa. 401, quoting Webster New Int. D., 2d Ed.

(2) "In its technical as well as in its generally accepted meaning, a charity is an institution or association organized for the purpose of granting relief or dispensing some good or benevolence to those who

use,⁵² a public institution partaking of some of the duties of government.⁵³ A charitable corporation, in the popular acceptance, is one that freely and voluntarily ministers to the physical needs of those pecuniarily unable to care for themselves.⁵⁴ As frequently stated, charitable associations, corporations, or institutions are such as are constituted for the perpetual distribution of the free alms of the founders of, and the contributors to, them, to such purposes and in such manner as they have directed.⁵⁵ Their principal aim is to benefit needy ones in other ways than by improving their morals,⁵⁶ although sometimes a corporation formed for the

purpose of accomplishing the moral reformation of a certain class of people is treated as a charitable institution.⁵⁷ Their principal and distinctive features are that they have no capital stock and no provision for making dividends or profits, but derive their funds mainly from public and private charity and hold them in trust for the object of the institutions.⁵⁸ In other words, the test of whether an enterprise or institution is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit, or private advantage.⁵⁹ As sometimes stated, in order that a corporation may be regarded as

require it."—*In re Padelford's Estate*, 9 Pa. Dist. 174.

(3) "An institution founded by a gift and intended for the use of the public as a hospital, a library, a school, a museum, etc."—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, Ariz., 77 P.2d 453, 461.

Educational institutions

The term "charitable institutions" may, under some circumstances, be broadly construed so as to include "educational institutions."—*State v. Board of Control*, 88 N.W. 533, 541, 85 Minn. 165.

Charitable or benevolent organizations within statutes restricting amount of estate testator may give such organizations see C.J.S. title Wills § 110, also 68 C.J. p 550 note 25—p 551 note 57.

52. Iowa.—*Samuelson v. Horn*, 265 N.W. 168, 170, 221 Iowa 203, citing New Standard D.

53. Iowa.—*Samuelson v. Horn*, supra.

N.Y.—*Barr v. Brooklyn Children's Aid Soc.*, 190 N.Y.S. 296, 298.

54. N.Y.—*In re Rockefeller's Estate*, 165 N.Y.S. 154, 158, 177 App. Div. 786, affirmed 119 N.E. 1074, 223 N.Y. 563.

55. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A. Va., 31 F.2d 869.

N.Y.—*Stearns v. Association of Bar of City of New York*, 276 N.Y.S. 390, 394, 154 Misc. 71.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 14, 146 Or. 168.

11 C.J. p 303 note 64.

Boy scouts organizations have been held charitable institutions.—*Young v. Boy Scouts of America*, 51 P.2d 191, 9 Cal.App.2d 760.

Workhouse in a foreign country, managed by poor law guardians and hospital and homes committee, was presumed to be a charitable institution.—*In re Moeller's Estate*, 251 P. 311, 199 Cal. 705.

Home for aged has been held a charity.—*In re Channon's Estate*, 28

Pa. Dist. 479, affirmed 109 A. 756, 266 Pa. 417.

Organizations regarded as charitable corporations

(1) Corporation supplying summer home and care for persons who would be especially benefited thereby.—*Wood v. Hartigan*, R.I., 195 A. 507.

(2) Association incorporated to provide retreat for unmarried mothers and home for poor and destitute females.—*Wood v. Hartigan*, supra.

(3) Nursing association incorporated to promote the social and physical welfare of citizens of specified city, one of the activities of which was to promote the welfare of children by way of clinics and other preventive means.—*Wood v. Hartigan*, supra.

(4) Children's aid society, one of the purposes of which was to care for unmarried mothers and their children of any age, creed, religion, and nationality.—*Wood v. Hartigan*, supra.

(5) Corporation chartered to prevent cruelty to children.—*Skinner v. Northern Trust Co.*, 123 N.E. 289, 283 Ill. 229.

(6) Corporation chartered to provide a home and proper training school for destitute and dependent boys.—*Skinner v. Northern Trust Co.*, supra.

(7) Corporation chartered to build and conduct a home and provide for destitute crippled children.—*Skinner v. Northern Trust Co.*, supra.

Public charity

A corporation whose objects are benevolent and charitable is a public charity.—*Zoulalian v. New England Sanatorium & Benevolent Ass'n*, 119 N.E. 686, 230 Mass. 102, L.R.A. 1918F 185.

Teachers' retirement fund of the city of Providence, which was established by the school committee of said city under Public Laws 1897 c 485, was not a "charity."—*In re Carpenter*, 134 A. 16, 47 R.I. 461, 47 A.L. R. 60.

56. N.Y.—*Stearns v. Association of*

Bar of City of New York, 276 N.Y. S. 390, 154 Misc. 71—*Matter of McCormick*, 127 N.Y.S. 493, 71 Misc. 95.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 14, 146 Or. 168.

57. Mich.—*Gallon v. House of Good Shepherd*, 122 N.W. 631, 158 Mich. 361, 133 Am.S.R. 387, 24 L.R.A., N. S., 286.

N.Y.—*Stearns v. Association of Bar of City of New York*, 276 N.Y.S. 390, 154 Misc. 71.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 14, 146 Or. 168.

11 C.J. p 303 note 66.

58. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Ill.—*People v. Y. M. C. A. of Chicago*, 6 N.E.2d 166, 365 Ill. 118—*Congregational Sunday School & Publishing Soc. v. Board of Review*, 125 N.E. 7, 290 Ill. 108.

Mo.—*Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong*, 85 S.W.2d 461, 337 Mo. 349.

N.Y.—*Stearns v. Association of the Bar of City of New York*, 276 N.Y. S. 390, 394, 154 Misc. 71, quoting *Corpus Juris*.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 14, 146 Or. 168, quoting *Corpus Juris*.

Tenn.—*Baptist Hospital v. City of Nashville*, 3 S.W.2d 1059, 1060, 156 Tenn. 589, quoting *Corpus Juris*.

Utah.—*Sessions v. Thomas D. Dee Memorial Hospital*, Utah, 78 P.2d 645, 656, citing *Corpus Juris*—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 39 Utah 222—*William Budge Memorial Hospital v. Maughan*, 3 P.2d 258, 263, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516, citing *Corpus Juris*.

11 C.J. p 304 note 67.

59. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 77 P.2d 458, 462, quoting *Corpus Juris*.

Ill.—*People v. Y. M. C. A. of Chicago*, 6 N.E.2d 166, 365 Ill. 118—

a public charity its controlling purpose must be for the common and public benefit.⁶⁰

In general, the nature of the corporation, as well as its purposes and objects, must be determined from its charter or articles of association,⁶¹ and usually, according to some cases, may not be shown by parol or extrinsic evidence.⁶² There is authority for the view, however, that a corporation which is not organized for profit may show by its charter, constitution, and by-laws, or by extrinsic evidence not inconsistent therewith, that it is organized solely for the purpose of administering a public charity, the foundation of which is derived from private donations,⁶³ and, where it is contended that, notwithstanding the articles of incorporation indicate that the institution is a charitable one, it is not carrying out the purposes of such articles, parol evidence is admissible to contradict the prima facie case made by the articles.⁶⁴ Notwithstanding a corporation is founded for a charitable purpose, it is not a charitable institution if, in its activities, it departs from its eleemosynary character.⁶⁵ A non-

charitable corporation which engages in work of a charitable nature is not a charitable institution,⁶⁶ and a corporation which is created by the incorporators or is administered and maintained by their successors for making money is not a public charity, even though at times it may expend money for purposes, or may render gratuitous services, which in common speech are called "charitable."⁶⁷

According to some cases, whether or not an institution is a charitable one is determined more by its deeds than by the methods by which it is sustained, or by its motives,⁶⁸ and it has been held that an institution operated by a municipality by means of funds raised by taxation may be a charitable institution.⁶⁹

Provided a corporation or association can otherwise be classed as a charitable one, the fact that it receives pay from some of the students, inmates, patients, or other persons to whom it extends benefits detracts nothing from its character as a purely charitable institution,⁷⁰ where no profit is made by

- Morgan v. National Trust Bank of Charleston*, 162 N.E. 883, 331 Ill. 182—*Congregational Sunday School & Publishing Soc. v. Board of Review*, 125 N.E. 7, 290 Ill. 108.
- Mass.—*Boston Symphony Orchestra v. Board of Assessors of City of Boston*, 1 N.E.2d 6—*Hall v. College of Physicians and Surgeons*, 149 N.E. 675, 254 Mass. 95.
- N.Y.—*Hamburger v. Cornell University*, 199 N.Y.S. 369, 204 App. Div. 664, affirmed 148 N.E. 539, 240 N.Y. 323, 42 A.L.R. 955.
- Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 14, 16, 146 Or. 168, quoting *Corpus Juris*—*Corporation of Sisters of Mercy v. Lane County*, 261 P. 694, 698, 123 Or. 144, citing *Corpus Juris*.
- Tenn.—*Baptist Hospital v. City of Nashville*, 3 S.W.2d 1056, 156 Tenn. 589.
- Tex.—*State v. Settegast*, Civ.App., 227 S.W. 253, 256, citing *Corpus Juris*.
- 11 C.J. p 304 note 67.

Corporation

A corporation is to be deemed eleemosynary or charitable where its property is derived from charitable gifts or bequests and is administered, not for the purpose of gain, but in the interest of humanity.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A.Va., 31 F.2d 869.

Corporation organized to collect Civil War data

Nonprofit, corporate memorial association formed to collect data regarding Civil War, and charging nominal fee for entry to museum is "charitable institution." — *Bodenheimer v. Confederate Memorial*

Ass'n, D.C.Va., 5 F.Supp. 526, affirmed, C.C.A., 68 F.2d 507, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L. Ed. 1483.

Sale of goods for charitable purpose

Corporation devoting proceeds of commodities sold in corporation's store to furnishing labor to needy, and commodities for charitable purposes, was "charitable institution." — *Jackson v. Atlanta Goodwill Industries*, 167 S.E. 702, 46 Ga.App. 425, certiorari denied 54 S.Ct. 63, 290 U.S. 625, 78 L.Ed. 545.

60. Mass.—*Hall v. College of Physicians and Surgeons*, 149 N.E. 675, 254 Mass. 95.

61. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Conn.—*Corbin v. American Industrial Bank & Trust Co.*, 110 A. 459, 95 Conn. 50.

Ga.—*Morton v. Savannah Hospital*, 96 S.E. 887, 148 Ga. 438, answers to certified questions conformed to 96 S.E. 888, 22 Ga.App. 607.

Minn.—*Craig v. Benedictine Sisters Hospital Ass'n*, 93 N.W. 669, 88 Minn. 535.

N.Y.—*Hamburger v. Cornell University*, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 323, 42 A.L.R. 955.

Utah.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 222—*William Budge Memorial Hospital v. Maughan*, 3 P. 2d 258, 261, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516, citing *Corpus Juris*.

11 C.J. p 304 note 68.

Where testator directed formation of corporation to administer certain

benevolences, the purposes and objects of the corporation must be ascertained from the act of incorporation, and not from the will or the codicil.—*Matter of Altman*, 149 N.Y. S. 601, 87 Misc. 255.

62. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Minn.—*Craig v. Benedictine Sisters Hospital*, 93 N.W. 669, 88 Minn. 535.

Utah.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 222—*Gitzhoffen v. Sisters of Holy Cross Hospital Assoc.*, 88 P. 691, 32 Utah 46, 8 L.R.A., N.S., 1161.

63. Ohio.—*O'Brien v. Physicians' Hospital Ass'n*, 116 N.E. 975, 96 Ohio St. 1, L.R.A.1917F 741.

64. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Utah.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 222.

65. N.Y. — *Hamburger v. Cornell University*, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 323, 42 A.L.R. 955.

66. N.Y. — *Hamburger v. Cornell University*, supra.

67. Mass.—*Hall v. College of Physicians and Surgeons*, 149 N.E. 675, 254 Mass. 95.

68. Wash.—*In re Wilson's Estate*, 191 P. 615, 111 Wash. 491.

69. Wash.—*In re Wilson's Estate*, supra.

70. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A. Va., 31 F.2d 869.

the institution, the amounts so received are applied in furthering the charitable purposes of the institution, and benefits are not denied to anyone because of inability to pay therefor.⁷¹ The original eleemosynary character of the institution is not transformed by this patronage, even if sufficient to relieve it from financial burdens, but the charity as established remains unaffected.⁷²

The fact that a corporation which is organized as a private corporation administers, or has for its purpose the administration of, a public charity does make such corporation a public corporation,⁷³ even though such corporation receives donations from the government or public funds to assist it in carrying on its work.⁷⁴

Eleemosynary corporations which assist the state in the performance of a governmental duty are favorites of the law.⁷⁵

Benevolent or benefit associations or corporations

and similar organizations. Benevolent associations are those having a philanthropic or charitable purpose, as distinguished from such as are conducted for profit, specifically, "benefit associations" or "beneficial associations."⁷⁶ A benevolent society is one organized for benevolent purposes.⁷⁷ A benevolent corporation is one that ministers to all and the purpose may be anything that promotes the mental, physical, or spiritual welfare of man.⁷⁸ The term may include a corporation to which a bequest is made to be used in the improvement of the social, physical, and economic condition of the employees of a business corporation.⁷⁹

Voluntary, unincorporated associations, organized to promote some purpose beneficial to the general public or of certain classes thereof are charitable societies⁸⁰ or institutions,⁸¹ and are subject to the rules applicable to such societies.⁸² In so far as a benevolent association has for its object the conferring of benefits without requiring an equivalent

Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 77 P.2d 458—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 125, 45 Ariz. 507, citing *Corpus Juris*.

Conn.—Boardman v. Burlingame, 197 A. 761, 123 Conn. 646.

Mass.—Boston Symphony Orchestra v. Board of Assessors of City of Boston, 1 N.E.2d 6.

N.Y.—Hamburger v. Cornell University, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955.

Tenn.—Baptist Hospital v. City of Nashville, 3 S.W.2d 1059, 156 Tenn. 539.

Tex.—Enell v. Baptist Hospital, Civ. App., 45 S.W.2d 395, 397, quoting *Corpus Juris*.

Wash.—Tribble v. Missionary Sisters of the Sacred Heart, 242 P. 372, 137 Wash. 326.

11 C.J. p 304 note 70.

Charge for most, if not all, services

If the purpose of the institution is one which is recognized in law as charitable, and if it is not maintained for the private gain, profit, or advantage of its organizers, officers, or owners, directly or indirectly, the institution is properly characterized as a charitable one, notwithstanding the fact that it charges for most, if not all, of the services which it may render, so long as its receipts are devoted to the necessary maintenance of the institution and the carrying out of the purpose for which it was organized.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, Ariz., 77 P.2d 458.

71. Ill.—People v. Y. M. C. A. of Chicago, 6 N.E.2d 166, 365 Ill. 118

—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344 — Congregational Sunday School & Publishing Soc. v. Board of Review, 125 N.E. 7, 290 Ill. 108. 11 C.J. p 304 note 70.

72. Mass.—New England Sanitarium v. Stoneham, 91 N.E. 335, 205 Mass. 335.

Tenn.—Baptist Hospital v. City of Nashville, 3 S.W.2d 1059, 1060, 156 Tenn. 539, quoting *Corpus Juris*.

Tex.—Enell v. Baptist Hospital, Civ. App., 45 S.W.2d 395.

73. Hawaii.—Oahu R. Co. v. Brown, 3 Hawaii 163, 165, quoting 2 Kent Comm. p 276.

N.Y.—Van Campen v. Olean General Hospital, 205 N.Y.S. 554, 210 App. Div. 204, affirmed 147 N.E. 219, 239 N.Y. 615.

14 C.J. p 73 note 99.

74. N.Y.—Van Campen v. Olean General Hospital, 205 N.Y.S. 554, 210 App.Div. 204, affirmed 147 N.E. 219, 239 N.Y. 615.

Corporations supported mainly by voluntary gifts

Corporations organized under legislative permission supported mainly through voluntary gifts, performing duties similar to those of public corporations, and engaged in charitable work, although affected with a public interest and receiving donations from government, are private and not public corporations.—Van Campen v. Olean General Hospital, supra.

75. Ind.—Old Folks' and Orphan Children's Home v. Roberts, 149 N.E. 183, 83 Ind.App. 546.

76. Black L.D.

77. N.C.—State v. Dunn, 46 S.E. 949, 134 N.C. 663, 665.

78. N.Y.—In re Rockefeller's Es-

tate, 165 N.Y.S. 154, 153, 177 App. Div. 786, affirmed 119 N.E. 1074, 223 N.Y. 563.

"Charitable corporation" compared and distinguished

(1) "In its popular acceptance, a charitable corporation is one that freely and voluntarily ministers to the physical needs of those pecuniarily unable to secure for themselves, while a benevolent corporation is one that ministers to all, and the purpose may be anything that promotes the mental, physical, or spiritual welfare of man."—In re Rockefeller's Estate, supra.

(2) "If it was the purpose of the founders of the corporation to extend aid and assistance to needy and destitute persons engaged in artistic and creative work, the corporation would be a benevolent corporation but would more properly be classified as a charitable corporation."—In re Peabody's Estate, 208 N.Y.S. 664, 671, 124 Misc. 338.

(3) Corporation empowered to promote commerce and to aid and assist members reduced to poverty and their widows and children was a "charitable corporation," or at least a "benevolent corporation" within the meaning of Personal Property Law § 12.—Corporation of Chamber of Commerce of New York v. Bennett, 257 N.Y.S. 2, 143 Misc. 513.

79. N.Y.—In re Altman's Estate, 149 N.Y.S. 601, 605, 87 Misc. 255.

80. Ark. — Town of Gravette v. Veach, 54 S.W.2d 704, 186 Ark. 544.

81. Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

82. Ark. — Town of Gravette v. Veach, 54 S.W.2d 704, 186 Ark. 544.

from the one benefited, it may be a charity.⁸³ The object of an unincorporated, voluntary association as shown by its constitution, and its activities may be considered in determining whether or not it is a charitable institution.⁸⁴

There is a distinction between public charities and mutual benefit associations supported by contributions or assessments from their members, whereby the members, or their widows and orphans, become entitled to certain benefits as a personal right. Such an association is not a public charity.⁸⁵ Where, however, an association is engaged in promoting a public charity, and its funds are impressed with a public trust, the fact that the benefits of the association may inure more directly to its members than to those who are not members does not deprive the association of its public character.⁸⁶

Masonic lodges, when classed as charitable institutions in state statutes, will be recognized as such by the courts;⁸⁷ and generally such lodges are held to be charities in respect of the funds they receive

for charitable uses, although not in respect of those received for the entertainment of their members.⁸⁸

b. Religious Organizations; Young Men's Christian Associations, Etc.

While "religious corporations" are in a sense corporations for charitable purposes, all "charitable corporations" are not "religious corporations."

While "religious corporations" are in a sense corporations for charitable purposes,⁸⁹ all "charitable corporations" are not "religious corporations."⁹⁰ A distinction between these two kinds of corporations is sometimes made by statute,⁹¹ but, where, by virtue of statute, there is no distinction between a charitable and a religious use, the term "charitable societies" may include a religious society.⁹²

The Salvation Army has been regarded as a charitable corporation.⁹³

In view of the provisions of its constitution and by-laws, the objects served, and the method of administration, it has been held that a young men's christian association is a benevolent or charitable institution,⁹⁴ notwithstanding the requirement of

83. N.C.—State v. Dunn, 46 S.E. 949, 134 N.C. 663.

84. Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

85. Cal.—In re Dol's Estate, 187 P. 428, 431, 182 Cal. 159, citing *Corpus Juris*.

Colo.—Board of County Com'rs of Chaffee County v. Denver & R. G. R. Co. Employes' Relief Ass'n, 203 P. 850, 852, 70 Colo. 592, citing *Corpus Juris*.

Pa.—In re Sharp's Estate, 71 Pa.Super. 34.

R.I.—Industrial Trust Co. v. Green, 23 A. 914, 17 R.I. 586, 17 L.R.A. 202.

Wis.—In re Prange's Will, 243 N.W. 488, 492, 208 Wis. 404, citing *Corpus Juris*.

11 C.J. p 305 note 75.

Corporation

A corporation organized for the benefit of its members who are entitled to benefits from a fund created by the dues and fees paid by them is not a charitable or benevolent society or corporation.—In re Dol's Estate, 187 P. 428, 431, 182 Cal. 159, citing *Corpus Juris*.

Odd Fellows' Home held not a charity

Pa.—In re Channon's Estate, 28 Pa. Dist. 479, affirmed 109 A. 756, 266 Pa. 417.

86. N.H.—Carter v. Whitcomb, 69 A. 779, 74 N.H. 482, 17 L.R.A., N.S., 738.

87. Ga. — Savannah v. Solomon's Lodge No. 1 F. & A. M., 53 Ga. 93. 11 C.J. p 305 note 79.

88. R.I.—Mason v. Perry, 48 A. 671, 22 R.I. 475.

11 C.J. p 306 note 80.

Exemption of masonic lodges from taxation as charitable institutions see C.J.S. title Taxation § 295, also 61 C.J. page 495 note 34.

Educational and home endowment funds

Educational and home endowment funds of Grand Lodge, incorporated under act of territory of Oregon enacted Jan. 12, 1853, are quasi-public charities, in view of facts that the beneficiaries are uncertain in number and that they consist of a class of persons described in general language, fluctuating and changing in respect of individual members.—State v. Toney, 17 P.2d 1105, 141 Or. 406.

Masonic Home regarded as charity

Pa.—In re Channon's Estate, 28 Pa. Dist. 479, affirmed 109 A. 756, 266 Pa. 417.

89. Md. — Baltzell v. Baltimore Church Home, etc., 73 A. 151, 110 Md. 244.

Maintenance of public worship and religious school

Corporation chartered for maintenance of Jewish public worship and religious school is "charitable corporation."—Glaser v. Congregation Kehillath Israel, 161 N.E. 619, 263 Mass. 435.

Publishing enterprise

Publishing house of church disseminating religious literature among membership, and maintaining job printing department for public patronage for profit, was not a "pub-

lic charity" or "charitable corporation."—Central Pub. House of Reformed Church in U. S. v. Flury, 157 N.E. 794, 25 Ohio App. 214, affirmed on other grounds Flury v. Central Pub. House of Reformed Church in U. S., 160 N.E. 679, 118 Ohio St. 154. Religious purpose as charitable purpose see *infra* § 17.

"Religious corporation" defined see C.J.S. title Religious Societies § 1, also 54 C.J. page 7 notes 15-22.

90. Md. — Baltzell v. Baltimore Church Home, etc., 73 A. 151, 110 Md. 244.

91. N.Y.—Matter of McCormick, 127 N.Y.S. 493, 71 Misc. 95.

92. Conn.—Brinsmade v. Beach, 119 A. 233, 98 Conn. 322.

Residuary clause of will

Conn.—Brinsmade v. Beach, *supra*.

93. R.I.—Basabo v. Salvation Army, 85 A. 120, 35 R.I. 22, 42 L.R.A., N.S., 1144.

94. Mass.—Little v. Newburyport, 96 N.E. 1032, 210 Mass. 414, Ann. Cas.1912D 425.

But it was held that, under the facts shown, a young men's christian association was not a public charitable corporation.—Chapin v. Holyoke Y. M. C. A., 42 N.E. 1130, 165 Mass. 280.

Want of profit

A young men's christian association has been regarded as a public charity in view of the facts that its object was the spiritual, mental, and physical welfare and improvement of young men, that it was general and public in scope, and that no personal

payment of a small annual fee by members.⁹⁵ A like rule has been applied to a young women's christian association.⁹⁶

c. Cemetery Associations or Corporations

A cemetery association or corporation may or may not be a charitable organization.

It has been held that a cemetery association or corporation is not a charitable organization, notwithstanding it has no capital stock, has never declared dividends, and its trustees receive no compensation for their services, where there is nothing in the articles of association or in the law under which the corporation was incorporated which prevents the conducting of business for profit, the payment of salaries, or the declaration of dividends,⁹⁷ and a like view has been taken even though the corporation has no right to declare a dividend to its members in the event profits are realized; where there is nothing in the charter which compels the application of any part of the corporate funds to charitable uses.⁹⁸ Cemetery corporations organized under some statutes are, however, charitable trusts.⁹⁹

d. Educational Institutions or Organizations

In general the test, in determining whether or not

an educational institution is a charitable institution, is whether it is carried on for public benefit or for private gain.

In general, whether or not an institution of learning is or is not charitable, depends on whether it is carried on for public benefit or for private gain;¹ and the fact that a particular institution is supported in whole or in part by voluntary contributions indicates that it is a charitable corporation.² So, an educational institution which is established and endowed or supported by private charity and is not operated for the purpose of gain but in the interest of humanity is, in general, a charitable institution.³ The eleemosynary or charitable character of an educational institution is not destroyed by the fact that it makes a charge for tuition,⁴ and the payment of tuition by its students does not prevent their being considered beneficiaries of the charity.⁵ The controlling purpose must be the common and public benefit in order to constitute a corporation conducting an institution of learning a public charity,⁶ and such a corporation is not a public charity if it was created by the incorporators or has been administered by the successors for the purpose of making money notwithstanding it may at times have expended money for purposes, or rendered gratuitous services, which in common speech are called charitable.⁷

or private gain accrued to the members of the corporation from its operation. — *Betts v. Young Men's Christian Ass'n of Erie*, 83 Pa.Super. 545.

Exemption from taxation see the C. J.S. title Taxation § 303, also 61 C.J. p 506 note 9—p 508 note 45.

95. Mass.—*Little v. Newburyport*, 96 N.E. 1032, 210 Mass. 414, Ann. Cas.1912D 425.

11 C.J. p 304 note 70.

96. Mo.—*Eads v. Young Women's Christian Association*, 29 S.W.2d 701, 325 Mo. 577.

Revenue from rentals

The fact that a young woman's christian association received rent from persons who occupied portions of its building did not destroy its status as a charitable organization, as it was assumed, in the absence of evidence to the contrary, that the association used the revenue so received in accordance with its declared and authorized purpose and the law under which it was incorporated. — *Eads v. Young Women's Christian Ass'n*, supra.

97. Ind.—*East Hill Cemetery Co. v. Thompson*, 97 N.E. 1036, 53 Ind. App. 417.

98. Mass. — *Donnelly v. Boston Catholic Cemetery Assoc.*, 15 N.E. 505, 146 Mass. 163.

99. N.J.—*Atlas Fence Co. v. West*

Ridgelawn Cemetery, 160 A. 683, 110 N.J.Eq. 580.

1. N.Y.—*Butterworth v. Reeler*, 114 N.E. 303, 219 N.Y. 446—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873.

11 C.J. p 318 note 22.

Colleges or universities may be public charities, but they are not "charitable institutions" in the common acceptance of that term.—*State v. Neff*, 40 N.E. 720, 52 Ohio St. 375, 28 L.R.A. 409—11 C.J. p 975 note 16.

2. Conn.—*Connecticut College for Women v. Calvert*, 88 A. 633, 87 Conn. 421, 423, 48 L.R.A.,N.S., 485, 11 C.J. p 318 note 23.

3. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A. Va., 31 F.2d 869—*Bodenheimer v. Confederate Memorial Ass'n*, D.C. Va., 5 F.Supp. 526, affirmed, C.C.A., 68 F.2d 507, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483.

Conn.—*Schusler's App.*, 70 A. 1029, 81 Conn. 276.

Cornell University

In view of the facts that L.1865 c 585, Education L. § 1033, incorporating Cornell University, shows that the purpose is educational and charitable and that there is an entire absence of pecuniary gain in any form inuring to the benefit of the founder, the incorporators, or the

governing body, that there is no capital stock, and that all the income of the university is used for educational purposes, and its doors are open to all who can comply with the "needful and proper regulations," the university is a charitable institution.—*Hamburger v. Cornell University*, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955.

Parochial school, although supported by private funds, is a charitable institution.—*Schusler's App.*, 70 A. 1029, 81 Conn. 276.

4. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A. Va., 31 F.2d 869.

N.Y.—*Hamburger v. Cornell University*, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y.S. 328, 42 A.L.R. 955.

11 C.J. p 304 note 70, p 975 note 15.

5. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A. Va., 31 F.2d 869.

6. Mass.—*Hall v. College of Physicians and Surgeons*, 149 N.E. 675, 254 Mass. 95.

7. Mass.—*Hall v. College of Physicians and Surgeons*, supra.

College under control of religious body

That a statute incorporating "the Board of Trustees of the Associate Reformed Presbyterian Synod," de-

An incorporated institution of learning which is founded as a private corporation is not a public corporation, notwithstanding it is conducted as a general or public charity in accordance with its purpose.⁸

e. Hospitals

Briefly, the test in determining whether or not a

hospital is a charitable institution, is whether or not it is maintained for gain or profit.

A hospital may be a public charity or a charitable institution,⁹ as may a corporation organized for the purpose of founding and maintaining a hospital.¹⁰ Briefly, the test which determines whether a hospital is charitable or otherwise is its purpose, that is, whether or not it is maintained for gain, profit, or advantage.¹¹ While it has been held that the

clared it to be a religious association engaged in the propagation of the gospel, and that another statute amending the defendant college's charter placed it under the jurisdiction of the synod, was insufficient to show that the college was a public charity, since such facts were not inconsistent with the view that defendant was a private corporation conducted for gain.—*Vermillion v. Woman's College of Due West*, 88 S.E. 649, 104 S.C. 197.

8. U.S. — *Dartmouth College v. Woodward*, N.H., 4 Wheat. 513, 4 L.Ed. 629.

14 C.J. p 74 note 16.

9. Mass.—*Frazier v. Merchants Nat. Bank of Salem*, 5 N.E.2d 550.

R.I.—*Rhode Island Hospital Trust Co. v. Williams*, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

Tex.—*Taylor University v. Boyd*, Civ.App., 18 S.W.2d 700—*Barnes v. Providence Sanitarium*, Civ.App., 229 S.W.2d 588.

Wis.—*In re Prange's Will*, 243 N.W. 488, 208 Wis. 404.

Hospital operated by municipality

A hospital operated by a municipality by means of funds raised by taxation may be a charitable institution.—*In re Wilson's Estate*, 191 P. 615, 111 Wash. 491.

Hospital society as "public charity"

Hospital society chartered by 1 Spec. Acts 1826 p 343, for the purpose of establishing and maintaining a general hospital, was a "public charity" in the popular significance of that term.—*Cohen v. General Hospital Soc. of Connecticut*, 154 A. 435, 113 Conn. 188.

Status not altered

Reference in the charter of a corporation which operated a hospital, to Gen.L.1896 c 177, and the action of tax commissioners in taking steps preliminary to revocation of the charter did not alter the charitable purpose of the corporation and make it a "business corporation."—*Rhode Island Hospital Trust Co. v. Williams*, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

10. Ind.—*St. Vincent's Hospital v. Stine*, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.

Mass.—*Zoulalian v. New England Sanatorium & Benevolent Ass'n*,

119 N.E. 686, 230 Mass. 102, 102 L.R.A.1918F 185.

Charitable association or institution

An association or corporation organized under Rev.St.1881 § 3502, to maintain a hospital was a charitable association or institution.—*St. Vincent's Hospital v. Stine*, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.

Benevolent and charitable objects

A corporation organized for the purpose of founding a hospital or charitable asylum for the care and relief of indigent or other sick or infirm persons and in no manner for private profit or dividend paying to anyone is a public charity, in view of the fact that its objects are benevolent and charitable.—*Zoulalian v. New England Sanatorium & Benevolent Ass'n*, 119 N.E. 686, 230 Mass. 102, L.R.A.1918F 185.

Charitable corporation

Corporation chartered to establish or maintain a hospital has been regarded as a charitable corporation.—*Skinner v. Northern Trust Co.*, 123 N.E. 289, 238 Ill. 229.

11. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 77 P.2d 458, 46 P.2d 118, 45 Ariz. 507.

Ind.—*St. Vincent's Hospital v. Stine*, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.

Kan.—*Nuns of Third Order of St. Dominic v. Younkin*, 235 P. 869, 118 Kan. 554.

Mich.—*Bruce v. Henry Ford Hospital*, 236 N.W. 813, 254 Mich. 394.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 16, 146 Or. 168, quoting *Corpus Juris*.

Utah. — *William Budge Memorial Hospital v. Maughan*, 3 P.2d 253, 261, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516.

11 C.J. p 304 note 67—30 C.J. p 462 note 4.

"Charitable hospital is one organized not for the purpose of making profit, but is maintained primarily for charitable purposes."—*Olander v. Johnson*, 258 Ill.App. 89, 98.

Hospital as charitable institution or public charity

(1) Hospital paying no dividends and largely supported by donations is charitable institution. — In re

Prange's Will, 243 N.W. 488, 208 Wis. 404.

(2) Evidence that hospital was nonprofit organization devoted to, and furnishing, care without payment or at charge below actual cost, showed that it was a charitable institution.—*Hallinan v. Prindle*, Cal. App., 62 P.2d 1075.

(3) A hospital, owned and managed by a corporation organized for benevolent purposes, which has no capital stock, declares no dividends, and has earned none, and which devotes all its income to the care of persons sick or injured, and in improving and extending its facilities for so doing, and which receives and cares for patients without discrimination as to their race, creed or wealth, is conducted exclusively for charitable purposes.—*Nuns of Third Order of St. Dominic v. Younkin*, 235 P. 869, 872, 118 Kan. 554.

(4) A sanitarium organized to nurse and restore to health the sick and minister to the unfortunate of every creed and nation, any profits being put back when earned and none of its income or gifts being diverted to private gain or profit, is purely a public charity.—*Barnes v. Providence Sanitarium*, Tex.Civ.App., 229 S.W. 588, dismissed for want of jurisdiction.

(5) An institution organized and conducted for care of persons suffering from mental diseases, which was tax exempt and was organized for public welfare without profit to itself or any individual, was a "charitable institution." — *Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646.

(6) The Savannah Hospital chartered by the general assembly, Acts 1835 pp 131, 132, amended Acts 1872 p 256, was authorized and empowered thereby to conduct an institution eleemosynary in character for the public benefit, and it was not the intention of the legislature that the business so conducted might be for the pecuniary gain or benefit of its managers, officers, or others.—*Morton v. Savannah Hospital*, 96 S.E. 837, 148 Ga. 438, answers to certified questions conformed to 96 S.E. 888, 22 Ga.App. 607.

Hospital not charitable institution

Where corporation, administering

intention of the legislature in chartering a hospital is fixed by the applicable statutes and that the charter provisions are controlling in determining the status of the hospital,¹² and that where the articles of association show that the corporation which operates a hospital is in fact a noncharitable corporation evidence to show that it is in fact a charitable corporation is not admissible,¹³ according to some cases the status of the hospital is not conclusively determined by its charter,¹⁴ and the question as to its character may be determined not only from the powers and purposes as defined in its articles of incorporation or charter but also from the manner

in which it is conducted,¹⁵ or, as otherwise stated, the question as to whether a hospital is maintained for the purpose of charity or for that of profit may be determined, in case the hospital is incorporated, not only from its powers as defined in its charter but also from the manner in which it is conducted.¹⁶ Where a hospital can otherwise be classed as a charitable institution, the fact that patients who are able to pay are required to do so does not deprive it of its charitable character;¹⁷ neither does the fact that the county pays for the services rendered to those who are a legal county charge.¹⁸ Furthermore, the fact that the institution has in-

educational trust, operated hospital which charged customary rates and made no pretense of receiving patients unable to pay for services rendered except where payment was guaranteed by independent organization, hospital was not a charitable institution.—*Baker v. Board of Trustees of Leland Stanford Junior University*, 23 P.2d 1071, 133 Cal.App. 243.

12. Ga.—*Morton v. Savannah Hospital*, 96 S.E. 887, 148 Ga. 438, answers to certified questions conforming to 96 S.E. 888, 22 Ga.App. 607.

Allegations in pleading as to operation for gain

In respect of Savannah Hospital chartered by Acts 1835 pp 131, 132, amended by Acts 1872 p 256, the charter provisions are controlling and determine its nature as an eleemosynary institution, notwithstanding allegations in a petition that it was conducted for pecuniary gain.—*Morton v. Savannah Hospital*, supra.

13. Minn.—*Craig v. Benedictine Sisters Hospital Ass'n*, 93 N.W. 669, 83 Minn. 535.

14. Tenn.—*Knox County Tuberculosis Sanitarium v. Moss*, 5 Tenn. App. 589.

Originally chartered for profit

Where a corporation was organized to conduct a sanitarium for profit but the charter was abandoned and was later used for the purpose of establishing and carrying out a charity, the charter was not conclusive and it was permissible to show that the property was being used exclusively for charitable purposes.—*Knox County Tuberculosis Sanitarium v. Moss*, supra.

15. Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Cal.—*Hallinan v. Prindle*, 29 P.2d 202, 220 Cal. 46—*Armstrong v. Wallace*, 47 P.2d 740, 8 Cal.App. 2d 429—*Levy v. Superior Court of California in and for City and*

County of San Francisco, 239 P. 1100, 74 Cal.App. 171.

Ohio.—*O'Brien v. Physicians' Hospital Ass'n*, 116 N.E. 975, 96 Ohio St. 1, L.R.A.1917F 741.

16. Cal.—*Stewart v. California Medical Missionary, etc., Assoc.*, 176 P. 46, 178 Cal. 413—*Stonsker v. Big Sisters Hospital*, 2 P.2d 520, 116 Cal.App. 375.

Mich.—*Bruce v. Henry Ford Hospital*, 236 N.W. 813, 254 Mich. 394.

Or.—*Hamilton v. Corvallis General Hospital Ass'n*, 30 P.2d 9, 146 Or. 167.

Utah.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 223—*William Budge Memorial Hospital v. Maughan*, 3 P. 2d 258, 79 Utah 516, rehearing denied 13 P.2d 1119, 79 Utah 516.

Long operation without charity patients

Where a hospital charged prices similar to those charged by other hospitals being conducted for profit and had operated for thirteen years without receiving any charity patients, it was a hospital being conducted for profit and not a charitable institution, although the corporation had been organized for charitable purposes.—*Stewart v. California Medical Missionary, etc., Assoc.*, 176 P. 46, 178 Cal. 413.

17. U.S.—*Deming Ladies' Hospital Ass'n v. Price*, C.C.A.N.M., 276 F. 668.

Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 77 P.2d 458.

Cal.—*Hallinan v. Prindle*, App., 62 P. 2d 1075.

Conn.—*Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646.

Ill.—*Hart v. Taylor*, 133 N.E. 857, 301 Ill. 344.

Kan.—*Nuns of Third Order of St. Dominic v. Younkin*, 235 P. 869, 118 Kan. 554.

Mass.—*Beverly Hospital v. Early*, 197 N.E. 641, 100 A.L.R. 1333—*New England Sanitarium v. Stoneham*, 91 N.E. 385, 205 Mass. 335.

Ohio.—*O'Brien v. Physicians' Hospi-*

tal Ass'n, 116 N.E. 975, 96 Ohio St. 1, L.R.A.1917F 741.

Tenn.—*Baptist Hospital v. City of Nashville*, 3 S.W.2d 1059, 156 Tenn. 539.

Tex.—*City of Dallas v. Smith*, Com. App., 107 S.W.2d 872, reversing *Smith v. City of Dallas*, Civ.App., 78 S.W.2d 301—*Enell v. Baptist Hospital*, Civ.App., 45 S.W.2d 395, error refused—*Baylor University v. Boyd*, Civ.App., 18 S.W.2d 700.

Wash.—*Tribble v. Missionary Sisters of the Sacred Heart*, 242 P. 372, 137 Wash. 326.

Wyo.—*Bishop Randall Hospital v. Hartley*, 160 P. 385, 24 Wyo. 408, Ann.Cas.1918E 1172.

11 C.J. p 804 note 70—30 C.J. p 462 note 6.

Hospital as charitable institution

(1) A hospital not being operated for profit, but at the end of the fiscal year placing in its general fund, and using for its general charitable purposes, any surplus, however derived, above expenses of maintenance and operation, is a charitable institution, although requiring of patients payment of their board according to their circumstances and the accommodations received, and this, although no person may individually have the right to demand admission.—*Baylor University v. Boyd*, Tex. Civ.App., 18 S.W.2d 700.

(2) A hospital organized and maintained with funds donated, caring for all sick and injured persons brought to it, charging those who are able to pay and treating free of charge those who are not, operated under a board of trustees consisting of the Protestant Episcopal bishop and the rector and church wardens of a specified church, is a charitable institution.—*Bishop Randall Hospital v. Hartley*, 160 P. 385, 24 Wyo. 408, Ann.Cas.1918E 1172.

18. Kan.—*Nuns of Third Order of St. Dominic v. Younkin*, 235 P. 869, 118 Kan. 554.

Minn.—*Hennepin County v. Brotherhood of Gethsemane*, 8 N.W. 595, 27 Minn. 460, 38 Am.R. 298.

creased the value of its plant from money received from patients who pay and from donations does not deprive the hospital of its charitable character.¹⁹ The fact that a department of a hospital earns a slight profit does not affect the status of the hospital as a charitable institution.²⁰

If a hospital is organized by a corporation not for the purpose of making a profit, but to take care of injured employees, who are received into the hospital without charge, the hospital is a charitable enterprise, even though the employees contribute to its support.²¹ However, if the hospital is conducted for profit, although receiving free of charge patients unable to pay, it is not a charitable institution.²²

The fact that a corporation which is organized as a private corporation operates, in accordance with its purpose, a hospital as a public charity or institution does not make such corporation a public corporation, even though the corporation receives donations from the government or public funds to assist it in carrying on its work.²³

§ 3. Origin and Development

Trusts for charitable uses are of ancient origin, and the rudiments of the English law as to charities had their source in the civil law.

The rise and development of the law of charitable uses furnishes a most interesting chapter in the history of equity jurisprudence,²⁴ few questions having been the subject of more laborious investigation, or having given rise to greater conflict of opinion, than that which relates to the origin of the peculiar

jurisdiction of equity in respect of charities.²⁵

Trusts for charitable uses are of ancient origin.²⁶ The rudiments of the law of charities in England were derived from the civil law.²⁷ The principle of charity was known also to the Jews,²⁸ who early favored aid toward self-help, and education suitable to that end, but except in cases of actual necessity disapproved of almsgiving as being the lowest form of charity;²⁹ and probably, as Sir Edward Coke observed, in the reign of Elizabeth, "no time was so barbarous, as to abolish learning and knowledge, nor so uncharitable, as to prohibit relieving the poor."³⁰ The oft recurring prayer, "This do in work of charity," in the earliest appeals to the English chancellor by those who had no remedy, shows that the common, if not the equitable, concept of the term under christian influences was the same in remote as in modern times.³¹ In 1601, the English parliament enacted the statute of 43 Elizabeth c 4, which is frequently referred to as the "Statute of Charitable Uses," and that act has had a most important bearing on the subject of public charities from that date until the present time.³² The statute of 43 Elizabeth was repealed in England in 1888, by the statute of 51 & 52 Victoria c 42 § 13,³³ but the repealing act incorporated and continued in force the preamble. While the courts of the various states differ as to whether this statute is in force as a part of the common law, as shown in the C.J.S. title Common Law § 13, also 11 C.J. p 309 note 39, p 310 note 43, 12 C.J. p 193 note 30 [c], and there has been some difference of opinion as to whether such statute conferred

19. Kan.—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 118 Kan. 554.

20. Cal.—Ritchie v. Long Beach Community Hospital Ass'n, 34 P. 2d 771, 139 Cal.App. 688.

X-ray department which earned slight profit should not be considered apart from hospital itself in determining whether hospital was charitable institution. — Ritchie v. Long Beach Community Hospital Ass'n, supra.

21. U.S.—Union Pac. R. Co. v. Artist, Wyo., 60 F. 365, 9 C.C.A. 14, 23 L.R.A. 581.

Tenn.—Baptist Hospital v. City of Nashville, 3 S.W.2d 1059, 156 Tenn. 589.

11 C.J. p 304 note 70 [a].

22. Or.—Hamilton v. Corvallis General Hospital Ass'n, 30 P.2d 9, 16, 146 Or. 188.

30 C.J. p 462 note 10.

23. N.Y.—Van Campen v. Olean General Hospital, 205 N.Y.S. 554,

210 App.Div. 204, affirmed 147 N. E. 219, 239 N.Y. 615.

14 C.J. p 74 note 17.

24. N.Y.—Utica Trust, etc., Co. v. Thompson, 149 N.Y.S. 392, 87 Misc. 31.

25. Ala.—Williams v. Pearson, 38 Ala. 299.

26. Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 37 L.R.A., N.S., 993, Ann.Cas.1912D 50.

27. U.S.—Church of Jesus Christ v. U. S., Utah, 10 S.Ct. 792, 136 U.S. 1, 34 L.Ed. 478.

11 C.J. p 306 note 86.

28. Mo.—Franta v. Bohemian Roman Catholic Cent. Union, 63 S.W. 1100, 164 Mo. 304, 86 Am.S.R. 611, 54 L.R.A. 723.

11 C.J. p 306 note 87.

29. N.Y.—Riker v. Leo, 30 N.E. 598, 133 N.Y. 519, affirming 15 N.Y.S. 966; 21 N.E. 719, 115 N.Y. 93, reversing 1 N.Y.S. 128.

30. Eng.—Porter's Case, 1 Coke 22b, 24a, 76 Reprint 50.

31. See Kerly Eq.Jur., Cambridge Prize Essay 1889, pp 16, 63.

32. Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 37 L.R.A., N.S., 993, Ann.Cas.1912D 50.

Contents and effect of statute generally

"This statute [43 Eliz. c 4] enumerated objects considered charitable, and placed devices, gifts and conveyances to such charitable uses without the statutes of mortmain, and enabled courts of chancery, in the exercise of their inherent jurisdiction over matters of trust and confidence, to give force and effect to such charitable uses as fell within the letter and spirit of those enumerated in the statute."—Biscoe v. Thweatt, 86 S.W. 432, 74 Ark. 545, 549, 4 Ann.Cas. 1136.

33. Miss.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

upon courts of equity the broad jurisdiction exercised by them to recognize and uphold charities, as shown below in § 6 b, the statute is important by reason of its enumeration in its preamble of purposes and objects which are considered charitable, as the courts of practically all jurisdictions give consideration and weight to this enumeration, regardless of the foundation of the law of charities in the particular jurisdiction, as shown below in § 12.

II. CREATION, VALIDITY, AND CONSTRUCTION IN GENERAL

§ 5. Creation and Requisites

A charitable trust may be created by will or deed, and special technical words are not required in order to establish a charitable use or trust.

It has been stated broadly that to constitute a charitable use there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary.³⁴ In general, however, a court of equity will not allow a gift for charitable uses to fail because the person designated as trustee is incapable of taking or acting as trustee, as shown in § 27, and, according to the rule usually recognized, indefiniteness of the beneficiaries is a characteristic of a charitable trust, as shown in § 39.

In order to create a valid charitable trust, it is essential that an intention to devote a fund to a charitable purpose shall be evidenced,³⁵ and that the trust shall be clear, definite, and certain,³⁶ that is, the words of creation must announce a definite subject and object and there must be a sufficient declaration of the terms of the trust.³⁷ The cer-

§ 4. Constitutional and Statutory Provisions

In addition to the English statute of 43 Elizabeth c 4, which is considered in various connections supra § 3 and infra §§ 6, 12, other statutes relating to or affecting charities have been enacted and are considered in this Title in connection with the particular subject matter to which such statutes relate or which they affect.

tainty or uncertainty of the trust is determined by the applicable rules or laws of construction and applicable statutory provisions.³⁸

The founder of a charity may fix and define its nature.³⁹

A charitable trust may be created either by will⁴⁰ or by deed;⁴¹ and, where a donor successively makes a deed of trust, a will, and a declaration of trust with regard to the same property and for the same charitable purpose, the trust will be applied in accordance with the declaration of trust, and the deed and will are to be considered only so far as they tend to throw light on the intention of the donor.⁴²

While a charitable bequest or a bequest to a charitable corporation to aid in carrying out the purposes for which it has been organized does not necessarily create a trust in a strict legal sense,⁴³ it has been stated broadly that, to effect a dedication of property to a charitable use, it is necessary that it shall be stamped with a trust.⁴⁴ According to

34. Nev.—Nixon v. Brown, 214 P. 524, 46 Nev. 439.

Necessity of charitable purpose in general see infra § 12.

35. Cal.—Xth Olympiad Committee of Games of Los Angeles, U. S. A. 1932, v. American Olympic Ass'n, 42 P.2d 1023, 2 Cal.2d 600.

36. Mo.—Jones v. Patterson, 195 S. W. 1004, 271 Mo. 1, L.R.A.1917F 660.

S.C.—City of Columbia v. Monteith, 137 S.E. 727, 139 S.C. 262.

37. Mo.—Jones v. Patterson, 195 S. W. 1004, 271 Mo. 1, L.R.A.1917F 660.

38. Cal.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

39. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

Who are founders

Persons who make a gift to an existing educational corporation for the

establishment of a new department, institution, or school within and as a corporate part of the preestablished educational institution of such corporation are regarded as the founders of such new department, institution, or school and although trustees of Phillips Academy, incorporated by St. 1780 c 15, had been incorporated and received donations more than twenty-five years before establishment of theological institution therein, permitted by St.1807 c 22, first donors of gifts for establishment of seminary were the founders of such theological institution in technical sense.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

40. Del.—Trustees of Methodist Episcopal Church of Milford v. Williams, 96 A. 795, 6 Boyce 62—Board of Stewards of Wilmington Conference of Methodist Episcopal Church v. Williams, 96 A. 791, 6 Boyce 52.

W.Va.—Hays v. Harris, 80 S.E. 827, 73 W.Va. 17.

11 C.J. p 306 note 3.

Restrictions on testamentary dispositions for charitable purposes see C.J.S. title Wills §§ 108-110, also 68 C.J. p 534 note 53-p 564 note 99.

41. U.S.—President, etc., of Bowdoin College v. Merritt, C.C.Cal., 75 F. 480, appeal dismissed 17 S.Ct. 996, 167 U.S. 745, 42 L.Ed. 1209, appeal dismissed 18 S.Ct. 415, 169 U.S. 551, 42 L.Ed. 850.

III.—Alden v. St. Peter's Parish, 42 N.E. 392, 158 Ill. 631, 30 L.R.A. 232.

Deed of realty was effective to create charitable trust, there being apt words, definite subject matter, ascertained object, and designated beneficiaries.—Shannonhouse v. Wolfe, 133 S.E. 93, 191 N.C. 769.

42. R.I.—Brice v. All Saints Memorial Chapel, 76 A. 774, 31 R.I. 183.

43. Conn.—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.

44. Del.—Delaware Land & Devel-

some cases, however, a gift for a charitable purpose may be effective whether it is a gift in trust or is a direct gift to the charity.⁴⁵

The owner of property may create a charitable trust by a declaration that he holds such property on a charitable trust⁴⁶ or by a transfer to another who is to hold such property on a charitable trust.⁴⁷

No formality of language⁴⁸ nor special technical words⁴⁹ are necessary to establish a charitable use or trust; the court looks through form to substance.⁵⁰ So failure of the donor to make an express declaration of trust does not prevent the creation of a charitable trust,⁵¹ since a trust for the purposes stated or intended may be implied even though the donor does not use express words of trust.⁵² According to some cases, a conveyance in the nature of a gift to a charitable use may be regarded as a conveyance to hold on the trust declared.⁵³ The intention on the part of the donor of property to create a charitable trust must exist, however, in order to create such a trust,⁵⁴ and it is necessary that the instrument should describe

the subject matter of the trust with certainty, as shown below in § 46, that it should indicate at least generally the charitable purpose of the donor, as shown below in § 20, and that it should describe the class of beneficiaries from which the ultimate individual recipients of the bounty shall be selected, as shown below in § 39.

A gift may be regarded as a charity notwithstanding it is not denominated a charity in the instrument which evidences the gift.⁵⁵

The requirements of the statute of wills and the statute of frauds by which the entire scheme of a charity should be in writing do not prevent an unincorporated charitable society from taking under a devise of realty for its benefit, if its by-laws sufficiently designate its objects as coinciding with the purposes of the devise.⁵⁶ In some jurisdictions a provision of the statute of frauds requiring a declaration of trust to be in writing applies only to trusts in land and does not apply to a charitable trust in personal property.⁵⁷

opment Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

In Tennessee a charitable trust must be in favor of person having capacity to take or else must be definite, lawful in creation, and must be executed and regulated by trustees.—*Davis v. Bullington*, 47 S.W.2d 555, 164 Tenn. 272.

45. Md.—*Rabinowitz v. Wollman*, 197 A. 566.

46. Mich.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

N.Y.—*Woodside Presbyterian Church v. Burden*, 269 N.Y.S. 682, 240 App. Div. 43, appeal dismissed 191 N.E. 629, 264 N.Y. 690.

Declaration sufficient

Defendant's letters to church authorities, followed by payments of interest for many years, was valid declaration of trust for church, and defendant held legal title to principal for church.—*Woodside Presbyterian Church v. Burden*, 269 N.Y.S. 682, 240 App.Div. 43, appeal dismissed 191 N.E. 629, 264 N.Y. 690.

47. Mich.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Conveyance held sufficient

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.

48. U.S.—*Todd v. Citizens Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Language sufficient to create trust Ill.—*Hart v. Taylor*, 133 N.E. 857, 301 Ill. 344.

49. Mass.—*Minot v. Attorney General*, 75 N.E. 149, 189 Mass. 176.

N.J.—*Industrial Education Schools v. Hoboken*, 62 A. 1, 70 N.J.Eq. 630.

11 C.J. p 306 note 6.

50. U.S.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

51. U.S.—*Todd v. Citizens' Gas Co. of Indianapolis*, supra.

Cal.—*In re De Mars' Estate*, App., 67 P.2d 374.

Minn.—*In re Peterson's Estate*, 277 N.W. 529.

R.I.—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

52. N.Y.—*In re Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing *In re Clayton*, 218 N.Y.S. 325, 218 App.Div. 317—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—*In re Patterson's Estate*, 249 N.Y.S. 441, 139 Misc. 872.

53. N.J.—*Trustees of First Presbyterian Church of Town of Salem v. Wheeler*, 149 A. 589, 106 N.J. Eq. 8—*Mills v. Davison*, 35 A. 1072, 54 N.J.Eq. 659.

54. Mich.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Personal gift

Where group of physicians organized society of physicians for purpose of increasing their business, and after dissolution of society, woman gave checks to certain physician, payable to society of physicians, naming physician as treasurer, and to physician individually, which

physician used to build medical and dental clinic, and donor testified that she gave money to physician personally and to do with as he pleased, there was no "charitable trust," but a "gift" to physician personally.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Mixed question of law and fact

Question whether testatrix intended to create a charitable trust was, under the circumstances, a mixed question of law and fact for probate court.—*In re De Mars' Estate*, Cal. App., 67 P.2d 374.

Intention to create trust shown

Cal.—*In re De Mars' Estate*, supra—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

55. U.S.—*Gossett v. Swinney*, C.C.A. Mo., 53 F.2d 772, affirming, D.C., *Irwin v. Swinney*, 44 F.2d 172, and certiorari denied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Mo.—*Missouri Historical Society v. Academy of Science*, 8 S.W. 346, 94 Mo. 459.

56. N.J.—*American Bible Soc. v. American Tract Soc.*, 50 A. 67, 62 N.J.Eq. 219—*Smith v. Smith*, 32 A. 1069, 54 N.J.Eq. 1, affirmed 41 A. 1116, 55 N.J.Eq. 821.

Capacity generally of unincorporated association to be donee or beneficiary of charitable trust see infra §§ 34, 37.

57. N.J.—*Peter E. Leddy Post No. 19 of American Legion v. Roberts*, Ch., 129 A. 148.

It is necessary that there should be a gift,⁵⁸ and the doctrine of charitable uses is inapplicable to a grant or purchase for a consideration in return.⁵⁹ So charitable trusts are usually created voluntarily and not by compulsory payments,⁶⁰ although there is authority for the view that an institution operated by a municipality by means of funds raised by taxation may be a charitable institution, as shown above in § 2 a.

A gift will not be deemed charitable merely from the nature of the professional character of the devisee,⁶¹ unless, according to some cases, the devisee or legatee is an association or corporation organized and conducted solely for charitable purposes, in which case a gift to the society by name, without further restriction or limitation as to use, will be deemed to be made for the purposes for which the society was founded, as indicated below in §§ 17, 20.

Where a conveyance is made of property to be

held in trust, it is none the less for a charitable use because the founders or contributors to the fund reserve to themselves the right of partaking of the benefits of the charity,⁶² nor because they are members of the society for whose use and benefit the property is held.⁶³

§ 6. Validity and Jurisdiction of Courts over

- a. General considerations
- b. Independently of statute
- c. Statutory regulation and authorization

a. General Considerations

Charitable gifts and trusts are favorites of the law and of the courts, and the courts will declare valid, and give effect to, such gifts and trusts where it is possible to do so consistently with established principles or rules of law.

Charitable gifts and trusts are favorites of the law⁶⁴ and of the courts,⁶⁵ or, more specifically, are

58. Del.—*Delaware Land & Development Co. v. First and Central Church of Wilmington, Del.*, 147 A. 165, 16 Del.Ch. 410.

11 C.J. p 307 note 14.

Setting aside part of general assets of incorporated college

Securities and funds contributed from general assets of incorporated college for establishment of library fund and placed in endowment fund were not part of charitable trust as against creditors.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

59. Del.—*Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del.*, 147 A. 165, 16 Del.Ch. 410.

Pa.—*Kerlin v. Campbell*, 15 Pa. 500.

60. Ala.—*Home Ins. Co. v. Cobbs*, 103 So. 165, 20 Ala.App. 491.

61. Pa.—*Flood v. Ryan*, 69 A. 908, 220 Pa. 450, 22 L.R.A., N.S. 1262, 13 Ann.Cas. 1189.

11 C.J. p 307 note 16.

62. Ky.—*Gass v. Wilhite*, 2 Dana 170, 26 Am.D. 446.

63. Ark.—*Fordyce v. Woman's Christian Nat. Library Assoc.*, 96 S.W. 155, 79 Ark. 550, 7 L.R.A., N.S., 485.

Ky.—*Gass v. Wilhite*, 2 Dana 170, 26 Am.D. 446.

64. U.S.—*St. Louis Union Trust Co. v. Burnet, C.C.A.*, 59 F.2d 922—*Gossett v. Swinney, C.C.A.Mo.*, 53 F.2d 772, affirming, D.C., 44 F.2d 172, and certiorari denied 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Conn.—*Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church*, 164 A. 910, 116 Conn. 347—*Cheshire Bank & Trust Co. v. Doo-*

little, 155 A. 82, 113 Conn. 231—*First Congregational Soc. of Bridgeport v. City of Bridgeport*, 121 A. 77, 99 Conn. 22.

Ind.—*Burke v. Crawfordsville Trust Co., App.*, 2 N.E.2d 817—*Herron v. Stanton*, 147 N.E. 305, 79 Ind.App. 663—*Barr v. Geary*, 142 N.E. 622, 82 Ind.App. 5.

Iowa.—*Beidler v. Dehmer*, 161 N.W. 32, 178 Iowa 1338.

Me.—*Bates v. Schillinger*, 145 A. 395, 128 Me. 14—*Bills v. Pease*, 100 A. 146, 116 Me. 98, L.R.A.1917D 1060. N.Y.—*In re Johnson's Estate*, 265 N.Y.S. 395, 148 Misc. 218.

Pa.—*In re Jordan's Estate*, 197 A. 150—*In re Harrison's Estate*, 30 Pa.Dist. 205.

R.I.—*Bliven v. Borden*, 185 A. 239.

Wis.—*In re Mead's Estate*, 277 N.W. 694, rehearing denied 279 N.W. 13—*In re Monaghan's Will*, 226 N.W. 306, 199 Wis. 273.

11 C.J. p 307 note 20.

Policy of law and public policy

(1) It is the policy of the law to encourage gifts and devises for charitable purposes.—*Gill's Ex'r v. Woman's Club of Louisville*, 266 S.W. 378, 205 Ky. 731.

(2) It is the policy of the law to uphold and give effect to such gifts. Ill.—*Farmers' & Mechanics' Bank v. Griffith*, 185 N.E. 854, 352 Ill. 323. R.I.—*Powers v. Home for Aged Women*, 192 A. 770, 110 A.L.R. 1361—*Rhode Island Hospital Trust Co. v. Benedict*, 103 A. 146, 41 R.I. 143.

(3) "The declared public policy of the state is that of a generous attitude toward charitable trusts."—*In re Tiffany's Estate*, 285 N.Y.S. 971, 932, 157 Misc. 873.

65. Cal.—*Collier v. Lindley*, 266 P. 526, 203 Cal. 641—*In re Puring-*

ton's Estate, 250 P. 657, 199 Cal. 661.

Ill.—*Farmers' & Mechanics' Bank v. Griffith*, 185 N.E. 854, 352 Ill. 323—*Webb v. Webb*, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404—*Summers v. Chicago Title & Trust Co.*, 167 N.E. 777, 335 Ill. 564—*Morgan v. National Trust Bank of Charleston*, 162 N.E. 888, 331 Ill. 182—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479—*Peek v. Woman's Home Missionary Soc.*, 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917—*Skinner v. Northern Trust Co.*, 123 N.E. 289, 238 Ill. 229—*Greear v. Sifford*, 7 N.E.2d 371, 239 Ill.App. 450—*Carlstrom v. Frackelton*, 263 Ill.App. 250.

Iowa.—*In re Durham's Estate*, 211 N.W. 358, 203 Iowa 497.

Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

Neb.—*In re Secrest's Estate*, 191 N.W. 663, 109 Neb. 431.

N.J.—*Noice v. Schnell*, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing, Ch., 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

Ohio.—*Becker v. Fisher*, 147 N.E. 744, 112 Ohio St. 284.

Wash.—*In re Wilson's Estate*, 191 P. 615, 111 Wash. 491.

Wyo.—*Bentley v. Whitney Benefits*, 281 P. 138, 41 Wyo. 11.

11 C.J. p 307 note 20.

Enforcing and protecting

(1) The courts take special care to enforce testamentary gifts to charities.

Conn.—*First Congregational Soc. of Bridgeport v. City of Bridgeport*, 121 A. 77, 99 Conn. 22.

Ill.—*Farmers' & Mechanics' Bank v.*

favorites of courts of equity;⁶⁶ and the courts will uphold or declare the validity of, and give effect to, such trusts and gifts if it is possible to do so consistently with established rules or principles of

law.⁶⁷ Accordingly, they are construed as valid and given effect wherever possible, by applying the most liberal rules of which the nature of the case admits,⁶⁸ and are often upheld where private trusts

Griffith, 185 N.E. 854, 352 Ill. 323—Peck v. Woman's Home Missionary Soc., 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917—In re Scanlan's Estate, 230 Ill.App. 505.

(2) Courts will protect charitable gifts from assault.

Conn.—First Congregational Soc. of Bridgeport v. City of Bridgeport, *supra*.

Ky.—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 267 Ky. 358.

66. Ala.—Sparks v. Woolverton, 99 So. 102, 210 Ala. 669.

Cal.—In re De Mars' Estate, App., 67 P.2d 374—Dingwell v. Seymour, 267 P. 327, 337, 91 Cal.App. 483, quoting *Corpus Juris*.

D.C.—Darcey v. O'Brien, 65 F.2d 599, 62 App.D.C. 151, certiorari denied 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 570.

Ill.—Walker v. Central Trust & Savings Bank of Geneseo, 149 N.E. 234, 318 Ill. 253—In re Scanlan's Estate, 230 Ill.App. 505.

Iowa.—In re Nugen's Estate, 272 N.W. 638—In re Walden's Estate, 180 N.W. 679, 190 Iowa 567—Hodge v. Wellman, 179 N.W. 534, 191 Iowa 877.

Me.—Prince v. Harmon, 113 A. 738, 120 Me. 114.

Mass.—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

Miss.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

Mo.—Burrier v. Jones, 92 S.W.2d 885, 887, 338 Mo. 679, quoting *Corpus Juris*—In re Rahn's Estate, 291 S.W. 120, 128, 316 Mo. 492, 51 L.R.A. 877, certiorari denied Martin v. Ahrens, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325, quoting *Corpus Juris*.

Nev.—Nixon v. Brown, 214 P. 524, 530, 46 Nev. 439, quoting *Corpus Juris*.

Ohio.—Gearhart v. Richardson, 142 N.E. 890, 109 Ohio St. 418.

Or.—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654—In re Kulka's Estate, 18 P.2d 1036, 142 Or. 104.

R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

Tenn.—Bank of Commerce & Trust Co. v. Banks, 28 S.W.2d 340, 161 Tenn. 11, 69 A.L.R. 1353, rehearing denied 29 S.W.2d 658, 69 A.L.R. 1353.

11 C.J. p 307 note 20.

Enlarged powers of courts of equity
"Courts of equity possess enlarged powers in giving effect to trusts for

charitable uses."—Collier v. Lindley, 266 P. 526, 531, 203 Cal. 641.

67. U.S.—St. Louis Union Trust Co. v. Burnet, C.C.A., 59 F.2d 922.

Cal.—Collier v. Lindley, 266 P. 526, 203 Cal. 641—In re Somerville's Estate, 55 P.2d 597, 12 Cal.App.2d 430—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Ill.—Bruce v. Maxwell, 143 N.E. 82, 311 Ill. 479.

Iowa.—In re Durham's Estate, 211 N.W. 358, 203 Iowa 497—Lupton v. Leander Clark College, 187 N.W. 496, 194 Iowa 1008—In re Walden's Estate, 180 N.W. 679, 190 Iowa 567—Hodge v. Wellman, 179 N.W. 534, 191 Iowa 877.

Ky.—Bush's Ex'r v. Mackoy, 103 S.W.2d 95, 267 Ky. 614—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 267 Ky. 358.

Mass.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, Ann.Cas. 1918B 1204.

Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

N.J.—Noice v. Schnell, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing, Ch., 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

N.Y.—In re Winburn's Will, 247 N.Y.S. 584, 139 Misc. 5—In re Mills' Will, 200 N.Y.S. 701, 121 Misc. 147—In re McGeehan's Estate, 187 N.Y.S. 823, 115 Misc. 737.

N.C.—Wachovia Banking & Trust Co. v. Ogburn, 107 S.E. 238, 181 N.C. 324.

Ohio.—Becker v. Fisher, 147 N.E. 744, 112 Ohio St. 284.

Or.—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654.

Wash.—De La Pole v. Lindley, 204 P. 15, 118 Wash. 398—In re Wilson's Estate, 191 P. 615, 111 Wash. 491.

11 C.J. p 307 note 20.

Testamentary gifts

(1) Testamentary gifts for charitable uses will not be declared void if, by any possibility consistent with the law, they may be held valid.

Ind.—Herron v. Stanton, 147 N.E. 305, 79 Ind.App. 683.

Iowa.—In re Nugen's Estate, 272 N.W. 638.

(2) The beneficent intention and desire of a testator in providing for a public charity will not be defeated unless the courts are com-

pelled to do so by manifest defects in the will or illegality in its execution.—In re Secrest's Estate, 191 N.W. 663, 109 Neb. 431.

Definiteness sufficient for administration

Charities will be enforced, if there is some pivotal point of definiteness by which, or through which, they may be administered.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

Where no element of perpetuity

Where there was no direction that a fund given to an organization should be preserved and only the income used and the fund could be used in lump for any need of the organization, the gift would not be closely scrutinized in respect of validity, in view of the fact that there was no element of perpetuity in the gift.—Milligan v. Greenville College, 2 S.W.2d 90, 156 Tenn. 495.

Provisions not fatally contradictory
Wis.—In re Keenan's Will, 176 N.W. 857, 171 Wis. 94.

68. U.S.—Darcey v. O'Brien, 65 F.2d 599, 62 App.D.C. 151, certiorari denied 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 570—St. Louis Union Trust Co. v. Burnet, C.C.A., 59 F.2d 922.

Cal.—In re De Mars' Estate, App., 67 P.2d 374—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Colo.—In re Schleier's Estate, 13 P.2d 278, 91 Colo. 172—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A.1918B 710.

Conn.—Cheshire Bank & Trust Co. v. Doolittle, 155 A. 82, 113 Conn. 231—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

Ill.—In re Scanlan's Estate, 230 Ill. App. 505.

Ind.—Burke v. Crawfordsville Trust Co., App., 2 N.E.2d 817.

Iowa.—Hodge v. Wellman, 179 N.W. 534, 191 Iowa 877—Beidler v. Dehner, 161 N.W. 32, 178 Iowa 1338.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14—Prime v. Harmon, 113 A. 738, 120 Me. 114.

Mass.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204.

Mich.—John Robinson Hospital v. Cross, 272 N.W. 724, 279 Mich. 407—Wanstead v. Fisher, 270 N.W. 218, 278 Mich. 68.

Mo.—Burrier v. Jones, 92 S.W.2d 885, 338 Mo. 679—In re Rahn's Estate,

would fail.⁶⁹ Thus, in order to sustain and give effect to a charitable trust or gift, every reasonable intendment, consistent with the terms and purpose of the gift, will be made,⁷⁰ and every presumption,

consistent with the language used, will be indulged.⁷¹ Of two possible constructions, the court will adopt that one which operates to sustain the trust or gift.⁷²

291 S.W. 120, 316 Mo. 492, 51 L.R.A. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439—In re *Hartung's Estate*, 160 P. 782, 40 Nev. 262, rehearing denied 161 P. 715, 40 Nev. 262.

N.H.—*Clark v. Campbell*, 133 A. 166, 82 N.H. 281, 45 A.L.R. 1433.

N.Y.—In re *Briglin's Will*, 203 N.Y.S. 646, 208 App.Div. 646—In re *Carpenter's Estate*, 297 N.Y.S. 649, 163 Misc. 474—*City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784, 159 Misc. 779—In re *Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—In re *Coughlin's Will*, 268 N.Y.S. 28, 149 Misc. 672, affirmed 273 N.Y.S. 444, 242 App.Div. 672—In re *Patterson's Estate*, 249 N.Y.S. 441, 139 Misc. 872—In re *McLoughlin's Estate*, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re *McLoughlin's Will*, 251 N.Y.S. 876, 233 App.Div. 886—In re *Philpoteaux's Estate*, 245 N.Y.S. 303, 138 Misc. 208—In re *Kelley's Will*, 245 N.Y.S. 294, 138 Misc. 190—In re *Frasch's Estate*, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, which is affirmed 156 N.E. 656, 245 N.Y. 174.

Ohio.—*Becker v. Fisher*, 147 N.E. 744, 112 Ohio St. 284—*Gearhart v. Richardson*, 142 N.E. 890, 109 Ohio St. 418—*Graham v. Bergin*, 18 Ohio App. 35.

Or.—*Vestal v. Pickering*, 267 P. 821, 125 Or. 553.

R.I.—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

Wyo.—*Bentley v. Whitney Benefits*, 281 P. 188, 41 Wyo. 11.

11 C.J. p 307 note 20.

Definite charitable purpose disclosed

(1) The charitable character of a trust being made apparent, all doubts will be resolved in its favor.—*Barr v. Geary*, 142 N.E. 622, 82 Ind.App. 5.

(2) Testator's language should be construed in broad and liberal spirit in accordance with intention, to uphold gift.

N.Y.—In re *Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing In re *Clayton*, 218 N.Y.S. 325, 218 App.Div. 317—*Morris v. Edwards*, 124 N.E. 724, 227 N.Y. 141, modifying 175 N.Y.S. 913, 188 App.Div. 894—In re *Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—In re *Patterson's Estate*, 249 N.Y.S. 441, 139 Misc. 872—In re *McLoughlin's Estate*, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re *McLoughlin's Will*, 251 N.Y.S. 876, 233 App.Div. 886—In re *Kelley's Will*, 245 N.Y.S. 294, 138 Misc. 190.

Ohio.—*Becker v. Fisher*, 147 N.E. 744, 112 Ohio St. 284.

(3) Charitable trusts are liberally construed so that clearly intended purpose may be carried into effect.—*Bliven v. Borden*, R.I., 185 A. 239.

Educational bequest

In a case in which the court said that the bequest involved was an "educational" bequest and not a "charitable or religious" bequest, it was held that the same rule as to liberal construction applied.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

69. Cal.—In re *De Mars' Estate*, App., 67 P.2d 374—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

Ill.—In re *Scanlan's Estate*, 230 Ill. App. 505.

Mo.—*Burrier v. Jones*, 92 S.W.2d 885, 338 Mo. 679—In re *Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 L.R.A. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.

Ohio.—*Gearhart v. Richardson*, 142 N.E. 890, 109 Ohio St. 418.

11 C.J. p 307 note 20.

70. Ala.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

Conn.—*Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church*, 164 A. 910, 116 Conn. 347.

71. Ill.—*Webb v. Webb*, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404—*Summers v. Chicago Title & Trust Co.*, 167 N.E. 777, 335 Ill. 564—*Morgan v. National Trust Bank of Charleston*, 162 N.E. 888, 331 Ill. 132—*Peek v. Woman's Home Missionary Soc.*, 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917—*Skinner v. Northern Trust Co.*, 123 N.E. 289, 288 Ill. 229—*Grear v. Sifford*, 7 N.E.2d 371, 289 Ill.App. 450—*Carlstrom v. Frackelton*, 263 Ill.App. 250—In re *Scanlan's Estate*, 230 Ill. App. 505.

Or.—In re *Kulka's Estate*, 18 P.2d 1036, 142 Or. 104.

11 C.J. p 307 note 20.

As to creator's intention

Where it is determined that the creator of a trust had a general charitable intention, the courts will presume that he did not desire the trust to fail.—*O'Hara v. Grand Lodge, I. O. G. T. of State of California*, 2 P.2d 21, 213 Cal. 131.

72. Cal.—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

Ill.—*Walker v. Central Trust & Savings Bank of Geneseo*, 149 N.

E. 234, 318 Ill. 253—In re *Scanlan's Estate*, 230 Ill.App. 505.

Mo.—In re *Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 L.R.A. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.

N.Y.—In re *Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing In re *Clayton*, 218 N.Y.S. 325, 218 App.Div. 317—In re *Briglin's Will*, 203 N.Y.S. 646, 208 App.Div. 511—In re *Skuse's Estate*, 1 N.Y.S.2d 202, 165 Misc. 554—In re *Stephani's Estate*, 300 N.Y.S. 813, 164 Misc. 240—In re *Carpenter's Estate*, 297 N.Y.S. 649, 163 Misc. 474—In re *Edge's Estate*, 288 N.Y.S. 437, 159 Misc. 505—*City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784, 159 Misc. 779—In re *Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—In re *Johnson's Estate*, 265 N.Y.S. 395, 148 Misc. 218—In re *McLoughlin's Estate*, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re *McLoughlin's Will*, 251 N.Y.S. 876, 233 App.Div. 886—In re *Philpoteaux's Estate*, 245 N.Y.S. 303, 138 Misc. 208—In re *Kelley's Will*, 245 N.Y.S. 294, 138 Misc. 190—In re *Frasch's Estate*, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, affirmed 156 N.E. 656, 245 N.Y. 174.

Ohio.—*Gearhart v. Richardson*, 142 N.E. 890, 109 Ohio St. 418.

11 C.J. p 308 note 25.

Doubt as to whether gift is charitable

(1) In case of doubt as to whether a gift is charitable, a construction favoring a public charity is preferred.—*Powers v. Home for Aged Women*, R.I., 192 A. 770, 110 A.L.R. 1361—*Rhode Island Hospital Trust Co. v. Williams*, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

(2) Doubtful devise is construed as gift to public charity, when possible.—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

(3) Gift in somewhat uncertain terms will be held one to public charity, if purpose was to limit property to benevolent public use.—*City of Providence v. Payne*, supra.

Educational bequest

In a case in which the court said that the bequest involved was an "educational" bequest and not a "charitable or religious" bequest, it was held that, where one of two possible constructions would sustain the bequest, such construction should be adopted.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

In consequence of the favorable consideration extended to charitable gifts or trusts, they are usually sustained although vaguely expressed.⁷³ If the trust instrument shows the intention of the creator or donor to create a charitable trust and the interpretation of the language used discloses the principal or essential elements of contracts and of a valid trust, such instrument is not void for want of certainty.⁷⁴

Where there are statutes relating to the subject, they will be liberally construed in order to sustain the trust, as shown below in subdivision c of this section, and even in those states where formerly the statutes did not favor charitable trusts, gifts to charitable, benevolent, scientific, or educational institutions are not against public policy, or restricted beyond what is strictly required by the statutes.⁷⁵

The court will not, however, create a gift where there is none;⁷⁶ it is the duty of the court carefully to weigh the objections made against the gifts or bequests, and to give effect to any sufficient to render the gifts or bequests void in law,⁷⁷ and courts of equity will not ignore established principles of law in order to give charitable bequests effect.⁷⁸ Furthermore the rule favoring a liberal construction applies only to a public charity and

does not extend to a trust for a private purpose.⁷⁹ It is said that while charitable gifts are favorites of the law, they are not so when made at or near the time of impending death, in view of a statutory provision voiding gifts in trust for charitable purposes within less than a prescribed period before the donor's death.⁸⁰

The court will not consider whether or not the gift is a wise one,⁸¹ and it has been stated broadly that the court will not concern itself with the propriety of the trust or with the character of the beneficiary.⁸² Furthermore it is not necessary to pass on the question as to the practicability of the enforcement of the terms of a charitable trust created by will where the institution which is the beneficiary of the trust is in a position to comply with the terms of the trust and the authorities of such institution are conducting it in general accordance with such terms.⁸³

While the fact that the instrument which attempts to create a charitable trust provides no way to carry out the clear intention of the donor as expressed in the instrument has been regarded as a ground for declaring the attempted trust invalid,⁸⁴ according to some cases failure of the donor to formulate practical plans to carry out the charitable purpose

Rejecting irrational intention

The court, in construing a will attempting to create a charitable trust, will not adopt a theory of an irrational intention, impossible of fulfillment, when a rational intention, easy of fulfillment and beneficial in results, can be gathered from the words of the testator.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

73. Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.
11 C.J. p 308 note 21.

Capability of enforcement

Charitable devises should be upheld provided they are sufficiently definite to permit of enforcement in a court of equity and are not in conflict with existing laws.—*Gossett v. Swinney*, C.C.A.Mo., 53 F.2d 772, affirming, D.C., *Irwin v. Swinney*, 44 F. 2d 172 and certiorari denied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Intention discernible

The court will never construe a charitable bequest to be void unless it is so absolutely clouded that it cannot discover the testator's meaning.—*In re Durham's Estate*, 211 N. W. 353, 203 Iowa 497.

74. Deeds of trust for charitable hospital held sufficiently certain Cal.—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

75. N.Y.—*Cross v. U. S. Trust Co.*,

30 N.E. 125, 131 N.Y. 330, 27 Am.S. R. 597, 15 L.R.A. 606—*Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

76. Conn.—*Organized Charities Assoc. v. Mansfield*, 74 A. 781, 32 Conn. 504, 135 Am.S.R. 285.

77. Wis.—*Maxcy v. Oshkosh*, 128 N. W. 899, 1136, 144 Wis. 238, 31 L.R. A.N.S., 787—*Dodge v. Williams*, 1 N.W. 92, 50 N.W. 1103, 46 Wis. 70.

Preference to one party

As respects contention that legacies for charitable purposes are favorites of courts, courts can have no fixed policy which will admit of operation of a principle by which one party to litigation will be favored to detriment of other party therein.—*In re Kline's Estate*, 32 P.2d 677, 138 Cal.App. 514.

Attempted trusts held invalid

(1) For indefiniteness, uncertainty, impracticability, and want of provision for carrying out.—*City of Columbia v. Monteith*, 137 S.E. 727, 139 S.C. 262.

(2) For uncertainty.—*City of Haskell v. Ferguson*, Tex.Civ.App., 66 S. W.2d 491.

(3) For uncertainty and ambiguity.—*Dirlam v. Morrow*, 131 N.E. 365, 102 Ohio St. 279.

(4) Elements of duress and com-

pulsion.—*Reagh v. Dickey*, 48 P.2d 941, 183 Wash. 564.

78. Iowa.—*In re Nugen's Estate*, 272 N.W. 633.

79. N.Y.—*In re Carpenter's Estate*, 297 N.Y.S. 649, 163 Misc. 474.

80. Pa.—*In re Kessler*, 70 A. 770, 221 Pa. 314, 128 Am.S.R. 741, 15 Ann.Cas. 791.

81. Iowa.—*Chapman v. Newell*, 125 N.W. 324, 146 Iowa 415.

Mo.—*Jones v. Patterson*, 195 S.W. 1004, 271 Mo. 1, L.R.A.1917F 660.
R.I.—*Rhode Island Hospital Trust Co.*, 103 A. 146, 41 R.I. 143.

82. Mo.—*Jones v. Patterson*, 195 S. W. 1004, 271 Mo. 1, L.R.A.1917F 660.

83. Ky.—*Bailey v. Waddy*, 243 S.W. 21, 195 Ky. 415.

Teaching certain religious doctrines

Where testator provided for the founding of a chair in a college controlled by a specified church and for the teaching of certain religious doctrines, and the college was then teaching the same doctrines, the court was not called on to speculate as to what might happen if the authorities of the college should change their views or if others who held contrary views should obtain control of the college.—*Bailey v. Waddy*, 243 S.W. 21, 195 Ky. 415.

84. S.C.—*City of Columbia v. Monteith*, 137 S.E. 727, 139 S.C. 262.

will not defeat the gift,⁸⁵ nor will the selection of illegal or impracticable methods.⁸⁶ A provision giving judges who are to appoint the trustees authority to formulate rules for their government does not invalidate the trust, as conferring a discretionary power in the administration of the trust.⁸⁷ A provision in an instrument under which an institution for a charitable purpose is to be established, giving power to a board of trustees to make rules and regulations for the admission and government of inmates, does not authorize the board to make rules and regulations which are at variance with the charitable purpose set forth in such instrument, and does not, therefore, render the trust invalid.⁸⁸

Where the trust instrument creates but one trust for a charitable purpose which is to be put in operation on the death of the donor, the trust is not rendered invalid by a provision reserving to the donor a life estate in, the revenue from, and the management of, the property devoted to the trust, by a conditional provision for the sale by the donor, with the consent of the trustees, of the property devoted to the trust, by a conditional provision for the purchase, during the lifetime of the donor, of land for the purpose of the charitable institution contemplated, or by a conditional provision for the waiver and surrender of the life estate by the donor and the establishment, during his lifetime, of the charitable institution contemplated, where there is no intention to terminate the charitable trust, to affect the title of the trustees to the property devoted to the trust or the substituted proceeds, or to affect the administration of the trust by the trustees; such provisions do not create passive trusts so as to affect the validity of the charitable trust created by the trust instrument.⁸⁹ A charitable trust or gift is not defeated by a provision in the instrument creating it that the trustee is to receive fees and compensa-

tion for his services,⁹⁰ by a provision that the gift shall not be liable for the debts of the organization to which the gift is made,⁹¹ by a provision for the maintenance of a dance hall as one of the means of promoting the dominant purpose of the trust,⁹² or by the fact that the carrying out of the charitable purpose of the donor is made dependent on contributions by others for a like purpose.⁹³ The fact that one of the parties to an agreement to make mutual wills for a charitable purpose fails to comply with the agreement does not invalidate the testamentary gift for such purpose made by the other party to the agreement.⁹⁴ The fact alone that the time specified in a will for the accomplishment of a charitable purpose expires before it is accomplished will not defeat a testamentary gift for such purpose.⁹⁵

According to some cases, a devise of land to an unincorporated charitable society is not necessarily void because of the devisee's nonexistence, but the legal title descends to the heir at law in trust for the society.⁹⁶ Testamentary provisions for payment of income to charitable corporations are not void on the theory that such corporations and their successors may cease to exist with the result that the residuary estate would vest in the heirs of the testator.⁹⁷ When a deed is clearly for a charitable use, the trustees named therein take the legal estate in fee, although the deed does not in terms run to their heirs and assigns, as shown below in § 43. Even if the trustee or beneficiary is, at the time of the gift, incapable of taking, or not in existence, equity will in general uphold the gift, and, if necessary appoint a trustee, as shown below in §§ 27, 37.

A suit by the transferee of the heirs of a testator to have certain charitable trusts created by the

85. Pa.—Thompson's Estate, 127 A. 446, 282 Pa. 30.

86. Ill.—Morgan v. National Trust Bank of Charleston, 162 N.E. 888, 331 Ill. 182—Peek v. Woman's Home Missionary Soc., 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917—Franklin v. Hastings, 97 N.E. 265, 253 Ill. 46, Ann.Cas.1913A 135—In re Scanlan's Estate, 230 Ill.App. 505.

Unlawful accumulation

A charitable trust created by will is not rendered invalid on the ground that the testamentary provision for management would in operation create an unlawful accumulation, in view of the authority of a court of equity to prescribe a lawful method of management.—Webb v. Webb, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404.

Cy pres doctrine in general see *infra* § 52.

87. Or.—In re John, 47 P. 341, 50 P. 226, 30 Or. 494, 36 L.R.A. 242.

88. N.J.—Kitchen v. Pitney, 119 A. 675, 94 N.J.Eq. 485, 493, 494, 495.

89. Cal.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

90. Ill.—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344.

N.Y.—City Bank Farmers' Trust Co. v. Bennett, 287 N.Y.S. 784, 159 Misc. 779.

91. Provision valid

Provision set forth in the text is a valid restriction.—In re Darlington's Estate, 137 A. 268, 289 Pa. 297.

92. Public policy

The provision set forth in the text did not render the trust void as

against public policy on the ground that the dance hall would tend to promote immorality or would degenerate into a negro dance hall, where the hall would be under the control of trustees.—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A.1917D 1062.

93. Pa.—In re Thompson's Estate, 127 A. 446, 282 Pa. 30.

94. N.Y.—In re Nelson's Estate, 258 N.Y.S. 667, 143 Misc. 843.

95. Ill.—Carlstrom v. Frackelton, 263 Ill.App. 250.

96. N.J.—American Bible Soc. v. American Tract Soc., 50 A. 67, 62 N.J.Eq. 219.

N.C.—State v. Gerard, 37 N.C. 210.

97. Ill.—Skinner v. Northern Trust Co., 123 N.E. 289, 238 Ill. 229.

will declared void is within jurisdiction of equity.⁹⁸

Amount of gift. The mere fact that the fund which constitutes the subject matter of a charitable trust is large does not render the trust invalid as against public policy.⁹⁹ That the organization which is to receive income from a trust for charitable purposes has not previously disbursed as much money as it will receive if the trust is sustained does not invalidate the trust, at least in the absence of a showing that such organization cannot, under its charter, properly expend the income which it will receive from the trust.¹ According to some cases, the test as to the reasonableness of the amount to be devoted to a charitable purpose under a will is not applied as between the next of kin of the testator and the charitable trust so as to defeat the intention of the testator as expressed in the will.² A limitation as to the amount to be disbursed for each beneficiary does not invalidate a trust for charitable purposes otherwise enforceable.³ The validity of a charitable trust does not depend on the adequacy of the fund to execute it to the full extent of the intention of testator.⁴

In Pennsylvania, in determining whether or not a bequest in trust for the maintenance of a burial lot is unreasonable in amount, many factors are to be considered, among which is the income which, under prevailing conditions, may be obtained on investments which the trustee is authorized to make. The amount which other lot owners have regarded as necessary for maintenance is not necessarily controlling, and the desires of the surviving members of the testator's family cannot prevail over the spe-

cific terms of the bequest.⁵ Such a bequest should be construed liberally,⁶ and the testator's liberality should not be thwarted unless the amount fixed by him is so disproportionate to the needs as to indicate clearly that such amount is excessive.⁷ The bequest is not avoided merely because the interest on the amount bequeathed may exceed the amount sufficient to maintain the lot.⁸

b. Independently of Statute

In general courts of equity have original and inherent jurisdiction to recognize and uphold charities, independently of the statute of 43 Elizabeth c 4.

While it was never seriously questioned that courts of equity, by reason of their jurisdiction over trusts in general and without reference to the statute of 43 Elizabeth c 4, had jurisdiction over charitable trusts when they presented no unusual features,⁹ it was at one time supposed that the power of such courts to effectuate charitable donations in favor of uncertain beneficiaries, or of those in whom no legal estate vested, originated in that statute and had no existence at common law prior thereto. This was asserted in the supreme court of the United States by Chief Justice Marshall in 1819.¹⁰ The position thus taken was not universally accepted, however,¹¹ and the question again came before the supreme court in 1844, when, after an elaborate examination of authorities and of ancient records of the court of chancery, then for the first time made available, it was held that the statute of 43 Elizabeth did not in any respect enlarge the jurisdiction of chancery, but that prior to and independently of that statute, charities were sustained

98. U.S.—Chicago Bank of Commerce v. McPherson, C.C.A. Mich., 62 F.2d 393, affirming, D.C., 2 F. Supp. 110, and certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

99. Four million dollars

A trust created by a will giving a fund exceeding four million dollars to trustees to be used in founding a home for aged bachelors and widowers, for the purchase of land and erection of buildings, and for the maintenance of the home, was not, because of the size of the fund, contrary to public policy and void.—Kitchen v. Pitney, 119 A. 675, 94 N. J.Eq. 485, 493, 494, 495.

1. Pa.—In re. Baughman's Estate, 126 A. 53, 281 Pa. 23.

2. N.Y.—Morris v. Edwards, 124 N. E. 724, 227 N.Y. 141, modifying In re Morris, 175 N.Y.S. 913, 188 App. Div. 894.

3. Mass.—Sherman v. Shaw, 137 N. E. 374, 243 Mass. 257.

4. N.C.—Wachovia Banking & Trust

Co. v. Ogburn, 107 S.E. 238, 181 N.C. 324.

Ohio.—Graham v. Birgin, 18 Ohio App. 35.

Gift upheld

Notwithstanding contention that the amount available to carry out a testamentary provision was insufficient, the gift was upheld in view of broad powers given to proposed corporation and of intention of testatrix that fund should not be distributed among her heirs.—Burke v. Crawfordville Trust Co., Ind.App., 2 N. E.2d 817.

5. Pa.—In re Leber's Estate, 186 A. 225, 123 Pa.Super. 1.

6. Pa.—In re Brogan's Estate, 138 A. 337, 290 Pa. 319, 55 A.L.R. 1301.

7. Pa.—In re Leber's Estate, 186 A. 225, 123 Pa.Super. 1.

Testamentary provision upheld

(1) Two thousand dollars.—In re Leber's Estate, 186 A. 225, 123 Pa. Super. 1.

(2) Between three and four thousand dollars.—In re Brogan's Estate,

138 A. 337, 290 Pa. 319, 55 A.L.R. 1301.

8. Pa.—In re Brogan's Estate, 138 A. 337, 290 Pa. 319, 55 A.L.R. 1301 —In re Neely's Estate, 88 Pa.Super. 372, affirmed 135 A. 540, 238 Pa. 130.

9. Colo.—Clayton v. Hallett, 70 P. 429, 30 Colo. 231, 97 Am.S.R. 117, 59 L.R.A. 407.

Ohio.—Williams v. Cincinnati First Presb. Soc., 1 Ohio St. 478—McIntire Poor School v. Zanesville Canal, etc., Co., 9 Ohio 203, 34 Am.D. 436.

10. U.S.—Philadelphia Baptist Assoc. v. Hart, Va., 4 Wheat. 1, 4 L. Ed. 499.

11 C.J. p 303 note 33.

11. Mass.—Burbank v. Whitney, 24 Pick. 146, 35 Am.D. 312.

N.Y.—McCartee v. Orphan Asylum Soc., 9 Cow. 437, 18 Am.D. 516—Potter v. Chapin, 6 Paige 639—Shotwell v. Mott, 2 Sandf.Ch. 46.

Vt.—Burr v. Smith, 7 Vt. 241, 23 Am. D. 154.

and enforced in chancery, irrespective of indefiniteness in the beneficiaries or lack of trustees.¹² This, with some qualifications as to the degree of indefiniteness permissible in the beneficiaries, has since generally been regarded as the law, and it is well settled in most of the states that courts of equity have an original and inherent jurisdiction to recognize and uphold charities, independently of the statute of 43 Elizabeth.¹³ And in some jurisdictions, the principles of law as to charitable uses which antedated such statute are in force except as modified by constitutional and statutory provisions, judicial decisions, and local conditions.¹⁴

It must be noted, however, that in some of the jurisdictions stating this rule, the statute of 43 Elizabeth is held to be in force as part of the common law, as shown in the C.J.S. title Common Law § 13, also 12 C.J. p 193 note 30 [c].

In some cases, it has been stated that even the want of any court vested with jurisdiction to enforce it does not affect the validity of a charitable trust.¹⁵

c. Statutory Regulation and Authorization

Some state statutes are, in substance at least, in accord with the statute of 43 Elizabeth c 4. Other statutes have restored or established the doctrine or law of charitable uses to some extent at least.

The statute of 43 Elizabeth c 4, relating to charitable uses, is a part of the common law of some states but not of others, as shown in the C.J.S. title Common Law § 13, also 11 C.J. p 309 note 39, p 310 note 43, 12 C.J. p 193 note 30 [c]. In some states in which the statute itself is not formally recognized as part of the common law, its principles have been approved and adopted with certain modifications.¹⁶ Some state statutes are substantially the same as this English statute,¹⁷ and other statutes, by express reference to the English statute, have made it applicable to gifts and trusts for charitable purposes.¹⁸

In some jurisdictions the passage of statutes containing provisions that charitable grants, gifts, devises, or bequests shall not fail because of the indefiniteness of beneficiaries, and other provisions, has operated to restore or establish the doctrine or law of charitable uses to some extent at least.¹⁹

12. U.S.—*Vidal v. Philadelphia*, Pa., 2 How. 127, 194, 11 L.Ed. 205.

11 C.J. p 308 note 35.

13. Colo.—*Haggin v. International Trust Co.*, 169 P. 133, 69 Colo. 135, L.R.A.1918B 710.

Neb.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

N.H.—*Clark v. Campbell*, 133 A. 166, 82 N.H. 281, 45 A.L.R. 1433.

Ohio.—*Gearhart v. Richardson*, 142 N.E. 890, 109 Ohio St. 418.

Okl.—*Phillips v. Chambers*, 51 P.2d 303, 174 Okl. 407.

11 C.J. p 309 note 36.

"This statute [43 Elizabeth c 4] did not mark the beginning of charitable uses, as courts of equity had, before it was enacted, assumed jurisdiction of charitable trusts."—*Second Nat. Bank v. Second Nat. Bank*, Md., 190 A. 215, 219.

14. In *Indiana*, the doctrine of charitable uses is a part of the law.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 233 U.S. 852, 75 L.Ed. 1459.

In *Mississippi*, there is no statute defining charities, and the rules governing charities are derived from the unwritten law of England prior to the statute of Elizabeth, or from that statute itself; for the purposes of the opinion it was not necessary to decide as to the source.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

In *Missouri*, the principles of law which antedated the statute of Eliza-

beth are in force.—*Burrier v. Jones*, 92 S.W.2d 885, 338 Mo. 679.

In *Oklahoma*, principles on which charitable trusts are approved and justified existed at common law independently of English statute of charitable uses, and such principles are part of law of Oklahoma except as modified by constitutional and statutory law, judicial decisions, and condition and wants of people.—*Phillips v. Chambers*, 51 P.2d 303, 174 Okl. 407.

15. U.S.—*Vidal v. Philadelphia*, Pa., 2 How. 127, 11 L.Ed. 205.

Mass.—*Saltonstall v. Sanders*, 11 Allen 446—*Drury v. Natick*, 10 Allen 169—*King v. Parker*, 9 Cush. 71—*Bartlet v. King*, 12 Mass. 537, 7 Am.D. 99.

16. Pa.—In re *Harrison's Estate*, 30 Pa.Dist. 205.

11 C.J. p 310 note 41.

17. Ky.—*State Bank & Trust Co. v. Patridge*, 248 S.W. 1056, 198 Ky. 403.

11 C.J. p 310 note 40.

Purpose of statute of Elizabeth

It has been said that the purpose of the statute of Elizabeth was to curb the acquisitions of eleemosynary corporations.—*State Bank & Trust Co. v. Patridge*, 248 S.W. 1056, 198 Ky. 403.

18. Md.—*Second Nat. Bank v. Second Nat. Bank*, 190 A. 215.

19. In Michigan

(1) Except as introduced by Act 122, P.A.1907, as amended by Act 125, P.A.1911, the doctrine of chari-

table uses never obtained, and so-called charitable trusts were subject to rules applicable to other trusts.—*Moore v. O'Leary*, 146 N.W. 661, 180 Mich. 261, Ann.Cas.1916A 373—11 C.J. p 310 note 48 [a].

(2) It seems that the doctrine of charitable uses has been introduced to some extent by the foregoing statute.—*Moore v. O'Leary*, supra.

In New York

(1) The rule stated in the text has been recognized or applied in considering the effect of L.1893 c 701, and amendments, Pers.Prop.L. § 12, Real Prop.L. § 113, sometimes referred to as the Tilden Act.—In re *Briglin's Will*, 203 N.Y.S. 646, 298 App.Div. 511—In re *Potts' Will*, 199 N.Y.S. 830, 205 App.Div. 147—In re *Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—11 C.J. p 310 note 48.

(2) The enactment of the statute was part of a general scheme to restore to the courts of equity the power formerly exercised by chancery in the regulation of gifts for charitable purposes.—In re *Frasch's Estate*, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App. Div. 797, affirming 211 N.Y.S. 635, 125 Misc. 381—11 C.J. p 310 note 48.

(3) Prior to the enactment of the statute, after some decisions to the contrary, it was finally established that, as a result of the repeal in 1783 of the statute of 43 Elizabeth c 4, the general law as to charities no longer obtained.—*Holland v. Alcock*, 16 N.E. 305, 108 N.Y. 312, 2 Am.S.R.

The provisions of a statute authorizing charitable gifts or trusts are to be read in the light of its history and purpose,²⁰ and it is to be construed liberally and applied in order to sustain trusts for charitable purposes.²¹ Such a statute is not retroactive in that it does not apply to the will of a testator who died before the enactment of the statute.²² It is not, however, rendered inapplicable to a trust provided for in a will, on the ground that the statute would be given retroactive effect, where the statute was enacted intermediate the making of the will and the death of the testator, in view of the rule that a will is effective only as of the time of the death of the testator.²³ While such a statute has been regarded as not applicable to an absolute gift,²⁴ it has been held or recognized that, even though the donor does not use express words of trust, a trust for the purposes stated or intended may be implied to bring the gift within the operation of the statute.²⁵ An unincorporated association, which seeks to take a legacy on the ground that such legacy is a gift for a charitable or benevolent use, within the meaning of a statute authorizing such a gift, has the burden of proving that

its objects are solely such as to bring it within the beneficial terms of such statute.²⁶

In Virginia, the question as to validity has arisen in connection with the indefiniteness of beneficiaries and is considered below in § 39. Both in this state and in West Virginia certain classes of indefinite charities have been validated by statute and charitable trusts restored to that extent.²⁷ In Louisiana, a statute authorizes donations or bequests of any description of property to trustees for educational, charitable, or literary purposes,²⁸ and such statute, even though construed to permit the creation by will of a perpetual trust for charitable purposes, does not violate the constitutional provision which forbids the creation of substitutions, fidei commissi, and trust estates for a period of more than ten years after the death of the testator, in view of the further constitutional provision that such prohibition shall not apply to donations for educational, charitable, or religious purposes.²⁹

Statutory provisions which limit the amount of a testator's estate which he may give for charitable uses do not apply to gifts effected by instruments other than wills.³⁰

120—11 C.J. p 310 note 48 [b] (1), (2).

(4) The decisions and the various statutes, including the act of 1893, have been considered and reviewed in detail.—*New York Sailors' Snug Harbor v. Carmody*, 105 N.E. 543, 211 N.Y. 286—*Utica Trust, etc., Co. v. Thomson*, 149 N.Y.S. 392, 87 Misc. 81. 11 C.J. p 310 note 48 [b] (6), (7).

Effect of statute in general on validity of charitable gift where beneficiaries indefinite see *infra* § 39.

20. N.Y.—*In re Frasch's Estate*, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, affirming 211 N.Y.S. 635, 125 Misc. 381.

21. N.Y.—*In re McDowell's Will*, 112 N.E. 177, 217 N.Y. 454, L.R.A. 1916E 1246, Ann.Cas.1917E 853—*In re Stephani's Estate*, 300 N.Y.S. 813, 164 Misc. 240—*Utica Trust, etc., Co. v. Thompson*, 149 N.Y.S. 392, 87 Misc. 81.

Wis.—*In re Monaghan's Will*, 226 N.W. 306, 199 Wis. 273.

22. Ind.—*Trustees of Presbyterian Church of Laporte, Ind. v. Chulip*, 134 N.E. 686, 78 Ind.App. 693—*Trustees of Presbyterian Church of Laporte, Ind. v. Katsianis*, 134 N.E. 684, 78 Ind.App. 406.

11 C.J. p 311 note 49.

23. Minn.—*Lundquist v. First Evangelical Lutheran Church*, 259 N.W. 9, 193 Minn. 474.

24. N.Y.—*Fralick v. Lyford*, 95 N.Y.

S. 433, 107 App.Div. 543, affirmed 79 N.E. 1105, 187 N.Y. 524.

25. N.Y.—*In re Dubrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing *In re Clayton*, 218 N.Y.S. 325, 218 App.Div. 317—*Manley v. Fiske*, 124 N.Y.S. 149, 139 App.Div. 665, modifying 123 N.Y.S. 129, 66 Misc. 388, and affirmed 95 N.E. 1133, 201 N.Y. 546—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873—*In re Stephen's Estate*, 269 N.Y.S. 614, 150 Misc. 27—*In re Walter's Estate*, 269 N.Y.S. 402, 150 Misc. 512—*In re Paterson's Estate*, 249 N.Y.S. 441, 139 Misc. 872.

Religious purposes

Under provision of will directing executor to distribute residue to advance Christ's kingdom on earth, gift in trust was implied.—*In re Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing *In re Clayton*, 218 N.Y.S. 325, 218 App.Div. 317.

Bequests to educational foundation

Under will and codicils making bequests to educational foundation, trust for purposes stated would be implied, even if testator had not used express words of trust.—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873.

26. N.Y.—*In re Howells' Estate*, 260 N.Y.S. 598, 145 Misc. 557, modified on other grounds 261 N.Y.S. 859, 146 Misc. 169.

Facts insufficient to support claim

The fact that testatrix inserted in her will an expression of her grati-

tude toward the association was not sufficient to show that the objects of the association were such as to entitle it to the benefit of the statute.—*In re Howells' Estate*, 260 N.Y.S. 598, 145 Misc. 557, modified on other grounds 261 N.Y.S. 859, 146 Misc. 169.

27. W.Va.—*Hays v. Harris*, 80 S.E. 827, 73 W.Va. 17.

11 C.J. p 311 note 52.

Construction of statute

Statute validating gifts to "church," "religious congregation," or "religious society" is restricted to local unincorporated body or congregation, and does not include church at large in its denominational sense, and statute does not apply to bequest of money to be administered by named pastor, who should pay interest drawn by money to "the Methodist Church South for missionary work where he thinks it will do the greatest good."—*Moore v. Perkins, Va.*, 192 S.E. 806.

28. La.—*Pires v. Youree*, 129 So. 552, 170 La. 986—*Succession of Marion*, 112 So. 667, 163 La. 734.

Act 1882 No. 124

La.—*Percival's Succ.*, 68 So. 409, 137 La. 203.

29. La.—*Pires v. Youree*, 129 So. 552, 170 La. 986.

30. U.S.—*Bowdoin College v. Merritt*, C.C.Cal., 75 F. 480.

Cal.—*Rutherford v. Ott*, 173 P. 490, 37 Cal.App. 47.

Restrictions on testamentary dispositions for charitable purposes in

Statutes of mortmain and similar statutes. The earlier English statutes forbidding, under the penalty of forfeiture, the conveyance of lands as gifts to religious houses and the Mortmain Act of 9 Geo II c 36, enacted in 1736, and substantially re-enacted in 1888, 51 & 52 Victoria c 42, prohibiting dispositions of land to charitable uses, unless by deed made twelve months, and enrolled in chancery six months, before the donor's death, did not in general extend to the colonies;³¹ and generally speaking, in the United States the English statutes of mortmain are not, and never have been, in force.³² In Mississippi, however, constitutional and statutory provisions invalidate certain devises and bequests for charitable or religious purposes, as shown in the C.J.S. title Wills § 108, also 68 C.J. p 534 note 57-p 535 note 67, and, under the statutes of a number of states, it is necessary to the validity of a devise or bequest for a religious, charitable, or educational purpose that the will be executed a specified time prior to the death of the testator, as shown in the C.J.S. title Wills § 109, also 68 C.J. p 535 note 68-p 546 note 47. A statutory provision declaring void dispositions of real or personal property where bequeathed, devised, or conveyed in trust for religious or charitable purposes, except the same be done by deed or will at least a specified time before the death of the testator or alienor, has been construed to apply to an attempted gift, other than testamentary, of personal property for a purpose within the statute, made within the prescribed pe-

riod before the death of the donor.³³ A legacy to a religious society has been upheld, however, notwithstanding a statutory provision that all grants or gifts to a religious corporation of any real estate or of money to be laid out in real estate shall be by deed duly executed, delivered, acknowledged, and recorded at least a specified time before the death of the donor or grantor, where there is no direction in the will that the amount of the legacy shall be laid out in real estate.³⁴

Some statutes impose restrictions as to the amount of property which a charitable corporation may hold, as shown below in § 30.

Statute of uses and similar statutes. In some jurisdictions in the United States in which the statute of uses, 27 Hen. VIII c 10, which was designed to make the beneficiary's interest a legal instead of an equitable estate and to defeat the trust, has been considered, it has been held or recognized that the statute does not apply to these trusts which in their nature are so continuing and executory that they cannot be terminated and executed without violence to the donor's intention, especially when the trustee appointed by the donor has a discretion as to the method of promoting the objects intended.³⁵ Statutes abolishing uses and trusts, except as therein authorized and modified, without distinguishing between charitable and other uses, have, however, been regarded in some jurisdictions as applicable to charitable uses and trusts,³⁶ and as abolishing, to

general see the C.J.S. title Wills §§ 108-110, also 68 C.J. p 534 note 43-p 564 note 99.

31. U.S.—Perin v. Carey, Ohio, 24 How. 465, 16 L.Ed. 701.

11 C.J. p 311 notes 56, 57-p 312 note 58.

Charitable Uses Act

St. 9 Geo. II c 36, designated as "Charitable Uses Act," has been defined as an English statute which prohibits gifts to charities of land or moneys arising from, or to be laid out in, land unless made in accordance with the provisions of the Act.—Sweet L.D.

32. Wis.—Dodge v. Williams, 1 N.W. 92, 50 N.W. 1103, 46 Wis. 70. 11 C.J. p 312 note 63.

In Pennsylvania, the mortmain statutes have been effective only in so far as they prohibit dedications to so-called superstitious uses and grants to corporations without a statutory license.—Miller v. Porter, 53 Pa. 292.—Pittsburgh Methodist Church v. Remington, 1 Watts 219, 26 Am.D. 61.

33. In Pennsylvania

(1) Act 1855 § 11, rendered void a subscription agreement not support-

ed by consideration for a purpose within the statute, made within the prescribed period.—Reimensnyder v. Gans, 2 A. 425, 110 Pa. 17.

(2) A like rule applied to a promissory note made as a gift within the prescribed period.—In re Luebbe, 36 A. 322, 179 Pa. 447.

(3) In an earlier case, however, which according to In re Luebbe, supra, had been practically overruled, the view was taken that the statute did not invalidate a gift of personal property, which the court regarded as executed, notwithstanding the donor died within the prescribed period.—McGlade's Appeal, 99 Pa. 338, 11 Wkly.N.C. 257.

34. Del.—Board of Stewards of Wilmington Conference of Methodist Episcopal Church v. Williams, 96 A. 791, 6 Boyce, 52.

35. Ga.—Huger v. Protestant Episcopal Church, 73 S.E. 385, 137 Ga. 205.

11 C.J. p 312 notes 69-72.

36. Mich.—Newark M. E. Church v. Clark, 3 N.W. 207, 41 Mich. 730. Minn.—Lane v. Eaton, 71 N.W. 1031, 69 Minn. 141, 65 Am.S.R. 559, 38 L.R.A. 669.

N.Y.—Holmes v. Mead, 52 N.Y. 332. 11 C.J. p 310 notes 46, 48 [b] (3)-(5).

Applicable only to real property

(1) In some jurisdictions at least, such a statute applies only to real property.

N.Y.—Holmes v. Mead, 52 N.Y. 332. Wis.—Harrington v. Pier, 82 N.W. 345, 105 Wis. 485, 76 Am.S.R. 924, 50 L.R.A. 307.—Dodge v. Williams, 50 N.W. 1103, 1 N.W. 92, 46 Wis. 70.

(2) In Wisconsin, in a case in which personal property was involved, it was said that it was not intended to commit the court as to whether the rule that the statute of uses and trusts did not affect testamentary gifts of personal property for charitable uses applied to like gifts of real estate.—Harrington v. Pier, supra.

(3) In earlier cases the view was taken that the statute applied to charitable uses and trusts in land.—Ruth v. Oberbrunner, 40 Wis. 238. 11 C.J. p 310 note 46.

Statutes abolishing uses and trusts in general see the C.J.S. title Trusts § 25, also 65 C.J. p 236 note 76-p 237 note 78.

great extent at least, the ancient law as to such uses and trusts.³⁷

7. Certainty as to Manner of Execution

The founder need not specify in detail the plan of administering the trust, in order to create a valid charitable trust, but may leave the determination as to such details to the trustee under the guidance of a court of equity.

It is not essential to the validity of a charitable trust that the founder should specify in detail the plan of administering the trust.³⁸ In general, where he describes the general nature of the trust, he may leave the details of administration to be determined by the trustee³⁹ under the guidance of a court of equity,⁴⁰ and such trust may be valid, notwithstanding the founder leaves such details for the determination of the trustee,⁴¹ or fails to designate the duties of the trustee.⁴² The method of execution provided for may, however, be so ambiguous and uncertain as to render the trust void for uncertainty.⁴³

The mere fact that the donor intentionally leaves to the trustee, subject to judicial control, the determination as to the time for the establishment of the charity provided for does not render the trust void for uncertainty.⁴⁴

³⁷ Minn.—Lane v. Eaton, 71 N.W. 1031, 69 Minn. 141, 65 Am.S.R. 559, 38 L.R.A. 669.

¹ C.J. p 310 note 46.

³⁸ Or.—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654.

³⁹ U.S.—Russell v. Allen, Mo., 2 S.Ct. 327, 107 U.S. 163, 27 L.Ed. 397.

Conn.—Hoyt v. Bliss, 105 A. 690, 93 Conn. 344.

Ohio.—Gearhart v. Richardson, 142 N.E. 890, 109 Ohio St. 418.

Indefinite powers

Trust authorizing trustees to promote improvements in government and assist in other connected matters by lawful means was not invalid as investing trustees with indefinite powers.—Collier v. Lindley, 166 P. 526, 203 Cal. 641.

Provision not rendering trust invalid

Testamentary trust for construction of gate or arch in city park was not invalidated by provision for selection of testator's friends to act in conjunction with the city officials in the construction of such gate or arch.—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A. 918B 710.

Memorial

A residuary bequest of money to a town for the erection of a monument to the memory of testatrix's brother, a prominent citizen of the town,

otherwise valid, was not invalid because testatrix left the site and details to the discretion of the proper town authorities.—Lawrence v. Prosser, 104 A. 772, 89 N.J.Eq. 248. Certainty as to purpose as affected by leaving details of administration to trustee see *infra* § 20.

⁴⁰ U.S.—Russell v. Allen, Mo., 2 S.Ct. 327, 107 U.S. 163, 27 L.Ed. 397.

Ohio.—Gearhart v. Richardson, 142 N.E. 890, 109 Ohio St. 418.

Administration by court of equity

Where the purpose of a charitable trust is distinctly declared, and trustees are appointed by the will to carry out the intent of the testator, and the beneficiary may be ascertained, it is not void on the ground of being too indefinite and uncertain to be administered by a court of equity.—Jones' Unknown Heirs v. Dorchester, Tex.Civ.App., 224 S.W. 596, dismissed for want of jurisdiction.

⁴¹ Conn.—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

⁴² Cal.—In re De Mars' Estate, App., 67 P.2d 374.

⁴³ Ohio.—Dirlam v. Morrow, 131 N.E. 365, 102 Ohio St. 279, 22 Ohio N.P.N.S., 565.

⁴⁴ Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

§ 8. Partial Invalidity

Partial invalidity does not of necessity render a provision for a charity entirely void.

The mere fact that a testator attempted to create by will charitable trusts which are invalid does not render invalid charitable trusts created by the will, which are otherwise valid.⁴⁵ The fact that the instrument creating a charitable trust attempts to impose an invalid condition does not necessarily invalidate the trust as to its paramount charitable purpose.⁴⁶

Questions as to the effect on the validity of an attempted charitable trust or gift of including in the same instrument provisions for trusts or gifts for charitable and for noncharitable purposes are considered in § 22.

§ 9. Estoppel or Waiver as to Defects or Objections

Consult Pocket Parts for later cases.

§ 10. Persons Entitled to Question Validity

One without interest cannot question the validity of a charity. Only the state can question the legality and powers of the beneficiary.

Establishment and maintenance by income of estate

Provision in a will that, as soon as possible after the death of the testatrix, the trustee shall establish and maintain, by the income from the estate, a home for sick, helpless mothers and their babies did not render the trust void for uncertainty, where, by other clauses of the will, testatrix had made provision for payment of legacies and annuities out of income, so that she could not know when sufficient money would be available to establish and maintain the home.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

⁴⁵ Ohio.—Becker v. Fisher, 147 N.E. 744, 112 Ohio St. 284—Graham v. Bergin, 18 Ohio App. 35.

⁴⁶ Ohio.—Graham v. Bergin, *supra*. Provision for payment of fixed rate of interest

Under will bequeathing property to city on condition that it would legally accept it and give pledge for payment semiannually to trustees under the will of interest on the fund at six per cent for use by trustees for charitable purposes, the charitable scheme was the testator's dominant purpose, and was not invalidated by the invalid provision as to rate of interest, as such provision, if regarded as condition, would yield to the overruling purpose.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

In accordance with the rule applicable to wills generally, stated in the C.J.S. title Wills § 329, also 68 C.J. p. 929 note 43, persons without an interest may not question a testamentary gift for a charitable purpose,⁴⁷ but the sole heir of the testator may attack an attempted gift which is void where no other valid disposition of the property involved is made by the will.⁴⁸

Only the state may question the legality of an organization and the capacity of the beneficiary.⁴⁹ Questions as to who may raise the objection that a particular corporation is incompetent to act as trustee, and an objection based on the amount of property which a corporate trustee may take and hold, are considered below in § 30.

§ 11. Construction in General

In construing and applying the terms of an Instru-

ment creating a charitable trust the intention of the creator will be carried out as nearly as possible.

In construing and applying the terms of an instrument creating a charitable trust, the intention of the donor or testator must be carried out as nearly as possible,⁵⁰ even though, according to some cases at least, the particular manner indicated by the donor is illegal or impracticable,⁵¹ and even though the fund could be more efficiently or judiciously administered in another place or applied to a different object.⁵² In construing such instruments, courts consider charity as the substance.⁵³

In ascertaining the meaning of a charitable trust, the language used should be given a liberal construction and one favorable to its purpose,⁵⁴ and it has been said that, in view of the rule that courts favor charities, the trust instrument is construed most strongly against the donor in determining whether or not a general charitable intent has been expressed.⁵⁵

47. Heirs at law and distributees

(1) The sole heir and distributee could not successfully attack a will because of a bequest to a donee without capacity to take, where there were valid, alternative bequests.—*In re Brown's Estate*, 165 N.W. 929, 198 Mich. 544.

(2) Heirs could not successfully complain of a testamentary gift as defective or void where such gift was subject to a statutory provision that, in so far as it exceeds the powers of the courts to determine the matter, the disposition of the property shall be taken to have been made a subject to be further regulated and disposed of by the legislature. The rule was applied where one ground of invalidity asserted was that the income of the corporate beneficiary would be increased beyond that which it legally could receive. The rule was also applied in deciding that it was not necessary for the court to make a determination as to the effect of the act of June 8, 1891, Pub.L. 211, Pa.St.1920 § 5598, requiring real property devised for charitable purposes to be sold within five years from the time the right of possession shall accrue.—*In re Darlington's Estate*, 137 A. 268, 289 Pa. 297.

48. Ky.—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562.

49. Colo.—*Tomay v. Crist*, 226 P. 156, 75 Colo. 437.

Power not conferred by charter

Only the attorney general may question the acceptance of funds by a charitable institution on the ground that authority to accept is not embodied in its charter.—*Fidelity Union Trust Co. v. Reeves*, 125

A. 582, 96 N.J.Eq. 490, affirmed 129 A. 922, 98 N.J.Eq. 412.

50. Iowa.—*Lupton v. Leander Clark College*, 137 N.W. 496, 194 Iowa 1008.

Ky.—*Carroll v. Cave Hill Cemetery Co.*, 139 S.W. 186, 172 Ky. 204.

Mass.—*Greek Orthodox Community v. Malicourtis*, 166 N.E. 863, 267 Mass. 472.

Ohio.—*Becker v. Fisher*, 147 N.E. 744, 112 Ohio St. 284—*Morrow v. Dirlam*, 22 Ohio N.P.N.S., 565, 131 N.E. 365, 102 Ohio St. 279.

R.I.—*Bliven v. Borden*, 185 A. 239—*Rhode Island Hospital Trust Co. v. American Nat. Red Cross*, 149 A. 581, 50 R.I. 461—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

11 C.J. p. 312 note 76, 69 C.J. p. 756 note 71.

Consonance with purpose

Mass.—*Boston Safe Deposit & Trust Co. v. Attorney General*, 125 N.E. 392, 234 Mass. 261.

Intent as to administration

Conn.—*Dwyer v. Leonard*, 124 A. 28, 100 Conn. 513.

Ejusdem generis

When certain things are enumerated and a more general description is coupled with the enumeration, the general description is commonly understood to cover only things of a like kind with those enumerated, since it will be presumed that the testator had only things of that kind in mind.—*Prime v. Harmon*, 113 A. 738, 120 Me. 299.

"Or" construed as "and"

Rule that word "or" will be construed to mean "and" when necessary to effectuate meaning intended applies especially where one word expresses charitable use and other if

standing alone might not.—*Thorp v. Lund*, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204.

Construction as to:

Beneficiary see *infra* §§ 37-42.

Property included and title and interest acquired see *infra* §§ 43-46.

Purposes see *infra* §§ 12-23.

Trustees or donees see *infra* §§ 24-36.

Construction in favor of validity see *supra* § 6 a.

51. Ill.—*Morgan v. National Trust Bank of Charleston*, 162 N.E. 838, 331 Ill. 182—*Grand Prairie Seminary v. Morgan*, 49 N.E. 516, 171 Ill. 444—*In re Scanlan's Estate*, 230 Ill.App. 505.

Cy pres doctrine see *infra* § 52.

52. Ill.—*Grand Prairie Seminary v. Morgan*, 49 N.E. 516, 171 Ill. 444.

53. Ill.—*Peek v. Women's Home Missionary Soc.*, 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917—*Franklin v. Hastings*, 97 N.E. 265, 253 Ill. 46, Ann.Cas.1913A 135—*In re Scanlan's Estate*, 230 Ill.App. 505.

Mass.—*Rotch v. Emerson*, 105 Mass. 431.

54. Conn.—*Hoyt v. Bliss*, 105 A. 699, 93 Conn. 344.

Wyo.—*Bentley v. Whitney Benefits*, 281 P. 133, 41 Wyo. 11.

Residuary clause

Where general intention of testator to create charity appears from will, courts, in dealing with ambiguous residuary clause, will lean in favor of broad rather than restricted construction.—*In re Somerville's Estate*, 55 P.2d 597, 12 Cal.App.2d 430.

55. Cal.—*O'Hara v. Grand Lodge, I. O. G. T. of State of California*, 2 P.2d 21, 213 Cal. 131.

In general, the donor's intention is to be determined from the instrument itself and the attendant circumstances.⁵⁶ The terms used are not to be measured separately, but each is to be considered in its relation to the entire provision, and the general meaning of each restricted by its associations, and made subordinate to the main purpose.⁵⁷ However, a distinction is made in construing charitable gifts between those parts of the instrument which define the gift and its purposes and those which relate only to the mode of administration.⁵⁸ The practical construction given to a charitable foundation of doubtful meaning by those charged with its administration through many years is entitled to great weight in ascertaining the correct construction.⁵⁹

In the construction of donations to charitable corporations, the purpose for which the donee was incorporated,⁶⁰ or, in the case of an unincorporated association, the objects and operations of the as-

sociation,⁶¹ may be considered; and a second gift to a charity is properly interpreted as was that previously established.⁶²

A gift to the trustees of an institution is in law and in fact a gift to the institution itself.⁶³

Evidence to aid construction. To aid in the construction, extrinsic evidence of the circumstances is usually admissible;⁶⁴ and, in case of obscurity and ambiguity, resort may be had to the use of the charity which has already been made by the trustees.⁶⁵ In the case of a testamentary gift, where the language used is plain and unambiguous, extrinsic evidence, such as of testator's declarations remote from the execution of the will, is not admissible to show the intention of the testator.⁶⁶ Evidence, otherwise competent, which tends to assist in the application of language of the will, which is clear and certain on its face, to the object contemplated by the will, may be admissible.⁶⁷

Language of instrument

Whether a bequest was intended for charitable purposes depends on the intention of the testatrix, to be ascertained largely from the will itself.—*De La Pole v. Lindley*, 204 P. 15, 118 Wash. 398.

56. Iowa.—*Lupton v. Leander Clark College*, 187 N.W. 496, 194 Iowa 1098.

Mass.—*Greek Orthodox Community v. Malicourtis*, 166 N.E. 863, 267 Mass. 472.

Nev.—*In re Hartung's Estate*, 161 P. 715, 40 Nev. 262, denying rehearing 160 P. 782, 40 Nev. 262.

Wis.—*First Wisconsin Trust Co. v. Board of Trustees of Racine College*, 272 N.W. 464.

Conditions

(1) A devise of real estate to a university on condition that it care for testator's tomb for all time is merely a conditional devise, and not a perpetual trust, so that it is valid regardless of whether the university has authority to accept a perpetual trust.—*Giblin v. Giblin*, 182 N.W. 357, 173 Wis. 632.

(2) Provision that devise of farm to town for benefit of poor "is upon condition" that town erect buildings and wall was not condition subsequent attached to devise.—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

Creation of charitable gift or trust
Mass.—*Thorp v. Lund*, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204.

Knowledge of statute

In the case of a bequest in trust with direction that the fund shall be invested and the net income paid to the treasurer of the public schools of a township, to be used to im-

prove and elevate the standard of practical education in such township as directed by the school directors, and the further direction that no part of the money paid to the school treasurer shall be used to lower the tax rate in said township, it was held that it was the intention of the testator that his gift should enable the school directors to do what they were permitted, but not required, to do by a certain statute prescribing the duties and powers of school directors, in view of the fact that the testator was doubtless familiar with such statute, and it was further held that, in view of such construction of the will, the bequest did not fail on the ground that it was impossible to comply with the condition in the will as to the reduction of the tax rate.—*In re Johns' Estate*, 108 A. 593, 265 Pa. 311.

57. Ky.—*Greer v. Synod Southern Presb. Church*, 150 S.W. 16, 150 Ky. 155.

Mass.—*Rotch v. Emerson*, 105 Mass. 431.

58. N.Y.—*City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784, 159 Misc. 779.
11 C.J. p 313 note 83.

59. Mass. — *Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

60. Ga.—*Martin Inst. v. Maddox*, 77 S.E. 629, 139 Ga. 491.

N.J.—*Mills v. Davison*, 35 A. 1072, 54 N.J.Eq. 659, 55 Am.S.R. 594, 35 L.R.A. 113.

61. Pa.—*Civic Club v. Central Trust Co.*, 44 Pa.Co. 401.

62. Mass.—*St. Paul's Church v.*

Atty.-Gen., 41 N.E. 231, 164 Mass. 188.

63. Ala.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

Devise to incorporated college

A devise to the trustees of an incorporated college, and their successors forever, in trust, vested the devise in the college.—*Curran v. Sears*, 2 Redf.Surr., N.Y., 526.

64. Ohio.—*Morrow v. Dirlam*, 22 Ohio N.P.N.S., 565, 131 N.E. 365, 102 Ohio St. 279.

11 C.J. p 313 note 84.

65. U.S.—*Independence Church of Christ v. Reorganized Church, Mo.*, 71 F. 250, 17 C.C.A. 387.

11 C.J. p 313 note 85.

66. Ky.—*Carroll v. Cave Hill Cemetery Co.*, 189 S.W. 186, 172 Ky. 204.

Location of mortuary chapel

A provision of a will directing erection of mortuary chapel "just beyond the basin" in a cemetery was not ambiguous.—*Carroll v. Cave Hill Cemetery Co.*, 189 S.W. 186, 172 Ky. 204.

67. Ky.—*Carroll v. Cave Hill Cemetery Co.*, supra.

Location of mortuary chapel

Where testatrix directed erection of mortuary chapel in cemetery, evidence of topography of the cemetery was competent for the purpose of determining the exact location of such chapel.—*Carroll v. Cave Hill Cemetery Co.*, supra.

"Latent ambiguity"

In passing on the question as to the admissibility of evidence to assist in carrying out the intention of the testator as to the construction of a mortuary chapel in a cemetery,

Under some circumstances, extrinsic evidence is admissible to identify or ascertain the beneficiaries, as shown below in § 41.

All presumptions consistent with the language used are indulged to sustain a charitable gift, as shown above in § 6 a.

III. CHARITABLE PURPOSES

§ 12. In General

Broadly, a charitable use or purpose may, where neither law nor public policy forbids, be applied to almost anything tending to promote the well doing and well being of social man, but the use or purpose must be a public, as distinguished from a private, one, for the benefit of the public at large or of a portion thereof or for the benefit of an indefinite number of persons.

It is essential to a valid charitable gift that it be

for a purpose recognized in law as charitable.⁶⁸ To constitute a charitable use or purpose, it must be a public as distinguished from a private one; it must be for the public use or benefit; and it must be for the benefit of the public at large, or of a portion thereof, or for the benefit of an indefinite number of persons.⁶⁹ However, as discussed in §§ 37-39 infra, this does not prevent the donor from se-

it was held that a "latent ambiguity" is one not appearing on the face of the words used, and not known to exist until the words are brought in contact with the collateral facts.—*Carroll v. Cave Hill Cemetery Co.*, supra.

68. Cal.—In re Vance's Estate, 4 P. 2d 977, 118 Cal.App. 163.

Me.—*Bates v. Schillinger*, 145 A. 395, 128 Me. 14.

N.Y.—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474—*Tavshanjian v. Abbott*, 112 N.Y.S. 583, 59 Misc. 642, modified on other grounds 115 N.Y.S. 938, 130 App. Div. 863, affirmed 93 N.E. 978, 200 N.Y. 374.

11 C.J. p 313 note 86.

A bequest not otherwise charitable is not rendered so because it is to persons who follow an employment which is noble and appealing.—In re Kennedy's Estate, 269 N.Y.S. 136, 139, 240 App.Div. 20, 23, affirmed 191 N.E. 629, 264 N.Y. 691—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474.

Statutory purposes

Where a statute sets forth the purposes which shall be deemed charitable, an intention to advance the public welfare is not of itself sufficient to render a gift for the benefit of indefinite and uncertain persons charitable, unless it is for a purpose authorized by the statute.—In re Frasch's Will, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, which affirmed In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381.

69. U.S.—*Gossett v. Swinney*, C.C.A. Mo., 53 F.2d 772, affirming, D.C., *Irwin v. Swinney*, 44 F.2d 172, and certiorari denied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Ala.—*Tarver v. Weaver*, 130 So. 209, 221 Ala. 663—*Johns v. Birmingham, Trust & Savings Co.*, 88 So. 835, 205 Ala. 535.

Conn.—*Mitchell v. Reeves*, 196 A. 785, 123 Conn. 549.

Del.—*Delaware L. & Dev. Co. v. First and Central Presb. Church*, 147 A. 165, 171, citing *Corpus Juris*.

Ill.—*People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago*, 158 N.E. 213, 326 Ill. 573, 54 A.L.R. 1376.

Iowa.—*Sisters of Mercy of Cedar Rapids v. Lightner*, 274 N.W. 86.

Me.—In re Clark's Estate, 159 A. 500, 502, 131 Me. 70—*Prime v. Harmon*, 113 A. 738, 120 Me. 299—*Bills v. Pease*, 100 A. 146, 116 Me. 98, L.R.A.1917D 1060.

Md.—*Second Nat. Bank v. Second Nat. Bank*, 190 A. 215, 220, citing *Corpus Juris*.

Mass.—*Sherman v. Shaw*, 137 N.E. 374, 243 Mass. 257—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 163, 28 A.L.R. 713—*Thorp v. Lund*, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1913B 1204—*Howard v. Howard*, 116 N.E. 937, 227 Mass. 395.

Mich.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Mo.—*Newton v. Newton Burial Park*, 34 S.W.2d 118, 121, 326 Mo. 901, citing *Corpus Juris*.

Neb.—*Elliot v. Quinn*, 189 N.W. 173, 109 Neb. 5.

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.

N.H.—*Clark v. Cummings*, 137 A. 660, 83 N.H. 27—*Glover v. Baker*, 83 A. 916, 76 N.H. 393.

N.J.—*Hewitt v. Camden County*, 146 A. 881, 7 N.J.Misc. 528.

N.Y.—In re MacDowell's Will, 112 N.E. 177, 217 N.Y. 454, L.R.A.1916E 1246, Ann.Cas.1917E 853, reversing 156 N.Y.S. 387, 170 App.Div. 245, which affirmed 153 N.Y.S. 653, 89 Misc. 323—In re Skuse's Estate, 1 N.Y.S.2d 202, 165 Misc. 554—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474—In re Upham's Will, 289 N.Y.S. 518, 160 Misc. 126—In re Hall's Estate, 282 N.Y.S. 856, 156 Misc. 841, affirmed In re Hall's Will, 287 N.Y.S. 324—In re De Long's Estate, 250 N.Y.S. 504, 140 Misc. 92—In re Burnham's Estate, 183 N.Y.S. 539, 112 Misc. 560, af-

firmed 187 N.Y.S. 929, 196 App.Div. 948, which is affirmed 134 N.E. 548, 232 N.Y. 506—*Camp v. Presbyterian Soc. of Sackets Harbor*, 173 N.Y.S. 581, 105 Misc. 139.

N.D.—*State v. Seigfried*, 168 N.W. 62, 64, 40 N.D. 57.

Tenn.—*Gibson v. Frye Institute*, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

Vt.—*Boyce v. Sumner*, 124 A. 853, 97 Vt. 473.

11 C.J. p 313 note 87.

All property held for public purposes is held as a charitable use, in the legal sense of the term "charity."—*Perin v. Carey*, Ohio, 24 How. U.S., 465, 494, 16 L.Ed. 701—*St. Louis Union Trust Co. v. Burnet*, C.C.A., 59 F.2d 922, 927.

If the purpose to be attained is personal, private, or selfish, it is not a charitable trust.—*Matter of McDowell's Will*, 112 N.E. 177, 217 N.Y. 454, L.R.A.1916E 1246, Ann.Cas. 1917E 853—In re Kennedy's Estate, 269 N.Y.S. 136, 139, 240 App.Div. 20—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474—In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381.

Gifts held not within rule

(1) Trust with intent or purpose to confer indirect benefit on public.—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474.

(2) Trust disclosing no evidence of general charitable intent.—*Edwards v. Packard*, 149 A. 623, 129 Me. 74.

(3) Trust where subject matter might become, on sale, a source of profit.—In re De Forest's Estate, 263 N.Y.S. 135, 137 Misc. 82.

(4) Gift which definitely contemplates a use for personal profit.—In re Skuse's Estate, 1 N.Y.S.2d 202, 165 Misc. 554.

(5) Gift to person for his own benefit, whereby consequential charity may arise.—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474.

Public charitable purpose

Trust was not open to criticism

lecting some particular class of the public and limiting his benefaction to that class, provided the class is composed of an indefinite number of persons rather than certain designated and named individuals. In determining whether a gift is charitable, the courts look to the nature and purpose of the gift, rather than to the donor's motives in making it;⁷⁰ and hence, where the nature of the gift is such that it must be deemed to be for a public purpose, the fact that there is also a private motive in making it does not deprive the gift of its public character so as to render it noncharitable.⁷¹ It is immaterial whether or not the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature.⁷² It constitutes no reason for holding a gift void as a charity that it is made for a purpose for which other

and perhaps ample provision has been made by law.⁷³

Charitable uses take such varied forms that a specific enumeration of the classes or objects is necessarily defective,⁷⁴ and they cannot be limited by any narrow and stated formula.⁷⁵ The preamble of the statute of 43 Elizabeth enumerates many specific charitable purposes;⁷⁶ but not only in jurisdictions where the statute is or has been in force or is adopted or recognized as part of the law of those jurisdictions but also in jurisdictions where it is not so adopted or recognized but is considered simply as persuasive authority or as an aid in determining what constitutes a charity, many purposes are deemed to be charitable which are not specifically named in the statute but are within its spirit and reason.⁷⁷ Although the relief of the poor,

that it authorized use of estate for public purpose, as distinguished from public charitable purpose.—Howard v. Howard, 116 N.E. 937, 227 Mass. 395.

Ultimate results

Consideration is to be given to the ultimate results to be accomplished by the creation of the trust, and not the incidental benefits that may accrue to certain purposes.—City Bank Farmers Trust Co. v. Bennett, 287 N.Y.S. 784, 159 Misc. 779.

Exclusiveness of application

Whether gift to corporation is for charitable purposes depends on whether trustee or corporate beneficiary is bound to apply it to such purposes only.—In re De Forest's Estate, 263 N.Y.S. 135, 137 Misc. 82.

70. Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 620.

N.Y.—In re Frasch's Will, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, which affirmed In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381.

Pa.—In re Archambault's Estate, 162 A. 801, 308 Pa. 549.—In re Jennings' Estate, 20 Pa.Dist. & Co. 506.—In re Becker's Estate, 28 Pa. Dist. 695.—In re Channon, 28 Pa. Dist. 479, 47 Pa.Co. 637, affirmed 109 A. 765, 266 Pa. 417.

Tenn.—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

Vt.—Boyce v. Sumner, 124 A. 853, 97 Vt. 473.

11 C.J. p 314 note 89.

Benevolent motive or a purpose to confer a general benefit does not bring a trust within the terms of the statute.—In re Frasch's Will, 156 N.E. 656, 245 N.Y. 174.—In re Carpenter's Estate, 297 N.Y.S. 649, 657, 163 Misc. 474.

71. Cal.—In re Coleman, 138 P. 992, 167 Cal. 212, Ann.Cas.1915C 582.

Me.—Bills v. Pease, 100 A. 146, 116 Me. 98, L.R.A.1917D, 1060.

Mass.—Massachusetts Institute of Technology v. Attorney General, 126 N.E. 521, 235 Mass. 288.—Howard v. Howard, 116 N.E. 937, 227 Mass. 395.

N.J.—First Camden Nat. Bank & Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59.

N.Y.—In re Harrington's Will, 276 N.Y.S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App. Div. 252.—In re Smith's Will, 268 N.Y.S. 83, 240 App.Div. 940.—In re Browning's Estate, 1 N.Y.S.2d 825, 165 Misc. 819.—In re Atkinson's Will, 197 N.Y.S. 831, 120 Misc. 186.

Ohio.—Becker v. Fisher, 147 N.E. 744, 112 Ohio St. 284.

Pa.—In re Becker's Estate, 28 Pa. Dist. 695.

11 C.J. p 314 note 90.

Private annuity

The mere fact that the corpus of gift is subject to an annuity to a person, not within the rule against perpetuities, does not destroy the charitable feature of the gift.—Dingwell v. Seymour, 267 P. 327, 91 Cal. App. 483.

72. U.S.—Michigan Trust Co. v. U. S., D.C.Mich., 21 F.Supp. 482.

Ill.—Farmers' & Mechanics' Bank v. Griffith, 185 N.E. 854, 352 Ill. 323.—Skinner v. Northern Trust Co., 123 N.E. 289, 288 Ill. 229.

Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 620.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.—Bills v. Pease, 100 A. 146, 116 Me. 98, L.R.A.1917D 1060.

Mass.—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474.—Jackson v. Phillips, 14 Allen 539.

N.J.—Noice v. Schnell, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, re-

versing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.—New Jersey Title Guarantee & Trust Co. v. Smith, 108 A. 16, 18, 90 N.J.Eq. 386.

73. Iowa.—Chapman v. Newell, 125 N.W. 324, 146 Iowa 415.

74. U.S.—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Pa.—In re Valley Forge Centennial, etc., Assoc., 83 A. 683, 235 Pa. 206.—In re Harrison's Estate, 30 Pa. Dist. 205.

75. U.S.—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Cal.—People v. Dashaway Ass'n, 24 P. 277, 84 Cal. 114, 12 L.R.A. 117.

Must expand with the advancement of civilization and the daily increasing needs of man.—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

76. Mo.—Buchanan v. Kennard, 136 S.W. 415, 234 Mo. 117, 37 L.R.A., N.S., 993, Ann.Cas.1912D 50.

11 C.J. p 314 note 93.

77. U.S.—Irwin v. Swinney, D.C. Mo., 44 F.2d 172, affirmed, C.C.A., Gossett v. Swinney, 53 F.2d 772, certiorari denied 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.

Ill.—Dickenson v. City of Anna, 141 N.E. 754, 310 Ill. 222, 30 A.L.R. 587.

Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 620.

Md.—Second Nat. Bank v. Second Nat. Bank, 100 A. 215, 219, citing Corpus Juris.

Mo.—Harger v. Barrett, 5 S.W.2d 1100, 319 Mo. 633.

or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity, this is not so in the view of the law,⁷⁸ and hence a gift to a public use is not unlawful as a charity because it is not limited to the purpose of relieving the sick or poverty stricken,⁷⁹ or because it extends to the rich as well as to the poor.⁸⁰ A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.⁸¹ In its legal sense, charity comprises four principal divisions: (1) Trusts for the relief of poverty and distress; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; and (4) trusts for other purposes beneficial to the community not falling under any of the preceding

heads.⁸²

While the term "benevolent" includes matters which are charitable, it is a broader term and includes matters which are not charitable. Accordingly, there is a distinction between benevolent purposes and charitable purposes, except where the two terms are obviously used synonymously,⁸³ or where the distinction has been done away with by statute.⁸⁴

Construction. If the terms of the gift are capable of two constructions, one of which would devote it to a charitable purpose and the other to possible private gain, that construction which is fairly within the law and sustains the trust should be preferred.⁸⁵

Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.
11 C.J. p 314 note 94.

Courts will construe trusts to religious, charitable, and benevolent uses as including uses within the spirit of the statute of charitable uses.—In re *Frasch's Will*, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, which affirmed In re *Frasch's Estate*, 211 N.Y.S. 635, 125 Misc. 381.

78. N.Y.—In re *MacDowell*, 112 N.E. 177, 217 N.Y. 454, 463, L.R.A. 1916E 1246.

Tex.—*Paschal v. Acklin*, 27 Tex. 173, 11 C.J. p 314 note 95.

79. Mass.—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

N.Y.—*Corporation of Chamber of Commerce of New York v. Bennett*, 257 N.Y.S. 2, 143 Misc. 513.

80. Ill.—*Congregational Sunday School Society v. Board of Review*, 125 N.E. 7, 290 Ill. 108.

Mass.—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

81. U.S.—*Ould v. Washington Hospital*, D.C., 95 U.S. 303, 34 L.Ed. 450—*Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City*, C.C.A.Mo., 64 F.2d 602, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561—*St. Louis Union Trust Co. v. Burnet*, C.C.A., 59 F.2d 922—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 233 U.S. 852, 75 L.Ed. 1459—*Koehler v. Lewellyn*, D.C.Pa., 44 F.2d 654, 655—*Schuster v. Nichols*, D.C. Mass., 20 F.2d 179.

Colo.—In re *Schleier's Estate*, 13 P.2d 273, 91 Colo. 172.

D.C.—*Pennsylvania Co. for Insurance on Lives and Granting of Annuities v. Helvering*, 66 F.2d 284, 286, 62 App.D.C. 254.

Ill.—*Continental Illinois Nat. Bank & Trust Co. v. Harris*, 194 N.E. 250, 253, 359 Ill. 36—*People v. Rockford Masonic Temple Bldg. Ass'n*, 181 N.E. 428, 431, 348 Ill. 567, 83 A.L.R. 768—*People v. Freeport Masonic Temple*, 179 N.E. 672, 347 Ill. 180—*Stowell v. Prentiss*, 154 N.E. 120, 323 Ill. 309, 50 A.L.R. 584—*School of Domestic Arts and Science v. Carr*, 153 N.E. 669, 322 Ill. 562—*People v. Walters Chapter of D. A. R.*, 142 N.E. 566, 311 Ill. 304—*Congregational Sunday School Society v. Board of Review*, 125 N.E. 7, 9, 290 Ill. 108—*Carlstrom v. Frackelton*, 263 Ill.App. 250.

Mass.—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713—*New England Sanitarium v. Stoneham*, 91 N.E. 385, 205 Mass. 335.

Mo.—*Missouri Historical Society v. Academy of Science*, 8 S.W. 346, 94 Mo. 459.

N.J.—*Noice v. Schnell*, 137 A. 582, 585, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied *Allison v. Schnell*, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

N.Y.—*Peo. v. Fitch*, 47 N.E. 983, 988, 154 N.Y. 14, 38 L.R.A. 591, reversing 42 N.Y.S. 1131, 12 App.Div. 581, affirming 39 N.Y.S. 926.

Pa.—In re *Barnwell's Estate*, 112 A. 535, 269 Pa. 443—In re *Harrison's Estate*, 30 Pa.Dist. 205—In re *Doboscinski's Estate*, 18 Pa.Dist. & Co. 563.

11 C.J. p 314 note 96.

82. Md.—*Rabinowitz v. Wollman*, 197 A. 566, 568, quoting *Corpus Juris*.

N.Y.—In re *Carpenter's Estate*, 297 N.Y.S. 649, 653, 163 Misc. 474, quoting *Corpus Juris*.

Or.—In re *Smith's Estate*, 25 P.2d 924, 144 Or. 561.

11 C.J. p 314 note 97.

83. U.S.—*St. Louis Union Trust Co. v. Burnet*, C.C.A., 59 F.2d 922.

N.J.—*Trustees of Bergen County Odd Fellows Ass'n v. City of Hackensack*, 190 A. 780, 781, 118 N.J. Law 1.

Tex.—*State v. Texas Mut. Life Ins. Co. of Texas*, Civ.App., 51 S.W.2d 405.

For distinction between charitable purpose and benevolence or benevolent purpose see *Benevolence* 10 C.J.S. p 342 notes 89-92, and *Benevolent* 10 C.J.S. p 343 notes 17, 18.

Connotes charity

Word "benevolent," used in connection with gifts for general beneficial public purposes, connotes "charity."—*St. Louis Union Trust Co. v. Burnet*, C.C.A., 59 F.2d 922.

Terms intended as synonymous

U.S.—*Irwin v. Swinney*, D.C.Mo., 44 F.2d 172, affirmed, C.C.A., *Gossett v. Swinney*, 53 F.2d 772, certiorari denied 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

84. Ky.—*Givens v. Shouse*, 5 Ky.L. 419, 12 Ky.Op. 372.

11 C.J. p 315 note 99.

85. N.Y.—In re *Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing In re *Clayton*, 218 N.Y.S. 325, 218 App.Div. 317—In re *Browning's Estate*, 1 N.Y.S.2d 325, 165 Misc. 819—In re *Skuse's Estate*, 1 N.Y.S.2d 202, 165 Misc. 554—In re *Stephani's Estate*, 300 N.Y.S. 813, 164 Misc. 240—In re *Edge's Estate*, 288 N.Y.S. 437, 159 Misc. 505—In re *McLoghlin's Estate*, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re *McLoghlin's Will*, 251 N.Y.S. 876, 233 App.Div. 386—In re *Kelley's Will*, 245 N.Y.S. 294, 138 Misc. 190.

Construction generally see *supra* § 11.

Words of unlimited discretion intended to create charitable and religious gifts should be construed as

Compensation for trustee. The mere fact that a gift in trust for charitable purposes makes provision for the compensation of the trustee does not deprive the gift of its charitable nature.⁸⁶

§ 13. Aid of Governmental Purposes

Gifts in aid of governmental purposes are for charitable purposes.

Gifts to a governmental unit which lessen the burdens of government,⁸⁷ or which are in aid of

being limited to suitable objects of gifts.—*In re Durbrow's Estate*, 157 N.E. 747, 245 N.Y. 469, reversing *In re Clayton*, 218 N.Y.S. 325, 218 App. Div. 317.

86. N.Y.—*City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784, 159 Misc. 779.

Limitation on expenses

The fact that only the income from the funds may be used for administrative expenses does not deprive the gift of its charitable nature.—*In re Wirt's Estate*, 12 P.2d 95, 124 Cal.App. 7.

87. R.I.—*Powers v. Home for Aged Women*, 192 A. 770, 110 A.L.R. 1361 —*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444—*Kelly v. Nichols*, 25 A. 840, 18 R.I. 62, 19 L.R.A. 413.

Gifts held charitable

(1) Gifts to a governmental unit.—*Dickenson v. City of Anna*, 141 N.E. 754, 310 Ill. 222, 30 A.L.R. 537—11 C.J. p 325 note 34.

(2) To pay part of a state or a national debt.—*Russell v. Allen*, Mo., 2 S.Ct. 327, 107 U.S. 163, 27 L.Ed. 397—*Girard Trust Co. v. Russell*, Pa., 179 F. 446, 102 C.C.A. 592, affirming 171 F. 161.

(3) To reduce or to discharge taxes or rates.—*New Castle Common v. Megginson*, 77 A. 565, 24 Del. 361, Ann.Cas.1914A 1207.

(4) To promote improvements in governmental conditions.—*Collier v. Lindley*, 266 P. 526, 203 Cal. 641.

(5) To aid in the support and care of former soldiers and defenders of the government.—*Lehnerr v. Feldman*, 202 P. 624, 110 Kan. 115.

88. U.S.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F. 2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Mass.—*Peirce v. Attwill*, 125 N.E. 609, 234 Mass. 389.

R.I.—*Powers v. Home for Aged Women*, 192 A. 770, 110 A.L.R. 1361—*Kelly v. Nichols*, 25 A. 840, 18 R.I. 62, 19 L.R.A. 413.

11 C.J. p 325 note 37.

Gifts held charitable

(1) Aid in the suppression of fires in a particular village.—*Sherman v.*

Richmond Hose Co. No. 2, 130 N.E. 613, 230 N.Y. 462, affirming 175 N.Y.S. 8, 186 App.Div. 417—11 C.J. p 326 note 49.

(2) Beautification and improvement of the grounds of a waterworks.—*Penny v. Croul*, 43 N.W. 649, 76 Mich. 471, 5 L.R.A. 858.

(3) Construction of a children's playhouse and ground.—*Smith's Estate*, 5 Pa.Dist. 327, 18 Pa.Co. 209, affirmed 37 A. 114, 181 Pa. 109.

(4) Drainage of land. — *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 454.

(5) Erection of a courthouse.—*Stuart v. Easton*, Pa., 74 F. 854, 21 C.C.A. 146, affirmed 18 S.Ct. 650, 170 U.S. 383, 42 L.Ed. 1078.

(6) Erection of a house of correction or a sessions house.—*Jackson v. Phillips*, 14 Allen, Mass., 539.

(7) Erection of a public auditorium or theater. Nev.—*Nixon v. Brown*, 214 P. 524, 46 Nev. 439.

N.C.—*Wachovia Banking & Trust Co. v. Ogburn*, 107 S.E. 238, 181 N.C. 324.

(8) Erection of a public bathhouse.—*In re Scanlan's Estate*, 230 Ill.App. 505.

(9) Erection of a town house. N.J.—*New Jersey Title Guarantee & Trust Co. v. Smith*, 108 A. 16, 90 N.J.Eq. 386.

N.Y.—*Coggeshall v. Pelton*, 7 Johns. Ch. 232, 11 Am.D. 471.

Tenn.—*Gibson v. Frye Institute*, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

(10) Erection or repair of highways and bridges. — *Carlstrom v. Frackelton*, 263 Ill.App. 250—11 C.J. p 325 note 38.

(11) Establishment and operation of a gas plant.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

(12) Establishment and repair of life saving stations.—*Richardson v. Mullery*, 86 N.E. 319, 200 Mass. 247.

(13) Establishment, maintenance, or beautification of public parks or buildings, even when the land given

public improvements and undertakings,⁸⁸ are for charitable purposes. Gifts for public purposes at specified localities are held good.⁸⁹

§ 14. Care, Maintenance or Improvement of Burial Grounds and Monuments

A gift for the care, maintenance, or improvement of a public or semi-public burial ground, or for the erection and maintenance of a public monument, is charitable in nature.

to a city therefor is beyond the corporate limits.

U.S.—*Gredig v. Sterling*, C.C.A.Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535. Colo.—*In re Schleier's Estate*, 13 P. 2d 273, 91 Colo. 172—*Haggin v. International Trust Co.*, 169 P. 138, 69 Colo. 135, L.R.A.1918B 710.

Miss.—*Lester v. Jackson*, 11 So. 114, 69 Miss. 887.

N.J.—*Noice v. Schnell*, 137 A. 532, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied *Allison v. Schnell*, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

R.I.—*Rhode Island Hospital Trust Co. v. Benedict*, 103 A. 146, 41 R.I. 143.

Vt.—*President and Fellows of Middlebury College v. Central Power Corporation of Vermont*, 143 A. 384, 101 Vt. 325.

Wis.—*Williams v. City of Oconomowoc*, 166 N.W. 322, 323, citing *Corpus Juris* and referring to cases there cited as authoritative. 11 C.J. p 326 note 43.

(14) "Paving, lighting, cleansing and improving" a town.—*Staines v. Burton*, 53 P. 1015, 17 Utah 331, 70 Am.S.R. 788.

(15) Planting of shade or of ornamental trees on waysides or within schoolhouse grounds or in other public places.—*In re Bartlett*, 40 N.E. 899, 163 Mass. 509—*Burbank v. Burbank*, 25 N.E. 427, 152 Mass. 254, 9 L.R.A. 748.

Pa.—*Cresson's Appeal*, 30 Pa. 437.

(16) Supplying a town or vicinity with water.—*Stowell v. Prentiss*, 154 N.E. 120, 323 Ill. 309, 50 A.L.R. 584—11 C.J. p 326 note 45.

89. N.J.—*Noice v. Schnell*, 137 A. 532, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied *Allison v. Schnell*, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

11 C.J. p 326 note 52.

Use held not charitable

A bequest for the erection of a base for a flagstaff in a park has been held not to be for a charitable use.—*Morristown Trust Co. v. Morristown*, 91 A. 736, 82 N.J.Eq. 521.

A gift for the maintenance of a churchyard or a burial ground in connection with a church or religious society, or of a public burial ground, or of a burial ground for all persons of a certain race, class, or neighborhood, is one for a charitable use.⁹⁰ In the absence of statute, a trust for the care and upkeep of a private burial lot, or particular graves, tombs, or monuments, when not intended for a public benefit, is not valid as a charitable gift,⁹¹ although a trust of this kind may be sustained as a private trust, as shown in the C.J.S. title Trusts § 25, also 65 C.J. p 236 note 72, provided it does not violate the rule against perpetuities. In some states, trusts for the care and upkeep of private burial lots

are authorized by statute,⁹² and while in a few of such states a trust so created is characterized as a statutory trust in contradistinction to a charitable trust,⁹³ in other states the statutes are so worded and construed that the trust is deemed a charitable one.⁹⁴ An unlimited bequest to a corporation authorized to acquire property by bequest or devise and incorporated to cremate the dead in the quickest, best, and most economical manner appears to be charitable and valid.⁹⁵

Monuments. A gift for the erection of a monument dedicated to the education and elevation of the public,⁹⁶ or as a memorial to a prominent citizen,⁹⁷ is for a charitable purpose. On the other

90. Cal.—In re Lubins Estate, 199 P. 15, 16, 186 Cal. 326, citing *Corpus Juris* with full approval.

Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.—Trustees of Methodist Episcopal Church of Milford v. Williams, 96 A. 795, 6 Boyce 62.

Iowa.—Meeker v. Lawrence, 212 N. W. 683, 203 Iowa 409.

Mass.—McElwain v. Allen, 134 N.E. 620, 241 Mass. 112.

Mo.—Newton v. Newton Burial Park, 34 S.W.2d 118, 326 Mo. 901, citing *Corpus Juris*.

N.H.—Drury v. Sleeper, 146 A. 645, 84 N.H. 98.

N.Y.—In re Upham's Will, 289 N.Y.S. 518, 160 Misc. 126.—In re Johnson's Estate, 265 N.Y.S. 395, 148 Misc. 218.

N.C.—Holton v. Elliott, 138 S.E. 3, 193 N.C. 708.

Pa.—In re Close's Estate, 26 Pa.Dist. 280, affirmed 103 A. 322, 260 Pa. 269.

11 C.J. p 324 note 24.

Cemetery conducted for profit

(1) While a cemetery may be conducted for profit or in some manner that precludes it from being considered as charitable in nature, like a hospital it may be conducted in such a manner as to make it charitable in nature, as where it is conducted by a charitable religious organization and as one of the religious objects of the organization and for the benefit of those of the faith which the organization professes.—In re Lubin's Estate, 199 P. 15, 16, 186 Cal. 326.

(2) It is at least doubtful whether the cemetery of a burial society whose articles of association contemplate the burial there of its own members only, but which has long permitted the interment of other inhabitants of the community on the payment of certain fees, not from a charitable motive but as a source of

private profit, can in the absence of express statute be regarded as held for a public charitable use.—Hopkins v. Grimshaw, D.C., 17 S.Ct. 401, 165 U.S. 342, 41 L.Ed. 739.

Designation of cemetery incidental

Bequest for adornment and improvement of cemetery in which testator was buried, was charitable and designation of cemetery was incidental, and where cemetery had been abandoned, and testator's body removed to another, his purpose could be accomplished by applying income for latter cemetery.—McElwain v. Allen, 134 N.E. 620, 241 Mass. 112.

91. Pa.—In re Wareham's Estate, 26 Pa.Dist. 827.

R.I.—Todd v. St. Mary's Church, Portsmouth, 120 A. 577, 45 R.I. 282. 11 C.J. p 325 note 25.

Private road to cemetery

Where testator directed trustees to build road to private cemetery partly over own land and partly over public highway, since the trust might be wholly applied to a private, rather than a charitable, purpose, it was void.—Spaulding v. Lackey, 173 N.E. 110, 340 Ill. 572, 71 A. L.R. 660.

92. N.Y.—In re Lyon, 159 N.Y.S. 951, 173 App.Div. 473.—In re McArdle's Will, 264 N.Y.S. 764, 147 Misc. 876.—In re Perkins' Will, 124 N.Y.S. 998, 63 Misc. 255, 7 Mills, 529.

Pa.—In re Boyd's Estate, 5 Pa.Dist. & Co. 359.

11 C.J. p 325 note 28.

Excess over funeral expenses for charitable purpose

The purchase of a family plot and the erection of a headstone thereon are properly part of decedent's funeral expenses to the extent of an amount reasonable for decedent's burial and headstone, and the balance, if any, expended therefor pursuant to the will is deemed an expenditure for a charitable purpose.—In re McArdle's Will, 264 N.Y.S. 764, 147 Misc. 876.

Reasonableness of amount

(1) A bequest of an unreasonably large sum for the maintenance of a burial lot may not be sustained as for a charitable purpose, at least as to the amount in excess of that reasonably necessary. — In re Turk's Will, 221 N.Y.S. 225, 128 Misc. 808, appeal dismissed 226 N.Y.S. 111, 222 App.Div. 724.

(2) Setting up one thousand dollars trust fund for cemetery upkeep is not excessive in absence of proof on subject.—In re Collins' Estate, 282 N.Y.S. 728, 156 Misc. 783.

(3) The mere fact that the income may exceed what is sufficient to keep up the lot is not necessarily fatal, particularly where it may be devoted to the convenience and attractiveness of the lot.—In re Brogan's Estate, 138 A. 837, 290 Pa. 319, 55 A.L.R. 1301.

93. Ill.—Mason v. Bloomington Library Assoc., 86 N.E. 1044, 237 Ill. 442, 15 Ann.Cas. 603, reversing 143 Ill.App. 39.

Mass.—Morse v. Natick, 57 N.E. 996, 176 Mass. 510.

94. Pa.—In re Eby's Estate, 30 Pa. Dist. 338. 11 C.J. p 325 note 30.

95. N.Y.—Spencer v. De Witt C. Hay Library Assoc., 73 N.Y.S. 712, 36 Misc. 393.

96. R.I.—Faunce v. People's Sav. Bank, 124 A. 731, 46 R.I. 75.

Federal monument fund

A gift for the purpose of creating a federal monument fund is valid.—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.

Use of word monument in a gift held broader in meaning than the conventional commemorative monument to persons dead.—Rhode Island Hospital Trust Co. v. Benedict, 103 A. 146, 41 R.I. 143.

97. Mass.—Eliot v. Attwill, 122 N.E. 648, 232 Mass. 517.

N.J.—Lawrence v. Prosser, 104 A. 772, 89 N.J.Eq. 248.

hand, a gift for the upkeep of a monument or memorial intended for a private purpose is not for a charitable purpose⁹⁸ unless made so by statute.⁹⁹

§ 15. Education and Advancement of Learning

a. In general

b. General or limited, restricted or conditional, purpose

a. In General

Gifts for the advancement of learning, science, and the useful arts generally, either with or without particular reference to the poor, are regarded as charitable.

Gifts for schools and scholars are expressly men-

tioned in the statute of Elizabeth, and gifts for the advancement of learning, science, and the useful arts generally, either with or without particular reference to the poor, are regarded as charities.¹ Except where a gift is improperly conditioned or restricted, as discussed later in this section, the courts will generally sustain all gifts for educational purposes,² since such gifts have been regarded by the courts of this country with special favor.³ Included as valid charitable gifts are not only those for the support of the public or free schools, but also those for the founding, establishment, support, and maintenance of other schools or institutions of learning which are not strictly private,⁴ even though they are under the control of a particular church

Pa.—Smith's Estate, 5 Dist. 327, 18 Pa.Co. 209.

98. Pa.—In re Stephan's Estate, 195 A. 653, 129 Pa.Super. 396.

Spiritualist memorial

A testamentary gift in trust for perpetual upkeep of spiritualist memorial, even if construed as gift to spiritualist association for promotion of its general activities, could not be sustained as perpetual trust for religious or charitable purposes where purposes of such association were neither religious nor charitable.—In re Stephan's Estate, supra.

99. N.Y.—In re McArdle's Will, 264 N.Y.S. 764, 147 Misc. 876.

1. U.S.—St. Louis Union Trust Co. v. Burnet, C.C.A.Mo., 59 F.2d 922 —Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Cal.—In re De Mars' Estate, App., 67 P.2d 374—In re Bartlett's Estate, 10 P.2d 126, 122 Cal.App. 375.

Colo.—St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Iowa.—Lupton v. Leander Clark College, 187 N.W. 496.

Ky.—Owens v. Owens' Ex'r, 32 S.W. 2d 731, 236 Ky. 118.

La.—Thompson v. Société Catholique D'Education Religieuse et Littéraire, 103 So. 247, 157 La. 875.

Neb.—Stork v. Schmidt, 261 N.W. 552, 554, 129 Neb. 311, quoting *Corpus Juris*.

N.H.—Drury v. Sleeper, 146 A. 645, 84 N.H. 98.

N.J.—First Camden Nat. Bank & Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59

—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

N.M.—Board of Education of City of Albuquerque v. School Dist. No. 5 of Bernalillo County, 157 P. 668, 21 N.M. 624.

N.Y.—Butterworth v. Keeler, 114 N.E. 803, 219 N.Y. 446, affirming 154 N.Y.S. 744, 169 App.Div. 136—Hamburger v. Cornell University, 199 N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955—In re Davidge's Will, 193 N.Y.S. 245, 200 App.Div. 437.

Ohio.—Linney v. Cleveland Trust Co., 165 N.E. 101, 30 Ohio App. 345

—Carrel v. State, 11 Ohio App. 281

—Rockwell v. Blaney, 9 Ohio N.P., N.S., 495.

Or.—Vestal v. Pickering, 267 P. 821, 125 Or. 553.

Pa.—Canovaro v. Brothers of Order of Hermits of St. Augustine, 191 A. 140, 326 Pa. 76.

R.I.—Powers v. Home of Aged Women, 192 A. 770, 110 A.L.R. 1361—Rhode Island Hospital Trust Co. v. Metcalf, 137 A. 875, 876, 48 R.I. 411, reargument denied 138 A. 54 —Town of South Kingstown v. Wakefield Trust Co., 134 A. 815, 48 R.I. 27, 48 A.L.R. 1122.

Tex.—Lightfoot v. Poindexter, Civ. App., 199 S.W. 1152, error refused.

11 C.J. p 296 note 40, p 317 note 16. "The purpose is charitable if it be the promotion of public learning and not private benefit."—Rhode Island Hospital Trust Co. v. Metcalf, supra.

"Educational purposes," as used in articles of high school association, includes all uses which reasonably serve purposes of "education."—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200.

Public schools

A devise to the benefit of the public schools of a particular district is valid as a charitable gift.

Iowa.—Liggett v. Abbott, 185 N.W. 569, 192 Iowa 742—Chapman v.

Newell, 125 N.W. 324, 146 Iowa 415.

Mo.—Burrier v. Jones, 92 S.W.2d 885, 338 Mo. 679.

N.J.—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

Misnomer held immaterial

A gift to a specific high school incapable of receiving a gift has been held a misnomer of the beneficiary and the gift transferred to the controlling board of education which had the power to receive the gift.—Breeding v. Williams, 9 Tenn. App. 335.

2. N.M.—Albuquerque Bd. of Education v. Bernalillo County School Dist. No. 5, 157 P. 668, 21 N.M. 624, 628.

11 C.J. p 317 note 17.

3. Cal.—In re Purington's Estate, 250 P. 657, 199 Cal. 661.

Ill.—Dickenson v. City of Anna, 141 N.E. 754, 756, 310 Ill. 222, citing *Corpus Juris*, and referring to entire section with approval.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Iowa.—Heald v. Johnson, 216 N.W. 772, 773, 204 Iowa 1067, citing *Corpus Juris*.

Neb.—Stork v. Schmidt, 261 N.W. 552, 554, 129 Neb. 311, quoting *Corpus Juris*.

N.J.—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

Ohio.—Rockwell v. Blaney, 9 Ohio N.P., N.S., 495.

Or.—Vestal v. Pickering, 267 P. 821, 124, 125 Or. 553.

R.I.—Town of South Kingstown v. Wakefield Trust Co., 134 A. 815, 48 R.I. 27, 48 A.L.R. 1122.

11 C.J. p 317 note 19.

4. Ill.—Dickenson v. City of Anna, 141 N.E. 754, 310 Ill. 222, 30 A.L.R. 587.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

or religious denomination.⁵ Although, as stated in § 2, an institution of learning is or is not charitable, according as to whether it is carried on for public benefit or for private gain, yet the fact that the instruction furnished is not gratuitous, or that fees are charged, does not prevent a gift to the institution from being a charitable one.⁶ The validity of a gift for educational purposes is not affected by the fact that the state has provided for the maintenance of schools for all children of school age within the territory intended to be benefited.⁷ In the case of a gift to or for a school, it is no objection to its validity that the school exists for the benefit of a restricted class of persons,⁸ nor does the fact that a preference is given to relatives of the donor take from the gift the character of a charity.⁹ Neither does the fact that a preference is given to children of parents connected with a particular religious denomination destroy the character of the gift as a public charity.¹⁰ However, a devise or bequest for the purpose of educating a certain relative of

the testator,¹¹ or the descendants of certain persons named,¹² is not valid as a charitable use.

b. General or Limited, Restricted or Conditional, Purpose

Charitable gifts may be limited and restricted to a particular educational purpose or use.

A valid charitable gift may be made for a general educational purpose or purposes, or it may be limited and restricted to a particular purpose or use.¹³ Accordingly, a gift for the endowment of a college "free from all sectional or political influence,"¹⁴ or for the higher education of young people in a certain locality,¹⁵ or for a school to be "taught by a female or females, wherein no book of instruction is to be used to teach except spelling books and the Bible,"¹⁶ is a valid charity. The gift may also be properly intended for the providing of school-books,¹⁷ the establishment of professorships, fellowships, scholarships, or the maintenance of teachers,¹⁸ or the payment of annuities to retired teachers,¹⁹ to establish a loan fund, for indigent stu-

R.I.—Rhode Island Hospital Trust Co. v. Metcalf, 137 A. 875, 48 R.I. 411, reargument denied 138 A. 54.
Tex.—McKnight v. Cage, Civ.App., 183 S.W. 854, error refused.
Wis.—First Wisconsin Trust Co. v. Board of Trustees of Racine College, 272 N.W. 464.
11 C.J. p 317 note 20.

Not subject to creditors' claims

Donations to college endowment fund conditioned on payment of annuities to donors are part of charitable trust not subject to creditors' claims.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

5. La.—Thompson v. Société Catholique D'Education Religieuse et Littéraire, 103 So. 247, 157 La. 875.
Tex.—Community of Priests of St. Basil v. Byrne, Com.App., 255 S.W. 601, reversing, Civ.App., 236 S.W. 1016.
11 C.J. p 318 note 21.

6. Colo.—St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

Ill.—Morgan v. National Trust Bank of Charleston, 162 N.E. 888, 331 Ill. 182.—Parks v. Northwestern University, 75 N.E. 991, 218 Ill. 381.—Andrews v. Andrews, 110 Ill. 223.

N.Y.—Butterworth v. Keeler, 114 N.E. 803, 219 N.Y. 446, affirming 154 N.Y.S. 744, 169 App.Div. 136.—Hamburger v. Cornell University, 199

N.Y.S. 369, 204 App.Div. 664, affirmed 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955.
11 C.J. p 318 note 24.

Gift to free school to be designated by city council includes any of the free public schools of a city although tuition is charged of nonresident pupils.—Laswell v. Hungate, C. C.A.Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied Bishop v. Same, 39 S. Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

7. Ga.—Bolick v. Cox, 90 S.E. 54, 145 Ga. 888.

Neb.—Elliott v. Quinn, 189 N.W. 173, 174, 109 Neb. 5, quoting *Corpus Juris*.
11 C.J. p 318 note 25.

8. R.I.—Meeting St. Baptist Soc. v. Hall, 8 R.I. 234.

9. W.Va.—Gallaher v. Gallaher, 146 S.E. 623, 106 W.Va. 588.
11 C.J. p 318 note 27.

If gift is created by will, and, for any reason, the provision for the benefit of the next of kin fails, a residuary provision in favor of the college or other institution of learning will apply both to void and to lapsed legacies.—Dexter v. Harvard College, 57 N.E. 371, 176 Mass. 195.

10. Pa.—Episcopal Academy v. Philadelphia, 25 A. 55, 150 Pa. 565.

11. Pa.—McMillen's App., 11 Wkly. N.C. 440.

12. Ky.—Johnson v. De Pauw Univ., 76 S.W. 851, 116 Ky. 671, 25 Ky. L. 950.

13. N.Y.—In re Sayre's Will, 166 N.Y.S. 499, 179 App.Div. 269.
11 C.J. p 318 note 34.

14. Or.—Raley v. Umatilla County, 13 P. 890, 15 Or. 172, 3 Am.S.R. 142.

15. Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 620.
Mo.—Musser v. Musser, 221 S.W. 46, 281 Mo. 649.

16. Mass.—Tainter v. Clark, 5 Allen 66, 67.

17. Mass.—Higginson v. Turner, 51 N.E. 172, 171 Mass. 586.—Drury v. Natick, 10 Allen 169.

18. Cal.—In re Purington's Estate, 250 P. 657, 199 Cal. 661.—In re Bartlett's Estate, 10 P.2d 126, 122 Cal.App. 375.

Conn.—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

N.Y.—In re Sayre's Will, 166 N.Y.S. 499, 179 App.Div. 269.

W.Va.—Gallaher v. Gallaher, 146 S.E. 623, 106 W.Va. 588.
11 C.J. p 319 note 41.

In state university

Under a statute so providing, free scholarships may be established in the state university by anyone for purpose of private benefaction.—In re Purington's Estate, 250 P. 657, 199 Cal. 661.

19. R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361.

dents,²⁰ to found a literary fund,²¹ or to establish a memorial in a school.²² Since the education provided for need not be general education, a gift is not without the bounds of charity because the training contemplated thereby may include special or specific education.²³ Thus, a gift for the advancement of medical science,²⁴ naval architecture,²⁵ marine engineering,²⁶ or agricultural knowledge,²⁷ for promotion of research in agricultural chemistry,²⁸ for art education, appreciation, and production,²⁹ for education in the principles of socialism,³⁰ for educating young persons in the domestic and useful acts,³¹ or for the education of young men for the christian ministry,³² is a valid charitable gift. A gift to a school does not cease to be for charitable uses, because religious instruction is combined in such school with that of a literary and scientific character.³³ A gift for the purpose of providing manual training or training in the trades is valid,³⁴ although manual training has been adopted in the

public schools.³⁵

Gifts other than to schools and colleges. Education comprehends in its broadest significance the acquisition of all knowledge tending to develop and train the individual and when used in this sense is not limited to the years of adolescence or to instruction in the schools.³⁶ Gifts for the promotion of science, learning, and useful knowledge by other means than schools or colleges, or for the direct instruction of pupils or students, are equally public and charitable.³⁷ A gift for the purpose of establishing or supporting a public library is a charitable gift,³⁸ even where a town is authorized to appropriate money therefor.³⁹ Likewise, gifts are charitable and valid when they are made for the purpose of establishing or supporting a geographical, agricultural, or historical society,⁴⁰ a literary society,⁴¹ an organization devoted to scientific research for the betterment of man,⁴² public museums,⁴³ an in-

20. Ill.—Morgan v. National Trust Bank of Charleston, 162 N.E. 883, 331 Ill. 182.

Educational purpose

Gift of loan fund for indigent students was held valid as charitable gift, in view of language of will requiring application of fund for purpose of obtaining education.—Morgan v. National Trust Bank of Charleston, supra.

Interest on loans

Placing in hand of trustee of loan fund for indigent students and provision for reasonable interest which interest went to enlargement of fund, did not deprive gift of charitable nature.—Morgan v. National Trust Bank of Charleston, supra.

Evidence held competent

In a suit involving the validity of a gift for a student loan fund, testimony as to the existence and maintenance of a student fund of the college was competent.—Morgan v. National Trust Bank of Charleston, supra.

21. Mass.—Amory v. Trustees of Amherst College, 118 N.E. 933, 229 Mass. 374.

22. Md.—Mather v. Knight, 123 A. 109, 143 Md. 612.

23. R.I.—Rhode Island Hospital Trust Co. v. Metcalf, 137 A. 875, 43 R.I. 411, reargument denied 138 A. 54.
11 C.J. p 319 note 42.

24. R.I.—Palmer v. Union Bank, 24 A. 109, 17 R.I. 627.

25. Mass.—Massachusetts Institute of Technology v. Attorney General, 126 N.E. 521, 235 Mass. 288.

26. Mass.—Massachusetts Institute of Technology v. Attorney General, supra.

27. Mass.—Rotch v. Emerson, 105 Mass. 431.

28. N.Y.—In re Frasch's Will, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 843, 216 App.Div. 797, which affirmed In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381.

29. N.Y.—In re Tiffany's Estate, 285 N.Y.S. 971, 157 Misc. 873.

30. Wash.—Peth v. Spear, 115 P. 164, 63 Wash. 291.

31. Pa.—Cresson's App., 30 Pa. 437. R.I.—Almy v. Jones, 21 A. 616, 17 R.I. 265, 12 L.R.A. 414.

Wis.—Webster v. Morris, 28 N.W. 353, 66 Wis. 368, 57 Am.R. 278.

32. U.S.—Field v. Drew Theological Seminary, C.C.Del., 41 F. 371.
11 C.J. p 319 note 48.

33. Pa.—Amole's Est., 32 Pa.Super. 636.

34. Ind.—Richards v. Wilson, 112 N.E. 780, 135 Ind. 335.

35. Iowa.—Wilson v. Independence First Nat. Bank, 145 N.W. 948, 164 Iowa 402, 416, Ann.Cas.1916D 481.
11 C.J. p 319 note 52.

36. Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.

37. Mass.—Drury v. Natick, 10 Allen 169.

N.H.—Sargent v. Cornish, 54 N.H. 18.

"Education," as used in relation to the law of charitable trusts, "includes not only the training and development of the mind, but the training and development of the body."—Gibson v. Frye Institute, 193 S.W. 1059, 1062, 137 Tenn. 452, L.R.A.1917D 1062.

Monument illustrative of music

Testator's gift in trust for erection of monument illustrative of music was for educational purposes, in so

far as it might stimulate interest in music, further a desire for its better understanding, and lead people to share in its refining influences.—Rhode Island Hospital Trust Co. v. Benedict, 103 A. 146, 41 R.I. 143.

38. U.S.—Kibbe v. City of Rochester, D.C.N.Y., 57 F.2d 542.

Iowa.—In re Nugen's Estate, 272 N. W. 638.

Neb.—In re Secrest's Estate, 191 N. W. 683, 109 Neb. 431.

N.Y.—Camp v. Presbyterian Soc. of Sackets Harbor, 173 N.Y.S. 581, 105 Misc. 139.

R.I.—Industrial Trust Co. v. City of Central Falls, 197 A. 467—Bliven v. Borden, 185 A. 239.

Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18
11 C.J. p 319 note 54.

Accessory amusements

Where testator made gift to erect building wherein dancing and other amusements might be carried on for working people of city in connection with library and lectures, dancing and amusements were merely accessory and auxiliary to purpose of trust, which was educational and charitable.—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

39. Mass.—Eastman v. Allard, 21 N. E. 235, 149 Mass. 154.

40. Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.
11 C.J. p 320 note 56.

41. Conn.—Mitchell v. Reeves, supra.

42. Conn.—Mitchell v. Reeves, supra.

43. Mass.—Richardson v. Essex Inst., 94 N.E. 262, 203 Mass. 311, 21 Ann.Cas. 1158.

11 C.J. p 320 note 57.

stitution devoted to fine arts,⁴⁴ an astronomical observatory,⁴⁵ an institution on the order of a Chautauqua,⁴⁶ or a botanical garden.⁴⁷ However, as the gift must be expressly, or by necessary implication, for the public benefit, a private museum, or a library established by private subscription for the use of the subscribers, is not a charity.⁴⁸

Prizes and medals. A bequest of a fund for the giving of prizes and medals for educational, medical, or literary work, or other deeds beneficial to the general public, is a valid charitable gift.⁴⁹

Detrimental instruction. A devise creating a

trust fund for the teaching of a certain medical doctrine which would be detrimental to the public health is void as against public policy.⁵⁰

§ 16. Relief of Poor or Unfortunate

General gifts for the relief of poor and unfortunate persons are for a charitable purpose.

A gift for the relief or amelioration of the condition of the poor, or the aged, young, homeless, sick, and afflicted, or other persons in unfortunate circumstances, is one for a charitable purpose.⁵¹ The fact that a bequest for the relief of the poor of a town also works a benefit to the taxpayers of

44. U.S.—*Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City*, C.C.A.Mo., 64 F.2d 602, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

Ala.—*Tarver v. Weaver*, 130 So. 209, 211, 221 Ala. 663, citing *Corpus Juris*.

Conn.—*Mitchell v. Reeves*, 196 A. 785, 123 Conn. 549.

R.I.—*McLyman v. Art Ass'n of Newport*, 154 A. 117, 51 R.I. 273.

11 C.J. p 320 notes 58, 59.

Art school

A bequest of money as a fund for an art school has been held a bequest for a charitable purpose.—*Herron v. Stanton*, 147 N.E. 305, 79 Ind.App. 683.

45. Ariz.—*Lowell v. Lowell*, 240 P. 280, 29 Ariz. 138.

Cal.—*Spence v. Widney*, 46 P. 463, 5 Cal.Unrep.Cas. 516.

46. N.C.—*Wachovia Banking & Trust Co. v. Ogburn*, 107 S.E. 238, 181 N.C. 324.

47. Mo.—*Lackland v. Walker*, 52 S. W. 414, 151 Mo. 210.

48. Me.—*Piper v. Moulton*, 72 Me. 155.

Mass.—*Drury v. Natick*, 10 Allen 169.

11 C.J. p 320 note 63.

49. Ill.—*Ashmore v. Newman*, 183 N.E. 1, 350 Ill. 64.

Neb.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

N.Y.—In re *Judd's Estate*, 274 N.Y. S. 902, 242 App.Div. 389, reversing 272 N.Y.S. 674, 151 Misc. 857, and affirmed in re *Fifth Avenue Bank*, 200 N.E. 2, 143 Misc. 513—In re *Browning's Estate*, 1 N.Y.S.2d 825, 165 Misc. 819.

11 C.J. p 320 note 64.

50. Homeopathic medicine

A devise creating a trust fund to promote the teaching of the homeopathic school of medicine according to the doctrine of certain specified books, without perversion or distortion, which, owing to the advance in

medical science, would be detrimental to the public health, is void as against public policy.—In re *Hill's Estate*, 204 P. 1055, 119 Wash. 62, affirmed 207 P. 689, 119 Wash. 62.

51. U.S.—*Eagan v. Commissioner of Internal Revenue*, 43 F.2d 381, 71 A.L.R. 863.

Cal.—In re *De Mars' Estate*, App., 67 P.2d 374.

Colo.—In re *Schleier's Estate*, 13 P. 2d 273, 91 Colo. 172.

D.C.—*Darcey v. O'Brien*, 65 F.2d 599, 62 App.D.C. 151, citing *Corpus Juris*, certiorari denied 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 570.

Ill.—*Jansen v. Godair*, 127 N.E. 97, 292 Ill. 364.

Kan.—*Hollenbeck v. Lyon*, 47 P.2d 63, 64, 142 Kan. 352, 99 A.L.R. 652, citing *Corpus Juris*—*Treadwell v. Beebe*, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

Me.—*Bills v. Pease*, 100 A. 146, 116 Me. 98, L.R.A.1917D 1060.

Md.—Second Nat. Bank v. Second Nat. Bank, 190 A. 215, 219, 171 Md. 547, quoting *Corpus Juris*.

Mass.—*Attorney General v. City of Lowell*, 141 N.E. 45, 246 Mass. 312—*Institution for Savings in Roxbury and its Vicinity v. Roxbury Home for Aged Women*, 139 N.E. 301, 244 Mass. 583—*Sherman v. Shaw*, 137 N.E. 374, 243 Mass. 257.

Mich.—*Scudder v. Security Trust Co.*, 213 N.W. 131, 238 Mich. 318.

N.H.—*Petition of Madden*, 172 A. 435, 86 N.H. 583—*Roberts v. Corson*, 107 A. 625, 79 N.H. 215, 5 A.L.R. 1172.

N.J.—*Rowe v. Rowe*, 167 A. 16, 113 N.J.Eq. 344.

N.Y.—In re *Skuse's Estate*, 1 N.Y.S. 2d 202, 165 Misc. 554—In re *Upham's Will*, 239 N.Y.S. 513, 160 Misc. 126—*City Bank Farmers Trust Co. v. Bennett*, 287 N.Y.S. 784, 159 Misc. 779.

R.I.—*Wood v. Hartigan*, 195 A. 507—*City of Providence v. Payne*, 184 A. 276, 47 R.I. 444.

Va.—*Pirkey v. Grubb's Ex'r*, 94 S.E. 344, 122 Va. 91.

11 C.J. p 315 note 1.

Gifts held for charitable purposes

(1) To provide medical aid for poor suffering from cancer or tuberculosis.—*Rishel v. McPherson County*, 253 P. 586, 122 Kan. 741, rehearing denied 255 P. 979, 123 Kan. 414 and opinion adhered to 257 P. 939, 124 Kan. 31—*Treadwell v. Beebe*, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

(2) To promote best interests of sewing girls in Boston.—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

(3) For a newspaper's charity known as "the 100 neediest cases."—In re *Skuse's Estate*, 1 N.Y.S.2d 202, 165 Misc. 554.

(4) For aid for flood sufferers.—*Kerner v. Thompson*, 13 N.E.2d 110, 293 Ill.App. 454.

(5) For a "fresh air fund."—*While v. City of Newark*, 103 A. 1042, 89 N.J.Eq. 5.

(6) For the relief of needy authors.—*Authors Club v. Kirtland*, 288 N.Y.S. 916, 248 App.Div. 82.

(7) Bequest to city for aid of persons temporarily in need of charitable assistance, notwithstanding a subsequent clause of will referring to fund as loaned to the city.—*Attorney General v. City of Lowell*, 141 N.E. 45, 246 Mass. 312.

(8) Other examples see 11 C.J. p 315 note 1 [a].

Alternative bequest

Legacy with wish of testatrix that it be given to worthy poor if not needed by legatee, created a charitable trust.—*Petition of Madden*, 172 A. 435, 86 N.H. 583.

Retired teachers

(1) A gift to provide a loan for retired teachers having an incurable progressive disease is for a charitable purpose.—In re *Howells' Estate*, 261 N.Y.S. 859, 146 Misc. 169, modifying 260 N.Y.S. 598, 145 Misc. 557.

(2) A gift to a teacher's retirement fund, however, is not for a charitable purpose.—In re *Carpenter*, 134 A. 16, 47 R.I. 461, 47 A.L.R. 60.

the town does not change the charitable nature of the gift.⁵²

Founding and maintenance of charitable institutions. Gifts for the purpose of establishing or maintaining hospitals, asylums, public homes, or like institutions for the benefit of the sick, injured, aged, infirm, insane, needy, homeless, orphaned, friendless, or other persons in unfortunate circum-

stances, are for a purpose recognized by the courts as charitable.⁵³ A gift for such a purpose is not invalid as a public charity because it does not impose poverty as a condition to the receipt of its benefits,⁵⁴ or because the inmates capable of so doing are expected to contribute to its support and development.⁵⁵

Oppressed or backward people. Gifts in the aid

52. Conn.—Strong's App., 37 A. 395, 68 Conn. 527.
11 C.J. p 315 note 2.

53. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535.

Cal.—O'Hara v. Grand Lodge, I. O. G. T. of State of California, 2 P.2d 21, 213 Cal. 131—In re Wood's Estate, 292 P. 144, 108 Cal.App. 694—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Conn.—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.

D.C.—Graff v. Wallace, 32 F.2d 960, 59 App.D.C. 64, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.

Ill.—Continental Illinois Nat. Bank & Trust Co. v. Harris, 194 N.E. 250, 254, 359 Ill. 86, quoting *Corpus Juris—Farmers' & Mechanics' Bank v. Griffith*, 185 N.E. 854, 352 Ill. 323—Skinner v. Northern Trust Co., 123 N.E. 289, 288 Ill. 229.

Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

Kan.—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 871, 118 Kan. 554, quoting *Corpus Juris*.

Me.—Stevens v. Smith, 133 A. 344, 134 Me. 175.

Md.—Second Nat. Bank v. Second Nat. Bank, 190 A. 215.

Mass.—Frazier v. Merchants Nat. Bank of Salem, 5 N.E.2d 550—Inst. for Savings v. Roxbury Home for Aged Women, 139 N.E. 301, 244 Mass. 583—Boston Safe Deposit & Trust Co. v. Attorney General, 125 N.E. 392, 234 Mass. 261.

Mo.—Nicholas v. Evangelical Deaconess Home and Hospital, 219 S. W. 643, 261 Mo. 182.

Neb.—Allebach v. City of Friend, 226 N.W. 440, 441, 118 Neb. 781.

N.J.—Caldwell Nat. Bank v. Rickard, 143 A. 745, 103 N.J.Eq. 516—McCran v. Kay, 115 A. 649, 93 N.J.Eq. 352.

N.Y.—In re Frasch's Will, 156 N.E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, which affirmed In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381—Butterworth v. Keeler, 114 N.E. 803, 219 N.Y. 446, affirming 154 N.Y.S. 744, 169 App.Div. 136—In re MacDowell's Will, 112 N.E. 177, 217 N.Y.

454, L.R.A.1916E 1246, Ann.Cas. 1917E 853, reversing 156 N.Y.S. 387, 170 App.Div. 245, which affirmed 153 N.Y.S. 653, 89 Misc. 323 N.C.—Hass v. Hass, 143 S.E. 541, 195 N.C. 734.

Pa.—In re Channon's Estate, 109 A. 756, 266 Pa. 417.

Vt.—Boyce v. Sumner, 124 A. 853, 97 Vt. 473.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19.

11 C.J. p 315 note 3.

Gifts held for charitable purposes

(1) For maintenance of "free rest for white, Protestant, female teachers."—Averill v. Lewis, 138 A. 815, 106 Conn. 582.

(2) For a home for the support and care of farmers.—Continental Illinois Nat. Bank & Trust Co. v. Harris, 194 N.E. 250, 359 Ill. 86.

(3) For a home for homeless boys.—Farmers' and Mechanics' Bank v. Griffith, 185 N.E. 854, 352 Ill. 323.

(4) For a home for unmarried working girls who are abused at home after the death of their parents.—In re Kelley's Will, 245 N.Y.S. 294, 138 Misc. 190.

(5) To construct hospital and treat charity patients suffering with cancer.—Bank of Commerce & Trust Co. v. Banks, Tenn., 29 S.W.2d 658, 69 A.L.R. 1353, denying rehearing 28 S.W.2d 340, 161 Tenn. 11, 69 A.L.R. 1353.

(6) For a home for good Christian women sixty years of age and over, residents of Vermont and of American lineage for two generations.—Boyce v. Sumner, 124 A. 853, 97 Vt. 473.

(7) Other examples see 11 C.J. p 315 note 3 [a].

Existence of other hospitals no bar Tex.—Jones' Unknown Heirs v. Dorchester, Civ.App., 224 S.W. 596, dismissed for want of jurisdiction.

Not charitable per se

A hospital cannot be the subject of a valid charitable trust unless terms of trust instrument require that hospital be operated wholly or at least in substantial part for gratuitous relief of its patients, since a hospital is not a "charitable institution" per se.—Trust Co. of Georgia

v. Williams, 192 S.E. 913, 184 Ga. 706.

Provision for free beds

Provision for as many free beds in hospital as financial condition permits did not destroy charitable character of trust.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

54. Cal.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Ill.—Continental Illinois Nat. Bank & Trust Co. v. Harris, 194 N.E. 250, 359 Ill. 86—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344.

Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

Kan.—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 118 Kan. 554.

11 C.J. p 316 note 4.

Trust held not invalidated by reservations and provisions.—Graham v. Bergin, 18 Ohio App. 35.

55. Cal.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Ga.—Trust Co. of Georgia v. Williams, 192 S.E. 913, 184 Ga. 706.

Ill.—Continental Illinois Nat. Bank & Trust Co. v. Harris, 194 N.E. 250, 359 Ill. 86—Morgan v. National Trust Bank of Charleston, 162 N.E. 883, 331 Ill. 182—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344—Congregational Publishing Society v. Board of Review, 125 N.E. 7, 290 Ill. 108.

Kan.—Nuns of Third Order of St. Dominic v. Younkin, 235 P. 869, 118 Kan. 554.

Mass.—Roosen v. Peter Bent Brigham Hospital, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

Mo.—Nicholas v. Evangelical Deaconess Home and Hospital, 219 S. W. 643, 261 Mo. 182.

Pa.—In re Channon's Estate, 28 Pa. Dist. 479, affirmed 109 A. 756, 266 Pa. 417.

11 C.J. p 316 note 5.

Maintenance charges consistent

Because a trust created by will, giving the residue for establishing a public hospital for treatment of white and colored patients, is a charitable trust, it does not necessarily follow that the benefits of the institution are to be enjoyed gratuitously; absence of a provision for maintenance is inconsistent with a purpose that treatment be free, and consistent with self-support.—Har-

of captives, prisoners, or slaves,⁵⁶ to protect citizens of African descent in their civil rights and to prevent discrimination against them,⁵⁷ or for the civilization and improvement of certain Indian tribes,⁵⁸ are generally considered to be for charitable purposes.

Gift to or for poor relations. A gift to poor relations or for their benefit is a private gift, although it would prevent their becoming a public charge,⁵⁹ but a gift may constitute a public charity and not a private trust, where it provides for the poor generally and gives a preference to relatives of the donor.⁶⁰ It has been held, however, that at common law dispositions in favor of poor relations are to be ranked among charitable uses whenever they seem to have been treated as such by the testator.⁶¹

§ 17. Religion

A gift for a religious purpose is one for a charitable purpose.

It is a general rule that a gift for a religious purpose is one for a charitable purpose;⁶² and in determining the validity of a charity, there is no distinction between the promotion of "piety" and of "religion," the two words being synonymous,⁶³ although in a few jurisdictions, as discussed in § 18, the courts use the term "pious uses" in relation to gifts of this character. As the term "church" imports an organization for religious purposes, a gift to a church or a church society by name, without declaration or restriction as to the use to be made of the subject matter of the gift, must be deemed to be a gift for the promotion of the purposes for which the church was organized and, therefore, to be a gift for a charitable purpose and to be valid if the other elements of a valid charitable gift exist.⁶⁴ Provided the tenets of the particular sect are not adverse to all religion, or subversive to all morality, the fact that a gift which is otherwise valid as being for a religious purpose is intended to aid or benefit a particular sect or denom-

ter v. Johnson, 115 S.E. 217, 122 S. C. 96.

56. Mass.—Jackson v. Phillips, 14 Allen 539.

11 C.J. p 316 notes 6–11.

57. Pa.—Lewis' Est., 25 A. 278, 152 Pa. 477.

58. Pa.—Magill v. Brown, 16 F.Cas. No.8,952, Brightly 346.

59. Ind.—Reasoner v. Herman, 134 N.E. 276, 191 Ind. 642.

Mass.—Kent v. Dunham, 7 N.E. 780, 142 Mass. 216, 55 Am.R. 667.

60. Ill.—Continental Illinois Nat. Bank & Trust Co. v. Harris, 194 N.E. 250, 359 Ill. 86.

11 C.J. p 316 note 15.

61. N.Y.—In re Moller's Estate, 178 N.Y.S. 682.

Accurate draft of instrument necessary

There is no principle of public policy prohibiting the foundation of a public charity by way of trust to care for the poor relations of the founder, if the conveyance or limitation is drafted accurately in a technical way.—In re Moller's Estate, 178 N.Y.S. 682.

62. Cal.—In re Lubin's Estate, 199 P. 15, 186 Cal. 326, citing *Corpus Juris*—In re De Mars' Estate, App., 67 P.2d 374.

Conn.—Cheshire Bank & Trust Co. v. Doolittle, 155 A. 82, 113 Conn. 231—City National Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22.

Del.—Hutton v. St. Paul Brotherhood of People's Church of Dover, 178 A. 584, 20 Del.Ch. 534—Dela-

ware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410—Trustees of Methodist Episcopal Church of Milford v. Williams, 96 A. 795, 6 Boyce 62.

Kan.—Barnhart v. Bowers, 57 P.2d 60, 62, 143 Kan. 866, citing *Corpus Juris*.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.

Mo.—Harger v. Barrett, 5 S.W.2d 1100, 319 Mo. 633.

Neb.—Stork v. Schmidt, 261 N.W. 552, 554, 129 Neb. 311, quoting *Corpus Juris*.

N.J.—First Camden Nat. Bank & Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59—Hewitt v. Camden County, 146 A. 831, 7 N.J.Misc. 528.

N.M.—Board of Education of City of Albuquerque v. School Dist. No. 5 of Bernalillo County, 157 P. 668, 21 N.M. 624.

N.Y.—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317—In re Winburn's Will, 247 N.Y.S. 584, 139 Misc. 5—Van De Bogert v. Reformed Dutch Church of Poughkeepsie, 220 N.Y. S. 50, 128 Misc. 603, affirmed 220 N.Y.S. 58, 219 App.Div. 220—In re Allen's Will, 181 N.Y.S. 398, 111 Misc. 93, affirmed 194 N.Y.S. 913.

Ohio.—Morrow v. Dirlam, 22 Ohio N. P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.

Pa.—Canovaro v. Brothers of Order of Hermits of St. Augustine, 191 A. 140, 326 Pa. 76—In re Becker's Estate, 28 Pa.Dist. 695.

R.I.—Todd v. St. Mary's Church, Portsmouth, 120 A. 577, 45 R.I. 228.

11 C.J. p 320 note 66.

"The advancement of religion has ever been held to be one of the principal divisions of charitable trusts."—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App. Div. 317.

63. N.H.—Glover v. Baker, 83 A. 916, 76 N.H. 393.

64. Fla.—Montgomery v. Carlton, 126 So. 135, 99 Fla. 152.

Ky.—Goode's Adm'r v. Goode, 38 S. W.2d 691, 238 Ky. 620.

La.—Succession of Marion, 112 So. 667, 163 La. 734.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.

Mass.—McNeilly v. First Presbyterian Church in Brookline, 137 N.E. 691, 243 Mass. 331.

N.Y.—In re Johnson's Estate, 265 N. Y.S. 395, 148 Misc. 218—In re Wilber's Estate, 262 N.Y.S. 515, 146 Misc. 163, affirmed In re Wilber's Ex'r, 258 N.Y.S. 978, 236 App.Div. 747.

Or.—In re Smith's Estate, 25 P.2d 924, 144 Or. 561.

R.I.—Buchanan v. McLyman, 153 A. 304, 51 R.I. 177.

Tex.—Allred v. Beggs, 84 S.W.2d 223, 125 Tex. 584, affirming Beggs v. Allred, Civ.App., 73 S.W.2d 599.

11 C.J. p 321 note 70.

Annuity gifts sustained.

The gift to the Trinity Episcopal Church of one hundred fifty dollars per annum for a period of ten years, and to the Men's Club of Trinity Parish of one hundred dollars per

ination, or to promote the spread of its doctrines, does not prevent it from being for a charitable purpose.⁶⁵ However, where a general charitable intent is shown to be lacking by the specific provisions of the grant, the gift will be held void.⁶⁶

§ 18. — Particular Religious Purposes

Gifts for the furtherance of purposes for which a church or religious organization exists, such as for the aid of its ministry, the erection and maintenance of church buildings, the aid of Sunday schools or missionaries, the circulation of religious literature, or for the saying of masses, are in general deemed charitable.

From ancient times a pious use has been considered a charitable use.⁶⁷ As is the case in jurisdictions where the courts look at such gifts as being for "religious" purposes, as shown in § 17, so in

jurisdictions where the courts use the term "pious" uses or purposes, a gift to a church generally is deemed to be made for the promotion of the pious purposes for which the church exists and consequently to be a gift for a pious purpose.⁶⁸ Gifts to a priest or minister in his public office for use by him for religious purposes are charitable.⁶⁹

Gifts are not prohibited as superstitious if they are for the observance of any ceremonial, the efficacy of which is recognized by the church of which the donor is a member, as no religious observances can be deemed, as a matter of law, superstitious.⁷⁰ Accordingly, gifts for the saying of masses are generally considered for a charitable purpose and hence are valid as to purpose,⁷¹ but in other jurisdictions a gift for the saying of masses for the repose of the

annum for a period of five years, may be sustained as gifts in the nature of an annuity, or trust in favor of charity.—*In re Allen's Will*, 181 N.Y.S. 398, 111 Misc. 93, affirmed 194 N.Y.S. 913.

Use "for" society

Bequest of money to be used "for" church society implied use for purpose of society, and therefore bequest was wholly charitable, even though there was no restriction as to use of fund.—*Bates v. Schillinger*, 145 A. 395, 128 Me. 14.

65. Conn.—*Bridgeport-City Trust Co. v. Bridgeport Hospital*, 179 A. 92, 120 Conn. 27.—*City Nat. Bank v. City of Bridgeport*, 147 A. 181, 109 Conn. 529.

N.Y.—*In re Winburn's Will*, 247 N.Y.S. 584, 139 Misc. 5.

Ohio.—*First German Reformed Church v. Weikel*, 7 Ohio N.P., N.S., 377.

11 C.J. p 321 note 71.

Gift to prepare minister

Owner of property may give it on trust to maintain and inculcate any doctrine of Christianity or to promote and extend any particular Christian denomination by training of ministers to preach its tenets, such gift constituting a charity, which will be upheld and protected.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

Astrologer, sorcerer, charlatan, mind reader, crystal gazer, and worker of magic or legerdemain, are not persons practicing benevolence or charity as inherent part of their occupations, within law respecting charitable gifts.—*In re Carpenter's Estate*, 297 N.Y.S. 649, 163 Misc. 474.

66. Charitable intent lacking

Under a will devising residence to niece for life and thereafter to church, conditioned on family por-

traits being kept in place, it was held that no general charitable intent was indicated.—*Ward v. Worthington*, 162 N.E. 714, 28 Ohio App. 325.

67. Mo.—*Strother v. Barrow*, 151 S.W. 960, 246 Mo. 241.

In Louisiana

(1) Donations or legacies for pious uses are deemed to be those which are destined to some work of piety or object of charity, and have their motive independent of the consideration which the merit of the donee or legatee might procure to them.—*Tilton's Succ.*, 63 So. 99, 133 La. 435.

(2) They are viewed with special favor by the law, and with double favor on account of their motives for sacred usages, and their advantage to the public weal.—*Tilton's Succ.*, supra—11 C.J. p 321 note 76.

(3) Indeed, in this state the term "pious uses" is given a very broad meaning. It includes not only the encouragement and support of pious and charitable institutions, but also those in aid of education and the advancement of science and the arts.—*Villa's Succ.*, 61 So. 765, 132 La. 714. 11 C.J. p 321 note 78.

68. La.—*Percival's Succ.*, 68 So. 409, 137 La. 203, 207.

11 C.J. p 321 note 81.

69. Del.—*Monaghan v. Joyce*, 103 A. 532, 12 Del.Ch. 28.

11 C.J. p 323 note 4.

In England, it would seem, that formerly courts disallowed trusts in favor of the Catholic or Jewish religion as being inimical to the established religion and settled policy of the government.—*Gass v. Whilite*, 2 Dana, Ky., 170, 26 Am.D. 446.

70. Cal.—*In re Lennon*, 92 P. 870, 152 Cal. 327, 125 Am.S.R. 58, 14 Ann.Cas. 1024 and note.

N.Y.—*Holland v. Alcock*, 16 N.E. 305, 108 N.Y. 312, 2 Am.S.R. 420.

71. Cal.—*In re Hamilton's Estate*, 186 P. 587, 181 Cal. 758, distinguishing *In re Lennon*, 92 P. 870, 152 Cal. 327, 125 Am.S.R. 58, 14 Ann.Cas. 1024, on the ground that that decision was based on the proposition that the bequest was for the benefit of the testator alone, which was a question of fact not controlling the present decision.

Ky.—*Obrecht v. Pujos*, 268 S.W. 564, 206 Ky. 751.

Mo.—*Minturn v. Conception Abbey*, 61 S.W.2d 352, 227 Mo.App. 1179.

N.J.—*Moran v. Kelley*, 124 A. 67, 95 N.J.Eq. 380, affirmed 128 A. 324, 96 N.J.Eq. 699.

N.Y.—*Morris v. Edwards*, 124 N.E. 724, 227 N.Y. 141, modifying *In re Morris*, 175 N.Y.S. 913, 138 App. Div. 894.—*In re Semenza's Will*, 238 N.Y.S. 556, 159 Misc. 487.—*In re Stephen's Estate*, 269 N.Y.S. 614, 150 Misc. 27.—*In re McArdle's Will*, 264 N.Y.S. 764, 147 Misc. 876.—*In re Cunningham's Estate*, 249 N.Y.S. 439, 140 Misc. 91.—*In re Werrick's Estate*, 239 N.Y.S. 740, 135 Misc. 876.—*In re Beck's Estate*, 225 N.Y.S. 187, 130 Misc. 765.—*In re Welch*, 172 N.Y.S. 349, 105 Misc. 27.

11 C.J. p 322 notes 90, 91.

Corpus Juris text has been referred to as containing the authorities on this subject.—*Rutherford v. Ott*, 173 P. 490, 491, 37 Cal.App. 47.

Admissibility of evidence

On the issue as to whether gifts for masses to be said for the repose of the souls of the testator and others are gifts for charitable uses, evidence as to the character and objects of the ceremonial of the mass according to the doctrine of the Roman Catholic church and also as to the rule of the church as to the offerings for masses is admissible.—*In re Hamilton's Estate*, 186 P. 587, 181 Cal. 758.

soul of a deceased person is not considered a charity, in that it is not for a general religious purpose or for the benefit of the public or any considerable portion thereof.⁷²

Aid of ministry. While the rule is otherwise as to a personal gift to or for a minister,⁷³ gifts for a minister or ministers as such, or for the maintenance of preaching, are for a valid charitable purpose.⁷⁴ Likewise, a gift for the support of a sermon or a course of sermons is one for a charitable purpose.⁷⁵ A devise to a religious group to be used for the support of old and needy ministers of a certain denomination is for a charitable purpose.⁷⁶

Erection and maintenance of church property. Gifts for charitable purposes include gifts for the erection, maintenance, and repair of church build-

ings, and the conveyance of land for the purpose of furnishing a site therefor.⁷⁷ More specifically, gifts for erecting, maintaining, or keeping in repair any part of a church edifice, such as a chancel or spire,⁷⁸ the pulpit,⁷⁹ a window or monument therein,⁸⁰ a grotto,⁸¹ or memorial chapels,⁸² are charitable, as is also a gift of land or of a building, or for the purchase, maintenance, or repair of a building, for a parsonage.⁸³ It is no objection to the execution of a gift for the erection of a place of worship that a building is already provided for such religious society and is held by other trustees.⁸⁴

Missionary purposes. The courts have frequently held that gifts to home or foreign missions, or to missionary societies, or for missionary purposes, are for a charitable purpose.⁸⁵

Bequest to archbishop

Where a bequest is left to an archbishop, with a request that masses be said in particular churches within his jurisdiction, the obligation of the archbishop is one as to disposition and use of the money and such bequest is for a religious purpose. Accordingly a will, giving the residue of testator's estate to "W., Archbishop of Dublin, Ireland, and I request that masses be offered for the repose of my soul," in certain named churches in Dublin, created a precatory trust.—*In re Hamilton's Estate*, supra.

72. Ala.—*Festorazzi v. St. Joseph's Catholic Church*, 18 So. 394, 104 Ala. 327, 53 Am.S.R. 48, 25 L.R.A. 360.

Iowa.—*Moran v. Moran*, 73 N.W. 617, 104 Iowa 216, 65 Am.S.R. 443, 39 L.R.A. 204.

11 C.J. p 322 notes 89, 92.

Funeral expenses

A bequest for masses, which was not in any form charitable, has been sustained by directing that it be paid by the executor in the same manner as funeral expenses.—*Chelsea Nat. Bank v. Our Lady Star of the Sea, Atlantic City, N.J.*, 147 A. 470, 105 N.J.Eq. 236.

Valid as gift

A bequest of funds for religious services in memory of certain persons to a certain priest, may be received by such priest, since a gift for that purpose is valid.

Pa.—*Seibert's Appeal*, 6 A. 105, 3 Pa. Cas. 412.

R.I.—*Slattery v. Ward*, 119 A. 755, 45 R.I. 54.

73. Md. — *Methodist Episcopal Church v. Smith*, 56 Md. 362.

Pa.—*In re Farrell's Estate*, 1 Pa. Dist. & Co. 128.

11 C.J. p 323 note 14.

74. N.Y.—*In re Edge's Estate*, 288 N.Y.S. 437, 159 Misc. 505.—*In re*

Bell's Will, 253 N.Y.S. 118, 141 Misc. 720.

N.C.—*Holton v. Elliott*, 138 S.E. 3, 193 N.C. 708.

11 C.J. p 323 note 15.

75. Mass.—*McAlister v. Burgess*, 37 N.E. 173, 161 Mass. 269, 24 L.R.A. 158.—*Atty.-Gen. v. Trinity Church*, 9 Allen 422.—*Atty.-Gen. v. Federal St. Meeting-House*, 3 Gray. 1.

76. Mo.—*Buckley v. Monck*, 187 S. W. 31.

N.Y.—*In re Edge's Estate*, 288 N.Y. S. 437, 159 Misc. 505.

Tenn.—*Rogers v. Baldridge*, 76 S.W. 2d 655, 18 Tenn.App. 300.

77. Del.—*Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington*, Del., 147 A. 165, 16 Del.Ch. 410.

Ky.—*Obrecht v. Pujos*, 268 S.W. 564, 206 Ky. 751.

Mass.—*Crawford v. Nies*, 113 N.E. 408, 224 Mass. 474.

Mo.—*Harger v. Barrett*, 5 S.W.2d 1100, 319 Mo. 633.

N.H.—*Gagnon v. Wellman*, 99 A. 786, 78 N.H. 327.

N.Y.—*In re Briglin's Will*, 203 N. Y.S. 646, 208 App.Div. 511.

11 C.J. p 323 note 5.

In Virginia, it is held that a code provision that conveyances and devises which have been made and conveyances which shall hereafter be made to charitable uses shall be valid does not authorize a bequest of money to be expended in building a church at a specified place.—*Seaburn v. Seaburn*, 15 Gratt. 423, 56 Va. 423.

78. Ga.—*Kelley v. Welborn*, 35 S.E. 636, 110 Ga. 540.

79. U.S.—*Jones v. Habersham*, Ga., 2 S.Ct. 336, 107 U.S. 174, 27 L.Ed. 401.

80. Pa.—*In re Becker's Estate*, 28 Pa.Dist. 695.

81. Iowa.—*Sisters of Mercy of Cedar Rapids v. Lightner*, 274 N.W. 86.

82. N.Y.—*In re Atkinson's Will*, 197 N.Y.S. 831, 120 Misc. 186.

83. Del. — *Trustees of Methodist Episcopal Church of Milford v. Williams*, 96 A. 795, 6 Boyce 62.

Ohio. — *First German Reformed Church v. Weikel*, 7 Ohio N.P.N.S. 377.

11 C.J. p 323 note 10.

84. Mass. — *Attorney General v. Armstrong*, 120 N.E. 673, 231 Mass. 196.

85. Conn.—*Cheshire Bank & Trust Co. v. Doolittle*, 155 A. 82, 113 Conn. 231.

Me.—*Prime v. Harmon*, 113 A. 738, 120 Me. 299.

Minn.—*Lundquist v. First Evangelical Lutheran Church*, 259 N.W. 9, 193 Minn. 474.

Mo.—*Cummings v. Dent*, 189 S.W. 1161.

Neb.—*Gould v. Board of Home Missions*, 167 N.W. 776, 778, 102 Neb. 526, citing *Corpus Juris*.

11 C.J. p 324 note 18.

Gift to a church society, which fits up missionary boxes, containing clothing and other useful articles for the families of missionaries, is for a charitable purpose.—*Brinsmade v. Beach*, 119 A. 233, 98 Conn. 322.

In Virginia, the provisions of Code 1919 § 537, validating gifts for educational purposes "and every gift, grant, devise or bequest hereafter made for charitable purposes," do not apply to gifts for religious purposes, and hence cannot validate bequest of money to be administered by named pastor, who should pay interest drawn by money to "the Methodist Church South for missionary work where he thinks it will do the greatest good."—*Moore v. Perkins*, 192 S.E. 806.

Sunday school purposes. Gifts for Sunday school purposes are charitable in nature;⁸⁶ but a gift for the purpose of making Christmas presents to the scholars of a certain Sunday school has been held not a charitable gift.⁸⁷

Circulation of religious literature. Gifts for the printing, circulation, and distribution of bibles or other religious literature are for a charitable purpose,⁸⁸ although it has also been held that a gift for the distribution of bibles which does not exclude the possibility of a distribution for profit is not for a charitable purpose.⁸⁹

Publication of newspaper. A gift to the board of directors of the First Church of Christ Scientist in Boston, Massachusetts, to be used in the interest of the Christian Science Monitor, an international newspaper, has been held to be for a charitable purpose.⁹⁰

Maintenance of Young Men's Christian Association. The object of a gift is a charitable one in a legal sense when it is for the purpose of assisting in the formation and maintenance of a young men's christian association.⁹¹

§ 19. Other Purposes

In addition to the purposes already discussed, many

others widely variant in character but alike in the aim of betterment to mankind have been held to be charitable.

Various gifts, in addition to those discussed in the preceding sections, have been held to fall within the requirements, as already set forth in § 12, of gifts for charitable purposes. Accordingly, gifts for the promotion of peace,⁹² for the promotion of temperance by suppressing the liquor traffic,⁹³ to provide for the mental, moral, and physical well-being of war veterans,⁹⁴ for a fire department relief association,⁹⁵ for the relief of flood sufferers,⁹⁶ for Memorial Day purposes,⁹⁷ for the improvement of the cultivation of vegetables and the extension of their use,⁹⁸ a grant of land to be used for holding agricultural exhibition fairs and other legitimate amusements,⁹⁹ or a gift seeking the honest enforcement of municipal contracts and to investigate city affairs¹ has been held to be for charitable purposes. Also a gift is for a charitable purpose when it is intended to relieve the suffering or to increase the comfort and enjoyment of animals,² even though there is a possibility that the means provided for the carrying out of the gift may benefit not only animals useful to man but also animals or birds not useful to him.³ A gift to promote improvements in the structure and methods of government with a view to encourage efficiency and popu-

86. Md. — Eutaw Place Baptist Church v. Shively, 10 A. 244, 67 Md. 493, 1 Am.S.R. 412.
11 C.J. p 324 note 19.

87. N.J.—Goodell v. Union Assoc., 29 N.J.Eq. 32.

88. R.I.—Kelly v. Nichols, 21 A. 906, 17 R.I. 306, 25 A. 840, 18 R.I. 62, 19 L.R.A. 413.
11 C.J. p 324 note 21.

89. Cal.—In re Vance's Estate, 4 P. 2d 977, 118 Cal.App. 163.

90. Or.—In re Smith's Estate, 25 P. 2d 924, 144 Or. 561.

91. Mass.—Little v. City of Newburyport, 96 N.E. 1032, 210 Mass. 414, Ann.Cas.1912D 425.

Pa.—Pa. v. Y. M. C. A., 17 A. 475, 125 Pa. 572.

Tenn.—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

11 C.J. p 324 note 22.

92. Me.—Tappan v. Deblois, 45 Me. 122.

Invalid for vagueness

A grant "to Peace Society of the U. S." was in form a charitable trust, but void, since no society of such name was shown to exist, and the purpose is vague, indefinite, and uncertain.—Morrow v. Dirlam, 22 Ohio N.P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.

93. Mass.—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 163, 23 A.L.R. 713.

Ohio.—Morrow v. Dirlam, 22 Ohio N.P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.
11 C.J. p 326 note 60.

In California such a gift is not included in the statutory purposes for which express trusts may be created, and a gift which has as its purpose the promotion of temperance is void.—Union Trust & Savings Bank of Pasadena v. Ishkanian, 137 P. 757, 45 Cal.App. 347.

94. N.J.—Peter E. Leddy Post No. 19 of American Legion v. Roberts, Ch., 129 A. 148.

95. Pa.—Jeanes' Estate, 3 Pa. Dist. 314, 34 Wkly.N.C. 190.

96. Ill.—Kerner v. Thompson, 6 N. E.2d 131, 365 Ill. 149, reversing 282 Ill.App. 403.

97. N.Y.—In re De Long's Estate, 250 N.Y.S. 504, 140 Misc. 92.

98. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.

99. S.D.—Rudolph v. Bennett, 168 N.W. 753, 41 S.D. 24.

1. Pa.—In re Harrison's Estate, 30 Pa. Dist. 205.

2. Colo.—In re Forresters' Estate, 279 P. 721, 86 Colo. 221.

Conn.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

Ky. — Commonwealth v. Nelson's Adm'x, 32 S.W.2d 19, 20, 235 Ky. 731, citing *Corpus Juris*—Willett v. Willett, 247 S.W. 739, 741, 197

Ky. 663, 31 A.L.R. 426, citing *Corpus Juris*.

N.J.—McCran v. Kay, 115 A. 649, 93 N.J.Eq. 352.

Ohio.—Morrow v. Dirlam, 22 Ohio N.P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.

Or.—In re Kulka's Estate, 18 P.2d 1036, 1039, 142 Or. 104, citing *Corpus Juris*.

Pa.—In re Lockhart's Estate, 21 Pa. Dist. & Co. 598.

11 C.J. p 326 note 62.

"Humane purpose" distinguished

Under a statute providing that gifts for any charitable or humane purpose are valid, "there is a clear distinction between a 'charity' and a 'humane purpose.' The latter may be sustained where the former would fail. Charity extends to every one of a class, while it is a humane purpose which moves a person to take care of or feed a single hungry person, bird, or dog."—Willett v. Willett, 247 S.W. 739, 740, 197 Ky. 663, 31 A.L.R. 426.

Mere precatory words that care be given the donor's dog, embraced within the general class of dogs to be benefited, or that drinking fountains for dumb animals be erected, do not render the bequest noncharitable.—In re Forresters' Estate, 279 P. 721, 86 Colo. 221.

3. Cal.—In re Coleman, 138 P. 992, 167 Cal. 212, Ann.Cas.1915C 682.

11 C.J. p 326 note 63.

lar control of government creates a valid charitable trust for the benefit and welfare of the public;⁴ and such gift is not invalid because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general, or the class for whose benefit the trust is created.⁵ A gift to a civilized and friendly nation for a national purpose is a valid charity.⁶

On the other hand, gifts for the benefit of a Masonic lodge,⁷ for keeping the testator's clock in repair at his home,⁸ for the development of an Irish Republic,⁹ for promoting a universal divorce law among the states,¹⁰ for the benefit of a saving's bank which is a private corporation,¹¹ for a public waterworks,¹² for helping a world's fair company out of financial difficulty,¹³ for a brass band to march to the testator's grave on holidays and "other proper occasions" and play funeral marches,¹⁴

or for private purposes generally¹⁵ have been held not to be for charitable purposes.

§ 20. Certainty of Purpose

It is essential to a valid gift for a charitable use that the instrument creating the gift point out the purpose with reasonable definiteness and certainty, or provide a means for its determination.

Among other things, it is essential to a valid gift for a charitable use, not only that the gift be for a purpose recognized in law as charitable, as already discussed in §§ 12-19, but that the instrument creating the gift point out such purpose¹⁶ with reasonable definiteness and certainty.¹⁷ This rule is especially declared by statute in some states.¹⁸ As to the degree of certainty and definiteness required, it is necessary and sufficient that the donor designate his charitable purpose with sufficient definiteness and certainty to enable it to be executed or carried out,¹⁹ and the gift will be sus-

4. Pa.—Taylor v. Hoag, 116 A. 826, 273 Pa. 194, 21 A.L.R. 946—Lewis Estate, 25 A. 878, 152 Pa. 477.

Woman suffrage

(1) In some jurisdictions, a gift to further advocacy of a change in a state constitution and for the attainment of woman suffrage in the United States was held to be charitable.

Ill.—Garrison v. Little, 75 Ill.App. 402.

Ohio.—Morrow v. Dirlam, 22 Ohio N. P.N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.

(2) In other jurisdictions a contrary view was taken.—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713—Jackson v. Phillips, 14 Allen (Mass.) 539.

Single tax theory

A gift to demonstrate the practicality of the single tax theory as a method of raising revenues for community support has been upheld as for a charitable purpose.—Ross v. Freeman, Del.Ch., 180 A. 527.

5. Pa.—Taylor v. Hoag, 116 A. 826, 273 Pa. 194, 21 A.L.R. 946.

6. Mass.—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204.

7. Pa.—Kellner v. Stahl, 7 Pa.Dist. & Co. 95.

8. R.I.—Kelly v. Nichols, 21 A. 906, 17 R.I. 306.

9. N.Y.—In re Killen's Will, 209 N. Y.S. 206, 124 Misc. 720.

10. Ohio.—Morrow v. Dirlam, 22 Ohio N.P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279.

11. Mass.—Institution for Savings in Roxbury and its Vicinity v. Roxbury Home for Aged Women, 139 N.E. 301, 244 Mass. 583.

12. Del.—Doughten v. Vandever, 5 Del.Ch. 51.

13. U.S.—World's Columbian Exposition v. U. S., 111, 56 F. 654, 6 C.C.A. 58.

14. N.J.—Detwiller v. Hartman, 37 N.J.Eq. 347.

15. Gift for grantor's benefit

Where educational corporation conveyed land to another corporation on condition that hospital be constructed thereon, purposes being to provide additional teaching facilities for donor, conveyance was not for charitable purpose, and did not create charitable trust.—Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13, 290 Ill. 205.

16. Cal.—Union Trust & Savings Bank of Pasadena v. Ishkanian, 187 P. 757, 45 Cal.App. 347, 11 C.J. p 327 note 82.

17. Mo.—National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry, 239 S.W. 519, 293 Mo. 399.

N.J.—Brezinski v. Breves, 156 A. 429, 109 N.J.Eq. 206.

N.Y.—In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317, reversed on other grounds 157 N.E. 747, 245 N.Y. 469.

Ohio.—Morrow v. Dirlam, 22 Ohio N. P., N.S., 565, affirmed 131 N.E. 365, 102 Ohio St. 279—Rea v. Griffin, 21 Ohio N.P., N.S., 129.

Or.—In re Johnson's Estate, 196 P. 385, 100 Or. 142.

Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

Tenn.—Davis v. Bullington, 47 S.W. 2d 555, 164 Tenn. 272—Howell v. Stroud, 1 Tenn.App. 301.

Va.—Massanetta Springs Summer Bible Conference Encampment v. Keezell, 171 S.E. 511, 161 Va. 532.

W.Va.—Mercantile Banking & Trust Co. v. Showacre, 135 S.E. 9, 102 W.Va. 260, 48 A.L.R. 1138.

11 C.J. p 327 note 83.

However, by statutory enactment in Pennsylvania, a charitable bequest may not be declared void for mere indefiniteness.—In re Barnwell's Estate, 29 Pa.Dist. 317, affirmed 112 A. 535, 269 Pa. 443—Casey's Estate, 12 Pa.Dist. 15, 23 Pa.Co. 81, 19 Montg. Co. 135.

18. Cal.—Union Trust & Savings Bank of Pasadena v. Ishkanian, 187 P. 757, 45 Cal.App. 347.

Ky.—Owens v. Owens' Ex'r, 32 S.W. 2d 731, 236 Ky. 118—Gooding v. Watson's Trustee, 31 S.W.2d 919, 235 Ky. 562—Miller v. Tatum, 205 S.W. 557, 181 Ky. 490—Simmon's Ex'r v. Hunt, 188 S.W. 495, 171 Ky. 397.

11 C.J. p 327 note 84.

19. U.S.—Long v. Union Trust Co., D.C.Ind., 272 F. 699, affirmed, C.C. A., 280 F. 636.

Cal.—In re McDole's Estate, 10 P.2d 75, 215 Cal. 328—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

Ill.—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344—In re Scanlan's Estate, 230 Ill.App. 505, 513, quoting Corpus Juris.

Mo.—Jones v. Patterson, 195 S.W. 1004, 271 Mo. 1, L.R.A.1917F 660.

N.J.—Noice v. Schnell, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

N.Y.—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474—In re Tackian's Estate, 179 N.Y.S. 188, 109 Misc. 519.

N.C.—Wachovia Banking & Trust Co.

tained by the court if it reasonably can do so.²⁰ Where, however, the donor or testator indicates generally a charitable purpose, together with the limits thereof, or fixes the means whereby they may be ascertained, the gift is sufficiently definite and certain as to purpose,²¹ even though there is an indefiniteness as to details, it being proper to leave the details of the administration and of the mode of executing the trust to be worked out by the trustee under the supervision of a court of equity.²² Although it has been broadly stated that it is not

essential to the validity of a charitable trust that the charitable purpose should be specifically designated,²³ a gift for charitable purposes generally without designating any particular purpose is invalid as a charitable gift on the ground of uncertainty,²⁴ unless the power of selecting the particular purpose is committed to the trustees, in which case the gift is generally deemed relieved of its uncertainty by providing a means by which the purpose can be made certain,²⁵ although in some

v. Ogburn, 107 S.E. 238, 181 N.C. 324.

Ohio.—Becker v. Fisher, 147 N.E. 744, 112 Ohio St. 284.

Pa.—In re Barnwell's Estate, 112 A. 535, 269 Pa. 443—Civic Club v. Central Trust Co., 44 Pa.Co. 401. 11 C.J. p 327 note 85.

Breadth of scope and generality of purpose do not in themselves breed impossibility of execution.—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317.

"Certainty" not absolute term

"Certainty," as applied to charitable trust, is not an absolute term, but must be understood in relative sense as applied to human affairs.—Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City, C.C.A.Mo., 64 F.2d 602, certiorari denied 54 S. Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

Incorrect designation of beneficiary does not invalidate charitable devise, where identity was not questioned.—In re Darlington's Estate, 137 A. 268, 289 Pa. 297.

Provision for "cattery"

Provision of will giving specified sum for founding "cattery . . . for the care of homeless animals and boarders" has been held not too uncertain to create valid trust for domestic animals.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

20. Wash.—De La Pole v. Lindley, 204 P. 15, 118 Wash. 398.

21. Kan.—Lehnher v. Feldman, 202 P. 624, 110 Kan. 115.

N.C.—Wachovia Banking & Trust Co. v. Ogburn, 107 S.E. 238, 181 N.C. 324.

Pa.—In re Gageby's Estate, 141 A. 842, 293 Pa. 109.

11 C.J. p 327 note 86.

Name immaterial

Name by which charitable gift is denominated is immaterial if gift is so described as to show it to be charitable in nature.—Hewitt v. Camden County, 146 A. 881, 7 N.J. Misc. 528.

22. U.S.—Irwin v. Swinney, D.C.Me., 44 F.2d 172, affirmed, C.C.A., Gossett v. Swinney, 53 F.2d 772, cer-

tiorari denied 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Cal.—In re McDole's Estate, 10 P.2d 75, 215 Cal. 328—Collier v. Lindley, 266 P. 526, 203 Cal. 641.

Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.

Del.—Monaghan v. Joyce, 103 A. 582, 12 Del.Ch. 28.

Ky.—Goode's Adm'r v. Goode, 38 S. W.2d 691, 238 Ky. 620—Russell v. Tyler, 6 S.W.2d 707, 224 Ky. 511—Kratz v. Slaughter's Ex'rs, 214 S.W. 878, 185 Ky. 256.

N.J.—First Camden Nat. Bank & Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59—Noice v. Schnell, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied Allison v. Schnell, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

N.Y.—In re Stephani's Estate, 300 N.Y.S. 813, 164 Misc. 240—In re Frasc'h's Estate, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, which is affirmed 156 N.E. 656, 245 N.Y. 174—In re Killen's Will, 209 N.Y.S. 206, 124 Misc. 720—In re Werner's Will, 181 N.Y.S. 433.

N.C.—Wachovia Banking & Trust Co. v. Ogburn, 107 S.E. 238, 181 N.C. 324.

Or.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 618, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

Pa.—In re Thompson's Estate, 127 A. 446, 282 Pa. 30—In re Harrison's Estate, 30 Pa.Dist. 205.

Tex.—Lightfoot v. Poindexter, Civ. App., 199 S.W. 1152, error refused. Wash.—De La Pole v. Lindley, 204 P. 15, 118 Wash. 398.

11 C.J. p 327 note 87.

Discretion in trustee

The fact that some discretion is vested in a trustee does not invalidate the trust.—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.

Manner of application of trust funds need not be minutely described.—In re Graham's Estate, 218 P. 84, 63 Cal.App. 41.

23. Cal.—In re De Mars' Estate, App., 67 P.2d 374.

Uncertain charitable trust sustained

A charitable trust is not rendered void because of testatrix's neglect to specify particular charitable objects or to appoint an empowered trustee, since charities are favorites of the law.—In re Jordan's Estate, Pa., 197 A. 150.

24. Ky.—Bush's Ex'r v. Mackoy, 103 S.W.2d 95, 267 Ky. 614.

Mo.—Jones v. Patterson, 195 S.W. 1004, 271 Mo. 1, L.R.A.1917F 660.

Tex.—City of Haskell v. Ferguson, Civ.App., 66 S.W.2d 491.

11 C.J. p 328 note 88.

Secret purposes

Will giving residuary estate to executors and trustees for secret purposes, and relying on their judgment, did not create charitable trust.—Blunt v. Taylor, 119 N.E. 954, 230 Mass. 303.

25. U.S.—Chicago Bank of Commerce v. McPherson, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F. Supp. 110, certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

Cal.—In re De Mars' Estate, App., 67 P.2d 374.

Iowa.—Martinson v. Jacobson, 205 N. W. 849, 200 Iowa 1054.

Me.—Prime v. Harmon, 113 A. 738, 120 Me. 299.

Md.—Rabinowitz v. Wollman, 197 A. 566.

Mass.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 84—Wells v. Doane, 3 Gray 201.

N.J.—Brown v. Coxson, 177 A. 551, 118 N.J.Eq. 114, affirmed 181 A. 42, 119 N.J.Eq. 86, and 181 A. 43, 119 N.J.Eq. 85—Smith v. Pond, 107 A. 800, 90 N.J.Eq. 445, reversed on other grounds 111 A. 154, 92 N.J. Eq. 211.

N.Y.—In re McLoughlin's Estate, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re McLoughlin's Will, 251 N.Y.S. 876, 233 App.Div. 886—In re Welch, 172 N.Y.S. 349, 105 Misc. 27.

Ohio.—Rea v. Griffin, 21 Ohio N.P., N.S., 129.

Pa.—In re Thompson's Estate, 127 A. 446, 282 Pa. 30—In re Anderson's Estate, 112 A. 766, 269 Pa. 535.

11 C.J. p 328 note 89.

Trust held valid

A trust for such public charitable

jurisdictions the rule is otherwise.²⁶ A gift by will may be upheld, although the testator refers to some past or intended declaration of the particular charity, which declaration is not made or cannot be found, and although the selection of the objects of the charity and the mode of application are left to the discretion of trustees, and even though the trustees refuse the gift, or die, or their appointment is revoked in the testator's lifetime, causing a lapse of the bequest at law.²⁷ Where, for instance, a will shows that a plan for carrying out the testator's object was afterward to be developed and left with his executor, a failure so to do will not by the common law override his general charitable intent and render the provision void, at least where he has vested others with authority to work out and put in operation the details necessary to make his idea of practical use to those he intended to benefit.²⁸ Even a testamentary gift in remainder to such charities as shall be deemed most useful by the legal representative of the tenant for life is a valid charity.²⁹

To constitute a charitable trust, the trustee's discretion must be confined to charitable objects,³⁰

and such discretion can never be so wide and indefinite that the trustee's conscience cannot be held to the carrying out of some purpose by a court of equity.³¹

A gift to an unincorporated association³² or to an incorporated institution, both founded and conducted as a charity, is presumed to be for a charitable purpose without it being expressly so stated.³³

Where the court construes the instrument in question to create an absolute unqualified gift rather than a trust, any uncertainty as to the purpose or object of the gift becomes immaterial.³⁴

§ 21. — Particular Classes of Gifts

The class of gift involved does not affect the question of certainty of a charitable purpose.

It would seem that the particular class of gift involved would in no way affect or control the question of certainty and definiteness of purpose.³⁵

In applying the general rules already stated in the preceding section, the courts have held some gifts for the relief of poverty and distress to be sufficiently definite and certain as to purpose,³⁶ and

purposes as shall meet the trustees' "approval under the conditions in which they may be called to act" is not invalid as a scheme of distribution later to be disclosed.—*Kirwin v. Attorney General*, 175 N.E. 164, 275 Mass. 34.

26. Ga.—*Egleston v. Trust Company of Georgia*, 93 S.E. 84, 147 Ga. 154.

Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614—*Gooding v. Watson's Trustees*, 31 S.W.2d 919, 235 Ky. 562.

Mo.—*Wentura v. Kinnerk*, 5 S.W.2d 66, 319 Mo. 1068.

N.C.—*Thomas v. Clay*, 122 S.E. 552, 187 N.C. 778.

Tenn.—*Davis v. Bullington*, 47 S.W.2d 555, 164 Tenn. 272.
11 C.J. p 328 note 90.

27. U.S.—*Church of Jesus Christ v. U. S.*, Utah, 10 S.Ct. 792, 136 U.S. 1, 34 L.Ed. 478—*Handley v. Palmer*, Pa., 103 F. 39, 43 C.C.A. 100, affirming 91 F. 948.

Pa.—*Grandom's Est.*, 6 Watts & S. 537.

Mislaidd joint will

Request to trustees of charitable institution, purposes of which were stated "in the last joint will" of testatrix and sister, was not defeated because such will was mislaidd.—*In re Gageby's Estate*, 141 A. 842, 293 Pa. 109.

28. Pa.—*In re Barnwell's Estate*, 112 A. 535, 269 Pa. 443.
11 C.J. p 328 note 92.

Fragmentary plan

This applies, although the testator's plan, as communicated to his trustee by parol, proves to be only general and fragmentary.—*Jones v. Watford*, 50 A. 180, 62 N.J.Eq. 339—*Smith v. Smith*, 32 A. 1069, 54 N.J.Eq. 1, affirmed 41 A. 1116, 55 N.J.Eq. 821.

29. Mass.—*Wells v. Doane*, 3 Gray 201.

30. Ill.—*Morgan v. National Trust Bank of Charleston*, 162 N.E. 888, 391, 331 Ill. 182, citing *Corpus Juris*.

N.J.—*Thomas v. Scheible*, 111 A. 519, 91 N.J.Eq. 451.

N.Y.—*In re Tactkian's Estate*, 179 N.Y.S. 183, 109 Misc. 519.
11 C.J. p 328 note 95.

Noncharitable objects

A trust, which by its terms may be applied to objects not charitable in the legal sense, is too indefinite to be carried out.

Me.—*Bills v. Pease*, 100 A. 146, 116 Me. 98, L.R.A.1917D 1060.

Wash.—*In re Long's Estate*, 67 P. 2d 331.

Possibility of profit

The mere possibility that a fund might be diverted to an enterprise intended for profit does not invalidate a gift for a charitable purpose.

—*In re Frasch's Estate*, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, which is affirmed 156 N.E. 656, 245 N.Y. 174.

Trust held not invalid on ground

that income could be applied for noncharitable purposes.

U.S.—*U. S. v. First Nat. Bank, C.C. A.Ala.*, 74 F.2d 360.

Mass.—*Kirwin v. Attorney General*, 175 N.E. 164, 275 Mass. 34.

31. Md.—*Trinity M. E. Church v. Baker*, 46 A. 1020, 91 Md. 539.
11 C.J. p 328 note 96.

32. N.Y.—*In re Patterson's Estate*, 249 N.Y.S. 441, 139 Misc. 872.

33. Ill.—*Dickenson v. City of Anna*, 141 N.E. 754, 757, 310 Ill. 222, 30 A.L.R. 587, citing *Corpus Juris*.

Md.—*Van Reuth v. Mayor and City Council of Baltimore*, 170 A. 199, 165 Md. 651—*Waters v. Waters*, 142 A. 297, 155 Md. 146.

Tenn.—*Breeding v. Williams*, 9 Tenn. App. 335.

11 C.J. p 328 note 97.

Charity to individual distinguished

In this regard it has been held that an indefinite charity to an individual or unincorporated body is invalid, although an indefinite charity to an incorporated body having the same powers as the object of the grantor's bounty is valid.—*Fitzgerald v. Doggett's Ex'r*, 155 S.E. 129, 155 Va. 112.

34. Md.—*Williams v. Baltimore Baptist Church*, 48 A. 930, 92 Md. 497, 54 L.R.A. 427—*Pratt v. Sheppard, etc., Hospital*, 22 A. 51, 88 Md. 610.

35. Pa.—*In re Dulle*, 67 A. 49, 218 Pa. 162, 12 L.R.A.N.S. 1177.

36. Ill.—*Continental Illinois Nat.*

others to be void on account of uncertainty.³⁷

Promotion of religion. While some instruments intended to create charitable gifts for religious purposes have been held insufficient to accomplish that end on account of vagueness and uncertainty in the language employed to designate the purpose,³⁸ yet the courts have held sufficiently definite and certain as to purpose many instruments intended to create a charitable gift for religious purposes, some of them containing expressions as general as those employed in cases where the gifts were held void for uncertainty;³⁹ but in many of these cases a discretion was committed to the trustees, and thus a means was provided for making the purpose more definite and certain.⁴⁰

Promotion of education. It has been held that a gift for the promotion of education should indicate the nature and extent of the education intended;⁴¹

but that appears not to be the prevailing view,⁴² especially when the mode of application is left to the discretion of trustees,⁴³ or when education at a particular institution or place is mentioned.⁴⁴ Some gifts for educational purposes have been held void for indefiniteness and uncertainty of purpose,⁴⁵ and many have been held sufficiently definite and certain as to purpose.⁴⁶

§ 22. Commingling Charitable and Noncharitable Purposes

Generally, where charitable purposes are mingled with other purposes which are noncharitable, the whole gift fails as a charity for uncertainty.

Where charitable purposes are mingled with other purposes, or where the terms used are so broad that they include both charitable and noncharitable purposes, the whole gift fails as a charity for un-

Bank & Trust Co. v. Harris, 194 N. E. 250, 359 Ill. 86.

Kan.—Treadwell v. Beebe, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

Or.—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 618, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

Pa.—In re Crawford's Estate, 143 A. 912, 294 Pa. 201.

11 C.J. p 328 note 1.

37. Ohio.—Collings v. Davis, 17 Ohio Cir.Ct.N.S., 221, affirmed Davis v. Collings, 102 N.E. 1122, 87 Ohio St. 504.

Tenn.—Howell v. Stroud, 1 Tenn. App. 301.

11 C.J. p 328 note 2.

38. N.J.—Kinnear v. Ballagh, 156 A. 269, 109 N.J.Eq. 27.

11 C.J. p 329 note 3.

Designations held too indefinite

(1) For missionary purposes for the propagation of the Christian religion "in the name of my dear Saviour and for the salvation of souls."—Jones v. Patterson, 195 S.W. 1004, 271 Mo. 1, L.R.A.1917F 660.

(2) Other examples see 11 C.J. p 329 note 3 [a].

39. Conn.—Cheshire Bank & Trust Co. v. Doolittle, 155 A. 82, 113 Conn. 231.

Iowa.—Martinson v. Jacobson, 205 N. W. 849, 200 Iowa 1054.

Ky.—American Christian Mission Soc. v. Tate, 250 S.W. 483, 198 Ky. 621—Goldberg v. Home Missions of the Presbyterian Church in the U. S., 248 S.W. 219, 197 Ky. 724—Bailey v. Waddy, 243 S.W. 21, 195 Ky. 415.

Md.—Waters v. Waters, 142 A. 297, 155 Md. 146—Board of Foreign Missions of General Synod of Evangelical Lutheran Church of

the United States v. Shoemaker, 105 A. 748, 133 Md. 594.

N.J.—Vineland Trust Co. v. Westendorf, 98 A. 314, 86 N.J.Eq. 343, affirmed 103 A. 1054, 87 N.J.Eq. 675. N.M.—Rhodes v. Yater, 202 P. 698, 27 N.M. 489, 22 A.L.R. 692.

N.Y.—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317—In re Olmstead's Will, 226 N.Y.S. 637, 131 Misc. 238. Pa.—In re Archambault's Estate, 162 A. 801, 308 Pa. 549.

11 C.J. p 329 note 4.

Designations held sufficiently certain

(1) To C street Church of Christ of Louisville, Ky., "to aid the church in its local work."—Miller v. Tatum, 205 S.W. 557, 181 Ky. 490.

(2) "To Foreign Missions: In this respect I regard Japan as an important field, and if Brother M. is then living and in Japan, regard him as a good and worthy man to invest the money."—Miller v. Tatum, supra.

(3) To "be sent to the country and destitute places, that the poor may have the gospel preached to them."—Miller v. Tatum, supra.

(4) For "missionary purposes."—Jones v. Patterson, 195 S.W. 1004, 271 Mo. 1, L.R.A.1917F 660.

(5) Other examples see 11 C.J. p 329 note 4 [a].

40. Ill.—Harges v. Zander, 145 N.E. 363, 314 Ill. 170.

Ky.—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 267 Ky. 358.

11 C.J. p 329 note 5.

41. Ga.—Beall v. Drane, 25 Ga. 430.

42. Conn.—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200.

11 C.J. p 329 note 7.

43. Iowa.—Liggett v. Abbott, 185 N. W. 569, 192 Iowa 742.

11 C.J. p 329 note 8.

44. Conn.—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

11 C.J. p 329 note 9.

45. N.Y.—Wait v. New York City Political Study Soc., 123 N.Y.S. 637, 68 Misc. 245.

Tenn.—Green v. Allen, 5 Humphr. 169.

11 C.J. p 329 note 10.

46. U.S.—Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City, C.C.A.Mo., 64 F.2d 602, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

Fla.—Holsey v. Atlantic Nat. Bank of Jacksonville, 155 So. 821, 115 Fla. 604.

Ga.—King v. Horton, 100 S.E. 103, 149 Ga. 361.

Mass.—Massachusetts Institute of Technology v. Attorney General, 126 N.E. 521, 235 Mass. 288.

N.C.—Humphrey v. Board of Trustees of I. O. O. F. Home of Goldsboro, 165 S.E. 547, 203 N.C. 201—Chandler v. Board of Education of Person County, 107 S.E. 452, 181 N.C. 444.

R.I.—Rhode Island Hospital Trust Co. v. Benedict, 103 A. 146, 41 R. I. 143.

Tenn.—Howell v. Stroud, 1 Tenn. App. 301.

W.Va.—Mercantile Banking & Trust Co. v. Showacre, 135 S.E. 9, 102 W.Va. 260, 48 A.L.R. 1138.

11 C.J. p 329 note 11.

In Michigan bequest to city for playground for children has been held to be for "educational" purpose within statute providing that no bequest for such purpose shall be void because uncertain.—Greenman v. Phillips, 217 N.W. 1, 241 Mich. 464.

certainty.⁴⁷ A class of cases exists, however, where there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which is objectionable.⁴⁸ When so restrained, that part of the fund as to which an invalid trust is created belongs to the donor.⁴⁹ In case the trusts were created by will, and an ascertainable portion of a fund or an estate was given on a void trust and the residue on a good charitable trust, the residue has the benefit of the failure of the prior trust.⁵⁰ A bequest "to charitable and deserving objects" has been held good as a charity.⁵¹

§ 23. Commingling Two or More Charitable Purposes

Two or more charitable purposes may legally be combined in a single gift.

On the question of want of certainty or definiteness the distinction between the purposes of any lawful trusts is not part of the ratio decidendi.⁵² Two or more charitable purposes may legally be combined in a single gift. Accordingly, a bequest to be used in the erection and maintenance of a building to be used jointly for a public library and a Young Men's Christian Association is valid as a charity.⁵³ A gift to a town for the relief of its poor or for their education is not too vague,⁵⁴ nor is a gift to a city for "any outstanding purpose" humanitarian or artistic void as too vague, uncertain, or indefinite.⁵⁵

IV. TRUSTEES

§ 24. Appointment of, or Provision for, by Donor

In the creation of a charitable trust there must be a separation of the legal estate from the beneficial enjoyment of the same; and where qualifications are prescribed with respect to trustees, the eligibility of a person depends on the possession of such qualifications.

In the creation of a charitable trust, there must be a separation of the legal estate from the bene-

ficial enjoyment of the same, indicated by words of the donor, in order to prevent an extinguishment of the trust by a merger of the equitable and legal estate;⁵⁶ and a bequest of money or property for a stated purpose will fail where there is no designation of a donee of the legal title or of the beneficiaries of the equitable interest, as there is no one on whom the duty is imposed, or to whom the power is granted, to effectuate such purpose.⁵⁷ However,

47. Cal.—In re Farrelly's Estate, 4 P.2d 948, 214 Cal. 199.

Ill.—Spaulding v. Lackey, 173 N.E. 110, 340 Ill. 572, 71 A.L.R. 660—Tichenor v. Mechanics & Metals Nat. Bank of City of New York, 125 A. 323, 96 N.J.Eq. 560—Smith v. Pond, 107 A. 800, 90 N.J.Eq. 445, decree reversed 111 A. 154, 92 N.J.Eq. 211.

N.Y.—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317.

Ohio.—Dirlam v. Morrow, 131 N.E. 365, 102 Ohio St. 279.

R.I.—Slattery v. Ward, 119 A. 755, 45 R.I. 54.

Wash.—In re Long's Estate, 67 P. 2d 331.

11 C.J. p 330 note 17.

The *Corpus Juris* text has been quoted with approval, but the court points out that in the text following there is a "strong drift away from a strict and technical application of this doctrine."—Graham v. Bergin, 18 Ohio App. 35, 40.

A benevolent motive in a trust to confer a general benefit, but which also permits a use for private profit, does not make such trust a charitable one.—In re Frasch's Will, 156 N.

E. 656, 245 N.Y. 174, affirming 215 N.Y.S. 848, 216 App.Div. 797, which affirmed In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381.

Invalid trust held separable from charitable trust

Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

Trusts held not divided in purpose

Cal.—In re Bartlett's Estate, 10 P. 2d 126, 122 Cal.App. 375.

Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

48. Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.

Md.—Rabinowitz v. Wollman, 197 A. 566.

Pa.—In re Wright's Estate, 131 A. 188, 190, 284 Pa. 334, quoting *Corpus Juris*.

11 C.J. p 330 note 19.

Partial invalidity

Where testatrix gave property for a home for sick and friendless women and their babies and provided that, if the home was not filled with such women, homeless, helpless, girls should be admitted, even though the latter provision should be invalid, it would not necessarily render the trust void.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

49. Mass.—St. Paul's Church v.

Atty.-Gen., 41 N.E. 231, 164 Mass. 188—Olliffe v. Wells, 130 Mass. 221—Nichols v. Allen, 130 Mass. 211, 39 Am.R. 445.

50. R.I.—Todd v. St. Mary's Church, Portsmouth, 120 A. 577, 45 R.I. 228.

11 C.J. p 330 note 21.

51. Mass.—Minot v. Baker, 17 N.E. 839, 147 Mass. 348, 9 Am.S.R. 713—Nichols v. Allen, 130 Mass. 211, 39 Am.R. 445.

Wis.—Sawtelle v. Witham, 69 N.W. 72, 94 Wis. 412.

52. Pa.—In re Dulle, 67 A. 49, 218 Pa. 162, 12 L.R.A.N.S., 1177.

53. Ohio.—Blume v. Thompson, 15 Ohio N.P., N.S., 97.

54. U.S.—Handley v. Palmer, C.C. Pa., 91 F. 948, affirmed 103 F. 39, 43 C.C.A. 100—Wood v. Paine, C. C.R.L., 66 F. 807.

55. Md.—Van Reuth v. Mayor and City Council of Baltimore, 170 A. 199, 165 Md. 651.

56. Mo.—Robinson v. Crutcher, 209 S.W. 104, 277 Mo. 1.

57. Ark.—Witten v. Wegman, 30 S. W.2d 834, 182 Ark. 62—Booe v. Vinson, 149 S.W. 524, 104 Ark. 439—Ingraham v. Sutherland, 117 S.W. 748, 89 Ark. 596.

as shown *infra* § 27, ordinarily the mere failure to appoint a trustee will not cause the trust to fail as equity may appoint a trustee.

Qualifications. Where certain qualifications are prescribed by the donor with regard to trustees, the eligibility of a person depends on the possession of such qualifications.⁵⁸

Status. A self-perpetuating board of trustees for an institution donated to a town is not a corporation or private instrumentality, but has the status of committees and boards selected by the municipality for definite purposes;⁵⁹ and where money or property is given to a municipal corporation on a charitable trust, a provision that the management thereof shall be in a board of trustees does not necessarily divest the municipality of the legal title and vest it in the trustees, but such a gift may be construed to make the municipality the technical

trustee holding the legal title, and the so-called trustees merely an agency intrusted with the duty of management.⁶⁰

§ 25. — Certainty and Construction

Where it can be made clear who is intended, either from the context of the instrument of gift or by evidence as to the surrounding circumstances, the person or institution identified as the one intended is entitled to take.

Where, from the context of the instrument of gift, or by parol evidence as to the surrounding circumstances, it can be made clear who is intended, a charitable gift is not invalid because the trustee or the donee is erroneously or uncertainly designated, but on the contrary the person or the institution identified as the one intended is entitled to take.⁶¹ It is not necessary to the valid appointment of a trustee of a charitable trust that he shall

Tex.—*City of Haskell v. Ferguson*, Civ.App., 66 S.W.2d 491.

58. Mass.—*Attorney General v. Armstrong*, 120 N.E. 678, 231 Mass. 196.

Ineligible trustee not removed

Under trust deed for erection of place of worship for local members of Methodist Episcopal Church, eligibility to election to board of trustees was held to depend on membership in local society, but organist appointed trustee with assent of all parties, and without deceit on court, although not a member, need not be removed.—*Attorney General v. Armstrong*, *supra*.

59. Mass.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453.

60. Mass.—*City of Boston v. Dolan*, 10 N.E.2d 275.

Minn.—*In re Peterson's Estate*, 277 N.W. 529.

R.I.—*Industrial Trust Co. v. City of Central Falls*, 197 A. 467.

61. Cal.—*In re Moeller's Estate*, 251 P. 311, 199 Cal. 705.

Conn.—*City Missionary Soc. v. August Moeller Memorial Foundation*, 126 A. 683, 101 Conn. 518—*Brinsmade v. Beach*, 119 A. 233, 98 Conn. 322—*Eccles v. Rhode Island Hospital Trust Co.*, 98 A. 129, 90 Conn. 592.

Ky.—*Martin v. Kentucky Christian Conference*, 73 S.W.2d 849, 255 Ky. 322—*Hughes v. Cleveland Jewish Orphan Asylum*, 212 S.W. 428, 184 Ky. 461.

Md.—*Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States v. Shoemaker*, 105 A. 748, 133 Md. 594.

Mass.—*Taber v. St. Peter's Parish, Springfield*, 117 N.E. 339, 228 Mass. 312—*Goring v. Emery*, 16 Pick. 107, 26 Am.D. 645.

Mo.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325, quoting *Corpus Juris—Schneider v. Kloepple*, 193 S.W. 334, 270 Mo. 339—*Society of Helpers of Holy Souls v. Law*, 186 S.W. 718.

N.J.—*Kerrigan v. Connelly*, Ch., 46 A. 227—*Moore v. Moore*, 25 A. 403, 50 N.J.Eq. 554.

N.Y.—*In re Dering's Estate*, 252 N.Y.S. 193, 140 Misc. 357.

Or.—*Endicott v. Bratzel*, 27 P.2d 883, 145 Or. 654—*Wemme v. First Church of Christ, Scientist, of Portland*, 219 P. 613, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

Tenn.—*Milligan v. Greenville College*, 2 S.W.2d 90, 156 Tenn. 495—*State v. Smith*, 16 Lea 662—*Horne v. Nashville Trust Co.*, 11 Tenn. App. 225.

11 C.J. p 331 note 24.

Agreed statement of facts

On application for appointment of a trustee to administer testator's charitable bequests, agreed statement of facts made solely to show surrounding circumstances could be used to establish charitable nature of bequests where mere identification of legatee characterized the legacies as charitable.—*Eccles v. Rhode Island Hospital Trust Co.*, 98 A. 129, 90 Conn. 592.

Division between institutions

In one case, where there was doubt as to which of two institutions was intended, the bequest was equally divided between them.—*East Carolina Diocese v. North Carolina Diocese*, 9 S.E. 310, 102 N.C. 442.

Insufficient designation

Where a bequest was made to the capital of particular funds, a di-

rection to the executor to pay the property over to the lawful custodian of such funds has been held insufficient as a designation of the donees under a charitable trust.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

Particular applications of rule

(1) The Women's Missionary Society of the Congregational Church at Stratford may take under a bequest to the Ladies Society of Stratford where there was no such society and the testatrix was a member and officer of the missionary society.—*Brinsmade v. Beach*, 119 A. 233, 98 Conn. 322.

(2) A bequest to the "Old People's Home of R." was held to be intended for the J. H. Palmeter's Old Ladies' Home.—*In re Scott's Will*, 195 N.W. 843, 181 Wis. 607.

(3) A devise to the "Cleveland Orphan Asylum of Cleveland, Ohio, an orphan asylum for Jewish orphans," was a devise to the Cleveland Jewish Orphan Asylum, where such orphanage was the only Jewish orphan asylum in Cleveland, which fact was known to testator, who at time of making will did not know exact name thereof.—*Hughes v. Cleveland Jewish Orphan Asylum*, 212 S.W. 428, 184 Ky. 461.

(4) A devise to an institution has been construed as a devise to the trustees maintaining such institution.—*In re McDole's Estate*, 10 P. 2d 75, 215 Cal. 328.

(5) A bequest "to the trustees" of an institution is a bequest to, and for the benefit of the institution, although those having charge of it are called managers in the charter. N.J.—*Van Wagenen v. Baldwin*, 7 N.J.Eq. 211.

be specified by name, or that the word "trustee" shall be used,⁶² provided it appears to the satisfaction of the court that the duties to be performed are such as are properly to be performed by one who is a trustee, and that the individual or the corporation is designated with sufficient precision to leave no doubt as to the identity;⁶³ and the designation of the trustees by their official character is equivalent to naming them by their proper names.⁶⁴

Thus, it has been held that a bequest to a church, unable to take, is not a bequest to a corporation managing the church edifice, nor to the corporation in whose name the property of such church was held;⁶⁵ that a bequest to the consistory of a church is in effect a bequest to the corporation itself, and the church members are to have the benefit of the bequest as controlled by the consistory;⁶⁶ that a bequest for building a Catholic convent in a certain town is a gift in trust to persons vested with power under the church laws to direct as to the erection of such buildings;⁶⁷ and that a grant to a church in a certain town vests title not in the congregation,⁶⁸ but in the pastor and his successors.⁶⁹

Where certain persons agree to give ground for the use of a church if members of the congregation

erect a church thereon and the church is erected, such persons are trustees of the property for the use of the congregation;⁷⁰ and a fund donated by members of the public for a charitable purpose, in response to an appeal therefor, has been held received by the one to whom the donations were sent as a trustee for the purposes as fixed by such appeal.⁷¹

Although it has been held that a bequest to a church of a particular denomination, of which the testator's wife might be a member when she died, belongs to the congregation of which she is a member, and not to the denomination generally,⁷² it has also been held that when a charity is given to a subordinate object or body of a charitable religious institution, the trust vests in the main society in aid of which it is granted,⁷³ and this rule has been applied when the bequest is to an unincorporated branch or department of a corporation;⁷⁴ but the gift must appear to be in case of the corporation to entitle it to take.⁷⁵

In the notes below will be found additional cases in which the instrument donating the property was construed with reference to the person entitled to act as trustee.⁷⁶

N.Y.—New York Inst. for Blind v. How, 10 N.Y. 84.
11 C.J. p 332 note 33.

(6) That change in name of university was irregular did not render gift invalid, where identity was not questioned.—In re Darlington's Estate, 137 A. 268, 289 Pa. 297.

(7) Other applications see 11 C.J. p 331 note 24 [a].

62. Conn.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.
Neb.—In re Secrest's Estate, 191 N.W. 663, 109 Neb. 431.

R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444—Tillinghast v. Council at Narragansett Pier, R.I., of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.
S.C.—Harter v. Johnson, 115 S.E. 217, 122 S.C. 96.
11 C.J. p 331 note 27.

63. Ky.—Violett's Adm'r v. Violett, 288 S.W. 1016, 217 Ky. 59.
Tenn.—Howell v. Stroud, 1 Tenn. App. 301.
11 C.J. p 331 note 28.

Difficulty in ascertaining trustees will not render the gift invalid.—Violett's Adm'r v. Violett, 288 S.W. 1016, 217 Ky. 59.

Trustee held sufficiently designated Ky.—Violett's Adm'r v. Violett, supra.
11 C.J. p 331 note 28 [a].

64. Iowa.—Beidler v. Dehner, 161 N.W. 32, 178 Iowa 1338.

Pa.—O'Donnell's Est., 21 Pa.Dist. 492, 39 Pa.C.C. 637.
11 C.J. p 332 note 29.

Acting treasurer

A bequest to the "acting treasurer" of a certain association or society sufficiently designates the trustees intended.—Goodrich's App., 18 A. 49, 57 Conn. 275—11 C.J. p 332 note 30.

Not uncertain because person may die

Charitable devise to certain named curates was not made too uncertain because an individual curate might die or be removed, as, the trust being imposed on them in their official capacity, whoever filled office when distribution was made was trustee empowered to act.—Beidler v. Dehner, 161 N.W. 32, 178 Iowa 1338.

65. N.Y.—In re Trustees of Sustentation Fund of Reformed Episcopal Church, 163 N.Y.S. 1042, 98 Misc. 145.

66. N.Y. — Prattsville Reformed Dutch Church v. Brandow, 52 Barb. 228.

67. Conn.—Hughes v. Daly, 49 Conn. 34.

68. Conn.—Lockwood v. Weed, 2 Conn. 287.

69. Cal.—Rutherford v. Ott, 173 P. 490, 37 Cal.App. 47.
11 C.J. p 332 note 35.

70. Pa.—Beaver v. Filson, 8 Pa. 27.

71. Ill.—Kerner v. Thompson, 13 N.E.2d 110, 293 Ill.App. 454.
Mass.—Elliot v. Attwill, 122 N.E. 648, 232 Mass. 517.

72. S.C.—Atty.-Gen. v. Jolly, 21 S.C. Eq. 379.

73. Del.—Hutton v. St. Paul Brotherhood of People's Church of Dover, 178 A. 534, 20 Del.Ch. 413.
Md.—Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States v. Shoemaker, 105 A. 748, 133 Md. 594.
11 C.J. p 332 note 36.

74. N.Y.—In re Upham's Will, 289 N.Y.S. 513, 160 Misc. 126.
11 C.J. p 332 note 37.

75. N.Y.—Matter of Gray, 142 N.Y.S. 1067, 81 Misc. 79—Matter of Fitzsimmons, 61 N.Y.S. 485, 29 Misc. 204.

Pa.—Evangelical Assoc.'s App., 35 Pa. 316.

76. Executor

Executor under will, bequeathing stated sums to parish priest in Ireland for tombstone over grave of testatrix' mother and masses for latter and testatrix, was held trustee charged with expenditure of such sums, unless priest is American citizen.—In re McArdle's Will, 264 N.Y.S. 764, 147 Misc. 878.

General and special provisions as to trustee

Where a will bequeathed a sum of money to officers of a church in

§ 26. — Provision for Appointment of New Trustee

The donor may not only name the trustees but may also determine the manner in which their colleagues or successors may be appointed.

A person creating a charitable trust may not only name the trustees who shall execute the trust but may also determine the manner in which their colleagues or successors shall be appointed,⁷⁷ as by conferring this power upon the trustees named by him;⁷⁸ and where the creator of the trust has provided a method for the filling of vacancies, this method will be carried out whenever possible.⁷⁹ Where the trust instrument provided for the perpetuation of the trustees, the invocation of the court's powers to appoint trustees because none were chosen in accordance with such provisions has been held not to abrogate them or impose permanently on the court the duty to appoint trustees.⁸⁰

trust to be used at their discretion and in another clause appointed a person as trustee of all the trusts, it was held that such person was not a trustee of the gift to the church as such a trust would amount to a passive or dry trust and would be executed by the statute of uses.—*Todd v. St. Mary's Church*, Portsmouth, 120 A. 577, 45 R.I. 282.

Successor corporation

Where a bequest was made to a corporation conducting a charity and such corporation had ceased to exist by reason of the expiration of its charter, it has been held that a new corporation which took over the management of the charity was entitled to the benefit of the gift.—*In re Scrimger's Estate*, 206 P. 65, 188 Cal. 158.

Merger with another corporation

Where home for aged, to which will directed payment of principal of invested proceeds of realty after death of life tenant, took necessary steps to revive its corporate existence, which had expired before death of such tenant, and, after revival, regularly effected merger with another such home, legacy passed to latter as against testatrix's heir.—*Blackstone v. Chandler*, 130 A. 34, 15 Del.Ch. 1.

77. Mass.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453.
11 C.J. p 332 note 41.

Plan held not unreasonable
Mass.—*Adams v. Plunkett*, supra.

78. Ga.—*Thompson v. Hale*, 51 S.E. 383, 123 Ga. 305.

Ky.—*Coleman v. O'Leary*, 70 S.W. 1068, 114 Ky. 388, 24 Ky.L. 1248.

79. Ala.—*Busbee v. Thomas*, 57 So. 587, 175 Ala. 423.

R.I.—*Selleck v. Thompson*, 67 A. 425, 28 R.I. 350.

80. Mass.—*Attorney General v. Armstrong*, 120 N.E. 678, 231 Mass. 196.

81. Tex.—*Pierce v. Weaver*, 65 Tex. 44.

82. U.S.—*Wells v. Commissioner of Internal Revenue*, C.C.A., 63 F.2d 425, certiorari granted *Burnet v. Wells*, 53 S.Ct. 528, 289 U.S. 716, 77 L.Ed. 1469, reversed on other grounds 53 S.Ct. 761, 289 U.S. 670, 77 L.Ed. 1439.—*Long v. Union Trust Co.*, D.C.Ind., 272 F. 699, affirmed, C.C.A., 280 F. 686.

Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.

Cal.—*In re McDole's Estate*, 10 P.2d 75, 215 Cal. 320.—*In re De Mars' Estate*, App., 67 P.2d 374.

Colo.—*Jeffreys v. International Trust Co.*, 48 P.2d 1019, 97 Colo. 138.

Conn.—*Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church*, 164 A. 910, 116 Conn. 347.

Del.—*Hutton v. St. Paul Brotherhood of People's Church of Dover*, 178 A. 584, 20 Del.Ch. 413.—*McBride v. Murphy*, 124 A. 798, 14 Del.Ch. 242, affirmed *Murphy v. McBride*, 130 A. 283, 14 Del.Ch. 457.

Ga.—*Dominy v. Stanley*, 133 S.E. 245, 162 Ga. 211.

Ill.—*Glader v. Schwinge*, 168 N.E. 658, 336 Ill. 551, 66 A.L.R. 172.—*In re Scanlan's Estate*, 230 Ill.App. 505.

Iowa.—*Meeker v. Lawrence*, 212 N.W. 688, 203 Iowa 409.—*In re Durham's Estate*, 211 N.W. 353, 203 Iowa 497.

Kan.—*Barnhart v. Bowers*, 57 P.2d 60, 143 Kan. 866, citing *Corpus Juris*.

Ky.—*Obrecht v. Pujos*, 268 S.W. 564, 206 Ky. 751.—*State Bank & Trust Co. v. Patridge*, 248 S.W. 1056, 198 Ky. 403.

Me.—*Bates v. Schillinger*, 145 A. 395,

However, the donor, after conveying in trust for a charity to trustees, cannot appoint new trustees, if he has not reserved the power, but it is for the court to appoint the new trustees.⁸¹

§ 27. Want or Failure of Trustee, and Appointment by Court

Ordinarily, a court of equity will not allow a gift for charitable uses, otherwise valid, to fail for want of a trustee, but will itself administer the trust or appoint a trustee to administer it.

It is a general rule, sometimes by virtue of statutory provisions, that a court of equity, provided it can see in the instrument a general charitable intent, will not allow a gift for charitable uses, which is otherwise valid, to fail for want of a trustee, but will itself administer the trust or appoint a trustee to administer it.⁸² The rule is applicable where the

128 Me. 14.—*Dupont v. Pelletier*, 113 A. 11, 120 Me. 114.

Md.—*Second Nat. Bank v. Second Nat. Bank*, 190 A. 215.

Mass.—*Kirwin v. Attorney General*, 175 N.E. 164, 275 Mass. 34.—*Reilly v. McGowan*, 166 N.E. 766, 267 Mass. 268.—*Binney v. Attorney General*, 156 N.E. 724, 259 Mass. 539.—*Turner v. First Congregational Soc. of North Brookfield*, 121 N.E. 106, 231 Mass. 414.

Mo.—*Newton v. Newton Burial Park*, 34 S.W.2d 118, 326 Mo. 901.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Neb.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.—*Elliott v. Quinn*, 189 N.W. 173, 109 Neb. 5.—*Gould v. Board of Home Missions of Presbyterian Church in the United States of America*, 167 N.W. 776, 102 Neb. 526.

N.H.—*Petition of Madden*, 172 A. 435, 86 N.H. 583.

N.J.—*Conway v. Third Nat. Bank & Trust Co. of Camden*, 177 A. 113, 118 N.J.Eq. 61, modified on other grounds 182 A. 916, 119 N.J.Eq. 575.—*Bible Readers' Aid Soc. of Trenton v. Katzenbach*, 128 A. 628, 97 N.J.Eq. 416.—*Smith v. Pond*, 107 A. 300, 90 N.J.Eq. 445, reversed on other grounds 111 A. 154, 92 N.J.Eq. 211.—*White v. City of Newark*, 103 A. 1042, 89 N.J.Eq. 5.

N.Y.—*Ely v. Megie*, 113 N.E. 800, 219 N.Y. 112, affirming *Ely v. Ely*, 148 N.Y.S. 691, 163 App.Div. 320, and reargument denied *Ely v. Megie*, 114 N.E. 1066, 219 N.Y. 597.—*In re Judd's Estate*, 274 N.Y.S. 902, 242 App.Div. 389, reversing 272 N.Y.S. 674, 151 Misc. 857, and affirmed *In re Fifth Avenue Bank*,

trustee is erroneously or uncertainly designated,⁸³ and where the person, association, or corporation named by the donor as trustee is not in existence at the time the gift becomes effective,⁸⁴ or is unable or incapable of taking and acting as trustee,⁸⁵ al-

though as to the last proposition there is authority to the contrary.⁸⁶ The rule is also applicable in case of the death or removal of,⁸⁷ or the refusal to accept the trust or to act as trustee⁸⁸ on the

200 N.E. 297, 270 N.Y. 516—In re Upham's Will, 289 N.Y.S. 518, 160 Misc. 126—In re Merritt's Will, 209 N.Y.S. 243, 124 Misc. 709—In re Trustees of Sustentation Fund of Reformed Episcopal Church, 163 N.Y.S. 1042, 98 Misc. 145.

Or.—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654.

Pa.—In re Jordan's Estate, 197 A. 150—In re Mears' Estate, 149 A. 157, 299 Pa. 217—In re Thompson's Estate, 127 A. 446, 282 Pa. 30—In re Shand's Estate, 118 A. 623, 275 Pa. 77.

R.I.—Wood v. Hartigan, 195 A. 507—Taylor v. Salvation Army, 142 A. 335, 49 R.I. 316.

Tex.—Wells v. Richardson, Civ.App., 280 S.W. 608, citing *Corpus Juris*—Lightfoot v. Poindexter, Civ.App., 199 S.W. 1152, error refused—Woods v. Bell, Civ.App., 195 S.W. 902, error refused.

Va.—Fitzgerald v. Doggett's Ex'r, 155 S.E. 129, 155 Va. 112.

Wis.—In re Mead's Estate, 277 N.W. 694—In re Briggs' Estate, 208 N.W. 247, 189 Wis. 524.

11 C.J. p 303 note 23, p 332 note 45.

Duty to appoint trustee

Under some statutes, it has been held the duty of the court to see that a trust for religious or charitable corporations does not fail for want of a trustee.—Dwyer v. Leonard, 124 A. 28, 100 Conn. 513—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.

No appropriate trustees available

A trust for local religious society would not fail even if no appropriate trustees were available possessing the qualifications specified.—Attorney General v. Armstrong, 120 N.E. 678, 231 Mass. 196.

Where title vests in court

Code Civ.Proc. § 2638, empowering the surrogate's court to appoint successive trustees, does not authorize it to appoint a trustee, where the legal title to the trust estate, constituting a charity, vests in the supreme court.—In re Welch, 172 N.Y.S. 349, 105 Misc. 27.

Court as trustee

Under Rev.St.1909 § 3746, a county court may act as a trustee of a charitable trust.—Robinson v. Crutcher, 209 S.W. 104, 277 Mo. 1.

Pleadings held appropriate

Pleading in suit to determine conflicting claims of trustees not demurrable, and not excepted to, was held to invoke court's power to appoint

new trustees.—Wells v. Richardson, Tex.Civ.App., 280 S.W. 608.

Charity not extinguished

In absence of provision in deed of trust, and where trustees had management and control of property for religious society, court's appointment of board of trustees did not extinguish charity.—Crawford v. Nies, 113 N.E. 408, 224 Mass. 474. Administration by the court see *infra* § 49.

Jurisdiction to remove or suspend trustee see *infra* § 49.

83. Mo.—Robinson v. Crutcher, 209 S.W. 104, 277 Mo. 1.

84. Mass.—Darcy v. Kelley, 26 N.E. 1110, 153 Mass. 433.

R.I.—Wood v. Hartigan, 195 A. 507. 11 C.J. p 333 note 46.

85. U.S.—Laswell v. Hungate, Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied Bishop v. Same, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

Colo.—Jeffreys v. International Trust Co., 48 P.2d 1019, 97 Colo. 183—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A. 1918B 710.

Conn.—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.

Ill.—Stowell v. Prentiss, 154 N.E. 120, 323 Ill. 309, 50 A.L.R. 584—Carlstrom v. Frackelton, 263 Ill. App. 250.

Iowa.—Meeker v. Lawrence, 212 N.W. 688, 203 Iowa 409.

Me.—Stevens v. Smith, 183 A. 344, 134 Me. 175.

Neb.—Gould v. Board of Home Missions of Presbyterian Church in the United States of America, 167 N.W. 776, 102 Neb. 526.

N.Y.—In re Turk's Will, 221 N.Y.S. 225, 128 Misc. 803, appeal dismissed 226 N.Y.S. 111, 222 App.Div. 724.

Or.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 618, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

R.I.—Tillinghast v. Council at Narragansett Pier, R. I., of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.

Va.—Fitzgerald v. Doggett's Ex'r, 155 S.E. 129, 155 Va. 112.

11 C.J. p 333 notes 47, 49.

Foreign corporation

Religious or charitable testamentary trust will not be permitted to fail because trustee named is incompetent to take title to realty because it is a nonresident corporation,

but competent trustee will be appointed to administer trust.—Stork v. Schmidt, 261 N.W. 552, 129 Neb. 311.

Voluntary association

Although the gift to a charitable use is to a voluntary association or an unincorporated society, which is uncertain, indefinite, and fluctuating in its membership, the court will, nevertheless, at least in some jurisdictions, uphold it and will appoint a trustee to take and to administer the fund according to the terms of the grant.

Del.—Hutton v. St. Paul Brotherhood of People's Church of Dover, 178 A. 584, 20 Del.Ch. 413.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.

Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

R.I.—Taylor v. Salvation Army, 142 A. 335, 49 R.I. 316.

11 C.J. p 333 note 50.

86. Mo.—Robinson v. Crutcher, 209 S.W. 104, 277 Mo. 1.

Cannot incorporate names of donees

In view of Rev.St.1909 § 583, a court of equity, in order to sustain a trust in a will cannot go to the extent of incorporating into the will the names of the donees who would take legal title to the funds bequeathed. Where testator bequeathed the residue of his estate to the capital of a county school fund, the names of the judges of the county court could not be inserted as custodians of the property, a charitable trust not having been sufficiently created to make applicable the provisions of Rev.St.1909 § 3747.—Robinson v. Crutcher, *supra*.

87. Conn.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

Me.—McCarthy v. Walsh, 122 A. 406, 123 Me. 157.

N.Y.—In re McLoghlin's Estate, 248 N.Y.S. 253, 139 Misc. 202, affirmed In re McLoghlin's Will, 251 N.Y.S. 876, 233 App.Div. 886—In re Kelley's Will, 245 N.Y.S. 294, 138 Misc. 190.

Pa.—In re Anderson's Estate, 112 A. 766, 269 Pa. 535.

11 C.J. p 333 notes 49, 51.

88. Me.—Dupont v. Pelletier, 113 A. 11, 120 Me. 114.

Mass.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.

N.H.—Petition of Madden, 172 A. 435, 86 N.H. 533—Winslow v. Stark, 97 A. 979, 78 N.H. 135.

Pa.—In re Mears' Estate, 149 A. 157.

part of, some or all of the original trustees.⁸⁹ While the rule has been applied even where the person making the gift failed to appoint a trustee or to make provision for the appointment of one,⁹⁰ there is some authority to the contrary.⁹¹

However, the rule is not applicable where the gift is to charity generally and no trustee was appointed by the testator.⁹² Also, the rule has been held not applicable where discretion of a personal nature is reposed in the trustee, inasmuch as the means of certainty as to the execution of the donor's wishes are lost by his death;⁹³ nor will the rule be applied where the gift is so uncertain that it cannot be executed and consequently cannot be upheld as a charity unless the testator has appointed, or provided for the appointment of, a trustee and has clothed him with a discretion, the exercise of which will relieve the gift of uncertainty, and the testator has not done this;⁹⁴ but where it does not expressly or impliedly appear that the donor limited the execution of the trust to the discretion of the named trustees, the court will appoint a trustee to apply the property or funds to the objects and in such a manner as will effectuate the intention of the donor,⁹⁵ and in some jurisdic-

tions, sometimes by virtue of statutory provisions, the trust does not fail or become inoperative by reason of a failure of the trustee to exercise the discretion conferred upon him, as the court may appoint a trustee to exercise such discretion.⁹⁶

Whom court should appoint. In appointing a trustee of a charitable trust, it is the duty of the court not to appoint one who is in hostility either to the purpose or to the beneficiaries of the gift.⁹⁷ The executor of a will will be permitted to act as trustee if the testator manifested an intention that he should so act.⁹⁸

A special statute declaring that the donor's oldest lineal male descendant shall be a trustee *ex gratia* was construed to mean the oldest male descendant in the oldest line of descent, akin to the doctrine of primogeniture.⁹⁹

§ 28. Acceptance or Refusal of Trust by Trustee

A trustee may elect to accept or decline the trust; and while he may generally renounce a trust, a town or city may not do so after accepting such trust.

In some cases a charitable gift does not vest in the trustee unless he accepts the trust¹ within a rea-

299 Pa. 217—*In re Thompson's Estate*, 127 A. 446, 282 Pa. 30. 11 C.J. p 333 notes 49, 52.

89. Tenn.—*State v. Ausmus, Ch.A.*, 35 S.W. 1021.

Tex.—*Tunstall v. Wormley*, 54 Tex. 476.

90. Cal.—*In re De Mars' Estate*, App., 67 P.2d 374.

Ky.—*Obrecht v. Pujos*, 268 S.W. 564, 206 Ky. 751.

N.J.—*While v. City of Newark*, 103 A. 1042, 89 N.J.Eq. 5.

11 C.J. p 333 note 48.

Specific object

If testator's bequest of income be for specific charitable object, and no trustee is appointed, court will nominate one.—*While v. City of Newark*, supra.

Comprehending all humanitarian objects

A bequest "to charity" made by testatrix who appointed no trustee created a valid charitable trust, since testatrix comprehended all the various religious, educational, benevolent, and humanitarian objects which the single word "charity" connotes, and the court would appoint a trustee to distribute the fund to various religious, educational, benevolent, and humanitarian objects.—*In re Jordan's Estate*, Pa., 197 A. 150.

91. Tenn.—*Ewell v. Sneed*, 191 S.W. 131, 136 Tenn. 602, 5 A.L.R. 303.

Statute not authorizing appointment—*Shannon's Code* § 5166, presuppos-

es the valid appointment of trustees, and does not authorize the attorney general to represent unascertained beneficiaries of a charitable trust so as to permit the appointment of trustees where none were originally appointed.—*Ewell v. Sneed*, 191 S.W. 131, 136 Tenn. 602, 5 A.L.R. 303.

92. N.J.—*While v. City of Newark*, 103 A. 1042, 89 N.J.Eq. 5.

93. Ohio.—*Rogers v. Rea*, 120 N.E. 328, 98 Ohio St. 315.

Tex.—*City of Haskell v. Ferguson*, Civ.App., 66 S.W.2d 491.

11 C.J. p 334 note 54.

94. Tex.—*City of Haskell v. Ferguson*, supra.

11 C.J. p 334 note 55.

95. Mass.—*Reilly v. McGowan*, 166 N.E. 766, 267 Mass. 268—*Binney v. Attorney General*, 156 N.E. 724, 259 Mass. 539.

Special confidence not reposed

(1) Devise for charitable purposes did not show testator placed personal confidence in executors requiring action by them only.—*Kirwin v. Attorney General*, 175 N.E. 164, 275 Mass. 34.

(2) Will bequeathing \$1,000 to executor to be applied at his discretion, for advancement of ten poor boys to be selected by him, does not indicate special confidence was placed in executor as to selection of beneficiaries, and trustee can be appointed to perform trust after executor's

death.—*Sherman v. Shaw*, 137 N.E. 374, 243 Mass. 257.

(3) Direction of will that income from charitable trust should be expended under direction of acting pastor of church and acting superintendent of Sunday school was held not to create such personal discretion as to preclude court from authorizing others to act in case there were no such persons who could do so.—*Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church*, 164 A. 910, 116 Conn. 347.

96. Pa.—*In re Thompson's Estate*, 127 A. 446, 282 Pa. 30—*In re Batterson's Estate*, 18 Pa.Dist. & Co. 52.

97. Pa.—*In re Shand's Estate*, 118 A. 623, 275 Pa. 77.

11 C.J. p 334 note 56.

98. Cal.—*In re De Mars' Estate*, App., 67 P.2d 374.

99. N.Y.—*Hewitt v. Cooper Union for Advancement of Science and Art*, 144 N.E. 650, 238 N.Y. 381, reversing 201 N.Y.S. 792, 207 App. Div. 256.

1. U.S.—*Seibold v. City of Naperville*, D.C.Ill., 19 F.Supp. 281. 11 C.J. p 334 note 58.

Sufficient acceptance

"There can be no doubt about the certainty of the acceptance of the trustees of the Walker trust, for they signed, acknowledged and agreed to the contents of each of the three deeds. The essential Code

sonable time where no time is specified;² and a statute providing that any person appointed as a trustee who shall neglect or refuse to give bond when required shall be considered as having declined the acceptance of the trust is applicable to charitable trusts.³ However, the failure to accept a gift within the time allowed by the instrument of donation has been held not to divest the title of the trustee where it had no knowledge of the gift during such time and it accepted the gift in the manner indicated shortly after acquiring knowledge thereof and the primary intention of the donor was to have the property go to such association;⁴ and where there are several gifts for the same object, any acts of the trustee indicating an intent to carry out the purpose for which the gifts were promised or made must be presumed to be in furtherance of each, unless otherwise shown.⁵

Where the trustee named is a town or city or

other governmental body, it may, like other trustees, elect either to accept or to decline the trust;⁶ and it may make a conditional acceptance thereof, and then will be bound only by the terms of the devise and its own conditional acceptance.⁷ A formal acceptance is not necessary;⁸ and while its action in adopting an order or resolution accepting the gift is a sufficient acceptance in some cases,⁹ where the gift was subject to a condition precedent which has not been performed and a reasonable time therefor has elapsed, a mere resolution is not a sufficient acceptance.¹⁰

The trustee of a charity may so distinctly repudiate and disavow the trust, and hold the property so adversely as to acquire a complete legal and equitable title.¹¹

Renunciation. Although a trustee may generally renounce his trust, either expressly or impliedly,¹²

element of certainty in this respect is beyond cavil."—*Dingwell v. Seymour*, 267 P. 327, 329, 91 Cal.App. 483.

2. Mich.—*In re DeBancourt's Estate*, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.

Lapse of time

Lapse of time before acceptance of charitable bequest is not in itself significant in determining whether bequest has lapsed, whether one pursues right promptly or slowly within legal limits being of little importance so long as parties are in same position. A bequest in trust for establishment and support of city library to be named for testator did not lapse because of city's failure to express formally its acceptance of bequest and designate library by such name until nearly forty years after executor under will notified city of bequest, such designation of library not being condition precedent to bequest.—*In re Mead's Estate*, Wis., 277 N.W. 694, rehearing denied 279 N.W. 718.

Reasonable time

Where will bequeathed sum of money to charitable organization to be used in erection of new building, the money to be paid by executor when he was satisfied that building would be completed and that organization could finance it, the organization was required to give notice of election to accept the legacy within a reasonable time, which would elapse on running of statute of limitations.—*In re DeBancourt's Estate*, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.

3. N.H.—*Fernald v. Scientist First Church of Christ*, 88 A. 705, 77 N.H. 108.

4. Mass.—*Woman's Seaman's Friend Soc. v. Boston Y. W. C. A.*, 134 N.E. 601, 240 Mass. 521.

5. Me.—*Central Maine General Hospital v. Carter*, 132 A. 417, 125 Me. 191, 44 A.L.R. 1333.

6. U.S.—*Seibold v. City of Naperville, D.C.Ill.*, 19 F.Supp. 281, 11 C.J. p 334 note 61.

Acceptance not a rejection of prior bequest in trust

A city's acceptance of Carnegie gift for erection of public library building and placing of plaque bearing inscription, "This Library is a gift of Andrew Carnegie to the City," in building constructed, did not indicate its rejection of prior bequest in trust for establishment and support of public library to be named for testator. The fact that city ignored executor's letter, calling its attention to bequest in trust for establishment and support of city library and stating that city had not accepted bequest, that difficulties in carrying out will might be overcome by cooperation between city and residuary legatees, and that writer was ready to turn over fund according to directions of will, did not indicate city's renunciation of bequest, it being executor's duty under will to turn over fund to trustees for purchase of books, on city's acceptance of Carnegie gift for erection of library building.—*In re Mead's Estate*, Wis., 277 N.W. 694, rehearing denied 279 N.W. 718.

Rejection not shown

A city did not renounce charitable bequest of fund for establishment and support of public library therein by agreeing to do so in consideration of payment of lesser sum to city by testator's heir, such agreement

being void as attempt to divert greater portion of trust fund to other purposes than those directed by will. The city, leasing building for library for five years after executors notified it of bequest in trust for establishment and support of public library in city, did not thereby renounce bequest.—*In re Mead's Estate*, supra.

7. Mass.—*Burr v. Boston*, 95 N.E. 208, 208 Mass. 587, 34 L.R.A., N.S., 143.

8. Iowa.—*In re Nugen's Estate*, 272 N.W. 638.

9. Mass.—*Attorney General v. City of Lowell*, 141 N.E. 45, 246 Mass. 312.

11 C.J. p 334 note 63.

Binding agreement

Warrant for town meeting, vote to accept hospital as gift, and ordinances, approved by donors, regarding selection of board of trustees, were held binding agreement.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453.

School board

The willingness of a school board to accept a charitable trust may be shown by a resolution adopted by it.—*Richards v. Wilson, Ind.*, 112 N.E. 780.

10. U.S.—*Seibold v. City of Naperville, D.C.Ill.*, 19 F.Supp. 281.

11. N.H.—*Newington Cong. Soc. v. Newington*, 53 N.H. 595.

Right of trustee to release trust see *infra*, § 66.

12. Tenn.—*Town of Franklin v. Gillespie*, 6 S.W.2d 323, 157 Tenn. 78.

Filing pleading adverse to beneficiaries

Filing of pleading by trustee adverse to interest of beneficiaries con-

it has been held that a town or city, after accepting a charitable trust, cannot renounce it.¹³

§ 29. Capacity of Trustees or Donees to Take

As a general rule, any person capable of taking and holding real and personal property may be a trustee of a charitable trust.

Any person capable of taking and holding real and personal property may be a trustee of a charitable trust;¹⁴ and it is not necessary that the trustee should be itself a charitable institution,¹⁵ it being immaterial, where the other requisites to a public charity exist, that distribution is to be made in private or by a private hand, as shown *supra* § 1. Where the person or corporation named as trustee by the person creating the trust is in existence and is competent to take title and execute the trust, there is no reason why he or it should not act as trustee,¹⁶ notwithstanding he or it may be a foreign trustee.¹⁷

stitutes renunciation of his trust.—*Town of Franklin v. Gillespie*, *supra*.

13. Conn.—*Yale College's App.*, 34 A. 1036, 67 Conn. 257.
11 C.J. p 334 note 64.

14. N.J.—*Johnson v. Bowen*, Ch., 95 A. 370.

Grant to individual in trust for state or public is valid charitable gift, in absence of statutory prohibition.—*President and Fellows of Middlebury College v. Central Power Corporation of Vermont*, 143 A. 384, 101 Vt. 325.

Statute contemplating incorporation of trustees

A statute contemplating that when natural persons are appointed trustees, they shall form themselves into a corporation for the purpose of administering and executing the trust, has been held not to prohibit the naming of an individual as trustee.—*Succession of Marion*, 112 So. 667, 163 La. 734.

15. Cal.—*Wiley's Est.*, 60 P. 471, 128 Cal. 1.

Holding land in trust not condition precedent

The holding of title to land in trust for a benevolent purpose is not a prerequisite to the taking of title to personalty by trustees on a like purpose.—*Hays v. Harris*, 30 S.E. 827, 73 W.Va. 17.

16. R.I.—*Rhode Island Hospital Trust Co. v. Newport*, 87 A. 182.

Orphans' home

(1) That Nevada laws authorize directors of Nevada orphans' home to receive bequests refuted contention directors were incapable of taking as trustees under will.—*In re*

Wood's Estate, 292 P. 144, 108 Cal. App. 694.

(2) In view of a statute prescribing those who may take under a will, it has been held that no valid bequest can be made to the state orphans' home.—*In re Beck's Estate*, 121 P. 1057, 44 Mont. 561, denying rehearing 121 P. 784, 44 Mont. 561.

17. Iowa.—*Beidler v. Dehner*, 161 N.W. 32, 178 Iowa 1338.

18. Neb.—*In re Douglass*, 143 N.W. 299, 94 Neb. 280, Ann.Cas.1914D 447.

19. Colo.—*In re Forresters' Estate*, 279 P. 721, 86 Colo. 221.

State bureau for child and animal protection

Colorado State Bureau for Child and Animal Protection was authorized to receive bequest for hungry, abused, and neglected animals and for prosecution of persons abusing and neglecting them.—*In re Forresters' Estate*, 279 P. 721, 86 Colo. 221.

Power to take liberally construed

"Plaintiffs insist that the powers of corporations to receive property are strictly construed. This is not the law where the gift is for charitable and public uses."—*Vestal v. Pickering*, Or., 267 P. 821, 824.

20. Del.—*Hutton v. St. Paul Brotherhood of People's Church of Dover*, 178 A. 584, 20 Del.Ch. 413.

Fla.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152.

N.H.—*Roberts v. Corson*, 107 A. 625, 79 N.H. 215, 5 A.L.R. 1172.

N.J.—*Bible Readers' Aid Soc. of Trenton v. Katzenbach*, 128 A. 628, 97 N.J.Eq. 416.

W.Va.—*Wilson v. Perry*, 1 S.E. 302, 29 W.Va. 169.

11 C.J. p 334 note 73.

The fact that persons designated in a will as trustees to hold title to national bank stock bequeathed to a church are officers of the bank does not disqualify them to act as such trustees.¹⁸

A discussion of the restrictions on testamentary dispositions for charitable, benevolent, or religious purposes, see the C.J.S. title Wills §§ 108-110, also 68 C.J. page 534 note 51—page 564 note 99.

§ 30. — Corporations Generally

Generally, a corporation capable of taking and holding property may be the trustee of a charity if the trust is not inconsistent with the purposes of its organization and the amount thereof does not exceed its statutory or charter capacity to take.

Provided it is capable of taking and holding property,¹⁹ a corporation may be the trustee of a charity where the trust is not inconsistent with, or repugnant to, the purposes of its organization;²⁰ and in any event, an objection that a church corporation is

Incorporated Christian service

board which was organized for the purpose of advancing the benevolent purposes of the church conference of which it was a subsidiary was entitled to take as trustee a testamentary gift to an unincorporated children's home and an unincorporated old people's home, both of which were owned and operated by the board. — *In re Peterson's Estate*, Minn., 277 N.W. 529.

Incorporated deaconess institute

which operated a deaconess home with which unincorporated testamentary donee was merged prior to testatrix' death was entitled to testamentary gift as trustee for the benefit of deaconesses affiliated with donee prior to merger and for continuing the benevolent work carried on through donees by the board which owned donee prior to the merger.—*In re Peterson's Estate*, *supra*.

Gift to college for chapel

A gift to a college for erection of a chapel is not void on the ground that the college, being incorporated for educational purposes, cannot own and control a building used for purpose of conducting religious services.—*Lightfoot v. Poindexter*, Tex. Civ.App., 199 S.W. 1152, error refused.

Substituted trustee

Under Act April 23, 1905, Pub.L. p 384, every corporation of state organized for religious, etc., purposes can act as substituted trustee for any religious, educational, or charitable trust.—*Bible Readers' Aid Soc. of Trenton v. Katzenbach*, 128 A. 628, 97 N.J.Eq. 416.

Powers of charitable corporations generally see *infra* § 72.

not authorized by law to hold title to the trust fund in controversy is without force, where the gift is to an individual trustee for the benefit of the corporation.²¹

Although it has been held that a gift to a charitable corporation failed where such corporation became insolvent and a receiver had been appointed prior to the time it was entitled to receive such gift,²² it has also been held that a bequest to a charitable corporation was valid, notwithstanding bankruptcy and the appointment of a trustee therein prior to the time the corporation was entitled to receive such gift, the court, in such case, applying the cy pres doctrine,²³ which doctrine is discussed infra § 52.

Statutory limitations. Grants and gifts to charities are often subject to statutory limitations, as for instance that devises shall not be made to charitable institutions of more than a specified percentage of the testator's estate to the exclusion of his wife or descendants, see the C.J.S. title Wills § 110, also 68 C.J. page 546 note 49—page 564 note 99. Frequently the limitation is as to the amount which charitable institutions may take and hold, and a charter limiting a charitable corporation's property to a fixed sum has been held not modified by a general law authorizing such corporations to take property in trust without any expressed limit.²⁴ Whether a gift of property to a corporation is void as to any excess above its legal capacity to take, with a resulting trust as to such excess in favor of the heirs at law and next of kin, is a question on which there exists a conflict of authority. In some jurisdictions the rule is that such gifts are void as to the excess of the chartered capacity of the corpo-

ration to take,²⁵ while in others the gift has been held not void as to the excess, at least where not attacked by the state.²⁶ However, a bequest of an amount above the statutory limit may be made valid as to such total by a legislative increase after the testator's death;²⁷ but where a corporation may not take by devise unless expressly allowed, a statute enabling a corporation to take by devise has been held not to make valid a devise by a testator who died before such statute was in force,²⁸ although if the corporation had not the capacity to take at the testator's death, where the gift was not to take effect until the happening of a future event, at which time such incapacity had been removed, it was held that the corporation was entitled to the gift.²⁹

Who may question validity or right to take.

While the heirs of a donor are entitled to litigate the question whether a corporation has any power to acquire property in trust by devise,³⁰ there is a conflict of authority as to the right to attack a gift made to a corporation in excess of its charter or statutory limit. In some jurisdictions, the excess of a gift above the limit allowed may be impugned by the heirs and next of kin,³¹ while in other jurisdictions the rule is that such gifts can be attacked only by direct proceedings instituted in behalf of the state, and that they cannot be impeached in suits brought by the heirs at law and the next of kin;³² and, where by special act the state has waived its right by authorizing the creation of a particular corporation with enlarged capacity to enable it to accept and to hold a gift, the power of the corporation in that respect cannot be questioned in any manner.³³

21. Mo.—Sandusky v. Sandusky, 168 S.W. 1150, 261 Mo. 351.

22. Tenn.—Garner v. Home Bank & Trust Co., 107 S.W.2d 223, 171 Tenn. 652.

23. N.Y.—In re Walter's Estate, 269 N.Y.S. 402, 150 Misc. 512.

24. N.Y.—Chamberlain v. Chamberlain, 43 N.Y. 424.

25. Tex.—House of Mercy v. Davidson, 39 S.W. 924, 90 Tex. 529.

11 C.J. p 335 note 78.

26. Tenn.—Bank of Commerce & Trust Co. v. Banks, 28 S.W.2d 340, 161 Tenn. 11, 69 A.L.R. 1353, rehearing denied 29 S.W.2d 658, 69 A.L.R. 1353.

27. Conn.—Dwyer v. Leonard, 124 A. 23, 100 Conn. 513.

11 C.J. p 335 note 82.

May take by devise

Statutes limiting the amount which charitable corporations may take and hold in trust and providing

that they may take funds received by gift or bequest have been held not to prevent them from taking realty by devise.—Hubbard v. Worcester Art Museum, C.C.Mass., 179 F. 406, writ dismissed 196 F. 871, 116 C.C.A. 433.

28. N.Y.—White v. Howard, 46 N.Y. 144—Bonard's Will, 16 Abb.Pr., N.S., 128.

Power of corporations to take by devise generally see the C.J.S. title Wills § 106, also 68 C.J. page 528 note 42—page 534 note 49.

29. N.Y.—Plymouth Soc. v. Hepburn, 57 Hun 161, 10 N.Y.S. 817.

30. Del.—McBride v. Murphy, 124 A. 798, 14 Del.Ch. 242, affirmed Murphy v. McBride, 130 A. 283, 14 Del.Ch. 457.

31. Tex.—House of Mercy v. Davidson, 39 S.W. 924, 90 Tex. 529.

11 C.J. p 335 note 79.

32. U.S.—Hubbard v. Worcester Art

Museum, C.C.Mass., 179 F. 406, error dismissed 196 F. 871, 116 C.C.A. 433.

Tenn.—Bank of Commerce & Trust Co. v. Banks, 28 S.W.2d 340, 161 Tenn. 11, 69 A.L.R. 1353, rehearing denied 29 S.W.2d 658, 69 A.L.R. 1353—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A. 1917D 1062.

11 C.J. p 335 notes 75, 80.

Devise not to take effect immediately

The fact that the time for receiving the bequest was postponed for a period of time does not affect the rule stated in the text.—Bank of Commerce & Trust Co. v. Banks, 29 S.W.2d 658, 69 A.L.R. 1353, denying rehearing 28 S.W.2d 340, 161 Tenn. 11, 69 A.L.R. 1353.

33. U.S.—Brigham v. Peter Bent Brigham Hospital, Mass., 134 F. 513, 67 C.C.A. 393, affirming, C.C. 126 F. 796.

§ 31. — Foreign Corporations

In the absence of a statute prohibiting a foreign corporation from holding property, and provided it is authorized to take by the law of its creation, a foreign corporation may take a gift or devise for charitable uses.

In the absence of a statute of the state in which the land is situated, which prohibits a foreign corporation from taking and holding land or real estate,³⁴ and provided it is authorized to take by the law of its creation,³⁵ a foreign corporation may take a gift, devise, or bequest for charitable uses; and although a foreign corporation may not be able to hold land or any interest in land, yet where the will directs a conversion of the realty into personalty, a bequest of the proceeds to such a corporation will be upheld.³⁶

§ 32. — Corporations to Be Formed

A valid charitable gift may be made to a corporation to be formed after the death of the testator or after the delivery of a deed by the donor.

A valid charitable gift may be made to a corporation to be formed or created after the death of the testator in case of a will,³⁷ or after the delivery of the deed in case of a gift by deed.³⁸

The trustees of a charity may impliedly be authorized to apply for and accept an act of incorporation to carry out the testator's plans,³⁹ and the giving of power to the trustees to incorporate companies obviously does not indicate an intent to create an unincorporated association in the nature of

a charitable foundation.⁴⁰ A direction that the executors shall "forthwith" obtain a "proper charter" makes them trustees of the trust fund until formal organization;⁴¹ and it is not necessary even that the contemplated corporation should be created, as a court of equity will uphold, protect, and enforce the gift for the charitable use,⁴² or at least will hold the fund until incorporation can be affected.⁴³ However, a legacy to a charitable institution described as in being cannot be treated as made to an institution to be created;⁴⁴ nor can an institution already established at the date of the will receive a bequest to such as "may be established";⁴⁵ and where a will prescribes certain rules and methods of government for a proposed institution not in being, it will not be sustained on the ground that without applying for a special act the institution may be incorporated under the general law which provides for a plan of incorporation different from that presented in the will.⁴⁶

§ 33. — Municipal Corporations and Other Governmental Bodies

Where the purposes of a trust are germane to the objects of a municipal corporation, it may be the trustee thereof.

A town or municipal corporation may be a trustee of a trust for charitable uses, where the purposes of the trust are germane to the objects of the corporation,⁴⁷ even though the object may be one which the municipality could not carry out at

34. Neb.—Stork v. Schmidt, 261 N. W. 552, 129 Neb. 311.

Corporation not for profit

A statute providing that no foreign corporation organized for pecuniary profit shall purchase or hold real estate in the state does not operate to prohibit a foreign corporation organized solely for educational purposes from taking by devise and holding land situated in the state to the extent of its capacity in the state of its creation.—Eaton v. Woman's Missionary Soc. of M. E. Church, 105 N.E. 746, 264 Ill. 83.

35. Md.—Waters v. Waters, 142 A. 297, 155 Md. 146.

11 C.J. p 335 note 85.

Right to question capacity

Legal capacity of foreign corporation to take testamentary gift could not be raised by next of kin or other private persons.—Waters v. Waters, supra.

36. Md.—Smith v. Methodist Episcopal Church Extension, 56 Md. 362.

Va.—Methodist Episcopal Church Missionary Soc. v. Calvert, 32 Gratt. 357, 73 Va. 357.

37. Md.—Second Nat. Bank v. Sec-

ond Nat. Bank, 190 A. 215—Gray v. Peter Gray Orphans' Home & Mechanical Institute of Washington County, 98 A. 202, 128 Md. 592.

Neb.—In re Secrest's Estate, 191 N. W. 663, 665, 109 Neb. 431, citing *Corpus Juris*.

N.Y.—In re Brigrin's Will, 203 N.Y. S. 646, 203 App.Div. 511—Maynard v. Farmers' Loan & Trust Co., 203 N.Y.S. 83, 208 App.Div. 112—Hull v. Pearson, 55 N.Y.S. 324, 36 App. Div. 224.

11 C.J. p 335 note 88.

Corporation exclusively charitable

Where will directed trustees to organize a corporation for the purpose of holding and leasing the real estate devised in trust and conducting a maternity home for unfortunate or wayward girls, the corporation was not one organized for profit, but was exclusively charitable.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 618, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

38. Mass.—Assessors of Town of Weston v. Boston College, Trustees, 6 N.E.2d 363.

11 C.J. p 336 note 89.

39. Mass.—Sanderson v. White, 18 Pick. 328, 29 Am.D. 591.

40. Pa.—In re Kimberly, 95 A. 82, 249 Pa. 469.

41. Pa.—In re Daly, 57 A. 180, 208 Pa. 58.

42. Ill.—French v. Calkins, 96 N.E. 877, 252 Ill. 243.

43. N.C.—Keith v. Scales, 32 S.E. 809, 124 N.C. 497.

44. La.—New Orleans v. Hardie, 9 So. 12, 43 La. Ann. 251.

45. Pa.—Pepper's Est., 1 Pa. Dist. 148, 11 Pa. Co. 257.

46. N.Y.—Peo. v. Simonson, 27 N.E. 380, 126 N.Y. 299.

47. U.S.—Kibbe v. City of Rochester, D.C.N.Y., 57 F.2d 542.

Cal.—McKevitt v. City of Sacramento, 203 P. 132, 55 Cal. App. 117.

Colo.—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A. 1918B 710.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Iowa.—In re Nugen's Estate, 272 N. W. 638.

Kan.—Treadwell v. Beebe, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

the public expense.⁴⁸ Indeed, the power to act as trustee is expressly conferred by some statutes, either on municipalities generally or on particular municipal corporations, or as to particular gifts,⁴⁹ which statutes have been held, in some cases, merely declaratory of the common law,⁵⁰ and it will not be assumed, as an impediment to accepting a trust, that such statutes will be abrogated in the future.⁵¹ However, a municipal corporation cannot take and hold property in trust for a purpose which is foreign or repugnant to the objects of its incorporation and in which it has no interest.⁵²

A charitable bequest in trust to a town is not void because the town, at the time the bequest is made, is incapable of taking the trust; and the fund may be ordered to be paid over to the town on it being enabled, by a subsequent act of the legislature, to administer the trust according to the will.⁵³ Where a city charter was repealed, and a new one granted, its area being enlarged, the city's title under a trust for charity was held not affected;⁵⁴ and if a town

is afterward incorporated as a city, the identity of the municipal corporation is not lost, and the property held by the inhabitants of the town in trust passes to the city on the same trust, without the action of any court, and trustees cannot be appointed for such cause alone to manage the funds in place of the city.⁵⁵

Other governmental bodies held capable of acting as trustees of a charitable trust include counties,⁵⁶ townships,⁵⁷ and school districts or school boards.⁵⁸ In the absence of any restraining statute,⁵⁹ a gift to a state,⁶⁰ or to the United States,⁶¹ in trust to apply the fund in executing a lawful governmental function is valid; but if the state refuses to accept the trust no substitute trustee can succeed to its sovereign powers in administering it.⁶²

Particular purposes. A governmental body has power to receive property in trust for educational purposes,⁶³ including a public library or reading room;⁶⁴ for the erection of a courthouse or other

Me.—In re Clark's Estate, 159 A. 500, 131 Me. 105.

Mass.—Adams v. Plunkett, 175 N.E. 60, 274 Mass. 453—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

N.H.—Petition of Tuttle, 112 A. 397, 80 N.H. 36.

N.J.—Lawrence v. Prosser, 104 A. 772, 89 N.J.Eq. 243.

R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

S.C.—Grady v. City of Greenville, 123 S.E. 494, 129 S.C. 89.

Wash.—In re Maynes' Estate, 204 P. 596, 118 Wash. 644.

Wis.—Beurhaus v. Cole, 69 N.W. 986, 94 Wis. 617.

11 C.J. p 336 note 99—43 C.J. p 1335 note 88—63 C.J. p 158 note 46.

Town treasurer as such

A town treasurer as such has been held not entitled to hold real estate in trust.—St. Albans Treasurer v. Gibbs, Brant, Vt., 76.

48. N.J.—Lawrence v. Prosser, 104 A. 772, 89 N.J.Eq. 243.

43 C.J. p 1336 note 89.

49. Colo.—Borough or Town of Clifton v. Central Sav. Bank & Trust Co., 208 P. 251, 71 Colo. 482.

11 C.J. p 336 note 1.

50. R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

51. Iowa.—In re Nugen's Estate, 272 N.W. 638.

52. Ill.—Stowell v. Prentiss, 154 N.E. 120, 323 Ill. 309, 50 A.L.R. 584.

43 C.J. p 1337 note 6.

53. R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

11 C.J. p 337 note 12.

54. U.S.—Girard v. Philadelphia, Pa., 7 Wall, U.S., 1, 19 L.Ed. 53.

55. Mass.—Higginson v. Turner, 51 N.E. 172, 171 Mass. 586.

11 C.J. p 337 note 14.

56. Kan.—Rishel v. McPherson County, 253 P. 586, 122 Kan. 741, rehearing denied 255 P. 979, 123 Kan. 414 and former opinion adhered to 257 P. 939, 124 Kan. 31.

Okl.—Phillips v. Chambers, 51 P.2d 303, 174 Okl. 407.

Va.—Pirkey v. Grubb's Ex'r, 94 S.E. 344, 122 Va. 91.

11 C.J. p 337 note 16.

Validity of permissive statute

In Virginia, the legislature has power to enact a statute authorizing a county to accept donations and trusts made for benevolent or charitable objects of a public character.—Pirkey v. Grubb's Ex'r, supra.

57. Ind.—Skinner v. Harrison Tp., 18 N.E. 529, 116 Ind. 139, 2 L.R.A. 137.

Educating orphan children

Townships have been held not proper trustees of a fund for the education of orphan children.—Mason v. Methodist Episcopal Church, 27 N.J.Eq. 47.

58. W.Va.—Mercantile Banking & Trust Co. v. Showacre, 135 S.E. 9, 102 W.Va. 260, 48 A.L.R. 1138.

11 C.J. p 337 note 17.

Title under trust not in county board of education

Title to land given in trust to maintain school was held not to have vested in county board of education under Civ.Code 1910 § 1484, vesting the board with title to all school-houses belonging to subdistricts, etc.

—Dominy v. Stanley, 133 S.E. 245, 162 Ga. 211.

59. Taking by devise

(1) Under the statutes, as they existed at one time in one jurisdiction, a devise of land in that state to the people of the United States was invalid for want of capacity to take by devise.

U.S.—U. S. v. Fox, N.Y., 94 U.S. 315, 24 L.Ed. 192.

N.Y.—In re Fox, 52 N.Y. 530, 11 Am. R. 751—Levy v. Levy, 33 N.Y. 97, affirming 40 Barb. 585.

(2) So, also, as to a devise to the people of a state.—Levy v. Levy, 33 N.Y. 97, affirming 40 Barb. 585—Catt v. Catt, 103 N.Y.S. 740, 118 App.Div. 742.

60. Conn.—Yale College's App., 34 A. 1036, 67 Conn. 237.

11 C.J. p 337 note 18.

61. Mass.—Dickson v. U. S., 125 Mass. 311, 28 Am.R. 230.

62. Conn.—Yale College's App., 34 A. 1036, 67 Conn. 237.

63. U.S.—Kibbe v. City of Rochester, D.C.N.Y., 57 F.2d 542.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

11 C.J. p 336 note 2—43 C.J. p 1336 note 97.

Designating school to be supported

Even if a city cannot act as trustee of property devised for support of a school in the city, it may, as contemplated by the devise, designate the school to be supported.—Laswell v. Hungate, Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied Bishop v. Same, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

64. U.S.—Kibbe v. City of Rochester, D.C.N.Y., 57 F.2d 542.

building for public use,⁶⁵ including a monument;⁶⁶ for the establishment and maintenance of hospitals or patients therein;⁶⁷ for laying out, improving, and lighting streets;⁶⁸ for the purchase and use for display of United States flags;⁶⁹ for planting and renewing shade trees;⁷⁰ for a public park;⁷¹ for the repair of highways and bridges;⁷² for use in connection with waterworks;⁷³ for the relief of emigrants passing through the city;⁷⁴ or for the starting of young artificers in business.⁷⁵ Also, in some states, a municipal corporation may be a trustee of a trust for aiding the poor or aged,⁷⁶ but the contrary has been held in other jurisdictions as to trusts for indigent persons not paupers.⁷⁷

While, under statutes in some jurisdictions, a municipal corporation may be a trustee of a trust for perpetual care of a cemetery lot,⁷⁸ in other jurisdictions a devise to a municipal corporation for perpetual care of a lot in a city-owned cemetery has been held invalid as a trust for a private purpose,⁷⁹ the statute legalizing trusts for private burial lots not removing the incapacity of a municipal corporation to act as trustee of such a trust.⁸⁰ While it has been held that towns may hold property in trust for the support of religion within their lim-

its,⁸¹ it has also been held that a municipal corporation cannot hold land in trust for religious or associated purposes;⁸² and school directors have no power to hold a spring for the use of the public.⁸³

Where a charitable trust is repugnant to, or inconsistent with, the proper purposes, for which the municipal corporation was created, that may furnish a ground why it may not be compelled to execute it, but it will furnish no ground to declare the trust itself void.⁸⁴

§ 34. — Unincorporated Associations in General

Although in some jurisdictions an unincorporated association cannot be a trustee and a charitable gift made directly to it is void, in other jurisdictions such gifts are upheld, sometimes on the ground that the trust will not be allowed to fail for want of a trustee.

In accordance with the general rule that unincorporated associations generally are incapable, as such, of taking or holding either real or personal property, as stated in the title associations § 14, it is a rule in some jurisdictions that an unincorporated association or other voluntary unincorporated organization cannot take and hold property for the purposes of administering a charitable trust.⁸⁵

Iowa.—In re Nugen's Estate, 272 N. W. 638.

43 C.J. p 1336 note 98.

65. U.S.—Kibbe v. City of Rochester, D.C.N.Y., 57 F.2d 542.

N.J.—New Jersey Title Guarantee & Trust Co. v. Smith, 108 A. 16, 90 N.J. 386.

11 C.J. p 336 note 3—43 C.J. p 1336 note 90.

66. N.J.—Lawrence v. Prosser, 104 A. 772, 89 N.J.Eq. 248.

43 C.J. p 1336 note 91.

67. Mass.—Adams v. Plunkett, 175 N.E. 60, 274 Mass. 453.

Va.—Pirkey v. Grubb's Ex'r, 94 S.E. 344, 122 Va. 91.

11 C.J. p 336 note 5.

Relief of distress

Under a statute providing that a municipal corporation may be a trustee of a trust for the relief of distress, a village has capacity to take a devise of realty to be used as a general hospital.—Matter of Hemstreet's Will, 167 N.Y.S. 1016, 101 Misc. 340.

68. Pa.—Philadelphia v. Fox, 64 Pa. 169.

69. N.H.—Sargent v. Cornish, 54 N. H. 18.

70. Pa.—Cresson's App., 30 Pa. 437.

71. Cal.—McKevitt v. City of Sacramento, 203 P. 132, 55 Cal.App. 117. 43 C.J. p 1336 note 96.

72. Conn.—Hamden v. Rice, 24 Conn. 350.

73. Mich.—Penny v. Croul, 43 N.W. 649, 76 Mich. 471, 5 L.R.A. 858.

74. Mo.—Chambers v. St. Louis, 29 Mo. 543.

75. Pa.—Apprentices' Fund Case, 2 Pa.Dist. 435, 13 Pa.Co. 241. 43 C.J. p 1337 note 5.

76. Kan.—Treadwell v. Beebe, 190 P. 768, 107 Kan. 31, 10 A.L.R. 1359.

Mass.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

Okl.—Phillips v. Chambers, 51 P.2d 303, 174 Okl. 407.

11 C.J. p 336 note 8—43 C.J. p 1336 note 1.

Statutory limitation on value of homes

Statute placing limitation on value of homes that may be established by county for care of poor was held not intended to impose limitation on amount of property which county could receive by gift or devise for purpose mentioned, purpose of statute being to place limitation on expenditure of public funds and to prevent counties from spending in excess of limited amount for that purpose without vote of people.—Phillips v. Chambers, supra.

77. Conn.—Daley v. New Haven, 22 A. 945, 60 Conn. 314, 14 L.R.A. 69. 11 C.J. p 337 note 9.

78. N.H.—Petition of Tuttle, 114 A. 867, 80 N.H. 155—Petition of Tuttle, 112 A. 397, 80 N.H. 36.

79. N.Y.—In re Turk's Will, 221 N. Y.S. 225, 128 Misc. 803, appeal dismissed 226 N.Y.S. 111, 222 App.Div. 724.

Power over rents and realty

A devise to commissioners of a city-owned cemetery for perpetual care of a cemetery lot is invalid as an attempt to make the commission a trustee with power over the rents and proceeds of realty.—In re Turk's Will, 221 N.Y.S. 225, 128 Misc. 803, appeal dismissed 226 N.Y.S. 111, 222 App.Div. 724.

Should follow city charter provisions

To obtain perpetual care of lot in city-owned cemetery, will should follow provisions of city charter.—In re Turk's Will, supra.

80. N.Y.—In re Turk's Will, supra.

81. N.H.—Atty.-Gen. v. Dublin, 38 N.H. 459, 577.

43 C.J. p 1337 note 8.

82. Mass.—Bullard v. Shirley, 27 N. E. 766, 153 Mass. 559, 12 L.R.A. 110.

43 C.J. p 1337 note 7.

83. Ill.—Stowell v. Prentiss, 154 N. E. 120, 323 Ill. 309, 50 A.L.R. 584.

84. Colo.—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A.1918B 710.

11 C.J. p 337 note 11.

85. N.Y.—Trustees of Sustentation Fund of Reformed Episcopal Church v. Hoosac School, 183 N.Y. S. 585, 192 App.Div. 742—In re

and that a charitable devise or bequest made directly to an unincorporated association is void for want of a person to take the legal title.⁸⁶ In these jurisdictions, a gift to an unincorporated association is construed to be a gift to the association as a body, and not to its members,⁸⁷ and hence cannot be taken by the individuals who compose the association as a gift to them.⁸⁸ Also, in these jurisdictions, a statute conferring quasi corporate capacity upon an unincorporated body to take land for purposes of public worship cannot be so extended as to confer power to take personal property.⁸⁹

However, in other jurisdictions, while it is sometimes held that an unincorporated association cannot be a trustee of a charitable trust,⁹⁰ the courts, sometimes by virtue of statutory provisions, uphold charitable gifts directly to an unincorporated as-

sociation, society, or other voluntary body or organization,⁹¹ which exists solely for charitable purposes.⁹² Such gifts have been upheld either on the ground that the association has such an existence that it can be dealt with as trustee,⁹³ or that such a gift is one to the trustees of such an institution,⁹⁴ or on the ground that the trust will not be allowed to fail for want of a trustee, and that, if necessary, the court will appoint a trustee to administer the trust.⁹⁵

§ 35. — Effect of Subsequent Incorporation of Association

A charitable association which incorporates before the death of the testator or before the devise or legacy vests may take such gift although it could not take as an unincorporated association.

Upham's Will, 289 N.Y.S. 518, 160 Misc. 126—In re Bell's Will, 253 N.Y.S. 118, 141 Misc. 720—In re Dering's Estate, 252 N.Y.S. 193, 140 Misc. 357—In re Winburn's Will, 247 N.Y.S. 584, 139 Misc. 5—Fisher v. Lister, 223 N.Y.S. 321, 130 Misc. 1, modified on other grounds 226 N.Y.S. 484, 222 App. Div. 841—In re Trustees of Sustentation Fund of Reformed Episcopal Church, 163 N.Y.S. 1042, 98 Misc. 145.
11 C.J. p 337 note 25.

Subordinate branch of a corporation, where such branch is clothed by the legislature with power to hold property, has been held capable of holding and administering a trust for purposes germane to the object of its existence.—Heiskell v. Chicksaw Lodge, 11 S.W. 825, 87 Tenn. 668, 4 L.R.A. 699.

86. Ill.—McNamara v. McNamara, 127 N.E. 130, 293 Ill. 54.
Tenn.—Howell v. Stroud, 1 Tenn.App. 301.
11 C.J. p 337 note 26.

87. N.Y.—In re Owens, 33 N.Y.S. 422, 1131, 24 N.Y.Civ.Proc. 256.
Tenn.—Robertson v. Walker, 3 Baxt. 316.

88. U.S.—Philadelphia Baptist Assoc. v. Hart, Va., 4 Wheat. 1, 4 L. Ed. 499.
Conn.—Greene v. Dennis, 6 Conn. 293, 16 Am.D. 58.
N.Y.—King v. Woodhull, 3 Edw. 79.

89. Tenn.—Rhodes v. Rhodes, 13 S. W. 590, 88 Tenn. 637.

90. R.I.—Taylor v. Salvation Army, 142 A. 335, 49 R.I. 316—Tillinghast v. Council at Narragansett Pier, R. I., of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.
Va.—Fitzgerald v. Doggett's Ex'r, 155 S.E. 129, 134, 155 Va. 112. citing *Corpus Juris*.

91. Ala.—Tarver v. Weaver, 130 So. 209, 221 Ala. 663.
Cal.—In re McDole's Estate, 10 P.2d 75, 215 Cal. 328—In re Irwin's Estate, 237 P. 1074, 196 Cal. 366—In re Somerville's Estate, 55 P.2d 597, 12 Cal.App.2d 430.
Colo.—Jeffreys v. International Trust Co., 48 P.2d 1019, 97 Colo. 188.
Conn.—Brinsmade v. Beach, 119 A. 233, 98 Conn. 322—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.
Iowa.—Meeker v. Lawrence, 212 N. W. 688, 203 Iowa 409.
Kan.—Clark v. Watkins, 237 P. 244, 130 Kan. 549.
Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.
Mo.—Harger v. Barrett, 5 S.W.2d 1100, 319 Mo. 633—Society of Helpers of Holy Souls v. Law, 186 S. W. 718, 267 Mo. 667.
N.H.—Roberts v. Corson, 107 A. 625, 79 N.H. 215, 5 A.L.R. 1172.
N.J.—New Jersey Title Guarantee & Trust Co. v. American National Red Cross, 160 A. 842, 111 N.J.Eq. 12—New Jersey Title Guarantee & Trust Co. v. Smith, 108 A. 16, 90 N.J.Eq. 386.
Pa.—In re Levan's Estate, 171 A. 617, 314 Pa. 274—In re Shand's Estate, 118 A. 623, 275 Pa. 77.
S.C.—Snider v. Snider, 50 S.E. 504, 70 S.C. 555, 106 Am.S.R. 754.
Va.—Fitzgerald v. Doggett's Ex'r, 155 S.E. 129, 155 Va. 112.
Wyo.—In re Gilchrist's Estate, 58 P.2d 431, 50 Wyo. 153, rehearing denied 60 P.2d 364, 50 Wyo. 153.
11 C.J. p 338 note 30.

Permanent institution

Notwithstanding the Kansas Soldiers' Home is subject to be changed, and its scope and purpose enlarged, as the legislature may deem advisable, it is none the less a permanent institution, and capable of taking property by gift or devise.—Lehn-

herr v. Feldman, 202 P. 624, 110 Kan. 115.

Organization to be formed

Where organization of trustees administering charitable foundation into a permanent association was contemplated by testatrix, and authorized by her will, they did not take charitable bequest in their personal capacity, but in capacity of the association, which on death of testatrix became vested with corpus of the trust.—In re Irwin's Estate, 237 P. 1074, 196 Cal. 366.

92. Fla.—Montgomery v. Carlton, 126 So. 135, 99 Fla. 152.

93. Wyo.—In re Gilchrist's Estate, 58 P.2d 431, 50 Wyo. 153, rehearing denied 60 P.2d 364, 50 Wyo. 153.
11 C.J. p 338 note 31.

94. Cal.—In re McDole's Estate, 10 P.2d 75, 215 Cal. 328.

95. Colo.—Jeffreys v. International Trust Co., 48 P.2d 1019, 97 Colo. 188.

Conn.—Eccles v. Rhode Island Hospital Trust Co., 98 A. 129, 90 Conn. 592.

Del.—Hutton v. St. Paul Brotherhood of People's Church of Dover, 178 A. 584, 20 Del.Ch. 413.

Kan.—Barnhart v. Bowers, 57 P.2d 60, 143 Kan. 866.

Me.—Bates v. Schillinger, 145 A. 395, 128 Me. 14.

Mo.—Schneider v. Kloepple, 193 S.W. 834, 270 Mo. 389.

Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

R.I.—Taylor v. Salvation Army, 142 A. 335, 49 R.I. 316—Tillinghast v. Council at Narragansett Pier, R. I., of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.
Va.—Fitzgerald v. Doggett's Ex'r, 155 S.E. 129, 155 Va. 112.

Wyo.—In re Gilchrist's Estate, 58 P.2d 431, 50 Wyo. 153, rehearing denied 60 P.2d 364, 50 Wyo. 153.

11 C.J. p 338 note 32.

Where a charitable devise or bequest is void because made directly to an unincorporated association, as shown supra § 34, it is not made valid by the incorporation of such association after the death of the testator.⁹⁶ On the other hand, in a jurisdiction where a devise or bequest of a charitable nature to an unincorporated society is valid as shown supra § 34, the fact that the society thereafter becomes incorporated does not defeat its right to the devise or bequest.⁹⁷ Where an unincorporated association or society becomes incorporated before the death of the testator,⁹⁸ or after his death, but before the devise or legacy vests,⁹⁹ then it may take.

§ 36. — Trustees of or for Unincorporated Associations

A charitable gift to competent trustees for an unincorporated association is valid.

Regardless of whether in the particular jurisdiction an unincorporated body or association can itself act as trustee of a charitable trust, as discussed supra § 34, a charitable gift to competent trustees for such an unincorporated body or association is valid so far as any objection pertaining to trustees is concerned,¹ even though the trustees named are also the trustees or other officers of the society or association intended as beneficiaries.²

V. BENEFICIARIES

§ 37. Character and Capacity

- a. In general
- b. Unincorporated association

a. In General

A charitable trust must be for the benefit of the public or some portion of it. It may be limited to the members of a specified class, who may be limited in their abode to a certain locality or world-wide in extent. Ordinarily the beneficiary need not be in existence at the time of the donor's death, but a gift to a specific person or charitable organization and not to charity generally will fail where the beneficiary is nonexistent.

Although it is requisite to a public charity that it be for the benefit of the public or some portion thereof, as appears supra § 12, it is not necessary that a charity should be for the benefit of the entire public.³ Where the donor selects a class to be benefited, the gift is a valid charitable gift,⁴ pro-

vided the purpose is a charitable one, for a consideration of which see supra §§ 12-23, and the requirements as to certainty of designation of the class and of indefiniteness of the persons to be benefited, as set forth infra § 39, are complied with. The class to take as beneficiaries may be limited to one sex;⁵ to persons following a specified trade or occupation,⁶ or employed by a named corporation or governmental department;⁷ and in a number of jurisdictions to the members or dependents of members of some particular cult, sect, society, or religious or secular organization.⁸ However, it has been held that a bequest to an association whose benevolence is restricted to its members only is not a public charity; but if the recipient's benevolence extends to an indefinite number of nonmembers, it may be counted a public charity; and the mere fact that members of the association also may share in

96. N.C.—Gaston County United Dry Forces v. Wilkins, 191 S.E. 8, 211 N.C. 560.

11 C.J. p 338 note 35.

97. Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

11 C.J. p 338 note 37.

98. N.J.—American Bible Soc. v. American Tract Soc., 50 A. 67, 62 N.J.Eq. 219.

11 C.J. p 338 note 38.

99. N.Y.—In re Upham's Will, 289 N.Y.S. 518, 160 Misc. 126.

11 C.J. p 338 note 39.

1. Ill.—Illinois Classis of Reformed Church in the United States v. Holben, 122 N.E. 46, 286 Ill. 473. Minn.—In re Peterson's Estate, 277 N.W. 529.

N.Y.—In re Upham's Will, 289 N.Y.S. 518, 160 Misc. 126—In re Winburn's Will, 247 N.Y.S. 584, 139 Misc. 5.

Pa.—Civic Club v. Central Trust Co., 44 Pa.Co. 401.

11 C.J. p 338 note 41. See also infra § 37 b.

Corpus Juris is quoted in In re Gilchrist's Estate, Wyo., 58 P.2d 431, 434.

2. Cal.—In re Upham, 59 P. 315, 127 Cal. 90.

11 C.J. p 338 note 42.

3. Mich.—Scarney v. Clarke, 275 N. W. 765, 282 Mich. 56.

Pa.—Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa.Co. 241.

4. N.Y.—In re Skuse's Estate, 1 N. Y.S.2d 202, 165 Misc. 554.

11 C.J. p 338 note 44.

5. Ill.—People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago, 158 N.E. 213, 215, 326 Ill. 573, 54 A.L.R. 1376, citing *Corpus Juris*.

6. N.Y.—Trustees of Sailors' Snug Harbor in City of New York v. Carmody, 105 N.E. 543, 211 N.Y. 286—Manley v. Fiske, 124 N.Y.S. 149, 139 App.Div. 665, affirmed 95 N.E. 1133, 201 N.Y. 546.

7. U.S.—Harrison v. Barker Annuity Fund, C.C.A.Ill., 90 F.2d 286.

N.Y.—In re Skuse's Estate, 1 N.Y.S. 2d 202, 165 Misc. 554—In re Westinghouse's Estate, 281 N.Y.S. 603, 156 Misc. 320, affirmed 288 N.Y.S. 1084, 248 App.Div. 568, leave to appeal denied 272 N.Y. 678.

8. Ill.—People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago, 158 N.E. 213, 215, 326 Ill. 573, 54 A.L.R. 1376, citing *Corpus Juris*.

Mass.—Norris v. Loomis, 102 N.E. 419, 215 Mass. 344.

Corpus Juris is cited arguendo in:

Ill.—Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of State of Illinois v. Board of Review of Moultrie County, 117 N.E. 1016, 1017, 281 Ill. 480.

Neb.—Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Com'rs, 241 N.W. 93, 99, 122 Neb. 536, 81 A.L.R. 1166.

the general benevolence will not, ex necessitate, defeat the charity, so long as the gift is for the benefit of an "indefinite number of persons" in the legal sense of that term, that is to say, for the benefit of all persons belonging to the recognized charitable classes covered by the benevolence in question.⁹ Also, it has been held that a gift in trust for the members or dependents of members of a particular fraternal order is invalid on the ground that the classification made is arbitrary and artificial and for a class less than the whole number of the group for whom the state may or should provide,¹⁰ but a testamentary gift, made absolutely and not in trust, to a denominational hospital and the grand lodge of a fraternal order both being corporations, is valid.¹¹ A gift, the beneficiaries of which are to be selected from a very narrow class of mystics, has been held invalid.¹²

Ability of donee to take. Grants or donations for charitable uses are not rendered void or inoperative because of the inability of the beneficiary to take at the time of the grant.¹³

Existence of beneficiary. In most jurisdictions

the beneficiary need not be in existence at the time of the donor's death, provided there is a trustee appointed for the management and control of the trust property in the meantime, or with discretionary powers;¹⁴ and a gift for charitable uses may, under the direction of the instrument creating it, be administered and enforced by and through a corporation subsequently created for that purpose.¹⁵ In some states, however, the beneficiary of a charitable gift must be in existence at the time the gift takes effect, if at all;¹⁶ and, where a particular beneficiary is not in existence, other charitable institutions named in the same instrument do not take its share, where the instrument cannot be construed as placing them in a class.¹⁷ It has been stated that a purely charitable trust may be sustained where no beneficiaries are named.¹⁸ However, a charitable gift intended for a particular institution and not for charity generally lapses where the particular institution intended ceases to exist before the gift takes effect;¹⁹ and, if there is no such organization or person as the one referred to in a will, then a public charity intended by the testator will fail for want of any taker;²⁰ thus a bequest to a charitable

9. Pa.—In re Lawson's Estate, 107 A. 376, 264 Pa. 77.

10. Kan.—Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc., 71 P. 286, 66 Kan. 1.

Case criticized as contrary to the great weight of authority.—Norris v. Loomis, 102 N.E. 419, 215 Mass. 344.

11. Kan.—Bradley v. Hill, 42 P.2d 580, 141 Kan. 602.

12. Beneficiaries with occult knowledge

A trust, created by will directing trustee to pay income "to such highly evolved individuals, with much occult knowledge who are ceaselessly working for the advancement of the Race and the alleviation of the suffering of Humanity as to him . . . may seem worthy," was wholly void and unenforceable.—In re Carpenter's Estate, 297 N.Y.S. 649, 163 Misc. 474.

13. Me.—Shapleigh v. Pillsbury, 1 Me. 271.

11 C.J. p 308 note 23, p 312 note 71.

14. Tenn.—Johnson v. Johnson, 23 S.W. 114, 92 Tenn. 559, 36 Am.S.R. 104, 22 L.R.A. 179.

11 C.J. p 339 note 55.

15. N.Y.—In re Robinson's Will, 96 N.E. 925, 203 N.Y. 380, 37 L.R.A., N.S., 1023.

11 C.J. p 308 note 23—69 C.J. p 228 note 20.

16. Ill.—Volunteers of America v. Peirce, 108 N.E. 318, 267 Ill. 406, reversing 187 Ill.App. 428.

Will construed as requiring existing beneficiary

Will and deed establishing trust held to make gifts to members of class in existence at time fixed for distribution.—Rhode Island Hospital Trust Co. v. American Nat. Red Cross, 149 A. 581, 50 R.I. 461.

17. Ill.—Volunteers of America v. Peirce, 108 N.E. 218, 267 Ill. 406, reversing 187 Ill.App. 428.

Pa.—Geisenberger's Estate, 15 Pa. Dist. 593, 23 Lanc.L.Rev. 105.

18. Or.—In re Johnson's Estate, 196 P. 385, 100 Or. 142.

19. Del.—Murphy v. McBride, 130 A. 283, 14 Del.Ch. 457, affirming McBride v. Murphy, 124 A. 798, 14 Del.Ch. 242.

Period for settling and closing corporate affairs

Where testator made a charitable corporation residuary legatee, but such corporation terminated by expiration of its charter prior to testator's death, it was not entitled to take within the three years allowed by Gen.Corp.L. § 40, in which to wind up its affairs.—McBride v. Murphy, 124 A. 798, 14 Del.Ch. 242, affirmed Murphy v. McBride, 130 A. 283, 14 Del.Ch. 457.

Bequests held ineffective

Bequest to "Gewerbschule" of city of Speyer, Germany, which originally were schools to educate German youth to apply arts to manufacture and elevation of mechanical instruction, cannot be sustained, as no such institution existed, where course of

instruction was changed to that of "Realschule" which were designed to fit pupils with higher education for merchants, bankers, postal and railroad employment. Bequest to "Protestant Orphan Asylum" of city of Speyer, Germany, failed, where one of two asylums in such city was Catholic orphanage and the other was municipal orphanage in which Catholics, Protestants, and Jews were sheltered.—Raue v. City of Speyer, Germany, 129 A. 207, 97 N.J. Eq. 447.

20. Md.—Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States, v. Shoemaker, 105 A. 748, 133 Md. 594.

Mo.—Cummings v. Dent, 189 S.W. 1161.

To person or organization never in existence

(1) A bequest to the "Reverend John Durappe" is void where the evidence shows that no person named "John Durappe" ever existed and there is not sufficient proof of a misnomer of some actual person.—Chelsea Nat. Bank v. Our Lady Star of the Sea, Atlantic City, N.J., 147 A. 470, 105 N.J.Eq. 236.

(2) A bequest in a will to an institution, where the evidence does not disclose the existence of any institution by the name mentioned, or satisfactorily refer to any corporate or other organization for which the bequest was intended, was properly held void.—Board of Foreign Missions of the General Synod of the

corporation may lapse by termination of its existence before the death of the testator;²¹ but a gift to a charitable corporation, which, prior to the testator's death, consolidates with another charitable corporation, which consolidated corporation continues the general policy and methods of the corporation to which the legacy was bequeathed, is payable to the consolidated corporation;²² and a charitable corporation whose charter has been forfeited but is continued as a body corporate for a specified time for the purpose of prosecuting and defending actions is in existence, although dormant, and if its charter is revived during the time the corporation remains a body corporate it is entitled to funds left it by name.²³

Situs. The class to take as beneficiaries may be limited to persons living in a certain locality,²⁴ as a specified community,²⁵ city or town,²⁶ county,²⁷ state,²⁸ or foreign country.²⁹ However, the beneficiaries need not be confined to any particular locality;³⁰ they may be world-wide in scope,³¹ and a provision which comprehends a class without limitation as to its abode, where charity is the object, will be upheld in case there is a power resting in the trustee to select from the class named;³² nor

is it necessary that a geographical limitation of the locality from which the beneficiaries are to be drawn should be geometrically exact.³³

Municipal corporation as beneficiary. A devise or bequest made directly to or in trust for a municipal corporation is valid.³⁴

State as beneficiary. In some states, under the statutes and constitutional provisions in force therein, the state is not entitled to take as beneficiary under a will.³⁵

Trustee as beneficiary. The rule that a sole trustee under a private trust cannot at the same time be a beneficiary does not apply to charitable or public trusts where there are several trustees.³⁶

b. Unincorporated Association

Although an unincorporated association cannot take a legacy made to it outright, it may be the beneficiary of a charitable trust, except in jurisdictions where the beneficiaries must be definite and certain.

Although there is some authority to the effect that unincorporated societies or voluntary associations are capable of taking as beneficiaries,³⁷ in general it is held, in conformity with the rule as to unincorporated associations, considered in the C.J.S.

Evangelical Lutheran Church of the United States v. Shoemaker, 105 A. 748, 133 Md. 594.

21. N.Y.—Wright v Wright, 122 N. E. 243, 225 N.Y. 329, affirming 159 N.Y.S. 1150, 173 App.Div. 966, rehearing denied 123 N.E. 71, 226 N. Y. 578.

R.I.—Rhode Island Hospital Trust Co. v. Williams, 148 A. 189, 50 R. I. 385, 74 A.L.R. 664.

Library association

Where testator bequeathed money to be paid to library association after termination of life estate, enactment of L.1901 c 57, providing for consolidation of public libraries, being subsequent to testator's death, did not, on beneficiary availing itself thereof, work substitution of consolidated libraries association as beneficiary, where beneficiary had surrendered its charter on making transfer so that no legal consolidation resulted.—Wright v. Wright, 122 N.E. 213, 225 N.Y. 329, affirming 159 N.Y.S. 1150, 173 App.Div. 966, rehearing denied 123 N.E. 71, 226 N. Y. 578.

22. N.Y.—In re Doane's Estate, 208 N.Y.S. 320, 124 Misc. 663.

23. R.I.—Rhode Island Hospital Trust Co. v. American Nat. Red Cross, 149 A. 581, 50 R.I. 461.

24. N.Y.—Starr v. Selleck, 130 N. Y.S. 693, 145 App.Div. 869, affirmed 98 N.E. 1116, 205 N.Y. 545.

25. N.J.—Goodell v. Union Associa-

tion, etc., of Burlington Co., 29 N. J.Eq. 32.

26. Ill.—People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago, 158 N.E. 213, 215, 326 Ill. 573, 54 A.L.R. 1376, citing *Corpus Juris*.

Mass.—Saltonstall v. Sanders, 11 Allen 446.

N.J.—Hesketh v. Murphy, 36 N.J.Eq. 304.

N.Y.—In re Rasquin, 144 N.Y.S. 988, 159 App.Div. 845.

27. Ill.—People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago, 158 N.E. 213, 215, 326 Ill. 573, 54 A.L.R. 1376, citing *Corpus Juris*.

28. N.J.—Kitchen v. Pitney, 119 A. 675, 94 N.J.Eq. 485, 493, 494, 495.

29. N.J.—Bloomer v. Bloomer, 131 A. 388, 98 N.J.Eq. 576, affirmed 134 A. 915, 100 N.J.Eq. 361.

N.Y.—In re Miller, 133 N.Y.S. 828, 149 App.Div. 113.

Foreign charitable organization

In absence of statute in state of testator's domicile forbidding bequests to foreign charitable organizations, such foreign organization, which under law of its domicile is competent to take and use bequest for purposes intended by testator, can take bequest.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.

30. Iowa.—Martinson v. Jacobson, 205 N.W. 849, 200 Iowa 1054.

N.M.—Rhodes v. Yater, 202 P. 698, 27 N.M. 489, 22 A.L.R. 692.

Ohio.—Palmer v. Oiler, 131 N.E. 362, 102 Ohio St. 271.

World-wide

Charitable trust is not invalid because scope of benefaction is world-wide.—First Camden Nat. Bank & Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59.

Residence in state not essential

The beneficiaries need not necessarily or in terms be confined to residents of the state.—In re Robinson's Will, 96 N.E. 925, 203 N.Y. 380, 37 L.R.A., N.S., 1023.—In re Killen's Will, 209 N.Y.S. 206, 124 Misc. 720.

31. Kan.—Hollenbeck v. Lyon, 47 P. 2d 63, 142 Kan. 352, 99 A.L.R. 652.

32. Iowa.—Martinson v. Jacobson, 205 N.W. 849, 200 Iowa 1054, 11 C.J. p 339 note 52.

33. Kan.—Hollenbeck v. Lyon, 47 P.2d 63, 142 Kan. 352, 99 A.L.R. 652.

34. Or.—Brown v. Brown, 7 Or. 285. Pa.—Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa.Co. 241.

35. Mont.—In re Beck's Estate, 121 P. 784, 44 Mont. 561, rehearing denied 121 P. 1057, 44 Mont. 561.

36. Fla.—Montgomery v. Carlton, 126 So. 135, 99 Fla. 152.

37. Ill.—Spray v. Glendinning, 163 Ill.App. 431.

title Associations § 14 a, an unincorporated charitable association cannot take a legacy made to it outright,³⁸ although a legacy to an unincorporated branch of an incorporated society will go to the principal corporation;³⁹ but such an association may be the beneficiary of a charitable trust⁴⁰ where, as appears supra § 36, a competent person or corporation has been made trustee for it, regardless of whether or not in a particular jurisdiction an unincorporated association may take as trustee or directly as donee of a charitable trust or gift, considered supra § 34. However, if under the law of the jurisdiction the beneficiaries must be definite and certain, considered infra § 39, an unincorporated association cannot be a beneficiary of a charitable trust, on account of its uncertain and fluctuating membership,⁴¹ except in the case of a valid gift inter vivos to a competent person or corporation for the ultimate benefit of the unincorporated association.⁴²

§ 38. Number

In general the class selected as beneficiaries may be either large or small. It should, however, be composed of an indefinite number of persons, although the number of persons to be selected from such class may be certain.

One necessary element of a charitable trust is that it be for the benefit of an indefinite number of persons,⁴³ except, it has been held, that the gift may be for a specified number of a certain class, the members of which are indefinite and fluctuating, where it in no way designates or identifies definite individuals as the beneficiaries.⁴⁴ However, where the purpose is charitable, the gift may be to a definite group, the members of which may be definitely and finally ascertained, and whether the members of a class are so limited as to make it a private trust is a matter which must be decided by the courts on the particular facts of each case.⁴⁵ The class selected may be large or small;⁴⁶ in other words, it is no objection that the class will be few in number,⁴⁷ or that the number of possible bene-

38. N.Y.—*Mount v. Tuttle*, 76 N.E. 373, 183 N.Y. 358, 2 L.R.A.N.S., 428—*Murray v. Miller*, 70 N.E. 870, 178 N.Y. 316—*Kernochan v. Farmers' Loan & Trust Co.*, 175 N.Y.S. 831, 187 App.Div. 668, affirmed 126 N.E. 912, 227 N.Y. 658—In re *Cameron's Estate*, 184 N.Y.S. 540, 113 Misc. 416.

39. N.Y.—*Kernochan v. Farmers' Loan & Trust Co.*, 175 N.Y.S. 831, 187 App.Div. 668, affirmed 126 N.E. 912, 227 N.Y. 658—In re *Isbell's Estate*, 37 N.Y.S. 919, 1 App.Div. 158—*Matter of Wehrhane*, 40 Hun 542, affirmed 18 N.E. 482, 110 N.Y. 678—In re *Cameron's Estate*, 184 N.Y.S. 540, 113 Misc. 416.

69 C.J. p 228 note 21.

40. Cal.—In re *Somerville's Estate*, 55 P.2d 597, 12 Cal.App.2d 430. Conn.—*Brinsmade v. Beach*, 119 A. 233, 98 Conn. 322.

Fla.—*Montgomery v. Carlton*, 126 So. 135, 140, 99 Fla. 152, citing *Corpus Juris*.

Minn.—In re *Peterson's Estate*, 277 N.W. 529.

Wyo.—In re *Gilchrist's Estate*, 58 P. 2d 431, 434, quoting *Corpus Juris*. 11 C.J. p 339 note 60—69 C.J. p 228 note 17.

Character in which property held

If it takes a bequest for religious or charitable purposes, a society, whether or not incorporated, is but a trustee, and is bound to apply its funds in furtherance of the charity and not otherwise.—In re *Lawson's Estate*, 107 A. 376, 264 Pa. 77.

Trust good although void at law

A devise to an unincorporated association is void at law, but such a devise is not permitted to fail if it

be for a charitable or religious purpose.—*Civic Club of Harrisburg v. Central Trust Co. of New York*, 44 Pa.Co. 401.

Religious society

(1) Donations and grants may be legally made to trustees for the use and benefit of an unincorporated religious society.—*Baxter v. McDonnell*, 49 N.E. 667, 155 N.Y. 83, 40 L.R.A. 670—*Van De Bogert v. Reformed Dutch Church of Poughkeepsie*, 220 N.Y.S. 50, 128 Misc. 603, affirmed 220 N.Y.S. 58, 219 App.Div. 220.

(2) A deed or devise for a charitable use to church officers, conferences, and associations, whether incorporated or unincorporated, which exist solely for charitable purposes, is valid.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152.

41. U.S.—*Kain v. Gibboney, Va.*, 101 U.S. 362, 25 L.Ed. 813. 11 C.J. p 340 note 63.

42. Md.—*Baltimore M. E. Church Annual Conference v. Methodist Episcopal Church Rooms Fund*, 83 A. 50, 117 Md. 86—*Snowden v. Crown Cork, etc., Co.*, 80 A. 510, 114 Md. 650, Ann.Cas.1912A 679.

43. U.S.—*Russell v. Allen, Mo.*, 2 S.Ct. 327, 107 U.S. 163, 27 L.Ed. 397.

Ala.—*Johns v. Birmingham Trust & Savings Co.*, 88 So. 835, 205 Ala. 535.

Cal.—In re *Dol's Estate*, 187 P. 428, 431, 182 Cal. 159; citing *Corpus Juris*—In re *Bailey's Estate*, App., 65 P.2d 102—*Baker v. Board of Trustees of Leland Stanford Junior University*, 23 P.2d 1071, 133 Cal.App. 243—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

Mass.—*Bullock v. Long*, 156 N.E. 743, 260 Mass. 129.

11 C.J. p 341 note 67.

It must be for all persons falling within a described class, indefinite in number.—In re *Sutro's Estate*, 102 P. 920, 155 Cal. 727.

To unascertained individual

Will providing that at life tenant's death remainder should be made into fund, interest of which was to be used to defray expenses of educating "some" boy or girl in music or art, recipient to be appointed by named individual, held to intend fund to be used to help defray the expense of educating some individual to be selected and not to create a "charitable trust."—In re *Huebner's Estate*, 15 P.2d 758, 127 Cal.App. 244.

44. Mass.—*Sherman v. Shaw*, 137 N. E. 374, 243 Mass. 257.

To ten poor boys

Bequest of one thousand dollars to executor, to be applied in shares of one hundred dollars each at his discretion for benefit of ten poor boys, to be selected by him, was a valid charity since it authorized selection of poor boys from all such in existence, and in no way designated or identified them, it was valid charity.—*Sherman v. Shaw*, supra.

45. U.S.—*Harrison v. Barker Annuity Fund, C.C.A.III.*, 90 F.2d 286.

46. N.H.—*Roberts v. Corson*, 107 A. 625, 79 N.H. 215, 5 A.L.R. 1172. 11 C.J. p 339 note 48.

47. N.J.—*Kitchen v. Pitney*, 119 A. 675, 94 N.J.Eq. 485, 493, 494, 495. 11 C.J. p 339 note 49.

Class held not too narrow

A charitable trust for the found-

ficiaries is large, provided a power of selection is lodged with the trustee.⁴⁸ Where the benefit intended is one in which all mankind may share, it is not necessary that some smaller class of humanity be selected;⁴⁹ but the courts will not sustain a testamentary trust, created for the benefit of so many beneficiaries that its administration would be practically impossible, or, if possible, barren of benefit to any one because of the insufficiency of the trust fund.⁵⁰

§ 39. Definiteness and Certainty in General

In general, Indefiniteness of the individuals to be

benefited is an essential requisite of a charitable gift; but the class from which they are to be selected should be designated with reasonable certainty, although in some jurisdictions it is sufficient if provision is made for making the beneficiaries certain by the instrument creating the charity conferring on trustees the power of selection or appointment of the class to be benefited.

Indefiniteness of the ultimate beneficiaries is one of the characteristics of a public charity or charitable use;⁵¹ accordingly, uncertainty and indefiniteness as to the ultimate individual recipients are not by any means fatal to the validity of a charitable gift which in other respects is sufficient.⁵² Indeed uncertainty and indefiniteness as to the individu-

ing of a home for white widowers and bachelors who have resided within the state for more than ten years, are over sixty years of age, and have lost their means of support in whole or in part through misfortune, is not confined to too narrow a class to be valid as a public charity.—*Kitchen v. Pitney*, supra.

48. Conn.—*Woodruff v. Marsh*, 26 A. 846, 63 Conn. 125, 38 Am.S.R. 346.

49. N.H.—*Glover v. Baker*, 83 A. 916, 76 N.H. 393.

50. Ala.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

51. U.S.—*Chicago Bank of Commerce v. McPherson*, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F. Supp. 110, certiorari denied 53 S. Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.—*Gossett v. Swinney*, C.C.A.Mo., 53 F.2d 772, affirming, D.C., *Irwin v. Swinney*, 44 F.2d 172, and certiorari denied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.—*Bauer v. Myers*, C.C.A.Kan., 244 F. 902.

Ala.—*Alstork v. Curry*, 91 So. 796, 798, 207 Ala. 135, citing *Corpus Juris*.

Del.—*Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington*, Del., 147 A. 165, 16 Del.Ch. 410.

Iowa.—*Martinson v. Jacobson*, 205 N.W. 849, 200 Iowa 1054.

Ky.—*Goode's Adm'r v. Goode*, 38 S. W.2d 691, 238 Ky. 620.

Mass.—*Newton Centre Woman's Club v. City of Newton*, 154 N.E. 846, 258 Mass. 326.

Minn.—*Lundquist v. First Evangelical Lutheran Church*, 259 N.W. 9, 193 Minn. 474.

Miss.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

N.C.—*Whitsett v. Clapp*, 158 S.E. 183, 200 N.C. 647.

Ohio.—*Linney v. Cleveland Trust Co.*, 165 N.E. 101, 30 Ohio App. 345.

Pa.—*In re Padelford's Estate*, 9 Pa. Dist. 174.

Wash.—*In re Peterson's Estate*, 252 P. 139, 141 Wash. 619.
11 C.J. p 340 note 65.

Distinguishing characteristic

(1) A distinguishing characteristic of a charitable trust is that the prospective beneficiary is undetermined and unknown.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

(2) Indefiniteness of beneficiaries is the essential characteristic in distinguishing a public trust from a private one.—*Long v. Union Trust Co.*, D.C.Ind., 272 F. 699, affirmed, C. C.A., 280 F. 686.

Best test

The best test of a public charitable trust is the indefiniteness of the ultimate beneficiaries, for, if they are confined too particularly, the trust becomes a private one.—*Kentucky Christian Missionary Soc. v. Moren*, 102 S.W.2d 335, 267 Ky. 358.

Changing beneficiaries

Gift for a definite class of beneficiaries, the membership of which is changing from time to time, is a characteristic of gifts for charitable uses.—*Tillinghast v. Council at Narragansett Pier, R.I.*, of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.

Beneficiaries held uncertain and indefinite

Under a devise of realty to foreign corporation for use and benefit of "Woman's Board of Home Missions of the Presbyterian Church in the United States of America," the beneficiaries were uncertain and indefinite until selected or appointed as particular beneficiaries.—*Gould v. Board of Home Missions of Presbyterian Church in the United States of America*, 167 N.W. 776, 102 Neb. 526.

52. U.S.—*U. S. v. First Nat. Bank*, C.C.A.Ala., 74 F.2d 360.

Ala.—*Johns v. Birmingham Trust & Savings Co.*, 88 So. 835, 205 Ala. 535.

Cal.—*Collier v. Lindley*, 266 P. 526, 203 Cal. 641.—*In re Dol's Estate*, 187 P. 428, 431, 182 Cal. 159, citing *Corpus Juris*—*In re Bartlett's Estate*, 10 P.2d 126, 122 Cal.App. 375

—*In re Vance's Estate*, 4 P.2d 977, 118 Cal.App. 163.

Colo.—*Jeffreys v. International Trust Co.*, 48 P.2d 1019, 97 Colo. 188.

Conn.—*Cheshire Bank & Trust Co. v. Doolittle*, 155 A. 82, 113 Conn. 231.

Fla.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152, citing *Corpus Juris*.

Ill.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479.

Ind.—*Richmond v. State*, 5 Ind. 334.

Kan.—*Hollenbeck v. Lyon*, 47 P.2d 63, 65, 142 Kan. 352, 99 A.L.R. 652, quoting *Corpus Juris*.

Mo.—*Hadley v. Forsee*, 101 S.W. 59, 203 Mo. 418, 14 L.R.A.N.S., 49.

N.H.—*Clark v. Campbell*, 133 A. 166, 82 N.H. 281, 45 A.L.R. 1433.

N.M.—*Rhodes v. Yater*, 202 P. 698, 27 N.M. 489, 22 A.L.R. 692.

N.Y.—*In re Davidge's Will*, 193 N. Y.S. 245, 200 App.Div. 437.—*In re Tiffany's Estate*, 285 N.Y.S. 971,

157 Misc. 873.—*In re Olmstead's Will*, 226 N.Y.S. 637, 131 Misc. 238

—*Van De Bogert v. Reformed Dutch Church of Poughkeepsie*, 220 N.Y.S. 50, 128 Misc. 603, affirmed

220 N.Y.S. 58, 219 App.Div. 220.—*In re Frasch's Estate*, 211 N.Y.S. 635, 125 Misc. 331, affirmed 215 N. Y.S. 848, 216 App.Div. 797, which is

affirmed 156 N.E. 656, 245 N.Y. 174.

Or.—*Endicott v. Bratzel*, 27 P.2d 883, 145 Or. 654.—*In re Johnson's Estate*, 196 P. 385, 100 Or. 142.

Pa.—*In re Klein's Estate*, 26 Pa.Dist. 476.

Tex.—*City of Haskell v. Ferguson*, Civ.App., 66 S.W.2d 491.

Wash.—*In re Stewart's Estate*, 66 P. 148, 67 P. 723, 26 Wash. 32.

11 C.J. p 340 note 66.

Rule requiring definiteness inapplicable

Rule declaring bequest to an indefinite person invalid applies to private but not to public trusts and charities.—*Clark v. Campbell*, 133 A. 166, 82 N.H. 281, 45 A.L.R. 1433.

Where class designated or power given to ascertain it

Charitable devise will not be set aside for indefiniteness as to individual beneficiaries if the class to be

als⁵³ and, in certain jurisdictions, as appears supra § 38, of the numbers, to be benefited, are necessary and essential elements of a valid charitable trust. In other words, a public charity begins when uncertainty of the recipient begins;⁵⁴ and, when an instrument creating a trust names the individual recipients or defines or designates them with certainty, the trust is a private, and not a public, one.⁵⁵

The above rules, however, refer to the uncertainty and indefiniteness of the individuals to be benefited, and not to the certainty of a class of individuals from whom the beneficiaries shall come.⁵⁶ There must be something definite in the indefiniteness.⁵⁷ The instrument creating the charitable gift must sufficiently define the beneficiaries so that the trust can be enforced by the courts.⁵⁸ The class of

benefited is designated with any reasonable degree of clearness, or if power be given to a trustee or other person to designate members of such class.—*Beidler v. Dehner*, 161 N.W. 32, 178 Iowa 1338.

Unnecessary to name particular beneficiary

In the creation of a charitable trust it is not necessary nor usually possible that the particular beneficiary be named.—*In re Graham's Estate*, 218 P. 84, 63 Cal.App. 41.

Membership of church

Gift to membership of church does not cause indefiniteness so as to render the gift void.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152.

Change of rule by statute

(1) In a few jurisdictions the contrary rule, which formerly obtained, has been changed by statutes which declare that no gift or bequest for charitable purposes or uses shall be invalid on account of indefiniteness of beneficiaries.—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873.—*Hornbeck v. Westbrook*, 9 Johns. N.Y., 73—11 C.J. p 340 note 66 [a].

(2) Under the law as it formerly existed, a bequest in a will of testator, dying before enactment of L. 1893 c 701, of remainder of personality to "Wildenthierrbach, Oberant Gerabron, Koenigrich Wyrtemberg, the interest arising from the same to be used for the benefit of the poor of said place," was held invalid for indefiniteness or uncertainty as to the beneficiaries.—*In re Crum*, 164 N.Y.S. 149, 98 Misc. 160.

In Minnesota

(1) Prior to the enactment in 1927 of a statute providing that no trust for any charitable, benevolent, educational, religious or other public use or trust "shall be invalid because of indefiniteness or uncertainty of the object of such trust or of the beneficiaries thereof designated in the instrument creating the same," it was held that a gift to an individual in trust for charitable purposes must designate the beneficiaries at least in such a way that they are capable of being rendered certain.—*Lane v. Eaton*, 71 N.W. 1031, 69 Minn. 141, 65 Am.S.R. 559, 38 L.R.A. 669—11 C.J. p 341 note 77.

(2) However, a gift to a corporation with directions as to use was valid, not as a trust, but as a gift

on condition, although the ultimate beneficiaries of the gift are more or less uncertain.—*Minneapolis Young Men's Christian Assoc. v. Horn*, 139 N.W. 805, 120 Minn. 404.—*Watkins v. Bigelow*, 100 N.W. 1104, 93 Minn. 210.

(3) Since the enactment of the above quoted statute, indefiniteness of beneficiaries is not a ground of invalidation of a charitable trust.—*Lundquist v. First Evangelical Lutheran Church*, 259 N.W. 9, 193 Minn. 474.

53. U.S.—*Bauer v. Myers*, C.C.A. Kan., 244 F. 902.

Ala.—*Alstork v. Curry*, 91 So. 796, 207 Ala. 135.

Cal.—*In re Dol's Estate*, 187 P. 428, 182 Cal. 159.—*Pratt v. Security Trust & Savings Bank*, 59 P.2d 862, 15 Cal.App.2d 630.—*In re Bartlett's Estate*, 10 P.2d 126, 122 Cal.App. 375.

D.C.—*Washington Loan & Trust Co. v. Hammond*, 278 F. 569, 51 App.D. C. 260.

Ill.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479.—*Dickenson v. City of Anna*, 141 N.E. 754, 310 Ill. 222.

Kan.—*Hollenbeck v. Lyon*, 47 P.2d 63, 65, 142 Kan. 352, 99 A.L.R. 652, quoting *Corpus Juris*.

Ky.—*Kentucky Christian Missionary Soc. v. Moren*, 102 S.W.2d 335, 267 Ky. 353.—*Obrecht v. Pujos*, 268 S. W. 564, 206 Ky. 751.

Mo.—*Buckley v. Monck*, 187 S.W. 31. N.C.—*Whitsett v. Clapp*, 158 S.E. 183, 200 N.C. 647.

Or.—*Endicott v. Bratzel*, 27 P.2d 883, 145 Or. 654.

Pa.—*In re Padelford's Estate*, 9 Pa. Dist. 174.

Wash.—*In re Stewart's Estate*, 66 P. 148, 67 P. 723, 26 Wash. 32.

W.Va.—*Mercantile Banking & Trust Co. v. Showacre*, 135 S.E. 9, 102 W. Va. 260, 48 A.L.R. 1138.—*Hays v. Harris*, 80 S.E. 827, 73 W.Va. 17. 11 C.J. p 341 note 67.

"To constitute a public charity the benefit must not be conferred upon certain and defined individuals, but must be conferred on indefinite persons composing the public or some part of the public."—*People v. Alpha Pi of Phi Kappa Sigma Educational Ass'n of University of Chicago*, 158 N.E. 213, 215, 326 Ill. 573, 54 A.L.R. 1376.

Difficulty of ascertainment immaterial

That difficulty may attend ascertainment of some of beneficiaries after death of person creating trust does not affect charitable trust, if effectively created by trust deed.—*Henderson v. Henderson*, 97 So. 353, 210 Ala. 73.

Particular person

(1) The bequest must not be for any particular person or persons.—*In re Sutro's Estate*, 102 P. 920, 155 Cal. 727.

(2) It is not necessary nor usually possible that the particular beneficiary be named.—*In re Graham's Estate*, 218 P. 84, 63 Cal.App. 41.

Will held not void for indefiniteness

(1) Will giving property to trustees and their heirs and assigns, "but in trust and in full confidence that such real estate will by them be so administered as to carry out my wishes concerning the same so far as made known to them in my said will," held to disclose an intention that the lands of the testator should be held by the trustees for public charitable uses, and be administered in furtherance and support of the specific charitable trusts created by the will or for other similar charitable purposes and not void for indefiniteness.—*Howard v. Howard*, 116 N.E. 937, 227 Mass. 395.

(2) A devise to a trustee in trust for the charitable uses of a stated foundation is sufficiently definite.—*Linney v. Cleveland Trust Co.*, 165 N.E. 101, 30 Ohio App. 345.

54. Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.—*Tarver v. Weaver*, 130 So. 209, 221 Ala. 663. Wash.—*In re Peterson's Estate*, 252 P. 139, 141 Wash. 619.—*In re Stewart's Estate*, 66 P. 148, 67 P. 723, 26 Wash. 32.

11 C.J. p 341 note 68.

55. Mo.—*Buckley v. Monck*, 187 S. W. 31.

11 C.J. p 341 note 69.

56. Tex.—*Paschal v. Acklin*, 27 Tex. 173.

57. Miss.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

58. N.Y.—*In re Robinson's Will*, 96 N.E. 925, 203 N.Y. 380, 37 L.R.A., N.S., 1023.

persons to be benefited must be definite.⁵⁹ In some states the class from which the persons to be benefited are to be selected must be designated with reasonable certainty,⁶⁰ and, where the class is selected with the particular objects of the donor's benefaction to be determined by the trustee appointed to administer it, a valid charitable trust is created,⁶¹ but as appears *infra* § 40, where the donor makes no selection, even of a class, and leaves to another the choice of classes as well as individuals the trust is invalid. In other states it is necessary and sufficient that the instrument creating the charity point out the class or body of persons to be benefited with reasonable certainty, or else confer the power of selection or appointment on the trustees, and thus provide a means for making the beneficiaries certain;⁶² or, at least, there must be some trustee or executor to whom the fund is given for the charity, with discretion, to complete the general scheme, and with authority to put into execution,⁶³ or if the class be indefinite, and the power of selection be

wanting, the plan or scheme or purpose must be so definite as to admit of no conjecture by those appointed to carry it into execution.⁶⁴ In still other states the beneficiaries must be indefinite, but capable of being ascertained, that is, at a given moment, all the beneficiaries who may in the future become such cannot and ought not to be ascertainable, but the beneficiaries who are such must be ascertainable.⁶⁵ In still other states there must not only be certainty as to the class of persons to be benefited but also an ascertained mode of selecting them out of such class,⁶⁶ but, as appears *infra* § 40, this latter requirement is fulfilled by conferring a power of selection on the trustees or other persons. The beneficiaries of a charitable trust should be of a class described in general language;⁶⁷ and where by will property is directed and devised for a particular charitable purpose as distinguished from charity generally, with a class within which a trustee can select the beneficiaries, it is not so indefinite as to be unenforceable.⁶⁸ A charitable bequest

59. W.Va.—*Mercantile Banking & Trust Co. v. Showacre*, 135 S.E. 9, 102 W.Va. 260, 48 A.L.R. 1138—*Hays v. Harris*, 80 S.E. 827, 73 W. Va. 17.

60. Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614—*Owens v. Owens' Ex'r*, 32 S.W.2d 731, 236 Ky. 118—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562—*Simmon's Ex'r v. Hunt*, 188 S.W. 495, 171 Ky. 397—*Gerick v. Gerick*, 165 S.W. 695, 158 Ky. 478.

Gift void

A gift to charity, designating no beneficiary or charitable purpose, held void under Ky.St. § 317 for uncertainty.—*Simmon's Ex'r v. Hunt*, 188 S.W. 495, 171 Ky. 397.

Court cannot enforce

A court could not enforce an agreement as a charitable trust, no cestui que being designated.—*Simmon's Ex'r v. Hunt*, *supra*.

Trustee cannot enforce

Where a court could not, because of uncertainty, enforce an agreement as a charitable trust, one designated as trustee could not.—*Simmon's Ex'r v. Hunt*, *supra*.

61. Ky.—*Kentucky Christian Missionary Soc. v. Moren*, 102 S.W.2d 335, 267 Ky. 358—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562.

62. Ala.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669—*Johns v. Birmingham Trust & Savings Co.*, 88 So. 835, 205 Ala. 535.

Ga.—*Bramblett v. Trust Co. of Georgia*, 185 S.E. 72, 182 Ga. 87.

Mo.—*Hadley v. Forsee*, 101 S.W. 59, 203 Mo. 418, 14 L.R.A.N.S., 49.

Wis.—*Tharp v. Smith*, 195 N.W. 331, 182 Wis. 107.
11 C.J. p 341 note 72.

Reasonable certainty as to class sufficient

In a will creating a charitable trust, a description of the persons to be benefited thereby is sufficient if from it the testator's intent can be ascertained, so that his trustees may execute the trust according to such intent with reasonable certainty.—*Kitchen v. Pitney*, 119 A. 675, 94 N. J.Eq. 483, 493, 494, 495.

Sufficient to bind trustee's conscience

Generally, general purpose of testator's gift must be sufficiently indicated to bind trustees' conscience.—*Cheshire Bank & Trust Co. v. Doolittle*, 155 A. 82, 113 Conn. 231.

Class held sufficiently designated

Devise to trustees for furtherance of "charitable, benevolent, hospital, infirmary, public, educational, scientific, literary, library, or research purpose in Kansas City," held not void for indefiniteness or failure to designate classes of beneficiaries.—*Gossett v. Swinney*, C.C.A.Mo., 53 F. 2d 772, affirming, D.C., *Irwin v. Swinney*, 44 F.2d 172, and certiorari denied *Gossett v. Swinney*, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Gift held too indefinite

Residuary devise to trustees of "Home" for "Gentlewomen" was not sustainable as "charitable devise," but was void for indefiniteness, creating intestacy as to residuum.—*Bramblett v. Trust Co. of Georgia*, 185 S.E. 72, 182 Ga. 87.

63. Miss.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

64. Miss.—*National Bank of Greece v. Savarika*, *supra*.

65. Me.—*Bates v. Schillinger*, 145 A. 395, 128 Me. 14.

66. Conn.—*Strong's App.*, 37 A. 395, 68 Conn. 527—*Woodruff v. Marsh*, 26 A. 846, 63 Conn. 125, 38 Am.S.R. 346.

11 C.J. p 341 note 73.

Organizations "exempt" from taxation

An otherwise valid charitable trust was not defeated because provisions in will creating the trust directed that distribution be made to organizations which were "exempt" from state and federal inheritance taxes, and that payment of federal taxes would be made out of the residuary estate from which the trust was created, where testatrix' intent was to describe as recipients, organizations, gifts to which, under the federal law, would be deducted in determining the net estate upon the basis of which the tax would be payable, and to include as beneficiaries only those exclusively devoted to charitable uses.—*Mitchell v. Reeves*, 196 A. 785, 128 Conn. 549.

67. Ky.—*Kentucky Christian Missionary Soc. v. Moren*, 102 S.W.2d 335, 267 Ky. 358.

General description sufficient

Bequest which describes in general terms the class of beneficiaries is sufficient.

Ky.—*Obrecht v. Pujos*, 268 S.W. 564, 206 Ky. 751.

Wash.—*In re Peterson's Estate*, 252 P. 139, 141 Wash. 619.

68. Wis.—*In re Keenan's Will*, 176 N.W. 857, 171 Wis. 94.

will be upheld if the bounty can be applied to any single object within the specified class.⁶⁹

Gift to corporation. A gift to a charitable corporation for the general purposes of its incorporation is not invalid because of indefiniteness.⁷⁰

In Maryland. Prior to the enactment of the Act of 1931, which provides that as to all trusts thereafter created for charitable purposes it shall be no objection to the validity of such trusts that the beneficiaries of such trust constitute an indefinite class, it was held that indefiniteness as to the beneficiaries was fatal;⁷¹ but a gift to a corporation for charitable uses within the scope of its charter was valid, unless the intention to create a trust was clear;⁷² and under the express provisions of a statute a devise or bequest for charitable uses was relieved of uncertainty when the will contained directions for the formation of a corporation to take the devise or bequest, and such corporation was formed within a specified period of time after probate of the will.⁷³ Since then, however, a gift to an indefinite class will be upheld as a gift to charity if the object of the gift is for a purpose commonly understood as charitable and the recipients are such persons as the charities, within the range of their activities, may be financially able to admit, under

such rules and regulations as may effectuate the purposes of the gift.⁷⁴

In Virginia, where the doctrine of charitable uses does not obtain in its fullest extent, as appears supra § 6, uncertainty in the beneficiaries of a charitable devise or bequest is fatal,⁷⁵ if the named trustee is an individual or an unincorporated body, unless expressly validated by statute.⁷⁶

§ 40. Selection by Trustees or Other Designated Persons

Gifts are not void for uncertainty as to beneficiaries where the trustee or some other person is empowered to select the beneficiaries, and ordinarily, in such case, it is sufficient if the gift is to charities generally.

The fact that the beneficiaries of a charitable trust are indefinite and uncertain, as is shown supra § 39, necessarily calls for the vesting of the power of selection in some person or in some body.⁷⁷ So it is a general rule that a gift for a charitable use, which is sufficiently definite and certain as to purpose, for a consideration of which see supra §§ 20-21, is not void for uncertainty as to beneficiaries, where power to select the individual beneficiaries is given expressly or impliedly to the trustees or to other persons or corporations;⁷⁸ and if the objects of the charitable trust are not suffi-

69. Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

70. W.Va.—*Osenton v. Elliott*, 81 S. E. 837, 73 W.Va. 519.

Gift to pay income to religious corporation

Gift of stock to charitable corporation on trust to pay income to religious corporation for certain charity held not void as perpetuity or because of uncertainty of beneficiary.—*Wells v. Commissioner of Internal Revenue*, C.C.A., 63 F.2d 425, certiorari granted *Burnet v. Wells*, 53 S. Ct. 528, 289 U.S. 716, 77 L.Ed. 1469, reversed on other grounds 53 S.Ct. 761, 289 U.S. 670, 77 L.Ed. 1439.

71. Md.—*Prettyman v. Baker*, 46 A. 1020, 91 Md. 539.

11 C.J. p 341 note 79, p 345 note 27.

Interposition of trustees ineffective

The interposition of trustees did not make a bequest good, which as an immediate and direct bequest would be void for uncertainty.—*Dashiell v. Attorney General*, 6 Harr. & J., Md., 1—*Dashiell v. Attorney General*, 5 Harr. & J., Md., 392, 9 Am. Dec. 572.

72. U.S.—*Art Students' League of New York v. Hinkley*, D.C.Md., 31 F.2d 469, affirmed, C.C.A., *Hinkley v. Art Students' League of New York*, 37 F.2d 225, certiorari denied 50 S.Ct. 247, 281 U.S. 733, 74 L.Ed. 1149.

Confusion of names not shown

Bequest to "Order of the Holy Cross" held not void for uncertainty because of existence of local non-functioning branch corporation having similar name.—*Waters v. Waters*, 142 A. 297, 155 Md. 146.

Limitation to purposes of corporation as evidence trust not created

The appointment of a corporation to hold property in trust for limited purposes comprehended by its charter is a very potent circumstance tending to show that no trust, as that term is construed under the Maryland law, has been created.—*Art Students' League of New York v. Hinkley*, D.C.Md., 31 F.2d 469, affirmed, C.C.A., *Hinkley v. Art Students' League of New York*, 37 F.2d 225, certiorari denied 50 S.Ct. 247, 281 U.S. 733, 74 L.Ed. 1149.

73. Md.—*Novak v. Baltimore City Orphans' Home*, 90 A. 997, 123 Md. 161, Ann.Cas.1915C 1067—*Chase v. Stockett*, 19 A. 761, 72 Md. 235.

74. Md.—*Second Nat. Bank v. Second Nat. Bank*, 190 A. 215.

75. Va.—*Jordan v. Universalist Gen. Convention Trustees*, 57 S.E. 652, 107 Va. 79.

11 C.J. p 341 note 76.

76. Va.—*Moore v. Perkins*, 192 S.E. 806.

77. Cal.—*In re Bartlett's Estate*, 10 P.2d 126, 122 Cal.App. 375.

Even where there is a definite class of indefinite members, the power to select such members must be vested somewhere.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

78. U.S.—*U. S. v. First Nat. Bank, C.C.A.Ala.*, 74 F.2d 360—*Chicago Bank of Commerce v. McPherson*, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F.Supp. 110, certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

Ala.—*Tarver v. Weaver*, 130 So. 209, 221 Ala. 663, citing *Corpus Juris*.

Cal.—*In re Peabody's Estate*, App., 70 P.2d 249.

Conn.—*Mitchell v. Reeves*, 196 A. 785, 123 Conn. 549.

Ind.—*Ex p. Lindley*, 32 Ind. 367.

Iowa.—*Martinson v. Jacobson*, 205 N. W. 849, 200 Iowa 1054.

Ky.—*Goode's Adm'r v. Goode*, 38 S. W.2d 691, 238 Ky. 620—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562.

Md.—*Rabinowitz v. Wollman*, 197 A. 566, citing *Corpus Juris*.

Mo.—*Buckley v. Monck*, 187 S.W. 31. N.H.—*Clark v. Cummings*, 137 A. 660, 83 N.H. 27.

N.J.—*Bloomer v. Bloomer*, 131 A. 388, 98 N.J.Eq. 576, affirmed 134 A. 915, 100 N.J.Eq. 361—*Kitchen v. Pitney*, 119 A. 675, 94 N.J.Eq.

ciently defined in the instrument making the gift, the fault, if any, is cured by the appointment of trustees with powers to select the objects within the classes named,⁷⁹ but the failure in the instrument to indicate some person to make selection of the unnamed class of beneficiaries has been held to invalidate the gift.⁸⁰ However, where the power to

select an organization as beneficiary is not limited to a charitable organization, but, under the power conferred, the trustee can select either a charitable institution or one organized for profit or not devoted exclusively to charitable purposes, the gift is invalid;⁸¹ and a bequest attempting to appoint certain individuals to divide anything not bequeath-

483, 493, 494, 495—King v. Rockwell, 115 A. 40, 93 N.J.Eq. 46.
N.M.—Rhodes v. Yater, 202 P. 698, 27 N.M. 489, 22 A.L.R. 692.

N.Y.—In re Groot's Estate, 159 N.Y.S. 1003, 173 App.Div. 436.—In re Olmstead's Will, 226 N.Y.S. 637, 131 Misc. 238.—In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, which is affirmed 156 N.E. 656, 245 N.Y. 174.—In re Killen's Will, 209 N.Y.S. 206, 124 Misc. 720.
Ohio.—Becker v. Fisher, 147 N.E. 744, 112 Ohio St. 284.

Wash.—In re Hunter's Estate, 265 P. 466, 147 Wash. 216.

Wis.—In re Monaghan's Will, 226 N.W. 306, 199 Wis. 273.

11 C.J. p 342 note 83.

Power to make selection shown

(1) Bequest to Denver Foundation for benefit of needy Denver people held not invalid on ground that particular beneficiaries were not specified, where executor was one of members of Foundation, since testatrix indicated desire that fund should be administered in accordance with Denver Foundation's plan, and distribution committee under such plan had authority to select individuals to receive benefit of bequest.—Jeffreys v. International Trust Co., 48 P.2d 1019, 97 Colo. 188.

(2) Where a will created a trust fund in executors on specified terms, and provided that from the residue of such fund, after payment of special bequests, there should be made annually liberal donations for charitable purposes, especially to a named orphans' home, and assistance to homes for fallen women, the executors were authorized to make donations to other charitable institutions which in their judgment were deemed subjects of charity, as well as to the more specifically mentioned homes.—Hodgson v. Hodgson, 102 S.E. 525, 150 Ga. 51.

Right to challenge selection

Where, at the close of the World War, the executive committee of the War Chest fund of the county appropriated the balance in hand to the local chapter of the American National Red Cross to be used for the benefit of ex-service men and their families a charitable trust was created in the hands of the donee, and an incorporated company of ex-service men from the county is not en-

titled to have the gift set aside and transferred to it.—American Nat. Red Cross v. Feltner Post, 159 N.E. 771, 86 Ind.App. 709.

Trusts held valid

(1) A bequest of the residue of an estate to such religious, charitable, scientific, literary, or educational Hebrew associations as might be selected by the executors was not invalid as indefinite.—Rabinowitz v. Wollman, Md., 197 A. 566.

(2) Gift of money to Red Cross for relief of ex-service men and their families held to create valid charitable trust.—American Nat. Red Cross v. Feltner Post, 159 N.E. 771, 86 Ind.App. 709.

(3) Will devising residue to executors for distribution among permanently disabled soldiers of late World War, in hospitals or institutions in or near Greater New York, whom executors and trustees may select, held valid.—In re Philipoteaux's Estate, 245 N.Y.S. 303, 138 Misc. 208.

(4) Bequest to "a Protestant Episcopal Mission to be named by my sister" held not void for indefiniteness and uncertainty as to beneficiary, where sister, on probate of will, designated certain mission as beneficiary.—In re Brendel's Estate, 269 N.Y.S. 791, 150 Misc. 136.

(5) Bequest to "the Rev. J. O., in trust, nevertheless, to devote the same to the use and benefit of any church or charitable institution as he sees fit, or in his discretion," held not void for indefiniteness or uncertainty of the persons designated as beneficiaries.—In re Werner's Will, 181 N.Y.S. 433.

(6) Charitable use shown by a settlement, directing the trustee to select at the end of a year an organization which cares for, supports, and maintains and educates, when needed, orphan children, indigent persons, and needy old people, one, any, or all of them, in a certain county of the state, or which cares for and supports, when needed, indigent, injured, or helpless miners, their wives or children, any, one, or all of them, in the state, and to pay to it the income from the trust estate for the year, to be used for such purposes, one, any, or all of them, and to do this each year, selecting a different organization or continuing payment to the one previously se-

lected, held not so indefinite as to render the trust void.—Johns v. Birmingham Trust & Savings Co., 88 So. 835, 205 Ala. 535.

(7) Where will directed trustees to pay stated amount annually to certain charity, and to contribute to other named charities, annual amounts to be determined by trustees, and provided that other similar charitable or educational institutions, if established in the same city, might in trustees' discretion be added to the list, the devise was not void for uncertainty as to beneficiaries, under Ky.St. § 317.—Gill's Ex'r v. Woman's Club of Louisville, 266 S.W. 378, 205 Ky. 731.

(8) Trust, whose income was to be paid over to incorporated institutions, to be selected by trustee, to be used in research in agricultural chemistry, was not so indefinite and uncertain as to beneficiaries as to render administration of trust impossible, in view of fact that trustee and advisory association named in will were both domestic corporations, and that, under Personal Prop.L. § 12, attorney general can represent beneficiaries in enforcement of trust, and has duty to compel by judicial decree application of fund to public use contemplated by will.—In re Frasch's Estate, 211 N.Y.S. 635, 125 Misc. 381, affirmed 215 N.Y.S. 848, 216 App.Div. 797, which is affirmed 156 N.E. 656, 245 N.Y. 174.

79. Ohio. — Linney v. Cleveland Trust Co., 165 N.E. 101, 30 Ohio App. 345.

Pa.—In re Thompson's Estate, 127 A. 446, 282 Pa. 30.

Supervision by court

"The trustees having such powers of selection are subject to the control of the court, may come to it for instructions, and can be restrained by it from diverting the funds to uses not contemplated by the creator of the trust."—Linney v. Cleveland Trust Co., 165 N.E. 101, 104, 30 Ohio App. 345.

80. N.J.—Chelsea Nat. Bank v. Our Lady Star of the Sea, Atlantic City, N. J., 147 A. 470, 105 N.J.Eq. 236.

81. Cal.—In re Peabody's Estate, App., 70 P.2d 249.—In re Vance's Estate, 4 P.2d 977, 118 Cal.App. 163.

Conn.—Mitchell v. Reeves, 196 A. 785, 123 Conn. 549.

ed to societies or institutions in a certain city is factually defective,⁸² as is also a bequest by a testator of his property to trustees "to be by them distributed to such persons, societies or institutions as they may consider most deserving" the trust being too indefinite to be carried into effect as a private trust, and unable to be upheld as a charitable trust on account of not being limited to persons in need of assistance or to objects which come within the class of charitable uses.⁸³

In many jurisdictions gifts are not void for uncertainty as to beneficiaries where the class is described generally as such charities, charitable institutions, or objects as the trustee deems best to choose or designate.⁸⁴ Under a statute requiring a charitable gift and trust to point out with reason-

able certainty the purposes of the charity and the beneficiaries thereof, where the purpose of the charity is made reasonably certain by the instrument creating it, the beneficiaries may be designated as a class only, leaving the particular objects of the generosity within the class to be determined by the trustee appointed to administer the bounty or by the court itself;⁸⁵ but the bequest, in order to be valid and capable of being rendered effectual, must be limited, in terms, to the benefit of some class of persons or objects, even when the bequest is accompanied by full power vested in some one to designate the charity;⁸⁶ and where neither class nor object is selected or designated by the donor, and it is left to the trustee to make the choice, the gift fails.⁸⁷

Limited to organizations engaged in charitable activities

(1) "Fraternal" associations, chosen by trustees as beneficiaries of charitable testamentary trust, must be engaged in charitable activities, and money received by them must be devoted thereto. — *Clark v. Cummings*, 137 A. 660, 83 N.H. 27.

(2) A bequest of the residue, "to pay same over to such charitable organizations, associations or institutions" as the executors "may deem worthy," giving the executors full discretion in determining the distribution "among worthy charities," is valid as against the contention that the gift may be devoted to purposes which are not charitable. — *King v. Rockwell*, 115 A. 40, 93 N.J.Eq. 46.

(3) A bequest of the residue of an estate to such religious, charitable, scientific, literary or educational Hebrew associations organized exclusively for such purposes, as might be selected by the executors, was not invalid as permitting the executors to choose between charitable and noncharitable organizations, since general purpose to be served of all the classes designated was "charitable." — *Rabinowitz v. Wollman*, Md., 197 A. 566.

"Public or private" organizations construed

"Public or private" organizations in will creating charitable trust held to mean state-owned organizations or those privately controlled. — *Clark v. Cummings*, 137 A. 660, 83 N.H. 27.

82. Minn.—*Preston v. Batcheller*, 203 N.W. 225, 162 Minn. 433.

83. Mass.—*Nichols v. Allen*, 130 Mass. 211, 39 Am.R. 445.

84. U.S.—*Chicago Bank of Commerce v. McPherson*, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F.Supp. 110, certiorari denied 53 S.

Ct. 596, 289 U.S. 736, 77 L.Ed. 1484, citing *Corpus Juris*.

Conn.—*Mitchell v. Reeves*, 196 A. 785, 123 Conn. 549.

Mass.—*Kirwin v. Attorney General*, 175 N.E. 164—*Reilly v. McGowan*, 166 N.E. 766, 267 Mass. 268.

Mo.—*Buckley v. Monck*, 187 S.W. 31. N.Y.—*In re Olmstead's Will*, 226 N.Y.S. 637, 131 Misc. 233.

Va.—*Moore v. Downham*, 184 S.E. 199, 166 Va. 77.

Wash.—*In re Planck's Estate*, 272 P. 972, 150 Wash. 301—*In re Stewart's Estate*, 66 P. 148, 67 P. 723, 26 Wash. 32.

11 C.J. p 342 note 84—69 C.J. p 229 note 24.

Within specified locality

Testamentary trust giving property to trustee to be distributed to such charities within county as it might deem needy and worthy held not void for indefiniteness.—*In re Monaghan's Will*, 226 N.W. 306, 199 Wis. 273.

Class need not be designated

Devise creating public charity need not specify class or designate particular devisee.—*Reilly v. McGowan*, 166 N.E. 766, 267 Mass. 268.

Power of selection held exercised

Executrix empowered to designate recipients of devise to charity effectually exercised such power by filing paper showing selection and notifying recipients named therein.—*In re Planck's Estate*, 272 P. 972, 150 Wash. 301.

Gifts held valid

(1) Where testator gave his estate to missions, and like good objects as his trustee may think best, failure to name organizations he wished to benefit was insufficient to defeat his clearly expressed intention.—*Coffin v. Attorney General*, 121 N.E. 397, 231 Mass. 579.

(2) Will giving property to trustee for support or assistance of per-

sons appearing to him to especially need assistance created valid charitable trust.—*Lord v. Miller*, 178 N.E. 649, 277 Mass. 276.

In Louisiana

(1) Since the enactment of Acts 1918 No. 72 p 108, which provides that donations may be made to trustees for educational, charitable or literary purposes generally, without designating the particular purpose to be fostered or aided, and in such cases to permit the trustees to appoint, create, or change the beneficiary, it is held that a testamentary perpetual trust, the beneficiary to be determined by the trustee, is valid notwithstanding Const.1921 art 4 § 16 forbidding fidei commissum or substitutions.—*Pires v. Youree*, 129 So. 552, 170 La. 986.

(2) Prior to that time charitable trusts in which the trustee had power to select the beneficiaries were void for uncertainty.—*Villa's Succ.*, 61 So. 765, 132 La. 714—11 C.J. p 342 note 81.

In New Jersey

(1) Formerly it was held that gifts generally to charitable organizations were invalid for indefiniteness of beneficiaries.—*Hegeman v. Roome*, 62 A. 392, 70 N.J.Eq. 562—*Thomson v. Norris*, 20 N.J.Eq. 489.

(2) A later case, however, held devises "to such charitable organizations, associations or institutions" as they [executors] "may deem worthy" to be valid.—*King v. Rockwell*, 115 A. 40, 41, 93 N.J.Eq. 46.

85. Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

86. Ky.—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562.

87. Ky.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614—*Kentucky Christian Missionary Soc. v. Moren*, 102 S.W.2d 335, 267 Ky. 358—*Gooding v. Watson's Trustee*, 31 S.W.2d 919, 235 Ky. 562.

In jurisdictions where the doctrine of cy pres is in force, see *infra* § 52, the elimination of a designated legatee or its failure to take or renunciation of the legacy will not cause the distribution of the property as intestate property, but the court will select another charity of like character as beneficiary where the intent of the testator to devote his estate to charitable purposes is plain and positive.⁸⁸

Ordinarily it will be presumed that the party designated to make the selection will properly discharge his duty, and, within the class indicated, select an institution which will effectuate the aims and purposes of the gift.⁸⁹

Person or institution designated to make selection. The power of selection of the particular person or object to be benefited out of the particular class selected by the person establishing the charity may be vested in certain named trustees.⁹⁰ It is not necessary to the validity of a charitable trust that the trustee should be clothed with power to select the beneficiaries, but it is sufficient if some person or corporation is given that power;⁹¹ nor is the validity of the trust affected by the fact that the selection of beneficiaries is left to a trustee or agency

not interested.⁹² If the power of selection is personal to the named trustee it cannot be exercised by a successor trustee,⁹³ although, where a charitable intent is shown, it may devolve upon the court upon the death or resignation of the named trustee.⁹⁴ If a gift to a specified class of charitable organizations, the particular organization or organizations to be selected by a trustee, by its terms is made to depend upon the judgment and discretion of a named trustee, and he fails to exercise such discretion, then the gift fails,⁹⁵ it being held in some cases that a gift to charity generally with a power in a named trustee to select the beneficiaries is void where the trustee dies prior to making a selection;⁹⁶ but if the intention of the donor is to make a gift to charitable purposes, and only the power of appointment is conferred upon the trustee, then his mere failure to act does not defeat the gift.⁹⁷

Implied authorization to make selection. Where neither the trustee nor any other person or corporation is expressly given the power of selection, the courts are very liberal, in construing the instrument creating the trust, in giving the trustee an implied power of selection.⁹⁸ Ordinarily the power to dis-

Reason for rule

Such a gift is in effect but the delegation of authority to make the will and dispose of the property according to the trustee's purposes rather than the testator's.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

Trust held void

Part of bequest for charitable purposes providing that trustee might distribute funds "as he thinks best wherever he thinks needed" held void for uncertainty, under statute.—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

88. Mich.—*Hannan v. Greene*, 199 N. W. 426, 227 Mich. 578—Appeal of *Hannan*, 199 N.W. 423, 227 Mich. 569.

89. U.S.—*Laswell v. Hungate*, C.C. A. Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied *Bishop v. Hungate*, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

90. Cal.—*In re Bartlett's Estate*, 10 P.2d 126, 122 Cal.App. 375.

91. Conn.—*Goodrich's App.*, 18 A. 49, 57 Conn. 275.

Trustee held not entitled to make selection

(1) Where testator bequeathed interest of capital to universities for scholarships, provision appointing trustees of fund to see to safety and investment held not to give trustees voice in manner of distributing scholarships and selecting beneficia-

ries, that power, under the will, being intended to vest in the universities.—*Succession of Breaux*, 143 So. 246, 175 La. 269.

(2) That universities acquiesced in judgments homologating trustees' accounts held not recognition of trustees' right to supervise disposition of scholarship money bequeathed to universities.—*Succession of Breaux*, *supra*.

92. Ala.—*Tarver v. Weaver*, 130 So. 209, 221 Ala. 663.

93. N.Y.—*In re Grueby's Estate*, 232 N.Y.S. 424, 133 Misc. 248.

Time to exercise power of selection

Under will providing that funds shall go to named college "if at the time of payment of the fund that institution shall have a course in ceramics, but I leave it entirely to the discretion of my trustee herein-after named to select such institution as to him shall seem advisable" the power could be exercised only at the time specified for payment of the fund.—*In re Grueby's Estate*, 232 N. Y.S. 424, 133 Misc. 248.

94. N.Y.—*In re Grueby's Estate*, *supra*.

95. Iowa.—*In re Walden's Estate*, 180 N.W. 679, 190 Iowa 567.

96. Ohio.—*Rea v. Griffin*, 21 Ohio N. P.N.S., 129.

97. Iowa.—*In re Walden's Estate*, 180 N.W. 679, 190 Iowa 567.

Gift held not defeated

Where testator bequeathed speci-

fied amount for erection and establishment of an orphans' home on the condition that a similar amount was donated by others within certain period, and specified that on failure of such condition the executor was empowered to pay a like sum to such other homes for orphans as he might believe to be deserving, but did not in such clause name the executor or state that the matter should be left entirely to the discretion of person named as executor in other part of will, the gift did not fail because of claimed executor's failure to act prior to his death, the taking effect of the gift not depending on the exercise of a discretion confided to the named executor.—*In re Walden's Estate*, 180 N.W. 679, 190 Iowa 567.

98. Ala.—*Sparks v. Woolverton*, 99 So. 102, 104, 210 Ala. 669, quoting *Corpus Juris*.

N.J.—*Bloomer v. Bloomer*, 131 A. 383, 98 N.J.Eq. 576, affirmed 134 A. 915, 100 N.J.Eq. 361.

11 C.J. p. 342 note 88.

Implied power of selection shown

(1) Under provision of will bequeathing residue to the trustees of named college, owned and controlled by the Methodist Church of the state, for the education of the sons of Methodist ministers within the state, the power to select the particular persons to be educated held impliedly given to the trustees.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

pense the fund carries with it, by implication, the power to select the particular beneficiaries.⁹⁹ Thus, where the fund is limited, and the scope of the charity is broader than the fund, and the donor or founder does not provide a rule or order of selection, there is in every public charity a necessary power of selection of beneficiaries in the trustees;¹ or, if property is given for a charitable use in trust for the benefit of a certain class of persons defined with reasonable certainty, and in order to execute that trust a power of selection in the trustees or some one else is necessary, that power will be implied.² If, in a gift to charity in which no trustee is appointed to select the beneficiary, the use is so expressed that the court may judge of the motive which actuated the donor so as to give specific effect to his general directions the gift will be upheld, and, as appears supra § 27, a trustee will be appointed and the trust administered by the court; but if the gift is to charity generally and no provision is made for the selection of the beneficiaries of the charity the courts will not uphold the gift.³ In jurisdictions which require that the class of beneficiaries be designated with reasonable certainty, if the class is so designated by the will, but the immediate objects of that class are left indefinite, the trustee nominated by the will or appointed by the court has the power of selecting the immediate objects to be benefited by the testator's bounty, provided they be within the general class designated by the testator; and the court itself may without the intervention of a trustee order the payment of a specific bequest to an immediate object within the

class of the testator's bounty.⁴ Under a statute providing that a gift for a religious or charitable purpose shall not fail for indefiniteness of the beneficiary a gift for a designated charity, without naming the beneficiaries, will be effectuated by the court appointing a trustee to select beneficiaries.⁵

Designation of method of selection. Generally, the failure of the donor to designate the method by which the trustee shall select the beneficiaries does not affect the validity of the trust.⁶ In jurisdictions which hold bequests for charitable purposes void for uncertainty of beneficiaries where there is not an ascertained mode of selecting them out of the class designated, see supra § 39, a gift to a charitable corporation, in terms of trust or otherwise, to expend the income or principal for its general purposes or for a special purpose within its charter provides a sufficiently definite mode of selecting the beneficiaries out of the class selected so as to prevent the gift being void for uncertainty or indefiniteness of beneficiaries.⁷

Discretion of trustee in making selection. The persons authorized to select the individual recipients of a charitable gift to a described class are authorized, in determining the recipients, to exercise discretion within the limits prescribed for the will.⁸ However, a power to select beneficiaries from a particular class does not give the power to discriminate between the classes who should be benefited;⁹ so that, where a gift for the benefit of a specified class does not specify age or sex, a reasonable number of women and children may be selected as

(2) Trustee, charged with execution of provision of will giving remainder in realty "for an old ladies' home for worthy poor protestant women over 60 years of age" residing in certain towns, held to have implied power to select persons to be benefited, since power to decide as to best means of carrying out trust is impliedly given trustee.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

99. N.J.—Hesketh v. Murphy, 36 N. J.Eq. 304.

Incidental to power to distribute

When a power is conferred on the trustees to distribute a fund to members of a class, such members having certain qualifications, which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection.—Hesketh v. Murphy, 36 N.J.Eq. 304.

1. Ala.—Sparks v. Woolverton, 99 So. 102, 210 Ala. 669.

2. Conn.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

Ohio.—Palmer v. Oiler, 181 N.E. 362, 102 Ohio St. 271.

No distinction between character of trustees

In the application of this rule no distinction is made between trustees who are corporate or voluntary associations and those who are individuals.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

3. Mo.—Buckley v. Monck, 187 S.W. 31.

4. Ky.—Lightfoot v. Lightfoot, 269 S.W. 529, 207 Ky. 426.

5. Pa.—In re Klein's Estate, 26 Pa. Dist. 476.

To endow hospital beds

Where a testatrix made a gift "to endow beds in the following hospitals," but failed to name the hospitals, the court will appoint a trustee to select the hospitals to receive the gift.—In re Klein's Estate, supra.

6. Cal.—In re De Mars' Estate, App., 67 P.2d 374.

7. Conn.—Dwyer v. Leonard, 124 A. 28, 100 Conn. 513.

To send poor children to the country

A gift to a corporation authorized by its charter to conduct playgrounds, fresh air excursions, etc., in carrying out its general purpose of improving the condition of the poor, to hold in trust and expend the income in sending poor children of New York City into the country, held not void for uncertainty as to the beneficiaries or the mode of designating them, such corporation having implied power to select the individuals to be sent.—Dwyer v. Leonard, supra.

8. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19.

9. Conn.—Healy v. Loomis Institute, 128 A. 774, 102 Conn. 410.

beneficiaries, but not to the exclusion of male adults.¹⁰ A bequest to be expended by the testator's executors in behalf of such charities as to them seem best is a bequest to an institution or association organized for the purpose of granting relief or dispensing some good or benevolence to those who require it, and the executors are not authorized to select individuals as the recipients of the bequest, even though they are sick and without means.¹¹

Supervision of selection by court. The courts are not entitled to set aside or to question the correctness of the selection of any individual made under a will which designates who is to select the individuals to be benefited from the class selected as beneficiaries of the gift and provides that there is to be no right of appeal from his decision.¹²

§ 41. Ascertainment and Identification

The ascertainment and identification of the beneficiaries depends upon the correct interpretation of the words used in creating the gift. If the language is clear extrinsic evidence is inadmissible to aid in its interpreta-

tion, but if there is mistake, inaccuracy, or ambiguity in the designation of the beneficiary extrinsic evidence may be admitted for the purpose of determining the donor's intention.

The determination of the beneficiaries of a charitable trust depends primarily upon a correct interpretation of the words used in creating it.¹³ Extrinsic evidence of who was intended will not be admitted where the language in the instrument is clear and of well-defined force and meaning,¹⁴ so that, if there was in existence at the time the instrument creating the trust was executed a party of the name designated as beneficiary, extrinsic evidence will not be admitted to show that another party with a different though closely similar name was intended.¹⁵ In general, however, the misnomer of the beneficiary will not defeat a gift for a charitable purpose.¹⁶ Thus, in case of mistake, inaccuracy, or ambiguity in the description of the beneficiaries of a charitable gift or trust, making it difficult to ascertain and identify them, the court may consider the whole instrument,¹⁷ and may admit parol evidence as to the surrounding circumstances,¹⁸ and also the wills of others who by com-

10. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

11. Pa.—In re Padelford's Estate, 9 Pa.Dist. 174.

12. Pa.—Elkin's Estate, 13 Pa.Dist. 211, 30 Pa.Co. 49.

13. Mass. — Attorney General v. Armstrong, 120 N.E. 678, 231 Mass. 196.

14. Ky.—Violett's Adm'r v. Violett, 288 S.W. 1016, 217 Ky. 59.

Beneficiaries held clearly described

Trust to assist poor and deserving students of Georgia held unambiguous and not subject to construction.—Vanderbilt University v. Mitchell, 36 S.W.2d 83, 162 Tenn. 217.

15. Or.—Hartman v. City of Pendleton, 186 P. 572, 96 Or. 503, 8 A.L.R. 904, modified on other grounds 190 P. 839, 96 Or. 503.

Existence of beneficiary shown

Evidence held to show that at the time of making of a will making a bequest in trust for the benefit of the library of the Commercial Association of Pendleton such association owned a library, so that there was no latent ambiguity as to the beneficiary.—Hartman v. City of Pendleton, supra.

Ambiguity, if any, held latent

Any ambiguity as to beneficiary of bequest in trust to use the income for benefit of the library of the Commercial Association of Pendleton, of the City of Pendleton, Or., is latent.—Hartman v. City of Pendleton, supra.

16. D.C.—Washington Loan & Trust

Co. v. Hammond, 278 F. 569, 51 App.D.C. 260.

Md.—Home for Incurables of Baltimore City v. Bruff, 153 A. 403, 160 Md. 156.

Minn.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.

Mo.—In re Rahn's Estate, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, certiorari denied Martin v. Ahrens, 47 S.Ct. 591, 274 U.S. 745, 71 L. Ed. 1325.

N.J.—De Camp v. Dobbins, 29 N.J. Eq. 36—Goodell v. Union Association, etc., of Burlington Co., 29 N. J.Eq. 32.

N.Y.—Kernochan v. Farmers' Loan & Trust Co., 175 N.Y.S. 831, 187 App. Div. 668, affirmed 126 N.E. 912, 227 N.Y. 658—In re Tinker's Estate, 283 N.Y.S. 151, 157 Misc. 200.

R.I.—Tillinghast v. Council at Narragansett Pier, R. I., of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.

Tenn.—Milligan v. Greeneville College, 2 S.W.2d 90, 156 Tenn. 495. 69 C.J. p 227 note 11.

Name by which ordinarily designated

Designation of institution by name by which it is commonly known instead of its proper corporate name will not invalidate the gift.—Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States v. Shoemaker, 105 A. 748, 133 Md. 594.

Under statute

Verdict sustaining trust for benefit of charitable institution incorrectly named in will will not be disturbed on the ground that the bene-

fiary named in the will is not ascertainable, in view of statute providing that no gift, grant, bequest, or devise shall be invalid by reason of indefiniteness or uncertainty as to the objects or beneficiaries of such trust.—Ladies Benevolent Soc. v. Orrell, 142 S.E. 493, 195 N.C. 405.

17. Md.—Vansant v. Roberts, 3 Md. 119.

11 C.J. p 343 note 90.

18. Iowa.—In re Durham's Estate, 211 N.W. 358, 203 Iowa 497.

Minn.—In re Henrikson's Estate, 203 N.W. 778, 163 Minn. 176.

Mo.—In re Aiken's Estate, App., 5 S.W.2d 662.

Neb.—Stork v. Schmidt, 261 N.W. 552, 559, quoting *Corpus Juris*.

N.Y.—In re Tinker's Estate, 283 N.Y. S. 151, 157 Misc. 200.

Ohio.—Linney v. Cleveland Trust Co., 165 N.E. 101, 30 Ohio App. 345.

S.D.—Chaddock v. American Baptist Home Mission Soc., 192 N.W. 742, 46 S.D. 346.

11 C.J. p 343 note 91.

Admissibility of parol evidence to identify legatees or devisees in case of charitable devise or bequest see the C.J.S. title Wills § 639, also 69 C.J. p 155 note 14-p 156 note 17.

Memoranda of instructions to attorney

Under will making gifts to hospital for benefit of its children's medical division, wherein testatrix did not designate as to whether city or university, both of which conducted divisions of hospital, were intended

pact agreed with the testator whose will is being construed to leave their estates to found a designated charity;¹⁹ and where, from the language of the instrument, construed in the light of all the surrounding facts and circumstances, the intent of

the donor is reasonably apparent and the beneficiaries are ascertainable, the court will not hold the gift void,²⁰ but will decide who are identified as beneficiaries according to the donor's intent.²¹ However, to justify the admission of parol evi-

as beneficiaries, memoranda of instructions delivered to attorney drafting will to effect that testatrix desired to make gifts for benefit of children's medical division conducted by university in memory of testatrix' husband would be regarded as of importance in determining testatrix' intent.—*In re Tinker's Estate*, 283 N.Y. S. 151, 157 Misc. 200.

Relations of donor with claimants

Evidence is admissible as to the relations of the donor with the claimants.—*Kingman v. New Bedford Home for Aged*, 129 N.E. 449, 237 Mass. 323.

19. Conn.—*Healy v. Loomis Institute*, 128 A. 774, 102 Conn. 410.

20. Iowa.—*Chapman v. Newell*, 135 N.W. 324, 146 Iowa 415.

Md.—*Vansant v. Roberts*, 3 Md. 119. N.Y.—*In re Tinker's Estate*, 283 N.Y.S. 151, 157 Misc. 200.

Bequest construed to include entire estate

Where holographic will expressly stated that none of testator's relatives except his wife should partake in his estate, and contained provision that if wife should predecease testator he wished to buy "a dog" for the home for the blind, and testator's wife predeceased him, home for blind held entitled to testator's entire estate as against contention that testator's sister was entitled to residuary estate for failure of testator to name residuary legatee.—*In re Somerville's Estate*, 55 P.2d 597, 12 Cal.App.2d 430.

21. Iowa.—*In re Durham's Estate*, 211 N.W. 358, 203 Iowa 497.

Md.—*Home for Incurables of Baltimore City v. Bruff*, 153 A. 403, 160 Md. 156.

Mo.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

11 C.J. p 343 note 93—69 C.J. p 226 note 8.

Residence requirement

Provision in will requiring residence for one year to entitle applicant to admission to home for sick and friendless mothers held not to mean one year's residence in state before testatrix's death, but rather one year's residence in the state prior to admission.—*Barr v. Geary*, 142 N.E. 622, 82 Ind.App. 5.

Limitation to residents of local territory

Testamentary trust to establish

hospital for inhabitants of village and vicinity, to which all licensed physicians shall have access for themselves or their patients, provides for use of hospital by licensed physicians of village and vicinity only and for their patients residing in and near village.—*Hart v. Taylor*, 133 N.E. 857, 301 Ill. 344.

Time when beneficiaries must exist

Clause of will leaving property in trust, and directing that sums of five hundred dollars be paid by trustee into building funds of Christian Science churches until total sum is exhausted, held not to limit application of fund to churches organized at time of death.—*Harges v. Zander*, 145 N.E. 363, 314 Ill. 170.

Alternative gift where testator failed to dedicate intended college

Where a testator, after creating a trust fund, the income to be used in educating certain classes of persons, provided that they should be educated "only in a college" erected on a lot dedicated by him in a certain town, and that, "should the college aforesaid be not erected" the income should go to two other designated colleges, the income, where the testator fails to dedicate a lot, must go to the two designated colleges.—*Emory & Henry College v. Shoemaker College*, 23 S.E. 765, 92 Va. 320.

Associations or organizations construed to be beneficiaries

(1) Will construed, and held that a city was entitled to one half of a trust estate, including accumulated income, for the construction and maintenance of a public library, and, in case of the death of a life tenant without children, would be entitled to the other half.—*Pierce v. Root*, 84 A. 295, 86 Conn. 90.

(2) Evidence held to establish testatrix intended to designate, as legatee, association called by name of Methodist Episcopal "Church" or Methodist Episcopal Church "Society."—*Bates v. Schillinger*, 145 A. 395, 128 Me. 14.

(3) A bequest to the "Loysville Orphanage of Pennsylvania," which the evidence plainly shows was a name commonly applied to the "Tressler Orphan Home of the Evangelical Lutheran Church," etc., and which testator intended to be identified as legatee, was not invalid for failure to designate legatee.—*Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States v. Shoemaker*, 105 A. 748, 133 Md. 594.

(4) Evidence held sufficient to justify findings of single justice that charity created by will was for benefit of Association for Relief of Aged Women in New Bedford, will having characterized beneficiary as New Bedford Home for Aged Women.—*Kingman v. New Bedford Home for Aged*, 129 N.E. 449, 237 Mass. 323.

(5) Where testatrix for several years before her death was one of the board of managers of the Presbyterian Home of the District of Columbia, which was authorized to take both men and women, but had never had more than one man, a bequest in the will to "the Presbyterian Home for Old Ladies supported by the Presbyterian Churches" was clearly intended to be for the benefit of the Presbyterian Home, that being the only home in the District supported by Presbyterian Churches.—*Washington Loan & Trust Co. v. Hammond*, 278 F. 569, 51 App.D.C. 260.

(6) Where a will created a trust for the people of a certain city, and devised the property to a church and an industrial school to be maintained in connection therewith, a decree construing the will, finding that the trusts were established for the benefit of the church and school instead of for the benefit of the people of the city, as shown by the will, was not erroneous, the church and school being public charitable institutions, which were to act as agencies in dispensing the charity.—*Worcester City Missionary Soc. v. Memorial Church*, 72 N.E. 71, 186 Mass. 531.

(7) A bequest to the "Sisters of St. Joseph's Hospital, Brook avenue and 143d street," held intended for the "St. Joseph's Hospital for Consumptives," located at the specified place, in which the testator had been a patient, there being no hospital with the name stated in the will.—*In re Brennan's Will*, 194 N.Y.S. 334, 118 Misc. 372.

(8) Testamentary trust in favor of "Actor's Fund of the City of New York" held intended for "Actors' Fund of America."—*In re Hoyt's Estate*, 208 N.Y.S. 790, 124 Misc. 857.

(9) Evidence held to show that testatrix who made gifts "to Bellevue Hospital . . . for the benefit of the Children's Medical Division" without designating as to whether city or university, both of which conducted divisions of hospital, were intended as beneficiaries,

dence, the instrument must contain sufficient indication of intention to warrant the application of the evidence; and, where the beneficiaries are not described in some way, evidence will not be admitted to show who was intended.²²

Ordinarily a gift to the officials of a charitable institution is a gift to the institution itself.²³ Where a gift is to an unincorporated charitable association, the association or institution, in its organized capacity, is the beneficiary, rather than the individual members composing it.²⁴ Also a gift to a particular institution to be used for the support of the people under its care is not confined to the persons actually cared for at the time the gift takes effect, but applies to all persons under the care of the institution during its existence.²⁵ A charitable institution may take, when capable of identification, although it is only indicated by the descriptive name of a particular charity;²⁶ and, where the name found in a will is a branch or a local designation of the particular work carried on by a charitable corporation, the will may be sustained and the payment of the legacy may be decreed to the parent corporation.²⁷

A corporation, organized and incorporated to receive the testator's bequest by the existing organizations of those named by the testator as the ones to organize a separate organization for the purposes

mentioned in his will, is the organization of his intention, even though one or more of the organizations mentioned in the will, having gone out of existence, and is not represented therein.²⁸

Religious views. When the terms of the gift are indefinite, the religious views of the donor are sometimes regarded;²⁹ but it has been held that such evidence is admissible only in cases where the primary object of the trust is the propagation of religious doctrine, and not where the charity is purely eleemosynary.³⁰ In ascertaining the faith of the grantor, resort may be had to the usages, tenets, and ecclesiastical history of the church to which he attached himself.³¹

Personal interest of beneficiaries. To be entitled as such, the beneficiaries of a charitable trust are never required to show that they contributed to, or have any personal interest in, the trust property, as their interest is measured by, and limited to, the uses for which the property is held.³²

Extinction of beneficiary. In jurisdictions where the cy pres doctrine does not obtain, see *infra* § 52, on the extinction of the beneficiary of a trust committed to trustees for their specific execution thereof, and for no other purpose, unless that contingency is provided for by the testator, the law makes the disposition which the testator has failed to

intended to benefit activities conducted not by city in such hospital but activities and charitable purposes maintained by university in its children's medical division of such hospital.—*In re Tinker's Estate*, 283 N.Y.S. 151, 157 Misc. 200.

(10) Evidence held to sustain a decree determining that a bequest in his will in trust to the "Freeman's Aid of South Carolina" was intended for the Freedman's Aid and Missionary Society, an organization of the Methodist Episcopal Church, and not in favor of the American Baptist Home Mission Society, both of which were engaged in negro missionary work in South Carolina.—*Chaddock v. American Baptist Home Mission Soc.*, 192 N.W. 742, 46 S.D. 346.

(11) Bequest to W. C. T. U. of San Antonio held to go to regular organization, as distinguished from faction which split off after execution of will.—*National W. C. T. U. v. Anderson*, Tex.Civ.App., 14 S.W.2d 956, error dismissed.

(12) Under will leaving legacy with trust company for benefit of town, held town was beneficiary, not trustee.—*In re Downer's Estate*, 142 A. 73, 101 Vt. 167.

22. Conn.—*Fairfield v. Lawson*, 50 Conn. 501, 47 Am.R. 669.

Ga.—*Bramblett v. Trust Co. of Georgia*, 185 S.E. 72, 76, 182 Ga. 87, quoting *Corpus Juris*.

Pa.—*Newell's App.*, 24 Pa. 197.

23. N.Y.—*Currin v. Fanning*, 13 Hun 458, affirming *Curran v. Sears*, 2 Redf.Surr. 526.

69 C.J. p 228 note 15.

Church council

A residuary clause of a will, directing payment to a church council, the money to be put on interest and the interest to be paid annually to the board of foreign missions, held a devise to the church council, with directions that the income be paid to the board of foreign missions of the designated church.—*Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States v. Shoemaker*, 105 A. 748, 133 Md. 594.

24. Cal.—*In re Merchant*, 77 P. 475, 143 Cal. 537.

R.I.—*Taylor v. Salvation Army*, 142 A. 335, 49 R.I. 316—*Tillinghast v. Council at Narragansett Pier, R. I.*, of Boy Scouts of America, 133 A. 662, 47 R.I. 406, 46 A.L.R. 823.

25. Del.—*Murphy v. McBride*, 130 A. 283, 14 Del.Ch. 457, affirming *Mc-*

Bride v. Murphy, 124 A. 798, 14 Del.Ch. 242.

26. R.I.—*Wood v. Fourth Baptist Church*, 61 A. 279, 26 R.I. 594.

11 C.J. p 343 note 94.

27. N.Y.—*In re Tinker's Estate*, 283 N.Y.S. 151, 157 Misc. 200.

28. Conn.—*City Missionary Soc. v. August Moeller Memorial Foundation*, 126 A. 683, 101 Conn. 518.

29. S.D. — *Chaddock v. American Baptist Home Mission Soc.*, 192 N.W. 742, 46 S.D. 346.

11 C.J. p 343 note 99.

30. N.J.—*Atty.-Gen. v. Moore*, 19 N.J.Eq. 503.

Evidence held inadmissible

Where a fund was bequeathed by a Catholic to found "St. James Roman Catholic Orphan Asylum" and a hospital, the founder's religious belief was not to be considered, as the name did not show an intent to make the charity denominational, or to subject it to the control of the Catholic Church. — *Atty.-Gen. v. Moore*, *supra*.

31. Mo.—*State v. McGrath*, 60 Mo. 586.

32. Ohio.—*Mannix v. Purcell*, 19 N.E. 572, 46 Ohio St. 102, 15 Am.S.R. 562, 2 L.R.A. 753.

make, and the title passes to the heirs of the testator.³³

Citizens. A gift for the benefit of a specified class of the citizens of a named locality of the United States is for the benefit of persons of the specified class who are citizens of the United States as defined by the Fourteenth Amendment to the Constitution of the United States and who are domiciled and resident in the named locality.³⁴

§ 42. Application of Rules to Gifts for Particular Purposes

- a. In general
- b. Relief of poverty and distress
- c. Promotion of education
- d. Promotion of religion

a. In General

Under and subject to rules above stated, bequests or donations for the benefit of certain groups or for undertakings beneficial to the general public are valid.

Applying the rules stated above in §§ 37-41, bequests and donations for the benefit of certain groups or for the aid of undertakings beneficial to the general public may be valid.³⁵ Thus bequests to aid Indians in attaining justice,³⁶ for the construction of a gate or arch at some entrance to the civic centre of a particular city,³⁷ or to trustees to organize a corporation to erect a building containing a library, lecture rooms, dance hall, and amusement rooms for the use of working peo-

ple of a particular city,³⁸ have been held valid.

Upkeep of cemetery lot. A devise and bequest for the perpetual care and upkeep of a cemetery lot may be valid.³⁹

b. Relief of Poverty and Distress

Under and subject to rules above stated, bequests or donations to particular institutions providing care for certain classes of the poor and unfortunate, or to certain institutions for the benefit of certain classes of the poor and unfortunate, or to trustees for the benefit of specified classes of the poor and unfortunate or for the benefit of the poor generally may be valid.

Applying the rules stated above in §§ 37-41, various gifts intended to ameliorate the condition of a particular class of the poor, sick, infirm, or other persons in unfortunate circumstances have been upheld as charitable, not only on account of their being for a charitable purpose, but also as being valid as against any objection as to beneficiaries, such as indefiniteness and uncertainty, or insufficient description of the class to be benefited, or because limited to a class, the most common illustration being that of a gift for the poor, or a certain described class of the poor, of a particular parish, town, or other place or locality.⁴⁰ In many cases gifts for the benefit of poor persons in general are held or declared to be valid.⁴¹ Other charitable gifts for the relief of poverty and distress, which are held not void for uncertainty and indefiniteness as to beneficiaries, include those for the founding and maintenance of an institution

33. Ala.—Trustees of Cumberland University v. Caldwell, 34 So. 846, 203 Ala. 590.

34. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

35. Ga.—King v. Horton, 100 S.E. 103, 104, citing *Corpus Juris*.

Wash.—In re Peterson's Estate, 252 P. 139, 140, quoting *Corpus Juris*.

36. Cal.—Collier v. Lindley, 266 P. 526, 203 Cal. 641.

37. Colo.—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A.1918B 710.

38. Tenn.—Gibson v. Frye Institute, 193 S.W. 1059, 137 Tenn. 452, L.R.A.1917D 1062.

39. Iowa.—Hipp v. Hibbs, 245 N.W. 247, 215 Iowa 253.

40. Wash.—In re Peterson's Estate, 252 P. 139, 140, quoting *Corpus Juris*.

11 C.J. p 344 notes 5, 6.

Transfer of portion of town ineffective to transfer gift to aged

Where testator gave money to a town for the support of the aged inhabitants, the town is a donee in trust for charity and the transfer thereafter of the whole business por-

tion of the town to another town does not give the second town a claim to the fund or any part of it.—Weston v. Amesbury, 53 N.E. 147, 173 Mass. 81.

Gifts held valid

(1) Legacy for poor, homeless children.—St. Louis Union Trust Co. v. Little, 10 S.W.2d 47, 320 Mo. 1058.

(2) Gift in trust for needy and poor women held valid.—Palmer v. Oiler, 131 N.E. 362, 102 Ohio St. 271.

(3) Devise in trust to organization for relief of young people in need of charitable assistance was not void on ground beneficiaries were uncertain or unknown.—In re Prickett's Estate, 275 P. 605, 128 Or. 591.

(4) Trust for benefit of needy poor in certain locality.—Hollenbeck v. Lyon, 47 P.2d 63, 142 Kan. 352, 99 A.L.R. 652.

(5) Charitable trust for benefit of aged and poor of named county.—Phillips v. Chambers, 51 P.2d 303, 174 Okl. 407.

(6) Bequest to poor people of Spokane held not so uncertain as to invalidate will.—In re Peterson's Estate, 252 P. 139, 141 Wash. 619.

(7) Devise in trust for benefit of disabled men in county, poor widows, deserted wives, and boys and girls within county needing means to provide education held clearly charitable, persons benefited being vague, uncertain, and indefinite until appointed, and classes being, as near as may be, perennial.—Reasoner v. Herman, 134 N.E. 276, 191 Ind. 642.

(8) Devises of money in trust "for the poor of the county of Luxemburg" and to the "poor curates of the county of Luxemburg" were not too indefinite to be incapable of reasonable designation of beneficiaries.—Beidler v. Dehner, 161 N.W. 32, 178 Iowa 1338.

(9) Bequest to the worthy poor in Ireland is valid.—Bloomer v. Bloomer, 181 A. 388, 98 N.J.Eq. 576, affirmed 134 A. 915, 100 N.J.Eq. 361.

(10) For other cases where general gifts to the poor of a given locality were held sufficient see 11 C.J. p 344 note 6 [a].

41. Iowa.—Grant v. Saunders, 95 N.W. 411, 121 Iowa 80, 100 Am.S.R. 310.

11 C.J. p 344 note 7.

f a particular charitable character or a charitable institution for the benefit of a class of persons described generally,⁴² as well as gifts for the benefit of the widows and orphans of the deceased mem-

bers of a certain lodge or fraternal order,⁴³ or for the members thereof in want or distress,⁴⁴ for the widows and orphans of a parish or town,⁴⁵ the widows and children of seamen at a particular

Mass.—*Dillaway v. Burton*, 153 N.E. 13, 256 Mass. 568.
1 C.J. p 344 note 8.

Home for girls

(1) Bequest to priest "to be applied towards starting home for benefit of unmarried working girls, who are abused at home, after death of their parents," held sufficiently certain as to beneficiaries.—*In re Selley's Will*, 245 N.Y.S. 294, 138 Misc. 190.

(2) Testamentary trust providing for the establishment of a home for unfortunate girls" and undertaking to provide for a corporation to hold the property and a board of trustees to manage it, with power to adopt regulations regarding the admission of such girls and the maintenance and conduct of the institution, held not void for indefiniteness of the beneficiaries.—*Second Nat. Bank v. Second Nat. Bank, Md.*, 190 A. 215.

Home for incurables

Will bequeathing property to Home for Incurables for Men" and to "Home for Incurables for Women" held to sufficiently identify object of testatrix' bounty under circumstances.—*Home for Incurables of Baltimore City v. Bruff*, 153 A. 403, 160 Md. 156.

Hospital

(1) Trust to establish and maintain a charitable hospital for the wounded, sick, and needy is valid.—*Kingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

(2) Where hospital was created to care for person suffering from "chronic" or incurable diseases, applicants should not be denied admission, even though disease may be relieved or cured.—*Dillaway v. Burton*, 153 N.E. 13, 256 Mass. 568.

(3) Hospital held not required to divide accommodations in fixed proportions for three classes named in will, but should divide them so as to give greatest benefit to all.—*Dillaway v. Burton*, supra.

Medical dispensary

Residuary clause of will, giving residue to trustees, who were to establish and carry on one or more free medical dispensaries, etc., held not subject to objection that it was uncertain as to beneficiaries.—*In re Teenan's Will*, 176 N.W. 857, 171 Wis. 94.

Mothers and their babies

Provision in will that home for sick and friendless shall be open and free to all honest, virtuous, sick, and

financially helpless mothers and their babies held not to render beneficiaries uncertain nor incapable of judicial enforcement.—*Barr v. Geary*, 142 N.E. 622, 82 Ind.App. 5.

Old ladies' home

Devise to some old ladies' home contemplated substantial home.—*In re Clifton's Estate*, 218 N.W. 926, 207 Iowa 71.

Old men's homes

(1) A deed giving certain described tracts of land, after the expiration of the grantee's life estate, "to build an old man's home" held to make a valid gift to charity.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479.

(2) Bequest to "Old Folks' Homes for men in Kansas City, Mo.," cannot be claimed by charities furnishing homes for both sexes.—*Bowen v. Kollar*, 18 Ohio App. 10.

(3) A charitable devise in trust for the foundation of a home for aged bachelors and widowers is not too indefinite because of a provision that an applicant for admission to the home must have lost by misfortune the means he once had for support, where the other provisions required the applicant to be respectable, which, with the term "misfortune," would exclude those who dissipated their means; and the word "means" as used in that connection is not to be limited to financial means, but includes physical ability to support as well.—*Kitchen v. Pitney*, 119 A. 675, 94 N.J.Eq. 485, 493, 494, 495.

Red Cross

Bequest to German Red Cross for relief of widows, orphans, and invalids of World War.—*In re Rahm's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 877, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Salvation Army

(1) Bequest to original chapter of Salvation Army located in Council Bluffs, Iowa, held not void for indefiniteness.—*In re Durham's Estate*, 211 N.W. 353, 203 Iowa 497.

(2) Will bequeathing residue of testatrix' estate to the head of the Salvation Army, to be used for such charitable or religious work being done by the Salvation Army as she thought best, manifested testatrix' intent to bequeath the residue of her estate to the Salvation Army as against contention that will was void for uncertainty, since it was patent

that the gift was to the head of the Salvation Army in her official capacity rather than her individual capacity, and that the bequest was to such official as a trustee for the charitable or religious work of the Salvation Army.—*Durrell v. Martin*, Tenn., 110 S.W.2d 316.

School and home for orphan boys

Testamentary trust for erection and maintenance of school and home for orphan boys of "Christian antecedents" held not void for uncertainty.—*Conway v. Third Nat. Bank & Trust Co. of Camden*, 177 A. 113, 118 N.J.Eq. 61, modified on other grounds 182 A. 916, 119 N.J.Eq. 575.

Widows' or children's home

Bequest to "the needy widows home, or childrens home."—*Bush's Ex'r v. Mackoy*, 103 S.W.2d 95, 267 Ky. 614.

Gift to branch of charitable corporation

Charitable gifts under will held not to fail because testatrix named hospital and its children's medical division rather than specifically designating city or university, both of which conducted divisions of hospital.—*In re Tinker's Estate*, 233 N.Y. S. 151, 157 Misc. 200.

Trustee held not beneficiary also

Board of education of church conference to which land was deeded in trust to maintain school for indigent children, was not "beneficiary" thereof, so as to render trust void.—*Snyder v. General Conference Board of Education of M. E. Church South*, 266 S.W. 661, 205 Ky. 812.

43. Ill.—*Gullfoil v. Arthur*, 41 N.E. 1009, 158 Ill. 600.

Tenn.—*Heiskell v. Chickasaw Lodge*, 11 S.W. 825, 87 Tenn. 668, 4 L.R.A. 699.

44. N.H.—*Roberts v. Corson*, 107 A. 625, 79 N.H. 215, 5 A.L.R. 1172.

Masonic lodge

A bequest of property to Masonic lodge, "to be used by it as it shall determine best in each case for the benefit of its members who may be in want or distress from any cause whatever, physical or financial," is for a legal purpose, and sufficiently definite to constitute a valid and enforceable charitable or public trust for the benefit of those who were or might become members.—*Roberts v. Corson*, supra.

45. Conn.—*Elliot's App.*, 51 A. 558, 74 Conn. 586.

11 C.J. p 345 note 10.

port,⁴⁶ the deserving,⁴⁷ aged unmarried women, preferably teachers,⁴⁸ aged and infirm native-born inhabitants of a town,⁴⁹ the indigent insane of a particular city or institution,⁵⁰ young married apprentices,⁵¹ to patients in government hospital,⁵² to assist deserving applicants for admission to a particular home, who are unable to furnish the necessary money to meet the requirements for admission,⁵³ and a bequest in trust for the benefit of a specified incorporated hospital.⁵⁴

A gift to a charitable home is a gift for the benefit of its inmates.⁵⁵

Donation for sufferers from specific catastrophe. A relief fund raised by donations of the people for the immediate relief of the sufferers from a large conflagration in a town is a private, and not a permanent or a general charity.⁵⁶

Preference for poor relatives. Where a gift is for a charitable purpose, but poor relatives are preferred, and the trustees make no selection, the

poor relatives are those who would take under the statute of distributions, although the trustees might have selected from a larger class, and the court of chancery might exercise the power of selection.⁵⁷

Necessity for method of ascertainment or selection. In some jurisdictions, it is held that, where no method for ascertainment or selection is provided, a gift fails for uncertainty when it is to the poor of a certain city,⁵⁸ or to the Roman Catholic orphans of a certain diocese.⁵⁹

Poverty of beneficiary required. There is no clear line capable of demarcation as to the requisite financial status of a particular recipient in order to justify the characterization of the benefit to him as charitable;⁶⁰ and a bequest for charitable purposes is not invalid because the individual recipients are not required to be entirely destitute,⁶¹ although, of course, the instructions in the instrument creating the trust as to the degree of destitution required will control.⁶² However, a gift to

46. N.Y.—Beekman v. Peo., 27 Barb. 260, affirmed 23 N.Y. 298, 80 Am. D. 269.

47. Cal.—Fay v. Howe, 69 P. 423, 136 Cal. 599.

48. Ky.—State Bank & Trust Co. v. Patridge, 248 S.W. 1056, 193 Ky. 403.

49. Mass.—Fellows v. Miner, 119 Mass. 541.

50. La.—Vance's Succ., 2 So. 54, 39 La. Ann. 371.

Indigent insane not paupers

Testator by his will leaving bequest to trustees of insane hospital for the benefit of the indigent insane held to have been made in contemplation of the statutory division of the inmates into the classes of insane paupers and indigent insane not paupers, and the latter class was intended as the beneficiaries of the trust fund.—Weeks v. Mansfield, 80 A. 784, 84 Conn. 544.

Benefit as limited to insane of particular institution

Where will directed the trustees to convey the residue of testator's estate to the board of trustees of the state general hospital for the insane located at M, to hold for the benefit of the insane poor of the state, with the right to expend the annual income for the support of indigent insane persons, with a preference to such persons as had a legal residence in the town of H, and a state statute, provides that insane persons committed from parts of the state lying outside certain counties, which counties do not include the town of H should be sent to the hospital at M, except as otherwise provided, and that indigents may be committed to

either of two state institutions at the discretion of the probate court upon consideration of a request made by the applicant, held that while the trustees must give preference to indigent insane residents of H in the hospital at M, and if the indigent residents of H were compelled to go to the N hospital because of insufficient accommodations at the other hospital, the trustees must provide for them there, under most conditions they could expend any balance of the income remaining after H residents in the hospital at M were provided for, in the support of other indigents in that hospital, but the fund could not be expended for the support of persons confined in other places than the state hospitals, unless confinement elsewhere was necessary for lack of accommodations for patients there, and if a resident of H voluntarily applied for admission to the N hospital is not entitled to support from the trust fund.—Weeks v. Mansfield, supra.

51. Pa.—Apprentices' Fund Case, 2 Pa. Dist. 435, 13 Pa. Co. 241.

52. D.C.—Darcey v. O'Brien, 65 F.2d 599, 62 App.D.C. 151, certiorari denied 54 S.Ct. 73, 290 U.S. 658, 78 L.Ed. 570.

Poor soldiers of hospital

Where residuary clause of holographic will read that "any amount left to go to the poor soldiers, Letterman Hospital" and testatrix had been a member of a relief organization actively engaged in aiding soldiers at such hospital, charitable trust was created to be used for benefit of such poor soldiers in hospital as officials in charge should determine in need of assistance, and

bequest was to that class of charitable patients, and to that class only.—In re De Mars' Estate, Cal. App., 67 P.2d 374.

53. D.C.—Washington Loan & Trust Co. v. Hammond, 278 F. 569, 51 App.D.C. 260.

54. N.Y.—Matter of Beaver, 116 N. Y.S. 424, 62 Misc. 155.

55. Cal.—In re McDole's Estate, 10 P.2d 75, 215 Cal. 328.

56. Me.—Doyle v. Whalen, 32 A. 1022, 87 Me. 414, 31 L.R.A. 118.

57. Conn.—Bull v. Bull, 8 Conn. 48, 20 Am.D. 86.

N.H.—Goodale v. Mooney, 60 N.H. 528, 49 Am.R. 334.

58. Wis.—Hoffen's Est., 36 N.W. 407, 70 Wis. 522.

59. Wis.—Heiss v. Murphey, 40 Wis. 276.

60. N.Y.—In re Skuse's Estate, 1 N. Y.S.2d 202, 165 Misc. 554.

61. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

Contributions from members or their friends permissible

Under will, trustees administering home for aged held to have discretion in selection of members for home, to receive membership fees from members able to contribute, and to receive, from members or their friends or relatives, any contributions of money or property to be used in aid of members' maintenance in home.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P.2d 403, 174 Wash. 19.

62. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

Support from relatives

Where persons eligible to admis-

the "poor" or "poorest" of a special class can be treated as charitable only when it can be construed as a gift to those actually poor, and not to the least wealthy of a prosperous class.⁶³

c. Promotion of Education

Under and subject to rules above stated, bequests or donations for the promotion of education either to or for the benefit of some educational institution or to or for specified classes of people whom the donor desires to aid in obtaining an education may be valid.

Since, as appears supra § 15, gifts for schools and scholars and the advancement of learning, science and the useful arts generally are for a charitable purpose, the general rules applicable to the beneficiaries of charitable trusts, considered supra §§ 37-41, apply thereto. Thus gifts to maintain a school or schools,⁶⁴ to a corporation organized to establish and maintain a school⁶⁵ or formed for the maintenance of art schools and the main-

tenance of art students abroad,⁶⁶ for the establishment of a school for girls,⁶⁷ for the aid and maintenance of a kindergarten in a certain city,⁶⁸ for the school fund of a certain county,⁶⁹ to aid free public schools within a particular town, district, or other designated area,⁷⁰ for educational purposes in the state, other than for schools owned or controlled by any religious sect or denomination,⁷¹ or to support an annual course of lectures to be delivered in a particular locality on specified subjects under the direction of the board of education⁷² are valid and not subject to attack because of any insufficiency as to the beneficiaries. Also, a gift for educational purposes may be valid as a charity, where the donor limits the benefits of the gift to a particular class, although he does not describe the class more particularly, except perhaps as to locality, than by such terms as "poor," "needy," or "indigent" students, children, or other

sion to hospital were described in will creating charity as those without necessary means of support, applicants having relations willing to support them and furnish medical and surgical treatment are not eligible.—*Dillaway v. Burton*, supra.

63. Mass.—*New England Sanitarium v. Stoneham*, 91 N.E. 385, 205 Mass. 335.

64. U.S.—*Laswell v. Hungate*, Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied *Bishop v. Hungate*, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

School founded by testator

Testamentary gift to trustees, invested with discretionary powers as to manner of expenditure, to aid a school founded by testator, at which white children between the ages of six and twenty-one shall be admitted free of tuition, preference to be given those who have been in attendance before and those who reside in the district, held to sufficiently describe the beneficiaries, and to be good as a gift to a public charity.—*Kirtley v. Spencer*, Tex.Civ.App. 222 S.W. 328, error refused.

Proper selection presumed

A devise for support of a free school to be designated by a city is not invalid, on the theory that it leaves the city free to designate a school whose teachings are contrary to public policy, as not only must it be presumed that it will properly discharge its duty, but, if it should fail therein, the courts could lend their aid.—*Laswell v. Hungate*, Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied *Bishop v. Hungate*, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

Right of school not selected as beneficiary

Under a devise to a township in

trust for the support of one or more Protestant schools, one maintaining a Protestant school, which had never been selected either by the township or the trustees thereof as the one to be supported by the fund was not entitled to such fund.—*German Evangelical Protestant Church v. Cincinnati*, 41 Ohio St. 278.

65. Conn.—*Lyme High School Ass'n v. Alling*, 154 A. 439, 113 Conn. 200.

Type of school to be assisted

(1) Under bequest to church board, the trust was not for the aid of colleges exclusively, and a night school in which only common branches were taught was a proper object of bounty.—*Mary S. Fithian Night School & Academy v. College Board of Presbyterian Church in United States*, 102 A. 855, 88 N.J.Eq. 468.

(2) Conveyance to denominational institute for school purposes only held to create trust for education of children who might attend denominational institute only and not for the benefit of the public schools or schools generally.—*King v. Banks*, 124 So. 871, 220 Ala. 274.

Pupils of a school

Any doubt concerning language of charter as to persons whom free educational institute should receive as pupils should be resolved liberally to carry out charitable purpose of donor as effectually as possible. Under charter of free educational institution referring to those to be benefited as "persons" and imposing no limitation of sex, in view of purpose of founders to benefit those who might belong to their name and to town where institute was to be located without discrimination, and of practical construction given charter by successors to founders, held, that trustees were required to fur-

nish girls educational benefits of institution.—*Healy v. Loomis Institute*, 128 A. 774, 102 Conn. 410.

66. U.S.—*Art Students' League of New York v. Hinkley*, D.C.Md., 31 F.2d 469, affirmed, C.C.A., *Hinkley v. Art Students League of New York*, 37 F.2d 225, certiorari denied 50 S.Ct. 247, 281 U.S. 733, 74 L.Ed. 1149.

Limitation on corporation's place of business immaterial

That charter of corporation organized to maintain art schools required business to be done in New York did not invalidate gift to it in trust for education of art students abroad.—*Art Students' League of New York v. Hinkley*, supra.

67. N.Y.—*Butterworth v. Keeler*, 154 N.Y.S. 744, 169 App.Div. 136.

Glass held sufficiently identified to prevent improper selection

In a gift to be used in founding and maintaining a college for the higher education of women, the beneficiaries are so positively identified by class that any arbitrary selection of pupils by the board of trustees could be restrained in a suit by the Attorney General in the interest of the people.—*Long v. Union Trust Co.*, D.C.Ind., 272 F. 699, affirmed, C.C.A., 280 F. 636.

68. Minn.—*Owatonna v. Rosebrock*, 92 N.W. 1122, 88 Minn. 318.

69. Neb.—*Elliot v. Quinn*, 189 N.W. 173, 109 Neb. 5.

70. Or.—*In re John*, 47 P. 341, 50 P. 220, 30 Or. 494, 36 L.R.A. 242. 11 C.J. p 346 note 49.

71. U.S.—*U. S. v. First Nat. Bank*, C.C.A.Ala., 74 F.2d 360.

72. W.Va.—*Mercantile Banking & Trust Co. v. Showacre*, 135 S.E. 9, 102 W.Va. 260, 48 A.L.R. 1138.

persons,⁷³ or although he indicates a particular class of poor persons as the beneficiaries.⁷⁴ The same is true where the donor describes the beneficiaries as young women to be selected in a certain order;⁷⁵ sons of ministers of a particular denomination;⁷⁶ Quaker children;⁷⁷ white children;⁷⁸ colored children or people;⁷⁹ apprentices;⁸⁰ workingmen;⁸¹ the deaf and dumb;⁸² the students of a particular institution;⁸³ worthy students of a particular institution;⁸⁴ or as the postgraduates of a certain school who desire to pursue their studies further at a particular college or university.⁸⁵

A bequest for "the education of poor children and towards the maintenance of a good common school in said district" has been held to apply only to white children, where a subsequent statute authorized colored children to participate in the benefits of the common schools;⁸⁶ but a bequest for the support of a free English school for the instruction of youth, "wherever they may belong," does not limit the instruction to male children only.⁸⁷

73. Ill.—Hitchcock v. Presbyterian Church Bd. of Home Missions, 102 N.E. 741, 259 Ill. 288, Ann.Cas. 1915B 1, reversing 175 Ill.App. 87. 11 C.J. p 346 note 36.

Definiteness of beneficiaries where trust is primarily for relief of poverty rather than for promotion of education see *supra* § 42 b.

74. Ark.—McDonald v. Shaw, 98 S. W. 952, 81 Ark. 235. 11 C.J. p 346 note 37.

75. Pa.—Curran's App., 4 Pennyp. 331, 15 Phila. 84.

76. Selected members of class intended

Provision of will giving residue to the trustees of a college for the education of the sons of Methodist ministers in the state held not void as against contention that it created a trust for the benefit of all the sons of Methodist ministers in the state, which would be of no benefit to any one because of the large number of the beneficiaries and the insufficiency of the trust fund to be of benefit to all, the intention of the testator being held to be that the fund should be used for the education of selected members of the general class to whom its benefits were limited.—*Sparks v. Woolverton*, 99 So. 102, 210 Ala. 669.

77. Pa.—Price v. Maxwell, 28 Pa. 23.

78. Ohio.—Cincinnati Univ. v. McMicken, 6 Ohio Cir.Ct. 188, 3 Ohio Cir.Dec. 409.

79. Conn.—Treat's App., 30 Conn. 113.

Ind.—*Craig v. Secrist*, 54 Ind. 419.
R.I.—*Godfrey v. Hutchins*, 68 A. 317, 28 R.I. 517.

80. Mass.—Smith Charities v. Northampton, 10 Allen 498.
Pa.—*Apprentices' Fund Case*, 2 Pa. Dist. 435, 13 Pa.Co. 241.

81. Ind.—Sweeney v. Sampson, 5 Ind. 465.

82. Conn.—American Asylum of Deaf and Dumb, etc. v. Phoenix Bank, 4 Conn. 172, 10 Am.D. 112.

83. Ill.—Summers v. Chicago Title & Trust Co., 167 N.E. 777, 335 Ill. 564.
N.Y.—*Sawyer v. Dearstyne*, 139 N.Y. S. 955.

Number to be selected

Will creating trust fund, with direction to use the income to "support" student through a course at specified college, construed to require ample provision for one student rather than support of more than one by giving each bare necessities, but to so support more than one student when income so permits, rather than to support one in extravagance.—*Hoyt v. Bliss*, 105 A. 699, 93 Conn. 344.

Discretion of trustee as to mode of selection

A will creating trust fund, with directions to use income for support of student, passing the best examination, through certain college course, without specifying the details of the examination, is not invalid, as such details will be left to the sound discretion of the trustee.—*Hoyt v. Bliss*, 105 A. 699, 93 Conn. 344.

Gifts to public or private educational institutions as affecting validity see *supra* § 15.

84. Ala.—Alstork v. Curry, 91 So. 796, 207 Ala. 135.

Where a trust was created for the establishment of a professorship in a college and a professor was provided but he never served as such, he is not entitled to any income from the trust fund.⁸⁸ A devise to "a public seminary" is not too indefinite as not identifying any one institution of learning, but may be applied to the seminary of the testator's county, or to any seminary which his executor or a court of equity may select.⁸⁹ After an offer to donate a site for a schoolhouse has been accepted by the proper authorities and expenditures have been made on the strength thereof, the donor will not be allowed to restrict the use of the school to a certain class of pupils.⁹⁰ The fact that a school requires its students to pay tuition does not change its character as a charitable institution.⁹¹ A devise of property to a specific department of a university is a devise to the department and not to the university as an entity,⁹² and the abolishment of such department by the university prior to the time the devise becomes effective constitutes a renunciation of such devise.⁹³ Under a statute authorizing edu-

Class of students held intended

A valid charity held created by residuary bequest as endowment fund for named college for "worthy student" to be selected by the institution's trustees and faculty, it being clear that the letter "s" was unintentionally omitted at the end of the quoted words, and that a general class was intended, the bequest being to aid the securing of an education.—*Alstork v. Curry*, *supra*.

85. N.Y.—Kurzman v. Lowy, 52 N. Y.S. 33, 23 Misc. 380.

86. Ky.—Leeds v. Shaw, 82 Ky. 79, 80.

87. Mass.—Nelson v. Cushing, 2 Cush. 519.

88. N.Y.—American Church Missionary Soc. v. Griswold College, 58 N.Y.S. 3, 27 Misc. 42.

89. Ky.—Curling v. Curling, 8 Dana 38, 33 Am.D. 475.

90. Ill.—Price v. School Directors, 58 Ill. 452.

91. Ill.—Summers v. Chicago Title & Trust Co., 167 N.E. 777, 335 Ill. 564.

Character of gift not changed

The fact that an institution charges tuition does not prevent a gift to it from being a charitable one, see *supra* § 15.

92. Ala.—Trustees of Cumberland University v. Caldwell, 84 So. 846, 203 Ala. 590.

93. Ala.—Trustees of Cumberland University v. Caldwell, *supra*.

Other department not entitled to devise

Where a trust was created by a will for the benefit of a department

cational corporations to take property by gift, devise or purchase, organizations such as library associations are authorized to take.⁹⁴

In Virginia where, as appears supra § 39, uncertainty of beneficiaries is fatal to a charitable trust, a bequest to the trustees of the proposed industrial school near a specified locality or to the church or other agency which shall establish and control such school is invalid for indefiniteness of the beneficiaries.⁹⁵ Also, under a statute which validates a gift for the education of either white or colored persons as separate classes, a gift for the founding and maintaining of an educational institution, in which the selection of worthy and dependent young men who are to be admitted to the institution is left to a self-perpetuating board of trustees, does not require the trustees to make their selection from both classes, but authorizes them to select all applicants from one class and reject all applicants from the other, and is therefore a valid gift.⁹⁶

Situs. A gift for educational purposes is good where there is no limit of space expressed,⁹⁷ where the benefit of the gift is confined in terms to a particular locality,⁹⁸ or where the limit, although real, is not geometrically exact, as where it is limited to a particular town and vicinity.⁹⁹ For instance, a gift for the education of the children, or a particular class of children, of a particular state, county, town, or community is valid.¹ While there is authority to the contrary,² a fund to establish a school for poor children will not be limited to the town as it then was, but as it may be extended in

territory or divided.³

Specification as to type of school or course as controlling. A gift to procure scholarships for a certain type of schooling does not authorize the trustees to assist in the maintenance of students in other and different types of schools.⁴ In the selection of the beneficiary of a gift for the education of a certain class of people in an educational institution offering a certain type and standard of education and located in, or adjacent to, a specified locality, the dominant intent of the testator will be construed to require that preference be given to an institution offering the type and standard of education specified, even though not situated in the locality specified, rather than to an institution situated in the specified locality, but offering a course of study of a type and standard different from that specified.⁵

Acceptance by beneficiaries. Where a testator bequeathed a certain amount to be paid by the trustees of a trust fund to several universities for scholarship funds, it was held that the refusal to accept such scholarship funds, under restrictions prescribed by the trustees, did not show that the universities did not intend to use the funds in accordance with the provisions of the will.⁶

d. Promotion of Religion

Under and subject to rules above stated, bequests or donations to religious societies or to individuals or trustees for the promotion of religious purposes may be valid.

Applying the rules stated above in §§ 37-41, a gift to a designated or described church or religious

of a university, and not for the benefit of the university as an entity, on abolishment and discontinuance of such department, the trustees could not employ the property to the maintenance and conduct of some other department, notwithstanding the charter granted the university by the state where it was located provided that upon discontinuance of a department trustees should have power to determine what application should be made of funds raised or given for its endowment.—Trustees of Cumberland University v. Caldwell, *supra*.

94. Colo.—Tomay v. Crist, 226 P. 156, 75 Colo. 437.

95. Va.—Massanetta Springs Summer Bible Conference Encampment v. Keezell, 171 S.E. 511, 161 Va. 532.

Corporation which had discussed establishment of such school
Bequest "to the trustees of the proposed Industrial School near

Massanetta Springs or to the Church or other agency which shall establish and control such Industrial School" held not to designate as beneficiary Massanetta Springs Summer Bible Conference Encampment, which had discussed establishment and operation of an industrial school, or to authorize appointment of trustee to carry out purpose of gift.—Massanetta Springs Summer Bible Conference Encampment v. Keezell, *supra*.

96. Va.—Triplett v. Trotter, 193 S. E. 514.

97. Mass.—Sears v. Chapman, 33 N. E. 604, 158 Mass. 400, 35 Am.S.R. 502.

98. Vt.—Clement v. Hyde, 50 Vt. 716, 23 Am.R. 522.

99. Mass.—Sears v. Chapman, 33 N. E. 604, 158 Mass. 400, 35 Am.S.R. 502.

1. Mass.—Richardson v. Essex Inst., 94 N.E. 262, 208 Mass. 311, 21 Ann. Cas. 1158.

11 C.J. p 346 note 35.

2. Mo.—Crow v. Clay County, 95 S. W. 369, 196 Mo. 234.

3. U.S.—Port of Mobile v. Watson, Ala., 6 S.Ct. 398, 116 U.S. 289, 29 L.Ed. 620.

Ohio.—Fairfield Township Board of Education v. Ladd, 26 Ohio St. 210 —Zanesville Canal, etc., Co. v. Zanesville, 20 Ohio 483.

4. Ark.—Union Nat. Bank v. Kirby, 72 S.W.2d 229, 189 Ark. 369.

Business or commercial course

Testamentary trust to procure scholarships for a "business or commercial course" did not authorize trustees to assist in maintenance of music student, but only to procure scholarships for courses usually taught by business or commercial schools or colleges.—Union Nat. Bank v. Kirby, 72 S.W.2d 229, 189 Ark. 369.

5. Pa.—In re Curran's Estate, 16 Pa.Dist. & Co. 603, affirmed 165 A. 842, 310 Pa. 434.

6. La.—Succession of Breaux, 143 So. 246, 175 La. 269.

congregation is valid when it can be clearly seen what congregation is intended,⁷ even though there is merely a congregation answering the description and the church intended is only in contemplation and is not in actual existence at the time the deed of gift is executed.⁸ The courts have upheld as sufficiently definite and certain as to beneficiaries instruments containing language intended to create a charitable gift for all the religious societies in a city,⁹ to a religious corporation for its corporate purposes,¹⁰ for the poor churches in a city,¹¹ for the benefit of the churches of a particular denomination within a specified locality,¹² to the westerly part of a certain town, if the inhabitants will settle a minister of a particular denomination within a certain time, for the support of the gospel,¹³ for Roman Catholic charitable institutions in the

diocese of a certain Catholic bishop,¹⁴ for the reconstruction of monasteries destroyed by war and the relief of poor ones,¹⁵ for the worn-out or superannuated preachers of a certain conference,¹⁶ for the erection and maintenance, in a certain town, of a church or churches of a particular denomination,¹⁷ for the creation of a place of worship for the benefit of an indefinite number of persons,¹⁸ for the distribution of Bibles to the poor,¹⁹ for mission work,²⁰ for keeping up preaching in weak churches,²¹ for the purpose of evangelization and preaching of the gospel,²² for advancement of Christ's kingdom on earth,²³ and for other objects of a religious nature.²⁴

The beneficiaries are sufficiently designated by a conveyance to the trustees of an incorporated re-

7. Wis.—Giblin v. Giblin, 182 N.W. 357, 173 Wis. 632.
11 C.J. p 347 note 60.

Indefinite fluctuating membership intended

Under will making bequest to church society, testatrix intended indefinite, fluctuating membership of society, not its actual then membership at her decease.—Bates v. Schilling, 145 A. 295, 128 Me. 14.

Misdescription

A devise to a named church in a certain city is a sufficient devise to a congregation of that name, especially where there is evidence that there was no church having the name stated in the devise.—Giblin v. Giblin, 182 N.W. 357, 173 Wis. 632.

8. Ga.—Huger v. Protestant Episcopal Church, 73 S.E. 385, 137 Ga. 205.

9. Iowa.—Phillips v. Harrow, 61 N.W. 434, 93 Iowa 92.

10. Md.—Home for Incurables of Baltimore City v. Bruff, 153 A. 403, 160 Md. 156.

11. Mass.—McAlister v. Burgess, 37 N.E. 173, 161 Mass. 269, 24 L.R.A. 158.

12. Ky.—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 267 Ky. 358.

13. N.H.—Hopkinton Second Cong. Soc. v. Hopkinton First Cong. Soc., 14 N.H. 315.

14. Ky.—Tichenor v. Brewer, 33 S.W. 86, 98 Ky. 349, 17 Ky.L. 936.

15. Ky.—Obrecht v. Pujos, 268 S.W. 564, 206 Ky. 751.

16. Mo.—Buckley v. Monck, 187 S.W. 31.

- 11 C.J. p 347 note 67.

Will construed to include entire conference

Bequest under will of residue to trustees of named church, for support of superannuated preachers of named conference. held payable to

preachers supported by conference as a whole, and not solely for the support of the local preacher alone.—In re Aiken's Estate, Mo.App., 5 S.W.2d 662.

17. Ill.—Harges v. Zander, 145 N.E. 363, 314 Ill. 170.

- Wis.—Giblin v. Giblin, 182 N.W. 357, 173 Wis. 632.

- 11 C.J. p 347 note 68.

Bequest to church instead of to trustee immaterial

Bequest of property to unincorporated Pleasant Ridge Baptist Church for the erection or improvement of a church house is not rendered uncertain because made to the church instead of to a trustee, since Baptist churches are strictly democratic bodies and every church is supreme in itself.—Harger v. Barrett, 5 S.W.2d 1100, 319 Mo. 633.

18. R.I.—Buchanan v. McLyman, 153 A. 304, 51 R.I. 177—Brice v. Trustees of All Saints Memorial Chapel, 76 A. 774, 31 R.I. 183.

Trust deed construed

Under trust deed for benefit of members of Methodist Episcopal church to erect place of worship, members of local church as members of general church which actually used building, held beneficiaries, and by making imperative acceptance of minister assigned to church by national governing authority, and in providing for successive trustees and referring to minister, implied that local society was to use church. Provision that general church should dispose of surplus from sale of church property to satisfy obligations incurred by trustees held to mean only local church established in connection with church edifice.—Attorney General v. Armstrong, 120 N.E. 673, 231 Mass. 196.

19. Ky.—Kasey v. Fidelity Trust Co., 115 S.W. 739, 131 Ky. 609.

Contrary rule

Trust giving residue of estate to

executors in trust to invest in Bibles for distribution in home and foreign lands in quantities and places thought best by them has been held not to create private trust because of uncertainty of beneficiaries.—In re Vance's Estate, 4 P.2d 977, 118 Cal.App. 163.

20. Minn.—Lundquist v. First Evangelical Lutheran Church, 259 N.W. 9, 193 Minn. 474.

Either home or foreign missions

Testamentary gift "for either Home or Foreign Missions" designated with sufficient certainty particular charitable purpose for which gift was to be used.—Cheshire Bank & Trust Co. v. Doolittle, 155 A. 82, 113 Conn. 231.

To church organization for mission work

(1) Residuary clause of will bequeathing remainder of estate "to the board of directors and their successors in office of the Evangelical 'Fosterland Stiftelsen' of Stockholm, Sweden, in trust, to be held by them in trust, and the interest, rents, etc. . . . used for the furtherance, promotion, and extension of their foreign mission work," held sufficiently to designate object of trust and beneficiaries.—Martinson v. Jacobson, 205 N.W. 849, 200 Iowa 1054.

(2) Devise of corporate stock and land with provision that net income should be paid to trustees of religious organization for home mission work held not void for indefiniteness.—Whitsett v. Clapp, 158 S.E. 183, 200 N.C. 647.

21. N.C.—Whitsett v. Clapp, supra.

22. N.M.—Rhodes v. Yater, 202 P. 698, 27 N.M. 489, 22 A.L.R. 692.

23. N.Y.—In re Durbrow's Estate, 157 N.E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317.

24. Ky.—Leak v. Leak, 78 S.W. 471, 25 Ky.L. 1703.

- 11 C.J. p 347 note 69.

ligious society for the use of its "members,"²⁵ or by a devise to a bishop by name or his successor in office, to be applied to such charitable purposes of the diocese, naming it, as he may deem fit.²⁶ A bequest for the benefit of a church in a certain city, but not naming nor describing it other than by the name of its denomination, has been construed to be for the benefit of the several individual churches in the city belonging to that denomination.²⁷ Where members of a religious order incorporate, using the name of the order as the name of the corporation, a devise to the name by which both the order and the corporation are known will pass title to one of them.²⁸

In various cases, instruments intended to create gifts for religious purposes have been held invalid on account of uncertainty as to beneficiaries, but many of these cases are of jurisdictions where, at least at the time of decision, indefiniteness of beneficiaries was fatal.²⁹ So a bequest to a trustee to be used by him for the extension of the kingdom of God in a certain church has been held invalid,³⁰ as is likewise a gift to some Catholic institution.³¹

At one time in West Virginia a bequest of income to be applied annually to the pastor's salary of a certain church was held void for uncertainty,³² but a bequest in trust for such a purpose of a fund which the testator himself held as trustee

was held valid.³³

A state constitutional provision which prohibits gifts, sales or devises to religious societies for the support of any minister, public teacher, or preacher of the gospel, religious sect, order or denomination, without the prior or subsequent sanction of the legislature, except land, not exceeding five acres, for a church, meeting-house, or other house of worship, or parsonage, or for a burying ground, does not apply so as to invalidate devises or bequests either to a secular corporation, even though it was founded by and is under the control of a particular church or religious society,³⁴ or to a religious corporation for the use of an educational institution provided for in the articles of its incorporation;³⁵ nor does the failure of a foreign religious corporation to secure the required legislative sanction of a testamentary gift, at the first session of the legislature thereafter, bar its right to the gift on the ground of laches.³⁶

Education of young men for the ministry. A bequest in trust to pay a certain sum as income to the "proper authorities" of an incorporated church, in order to assist for the ministry young men of the church to be selected by the pastor and church council, is not void for uncertainty,³⁷ nor is a trust to aid "indigent young men" of a certain town or state in fitting themselves for the evangelical ministry.³⁸

25. Wis.—Fadness v. Braunborg, 41 N.W. 84, 73 Wis. 257.

26. Del.—Monaghan v. Joyce, 103 A. 582, 12 Del.Ch. 28.

27. La.—Villa's Succ., 61 So. 765, 132 La. 714.

28. Mo.—Society of Helpers of Holy Souls v. Law, 186 S.W. 718, 267 Mo. 667.

29. Cal.—In re Vance's Estate, 4 P. 2d 977, 118 Cal.App. 163.

Md.—Prettyman v. Baker, 46 A. 1020, 91 Md. 539.

11 C.J. p 347 note 74.

To charity connected with church

Will devising property to charity connected with Methodist Episcopal Church of United States held too vague and indefinite, since it cannot be known what class of persons are entitled to the benefit sought to be conferred.—Methodist Episcopal Church of U. S. of America v. Walters, D.C.Mo., 50 F.2d 416.

To Seventh Day Adventist Church

A bequest in trust for the benefit of the "Seventh Day Adventist Church," to be used principally for publication and distribution of tracts and literature teaching its doctrine, to be paid to the "proper trustees"

of said church, held, in view of the various organizations of the church, the absence of any local church, the fact that testator was not a member or attendant of any such church, etc., to be void for uncertainty, the cy pres doctrine not obtaining in the state.—Tharp v. Smith, 195 N.W. 331, 182 Wis. 107.

To unincorporated society

Trust of land to unincorporated society, called Quakers is void for indefiniteness of cestui.—Mayfield v. Safe Deposit & Trust Co. of Baltimore, 132 A. 595, 150 Md. 157.

Bequest to pastor for missionary work of church

Bequest of money to be administered by named pastor, who should pay interest drawn by money to "the Methodist Church South for missionary work where he thinks it will do the greatest good," held not to effect gift, in view of rule that trust for indefinite beneficiaries, if named trustee is individual or unincorporated body, is invalid unless expressly validated by statute; and held not to effect valid gift on theory that it was in effect gift to Board of Missions of the Methodist Episcopal Church South, a corporation.—Moore v. Perkins, Va., 192 S.E. 806.

30. Minn.—In re Ford's Estate, 175 N.W. 913, 144 Minn. 454.

31. N.J.—Chelsea Nat. Bank v. Our Lady Star of the Sea, Atlantic City, N.J., 147 A. 470, 105 N.J.Eq. 236.

Reason for invalidity

Testamentary gift "to some Catholic Institution," although "gift to charitable institution," held void because no beneficiary was named and no person appointed to select beneficiary.—Chelsea Nat. Bank v. Our Lady Star of the Sea, Atlantic City, N.J., supra.

32. W.Va.—Pack v. Shanklin, 27 S. E. 389, 43 W.Va. 304.

33. W.Va.—Morris v. Morris, 37 S. E. 570, 43 W.Va. 430.

34. Md.—President and Counsel of Mt. St. Mary's College v. Williams, 103 A. 479, 132 Md. 184.

35. Md.—Mather v. Knight, 123 A. 109, 143 Md. 612.

36. Md.—Waters v. Waters, 142 A. 297, 155 Md. 146.

37. R.I.—Wood v. Fourth Baptist Church, 61 A. 279, 26 R.I. 594. 11 C.J. p 347 note 70.

38. Conn.—Storr's Agricultural School v. Whitney, 3 A. 141, 54 Conn. 342.

Masses. Although there is authority that bequests for masses for particular deceased persons are private trusts, which are void because there is no living beneficiary to enforce the trust,³⁹ in gen-

eral, they are sustained either under the doctrine of charitable and pious uses,⁴⁰ or as outright gifts for a specified legal object.⁴¹

VI. SUBJECT MATTER AND TITLE OR INTEREST ACQUIRED

§ 43. In General

The subject matter of a gift or bequest to charity and the title or interest acquired are determined by the intention of the donor as revealed by the instrument he has executed in the light of attending circumstances.

In determining the character of the interest con-

veyed by a particular gift or bequest to charity,⁴² or the time of vesting thereof,⁴³ the intention of the donor, as revealed by the instrument he has executed, construed in the light of attending circumstances, controls, and there is no presumption

39. Ala.—Festorazzi v. St. Joseph's Catholic Church of Mobile, 18 So. 394, 104 Ala. 327.

40. Ill.—Hoeffer v. Clogon, 49 N.E. 527, 171 Ill. 462, 40 L.R.A. 730, 63 Am.S.R. 241.

N.H.—Webster v. Sughrow, 45 A. 139, 69 N.H. 380, 48 L.R.A. 100.

N.Y.—Morris v. Edwards, 124 N.E. 724, 227 N.Y. 141, modifying In re Morris, 175 N.Y.S. 913, 188 App. Div. 894—Matter of Eppig, 118 N.Y.S. 683, 63 Misc. 613—Matter of Zimmerman, 50 N.Y.S. 395, 22 Misc. 411.

Wis.—In re Kavanaugh's Estate, 126 N.W. 673, 143 Wis. 90, 28 L.R.A., N.S., 470, overruling McHugh v. McCole, 72 N.W. 631, 97 Wis. 166, 40 L.R.A. 724, 65 Am.S.R. 106.

Selection of immediate object by trustee permitted

A bequest to be applied for masses to be celebrated for testator will not fail because no beneficiary was designated, since testator undoubtedly intended that masses should be said in some Roman Catholic church, and general class of use being designated with reasonable certainty, immediate object thereof may be selected by trustee, and if trustee appointed should fail to execute wish, he may be called to account.—Obrecht v. Pujos, 268 S.W. 564, 206 Ky. 751.

Prior law in New York

*Prior to the time the law was changed so as to permit indefiniteness of beneficiaries of indefinite trusts, see supra § 39, a bequest for masses for the souls of particular deceased persons, and also for the souls of all others who may be in purgatory, was invalid.—Holland v. Alcock, 16 N.E. 305, 108 N.Y. 312, 2 Am.S.R. 420, reversing 40 Hun 372, 3 How.Pr.N.S., 106.

As constituting charitable purpose

Gifts for masses as constituting gifts for charitable or pious purposes see supra § 18, and the C.J.S. title Wills § 108, also 68 C.J. p 543 notes 87-90, p 554 notes 7-15.

41. Cal.—In re Lennon's Estate, 92 P. 870, 152 Cal. 327, 125 Am.S.R. 58, 14 Ann.Cas. 1024.

Iowa.—Moran v. Moran, 73 N.W. 637,

104 Iowa 216, 39 L.R.A. 204, 65 Am.S.R. 443.

R.I.—Sherman v. Baker, 40 A. 11, 20 R.I. 446, 40 L.R.A. 717.

Failure to designate parish or priest immaterial

A bequest directing executor to sell land and expend the proceeds for masses for testator and his deceased wife, naming neither parish nor priest, is not void for uncertainty in the designation of a beneficiary.—Wilmes v. Tiernay, 174 N.W. 271, 187 Iowa 390.

42. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535.

Ill.—Jansen v. Godair, 127 N.E. 97, 292 Ill. 364.

Mass.—Williams v. Young Men's Christian Ass'n, 122 N.E. 570, 232 Mass. 472—Turner v. First Congregational Soc. of North Brookfield, 121 N.E. 106, 231 Mass. 414. Neb.—Alleback v. City of Friend, 226 N.W. 440, 118 Neb. 781.

N.Y.—In re Tift, 180 N.Y.S. 384, 110 Misc. 624.

11 C.J. p 348 note 91.

Income from the corpus was pro-rated among charities in accordance with testatrix's intentions.—In re Henderson's Estate, 185 A. 819, 323 Pa. 305.

Number of shares of stock

Number of shares of corporation stock, which hospital is entitled to have held for it under will directing trustee to set aside, invest, and pay hospital income from five hundred thousand dollars worth of such shares, depends on value thereof when trust is effectively set up. A subsequent decline in the value of the stock does not require the appropriation of additional shares.—First Nat. Bank of Boston v. Truesdale Hospital, 192 N.E. 150, 288 Mass. 35.

Property held devoted to charity

(1) Principal and income of fund. N.J.—Brown v. Coxson, 181 A. 42, 119 N.J.Eq. 86, affirming 177 A. 551, 118 N.J.Eq. 114—Brown v. Coxson, 181 A. 43, 119 N.J.Eq. 85,

affirming 177 A. 551, 118 N.J.Eq. 114.

Pa.—In re Henderson's Estate, 185 A. 819, 323 Pa. 305.

(2) Entire residuary estate.

Conn.—Brinsmade v. Beach, 119 A. 233, 98 Conn. 322.

Mass.—Massachusetts Institute of Technology v. Attorney General, 126 N.E. 521, 235 Mass. 288.

(3) After life tenant's death, any sum not needed for annuities, expenses, and management of trust estate.—Webb v. Webb, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404.

(4) Entire income of fund.—McElwain v. Allen, 134 N.E. 620, 241 Mass. 112.

(5) Fund added to original fund.—Trustees Stewart Common School Fund v. Lewis, 28 S.W.2d 27, 234 Ky. 286.

(6) Income accruing prior to beneficiary's incorporation.—Young Men's Christian Ass'n of Matawan v. Appleby, 127 A. 25, 97 N.J.Eq. 95, affirmed 130 A. 921, 98 N.J.Eq. 704.

(7) Additions to, and improvements on, lot devised.—Board of Foreign Missions of the General Synod of the Evangelical Lutheran Church of the United States of America v. Shoemaker, 105 A. 748, 133 Md. 594.

(8) Such sum as shall be suitable, for saying of mass, to the condition in life of testator.—In re Welch, 172 N.Y.S. 349, 105 Misc. 27.

43. N.Y.—Wright v. Wright, 122 N.E. 213, 225 N.Y. 329, affirming 159 N.Y.S. 1150, 173 App.Div. 966, rehearing denied 123 N.E. 71, 226 N.Y. 578.

Gift held not to be contingent

Devise of farm to trustee to lease and receive rents therefrom, to keep it in good repair and improvement, so as to get best possible income therefrom, and out of income pay lawful assessments thereon, improvements, and expenses, and directing that net income be paid to hospital for named purposes.—Walker v. Central Trust & Savings Bank of Geneseo, 149 N.E. 234, 313 Ill. 253.

that any particular estate was intended to be conveyed other than the words of the instrument itself indicate.⁴⁴ Since, however, charities are favored by the law, and are presumed to be perpetual, in the absence of the expression of an intention to pass a lesser estate,⁴⁵ a deed to trustees for a charitable use passes prima facie a fee, although it does not run to their heirs and assigns.⁴⁶ Also the language of the instrument and the circumstances may be such that money given for a charitable use becomes part of a charitable fund already established.⁴⁷

Where a charitable trust is created, legal title to the property vests in the named trustee.⁴⁸ In case the trust is not to take effect until a date subsequent to the death of the testator, the legal title to the property given for this purpose vests in the executor or the heir at law during the interim,⁴⁹ and under some statutes, if no person is named as trustee, title vests in a designated court.⁵⁰ However, it is in a sense immaterial who has the legal title, as whoever takes the property takes it charged with the use or trust.⁵¹

The beneficiaries of such a trust generally obtain an equitable estate therein,⁵² which becomes fixed at the time of their selection or appoint-

ment.⁵³ Ordinarily, where such power is not conferred by the deed of trust, the beneficiary of a charitable trust does not have the right to assign its right to income therefrom.⁵⁴

A statute providing in effect that personal property given to, or acquired by, trustees for a charitable purpose shall stand vested in the trustees will be construed impliedly to authorize the transfer of personal property for a charitable trust.⁵⁵

Estate of donor. A devise of property to charity is not invalidated by the fact that the testator owned only an undivided interest in the property in question.⁵⁶

Interest and accumulations. A charitable trust created in a legacy draws interest from the time of the testator's death⁵⁷ and is not governed by the rule that general legacies shall not draw interest until one year after the testator's death, considered in the C.J.S. title Wills § 1348, also 69 C.J. p 1261 note 27. Where, however, the intention of the testator is that the fund shall be set up within a "reasonable time" after his death, such fund is not entitled to interest, unless the reasonable time for payment is exceeded.⁵⁸ Where such is the intention of the testator, accumulations of a gift of corporate stock to a charity belong to the

44. Fla.—*Jordan v. Landis*, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

45. Ala.—*Antones v. Eslava*, 9 Port. 527.

Perpetual easement

Sometimes the language of the instrument may be such that a perpetual easement for a charitable purpose is created.—*Saxton v. Mitchell*, 78 Pa. 479.

46. U.S.—*Gredig v. Sterling*, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535.

11 C.J. p 348 note 81.

Fee simple estate

A devise of land to a corporation for charitable purposes passes a fee simple in the land, although it contains the words "so that the profits or interests arising therefrom be annually appropriated to the objects of said societies forever."—*Thompson v. Swoope*, 24 Pa. 474.

Partition suit did not affect title to lands devised for scientific purposes and preservation of relics thereon.—*President and Fellows of Harvard College v. Jewett*, C.C.A. Ohio, 11 F.2d 119.

47. Mass.—*St. Paul's Church v. Atty.-Gen.*, 41 N.E. 231, 164 Mass. 188.

48. Mass.—*Williams v. Young Men's*

Christian Ass'n, 122 N.E. 570, 232 Mass. 472.

N.Y.—*In re Tiffany's Estate*, 285 N.Y.S. 971, 157 Misc. 873.

Vt.—*Davis v. Union Meeting House Soc.*, 108 A. 704, 93 Vt. 520.

49. N.D.—*Hagen v. Sacrison*, 123 N.W. 518, 19 N.D. 180, 26 L.R.A., N.S., 724.

11 C.J. p 348 note 86.

50. N.Y.—*Rothschild v. Schiff*, 80 N.E. 1030, 188 N.Y. 327.

51. U.S.—*Inglis v. Sailor's Snug Harbor*, N.Y., 3 Pet. 99, 7 L.Ed. 617.

N.Y.—*Sailors' Snug Harbor v. Carmody*, 144 N.Y.S. 24, 158 App.Div. 738, reversing 137 N.Y.S. 968, 77 Misc. 494, and affirmed 105 N.E. 543, 211 N.Y. 287.

Hold title for beneficiaries

The holders of the legal title of a bequest to or for the use of a charity hold the title as trustees for the beneficiaries, or, if such trust fails, then for the heirs or next of kin of the testator.—*Rabinowitz v. Wollman*, Md., 197 A. 566.

Will of trustee, under void charitable trust, passes only the personal interest of the trustee in the corpus of the fund.—*Simmon's Ex'r v. Hunt*, 188 S.W. 495, 171 Ky. 397.

52. Mass.—*Williams v. Young Men's Christian Ass'n*, 122 N.E. 570, 232 Mass. 472.

Vt.—*Davis v. Union Meeting House Soc.*, 108 A. 704, 93 Vt. 520.

53. Del.—*State v. Griffith*, 2 Del.Ch. 392.

Teachers' retirement fund

A bequest of income to a teachers' retirement fund was held, under a statute abolishing such fund and creating a general retirement fund, not to pass to or become a part of the general fund.—*Powers v. Home for Aged Women*, R.I., 192 A. 770, 110 A.L.R. 1361.

54. Me.—*Bancroft v. Maine Sanatorium Ass'n*, 109 A. 585, 119 Me. 56.

No right of possession

Whatever rights purchasers of interests of part of beneficiaries of charitable trust acquired did not confer on them right of possession or control of trust property or make them tenants in common with trustee.—*State ex rel. Carmichael v. Bibb*, Ala., 173 So. 74.

55. W.Va.—*Hays v. Harris*, 80 S.E. 827, 73 W.Va. 17.

56. Pa.—*In re Darlington's Estate*, 137 A. 263, 289 Pa. 297.

57. N.Y.—*In re Parkin*, 180 N.Y.S. 684, 190 App.Div. 875, affirming *In re Wallace's Estate*, 175 N.Y.S. 730, 106 Misc. 305—*In re People's Trust Co.*, 174 N.Y.S. 163, 106 Misc. 108.

58. N.Y.—*In re People's Trust Co.*, supra.

charity, even though they arise before final acceptance of the gift by the beneficiary.⁵⁹

§ 44. Conditions

A charitable gift may be subject to any legal conditions, and such conditions are subject to the usual rules governing conditional gifts and devises.

Charitable gifts may be conditional,⁶⁰ and, when such conditions are accepted, there is a binding obligation that may be enforced through the courts,⁶¹ provided they are not unreasonable, impossible of performance, or opposed to public policy.⁶² An intention to render a charitable gift conditional is not to be lightly inferred, but must clearly appear from the words of the instrument.⁶³ Mere state-

ments as to the general purpose of the gift or the use to which it is to be applied,⁶⁴ or mere precatory expressions,⁶⁵ are insufficient to render charitable gifts or bequests conditional, and the donor's declaration of one condition excludes all others.⁶⁶ Even where the word condition is used, the instrument creating a charitable trust will not be interpreted as imposing a condition in the absence of a reverter clause.⁶⁷

Conditions in a charitable gift or bequest will be given a reasonable construction,⁶⁸ and in settling the meaning and effect thereof, the determining factor is the intention of the donor as ascertained from the entire instrument and in the light of the circumstances under which it came into existence.⁶⁹

59. Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18.

60. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L. Ed. 535.

Iowa.—Curtis & Barker v. Central University of Iowa, 176 N.W. 330, 188 Iowa 300.

Kan.—In re White's Estate, 288 P. 764, 130 Kan. 714.

Mass.—Adams v. Plunkett, 175 N.E. 60, 274 Mass. 453.

11 C.J. p 349 note 92.

Particular conditions held valid

(1) Restraint on alienation.—Sisters of Mercy of Cedar Rapids v. Lightner, Iowa, 274 N.W. 86.

(2) Preventing diversion of trust estate from uses on which estate is granted.—Trustees of First Presbyterian Church of Town of Salem v. Wheeler, 149 A. 589, 106 N.J.Eq. 8.

(3) As to selection of trustees.—Adams v. Plunkett, 175 N.E. 60, 274 Mass. 453.

61. Iowa.—Curtis & Barker v. Central University of Iowa, 176 N.W. 330, 188 Iowa 300.

11 C.J. p 349 note 93.

62. N.Y.—In re Sterne's Estate, 263 N.Y.S. 304, 147 Misc. 59.

11 C.J. p 350 note 13.

Effect of void condition

(1) Where the condition was unreasonable, the gift was given to the charity free therefrom. — In re Sterne's Estate, 263 N.Y.S. 304, 147 Misc. 59.

(2) The fact that eminent domain proceedings render a condition subsequent in a charitable gift impossible of performance does not deprive the charity of its right to the remainder of the gift.—In re Cook's Will, 277 N.Y.S. 26, 243 App.Div. 706, affirmed In re Westchester County, by Westchester County Park Commission, 198 N.E. 404, 268 N.Y. 560.

63. Mass.—Attorney General v. City

of Lowell, 141 N.E. 45, 246 Mass. 312.

R.I.—Buchanan v. McLyman, 153 A. 304, 51 R.I. 177.

Tenn.—Southwestern Presbyterian University v. City of Clarksville, 259 S.W. 550, 149 Tenn. 256.

Gifts held not conditional

(1) Words "said association" in a gift to a Y. M. C. A. were held not to show an intention to make the vesting of the gift conditional on the incorporation of the association.—Young Men's Christian Ass'n of Matawan v. Appleby, 127 A. 25, 97 N.J.Eq. 95, affirmed 130 A. 921, 98 N.J. Eq. 704.

(2) City receiving bequest for erection of hospital was held to be entitled to receive funds from other sources to aid in completion of hospital.—Allebach v. City of Friend, 226 N.W. 440, 118 Neb. 781.

(3) Gift to endowment of a college held not conditional so as to prevent college from removal to another town and merger with another college without forfeiture.—Lupton v. Leander Clark College, 187 N.W. 496, 194 Iowa 1008—Starr v. Morningside College, 178 N.W. 281, 186 Iowa 790.

Gift held not to create contingent interest

Ill.—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344.

64. Ga.—Heyward v. Hatfield, 185 S. E. 519, 182 Ga. 373.

Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

La.—Hutchinson v. Tulane University of Louisiana, 131 So. 838, 171 La. 653.

N.Y.—In re Arber's Estate, 272 N.Y. S. 684, 151 Misc. 861.

Tenn.—Southwestern Presbyterian University v. City of Clarksville, 259 S.W. 550, 149 Tenn. 256.

11 C.J. p 349 notes 3, 4.

65. U.S.—Laswell v. Hungate, C.C. A.III., 256 F. 635, 168 C.C.A. 29,

certiorari denied Bishop v. Hun-

gate, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 471, 121 Me. 391, citing *Corpus Juris*.

11 C.J. p 351 note 27.

Expression of desire

A clause in a will, "I hereby desire that said building be commenced within two years from my death," is not a condition precedent to the vesting of the bequest, and the word "desire" in this connection must be considered as precatory.—In re Secrest's Estate, 191 N.W. 663, 109 Neb. 431.

66. Conn.—Bristol Baptist Church v. Connecticut Baptist Convention, 120 A. 497, 98 Conn. 677.

67. Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18.

68. Ill.—Peek v. Woman's Home Missionary Soc. of M. E. Church, 127 N.E. 760, 293 Ill. 337.

11 C.J. p 349 note 94.

69. Conn.—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200.

Ill.—Peek v. Woman's Home Missionary Soc., 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917.

Pa.—In re Wanamaker's Estate, 167 A. 592, 312 Pa. 362.

Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18.

Particular provisions construed

(1) As to selection of hospital staff from university faculty.—Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13, 290 Ill. 205.

(2) As to right of second charity to gift on failure of first one designated to accept.—Young v. Davis, 252 S.W. 100, 200 Ky. 76.

(3) As to maximum salaries to be paid to teachers.—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200.

(4) Word "support" of minister as

The courts look with favor on the efforts of the beneficiary to comply with such conditions,⁷⁰ and they are strictly construed when relied on to work a forfeiture.⁷¹

Since conditions subsequent, especially as applied to charities, are not favored by the law,⁷² the intention of the donor to create such a condition must clearly be expressed,⁷³ and, if it is doubtful whether a clause in a deed is a covenant or a condition, courts will always lean against the latter construc-

tion.⁷⁴ Where, however, an intention to create such a condition in a charitable gift unmistakably appears, it will be given effect,⁷⁵ and the property or beneficial interest will vest in the charity, subject to being divested;⁷⁶ but where the condition subsequent is performed, the grantee obtains complete title.⁷⁷ Although the intention of the donor or testator governs in determining whether a condition attached to a charity is precedent or subsequent,⁷⁸ the courts are inclined to construe condi-

salary.—*Conner v. Trinity Reformed Church of Boonsborough*, Washington County, 99 A. 547, 129 Md. 360.

(5) As to acceptance and expenditure of income.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

70. Ill.—*Peek v. Woman's Home Missionary Soc.*, 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917.

Disjunctive conditions

Where a will provides that a bequest for a charity is not to be paid until the contract is let and the work actually begun, or a site purchased for the building, if either of such conditions is complied with before the money is paid over, it is sufficient, and the trustee is authorized to pay the money.—*In re Secrest's Estate*, 191 N.W. 663, 109 Neb. 431.

Performance held sufficient

(1) Generally.

Me.—*Bancroft v. Maine Sanatorium Ass'n*, 109 A. 585, 119 Me. 56.

N.H.—*Borchers v. Taylor*, 145 A. 666, 83 N.H. 564, 63 A.L.R. 874.

Wis.—*In re Mead's Estate*, 277 N.W. 694, rehearing denied 279 N.W. 18.—*In re Stark's Will*, 234 N.W. 750, 203 Wis. 611.

(2) By purchase of new property, on sale of devised property.—*Society of the Holy Family v. Charbonnet*, 98 So. 410, 154 La. 894.

(3) Under a devise of land for an old ladies' home, which the testator does not endow, but providing for a reverter, if sold or used for any other purpose, this condition subsequent is not broken by a delay of three years in opening and establishing it, or by letting the land to pay taxes, insurance, and repairs.—*Capen v. Skinner*, 58 N.E. 473, 177 Mass. 84.

(4) Home purchased, although only partly paid for, and dedicated as home for poor, elderly, and destitute Germans, was such an "established" home as testator intended as recipient of trust fund created by will, and such home was established within five-year limit of provision attached to bequest, although, because of necessary repair, it was not ready for inmates during such period.—*City Missionary Soc. v. Au-*

gust Moeller Memorial Foundation, 126 A. 683, 101 Conn. 518.

(5) A devise conditioned on an establishment by a fraternal order of an orphans' home "worthy of its name" constituted the order itself the primary judge of such worthiness, and the condition was satisfied by the establishment of a home which, considering the general existing conditions, compared favorably with similar institutions of the order elsewhere. Also, the establishment of the orphanage within the corporate limits of a city satisfied a requirement that it be near the city.—*In re Hartung's Estate*, 160 P. 782, 40 Nev. 262, rehearing denied 161 P. 715, 40 Nev. 262.

Performance held insufficient

Erection of building by Salvation Army three years before death of testatrix was not compliance with condition of will making bequest for building to be commenced within two years after death of testatrix.—*In re White's Estate*, 288 P. 764, 130 Kan. 714.

71. Me.—*Bancroft v. Maine Sanatorium Ass'n*, 109 A. 585, 119 Me. 56.

Tenn.—*Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550, 149 Tenn. 256.

72. Tenn.—*Nolfe v. Byrne*, 219 S.W. 1, 142 Tenn. 309.

11 C.J. p 349 note 93.

73. U.S.—*Gredig v. Sterling*, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535.

11 C.J. p 349 note 1.

Provisions held not to create conditions subsequent

(1) Paragraph of will, devising all property bequeathed to trustees to testator's relatives should trustees fail to establish charity hospital and devise lapse, did not create condition subsequent that trustees locate hospital on land devised.—*Gredig v. Sterling*, supra.

(2) Instructions that gift to charitable corporation should be used for relief of unfortunate merchants and to aid and assist members reduced to poverty and their widows and children did not create condition sub-

sequent, but were precatory merely.—*Corporation of Chamber of Commerce of New York v. Bennett*, 257 N.Y.S. 2, 143 Misc. 513.

Where there is no clause of reverter or forfeiture, conditions subsequent do not arise in deeds for charitable uses by mere implication, unless the implication is a necessary one.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

74. R.I.—*Greene v. O'Connor*, 25 A. 692, 13 R.I. 56, 19 L.R.A. 262.

75. Nev.—*In re Hartung's Estate*, 161 P. 715, 40 Nev. 262, denying rehearing 160 P. 782, 40 Nev. 262.

Use of property as public hospital

Gift of hospital to town, conditioned on use forever as hospital, with no endowment accompanying grant, imported obligation by town to maintain hospital at public expense so far as necessary.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453.

Use of property for religious purposes

A grant of land on condition that it shall forever thereafter be used for certain religious purposes is a grant on condition subsequent, and there is a forfeiture if the property is devoted to secular uses.—*Norton v. Valentine*, 135 N.Y.S. 1084, 151 App.Div. 392—11 C.J. p 349 note 5.

Maintenance of religious doctrines

Some gifts and bequests to religious societies are construed to be on condition that they maintain the same doctrines and principles.—*Princeton v. Adams*, 10 Cush., Mass., 129—11 C.J. p 350 note 6.

76. Md.—*Bennett v. Baltimore Humane Impartial Soc.*, 45 A. 838, 91 Md. 10.

11 C.J. p 349 note 97.

77. Ill.—*Scheidecker v. Reorganized Church of Jesus Christ of Latter Day Saints*, 235 Ill.App. 374.

N.Y.—*Trustees of Calvary Presbyterian Church of Buffalo v. Putnam*, 221 N.Y.S. 692, 129 Misc. 506, affirmed 224 N.Y.S. 651, 221 App. Div. 502, affirmed 162 N.E. 601, 249 N.Y. 111.

78. Colo.—*Robbins v. Boulder County Comrs.*, 115 P. 528, 50 Colo. 610.

tions in instruments evidencing a gift or conveyance for a charitable purpose to be conditions subsequent rather than conditions precedent.⁷⁹ A gift in trust for charity, when made conditional on a future and uncertain event, is subject to the same rules and principles as any other estate dependent on its coming into existence on a condition precedent.⁸⁰

Where no particular time is mentioned for the performance of a condition attached to a charitable grant, devise, or bequest, the law requires that it should be done in a reasonable time,⁸¹ to be determined from all the surrounding circumstances,⁸² and unreasonable delay may be considered as a refusal of the gift.⁸³ In case a limitation of time is made by the instrument creating the trust, it is deemed applicable only to the particular condition of the particular gift; it is not affected by another limitation contained in the same instrument but referring to other charitable gifts,⁸⁴ nor does it extend to another condition affecting the same gift.⁸⁵ Also, if such is the intention of the donor, even where a particular time is specified, compliance within such time may be excused by the interven-

tion of unforeseen circumstances beyond the control of the beneficiary.⁸⁶ A court of equity may relieve against conditions, when, in view of changed circumstances or otherwise, they become more burdensome than the trustee is willing to assume.⁸⁷

Limitations as to control or management. There is a wide distinction between conditions precedent or subsequent, and administrative limitations as to the control and management of the trust,⁸⁸ the violation of which by the trustees gives rise to no rights on the part of the grantor or those claiming under him, but merely affords grounds for an application to a court of equity to enforce the proper observance of the trust.⁸⁹ So, where a vested estate is distinctly given for charitable uses and there are annexed thereto conditions, limitations, powers, trusts, or other restraints relative to its use, management, or disposal, any of which are not sanctioned by law, it is such restraints, and the estates limited on them, that are void, and not the principal or vested estate;⁹⁰ and a gift for a charitable purpose does not fail although a limitation which is not an essential part thereof, fails.⁹¹

Whether the language creates a condition or a

Provisions held conditions precedent

(1) That a home for the charitable purpose be established within five years after testator's death.—*City Missionary Soc. v. August Moeller Memorial Foundation*, 126 A. 683, 101 Conn. 518.

(2) Bequest made in the event that University established permanent course for mercantile business instruction.—*In re Wanamaker's Estate*, 167 A. 592, 312 Pa. 362.

79. Iowa.—*In re Nugen's Estate*, 272 N.W. 638.

Provisions held conditions subsequent

(1) Condition that municipality accept and maintain gift.

Colo.—*Borough or Town of Clarion v. Central Sav. Bank & Trust Co.*, 208 P. 251, 71 Colo. 482.

Iowa.—*In re Nugen's Estate*, 272 N.W. 638.

(2) Conditions that the "gallery and art school . . . when established and maintained shall be designated and named by such name or names as will include the name of the testator."—*Herron v. Stanton*, 147 N.E. 305, 79 Ind.App. 683.

(3) Requirement that the association, within one year after probate of will, deliver to executors binding contract to perform conditions thereof.—*Woman's Seaman's Friend Soc. v. Boston Y. W. C. A.*, 134 N.E. 601, 240 Mass. 521.

(4) Condition that beneficiary "forthwith" erect substantial build-

ing to house school approved by trustee.—*Massachusetts Institute of Technology v. Attorney General*, 126 N.E. 521, 235 Mass. 288.

(5) Bequest to city for erection of hospital.—*Allebach v. City of Friend*, 226 N.W. 440, 118 Neb. 781.

(6) Provision for defeasement on failure to conduct institution in keeping with its charter for period of ten years.—*Mountain Park Institute v. Lovill*, 153 S.E. 114, 198 N.C. 642.

(7) A devise of land and money in trust "for the sole and only purpose of founding a home as hereinbefore stated."—*Nolfe v. Byrne*, 219 S.W. 1, 142 Tenn. 309.

80. Ark.—*Word v. Sparks*, 82 S.W. 2d 5, 191 Ark. 893.

N.Y.—*Simms v. Folts Mission Institute*, 276 N.Y.S. 145, 154 Misc. 384, affirmed 289 N.Y.S. 918, 248 App. Div. 668.

Pa.—*In re Wood's Estate*, 184 A. 113, 321 Pa. 164.—*In re Wanamaker's Estate*, 167 A. 592, 312 Pa. 362, 11 C.J. p 349 note 96.

81. Iowa.—*Sisters of Mercy of Cedar Rapids v. Lightner*, 274 N.W. 86.

Mass.—*Massachusetts Institute of Technology v. Attorney General*, 126 N.E. 521, 235 Mass. 288.

Mich.—*In re DeBancourt's Estate*, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.

Neb.—*Allebach v. City of Friend*, 226 N.W. 440, 118 Neb. 781.

Tenn.—*Nolfe v. Byrne*, 219 S.W. 1, 142 Tenn. 309.

11 C.J. p 350 note 7.

82. Neb.—*Allebach v. City of Friend*, 226 N.W. 440, 118 Neb. 781.

83. Neb.—*Allebach v. City of Friend*, supra.

84. Ill.—*Board of Administration v. Stead*, 102 N.E. 173, 259 Ill. 194, 11 C.J. p 350 note 8.

85. Conn.—*Beardsley's App.*, 60 A. 664, 77 Conn. 705.

86. Ill.—*Peek v. Woman's Home Missionary Soc.*, 136 N.E. 772, 304 Ill. 427, 26 A.L.R. 917.

87. N.H.—*Rollins v. Merrill*, 48 A. 1088, 70 N.H. 486.

88. Ill.—*Webb v. Webb*, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404—*Greear v. Sifford*, 7 N.E.2d 371, 289 Ill.App. 450.

11 C.J. p 350 note 14.

89. U.S.—*Gedig v. Sterling*, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L. Ed. 535.

11 C.J. p 350 note 15.

90. Ill.—*Webb v. Webb*, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404—*Greear v. Sifford*, 7 N.E.2d 371, 289 Ill.App. 450.

91. N.J.—*Noice v. Schnell*, 137 A. 582, 101 N.J.Eq. 252, 52 A.L.R. 965, reversing 134 A. 81, 99 N.J.Eq. 572, and certiorari denied *Allison v. Schnell*, 48 S.Ct. 304, 276 U.S. 625, 72 L.Ed. 738.

limitation in trust is to be determined from a consideration of the whole instrument, and not from any particular expression,⁹² and where there is nothing in the surrounding facts and circumstances or the express language of the instrument to show that the donor intended a particular limitation, direction, or restriction, it will not be implied.⁹³ In general a conveyance for a perpetual charitable use does not create a conditional estate, but a trust for the charitable use which is not liable to be defeated without an express condition therefor.⁹⁴

§ 45. Gift Absolute or in Trust

Whether a charitable gift or bequest is absolute or in trust depends on the intention of the donor as gathered from the wording of the instrument construed in the light of the surrounding circumstances.

The character of a charitable gift whether a gift absolute, on condition, or in trust, depends on the intention of the donor as gathered from the words employed in the instrument construed in the light

of the surrounding circumstances.⁹⁵ While it is stated that any gift to a religious or other charitable society is a gift in trust for its proper objects,⁹⁶ and that, although the instrument of gift makes no provision for a conveyance to trustees, the donated property becomes immediately charged with the trust in the hands of either the executors or the heirs,⁹⁷ generally speaking, a provision for a direct gift to charity or to a charitable organization is not a trust in the eyes of the law; it is a charitable donation.⁹⁸ Such a provision is not rendered the less absolute or converted into a trust because the donor expresses a desire, request, or hope for,⁹⁹ or suggests,¹ a particular use or application, or because the provision specifies that the donation shall be employed for one or more of the purposes for which the charitable organization benefiting thereby was formed,² or even that the bequest shall be in trust for such a purpose.³ Also, a gift of the income from property to a charity without limitation as to the

92. N.H.—Petition of Tuttle, 112 A. 397, 80 N.H. 36.
N.J.—Young Men's Christian Ass'n of Matawan v. Appleby, 127 A. 25, 97 N.J.Eq. 95, affirmed 130 A. 921, 98 N.J.Eq. 704.
11 C.J. p 350 note 16.

Formation of corporation

A provision in a charitable subscription that a corporation is to be formed to carry the purpose of the gift into effect is usually deemed not a condition, but an expression of the donors as to matters affecting the administration of the trust.—Richards v. Wilson, Ind., 112 N.E. 780.

Use for particular denomination

A conveyance of land with a church thereon to a religious society or the authorities thereof, to be forever held for the use of a church of a particular denomination in a certain town, creates merely a trust, and is not on a condition involving a forfeiture.

- Ill.—Germain v. Baltes, 113 Ill. 29.
N.J.—Mills v. Davison, 35 A. 1072, 54 N.J.Eq. 659, 55 Am.S.R. 594, 35 L.R.A. 113.

93. N.H.—Adams v. Derry, 53 A. 734, 71 N.H. 544.

94. N.Y.—Van De Bogert v. Reformed Dutch Church of Poughkeepsie, 220 N.Y.S. 50, 128 Misc. 603, affirmed 220 N.Y.S. 58, 219 App.Div. 220.
11 C.J. p 350 note 18.

95. Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

Charitable nature of beneficiary does not operate to make the settlor's expressed purpose and design

- any less a trust.—Trustees of Cumberland University v. Caldwell, 84 So. 846, 203 Ala. 590.

Gifts or bequests held to create trusts

- N.Y.—In re McArdle's Will, 264 N.Y.S. 764, 147 Misc. 876—In re Weiner's Will, 243 N.Y.S. 136, 137 Misc. 46—In re Swan's Estate, 238 N.Y.S. 610, 135 Misc. 893.
11 C.J. p 351 note 30.

96. Minn.—In re Peterson's Estate, 277 N.W. 529.
11 C.J. p 350 note 21.

97. Or.—In re John, 47 P. 341, 50 P. 226, 30 Or. 494, 36 L.R.A. 242.

Without intervention of trustee

Fact that donations to college endowment fund are made direct to college without intervention of trustee does not defeat trust and invest college with absolute title.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

98. Cal.—In re Dol's Estate, 187 P. 428, 132 Cal. 159.

- Mo.—National Board of Christian Women's Board of Missions of Christian Church of the U. S. v. Fry, 239 S.W. 519, 293 Mo. 399.
N.Y.—In re Lister's Estate, 292 N.Y.S. 870, 161 Misc. 734—In re Allen's Will, 181 N.Y.S. 398, 111 Misc. 93, affirmed 194 N.Y.S. 913.
11 C.J. p 351 note 29.

99. U.S.—Laswell v. Hungate, Ill., 256 F. 635, 163 C.C.A. 29, certiorari denied Bishop v. Hungate, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.
11 C.J. p 351 note 28.

1. Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 471, 121 Me. 391, citing *Corpus Juris*.

- Md.—Williams v. Baltimore Baptist Church, 43 A. 930, 92 Md. 497, 54 L.R.A. 427.

2. Md.—Conner v. Trinity Reformed Church of Boonsborough, Washington County, 99 A. 547, 129 Md. 360.

- Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

- N.Y.—In re Lister's Estate, 292 N.Y.S. 870, 161 Misc. 734—Corporation of Chamber of Commerce of New York v. Bennett, 257 N.Y.S. 2, 143 Misc. 513—In re Hart's Will, 200 N.Y.S. 63, 205 App.Div. 703—In re Donchian's Estate, 199 N.Y.S. 107, 130 Misc. 535, affirmed 204 N.Y.S. 903, 209 App.Div. 806.
11 C.J. p 351 notes 23, 33, 35–37.

Gifts held absolute

(1) Donation to charitable corporation, to be used for relief of unfortunate merchants, and to aid and assist members thereof reduced to poverty and their widows and children.—Corporation of Chamber of Commerce of New York v. Bennett, 257 N.Y.S. 2, 143 Misc. 513.

(2) Gifts for the founding, erection, and maintenance of schools and classes.

Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

- N.Y.—In re Hart's Will, 200 N.Y.S. 63, 205 App.Div. 703.

Gift to endowment fund

A gift to a school is not a trust merely because the donor directs that it become a part of the schools' endowment fund.—Grear v. Sifford, 7 N.E.2d 371, 289 Ill.App. 450.

3. Md.—Conner v. Trinity Reformed Church of Boonsborough, Wash-

time of enjoyment and no other disposition of the corpus, is in legal effect a gift of the corpus;⁴ and a trust is not established by a provision merely that money or property be given to the trustees of a particular charity,⁵ or by an instrument which gives the same person both the legal estate and the beneficial interest.⁶ Sometimes, a testamentary gift in trust for a charitable use may be deemed an absolute gift, so far as the settlor or the testator is concerned, in order to enable the beneficiary to take the same,⁷ but not even in the case of a charity will an imperfect gift be turned into a declaration of trust, for no better reason than that it is imperfect.⁸

Where a will gives the residuary estate to executors to be transferred to a corporation to be formed for charitable purposes, nothing passes directly to the corporation, but it takes only by conveyance from the executors;⁹ but, after so taking, it does not hold the property in trust in the true sense of the term, but as its own, to be devoted to the purpose for which it was created.¹⁰

§ 46. Certainty as to Subject Matter

Certainty as to the subject matter is essential to the validity of a charitable gift or trust.

To constitute a valid charitable gift or trust there must be, among other things, certainty as to the subject matter.¹¹ The courts, however, are reluctant to hold a charitable gift or trust void for uncertainty, and will do so only when compelled by the language used.¹² There is no such uncertainty as to subject matter as will render the gift or trust void on that account where the property, or the interest therein, which is to go to the donee or beneficiary is clearly designated, but the amount thereof is necessarily uncertain until the time for payment over arrives,¹³ where the amount, although not specified, may be easily calculated,¹⁴ or where the amount of income to go to the beneficiary is specified, but the amount of principal to be set aside for the purpose of producing the income must be ascertained.¹⁵ A bequest for charitable purposes of a sum not to exceed a specified amount is not void for uncertainty,¹⁶ and a devise or bequest of a fund in trust for various charitable purposes is not invalid because it does not designate the amounts to be used for the respective trust purposes.¹⁷ It is also no objection to the validity of a charitable gift that it is made up of several parts which are to be administered together, the income to be divided according to the discretion of the trustee,¹⁸ although it has been

ington County, 99 A. 547, 129 Md. 360.

11 C.J. p 351 note 24.

4. Kan.—Schnack v. City of Larned, 186 P. 1012, 106 Kan. 177.

N.Y.—Woodside Presbyterian Church v. Burden, 269 N.Y.S. 682, 240 App. Div. 43, appeal dismissed 191 N.E. 629, 264 N.Y. 690.—In re Allen's Will, 181 N.Y.S. 398, 111 Misc. 93, affirmed 194 N.Y.S. 913.

11 C.J. p 351 note 34.

5. Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

6. Me.—Whitmore v. Church of the Holy Cross, *supra*.

Md.—Charles T. Brandt, Inc. v. Y. W. C. A. of Baltimore City, 182 A. 452, 169 Md. 607.

7. N.Y.—St. John v. Andrews Inst., 102 N.Y.S. 808, 117 App. Div. 698, modified on other grounds 83 N.E. 981, 191 N.Y. 254, 14 Ann. Cas. 708, appeal dismissed 29 S.Ct. 601, 214 U.S. 19, 53 L.Ed. 892.

8. Conn.—Organized Charities Assoc. v. Mansfield, 74 A. 781, 82 Conn. 504, 135 Am.S.R. 285.

9. Mass.—Codman v. Brigham, 72 N. E. 1008, 187 Mass. 309, 105 Am.S. R. 394.

10. U.S.—Brigham v. Peter Bent Brigham Hospital, Mass., 67 C.C.A. 393, 134 F. 513, affirming, C.C., 126 F. 796.

11. N.Y.—In re Durkin's Estate, 300 N.Y.S. 656, 165 Misc. 366.

11 C.J. p 351 note 39.

Gifts held void for uncertainty

(1) A provision that only some indefinite or uncertain part of certain income should be devoted to charity. —Welch v. Caldwell, 80 N.E. 1014, 226 Ill. 488.

(2) Where it is uncertain whether there will be anything in the hands of the trustees to devote to the charitable purpose.—Morrow v. Dirlam, 22 Ohio N.P.N.S., 565, affirmed 181 N.E. 365, 102 Ohio St. 279—11 C.J. p 351 note 41.

(3) A charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, is void; and it would appear that such a defect is incurable even by the cy pres power.—Beekman v. Bonsor, 23 N.Y. 298, 80 Am.D. 269.

12. Tex.—Lightfoot v. Poindexter, Civ.App., 199 S.W. 1152, error refused.

Gift subject to annuities

Where the estate is large, and there is nothing to show that it will be exhausted by the payment of certain annuities and fixed charges, a bequest for a charitable purpose is not uncertain as to whether there will be anything left after the payment of the charges and the annuities.—French v. Calkins, 96 N.E. 877,

252 Ill. 243, distinguishing Wilce v. Van Anden, 94 N.E. 42, 248 Ill. 358, 140 Am.S.R. 212, 21 Ann. Cas. 153, and Mills v. Newberry, 1 N.E. 156, 112 Ill. 123, 54 Am.R. 213.

Subject matter held not uncertain

Cal.—Dingwell v. Seymour, 267 P. 327, 91 Cal.App. 483.

N.Y.—In re McGeehan's Estate, 187 N.Y.S. 823, 115 Misc. 737.

13. Ind.—Barr v. Geary, 142 N.E. 622, 82 Ind.App. 5.

11 C.J. p 352 note 45.

14. U.S.—Field v. Drew Theological Seminary, C.C.Del., 41 F. 371.

15. Ill.—Crawford v. Mound Grove Cemetery Assoc., 75 N.E. 998, 218 Ill. 399.

11 C.J. p 352 note 47.

16. U.S.—Speer v. Colbert, 26 S.Ct. 201, 200 U.S. 130, 50 L.Ed. 403, affirming 24 App.D.C. 187.

Specified limits of cost

A bequest for erection of a chapel by the executor at a cost between specified limits was not void for uncertainty of amount.—Lightfoot v. Poindexter, Tex.Civ.App., 199 S.W. 1152, error refused.

17. Wis.—Beurhaus v. Cole, 69 N.W. 986, 94 Wis. 617.

18. N.H.—Haynes v. Carr, 49 A. 638, 70 N.H. 463—Webster v. Sughrow, 45 A. 139, 69 N.H. 330, 48 L.R.A. 100—Gafney v. Kenison, 10 A. 706, 64 N.H. 354.

held that where a fund is left for distribution among different charities, the part which each shall

take must be definitely pointed out, or the gift will be held void for uncertainty.¹⁹

VII. ADMINISTRATION, MANAGEMENT, AND ENFORCEMENT

§ 47. Administration and Application of Property and Funds Generally

A public or charitable trust fund should be applied to the purposes, and for the benefit of the persons or

institutions, and in the mode or manner, indicated by the founder.

In general, the property or funds forming the subject matter of a charity should be applied to the purposes,²⁰ and for the benefit of the persons or

19. N.Y.—Matter of Goodrich, 2 Redf.Surr., N.Y., 45.

20. U.S.—President and Fellows of Harvard College v. Jewett, C.C.A. Ohio, 11 F.2d 119.

Ala.—Lovelace v. Marion Institute, 110 So. 381, 215 Ala. 271.

Ariz.—Central Arizona Light & Power Co. v. Meek, 11 P.2d 850, 852, 40 Ariz. 255, citing *Corpus Juris*.

Conn.—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200.

D.C.—Graff v. Wallace, 32 F.2d 960, 59 App.D.C. 64, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.

Fla.—Jordan v. Landis, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

Ill.—Kerner v. Thompson, 13 N.E.2d 110, 293 Ill.App. 454.

Iowa.—Liggett v. Abbott, 185 N.W. 569, 192 Iowa 742.

Ky.—Lightfoot v. Lightfoot, 269 S. W. 529, 207 Ky. 426.

Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256—Thorp v. Lund, 116 N. E. 946, 227 Mass. 474, Ann.Cas. 1918B 1204.

N.J.—Smith v. Pond, 107 A. 800, 90 N.J.Eq. 445, reversed on other grounds 111 A. 154, 92 N.J.Eq. 211.

N.Y.—Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 230 N.Y. 462, affirming 175 N.Y.S. 8, 186 App.Div. 417 — Authors Club v. Kirtland, 288 N.Y.S. 916, 248 App. Div. 82.

Ohio.—O'Brien v. Physicians' Hospital Ass'n, 116 N.E. 975, 96 Ohio St. 1, L.R.A.1917F 741—Clinton County Nat. Bank & Trust Co. of Wilmington v. Todhunter, 183 N.E. 88, 43 Ohio App. 289.

Or.—State v. Toney, 17 P.2d 1105, 141 Or. 406 — Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 613, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

Pa.—Appeal of Lafayette College, 116 A. 532, 273 Pa. 1—In re Carson's Estate, 98 A. 868, 254 Pa. 259.

Tex.—Wells v. Richardson, Civ.App., 280 S.W. 608.

Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18. 11 C.J. p 352 note 52.

Bond

(1) The provisions of Rev.St. c 69, requiring trustees under a will to give bond to the judge of probate before entering on the duties of their trust, were held to be confined to private trusts of limited duration, and not to extend to a public and permanent charity, the beneficiaries of which were indefinite, and a perpetual succession of trustees provided for in the will establishing it.—In re Lowell, 22 Pick., Mass., 215.

(2) This restriction to private trusts is not affected by the revision of that chapter (Gen.St. c 100).—Drury v. Natick, 10 Allen, Mass., 169.

Duty of trustee

(1) Trustee need not see that fund payable to charity was applied in accordance with will, charity being required to apply fund as directed.—In re Grossman's Will, 227 N.Y.S. 470, 131 Misc. 526.

(2) Trustees are under duty to seek means to render trust capable of execution.—Carlstrom v. Frackelton, 263 Ill.App. 250.

(3) Trustees of hospital to which testatrix had made gift of funds for building of annex were, regardless of fact that city had taken over hospital, charged with carrying out of trust.—In re Harrington's Will, 276 N.Y.S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App.Div. 252.

(4) Coöperation with city by residuary legatees under will, leaving specific legacies, providing trust fund for public library in certain city and bequeathing remainder of testator's estate to his wife and daughter, was unnecessary to enable trustees to devote such fund to purposes of trust.—In re Mead's Estate, Wis., 277 N.W. 694, rehearing denied 279 N.W. 18.

(5) Will bequeathing residuary estate to city for memorial library and fine arts building, "for the use and enjoyment of all the people" thereof, creates trust in fund, acceptance of which by city created obligation to carry out such purpose.—Kibbe v. City of Rochester, D.C.N. Y., 57 F.2d 542.

Irrevocability of use

The general rule of law is that money or property devoted to a

charitable use, where a trust is created, must, if the gift is accepted, be irrevocably devoted to such use.—In re Opinion of the Justices, 131 N.E. 31, 237 Mass. 613—11 C.J. p 370 note 16.

Particular uses held proper or improper

(1) Masonic Grand Lodge, holding educational and home endowment funds in trust, cannot divert moneys therefrom to home maintenance fund.—State v. Toney, 17 P.2d 1105, 141 Or. 406.

(2) Where a testator directed trustees to organize a corporation for the purpose of holding and leasing the property devised in trust and conducting a maternity hospital for wayward girls, and to transfer the stock to named churches, which he requested to continue such home, the churches could not use the proceeds of the property for other purposes, on the ground that they could not administer the trust in operating the maternity home without violating the religious convictions of the members of their churches.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 613, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

(3) Where testatrix directed that property be sold and proceeds used to build church, but before death of life tenant church of which she was a member erected a new building, bequest should be given to such church to be devoted to improving and equipping building so erected, rather than to another newly organized church, "build" as used in will meaning more than mere erection of outer walls and including necessary equipment.—Lightfoot v. Lightfoot, 269 S.W. 529, 207 Ky. 426.

(4) Where land was conveyed to mission institute organized for religious education on condition that land be used for mission institute purposes, use of land for home for aged was not fulfillment of condition.—Simms v. Folts Mission Institute, 276 N.Y.S. 145, 154 Misc. 384, affirmed 289 N.Y.S. 918, 248 App.Div. 668.

(5) Conveyance of lots in trust for erection of house of worship and parsonage is violated by trustees erecting business building on part

institutions,²¹ and in the mode or manner, indicated by the founder;²² but, where a particular application or mode of administration is not prohibited by the instrument creating the trust, or may be deem-

of lots for rental purposes and failing to erect parsonage.—*Lewis v. Brubaker*, 14 S.W.2d 982, 322 Mo. 52.

(6) It was not a diversion or abandonment of the charitable and pious use for which property was conveyed to a Methodist Episcopal Church as a place of worship for it to convey it in trust as a place of worship for the Methodist Episcopal Church, South. — *First Methodist Church of Poplar Bluff v. Berryman*, 261 S.W. 73, 303 Mo. 475.

(7) Property acquired by religious society in denominational name is not held on any trust to promote doctrines or to be administered in accordance with rules of particular denomination.—*Greek Orthodox Community v. Malicourtis*, 166 N.E. 863, 267 Mass. 472.

(8) Where a donation of property for orphanage purposes provided that it should be used for no other object, but permitted it to be sold and the proceeds reinvested in other property for the same purposes, it was of no importance that, after a purchase of new property, the old property remained vacant for thirteen years and until its sale, it being sufficient that it was not used adversely to the express wishes of the donor.—*Society of the Holy Family v. Charbonnet*, 98 So. 410, 154 La. 894.

(9) Successor trustees, appointed by court after death of trustee under will creating trust fund for establishment and support of city library, are not limited in disbursement of fund to purchase of books only under testamentary provision for expenditure of sum remaining after trustees' erection of library building on city's omission to do so within time specified, but authorized to devote it to making of future additions to library, where city's library facilities were inadequate. — *In re Mead's Estate*, Wis., 277 N.W. 694, rehearing denied 279 N.W. 18.

Performance not forbidden

Notice to town, as trustee by owners of burial lot where testator was buried, forbidding it to perform its fiduciary duties in disbursement of moneys on lot or for preservation of monument thereon was not refusal to permit trustee to carry out trust under penalty of being treated as trespasser.—*McCoy v. Inhabitants of Town of Natick*, 129 N.E. 381, 237 Mass. 99.

Use not specifically declared

(1) Property given to church nomine, in absence of declaration of trust or use, must be construed, as intended, to promote purpose for which church was instituted.—*Mont-*

gomery v. Carlton, 126 So. 135, 99 Fla. 152.

(2) A gift or bequest to an unincorporated or incorporated association existing solely for charitable work will usually be construed to be held on trust for that purpose.

Fla.—*Jordan v. Landis*, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

N.Y.—*In re Walter's Estate*, 269 N.Y.S. 402, 150 Misc. 512—*In re Johnson's Estate*, 265 N.Y.S. 395, 148 Misc. 218.

R.I.—*Rhode Island Hospital Trust Co. v. Williams*, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

21. U.S.—*Gonzalez v. Roman Catholic Archbishop of Manila*, Philippine Islands, 50 S.Ct. 5, 280 U.S. 1, 74 L.Ed. 131.

Me.—*Dupont v. Pelletier*, 113 A. 11, 120 Me. 114.

Ohio.—*O'Brien v. Physicians' Hospital Ass'n*, 116 N.E. 975, 96 Ohio St. 1, L.R.A.1915F 741.

11 C.J. p 352 note 53.

Donation to another corporation

A charitable corporation cannot donate its funds to another corporation organized for similar or other purposes, except to assist to carry out purpose for which the charitable corporation was created.—*Northwestern University v. Wesley Memorial Hospital*, 125 N.E. 13, 290 Ill. 205.

Preference indicated by founder

In directing administration of trust for benefit of university, founder is not precluded from declaring what preference shall be given to any particular class.—*In re Purington's Estate*, 250 P. 657, 199 Cal. 661.

Changes in school system

(1) The creator of a charitable trust is presumed to have contemplated legislative changes respecting the school system, and, under a trust providing for the expenditure of the income for school purposes in a certain district, where such district has been abolished except for the purpose of holding and enjoying any property held by it in trust, it has been held that the income should be paid to the school board of the town district of which it forms a part.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

(2) Where will devised land to certain school districts for public school purposes, the discontinuance of the district and the inclusion of the territory thereof in other districts did not destroy the trust, but the income will be apportioned to such other districts in proportion to number of children in the old district in each of such districts.—*Chandler*

v. Board of Education of Person County, 107 S.W. 452, 181 N.C. 444.

22. Ark.—*Hicks Memorial Christian Ass'n v. Locke*, 12 S.W.2d 866, 178 Ark. 892.

Conn.—*Lyme High School Ass'n v. Ailing*, 154 A. 439, 113 Conn. 200.

Ky.—*Carroll v. Cave Hill Cemetery Co.*, 189 S.W. 186, 172 Ky. 204.

Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256—*Attorney General v. Armstrong*, 120 N.E. 678, 231 Mass. 196.

Pa.—*In re Ellis' Estate*, 12 Pa.Dist. & Co. 213.

R.I.—*Bliven v. Borden*, 185 A. 239. Tenn.—*State v. Bank of Commerce & Trust Co.*, 227 S.W. 1029, 143 Tenn. 278.

11 C.J. p 352 note 54.

Changing plan of society from its original plan cannot be countenanced by law.—*Bailey v. People*, 246 P. 205, 79 Colo. 386.

Control of executors over trustees

A clause requiring the trustee accepting the trust to enter into terms with the executors does not empower the executors to impose unreasonable terms on the trustee and thereby defeat the trust.—*Young v. Davis*, 252 S.W. 100, 200 Ky. 76.

Expenses

Provision for payment of expenses attending management of testatrix's "estate" refers to endowment part of trust estate. Where will provided for payment of "expenses (such as taxes, special assessments . . .)" attending management of estate out of income, but directed reasonably permanent improvements other than ordinary repairs to be charged to principal, special assessments are properly charged to principal or capital account.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

Maintenance in "perpetuity"

Will directing that income from fifteen thousand dollars be used to endow two free beds to be maintained in hospital in "perpetuity" required such maintenance only so long as trustee administered funds under will.—*In re Stark's Will*, 234 N.W. 750, 203 Wis. 611.

Performance of condition impossible

Where gift provided that before income could be used for particular purpose, beneficiaries and amounts of income should be approved by testator's sons, or survivor of them, sons having died without having approved such use, fund must be wholly devoted to further uses designated.—*Boston Safe Deposit & Trust*

ed by construction to be within its terms, it may be adopted in order fully and properly to execute the trust and to effectuate the intent of the donor or testator.²³ Sometimes a provision, in the instrument creating the trust, as to a particular application of the funds is considered merely directory;²⁴

and the donor may legally give the trustees wide discretion as to the management of the trust,²⁵ and a power to decide on the best means to employ for carrying out the charitable purpose is sometimes given by implication.²⁶ The fact that another agency performs what the trustees are directed to do

Co. v. Attorney General, 125 N.E. 392, 234 Mass. 261.

Title and management of duplicate fund in absence of contrary indication presumably follows that of fund duplicated.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

Purchase of books for library

(1) A bequest to trustees of money to be invested by them and the income "to be used by them for the benefit of the library" of a certain association does not require them to pay the income to the association, but they may select and purchase the books or supplies.—Hartman v. City of Pendleton, 186 P. 572, 96 Or. 503, 8 A.L.R. 904, opinion modified on other grounds on petition for rehearing 190 P. 339, 96 Or. 503.

(2) Where, owing to controversy as to who was beneficiary of a library fund, intended annual expenditures were halted and accumulations not expended, so that the amount accrued, not including the principal, aggregates more than double the amount of the original fund, such fund will not be used all at once in the purchase of books, thus leaving the library to depend on a small income provided by an amount of five thousand dollars bequeathed for its support, but the whole amount will be treated as principal, and the annual income applied to purchase of books and supplies.—Hartman v. City of Pendleton, 190 P. 339, 96 Or. 503, modifying opinion on petition for rehearing 186 P. 572, 96 Or. 503, 8 A.L.R. 904.

23. R.I.—Industrial Trust Co. v. City of Central Falls, 197 A. 467. S.C.—Harter v. Johnson, 115 S.E. 217, 122 S.C. 96.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 417, 174 Wash. 19, quoting *Corpus Juris*.

11 C.J. p 353 note 55.

Erection of building

Under trust fund for relief of "all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West," income from trust, in so far as not required for specific objects intended, is not available to erect building for administration of relief to persons entitled to benefit of such charity.—Thatcher v. Lewis, 76 S.W.2d 677, 335 Mo. 1130.

Establishment of hospital

(1) Executors authorized and em-

powered to carry out according to their best judgment the provision of the will giving the residue for the purpose of establishing, building, and equipping a public hospital may organize an executive force to operate and manage it, and this, too, through the formation of a society, association, or corporation, all this being implied in, and referable to, the duty of "establishment."—Harter v. Johnson, 115 S.E. 217, 122 S.C. 96.

(2) Under will establishing trust for children's hospital, hospital is not required to be sectarian organization in absence of showing of testator's intent, nor is hospital required to be separate institution, but may be connected with another hospital.—In re Stark's Will, 234 N.W. 750, 203 Wis. 611.

Fund for meeting operating deficiency

Under discretion lodged in executors by will to carry out according to their best judgment the provision giving the residue for the purpose of establishing, building, and equipping a public hospital in the town of F, for treatment of white and colored patients, they may well, and should, take into consideration the size of the town, the health and needs of the community, the proximity of similar institutions, and other matters affecting the reasonable extent of the venture, with the result of leaving part of the fund for meeting deficiency in operation, as a proper element in the policy of a sound "establishment."—Harter v. Johnson, 115 S.E. 217, 122 S.C. 96.

A bequest to a church board which was subject to the authority of the general assembly of the church must be deemed necessarily to include and embody a direction that any appropriate orders of the general assembly touching the administration of the trust fund within the fields defined by the trust shall control its disposition.—Mary S. Fithian Night School & Academy v. College Board of Presbyterian Church in United States, 102 A. 855, 88 N.J.Eq. 463.

24. Conn.—Loomis Institute v. Healy, 119 A. 31, 98 Conn. 102. 11 C.J. p 353 note 56.

Expression of "desire" that income of trust be loaned, not given, to poor and worthy students, is in form precatory.—Vanderbilt University v. Mitchell, 36 S.W.2d 83, 162 Tenn. 217.

25. Me.—Bancroft v. Maine Sana-

torium Ass'n, 109 A. 585, 119 Me. 56.

Mass.—McElwain v. Allen, 134 N.E. 620, 241 Mass. 112.

N.H.—Winslow v. Stark, 97 A. 979, 78 N.H. 135.

R.I.—Industrial Trust Co. v. City of Central Falls, 197 A. 467.

Wis.—In re Keenan's Will, 176 N.W. 857, 171 Wis. 94.

Absolute discretion

U.S.—Irwin v. Swinney, D.C.Mo., 44 F.2d 172, affirmed, C.C.A., Gossett v. Swinney, 53 F.2d 772, certiorari denied 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282.

Decision whether nucleus of congregation exists

Where the testator's executors were directed by his will to erect and transfer a church to a certain denomination, provided the nucleus of a congregation could be found in the neighborhood, it was held that the church trustees, and not the executors, were to judge whether there were enough persons to organize a church.—Fidelity Ins., etc., Co.'s App., 99 Pa. 443, affirming 15 Phila. 17.

The manner of the application of the trust funds need not be described in detail by the donor.—In re Graham's Estate, 218 P. 84, 63 Cal.App. 41.

Solvency of beneficiary

Where declaration of trust in favor of sanatorium provided for forfeiture of trust on sanatorium's failure to have paid its debts within three months after notice so to do from trustees to be given every other year in case trustees are satisfied that the sanatorium cannot meet its indebtedness, the income due from trustees, but in fact unpaid, was properly considered as assets of the sanatorium in determining its financial condition on certain date.—Bancroft v. Maine Sanatorium Ass'n, 109 A. 585, 119 Me. 56.

Successor trustees

Charitable trust for purposes selected by trustees is valid in hands of successor trustees, notwithstanding testator's specific expression of confidence in trustees named in will, where he also provided for succession.—Chicago Bank of Commerce v. McPherson, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F.Supp. 110, certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

26. Ind.—American Nat. Red Cross

has been held not to relieve the trustees,²⁷ and, where the trust is for educational purposes, the trustees may, in administering the trust, work in conjunction with the public school authorities,²⁸ provided, in so doing, they do not go beyond the terms and purpose of the trust.²⁹

The amount to be devoted to a particular purpose, or to be apportioned to a particular beneficiary, is largely dependent on the terms of the instrument creating the trust;³⁰ and the amount may be paid over when conditions precedent have been performed.³¹ Where authorized, either expressly or impliedly, the trustees may exhaust the funds donated for the purpose of the trust;³² and, in an action to compel the distribution of a fund contributed for the relief of sufferers from a disaster, where the part of the fund specifically designated for the use of such sufferers had been paid out, one claiming as a sufferer cannot compel the distribution of any part of the remaining funds to himself.³³

It is the duty of trustees or custodians of a charitable fund to keep it separate from other moneys in their hands; and they are chargeable with everything for which they have not accounted as having been expended for proper purposes.³⁴ While the trustees must make no contracts inconsistent with the trust,³⁵ and, where they are given discretion to apply a fund to either a legal or an illegal object, the law forbids them to apply the fund to the illegal object,³⁶ it will not be presumed that the trustees will misapply the funds.³⁷ Although the trustees' misapplication of the income of a charity, if made in good faith and continued for many years, will not be lightly disturbed,³⁸ generally no

length of time of diversion from the plain provisions of a charitable foundation will prevent its restoration to its true purpose.³⁹

In accordance with general rules, a trustee of a public or charitable trust applying for a discharge has a duty to account.⁴⁰ Where a donation agreement provided that the money should revert on the happening of a condition, but notwithstanding the happening of the condition the continuance of the agreement was recognized, the trustees, as respects their individual liability, have been held entitled to treat the donation as if such condition had not happened until a demand for the return thereof was made.⁴¹

Although a charitable devise is adjudged invalid for uncertainty, all expenses of caring for the property should be paid, and reasonable compensation made for its management, where it has been well and faithfully administered.⁴² Where part of a college endowment fund is used for erecting a building and payment of general expenses, it is converted into general assets and cannot be restored to the endowment fund to the prejudice of the creditors.⁴³

The fact that the trustees are authorized by statute to incorporate does not require that they do so.⁴⁴

Joint or separate action of trustees. Generally, the power, interest, and authority of the trustees in the subject matter of a private trust are equal and undivided, and they cannot act separately, as shown in the C.J.S. title Trusts § 258, also 65 C.J. p. 667 note 53—p. 668 note 60, but, in cases of charitable and public trusts, however, where the number of

v. Feilzner Post, 159 N.E. 771, 86 Ind.App. 709.

Mo.—Newton v. Newton Burial Park, 34 S.W.2d 118, 326 Mo. 901, 11 C.J. p. 353 note 57.

27. N.C.—Humphrey v. Board of Trustees of I. O. O. F. Home of Goldsboro, 165 S.E. 547, 203 N.C. 201.

28. Mo.—Crow v. Clay County, 95 S.W. 369, 196 Mo. 234.

S.C.—Mars v. Gibert, 77 S.E. 131, 93 S.C. 455.

29. Me.—Allen v. Nassau Inst., 77 A. 638, 107 Me. 120, 11 C.J. p. 353 note 59.

30. Mass.—First Nat. Bank v. Truesdale Hospital, 192 N.E. 150, 283 Mass. 35—Williams v. Young Men's Christian Ass'n, 122 N.E. 570, 232 Mass. 472.

Pa.—In re Neely's Estate, 88 Pa. Super. 372, affirmed 135 A. 540, 238 Pa. 130.

11 C.J. p. 353 note 61.

31. Me.—Moore v. McKenzie, 92 A. 296, 112 Me. 356.

32. Pa.—Atchison v. United Presbyterian Board of Publication, 109 A. 597, 266 Pa. 47.

33. N.Y.—Boenhardt v. Loch, 113 N.Y.S. 747, 129 App.Div. 355, affirmed 92 N.E. 1078, 198 N.Y. 631.

34. Mass.—Atty.-Gen. v. Bedard, 105 N.E. 993, 218 Mass. 378.

35. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

N.Y.—Mercer v. Chamberlain Institute, 174 N.Y.S. 194, 187 App.Div. 763.

11 C.J. p. 353 note 66.

36. Mass.—St. Paul's Church v. Atty.-Gen., 41 N.E. 231, 164 Mass. 188—Jackson v. Phillips, 14 Allen 539.

37. Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 520.

38. Mass.—Atty.-Gen. v. Old South Soc., 13 Allen 474.

N.H.—Atty.-Gen. v. Dublin, 38 N.H. 459.

39. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

40. N.J.—Bible Readers' Aid Soc. of Trenton v. Katzenbach, 128 A. 628, 97 N.J.Eq. 416.

41. Ark.—Graham Bros. Co. v. Galloway Woman's College, 81 S.W.2d 337, 190 Ark. 692.

42. Ky.—Spalding v. St. Joseph's Industrial School, 54 S.W. 200, 107 Ky. 382, 21 Ky.L. 1107.

43. Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

44. Mo.—Stewart v. Coshow, 142 S.W. 233, 238 Mo. 662.

trustees is usually larger, it has been held that the decisions of the majority of the trustees as to matters of administration will be binding on the rest.⁴⁵

Where state or municipality is trustee. Where a municipal corporation accepts a charitable trust as trustee, it assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts, and among them is the obligation perpetually to administer the charitable fund in accordance with the expressed wish of the testator.⁴⁶ Thus, when the state or a municipality is the trustee of a charitable fund, it is not entitled to reimbursement out of such fund for expenditures made by it in carrying on a similar charity.⁴⁷

Conveyances to trustees should be made to them in their proper designation.⁴⁸

§ 48. — Sale or Lease of Property, or Loan of Funds

- a. Sale
- b. Mortgaging property
- c. Loan or investment of funds

a. Sale

- (1) In general
- (2) Validity

45. Mass.—*City of Boston v. Curley*, 177 N.E. 557, 276 Mass. 549. 11 C.J. p 354 note 74.

46. Cal.—*McKevitt v. City of Sacramento*, 203 P. 132, 55 Cal.App. 117. Ky.—*Woman's Hospital League v. City of Paducah*, 223 S.W. 159, 188 Ky. 604.

Mass.—*Attorney General v. City of Lowell*, 141 N.E. 45, 246 Mass. 312. N.H.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

N.Y.—*In re Harrington's Will*, 276 N.Y.S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App. Div. 252.

S.C.—*Grady v. City of Greenville*, 123 S.E. 494, 129 S.C. 89.

11 C.J. p 354 note 69—43 C.J. p 1336 note 99.

Effect of violation

Under bequest to city on condition that it should legally accept the bequest and pledge itself for payment of interest semi-annually to trustees for charitable purposes, city violated obligation by spending the fund, but such breach of trust does not affect validity of the trust, and it must restore the fund.—*Attorney General v. City of Lowell*, 141 N.E. 45, 246 Mass. 312.

47. Cal.—*McKevitt v. City of Sacramento*, 203 P. 132, 55 Cal.App. 117. 11 C.J. p 353 note 64.

Transfer to another custodian

Transfer of trust fund of town to trustees in consonance with a legislative act has been held not breach of material condition of gift designating selectmen as custodians.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

48. Town or fund

Where a fund is to be administered by trustees for the use and benefit of a town and the inhabitants thereof and is to be known by a designated name, a conveyance should be made to the trustees as trustees of the town and not as trustees of the fund.—*Town of Cascade v. Cascade County*, 243 P. 806, 75 Mont. 304.

49. Mo.—*Lackland v. Walker*, 52 S.W. 414, 151 Mo. 210.

50. Mo.—*Lackland v. Walker*, supra.

51. Ky.—*Sawyer v. Lamar*, 18 S.W. 2d 971, 230 Ky. 163. 11 C.J. p 354 note 76.

52. Ariz.—*Lowell v. Lowell*, 240 P. 280, 285, 29 Ariz. 138. Tenn.—*King College v. Anderson*, 255 S.W. 374, 148 Tenn. 323. 11 C.J. p 354 note 77.

Discretion as to security

The trustees have the duty and the discretion to pass on the adequacy of the security.—*Dickey v.*

(1) In General

While the court may authorize a sale of trust property in a proper case, the power of the trustees to sell the property is dependent, primarily, on the trust instrument, and the manner in which such property is held by them.

When considering the right of trustees of a charitable trust to sell property belonging to the trust, a difference is to be noted between lands actually used for the charity itself, lands which are set apart in order to provide, by means of their income or use, a fund for the endowment of the charity, and lands which are purchased or otherwise acquired by the trustees as an investment of surplus funds;⁴⁹ and in the absence of an express provision concerning the matter, property of the character last noted is taken to be held free from any general restraint on the power to alienate which may be declared in the instrument of foundation or implied by law.⁵⁰

A sale is frequently the best mode of executing a charitable trust as to part of the property, and sometimes as to the whole of it,⁵¹ and when, by the instrument creating the trust, the trustees are invested with express power to alienate, there is no room for question.⁵² Also the instrument is sometimes so worded as to confer upon them implied power to sell,⁵³ but a power of sale does not arise

Volker, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 853, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

53. Fla.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152. Hawaii.—*Smith v. Lymer*, 29 Hawaii 169.

Ky.—*Goldberg v. Home Missions of the Presbyterian Church in the U. S.*, 248 S.W. 219, 197 Ky. 724. N.C.—*Page v. Covington*, 122 S.E. 481, 187 N.C. 621. 11 C.J. p 354 note 78.

"Funds"

Will giving trustees or their successors the absolute discretion to determine to what causes and activities of a church the funds bequeathed to it should be devoted, etc., was held to have created in the trustees a power to sell realty, "funds" not having been used in the sense of personal estate, but to include all property of every kind devised.—*Kratz v. Slaughter's Ex'rs*, 214 S.W. 878, 185 Ky. 256.

Same power as "will trustees"

Corporation organized to administer provisions of trust for educational purposes as contemplated by will, with same powers to deal with realty as will trustees, who had power of sale, had power to sell real estate.—*Bentley v. Whitney Benefits*, 281 P. 188, 41 Wyo. 11.

by necessary implication from a power to make such use of the property as will most effectually carry out the wish of the donor or the testator.⁵⁴ Where a sale is expressly forbidden,⁵⁵ or where such a power has not been given expressly or impliedly, and a court of equity has not given its sanction, the trustees are without power to alienate,⁵⁶ and in such a case the lands given to charity are deemed practically inalienable, it being the very essence of a charity that it shall endure forever.⁵⁷ Of course, one who is not rightfully a trustee of the property has no right to sell trust property.⁵⁸

Sale authorized by statute or by equity court. The legislature may authorize a sale of charitable trust property,⁵⁹ and despite any lack of power

that may exist in the trustee, it is recognized that a court of equity has a general and inherent jurisdiction, as incident to the administration of a charity estate, to order the alienation of charity property in a proper case;⁶⁰ and in some states the power, with certain limitations,⁶¹ is expressly conferred upon the court by statute.⁶² The court is not deprived of its inherent jurisdiction to order a sale of the property of a charitable trust by a statute authorizing the trustees to lease⁶³ or to sell the land,⁶⁴ or authorizing the creation of a charitable trust by which the subject matter shall be inalienable.⁶⁵ It has also been held that the power may be exercised by the court even where the donor intended to have the land conveyed used in specie and provided that it should not be sold or alienated,⁶⁶ provided, how-

Rents, profits, and income

Provision of will devising farm to town for poor, that all rents, profits, and income be applied to their support and maintenance, was held not to authorize removal of part of wall around farm, or platting of part of farm into lots for residence purposes as forbidden by a previous provision.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

54. Pa.—Seif v. Krebs, 86 A. 872, 239 Pa. 423.

55. R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

56. Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

Or.—Waller v. Lane County, 63 P.2d 214, 155 Or. 160.

Pa.—In re Rorer's Estate, 3 Pa. Dist. & Co. 41, affirmed 123 A. 781, 279 Pa. 313.

11 C.J. p 354 note 80.

57. Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Fla.—Jordan v. Landis, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

Or.—Waller v. Lane County, 63 P. 2d 214, 155 Or. 160.

11 C.J. p 354 note 81.

Where trustees incorporate

Where trustees, without authority, conveyed to corporation realty held upon trust for charitable purpose, circuit court's statutory act in approving proposed charter of corporation did not change status of trust realty, and charter provisions relating to powers and duties of trustees under charter could not enlarge their powers and duties, as each set of trustees was governed by the trust instrument.—Jordan v. Landis, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

58. Ga.—Dominy v. Stanley, 133 S. E. 245, 162 Ga. 211.

59. Del.—Delaware Land & Develop-

ment Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Mass.—In re Opinion of the Justices, 131 N.E. 31, 237 Mass. 613.

N.C.—Shields v. Harris, 130 S.E. 189, 190 N.C. 520.

Burying ground

Where land had been granted to trustees of church for use as cemetery, and by reason of growth and changed conditions a law had made further use of burying ground illegal, and conditions made continuance of use as burial place of bodies already there undesirable, it was not violation of trust, when concurred in by all cestui que trust to make sale of grounds after removal of bodies.—Shields v. Harris, supra.

Power of legislature over charities generally see *infra* § 57.

60. Ark.—Burel v. Grand Lodge, I. O. O. F., 259 S.W. 369, 163 Ark. 131.—McCarroll v. Grand Lodge, I. O. O. F., 243 S.W. 870, 154 Ark. 376.

Conn.—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22.

Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 174, 16 Del.Ch. 410, citing *Corpus Juris*—Trustees for Baptist Church of Borough of Wilmington v. Laird, 85 A. 1082, 10 Del.Ch. 118.

Mass.—Congregational Church Union of Boston and Vicinity v. Attorney General, 194 N.E. 820, 290 Mass. 1.

Neb.—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219.

N.C.—Holton v. Elliott, 138 S.E. 3, 193 N.C. 708—Shields v. Harris, 130 S.E. 189, 190 N.C. 520.

Ohio.—First German Reformed Church v. Weikel, 7 Ohio N.P., N.S., 377.

Or.—Waller v. Lane County, 63 P. 2d 214, 155 Or. 160.

Pa.—In re Rorer's Estate, 3 Pa. Dist.

& Co. 41, affirmed 123 A. 781, 279 Pa. 313.

R.I.—Town of South Kingstown v. Wakefield Trust Co., 134 A. 815, 43 R.I. 27, 43 A.L.R. 1122.

Wyo.—Bentley v. Whitney Benefits, 281 P. 188, 41 Wyo. 11.

11 C.J. p 354 note 86.

61. Ky.—People's Saving Bank & Trust Co. v. Board of Trustees of South Side Baptist Church of Covington, 294 S.W. 804, 220 Ky. 113. 11 C.J. p 355 note 87.

Statute is applicable where the property conveyed is a gift or a charity, or is otherwise subject to limitations or restrictions that the donor or grantor may enforce, and the title cannot be otherwise conveyed.—People's Saving Bank & Trust Co. v. Board of Trustees of South Side Baptist Church of Covington, supra.

62. N.J.—In re Young Women's Christian Ass'n of New York City, 126 A. 610, 96 N.J.Eq. 568.

Or.—Waller v. Lane County, 63 P.2d 214, 155 Or. 160.

Pa.—Myers v. Crick, 114 A. 255, 271 Pa. 399.

11 C.J. p 355 note 83.

63. N.Y.—Sailors' Snug Harbor v. Carmody, 144 N.Y.S. 24, 158 App. Div. 738, reversing 134 N.Y.S. 963, 77 Misc. 494.

64. N.J.—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

11 C.J. p 355 note 90.

Creation of limitations

Legislature, in authorizing trustees to convey land to board of education, cannot create limitations on estate not contemplated by original grantors.—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

65. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.

66. N.J.—Imbrie v. Steen, 124 A. 155, 96 N.J.Eq. 190.

Pa.—Myers v. Crick, 114 A. 255, 271 Pa. 399.

11 C.J. p 355 note 93.

ever, the sale will not prejudice the trust, charity, or purpose for which the same is held, and that it can be made without violation of any law conferring an immunity or exemption from sale or alienation.⁶⁷

Unless the trust is coupled with a condition for reverting if the trust be breached,⁶⁸ the power, whether inherent in the court or conferred by statute, is properly exercised where changed conditions and circumstances make the alienation of a part or all of the property essential to the beneficial administration of the charity;⁶⁹ and, notwithstanding a provision of reverter, if the grant of the property is incident to the main purpose of the grantor, it is not of the essence of the charity and the court may properly order a sale where it is no longer available for the use for which the grantor had intended.⁷⁰ However, such power should be exercised cautiously and only where it clearly appears that the proposed alienation is clearly for the benefit of the charity,⁷¹ and a power to sell such property cannot be conferred upon the trustee to act in the future as he alone shall determine to be wise or necessary.⁷² Also, whether the sale is proposed to be made under authority of a court of equity, or by

virtue of an express or implied power vested in the trustees, the property cannot be sold for any purpose other than that of carrying out the purpose of the trust;⁷³ and, after the sale has been made, the moneys received therefrom are impressed with the trust and must be so applied as to carry out its purpose;⁷⁴ but the purchaser of the property is not required to follow the funds in the hands of the vendor in order to see that they are invested as directed in the act of donation.⁷⁵

Leases. Whether the trustees may lease the property is primarily dependent on the terms of the instrument creating the trust.⁷⁶ Long leases will not be set aside when made by trustees of a charitable trust who are given an unlimited discretion.⁷⁷ Leases directed by the testator for so long a period as sixty years, with covenants for their perpetual renewal, operate as a substantial alienation of the premises;⁷⁸ and, accordingly, the trustee has a power of alienation limited only as to form.⁷⁹

Compensation of trustees. The compensation of trustees on a sale of the trust property or a part thereof is sometimes regulated by statutory provisions.⁸⁰

67. Pa.—Myers v. Crick, 114 A. 255, 271 Pa. 399.

68. Conn.—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22.—Bristol Baptist Church v. Connecticut Baptist Convention, 120 A. 497, 98 Conn. 677.

69. Neb.—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219.

N.C.—Holton v. Elliott, 133 S.E. 3, 193 N.C. 708.

Or.—Waller v. Lane County, 63 P.2d 214, 155 Or. 160.

Pa.—In re Rorer's Estate, 3 Pa. Dist. & Co. 41, affirmed 123 A. 781, 279 Pa. 313.

R.I.—Town of South Kingstown v. Wakefield Trust Co., 134 A. 815, 48 R.I. 27, 43 A.L.R. 1122.

Wyo.—Bentley v. Whitney Benefits, 281 P. 188, 41 Wyo. 11.

11 C.J. p 355 note 92.

70. Conn.—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22.

71. Mo.—City of St. Louis v. McAllister, 218 S.W. 312, 281 Mo. 26, citing *Corpus Juris*.

Neb.—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219.

N.J.—Trustees of First Presbyterian Church of Town of Salem v. Wheeler, 149 A. 589, 106 N.J.Eq. 8.—Imbrie v. Steen, 124 A. 155, 96 N.J.Eq. 190.

N.C.—Shannonhouse v. Wolfe, 133 S.E. 93, 191 N.C. 769.

11 C.J. p 356 note 94.

Depressed market

Ordering sale of real estate of a trust estate, and reinvestment of the fund is erroneous, where the realty could not be sold for more than fifty per cent of its value.—City of St. Louis v. McAllister, 218 S.W. 312, 281 Mo. 26.

Encroachment of business around church

S.C.—Patton v. First Presbyterian Church of Greenville, 123 S.E. 493, 129 S.C. 15.

72. Mass.—Congregational Church Union of Boston and Vicinity v. Attorney General, 194 N.E. 820, 290 Mass. 1.

Recital that trustor did not wish to bind trustees' discretion respecting disposition or holding of property is not tantamount to direction to hold property indefinitely.—Dingwell v. Seymour, 267 P. 327, 91 Cal. App. 483.

73. Pa.—Myers v. Crick, 114 A. 255, 271 Pa. 399.

11 C.J. p 356 note 95.

Statute rendering the transfer of property in contravention of the trust void is not applicable where the transfer was for the purpose of carrying out the trust.—O'Hara v. Grand Lodge, I. O. G. T. of State of California, 2 P.2d 21, 213 Cal. 131.

74. Del.—Delaware Land & Development Co. v. First and Central

Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Mass.—Attorney General v. Armstrong, 120 N.E. 678, 231 Mass. 196.

N.J.—In re Young Women's Christian Ass'n of New York City, 126 A. 610, 96 N.J.Eq. 568.

Or.—Waller v. Lane County, 63 P.2d 214, 217, 155 Or. 160, citing *Corpus Juris*.

11 C.J. p 356 note 96.

75. La.—Society of the Holy Family v. Charbonnet, 98 So. 410, 154 La. 394.

Ohio.—First German Reformed Church v. Weikel, 7 Ohio N.P., N.S., 377.

76. R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

Implied power

Where trustees have express power to sell and convey property held for the benefit of a perpetual trust, it has been held that they have implied power to execute an oil and gas lease.—Heffelfinger v. Scott, 47 P. 2d 66, 142 Kan. 395.

77. Pa.—Providence Proprietors' School Fund's App., 2 Walk. 37.

78. Ill.—Atty.-Gen. v. Newberry Library, 37 N.E. 236, 150 Ill. 229.

11 C.J. p 356 note 98.

79. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.

Usual commission on final payment

Trustees may charge usual commission allowed by statute on final

(2) Validity

While a sale made without authority is void, in the absence of fraud, mismanagement, or incapacity, the courts are without authority to interfere with the express power of the trustees to manage and sell the property.

The managers and operators of the properties of a charitable trust have been held not precluded nor disqualified from purchasing such properties from the trustees;⁸¹ but where a sale is made without authority, the deed is void and subject to cancellation, at least where the purchaser had notice of the lack of authority.⁸² Any inquiry as to the trustees' good judgment in selling the trust property under power expressly conferred is barred if the statutory method of sale was followed;⁸³ and in the absence of fraud, mismanagement, or incapacity, the courts are without authority to interfere with the express power of the trustees to manage and sell the property.⁸⁴ Also, a sale will not be set aside in the absence of a showing that the price is inadequate, or that a resale would probably result in a higher price.⁸⁵

b. Mortgaging Property

The power of the trustees to mortgage the property is dependent on the trust instrument and if such power is expressly denied, a court of equity has been held without power to authorize them to mortgage the property.

While the trustees may not mortgage the trust

property unless authorized so to do,⁸⁶ this power may be implied from the wording of the trust instrument.⁸⁷ However, a court of equity has been held without power to authorize a mortgage of the property contrary to the express terms of the trust,⁸⁸ notwithstanding conditions had so changed that it was necessary to mortgage the property to avoid a failure of the trust.⁸⁹

Where the trustees of a charitable trust are without authority to mortgage the trust property, the property cannot be sold on an execution issued on a judgment rendered in a proceeding for foreclosure of a mortgage given by them.⁹⁰

c. Loan or Investment of Funds

The right or duty of the trustees to loan or invest the trust funds is dependent, in the first instance, on the instrument creating the trust.

The right or duty to invest or loan the trust funds is sometimes expressly regulated by the instrument creating the trust.⁹¹ Under a will declaring that certain stock should become a trust fund and part of it put aside and invested for a particular charity, it has been held that the trustee had a right to retain the fund in the form in which it was received in the absence of any reason to fear for the safety of the investment;⁹² and where it is directed that the principal of the fund to arise shall be loaned only on real estate security, if that particular

payment on selling portion of corpus of trust estate for erection of school buildings under trust.—*Smith v. Lymer*, 29 Hawaii 169.

81. Mo.—*Dickey v. Volker*, 11 S.W. 2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

82. Fla.—*Jordan v. Landis*, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604.

Bona fide purchaser

A person purchasing land from a trustee has been held not a bona fide purchaser where the instrument deeding the land to the trustee was sufficient to put a prudent man on inquiry as to the validity of the conveyance in trust.—*Union Trust & Savings Bank of Pasadena v. Ishkanian*, 187 P. 757, 45 Cal.App. 347.

83. S.C.—*State ex rel. Daniel v. Strong*, 192 S.E. 671, 185 S.C. 27.

84. Mo.—*Dickey v. Volker*, 11 S.W. 2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

Fraud or mismanagement in sale not shown

Mo.—*Dickey v. Volker*, supra.

Furnishing information to bidder

The trustees in their discretion,

may limit the information to be furnished to prospective bidders, and that the trustees selling property of the trust referred inquiries of bidders to operators of the properties, who were also bidders, has been held not to warrant setting aside the sale, as there was no other source of information and there was no allegation that the information given was incorrect or misleading.—*Dickey v. Volker*, supra.

85. Mo.—*Dickey v. Volker*, supra.

86. N.C.—*Shannonhouse v. Wolfe*, 133 S.E. 93, 191 N.C. 769.

87. Fla.—*Montgomery v. Carlton*, 126 So. 135, 99 Fla. 152.

Mortgage not authorized

A provision giving the trustees "entire control, disposal, and management" has been held not to authorize the trustees to mortgage the property.—*Shannonhouse v. Wolfe*, 133 S.E. 93, 191 N.C. 769.

88. Ala.—*Lovelace v. Marion Institute*, 110 So. 381, 215 Ala. 271.

Ark.—*Atkinson v. Lyle*, 85 S.W.2d 715, 191 Ark. 61.

89. Ark.—*Atkinson v. Lyle*, supra.

90. N.C.—*Shannonhouse v. Wolfe*, 133 S.E. 93, 191 N.C. 769.

11 C.J. p 356 note 97.

91. Mass.—*Massachusetts Institute of Technology v. Attorney General*, 126 N.E. 521, 235 Mass. 288.

Action by majority of trustees

Mass.—*City of Boston v. Curley*, 177 N.E. 557, 276 Mass. 549.

Discharge from duty

Where a will directs the trustees to invest and reinvest the fund until a certain time elapses or the fund reaches a certain amount, if the fund exceeded such amount when the will was probated the trustees are discharged of any duty of investment and are required only to pay over the entire fund to the beneficiary.—*Massachusetts Institute of Technology v. Attorney General*, 126 N.E. 521, 235 Mass. 288.

Loan to beneficiaries

Sometimes the instrument creating a charitable trust expressly confers power upon the trustee to loan without security any part of the income to those whom he deems to be beneficiaries within the scope of the trust.—*Monroe County Baptist Home v. Gardner*, 145 N.Y.S. 275.

92. Mass.—*First Nat. Bank v. Truesdale Hospital*, 192 N.E. 150, 288 Mass. 35.

form of security fails or becomes unavailable, the trustees may be authorized to loan on other sufficient securities without impairment of the trust.⁹³ Also, where a bequest was made to a city on condition that it pay interest at a certain per cent to the trustee for use for charitable purposes and interest at the rate specified cannot be obtained on investments suitable for trust funds, the city is only required to invest the fund in appropriate securities and pay over the income received.⁹⁴

The certificate of deposit, bond, or other investment of a public charitable fund should indicate, so far as practicable, the legal owner, the trustee, and the trust.⁹⁵

The court will not assume that an investment or reinvestment of trust property or funds would be made in such a way as to violate the law;⁹⁶ and a trustee is not personally liable for a mere error

or mistake in judgment in the investment of trust funds.⁹⁷

§ 49. Judicial Supervision and Administration in General

Courts of equity exercise an extensive supervisory jurisdiction over charitable trusts to protect them and enforce their execution, but not to create, alter, or destroy them.

While it has been stated that a court of equity never had visitatorial power,⁹⁸ such courts have always exercised an extensive jurisdiction over charitable uses and trusts, not only to uphold them and to recognize their validity, as shown supra § 6, but also to protect them, prevent their misuse or abuse, and enforce their execution.⁹⁹ This jurisdiction exists, although the instrument creating the trust does not expressly confer it;¹ and sometimes the instrument does expressly or impliedly show an

93. Or.—In re John, 47 P. 341, 50 P. 226, 30 Or. 494, 530, 36 L.R.A. 242.

94. Mass.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

95. Mass.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

96. Ky.—Goode's Adm'r v. Goode, 38 S.W.2d 691, 238 Ky. 620.

97. Ark.—Graham Bros. Co. v. Gal-lowsay Woman's College, 31 S.W. 2d 837, 190 Ark. 692.

Best judgment

Every member of corporation managing public charitable fund, being charged with trustee's obligations, must exercise his best judgment regarding every investment.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

Spreading investments

Withdrawing almost four-fifths of a public charitable fund from a single investment to obtain a wider variety of stable investments has been held not beyond the power of trustees in accordance with the degree of care required of trustees.—City of Boston v. Curley, supra.

98. N.Y.—In re Norton, 161 N.Y.S. 710, 97 Misc. 239.

99. U.S.—Irwin v. Swinney, D.C. Mo., 45 F.2d 890.

Ala.—State ex rel. Carmichael v. Bibb, 173 So. 74—Lovelace v. Marion Institute, 110 So. 381, 215 Ala. 271.

Ariz.—Lowell v. Lowell, 240 P. 280, 286, 29 Ariz. 138, citing *Corpus Juris*.

Colo.—Haggin v. International Trust Co., 169 P. 138, 69 Colo. 135, L.R.A. 1918B 710.

Conn.—Newton v. Healy, 122 A. 654, 100 Conn. 5.

Ill.—Kerner v. Thompson, 6 N.E.2d 131, 365 Ill. 149, reversing 232 Ill. App. 403—Hart v. Taylor, 133 N.E. 857, 301 Ill. 344—Maguire v. City of Macomb, 127 N.E. 682, 293 Ill. 441—Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13, 290 Ill. 205.

Iowa.—Curtis & Barker v. Central University of Iowa, 176 N.W. 330, 188 Iowa 300.

Ky.—Martin v. Kentucky Christian Conference, 73 S.W.2d 849, 255 Ky. 322.

Me.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195—Petition of Pierce, 84 A. 1070, 109 Me. 509.

Md.—American Colonization Soc. v. Soulsby, 99 A. 944, 129 Md. 605, L.R.A. 1917C 937.

Mo.—Burrier v. Jones, 92 S.W.2d 885, 338 Mo. 679.

Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416—Elliott v. Quinn, 189 N.W. 173, 109 Neb. 5—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219.

N.J.—Bible Readers' Aid Soc. of Trenton v. Katzenbach, 128 A. 628, 97 N.J.Eq. 416.

N.Y.—In re Norton, 161 N.Y.S. 710, 97 Misc. 239.

Or.—State v. Toney, 17 P.2d 1105, 141 Or. 406.

Pa.—In re Toner's Estate, 103 A. 541, 260 Pa. 49.

Wash.—In re Hunter's Estate, 265 P. 466, 147 Wash. 216.

11 C.J. p 356 note 11.

Test for guidance of court, in passing on nature of permissible conduct in which trustees of charitable trust may engage in course of administering trust, is objects sought to be promoted and reasonableness of means adopted for their most ef-

ficacious accomplishment.—Ross v. Freeman, Del.Ch., 180 A. 527.

Although county or municipality is trustee, equity has jurisdiction over the administration of the trust. Iowa.—Chapman v. Newell, 125 N.W. 324, 146 Iowa 415.

R.I.—City of Providence v. Payne, 134 A. 276, 47 R.I. 444.

Effect of change of form of property

Where the form of trust property is legally changed, equity's supervisory power of administration follows it in its new form.—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219.

Personal trusts

If testator leaves his estate to charity generally, but authorizes his executor to determine for what charitable purposes it shall be used and to select beneficiaries thereof, and the will contains no other definite manner of selection, the trust is a personal one, and a court of equity does not have jurisdiction to determine the purpose or select beneficiaries.—Allred v. Beggs, 84 S.W.2d 223, 125 Tex. 584, affirming Beggs v. Allred, Civ.App., 73 S.W.2d 599.

Private trusts distinguished

Trustees of religious, charitable, or other public trusts have been held not required to make annual returns to the court of ordinary, under a statute which applies to trustees charged with the management of estates of which private individuals are the beneficiaries.—City of Waycross v. Waycross Savings & Trust Co., 90 S.E. 382, 146 Ga. 68—Ford v. Thomas, 36 S.E. 841, 111 Ga. 493.

1. Ky.—Jenkins v. Berry, 92 S.W. 10, 122 Ky. 311, 28 Ky.L. 1224—Jenkins v. Berry, 83 S.W. 594, 119 Ky. 350, 26 Ky.L. 1141.

intent to vest a supervisory power over the management and control of the trust property in a court of equitable jurisdiction,² and in some states the jurisdiction is expressly conferred, or at least restored, by statute.³ The court, in all of its doings, represents the persons, institutions, and classes who are to be benefited,⁴ and this jurisdiction over charities extends to such as are founded or supported by voluntary contributions or subscriptions when there is property impressed with a charitable trust,⁵ notwithstanding some contributions were made by citizens of other states.⁶

The supervisory power of courts of equity often enables them to control the trustees in the direction and management of the trust, but they have no authority to interfere with the just exercise of the trustees' powers and duties.⁷ In other words, while the ultimate control rests in the court,⁸ yet a charitable trust will not be interfered with while the

trust estate is being managed according to the donor's intention.⁹ Thus, while equity will compel the trustees to exercise their discretion,¹⁰ and will decide, as a question of fact, whether the trustees have reasonably and fairly exercised their discretion,¹¹ where such discretion is being fairly and honestly exercised the court will not control or interfere with it,¹² nor substitute its own discretion for that of the trustees.¹³

This jurisdiction includes power to construe the trust instrument,¹⁴ to remove or to suspend an unfaithful trustee,¹⁵ to correct irregularities in administration,¹⁶ to restrain a contemplated breach of trust or abuse of power by the trustee,¹⁷ to protect the trust property from loss or diversion,¹⁸ to give directions for the future administration of the trust,¹⁹ to instruct the trustees in case of doubt as to their powers and duties,²⁰ and, as shown supra § 48, to order a sale of the trust property.

2. Ky.—*Ellerherst v. Pythian*, 63 S. W. 37, 110 Ky. 923, 23 Ky.L. 354.
11 C.J. p 357 note 13.

3. Pa.—*Wilson v. Board of Directors of City Trusts*, 138 A. 538, 324 Pa. 545.
11 C.J. p 357 note 14.

Orphans' court

Orphans' court has broad visitatorial and supervisory powers of Commonwealth in exercise of its power to surcharge testamentary trustees for dereliction in office, particularly where charitable uses or bequests are involved, and the act requiring reports to city council by board of directors of city trusts did not divest orphans' court of its control of trust estates created by will.—*Wilson v. Board of Directors of City Trusts*, supra.

4. Ind.—*Grimes v. Harmon*, 35 Ind. 198, 9 Am.R. 690.
11 C.J. p 357 note 22.

5. N.J.—*Bible Readers' Aid Soc. of Trenton v. Katzenbach*, 128 A. 628, 97 N.J.Eq. 416.

6. Ill.—*Kerner v. Thompson*, 6 N.E. 2d 131, 365 Ill. 149, reversing 282 Ill.App. 403.

7. Ga.—*Murrell v. Horton*, 155 S.E. 337, 171 Ga. 344.
11 C.J. p 357 note 23.

8. Iowa.—*In re Clevon*, 142 N.W. 986, 161 Iowa 289.

9. N.J.—*Smith v. Pond*, 107 A. 800, 90 N.J.Eq. 445, reversed on other grounds 111 A. 154, 92 N.J.Eq. 211.

10. N.J.—*Smith v. Pond*, supra.

11. Ill.—*Maguire v. City of Macomb*, 127 N.E. 682, 293 Ill. 441.
11 C.J. p 357 note 25.

12. Ala.—*Lovelace v. Marion Insti-*

tute, 110 So. 381, 382, 215 Ala. 271, citing *Corpus Juris*.

Conn.—*Healy v. Loomis Institute*, 128 A. 774, 102 Conn. 410.

Me.—*Bancroft v. Maine Sanatorium Ass'n*, 109 A. 585, 119 Me. 56.

Mich.—*In re DeBancourt's Estate*, 272 N.W. 891, 279 Mich. 518, 110 A.L.R. 1346.

Ohio.—*Carrel v. State*, 11 Ohio App. 281.

Tenn.—*Vanderbilt University v. Mitchell*, 36 S.W.2d 83, 162 Tenn. 217.

11 C.J. p 357 note 27.

Fairly exercised

Circumstances justified trustee in making costs to Georgia students attending Vanderbilt University as low as costs in Georgia universities, besides making loans.—*Vanderbilt University v. Mitchell*, supra.

13. Mo.—*Sandusky v. Sandusky*, 177 S.W. 390, 265 Mo. 219.

14. R.I.—*Town of South Kingstown v. Wakefield Trust Co.*, 134 A. 815, 47 R.I. 27, 48 A.L.R. 1122.

11 C.J. p 357 note 15.

Certifying to supreme court

Superior court had no jurisdiction to enter final decree construing charitable trust deed without certifying proceedings to supreme court, where so required by statute.—*Town of South Kingstown v. Wakefield Trust Co.*, supra.

15. Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.

Pa.—*Wilson v. Board of Directors of City Trusts*, 138 A. 538, 324 Pa. 545.

11 C.J. p 357 note 16.

16. D.C.—*Washington Loan & Trust Co. v. Hammond*, 278 F. 569, 51 App.D.C. 260.

Md.—*American Colonization Soc. v.*

Soulsby, 99 A. 944, 129 Md. 605, L.R.A.1917C 937.

11 C.J. p 357 note 17.

17. Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.

Conn.—*Healy v. Loomis Institute*, 128 A. 774, 102 Conn. 410.

11 C.J. p 357 note 18.

18. Pa.—*Seitzinger v. Becker*, 101 A. 650, 257 Pa. 264.

11 C.J. p 357 note 19.

19. R.I.—*Taylor v. Salvation Army*, 142 A. 335, 49 R.I. 316.

11 C.J. p 357 note 20.

Vacating former decree

That court of equity instructed trustee as to administration of charitable trust does not prevent it from vacating decree, if not acted on, and entering a new one with other instructions, and decree never acted on, where change of circumstances made compliance undesirable, should be vacated.—*Town of South Kingstown v. Wakefield Trust Co.*, 134 A. 815, 47 R.I. 27, 48 A.L.R. 1122.

20. Conn.—*Newton v. Healy*, 122 A. 654, 100 Conn. 5.

Ky.—*Goode's Adm'r v. Goode*, 38 S. W.2d 691, 238 Ky. 620.

Mass.—*Crawford v. Nies*, 113 N.E. 408, 224 Mass. 474.

N.Y.—*In re Harrington's Will*, 276 N.Y.S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App. Div. 252.

R.I.—*Taylor v. Salvation Army*, 142 A. 335, 49 R.I. 316.

11 C.J. p 357 note 21.

Trustee may ask court for instructions

When in doubt as to his powers or duties, a trustee may ask the court for instructions.

Me.—*Snow v. President and Trustees*

However, the jurisdiction of a court of equity or chancery is not so extensive as to authorize its interference in all cases.²¹ Its jurisdiction is not to create or to alter the trust,²² or to destroy the trust,²³ or to sanction a diversion of any portion of the trust estate,²⁴ but its powers are confined to the mere execution of the trust, to secure the faithful application of the fund or property to the use and object indicated in the deed or will, or, in other words, to carry out the intention of the grantor or testator as thus expressed.²⁵

There is a wide distinction between a gift to a charity and a gift to a trustee to be applied to a charity, as in the former instance all that is necessary to be done is for the court to award the fund to the particular charity, the action of the court in this respect being ministerial only; whereas in a gift to a trustee to be applied to a charity, the court has jurisdiction over the trustee, as it has over all trustees, to see that he does not commit a breach of his trust or apply the fund in bad faith or to purposes that are not charitable.²⁶ Also, a scheme of charity is to be distinguished from a scheme or plan for administering it; in the former, while the courts may be expressly or impliedly empowered by the donor to direct the particular manner of carrying out the scheme, they cannot infringe upon, change, or modify the nature of the charity as established by the donor.²⁷ Thus, if the donor or the trustee, where the latter is so authorized, does not frame a scheme for the administration or distribution of the trust, a scheme for administration will be devised by the court.²⁸

Reviewing exercise of visitatorial powers. The duty of the courts touching the determination by visitors acting within their general jurisdiction is to interpose to prevent action contrary to law in the administration of the trust. Generally, where a visitor has given a decision within his powers, it is final and not subject to reexamination at law or in equity, and the ordinary exercise of visitatorial powers, if founded on any evidence, is not reviewed by the courts.²⁹

Administration by court. It is held that, where a trustee is not appointed by the testator, and the will does not declare the manner in which the charitable devise is to be made effectual, equity will not administer the trust;³⁰ but that, where the trustees of a church fail to administer a fund created for the purpose of taking care of the poor of the church, the court will take charge of the fund until such time as it is evident that the higher authorities of the church will take charge of and properly administer it.³¹ On the death of the trustee under a valid charitable trust, the execution of the trust is devolved on the supreme court under some statutes;³² and on the resignation of a testamentary trustee having a personal power of appointment to designate a beneficiary, such power of appointment has been held to pass to the supreme court.³³

§ 50. Variation from Original Plan or Purpose

A court of equity, under its general jurisdiction, has the power to vary the precise terms of a charitable trust when necessary, and this power has sometimes been called the rule or doctrine of approximation.

of Bowdoin College, 175 A. 268, 133 Me. 195.

Mass.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.

21. Ala.—Houston v. Howze, 50 So. 266, 162 Ala. 500.

N.J.—Atty.-Gen. v. Moore, 19 N.J. Eq. 503.

Trivial matters

Even as to charities, equity will not, in the absence of bad faith, necessarily interfere in trivial matters.—Woodbury v. Portland Mar. Soc., 37 A. 323, 90 Me. 17.

22. Ala.—Lovelace v. Marion Institute, 110 So. 381, 215 Ala. 271.

Ark.—Union Nat. Bank v. Kirby, 72 S.W.2d 229, 189 Ark. 369.

Miss.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

11 C.J. p 357 note 31.

23. Mass.—Congregational Church Union of Boston and Vicinity v. Attorney General, 194 N.E. 820, 290 Mass. 1.

24. Ark.—Union Nat. Bank v. Kirby, 72 S.W.2d 229, 189 Ark. 369.

25. Ind.—Grimes v. Harmon, 35 Ind. 198, 9 Am.R. 690.

Mo.—Crow v. Clay County, 95 S.W. 369, 196 Mo. 234.

26. Pa.—Unruh's Est., 93 A. 1000, 248 Pa. 185.

Tenn.—Milligan v. Greeneville College, 2 S.W.2d 90, 156 Tenn. 495.

11 C.J. p 357 note 34.

27. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.

11 C.J. p 358 note 35.

28. Mass.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34—McElwain v. Allen, 134 N.E. 620, 241 Mass. 112.

Probate judge could order distribution of charitable trust fund according to scheme he adopted, if last surviving trustee and administrator had no right to vest fund.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.

Heir's administrator, who was held not to have right in charitable trust

fund, had no standing to object to distributees. — Kirwin v. Attorney General, supra.

29. Mass. — Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

30. S.C. — Dye v. Beaver Creek Church, 26 S.E. 717, 48 S.C. 444, 59 Am.S.R. 724.

31. La.—Von Hoven v. New Orleans Immanuel Presb. Church, 32 So. 389, 108 La. 274.

32. N.Y.—In re Harrington's Will, 281 N.Y.S. 93, 245 App.Div. 252, adhering to 276 N.Y.S. 868, 243 App.Div. 235 — In re Olmstead's Will, 226 N.Y.S. 637, 131 Misc. 238 — In re Merritt's Will, 209 N.Y.S. 243, 124 Misc. 709—In re Welch, 172 N.Y.S. 349, 105 Misc. 27—In re Trustees of Sustentation Fund of Reformed Episcopal Church, 163 N.Y.S. 1042, 98 Misc. 145.

11 C.J. p 358 note 39.

33. N.Y.—In re Grueby's Estate, 232 N.Y.S. 424, 133 Misc. 248.

Under the general jurisdiction of a court of chancery to administer the estate of a charity, it has power to vary the precise terms of a charitable trust when necessary.³⁴ It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for their administration should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances, and to relieve the trust from a condition which imperils or endangers the charity itself or the funds provided for its endowment and maintenance.³⁵

This power to vary the details of administration is sometimes called the equitable doctrine of approximation,³⁶ and as such is not confined to the administration of charities, but is an essential element of equity jurisprudence.³⁷ While the doctrine of approximation has been held not to take the place of, nor to be the same as, the cy pres doctrine,³⁸ the doctrine of cy pres as modified and applied generally in the United States has also been called the doctrine of approximation, as shown infra § 52. The doctrine of approximation is in the nature of a judicial construction of the trust as intended by the grantor when considered in the light of changed conditions,³⁹ but the possibility of a use of the property merely approximating the use intended by the grant will not save the trust.⁴⁰ Also, the impossibility of using trust property as directed

has been held not to empower the court to change the beneficiaries,⁴¹ and the court cannot devote any portion of a fund, dedicated to a charitable use, to an object not contemplated by the donor.⁴²

The jurisdiction merely "to vary the details of administration" is said to be more liberally exercised,⁴³ and perhaps to be more firmly established and more widely recognized than is that which is usually called the cy pres power of the court.⁴⁴ However, it is difficult to distinguish many applications of the cy pres doctrine from an exercise of the power to vary the details of administration.

§ 51. — Prerogative Power

The prerogative power by which the king controls and carries into effect donations in which no definite charities are expressed or no trustees appointed has never been recognized as belonging to courts of equity in the United States.

The prerogative power over charities is that by which the king, in consequence of his position as *parens patriæ*, in the absence of trustees or of persons having power of appointment, controls and carries into effect donations in which no definite charities are expressed as the objects of the testator's bounty and no specific charitable purposes enumerated, but in which the gift is to charity in general. This power is executed by the lord chancellor, as keeper of the sovereign's conscience, under the sign manual of the crown.⁴⁵ This power is

34. Ala.—Dunn v. Ellisor, 141 So. 700, 225 Ala. 15 — Lovelace v. Marion Institute, 110 So. 381, 382, 215 Ala. 271, quoting *Corpus Juris*. Cal.—O'Hara v. Grand Lodge, I. O. G. T. of State of California, 2 P. 2d 21, 213 Cal. 131. Conn.—Newton v. Healy, 122 A. 654, 100 Conn. 5. Ill.—Trustees of Rush Medical College v. University of Chicago, 143 N.E. 434, 312 Ill. 109. N.H.—Gagnon v. Wellman, 99 A. 786, 78 N.H. 327. Pa.—In re Toner's Estate, 103 A. 541, 260 Pa. 49. 11 C.J. p 358 note 40.

Sending fund to adjacent county

When in the opinion of the court the interest of any trust for charitable uses can be promoted by sending fund into an adjacent county, courts have ample power to do so, unless it is expressly or impliedly forbidden by the donor or testator.—In re Toner's Estate, *supra*.

Necessity

Consideration of extension to students from other states of trust created to assist Georgia students was held not justified until trustee's full discretion with respect to assisting Georgia students was exercised and

found unavailing.—Vanderbilt University v. Mitchell, 36 S.W.2d 83, 162 Tenn. 217.

35. Ala.—Lovelace v. Marion Institute, 110 So. 381, 215 Ala. 271. Conn.—Newton v. Healy, 122 A. 654, 100 Conn. 5. Me.—Stevens v. Smith, 183 A. 344, 134 Me. 175. Miss.—National Bank of Greece v. Savarika, 148 So. 649, 654, 167 Miss. 571, quoting *Corpus Juris*. N.J.—In re Young Women's Christian Ass'n of New York City, 126 A. 610, 96 N.J.Eq. 568. 11 C.J. p 358 note 41.

36. Ala.—Lovelace v. Marion Institute, 110 So. 381, 215 Ala. 271. Miss.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

37. Pa.—Hughes v. Smith, 17 Pa. Dist. & Co. 133.—In re Kalbach's Estate, 10 Pa. Dist. & Co. 195. 11 C.J. p 360 note 59.

38. Ala.—Dunn v. Ellisor, 141 So. 700, 225 Ala. 15.

Purpose and application entirely different

The purpose and the application of the cy pres doctrine and the equitable doctrine of approximation are

entirely different.—National Bank of Greece v. Savarika, 148 So. 649, 167 Miss. 571.

39. Ala.—Dunn v. Ellisor, 141 So. 700, 225 Ala. 15.

40. Ala.—King v. Banks, 124 So. 371, 220 Ala. 274.

41. Ala.—King v. Banks, *supra*. S.C.—City of Columbia v. Monteith, 137 S.E. 727, 139 S.C. 262.

42. S.C.—City of Columbia v. Monteith, *supra*.

Use in aid of public schools

Where will devised property for industrial school for children of indigent white persons for training for domestic service, use of property in aid of public schools was unauthorized.—City of Columbia v. Monteith, *supra*.

43. Mass.—Jackson v. Phillips, 14 Allen 539.

Mo.—Lackland v. Walker, 52 S.W. 414, 151 Mo. 210.

44. Mo.—Lackland v. Walker, *supra*.

45. Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416. Pa.—In re Scott's Estate, 28 Pa. Dist. 292.

11 C.J. p 358 note 45.

generally referred to by the courts as part of the cy pres power, although it is distinct from the judicial part of it which is adopted and administered by the courts of equity in the United States,⁴⁶ and this ultra-judicial function has never been recognized as belonging to courts of equity in the United States, unless expressly delegated to them by the legislature, the power lying, if anywhere, with the legislatures or the people, as succeeding to the rights of the king as *parens patriæ*.⁴⁷

§ 52. — Cy Pres Power as Judicial Function

- a. Definition and nature
- b. Adoption or rejection of doctrine
- c. Application and limitation of doctrine

a. Definition and Nature

Cy pres means "as near to," and the doctrine is one of construction, the reason or basis thereof being to permit the main purpose of the donor of a charitable trust to be carried out as nearly as may be where it cannot be done to the letter.

Cy pres has been defined or translated as mean-

ing "as near as may be,"⁴⁸ and literally it means "as near to."⁴⁹

The doctrine of cy pres is the doctrine of nearness or approximation,⁵⁰ and, as modified and applied by some courts in the United States, has been called the doctrine of approximation,⁵¹ although in some jurisdictions, as shown *supra* § 50, the doctrine of approximation has been held not to take the place of, nor to be the same as, the cy pres doctrine. However, the equity doctrine of approximation and that of cy pres are both said to be in reality judicial principles of construction and not of administration,⁵² the construction not being the result of an arbitrary power exercised in disregard of the donor's wishes for the public benefit, but being based on a judicial finding of his intention as applied to new conditions.⁵³ The meaning of the doctrine of cy pres is that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced,⁵⁴ and the reason or basis for

Two classes

The principal, if not the only, cases in which the disposition of a charity is held or declared to be in the crown by sign manual are of two classes: The first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.

Iowa.—*Klumpert v. Vrieland*, 121 N. W. 34, 142 Iowa 434.

Mass.—*Jackson v. Phillips*, 96 Mass. 539.

Mo.—*Crow v. Clay County*, 95 S.W. 369, 196 Mo. 234.

N.Y.—*Loch v. Mayer*, 100 N.Y.S. 837, 50 Misc. 442.

46. Neb.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

47. U.S.—*Schell v. Leander Clark College*, D.C.Iowa, 10 F.2d 542.

Ky.—*Adams v. Bohon*, 195 S.W. 156, 176 Ky. 66.

Pa.—*In re Scott's Estate*, 28 Pa.Dist. 292.

Tex.—*Allred v. Beggs*, 84 S.W.2d 223, 125 Tex. 584, affirming *Beggs v. Allred*, Civ.App., 73 S.W.2d 599.

Wash.—*Reagh v. Dickey*, 48 P.2d 941, 183 Wash. 564—*Chellew v. White*, 221 P. 3, 127 Wash. 382.

Wis.—*In re Lott's Will*, 214 N.W.

391, 193 Wis. 409.

11 C.J. p 358 note 49.

In Tennessee no official has been intrusted with the authority and duties of *parens patriæ* to represent the unascertained beneficiaries of a charitable trust.—*Ewell v. Sneed*, 191 S.W. 131, 136 Tenn. 602, 5 A.L.R. 303.

Statutory adoption

Ky.St. § 317, regulating charitable trusts, is liberally construed by the courts to carry out, if possible, the charitable purposes of the donor of the trust, and no such trust will be permitted to fail for want of a trustee, but it is not construed so liberally as to adopt the cy pres doctrine, under which the trust can be extended for a charitable purpose, although no specific one was expressly named.—*State Bank & Trust Co. v. Patridge*, 248 S.W. 1056, 198 Ky. 403.

48. Iowa.—*Hodge v. Wellman*, 179 N.W. 534, 191 Iowa 877.

N.J.—*Crane v. Morristown School Foundation*, 187 A. 632, 120 N.J.Eq. 583.

49. Mo.—*Thatcher v. Lewis*, 76 S.W. 2d 677, 335 Mo. 1130.

Pa.—*In re Trexler Orphans' Home*, 19 Pa.Dist. & Co. 231.

17 C.J. p 695 note 5.

50. Ark.—*State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42*, 89 S.W.2d 605, 191 Ark. 1096.

N.J.—*Crane v. Morristown School Foundation*, 187 A. 632, 120 N.J.Eq. 583.

51. Conn.—*Newton v. Healy*, 122 A. 654, 100 Conn. 5.

Pa.—*Hughes v. Smith*, 17 Pa.Dist. & Co. 133—*In re Kalbach's Estate*, 10 Pa.Dist. & Co. 195.

11 C.J. p 360 note 58.

52. Ala.—*Lovelace v. Marion Institute*, 110 So. 381, 215 Ala. 271.

Ark.—*State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42*, 89 S.W.2d 605, 191 Ark. 1096.

Iowa.—*Hodge v. Wellman*, 179 N.W. 534, 191 Iowa 877.

Me.—*Stevens v. Smith*, 183 A. 344, 134 Me. 175.

Pa.—*In re Kalbach's Estate*, 10 Pa.Dist. & Co. 195.

11 C.J. p 360 note 61.

53. Ala.—*Lovelace v. Marion Institute*, 110 So. 381, 382, 215 Ala. 271, citing *Corpus Juris*.

N.Y.—*In re Walter's Estate*, 269 N.Y.S. 402, 150 Misc. 512—*Camp v. Presbyterian Soc. of Sackets Harbor*, 173 N.Y.S. 581, 105 Misc. 134.

Pa.—*In re Trexler Orphans' Home*, 19 Pa.Dist. & Co. 231—*In re Kalbach's Estate*, 10 Pa.Dist. & Co. 195.

11 C.J. p 360 note 62.

54. Pa.—*In re Curran's Estate*, 165 A. 842, 310 Pa. 434—*In re Trexler Orphans' Home*, 19 Pa.Dist. & Co. 231—*Hughes v. Smith*, 17 Pa.Dist. & Co. 133—*In re Kalbach's Estate*, 10 Pa.Dist. & Co. 195—*In re Becker's Estate*, 28 Pa.Dist. 695—*In re Scott's Estate*, 28 Pa.Dist. 292.

11 C.J. p 359 note 54 [c] (2)—17 C.J. p 695 note 6.

the doctrine is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter.⁵⁵

b. Adoption or Rejection of Doctrine

While rejected in a few jurisdictions, the cy pres doctrine or a similar doctrine is adopted in most jurisdictions.

While, as has been seen supra § 51, the cy pres doctrine, in so far as it comprehends the exercise of the prerogative power, has not been adopted

in the United States, so far, however, as the doctrine of the cy pres application of charitable trusts is a branch of the general equitable powers of a court of chancery, independent of the prerogative power of the crown, it has been extensively recognized, adopted, and applied⁵⁶ with whatever limitations prevail in the particular jurisdiction.⁵⁷ In a few jurisdictions the doctrine is wholly rejected;⁵⁸ and in some states the doctrine, or a part thereof, or at least a similar doctrine, has been adopted or recognized by legislation.⁵⁹

Other statements

(1) The cy pres rule or doctrine is this: Where a testator in his will evidences a general intention to be executed in a prescribed manner, if such intention cannot be executed in accordance with the terms of the will it may be done with as close proximity to the terms of the will as is reasonably possible.—*Sheldon v. Powell*, 128 So. 258, 99 Fla. 782.

(2) The rule relating to the cy pres doctrine is as follows: Where the literal execution of the trusts of a charitable gift is inexpedient or impracticable a court of equity will execute them, as nearly as it can, according to the original plan. The general principle on which the court acts is that, if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be executed shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, although the formal intention as to the mode cannot be accomplished.—*Allen v. City of Bellefontaine*, 191 N.E. 896, 47 Ohio App. 359.

55. Ill.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479.

Mo.—*Thatcher v. Lewis*, 76 S.W.2d 677, 335 Mo. 1130.

56. U.S.—*Schell v. Leander Clark College*, D.C.Iowa, 10 F.2d 542.

Ark.—*State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42*, 89 S.W.2d 605, 191 Ark. 1096.

Conn.—*First Congregational Soc. of Bridgeport v. City of Bridgeport*, 121 A. 77, 99 Conn. 22.

Fla.—*Sheldon v. Powell*, 128 So. 258, 99 Fla. 782.

Ill.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479—*Jansen v. Godair*, 127 N.E. 97, 292 Ill. 364.

Ind.—*Reasoner v. Herman*, 134 N.E. 276, 191 Ind. 642.

Iowa.—*Hodge v. Wellman*, 179 N.W. 534, 191 Iowa 877.

Me.—*Snow v. President and Trustees of Bowdoin College*, 175 A. 268, 133 Me. 195.

Mass.—*In re Opinion of the Justices*, 131 N.E. 31, 237 Mass. 613.

Mo.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

Neb.—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

N.H.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

N.J.—*Crane v. Morristown School Foundation*, 187 A. 632, 120 N.J.Eq. 583—*Patton v. Pierce*, 169 A. 284, 114 N.J.Eq. 548—*Imbrie v. Steen*, 124 A. 155, 96 N.J.Eq. 190—*Smith v. Pond*, 107 A. 800, 90 N.J.Eq. 445, reversed on other grounds 111 A. 154, 92 N.J.Eq. 211.

Pa.—*In re Morris' Estate*, 19 Pa.Dist. & Co. 420—*In re Garrison's Estate*, 17 Pa.Dist. & Co. 272—*In re McMullen's Estate*, 2 Pa.Dist. & Co. 720—*In re McCully's Estate*, 30 Pa.Dist. 257—*In re Becker's Estate*, 28 Pa.Dist. 695—*In re Scott's Estate*, 28 Pa.Dist. 292.

R.I.—*City of Providence v. Payne*, 134 A. 276, 47 R.I. 444.

Tex.—*Women's Christian Temperance Union of El Paso v. Cooley*, Civ.App., 25 S.W.2d 171, error refused.

Wis.—*First Wisconsin Trust Co. v. Board of Trustees of Racine College*, 272 N.W. 464.

11 C.J. p 359 note 53.

Court as parens patriæ

Where object of public charity falls, equity courts act at instance of state or national government as parens patriæ.—*Schell v. Leander Clark College*, D.C.Iowa, 10 F.2d 542.

Jurisdiction of particular courts

(1) Orphans' court has equitable power to apply doctrine of cy pres.—*In re Neely's Estate*, 88 Pa.Super. 372, affirmed 135 A. 540, 238 Pa. 130.

(2) The superior court has exclusive original jurisdiction in determining the application of the cy pres doctrine in administering a trust.—*City of Newport v. Sisson*, 155 A. 576, 51 R.I. 481—*Rhode Island Hospital Trust Co. v. Williams*, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664—*Gardner v. Sisson*, 144 A. 669, 49 R.I. 504.

57. N.J.—*MacKenzie v. Jersey City Presbytery*, 61 A. 1027, 67 N.J.Eq. 652, 676, 3 L.R.A.N.S., 227.

11 C.J. p 359 note 54.

Limitations on application of doc-

trine see *infra* subdivision c of this section.

58. Ala.—*Dunn v. Ellisor*, 141 So. 700, 225 Ala. 15—*King v. Banks*, 124 So. 371, 220 Ala. 274—*Lovelace v. Marion Institute*, 110 So. 381, 215 Ala. 271—*Trustees of Cumberland University v. Caldwell*, 84 So. 846, 203 Ala. 590.

Del.—*Murphy v. McBride*, 130 A. 283, 14 Del.Ch. 457, affirming *McBride v. Murphy*, 124 A. 798, 14 Del.Ch. 242.

D.C.—*Graff v. Wallace*, 32 F.2d 960, 59 App.D.C. 64, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629. Miss.—*National Bank of Greece v. Savarika*, 148 So. 649, 167 Miss. 571.

N.C.—*Thomas v. Clay*, 122 S.E. 852, 187 N.C. 778—*Wachovia Banking & Trust Co. v. Ogburn*, 107 S.E. 238, 181 N.C. 324.

11 C.J. p 360 note 55.

Doctrine of approximation see supra § 50.

In Louisiana, the application of the funds of a charitable trust to the use approximating most nearly the one for which the fund was created is a function of the legislature.—*Cox v. Gretna Academy*, 76 So. 177, 141 La. 1001.

Statute relating to sale of land held under trust deed in specific instances was held not to establish cy pres doctrine.—*King v. Banks*, 124 So. 371, 220 Ala. 274.

59. Minn.—*In re Peterson's Estate*, 277 N.W. 529.

11 C.J. p 360 note 56.

In Connecticut

(1) While the cy pres doctrine was recognized by statute in the case of trusts created by deed, it was held not applicable to trusts created by will.—*White v. Fisk*, 22 Conn. 31—11 C.J. p 360 note 56 [b].

(2) However, in a later case it was said that there can be no reason for its application to deeds, and not to wills.—*First Congregational Soc. of Bridgeport v. City of Bridgeport*, 121 A. 77, 99 Conn. 22.

In New York

(1) By L.1893 c 701 as amended by L.1901 c 291, the doctrine of cy pres is applicable.—*Camp v. Pres-*

c. Application and Limitation of Doctrine

The cy pres doctrine is properly applied where there is a general charitable purpose, but a literal compliance with the terms of the trust becomes impossible or impracticable, in which case the court directs the administration of the trust as nearly as possible in conformity with the intention of the donor or testator.

While the absence of express words of trust does not prevent the application of the cy pres powers of the court,⁶⁰ the cy pres doctrine, as applied judicially, unlike that of approximation, relates only to charitable gifts, and also only to such gifts as are valid.⁶¹ A statute conferring on certain courts

power to administer the subject matter of a charitable trust cy pres, where the circumstances have changed since the execution of the gift, is not applicable where the title of the donor fails because fraudulently obtained.⁶²

The cy pres doctrine is properly applied in a case where there is a general charitable purpose, but a literal compliance with the terms of the trust becomes impossible or impracticable, in which case the court directs the administration of the trust as nearly as possible in conformity with the intention of the donor or testator.⁶³ Thus, where the selec-

byterian Soc. of Sackets Harbor, 173 N.Y.S. 531, 105 Misc. 139—In re Brundage's Estate, 167 N.Y.S. 694, 101 Misc. 528, affirmed In re Farmers' Loan & Trust Co., 175 N.Y.S. 37, 186 App.Div. 722, which is modified on other grounds 124 N.E. 1, 226 N.Y. 691.

(2) By the so-called Tilden Acts, greater power has been conferred upon the supreme court, and these acts, now § 12 of the Personal Property Law and § 113 of the Real Property Law did more than make applicable to this state the doctrine of charitable uses. They authorized the court itself to apply the cy pres rule not only where a trust existed, but where the property had been devised or bequeathed to a corporation authorized to take and hold it for charitable purposes.—*Sherman v. Richmond Hose Co.* No. 2, 130 N.E. 613, 230 N.Y. 462, affirming 175 N.Y.S. 8, 186 App.Div. 417—In re *Walter's Estate*, 269 N.Y.S. 402, 150 Misc. 512—In re *Mills' Will*, 200 N.Y.S. 701, 121 Misc. 147—11 C.J. p 360 note 56 [d].

(3) However, where a hospital could not administer a bequest in the manner contemplated by the will, a decree holding that the legacy lapsed and refusing to apply the cy pres power was affirmed, although in a dissenting opinion it was stated that the statute is not limited, as the surrogate held, to instances where the bequest is in trust, but applies wherever there exists a gift, grant, or bequest for charitable purposes.—In re *Collins' Estate*, 3 N.Y.S.2d 291.

In *Pennsylvania*, Pub.L. 173, Pa.St. 1920 § 2592, providing that no disposition of property made for any religious or charitable use shall fail by reason of the object ceasing but that it shall be the duty of any court having equity jurisdiction in the proper county by its decrees to carry into effect the intent of the donor or testator as far as it can be ascertained and carried into effect consistently with law or equity, has been frequently applied.—In re *Hunter's Estate*, 123 A. 865, 279 Pa. 349—In re *McCully's Estate*, 112 A.

159, 269 Pa. 122—In re *Toner's Estate*, 103 A. 541, 260 Pa. 49—In re *Swalley's Estate*, 23 Pa.Dist. & Co. 629—In re *Scott's Estate*, 28 Pa.Dist. 292—11 C.J. p 360 note 56 [e].

60. N.Y.—Prudential Ins. Co. of America v. New York Guild for Jewish Blind, 299 N.Y.S. 917, 252 App.Div. 493.

However, in a later case affirmed without opinion, it was stated in a dissenting opinion that the statute is not limited, as the surrogate held, to instances where the bequest is in trust, but applies wherever there exists a gift, grant, or bequest for charitable purposes.—In re *Collins' Estate*, 3 N.Y.S.2d 291.

61. Ill.—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479.

Mass.—*Bowditch v. Attorney General*, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

Mo.—*Robinson v. Crutcher*, 209 S.W. 104, 277 Mo. 1.

N.Y.—In re *Carpenter's Estate*, 297 N.Y.S. 649, 163 Misc. 474.

Pa.—In re *Stephan's Estate*, 195 A. 653.

11 C.J. p 360 note 60.

Corpus Juris is cited with approval in general discussion of the cy pres doctrine in *Fisher v. Minshall*, 78 P.2d 363, 364, 102 Colo. 154.

Property given absolutely

Cy pres doctrine under statute gives court no jurisdiction to control property devised or bequeathed absolutely.—In re *Rappolt's Will*, 250 N.Y.S. 377, 140 Misc. 239.

No beneficiary or purpose

Cy pres doctrine has not been adopted to extent of supplying beneficiary or purpose, where objects are not expressed in well.—*Russell v. Tyler*, 6 S.W.2d 707, 224 Ky. 511.

Avoidance of rule against perpetuities

The cy pres doctrine cannot be invoked to transform a noncharitable into a charitable trust, nor to take trust out of operation of rule against perpetuities.—In re *Stephan's Estate*, Pa., 195 A. 653.

62. N.Y.—In re *Lyon*, 159 N.Y.S. 951, 173 App.Div. 473.

63. U.S.—*Schell v. Leander Clark College*, D.C.Iowa, 10 F.2d 542—*Laswell v. Hungate*, Ill., 256 F. 635, 168 C.C.A. 29, certiorari denied *Bishop v. Same*, 39 S.Ct. 386, 249 U.S. 612, 68 L.Ed. 801.

Ark.—*State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42*, 89 S.W.2d 605, 191 Ark. 1096.

Cal.—*O'Hara v. Grand Lodge, I. O. G. T. of State of California*, 2 P.2d 21, 213 Cal. 131—In re *Scrimger's Estate*, 206 P. 65, 138 Cal. 158.

Conn.—*Citizens & Manufacturers Nat. Bank v. Guilbert*, 186 A. 564, 121 Conn. 520—*Shannon v. Eno*, 179 A. 479, 120 Conn. 77.

Fla.—*Sheldon v. Powell*, 128 So. 253, 99 Fla. 782.

Ill.—*Webb v. Webb*, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404—*Bruce v. Maxwell*, 143 N.E. 82, 311 Ill. 479—*Kerner v. Thompson*, 13 N.E.2d 110, 293 Ill.App. 454.

Ind.—*Reasoner v. Herman*, 134 N.E. 276, 191 Ind. 642—*Richards v. Wilson*, 112 N.E. 780, 185 Ind. 335.

Iowa.—In re *Nugen's Estate*, 272 N.W. 638—*Mary Franklin Home for Aged Women v. Edson*, 187 N.W. 546, 193 Iowa 567—*Lupton v. Leander Clark College*, 187 N.W. 496, 194 Iowa 1008—*Hodge v. Welman*, 179 N.W. 534, 191 Iowa 877.

Me.—*Stevens v. Smith*, 183 A. 344, 134 Me. 175—*Snow v. President and Trustees of Bowdoin College*, 175 A. 268, 133 Me. 195.

Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

Minn.—In re *Peterson's Estate*, 277 N.W. 529.

Mo.—*Mott v. Morris*, 155 S.W. 434, 249 Mo. 137.

N.H.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

N.J.—*Crane v. Morristown School Foundation*, 187 A. 632, 120 N.J. Eq. 533—*Patton v. Pierce*, 169 A. 284, 114 N.J.Eq. 548—In re *Young Women's Christian Ass'n of New York City*, 126 A. 610, 96 N.J.Eq. 568—*Imbrie v. Steen*, 124 A. 155, 96 N.J.Eq. 190—*Christian v. Catholic Church of St. John the Bap-*

tion of a particular charitable purpose or the individuals of a class described generally is committed by the donor to a trustee or other person, but the selection is not made, the court will administer the fund cy pres by making a selection;⁶⁴ and the right of a donee to receive payment of the fund

given for charity is not postponed until after a scheme is prepared for its application.⁶⁵ Conversely, it is only when it becomes impracticable to administer a charitable trust according to its terms that a court of chancery will apply the doctrine of cy pres,⁶⁶ and the doctrine is not applicable to

tist of Paterson, 110 A. 579, 91 N. J.Eq. 374.
 N.Y.—City Bank Farmers Trust Co. v. Arnold, 197 N.E. 288, 268 N.Y. 297, affirming 271 N.Y.S. 1008, 241 App.Div. 869—Sherman v. Richmond Hose Co., No. 2, 130 N.E. 613, 230 N.Y. 462, affirming 175 N.Y.S. 8, 186 App.Div. 417—In re MacDowell's Will, 112 N.E. 177, 217 N.Y. 454, L.R.A.1916E 1246, Ann.Cas.1917E 853, reversing 156 N.Y.S. 387, 170 App.Div. 245, which affirmed 153 N.Y.S. 653, 89 Misc. 323—Prudential Ins. Co. of America v. New York Guild for Jewish Blind, 299 N.Y.S. 917, 252 App.Div. 493—In re Gary's Estate, 288 N.Y.S. 382, 248 App.Div. 373, affirmed In re Gary's Will, 5 N.E.2d 368, 272 N.Y. 635, reargument denied 6 N.E. 2d 423, 273 N.Y. 499, affirming In re Gray's Estate, 292 N.Y.S. 785, 161 Misc. 351—In re Swan's Will, 261 N.Y.S. 428, 237 App.Div. 454, motion granted 264 N.Y.S. 898, 239 App.Div. 762 and affirmed In re St. John's Church of Mt. Morris, 189 N.E. 734, 263 N.Y. 638—In re Bay-side Red Cross League, 239 N.Y.S. 219, 228 App.Div. 719—In re Crespi's Will, 285 N.Y.S. 780, 158 Misc. 383—In re Mills' Will, 282 N.Y.S. 25, 156 Misc. 473—In re Walter's Estate, 269 N.Y.S. 402, 150 Misc. 512—In re Walter's Estate, 269 N.Y.S. 400, 150 Misc. 512—Graff v. Raymer, 240 N.Y.S. 658, 136 Misc. 297—In re Mills' Will, 200 N.Y.S. 701, 121 Misc. 147—In re Donchian's Estate, 199 N.Y.S. 107, 120 Misc. 535, affirmed 204 N.Y.S. 903, 209 App.Div. 806.
 Ohio.—Gearhart v. Richardson, 142 N.E. 890, 109 Ohio 418—Procter v. Mathers, 17 Ohio App. 118.
 Pa.—In re Hoff's Estate, 172 A. 645, 315 Pa. 286—In re Curran's Estate, 165 A. 842, 310 Pa. 434—In re Mears' Estate, 149 A. 157, 299 Pa. 217—In re Neely's Estate, 135 A. 540, 288 Pa. 130, affirming 88 Pa. Super. 372—In re Thompson's Estate, 127 A. 446, 282 Pa. 30—In re Swalley's Estate, 23 Pa.Dist. & Co. 623—In re White's Estate, 20 Pa. Dist. & Co. 585—In re Trexler Orphans' Home, 19 Pa.Dist. & Co. 231—In re Dreer's Estate, 13 Pa.Dist. & Co. 257—In re Becker's Estate, 28 Pa.Dist. 695—In re Scott's Estate, 28 Pa.Dist. 292—Smith's Est., 18 Pa.Dist. 1024.
 R.I.—City of Newport v. Sisson, 155 A. 576, 51 R.I. 481—City of Providence v. Payne, 134 A. 276, 47 R.I.

444—Hicks v. City of Providence, 113 A. 791, 43 R.I. 484.
 Wis.—First Wisconsin Trust Co. v. Board of Trustees of Racine College, 272 N.W. 464.
 11 C.J. p 360 note 64.

Corpus Juris is referred to for a review of the many cases discussing the application and limitations of the cy pres doctrine in *Thatcher v. Lewis*, 76 S.W.2d 677, 683, 335 Mo. 1130.

Dominant intention

Where testator left residuary estate in trust to expend income in establishing home for aged worthy poor in memory of testator's deceased wife, dominant intent was charitable rather than to establish memorial for wife, as regards application of doctrine of approximation.—*Citizens & Manufacturers Nat. Bank v. Guilbert*, 186 A. 564, 121 Conn. 520.

Trusts created by will

The cy pres doctrine is not confined to trusts created by will.—*Peter E. Leddy Post No. 19 of American Legion v. Roberts*, N.J.Ch., 129 A. 148.

Refusal of donee or trustee to accept gift

(1) On rejection of the donation by the donee doctrine of cy pres applied, and the fund should be distributed proportionately among other preferred donees named in the deed creating the trust.—*City Bank Farmers Trust Co. v. Arnold*, 197 N.E. 288, 268 N.Y. 297, affirming 271 N.Y. S. 1009, 241 App.Div. 869.

(2) Other illustrations see 11 C.J. p 360 note 64 [a].

Disposition of property of charitable corporation on dissolution see *infra* § 76.

64. Ill.—*Mills v. Newberry*, 112 Ill. 123, 54 Am.R. 213.
 Mass.—*Minot v. Baker*, 17 N.E. 839, 147 Mass. 348.
 11 C.J. p 363 note 83.

65. Mass.—*Atty.-Gen. v. Old South Soc.*, 13 Allen 474.

66. U.S.—*President and Fellows of Harvard College v. Jewett*, C.C.A. Ohio, 11 F.2d 119.

Ark.—*Hicks Memorial Christian Ass'n v. Locke*, 12 S.W.2d 866, 178 Ark. 392.

Conn.—*Newton v. Healy*, 122 A. 654, 100 Conn. 5.

Fla.—*Sheldon v. Powell*, 128 So. 258, 99 Fla. 782.

Ga.—*Reynolds v. Stanton*, 162 S.E. 783, 174 Ga. 340.

Me.—*Dupont v. Pelletier*, 113 A. 11, 120 Me. 114.

Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256—*Reed v. Fogg*, 143 N.E. 47, 248 Mass. 336—*Elliot v. Attwill*, 122 N.E. 648, 232 Mass. 517—*Crawford v. Nies*, 113 N.E. 408, 224 Mass. 474.

Mo.—*City of St. Louis v. McAllister*, 218 S.W. 312, 281 Mo. 26.

N.H.—*Drury v. Sleeper*, 146 A. 645, 84 N.H. 98.

N.J.—*Crane v. Morristown School Foundation*, 187 A. 632, 120 N.J.Eq. 583.

N.Y.—In re *Donchian's Estate*, 199 N.Y.S. 107, 120 Misc. 535, affirmed 204 N.Y.S. 903, 209 App.Div. 806.

Pa.—In re *Derr's Estate*, 16 Pa. Dist. & Co. 408—In re *Mear's Estate*, 12 Pa.Dist. & Co. 273, affirmed 49 A. 157, 299 Pa. 217.
 11 C.J. p 361 note 65.

Doctrine not applicable

The cy pres doctrine is inapplicable, where supreme court construes clause in will, giving charitable corporations, dissolved before testatrix' death, stated sums for investment and application of income to their purposes and uses, as entitling other charitable corporations, selected by former corporations as their successors before dissolution, to such legacies.—*Wood v. Hartigan*, R.I., 195 A. 507.

Intent not impossible of execution

Trustees of a trust fund, the income of which was to be used to provide facilities for higher education in particular part of a town, were held not authorized to turn part of fund over to the town, which would otherwise be unable to provide higher education, where it was not impossible that the specific intent of the testator might later be carried out, and, in the meantime, the discretionary powers given the trustees, were sufficient to enable them to carry out the general charitable purposes of testator as by paying expenses of attendance of high school in another town.—*Newton v. Healy*, 122 A. 654, 100 Conn. 5.

New site for building

Court could not select new location for building testator provided for, cy pres, where site designated was still as suitable as at time will was written.—*Hicks Memorial Chris-*

a case where the facts simply call for the reception of extrinsic evidence to identify the donee or beneficiary.⁶⁷ The difficulty, however, need be only a reasonable one, and not such as to make the donor's plan a physical impossibility.⁶⁸ Of course, the doctrine of cy pres can have no existence when the donor himself provides for the application of the fund in the event of the failure of the charitable use to which he in the first instance directed that it should be devoted.⁶⁹ The fact that the residue is given to a charity does not defeat the application of the doctrine of cy pres to another charitable bequest which it becomes impracticable to administer precisely according to the terms of the will.⁷⁰

General charitable purpose. It is also a prerequisite to the application of the doctrine that the court can see in the instrument of trust a general charitable purpose⁷¹ of such a kind that the court can satisfy itself that some other object can be found, answering in a reasonable degree and most

nearly consonant to such purpose,⁷² since where it appears that the gift was for a particular purpose only, and there was no general charitable intention, the court cannot be construction apply the gift cy pres.⁷³ To determine the donor's general intention, the court may look at all of the charitable bequests in the will,⁷⁴ and in applying the cy pres doctrine, equity is always more ready, in the case of a gift to a charitable institution which is not found or functioning, to infer a general charitable intention than to infer the contrary.⁷⁵

Failure of trust at outset or after creation. The courts are more ready to apply the doctrine of cy pres where the particular trust fails at a time after its creation than where the particular purpose fails at the outset.⁷⁶ Thus, where the particular object of the charitable bequest is in existence at the testator's death, but ceases to exist at a subsequent time, the legacy does not lapse, and the fund, having once vested in charity, may be ap-

tian Ass'n v. Locke, 12 S.W.2d 866, 178 Ark. 892.

67. Mich.—Cook v. Universalist General Convention, 101 N.W. 217, 138 Mich. 157.

68. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.
11 C.J. p 361 note 67.

69. Conn.—Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church, 164 A. 910, 116 Conn. 347.

Mass.—Bowditch v. Attorney General, 134 N.E. 796, 241 Mass. 168, 28 A.L.R. 713.

N.J.—In re Young Women's Christian Ass'n of New York City, 126 A. 610, 98 N.J.Eq. 568—Imbrie v. Steen, 124 A. 155, 96 N.J.Eq. 190.

Pa.—In re Jordan's Estate, 165 A. 652, 310 Pa. 401.

R.I.—Rhode Island Hospital Trust Co. v. American Nat. Red Cross, 149 A. 581, 50 R.I. 461.

11 C.J. p 363 note 79.

70. Mass.—Atty.-Gen. v. Briggs, 42 N.E. 118, 164 Mass. 561.

11 C.J. p 363 note 89.

71. Iowa.—Hodge v. Wellman, 179 N.W. 534, 191 Iowa 377—Curtis & Barker v. Central University of Iowa, 176 N.W. 330, 188 Iowa 300.

Me.—Bancroft v. Maine Sanatorium Ass'n, 109 A. 535, 119 Me. 56—Gillman v. Burnett, 102 A. 108, 116 Me. 382, L.R.A.1918A 794.

Mo.—City of St. Louis v. McAllister, 257 S.W. 425, 302 Mo. 152.

N.J.—Raque v. City of Speyer, Germany, 129 A. 207, 97 N.J.Eq. 447.

N.Y.—In re O'Hanlon's Estate, 264 N.Y.S. 251, 147 Misc. 546.

Ohio.—Allen v. City of Bellefontaine, 191 N.E. 896, 47 Ohio App. 359.

R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361—Smith v. Ahern, 161 A. 117, 52 R.I. 346—Rhode Island Hospital Trust Co. v. Williams, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

Tex.—Women's Christian Temperance Union of El Paso v. Cooley, Civ.App., 25 S.W.2d 171, error refused.

11 C.J. p 361 note 71.

Technical charitable trust

Cy pres doctrine is applicable only to technical charitable trusts.—Raque v. City of Speyer, Germany, 129 A. 207, 97 N.J.Eq. 447.

Extrinsic evidence

Will must first be examined, and if not entirely clear, extrinsic evidence is admissible to ascertain whether testator's intention is of general charitable nature within cy pres doctrine.—Rhode Island Hospital Trust Co. v. Williams, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

General charitable intent shown

(1) General charitable intent making applicable the cy pres rule, were there no existing school to which the devise were applicable, was held shown by devise for support of "a school" in a city, "the tuition of which shall be free," "such free school as said [city] council shall see fit," with declaration, "I have made the gift for the benefit of the young . . . and do not wish them to lose the benefit of the gift by the neglect of others."—Laswell v. Hungate, Ill., 256 F. 635, 168 C.C. A. 29, certiorari denied Bishop v. Hungate, 39 S.Ct. 386, 249 U.S. 612, 63 L.Ed. 801.

(2) Where testatrix devoted resi-

due to specific public charities, including dormant cottage hospital whose charter was forfeited, general charitable intent was manifested permitting application of cy pres doctrine.—Rhode Island Hospital Trust Co. v. Williams, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

72. N.Y.—In re Rappolt's Will, 250 N.Y.S. 377, 140 Misc. 239.
11 C.J. p 361 note 72.

Devise to "charity"

The court will not substitute its own jurisdiction for the personality of the testator by executing a devise to "charity," since in such a case the doctrine of cy pres can have no application, because it covers the entire field of charitable activity, and to be as near as possible to the thing expressed must still be outside it.—Buckley v. Monck, Mo., 187 S.W. 31.

73. Me.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195.

N.J.—Raque v. City of Speyer, Germany, 129 A. 207, 97 N.J.Eq. 447.

N.Y.—In re Rappolt's Will, 250 N.Y.S. 377, 140 Misc. 239—Camp v. Presbyterian Soc. of Sackets Harbor, 173 N.Y.S. 581, 105 Misc. 139.
Ohio.—Allen v. City of Bellefontaine, 191 N.E. 896, 47 Ohio App. 359.
11 C.J. p 362 note 73.

74. Me.—Lynch v. Augusta South Cong. Parish, 82 A. 432, 109 Me. 32.

75. Ark.—State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605, 191 Ark. 1086.

R.I.—Rhode Island Hospital Trust Co. v. Williams, 148 A. 189, 50 R.I. 385, 74 A.L.R. 664.

76. R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361.

plied cy pres by the court;⁷⁷ but where the testator makes a bequest to some particular object of charity, as to a particular charitable institution, and the bequest fails because the object designated ceases to exist during the testator's lifetime, it has been held in some jurisdictions that the fund never vests in charity at all, but the legacy lapses, and the doctrine of cy pres has no application.⁷⁸ However, it has also been said that the doctrine of cy pres may be applied even though the particular purpose of the settlor fails at the outset,⁷⁹ and where the donee is not in existence at the time the gift takes effect, or has not the capacity to take, the charity will, nevertheless, be enforced according to the

main charitable intention of the donor.⁸⁰ Thus, a legacy to a particular association which was not in existence at the time of the testator's death has been held not to lapse, but merely to require the appointment of a trustee.⁸¹

Similarly, the doctrine has been held applicable where a defect in the method of administration is present at the time of the creation of the trust.⁸²

Manner in which applied. No general rule can be enunciated as to the manner in which the cy pres doctrine will be applied, but each case must necessarily depend on its own peculiar circumstances.⁸³ One limitation of the rule is that the

77. Mo.—Thatcher v. Lewis, 76 S.W. 2d 677, 335 Mo. 1130.

N.Y.—In re Mills' Will, 200 N.Y.S. 701, 121 Misc. 147.

R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361.

11 C.J. p 363 note 81.

Retirement fund

That act authorizing establishment of retirement system to supersede teachers' retirement fund gave each teacher definite and enforceable rights, so that plan was not one for charitable purposes, did not prevent administration of bequest to fund payable on termination of trust, which bequest vested before fund was superseded and became payable thereafter, under doctrine of cy pres, since gift in aid of better carrying out of plan would be one for "charity."—Powers v. Home for Aged Women, *supra*.

Expending entire fund

A bequest to teachers' retirement fund, payable on termination of trust which vested before fund was superseded by retirement system and became payable thereafter, could be administered under doctrine of cy pres without permanent retention of principal sum payable.—Powers v. Home for Aged Women, *supra*.

Hospital taken over by city

Where hospital to which testatrix had made gift of funds for building of annex was in existence at time gift took effect and still existed as legal entity, that hospital had been taken over by city was held not to have caused legacy to lapse, since original hospital was capable of accepting gift and administering trust.—In re Harrington's Will, 276 N.Y. S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App.Div. 252.

78. Tex.—Women's Christian Temperance Union of El Paso, v. Cool-ey, Civ.App., 25 S.W.2d 171, error refused.

11 C.J. p 363 note 80.

Where legacy has legally lapsed, the doctrine of cy pres cannot be invoked to save the gift.—In re Har-

ington's Will, 276 N.Y.S. 868, 243 App.Div. 235, adhered to 281 N.Y.S. 93, 245 App.Div. 252.

79. R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361.

80. Ark.—State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605, 191 Ark. 1096.

81. Wis.—In re Briggs' Estate, 208 N.W. 247, 189 Wis. 524.

Duty of court

Court sitting as court of equity must exercise its judgment in determining agencies which in its opinion will best serve purpose of accomplishing testator's manifested intention to carry out charitable trust. Distribution of charitable trust by trustee appointed by court will be left to trustee's discretion, who may be guided by court having jurisdiction of administration of trust.—In re Briggs' Estate, 208 N.W. 247, 189 Wis. 524.

Particular distribution authorized

Distribution of trust fund for Young Women's Christian Association will not be confined to existing organizations, but may be used to create new units, in coöperation with national board.—In re Briggs' Estate, *supra*.

82. Conn.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

83. Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 682, 335 Mo. 1130, quoting *Corpus Juris*.

N.Y.—In re MacDowell's Will, 112 N.E. 177, 217 N.Y. 454, L.R.A.1916E 1246, Ann.Cas.1917E 853, reversing 156 N.Y.S. 387, 170 App.Div. 245, which affirmed 153 N.Y.S. 653, 89 Misc. 323.

Nature of other beneficiaries

The court should be guided to a large extent in the choice of a charity or charities by the general nature of other beneficiaries selected by the testator in his will.—In re Walter's Estate, 269 N.Y.S. 402, 150 Misc. 512.

Retention of funds in state

Where testator was a resident of

the state, a fund bequeathed for religious, charitable, and educational purposes should properly be retained within the state, subject to the jurisdiction of the supreme court, in view of the fact that the conditions of such gift might ultimately become impossible of performance, making the doctrine of cy pres applicable under Pers.Prop.L. § 12, and Real Prop.L. § 113, reenacting the Tilden Act of 1893.—In re Donchian's Estate, 199 N.Y.S. 107, 120 Misc. 535, affirmed 204 N.Y.S. 903, 209 App.Div. 806.

Particular applications of doctrine

(1) Where Methodist school, which was beneficiary of charitable trust, failed to function and it appeared that donor intended to establish perpetual trust for aid of school under care of designated Methodist Conference, assets of trust would be transferred to school established by such conference to carry on work of original beneficiary.—State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605, 191 Ark. 1096.

(2) Where trust fund for benefit of enlisted men during war had been established, on close of war, investment of fund, and the use of interest for present and future needs of objects of original trust was held more proper than erection of memorial building for recreation and other purposes in interest of veterans.—Peter E. Leddy Post No. 19 of American Legion v. Roberts, N.J.Ch., 129 A. 148.

(3) Where testator created trust for maintenance of indigent females and directed use of homestead, but conditions had changed so that homestead was not suitable, court properly permitted trustee to administer trust by caring for indigent females in private or institutional homes.—In re Swan's Will, 261 N.Y. S. 428, 237 App.Div. 454, motion granted 264 N.Y.S. 898, 239 App.Div. 762, and affirmed In re St. John's Church of Mt. Morris, 189 N.E. 734, 263 N.Y. 638.

(4) Under life policy designating as one of the beneficiaries "Cancer

purpose of the gift cannot be changed.⁸⁴ For example, if property is devised to education, it cannot be judicially diverted to religion, or the relief of the poor or the sick, or to general charity, or vice versa.⁸⁵ However, this limitation does not prevent the substitution by the court of another object of the same general charitable nature where the original object fails;⁸⁶ but where it is impossible to carry out the expressed general charitable purposes of the testator by the use of any means or method, the gift will lapse.⁸⁷ Also, the doctrine

cannot be invoked in disregard of the express terms of the grant or devise,⁸⁸ and the court should not, under the guise of cy pres, sanction an act by the trustees which the donors have expressly prohibited.⁸⁹

Alteration of scheme once settled. After a scheme is once settled by a decree in chancery, the court has power to alter it from time to time as circumstances may require, since the control of administrative functions is entirely distinct from

Clinic of New York," where only cancer clinic in New York City was one owned and maintained by the city of New York under the name of "New York Cancer Clinic," such clinic would be considered beneficiary, notwithstanding that it was unincorporated, where gift could be made effective by awarding it to the city of New York in trust for the beneficiary.—Prudential Ins. Co. of America v. New York Guild for Jewish Blind, 299 N.Y.S. 917, 252 App.Div. 493.

(5) American National Red Cross was entitled to funds collected by local Red Cross league, on failure of purpose for which collected.—In re Bayside Red Cross League, 239 N.Y.S. 219, 228 App.Div. 719.

(6) Testamentary trust for salary of pastor of Lyons Baptist Church "so long as said society exists" should, when church ceased to function, be turned over to state Baptist Missionary Convention to pay clergymen's salaries.—Graft v. Dunning, 244 N.Y.S. 310, 137 Misc. 715—Graft v. Harrington, 244 N.Y.S. 307, 137 Misc. 712.

(7) Where trust was created for erection and repair of buildings of college for education of orphan children of deceased Episcopal ministers of the state of Wisconsin and college ceased to exist, trust fund would be awarded to foundation for church work which took over all land and buildings of college, and maintained and used the property for educational and religious activities and cared for and educated orphan children, rather than to orphan asylum for which testatrix also provided in her will, or for college for education of Episcopal ministers.—First Wisconsin Trust Co. v. Board of Trustees of Racine College, Wis., 272 N.W. 464.

(8) College trustees, to whom will devised property in trust to use two-thirds of income for purposes of college medical school and add remaining third to trust fund until it reached stated sum, after which entire income should be used for such purposes, were entitled to payment of balance in testamentary trustees' hands and required to add entire in-

come to principal until total reached designated sum after such school ceased to exist or function.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195.

(9) Where testator left funds in trust for erection of monument to Roger Williams in specified place, request by Society of Colonial Dames to be allowed, to use funds for erection of statue of Roger Williams of such design and materials and in such location on state house grounds as might be approved by state house commission was refused as not proper application under cy pres doctrine, such commission being subject to frequent changes, not a party to proceeding, and not subject to court's direction.—Faunce v. People's Sav. Bank, 124 A. 731, 46 R.I. 75.

(10) A fund donated for the relief of flood sufferers of the Mississippi Valley could not be applied after the immediate necessity for relief had passed to organize a corporation for the purpose of devising means for the prevention of floods and to promote the development and extension of waterways of the Mississippi Valley.—Kerner v. Thompson, 13 N.E. 2d 110, 293 Ill.App. 454.

(11) The cy pres doctrine need not be applied in determining whether city or testator's heir is entitled to trust fund, created by will for establishment and support of city library, farther than to construe testamentary provisions liberally in support of trust and extend provision for purchase of books to other library purposes if conditions have become such as to render use of part of fund therefor more needful and beneficial to library than expenditure of whole sum for books alone.—In re Mead's Estate, Wis., 277 N.W. 694, rehearing denied 279 N.W. 18.

(12) Where provision of will making bequest to hospital to be used for construction of a new building or to be used to dedicate an existing building could not be literally complied with because of insufficiency of bequest to construct a new building and because the existing building named in will was dedicated, court would permit hospital to construct a new structure on the roof of one of

its existing buildings, devoted to medical research and laboratory use, and to place on it an appropriate tablet of the origin of the gift.—In re Meyer's Estate, 3 N.Y.S.2d 117, 166 Misc. 712.

84. Ill.—Kerner v. Thompson, 13 N.E.2d 110, 293 Ill.App. 454.

Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 335 Mo. 1130.

This judicial power will not be exercised to the full extent of the prerogative power, that is, to devote the fund to a different purpose than the donor intended.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

Discretion of court

(1) Equity has wide discretion in determining disposition of charitable trust fund after fulfillment of donor's specific objects, but must carry out donor's intention.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195.

(2) The court has no discretion in applying the trust to what may seem the highest possible use, but must apply it to a purpose as nearly like the original scheme as may be devised.—Peter E. Leddy Post No. 19 of American Legion v. Roberts, N.J. Ch., 129 A. 148.

85. Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 335 Mo. 1130.

11 C.J. p 362 note 74.

86. Mo.—Thatcher v. Lewis, supra.

87. N.J.—McCran v. Kay, 115 A. 649, 93 N.J.Eq. 352.

Beautifying discontinued church property

Trust to repair and beautify building and grounds of discontinued church was held to fail and cannot be applied to other purposes under cy pres doctrine.—Saltsman v. Greene, 243 N.Y.S. 576, 136 Misc. 497, affirmed 246 N.Y.S. 913, 231 App.Div. 781, affirmed 177 N.E. 172, 256 N.Y. 636, motion denied 177 N.E. 196, 256 N.Y. 691.

88. U.S.—President and Fellows of Harvard College v. Jewett, C.C.A. Ohio, 11 F.2d 119.

89. N.J.—Imbrie v. Steen, 124 A. 155, 96 N.J.Eq. 190.

conditions either precedent or subsequent imposed by the founder of the charity.⁹⁰

Cy pres application by trustees without judicial sanction. In the absence of any scheme judicially approved, the trustees of a charity may not make a cy pres application of the estate on their own authority, even though it is desirable,⁹¹ as the responsibility of applying the trust cy pres rests entirely on the court.⁹²

Surplus and deficiency. When the whole of a fund is given to a charitable foundation, a surplus subsequently arising, but not specifically disposed of, will be applied to the same or like charitable objects.⁹³ Where there was a fund donated for the

relief of sufferers in a certain disaster, the surplus remaining after the payment of all claims has been held to revert to the donors if ascertainable, otherwise to the state;⁹⁴ but in another case it was held that the fund was properly turned over to an association for relieving those who might suffer in the future by reason of a similar disaster or for purposes closely related to the original purpose.⁹⁵

The insufficiency of the fund provided is no good reason for defeating a charitable gift or trust if the intention of the donor can to some extent be carried into effect,⁹⁶ as, under the doctrine of cy pres, the courts may authorize its employment to effect the general charitable purpose of the donor,⁹⁷ and this method will be followed rather than the

90. Mo.—Lackland v. Walker, 52 S. W. 414, 151 Mo. 210.

Pa.—In re Cincinnati Soc., 26 A. 647, 154 Pa. 621, 20 L.R.A. 323.

91. U.S.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

N.J.—Imbrie v. Steen, 124 A. 155, 96 N.J.Eq. 190.

Or.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 613, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

11 C.J. p 363 note 92.

92. N.J.—Peter E. Leddy Post No. 19 of American Legion v. Roberts, 129 A. 148.

93. Ill.—Webb v. Webb, 172 N.E. 730, 340 Ill. 407, 71 A.L.R. 404.

Ky.—Trustees Stewart Common School Fund v. Lewis, 28 S.W.2d 27, 234 Ky. 286.

Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 682, 335 Mo. 1130, quoting *Corpus Juris*.

N.J.—Peter E. Leddy Post No. 19 of American Legion v. Roberts, 129 A. 148.

N.Y.—Camp v. Presbyterian Soc. of Sackets Harbor, 173 N.Y.S. 581, 105 Misc. 139.

Ohio.—American Legion v. Colville, 25 Ohio N.P., N.S., 375.

Pa.—In re Scott's Estate, 28 Pa. Dist. 292.

11 C.J. p 363 note 94.

Relief of travelers and immigrants

Under will establishing trust for relief of "all poor immigrants and travelers coming to St. Louis on their way, bona fide, to settle in the West," income from trust fund, in so far as not required for specific objects intended, was held properly applicable to relief and assistance of other poor immigrants and travelers in need and worthy of aid, and for cooperation with travelers' aid so-

cieties for that purpose.—Thatcher v. Lewis, 76 S.W.2d 677, 335 Mo. 1130.

94. N.Y.—Boenhardt v. Loch, 107 N. Y.S. 736, 56 Misc. 406.

95. Ill.—Kerner v. Thompson, 13 N. E.2d 110, 293 Ill.App. 454.

96. Ark.—Burel v. Grand Lodge, I. O. O. F., 259 S.W. 369, 163 Ark. 131.—McCarroll v. Grand Lodge, I. O. O. F., 243 S.W. 870, 154 Ark. 376.

Iowa.—Mary Franklin Home for Aged Women v. Edson, 187 N.W. 546, 193 Iowa 567.

N.J.—Patton v. Pierce, 169 A. 284, 114 N.J.Eq. 548.

N.Y.—In re Nelson's Estate, 258 N. Y.S. 667, 143 Misc. 843.

Tex.—Jones' Unknown Heirs v. Dorchester, Civ.App., 224 S.W. 596, dismissed for want of jurisdiction. 11 C.J. p 364 note 98.

97. Ark.—Burel v. Grand Lodge, I. O. O. F., 259 S.W. 369, 163 Ark. 131.—McCarroll v. Grand Lodge, I. O. O. F., 243 S.W. 870, 154 Ark. 376.

Iowa.—Mary Franklin Home for Aged Women v. Edson, 187 N.W. 546, 193 Iowa 567.

N.J.—Patton v. Pierce, 169 A. 284, 114 N.J.Eq. 548.

N.Y.—In re MacDowell's Will, 112 N.E. 177, 217 N.Y. 454, L.R.A.1916E 1246, Ann.Cas.1917E 853, reversing 156 N.Y.S. 387, 170 App.Div. 245, which affirmed 153 N.Y.S. 653, 89 Misc. 323.—In re Fletcher's Estate, 2 N.Y.S.2d 771, 166 Misc. 486.—In re Nelson's Estate, 258 N.Y.S. 667, 143 Misc. 843.

Tex.—Jones' Unknown Heirs v. Dorchester, Civ.App., 224 S.W. 596, dismissed for want of jurisdiction. 11 C.J. p 364 note 99.

Particular applications of doctrine

(1) Where testator left residuary estate in trust to expend income in establishing home for aged worthy poor in memory of deceased wife, but residuary estate was insufficient

to accomplish purpose by prescribed method, doctrine of approximation was applicable, and income could be applied for shelter, support, and care of aged worthy poor.—Citizens & Manufacturers Nat. Bank v. Guilbert, 186 A. 564, 121 Conn. 520.

(2) Where will gave two thousand dollars for "founding and supporting a cattery . . . for the care of homeless animals and boarders," it was proper in view of insufficiency of fund to carry out testatrix' dominant purpose, to direct payment of income thereof to State Humane Society, subject, however, to restriction that money be used for care of animals.—Shannon v. Eno, 179 A. 479, 120 Conn. 77.

(3) Court, in administering charitable trust whereby remainder interest in realty was devised for "old ladies' home for worthy poor Protestant women over sixty years of age" residing in designated towns, properly applied doctrine of approximation, where bequest was insufficient to carry out testatrix' literal direction, but hospital to which income was given should be limited to use thereof for purposes designated by testatrix, and the judgment directing the transfer of property should direct that it be held by hospital in trust and not as part of its corporate funds.—Shannon v. Eno, supra.

(4) Chamberlain of city of New York holding fund subscribed by citizens in 1918 to build arch in memory of war dead, which fund was insufficient for such purpose, was held authorized to use money for war memorial playgrounds.—Berle v. Dawkins, 271 N.Y.S. 579, 150 Misc. 911.

(5) Under will devoting nearly all of estate worth more than two million dollars to charitable purposes and evidencing a general charitable purpose to benefit residents of particular town, direction that one hundred thousand dollars be set aside to establish and maintain a hospital in

method of directing the trustees to hold the fund for accumulation in the hope that at some time, in the more or less distant future, they shall be able literally to carry out the purpose of the donor.⁹⁸ A resolution of the trustees or donees directing the investment of the fund given for a charitable purpose is not of itself sufficient to show the inadequacy of the fund for the carrying out of the purpose.⁹⁹

§ 53. Control, Supervision, and Visitation by Persons or Bodies Other than Court and Trustee

The control, supervision, and visitation by persons or bodies other than the court and the trustee is treated *infra* §§ 54–57. For later cases see *Pocket Parts*.

§ 54. — Visitation or Supervisory Powers in General

The visitatorial power to control charitable trusts and correct abuses is originally in the donor or founder, but may be imparted to others; and to all eleemosynary corporations a visitatorial power attaches as a necessary incident.

To all eleemosynary corporations a visitatorial power attaches as a necessary incident;¹ and in this connection it must be borne in mind that the words "charitable" and "eleemosynary" are practically synonymous, the latter designating techni-

cally a class of corporations organized for charitable purposes.² These corporations are composed of individuals, and they are subject to infirmities, and are liable not to carry out the purposes of the original giver of the funds. The law, therefore, from very early times has provided that there shall somewhere exist a power to visit and to inquire into, and correct all the irregularities and abuses, and to see that the charity is being applied according to the intention of the donor,³ and the common law in this regard is in force in most jurisdictions except so far as the same has been altered by constitution or statute.⁴

Where power rests. If the state is the only donor, then the power to appoint visitors and the visitatorial power vests in the state.⁵ However, if the charity is one resting solely on a private foundation, then the visitatorial power rests originally in the donor and at his death in his heirs,⁶ and he may impart that power to any person or persons he may see fit,⁷ and no formality or precise language is required in imparting such power, although the giving of the power of "supervision" is not equivalent to the giving of the power of "visitation." Furthermore, where the founder has thus appointed a general visitor, and for some cause the latter's function shall have been suspended, the power of visitation does not, ipso facto, return to the founder or his heirs, but is exercised through the courts of the land properly invoked.⁸

town was not a condition precedent to operation of general charitable intent and did not prevent application of cy pres doctrine on showing that fund was insufficient to build and maintain a modern fair-sized hospital.—*In re Fletcher's Estate*, 2 N.Y.S.2d 771, 166 Misc. 486.

98. Mass.—*Norris v. Loomis*, 102 N.E. 419, 215 Mass. 344—*Grimke v. Atty.-Gen.*, 91 N.E. 899, 206 Mass. 49—*Ely v. Attorney General*, 89 N.E. 166, 202 Mass. 545.

99. Cal.—*In re Royer*, 56 P. 461, 123 Cal. 614, 44 L.R.A. 364.

1. Conn.—*Dwyer v. Leonard*, 124 A.28, 100 Conn. 513.

Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 411, 174 Wash. 19, quoting *Corpus Juris*.

11 C.J. p 364 note 4.

2. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, supra, quoting *Corpus Juris*. 11 C.J. p 364 note 5.

3. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

N.Y.—*Newton v. Lewis*, 193 N.Y.S.

438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 364 note 6.

4. N.Y.—*Congregation Emanuel of City of New York v. City of New York*, 270 N.Y.S. 6, 150 Misc. 657, affirmed 277 N.Y.S. 955, 243 App.Div. 692—*Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

11 C.J. p 364 note 3.

State boards or commissions see *infra* § 55.

5. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 364 note 7.

6. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

N.Y.—*Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which

is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 364 note 8.

Devisees or legatees without interest in fund

Residuary devisees or legatees having no interest in fund given by testator for public charity have no right of visitation to charitable institution supported thereby.—*Wemme v. Noyes*, 295 P. 465, 134 Or. 590 —*Wemme v. Noyes*, 294 P. 602, 134 Or. 590.

7. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

N.Y.—*Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

11 C.J. p 365 note 9.

8. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 365 notes 9–11.

If the objects of the charity are not incorporated, but certain trustees are incorporated to manage the charity, the visitatorial power is deemed to belong to such trustees in their corporate capacity,⁹ unless there is an express reservation of that power to the founders or to others to whom it is assigned,¹⁰ and there is no other visitor.¹¹

Extent of power. The visitatorial power is a power to control and to arrest abuses;¹² it is not a power to revoke the gift, to change its uses, or to divest the rights of the parties entitled to the bounty.¹³ The extent of the visitatorial power is primarily dependent on the instrument creating or appointing the visitors,¹⁴ and where not amplified or restricted by the terms of the foundation the authority and power of visitors is that of a domestic tribunal, constituted by the founder of the

charity, under the authority of law, to superintend the doings of the trustees, to correct mistakes, and to restrain all abuses of authority.¹⁵ Where the visitatorial feature was to be exercised by a separate board outside the trustees and was a constituent element of the institution, all gifts made thereafter to the institution are by implication, unless express provision is made to the contrary, made subject to the visitatorial power. While the trustees are to decide, in the first instance, all questions pertaining to the administration of the charity, the visitors have supervision and control of any decision of great magnitude.¹⁶

While a college or hospital chartered by the state, but founded and endowed by private benefaction, is a charity, it is also a private corporation;¹⁷ and in all such cases, as the duties of visi-

Whether testamentary appointees are visitors depends on the nature of the powers delegated to them by the founder of the charity, rather than on the name by which the appointees are called in the instrument of foundation.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

9. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 365 note 12.

Accepting funds with visitatorial powers in others

St.1780 c 15, incorporating trustees of Phillips Academy and constituting them sole visitors of corporation, held not inconsistent with acceptance by them of funds for foundation of theological seminary, to be administered by them with visitatorial powers in others especially as St.1807 c 22, was special authorization to that general effect.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

"In 2 Kent's Commentaries, 13th Ed., 300, it is said: 'Where governors, or trustees, are appointed by a charter, according to the will of the founder, to manage a charity (as is usually the case in colleges and hospitals), the visitatorial power is deemed to belong to the trustees in their corporate capacity.'"—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19—11 C.J. p 365 note 12.

10. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips*

Academy in Andover, 148 N.E. 900, 253 Mass. 256.

May be confided in others

The visitatorial power may be confided by the founder of the charity to some person or persons other than the trustees of the corporation organized for the purpose of the charity.

Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, supra.

Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

Express power to receive gifts subject to visitation

St.1807 c 22, conferring express powers on trustees of Phillips Academy in Andover to receive gifts for theological seminary was held sufficiently comprehensive to enable corporation to receive gifts for seminary, subject to powers of visitation as donors might impose and trustees accept.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256—*Smyth v. Phillips Academy*, 28 N.E. 683, 154 Mass. 551.

11. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

11 C.J. p 365 note 13.

12. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

N.Y.—*In re Norton*, 161 N.Y.S. 710, 97 Misc. 289.

11 C.J. p 365 note 14.

13. U.S.—*Allen v. McKean*, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

14. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips*

Academy in Andover, 148 N.E. 900, 253 Mass. 256.

N.Y.—*Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

Visitors of seminary and not of particular donations

Visitors of theological seminary, when accepted by trustees of Phillips Academy in Andover and confirmed by St.1823 c 50, whereby they were made a corporation, were held to be visitors of the seminary, and not of particular donations thereto.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

General words at conclusion of specifications

Where at end of enumeration of powers and duties of visitors of theological seminary, authorized by St.1807 c 22, general words were added, it was held, that powers given to visitors and words and context of grant made inapplicable principle that general words at conclusion of specifications are to be restrained to incidental matter ejusdem generis.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

15. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, supra—*Nelson v. Cushing*, 2 Cush. 519.

16. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

17. U.S.—*Dartmouth College v.*

tor are strictly domestic, his power is confined to offenses against the private laws and regulations of the corporation, and he has no cognizance of acts of disobedience to the general laws of the land.¹⁸

Procedure and competency of visitors. The number and time of visitations may be regulated by the instrument appointing or providing for visitors.¹⁹

A provision that no visitor shall hold office after reaching a certain age has been held directory and not mandatory, and is not a limitation on the power of the visitors, and the failure to conform to it has been held not fatal to the validity of acts performed, at least where the visitors constitute a corporation.²⁰

Where the visitors met for a purpose of which adequate notice had been given the trustees, and every formality so far as it concerned the trustees was observed, the latter cannot object to the meeting as a visitation; and objections to the place of the meeting, where not raised at the meeting, will not be considered. Approval by the visitors of one plan proposed by trustees has been held not to estop

them from considering or examining a later plan differing materially from the first one, and the fact that the visitors did not summon before them the other party to the contract for hearing on the validity thereof has been held not to affect the jurisdiction of the visitors. A decision to authorize counsel to take steps fully to present the question to the court has been held not a determination of the merits of action taken by the trustees.²¹

Review by court of exercise of power by visitors is treated *supra* § 49.

§ 55. — Boards and Commissions

In some states a board of charities is provided for, and the institutions subject to its visitation depend on the terms of the constitution or statute and the construction placed thereon by the courts.

The constitutions and statutes of some states create a state board of charities and invest it with the power and duty of visitation and inspection. The institutions subject to the jurisdiction of the board are such as come within the terms of the constitution and statutes and the construction placed thereon by the courts.²² Under some constitutional or statutory provisions, it has been held that the

Woodward, N.H., 4 Wheat. 518, 4 L.Ed. 629.

11 C.J. p 365 note 16.

18. Ohio.—Koblitz v. Western Reserve Univ., 21 Ohio Cir.Ct. 144, 11 Ohio Cir.Dec. 515.

19. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

Number of visitations

In view of associate statutes governing foundation of Andover Theological Seminary, visitors thereof were not restricted to single annual visitation, special visitations being permitted on necessary occasion, when called to that end under governing statute.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148 N.E. 900, 253 Mass. 256.

Adjournment from time to time

In view of powers conferred on visitors of Andover Theological Seminary by statutes thereof requiring at least one visitation each year, where annual visitation was fixed for November, 1921, it was held that such meeting could be kept alive by successive adjournments until June 15, 1922.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

20. Mass.—Trustees of Andover Theological Seminary v. Visitors

of Theological Inst. in Phillips Academy in Andover, *supra*.

No change in corporate entity

Where visitors of theological seminary constituted corporation, changes in members or officers thereof did not concern its corporate entity or continuity, and hence circumstance as to expiration of term of one visitor by efflux of time on reaching age of seventy years did not affect validity of proceedings of visitors as a corporation.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

Corporation continues to function

Even if it be assumed that the term of office of the visitor came to an end by the efflux of time, the visitors as a corporation continued to function with the two remaining members.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

21. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

22. N.Y.—Newton v. Lewis, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed People v. Lewis, 147 N.E. 181, 239 N.Y. 528.

Homes under supervision of churches and fraternal societies

In some jurisdictions the board of public charities has the right to in-

quire into the management of, and to demand reports from, homes that are maintained and managed under the direct supervision of churches and fraternal societies, and which do not receive state aid.—Board of Public Charities, 21 Pa.Dist. 420.

School for blind

A state school for the blind has been held within the class of institutions subject to the power of visitation and inspection by the state board of charities.—Newton v. Lewis, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed People v. Lewis, 147 N.E. 181, 239 N.Y. 528—11 C.J. p 366 note 29 [a] (2).

Society for Prevention of Cruelty to Children

The institutions subject to the jurisdiction of the board are those in which indigent persons are supported by taxation, and do not include such eleemosynary institutions as the Society for the Prevention of Cruelty to Children, although its work is aided by an allowance from city funds which relieves the police department.—People v. New York S. P. C. C., 55 N.E. 1063, 161 N.Y. 233, reargument denied 56 N.E. 1004, 162 N.Y. 429, and reversing 59 N.Y.S. 953, 42 App.Div. 83—New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly 188.

The former practice under the statute of 43 Elizabeth requiring a commissioner to inquire into and to

board's power is not limited to mere observation, and it may require the officials or trustees to exhibit records and make reports.²³

Where provided for in the constitution, the right of visitation has been held placed therein so that it could not be taken away except by express approval of the people, and, if it cannot be taken away, neither can it be essentially impaired.²⁴

§ 56. — Municipality

A statute conferring authority on a municipality to become a trustee has been held not to give it supervisory jurisdiction over funds intrusted to other trustees notwithstanding such funds may be used to help or hinder the performance of the duties of the municipality.

While, as shown supra § 33, a municipality may generally be a trustee of a charitable trust, a statute conferring capacity on a municipality to become a trustee of a charitable trust on appointment has been held not to give the city supervisory jurisdiction over funds intrusted to other trustees, although such funds may be so administered as to help or to hinder the performance of the duties of the municipality.²⁵

§ 57. — Legislature

While the legislature may enact general laws respecting the regulation of charitable trusts, it cannot materially change the execution of a charitable trust in the absence of an exigency for such change.

bring to the attention of the chancellor the abuses and mismanagement of funds and lands given to charity has never been employed in this country.

Ky.—*Jenkins v. Berry*, 83 S.W. 594, 119 Ky. 350, 26 Ky.L. 1114.

Mass.—*Jackson v. Phillips*, 14 Allen 539.

23. N.Y.—*Newton v. Lewis*, 196 N.Y.S. 711, 203 App.Div. 395, affirming *Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, and affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

24. N.Y.—*Newton v. Lewis*, 193 N.Y.S. 438, 118 Misc. 382, affirmed 196 N.Y.S. 711, 203 App.Div. 395, which is affirmed *People v. Lewis*, 147 N.E. 181, 239 N.Y. 528.

25. R.I.—*Stearns v. Newport Hospital*, 62 A. 132, 27 R.I. 309, 8 Ann. Cas. 1176.

26. Mass.—In re Opinion of the Justices, 131 N.E. 31, 237 Mass. 613.

27. Mass.—In re Opinion of the Justices, supra.

Pa.—*Meadville Theological School v. Hempstead*, 138 A. 747, 290 Pa. 222.

Under a constitutional provision that corporations acquiring benefits thereunder shall become subject to

its provisions and liable to regulation by legislation passed pursuant thereto, it has been held that an eleemosynary corporation chartered prior to, but applying for an amendment after, the adoption of the constitution, was liable to regulation at least in so far as such regulation did not conflict with any express franchise given by the special incorporating acts.—*Meadville Theological School v. Hempstead*, supra.

Quorum of trustees

Where a statute, applicable to an eleemosynary corporation, provides that a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum, it has been held that a decree granting an amendment to the charter and authorizing a quorum of five trustees was erroneous.—*Meadville Theological School v. Hempstead*, supra.

28. Ala.—*Lovelace v. Marion Institute*, 110 So. 331, 215 Ala. 271.

Mass.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453—In re Opinion of the Justices, 131 N.E. 31, 237 Mass. 613.

11 C.J. p 366 note 32.

Statute held invalid

Statute providing scheme of man-

The legislature may exercise a considerable power over charitable trusts held by municipalities,²⁶ and may enact general laws respecting the regulation of charitable trusts.²⁷ However, the legislature cannot, without the consent of the donor, materially change the execution of a charitable trust, unless there exists an exigency for such change;²⁸ but if the purposes of the charity may best be carried out and promoted by a change in the administration of the trust, without a diversion thereof, the legislature, as *parens patriæ*, may direct such a change.²⁹

§ 58. Persons Entitled to Enforce

- a. In general
- b. Attorney general
- c. Trustees
- d. Other persons

a. In General

In general, the nature of the suit is largely controlling as to the person who may be entitled to sue with reference to the administration or enforcement of a charity.

Before a court of equity is entitled to interfere in the administration and enforcement of a charitable trust, its jurisdiction must be invoked by some one having the right to institute an action or proceeding for that purpose;³⁰ the court cannot act on its own volition,³¹ although in an action to

agement for town hospital different from that established by completed gift as condition thereto was held invalid.—*Adams v. Plunkett*, 175 N.E. 60, 274 Mass. 453.

29. Del.—*Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington*, Del., 147 A. 165, 16 Del.Ch. 410.

Wis.—In re Lott's Will, 214 N.W. 391, 193 Wis. 409.

11 C.J. p 366 note 33.

Trust of dissolved church given to state convention

On failure of trust because of dissolution of village Baptist church, corpus thereof under statute became property of the Wisconsin Baptist state convention.—In re Lott's Will, 214 N.W. 391, 193 Wis. 409.

Power of legislature to order sale of property held in trust see supra § 48 a.

30. Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.

Tex.—*Allred v. Beggs*, 84 S.W.2d 223, 227, 125 Tex. 584, affirming *Beggs v. Allred*, 73 S.W.2d 599, citing *Corpus Juris*.

11 C.J. p 366 note 35.

31. Tex.—*Allred v. Beggs*, supra.

11 C.J. p 366 note 36.

have a legacy in trust declared void, it has been held that courts of equity will of their own initiative find out and discover the purpose for which the trust was created.³²

Some authorities have arranged in four classes the principal cases in which litigation arises respecting charity property: (1) There may be wrongs to be redressed or relief to be sought, for which actions at law or suits in equity might lie, if the charity estates or funds were the private property of the trustees of the charity. In such cases, ordinary actions or suits are maintainable by the trustees, as shown *infra* this section, subdivision c. (2) A testator may make a charitable disposition by his will, and questions will be raised as to its validity or the proper means of carrying it out; in such cases, the questions can be considered in an ordinary suit to administer his estate, or, occasionally, can be considered in other suits which come before the court under other branches of its jurisdiction. (3) The trustees of the charity may improperly sell or lease the prop-

erty to some person having a knowledge of the trust. (4) The trustees of the charity may apply the property to wrong objects or appropriate it to their own use.³³ While, as to the third and fourth classes of cases, there was for a time a doubt as to who was the proper person to bring a suit, at length, however, it came to be established that the attorney general was the proper person, as shown *infra* this section, subdivision b.

b. Attorney General

Ordinarily, the attorney general has a preclusive right to institute proper proceedings to prevent a misuse of property devoted to a public charity.

It has been generally held, sometimes by virtue of statutory provisions, that the attorney general has a preclusive right to prevent a misuse of property devoted to a public charity and to institute proper proceedings to protect the estate.³⁴ However, the charities which the attorney general can sue to enforce or conserve must be charities of a character so public as to interest "the entire public,"³⁵ and in order for the attorney general to be

32. Ohio.—Linney v. Cleveland Trust Co., 165 N.E. 101, 30 Ohio App. 345.

33. N.J.—MacKenzie v. Jersey City Presbytery, 61 A. 1027, 67 N.J.Eq. 652, 3 L.R.A., N.S., 227.

Persons entitled to question validity see *supra* § 10.

34. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Ala.—State ex rel. Carmichael v. Bibb, 173 So. 74.

Ark.—State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605, 607, 191 Ark. 1096, citing *Corpus Juris*.

Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal. App.2d 630.

Del.—Cannon v. Stephens, 159 A. 234, 13 Del.Ch. 276.

Fla.—Jordan v. Landis, on Behalf of State, and ex rel. Goodwin, 175 So. 241, 128 Fla. 604—State ex rel. Landis v. S. H. Kress & Co., 155 So. 823, 115 Fla. 189.

Ill.—Kerner v. Thompson, 6 N.E.2d 131, 365 Ill. 149, reversing 282 Ill. App. 403—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425—Barker v. Hauberg, 156 N.E. 806, 325 Ill. 538—Gear v. Sifford, 7 N.E.2d 371, 289 Ill.App. 450—Smith v. Thompson, 266 Ill.App. 165—Carlstrom v. Frackelton, 263 Ill.App. 250.

Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, 148

N.E. 900, 253 Mass. 256—Krauthoff v. Attorney General, 132 N. E. 865, 240 Mass. 88.

Mo.—Dickey v. Volker, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

N.J.—Cuthbert v. McNeill, 142 A. 667, 103 N.J.Eq. 134, affirmed 146 A. 881, 104 N.J.Eq. 495—Hewitt v. Camden County, 146 A. 881, 7 N.J. Misc. 523.

N.Y.—In re Durbrow's Estate, 157 N. E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317.

Ohio.—McCall v. W. J. Schoenberger Co., 29 Ohio N.P., N.S., 456.

Or.—Waller v. Lane County, 63 P.2d 214, 155 Or. 160—Wemme v. Noyes, 295 P. 465, 134 Or. 590—Wemme v. Noyes, 294 P. 602, 134 Or. 590—Wemme v. First Church of Christ, Scientist, of Portland, 237 P. 674, 115 Or. 281.

Tenn.—Nolfe v. Byrne, 219 S.W. 1, 142 Tenn. 309.

Tex.—Allred v. Beggs, 84 S.W.2d 223, 227, 125 Tex. 534, affirming Beggs v. Allred, 73 S.W.2d 599, citing *Corpus Juris*—Carroll v. City of Beaumont, Civ.App., 13 S.W.2d 813, error refused.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19.

6 C.J. p 814 note 94—11 C.J. p 367 note 44.

Cy pres doctrine

State, not church, under auspices of which college to which endowment was made was founded, may, through agency of court of equity,

propose scheme for administration of endowment fund, under cy pres rule, and state attorney general should institute, or be made defendant in suit to have college endowment fund administered under cy pres doctrine.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Certificate of authority

The attorney general's certificate of authority for inquiry by state, on behalf of public charity as trust beneficiary, into acts of executors and testamentary trustees, as in selling trust property under power conferred by will, is properly requisite. While attorney general may be justified in authorizing inquiry by state into their acts, mere dissatisfaction with result of sale or ill-founded suspicion would not justify him in approving proceeding for inquiry by state.—State ex rel. Daniel v. Strong, 192 S.E. 671, 185 S.C. 27.

35. Mo.—Dickey v. Volker, 11 S.W. 2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

Tex.—Allred v. Beggs, 84 S.W.2d 223, 125 Tex. 534, affirming Beggs v. Allred, Civ.App., 73 S.W.2d 599, 602, quoting *Corpus Juris*.

11 C.J. p 367 note 45.

Fund that may or may not be used for charity

Where a fund or property is so given that it may or may not be used for charity, or may or may not be used for a charitable object of a public character, without violating the directions of the will, case is not one for enforcing the gift as a "pub-

alone entitled to enforce a charitable trust, there must be some benefit to be conferred upon, or duty to be performed toward, either the public at large or some part thereof, or an indefinite class of persons.³⁶

c. Trustees

Trustees may generally sue to obtain or protect the subject matter of the trust.

When shown to be such, the trustees of a charity may sue to obtain or protect the subject matter of the trust;³⁷ or to obtain instructions,³⁸ and, sometimes by virtue of statutory provisions, proceedings for the sale of property belonging to the trust may be instituted by them, rather than by the attorney general,³⁹ provided the latter is made a party defendant, as shown *infra* § 62. Also, sometimes by virtue of statutory provisions, the trustees may appeal to the courts from a determination or decree of visitors.⁴⁰

Acting trustees may file a bill in equity in their own names for the transfer of a public charity to new trustees, making the attorney general a defendant.⁴¹

Secondary trustee. Where a trust for a charitable purpose in a city was created, it has been held that the city becomes a secondary trustee and has a primary right of action to enforce the provisions of the trust.⁴²

Trustee of fund payable to another. Trustees under a will giving the income thereof to a charity created under the will of another, having a duty only to pay the income received in accordance with the terms of the will, have been held without right to maintain a bill to enjoin an alleged unlawful conduct thereof.⁴³

d. Other Persons

To entitle a private person to prosecute a suit in regard to the administration and enforcement of a charitable trust, he must be a party to the contract of donation, or a representative of such party, or be interested personally and individually as a beneficiary rather than as a taxpayer or member of the community, in the uses to which the property is to be put.

One not interested directly in the administration of a charitable trust cannot maintain a legal proceeding for an accounting or the control of the administration of said charity,⁴⁴ at least in the absence of a showing of fraud on the part of those who may institute such proceedings,⁴⁵ and the fact that the attorney general is joined as a party defendant is of no import.⁴⁶ To entitle a private individual to prosecute a bill in regard to the administration and enforcement of a charitable trust, he must be a party to the contract of donation, or the representative of such party, or be interested, personally and individually, as a beneficiary rather than as a taxpayer or a member of the community, in the uses to which the property is to be put.⁴⁷

lic charity" in a suit by the attorney general, as, for example, where a will authorizes independent executor, with advice of testator's sister, to devote estate to any charity or purpose that might be determined on.—*Allred v. Beggs*, *supra*.

36. Del.—*Cannon v. Stephens*, 159 A. 234, 18 Del.Ch. 276.

Class suits and suits by donor, etc., see *infra* subdivision d of this section.

37. N.J.—*Cuthbert v. McNeill*, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495—*Hewitt v. Camden County*, 146 A. 881, 7 N.J. Misc. 528.

Or.—*Wemme v. First Church of Christ, Scientist, of Portland*, 237 P. 674, 115 Or. 281.

11 C.J. p 367 note 47.

Gift to church

Although testator made no reference to trustees in devising property to charity connected with Methodist church, trustees of Methodist church could prosecute action for property in their name.—*Methodist Episcopal Church of U. S. of America v. Walters*, D.C.Mo., 50 F.2d 416.

38. Mass.—*Crawford v. Nies*, 113 N.E. 408, 224 Mass. 474.

39. Ala.—*State ex rel. Carmichael v. Bibb*, 173 So. 74.

11 C.J. p 367 note 48.

40. Mass.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

41. Mass.—*Harvard College v. Theological Education Soc.*, 3 Gray 280.

Mo.—*Women's Christian Assoc. v. Kansas City*, 48 S.W. 960, 147 Mo. 103.

42. Cal.—*Pratt v. Security Trust & Savings Bank*, 59 P.2d 862, 15 Cal.App.2d 630.

City as proper party to action concerning validity see *infra* § 62.

43. Mass.—*Dillaway v. Burton*, 153 N.E. 13, 256 Mass. 568.

44. Cal.—*Pratt v. Security Trust & Savings Bank*, 59 P.2d 862, 15 Cal. App.2d 630.

Ill.—*Smith v. Thompson*, 266 Ill.App. 165.

Mo.—*Dickey v. Volker*, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

N.Y.—*Hoffstot v. Fifth Ave. Hospital of City of New York*, 249 N.Y. S. 399, 146 Misc. 206, affirmed 257

N.Y.S. 1034, 236 App.Div. 667, affirmed 188 N.E. 28, 262 N.Y. 479.

Ohio.—*McCall v. W. J. Schoenberger Co.*, 29 Ohio N.P., N.S., 456.

Or.—*Wemme v. Noyes*, 295 P. 465, 134 Or. 590—*Wemme v. Noyes*, 294 P. 602, 603, 134 Or. 590, citing *Corpus Juris*.

45. Cal.—*Pratt v. Security Trust & Savings Bank*, 59 P.2d 862, 15 Cal. App.2d 630.

46. Cal.—*Pratt v. Security Trust & Savings Bank*, *supra*.

Ill.—*Smith v. Thompson*, 266 Ill.App. 165.

47. Del.—*Cannon v. Stephens*, 159 A. 234, 237, 18 Del.Ch. 276, quoting *Corpus Juris*.

Ill.—*Barker v. Hauberg*, 156 N.E. 806, 325 Ill. 538.

Mass.—*Greek Orthodox Community v. Malicourtis*, 166 N.E. 863, 267 Mass. 472—*Dillaway v. Burton*, 153 N.E. 13, 256 Mass. 568—*Krauthoff v. Attorney General*, 132 N.E. 865, 240 Mass. 88.

Mo.—*Dickey v. Volker*, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

Tex.—*Carroll v. City of Beaumont*,

In general, he must be a trustee, or cestui que trust, or have some reversionary interest in the trust fund.⁴⁸

Donor or heirs. While, under some circumstances, the donor,⁴⁹ or his heirs,⁵⁰ or any beneficiary, having an interest in the subject of the gift,⁵¹ has the right to enforce, by legal proceedings, a faithful execution of the beneficent objects of the founder of the charity; where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he, nor those claiming under him, have any standing in a court of equity as to its disposition and control.⁵²

Civ.App., 18 S.W.2d 813, error refused.

11 C.J. p 367 note 51.

Church founding endowed college

Instrumentality or member of church, under auspices of which college to which endowment was made, was founded, may sue to prevent unlawful disposition of endowment fund.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Directors, managers, or employees of charity

The directors, managers, superintendents, or other agents or employees engaged in the administration of a public charity have no right to call on a court of equity to compel the continued maintenance and operation of the charity in order that they may continue to render the services necessary for such maintenance and operation.—Barker v. Hauberg, 156 N.E. 806, 325 Ill. 538.

Member or stockholder of corporation

(1) A member of a charitable corporation is without standing to maintain bill to enjoin unlawful conduct of charity.—Dillaway v. Burton, 153 N.E. 18, 266 Mass. 568.

(2) Stockholder of charitable corporation, transferring property to city in trust for charitable purposes, cannot sue for enforcement of trust.—Carroll v. City of Beaumont, Tex. Civ.App., 18 S.W.2d 813, error refused.

Unsuccessful bidder at sale of properties of public charitable trust was unauthorized to sue to set aside sale.—Dickey v. Volker, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

48. Ill.—Smith v. Thompson, 266 Ill. App. 165.

Iowa.—Beidler v. Dehner, 161 N.W. 32, 178 Iowa 1338.

N.J.—Cuthbert v. McNeill, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495—Hewitt v. Camden County, 146 A. 881, 7 N. J.Misc. 528.

11 C.J. p 367 note 52.

Limitation of right of beneficiary

Active charitable trust gave to cestui que trust only the right in equity to enforce the performance of the trust.—State ex rel. Carmichael v. Bibb, Ala., 173 So. 74.

49. Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

11 C.J. p 367 note 53.

Reverter

Where a fund has been devoted to a charity, and, if the charity fails, such fund will go to others or revert to the settlor, those persons having hostile interests may, of course, assert any claim they may have in the subject, and may show that the charitable use has for any cause failed and become inoperative and void.—Powers v. Home for Aged Women, R.I., 192 A. 770, 110 A.L.R. 1361—11 C.J. p 368 note 59.

50. Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

Ky.—Trustees Stewart Common School Fund v. Lewis, 28 S.W.2d 27, 234 Ky. 286.

11 C.J. p 367 note 54.

51. Ill.—Northwestern University v. Wesley Memorial Hospital, 125 N. E. 13, 290 Ill. 205.

11 C.J. p 367 note 55.

Gift to two corporations on conditions

Where donor to hospital directed that hospital staff was to be appointed from faculty of educational corporation, indicating gift was for both corporations, obligations imposed on corporations were mutual and of such character that either might sue the other to enforce performance of conditions.—Northwestern University v. Wesley Memorial Hospital, supra.

52. U.S.—Gredig v. Sterling, C.C.A. Tex., 47 F.2d 832, certiorari denied 52 S.Ct. 13, 284 U.S. 629, 76 L.Ed. 535.

Ill.—Smith v. Thompson, 266 Ill.App. 165.

Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind. App. 709.

N.J.—First Camden Nat. Bank &

Contributors to fund. As a general rule, the contributors to a fund creating a trust for mere charitable purposes cannot call the trustees of that fund to an account for a misapplication of the fund or any other breach of the trust.⁵³ There must be something peculiar in the transaction, beyond the mere fact of contribution, to give a contributor to a charitable fund a foothold in court to enable him to question the disposition of the fund.⁵⁴

Visitors; class suits. Under some circumstances, visitors of a charity have been held entitled to sue,⁵⁵ but they have no general right to invoke

Trust Co. v. Collins, 160 A. 848, 110 N.J.Eq. 623, reversed on other grounds 168 A. 275, 114 N.J.Eq. 59 —Cuthbert v. McNeill, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495.

N.Y.—In re Durbrow's Estate, 157 N. E. 747, 245 N.Y. 469, reversing In re Clayton, 218 N.Y.S. 325, 218 App.Div. 317.

N.C.—Shields v. Harris, 130 S.E. 189, 190 N.C. 520.

Or.—Wemme v. Noyes, 295 P. 465, 134 Or. 590—Wemme v. Noyes, 294 P. 602, 134 Or. 590.

Tenn.—Nolfe v. Byrne, 219 S.W. 1, 142 Tenn. 309.

11 C.J. p 367 note 56.

Residuary legatee

Where the trust is valid, a residuary legatee, or his assignee, has no such interest in its administration and enforcement as will entitle him to sue.

Iowa.—Lupton v. Leander Clark College, 187 N.W. 496, 194 Iowa 1008. N.Y.—Stewart v. Franchetti, 153 N. Y.S. 453, 167 App.Div. 541—In re Fletcher's Estate, 2 N.Y.S.2d 771, 166 Misc. 486.

11 C.J. p 368 note 60.

53. Ill.—Smith v. Thompson, 266 Ill. App. 165.

Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind. App. 709.

Miss.—Freedman's Aid & Southern Education Soc. v. Scott, 87 So. 659, 125 Miss. 299.

11 C.J. p 367 note 57.

54. Ill.—Smith v. Thompson, 266 Ill. App. 165.

11 C.J. p 367 note 57.

Patron of school

Patron of school and persons helping to maintain it for benefit of children in community were held to have such interest therein as to authorize their suit to prevent land conveyed in trust for school from being sold.—Dominy v. Stanley, 133 S.E. 245, 162 Ga. 211.

55. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips

the aid of the court against an improper use of the trust.⁵⁶

A localized or grouped charity may be enforced by a class suit,⁵⁷ and if the terms defining a charitable trust are such that it is possible to ascertain definite persons and institutions as the recipients of its benefits, such definitely ascertained persons have a status which entitles them to sue without the intermediation of the attorney general.⁵⁸ Thus, the members of a church have a standing in court to compel a board of trustees to administer a fund in accordance with the will which left it to enable such board to take care of the poor of the church.⁵⁹

§ 59. Actions

Questions relating to actions involving charitable trusts are considered *infra* §§ 60-65. For later cases consult Pocket Parts.

§ 60. — Right of Action and Form of Remedy

On violation of a trust, action may be brought to enforce the trust, or to remove the trustee.

While, in some jurisdictions, the only remedy for a violation of a trust is an action to enforce the trust,⁶⁰ in others a suit to have the trustee removed is a proper remedy to correct an abuse of trust.⁶¹ Also, in some states, provision is made by statute for the filing of an information on the failure to make due application of funds given to public

charities.⁶² Notwithstanding a statute referring to charities contemplates a summary petition by the trustees for leave to sell land, the trustees may proceed by action;⁶³ but a general statutory action for the determination of the right and title to land of a party in or out of possession is not a proper action in which to determine the questions of the right of the trustees of a charitable trust to sell the trust property and the interest of the grantor's heirs,⁶⁴ and a statute authorizing a summary inquiry into an application for the sale of land given to a charitable corporation has been held not to contemplate an adjudication of a disputed legal title.⁶⁵

A beneficiary may not sue with respect to the trust property without first performing conditions precedent;⁶⁶ and in the absence of any allegation of mismanagement or misapplication of the trust funds, the trustees cannot be required to account for the funds in their hands prior to the time fixed for devoting such funds to the uses of the trust.⁶⁷

§ 61. — Laches, Limitations, and Defenses

Lapse of time before suit is brought will be given consideration and weight according to the circumstances of the particular case.

Although laches and limitations constitute no absolute bar to suits pertaining to charitable trusts, lapse of time will be given consideration and weight according to the circumstances of the particular case.⁶⁸

Academy in Andover, 148 N.E. 900, 253 Mass. 256.

Enforcing their determinations

Visitors of a charity may invoke the courts to enforce determinations made by them within the scope of their power.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

56. Mass.—Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover, *supra*.

57. Mo.—Dickey v. Volker, 11 S.W. 2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 936.

58. Del.—Cannon v. Stephens, 159 A. 234, 18 Del.Ch. 276.

59. La.—Van Hoven v. New Orleans Immanuel Presb. Church, 32 So. 389, 108 La. 274.

60. N.Y.—Van De Bogert v. Reformed Dutch Church of Poughkeepsie, 220 N.Y.S. 50, 128 Misc. 603, affirmed 220 N.Y.S. 58, 219 App.Div. 220.

61. Ill.—Carlstrom v. Frackelton, 263 Ill.App. 250.

11 C.J. p 368 note 67.

62. Mass.—Atty.-Gen. v. Parker, 126 Mass. 216.

63. N.Y.—Sailors' Snug Harbor v. Carmody, 144 N.Y.S. 24, 158 App. Div. 738, reversing 137 N.Y.S. 968, 77 Misc. 494, 4 N.Y.Civ.Proc., N.S., 71, and affirmed 105 N.E. 543, 211 N.Y. 286.

64. Mo.—Mott v. Morris, 155 S.W. 434, 249 Mo. 137.

65. N.J.—In re Board of Education of City of Camden, 143 A. 620, 103 N.J.Eq. 428.

66. Cal.—In re Houk's Estate, 200 P. 417, 186 Cal. 643.

N.C.—Cecil v. Pleasant Grove Methodist Protestant Church, 174 S.E. 452, 206 N.C. 597.

Conditions which must be performed

(1) Under a will directing trustee to pay the city such a sum up to one hundred thousand dollars as is necessary to build a pleasure pier on condition that city raise a like fund and that bequest should fall into residue if condition was not performed, the city, without performing or guaran-

teeing the condition, may not sue the trustee to sequester the one hundred thousand dollar fund for use of the city.—In re Houk's Estate, 200 P. 417, 186 Cal. 643.

(2) Nephew of testator who devised property to church in will providing for church's rendering of assistance to testator's needy kinfolks could not maintain action to require church to assist him without previously applying to church for assistance and being refused.—Cecil v. Pleasant Grove Methodist Protestant Church, 174 S.E. 452, 206 N.C. 597.

67. Tenn.—State v. Bank of Commerce & Trust Co., 227 S.W. 1029, 143 Tenn. 278.

68. Wis.—In re Mead's Estate, 277 N.W. 694, rehearing denied 279 N.W. 18.

11 C.J. p 368 note 70.

Action held timely

An application by successor trustees, when the administrator petitioned the court for construction of the will, to compel him to apply the fund to the purposes of the trust has been held timely.—In re Mead's Estate, *supra*.

The application of statutes of limitation to trusts generally is treated in the C.J.S. title Limitations of Actions §§ 178-182, also 37 C.J. page 903 note 14—page 929 note 93.

§ 62. — Parties

- a. In general
- b. Attorney general
- c. Heirs
- d. Trustees

a. In General

All persons interested should be made parties to a proceeding involving a charitable trust.

In accordance with the general principle of equity all persons interested should be made parties to proceedings involving a charitable trust.⁶⁹ In a suit involving the validity of a will which directs the executor to dispose of the residuary estate according to his judgment for good and charitable purposes, he may not join as parties religious, educational, and charitable organizations which he has selected to receive the gift, on his mere allegation that they are such beneficiaries as the testator had in mind and intended as the recipients of the gift.⁷⁰ Also, where the title to church property is in a corporation and not in the church members, the members are not necessary parties to a bill to execute cy pres the trust in the church property.⁷¹

69. Or.—Wemme v. First Church of Christ, Scientist, of Portland, 237 P. 674, 115 Or. 281.
11 C.J. p 368 note 73.

On distribution by court

Necessary parties are testator's administrator, heirs and next of kin or representatives, attorney general, and any charities having vested rights. Donees nominated by deceased executor, as trustees, and by administrator, and proposed under scheme to be framed by court, are proper parties.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.

Purchaser of trust property

In suit between heirs and trustees, involving ownership of property incorporated in a testamentary charitable trust, to have title to property sold by original trustees determined, the purchaser is a necessary party to the suit, as well as attorney general or prosecuting attorney of county where case was tried.—Wemme v. First Church of Christ, Scientist, of Portland, 237 P. 674, 115 Or. 281.

Representation

Where the beneficiaries of a charitable trust are not named, or are uncertain individuals of an unascertained class so that no one of them can sue or be sued respecting the trust, no one can appear for them

except parens patriæ or some official to whom that prerogative has been delegated.—Ewell v. Sneed, 191 S.W. 131, 136 Tenn. 602, 5 A.L.R. 303.
Persons entitled to institute proceedings see supra § 58.

70. Ky.—Gerick v. Gerick, 165 S.W. 695, 158 Ky. 478.

71. Ill.—People v. Braucher, 101 N. E. 944, 258 Ill. 604, 47 L.R.A., N.S., 1015.

72. Ark.—Morris v. Boyd, 162 S.W. 69, 110 Ark. 463, Ann.Cas.1916A 1004.

73. Colo.—Borough or Town of Clarion v. Central Sav. Bank & Trust Co., 208 P. 251, 71 Colo. 482.

74. Mass.—Atty.-Gen. v. Parker, 126 Mass. 216—Atty.-Gen. v. Butler, 123 Mass. 304.

75. Ark.—State ex rel. Atty. Gen. v. Van Buren School Dist. No. 42, 89 S.W.2d 605, 191 Ark. 1096.

Del.—Cannon v. Stephens, 159 A. 234, 18 Del.Ch. 276.

Ill.—Stowell v. Prentiss, 154 N.E. 120, 124, 323 Ill. 309, 50 A.L.R. 584, citing *Corpus Juris*.

Mass.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34—Crawford v. Nies, 113 N.E. 408, 224 Mass. 474.

However, where a will gave property, on the happening of a certain contingency, in trust to establish a college under the direction of the Roman Catholic bishop of the diocese, the bishop is a proper party to a proceeding to prevent the violation of the trust by distributing the property contrary to the will;⁷² and where property was given to a trustee to be devoted to a charitable purpose in a city, such city has been held to have the right to be a party to an action concerning the validity of the gift.⁷³

The relators in an information by the attorney general are not parties to the suit; they have no interest in the matter for which they seek relief; they cannot be heard by counsel nor in person. They are important to the proceedings merely that there may be somebody responsible for costs in case it should appear that the information is unfounded.⁷⁴

b. Attorney General

Ordinarily, the attorney general is not only a proper, but a necessary, party to proceedings affecting the validity, administration or enforcement of a charitable trust.

The attorney general is a proper, and generally a necessary, party to proceedings affecting the validity, administration, or enforcement of a charitable trust,⁷⁵ and when the public is the beneficiary

Mo.—Dickey v. Volker, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 358, certiorari denied 49 S.Ct. 252, 279 U.S. 339, 73 L.Ed. 986—Cummings v. Dent, 189 S.W. 1161.

N.J.—Trenton Sav. Fund Soc. v. Wythman, 145 A. 462, 104 N.J.Eq. 271, reversed on other grounds 148 A. 622, 106 N.J.Eq. 93—Bible Readers' Aid Soc. of Trenton v. Katzenbach, 123 A. 628, 97 N.J.Eq. 416—Christian v. Catholic Church of St. John the Baptist of Paterson, 110 A. 579, 91 N.J.Eq. 374—While v. City of Newark, 103 A. 1042, 89 N. J.Eq. 5.

Or.—Wemme v. First Church of Christ, Scientist, of Portland, 237 P. 674, 115 Or. 281.

R.I.—Powers v. Home for Aged Women, 192 A. 770, 110 A.L.R. 1361—Powers v. Home for Aged Women, 179 A. 610, 612, 55 R.I. 187, citing *Corpus Juris*—Newport Hospital v. Harvey, 133 A. 648, 47 R.I. 382, citing *Corpus Juris*.

Tex.—Carroll v. City of Beaumont, Civ.App., 18 S.W.2d 813, error refused.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19.

6 C.J. p 814 note 93—11 C.J. p 368 note 78.

of a charitable trust, the attorney general has been held the only necessary party to a suit instituted by the trustees with relation to their powers and duties.⁷⁶ However, where the recipients of the trust are definite persons and institutions and suit is brought by them, the attorney general has been held not a necessary,⁷⁷ nor a proper,⁷⁸ party; and a suit brought to remove trustees has been held not to involve interests of the public so essentially as to require the attorney general to be made a party, even though relating to a public charitable trust.⁷⁹ Also, such officer has been held not a necessary party to a bill for the instructions of the court as to the administration of a public charity, when the gift is in the hands of trustees charged specifically by the donor with its management for the cestui que trust, and no charges of waste or mismanagement are made against them;⁸⁰ and where a donation was made to two corporations on a condition, the attorney general has been held not a necessary party in a suit by the one corporation against the other to enforce such condition.⁸¹

The attorney general may file an information either of his own motion or on the relation of any party concerned;⁸² or he may come in by intervention or be brought in by amendment, when necessary.⁸³ In case he should choose so to do, he should be given the right to take charge and control of

that portion of the litigation which relates to the public right;⁸⁴ but when the relator has the chief interest in the suit, the attorney general, after consenting to the use of the name of the state on his behalf, cannot withdraw and terminate the suit to his prejudice.⁸⁵

c. Heirs

Where the heirs have no possible interest in the trust property, they are not necessary or proper parties.

In a suit by the trustees of a public trust for directions as to the execution of the trust, the heirs at law or the next of kin of the donor are not necessary parties defendant, in view of the fact that no right of reverter arises on the breach or violation of a public trust.⁸⁶ Where, however, the heirs have a possible interest in the trust property, as where the inquiry is whether a good charitable trust was created, they are necessary parties.⁸⁷

d. Trustees

As to whether all the trustees are necessary parties depends on the nature of the suit and the relief asked.

Where, in a suit to determine the disposition of the proceeds of a sale of public charitable trust property, all the trustees are joined, the proper parties are before the court.⁸⁸ As to whether all the trustees are necessary parties, the nature of the suit and the relief asked must be looked to, it being

Suit for directions or construction of trust instrument

Where a bill is filed by the trustee of a public charity, seeking directions as to the mode of executing their trust or for a construction of the trust instrument, the attorney general is a proper party defendant as representing the public interest. R.I.—Powers v. Home for Aged Women, 179 A. 610, 55 R.I. 187. Tenn.—Vanderbilt University v. Mitchell, 36 S.W.2d 83, 162 Tenn. 217. Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19. 11 C.J. p 369 note 84.

Beneficiary's suit to quiet title

Mo.—Harger v. Barrett, 5 S.W.2d 1100, 319 Mo. 633. 76. U.S.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542. 11 C.J. p 369 note 81. 77. Del.—Cannon v. Stephens, 159 A. 234, 18 Del.Ch. 276. N.J.—Mary S. Fithian Night School & Academy v. College Board of Presbyterian Church in United States, 102 A. 855, 88 N.J.Eq. 468. 78. Ala.—Davis v. Stokes, 107 So. 76, 214 Ala. 234. 79. Mass.—Attorney General v. Eustace, 132 N.E. 865, 240 Mass. 14 C.J.S.—34

93.—Eustace v. Dickey, 132 N.E. 852, 240 Mass. 55.

80. Ill.—Smith v. Thompson, 266 Ill.App. 165. 11 C.J. p 369 note 85.

81. Ill.—Northwestern University v. Wesley Memorial Hospital, 125 N. E. 13, 290 Ill. 205.

82. U.S.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542. Mass.—Crawford v. Nies, 113 N.E. 408, 224 Mass. 474.

Mo.—Dickey v. Volker, 11 S.W.2d 278, 321 Mo. 235, 62 A.L.R. 858, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 986.

N.J.—Trenton Sav. Fund Soc. v. Wythman, 145 A. 462, 104 N.J.Eq. 271, reversed on other grounds 148 A. 622, 106 N.J.Eq. 93—Bible Readers' Aid Soc. of Trenton v. Katzenbach, 128 A. 628, 97 N.J.Eq. 416.

Tex.—Carroll v. City of Beaumont, Civ.App., 18 S.W.2d 813, error refused.

Wash.—Samuel and Jessie Kenney Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19. 6 C.J. p 814 note 95—11 C.J. p 368 note 76.

83. Ill.—Stowell v. Prentiss, 154 N. E. 120, 323 Ill. 309, 50 A.L.R. 584. Wash.—Samuel and Jessie Kenney

Presbyterian Home v. State, 24 P. 2d 403, 174 Wash. 19. 11 C.J. p 369 note 82.

84. Ill.—Stowell v. Prentiss, 154 N. E. 120, 323 Ill. 309, 50 A.L.R. 584. 11 C.J. p 369 note 83.

85. Cal.—People v. Clark, 13 P. 856, 72 Cal. 289—People v. North San Francisco Homestead, etc., Assoc., 38 Cal. 564.

86. N.Y.—In re Swan's Will, 261 N. Y.S. 428, 237 App.Div. 454, motion granted 264 N.Y.S. 898, 239 App. Div. 762, and affirmed In re St. John's Church of Mt. Morris, 189 N.E. 734, 263 N.Y. 638. 11 C.J. p 369 note 86.

No intervention to determine legal title

Heir of original grantor could not intervene to determine legal title in educational corporation's summary proceeding to sell land, especially where a proceeding is pending in the law courts for such purpose.—In re Board of Education of City of Camden, 143 A. 620, 103 N.J.Eq. 428.

87. Mass.—Hubbard v. Worcester Art Museum, 80 N.E. 490, 194 Mass. 280, 9 L.R.A., N.S., 689, 10 Ann.Cas. 1025.

11 C.J. p 369 note 87.

88. Mass.—Crawford v. Nies, 107 N. E. 382, 220 Mass. 61.

held in some cases that they are all necessary parties,⁸⁹ and in others that it is not necessary to join all the trustees.⁹⁰ A trustee whose only duty is to pay over the income of a fund to a charitable corporation created by a third person has been held not a proper party to a suit by such corporation for instructions.⁹¹

§ 63. — Pleading and Evidence

In order to obtain the relief asked, the pleadings must contain appropriate allegations and must be supported by proof.

In a suit to compel the proper application of charitable trust funds, or the execution of the trust in a certain way, it is necessary and sufficient for the bill, complaint, or petition to contain the allegations necessary and appropriate to a suit of that kind.⁹² In an action to declare a trust void, it is insufficient to allege that the objects of the trust are not being carried out owing to mismanagement; there must be an allegation and proof that the purposes cannot be carried out by proper management.⁹³

Evidence. In accordance with general rules, the

burden of proof is on the party claiming that a charitable gift has been forfeited,⁹⁴ or that the charity is not being conducted within the authorized purposes thereof.⁹⁵

Any competent evidence is admissible where it is relevant and material to the issues in a suit concerning a charitable trust.⁹⁶

In accordance with general rules, a preponderance of evidence is generally necessary and sufficient to establish the facts in issue.⁹⁷

§ 64. — Trial, Judgment, and Review

The court will grant relief according to the case made as it appears on the whole record, but where the trustee has not been remiss in his duties he will not be interfered with or harassed by court orders.

A proceeding to enforce an intended gift to a public charity will be determined on equitable principles and the rules applicable to charitable gifts;⁹⁸ and, generally, the court will grant relief according to the case made, as it appears on the whole record.⁹⁹ Where it appears that complainants have no direct interest in the enforcement of the trust,

89. Ohio.—State v. Toledo, 23 Ohio Cir.Ct. 327.

90. Mo.—Farmers', etc., Bank v. Robinson, 70 S.W. 372, 96 Mo.App. 385.

91. Mass.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

92. Ala.—State ex rel. Carmichael v. Bibb, 173 So. 74.
11 C.J. p 369 note 95.

Allegations held sufficient to invoke jurisdiction of court of equity, and to state cause for accounting, removal of trustee, and appointment of new trustee.—State ex rel. Carmichael v. Bibb, Ala., 173 So. 74.

Bill held insufficient to constitute a basis for any relief concerning a diversion of the property from the purposes of the trust.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

Petition not construable as one for instructions

Bill seeking to enjoin conduct of hospital as then conducted and bring about removal of officers was held not construable as petition for instructions.—Dillaway v. Burton, 153 N.E. 13, 256 Mass. 568.

93. Md.—American Colonization Soc. v. Soulsby, 99 A. 944, 129 Md. 605, L.R.A.1917C 937.

94. Pa.—In re Jordan's Estate, 165 A. 652, 310 Pa. 401.

Presumption of acceptance

Presumption is that large class of individuals or public, in favor of which charge or burden is imposed by donor, accepts advantage.—

Thompson v. Société Catholique D'Education Religieuse et Littéraire, 103 So. 247, 157 La. 875.

95. U.S.—Wells v. Commissioner of Internal Revenue, C.C.A.D.C., 63 F. 2d 425, certiorari granted Burnet v. Wells, 53 S.Ct. 528, 289 U.S. 716, 77 L.Ed. 1469, reversed on other grounds 53 S.Ct. 761, 289 U.S. 670, 77 L.Ed. 1439.

96. Pa.—In re Wanamaker's Estate, 167 A. 592, 312 Pa. 362.

Court may hear evidence

Court, about to frame scheme of distribution for charitable purposes, trustee having failed to do so, could determine whether parties in interest were before it, and thereupon take evidence to aid in making proper distribution, and acts of deceased trustee in framing scheme for distribution are material and their admission is not prejudicial.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.

97. Evidence held sufficient

(1) In general.
Cal.—O'Hara v. Grand Lodge, I. O. G. T. of State of California, 2 P. 2d 21, 213 Cal. 131.
Ga.—Reynolds v. Stanton, 162 S.E. 783, 174 Ga. 340.
Minn.—Wyman v. Trustees of Westminster Presbyterian Church of Minneapolis, 266 N.W. 165, 197 Minn. 62.

(2) To show intention of testatrix that mortuary chapel should be erected on site contended for by heirs, and not that contended for by the cemetery.—Carroll v. Cave Hill

Cemetery Co., 189 S.W. 186, 172 Ky. 204.

(3) To sustain finding that revenue derived from park would be insufficient to pay indebtedness already accrued and current expenses.—Woods v. Bell, Tex.Civ.App., 195 S. W. 902, error refused.

(4) The capacity of a particular foreign unincorporated association to take a bequest for a charitable use is sufficiently established where there is ample evidence of its capacity and no evidence to the contrary.—Matter of Weeks, 146 N.Y.S. 1006, 85 Misc. 280.

Evidence held insufficient

(1) In general.—In re Donchian's Estate, 199 N.Y.S. 107, 120 Misc. 535, affirmed 204 N.Y.S. 903, 209 App.Div. 806.

(2) To show compliance with bequest.—In re Wanamaker's Estate, 167 A. 592, 312 Pa. 362.

98. Ala.—State ex rel. Carmichael v. Bibb, 173 So. 74.

99. Ala.—King v. Banks, 124 So. 871, 220 Ala. 274.

Pa.—In re Toner's Estate, 103 A. 541, 260 Pa. 49.

Question of fact

Maintenance of church and society in conformity with will making devise thereto constitutes matter of fact.—Jepperson v. Advent Christian Publication Soc., 142 A. 686, 83 N. H. 387, 59 A.L.R. 616.

Relief granted in particular cases

(1) Petition to vacate decree allowing testamentary trustee to remove charitable institution from

their bill will be dismissed,¹ and if no public interest appears, the relator cannot have the information retained as a simple bill in equity.² The court will make the proper orders to secure the just administration of the trust, whether the pleadings are formal or informal, or pray for the relief granted, or for different relief,³ and, where it is shown that the trustee has wasted, misemployed, or mismanaged the trust fund, the decree in an action against him should direct the specific performance of the trust, and not the return of the fund to the donor or his heirs.⁴ However, where there is no proof that the trustee is remiss in his duty, he should not be interfered with or harassed by court orders.⁵

Where property limited to a charitable use has been withheld by one charitable corporation from

another, and no injury to the property is shown, only nominal damages are recoverable.⁶

The judgment or decree must be full and complete,⁷ and must not be indefinite.⁸

§ 65. — Costs

Except as regulated by statute, in actions looking forward to the enforcement of the trust, the expenses of the suit are generally paid out of the trust estate.

Where statutes exist, the right to recover, and the liability for, costs are dependent thereon.⁹ In actions looking toward the enforcement of the trust, such as those for instructions or for construction of the trust instrument, etc., the expenses of the suit, including those of the defeated party, are generally paid out of the trust estate,¹⁰ but in

testator's farm was properly refused without hearing petitioner's testimony, in the absence of any provision in the will as to site.—*In re Toner's Estate*, 103 A. 541, 260 Pa. 49.

(2) Where denominational institute had passed out of existence and trustees had died long ago, court must assume trust under conveyance to denominational institute had lapsed.—*King v. Banks*, 124 So. 871, 220 Ala. 274.

(3) Where a home was given a gift over after application of income to maintenance of burial lots, its claim that part of corpus sufficient to carry out testator's wishes should be set aside, and excess principal or income awarded to it, was properly denied, without prejudice, where there was no showing that income might not be wholly used.—*In re Close's Estate*, 103 A. 322, 260 Pa. 269.

(4) Trustee who refused to make further income payments to church, the beneficiary, was held liable in suit for accounting as to principal and interest of trust.—*Woodside Presbyterian Church v. Burden*, 269 N.Y.S. 682, 240 App.Div. 43, appeal dismissed 191 N.E. 629, 264 N.Y. 690.

(5) In a suit to enforce a legacy, where an action was pending by a charitable corporation to recover its property sold on foreclosure, in view of the fact that, if it recovered its property, its charitable purpose would again become effective, and it would be entitled to receive the legacy for charitable purposes, but if it failed in the action, the object of the bequest could not be carried out, the bequest should be paid to the county treasurer, pending the determination of the action.—*In re Mills' Will*, 200 N.Y.S. 701, 121 Misc. 147.

(6) Where a trust was created on a condition that the proper public authorities should enter into a con-

tract with the trustees within a stated time to carry out the purpose of the trust, but nothing was done until such time had almost elapsed, the court in a suit to enforce the trust extended the time for the execution of the trust, discharged the trustees, and appointed new trustees with directions to carry out the purposes of the trust.—*Carlstrom v. Frackelton*, 263 Ill.App. 250.

1. Ill.—*Smith v. Thompson*, 266 Ill. App. 165.

2. Mass.—*Atty.-Gen. v. Salem*, 103 Mass. 138.

Mich.—*Atty.-Gen. v. Evart Booming Co.*, 34 Mich. 462.

Or.—*Wilson v. Shively*, 10 Or. 267.

3. N.J.—*Bliss v. Linden Cemetery Assoc.*, 87 A. 224, 81 N.J.Eq. 394.

4. R.I.—*City of Newport v. Sisson*, 155 A. 576, 51 R.I. 481.

11 C.J. p 370 note 3.

5. N.Y.—*Buell v. Gardner*, 149 N.Y. S. 803, 153 N.Y.S. 1108, 168 App. Div. 278.

6. N.Y.—*Brooklyn Church Soc. v. Brooklyn Free Kindergarten Soc.*, 152 N.Y.S. 41, motion denied 153 N.Y.S. 1107, 169 App.Div. 955.

11 C.J. p 370 note 6.

7. Conn.—*Bristol Baptist Church v. Connecticut Baptist Convention*, 120 A. 497, 98 Conn. 677.

Erroneous in form

Where land held in trust for the purpose of a site for a meeting house of a Baptist society was sold because of changed conditions, a judgment which failed to provide that the avails of the sale were to be used for the purchase of a site or the erection of a house of public worship, to be held on the same trust and for the same purposes, and subject to the same conditions and restrictions as was the land sold, was erroneous in form.—*Bristol Baptist Church v. Connecticut Baptist Convention*, *supra*.

8. Ill.—*Stowell v. Prentiss*, 154 N. E. 120, 323 Ill. 309, 50 A.L.R. 584.

9. Special attorney appointed by attorney general

Where a statute permits the appointment of assistants by the attorney general at annual salaries only, which shall be in lieu of all other salaries and fees, an allowance, out of funds in court, of fees to a special attorney appointed by the attorney general to intervene and represent the public interest in a suit between private litigants involving the ownership of the property included in a charitable trust, is prohibited.—*Wemme v. First Church of Christ, Scientist, of Portland*, 223 P. 250, 110 Or. 179, denying motion to recall mandate 219 P. 618, 110 Or. 179.

10. Or.—*Wemme v. First Church of Christ, Scientist, of Portland*, 237 P. 674, 676, 115 Or. 281, citing *Corpus Juris*.

Tenn.—*Vanderbilt University v. Mitchell*, 36 S.W.2d 83, 162 Tenn. 217.

11 C.J. p 370 note 13.

Costs of visitors

In proceeding to determine whether plan of closer affiliation of theological seminary with divinity school was consistent with purpose of foundation of seminary, where visitors held no funds and performed gratuitous duty imposed on them by founders, their costs, as between solicitor and client, were payable out of general funds of trustees of seminary.—*Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Academy in Andover*, 148 N.E. 900, 253 Mass. 256.

Heirs

In a suit to construe an instrument creating a charitable trust, the testator's heirs, who intervened as necessary parties to a full determination of the cause, doing nothing to hinder, delay, or obstruct the

those jurisdictions where the theory of apportionment of the expenses of litigation does not prevail, defendants have been held not entitled to recover their costs from such fund.¹¹ In an unsuccessful action to set aside and destroy a charitable trust, the defeated party has been held not entitled to costs to be paid by the trustees or out of the trust estate;¹² and a trustee, acting in good faith, should not be charged with the costs of a proceeding to determine which of two claimants was entitled to

the income of the trust fund.¹³

On the removal of the trustee of a charitable relief fund for fraud or malfeasance, he may be allowed expenses incurred with the approval of its board of control, but not commissions as trustee, or counsel fees, or other disbursements made in resisting such board's claim to the trust fund.¹⁴

Where the case presented by a relator is without merit, he is liable for the costs.¹⁵

VIII. MODIFICATION AND TERMINATION

§ 66. In General

Although the intention of the donor is controlling, the courts will readily attribute an intention to the donor that charitable gifts should be as permanent and perpetual as any human institution can be.

Every conveyance in the nature of a gift to a charitable use, once vested, can never cease during the period, perpetual or otherwise, for which it was intended to subsist,¹⁶ and as charities are established for objects of public, general, and lasting benefit, the courts will readily attribute an intention to the donor that they should be as permanent and perpetual as any human institution can be, whether so declared in terms or not.¹⁷ While a charitable gift for religious purposes may be made originally for a limited period or during the pleasure of the donor,¹⁸ the fact that the trust empowered the trus-

tees to select the beneficiaries is no indication whatever that the charity was limited to their lifetime.¹⁹

The courts will not declare charitable gifts to be forfeited in doubtful cases,²⁰ and, generally speaking, a charitable devise or bequest does not lapse or fail where there is a beneficiary in being at the time of the testator's death and there are no conditions subsequent or precedent;²¹ nor does a charitable trust fail where it is not repugnant to law or contrary to public policy and its purposes have not been accomplished.²² The duration of a charitable trust, evidenced by a written instrument, is usually governed by the donor's intention as expressed therein,²³ and the court will not order the termination of a charitable trust and the transfer of the assets to the beneficiary where to do so would de-

speedy and orderly disposition of the cause, were entitled to reasonable attorney's fees from the trust fund.—*City of St. Louis v. McAllister*, 257 S.W. 425, 302 Mo. 152.

Attorney's fees

An allowance for attorney's fees out of the fund in the hands of the court is dependent on the right of their client to such fees. If the client is not entitled to costs, including attorney's fees, no allowance can be made directly to the attorney.—*Wemme v. First Church of Christ, Scientist, of Portland*, 223 P. 250, 110 Or. 179, denying motion to recall mandate 219 P. 618, 110 Or. 179.

Amount allowed

Where, but for active labors of attorneys, principal object of a charitable trust would have been disregarded, and resources of decedent's estate, amounting to between four hundred thousand dollars and five hundred thousand dollars, were restored to original trust largely through their efforts, attorneys were entitled to fee of fifteen thousand dollars and one thousand dollars for expenses necessarily incurred.—*Wemme v. First Church of Christ, Scientist, of Portland*, 227 P. 277, 111 Or. 386.

11. N.H.—*Borchers v. Taylor*, 145 A. 666, 33 N.H. 564, 63 A.L.R. 874.

12. Ky.—*Catholic Men v. Coleman*, 92 S.W. 342, 122 Ky. 544.

Discretion of court

Where the allowance of costs rests in the discretion of the court, the granting or denial thereof will not be set aside in the absence of an abuse of such discretion.—*Thatcher v. Lewis*, 76 S.W.2d 677, 335 Mo. 1130.

13. Or.—*Hartman v. City of Pendleton*, 186 P. 572, 96 Or. 503, 8 A.L.R. 904, modified on other grounds 190 P. 339, 96 Or. 503.

14. N.Y.—*Walton v. Collins*, 56 N.Y.S. 1045, 38 App.Div. 624, affirmed 60 N.E. 1121, 167 N.Y. 538.

15. Mass.—*Atty.-Gen. v. Clark*, 45 N.E. 183, 167 Mass. 201—*Burbank v. Burbank*, 25 N.E. 427, 152 Mass. 254, 9 L.R.A. 748—*Atty.-Gen. v. Butler*, 123 Mass. 304.

16. N.J.—*Trustees of First Presbyterian Church of Town of Salem v. Wheeler*, 149 A. 589, 106 N.J.Eq. 8—*Cuthbert v. McNeill*, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495.

17. Mo.—*Lewis v. Brubaker*, 14 S.

W.2d 982, 322 Mo. 52—*Glaze v. Allen*, 213 S.W. 784.

11 C.J. p 370 note 17.

The term "perpetuity," as applied to charitable trusts, has retained its original significance, in that it means an inalienable and indestructible interest subject to unforeseen social changes or eventualities destroying the property, or rendering the enforcement of the trust impossible.—*Maxcy v. Oshkosh*, 128 N.W. 399, 1136, 144 Wis. 238, 31 L.R.A., N.S., 787.

18. Ala.—*Antones v. Eslava*, 9 Port. 527.

19. Ala.—*Woodroof v. Hundley*, 39 So. 907, 147 Ala. 287.

20. Pa.—*In re Jordan's Estate*, 165 A. 652, 310 Pa. 401.

21. U.S.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

22. Mass.—*McCoy v. Inhabitants of Town of Natick*, 129 N.E. 381, 237 Mass. 99.

11 C.J. p 371 note 32.

23. Conn.—*Bridgeport-City Trust Co. v. Bridgeport Hospital*, 179 A. 92, 120 Conn. 27.

Mass.—*Boston Safe Deposit & Trust Co. v. Stratton*, 156 N.E. 885, 259 Mass. 465.

feat the intention of the donor,²⁴ even at the request of both the trustee and the cestui que trust.²⁵ If the donor of a trust has expressed a general charitable intent, the trust must be continued within the limits of its general purpose and does not cease when a particular objective has been accomplished.²⁶ Where such is the evident intent of the donor, a bequest to a charitable corporation does not lapse because the corporation has discontinued part of its charity work,²⁷ or because of a change in the ownership or management thereof,²⁸ and, in the absence of controlling words or clear inference in a will, a devise or bequest to a state controlled institution of learning will not lapse by reason of a change of public policy as to coeducation,²⁹ nor will it lapse by the technical abolishment of the institution, where there is prompt reestablishment before action is taken by the heirs.³⁰ In the absence of an intention to the contrary expressed in the instru-

ment creating the trust,³¹ the consolidation,³² merger,³³ or union³⁴ of the beneficiary of the trust with another similar institution will not terminate a charitable trust. Although a charitable trust has been held to fail when the beneficiary ceases to exist,³⁵ it has also been held that a bequest expressing a general charitable intent will not fail on the bankruptcy of the beneficiary,³⁶ but that the situation is one calling for the exercise of the cy pres doctrine, as already considered in § 52.

It is not within the power of a state legislature to terminate a charitable trust in the absence of constitutional authorization;³⁷ neither can a trustee who has accepted such a trust defeat it by renunciation or abandonment,³⁸ and the donor cannot withdraw a gift to charity.³⁹ Also, in the absence of a reserved power, the donor and donees cannot alter or terminate a charitable trust.⁴⁰

24. Pa.—In re Unruh, 93 A. 1000, 248 Pa. 185.

25. Pa.—In re Unruh, supra.

26. Mo.—Thatcher v. Lewis, 76 S. W.2d 877, 385 Mo. 1130.

Adoption of public school system

(1) A gift for the education of poor children in a certain district is not defeated by the subsequent adoption by the legislature of the common school system, and the abandonment of the district schools.

Mo.—Crow v. Clay County, 95 S.W. 369, 196 Mo. 234.

N.J.—Green v. Blackwell, Ch., 35 A. 375.

(2) Under such circumstances, the trustees may resort to such other means as will relieve the necessities of poor children and make their education practicable.

Conn.—Birchard v. Scott, 39 Conn. 63.

N.J.—Green v. Blackwell, supra.

Ohio.—McIntire v. Zanesville Canal, etc., Co., 17 Ohio St. 352.

(3) At an early date country schools, under the voluntary system in Pennsylvania, were temporary in their object and formation, and hence were not charities so as to come within the rule that the courts will not let a charity fail for the non-user of those who have the management of it.—Kirk v. King, 3 Pa. 436.

27. Mo.—Soldiers' Orphans' Home v. Wolff, 10 Mo.App. 596.

28. Mich.—John Robinson Hospital v. Cross, 272 N.W. 724, 279 Mich. 407.

29. Fla.—Lewis v. Gaillard, 56 So. 281, 61 Fla. 819.

30. Fla.—Lewis v. Gaillard, supra.

31. Not "successors in office"

A devise to trustees of named church "and their successors in of-

fice" for use of church, lapsed on consolidation of such church with other church and creation of new organization, trustees of new organization not being "successors in office" of devisees.—Trustees of Presbyterian Church of Laporte, Ind. v. Chulip, 184 N.E. 686, 78 Ind.App. 698.—Trustees of Presbyterian Church of Laporte, Inc. v. Katsianis, 134 N.E. 684, 78 Ind.App. 406.

32. Pa.—In re McCully's Estate, 112 A. 159, 269 Pa. 122.

33. Conn.—Bridgeport-City Trust Co. v. Bridgeport Hospital, 179 A. 92, 120 Conn. 27.

Iowa.—Lupton v. Leander Clark College, 187 N.W. 496, 194 Iowa 1008.

Mass.—Reed v. Fogg, 143 N.E. 47, 248 Mass. 336.

Institution of learning

Where a will directed that a certain sum be held in trust, the income to be paid to a private school "so long as it continues to be an institution of learning," it was held that the trust was not terminated because the trustees gave over the entire control of the school to the school committee of the town wherein the school was located and retained control only of a few matters connected with the upkeep of the buildings and grounds, since the school continued to be an "institution of learning" as the testator intended.—Boston Safe Deposit & Trust Co. v. Stratton, 156 N.E. 885, 259 Mass. 465.

34. Conn.—Hartford Nat. Bank & Trust Co. v. Oak Bluffs First Baptist Church, 164 A. 910, 116 Conn. 347.

N.H.—Jepperson v. Advent Christian Publication Soc., 142 A. 686, 83 N.H. 387, 59 A.L.R. 616.

Reciprocal teaching agreement

A trust for the benefit of an edu-

cational academy was held not to have terminated under the will governing the trust merely because the academy entered into a reciprocal teaching agreement with another school.—In re Jordan's Estate, 165 A. 652, 310 Pa. 401.

35. N.C.—University of North Carolina v. City of High Point, 166 S.E. 511, 203 N.C. 558.

36. N.Y.—In re Walter's Estate, 269 N.Y.S. 400, 150 Misc. 512.

37. Mass.—In re Opinion of the Justices, 181 N.E. 31, 237 Mass. 613.

38. Mass.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

Pa.—In re Woolman School's Application, 13 Pa.Dist. & Co. 699, 11 C.J. p 371 note 21.

Acceptance or refusal of trust by trustee see supra § 28.

Municipal trustee

A charitable bequest to a city as trustee for the relief or prevention of poverty cannot be renounced or abandoned by the city, so as to defeat the charity, after it has accepted the trust.—Attorney General v. City of Lowell, 141 N.E. 45, 246 Mass. 312.

39. N.Y.—Montague v. Cooney, 263 N.Y.S. 346, 147 Misc. 125.

Pa.—In re Woolman School's Application, 13 Pa.Dist. & Co. 699, 11 C.J. p 371 note 21.

40. N.Y.—Authors Club v. Kirtland, 288 N.Y.S. 916, 248 App.Div. 82.

Or.—In re Kulka's Estate, 18 P.2d 1036, 1039, 142 Or. 104, quoting *Corpus Juris*.

11 C.J. p 371 note 22.

Evidence held to show that release by donee's officers was unauthorized; also, an executor has burden to establish that eleemosynary corpora-

Where a charity assumes a contractual obligation in accepting a gift, it cannot subsequently repudiate it over the opposition of the donor.⁴¹

The abandonment of a charitable use involves the elements of intent to abandon permanently, and the physical fact of nonuser; and the evidence to establish an abandonment thereof must be clear and conclusive.⁴²

Under influence, fraud, and mistake. A grant for charitable purposes may be set aside for undue influence, like other conveyances; but this will be done only when the donor has clearly been deceived or deprived of free agency.⁴³ Such a grant may be set aside for mistake as well as for fraud; but this does not enable such a charitable institution as an orphan asylum which has received an orphan gratuitously to revoke the charity on ascertaining that the orphan has a small pension from the government.⁴⁴

§ 67. Reverter

In the absence of a reservation of a right of re-

version, a charitable gift ordinarily does not revert to the donor or his heirs.

In the absence of an express provision for reverter,⁴⁵ a gift, grant, or conveyance of property for a charitable use ordinarily does not revert to the donor or his heirs,⁴⁶ and an implied condition against reverter is raised,⁴⁷ the absence of such a provision being evidence that the donor did not intend that the estate should revert while the carrying out of his general purpose is practicable.⁴⁸ So, if a perpetual trust is created for a particular charitable purpose, which has taken effect in the first instance, there is no reverter, regardless of a subsequent failure of the purpose thereof,⁴⁹ abandonment by nonuser,⁵⁰ or violation of the terms thereof,⁵¹ unless there is a limitation or condition to the contrary in the grant or conveyance.⁵² Likewise, in the absence of statute or an express provision to the contrary, the trust will not fail or the property revert because of the trustees' abandonment or abuse thereof,⁵³ or because some of the benefi-

tion named as legatee in will authorized corporate officers' release of legacy.—*In re Kulka's Estate*, supra.

Release is void if made by donee unsupported by a consideration, or if it is executed as a result of a misunderstanding, and the donee was not estopped to claim its release.—*In re Kulka's Estate*, supra.

Sinking fund

The beneficiaries of a testamentary charitable trust may not terminate a sinking fund provided for in the will, for the judicious management of the trust.—*Webb v. Webb*, 172 N. E. 730, 340 Ill. 407, 71 A.L.R. 404.

41. Pa.—*Alumnæ Ass'n of William Penn High School for Girls v. Trustees of University of Pennsylvania*, 159 A. 449, 306 Pa. 283.

Duration of service

Agreement for endowment of hospital bed was held to contemplate continuation of hospital service during entire existence of hospital and its successors.—*Alumnæ Ass'n of William Penn High School for Girls v. Trustees of University of Pennsylvania*, supra.

42. Ky.—*Carlisle County v. Norris*, 254 S.W. 1044, 1045, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris*. 11 C.J. p 372 notes 45, 46.

Delinquent tax proceedings

There is no such abandonment merely because a suit for the enforcement of a tax lien has been instituted against the property.—*Town of Franklin v. Gillespie*, 6 S.W.2d 323, 157 Tenn. 78.

43. U.S.—*Bowdoin College v. Merritt*, C.C.Cal., 75 F. 480, appeal dismissed 17 S.Ct. 996, 167 U.S. 745, 42 L.Ed. 1209.

Ala.—*Johnson v. Rogers*, 20 So. 929, 112 Ala. 576.

Ill.—*Shea v. Murphy*, 45 N.E. 1021, 164 Ill. 614, 56 Am.S.R. 215.

44. Ky.—*St. Joseph's Orphan Soc. v. Wolpert*, 80 Ky. 86.

45. N.Y.—*Simms v. Folts Mission Institute*, 276 N.Y.S. 145, 154 Misc. 384, affirmed 239 N.Y.S. 918, 248 App.Div. 668.

46. U.S.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

Fla.—*Montgomery v. Carlton*, 126 So. 135, 140, 97 Fla. 152, quoting *Corpus Juris*.

Ga.—*Heyward v. Hatfield*, 185 S.E. 519, 182 Ga. 373.

Ky.—*Carlisle County v. Norris*, 254 S.W. 1044, 1045, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris* extensively, and declaring the rules as there set forth to be well stated.

Mo.—*Glaze v. Allen*, 213 S.W. 784, citing *Corpus Juris*.

N.J.—*Hewitt v. Camden County*, 146 A. 881, 7 N.J.Misc. 528.

N.Y.—*Montague v. Cooney*, 263 N. Y.S. 346, 147 Misc. 125. 11 C.J. p 371 note 37.

Resulting trust

(1) Where there has been a valid gift to charity without reservation of reversion, there is no resulting trust to the heirs of the donor.

N.J.—*Cuthbert v. McNeill*, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495.

N.Y.—*Montague v. Cooney*, 236 N. Y.S. 346, 147 Misc. 125.

Or.—*Wemme v. Noyes*, 295 P. 465, 134 Or. 590—*Wemme v. Noyes*, 294 P. 602, 134 Or. 590.

11 C.J. p 371 note 38.

(2) Where, however, the gift to charity is not valid, as for uncertainty, the heirs or next of kin take by way of resulting trust.—*Olliffe v. Wells*, 130 Mass. 221.

47. N.J.—*Cuthbert v. McNeill*, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495—*Hewitt v. Camden County*, 146 A. 881, 7 N. J.Misc. 528.

11 C.J. p 372 note 52.

48. N.H.—*Winslow v. Stark*, 97 A. 979, 78 N.H. 135.

49. N.J.—*Cuthbert v. McNeill*, 142 A. 667, 103 N.J.Eq. 184, affirmed 146 A. 881, 104 N.J.Eq. 495.

Performance impracticable

Reverter did not arise in favor of heirs at law of donor in charitable trust, because performance had become impracticable by changing conditions.—*Cuthbert v. McNeill*, supra.

50. U.S.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

51. Mo.—*Lewis v. Brubaker*, 14 S. W.2d 982, 322 Mo. 52.

N.Y.—*In re Fletcher's Estate*, 2 N. Y.S.2d 771, 166 Misc. 486.

No reverter on improper sale of property granted to charity.—*Glaze v. Allen*, 213 S.W. 784.

52. Ky.—*Carlisle County v. Norris*, 254 S.W. 1044, 200 Ky. 338, 38 A. L.R. 41, quoting *Corpus Juris*.

Mo.—*Lewis v. Brubaker*, 14 S.W.2d 982.

Pa.—*In re Trustees' Petition*, 12 Pa. Dist. & Co. 538.

11 C.J. p 372 note 41.

53. U.S.—*Kibbe v. City of Rochester*, D.C.N.Y., 57 F.2d 542.

Conn.—*Bristol Baptist Church v.*

aries have ceased to exist.⁵⁴ If the estate is misapplied, the fitting remedy is not its forfeiture to the grantor or his heirs, but a proceeding on the equity side of the court to enforce the trust.⁵⁵

On the other hand, the fund will revert to the donor's estate or to his heirs at law even in the absence of an express provision therefor, if it is clear that he had no general charitable purpose in mind but instead contemplated the carrying out of one or more particular purposes which are impossible of fulfillment,⁵⁶ as where the beneficiaries have failed to accept it,⁵⁷ or where the particular institution he intended to aid no longer exists.⁵⁸ Accordingly, in gifts or bequests for specific rather than general charitable purposes,⁵⁹ or in charitable bequests to corporations,⁶⁰ there may be a possibility of reverter to the heirs of the donor. However,

where there is no reservation of a power of revocation or provision for reverter, the trust may be extinguished so as to revert to the donor or his heirs only when there has been an entire failure of object or purpose,⁶¹ there being no reverter when the gift can be applied to a similar charity,⁶² under the doctrine of cy pres, considered above in § 52. If the fund provided by the donor is insufficient to carry out his purpose, and enough is not secured from other sources, his gift has been held to revert to him;⁶³ but this holding is contrary to the general rule that a charitable gift will not be allowed to fail merely on account of the inadequacy of the fund provided, as the fund may be applied under the doctrine of cy pres, discussed above in § 52.

A condition in a charitable trust providing for

Connecticut Baptist Convention, 120 A. 497, 98 Conn. 677.

Fla.—Montgomery v. Carlton, 126 So. 135, 140, 99 Fla. 152, quoting *Corpus Juris*.

Ga.—Bolick v. Cox, 90 S.E. 54, 145 Ga. 888.

Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425—People v. Greer College, 135 N.E. 80, 302 Ill. 538—Northwestern University v. Wesley Memorial Hospital, 125 N.E. 13, 290 Ill. 205.

Ky.—Carlisle County v. Norris, 254 S.W. 1044, 1045, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris*—National Finance Corporation v. Robinson, 237 S.W. 418, 193 Ky. 649.

Mo.—Lewis v. Brubaker, 14 S.W.2d 982, 322 Mo. 52.

Ohio.—Gearhart v. Richardson, 142 N.E. 890, 109 Ohio St. 418.

Pa.—In re Toner's Estate, 103 A. 541, 360 Pa. 49.

W.Va.—Staats v. McCuskey, 126 S.E. 337, 93 W.Va. 26.

11 C.J. p 371 note 39.

Purchasers from grantor

Where grantors of property in trust for religious purposes parted with their title for a valuable consideration, held that, on violation of trustees of terms of trust, property will not be declared to revert to purchasers from grantors, since grantors, by parting with their title, divested themselves of all right to reversion of title, and purchasers whose rights are purely derivative can claim no greater right.—Lewis v. Brubaker, 14 S.W.2d 982, 322 Mo. 52.

Delay in effecting sale

A bequest directing an executor to sell designated lands and expend proceeds for masses does not fail because of long delay by the executor in effecting the sale, although the land has greatly increased in value.

—Wilmes v. Tiernay, 174 N.W. 271, 187 Iowa 390.

54. Ky.—Gill's Ex'r v. Woman's Club of Louisville, 266 S.W. 378, 205 Ky. 731.

55. Fla.—Montgomery v. Carlton, 126 So. 135, 140, 99 Fla. 152, quoting *Corpus Juris*.

Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425.

Ky.—Carlisle County v. Norris, 254 S.W. 1044, 1045, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris*.

N.J.—Hewitt v. Camden County, 146 A. 881, 7 N.J.Misc. 528.

R.I.—City of Newport v. Sisson, 155 A. 576, 51 R.I. 481.
11 C.J. p 371 note 40.

56. U.S.—Board of Missions of M. E. Church, South, v. Mayo, C.C. A. Ky., 81 F.2d 449—President and Fellows of Harvard College v. Jewett, C.C.A. Ohio, 11 F.2d 119.

Ala.—Dunn v. Ellisor, 141 So. 700, 225 Ala. 15.

Me.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195.

Md.—Golding v. Gaither, 77 A. 333, 113 Md. 187.

Ohio.—Allen v. City of Bellefontaine, 191 N.E. 896, 47 Ohio App. 359.

Tenn.—Garner v. Home Bank & Trust Co., 107 S.W.2d 223, 171 Tenn. 652.

11 C.J. p 372 note 42.

Power to change conveyance

Where deed provided that on donee's failure to conduct educational institution, title should pass to common school district.—Board of power to donors or survivor to change conveyance, donee's abandonment of educational institution after surviving donor had conveyed absolute title to donee resulted in reversion to surviving donor and not to common school district, but reserved Missions of M. E. Church, South, v. Mayo, C.C.A. Ky., 81 F.2d 449.

57. Ky.—Carlisle County v. Norris, 254 S.W. 1044, 200 Ky. 338, 38 A.L.R. 41.

Nonuser

Where one transferred a tract of land to trustees to be used as a public burying ground for the use of the public, and funds were deposited with the trustees for the improvement and beautification of the grounds, and the cemetery was open to the public for more than ten years and not a single body had been interred therein, the creator of the trust was entitled to have it set aside and annulled, and the funds returned, it being against public policy to allow the lands and funds to remain unemployed.—Carlisle County v. Norris, *supra*.

58. Ala.—King v. Banks, 124 So. 871, 220 Ala. 274.

Me.—Snow v. President and Trustees of Bowdoin College, 175 A. 268, 133 Me. 195.

59. U.S.—President and Fellows of Harvard College v. Jewett, C.C.A. Ohio, 11 F.2d 119.

60. Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425—Bishop v. Hungate, 223 Ill.App. 351.

61. Ky.—Carlisle County v. Norris, 254 S.W. 1044, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris*.

Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 682, 335 Mo. 1130, quoting *Corpus Juris*.

11 C.J. p 372 note 42.

Purposes of trust not shown to have failed

Mo.—Thatcher v. Lewis, 76 S.W.2d 677, 335 Mo. 1130.

62. Ky.—Carlisle County v. Norris, 254 S.W. 1044, 200 Ky. 338, 38 A.L.R. 41, quoting *Corpus Juris*.

11 C.J. p 372 note 43.

63. Wis.—Webster v. Morris, 28 N.W. 353, 66 Wis. 366, 57 Am.R. 278.

forfeiture and reversion on its breach is binding on a grantee who accepts the trust,⁶⁴ and where there is a provision for forfeiture⁶⁵ and reverter⁶⁶ the trustees' legal title endures only as long as does the use that it was created to protect.⁶⁷ The mere fact that an honest effort has been made to comply with the condition will not excuse a failure to do so.⁶⁸ Of course, the prescribed condition must be violated before there can be a reverter.⁶⁹ Where such a condition is expressed the court will give it a reasonable construction⁷⁰ and will not permit the heirs to profit by their conduct in causing a breach

thereof.⁷¹ However, the court will not infer such a condition where it is not expressed or necessarily implied;⁷² neither will the court infer that, where there is a condition coupled with a reverter, such reverter is to be construed as coupled with another and different condition in the same instrument.⁷³

If a statute so provides, in case the object of a testamentary charitable trust ceases to exist, the property reverts to the heirs at law and next of kin of the testator.⁷⁴

IX. CHARITABLE CORPORATIONS AND ASSOCIATIONS

§ 68. Incorporation and Organization

Charities or their managing officers may be incorporated under statutes conferring the requisite authority and on compliance with their provisions.

Incorporation of a charity, on the theory that the instrument setting it up so requires, may not be permitted in the absence of language fairly showing such intent.⁷⁵ Under appropriate statutory authority, a voluntary association may be incorporated as a

charitable corporation,⁷⁶ but a statute authorizing the incorporation of charitable societies obviously does not, however, authorize the incorporation of a noncharitable society.⁷⁷

Where the donor of a gift to a charitable association, provided it is incorporated, does not specify the time within which incorporation must be completed nor impose a forfeiture of the gift for failure to incorporate within a specified time, and no

64. Conn.—First Congregational Soc. of Bridgeport v. City of Bridgeport, 121 A. 77, 99 Conn. 22.

65. Wis.—Evenson's Will, 155 N.W. 145, 161 Wis. 627.

66. Ill.—Green v. Old People's Home, 109 N.E. 701, 269 Ill. 134, reversing 190 Ill.App. 152.

67. Pa.—Henderson v. Hunter, 59 Pa. 335.
Wis.—Strong v. Doty, 32 Wis. 381.

68. N.Y.—Simms v. Folts Mission Institute, 276 N.Y.S. 145, 154 Misc. 384, affirmed 289 N.Y.S. 918, 248 App.Div. 668.

69. Iowa.—Butterfield v. Wilton Academy, 38 N.W. 390, 74 Iowa 515.

70. Ill.—Peek v. Woman's Home Missionary Soc. of M. E. Church, 127 N.E. 760, 293 Ill. 337.

Pro rata distribution of dividends among common school children

Where donor established a trust fund of certain stock, dividends of which were to be prorated annually among all common school children in county, and trustee paid to county superintendent each year from such fund two cents per pupil which went to pay teachers of county, this method of handling income from trust fund was not an intentional diversion, and hence there was no reverter under provision of trust that, should dividends be intentionally diverted, stock should be returned to donor or his legal representative.—Trustees Stewart Common School

Fund v. Lewis, 28 S.W.2d 27, 234 Ky. 286.

71. Ill.—Peek v. Woman's Home Missionary Soc. of M. E. Church, 127 N.E. 760, 293 Ill. 337.

72. R.I.—City of Newport v. Sisson, 155 A. 576, 51 R.I. 481.
11 C.J. p 372 note 50.

Excluded by implication

Where a deed conveying property in trust for church purposes provided that in case of a breach of the trust the convention of the church denomination might enter and take possession, the declaration of such condition excluded all others, including any condition of reverter for the benefit of donor's heirs.—Bristol Baptist Church v. Connecticut Baptist Convention, 120 A. 497, 98 Conn. 677.

73. R.I.—Brice v. All Saints' Memorial Chapel, 76 A. 774, 31 R.I. 183.

74. Pa.—In re McCully's Estate, 112 A. 159, 269 Pa. 122.

Dissolution of beneficiary immaterial

Under Act July 7, 1885, P.L. 259, providing that gift for charitable purpose, if "void for uncertainty, or the object of the trust be not ascertainable, or has ceased to exist or be an unlawful perpetuity," shall go to the deceased's heirs and next of kin, it is the object of the trust, and not the beneficiary, that must cease to exist before the next of kin can claim the property, so that a gift to a church was not terminated by its dissolution and union with an-

other of the same denomination pursuing the same work.—In re McCully's Estate, supra.

75. Pa.—In re Curran Foundation Charter, 146 A. 908, 297 Pa. 272.

Appeal from decree of incorporation

In the absence of any statutory right of appeal in such cases an appeal from decree incorporating a charity created by will is limited to questions relating to trial court's discretion.—In re Curran Foundation Charter, supra.

Application for legislation

Will requiring application for legislation to give a charitable institution legal existence was held to refer to franchises under existing legislation, where special legislation for corporations was prohibited.—In re Curran Foundation Charter, supra.

Provision for directors

Will providing for directors to supervise expenditure of income of "foundation" was held to refer to foundation as principal of trust estate and did not authorize incorporation of foundation.—In re Curran Foundation Charter, supra.

76. Ala.—Spring Park Ass'n v. Rosedale Park Amusement Co., 114 So. 43, 216 Ala. 549.

Colo.—Tomay v. Crist, 226 P. 156, 75 Colo. 437.

77. N.Y.—People v. Gunn, 96 N.Y. 317—People v. Nelson, 3 Lans. 394, 60 Barb. 159, reversed on other grounds 46 N.Y. 477.
11 C.J. p 372 note 56.

injury prejudicial to other interested parties results from delay in filing a certificate of incorporation, such delay may not preclude acquisition of such gift by the association.⁷⁸

Incorporation of managing officers. Under appropriate statutory provisions, the managing officers of a charity may be incorporated.⁷⁹ A gift to trustees, with the injunction that they may constitute themselves a body corporate for the purpose of carrying into effect the charitable purposes of the donor by means of a perpetual trust, requires that existing trustees of a charity be organized into a body corporate.⁸⁰ Incorporation of the managing officers of a charity may not, however, affect either their powers or responsibilities.⁸¹

Compliance with statute. In accordance with general rules, see the C.J.S. title Corporations § 45, also 14 C.J. p 119 note 63, substantial compliance with statutes authorizing the incorporation of charitable organizations is sufficient to bring the corpo-

ration into legal existence,⁸² and a de facto corporation exists where there has been a bona fide attempt to incorporate under their provisions followed by user or exercise of corporate powers.⁸³ In order to constitute a charitable corporation de jure, however, all statutory requirements must be complied with,⁸⁴ unless they are directory only.⁸⁵ Informalities or irregularities in the incorporation of a charitable corporation may be waived or cured by a subsequent legislative recognition of the existence of the corporation.⁸⁶

Membership. Membership in a charitable corporation may not be extinguished by its affiliation with other charitable organizations.⁸⁷

Receivership. Where a receiver is appointed to continue the operation of a charitable enterprise and to preserve its going value, he is authorized to perform such acts as will preserve the good will of the charity.⁸⁸ In accordance with general rules stated in the C.J.S. title Receivers § 287, also 53

78. N.J.—Young Men's Christian Ass'n of Matawan v. Appleby, 127 A. 25, 97 N.J.Eq. 95, affirmed 130 A. 921, 98 N.J.Eq. 704.

Delay for eleven years

N.J.—Young Men's Christian Ass'n of Matawan v. Appleby, supra.

79. Mass.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

Incorporating statute not unconstitutional

Mass.—City of Boston v. Curley, supra.

80. D.C.—Graff v. Wallace, 32 F.2d 960, 59 App.D.C. 64, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.

81. Mass.—City of Boston v. Curley, 177 N.E. 557, 560, 276 Mass. 549.

Corporation no shield

"This is one of the instances where the corporation, although a separate entity for all purposes to facilitate the administration and execution of the trust, does not afford a shield to the managers in any of their trust responsibilities to the court, or to the representatives of public authority rightly acting toward the enforcement of the trust. The court will look through the corporate form in order to hold the individual members to the responsibilities and duties resting on trustees in their natural capabilities."—City of Boston v. Curley, supra.

82. Colo.—Tomay v. Crist, 226 P. 156, 75 Colo. 437.

Affidavit

In the absence of any requirement in the statute, an affidavit to be filed in the office of a county clerk need not specify the object or purposes of a charitable corporation, and a

requirement that such affidavit shall be subscribed by the secretary of the organization is sufficiently complied with by the signature of one shown by the affidavit to be such secretary, without any further designation.—Tomay v. Crist, supra.

Designation of beneficiaries

It is unnecessary, in the incorporation of a charitable society, that the ultimate recipients of the bounty of the society be precisely defined in the certificate of incorporation.—Smith v. Havens Relief Fund Soc., 90 N.Y.S. 168, 44 Misc. 594, affirmed 103 N.Y.S. 770, 118 App.Div. 678, affirmed 83 N.E. 1182, 190 N.Y. 557.

Objects and purposes

(1) Under a statute requiring certificates of incorporation for proposed charitable corporations be approved by a justice of a specified court, it is held to be his duty to determine whether the objects and purposes of such corporations are in accord with public policy. A proposed corporation for purposes of facilitating entry of German Jewish children into United States, aiding them, preventing them from becoming public charges, and placing them in foster homes or institutions, has proper objects consistent with public policy. That the certificate states that one of the purposes of the proposed corporation is to give proper bonds or undertakings will not warrant the withholding of such approval where the giving of such instruments are necessary to the accomplishing of the main charitable purpose of the proposed corporation.—In re German Jewish Children's Aid, 272 N.Y.S. 540, 151 Misc. 834.

(2) Where the approval of a specified state board is indorsed on the

original certificate of incorporation as required by the incorporating statute, that a certificate of extension of corporate purposes, not specified in such statute, is not accompanied by the approval of such board does not justify a refusal to file such certificate.—No. 17 Beekman Place v. Flynn, 291 N.Y.S. 524, 249 App.Div. 688.

83. Ark.—Watts v. Commercial Printing Co., 7 S.W.2d 24, 177 Ark. 525.

84. Ark.—Watts v. Commercial Printing Co., supra.
11 C.J. p 372 note 57.

85. Md.—Baltzell v. Baltimore Church Home, etc., 73 A. 151, 110 Md. 244.

11 C.J. p 372 note 58.

86. N.Y.—Smith v. Havens Relief Fund Soc., 90 N.Y.S. 168, 44 Misc. 594, affirmed 103 N.Y.S. 770, 118 App.Div. 678, affirmed 83 N.E. 1182, 190 N.Y. 559.

87. N.Y.—In re Mt. Sinai Hospital, 219 N.Y.S. 505, 128 Misc. 476, affirmed 228 N.Y.S. 855, 223 App.Div. 336, and affirmed 164 N.E. 871, 250 N.Y. 103, 62 A.L.R. 564.

Nonpayment of dues

Membership corporation's by-law authorizing trustees to erase from membership roll members in arrears in paying dues, requires affirmative action by trustees.—In re Mt. Sinai Hospital, supra.

88. Minn.—Peterson v. Northwestern Baptist Hospital, 260 N.W. 512, 194 Minn. 399.

Payment of annuities

During temporary receivership of solvent charitable hospital corporation, receiving substantial part of

C.J. p 246 note 79, the claim of a donor of trust property to a charitable corporation may, as against general creditors of the corporation, subsequently in receivership, be entitled to priority.⁸⁹

Consolidation. Under a statute so providing there may be a consolidation of charitable corporations, and it is no objection to consolidation that the corporations involved pursue different methods to accomplish their charitable objects, where the statute only requires that such organizations be charitable; nor is it any objection to consolidation that certain donations have been given to the respective organizations with certain conditions of reverter which will be lost to the united body on consolidation.⁹⁰

Exclusive right to name. An exclusive right to the name under which it does its business may be acquired by a charitable association.⁹¹

§ 69. Regulation

The rights and privileges of charities have been held to be subject to regulation by state legislature.

Subject to constitutional provisions prohibiting states from impairing the obligation of contracts, see the C.J.S. title Constitutional Law § 274, also 12 C.J. p 987 notes 35, 36, the chartered rights and privileges of charities may be amended and altered by state legislatures.⁹² Control, supervision and visitation by persons or bodies other than court and trustee, including the visitatorial power of the state, as regards charities has been considered previously in this title, see supra § 79.

§ 70. Public Aid

In the absence of constitutional prohibition, and under appropriate legislative authority, public aid may be extended toward the support of charitable enterprises.

working capital by donations on promises to pay annuities, payment of annuities by receiver to donors was held to be proper to preserve good will of corporation.—*Peterson v. Northwestern Baptist Hospital*, supra.

89. Ark.—*Word v. Sparks*, 82 S.W. 2d 5, 191 Ark. 893.

Bonds converted into heating plant

Where college, as a charitable corporation, wrongfully sold bonds, which were to be added to endowment fund only on death of donor and wife, and payment to them by college of an annuity, and proceeds of bonds were invested in heating plant which could not be removed, and college thereafter became insolvent, surviving wife of donor was held to be entitled to lien on all trust funds in hands of receiver of

college to satisfy her claim for amount of bonds and accrued interest.—*Word v. Sparks*, supra.

90. Ohio.—*Dunham v. Kauffman*, 10 Ohio N.P., N.S., 49.

Statute held constitutional

Ohio.—*Dunham v. Kauffman*, supra.

91. Cal.—*Hooper v. Stone*, 202 P. 485, 54 Cal.App. 668.

92. S.C.—*Epworth Orphanage v. Wilson*, 193 S.E. 644.

93. N.Y.—*People v. Fitch*, 47 N.E. 983, 154 N.Y. 14, 38 L.R.A. 591—*People v. Brooklyn*, 46 N.E. 852, 152 N.Y. 399, affirming 42 N.Y.S. 657, 11 App.Div. 114—*White v. Inebriates' Home*, 35 N.E. 1092, 141 N.Y. 123—*Shepherd's Fold v. New York*, 96 N.Y. 137.

94. Mass.—*City of Boston v. Curley*, 177 N.E. 557, 276 Mass. 549.

In the absence of any constitutional prohibition, and under appropriate legislative authorization for the appropriation or expenditure of public money in aid of charitable enterprises, see the C.J.S. titles Counties § 236, also 15 C.J. p 587 note 31, Municipal Corporations § 1841, also 44 C.J. p 1115 notes 70, 71, and States § 133, also 59 C.J. p 201 note 67, local authorities may lawfully raise money by local taxation and pay the same over to local charitable corporations, for the purpose of carrying out designated charities through the instrumentality of private corporations.⁹³

§ 71. Officers and Agents

- a. Selection, appointment, supervision, and removal
- b. Authority, rights, duties, and liabilities

a. Selection, Appointment, Supervision, and Removal

The selection and appointment of officers and agents of a charity are determined by the intent of the donor, although such officers or agents are accountable to the court and subject to removal by it or by an appropriate state body.

As in the case of trustees, see supra §§ 24–26, it is the intent of the donor that, in the first instance, determines who shall be selected or appointed as the managing officers of the charity set up by him, and where changed conditions, not foreseen or provided against by the donor, renders the selection of some of such officers, as directed by the donor, impossible, their selection is to be determined by the courts.⁹⁴ On the other hand, the intrusion of a court into the affairs of officers in holding an election has been held to be improper and to render such election invalid.⁹⁵ The officers of a charita-

Appointment by mayor

Statute incorporating managers of public charitable fund, ostensibly making the corporation municipal board or department, was held ineffective to bring managers within mayor's appointive power under a city charter, providing that all heads of departments and members of municipal boards shall be appointed by the mayor.—*City of Boston v. Curley*, supra.

95. Colo.—*Bailey v. People*, 246 P. 205, 79 Colo. 386.

Estoppel of participating officers

Trustees of semicharitable society were not estopped to question legality of annual election by participating therein after protest.—*Bailey v. People*, supra.

Previously elected officers

Officers elected in election held

ble organization are, however, accountable to the court and, after hearing, subject to removal by the court,⁹⁶ and may also be subject to removal by an appropriate state body.⁹⁷

b. Authority, Rights, Duties, and Liabilities

Ordinary strict rules concerning the authority of fiduciaries apply to officers and agents of charitable organizations.

The officers and agents of a charity are bound by the ordinary strict rules concerning the authority of a fiduciary,⁹⁸ and persons dealing with them must, at their peril, take notice of the powers granted the corporation by its articles of incorporation.⁹⁹ It may not, however, be improper for an officer of a charity to deal with it in a manner which happens to be of financial advantage to himself, provided the charity is not subjected to any expense by reason of the transaction.¹

The officers and agents of charitable institutions may be individually liable for injury resulting from the acts or conduct of such officers and agents,² and particularly as regards an injury which results

from their misfeasance as distinguished from non-feasance.³ By statute in New York the liability of directors of charitable corporations is the same in kind as that of stockholders, under the various laws governing corporations, and differs only in degree;⁴ and a court of law is primarily the proper forum for the enforcement of this liability, a resort to equity being permissible only where the remedy at law is inadequate or will lead to inequitable results.⁵

Compensation. The officers of a charity are properly entitled to such compensation as is provided for by the donor.⁶ On the other hand, in the absence of any declared intent on the part of a testator that an agent of a charitable association shall share in a bequest to the association, he may not be entitled to compensation from such bequest, notwithstanding the existence of a contract between the association and such agent promising to pay him a certain portion of money secured by his personal solicitations.⁷ This is particularly true in the absence of any showing that the testator ever knew of the terms of the contract between the agent and the

prior to annual election by agreement of parties in proceeding to try title to office of trustee in semicharitable society were held to be legal officers thereof till next legal annual election.—*Bailey v. People*, *supra*.

96. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19. 11 C.J. p 373 note 63.

Removal provided for by donor

Where the donor has provided that trustees of charitable trust are removable by a designated body for good cause shown, trustees have been held to be removable by such body for good cause shown only after hearing by court of competent jurisdiction.—*Samuel and Jessie Kenney Presbyterian Home v. State*, *supra*.

97. Ky.—*Willis v. Scott*, 142 S.W. 1012, 146 Ky. 547. 11 C.J. p 373 note 64.

98. Iowa.—*Jones v. American Home Finding Ass'n*, 182 N.W. 191, 191 Iowa 211. 11 C.J. p 373 note 65.

Commissions out of charitable fund

The officers of a charitable association have no authority to contract to pay commissions on charitable funds of the association, whereby private persons other than the proper beneficiaries of the charity would reap benefits of bequests for charity.—*Jones v. American Home Finding Ass'n*, *supra*.

99. Neb.—*Horton v. Tabitha Home*, 145 N.W. 1023, 95 Neb. 491, 51 L.R.A., N.S., 161, Ann.Cas.1915D 1139.

1. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

Writing fire insurance

That one of trustees of public charitable trust, personally engaged in insurance business, wrote part of fire insurance on home for aged was not improper.—*Samuel and Jessie Kenney Presbyterian Home v. State*, *supra*.

Selling mortgages

That one of trustees of charitable trust sold mortgages to corporation administering such trust was held not improper, where his commissions on transactions were not paid by corporation, and security was appraised and passed on by other trustees.—*Samuel and Jessie Kenney Presbyterian Home v. State*, *supra*.

2. Mass.—*Pease v. Parsons*, 173 N.E. 406, 273 Mass. 111. Tenn.—*Gamble v. Vanderbilt University*, 200 S.W. 510, 138 Tenn. 616, L.R.A.1918C 875. 11 C.J. p 374 note 77.

3. Mass.—*Pease v. Parsons*, 173 N.E. 406, 273 Mass. 111. Tenn.—*Gamble v. Vanderbilt University*, 200 S.W. 510, 138 Tenn. 616, L.R.A.1918C 875.

4. N.Y.—*Marsh v. Kaye*, 61 N.E. 177, 168 N.Y. 196, affirming 60 N.Y.S. 439, 44 App.Div. 68.

5. N.Y.—*Marsh v. Kaye*, *supra*.

6. Wash.—*Samuel and Jessie Kenney Presbyterian Home v. State*, 24 P.2d 403, 174 Wash. 19.

Mode of determining

Where the donor and creator of a

charity has provided that the trustees shall be paid a specified percentage of the annual income after deduction of lawful expenses, amounts expended for maintenance of home for aged and its members were held not deductible from gross income of charitable trust estate before determination of net income for computation of trustees' compensation, although home had been inventoried and appraised as part of estate; nor was depreciation in appraised value of the home an "expense" chargeable to gross income in determination of net income for computation of trustees' compensation.—*Samuel and Jessie Kenney Presbyterian Home v. State*, *supra*.

7. It would be contrary to public policy to permit a diversion to an agent of a bequest which has been made to a charity.—*Jones v. American Home Finding Ass'n*, 182 N.W. 191, 191 Iowa 211.

Personal solicitations not shown

In an agent's action for a commission on money willed to the association there was held to be no evidence to show that the bequest was secured by and through his personal solicitations.—*Jones v. American Home Finding Ass'n*, *supra*.

Subscriptions contemplated

A contract by which an agent was to receive a commission for securing money, contemplated moneys collected and enforceable subscriptions, but not money willed to the association.—*Jones v. American Home Finding Ass'n*, *supra*.

association.⁸ Where a charitable institution is subject to legislation providing for its officers, a person appointed to an office not provided for by law is not entitled to any compensation;⁹ and a statute providing that no trustee of a charitable corporation shall be entitled to compensation except under a special employment by the board of trustees prohibits a trustee from receiving compensation for services in the rendition of which the trustees have simply acquiesced.¹⁰

Delegation of power. The officers of a charitable organization may delegate their powers involving nothing more than incidental and administrative details.¹¹ Those powers which involve the performance of a personal duty on the part of an officer cannot, however, be delegated.¹²

Treasurer. The treasurer of a charitable corporation has only the powers expressly conferred upon him by the directors.¹³

City treasurer. A city treasurer who is under the by-laws of a charity ex officio the custodian of its funds, and to whom the treasurer of the charity has transmitted power of attorney to cancel certificates of deposit and to collect the amount due thereon, is bound by the vote of the managing officers of the charity to convert into cash certain certificates

held by the charity and to reinvest the proceeds as directed.¹⁴

§ 72. Powers

Charitable corporations have only such powers as are expressly or impliedly conferred by their charters.

As in the case of other corporations, see the C.J.S. title Corporations § 935, also 14 C.J. p 246 note 69, a charitable corporation has no powers except such as are expressly or impliedly conferred by its charter and amendments thereto,¹⁵ although in construing the charter, to determine what powers are possessed by a particular charitable corporation, restrictive words are to be read in conjunction with language stating wider corporate purposes, in order to uphold the particular power which is claimed.¹⁶ Under the doctrine of implied powers, see the C.J.S. title Corporations § 945, also 14 C.J. p 252 note 11, which has been expressly held to be applicable to charitable corporations,¹⁷ charitable corporations may, as will be observed hereafter in this section, exercise such powers as are incidental to the corporate existence of such corporations, as well as powers implied from those expressly granted. For example, in a proper case a charitable corporation has power to enter into, and bind itself by, contract,¹⁸ and, when acting as the agent of an-

8. Iowa.—Jones v. American Home Finding Ass'n, 182 N.W. 191, 191 Iowa 211.

9. N.Y.—Lake v. Stoddard, 109 N. Y.S. 523, 125 App.Div. 305.

10. Mich.—Henry v. Michigan Sanitarium, etc., Assoc., 110 N.W. 523, 147 Mich. 142.

11 C.J. p 373 note 76.

11. Mass.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

Withdrawal and reinvestment of funds

That treasurer of corporation managing public charitable fund transmitted powers of attorney authorizing city treasurer, pursuant to vote of corporation, to withdraw and reinvest fund, was not improper delegation of power within the text rule.—City of Boston v. Curley, supra.

12. Iowa.—City of Boston v. Curley, supra.

Selection of prospective investments

Status of manager of public charitable fund involved performance of personal duty, which, as regards the selection of prospective investments, could not be delegated to committee or agent.—City of Boston v. Curley, supra.

13. Mass.—Boston Y. M. C. A. v. Royal Indemnity Co., 194 N.E. 125, 289 Mass. 391.

14. Mass.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

15. Ill.—Alton Mfg. Co. v. Garrett Biblical Inst., 90 N.E. 704, 243 Ill. 298.

Vt.—Brattleboro Retreat v. Town of Brattleboro, 173 A. 209, 106 Vt. 228.

Powers and purposes distinguishable

A distinction is to be drawn between the purposes of a charitable corporation and its powers.—Free Baptists' Gen. Conference v. Berkey, 105 P. 411, 156 Cal. 466.

16. Mass.—Springfield Y. M. C. A. v. Board of Assessors of City of Springfield, 187 N.E. 104, 284 Mass. 1.

Maxim inapplicable

"The maxim 'expressio unius est exclusio alterius' is not here applicable."—Springfield Y. M. C. A. v. Board of Assessors of City of Springfield, supra.

Power to provide dormitory

A charitable organization having for its wider corporate purposes the ministering to the spiritual, mental, moral, social, and physical improvement of young men and promoting kindly intercourse between them, was held to have power to provide a dormitory, notwithstanding charter provisions expressly authorizing the organization to provide "places for reading rooms, libraries, and social

and religious meetings."—Springfield Y. M. C. A. v. Board of Assessors of City of Springfield, supra.

17. N.Y.—In re German Jewish Children's Aid, 272 N.Y.S. 540, 151 Misc. 834.

18. Ga.—Brooke v. Kennedy, 158 S. E. 4, 172 Ga. 461.

N.Y.—In re German Jewish Children's Aid, 272 N.Y.S. 540, 151 Misc. 834—Roche v. St. John's Riverside Hospital, 160 N.Y.S. 401, 96 Misc. 289, affirmed 161 N.Y.S. 1143, 176 App.Div. 885.

Care of child

A hospital operated as a charity has power to contract with an infant and his parents to care for the child and safeguard him while his mother is undergoing treatment.—Roche v. St. John's Riverside Hospital supra.

Subscription contracts

A charitable corporation has power to accept subscription contracts to provide money for carrying out the charitable purposes of the enterprise.—Brooke v. Kennedy, 158 S.E. 4, 172 Ga. 461.

Undertakings for Jewish children from Germany

When necessary to accomplish the main purpose of a charitable corporation to provide an asylum for Jewish children from Germany, the corporation has power to enter into undertakings as a guaranty that such

other, a charitable corporation may bind its principal by contract.¹⁹

A charitable corporation may, likewise, take and receive such gifts and bequests as are within the purposes of the corporation as described in its charter or articles of association.²⁰ This is particularly true as regards gifts of money to be applied to the corporation's charitable purposes,²¹ and donations of real estate to be used for any of the expressed purposes of the corporation.²² That the incorporators stated in the charter of the corporation that it had neither capital stock nor assets does not militate against the existence of the corporation's power to receive a donation of real estate; nor is it any reason to deny to a charitable corporation the power to accept title in perpetuity to real estate that the corporation's charter is for a specified number of years, since the corporation, if it has not disposed of its interest prior to the time the existing charter expires, may obtain a new charter, and, if the corporation has failed so to do, it is time enough for the heirs of the donor to claim a reversion of the property.²³ It is also within the power of a char-

itable corporation to convey its real property,²⁴ particularly where it becomes necessary to do so in order to perpetuate the charitable purposes of the corporation.²⁵ Nevertheless, it has been observed that the power of a charitable corporation to take and to sell real estate is purely incidental in the prosecution of its main purpose.²⁶

Under the general implied power of corporations generally to borrow money, when necessary to carry out the purposes of their organization, see the C.J. S. title Corporations § 1144, also 14 a C.J. p 605 note 37, charitable corporations may borrow.²⁷ Under the provisions of a particular statute creating a charitable corporation with specified powers subject to such orders as a court of equity should make, it was held that the execution of a mortgage to secure a loan, when approved by an equity court was within the power of the corporation.²⁸

As in the case of trustees of charitable trusts generally, see supra § 47, a charitable corporation or association holding property or funds in trust for a charitable use is without power to divert them from the purpose for which they were given.²⁹

children shall not become public charges.—In re German Jewish Children's Aid, 272 N.Y.S. 540, 151 Misc. 834.

19. U.S.—St. Louis Union Trust Co. v. Oregon Annual Conference of M. E. Church, D.C.Or., 14 F.Supp. 35.

Liability for debt

(1) Charitable hospital corporation, under control of church conference, was held to be the latter's agent in acquiring realty, constructing buildings thereon, and negotiating loans for such purposes, so as to render it liable for debt incurred.—St. Louis Union Trust Co. v. Oregon Annual Conference of M. E. Church, supra.

(2) That the minutes of the principal's and of the charitable agent's boards did not show specifically their concurrence in the action of the agent in contracting a debt was held not to affect the power of such agent to bind such principal.—St. Louis Union Trust Co. v. Oregon Annual Conference of M. E. Church, supra.

Liability on bonds

The principal cannot be rendered liable on a charitable agent's bonds which do not bear the name of the principal nor the actual signatures of its officials purporting to bind it.—St. Louis Union Trust Co. v. Oregon Annual Conference of M. E. Church, supra.

20. Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709.

La.—Sisters of Charity of Incarnate

Word v. Emery, 81 So. 99, 144 La. 614.

Pa.—In re Garrison's Estate, 17 Pa. Dist. & Co. 272.

11 C.J. p 374 note 82.

Property held in trust

Whether a gift to a charitable corporation for any of its corporate purposes be in form a gift outright or in trust, the corporation holds it on a trust.—Dwyer v. Leonard, 124 A. 28, 100 Conn. 513.

21. Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709.

Pa.—In re Garrison's Estate, 17 Pa. Dist. & Co. 272.

Incapacity from inactivity

Mere inactivity of a charitable corporation in relation to the objects of its incorporation may not incapacitate it from accepting a gift of money for the purpose of carrying out the charitable purposes of the corporation.—In re Garrison's Estate, supra.

Red Cross

The American National Red Cross, incorporated by act of congress, has authority to accept bequests for its charitable corporate purposes and may through the agency, of its local chapters defend in the courts its right to funds which are given for such purposes.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709.

22. La.—Sisters of Charity of Incarnate Word v. Emery, 81 So. 99, 144 La. 614.

23. La.—Sisters of Charity of In-

caruate Word v. Emery, 81 So. 99, 144 La. 614.

24. Ark.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, 4 S.W.2d 933, 176 Ark. 946.

Under statute authorizing conveyance

Pa.—Lopes v. School Dist. of Borough of Greensburg, 112 A. 155, 268 Pa. 356, error dismissed School Dist. of Borough of Greensburg v. Lopes, 44 S.Ct. 4, 263 U.S. 674, 68 L.Ed. 501.

25. Ark.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, 4 S.W.2d 933, 176 Ark. 946.

26. Cal.—Free Baptists' Gen. Conference v. Berkey, 105 P. 411, 156 Cal. 466.

27. Ill.—Alton Mfg. Co. v. Garrett Biblical Inst., 90 N.E. 704, 243 Ill. 298.

Mass.—Hayward v. Pilgrim Soc., 21 Pick. 270.

Tenn.—Moss v. Harpeth Academy, 7 Heisk. 283.

28. N.C.—City of Raleigh v. Trustees of Rex Hospital, 174 S.E. 278, 206 N.C. 485.

For new building and equipment

N.C.—City of Raleigh v. Trustees of Rex Hospital, supra.

29. Iowa.—Jones v. American Home Finding Ass'n, 182 N.W. 191, 191 Iowa 211.

Pa.—In re Lawson's Estate, 107 A. 376, 264 Pa. 77.

11 C.J. p 374 note 83.

Thus, a charitable corporation has no power to divert its charitable trust funds toward a private individual, who is not an object of charity, notwithstanding services performed by him in procuring gifts to the corporation;³⁰ but the use which a charitable corporation may make of any part of its funds, as long as it does not violate the terms of the instrument under which it has received it, cannot render such use illegal, if the use is a charitable one.³¹ For example, when not restricted by the terms of a gift or the purposes for which a charitable corporation was organized, it may apply its funds toward the acquisition of real as well as personal property.³² So, a charitable institution has power to expend its funds for charitable purposes outside the state;³³ and when organized to establish and maintain a school in a town for the education of children residing therein, it may receive pupils who are not domiciled inhabitants of the town.³⁴ In an early case, it was held that in a proper case a charitable corporation may apply for an amendment to its charter authorizing the corporation to hold and appropriate its surplus funds to a purpose, other than that for which the charity was originally established.³⁵

Unincorporated associations. An unincorporated charitable association may, in the absence of any statute forbidding, acquire and hold real and personal property by purchase, gift, bequest, or other-

wise;³⁶ and where the trustees of a charitable trust, or the charitable society of which they are trustees, incorporate, the title to the property held by them in trust passes to, and vests in, the corporation.³⁷ Incorporation of a charitable association does not preclude acceptance by the corporation of a gift to such association, provided the incorporation has not wrought a change contrary to provisions of such gift.³⁸

Exercise of power. Under an applicable statute of incorporation expressly providing that a majority of the whole number of trustees shall be necessary to constitute a quorum, action by the majority of the trustees of a charitable corporation is necessary to the valid exercise of corporate powers.³⁹ Where, in order to provide means which will permit the trustees of a charity to execute their trust with less difficulty, they are by special act incorporated, in exercising fundamental, as distinguished from administrative, powers of such corporation, action by a majority of the members constituting such corporation is required to constitute a valid corporate act.⁴⁰

Representation by officers and agents. The authority of the officers of a charitable corporation to bind it is never presumed and must be specifically proved.⁴¹ Like other corporations, see the C.J.S. title Corporations § 1014, also 14 a C.J. p 373 note 88, a charitable corporation may ratify and become

30. Iowa.—Jones v. American Home Finding Ass'n, 182 N.W. 191, 191 Iowa 211.

Commissions for procuring gifts

Iowa.—Jones v. American Home Finding Ass'n, supra.

31. Conn.—Lyme High School Ass'n v. Alling, 154 A. 439, 113 Conn. 200. 11 C.J. p 374 note 89.

32. Conn.—Lyme High School Ass'n v. Alling, supra.

Land or buildings

Educational corporation could acquire lands or buildings, within scope of its purposes, with moneys received under will, where not limited in uses thereof.—Lyme High School Ass'n v. Alling, supra.

33. Mass.—Balch v. Shaw, 54 N.E. 490, 174 Mass. 144.

34. Conn.—Hewitt v. Wheeler School, 72 A. 935, 82 Conn. 188. 11 C.J. p 374 note 91.

35. S.C.—Atty.-Gen. v. Ministers Relief Soc., 31 S.C.Eq. 604.

36. Utah.—Mansfield v. Neff, 134 P. 1160, 43 Utah 258.

Capacity of unincorporated voluntary association to be donee or trustee of charitable gift or trust see supra § 34.

37. Ga.—Howell v. New Hope Benev. Soc. No. 1, 84 S.E. 117, 143 Ga. 38. N.Y.—Sailors' Snug Harbor v. Carmody, 144 N.Y.S. 24, 158 App.Div. 738, reversing 137 N.Y.S. 968, 77 Misc. 494, and affirming 105 N.E. 543, 211 N.Y. 286.

38. Mass.—Curtis v. First Church in Charlestown, 188 N.E. 631, 285 Mass. 73.

Gift to religious body

Testamentary gift to the First Church in Charlestown, conditioned on continuance of church and its maintenance of public worship as separate organization, was held to be properly received by a particular church, notwithstanding the named church, which had been voluntary religious association, became incorporated and conveyed all its property to corporation, and that corporation absorbed another church and religious services were held in edifice formerly owned by such other church.—Curtis v. First Church in Charlestown, supra.

39. Pa.—Meadville Theological School v. Hempstead, 138 A. 747, 290 Pa. 222.

Contract for sale of land

Purchaser properly refused compliance with contract by eleemosyn-

ary corporation to sell land under resolution at meeting attended by only five of thirty trustees.—Meadville Theological School v. Hempstead, supra.

40. Mass.—City of Boston v. Curley, 177 N.E. 557, 276 Mass. 549.

Making investment

Vote, by corporation managing public charitable fund, empowering city treasurer to reinvest funds in securities in which savings banks' funds may lawfully be invested was held to be too indefinite.—City of Boston v. Curley, supra.

41. N.Y.—Brown v. Actors' Fund of America, 171 N.Y.S. 682, 103 Misc. 578, affirmed 179 N.Y.S. 912, 190 App.Div. 908.

Powers of treasurer of a charitable corporation to bind it may be more strictly construed than those of treasurers of manufacturing and trading corporations. For example, the opening of a bank account in the name of a charitable corporation, with the knowledge of its treasurer but without its authority and when not subsequently ratified by the corporation, may not be binding on it.—Boston Y. M. C. A. v. Royal Indemnity Co., 194 N.E. 125, 289 Mass. 391.

bound by unauthorized acts of its officers and agents which are within the scope of its corporate powers and which might have been previously authorized by it.⁴²

The officers of a charitable corporation may have power to convey its property particularly where such conveyance is necessary to perpetuate the charitable purposes of the corporation.⁴³ The officers of a charitable association may likewise, bind it by a lease of its real property in order to obtain income to be used in carrying out the charitable objects of the association.⁴⁴ On the other hand, a treasurer of a charitable corporation not engaged in commercial business has no implied authority to bind it by the transfer or sale of securities standing in its name.⁴⁵

Express authority is necessary to enable individual officers or agents of a charitable corporation to bind the corporation by borrowing money⁴⁶ or executing notes;⁴⁷ and the retention by the corporation of property acquired in a transaction of which the note in question was not a part does not constitute a ratification or estoppel on the part of the corporation.⁴⁸ However, where the trustees have power to borrow money for proper corporate purposes, and to execute notes therefor, they may appoint one of their number as agent of the corporation for that purpose, and may expressly or impliedly clothe him with authority to borrow money and to give notes.⁴⁹

The trustees, elected to manage the affairs of a corporation organized for charitable purposes, cannot render its property subject to a mechanic's lien without first having obtained an order of the proper court.⁵⁰

§ 73. Duties and Liabilities

The duties and liabilities of charities are discussed hereafter in detail, as regards contracts, in § 74, and as regards torts, in § 75.

§ 74. — Liability on Contract

Charities may be liable for breach of contract.

If a charitable institution is guilty of a breach of contract, recovery may be had against it.⁵¹ No recovery, based on a debt incurred by one having no interest in the trust, may, however, be had against a charitable trust fund.⁵²

Notwithstanding the general rule exempting charitable hospitals from liability for injury to patients resulting from the tortious acts of physicians, nurses, or other persons in the employment of such hospitals, see *infra* § 75, it has been held that a charitable hospital may be liable for the breach of an express contract to furnish a patient, skilled and careful treatment.⁵³ On the other hand, it has been held that where there is no liability for tort, no liability is assumed by a contract purporting to bind the hospital to render careful treatment.⁵⁴

42. Ark.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, 4 S.W.2d 933, 176 Ark. 946.

Inaction of members of an incorporated charitable association has been held to work a ratification of a sale of the corporation's real property by its officers.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, *supra*.

43. Ark.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, *supra*.

Hospital about to close

Where a charitable hospital corporation had come to the end of its resources and the enterprise was about to fail through lack of support, with the buildings closed and deteriorating in value and debts unpaid, a conveyance of the corporation's property to an association, which agreed to reopen, operate, and maintain the hospital as a charitable institution, was held to be within the authority of the officers of the corporation.—Hospital & Benevolent Ass'n v. Arkansas Baptist State Convention, *supra*.

44. Ky.—National Finance Corpora-

tion v. Robinson, 237 S.W. 418, 193 Ky. 649.

45. N.Y.—Jennie Clarkson Home for Children v. Missouri, etc., R. Co., 74 N.E. 571, 182 N.Y. 47, 70 L.R.A. 787, affirming 87 N.Y.S. 1138, 92 App.Div. 617, affirming 83 N.Y.S. 913, 41 Misc. 214.

46. Ill.—Alton Mfg. Co. v. Garrett Biblical Inst., 90 N.E. 704, 243 Ill. 298.

11 C.J. p 373 note 69.

47. Mass.—People's Nat. Bank v. New England Home for Deaf Mutes, etc., 95 N.E. 77, 209 Mass. 48.

11 C.J. p 373 note 70.

48. Mass.—People's Nat. Bank v. New England Home for Deaf Mutes, etc., *supra*.

11 C.J. p 373 note 71.

49. Ill.—Alton Mfg. Co. v. Garrett Biblical Inst., 90 N.E. 704, 243 Ill. 298.

50. Neb.—Horton v. Tabitha Home, 145 N.W. 1023, 95 Neb. 491, 51 L. R.A., N.S., 161, Ann.Cas.1915D 1139.

51. Ill.—Armstrong v. Wesley Hospital, 170 Ill.App. 81.

N.Y.—Ward v. St. Vincent's Hospital, 57 N.Y.S. 784, 39 App.Div. 624.

Tenn.—Hall-Moody Inst. v. Copass, 69 S.W. 327, 108 Tenn. 582.

52. Mass.—Boston Five Cents Sav. Bank v. Trustees of Methodist Religious Soc. in Boston, 4 N.E. 2d 315.

Creditor of trustee entitled to reimbursement

Rule that creditor of trustee in certain instances entitled to reimbursement may go directly against trust estate is held to be inapplicable where creditor seeks to reach public charitable trust in hands of trustees appointed by court, in order to pay debt incurred by one who had no interest in such trust.—Boston Five Cents Sav. Bank v. Trustees of Methodist Religious Soc. in Boston, *supra*.

53. N.Y.—Roche v. St. John's Riverside Hospital, 160 N.Y.S. 401, 96 Misc. 289, affirmed 161 N.Y.S. 1143, 176 App.Div. 885.

11 C.J. p 378 note 23.

54. Kan.—Davin v. Kansas Medical Missionary & Benevolent Ass'n, 172 P. 1002, 103 Kan. 48.

Mass.—Roosen v. Peter Bent Brigham Hospital, 126 N.E. 392, 397, 235 Mass. 66, 14 A.L.R. 563.

"The allegation of an oral con-

Construction of contract. Doubts and uncertainties, in written contracts between a charity and a beneficiary, when prepared by the charity, are to be construed most strongly against the charity.⁵⁵

Liability for benefits. Notwithstanding a charitable institution lacks capacity under its charter to enter into a contract to pay for benefits received, the institution may on equitable principles be required to pay for such benefits.⁵⁶

§ 75. — Liability for Torts

- a. In general
- b. Hospitals

a. In General

There is much divergence in the authorities as to

tract . . . adds no element of liability to those which would exist otherwise. There can be no liability in contract . . . if none exists in tort."—Roosen v. Peter Bent Brigham Hospital, *supra*.

55. Ill.—Evangelical Lutheran St. Stephan's Congregation v. Bishop, 213 Ill.App. 137.

Return of beneficiary's property

Contract for admission to an old people's charitable home, under which applicant was to pay a certain sum in cash and to turn over all of her estate to the home, was construed under the text rule as requiring a return of estate transferred, where applicant died before expiration of one year.—Evangelical Lutheran St. Stephan's Congregation v. Bishop, *supra*.

56. Neb.—Horton v. Tabitha Home, 169 N.W. 434, 102 Neb. 677.—Horton v. Tabitha Home, 169 N.W. 2, 102 Neb. 677.

Funds raised for benefit

Where a charitable institution provided for the raising of a fund for the payment of the value of such benefits, the court will order the application of any such funds so raised to the payment of the cost of any benefits received.—Horton v. Tabitha Home, 169 N.W. 434, 102 Neb. 677.—Horton v. Tabitha Home, 169 N.W. 2, 102 Neb. 677.

57. Conn.—Cohen v. General Hospital Soc. of Connecticut, 154 A. 435, 113 Conn. 188.

Mo.—Eads v. Young Women's Christian Ass'n, 29 S.W.2d 701, 325 Mo. 577.

Ohio.—Lakeside Hospital v. Kovar, 2 N.E.2d 857, 859, 131 Ohio St. 333, quoting *Corpus Juris*—Rudy v. Lakeside Hospital, 155 N.E. 126, 115 Ohio St. 539, quoting *Corpus Juris*.

S.C.—Vermillion v. Woman's College

of Due West, 38 S.E. 648, 104 S.C. 197.

11 C.J. p 374 note 94.

"Almost hopelessly tangled mass"

"It has been said that 'the cases on this subject present an almost hopelessly tangled mass of reason and unreason such as is not often encountered in the law.'"—Cohen v. General Hospital Soc. of Connecticut, 154 A. 435, 437, 113 Conn. 188.

Diversity in conclusions and reasons

"The question is one which has received much judicial consideration, and the conclusions reached, as well as the reasons assigned therefor by the courts in various jurisdictions, show great diversity of judicial opinion."—Eads v. Young Women's Christian Ass'n, 29 S.W.2d 701, 704, 325 Mo. 577.

Liability of reformatory association for torts see the C.J.S. title Reformatories §§ 12, 13, also 53 C.J. page 1060 note 52—page 1061 note 64.

58. Ky.—Emery v. Jewish Hospital Ass'n, 236 S.W. 577, 193 Ky. 400.

Mass.—Foley v. Wesson Memorial Hospital, 141 N.E. 113, 246 Mass. 363.—Roosen v. Peter Bent Brigham Hospital, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

Pa.—Betts v. Young Men's Christian Ass'n of Erie, 83 Pa.Super. 545.—Enders v. Dauphin County Poor Directors, 44 Pa.Co. 643.

S.C.—Vermillion v. Woman's College of Due West, 38 S.E. 649, 650, 104 S.C. 197.

11 C.J. p 374 note 95.

Criticism of rule answered

"This rule does not put such charities above the law, for their conduct is subject to the supervision of the court of equity; nor does it deny an injured person a remedy for his wrong. It is merely an exception to the rule of respondeat superior, which is itself based on reasons of

whether a charitable institution may be held liable for its torts, and in those jurisdictions in which such a liability is recognized its imposition in a particular case may depend on the relation to the charity of the person injured and on the nature of the act out of which the injury arises.

The authorities on the subject of liability of charities for the negligence of agents or employees are extremely divergent.⁵⁷

Some of the cases absolutely deny the liability of a charitable institution, in any event, to pay damages for injuries arising from the negligence or other tort of its servants or agents,⁵⁸ and while there exists authority to the effect that the trust fund theory of exemption, which is stated and considered in the course of this section, does not require that charitable organizations shall be absolutely immune,⁵⁹

public policy. The injured person has his remedy against the actual wrongdoer. It is said, however, that he may be and often is financially irresponsible. But the answer is that the law does not undertake to provide a solvent defendant for every wrong done. There are many cases of wrongful injury not compensated, because the wrongdoer is insolvent. The head of a family is liable for the torts of his servants; but you cannot take his homestead and break up his family to satisfy a judgment against him, either for his own or for his servant's torts. Public policy says it is better for the individual to suffer the injury uncompensated than for the state to suffer the evil consequences of having the homes and families of its citizens destroyed. The state is likewise most deeply interested in the preservation of public charities. Questions of public policy must be determined upon consideration of what on the whole will best promote the general welfare."—Vermillion v. Woman's College of Due West, *supra*.

Exemption not subject to waiver

A public charitable corporation cannot waive its exemption from liability in tort and hence does not waive such exemption by its failure to plead the exemption prior to the entry of a default judgment against it.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 224 Ill.App. 367, reversed on other grounds 140 N.E. 836, 309 Ill. 147.

59. Tenn.—Love v. Nashville Agricultural and Normal Institute, 243 S.W. 304, 309, 146 Tenn. 550, 23 A.L.R. 837.

Analogy to individual liability

"It is fundamental that an individual in doing a charitable act is responsible for his conduct which inflicts injury upon others, notwith-

and there is other authority to the effect that the actual diversion of the institution's trust funds is the essential factor to be considered,⁶⁰ it is usually held that logical consistency requires that charitable institutions be regarded as absolutely exempt where the trust fund theory has been adopted.⁶¹

Another line of cases, in total dissatisfaction with the rules, exempting a charitable institution from tort liability, and their various reasons, have repudiated such rules altogether and hold those bodies as much subject as others to the doctrine of respondeat superior.⁶²

A third line of authority takes the view that there is no general exemption from tort liability in favor of charitable institutions, as such,⁶³ although,

notwithstanding this view, it is held that in the absence of negligence on the part of a charitable institution in selecting persons to perform nonadministrative functions, it is not liable for injuries resulting from their negligence in the performance of such functions.⁶⁴

In order that exemption from liability for its torts shall be available to a charitable institution, as such, it is essential that, when sued, it plead and prove facts entitling it to such exemption.⁶⁵

Grounds for exemption. Rules for exempting, either totally or to a limited extent, charitable institutions from liability for torts are based generally, either expressly or inferentially, on public policy.⁶⁶ Another ground of exemption known as the "trust

standing the benevolent purpose of his act . . . there would seem to be no reason at all for exempting him from liability where he sets apart a fund and places it in the hands of trustees to administer."—*Love v. Nashville Agricultural and Normal Institute*, supra.

60. Colo.—*St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon*, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

Judgment and execution

(1) It has been held that the trust fund rule does not preclude the recovery of a judgment against a charitable institution based on the tort of its agents or employees but prohibits the execution of such judgment from the trust funds of the institution.—*St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon*, supra.

(2) But where it appears that the satisfaction of a judgment against a charitable institution would deplete its trust funds, it has been held that an action to recover such judgment cannot be maintained.—*Brown v. St. Luke's Hospital Ass'n*, 274 P. 740, 85 Colo. 167.

61. Mass.—*Foley v. Wesson Memorial Hospital*, 141 N.E. 113, 246 Mass. 336—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

S.C.—*Vermillion v. Woman's College of Due West*, 88 S.E. 649, 104 S.C. 197.

62. La.—*Rome v. London & Lancashire Indemnity Co. of America*, App., 169 So. 132.

Minn.—*Geiger v. Simpson Methodist Episcopal Church of Minneapolis*, 219 N.W. 463, 464, 174 Minn. 389, 62 A.L.R. 716, citing *Corpus Juris*. 11 C.J. p 375 note 96.

Reasons for rule

"It is a trite saying that charity begins at home. . . . Men and

corporations alike are required to be just before being charitable. We do not think it would be good public policy to relieve them from liability for torts or negligence. Where innocent persons suffer through their fault, they should not be exempted. That rule, in the long run, will tend to increased efficiency and benefit them and the public, as well as persons so injured. It is almost contradictory to hold that an institution organized to dispense charity shall be charitable and extend aid to others, but shall not compensate or aid those injured by it in carrying on its activities."—*Geiger v. Simpson Methodist Episcopal Church*, Minn., 219 N.W. 463, 465.

63. N.Y.—*Gollob v. Congregation Ohel Moïshe Chevra Tehilim*, 196 N.Y.S. 517, 119 Misc. 346.

Ohio.—*Sisters of Charity of Cincinnati v. Duvelius*, 173 N.E. 737, 123 Ohio St. 52, affirming *Duvelius v. Sisters of Charity of Cincinnati*, 174 N.E. 256, 37 Ohio App. 171.

64. U.S.—*Higgins v. Pratt Institute*, C.C.A.N.Y., 45 F.2d 698.

N.Y.—*Hamburger v. Cornell University*, 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955, affirming 199 N.Y.S. 369, 204 App.Div. 664—*Stearns v. Association of Bar of City of New York*, 276 N.Y.S. 390, 393, 154 Misc. 71.

"Question is not one of personnel or title but rather one of function."—*Stearns v. Association of Bar of City of New York*, supra.

Professors and instructors

Charitable education institutions have been held to be exempt from liability for injuries resulting from the negligence of professors and instructors under the rule stated in the text.

U.S.—*Higgins v. Pratt Institute*, C.C.A.N.Y., 45 F.2d 698.

N.Y.—*Hamburger v. Cornell University*, 148 N.E. 539, 240 N.Y. 328,

42 A.L.R. 955, affirming 199 N.Y.S. 369, 204 App.Div. 664.

65. Cal.—*Lewis v. Young Men's Christian Ass'n*, 273 P. 580, 206 Cal. 115.

Tex.—*Barnes v. Providence Sanitarium*, Civ.App., 229 S.W. 538, dismissed for want of jurisdiction.

66. U.S.—*Bodenheimer v. Confederate Memorial Ass'n*, C.C.A.Va., 68 F.2d 507, affirming, D.C., 5 F.Supp. 526, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A.Va., 31 F.2d 869.

Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Conn.—*Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646.

Kan.—*Davin v. Kansas Medical Missionary & Benevolent Ass'n*, 172 P. 1002, 103 Kan. 48.

Ky.—*Emery v. Jewish Hospital Ass'n*, 236 S.W. 577, 193 Ky. 400.

Mass.—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

N.J.—*Kolb v. Monmouth Memorial Hospital*, 182 A. 822, 116 N.J.Law 118—*Boekkel v. Orange Memorial Hospital*, 158 A. 832, 108 N.J.Law 453, affirmed 166 A. 146, 110 N.J.Law 509—*D'Amato v. Orange Memorial Hospital*, 127 A. 340, 101 N.J.Law 61—*Daniels v. Rahway Hospital*, 160 A. 644, 10 N.J.Misc. 585.

Ohio.—*Lakeside Hospital v. Kovar*, 2 N.E.2d 857, 131 Ohio St. 333.

S.C.—*Vermillion v. Woman's College of Due West*, 88 S.E. 649, 104 S.C. 197.

Va.—*Weston's Adm'x v. Hospital of St. Vincent of Paul*, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

W.Va.—*Roberts v. Ohio Valley General Hospital*, 127 S.E. 318, 98 W.Va. 476, 42 A.L.R. 968.

11 C.J. p 374 note 95, p 375 note 97.

Another statement of rule

"Principle is that, in organized so-

fund theory,"⁶⁷ is that trust funds created for charitable purposes should not be diverted therefrom to pay damages arising from torts of servants.⁶⁸ A third ground of exemption, known as that of "implied waiver,"⁶⁹ proceeds on the theory that, where one accepts the benefit of a public charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, at least where the benefactor has used due care in the selection of those servants.⁷⁰ All three of these grounds have been held to be based on sound logic by cases not expressly adopting any one, nor all of them.⁷¹ Where the exemption of a charitable institution as regards injuries sustained by a recipient of the charity could have been based on more than one of the foregoing grounds, a judicial declaration of the precise ground

on which nonliability was based has been denied.⁷² There are cases wherein the trust fund doctrine has been criticized,⁷³ and in that line of decisions which exempts charitable institutions from liability for negligence of persons engaged to perform nonadministrative functions, both the waiver doctrine⁷⁴ and the trust fund doctrine⁷⁵ have apparently been discarded, the courts in such cases taking the view that in analogy to the general rule which exempts a contractee from liability for injuries to third persons resulting from the negligence of independent contractors, see the C.J.S. title Master and Servant § 584, also 39 C.J. p 1324 note 11, and the C.J.S. title Negligence § 92, also 45 C.J. p 880 note 60, a charitable institution ought not to be liable for the torts of persons while performing the duties of a nonadministrative agent of such institution.⁷⁶

ciet, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity."—*Vermillion v. Woman's College of Due West*, 88 S.E. 649, 650, 104 S.C. 197.

"Rule of total exemption is, perhaps, without exception, based upon grounds of public policy."—*Vermillion v. Woman's College of Due West*, supra.

67. *Ariz.*—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 123, 45 Ariz. 507.

Md.—Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 100 A. 301, 303, 130 Md. 265, L.R.A. 1917D 967.

68. *Colo.*—St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

Ga.—Butler v. Berry School, 109 S. E. 544, 27 Ca.App. 560.

Kan.—Davin v. Kansas Medical Missionary & Benevolent Ass'n, 172 P. 1002, 103 Kan. 48.

La.—Bougon v. Volunteers of America, App. 151 So. 797.

Md.—Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 100 A. 301, 130 Md. 265, L.R.A.1917D 967.

Mass.—Beverly Hospital v. Early, 197 N.E. 641, 100 A.L.R. 1338—*Kidd v. Massachusetts Homeopathic Hospital*, 130 N.E. 55, 237 Mass. 500—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

Mo.—Eads v. Young Women's Christian Ass'n, 29 S.W.2d 701, 325 Mo. 577—*Nicholas v. Evangelical Deaconess Home and Hospital*, 219 S. W. 643, 281 Mo. 182.

Or.—O'Neill v. Odd Fellows Home of Oregon, 174 P. 148, 89 Or. 382.

Pa.—Enders v. Dauphin County Poor Directors, 44 Pa.Co. 643.

Tenn.—McLeod v. St. Thomas Hospital, 95 S.W.2d 917, 170 Tenn. 423

—*Lincoln Memorial University v. Sutton*, 43 S.W.2d 195, 163 Tenn. 298—*Love v. Nashville Agricultural and Normal Institute*, 243 S. W. 304, 146 Tenn. 550, 23 A.L.R. 837—*Knox Co. Tuberculosis Sanitarium v. Moss*, 5 Tenn.App. 589.

11 C.J. p 376 note 6.

"Idea is that tolerance of such liabilities might eventuate in the destruction of the charity and discourage donors to the detriment of the public welfare."—*Lincoln Memorial University v. Sutton*, 43 S.W.2d 195, 163 Tenn. 298.

69. *Ariz.*—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 123, 45 Ariz. 507.

70. *Cal.*—Bardinelli v. Church of all Nations, Methodist Episcopal, App. 73 P.2d 1264—*England v. Hospital of the Good Samaritan*, 61 P.2d 48, 16 Cal.App.2d 640—*Stonaker v. Big Sisters Hospital*, 2 P.2d 520, 116 Cal.App. 375.

Va.—Weston's Adm'x v. Hospital of St. Vincent of Paul, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

11 C.J. p 376 note 8.

71. *Ky.*—Averback v. Y. M. C. A. of Covington, 61 S.W.2d 1066, 250 Ky. 34—*Williams' Adm'x v. Church Home for Females and Infirmary for Sick*, 3 S.W.2d 753, 223 Ky. 355.

72. *Cal.*—Shane v. Hospital of the Good Samaritan, 37 P.2d 1066, 2 Cal.App.2d 334.

73. *Minn.*—Geiger v. Simpson Methodist-Episcopal Church, 219 N.W. 463, 174 Minn. 389.

More specifically
(1) In opposition to this doctrine

it has been pointed out that the same principle, logically extended, would exempt such bodies from liability for any tort of a servant, whereas, at least in some jurisdictions, there are various torts for which all employers are held responsible, even though they are engaged in public charity.—*Tucker v. Mobile Infirmary Assoc.*, 68 So. 4, 191 Ala. 572, L.R.A.1915D 1167—11 C.J. p 376 note 7.

(2) In a case, declaring charitable institutions to be liable for torts in the same manner as other corporations and individuals, it was said that the trust fund theory "has been so weakened and limited by the decisions that it is not likely to hereafter have practical application or importance." — *Geiger v. Simpson Methodist-Episcopal Church*, 219 N. W. 463, 466, 174 Minn. 389.

74. *N.Y.* — *Hamburger v. Cornell University*, 148 N.E. 539, 543, 240 N.Y. 328, 42 A.L.R. 955, affirming 199 N.Y.S. 369, 204 App.Div. 664—*Phillips v. Buffalo General Hospital*, 146 N.E. 199, 239 N.Y. 189—*Mills v. Society of New York Hospital*, 274 N.Y.S. 233, 242 App.Div. 245, affirmed 1 N.E.2d 346, 270 N. Y. 594—*Stearns v. Association of Bar of City of New York*, 276 N.Y. S. 390, 154 Misc. 71.

75. *N.Y.* — *Hamburger v. Cornell University*, 148 N.E. 539, 240 N. Y. 328, 42 A.L.R. 955, affirming 199 N.Y.S. 369, 204 App.Div. 664—*Horden v. Salvation Army*, 92 N.E. 626, 199 N.Y. 233, 32 L.R.A.N.S., 62, 139 Am.S.R. 889—*Stearns v. Association of Bar of City of New York*, 276 N.Y.S. 390, 154 Misc. 71.

76. *N.Y.* — *Hamburger v. Cornell University*, 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955—*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 211 N.Y. 125.

In some instances charitable institutions have been exonerated from liability for the negligence of their officers, trustees, and servants because they were agencies of the government;⁷⁷ but in a particular case a charitable institution's claim of exemption for injury to a recipient of its charity, on the ground that the institution was acting as an agency of the state was denied.⁷⁸

Nondelegable duties. There are tort cases against charities which do not come within the foregoing classifications and discussion at all, cases where the duty owed is one specifically cast on defendant by law, and therefore incapable of being evaded or escaped by being delegated to any servant.⁷⁹ Liability in such cases does not rest on the rule of respondeat superior, but on the narrower one that the duty is one for defendant to perform itself, and in-

to which the question of the negligence of servants does not enter.⁸⁰ In jurisdictions, however, where the charitable corporation is wholly exempt from liability for torts, as on the trust fund theory, considered hereafter in this section, it has been deemed immaterial whether the tort is that of the corporation itself in selecting its servants or that of superior officers and agents, or that of its servants,⁸¹ and this notwithstanding the person injured is a beneficiary of the institution's charitable service.⁸² On the other hand, in many decisions the courts have limited the exemption of a charitable institution for the negligence of its servants and agents to cases where there has been no negligence in the selection or retention of such persons,⁸³ particularly as regards injuries to recipients of the institution's charity.⁸⁴ Under this view a charitable in-

77. U.S.—Lyle v. National Home for Disabled Volunteer Soldiers, C.C. Tenn., 170 F. 842.
11 C.J. p 376 note 5.

78. Ind.—Old Folks' and Orphan Children's Home of Church of Brethren of Middle Dist. of Indiana, v. Roberts, 171 N.E. 10, 91 Ind. 538.

Evidence of inspection

Evidence that state board inspected the institution's engine room and made no objection, and no recommendation for change prior to inmate's injury by engine was held to be properly excluded.—Old Folks' and Orphan Children's Home of Church of Brethren of Middle Dist. of Indiana v. Roberts, *supra*.

79. N.Y. — Hamburger v. Cornell University, 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955, affirming 199 N.Y.S. 869, 204 App.Div. 664—Shapiro v. Jewish Board of Guardians, 300 N.Y.S. 556, 165 Misc. 581, affirmed 2 N.Y.S.2d 629.
11 C.J. p 376 note 9.

80. N.Y.—Shapiro v. Jewish Board of Guardians, 300 N.Y.S. 556, 165 Misc. 581, affirmed 2 N.Y.S.2d 629.
11 C.J. p 376 note 10.

81. Colo.—St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

Mass.—Foley v. Wesson Memorial Hospital, 141 N.E. 113, 246 Mass. 363—Roosen v. Peter Bent Brigham Hospital, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.
11 C.J. p 377 note 11.

Attempted distinction considered

(1) The attempt to distinguish between the liability of a charitable institution for negligence in selecting its servants and exemption for the negligence of servants has been described as, an "illogical compro-

mise between two irreconcilable principles"—i. e. between liability and exemption.—St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon, 238 P. 22, 77 Colo. 463, 42 A.L.R. 964, followed in 238 P. 25, 77 Colo. 474.

(2) "What difference can it make whether the tort is that of the corporation itself or its superior officers and agents, or that of its servants? Liability for the one would as effectually embarrass or sweep away the charity as the other. It would therefore be illogical to admit liability for the one and deny it for the other."—Vermillion v. Woman's College of Due West, 88 S.E. 649, 650, 104 S.C. 197.

82. U.S.—Bodenheimer v. Confederate Memorial Ass'n, C.C.A.Va., 68 F.2d 507, affirming, D.C., 5 F.Supp. 526, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483—Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va., 31 F.2d 869.

Mass.—Roosen v. Peter Bent Brigham Hospital, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

Condition of premises

"As affects, this exemption, it makes no difference that the negligence relied on relates to the condition of the premises maintained by the charity."—Bodenheimer v. Confederate Memorial Ass'n, C.C.A.Va., 68 F.2d 507, 509, affirming, D.C., 5 F.Supp. 526, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483.

Museum visitor

U.S. — Bodenheimer v. Confederate Memorial Ass'n, *supra*.

Student

U.S.—Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va., 31 F.2d 869.

83. Ariz.—Southern Methodist Hos-

pital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 45 Ariz. 507. Cal.—Bardinelli v. Church of All Nations, Methodist Episcopal, App., 73 P.2d 1264.

Ga.—Jackson v. Atlanta Goodwill Industries, 167 S.E. 702, 46 Ga.App. 425, certiorari denied 54 S.Ct. 63, 290 U.S. 626, 78 L.Ed. 545—Butler v. Berry School, 109 S.E. 544, 27 Ga.App. 560.

Ind.—Old Folks' and Orphan Children's Home v. Roberts, 149 N.E. 188, 83 Ind.App. 546.

La.—Thibodaux v. Sisters of Charity of The Incarnate Word, 123 So. 466, 11 La.App. 423.

11 C.J. p 375 note 97.

Statute not abrogating rule

Act subjecting nontrading corporations to the same liabilities as business corporations has been held not to abrogate general rule exempting charitable institutions from liability for injuries through servants' negligence. — Thibodaux v. Sisters of Charity of The Incarnate Word, 123 So. 466, 11 La.App. 423.

84. Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 118, 45 Ariz. 507.

Cal.—Bardinelli v. Church of All Nations, Methodist Episcopal, App., 73 P.2d 1264.

Ga.—Butler v. Berry School, 109 S.E. 544, 27 Ga.App. 560.

Ind.—Old Folks' and Orphan Children's Home v. Roberts, 149 N.E. 188, 83 Ind.App. 546.

Statute for protection of laborers

A statute requiring the adoption of means to protect laborers from dangerous machinery, is not applicable so as to protect inmates of a charitable institution. — Old Folks' and Orphan Children's Home v. Roberts, *supra*.

Child falling from fire escape

A charity which maintained boys'

stitution may be regarded as under a nondelegable duty of care and diligence to select competent employees,⁸⁵ and may be liable to a recipient of the institution's services for injuries resulting from the negligence of the institution in selecting the servants whose negligence caused the injury in question.⁸⁶

Relation to charity of person injured. In jurisdictions where the exemption of charitable institutions for the negligence of their agents or servants is held to be complete, the relation of the injured person to the particular institution is immaterial.⁸⁷ Also, under that line of authority which grants exemption to charitable institutions only from the neg-

ligence of persons properly selected to perform non-administrative functions, that an injured person happens to be a beneficiary of an institution's charitable service has been held to have no application to a case wherein the negligence complained of is that of a mere servant or employee.⁸⁸ On the other hand, in jurisdictions where charitable institutions are not entirely immune from liability for the negligence or torts of their agents and servants, it is usually held that, in the absence of negligence on the part of a charitable institution in their selection, it is not liable for their negligence or torts when the injured person is a recipient of the institution's charitable service.⁸⁹ Since the acceptance

club for needy children and selected its employees with due care was not liable for death of six year old boy who fell off fire escape on outside of club building.—*Bardinelli v. Church of All Nations, Methodist Episcopal*, Cal.App., 73 P.2d 1264.

85. N.Y. — *Hamburger v. Cornell University*, 148 N.E. 539, 240 N.Y. 328, 42 A.L.R. 955, affirming 199 N.Y.S. 369, 204 App.Div. 664.

Burden of proof

(1) Party asserting incompetent selection of instructors or employees has the burden of establishing that fact.—*Hamburger v. Cornell University*, supra.

(2) In a particular case this burden was held not to be sustained by a student suing a charitable university on the theory that it was negligent in the selection of employees to handle chemical supplies which exploded injuring such student.—*Hamburger v. Cornell University*, supra.

86. Ind.—*Old Folks' and Orphan Children's Home of Church of Brethren of Middle Dist. of Indiana v. Roberts*, 171 N.E. 10, 91 Ind. 533.

N.Y.—*Goodman v. Brooklyn Hebrew Orphan Asylum*, 165 N.Y.S. 949, 178 App.Div. 682.

Retaining incompetent manager

Evidence in action against charitable corporation by minor inmate for injuries was held to warrant finding that corporation was negligent in retaining incompetent manager.—*Old Folks' and Orphan Children's Home of Church of Brethren of Middle Dist. of Indiana v. Roberts*, 171 N.E. 10, 91 Ind.App. 533.

87. S.C. — *Vermillion v. Woman's College of Due West*, 88 S.E. 649, 104 S.C. 197.

Wis.—*Bachman v. Young Women's Christian Ass'n*, 191 N.W. 751, 179 Wis. 178, 30 A.L.R. 448.

88. N.Y.—*Sheehan v. North Country Community Hospital*, 7 N.E.2d 28, 273 N.Y. 163, 109 A.L.R. 1197, af-

firming 289 N.Y.S. 756, 248 App.Div. 632.

89. U.S.—*Higsons v. Pratt Institute*, C.C.A.N.Y., 45 F.2d 698—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A.Va., 31 F.2d 869—*Deming Ladies Hospital Ass'n v. Price*, C.C.A.N.M., 276 F. 668—*Paterlini v. Memorial Hospital Ass'n of Monogahela City, Pa.*, 247 F. 639, 160 C.C.A. 49, affirming, D.C., 241 F. 429, and certiorari denied 38 S.Ct. 334, 246 U.S. 665, 62 L. Ed. 929.

Ariz.—*Southern Methodist Hospital and Sanatorium of Tucson v. Wilson*, 46 P.2d 118, 45 Ariz. 507.

Cal.—*Bardinelli v. Church of All Nations, Methodist Episcopal, App.*, 73 P.2d 1264—*Young v. Boy Scouts of America*, 51 P.2d 191, 9 Cal.App. 2d 760.

Conn.—*Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646—*Cashman v. Meriden Hospital*, 169 A. 915, 117 Conn. 585.

Ind.—*St. Vincent's Hospital v. Stine*, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361—*Old Folks' and Orphan Children's Home v. Roberts*, 149 N.E. 188, 83 Ind.App. 546.

Ky.—*Averback v. Y. M. C. A. of Covington*, 61 S.W.2d 1066, 250 Ky. 34—*Williams' Adm'x v. Church Home for Females and Infirmary for Sick*, 3 S.W.2d 753, 223 Ky. 355, 62 A.L.R. 721.

La.—*Thibodaux v. Sisters of Charity of The Incarnate Word*, 123 So. 466, 11 La.App. 423.

Mass.—*Glaser v. Congregation Kehilath Israel*, 161 N.E. 619, 263 Mass. 435—*Kidd v. Massachusetts Homeopathic Hospital*, 130 N.E. 55, 237 Mass. 500—*Conklin v. John Howard Industrial Home*, 112 N.E. 606, 224 Mass. 222.

Mich.—*Bruce v. Henry Ford Hospital*, 236 N.W. 813, 254 Mich. 394.

Nev.—*Bruce v. Young Men's Christian Ass'n*, 277 P. 798, 51 Nev. 372.

Ohio.—*Walsh v. Sisters of Charity of St. Vincent's Hospital*, 191 N.E. 791, 47 Ohio App. 228.

Va.—*Weston's Adm'x v. Hospital of St. Vincent of Paul*, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

Wash.—*Thurston County Chapter, American Nat. Red Cross v. Department of Labor & Industries*, 7 P.2d 577, 166 Wash. 438—*Susman v. Young Men's Christian Ass'n of Seattle*, 172 P. 554, 101 Wash. 487.

Wis. — *Waldman v. Young Men's Christian Ass'n of Janesville*, 277 N.W. 632.

11 C.J. p 375 note 98.

Agreement on rule but not on reasons

While the courts are in practical agreement in stating and applying the text rule, there is a diversity of opinion as to the reasons therefor. U.S.—*Ettlinger v. Trustees of Randolph-Macon College*, C.C.A.Va., 31 F.2d 869, 872.

Conn.—*Cashman v. Meriden Hospital*, 169 A. 915, 117 Conn. 585.

"False and fraudulent representations"

The making of "false and fraudulent representations" whereby a beneficiary of a charitable institution was induced to remain therein was held to fall within the meaning of the words "negligence or torts" in the text statement of the rule.—*Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646.

Safety of instrumentalities and place

(1) The rule requiring a master to furnish his servant with reasonably safe instrumentalities wherewith, and places wherein, to do his work, see the C.J.S. title Master and Servant § 201, also 39 C.J. page 308 note 13, does not apply to a charity so as to impose any such duty toward a recipient of its charity.—*Higsons v. Pratt Institute*, C.C.A.N.Y., 45 F.2d 698.

(2) A so-called "Safe place statute" requiring public buildings to be kept safe has been held to be applicable to a charitable corporation, as respects one attending church luncheon, injured on unlighted stair-

of payment from some of its beneficiaries does not alter the status of a corporation or association otherwise classed as charitable, see *infra* § 2, the rule that a charity is not liable for the negligence of its agents or employees is applicable in cases where the person injured is one who has paid for the services rendered by the charity.⁹⁰

In jurisdictions which favor the view that charitable institutions are entirely exempt from liabil-

ity for their torts, it is held that such institutions are not liable for injuries sustained by their employees⁹¹ or third persons.⁹² On the other hand, where the view prevails that a charity may, under some circumstances, be liable for injuries resulting from the negligence of its agents or employees, a charity may be liable for injury to an employee⁹³ or a third person,⁹⁴ particularly when he is a complete stranger.⁹⁵

way.—*Wilson v. Evangelical Lutheran Church of Reformation of Milwaukee*, 230 N.W. 708, 202 Wis. 111.

(8) However, in action against a boys' charitable organization for injuries sustained by boy beneficiary when an improvised diving board in organization's swimming pool struck boy as another swimmer jumped off board, it was held that the premises involved did not constitute a "place of employment," within safe place statute, so as to place statutory liability on the organization.—*Waldman v. Young Men's Christian Ass'n of Janesville, Wis.*, 277 N.W. 632.

Violation of ordinance

A municipal ordinance, regulating operation of elevators, imposes no liability against charitable institutions, otherwise exempt, under the text rule, for injury resulting from violation of such ordinance, in the absence of such express or implied intent in such ordinance.—*Susman v. Young Men's Christian Ass'n of Seattle*, 172 P. 554, 101 Wash. 487.

Invitee attending religious service

Public charitable corporation, chartered to maintain public worship, is not liable for injuries to invitee attending services free in its church or temple.—*Glaser v. Congregation Kehillath Israel*, 161 N.E. 619, 263 Mass. 435.

90. U.S.—*Bodenheimer v. Confederate Memorial Ass'n, C.C.A.Va.*, 63 F.2d 507, affirming, D.C., 5 F.Supp. 526, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483.—*Higgo v. Pratt Institute, C.C.A.N.Y.*, 45 F.2d 698.—*Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va.*, 31 F.2d 869.—*Deming Ladies Hospital Ass'n v. Price, C.C.A.N.M.*, 276 F. 668.

Conn.—*Boardman v. Burlingame*, 197 A. 761, 123 Conn. 646.

Ga.—*Butler v. Berry School*, 109 S.E. 544, 27 Ga.App. 560.

Ind.—*St. Vincent's Hospital v. Stine*, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.

N.Y.—*Barr v. Brooklyn Children's Aid Soc.*, 190 N.Y.S. 296.

Va.—*Weston's Adm'x v. Hospital of St. Vincent of Paul*, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

Wis.—*Waldman v. Young Men's*

Christian Ass'n of Janesville, 277 N.W. 632.

Student

U.S.—*Higgo v. Pratt Institute, C.C.A.N.Y.*, 45 F.2d 698.—*Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va.*, 31 F.2d 869.

Ga.—*Butler v. Berry School*, 109 S.E. 544, 27 Ga.App. 560.

Visitor to museum

Confederate Memorial Association, incorporated to erect and maintain memorial institute and to collect and preserve historical material and data relating to Southern Confederacy, being charitable institution, was held not liable for injuries sustained by pay visitor through fall on alleged defective sidewalk on premises.—*Bodenheimer v. Confederate Memorial Ass'n, C.C.A.Va.*, 63 F.2d 507, affirming, D.C., 5 F.Supp. 526, certiorari denied 54 S.Ct. 643, 292 U.S. 629, 78 L.Ed. 1483.

91. N.C.—*Cowans v. North Carolina Baptist Hospitals*, 147 S.E. 672, 197 N.C. 41.

11 C.J. p 375 note 99.

92. Ga.—*Jackson v. Atlanta Goodwill Industries*, 167 S.E. 702, 46 Ga. App. 425, certiorari denied 54 S.Ct. 63, 290 U.S. 625, 28 L.Ed. 545.

Kan.—*Webb v. Vought*, 275 P. 170, 127 Kan. 799.

Mass.—*Foley v. Wesson Memorial Hospital*, 141 N.E. 113, 246 Mass. 363.

Mo.—*Eads v. Young Women's Christian Ass'n*, 29 S.W.2d 701, 325 Mo. 577.

Collision with motor vehicle of charity

Ga.—*Jackson v. Atlanta Goodwill Industries*, 167 S.E. 702, 46 Ga. App. 425, certiorari denied 54 S.Ct. 63, 290 U.S. 625, 28 L.Ed. 545.

Kan.—*Webb v. Vought*, 275 P. 170, 127 Kan. 799.

93. Mass.—*Reavey v. Guild of St. Agnes*, 187 N.E. 557, 284 Mass. 300.—*Zoulalian v. New England Sanatorium & Benevolent Ass'n*, 119 N.E. 686, 230 Mass. 102, L.R.A.1918F 185.

Or.—*O'Neill v. Odd Fellows Home of Oregon*, 174 P. 148, 89 Or. 382.

Employee engaged in painting building

Mass.—*Reavey v. Guild of St. Agnes*, 187 N.E. 557, 284 Mass. 300.

Declaration insufficient

Mass.—*Reavey v. Guild of St. Agnes*, supra.

94. Ala.—*Alabama Baptist Hospital Board v. Carter*, 145 So. 443, 226 Ala. 109.

Conn.—*Cohen v. General Hospital Soc. of Connecticut*, 154 A. 435, 438, 113 Conn. 188, citing *Corpus Juris*.

La.—*Unser v. Baptist Rescue Mission*, App., 157 So. 298.—*Bougon v. Volunteers of America, App.*, 151 So. 797.

N.J.—*Simmons v. Wiley M. E. Church*, 170 A. 237, 112 N.J.Law 129.—*Daniels v. Rahway Hospital*, 160 A. 644, 10 N.J.Misc. 585.

N.Y.—*Gollob v. Congregation Ohel Moishe Chevra Tehilim*, 196 N.Y.S. 517, 119 Misc. 346.—*Van Ingen v. Jewish Hospital of Brooklyn*, 164 N.Y.S. 832, 99 Misc. 655.

Ohio.—*Sisters of Charity of Cincinnati v. Duvelius*, 173 N.E. 737, 123 Ohio St. 52, affirming *Duvelius v. Sisters of Charity of Cincinnati*, 174 N.E. 256, 37 Ohio App. 171.

11 C.J. p 375 note 1.

Corpus Juris is cited with approval in holding a coöperative fire insurance association liable for tort in *Mortimer v. Farmer's Mut. Fire & Lightning Ins. Assn.*, 249 N.W. 405, 407, 217 Iowa 1246.

Invitee

Conn.—*Cohen v. General Hospital Soc. of Connecticut*, 154 A. 435, 113 Conn. 188.

Neb.—*Wright v. Salvation Army*, 249 N.W. 549, 125 Neb. 216.

95. N.J.—*Daniels v. Rahway Hospital*, 160 A. 644, 10 N.J.Misc. 585.

N.Y.—*Van Ingen v. Jewish Hospital of Brooklyn*, 164 N.Y.S. 832, 99 Misc. 655.

Another statement of rule

"No one no matter how humane his purpose, should be premitted to set up and operate the machinery of his charitable organization with impunity to injure by negligence those unconcerned in and unrelated to that which the donor brought into being or supports in operation."—*Daniels v. Rahway Hospital*, 160 A. 644, 10 N.J.Misc. 585.

Pedestrian struck by motortruck

La.—*Bougon v. Volunteers of America, App.*, 151 So. 797.

Nature of acts to which exemption extends.

While, under the view that a charity is exempt from liability for negligence, it is not liable for such negligence while engaged in functions within its corporate powers and calculated to accomplish its purposes,⁹⁶ the exemption of a charitable institution from liability for torts is not ordinarily regarded as extending to torts arising in the course of work not in connection with the charity,⁹⁷ and, more particularly, to activities beyond its corporate powers.⁹⁸ The exemption of a charitable institution from liability cannot properly be claimed by an association or corporation which is not actually such an institution.⁹⁹

Fact of insurance. The fact that a charitable

organization has procured indemnity or liability insurance will not impose liability on it for the torts of its agents where it would not otherwise be liable.¹

Maintenance of nuisance. A charitable institution, even when not suable at law, is subject to an injunction against the continuance of a nuisance,² and is liable for damages which may be allowed as additional relief.³

b. Hospitals

A charitable hospital is, according to some authorities, completely exempt from liability for tort, according to other authorities it is liable to the same extent as other persons, while the third rule is that, while not completely exempt from liability, it is exempt from liability

96. Mass.—Reavey v. Guild of St. Agnes, 187 N.E. 557, 284 Mass. 300.

Another statement of rule

"A charitable corporation is not liable for negligence in the course of activities within its corporate powers carried on to accomplish directly its charitable purposes."—Reavey v. Guild of St. Agnes, supra.

Incidental revenue

The text rule has been held applicable, notwithstanding the activity in question incidentally yields revenue.—Reavey v. Guild of St. Agnes, supra.

Painting building

Mass.—Reavey v. Guild of St. Agnes, supra.

97. Hawaii. — Luhi v. Honolulu Lodge No. 1, Modern Order of Phoenix, 31 Hawaii 740.

Miss.—Rhodes v. Millsaps College, 176 So. 253.

Tenn.—Lincoln Memorial University v. Sutton, 43 S.W.2d 195, 163 Tenn. 298—Gamble v. Vanderbilt University, 200 S.W. 510, 138 Tenn. 616, L.R.A.1918C 875.

11 C.J. p 375 note 2.

Operation of automobile

Charitable corporation is liable as any other for servant's negligent operation of automobile for its own purpose in city.—Phoenix Assur. Co., Limited, of London v. Salvation Army, 256 P. 1106, 83 Cal.App. 455.

Business operated for profit

(1) A charitable institution is not exempt from liability for torts arising out of its enterprises operated for profit.

Mass.—McKay v. Morgan Memorial Co-Op. Industries and Stores, 172 N.E. 68, 272 Mass. 121.

Tenn.—Lincoln Memorial University v. Sutton, 43 S.W.2d 195, 163 Tenn. 298.

(2) This is so, notwithstanding the business is within the corporate powers of the charitable corporation in question and the proceeds of such

business are applied wholly to charitable purposes.—McKay v. Morgan Memorial Co-Op. Industries and Stores, supra.

(3) Accordingly, to extent of income from its office building, operated largely for profit and separately from rest of its educational plant, although occupied in part by its law school library, a university, although a charitable institution, was liable to widow of tenant for his death in elevator accident.—Gamble v. Vanderbilt University, 200 S.W. 510, 138 Tenn. 616, L.R.A.1918C 875.

(4) A charitable educational institution was not exempt from liability for injuries to its employee sustained during construction of a water reservoir where three quarters of the water supplied was distributed for profit to the public.—Lincoln Memorial University v. Sutton, supra.

98. Miss.—Rhodes v. Millsaps College, 176 So. 253.

Corpus Juris is quoted with approval with reference to the liability of a beneficial association in McMillen v. Summuduwoot Lodge No. 3, 1 O. O. F., 54 P.2d 985, 988, 143 Kan. 502.

Revenue devoted to charity

That the revenue derived from such activity is devoted to the charitable purposes of the institution, does not alter the text rule.—Rhodes v. Millsaps College, Miss., 176 So. 253.

Liability same as other corporations

An incorporated college, given no specific power by its charter to operate building subsequently, donated to it or business not connected with its charity, is subject to general law as to such operation and hence liable for injuries resulting therefrom.—Rhodes v. Millsaps College, supra.

99. Ala.—Supreme Lodge of World, Loyal Order of Moose v. Kenny, 73 So. 519, 198 Ala. 332, L.R.A.1917C 469, certiorari denied 37 S.Ct. 650, 244 U.S. 652, 61 L.Ed. 1372.

Mass.—Hall v. College of Physicians and Surgeons, 149 N.E. 675, 254 Mass. 95.

N.Y.—Barr v. Brooklyn Children's Aid Soc., 190 N.Y.S. 296.

Tenn.—Tri-State Fair v. Rowton, 204 S.W. 761, 140 Tenn. 304, L.R.A. 1918F 657.

Wash. — Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554, 101 Wash. 487.

11 C.J. p 376 note 3.

Farm school

N.Y.—Barr v. Brooklyn Children's Aid Soc., 190 N.Y.S. 296.

Home maintained by lodge

Ala.—Supreme Lodge of World, Loyal Order of Moose, v. Kenny, 73 So. 519, 198 Ala. 332, L.R.A.1917C 469, certiorari denied 37 S.Ct. 650, 244 U.S. 652, 61 L.Ed. 1372.

1. Ky.—Williams' Adm'x v. Church Home for Females and Infirmary for Sick, 3 S.W.2d 753, 223 Ky. 355, 62 A.L.R. 721.

Mass.—McKay v. Morgan Memorial Co-Op. Industries and Stores, 172 N.E. 68, 272 Mass. 121—Enman v. Trustees of Boston University, 170 N.E. 43, 270 Mass. 299.

Wash. — Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554, 101 Wash. 487.

Liability insurance policy properly excluded

Mass.—Enman v. Trustees of Boston University, 170 N.E. 43, 270 Mass. 299.

2. Tenn.—Love v. Nashville Agricultural and Normal Institute, 243 S.W. 304, 310, 146 Tenn. 550, 23 A.L.R. 887.

46 C.J. p 749 note 29.

Not precluded by trust fund doctrine

"No principal involved in the trust fund doctrine can justify the continued maintenance by a charitable corporation of a nuisance working injury to another's property."—Love v. Nashville Agricultural and Normal Institute, supra.

3. Tenn.—Love v. Nashville Agri-

for the acts of its agents or employees performing non-administrative functions. These views are varied to some extent by the status of the person injured as a patient, employee, or stranger and by the delegable character of the duty on the negligence of which liability is predicated.

As in the case of charities generally, which have been considered in the preceding subdivision of this section, there is a divergence of opinion as to the liability of a charitable hospital for the torts or negligence of its agents or employees. According to one view a total exemption exists;⁴ according to a contrary view the hospital is liable for the torts of its agents and employees to the same extent as would be any person under similar circumstances;⁵ the third view is that, while a charitable hospital is not completely exempt from tort liability,⁶ it is not liable for the torts or negligence of persons who have been procured by it to perform nonadministrative functions where the injury in question occurs

during the performance of such functions.⁷

A hospital claiming to be exempt from liability for tort as a charitable institution has the burden of establishing the elements of that defense.⁸

Nondelegable duties. A charitable hospital may be liable for its own neglect of duty, as distinguished from the negligence of its servants.⁹ For example, it may be liable for its failure to exercise due care in the selection of physicians, nurses, attendants, or other agents or employees whose acts result in the injuries complained of.¹⁰ On the other hand, under the doctrine of complete exemption, it has been held that the hospital is not liable merely because of such negligence,¹¹ nor is it rendered liable by a death statute imposing liability for death occasioned by negligence while engaged in business.¹² In order that liability may be predicated on negligence in the selection of agents or em-

cultural and Normal Institute, *supra*.

4. Ky.—*Emery v. Jewish Hospital Ass'n*, 236 S.W. 577, 193 Ky. 400. Mass.—*Foley v. Wesson Memorial Hospital*, 141 N.E. 113, 246 Mass. 383.

Child labor statute

The rule stated in the text was not changed by a statutory provision making it unlawful to employ one under sixteen years to operate an elevator.—*Emery v. Jewish Hospital Ass'n*, 236 S.W. 577, 193 Ky. 400.

Depletion of trust fund

Where it appeared that the necessary effect of satisfying a judgment rendered against a charitable hospital would be to deplete its trust funds, it was held that an action to recover such judgment could not be maintained.—*Brown v. St. Luke's Hospital Ass'n*, 274 P. 740, 85 Colo. 167.

5. Minn.—*Mulliner v. Evangelischer Diakonissenverein of Minnesota Dist. of German Evangelical Synod of North America*, 175 N.W. 699, 144 Minn. 392.

11 C.J. p 377 note 13.

6. Ohio.—*Sisters of Charity of Cincinnati v. Duvelius*, 173 N.E. 737, 123 Ohio St. 52, affirming *Duvelius v. Sisters of Charity of Cincinnati*, 174 N.E. 256, 37 Ohio App. 171.

7. N.Y.—*Phillips v. Buffalo General Hospital*, 146 N.E. 199, 239 N.Y. 188, affirming 202 N.Y.S. 572, 207 App.Div. 640.—*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 211 N.Y. 125.—*Bush v. Board of Managers of Binghamton City Hospital*, 297 N.Y.S. 991, 251 App.Div. 601.—*Mills v. Society of New York Hospital*, 274 N.Y.S. 233, 242 App.Div. 245, affirmed 1 N.E.

2d 346, 270 N.Y. 594.—*Meshel v. Crotona Park Sanitarium*, 276 N.Y. S. 989, 154 Misc. 221.—*Wilson v. New York Homeopathic Medical College and Flower Hospital*, 204 N.Y.S. 175, 122 Misc. 452.

8. Cal.—*Baker v. Board of Trustees of Leland Stanford Junior University*, 23 P.2d 1071, 133 Cal.App. 243.—*Inderbitzen v. Lane Hospital*, 12 P.2d 744, 124 Cal.App. 462, hearing denied 13 P.2d 905, 124 Cal.App. 462.

Ky.—*Pikeville Methodist Hospital v. Donahoo*, 299 S.W. 159, 221 Ky. 538. La.—*Thibodaux v. Sisters of Charity of The Incarnate Word*, 123 So. 466, 11 La.App. 423.

Tex.—*Barnes v. Providence Sanitarium, Civ.App.*, 229 S.W. 588, dismissed for want of jurisdiction.

Utah.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 222.

W.Va.—*Roberts v. Ohio Valley General Hospital*, 127 S.E. 318, 98 W. Va. 476, 42 A.L.R. 968.

Name not dispensing with proof

That institution is denominated "hospital," "sanitarium," "orphans' home," or "memorial institution or association" does not, in suit for negligence of its employees, when its charitable character is attacked, dispense with necessity of proof of its character and operations.—*Sessions v. Thomas Dee Memorial Hospital Ass'n*, 51 P.2d 229, 89 Utah 222.

9. Ohio.—*Taylor v. Flower Deaconess Home & Hospital*, 135 N.E. 287, 104 Ohio St. 61, 23 A.L.R. 900.

11 C.J. p 378 note 22.

10. N.Y.—*Fontanella v. New York Cent. R. Co.*, 174 N.Y.S. 537, 186 App.Div. 538, affirmed 126 N.E. 907, 228 N.Y. 546.

Ohio.—*Taylor v. Flower Deaconess Home and Hospital*, 135 N.E. 287, 104 Ohio St. 61, 23 A.L.R. 900.

Va.—*Norfolk Protestant Hospital v. Plunkett*, 173 S.E. 363, 162 Va. 151.

Wash.—*Tribble v. Missionary Sisters of the Sacred Heart*, 242 P. 372, 137 Wash. 326.

W.Va.—*Roberts v. Ohio Valley General Hospital*, 127 S.E. 318, 98 W. Va. 476, 42 A.L.R. 968.

Affirmative showing essential

(1) Where the hospital's negligence in selecting an incompetent nurse is relied on as a basis for the imposition of liability, it must affirmatively appear that the injury in question was caused by such negligence rather than the individual negligence of the nurse.

Iowa.—*Mikota v. Sisters of Mercy*, 168 N.W. 219, 183 Iowa 1378.

Wash.—*Bise v. St. Luke's Hospital*, 43 P.2d 4, 181 Wash. 269.

(2) But it has been held that the defense of due care in the selection of an employee whose act caused the injury in question may be available on proper proof thereof, notwithstanding a failure to prove such care.—*Ritchie v. Long Beach Community Hospital Ass'n*, 34 P.2d 771, 139 Cal.App. 688.

11. Mass.—*Foley v. Wesson Memorial Hospital*, 141 N.E. 113, 246 Mass. 363.—*Kidd v. Massachusetts Homeopathic Hospital*, 130 N.E. 55, 237 Mass. 500.—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

Wis.—*Schumacher v. Evangelical Deaconess Soc. of Wisconsin*, 260 N.W. 476, 218 Wis. 169.

12. Mass.—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

ployees, such negligence must have actually existed.¹³ The question is one of fact,¹⁴ and the negligence must be pleaded and proved by the person seeking to enforce liability.¹⁵

Injuries to patients. As a general rule, in the

absence of negligence in selecting or retaining in its service physicians, nurses, attendants, or other agents or employees, a charitable hospital is not liable for their torts or negligence resulting in the injury of a patient of the hospital.¹⁶ Under the rule

Administration of corrosive sublimate for Epsom salts

Mass.—Roosen v. Peter Bent Brigham Hospital, *supra*.

13. Cal.—England v. Hospital of the Good Samaritan, 61 P.2d 48, 16 Cal. App.2d 48.

Ga.—Georgia Baptist Hospital v. Smith, 139 S.E. 101, 37 Ga.App. 92, 11 C.J. p 377 note 15.

14. Cal.—England v. Hospital of the Good Samaritan, 61 P.2d 48, 16 Cal.App.2d 48.

N.Y.—Klein v. New York Eye & Ear Infirmary, 201 N.Y.S. 218, 210 App. Div. 770, affirmed 206 N.Y.S. 923, 210 App.Div. 770, and 206 N.Y.S. 924, 210 App.Div. 770.

Ohio.—Duvelius v. Sisters of Charity of Cincinnati, 174 N.E. 256, 37 Ohio App. 171, affirmed Sisters of Charity of Cincinnati v. Duvelius, 173 N.E. 737, 123 Ohio St. 52.

Wash.—Tribble v. Missionary Sisters of the Sacred Heart, 242 P. 372, 137 Wash. 326.

Evidence sufficient

To support recovery by pay patient against hospital primarily charitable for negligence of anesthetist.—Georgia Baptist Hospital v. Smith, 139 S.E. 101, 37 Ga.App. 92.

15. Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 77 P.2d 458.

Ohio.—Lakeside Hospital v. Kovar, 2 N.E.2d 857, 131 Ohio St. 333.

Knowledge of previous negligence

Where hospital employed only graduate and licensed nurses authorized by state to practice their profession, the presumption arising from doctrine of *res ipsa loquitur*, that hospital did not use due care in selection of nurse who negligently applied hot-water bottle to infant, was destroyed, and recovery from hospital on ground that it employed negligent nurse could be had only on affirmative proof showing that the hospital had knowledge of the previous negligence of the nurse and notwithstanding such knowledge continued her employment.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, Ariz., 77 P.2d 458.

Evidence sufficient to sustain finding that charitable hospital was negligent in selection and retention of nurse.—Norfolk Protestant Hospital v. Plunkett, 173 S.E. 363, 162 Va. 151.

Evidence insufficient

(1) Student nurse's negligence, causing injury to charitable hospi-

tal's patient, in leaving hot water bottle in bed prepared for patient after operation.—Bise v. St. Luke's Hospital, 43 P.2d 4, 181 Wash. 269.

(2) That three weeks prior to time infant was burned by negligent exposure to hot-water bottle in hospital another baby was burned in a somewhat similar manner, and that a certain nurse named in the evidence assisted in the case of the other infant, was held not to establish that the hospital did not use care in her selection and retention.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, Ariz., 77 P.2d 458.

(3) Mere proof that operating room nurses were negligent, which resulted in burning of patient's leg, was insufficient to prove negligence on part of charitable hospital in failure to prescribe proper rules of government or in selection or retention of offending nurses.—Steele v. St. Joseph's Hospital, Tex.Civ.App., 60 S.W.2d 1083, error refused.

16. U.S.—Paterlini v. Memorial Hospital Ass'n of Monongahela City, D.C.Pa., 241 F. 429, affirmed 247 F. 639, 160 C.C.A. 49, certiorari denied 38 S.Ct. 334, 246 U.S. 665, 62 L.Ed. 929.

Ariz.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 77 P.2d 458.—Southern Methodist Hospital and Sanatorium of Tucson v. Wilson, 46 P.2d 113, 45 Ariz. 507.

Cal.—Armstrong v. Wallace, 47 P.2d 740, 8 Cal.App.2d 429.—Shane v. Hospital of the Good Samaritan, 37 P.2d 1066, 2 Cal.App.2d 334.—Hallinan v. Prindle, App., 62 P.2d 1075.—Ritchie v. Long Beach Community Hospital Ass'n, 34 P.2d 771, 139 Cal.App. 688.—Stonaker v. Big Sisters Hospital, 2 P.2d 520, 116 Cal.App. 375.—Burdell v. St. Luke's Hospital, 173 P. 1003, 37 Cal.App. 310.

Conn.—Boardman v. Burlingame, 197 A. 761, 123 Conn. 646.—Cashman v. Meriden Hospital, 169 A. 915, 117 Conn. 585.

Ill.—Mater v. Silver Cross Hospital, 2 N.E.2d 138, 285 Ill.App. 437.—Olander v. Johnson, 258 Ill.App. 39.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 224 Ill.App. 367, reversed on other grounds 140 N.E. 836, 309 Ill. 147.

Ind.—St. Vincent's Hospital v. Stine, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.

Kan.—Ratliffe v. Wesley Hospital and Nurses' Training School, 10 P.2d 859, 135 Kan. 306.—Davin v. Kansas Medical, Missionary & Benevolent Ass'n, 172 P. 1002, 103 Kan. 48.

La.—Messina v. Societe Francaise De Bienfaisance Et D'Assistance Mutuelle De La Nouvelle Orleans, App., 170 So. 801.—Jordan v. Touro Infirmary, App., 123 So. 726.—Thibodaux v. Sisters of Charity of The Incarnate Word, 123 So. 466, 11 La.App. 423.—Foye v. St. Francis Sanitarium & Training School for Nurses, 2 La.App. 305.

Mich.—Greatrex v. Evangelical Deaconess Hospital, 246 N.W. 137, 261 Mich. 327, 86 A.L.R. 487.—Bruce v. Henry Ford Hospital, 236 N.W. 813, 254 Mich. 394.

Miss.—Mississippi Baptist Hospital v. Moore, 126 So. 465, 156 Miss. 676, 67 A.L.R. 1106.

Mo.—Nicholas v. Evangelical Deaconess Home and Hospital, 219 S. W. 643, 231 Mo. 132.—Roberts v. Kirksville College of Osteopathy & Surgery, App., 16 S.W.2d 625.

Neb.—Sibilla v. Paxton Memorial Hospital, 238 N.W. 751, 121 Neb. 860.

N.J.—Boeckel v. Orange Memorial Hospital, 158 A. 832, 103 N.J.Law 453, affirmed 166 A. 146, 110 N.J. Law 509.—D'Amato v. Orange Memorial Hospital, 127 A. 340, 101 N. J.Law 61.

Ohio.—Lakeside Hospital v. Kovar, 2 N.E.2d 857, 131 Ohio St. 333.—City Hospital of Akron v. Lewis, 192 N.E. 140, 47 Ohio App. 465.—Walsh v. Sisters of Charity of St. Vincent's Hospital, 191 N.E. 791, 47 Ohio App. 228.—Duvelius v. Sisters of Charity of Cincinnati, 174 N.E. 256, 37 Ohio App. 171, affirmed Sisters of Charity of Cincinnati v. Duvelius, 173 N.E. 737, 123 Ohio St. 52.

Tenn.—Wallwork v. City of Nashville, 251 S.W. 775, 777, 147 Tenn. 681, quoting *Corpus Juris*—Knox Co. Tuberculosis Sanitarium v. Moss, 5 Tenn.App. 589.

Tex.—Steele v. St. Joseph's Hospital, Civ.App., 60 S.W.2d 1083, error refused.—Enell v. Baptist Hospital, Civ.App., 45 S.W.2d 395, error refused.—Baylor University v. Boyd, Civ.App., 18 S.W.2d 700.—Barnes v. Providence Sanitarium, Civ.App., 229 S.W. 588, dismissed for want of jurisdiction.

Utah.—Sessions v. Thomas Dee Memorial Hospital Ass'n, 51 P.2d 229, 89 Utah 222.

of complete exemption of charitable institutions for their torts, it is not material that the injured person happens to be a patient.¹⁷ Under the narrower rule of exemption from liability which limits that exemption to torts committed by persons engaged to perform nonadministrative functions, in the absence of negligence in the selection of third persons which a charitable hospital has undertaken merely to supply for the purpose of healing, it is not liable for their torts resulting in injury to patients of the hospital,¹⁸ and under this rule it has been held exempt from liability for the torts of physicians and

surgeons,¹⁹ and of nurses and others properly engaged in the function of nursing,²⁰ but it is not exempt from liability for personal injuries caused by the negligence of one acting as a mere servant or employee.²¹ Exemption from liability cannot, according to cases adhering to these rules, be based on the ground that in serving the community the hospital is performing a governmental function.²²

The mere fact that a person who is injured by the tort or negligence of the hospital or its agents or employees is a pay patient is not regarded as affecting the right of the hospital to exemption,²³

Va.—*Weston's Adm'x v. Hospital of St. Vincent of Paul*, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

Wash.—*Bise v. St. Luke's Hospital*, 43 P.2d 4, 181 Wash. 269—*Magnuson v. Swedish Hospital*, 169 P. 828, 99 Wash. 399.

Wis.—*Morrison v. Henke*, 160 N.W. 173, 165 Wis. 166.

Wyo.—*Bishop Randall Hospital v. Hartley*, 160 P. 385, 24 Wyo. 408, Ann.Cas.1918E 1172.

11 C.J. p 377 note 14.

"By far the most generally accepted theory, and that which is supported by the great weight of authority throughout the states, is that a charitable hospital should not be held liable for the negligence of employees when reasonable care has been used in their selection and retention."—*Roberts v. Ohio Valley General Hospital*, 127 S.E. 318, 98 W. Va. 476, 42 A.L.R. 968.

Reasons irreconcilable

"While the conclusions are in accord, the reasons advanced for the conclusions are irreconcilable."—*Shane v. Hospital of the Good Samaritan*, Cal.App., 37 P.2d 1066, 1067.

Contractual incapacity of patient

A charitable hospital's exemption from liability for injuries to patient was not affected by the fact that the patient was a new-born baby, who could not enter into a contract, since the father, in the selection of the hospital for birth of the baby, assumed the risk in the baby's behalf.—*Weston's Adm'x v. Hospital of St. Vincent of Paul*, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.

Remedy against negligent individual

(1) Remedy of patient injured by negligence of physician or others employed by charitable hospital which exercised due care in their selection is against person causing injury.—*Mississippi Baptist Hospital v. Moore*, 126 So. 465, 156 Miss. 676, 67 A.L.R. 1106.

(2) The negligence of such individual must, however, be alleged by the person bringing suit.—*Wallwork v. City of Nashville*, 251 S.W. 775, 147 Tenn. 681.

Evidence insufficient

To go to jury on question whether a disease from which an infant died after it left a hospital was contracted while it was there.—*Mater v. Silver Cross Hospital*, 2 N.E.2d 138, 285 Ill.App. 437.

17. Mass.—*Kidd v. Massachusetts Homeopathic Hospital*, 130 N.E. 55, 237 Mass. 500—*Roosen v. Peter Bent Brigham Hospital*, 126 N.E. 392, 235 Mass. 66, 14 A.L.R. 563.

18. N.Y.—*Phillips v. Buffalo General Hospital*, 146 N.E. 199, 239 N.Y. 188, affirming 202 N.Y.S. 572, 207 App.Div. 640—*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 211 N.Y. 125—*Bush v. Board of Managers of Binghamton City Hospital*, 297 N.Y.S. 991, 251 App.Div. 601—*Mills v. Society of New York Hospital*, 274 N.Y.S. 233, 242 App.Div. 245, affirmed 1 N.E. 2d 346, 270 N.Y. 594—*Meshel v. Crotona Park Sanitarium*, 276 N.Y.S. 989, 154 Misc. 221—*Wilson v. New York Homeopathic Medical College and Flower Hospital*, 204 N.Y.S. 175, 122 Misc. 452.

19. N.Y.—*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 211 N.Y. 125—*Bush v. Board of Managers of Binghamton City Hospital*, 297 N.Y.S. 991, 251 App.Div. 601—*Mills v. Society of New York Hospital*, 274 N.Y.S. 233, 242 App.Div. 245, affirmed 1 N.E.2d 346, 270 N.Y. 594—*Wilson v. New York Homeopathic Medical College & Flower Hospital*, 204 N.Y.S. 175, 122 Misc. 452.

Another statement of rule

"It is said that this relation is not one of master and servant, but that the physician occupies the position, so to speak, of an independent contractor, following a separate calling liable, of course, for his own wrongs to the patient whom he undertakes to serve, but involving the hospital in no liability, if due care has been taken in his selection."—*Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93, 211 N.Y. 125.

20. N.Y.—*Phillips v. Buffalo General Hospital*, 146 N.E. 199, 239 N.Y. 188, affirming 202 N.Y.S. 572, 207

App.Div. 640—*Bush v. Board of Managers of Binghamton City Hospital*, 297 N.Y.S. 991, 251 App.Div. 601—*Meshel v. Crotona Park Sanitarium*, 276 N.Y.S. 989, 154 Misc. 221—*Wilson v. New York Homeopathic Medical College & Flower Hospital*, 204 N.Y.S. 175, 122 Misc. 452.

Orderly performing nursing function

N.Y.—*Phillips v. Buffalo General Hospital*, 146 N.E. 199, 239 N.Y. 188, affirming 202 N.Y.S. 572, 207 App.Div. 640.

21. N.Y.—*Sheehan v. North Country Community Hospital*, 7 N.E.2d 28, 273 N.Y. 163, 109 A.L.R. 1197, affirming 289 N.Y.S. 756, 248 App.Div. 632—*Fontanella v. New York Cent. R. Co.*, 174 N.Y.S. 537, 186 App.Div. 588, affirmed 126 N.E. 907, 228 N.Y. 546—*Van Ingen v. Jewish Hospital of Brooklyn*, 169 N.Y.S. 412, 182 App.Div. 10, affirming 164 N.Y.S. 832, 99 Misc. 655, and affirmed 126 N.E. 924, 227 N.Y. 665.

Ambulance driver

N.Y.—*Sheehan v. North Country Community Hospital*, 7 N.E.2d 28, 273 N.Y. 163, 109 A.L.R. 1197, affirming 289 N.Y.S. 756, 248 App.Div. 632.

Relation to hospital not shown

In action by plaintiff, who fell from stretcher while being carried down stairs in her home to ambulance sent by defendant hospital, dismissing complaint on ground that defendant was not responsible because charitable institution was held to be error, where evidence did not clearly show relationship between hospital and persons carrying stretcher.—*McCormack v. Jewish Hospital of Brooklyn*, 283 N.Y.S. 737, 246 App.Div. 731.

22. N.Y.—*Sheehan v. North Country Community Hospital*, 7 N.E.2d 28, 273 N.Y. 163, 109 A.L.R. 1197, affirming 289 N.Y.S. 756, 248 App.Div. 632—*Bush v. Board of Managers of Binghamton City Hospital*, 297 N.Y.S. 991, 251 App.Div. 601.

23. Ariz.—*Southern Methodist Hos-*

particularly where the amount paid is a contribution not sufficient to pay more than the actual expense of care,²⁴ although there is authority to the contrary holding the hospital liable for their negligence to those who have paid it for its services.²⁵ It has also been held that a charitable hospital may be liable to pay patients to the extent that its income is derived from pay patients or other noncharitable sources.²⁶

In various cases, hospitals have been held free from liability for the negligence or tortious acts of its physicians, attendants, or servants toward insane patients.²⁷

Employees or third persons. Under the view under which a charitable institution may be liable for its torts, a hospital may be liable for torts to an employee²⁸ or a third person,²⁹ and more particularly to a complete stranger.³⁰ Under the rule of non-

pital & Sanitarium of Tucson v. Wilson, 46 P.2d 118, 45 Ariz. 507.
Cal.—Armstrong v. Wallace, 47 P.2d 740, 8 Cal.App.2d 429—Stonaker v. Big Sisters Hospital, 2 P.2d 520, 116 Cal.App. 375.
Conn.—Boardman v. Burlingame, 197 A. 761, 123 Conn. 646.
Ill.—Hogan v. Chicago Lying-In Hospital & Dispensary, 166 N.E. 461, 335 Ill. 42, affirming 247 Ill. App. 331.
Ind.—St. Vincent's Hospital v. Stine, 144 N.E. 537, 195 Ind. 350, 33 A.L.R. 1361.
Iowa.—Mikota v. Sisters of Mercy, 163 N.W. 219, 183 Iowa 1378.
Ky.—Cook v. John N. Norton Memorial Infirmary, 202 S.W. 874, 180 Ky. 331, L.R.A.1918E 647.
La.—Messina v. Societe Francaise De Bienfaisance Et D'Assistance Mutuelle De La Nouvelle Orleans, App., 170 So. 801—Thibodaux v. Sisters of Charity of The Incarnate Word, 123 So. 466, 11 La.App. 423.
Mass.—Beverly Hospital v. Early, 197 N.E. 641, 100 A.L.R. 1338.
Mich.—Downes v. Harper Hospital, 60 N.W. 42, 101 Mich. 555, 45 Am. S.R. 427, 25 L.R.A. 602.
Mo.—Nicholas v. Evangelical Deaconess Home and Hospital, 219 S.W. 643, 281 Mo. 182.
N.J.—D'Amato v. Orange Memorial Hospital, 127 A. 340, 101 N.J.Law 61.
N.Y.—Phillips v. Buffalo General Hospital, 146 N.E. 199, 239 N.Y. 183, affirming 202 N.Y.S. 572, 207 App.Div. 640—Mills v. Society of New York Hospital, 274 N.Y.S. 233, 242 App.Div. 245, affirmed 1 N.E.2d 346, 270 N.Y. 594—Meshel v. Crotona Park Sanitarium, 276 N.Y.S. 989, 154 Misc. 221.
Tenn.—Wallwork v. City of Nashville, 251 S.W. 775, 147 Tenn. 681.
Tex.—City of McAllen v. Gartman, Civ.App., 81 S.W.2d 147, affirmed, Com.App., Gartman v. City of McAllen, 104 S.W.2d 879—Enell v. Baptist Hospital, Civ.App., 45 S.W.2d 395, error refused—Baylor University v. Boyd, Civ.App., 18 S.W.2d 700.
Utah.—Sessions v. Thomas Dee Memorial Hospital Ass'n, 51 P.2d 229, 89 Utah 222.
Va.—Weston's Adm'x v. Hospital of

St. Vincent of Paul, 107 S.E. 785, 131 Va. 587, 23 A.L.R. 907.
W.Va.—Roberts v. Ohio Valley General Hospital, 127 S.E. 318, 319, 98 W.Va. 476, 42 A.L.R. 968, quoting **Corpus Juris**.
11 C.J. p 378 note 17.
24. N.Y.—Willson v. New York Homeopathic Medical College and Flower Hospital, 204 N.Y.S. 175, 122 Misc. 452.
25. Okl.—City of Pawhuska v. Black, 244 P. 1114, 117 Okl. 108—City of Shawnee v. Roush, 223 P. 354, 101 Okl. 60.
11 C.J. p 378 note 16.
26. Ga.—Morton v. Savannah Hospital, 96 S.E. 887, 888, 148 Ga. 438, answers to certified questions conformed to 96 S.E. 888, 22 Ga.App. 607, citing **Corpus Juris**—Robertson v. Executive Committee of Baptist Convention, 190 S.E. 432, 55 Ga.App. 469.

Petition

(1) Where pay patient in charity hospital is injured by the negligence of an employee, petition need not allege that the corporation failed to exercise ordinary care in the selection of its officers and employees or in retaining them to recover funds derived from pay patients. However, in so far as the petition seeks to recover or subject to judgment funds held by a charitable hospital in trust for charitable objects, it is essential that it be alleged that the hospital failed to exercise ordinary care in the selection of servants whose conduct caused the injury in question.—Morton v. Savannah Hospital, 96 S.E. 887, 148 Ga. 438, answers to certified questions conformed to 96 S.E. 888, 22 Ga.App. 607.

(2) Pay patient's petition for injuries allegedly sustained through negligence of servants of defendant's hospital in permitting patient, who was in helpless condition, to fall from chair, stated cause of action, where alleging that defendant's hospital was operated for pecuniary gain, notwithstanding petition did not restrict prayer for recovery to hospital income derived from pay patients.—Robertson v. Executive Committee of Baptist Convention, 190 S.E. 432, 55 Ga.App. 469.

Evidence sufficient to authorize re-

covery.—Robertson v. Executive Committee of Baptist Convention, supra.

27. Conn.—Boardman v. Burlingame, 197 A. 761, 123 Conn. 646.
N.Y.—Mills v. Society of New York Hospital, 274 N.Y.S. 233, 242 App. Div. 245, affirmed 1 N.E.2d 346, 270 N.Y. 594.
11 C.J. p 378 note 24.

28. N.C.—Cowans v. North Carolina Baptist Hospitals, 147 S.E. 672, 197 N.C. 41.
Tex.—Hotel Dieu v. Armendarez, Com.App., 210 S.W. 518, affirming Hotel Dieu v. Armendariz, Civ. App., 167 S.W. 181.
11 C.J. p 378 note 20.

29. Ala.—Alabama Baptist Hospital Board v. Carter, 145 So. 443, 226 Ala. 109.
Conn.—Cohen v. General Hospital Soc. of Connecticut, 154 A. 435, 113 Conn. 188.

N.J.—Kolb v. Monmouth Memorial Hospital, 182 A. 822, 116 N.J.Law 118—Daniels v. Rahway Hospital, 160 A. 644, 10 N.J.Misc. 585.
N.Y.—Van Ingen v. Jewish Hospital of Brooklyn, 164 N.Y.S. 822, 99 Misc. 655.

Ohio.—Sisters of Charity of Cincinnati v. Duvelius, 173 N.E. 737, 123 Ohio St. 52, affirming Duvelius v. Sisters of Charity of Cincinnati, 174 N.E. 256, 37 Ohio App. 171.
11 C.J. p 378 note 21.

Invitee

Ala.—Alabama Baptist Hospital Board v. Carter, 145 So. 443, 226 Ala. 109.
Conn.—Cohen v. General Hospital Soc. of Connecticut, 154 A. 435, 113 Conn. 188.

Neb.—Marble v. Nicholas Senn Hospital Ass'n of Omaha, 167 N.W. 208, 102 Neb. 343.

N.J.—Kolb v. Monmouth Memorial Hospital, 182 A. 822, 116 N.J.Law 118.

Ohio.—Duvelius v. Sisters of Charity of Cincinnati, 174 N.E. 256, 37 Ohio App. 171, affirmed Sisters of Charity of Cincinnati v. Duvelius, 173 N.E. 737, 123 Ohio St. 52.

Tenn.—McLeod v. St. Thomas Hospital, 95 S.W.2d 917, 170 Tenn. 423.

30. N.J.—Daniels v. Rahway Hospitals, 160 A. 644, 10 N.J.Misc. 585.
N.Y.—Van Ingen v. Jewish Hospital

liability, the hospital has been held not liable for its negligence as to employees³¹ or third persons.³² The rule that the hospital is exempt from liability for the torts of persons provided for the performance of nonadministrative functions has been held not to affect its liability to strangers or persons other than patients for the torts of its employees committed within the scope of their employment.³³ The question of whether the person injured was or was not a pay patient does not enter into the question of the liability of the hospital to a third person.³⁴

Railroad and like hospitals. Railroad and other corporations or associations formed and maintained by them, having in their regular employ physicians and surgeons whose duty to those corporations requires them to care for the sick and injured among the corporations' employees, are not liable to those employees for the malpractice or negligence of such physicians and surgeons, when there has been no negligence in selecting them.³⁵ This view is based on the assumption that the railroad company or the

association maintained under its direction does not derive any pecuniary profit or gain from the conduct of the institution. If such is the case, a different standard of responsibility is established.³⁶ Where a railroad required its employees to pay a fixed sum at regular specified intervals toward a hospital controlled by the railroad, it was held not to be exempt, as a charitable institution, for injuries to such employees resulting from the negligence of the hospital attendants, agents, or employees, and this notwithstanding the absence of any showing whether or not the railroad company derives a profit from the arrangement.³⁷ A railroad may, of course, be liable for injuries resulting to an injured workman resulting from the negligence of the railroad's own employee, in the selection of whom the railroad has been negligent.³⁸

Noncharitable institution. A hospital which is not in fact a charitable institution is not exempt from liability under rules applicable to charitable hospitals alone.³⁹

of Brooklyn, 164 N.Y.S. 832, 99 Misc. 655.

Automobile passenger

Charitable hospital was held to be liable for ambulance driver's negligence in colliding with automobile and causing injury to complete stranger having no beneficial relation to hospital.

N.J.—Daniels v. Rahway Hospital, 160 A. 644, 10 N.J.Misc. 585.

N.Y.—Van Ingen v. Jewish Hospital of Brooklyn, 164 N.Y.S. 832, 99 Misc. 655.

31. Ky.—Emery v. Jewish Hospital Ass'n, 236 S.W. 577, 580, 193 Ky. 400.

32. Ill.—Simon v. Pelouze, 263 Ill. App. 177.

Md.—Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 100 A. 301, 130 Md. 265, L.R.A.1917D 967.

Mass.—Foley v. Wesson Memorial Hospital, 141 N.E. 113, 246 Mass. 363.

N.J.—Boeckel v. Orange Memorial Hospital, 158 A. 832, 108 N.J.Law 453, affirmed 166 A. 146, 110 N.J. Law 509.

Fireman

Fireman injured through defective condition of fire escape attached to realty of charitable hospital corporation was not permitted to recover damages against corporation for his injuries.—Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital, 100 A. 301, 130 Md. 265, L.R.A.1917D 967.

Persons visiting patient

Ill.—Simon v. Pelouze, 263 Ill.App. 177.

N.J.—Boeckel v. Orange Memorial

Hospital, 158 A. 832, 108 N.J.Law 453, affirmed 166 A. 146, 110 N.J. Law 509.

33. N.Y.—Grawunder v. Beth Israel Hospital Ass'n, 272 N.Y.S. 171, 242 App.Div. 56, affirmed 195 N.E. 221, 266 N.Y. 605—Van Ingen v. Jewish Hospital of Brooklyn, 169 N.Y.S. 412, 182 App.Div. 10, affirming 164 N.Y.S. 832, 97 Misc. 655, and affirmed 126 N.E. 924, 227 N.Y. 665.

Private automobile passenger

Where a passenger in a private automobile was injured in a collision with a charitable hospital ambulance as a result of the ambulance driver's negligence, the hospital was held not to be exempt from liability.—Van Ingen v. Jewish Hospital of Brooklyn, 169 N.Y.S. 412, 182 App. Div. 10, affirming 164 N.Y.S. 832, 99 Misc. 655, and affirmed 126 N.E. 924, 227 N.Y. 665.

Nurse leaving hospital

Nurse who, having accompanied patient's mother to hospital, was leaving when injured because of old, worn, defective, and slippery condition of linoleum in corridor, properly recovered against hospital, which claimed exemption merely as charitable corporation.—Johnsen v. Staten Island Hospital, 283 N.Y.S. 664, 246 App.Div. 638, affirmed 2 N.E.2d 674, 271 N.Y. 519.

34. Tenn.—McLeod v. St. Thomas Hospital, 95 S.W.2d 917, 170 Tenn. 423.

Injury to invitee

Fact that husband of plaintiff suing hospital for injuries was paying patient in hospital and not recipient of charity, was held not to affect lia-

bility, if any, of hospital to plaintiff who was injured while paying visit to her husband.—McLeod v. St. Thomas Hospital, supra.

35. Kan.—Nicholson v. Atchison, Topeka & Santa Fé Hospital Ass'n, 155 P. 920, 97 Kan. 480, L.R.A. 1916D 1029.

11 C.J. p 378 note 18.

36. Mo.—Phillips v. St. Louis, etc., R. Co., 111 S.W. 109, 211 Mo. 419, 124 Am.S.R. 736, 17 L.R.A.,N.S., 1167, 14 Ann.Cas. 742.

11 C.J. p 378 note 19.

37. Cal.—Bowman v. Southern Pac. Co., 204 P. 403, 55 Cal.App. 734.

11 C.J. p 378 note 19 [a].

38. N.Y.—Fontanella v. New York Cent. R. Co., 174 N.Y.S. 537, 186 App.Div. 588, affirmed 126 N.E. 907, 228 N.Y. 546.

Providing emergency treatment

Railroad, whose station master was negligent in failing to provide prompt emergency treatment for an employee, whose leg had been broken, was not exempted from liability on ground that, in maintaining its own emergency hospital, it was operating a charity.—Fontanella v. New York Cent. R. Co., 174 N.Y.S. 537, 186 App. Div. 588, affirmed 126 N.E. 907, 228 N.Y. 546.

39. Cal.—Stewart v. California Medical Missionary & Benevolent Ass'n, 176 P. 46, 48, 173 Cal. 418, citing Corpus Juris—Baker v. Board of Trustees of Leland Stanford Junior University, 23 P.2d 1071, 133 Cal.App. 243.

Neb.—Malcolm v. Evangelical Lutheran Hospital Ass'n of York, Seward, Hamilton and Other Counties, 185 N.W. 330, 107 Neb. 101.

Fact of insurance. Where a charitable hospital is not otherwise liable for the torts of its agents or employees, it is not rendered liable by the fact that it has procured insurance against such liability.⁴⁰

Unlawful possession of body. Under a statute imposing liability on any person, association, or company having possession of a dead body, a charitable hospital may be liable for the acts of its agents or employees in retaining possession of a dead body.⁴¹

§ 76. Dissolution

Charitable corporations and associations are subject to dissolution under particular circumstances.

As in the case of other corporations see the C. J.S. title Corporations §§ 1656, 1663, also 14 A C.J. p 1104 note 60, p 1107 note 98, a charitable corporation may be dissolved by forfeiture of its franchise for nonuser or misuser.⁴² For example, where there has been a misuser, or a nonuser, in regard to matters which are of the essence of the contract between the corporation and the state, and

the acts or omissions complained of have been repeated and willful, they may constitute a just ground of forfeiture.⁴³ However, a franchise granted by the state to a charitable corporation cannot be taken away by the state except for just cause.⁴⁴ A fortiori, a trustee charged with the conduct of such corporation will not be permitted to take away its charter without just cause.⁴⁵ In the absence of statutory authority, a charitable corporation has no power, by the action of its stockholders and directors, or of either, voluntarily to dissolve itself;⁴⁶ but a court of equity has power, on a breach of trust, to dissolve such a corporation.⁴⁷ It will not ordinarily exercise such power, however, while those remain who will execute the public trust, especially where only a minority desires dissolution.⁴⁸ A vote of the membership of a charitable association to transfer its funds to another charitable organization, coupled with a failure to hold subsequent meetings or elect officers, has been held to work a dissolution of such association.⁴⁹ A statutory mode of dissolution must be followed strictly, if the charitable organization would avail

N.D.—Boetcher v. Budd, 237 N.W. 650, 61 N.D. 50.

Wash.—Mueller v. Winston Bros. Co., 4 P.2d 854, 165 Wash. 130.

Ownership by charitable corporation

That corporation owning a hospital is a charitable organization does not preclude a patient from recovering for negligence of nurse employed by such hospital, where patient paid for accommodations at rate ordinarily charged by hospitals conducted for profit, and had no knowledge of charitable character of such corporation.—Stewart v. California Medical Missionary & Benevolent Ass'n, 176 P. 46, 178 Cal. 418.

Question for jury; direction of verdict

(1) Whether hospital corporation organized for charitable purposes was in fact "charitable institution" and as such immune from liability for negligence of its employees, has been held to be a question for jury under evidence.—Hamilton v. Corvallis General Hospital Ass'n, 30 P. 2d 9, 146 Or. 167.

(2) In a particular case, however, uncontradicted testimony of member of hospital board that hospital was not operated for profit and was maintained by gifts, bequests, and fees from patients able to pay, was held to require directed verdict for defendant on ground that hospital was charitable institution.—Walsh v. Sisters of Charity of St. Vincent's Hospital, 191 N.E. 791, 47 Ohio App. 228.

40. Cal.—Levy v. Superior Court of California in and for City and

County of San Francisco, 239 P. 1100, 74 Cal.App. 171.

Miss.—Mississippi Baptist Hospital v. Moore, 126 So. 465, 156 Miss. 676, 67 A.L.R. 1106.

Tenn.—McLeod v. St. Thomas Hospital, 95 S.W.2d 917, 170 Tenn. 423.

Evidence of insurance inadmissible

Cal.—Stonaker v. Big Sisters Hospital, 2 P.2d 520, 116 Cal.App. 375.—Levy v. Superior Court of California in and for City and County of San Francisco, 239 P. 1100, 74 Cal.App. 171.

41. Ohio.—Howard v. Children's Hospital of Protestant Episcopal Church, 174 N.E. 166, 37 Ohio App. 144.

42. Pa.—Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata, 176 A. 17, 317 Pa. 358.

43. Pa.—Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata, supra.

Waste of corporate property

(1) Continual waste of property of corporation organized for charitable purposes is ground for forfeiture of corporation's charter, particularly where property has become of historic value.—Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata, 176 A. 17, 317 Pa. 358.

(2) This waste need not continue to such extent that purposes of the corporation are impossible of fulfillment before its charter may be forfeited, continuous, deliberate waste, and such disregard of corporate purposes as completely deprived public

of charitable benefits, for which corporation was created, being sufficient.—Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata, supra.

(3) In a particular case unauthorized sales of land belonging to religious corporation, charter of which provided for application of proceeds of its property to support of members and poor thereof, coupled with corporate waste and mismanagement, as in permitting sale of valuable antiques, tearing down building of historic value, and failing to account for moneys collected, pay taxes, dispense charity, and hold religious services regularly, were held to justify judgment forfeiting the corporation's charter and ousting its trustees.—Commonwealth ex rel. Schnader v. Seventh Day Baptists of Ephrata, supra.

44. Or.—Wemme v. First Church of Christ, Scientist, of Portland, 219 P. 618, 110 Or. 179, motion denied 223 P. 250, 110 Or. 179.

45. Or.—Wemme v. First Church of Christ, Scientist, of Portland, supra.

46. N.J.—Summer Lodge v. Odd Fellows Home, 77 A. 36, 77 N.J.Eq. 386.

47. N.Y.—People v. Dispensary, etc., Soc., 7 Lans. 304.
11 C.J. p 379 note 26.

48. Pa.—Thomas v. Ellmaker, 1 Pars.Eq.Cas. 93.

49. Vt.—Penfield v. Skinner, 11 Vt. 296.

itself of the statutory provisions,⁵⁰ and it must further appear that the statute in question is applicable, it being held in some states that a statute relating to the winding up of insolvent corporations generally is not applicable to the case of an insolvent corporation administering a charitable use.⁵¹

§ 77. — Disposal of Property on Dissolution

On dissolution of charitable corporations their property, according to some authority, reverts to the original donor or his heirs; according to other authority, such property should be devoted to purposes similar to those of the dissolved corporation.

Under rules of reverter heretofore considered, see supra § 67, it has been held in some jurisdictions, on the dissolution of a charitable corporation, the title to its property reverts to the original donor or his heirs,⁵² subject to debts incurred by the corporation,⁵³ although a statute authorizing donors of property for the purpose of establishing and maintaining specified types of charitable institutions to sue for the dissolution of such institutions and regain title to such property has been held to be unconstitutional as discriminating against other classes of donors.⁵⁴ In other jurisdictions, on dissolution the property of a charitable organization does not revert to the donors, nor may it be divided among the members of the association, but in pursuance of the doctrine of cy pres, see supra § 52, should be devoted to the purpose most nearly akin to the intent of the donors, under the direction of the

court.⁵⁵ In the latter class of jurisdictions, when an incorporated charitable institution has ceased its operations, and, having sold its property, holds the proceeds subject to the order of the court, the wishes and recommendations of the contributors are not absolutely controlling as to its decree;⁵⁶ and, if such institution is a temporary home for poor children, it is within the court's discretion to award the fund to a children's aid society rather than to a hospital and dispensary.⁵⁷ Where the property of a charitable corporation has been acquired with funds appropriated to its use by the state, it is competent for the legislature, in dissolving the corporation, to direct that the proceeds of the property be returned to the county treasury of the county in which the institution is located;⁵⁸ and, even where such a statute is alleged to be unconstitutional, the trustees of the corporation cannot recover back the proceeds of the property which they have voluntarily paid to the county treasurer in pursuance of the mandate of the statute, where the corporation has no creditors, and no person claims title by reversion.⁵⁹ Under a federal statute of escheats, it was held that land granted by the federal government to a charitable corporation should on its dissolution escheat to the federal government,⁶⁰ and under a state statute of escheats, it was held that, on the dissolution of a charitable organization, land which it had bought and paid for escheated to the county wherein such land was situated, rather than reverted to the heirs of the organization's grantor.⁶¹

X. FOREIGN CHARITIES

§ 78. In General

Generally courts administer charities only within the state and conforming to its public policy, and by comity foreign charities are not given greater rights than domestic.

The courts will not administer a foreign charity,⁶² but will direct the money devoted to it to be

paid over to the proper persons, leaving its administration to the courts of the state where the charity is to be established.⁶³ If a charitable gift is clearly against the public policy of the state which is called on to administer it, its courts may decline to administer it and remit the fund to the testator's domicile, but they cannot properly divest the title and

50. Pa.—Humane F. Co.'s App., 88 Pa. 339.

51. N.J.—Bliss v. Linden Cemetery Assoc., 87 A. 224, 31 N.J.Eq. 394. 11 C.J. p 379 note 29.

52. Ill.—People v. Braucher, 101 N. E. 944, 258 Ill. 604, 47 L.R.A., N.S., 1015. 11 C.J. p 379 note 30.

53. Ky.—Commonwealth v. Louisville Trust Co., 26 S.W. 582, 16 Ky. L. 131.

Tex.—Acklin v. Paschal, 48 Tex. 147.

54. Ill.—People v. Greer College, 135 N.E. 80, 302 Ill. 533.

55. Mass.—Coe v. Washington Mills, 21 N.E. 966, 149 Mass. 543. 11 C.J. p 379 note 32.

Reason members not entitled

"The members do not invest their money. They give it to charity."—In re Mt. Sinai Hospital, 164 N.E. 871, 250 N.Y. 103, 62 A.L.R. 564, affirming 228 N.Y.S. 855, 223 App.Div. 836, which affirmed 219 N.Y.S. 505, 128 Misc. 476.

56. Pa.—Commonwealth v. Pauline Home, 21 A. 661, 141 Pa. 537.

57. Pa.—Commonwealth v. Pauline Home, supra.

58. N.Y.—Avila v. New York, 94 N. Y.S. 1132, 106 App.Div. 120.

59. N.Y.—Avila v. New York, supra.

60. U.S.—Church of Jesus Christ v. U. S., 10 S.Ct. 792, 136 U.S. 1, 34 L.Ed. 481, affirming 15 P. 473, 5 Utah 361.

61. Ill.—Franklin County v. Blake, 119 N.E. 288, 283 Ill. 292.

62. U.S.—Jones v. Habersham, Ga., 2 S.Ct. 336, 107 U.S. 174, 27 L.Ed. 401. 11 C.J. p 380 note 44.

63. Ky.—Green v. Louisville Fidelity Trust Co., 120 S.W. 283, 134 Ky. 311, 20 Ann.Cas. 861. 11 C.J. p 380 note 45.

transfer it to others.⁶⁴ A foreign religious society cannot by comity have a better right than domestic corporations to take property by devise.⁶⁵

It has been held that neither the fact that the trustees receiving the gift were conducting a charity in a sister state under a nonintervention will, invalid in the state of the testator's domicile,⁶⁶ nor the fact that the funds of a valid charitable gift in trust were to be expended in a foreign country,⁶⁷ nor that the bequest indicated an intention to grant immediate relief and payment was delayed,⁶⁸ will invalidate a charitable trust for the benefit of foreign or nonresident beneficiaries.

Capacity of foreign corporation to take as trustee of charitable trust see *supra* § 31.

§ 79. What Law Governs

Generally a charitable devise of land is governed by the law of the place where the land lies, while a charitable bequest of personal property is governed by the law of the testator's domicile.

The general rule to be deduced from the facts and the language of the cases is that the validity of a charitable devise of lands depends on the law of the state where the land lies, and that the validity of a charitable bequest of personal property depends

on the laws of the state where the testator had his domicile.⁶⁹ If the will contains a particular bequest of funds to be transmitted to and administered for particular purposes in another state or country, the validity of such bequest must be tested by the law of the latter state or country;⁷⁰ and a bequest to a charity, or on a trust to be administered in another state or country, where lawful in the place of the testator's domicile, may be sustained in the state in which the fund is to be administered, although it contravenes the statute of the latter state against perpetuities, since it is not the policy of one state to interdict perpetuities in other states.⁷¹ A statute providing that a charitable trust shall not fail by reason of indefiniteness of the beneficiaries applies only to trusts to be executed within the state,⁷² but a trust otherwise valid, under such a statute, will be sustained although the beneficiaries are not necessarily or in terms confined to residents of the state.⁷³ The legality of a charitable gift to a foreign corporation or association usually depends on the ability to take under the laws of the place where it exists or is domiciled.⁷⁴

A will making a bequest to charity is construed according to the law of the testator's domicile if the bequest is of personal property,⁷⁵ while if realty is devised the will is construed according to the law of

64. Ga.—*Silcox v. Harper*, 32 Ga. 639.

N.Y.—*Dammert v. Osborn*, 35 N.E. 407, 140 N.Y. 30.

65. N.Y.—*Levy v. Levy*, 33 N.Y. 97.

66. Cal.—*In re McDole's Estate*, 10 P.2d 75, 215 Cal. 328.

67. N.Y.—*In re Stephen's Estate*, 269 N.Y.S. 614, 150 Misc. 27.

68. Mo.—*In re Rahn's Estate*, 291 S.W. 120, 316 Mo. 492, 51 A.L.R. 377, certiorari denied *Martin v. Ahrens*, 47 S.Ct. 591, 274 U.S. 745, 71 L.Ed. 1325.

Bequest to German Red Cross

Bequest of money to German Red Cross for relief of widows, orphans and invalids of World War held not void as against public policy.—*In re Rahn's Estate*, *supra*.

69. U.S.—*Jones v. Habersham*, Ga., 2 S.Ct. 336, 107 U.S. 174, 27 L.Ed. 401.

Mass.—*Healy v. Reed*, 28 N.E. 404, 153 Mass. 197, 10 L.R.A. 766.

Pa.—*Hutchinson's Estate*, 17 Pa.Dist. 248.

11 C.J. p 379 note 37, p 380 note 39.

Validity of charitable trust was determined by law of state of testator's residence.—*Chicago Bank of Commerce v. McPherson*, C.C.A.Mich., 62 F.2d 393, affirming, D.C., 2 F.Supp. 110, certiorari denied 53 S.Ct. 596, 289 U.S. 736, 77 L.Ed. 1484.

70. N.Y.—*Hasbroch v. Bookstaver*, 114 N.Y.S. 949, 130 App.Div. 378.—*In re Feehan's Estate*, 241 N.Y.S. 669, 135 Misc. 903.—*In re Crum*, 164 N.Y.S. 149, 98 Misc. 160. 11 C.J. p 380 note 40.

Administration in Germany

(1) The validity of alleged charitable bequest to German bank to be administered in Germany must be determined by laws of Germany.—*In re Stephani's Estate*, 300 N.Y.S. 813, 164 Misc. 240.

(2) Laws of this state as to trusts held not to be interposed to defeat will of former resident of this state, who after returning to Germany executed a will containing gifts of personal estate to foreign trustee for a foreign charity, valid there.—*Stieglitz v. Attorney General*, 154 N.Y.S. 137, 91 Misc. 139, 15 Mills Surr. 121.

Direction to sell and transmit proceeds

Where testator directed that his real property be sold and proceeds, together with personality, transmitted to trustee in Italy to found hospital, validity of trust must be determined by law of Italy.—*Mena v. Virnard*, 207 N.Y.S. 504, 124 Misc. 637.

New York devise to fund in Massachusetts

Where a resident of New York

devised the residue of his estate to a charitable fund created by the will of a Massachusetts resident, and the latter will was duly admitted to probate, it was held that the devise would be upheld in New York, it being valid under the law of Massachusetts.—*In re Feehan's Estate*, 241 N.Y.S. 669, 135 Misc. 903.

Place where fund situated

The validity of a testamentary trust is to be determined by the law of the place where the fund is situated.—*Manley v. Fiske*, 123 N.Y.S. 129, 66 Misc. 388, modified on other grounds 124 N.Y.S. 149, 139 App.Div. 665, which is affirmed 95 N.E. 1133, 201 N.Y. 546.

71. N.Y.—*Cross v. U. S. Trust Co.*, 30 N.E. 125, 131 N.Y. 330, 27 Am. S.R. 597, 15 L.R.A. 606. 11 C.J. p 380 note 41.

72. N.Y.—*In re Crum*, 164 N.Y.S. 149, 98 Misc. 160. 11 C.J. p 380 note 46.

73. N.Y.—*In re Robinson*, 96 N.E. 925, 203 N.Y. 330, 37 L.R.A., N.S., 1023.

74. N.Y.—*Smithsonian Inst. v. St. John*, 83 N.E. 981, 191 N.Y. 254, 14 Ann.Cas. 708, appeal dismissed 29 S.Ct. 601, 214 U.S. 19, 53 L.Ed. 892. 11 C.J. p 380 note 50.

75. U.S.—*Sickles v. City of New*

the place where the property lies.⁷⁶ Whether a donation in a particular case is a public charity depends upon the law of the state where it is created and administered.⁷⁷

Generally a charity is administered according to the law of the donor's domicile,⁷⁸ and the fact that it is to be administered abroad does not make the gift void, especially where it does not appear that

it is not a valid charity in the foreign state or country.⁷⁹ However, where the object of the trust is the acquisition of lands in another state, the execution thereof must depend entirely on the validity, under the laws of that state, of the trust under which the land is there to be held or on the competency to take of the donee on whom the title is to be conferred.⁸⁰

CHARIVARI. A mock serenade of discordant music, or noises, made with kettles, tin horns, etc., designed to annoy and insult; a vile or noisy music made with tin horns, bells, kettles, pans, etc., in derision of some person or event.¹ It was at first directed against widows who married a second time, at an advanced age, but is now extended to other occasions of nocturnal annoyance and insult.²

CHARLEY or **CHARLIE.** A corruption of, or a familiar nickname or substitute for, "Charles."³

CHARRE OF LEAD. A quantity consisting of thirty-six pigs of lead, each pig weighing about seventy pounds.⁴

CHART. A form of map;⁵ a guiding map, and hence derivatively, or by extension, a paper on which information is exhibited, a sheet showing facts, or a tabulated instrument.⁶ The word

"chart," in a particular connection, has been held not to include sheets of paper exhibiting tabulated or methodically arranged information,⁷ nor sleeve patterns made of cardboard.⁸

CHARTA. Originally, a leaf of the Egyptian papyrus; hence, paper, or any material to write upon.⁹ In old English law, an instrument written and sealed; the formal evidence of conveyances and contracts; any signal or token by which an estate was held; hence a charter or deed;¹⁰ also a royal grant of privileges or liberties (*charta regia*) either to an individual, as "*carta perdonationes*"—a charter of pardon—to a public or private corporation (charter), or to a nation, as *Magna Charta*, the Great Charter.¹¹ The word appears in various Latin maxims, appearing in their proper alphabetical sequence; and in phrases set out in the subjoined note.¹²

Orleans, La., 80 F. 868, 26 C.C.A. 204.

76. Colo.—In re Pence's Estate, 42 P.2d 199, 96 Colo. 270.

77. U.S.—Schell v. Leander Clark College, D.C.Iowa, 10 F.2d 542.

Trust for art gallery

Whether a trust providing for aiding in the construction of an art gallery in Kansas City, Mo., and for the maintenance and improvement thereof, is charitable, depends on the law of Missouri, the state of the testator's domicile.—*Simmons v. Fidelity Nat. Bank & Trust Co. of Kansas City*, C.C.A.Mo., 64 F.2d 602, certiorari denied, 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

78. Ky.—*Green v. Louisville Fidelity Trust Co.*, 120 S.W. 283, 134 Ky. 311, 20 Ann.Cas. 861. 11 C.J. p 380 note 42.

79. Mass.—*Teele v. Derry*, 47 N.E. 422, 168 Mass. 341, 60 Am.S.R. 401, 38 L.R.A. 629.

11 C.J. p 380 note 43.

80. N.Y.—*Mount v. Tuttle*, 76 N.E. 873, 183 N.Y. 358, 2 L.R.A.N.S., 428.

1. Ill.—*Gilmore v. Fuller*, 65 N.E. 84, 193 Ill. 130, 132, 60 L.R.A. 286. Kan.—*Cherryvale v. Hawman*, 101 P.

994, 80 Kan. 170, 174, 133 Am.S.R. 195, 18 Ann.Cas. 149, 23 L.R.A.N.S., 645.

11 C.J. p 381 notes 4-6.

2. Ind.—*Bankus v. State*, 4 Ind. 114, 116, quoting Webster D.

3. N.D.—*Styles v. Scotland*, 134 N.W. 708, 22 N.D. 469, 479.

Okl.—*Carroll v. State*, 215 P. 797, 798, 24 Okl.Cr. 26.

4. Black L.D.

5. U.S.—*Ehret v. Pierce*, C.C.N.Y., 10 F. 553, 554, 18 Blatchf. 302.

6. U.S.—*Sheldon v. U. S.*, 4 Cust. App. 42, 46, quoting March Thesaurus D.

11 C.J. p 381 notes 10-14.

7. U.S.—*Taylor v. Gilman*, C.C.N.Y., 24 F. 632, 634, 23 Blatchf. 325.

8. Eng.—*Hollinrake v. Truswell*, [1894] 3 Ch. 420.

9. Adams Gloss.

10. Black L.D.

11 C.J. p 381 note 15.

11. Adams Gloss.

As public or private

The term came to be applied, by way of eminence, to such documents as proceeded from the sovereign, granting liberties or privileges, and either where the recipient of the

grant was the whole nation, as in the case of *Magna Charta*, or a public body, or private individual, in which case it corresponded to the modern word "charter."—Black L.D.

12. *Charta communis*—In old English law, an indenture; a common or mutual charter or deed, that is, one containing mutual covenants, or involving mutuality of obligation; one to which both parties might have occasion to refer, to establish their respective rights.—Black L.D.

Charta cyrographata or *chyrographata*—In old English law, a chirographed charter, that is, a charter executed in two parts, and cut through the middle, where the word "cyrographum" or "chirographum" was written in large letters.—Black L.D.

Charta de confirmatione—a charter of confirmation.—Adams Gloss.

Charta de feoffamento—a charter or deed of feoffment.—Adams Gloss.

Charta de foresta—a collection of the laws of the forest, made in ninth year of the reign of Henry III and said to have been originally a part of *Magna Charta*; it was called the Great Charter of the woodland population, nobles, barons, freemen, and

In the civil law, paper, suitable for the inscription of documents or books; hence, any instrument or writing.¹³

CHARTA DE NON ENTE NON VALET.¹⁴

CHARTA EST LEGATUS MENTIS.¹⁵

CHARTA NON EST NISI VESTIMENTUM DO-NATIONIS.¹⁶

CHARTARUM SUPER FIDEM, MORTUIS TES-TIBUS, AD PATRIAM DE NECESSITUDINE RECURRENDUM EST.¹⁷

CHARTE. Law French, a chart or plan which mariners use at sea.¹⁸

CHARTEL. A variant of "cartel."¹⁹

CHARTE-PARTIE. In French marine law, a charter-party.²⁰

CHARTER.

As a Noun

A grant made by the sovereign, either to the

whole people or to a portion of them, securing to them the enjoyment of certain rights;²¹ the authority by virtue of which an organized body acts²² and, more specifically, an act of a legislative body creating a municipal or other corporation, and defining its powers and privileges;²³ the common name for a certificate of incorporation;²⁴ the constitution, or the organic law of a city.²⁵

The applications of, and the legal principles governing, the last two specific definitions are more fully discussed in the C.J.S. titles Corporations and Municipal Corporations. As a contract for the hiring of all or part of a vessel see the C.J.S. title Shipping §§ 26-56, also 58 C.J. p 106 note 74-p 263 note 34.

Phrases: "Catch time charter," see the C.J.S. title Shipping § 43, also 58 C.J. p 204 note 9 [b], "charter of a city," see the C.J.S. title Municipal Corporations § 10, also 43 C.J. p 84 notes 71-86, "charter of a corporation" or "corporate charter," see the C.J.S. title Corporations § 947, also 14A C.J. p 258 note 34-p 259 note 47, "home rule char-

slaves, loyally granted by Henry III early in his reign (A.D. 1217).—Black L.D.

Charta de quiete clamantia—a charter or deed of quitclaim.—Adams Gloss.

Charta de una parte—a deed-poll; a deed of one part; formerly used to distinguish a "deed poll," that is, an agreement made by one party only—from a deed "inter partes."—Black L.D.

Chartæ libertatum—the charters (grants) of liberties; these are *Magna Charta* and *Charta de Foresta*.—Black L.D.

Charta indentata—a charter or deed indented.—Adams Gloss.

Charta libertatem regni—the charter of the nation's liberty; applied to *Magna Charta*, as the great charter of liberty.—Adams Gloss.

Charta (or *carta*) *pardonationis*—In English criminal law, a charter under the great seal by which a man is forgiven a felony or other offense committed against the king's crown and dignity.—Adams Gloss.

Charta pardonationis se defendendo—In old English law, a form of pardon for killing another man in his own defense.—Adams Gloss., citing Reg. Orig. fol 287.

Charta partita—literally, a deed divided; hence, a charter-party.—Black L.D.

Charta per legem terræ—the charter by the law of the land.—Adams Gloss.

Charta pura—Latin, a blank piece of paper.—Adams Gloss.

Charta regia—In English law, an instrument in writing conferring a grant from the crown to any person or persons, or to any body politic, of any rights, liberties, franchises, or privileges; it is commonly known as a "royal charter."—Adams Gloss., citing Bracton fol 33 b.

Charta seu libellus prædialis—a charter or deed of land.—Adams Gloss.

Charta sua manifeste expressa—clearly expressed by his or her deed (or writing).—Adams Gloss.

Magna Charta—the great charter. The name of a charter (or constitutional enactment) granted by King John of England to the barons, at Runnymede, on June 15, 1215, and afterward, with some alterations, confirmed in parliament by Henry III and Edward I. This charter is justly regarded as the foundation of English constitutional liberty. Among its thirty-eight chapters are found provisions for regulating the administration of justice, defining the temporal and ecclesiastical jurisdictions, securing the personal liberty of the subject and his rights of property, and the limits of taxation, and for preserving the liberties and privileges of the church. *Magna Charta* is so called, partly to distinguish it from the *Charta de Foresta*, which was granted about the same time, and partly by reason of its own transcendent importance.—Black L. D.

13. Black L.D.

14. A maxim meaning "A deed of a

thing not in being is not valid."—Black L.D.

15. A maxim meaning "A charter or deed is the representative of the mind."—Adams Gloss., citing Coke Litt. p 36.

16. A maxim meaning "A deed is nothing else than the vestment of a gift."—Black L.D.

17. A maxim meaning "The witnesses being dead, the truth of charters must of necessity be referred to the country, i. e., a jury."—Black L. D.

18. Black L.D.

19. Black L.D.

20. Black L.D.

21. N.J.—*State v. Railroad Taxation Comm'n*, 37 N.J.Law 228, 237.

Va.—*Dew v. Sweet Spring Dist. Ct.*, 3 Hen. & M. 1, 23, 13 Va. 1, 23, 3 Am.D. 639.

11 C.J. p 381 note 18.

22. Tex.—*Ryan v. Witt*, Civ.App., 173 S.W. 952, 959.

23. La.—*Benedict v. New Orleans*, 39 So. 792, 115 La. 645, 667.

Minn.—*State v. Ehrmantraut*, 65 N. W. 251, 63 Minn. 104, 107.

24. Del.—*Gow v. Consolidated Copermines Corporation*, 165 A. 136, 140, 19 Del.Ch. 172.

25. U.S.—*City of St. Louis v. Western Union Tel. Co.*, Mo., 13 S.Ct. 990, 991, 149 U.S. 30, 37 L.Ed. 637. Mich.—*Hudson Motor Car Co. v. City of Detroit*, 275 N.W. 770, 773, 282 Mich. 69—*Streat v. Vermilya*, 255 N.W. 604, 606, 263 Mich. 1.

ter,"²⁶ and "pay for the the charter;"²⁷ also "private charters."²⁸

As a Verb

To establish by charter, as a railroad or bank; to hire (a vessel) by charter party, to hire or let by charter; hence, colloquially, to hire by contract any means of conveyance, as a train or car.²⁹

Chartered. Hired;³⁰ let for temporary use.³¹

Phrases: "Agree to charter and hire said vessel;"³² also "chartered voyage" and "purchased, chartered, or leased."³³

As an Adjective

Charter land. Land held by charter or by written evidence; bookland.³⁴

Other phrases: "Charter fee,"³⁵ "charter money," see the C.J.S. title Shipping §§ 42-45, also 58 C.J. p 198 note 64-p 213 note 19, "Charter Oak,"³⁶ "charter party," see the C.J.S. title Shipping § 26, also 58 C.J. p 106 notes 74-82, and "charter rates."³⁷

CHARTERER. One who charters, or one who by contract acquires the right to use a vessel belonging to another.³⁸ A "charterer" has been contrasted with, or distinguished from, a "passenger."³⁹

Phrases: "Charterer as owner 'pro hac vice,'" see the C.J.S. title Shipping § 34, also 58 C.J. p 152 note 75-p 172 note 25, "charterer of a vessel," see the C.J.S. title Shipping § 27 et seq, also 58 C.J. p 106 note 75 et seq, "charterer who mans, victuals, and navigates the chartered vessel,"⁴⁰ "plane char-

terer,"⁴¹ and "proprietor, owner, charterer, or hirer of a railroad."⁴²

CHARTERS SONT APPELLE "MUNIMENTS" A MUNIENDO, QUIA MUNIUNT ET DEFENDUNT HAEREDITATEM.⁴³

CHARTIS REDDENDIS. Literally, "For returning the charters." An ancient writ which lay against one who had charters of feoffment intrusted to his keeping and refused to deliver them.⁴⁴

CHARTOPHYLAX. In old European law, a keeper of records or public instruments; a chartulary; a registrar.⁴⁵

CHARTREUSE. It is the French term for a kind of building, that is, a Carthusian monastery; but for American commercial purposes, it means a certain drinkable manufactured by that branch of the Carthusian order living near Grenoble in La Grande Chartreuse, that is, the monastery occupied by the Father Superior;⁴⁶ and has been specifically defined as a highly esteemed tonic cordial obtained by the distillation of various aromatic plants, especially nettles, growing on the Alps;⁴⁷ a liqueur composed of distilled spirits and extracts from certain plants subjected to an elaborate process of manufacture at the Grand Chartreuse of the Carthusian monks.⁴⁸

CHARTULARIUS. A keeper of the archives of court.⁴⁹

CHARUE. In old English law, a plow.⁵⁰

26. Minn.—In re Hull, 204 N.W. 534, 535, 163 Minn. 439, 49 A.L.R. 320.

27. Or.—Grimberg v. Columbia Packers' Ass'n, 83 P. 194, 47 Or. 257, 265, 114 Am.S.R. 927, 8 Ann.Cas. 491.

28. Mass.—Charles River Bridge v. Warren Bridge, 7 Pick. 344, 361.

29. N.C.—White v. Norfolk, etc., R. Co., 20 S.E. 191, 115 N.C. 631, 633, 44 Am.S.R. 489.

See 11 C.J. p 381 notes 20-22, p 382 note 23.

30. N.C.—White v. Norfolk, etc., R. Co., supra.

31. U.S.—The Lake Monroe, Mass., 39 S.Ct. 460, 463, 250 U.S. 246, 63 L.Ed. 962.

Not necessarily "demised"

"'Chartering' does not necessarily mean a letting of the ship by way of demise, and is equally as consistent with the idea of a contract for affreightment."—Grimberg v. Columbia Packers' Ass'n, 83 P. 194, 47 Or. 257, 264, 265, 114 Am.S.R. 927, 8 Ann. Cas. 491.

32. Or.—Grimberg v. Columbia Packers' Ass'n supra.

33. U.S.—The Lake Monroe, Mass., 39 S.Ct. 460, 463, 250 U.S. 246, 63 L.Ed. 962.

34. See 11 C.J. p 382 note 27.

35. U.S.—J. D. Adams Mfg. Co. v. Storen, Ind., 58 S.Ct. 913, 915, 304 U.S. 307, 82 L.Ed. 1365.

36. U.S.—Filley v. Child, C.C.N.Y., 9 F.Cas.No.4,787, 16 Blatchf. 376, 4 Bann. & A. 353, 16 Off.Gaz. 261.

37. U.S.—The Lake Monroe, Mass., 39 S.Ct. 460, 463, 250 U.S. 246, 63 L.Ed. 962.

38. U.S.—Allen v. Dillingham, Tex., 60 F. 176, 179, 8 C.C.A. 544. Tex.—Turner v. Cross, 18 S.W. 578, 83 Tex. 218, 223, 15 L.R.A. 262.

39. U.S.—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F. 2d 710, 711.

40. U.S.—The James Horan, D.C.N. J., 10 F.Supp. 28, 31.

41. U.S.—Curtiss-Wright Flying Service v. Glose, C.C.A.N.J., 66 F.2d 710, 711.

42. "Receiver of railroad" held not included

Tex.—Turner v. Cross, 18 S.W. 578, 83 Tex. 218, 223, 227, 15 L.R.A. 262. 11 C.J. p 382 note 25 [a].

43. A maxim meaning "Charters are called 'muniments' from 'muniendo' [from fortifying, defending] because they fortify and defend the inheritance."—Adams Gloss., citing 4 Coke p 153.

44. Black L.D.

45. Black L.D.

46. U.S.—Baglin v. Cusenier Co., C. C.N.Y., 156 F. 1016, 1017. 11 C.J. p 382 note 32.

47. U.S.—Bauer v. Order of Carthusian Monks, Ill., 120 F. 78, 79, 56 C.C.A. 484.

48. U.S.—Nicholas v. U. S., C.C.N. Y., 122 F. 892, 893.

49. Adams Gloss., citing Justinian Cod. iii 26, 10.

50. Black L.D.

Bestes des charues—beasts of the plow.—Black L.D.

CHASE.**English**

A large extent of woody ground lying open and privileged for wild beasts and wild fowl; also a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so-called, the wild animals of chase.⁵¹ "Chase" has been distinguished from "park."⁵²

Common chase. A place where all alike were entitled to hunt wild animals.⁵³

Other phrases: "Beasts of the chase," see *Beast* 10 C.J.S. p 220 note 78, and "law of the chase" (as means of acquiring property in game), see the C.J.S. title *Game* § 2, also 27 C.J. p 942 notes 11–16.

French

In law French, compelled, driven.⁵⁴

CHASING. The art of engraving designs on metallic surfaces with a chisel or a burin;⁵⁵ also a technical term relating to the cutting of bricks for wiring.⁵⁶

CHASSIS. As applied to a motor car, the word means the rectangular metal framework thereof, as distinguished from its body and seats, but including its accessories for propulsion, as the tanks, motor, generator, gears, springs, axles, wheels, tires, fan, and general running gear.⁵⁷

As applied to a radio receiving set, a "chassis" is a metal structure on which the tuned radio frequency receiver complete in all its elements, except its tubes, is mounted.⁵⁸

CHASTE. The word is used as descriptive of persons or of their lives or conduct;⁵⁹ and has been defined as meaning, in popular language, pure, genuine, uncorrupt, undefiled, or virtuous;⁶⁰ and, more specifically, free from all unlawful commerce of the sexes, from obscenity, or from unlawful sexual intercourse;⁶¹ never having had unlawful sexual intercourse.⁶² Applied to persons before marriage, it signifies pure from all sexual commerce, undefiled; and as applied to married persons, it means true to the marriage bed.⁶³ In Spanish, the term is signified by "pura."⁶⁴

Phrases: "Chaste and virtuous,"⁶⁵ "chaste character," see *Character* ante p 400 notes 53, 54, and "chaste female."⁶⁶

CHASTISEMENT. The act of chastising; also, that which is suffered or experienced in being chastised; especially, pain inflicted for punishment and correction; discipline; punishment.⁶⁷

CHASTITY. Continence, purity; or virtue;⁶⁸ that virtue which prevents the unlawful commerce of the sexes;⁶⁹ also the state of purity or abstinence from unlawful sexual connection.⁷⁰ The term means physical purity as a fact and as an actual condition; actual personal virtue and character, not mere external reputation for chastity;⁷¹ and in the case of an unmarried woman means that she is "virgo intacta."⁷² Unchastity is the opposite of what is defined as chastity.⁷³

CHATEAUX or CHATEUX. Law French, chatels.⁷⁴

CHATTEL or CHATTELS. It has been said that

51. See 11 C.J. p 382 note 34.
52. Pa.—Commonwealth v. Hazen, 20 Pa.Super. 487, 493.
53. Black L.D.
54. Adams Gloss.
Chase à répondre—driven to answer.—Adams Gloss.
Chase de plèder—driven to plead.—Adams Gloss.
Chase at rechase les bestes—to drive and redrive the beasts.—Adams Gloss.
55. See 11 C.J. p 382 note 35.
56. N.Y.—M. B. Foster Electric Co. v. Phi Gamma Delta Club, 120 N.Y.S. 809, 810.
57. Mo.—Kansas City Automobile School Co. v. Holcker-Elberg Mfg. Co., App., 182 S.W. 759, 760.
58. Del.—Philadelphia Storage Battery Co. v. Radio Corporation of America, Ch., 194 A. 414, 432.
59. N.Y.—People v. Weinstock, 140 N.Y.S. 453, 457, 27 N.Y.Cr. 53.

60. N.Y.—People v. Kenyon, 5 Park. Cr. 254, 270.
61. N.Y.—People v. Weinstock, 140 N.Y.S. 453, 457, 27 N.Y.Cr. 53.
62. Cal.—Carter v. Murphy, App., 66 P.2d 1234, 1235.
Neb.—Marchand v. State, 201 N.W. 890, 891, 113 Neb. 87.
11 C.J. p 382 note 42 [a] (2).
63. Iowa.—State v. Carron, 18 Iowa 372, 375, 87 Am.D. 401.
Mo.—State v. Kelley, 90 S.W. 834, 191 Mo. 680, 691.
N.Y.—People v. Kenyon, 5 Park.Cr. 254, 270.
64. Porto Rico.—People v. Martinez, 13 Porto Rico 241, 243.
65. Ind.T.—Kerr v. U. S., 104 S.W. 809, 7 Ind.T. 486, 490.
11 C.J. p 382 note 42 [a].
66. Neb.—Marchand v. State, 201 N.W. 890, 891, 113 Neb. 87.
Okl.—Marshall v. Territory, 101 P. 139, 2 Okl.Cr. 136, 147.

67. See 11 C.J. p 382 note 48—p 383 note 53.
68. Cal.—People v. Kehoe, 55 P. 911, 912, 123 Cal. 224, 69 Am.S.R. 52.
Ind.T.—Kerr v. U. S., 104 S.W. 809, 7 Ind.T. 486, 490.
Iowa.—State v. Carron, 18 Iowa 372, 375, 87 Am.D. 401.
69. Neb.—Woodruff v. State, 101 N.W. 1114, 72 Neb. 815, 827.
11 C.J. p 383 note 55.
70. Iowa.—State v. Carron, 18 Iowa 372, 375, 87 Am.D. 401.
71. N.Y.—People v. Weinstock, 140 N.Y.S. 453, 457, 27 N.Y.Cr. 53.
72. Cal.—People v. Kehoe, 55 P. 911, 912, 123 Cal. 224, 69 Am.S.R. 52.
73. Minn.—Lysacker v. Bemidji Pioneer Pub. Co., 130 N.W. 850, 114 Minn. 179, 181.
74. Adams Gloss., citing Littleton §§ 321, 323.
Chateux moeble—movable or personal chattels.—Adams Gloss., citing Reg. Orig. p 93 b.

the word is derived from the French, or Norman French, "chateaux" or "chateux,"⁷⁵ and also from the technical Latin word "catalla;"⁷⁶ it is described as a term of very broad import,⁷⁷ denoting property and ownership;⁷⁸ and has been defined generally as including all kinds of property, except the freehold and things which are parcel of it.⁷⁹

For specific definitions of the term see the C.J.S. title Property § 8, also 11 C.J. p 383 note 62—p 386 note 23.

Phrases: "Chattels capable of being imported," see Capable 12 C.J.S. p 1115 note 37, "chattels per-

sonal" and "chattels real," see the C.J.S. titles Estates § 12, also 50 C.J. p 763 note 26, and 11 C.J. p 385 note 13—p 386 note 18, and Property § 8, also 50 C.J. p 763 note 25, p 747 note 20—p 748 note 33, and 11 C.J. p 385 note 7—p 386 note 22, "goods and chattels,"⁸⁰ "incorporeal chattels," see the C. J.S. title Property § 8, also 11 C.J. p 385 note 5 and "personal chattels;"⁸¹ also, adjectively, "chattel interest," see the C.J.S. title Estates § 12, also 11 C.J. p 386 note 25, "chattel mortgage," see the C. J.S. title Chattel Mortgages § 1, and "chattel property."⁸²

Chateux moeble et immeuble—
chattels movable and immovable.—
Adams Gloss., citing 2 Blackstone
Comm. p 386 note (e).

75. U.S.—U. S. v. Sischo, D.C.Wash.,
262 F. 1001, 1005.

76. Ill.—Chicago, etc., R. Co. v.
Thompson, 19 Ill. 578, 584.
11 C.J. p 383 note 59. [a].

77. U.S.—Gilchrist Transp. Co. v.

Phenix Ins. Co., Ohio, 170 F. 279,
282, 95 C.C.A. 475.

Tenn.—Sharp v. Cincinnati, N. O. &
T. P. Ry. Co., 179 S.W. 375, 376, 133
Tenn. 1, Ann.Cas.1917C 1212.
11 C.J. p 383 note 60.

78. La.—State v. Vanderlip, 4 La.
Ann. 444.
11 C.J. p 383 note 61.

79. U.S.—U. S. v. Sischo, D.C.Wash.,
262 F. 1001, 1005.

Iowa.—Hamby v. Samson, 74 N.W.

918, 105 Iowa 112, 113, 67 Am.S.R.
285, 40 L.R.A. 508.

11 C.J. p 383 note 62.

80. Tenn.—Sharp v. Cincinnati, N.
O. & T. P. Ry. Co., 179 S.W. 375,
376, 133 Tenn. 1, Ann.Cas.1917C
1212.

28 C.J. p 723 note 85—p 725 note 68.

81. Fla.—Curington v. State, 86 So.
344, 80 Fla. 494.

82. N.C.—In re Cross, 170 S.E. 660,
662, 205 N.C. 160.

CHATTEL MORTGAGES

This Title includes transfers of personal property in general, as security for payment of money or performance of contracts or other obligations, whether such transfer be made by conveyance on condition or with a defeasance or by deed of trust, or be made by bill of sale or other conveyance absolute in form without delivery of the property; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; instruments in writing by which such conveyances, defeasances, etc., are made, and delivery, acceptance, recording or registration, and construction thereof; liens of mortgages and priorities; rights, duties, and liabilities of the parties as between themselves and as to others; effect of transfers of debts or obligations secured or of mortgages, and of property mortgaged; fraudulent sale or removal of mortgaged goods; payment or other satisfaction or release; enforcement; and redemption.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITION, NATURE, AND DISTINCTIONS

§ 1. Definition and Nature in General

A chattel mortgage is a conveyance of some present legal or equitable right in personal property, as security for the payment of money, or for the performance of some other act. It operates in some states to pass the legal title to the mortgagee, but in other states merely to create a lien.

A chattel mortgage is a conveyance of some present legal or equitable right in personal property, as security for the payment of money, or for the performance of some other act.¹ The essence of the mortgage is the intention to transfer title to secure the payment of a debt or the performance of an obligation;² and the holder of the mortgage takes it subject to the qualifications attached to the contract by law the moment the contract is formed.³

As passing title. A variance of opinion, similar to that which prevails with reference to mortgages of real property, as explained in the C.J.S. title Mortgages § 1, also 41 C.J. p 274 note 5—p 280 note 22, exists with respect to whether a chattel mortgage passes title or merely creates a lien,⁴ although under either theory it is the giving of security, and is not an absolute and unconditional transfer of the property.⁵

In some states, except to the extent that the rule is modified by statute with respect to mortgages of particular property,⁶ the mortgage operates as a sale of the subject matter on condition subsequent, passing a present legal title subject to be defeated by the performance of the condition,⁷ so that on

1. U.S.—In re Ulrop-Huff Co., D.C. N.Y., 9 F.2d 922, 923, affirmed, C. C.A., 9 F.2d 924.
- Ark.—Ribelin v. Loyd, 230 S.W. 556, 148 Ark. 487.
- Iowa.—O'Connor v. Hassett, 222 N. W. 530, 534, 207 Iowa 155.
- N.M.—Mathieu v. Roberts, 247 P. 1066, 1067, 31 N.M. 469, quoting *Corpus Juris*.
- N.Y.—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 1021, 161 Misc. 238.
- N.D.—Davis v. Caldwell, 163 N.W. 275, 277, 37 N.D. 1.
- Pa.—Commonwealth v. One Nash Roadster, 9 Pa.Dist. & Co. 75, 78, affirmed 91 Pa.Super. 600.
- S.C.—Miller v. Eagle Star & British Dominions Ins. Co., Limited, of London, England, United States Branch, New York, 143 S.E. 663, 666, 146 S.C. 123.
- Wis.—Leach Co. v. Trace, 226 N.W. 308, 309, 199 Wis. 292.
- 11 C.J. p 398 note 1.

Similar definition

"A conditional sale of personal property to secure a debt or obligation of the mortgagor."—Adler, Salzman & Adler v. Ammerman Furniture Co., 123 A. 268, 269, 100 Conn. 223—Williams v. Chadwick, 50 A. 720, 721, 74 Conn. 255.

Statutory definition

"A contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession."—Cal.Civ.Code § 2920, quoted in Bank of California v. McCoy, Cal. App., 72 P.2d 923, 925—11 C.J. p 399 note 3 [1]—48 C.J. p 1047 notes 26, 27.

2. Cal.—Bank of California v. McCoy, App., 72 P.2d 923, 925.
- III.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 661, 332 Ill. 362, reversing 243 Ill.App. 195—Citizens' State Bank

of Manteno v. Senesac, 267 Ill.App. 238, 295.

- N.J.—Smith v. Commercial Credit Corporation, 165 A. 637, 113 N.J.Eq. 12, affirmed Morrow v. Smith, 170 A. 607, 115 N.J.Eq. 310.
- N.D.—Davis v. Caldwell, 163 N.W. 275, 277, 37 N.D. 1.

The usual earmarks of a chattel mortgage are: First, that there is a previous debt, or a present advance of money on loan, for which some evidence is taken, obliging the borrower personally to the absolute payment and second, that there is a bond for the debt, or a covenant in the mortgage deed for the payment. —Schneider v. Daniel, 131 N.E. 816, 17 A.L.R. 1410.

Essential elements generally see infra §§ 17–45.

3. La.—Baton Rouge Rice Mill v. Fairbanks, Morse & Co., 114 So. 633, 164 La. 729, error dismissed Fairbanks, Morse & Co. v. Baton Rouge Rice Mill, 49 S.Ct. 35, 278 U.S. 564, 73 L.Ed. 508.

4. N.M.—Mathieu v. Roberts, 247 P. 1066, 1067, 31 N.M. 469, quoting *Corpus Juris*.

5. R.I.—Aristo Hosiery Co. v. Ramsbottom, 129 A. 503, 46 R.I. 505.

6. Mortgage on unplanted crops

In Alabama, under Code 1923 § 9008, and prior similar statutes, a chattel mortgage executed after January the first, in which a cotton crop is to be grown, conveys the legal title to such crop, but a mortgage executed before the first of the year conveys only an equitable title. —Faulk v. Dorsey, 166 So. 792, 232 Ala. 85—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., 75 So. 568, 200 Ala. 120—Sugg v. Davis, 115 So. 152, 22 Ala.App. 281, certiorari denied 115 So. 153, 217 Ala. 191.

7. U.S.—Goldstein v. Rusch, C.C.A.

N.Y., 56 F.2d 10, modifying, D.C., 54 F.2d 86, and certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526—North River Coal & Wharf Co. v. McWilliams Bros., D.C.N.Y., 32 F.2d 355, affirmed, C.C.A., 37 F. 2d 22—In re Packard Press, C.C.A. N.Y., 5 F.2d 633.

Ala.—Bank of Andalusia v. Freeman, 75 So. 325, 200 Ala. 13—Fraser v. R. W. Allen & Co., 94 So. 732, 19 Ala.App. 55—Phillips v. Hartselle, 81 So. 857, 17 Ala.App. 79.

Ark.—Hall v. Pryor, 114 S.W.2d 847.

Colo.—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599.

Ind.—Sapirie v. Collins, 122 N.E. 679, 70 Ind.App. 529.

N.Y.—Bier v. Perlmutter, 222 N.Y. S. 238, 129 Misc. 819—Rodack v. New Moon Theatre, 200 N.Y.S. 237, 121 Misc. 63—Altman v. Krumholtz, 172 N.Y.S. 126.

Contra Edson & Co. v. Hudson Motor Car Co., 228 N.Y.S. 582, 132 Misc. 223.

N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575.

11 C.J. p 399 note 2.

"At common law, the execution of a chattel mortgage served to transfer, eo instante, to the mortgagee a defeasible title to the property mortgaged, which became absolute at law for the failure by the mortgagor to pay at the stipulated time."—Lowery v. Louisville & N. R. Co., 153 So. 467, 228 Ala. 137, reversing 153 So. 465, 26 Ala.App. 70.

Absolute sale

The mortgage operates as absolute sale, passing general property to mortgagee, subject to right to redeem.—Faska v. Saunders, 153 A. 451, 103 Vt. 204—Mason v. Sault, 108 A. 267, 93 Vt. 412.

A purchase-money mortgage conveying legal title retains title in the

breach of condition the mortgagee may, so far as legal rights are concerned, treat the property as his own;⁸ and as so defined it has been referred to as a personal mortgage.⁹ In some of these states, however, while the general property is regarded as passing to the mortgagee by the mortgage, there is a statutory right of redemption in the mortgagor existing until there has been a foreclosure in accordance with the statute, which vests a legal right in the mortgagor limiting the right and title of the mortgagee;¹⁰ and accordingly the legal title in the mortgagee is subject to a reversion of title to the mortgagor on payment of the debt or performance

of the obligation before foreclosure or sale,¹¹ and this leaves in the mortgagor an interest, as property, which he may sell or transfer, subject to the mortgage, or which may be levied on before default.¹² In equity it has been held that the mortgage is security, and not a conveyance, in the sense that title is divested.¹³

As creating lien. In other states, as a result either of statutory enactment or judicial decision, the mortgage is regarded, not as passing the legal title to the mortgagee, but as constituting a security only, and as merely creating a lien on the subject matter,¹⁴ and under some statutes the creation of

seller as security for the debt.—Bradford v. Proctor, 96 So. 203, 209 Ala. 299.

Prima facie title

Mortgagor being in possession when mortgage was given, prima facie, title passed to mortgagee.—McLeod Lumber Co. v. Neighbors, 114 So. 176, 22 Ala.App. 204.

As of date of mortgage

Mortgagee acquires title as of date of mortgage.—Doughty v. Rockingham Nat. Bank, D.C.N.H., 2 F.Supp. 213.

In Indian Territory

Under the laws of Arkansas in force in Indian Territory, a mortgage conveyed title to the mortgagee subject only to the right of redemption.—Continental Gin Co. v. Pannell, 160 P. 598, 61 Okl. 102.

In Ohio, interest of mortgagee is that of a general owner of the property mortgaged.—Winters Nat. Bank & Trust Co. v. Midland Acceptance Corporation, 191 N.E. 839, 47 Ohio App. 324—City Loan & Savings Co. v. Dickison, 19 Ohio N.P.N.S., 215, 216—11 C.J. p 399 note 3 [k].

8. N.Y.—People v. Scudder, 163 N.Y.S. 739, 177 App.Div. 225, affirmed 117 N.E. 1080, 221 N.Y. 670. Absolute legal title as passing after default see infra § 176.

9. U.S.—In re Riggs Restaurant Co., N.Y., 130 F. 691, 693, 66 C.C.A. 48. N.Y.—Butler v. Miller, 1 N.Y. 496, 500—Streeter v. Ward, 12 N.Y.St. 333, 334.

10. U.S.—Doughty v. Rockingham Nat. Bank, D.C.N.H., 2 F.Supp. 213. Ala.—Horton v. Hovater, 66 So. 939, 11 Ala.App. 413.

Colo.—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

Mass.—Weeks v. Baker, 24 N.E. 905, 152 Mass. 20.

N.Y.—Sheldon v. McFee, 111 N.E. 220, 216 N.Y. 618, affirming 145 N.Y.S. 624, 160 App.Div. 361, and rehearing denied 112 N.E. 1076, 217 N.Y. 665.

Vt.—Paska v. Saunders, 153 A. 451,

103 Vt. 204—Mason v. Sault, 108 A. 267, 93 Vt. 412.

Redemption generally see infra §§ 432-439.

11. U.S.—In re Herkimer Mills Co., D.C.N.Y., 39 F.2d 625.

N.Y.—People v. Scudder, 163 N.Y.S. 739, 177 App.Div. 225, affirmed, 117 N.E. 1080, 221 N.Y. 670.

12. U.S.—In re Packard Press, C.C. A.N.Y., 5 F.2d 633.

13. Ala.—Metcalf v. Clemmons-Powers & Co., 76 So. 9, 200 Ala. 243.

14. U.S.—Intertype Corporation v. Pulver, D.C.Fla., 2 F.Supp. 4, affirmed, C.C.A., 65 F.2d 419, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571—In re Martin, D. C.Tex., 283 F. 833.

Ariz.—Brown v. Schwab, 233 P. 593, 27 Ariz. 457, 39 A.L.R. 150—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517—Mooney v. Broadway, 11 P. 107, 2 Ariz. 114.

Cal.—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697—Metheny v. Davis, 290 P. 91, 107 Cal.App. 137—Shelley v. Byers, 233 P. 177, 73 Cal.App. 44—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728—People v. Martin, 200 P. 808, 53 Cal.App. 671.

Colo.—See Mosko v. Matthews, 284 P. 1021, 87 Colo. 55, construing Oklahoma statute.

Fla.—Berlein v. Eddy, 104 So. 780, 39 Fla. 484.

Ga.—Hix v. Williams, 155 S.E. 355, 42 Ga.App. 143—Grady v. T. I. Harris, 151 S.E. 829, 41 Ga.App. 111—Wilkins v. Friedman, 139 S.E. 113, 37 Ga.App. 141.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231—Stoddard v. Ploeger, 247 P. 791, 42 Idaho 688.

Mich.—General Motors Acceptance Corporation v. Lee, 239 N.W. 287, 256 Mich. 108—Young v. Phillips, 169 N.W. 822, 203 Mich. 566, affirming 168 N.W. 549, 202 Mich. 488—Lucking v. Wesson, 25 Mich. 443.

Mo.—State v. Norman, 232 S.W. 452—Adamson v. Fogelstrom, 300 S.

W. 841, 221 Mo.App. 1243—Olean Milling Co. v. Tyler, 235 S.W. 186, 208 Mo.App. 430.

Mont.—Barth v. Ely, 278 P. 1002, 85 Mont. 310.

Neb.—National Bond & Investment Co. v. Haas, 247 N.W. 563, 124 Neb. 631, 88 A.L.R. 1180—Appel Mercantile Co. v. Kirtland, 181 N.W. 151, 105 Neb. 494.

N.M.—American Mortg. Co. v. White, 287 P. 702, 34 N.M. 602—Enfield v. Stewart, 174 P. 428, 24 N.M. 472, 2 A.L.R. 196.

N.D.—Davis v. Caldwell, 163 N.W. 275, 37 N.D. 1.

Okl.—Reisinger v. Van Huss, 9 P.2d 724, 156 Okl. 8—First Nat. Bank v. Young, 8 P.2d 1108, 155 Okl. 282—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95—State Exchange Bank v. Purcell Bank & Trust Co., 218 P. 320, 95 Okl. 197—First State Bank of Lamont v. Ware, 174 P. 273, 71 Okl. 1—Nicholson v. Bynum, 162 P. 740, 62 Okl. 167.

Or.—Commercial Securities, Inc. v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194—Nash v. Jaynes, 263 P. 746, 126 Or. 64—Laam v. Green, 211 P. 791, 106 Or. 311—Hart v. Oregon Laundry Co., 178 P. 932, 91 Or. 324.

Tex.—Walden v. Locke, Civ.App., 49 S.W.2d 832—Barton v. Lary, Civ. App., 283 S.W. 920—Stephens v. Cox, Civ.App., 255 S.W. 241, rehearing denied 256 S.W. 643—Connally v. State, 234 S.W. 886, 90 Tex.Cr. 284.

Wash.—Lahn & Simons v. Matzen Woolen Mills, 266 P. 697, 147 Wash. 560—First Guaranty Bank v. Western Cross-Arm & Mfg. Co., 247 P. 1027, 139 Wash. 614—Wintler Abstract & Loan Co. v. Sears, 184 P. 309, 108 Wash. 461, 7 A.L.R. 152.

11 C.J. p 399 note 3.

"The security is dependent upon the title"

Mo.—Globe Securities Co. v. Gardner Motor Co., 85 S.W.2d 561, 337 Mo. 177.

secondary liens by subsequent mortgages is contemplated.¹⁵ Under this theory the legal title to, or general property in, the chattel mortgaged remains in the mortgagor, until condition broken,¹⁶ notwithstanding an agreement to the contrary,¹⁷ and notwithstanding the mortgage is in form a conveyance.¹⁸ Furthermore, in some states, following the lien theory, no title is regarded as passing to the mortgagee until after foreclosure and sale, or some act tantamount thereto,¹⁹ while in other states the mortgagee, after condition broken, is regarded as having become vested with a special property in the subject matter of the mortgage.²⁰

Status under civil and common law. It seems that a chattel mortgage, as such, is unknown to the civil law,²¹ and according to some authorities, as

a lien, was not known at common law,²² and has been said to be in derogation of the common law.²³ On the other hand, it has been said that the power to assign and to transfer property by way of chattel mortgage is not dependent on statute, and was not conferred by the chattel mortgage acts;²⁴ and it has been held that, except so far as modified by controlling statutes, the force and validity of such a mortgage is to be tested by the common law touching sales of personal property.²⁵

§ 2. Statutory Provisions

Chattel mortgages in many states are regulated and controlled by statutes which generally should be strictly construed.

Chattel mortgages in many states are now regulated and controlled by statutes,²⁶ which have been

A purchaser's execution and seller's acceptance of a chattel mortgage, as provided in the contract of sale, passes title to the purchaser and the creation of a lien in favor of the seller as mortgagee.—*Theatre Equipment Acceptance Corporation v. Betman*, 242 N.W. 953, 259 Mich. 245.

Crop mortgage

Where party secured from bank advances to make crops, giving a mortgage after the crops were planted to secure indebtedness, past, present, and future, the mortgage constituted a lien only on the crops for the current year, and did not constitute title.—*Commercial City Bank v. Sullivan*, 90 S.E. 173, 18 Ga.App. 608.

Successive assignments of business and assets of a partnership, absolute on their face, do not prevent the operation of the rule that, where the relation is that of debtor and creditor, and the property is regarded as security, there is no transfer of title.—*Sterman v. Ziem*, 62 P.2d 160, 17 Cal.App.2d 414.

In Illinois

(1) By a decision of the supreme court, "the chattel mortgage act . . . recognizes a lien as existing under the mortgage upon the property mortgaged."—*Barchard v. Kohn*, 41 N.E. 902, 903, 157 Ill. 579, 29 L.R.A. 803, reversing 54 Ill.App. 629.

(2) By decisions of the court of appeals, however, it has been held that the mortgage passes a qualified title to the mortgagee.—*Greenspahn v. Ehrlich*, 277 Ill.App. 322—*Bross v. Green*, 113 Ill.App. 58.

(3) A mortgage in form "granting, selling, conveying, and conforming" the mortgaged property to the mortgagee transfers the legal title at time of delivery of the mortgage.—*Van Zele v. Cleaveland*, 208 Ill.App. 387, 396.

In New Jersey the rule has been stated that, while at law the mort-

gage conveys the legal title, in equity it merely creates a lien.—*Rosenblatt v. Premier Dyeing Co.*, 139 A. 389, 101 N.J.Eq. 569.

In South Carolina

(1) A mortgage does not vest title to mortgaged property in mortgagee at date of execution.—*General Motors Acceptance Corporation v. Hanahan*, 143 S.E. 820, 146 S.C. 257.

(2) Earlier decisions, however, held the contrary.—*Hill v. Winnsboro Granite Corporation*, 99 S.E. 836, 112 S.C. 243.
11 C.J. p 399 note 2.

15. Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 23 Ariz. 517.

16. Cal.—*Pacific Finance Corporation v. Hendley*, 7 P.2d 391, 119 Cal.App. 697—*Metheny v. Davis*, 290 P. 91, 107 Cal.App. 137.

Mo.—*Adamson v. Fogelstrom*, 300 S.W. 841, 221 Mo.App. 1243.

N.M.—*American Mortg. Co. v. White*, 287 P. 702, 34 N.M. 602.

Tex.—*Camden Fire Ins. Ass'n v. Sutherland*, Civ.App., 278 S.W. 907, reformed on other grounds, Com. App., 284 S.W. 927.

17. Okl.—*First State Bank of Lamont v. Ware*, 174 P. 273, 71 Okl. 1.

18. Tex.—*Stephens v. Cox*, Civ.App., 255 S.W. 241, rehearing denied 256 S.W. 643.

19. U.S.—*In re Martin*, D.C.Tex., 283 F. 833.

Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 23 Ariz. 517.

Or.—*Commercial Securities v. Mast*, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

Tex.—*Sabine Motor Co. v. W. C. English Auto Co.*, Com.App., 291 S.W. 1088, reversing, Civ.App., 283 S.W. 224.

Wash.—*Marsh v. Wade*, 20 P. 578, 1 Wash. 538.

20. Or.—*Commercial Securities, Inc. v. Mast*, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

11 C.J. p 401 note 6.

"The default of the mortgagor to pay his debt at maturity in no way affects the nature of the mortgagee's rights concerning the property mortgaged, except that he then becomes entitled to proceed to make the security available in the manner prescribed by law or by the terms of the contract."—*American Mortg. Co. v. White*, 287 P. 702, 705, 34 N.M. 602.

Right to possession or control of property after default generally see *infra* §§ 183-185.

21. La.—*Delop v. Windsor*, 26 La. Ann. 185.

Porto Rico.—*Matter of Carballo*, 4 Porto Rico Fed. 233.

11 C.J. p 401 note 8.

22. Ill.—*Scott v. Judd*, 255 Ill.App. 558.

11 C.J. p 401 note 9.

Statutory lien

Chattel mortgage is purely statutory lien.—*Scott v. Judd*, 255 Ill.App. 558.

23. Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 329 Ill. 403.

24. N.J.—*Cumberland Nat. Bank v. Baker*, 40 A. 850, 57 N.J.Eq. 231.

25. Mass.—*Atlantic Transp. Co. v. Alexander Shipping Co.*, 157 N.E. 725, 261 Mass. 1.

26. In New York chattel mortgages are not controlled by the Personal Property Law of the state, but by article ten of the Lien Law of Consolidation c 33 § 230 et seq.—*In re Excelsior Macaroni Co.*, D.C.N.Y., 55 F. 2d 406.

Statutory regulations as to filing or recording see *infra* § 131.

Repeal of statute

Supplement to act dealing with chattel mortgages, which made cer-

held to be constitutional;²⁷ and where no special types are recognized by, or exempt from, its provisions, such a statute applies to all chattel mortgages.²⁸ Such statutes do not operate retroactively, and the validity and the effect of a mortgage are to be determined by the law in force when it was made.²⁹

The provisions of such a statute, in derogation of the common law, should be strictly construed,³⁰ and will be construed as intending to make such mortgages subject to general laws, except where a contrary intent is expressed.³¹ While the general rule is that the provisions of a statute respecting chattel mortgages are mandatory, the application of the rule concerns only substantial departures from the requirements of the statute.³²

A chattel mortgage which conforms to the requirements of a statute providing when such mort-

gages are void as to third persons is not void, and, where a mortgage is valid between the parties thereto and there is no provision making it void as to third persons, its terms are binding on those who take with notice.³³

§ 3. Distinctions between Chattel Mortgages and Other Transactions

Whether or not a particular transaction constitutes a chattel mortgage or some other distinguishable transaction depends on the intention of the parties as shown by the instruments executed by them, together with the surrounding facts and circumstances.

Whether or not a particular transaction constitutes a chattel mortgage or some other distinguishable transaction depends on the intention of the parties as ascertained from the character and language of the instruments executed by them, together with the surrounding facts and circumstances;³⁴ and,

tain exceptions as to recording where parties execute statement which must be recorded, does not repeal statute relating to mortgages executed by mortgagors engaged in business of selling such goods as those mortgaged.—*Smith v. Packard Suburban*, 195 A. 618, 122 N.J.Eq. 566.

27. U.S.—*In re Boswell*, D.C.Cal., 20 F.Supp. 748.

The constitutionality of a statute regulating trust receipts cannot be challenged on the ground of alleged grave changes introduced into statutory commercial credit methods, since such challenge raises a question of legislative policy and not judicial questions, and the state has undoubted power to modify or enlarge its laws relating to personal property, lien rights thereon, or credit mediums thereof, as well as the filing and recordation requirements therein, provided it does so constitutionally.—*In re Boswell*, supra.

28. N.J.—*Smith v. Commercial Credit Corporation*, 165 A. 637, 113 N.J.Eq. 12, affirmed *Morrow v. Smith*, 170 A. 607, 115 N.J.Eq. 310.

A loan brokers act regulating loans on chattel mortgages has no application to a chattel mortgage by an ordinary lender of money.—*Sutton v. Lovan*, Tex.Civ.App., 279 S.W. 295.

29. La.—*Bank of White Castle v. Clark*, 159 So. 409, 181 La. 303. 11 C.J. p 426 note 21.

Amendment of mortgage statute is not noticed when considering mortgage recorded before amendment was adopted.—*Remington-Rand v. Profits Island Gravel Co.*, La.App., 144 So. 636, opinion reinstated 150 So. 76.

Better declaration of law

Mortgage covering agricultural im-

plements and farm equipment, granted under statute authorizing granting, recording, and enforcing of chattel mortgages, is not invalid as to subsequent farm mortgage because of subsequently enacted statute providing that chattel mortgage of movables subsequently immobilized should not be affected by sale or mortgage of the immovable, in view of presumption against meaningless legislation applying to prior statute, and the subsequent statute obviously being enacted to better declare the law as it existed under the prior statute.—*Bank of White Castle v. Clark*, 159 So. 409, 181 La. 303.

30. Ill.—*Lyons v. People's Bank of Lexington*, 147 N.E. 398, 317 Ill. 44 — *McKesson-Fuller-Morrisson Co. v. Chapell Ice Cream Co.*, 2 N.E.2d 561, 285 Ill.App. 472—*Scott v. Judd*, 255 Ill.App. 558.

Lien independent of possession

A statute which gives a special right to a lien independent of possession, a situation unknown to the common law with relation to personal property, should be strictly construed.—*Kahrman v. Jones*, 263 P. 537, 203 Cal. 254.

Requiring card with information concerning loan

A statute requiring persons licensed to make loans on salaries or wages or chattel mortgages to give the borrower a card with information concerning the loan does not apply unless the borrower is obtaining the loan on salary, wages, or a chattel mortgage.—*Fenn v. State*, 17 Ohio N.P., N.S., 474.

In Montana, however, under Rev. Codes 1921 § 4, statutes in derogation of common law are no longer to be strictly construed, but all proceedings under code are to be lib-

erally construed, and, no exception having been made as to Chattel Mortgage Statute, Rev. Codes 1921 § 8276, such statute is to be liberally construed.—*Swords v. Occident Elevator Co.*, 232 P. 189, 72 Mont. 189.

31. La.—*Charrier v. Greenlaw Truck & Tractor Co.*, 2 La.App. 622.

A statute referring to a lien must be construed to include a chattel mortgage, unless a contrary intention is expressed.—*Barth v. Ely*, 278 P. 1002, 85 Mont. 310.

32. Ill.—*Greenwald v. Lee*, 252 Ill. App. 184.

33. Cal.—*Bank of California v. McCoy*, App., 72 P.2d 923.

34. Ala.—*Bank of Mobile v. Lewis*, 80 So. 179, 16 Ala.App. 605. Conn.—*Adler, Salzman & Adler v. Ammerman Furniture Co.*, 123 A. 268, 100 Conn. 223.

Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

N.H.—*General Motors Acceptance Corporation v. Berry*, 167 A. 553, 86 N.H. 280.

N.C.—*Jones-Phillips Co. v. McCormick*, 93 S.E. 449, 174 N.C. 82.

Okl.—*Jones v. Farmers' Nat. Bank of Wewoka*, 162 P. 681, 65 Okl. 11.

Wis.—*Carpenter v. Forbes*, 247 N.W. 857, 211 Wis. 648.

Agreement to pay debt

An agreement whereby a debtor executes to his creditor a bill of sale of an automobile, which is placed in the hands of a bailee, the title thereto to become absolute if the debt is not paid, and the car to be returned if the debt is paid, is not a mortgage, but an agreement to pay the debt in money or property at the debtor's election.—*Petridge v. Osborn*, 206 P. 839, 120 Wash. 21.

Consignment

Where a contract between a retail piano dealer and defendant provided

where it is apparent that the intention is to turn over chattels to another merely as security for a debt or obligation, the transaction will generally be held to be a chattel mortgage and not another form

of contract or transfer.³⁵

A chattel mortgage cannot be distinguished from other transactions merely by the form given to the instrument,³⁶ nor by the name which the parties

that defendant, paying for pianos purchased by the dealer for himself, should consign them to the dealer for sale, and that the dealer should report all sales and settle for cash sales immediately; that lien notes should be indorsed to defendant until the amount due for the instruments represented was settled, with interest; that the dealer's commission should be the amount for which instruments were sold in excess of the cost thereof, as represented by consignment receipts, reciting that the instruments should remain the property of defendant; and that the dealer should make all collections, and carry insurance to cover cost of instruments in stock, and surrender to defendant, on thirty days' notice, unsold instruments held on consignment, it was held that the contract vested in defendant the title to pianos purchased from manufacturers and paid for, and was not a chattel mortgage to secure defendant, the term "consignment" indicating title in the consignor.—*Wasey v. Whitcomb*, 132 N.W. 572, 579, 167 Mich. 58.

An instrument executed to cancel and satisfy a debt, and not to continue it, does not constitute a chattel mortgage.—*Trott v. Flato*, Tex. Civ.App., 244 S.W. 1085.

Payment and not chattel mortgage

(1) Assignment of money as security for payment of obligation is pro tanto "payment" and not "chattel mortgage."—*Silverstein v. Oakland Title Insurance & Guaranty Co.*, 9 P.2d 846, 122 Cal.App. 73.

(2) That a bank permits receivers to transfer their general account to a trust account in the trust department does not amount to the giving of security by the bank for the account, but is the actual payment of the general account and the creation of a new trust agreement.—*People ex rel. Barrett v. Cairo-Alexander County Bank*, 282 Ill.App. 343, reversed on other grounds 2 N.E.2d 839, 363 Ill. 589.

Transactions held not chattel mortgages

(1) Agreement to market fruit through creditor and give option to creditor to apply subsequent crops until indebtedness was paid.—*Summerlin v. Orange Shores*, 122 So. 508, 97 Fla. 996.

(2) A written contract to reconvey part of the leasehold interest transferred by a contemporaneous convey-

ance on which the contract is indorsed, if part of the purchase price is returned in thirty days.—*Gwyanne v. Mann*, Tex.Civ.App., 240 S.W. 1035.

(3) Writing conveying personality to lender as security, with agreement that borrower hold property as bailee until payment.—*Tarver v. Beneficial Loan Soc. of Macon*, 148 S.E. 288, 39 Ga.App. 646.

(4) Transfer by assignee of purchase-money notes given by conditional purchaser as security for debt of assignee does not create a legal mortgage of unassigned agreement of conditional sale, or of property which bill of sale covered, legal title to which remained in assignee of original vendor.—*J. H. Gerlach Co. v. Noyes*, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

35. U.S.—*In re Bonk*, D.C.Mich., 270 F. 657—*Cozart v. Barnes*, S.C., 240 F. 935, 153 C.C.A. 621.

Colo.—*Clay, Robinson & Co. v. Martinez*, 218 P. 903, 74 Colo. 10.

Ill.—*Citizens' State Bank of Manteno v. Senesac*, 267 Ill.App. 288.

Mass.—*Hartford Accident & Indemnity Co. v. Callahan*, 171 N.E. 820, 271 Mass. 556.

N.J.—*David Straus Co. v. Commercial Delivery Co., Ch.*, 113 A. 604, affirmed 112 A. 417, 92 N.J.Eq. 290 —*Samuelson v. Weisberg*, 177 A. 254, 13 N.J.Misc. 193.

S.D.—*First Nat. Bank v. Veglahn*, 231 N.W. 601, 57 S.D. 127.

Wash. — *First Guaranty Bank v. Western Cross-Arm & Mfg. Co.*, 247 P. 1027, 139 Wash. 614.

Wis.—*National Bank of Commerce of Milwaukee v. Brogan*, 253 N.W. 385, 214 Wis. 378.

Wyo.—*U. S. Fidelity & Guaranty Co. v. Thompson*, 41 P.2d 269, 47 Wyo. 519 — *Sterling Lumber Co. v. Thompson*, 41 P.2d 264.

Admission of title to chattel subject to payment of loan

A written instrument which on its face is an admission of title to chattels, but which is subject, by oral arrangement, to redemption on payment of a sum of money loaned, is in law a chattel mortgage subject to the statutes governing their execution and recording.—*Commonwealth Finance Corporation v. Schutt*, 116 A. 722, 97 N.J.Law 225.

An indemnity contract which also assigns chattels as security is in effect a chattel mortgage.

U.S.—*Commercial Casualty Ins. Co.*

v. Williams, C.C.A.N.C., 37 F.2d 326, certiorari denied 50 S.Ct. 409, 281 U.S. 757, 74 L.Ed. 1167.

Mont.—*Brown v. Federal Surety Co.*, 8 P.2d 647, 91 Mont. 389.

Wyo.—*State Bank of Wheatland v. Bagley Bros.*, 11 P.2d 592, 44 Wyo. 307.

Chattel mortgage and not partnership agreement

Written agreement pursuant to which plaintiff turned over to another goods and fixtures of a mercantile establishment for the operation of a mercantile business, the entire property to remain the property of plaintiff to secure purchase-money note, is not a partnership agreement, but a chattel mortgage.—*Farrow v. Farrow*, 206 S.W. 134, 136 Ark. 140.

Chattel mortgage and not warehouse receipt

A written instrument, whereby defendant "conveyed and delivered unto the possession" of plaintiffs certain grain stored at a particular place, and further provided that the transfer was by way of mortgage, to secure an indebtedness due plaintiffs, that they should sell the grain, apply the proceeds to defendant's indebtedness, and account to him for the balance, and that "the receipt" was assignable by indorsement, was a chattel mortgage, and not a warehouse receipt.—*Snyder v. Blatchley*, 52 N.E. 742, 177 Ill. 506, affirming 72 Ill.App. 519.

Transactions held chattel mortgages

(1) Assignment to conditional seller of interest in machines as security for indebtedness on additional machines.—*Röwe Vending Mach. Co. v. Morris*, 177 N.E. 112, 276 Mass. 274.

(2) A transfer and assignment by a borrower to a lender as trustee of all the borrower's one-half interest in a corporation as security for a loan.—*Boyett v. Hahn*, 73 So. 79, 197 Ala. 439.

(3) A public improvement contractor's assignment of his tangible assets to a surety as security, such assets remaining in the possession of the contractor and being used in the ordinary course of his business.—*Stulz-Sickles Co. v. Fredburn Const. Corporation*, 169 A. 27, 114 N.J.Eq. 475.

36. Wis.—*Smith v. Pfleger*, 105 N. W. 476, 126 Wis. 253, 110 Am.S.R. 911, 2 L.R.A., N.S., 783.
11 C.J. p 401 note 12.

have given it,³⁷ nor can it be so distinguished by the parties' belief as to the effects of their acts.³⁸ Conversely, an instrument, in fact a chattel mortgage will not be regarded as something different because called by the parties by a different name,³⁹ particularly where there is a statutory provision to that effect.⁴⁰ Accordingly a conveyance of personal property may properly be held to be a mortgage notwithstanding the person receiving it expressed at the time his unwillingness to accept a mortgage.⁴¹ Furthermore the character of the transaction is fixed at its inception, and if an instrument is a mortgage when executed its character does not afterward change, for, Once a mortgage always a mortgage, is a maxim of the law.⁴²

Distinguished from an agricultural lien see Agriculture § 44; from an assignment see Assignments § 2 b (8); from an assignment for the benefit of creditors see Assignments for Benefit of Creditors § 4 g; from a bailment see Bailments § 4. Chattel mortgage as transfer within meaning of bulk sales law see the C.J.S. title Fraudulent Conveyances § 481, also 27 C.J. p 883 notes 34-39.

§ 4. — Pledge

- a. In general
- b. Effect of transfer of title
- c. Effect of transfer or retention of possession
- d. Effect of nonperformance
- e. Existence of independent debt
- f. Effect of power of sale

- g. Necessity of writing
- h. Intention of parties as controlling
- i. Change of character of transaction

a. In General

A chattel mortgage is to be distinguished from a pledge, although it is sometimes difficult to determine into which class a particular transaction falls.

The securing of the payment of a debt or the performance of other obligations is equally the object of both pledges and chattel mortgages;⁴³ hence, it is sometimes difficult to determine into which class a particular transaction falls,⁴⁴ although there are well recognized distinctions between them.⁴⁵ The law favors a pledge rather than a mortgage in a case where there is any doubt as to whether the transaction is a pledge or a mortgage.⁴⁶

By the statutes in some states the distinction between a mortgage and a pledge is clearly recognized,⁴⁷ while in other jurisdictions the effect of the statutes is to make the rights of a pledgee and of a mortgagee in possession substantially the same.⁴⁸ A contract of pledge being held different from a chattel mortgage, it follows that statutes specifically confined to chattel mortgages are not applicable to pledges,⁴⁹ and vice versa.⁵⁰

b. Effect of Transfer of Title

Under the view that the legal title passes to the mortgagee, a chattel mortgage is distinguished from a pledge in that in case of a mortgage the general property passes to the mortgagee subject to be divested on performance of the condition, whereas under a pledge the pledgee acquires only a special property or lien.

³⁷ Ala.—Bank of Mobile v. Lewis, 80 So. 179, 16 Ala.App. 605. 11 C.J. p 402 note 13.

Use of words "chattel mortgage" in renewal affidavit cannot make instrument chattel mortgage where instrument was not in form and did not use terms ordinarily found in chattel mortgage.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451.

³⁸ Conn.—Adler, Salzman & Adler v. Ammerman Furniture Co., 123 A. 268, 100 Conn. 223—Williams v. Chadwick, 50 A. 720, 74 Conn. 255.

³⁹ U.S.—In re Farmers' Co-op Ass'n of Marion County, Fla., D.C. Fla., 3 F.2d 708. 11 C.J. p 402 note 14.

⁴⁰ **Statute providing conveyance as security considered mortgage**

Statute providing that instruments conveying property to secure payment of money shall be considered mortgages is designed to insure effectuation of genuine intention of parties, and neither artifice of form nor superficial declaration of inten-

tion will obscure true nature of transaction.—Cary & Co. v. Hyer, 107 So. 684, 91 Fla. 322.

⁴¹ Conn.—Williams v. Chadwick, 50 A. 720, 74 Conn. 252.

⁴² Fla.—Pittman v. Milton, 68 So. 658, 69 Fla. 304. Wash.—Freepons v. Elliott, 67 P.2d 924, 190 Wash. 348.

⁴³ N.C.—Sneeden v. Nurnberger's Market, 135 S.E. 328, 192 N.C. 439. 11 C.J. p 402 note 17.

A chattel mortgage is in the nature of a pledge to secure payment of a debt.—Appel Mercantile Co. v. Kirtland, 181 N.W. 151, 105 Neb. 494.

⁴⁴ U.S.—Bank of British Columbia v. Marshall, C.C.Or., 11 F. 19, 8 Sawy. 29. Ala.—Oden v. Vaughn, 85 So. 779, 204 Ala. 445. 11 C.J. p 402 note 18.

⁴⁵ N.C.—Sneeden v. Nurnberger's Market, 135 S.E. 328, 192 N.C. 439.

"There may be little or no difference between a pledge and chattel mortgage in actual practice, and it

may be that legislation treats them as similar, to some extent."—J. H. & C. K. Eagle v. Kunkle, 122 A. 276, 278, 278 Pa. 190.

"Formerly no distinction was taken between a pledge and a mortgage of chattels. They were both regarded as security for a debt, and the title of the pledgee was considered as substantially the same in both cases."—Appeal of Collins, 107 Pa. 590, 605, 52 Am.R. 479.

⁴⁶ U.S.—In re Cross, D.C.N.Y., 244 F. 844. 11 C.J. p 402 note 19.

⁴⁷ Cal.—Ehrlich v. Ewald, 4 P. 1062, 66 Cal. 97.

Dak.—Everett v. Buchanan, 6 N.W. 439, 8 N.W. 31, 2 Dak. 249.

⁴⁸ Wash.—Marsh v. Wade, 20 P. 578, 1 Wash. 538.

⁴⁹ N.C. — Bundy v. Commercial Credit Co., 163 S.E. 676, 202 N.C. 604. 11 C.J. p 402 note 22.

⁵⁰ N.Y.—White v. Cole, 24 Wend. 116, reversed on other grounds 26 Wend. 511.

Under the view that the legal title passes to the mortgagee, as announced supra § 1, a chattel mortgage is distinguishable from a pledge in that in the case of a mortgage the general property passes to the mortgagee subject to be divested on performance of the condition, while under a pledge the general property does not pass, the pledgee having only a special property or a lien.⁵¹

Choses in action. In a pledge of choses in action, such as stocks, bonds, and notes, it may be necessary to the value of the security that the legal title pass to the pledgee; but it is held by him for the benefit of the pledgor in whom the general property remains, and the contract is construed in all respects as one of pledge.⁵² Transfer of stock on the books of the corporation from the debtor to the creditor as security is a pledge and not a mort-

gage.⁵³ Where, however, stocks are deposited with the lender of money as collateral security for the loan with authority to the lender to sell the same on nonpayment of the sum borrowed, the transaction is a mortgage and not a pledge.⁵⁴

Covenant to warrant title. A covenant in the instrument to warrant and defend the title to the thing pledged will not render it a mortgage since such covenant, being in its nature and terms executory, cannot be construed to operate as a conveyance of the title.⁵⁵

Delivery of bill of sale. Although there are decisions to the contrary,⁵⁶ according to the weight of authority the delivery of a bill of sale or bill of parcels, absolute on its face, with the intention that it shall operate as a security, constitutes not a mortgage, but a pledge.⁵⁷ Where, however, the bill of

51. U.S.—Goldstein v. Rusch, C.C.A. N.Y., 56 F.2d 10, modifying, D.C., 54 F.2d 86, and certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.—In re German Publication Society, D.C.N.Y., 289 F. 509, affirmed, C.C.A., 289 F. 510.—In re Pittman, D.C.N.C., 275 F. 681.

Ala.—Oden v. Vaughn, 85 So. 779, 204 Ala. 445.

Fla.—Therrell v. Filer, 133 So. 861, 101 Fla. 192.

Ga.—Evans v. Odum, 183 S.E. 669, 52 Ga.App. 453.

Minn.—Thoen v. First Nat. Bank, 271 N.W. 111.

N.Y.—People v. Scudder, 163 N.Y.S. 739, 177 App.Div. 225, affirmed 117 N.E. 1080, 221 N.Y. 670.

N.C.—Bundy v. Commercial Credit Co., 163 S.E. 676, 202 N.C. 604.

Pa.—J. H. & C. K. Eagle v. Kunkle, 122 A. 276, 278 Pa. 190.—Appeal of Collins, 107 Pa. 590, 52 Am.R. 479. 11 C.J. p 402 note 24.

Similar statements of distinction

(1) "Between a mortgage and a pledge there is a recognized and approved distinction: The former is a conditional transfer or conveyance of the property itself, and, if the condition is not performed, the title vests absolutely at law in the mortgagee; the latter passes the possession of the property, or at most a special property in the pledge, with a right of retainer until the debt is paid." — Sneed v. Nurnberger's Market, 135 S.E. 323, 330, 192 N.C. 439.

(2) "The distinction between a mortgage and a pledge is that in the mortgage the legal title is vested in the mortgagee, leaving the mortgagor with only an equitable title, which only a court of equity can enforce, while in the pledge the pledgor retains his legal title to the property pledged, which a court of law can

act upon and enforce."—Minge v. Clark, 72 So. 167, 196 Ala. 617.

An agreement for pledge of an automobile as security for an indebtedness, which does not contain a defeasance clause is not a chattel mortgage.—Fletcher American Nat. Bank v. McDermid, 128 N.E. 685, 76 Ind.App. 150.

Transactions held chattel mortgages

(1) Where a transaction operates to pass title to the lender, subject to the right of the borrower to reacquire, it is a mortgage instead of a pledge.—Rice v. Garnett, 84 So. 557, 17 Ala.App. 239, certiorari denied Ex parte Garnett, 85 So. 921, 204 Ala. 698.

(2) A note reciting a pledge of a mule as security with power to sell it if the debt were not paid at maturity evidenced payee's right, title, and interest in the mule, and hence was a mortgage, and not a pledge, where the evidence showed that the parties intended a transfer of the property as security for the debt contracted in its purchase.—Bradford v. Proctor, 96 So. 203, 209 Ala. 299.

11 C.J. p 402 note 24 [d].

Transactions held pledges

(1) A transaction whereby neither an absolute nor a defeasible title to personalty is transferred by the owner, but only possession with the power to sell if default is made in the payment of the note secured, is not a mortgage, but a "pledge."—Grand Ave. Bank v. St. Louis Union Trust Co., 115 S.W. 1071, 1074, 135 Mo.App. 366.

(2) A lease of a farm providing that if the grain raised thereon should be sold or removed or should be claimed or levied on by third persons before the rent was paid, the lessor should have the right to enter

the premises, take possession of, and sell the grain and apply the proceeds on the rent, did not create a mortgage, but only attempted to create a pledge.—Ash Creek State Bank v. Zwart, 196 N.W. 935, 158 Minn. 100. 11 C.J. p 402 note 24 [b], [c], [e].

52. Minn.—Palmer v. New York Mutual Life Ins. Co., 130 N.W. 250, 114 Minn. 1, Ann.Cas.1912B 957. 11 C.J. p 403 note 25.

Assignment of contract

One to whom rights of buyer of timber, under contract which left title in sellers, were assigned to secure loan acquires only a pledge of the contract, with the right to pay purchase price according to its terms, and not lien on timber.—First Guaranty Bank v. Western Cross-Arm & Mfg. Co., 247 P. 1027, 139 Wash. 614.

Transfer of a chattel mortgage merely by way of collateral security for the payment of a debt is a pledge, and not a mortgage thereof.—Haskins v. Kelly, 24 N.Y.Super. 160, 1 Abb.Pr.N.S., 63.

53. Or.—Irving Park Assoc. v. Watson, 67 P. 945, 41 Or. 95. 11 C.J. p 404 note 26.

54. Ala.—Campbell v. Woodstock Iron Co., 3 So. 369, 83 Ala. 351. 11 C.J. p 404 note 27.

55. Ky.—Hamilton v. Wagner, 2 A. K.Marsh. 331.

56. Cal.—Heylrod v. Badger, 35 Cal. 404.

N.Y.—Peo. v. Remington, 12 N.Y.S. 824, 14 N.Y.S. 98, 59 Hun 282, affirmed 27 N.E. 853, 126 N.Y. 654.—Tedesco v. Oppenheimer, 37 N.Y.S. 1073, 15 Misc. 522, 2 N.Y.Ann.Cas. 411.

57. U.S.—Petition of Chattanooga Savings Bank, C.C.A.Tenn., 261 F. 116.

11 C.J. p 404 note 29.

sale contains a defeasance clause, it is, in most jurisdictions, held to be a chattel mortgage,⁵⁸ although in some jurisdictions it may constitute a pledge.⁵⁹ Where the bill of sale is accompanied by the delivery of a separate writing containing a defeasance clause,⁶⁰ or is accompanied by a parol agreement of the creditor to hold the property as security for a debt contracted at the time of its execution,⁶¹ it has been held to constitute a mortgage.

Stipulation for a lien. A stipulation in an instrument for a lien on the property is consistent with the idea of a pledge, but inconsistent with that of a chattel mortgage where the effect of the mortgage is regarded as passing legal title.⁶²

c. Effect of Transfer or Retention of Possession

A chattel mortgage is also distinguished from a pledge in that delivery of possession is generally essential to a pledge, but not to a mortgage.

A delivery and retention of the possession of the chattels is generally essential to a pledge, while, as between the parties at least, a delivery is not necessary to the validity of a mortgage.⁶³ If, however,

an instrument is in form a mortgage, in that it has a defeasance clause, it will be held to be a mortgage, although possession of the mortgaged chattels is delivered to the mortgagee at the time of its execution.⁶⁴

Where the property attempted to be pledged is in the possession of another party for a specific purpose, as, for instance, collateral security, and delivery of possession is at the time impossible, it is nevertheless a valid pledge and not a mortgage, especially when such was the clear intention of the parties.⁶⁵

d. Effect of Nonperformance

Nonpayment or nonperformance of the condition generally works a forfeiture in case of a chattel mortgage, but not in case of a pledge.

In case of a pledge, nonpayment of the debt even after it is due does not work a forfeiture, but the title remains in the pledgor until it is divested, either by foreclosure in equity or by a sale on due notice. Whereas in the case of a mortgage nonperformance of the condition at the time specified works a forfeiture, and at law no performance or offer to perform thereafter will revest the title in

Delivery of a car under an absolute bill of sale will constitute a pledge and not a chattel mortgage where it appears from a promissory note executed to the transferee contemporaneously therewith that the transfer is made as collateral security for the payment of the note.—*Petition of Chattanooga Savings Bank, C.C.A.Tenn., 261 F. 116—Darragh v. Elliott, Tenn., 215 F. 340, 131 C.C.A. 482.*

Absolute transfer as pledge generally see the C.J.S. title Pledges § 15, also 49 C.J. p 907 note 30—p 908 note 25.

58. U.S.—In re German Publication Society, D.C.N.Y., 289 F. 509, affirmed, C.C.A., 289 F. 510.
11 C.J. p 404 note 30.

59. Mass.—*Kimball v. Hildreth*, 8 Allen 167.

60. Tex.—*Keppler v. Kelly*, Civ. App., 201 S.W. 447.
11 C.J. p 404 note 32.

Written bill of sale and contemporaneous agreement to retransfer the property on the seller's payment of the consideration are in effect a chattel mortgage and not a pledge, under which either party by agreement might have possession.—*Keppler v. Kelly*, supra.

61. N.Y.—*Smith v. Beattie*, 31 N.Y. 542—*Schoenrock v. Farley*, 49 N.Y.Super. 302.

62. U.S.—*British Columbia Bank v.*

Marshall, C.C.Or., 11 F. 19, 8 Sawy. 29.

Mont.—*Barth v. Ely*, 278 P. 1002, 85 Mont. 310.

63. U.S.—*Manufacturers Acceptance Corporation v. Hale*, C.C.A.Tenn., 65 F.2d 76—In re German Publication Society, D.C.N.Y., 289 F. 509, affirmed, C.C.A., 289 F. 510—In re Pittman, D.C.N.C., 275 F. 681.

Ala.—*Rice v. Garnett*, 84 So. 557, 17 Ala.App. 239, certiorari denied 85 So. 921, 204 Ala. 698.

Cal.—*Arena v. Bank of Italy*, 228 P. 441, 194 Cal. 195.

Ga.—*Evans v. Odum*, 183 S.E. 669, 52 Ga.App. 453.

Ind.—*Fletcher American Nat. Bank v. McDermid*, 128 N.E. 685, 76 Ind. App. 150.

N.Y.—*Cortelyou v. Lansing*, 2 Cal. Cas. 200.

N.D.—*Kelly v. Baird*, 252 N.W. 70, 64 N.D. 346.

Pa.—*J. H. & C. K. Eagle v. Kunkle*, 122 A. 276, 278 Pa. 190.
11 C.J. p 404 note 36.

A written transfer of the legal title to property as security for a debt under such circumstances as to show that the parties intended a sale, whether with or without delivery, constitutes a mortgage, although no method of foreclosure is provided, while, if possession of the property is delivered, legal title remaining in the debtor and the creditor having a mere lien, the transaction is a

pledge.—*Oden v. Vaughn*, 85 So. 779, 204 Ala. 445.

Indenture placing securities in trustee's hands for payment of bonds is not mortgage or trust deed, but pledge.—*Central State Bank v. Commercial Building & Securities Co.*, 218 N.W. 622, 206 Iowa 75.

64. U.S.—In re German Publication Society, D.C.N.Y., 289 F. 509, affirmed, C.C.A., 289 F. 510.

65. U.S.—In re Cross, D.C.N.Y., 244 F. 844.

An agreement that plaintiff should hold corporate stock, then in the possession of another, as collateral security for an indebtedness, as possession of the stock could not be given, the agreement should be construed as a valid pledge, instead of a mortgage, particularly as the certificates merely represent the stock, and are not the shares themselves.—*First Nat. Bank of Waterloo v. Exchange Nat. Bank of Seneca Falls*, 153 N.Y.S. 818, 179 App.Div. 22, affirmed 164 N.Y.S. 1092, 179 App.Div. 22.

Goods in warehouse

Construed together, a note for a loan purporting to pledge as collateral security therefor goods in a warehouse, and an instrument of same date whereby the maker assigns all his right, title, and interest in the goods on account of said loan, constitutes a pledge rather than a mortgage.—In re Cross, D.C.N.Y., 244 F. 844.

the mortgagor.⁶⁶ In equity, however, contracts of pledge and mortgages are in most respects subject to the same rules, a mortgage being considered in equity but a pledge or security for the payment of the debt or the discharge of the other engagements for which it was originally given.⁶⁷

e. Existence of Independent Debt

A transfer of property as security for an independent debt is a pledge and not a mortgage.

Where a debt exists independent of the transfer of property for the payment of which the transfer is a collateral security, the transaction constitutes a pledge and not a mortgage.⁶⁸

f. Effect of Power of Sale

Power of sale alone does not determine whether the transaction is a pledge or a mortgage.

A power of sale, although a frequent provision in a mortgage, is not determinative of the fact that a particular transaction constitutes a pledge.⁶⁹

g. Necessity of Writing

A distinction has been made that a writing is required for a mortgage but not for a pledge.

A still further distinction observed by some cases is that in case of a pledge no writing is required,⁷⁰ whereas in some jurisdictions a mortgage may be required to be in writing.⁷¹ This distinction, however, is not tenable under the common-law rule that a parol mortgage of personal property is valid as between the parties even without change of possession.⁷²

h. Intention of Parties as Controlling

The intention of the parties may be a controlling factor in determining whether a particular transaction constitutes a mortgage or a pledge.

The intention of the parties will not control the established legal effect of their transaction,⁷³ but, nevertheless, when properly ascertained, it may be a controlling factor in determining whether a doubtful transaction constitutes a mortgage or a pledge,⁷⁴ as where it becomes necessary to determine whether or not they intended the title to pass.⁷⁵ This intention is to be gathered from the language of the entire instrument,⁷⁶ and from the language and conduct of the parties.⁷⁷ In the absence of other means for determining the character of the transaction, its abstract form usually controls the question.⁷⁸

i. Change of Character of Transaction

The character of a transaction, as pledge or mortgage, cannot be altered without a new agreement.

The character of a transaction cannot be altered from a pledge to a chattel mortgage, or, conversely, without a new agreement of the parties.⁷⁹ The fact that a pledge is recorded as a mortgage does not alter its character.⁸⁰

§ 5. — Sale in General

A sale is distinguished from a mortgage, in that a sale is a transfer of absolute property in a chattel for a price, whereas a mortgage is at most a conditional sale or transfer as security, subject to revesting of title in the mortgagor on performance of the condition. In determining whether a transaction is a sale or a mortgage, the intention of the parties as ascertained from the whole transaction is controlling.

66. Pa.—J. H. & C. K. Eagle v. Kunkle, 122 A. 276, 278 Pa. 190. 11 C.J. p 405 note 38.

67. Tex.—Luckett v. Townsend, 3 Tex. 119, 49 Am.D. 723.

68. N.Y.—Haskins v. Kelly, 24 N.Y. Super. 160. 11 C.J. p 405 note 40.

69. U.S.—British Columbia Bank v. Marshall, C.C.Or., 11 F. 19, 8 Sawy. 29.

N.Y.—Brownell v. Hawkins, 4 Barb. 491.

11 C.J. p 405 note 41.

Transaction held mortgage

A note stating a deposit as security of certain tobacco, which the payees are empowered to sell, amounts to a mortgage.—Cozart v. Barnes, S.C., 240 F. 935, 153 C.C.A. 621.

70. Ala.—Oden v. Vaughn, 85 So. 779, 204 Ala. 445.

Me.—Eastman v. Avery, 23 Me. 248. Necessity of writing to constitute pledge in general see the C.J.S. title Pledges § 12, also 49 C.J. p 905 notes 83–90.

71. Ky.—Flowers v. Sproule, 2 A.K. Marsh. 54.

Tenn.—Hurst v. Jones, 10 Lea 8. Necessity of writing to constitute mortgage see infra § 49.

72. N.C.—McCoy v. Lassiter, 95 N.C. 88.

73. U.S.—Thurber v. Oliver, C.C.Md., 26 F. 224.

Mass.—Copeland v. Barnes, 18 N.E. 65, 147 Mass. 388.

Wis.—Leach Co. v. Trace, 226 N.W. 308, 309, quoting *Corpus Juris*.

74. U.S.—In re German Publication Society, D.C.N.Y., 289 F. 509, affirmed, C.C.A., 289 F. 510.

Ala.—Bradford v. Proctor, 96 So. 203, 209 Ala. 299.

N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.

Wash.—Freepons v. Elliott, 67 P.2d 924, 190 Wash. 348.

11 C.J. p 405 note 46.

Indenture of trust, by which debtor transferred to its manager, to hold as trustee for a creditor, certain marine engines, may create a

valid pledge, rather than a mortgage, in view of intention of the parties, especially as indicated by their conduct. — *Manufacturers' & Traders' Nat. Bank of Buffalo v. Gilman*, C. C.A.Mass., 7 F.2d 94.

75. N.C.—McCoy v. Lassiter, 95 N.C. 88.

76. U.S.—Herrmann v. Central Car Trust Co., N.Y., 101 F. 41, 41 C.C. A. 176.

11 C.J. p 405 note 48.

77. Mass.—Gamson v. Pritchard, 96 N.E. 715, 210 Mass. 296.

N.C.—Bundy v. Commercial Credit Co., 163 S.E. 676, 202 N.C. 604.

78. Minn.—Palmer v. New York Mut. L. Ins. Co., 130 N.W. 250, 114 Minn. 1, Ann.Cas.1912B 957.

N.Y.—People v. Scudder, 163 N.Y.S. 739, 177 App.Div. 225, affirmed 117 N.E. 1080.

79. N.H.—Janvrin v. Fogg, 49 N.H. 340, 351.

11 C.J. p 405 note 51.

80. Ky.—Bogard v. Tyler, 55 S.W. 709, 119 Ky. 637, 21 Ky.L. 1452.

A sale is distinguished from a mortgage in that the former is a transfer of the absolute property in the goods for a price, whereas a mortgage is at most a conditional sale of personal property as security for the payment of a debt or the performance of some other obligation, subject to the condition that on performance title shall revert in the mortgagor.⁸¹ In determining whether a transaction is a sale or a mortgage, the court will take into consideration the intention of the parties as shown by the whole transaction, in view of all the circumstances,⁸² such intention when ascertained being controlling,⁸³ except as against the legal effect of

the transaction;⁸⁴ and the form which has been given the instrument evidencing the transaction is of but slight importance.⁸⁵

The purpose which the transaction is intended to effectuate is in all cases the final test,⁸⁶ and, if the transaction resolves itself into security for a debt or other obligation, it is generally a mortgage.⁸⁷ Where a bill of sale states on its face that it is intended as security, such fact is ordinarily conclusive that it is intended as a mortgage.⁸⁸

As conducing toward the construction of a transaction as a mortgage rather than as a sale, the

81. Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

Okl.—First Nat. Bank v. Young, 8 P.2d 1108, 155 Okl. 282—Waldrep v. Exchange State Bank, 197 P. 509, 511, 81 Okl. 162, quoting *Corpus Juris*.

11 C.J. p 405 note 53.

Mortgage as lien rather than conditional sale see *supra* § 1.

82. U.S.—Vander Lei v. Blakely, C. C.A.Mich., 284 F. 516.

Ill.—See Gordon v. Brucker, 203 Ill. App. 188.

Kan.—Doyle v. Bentrup, 207 P. 859, 111 Kan. 442.

N.C.—General Motors Acceptance Corporation v. Mayberry, 142 S.E. 767, 195 N.C. 508.

Tex.—Walker v. Wilmore, Com.App., 212 S.W. 655, reversing, Civ.App., 174 S.W. 921.

Wash.—Hays v. Bashor, 185 P. 814, 108 Wash. 491.

11 C.J. p 406 note 54.

Instruments construed together

Bill of sale and letter given by buyer to seller at same time must be construed together.—Kenworthy Grain & Milling Co. v. Green Meadow Cheese Factory & Dairy Co., 13 P.2d 489, 171 Wash. 513.

83. Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

Fla.—Cary & Co. v. Hyer, 107 So. 684, 91 Fla. 322.

Wash.—Kelly v. Price, 269 P. 842, 148 Wash. 542.

11 C.J. p 406 note 55.

84. Wis.—Leach Co. v. Trace, 226 N.W. 308, 199 Wis. 292.

85. N.Y.—Yousoupoff v. Widener, 158 N.E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App.Div. 712, which affirmed 215 N.Y.S. 24, 126 Misc. 491.

11 C.J. p 406 note 56.

"Mortgage, sell and transfer"

Instrument by which purchasers of realty promised to pay balance due vendor in certain designated installments and that "to secure" the

payment of the instrument "we mortgage, sell and transfer . . . our Piano" to the vendor was a "chattel mortgage."—Ward v. Warner, Wash., 71 P.2d 677.

86. Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

Okl.—Waldrep v. Exchange State Bank, 197 P. 509, 511, 81 Okl. 162, quoting *Corpus Juris*.

Wis.—Smith v. Pfuger, 105 N.W. 476, 126 Wis. 253, 110 Am.S.R. 911, 2 L.R.A., N.S., 783.

87. U.S.—Universal Credit Co. v. Fortinberry, C.C.A.Tex., 63 F.2d 71—In re Sachs, C.C.A.Md., 30 F.2d 510, affirming in part and reversing in part, D.C., 21 F.2d 984—In re Ulrop-Huff Co., D.C.N.Y., 9 F.2d 922, affirmed, C.C.A., 9 F.2d 924—In re Farmers' Co-op. Ass'n of Marion County, Fla., D.C.Fla., 3 F.2d 708.

Ala.—Oden v. Vaughn, 85 So. 779, 204 Ala. 445.

Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

Fla.—Yearwood v. Welch, 144 So. 308, 107 Fla. 143—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ga.—Hix v. Williams, 155 S.E. 355, 42 Ga.App. 143—Grady v. T. I. Harris, 151 S.E. 829, 41 Ga.App. 111—Lane v. Smart, 94 S.E. 325, 21 Ga.App. 292.

Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195.

Ky.—Allin v. City of Harrodsburg, 57 S.W.2d 45, 247 Ky. 360.

Mich.—In re Parkstone Apartment Co., 220 N.W. 780, 243 Mich. 401—Burroughs Adding Mach. Co. v. Wieselburg, 203 N.W. 160, 230 Mich. 15.

Mo.—Puryear-Meyer Grocer Co. v. Cardwell Bank, App., 4 S.W.2d 489.

N.J.—David Straus Co. v. Commercial Delivery Co., 112 A. 417, 92 N. J.Eq. 290, affirming, Ch., 113 A. 604.

N.Y.—Yousoupoff v. Widener, 158 N.

E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App.Div. 712, which affirmed 215 N.Y.S. 24, 126 Misc. 491.

11 C.J. p 406 note 58.

Assignment of lumber to secure the payment of a debt, with the agreement that it should be shipped to brokers to whom the assignor had been shipping lumber and the proceeds paid the assignee by the brokers, is in legal effect a mortgage good as between the parties.—Montgomery v. Dant & Russell, 196 P. 461, 100 Or. 27.

Assignment of rents made by assignor for purpose of excepting such rentals from a threatened foreclosure sale of the land, and accepted by assignees to secure attorney's fees due them, constitutes only a mortgage, and not an absolute conveyance.—J. B. Farthing Lumber Co. v. Williams, Tex.Civ.App., 194 S.W. 453.

Intention to finance dealer

Where it is shown that it was not intended that a finance company should do anything but finance a dealer in the purchase of an automobile, and that the automobile should stand as security for money advanced, security by mortgage should have been taken, and the transaction did not constitute a sale.—Kelly v. Price, 269 P. 842, 148 Wash. 542.

Oral agreement by planter to deliver crop to person making advances is a mortgage, not a conveyance of title.—Wilkins v. Friedman, 139 S.E. 113, 37 Ga.App. 141.

To provide means of payment

A bill of sale given as security to provide means of payment is a mortgage.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

88. N.J.—National Shoe, etc., Bank v. August, 33 A. 803, 54 N.J.Eq. 182, affirmed 39 A. 1114, 55 N.J.Eq. 590.

11 C.J. p 406 note 53.

courts will consider such facts as that there has been no transfer of possession,⁸⁹ that the bill of sale contains or is accompanied by a defeasance,⁹⁰ that there is a provision for redemption⁹¹ or an agreement for a reconveyance,⁹² that there is a waiver of homestead,⁹³ that a borrowing on the one hand and a lending on the other is designed at the time of the execution of the instrument,⁹⁴ or that there is a continuation of indebtedness on the part of the seller.⁹⁵

When on the face of the transaction it is doubtful whether the parties intended a mortgage or a sale,⁹⁶ or there is great disparity between the value of the property and the price,⁹⁷ or fraud has intervened to

make a transaction intended as a mortgage assume the form of an absolute sale,⁹⁸ equity will treat the transaction as security only. On the other hand, it is equally well settled that, where the transaction clearly shows that the entire interest in property is conveyed without reservation, it will be treated as an absolute sale,⁹⁹ for unless it was intended at the time of the execution of the bill of sale that it should operate as a security, the court will not treat it as a mortgage,¹ particularly where such a construction would destroy the legal effect of the transaction;² and the court cannot change a transaction into a mortgage by a fictitious inference.³ The absence of personal obligation on the part of the vendor shows that the transaction was not a mortgage.⁴

89. U.S.—*In re Myers Motor Sales Co.*, D.C.Tex., 1 F.Supp. 509.
Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

11 C.J. p 406 note 60.

90. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, supra.
Ga.—*Ward v. Lord*, 28 S.E. 446, 100 Ga. 407—*Wilson v. Voche*, 172 S. E. 672, 48 Ga.App. 173—*Daniels v. State*, 159 S.E. 903, 43 Ga.App. 779—*Grady v. T. I. Harris*, 151 S.E. 829, 41 Ga.App. 111—*Perdue v. Griffin*, 122 S.E. 713, 32 Ga.App. 100.

N.Y.—*Walsh v. Gray*, 212 N.Y.S. 230, 214 App.Div. 296.

Or.—*First Nat. Bank v. Wegener*, 186 P. 41, 94 Or. 318.

11 C.J. p 406 note 61.

Bill of sale, providing in a separate defeasance clause that, if the seller should within ten days repay the recited consideration, etc., is a mortgage, and not a sale, "repay" meaning "to pay back; to refund; as, to repay money borrowed or advanced."—*Walker v. Wilmore*, Tex. Com.App., 212 S.W. 655, reversing, Civ.App., 174 S.W. 921.

Agreement to resell

Agreement by the purchaser to resell to the seller at the same price, within a specified time, is a defeasance and operates to create a mortgage.—*Lipe v. Beech-Nut Packing Co.*, 277 N.Y.S. 832, 243 App.Div. 433.

Instrument purporting to be mortgage to secure the payment of a promissory note therein specifically described, and containing a defeasance clause, and in which no contrary intention otherwise appears, is a mortgage and not a bill of sale.—*Decatur County Bank v. Broome*, 142 S.E. 565, 37 Ga.App. 821.

91. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

11 C.J. p 407 note 62.

92. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, supra.

Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

Ill.—*Southern Surety Co. v. People's State Bank of Astoria*, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195.

11 C.J. p 407 note 63.

93. Ga.—*Powers v. Georgia-Florida Grocery Co.*, 67 S.E. 685, 7 Ga.App. 592.

94. U.S.—*Kaye v. MacMillan*, C.C.A. Ky., 60 F.2d 7.

Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

N.Y.—*Knickerbocker Portland Cement Co. v. State*, 217 N.Y.S. 652, 218 App.Div. 22.

Or.—*Bell v. Hanover Fire Ins. Co.*, 214 P. 340, 107 Or. 513.

11 C.J. p 407 note 65.

95. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

Mo.—*Puryear-Meyer Grocer Co. v. Cardwell Bank*, App., 4 S.W.2d 489.

11 C.J. p 407 note 66.

96. Ala.—*Oden v. Vaughn*, 85 So. 779, 204 Ala. 445.

11 C.J. p 407 note 67.

97. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

11 C.J. p 407 note 68.

Where transfer is for grossly inadequate consideration, subject to a right of defeasance by repayment of the amount received with interest, it is a permissible inference that a loan only was intended.—*Youssoupoff v. Widener*, 158 N.E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App. Div. 712, which affirmed 215 N.Y.S. 24, 126 Misc. 491.

98. Ala.—*Smith v. Pearson*, 24, Ala. 355.

11 C.J. p 407 note 69.

99. U.S.—*In re Rogers*, D.C.Mass., 288 F. 140.

Ark.—*Farmerville State Bank v. Harmon*, 75 S.W.2d 1010, 189 Ark. 1029.

Ga.—*Worsham v. Penn*, 122 S.E. 817, 32 Ga.App. 189.

Wash.—*Long v. McAvoy*, 233 P. 930, 133 Wash. 472, 44 A.L.R. 483, affirmed 236 P. 806, 133 Wash. 472.

11 C.J. p 407 note 70.

Sale with agreement to sell and collect for transferee

An instrument whereby one sells to another an automobile and agrees to sell and collect for the same in trust for the transferee and to account therefor is a bill of sale and not a mortgage, although it is given as collateral security for a debt, and by its terms the seller becomes the buyer's agent to sell the car and hold the proceeds.—*American Exch. Nat. Bank v. Lacy*, 123 S.E. 475, 188 N.C. 25, 36 A.L.R. 680.

1. Fla.—*Long v. State*, 32 So. 870, 44 Fla. 134.

Wis.—*Leach Co. v. Trace*, 226 N.W. 308, 199 Wis. 292.

11 C.J. p 408 note 71.

2. Tex.—*Trott v. Flato*, Civ.App., 244 S.W. 1085.

Conveyance not treated as mortgage

Where plaintiff conveyed property to trustee under agreement that corporation should be formed and stock issued to his creditors with the option to him of repurchasing the stock, and a corporate charter was obtained on affidavit, stating that the capital stock had been paid by transfer of the property to the corporation, the bill of sale cannot be construed as a mortgage, as this would show that the charter was obtained by fraud, and the transaction must be given that construction which upholds its legal effect.—*Trott v. Flato*, supra.

3. N.Y.—*Youssoupoff v. Widener*, 158 N.E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App.Div. 712, which affirmed 215 N.Y.S. 24, 126 Misc. 491.

4. Tenn.—*Hickman v. Cantrell*, 9 Yerg. 171, 30 Am.D. 396.

11 C.J. p 408 note 72.

Retaining lien for purchase price. An instrument by which one party agrees to sell, and the other to purchase, certain personal property, and which provides that the vendor shall have a lien on the property until the purchase price is paid, is in the nature of a mortgage,⁵ particularly where it covers other property than that for the purchase price of which the lien is reserved.⁶

Transfer with authority to sell and apply proceeds. Where property is transferred to a creditor with authority in him to sell it and to apply the proceeds to the payment of the transferor's indebtedness and to pay over any surplus to the transferor, the transaction will, ordinarily, be held to be a mortgage;⁷ and the same rule has been applied where the creditor is authorized to satisfy other debts of the transferor as well as that to himself.⁸ A chattel mortgage is not converted into a sale, with a provision that the mortgagor shall act as the agent of the buyer in disposing of the goods, by stipulations concerning agency, which are simply

auxiliary to the main purpose of the instrument in securing an indebtedness from the mortgagor to the mortgagee.⁹

Transfer in payment of debt. A transfer of title by a debtor to a creditor, in payment, is in effect a sale and not a mortgage;¹⁰ and it does not affect the application of the rule that the instrument does not, in terms, declare the conveyance to be a satisfaction of the debt,¹¹ or that there is a collateral agreement to resell.¹²

§ 6. — Absolute Bill of Sale as Mortgage

A bill of sale, although absolute on its face, if taken as security for a debt, particularly where it is accompanied by a defeasance, is in effect a mortgage, and will be treated as such as between the parties thereto and as to third persons with notice.

A bill of sale, although absolute on its face, if taken as security for a debt, is in effect a mortgage, and as to the immediate parties thereto will be treated and considered as such¹³ on equitable

5. Colo.—Beatrice Creamery Co. v. Sylvester, 179 P. 154, 65 Colo. 569, 13 A.L.R. 441.

Fla.—Yearwood v. Welch, 144 So. 308, 107 Fla. 143.

11 C.J. p 408 note 73.

6. U.S.—In re Farmers' Ass'n of Marion County Fla., D.C.Fla., 3 F. 2d 708.

As conveyance for security

An instrument whereby title is retained to property sold, and title to other property as additional security is conveyed, is not a mortgage, but a conveyance carrying title for the security for debt.—Arnold v. Booth, 100 S.E. 779, 24 Ga.App. 416.

Vendor's lien only on particular article

A vendor's lien can only arise as security for the payment of the purchase price of the particular article on which it is claimed, and an instrument attempting to retain a lien on store fixtures for the purchase price of such fixtures, a stock of merchandise, and other property does not give a vendor's lien, but is a chattel mortgage.—In re Farmers' Co-op. Ass'n of Marion County, Fla., D.C.Fla., 3 F.2d 708.

7. Ky.—Baldwin v. Owens, 51 S.W. 438, 21 Ky.L. 352.

N.Y.—Knickerbocker Portland Cement Co. v. State, 217 N.Y.S. 652, 218 App.Div. 22.

Or.—Snodgrass v. Wallowa Milling & Grain Co., 227 P. 294, 111 Or. 402. 11 C.J. p 408 note 74.

As note and mortgage

Where the first portion of an instrument is in the form of a note and the second part is a mortgage

on a chattel, for which the note is partial payment, and provides that if default is made in paying the note the mortgagee may sell the chattel, the instrument is a note and mortgage, and not merely a purchase-money contract.—Morgan v. Mulcahey, Mo.App., 298 S.W. 242. As conditional sale or mortgage see *infra* § 7 c (4).

8. Ill.—Doggett v. Bates, 26 Ill.App. 369.

Okl.—Greenville Nat. Bank v. Evans-Snyder-Buel Co., 60 P. 249, 9 Okl. 353.

9. U.S.—Crowder v. Allen-West Commn. Co., Ark., 213 F. 177, 129 C.C.A. 521, affirming, D.C., 204 F. 309.

11 C.J. p 408 note 76.

10. Idaho.—Jameson v. Diggs, 276 P. 969, 47 Idaho 478.

11 C.J. p 408 note 77.

Instrument in ordinary form of bill of sale, providing that seller, in consideration of one dollar and other valuable considerations paid, does "sell and deliver" described personally to buyer and agrees to credit money received on seller's indebtedness to buyer, is bill of sale, not mortgage.—Farmerville State Bank v. Harmon, 75 S.W.2d 1010, 189 Ark. 1029.

11. Mass.—Miller v. Baker, 20 Pick. 285.

11 C.J. p 408 note 78.

12. Miss.—Mason v. Moody, 26 Miss. 184.

11 C.J. p 408 note 79.

13. U.S.—Blue v. Herkimer Nat. Bank, C.C.A.N.Y., 30 F.2d 256—

Vander Lei v. Blakely, C.C.A.Mich., 284 F. 516—Lake View State Bank v. Jones, Wis., 242 F. 821, 155 C. C.A. 409.

Ark.—Cain v. Songer, 3 S.W.2d 315, 176 Ark. 551.

Cal.—Peo. v. Martin, 200 P. 808, 53 Cal.App. 671.

Fla.—Cary & Co. v. Hyer, 107 So. 684, 91 Fla. 322, citing *Corpus Juris*.

Ind.—Powell v. Totten, 162 N.E. 418, 93 Ind.App. 442.

Mich.—Klingensmith v. James B. Clow & Sons, 259 N.W. 312, 270 Mich. 460, reversed on other grounds 262 N.W. 644, 273 Mich. 48—American Steel & Wire Co. v. Dedrick, 163 N.W. 18, 186 Mich. 731.

Mo.—Bentrop v. Johnson, 14 S.W.2d 537, 223 Mo. 299—Purveyor-Meyer Grocer Co. v. Cardwell Bank, App., 4 S.W.2d 489—Miller v. Tallent, App., 212 S.W. 73.

Neb.—Hippodrome Amusement Co. v. Redick, 191 N.W. 317, 109 Neb. 390. N.J.—Central Chemical Co. v. Virginia-Carolina Chemical Corporation, 168 A. 279, 114 N.J.Eq. 48—Harding v. First-Mechanics Nat. Bank of Trenton, 166 A. 142, 113 N.J.Eq. 129—Unger v. Hochman, 133 A. 180, 4 N.J.Misc. 445.

N.Y.—Finkenberg v. Levinson, 182 N.Y.S. 18, 192 App.Div. 1.

N.D.—Godman v. Olson, 165 N.W. 515, 39 N.D. 360.

Ohio.—McPherson v. Gillespie & Co., 18 Ohio N.P., N.S., 167.

Or.—Nash v. Jaynes, 268 P. 746, 126 Or. 64—Carnes v. Manning, 248 P. 137, 118 Or. 665.

Tex.—Walker v. Wilmore, Com.App., 212 S.W. 655, reversing, Civ.App.,

principles,¹⁴ although the instrument contains a stipulation that the title to the property is to become absolute on default of the repayment by the seller of the consideration.¹⁵

This rule is particularly applicable where the bill of sale contains or is accompanied by a defeasance, as explained supra § 5. The fact, however, that an instrument contains no defeasance does not determine its character; if it clearly and expressly appears from the instrument itself that it is given as security for an alleged indebtedness, this fact stamps it as a mortgage,¹⁶ even though the word "security" is not used.¹⁷ The courts, however, will not assume or hold that an absolute transfer of property is security for a debt, where the purpose

of the transfer is made clear by the transaction between the parties, and this purpose is contrary to the idea of security,¹⁸ as where no debt or obligation remains in existence.¹⁹

Separate written defeasance. The execution of a defeasance simultaneously with a bill of sale absolute on its face constitutes them, in contemplation of law, one entire instrument, to the same extent as if the defeasance had been incorporated in the instrument, and will have the effect of making the instrument a mortgage.²⁰

Verbal defeasance. Under the rule permitting a written conveyance to be shown to be a mortgage by parol evidence, as announced infra § 11, a de-

174 S.W. 921—Fithel v. Saltes, Civ. App., 11 S.W.2d 815, error refused. Wash.—Seaboard Securities Co. v. Sullivan, 16 P.2d 836, 170 Wash. 699—Sullivan v. Mahl, 16 P.2d 836, 170 Wash. 699—Sullivan v. Lewis, 16 P.2d 834, 170 Wash. 413—Pacific States Securities Corporation v. Austin, 263 P. 732, 146 Wash. 492—Olsen v. Legal Adjustment Bureau, 253 P. 643, 142 Wash. 446. 11 C.J. p 409 note 81, p 446 note 4 [b].

Acceptance of bill by execution creditor

Where an execution creditor, instead of compelling a sale, accepted a bill of sale as security, so as to give the debtor time, the bill of sale must be treated as a mortgage.—In re Schilling, D.C.Ohio, 251 F. 972.

Loan or forbearance of money as consideration

A transfer of personalty, although absolute on its face, will be assumed and held to be a mortgage, where it is shown that there is no other consideration for the transfer than a loan or forbearance of money.—Hays v. Bashor, 185 P. 814, 108 Wash. 491.

Oral agreements

(1) Oral agreement that a bill of sale, absolute in form, is to be held as security for the seller's indebtedness is sufficient to constitute the instrument a mortgage.—Clark v. Williams, 76 N.E. 723, 190 Mass. 219.

(2) Oral agreement that bill of sale under seal should be held as security made transaction simple contract, and was in substance a valid mortgage.—Hill v. Scott, 143 A. 276, 101 Vt. 356.

Reservation of secret lien

Where transaction between buyer and seller is absolute sale, written contracts reserving secret lien constitute a mortgage.—Anglo-American Mill Co. v. First Nat. Bank, 230 P. 118, 76 Colo. 57.

14. "It is upon equitable principles that a bill of sale is transformed to an equitable mortgage, and, while the remedy is in equity, the parties or their legal representatives may accept the instrument as an equitable mortgage, and govern and conform the assertion and settlement of their respective rights and liabilities with reference to the actual relation between them of debtor and of creditor, with a pledge of property having been given, and received as security for the debt."—State v. Maryland Casualty Co., 163 A. 856, 858, 164 Md. 69.

As equitable mortgage

As between original parties, bill of sale securing loan may be treated as equitable mortgage.

Ark.—Taylor v. Hildebrand Poster Advertising Co., 58 S.W.2d 211, 187 Ark. 53.

Conn.—Petello v. Teutonia Fire Ins. Co., 93 A. 137, 89 Conn. 175, L.R.A. 1915D 812.

15. Tex.—Walker v. Wilmore, Com. App., 212 S.W. 655, reversing, Civ. App., 174 S.W. 921.

16. Fla.—Cary & Co. v. Hyer, 107 So. 684, 91 Fla. 322—Wylly-Gabbert Co. v. Williams, 42 So. 910, 53 Fla. 872.

Mich.—Weed v. Mirick, 29 N.W. 78, 62 Mich. 414—Cooper v. Brock, 2 N.W. 660, 41 Mich. 483.

Ohio.—Metropolitan Securities Co. v. Warren State Bank, 158 N.E. 81, 117 Ohio St. 69.

As bill of sale to secure debt

(1) Under a statutory provision that a bill of sale to secure a debt, accompanied by a defeasance, shall pass title until the debt is paid, an instrument, without a defeasance clause or words which could be construed as having that effect, which conveys personalty as security, and contains an obligation to reconvey on payment of the debt, is not a mortgage, but a bill of sale to secure a

debt, and passes title until the debt is paid.—Watts v. Wight Inv. Co., 103 S.E. 184, 25 Ga.App. 291—Hill v. Marshall, 90 S.E. 175, 18 Ga.App. 652—Owens v. Bridges, 79 S.E. 225, 13 Ga.App. 419.

(2) This rule applies, where the obligor retains possession, although the bill of sale contains no obligation, on the part of the obligee, to reconvey on payment of the indebtedness.—Jackson v. Parks, 174 S.E. 203, 49 Ga.App. 29.

(3) A provision of such a writing by a borrower that he agrees to hold the property as bailee for the lender until the debt is paid, and not operating as a defeasance on the payment of the debt, does not characterize the instrument as a mortgage.—Tarver v. Beneficial Loan Soc. of Macon, 148 S.E. 288, 39 Ga.App. 646.

Bill of sale and consignment agreement held to constitute chattel mortgage of motor vehicle.—In re Sachs, C.C.A.Md., 30 F.2d 510, affirming in part and reversing in part, D. C., 21 F.2d 984.

17. Cal.—Forrest v. Burt, 227 P. 949, 67 Cal.App. 564.

18. Wash.—Hays v. Bashor, 185 P. 814, 108 Wash. 491.

19. Mo.—Purveyor-Meyer Grocer Co. v. Cardwell Bank, App., 4 S.W.2d 489.

Wash.—Hays v. Bashor, 185 P. 814, 108 Wash. 491.

11 C.J. p 446 note 4 [b].

If there is no existing indebtedness, an agreement to resell does not convert an absolute conveyance into a mortgage, but it is a mere privilege to repurchase.—Mitts v. Price, 92 So. 163, 129 Miss. 554.

20. N.Y.—Finkenberg v. Levinson, 182 N.Y.S. 18, 192 App.Div. 1. Tex.—Fithel v. Saltes, Civ.App., 11 S.W.2d 815, error refused. 11 C.J. p 410 note 83.

feasance changing the character of an absolute bill of sale to a mortgage may rest in parol.²¹ Accordingly, although a written instrument in terms conveys title to a chattel, if, by oral agreement, it is security for the payment of money, and the chattel may be redeemed on the payment thereof, it is a mortgage.²²

Modification by subsequent agreement. A bill of sale intended as such by the parties may be modified by subsequent agreement so as to take effect as a mortgage,²³ but a defeasance clause subsequently made must be based on a new consideration.²⁴

As to third persons. It is well settled that innocent third parties who have been misled by the form of the instrument, with the honest belief that it was indefeasible, have a right to insist that as to them it shall be what on its face it purports to be, and be enforced as such.²⁵ This is also true where the instrument was executed for a fraudulent purpose.²⁶ However, as to third parties with notice that a bill of sale absolute on its face is given to secure a debt, it will be treated as a mortgage,²⁷ and, further, third persons are entitled to show that the real character of the transaction as between the original parties is a mortgage and not an absolute sale.²⁸

§ 7. — Conditional Sales

a. In general

- b. Conditions permitting repurchase
- c. Payment of purchase price as condition
- d. Effect of passing of title

a. In General

A mortgage, although in some respects similar to a conditional sale, is to be distinguished therefrom. In determining whether a transaction is a mortgage or a conditional sale the intention of the parties, as construed from the whole transaction, is controlling; a construction in favor of a mortgage being favored in case of doubt.

Although a mortgage and a conditional sale are, in important respects, governed by the same principles,²⁹ and the relationship between the parties, under the two forms of contract, are in many respects similar, there is a difference between a conditional sale and a mortgage which cannot be ignored by the courts;³⁰ and the distinction is important, since, in the absence of statute, the remedies of a mortgagor and of the seller in a conditional sale are distinct.³¹ A mortgage is in itself regarded in many states as a conditional sale under which title passes to become absolute on nonpayment of the debt or the nonperformance of other obligations secured by it, as announced supra § 1, but it is to be distinguished from sales on other conditions, such as conditions permitting repurchase, as explained infra § 7 b, or conditions that title shall not pass until payment of the purchase money, as explained infra § 7 c.

21. Neb.—Omaha Book Co. v. Sutherland, 6 N.W. 367, 10 Neb. 334. 11 C.J. p 410 note 85.
22. U.S.—Keystone Finance Corporation v. Krueger, C.C.A.N.J., 17 F. 2d 904.
23. Ill.—Martin v. Duncan, 41 N.E. 43, 156 Ill. 274.
- Minn.—Berlin Mach. Works v. Security Trust Co., 61 N.W. 1131, 60 Minn. 161.
- Mo.—King v. Greaves, 51 Mo.App. 534.
24. Ala.—Freeman v. Baldwin, 13 Ala. 246.
25. U.S.—In re Thomas-Daggett Co., D.C.Mich., 20 F.2d 410, affirmed, C. C.A., Martin v. Michigan Trust Co., 23 F.2d 609.
- Ark.—Taylor v. Hildebrand Poster Advertising Co., 58 S.W.2d 211, 187 Ark. 53—Cate-La Nieve Co. v. Plant, 287 S.W. 750, 172 Ark. 82. 11 C.J. p 410 note 88.
26. N.Y.—Wheeler v. Eastwood, 34 N.Y.S. 513, 88 Hun 160. 11 C.J. p 410 note 89.
27. Or.—Montgomery v. Dant & Russell, 196 P. 461, 100 Or. 27. 11 C.J. p 410 note 90.
28. Wis.—Manufacturers' Bank v. Rugee, 18 N.W. 251, 59 Wis. 221. 11 C.J. p 410 note 91.
29. Tenn.—Blackwood Tire & Vulcanizing Co. v. Auto Storage Co., 182 S.W. 576, 133 Tenn. 515, L.R.A. 1916E 254, Ann.Cas.1917C 1168—Williamson Bros. v. Daniel, App., 110 S.W.2d 1028.
- "The execution of a chattel mortgage . . . is conclusive evidence upon the one hand of an absolute purchase from the seller, mortgagee, and a reconveying of title by way of mortgage to the mortgagee.—Great American Indemnity Co. v. Utility Contractors, Tenn.App., 111 S.W.2d 901, 910—Sweeney v. Mergenthaler Linotype Co., 8 Tenn.Civ.App. 244, 247.
30. U.S.—In re Lake's Laundry, D. C.N.Y., 11 F.Supp. 237, affirmed, C. C.A., 79 F.2d 326, 102 A.L.R. 247, certiorari denied Lake's Laundry v. Braun, 56 S.Ct. 144, 296 U.S. 622, 80 L.Ed. 442—Robinson v. Bowe, C.C.A.S.D., 72 F.2d 238—In re Excelsior Macaroni Co., D.C.N.Y., 55 F.2d 406.
- Ala.—Perkins v. Skates, 124 So. 514, 220 Ala. 216.
- Mich.—In re Parkstone Apartment Co., 220 N.W. 780, 243 Mich. 401.
- N.Y.—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238.
- S.D.—Allis-Chalmers Mfg. Co. v. Nein, 262 N.W. 235, 236, 63 S.D. 635.
- Va.—C. I. T. Corporation v. Guy, 195 S.E. 659.

Different species of contract

Conditional sales contracts are "a species of contracts entirely separate and apart from chattel mortgage contracts, or other forms of security."—Smith v. Russell, Iowa, 272 N.W. 121, 124.

31. Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451. 11 C.J. p 411 note 98.

Distinction stated

Whether instrument is "chattel mortgage" or "conditional sale" is determined by rights and remedies of vendor who may retake goods on default and rescind sale or sue for price and elect to pass property to buyer, if instrument is conditional sale, and who has lien on property with right to reclaim and resell and sue for deficiency, if instrument is chattel mortgage.—Mills Novelty Co. v. Morett, supra.

A distinguishing feature, in some states, is that in case of a conditional sales contract title remains in the seller until payment or performance of the stipulated condition, while in case of a mortgage it is in the buyer or mortgagor until default.³² Another striking difference is that in a mortgage if there is a default in payment there is an equity of redemption which must be foreclosed, while in a conditional sale the condition of payment must be strictly performed.³³

It is frequently difficult to determine whether a particular transaction constitutes a mortgage or a conditional sale,³⁴ and the securing of the payment of the purchase price of an article sold may be the primary object in either case.³⁵ In construing a contract for the purpose of making such a determination, it may be assumed that the seller intends to

employ every available remedy in case of the buyer's default.³⁶

The general test to be applied in determining whether the transaction is a mortgage or a conditional sale is this: If the transfer is intended merely to secure an existing indebtedness or loan, it is a mortgage; but if the debt is extinguished, or if the money advanced is not by way of a loan, and the grantor has the privilege of refunding if he pleases and thereby of entitling himself to a reconveyance, the transaction is a conditional sale.³⁷ Where the owner of a motor car, to secure money borrowed, executes a bill of sale thereof to the lender, and the parties then enter into an agreement of conditional sale to the borrower, the consideration for which is the amount of the money borrowed,³⁸ or where the purchaser reconveys the car to

32. N.Y.—Meisel Tire Co. v. Mar-Bel Trading Co., 280 N.Y.S. 335, 155 Misc. 664.

S.D.—Allis-Chalmers Mfg. Co. v. Nein, 262 N.W. 285, 236, 63 S.D. 635.

Wash.—Raymond Bros. Impact Pulverizer Co. v. Thomas, 294 P. 219, 159 Wash. 550—Lahn & Simons v. Matzen Woolen Mills, 266 P. 697, 147 Wash. 560.

Other statements of distinction

(1) "A conditional sale and a chattel mortgage are inconsistent with one another. A conditional sale exists where the title remains in the vendor. A chattel mortgage may exist only when the title to the property has passed, and the vendee has given the chattel mortgage or lien upon his title as security for the payment of the debt."—*In re Parkstone Apartment Co.*, 220 N.W. 780, 781, 243 Mich. 401.

(2) "A chattel mortgage differs from a conditional sales contract, in that in the former title passes to the mortgagee, whereas in the latter possession is transferred and the title retained."—*Kettwig v. Aero Inv. Co.*, 254 N.W. 629, 630, 191 Minn. 500.

(3) "In the case of a chattel mortgage, the mortgagor transfers his title to the mortgagee as security . . . which title becomes reinvested in the mortgagor upon compliance with the conditions. In a conditional bill of sale contract, the title remains in the seller until the payment of the consideration, or until the other conditions mentioned in the conditional bill of sale contract are performed by the purchaser."—*In re Excelsior Macaroni Co.*, D.C. N.Y., 55 F.2d 406, 407. 11 C.J. p 410 note 96 [a].

Conditional sale distinguished from absolute sale with mortgage back

"There is a real distinction be-

tween a conditional sale and an absolute sale with a mortgage back, in that under the former the vendor remains the owner, subject to the vendee's right to acquire the title by complying with the stipulated conditions; while under the latter the vendee immediately becomes the owner, subject to the lien created by the mortgage."

Ill.—*Horvitz v. Leibowitz*, 274 Ill. App. 196, 201.

Okl.—*Mondie v. General Motors Acceptance Corporation*, 63 P.2d 708, 710, 178 Okl. 584—*Security Nat. Bank of Oklahoma v. Truscon Steel Co.*, 218 P. 665, 670, 92 Okl. 81.

33. Mich.—*Powers v. Fisher*, 272 N.W. 737, 740, 279 Mich. 442.

Minn.—*Kettwig v. Aero Inv. Co.*, 254 N.W. 629, 191 Minn. 500.

34. Ark.—*Sternberg v. City Nat. Bank of Ft. Smith*, 233 S.W. 691, 149 Ark. 432.

11 C.J. p 410 note 96.

35. N.Y.—*Tweedie v. Clark*, 99 N.Y.S. 856, 114 App.Div. 296.

36. U.S.—*Cooper v. Michigan Artificial Ice Products Co.*, D.C.Mich., 1 F.Supp. 741, affirmed, C.C.A., *Westerlin & Campbell Co. v. Chapman*, 61 F.2d 1046, certiorari denied *Westerlin & Campbell Co. v. Michigan Artificial Ice Products Co.*, 53 S.Ct. 400, 288 U.S. 603, 77 L.Ed. 983.

Mich.—*Burroughs Adding Mach. Co. v. Wieselsberg*, 203 N.W. 160, 230 Mich. 15.

37. Cal.—*Shockley v. Elmore*, 50 P. 2d 91, 9 Cal.App.2d 419.

Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

Wash.—*Mahon v. Nelson*, 268 P. 144, 148 Wash. 110.

11 C.J. p 411 note 99.

"Where the transaction was founded upon a pre-existing debt, or upon

money loaned, the general rule is that the transaction is a mortgage; but in the absence of such surroundings the transaction will be held as denominated in the instrument."—*Schneider v. Daniel*, 131 N.E. 816, 818, 191 Ind. 59, 17 A.L.R. 1410, citing *Corpus Juris*.

As loan contract

Conditional sales contract entered into by borrower and lender, taking personality as security for loan and receiving interest, will be construed as loan contract.—*Turney v. Goldberg's Loan Office*, 274 P. 464, 135 Okl. 147.

Transfer of notes and agreement

A conditional seller's transfer of purchase-money notes and conditional sales agreement as security for the payment of a debt owed by him operates as a mortgage as between the parties.—*J. H. Gerlach Co. v. Noyes*, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

38. Cal.—*Washington Lumber & Millwork Co. v. McGuire*, 1 P.2d 437, 213 Cal. 13—*Mercantile Acceptance Corporation v. Pioneer Credit Indemnity Co.*, 12 P.2d 988, 124 Cal.App. 593—*Pacific Finance Corporation v. Hendley*, 284 P. 736, 103 Cal.App. 335, hearing denied and opinion modified on other grounds 285 P. 1043—*Commercial Securities Corporation Consol. v. Lindsay Mercantile Co.*, 267 P. 766, 92 Cal.App. 91—*Bonestell v. Western Automotive Finance Corp.*, 232 P. 734, 69 Cal.App. 719—*Blodgett v. Rheinschild*, 206 P. 674, 56 Cal. App. 728.

Floor plan contract

Where a motor vehicle dealer executes a contract, denominated a bill of sale, to an investment company to which the motor vehicles on being received from the factory are resold, and the investment company in turn reconsigns the vehicles to the dealer

the seller as security for the unpaid purchase price or other debt,³⁹ the transaction is a mortgage.

Further tests. Further tests which are employed in determining whether the transaction is a mortgage or a conditional sale are a consideration of the adequacy or inadequacy of consideration, an inadequate consideration tending to establish a mortgage,⁴⁰ especially when coupled with the financial embarrassment of the grantor or mortgagor,⁴¹ and the existence or extinguishment of the debt, the extinguishment of the debt tending to establish a conditional sale.⁴² Another determining question is, whose loss it will be if the thing is destroyed; if that of the maker of the instrument, then it is a

mortgage, but if it is the loss of the payee, it is a conditional sale.⁴³

Intention of the parties. Whether a transaction constitutes a mortgage or a conditional sale ultimately depends on the intention of the parties, which must be ascertained from their conduct and the attendant circumstances, as well as from the terms of the agreement,⁴⁴ and if the intent is not clear, ambiguities will be resolved against the party who selected and relied on the language of the contract,⁴⁵ or who has proffered the instrument,⁴⁶ and as against the seller's right to assert a secret lien against innocent purchasers and creditors.⁴⁷

Further, the intention must be ascertained from

on what is known as the "floor plan," and through the transaction the dealer obtains money to pay for the vehicles from the investment company, and concurrently with the execution of the floor plan contract and as a part thereof the dealer executes his acceptance of a ninety-day draft for the amount of money advanced to him, by the investment company, the transaction constitutes a mortgage.—*In re Baumgartner*, C. C.A.Wis., 55 F.2d 1041.

39. Ky.—*Cartwright v. C. I. T. Corporation*, 70 S.W.2d 388, 253 Ky. 690.

N.C.—*Sloan Bros. v. Sawyer-Felder Co.*, 96 S.E. 39, 175 N.C. 657.

S.D.—*Universal Finance Corporation v. Hamner*, 250 N.W. 33, 61 S.D. 540.

40. Conn.—*Gulford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

11 C.J. p 411 note 1.

Adequacy as dependent on market value

Whether price paid for paintings was adequate, in determining whether transaction was a conditional sale or a mortgage, depends on market value and not intrinsic value.—*Yousoupoff v. Widener*, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.

Conclusiveness

That price is inadequate would be almost conclusive evidence that contract of sale with right to repurchase is a mortgage, but if it is adequate it is just as strong evidence that it is a sale.—*Yousoupoff v. Widener*, supra.

"Where the security is much greater than the debt . . . the transaction should be treated as a conditional sale, as named in the instrument."—*Schneider v. Daniel*, 131 N.E. 816, 191 Ind. 59, 17 A.L.R. 1410.

41. Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322—*Hull v. Burr*, 50 So. 754, 58 Fla. 432, 471.

42. Ala.—*Parish v. Gates*, 29 Ala. 254.

11 C.J. p 412 note 2.

43. Ind.—*Schneider v. Daniel*, 131 N.E. 816, 191 Ind. 59, 17 A.L.R. 1410.

44. U.S.—*In re Central States Freight Corporation*, D.C.Mich., 46 F.2d 545—*Keystone Finance Corporation v. Krueger*, C.C.A.N.J., 17 F.2d 904—*Vander Lei v. Blakely*, C. C.A.Mich., 284 F. 516—*In re American Steel Supply Syndicate*, D.C. Mich., 256 F. 876.

Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

Ill.—*Southern Surety Co. v. People's State Bank of Astoria*, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195.

Ind.—*Southern Finance Co. v. Mercantile Discount Corporation*, 141 N.E. 250, 251, 80 Ind.App. 436, citing *Corpus Juris*—*Schneider v. Daniel*, App., 119 N.E. 1008, 1010, quoting *Corpus Juris*.

Mass.—*J. H. Gerlach Co. v. Noyes*, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

Mich.—*Mills Novelty Co. v. Morett*, 254 N.W. 163, 266 Mich. 451—*Petition of Hume*, 245 N.W. 514, 260 Mich. 555—*Luce v. Stott Realty Co.*, 167 N.W. 869, 201 Mich. 587.

Or.—*Kliks v. Courtemanche*, 43 P. 2d 913, 916, 150 Or. 332, quoting *Corpus Juris*.

Philippine.—*Viegelmann v. Perez*, 37 Philippine 678.

R.I.—*Arnold v. Chandler Motors of Rhode Island*, 123 A. 85, 45 R.I. 469.

Tex.—*O'Neal v. Allison*, Civ.App., 292 S.W. 269.

Wash.—*West American Finance Co. v. Finstad*, 262 P. 636, 146 Wash. 315.

11 C.J. p 412 note 3.

Note containing conditional sale clause executed at the time of a sale

transaction, constitutes a conditional sale, although the vendee subsequently executes a mortgage on the same property to the vendor.—*Kelley v. Brack*, 232 S.W. 190, 214 Ky. 9.

Instruments giving seller rights and remedies of mortgagee against buyer and chattels subject of sale, if rights of third persons do not intervene, but so colored as to be employed in support of claim of conditional sale only, when rights of third persons do intervene, are ab initio instruments in nature of chattel mortgage.—*Burroughs Adding Mach. Co. v. Wieselberg*, 203 N.W. 160, 230 Mich. 15.

Transaction held mortgage

Transaction whereby borrower, for purpose of obtaining loan, executed contract to sell his automobile by conditional sale to third person and third person assigned contract to lender and executed note payable to borrower which borrower indorsed to lender, is valid as between parties as giving lender mortgage.—*Pietranlio v. Scalzo*, Conn., 181 A. 628.

45. U.S.—*Martin v. Michigan Trust Co.*, C.C.A.Mich., 23 F.2d 609, affirming, D.C., *In re Thomas-Daggett Co.*, 20 F.2d 410.

Doubts should be resolved against vendor when there is purposeful ambiguity adopted in hope of construing contract later as chattel mortgage or conditional sale as may best serve vendor's purpose.—*Mills Novelty Co. v. Morett*, 254 N.W. 163, 266 Mich. 451.

46. N.Y.—*Sheeley v. Holmes Music Co.*, 179 N.Y.S. 202, 189 App.Div. 756.

47. U.S.—*In re Thomas-Daggett Co.*, D.C.Mich., 20 F.2d 410, 413, affirming *Martin v. Michigan Trust Co.*, C.C.A., 23 F.2d 609.

"If vendors intend to enjoy the protection of a secret lien as against innocent purchasers and creditors, the contract should speak so clearly that it is removed from the field of doubt, and if, by the omission or

the entire transaction and not from any particular feature of it,⁴⁸ and from the actual agreement of the parties and not from their characterization of it,⁴⁹ although the construction placed on the contract by the parties may properly be considered.⁵⁰ The form of the instrument is of little importance.⁵¹

A contract of conditional sale will not be regarded as a mortgage merely because it is recorded as such,⁵² or has an affidavit attached which is required only as to mortgages.⁵³ Further, an instrument which is otherwise a conditional sales contract will not be regarded as a mortgage because of the mere fact that it contains an acceleration clause,⁵⁴

or a clause requiring the buyer to keep the property insured for the seller's benefit,⁵⁵ or requiring him to pay attorney's fees in case the seller is required to employ one to recover the property or unpaid purchase money;⁵⁶ nor because of the fact that the seller takes promissory notes for the balance of the purchase price,⁵⁷ or that attached matter provides that the notes shall be secured by a mortgage on the property,⁵⁸ or that an absolute negotiable note is given for the price, and the buyer agrees to pay the taxes and reimburse the seller for any taxes assessed against him,⁵⁹ or that the seller accepts renewal notes obligating the buyer to pay the balance remaining after sale of the property or the expenses of collection if the property is destroyed.⁶⁰

shuffling of words, they seek to secure the advantages incident to the construction of the instrument as either a chattel mortgage or conditional sale contract, as ultimately will be most advantageous, such an agreement should be construed most strongly against the right of the vendor to assert his claimed lien. Certainly, in the absence of a specific reservation of title, such contract should not be construed as a conditional sale contract, unless the intention of the parties as therein expressed and the rights and remedies therein provided are clearly consistent with such construction."—In re Thomas-Daggett Co., *supra*.

48. U.S.—Keystone Finance Corporation v. Krueger, C.C.A.N.J., 17 F. 2d 904.

Or.—Kliks v. Courtemanche, 43 P.2d 913, 916, 150 Or. 332, quoting *Corpus Juris*.

Wash.—Lahn & Simons v. Matzen Woolen Mills, 266 P. 697, 147 Wash. 560.

11 C.J. p 412, note 4.

49. U.S.—Keystone Finance Corporation v. Krueger, C.C.A.N.J., 17 F.2d 904.

Ga.—Bacon v. Hanesley, 90 S.E. 1033, 19 Ga.App. 69.

Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451.

Or.—Kliks v. Courtemanche, 43 P.2d 913, 150 Or. 332.

Wash.—West American Finance Co. v. Finstad, 262 P. 636, 146 Wash. 315.

11 C.J. p 412 note 5.

50. N.Y.—Sisson v. First Nat. Bank, 254 N.Y.S. 527, 233 App.Div. 506.

Or.—Kliks v. Courtemanche, 43 P. 2d 913, 150 Or. 332.

Wyo.—Studebaker Bros. Co. v. Mau, 80 P. 151, 13 Wyo. 358, 110 Am.S.R. 1001.

Attitude of seller

As respects claim of mortgage, attitude of seller as expressed in letters to buyer, in which he apparent-

ly considered chattels to have been sold under conditional sales contract, although not controlling, is persuasive, especially where buyer does not refute statements, that both parties originally considered contract a conditional sales contract.—Uhl v. Wexford Co., 256 N.W. 488, 268 Mich. 473.

51. Ind.—Southern Finance Co. v. Mercantile Discount Corporation, 141 N.E. 250, 251, 80 Ind.App. 436, citing *Corpus Juris*—Schneider v. Daniel, App., 119 N.E. 1008, 1009, citing *Corpus Juris*.

Or.—Kliks v. Courtemanche, 43 P.2d 913, 150 Or. 332.

11 C.J. p 412 note 7.

52. U.S.—U. S. v. Montgomery, D. C. Ariz., 289 F. 125.

Ill.—Gilbert v. National Cash Register Co., 52 N.E. 22, 176 Ill. 288.

Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451—American Harrow Co. v. Deyo, 96 N.W. 1055, 134 Mich. 639.

Or.—Kliks v. Courtemanche, 43 P. 2d 913, 150 Or. 332.

53. U.S.—In re Ames, C.C.A.Mich., 289 F. 208, reversing, D.C., 283 F. 465.

Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451—Contractors' Equipment Co. v. Reasner, 219 N.W. 713, 242 Mich. 589.

54. Mich.—Powers v. Fisher, 272 N. W. 737, 279 Mich. 442—Uhl v. Wexford Co., 256 N.W. 488, 268 Mich. 473—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451—Gallion Iron Works & Mfg. Co. v. Service Coal Co., 249 N.W. 852, 264 Mich. 298.

55. Mich.—Powers v. Fisher, 272 N. W. 737, 279 Mich. 442—Uhl v. Wexford Co., 256 N.W. 488, 268 Mich. 473—Federal Commercial & Savings Bank v. International Clay Machinery Co., 203 N.W. 166, 230 Mich. 33, 43 A.L.R. 1245.

Wash.—Seaboard Securities Co. v.

Berg, 17 P.2d 646, 170 Wash. 681, 92 A.L.R. 297.

Agreement not controlling

An agreement on the part of the buyer to insure the property with loss payable to the seller, while indicating a chattel mortgage, is not controlling.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451.

56. Wash.—Seaboard Securities Co. v. Berg, 17 P.2d 646, 170 Wash. 681, 92 A.L.R. 297.

57. Mich.—Powers v. Fisher, 272 N. W. 737, 279 Mich. 442—Uhl v. Wexford Co., 256 N.W. 488, 268 Mich. 473—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451—In re Parkstone Apartment Co., 220 N.W. 780, 243 Mich. 401—Federal Commercial & Savings Bank v. International Clay Machinery Co., 203 N.W. 166, 230 Mich. 33, 43 A.L.R. 1245.

58. Wash.—Edison General Electric Co. v. Walter, 33 P. 752, 10 Wash. 14.

Printed form of contract of sale providing by certain typewritten matter attached thereto for partial payments of the purchase price in cash and in notes secured by a mortgage on the property to be sold, but containing in the body thereof a clause that "the title to the plant shall not pass from the company to the purchaser until it is fully paid for as per contract," is one evidencing a conditional sale of the property covered by it.—Edison Gen. Electric Co. v. Walter, *supra*.

59. U.S.—Petition of National Cash Register Co., C.C.A.Mich., 283 F. 742, reversing, D.C., In re Nader, 276 F. 123.

Mich.—Federal Commercial & Savings Bank v. International Clay Machinery Co., 203 N.W. 166, 230 Mich. 33, 43 A.L.R. 1245.

60. Ind.—Mellencamp v. Reeves Auto Co., 190 N.E. 618, 100 Ind. App. 26.

Construction as mortgage favored. The inclination of the courts in doubtful cases is to construe the transaction as a mortgage rather than as a conditional sale, for the reason that an error which converts a conditional contract of sale into a mortgage is less harmful than one which converts a mortgage into a conditional sale,⁶¹ provided this is not contrary to the clearly expressed intention of the parties;⁶² therefore, if the parties have chosen to make the transaction a conditional sale and to subject themselves to the statutory restrictions relating to such contracts, it cannot be contended that it constitutes a mortgage.⁶³ Where an instrument is in form a conditional sale, and alleged, in a bill to enforce it, to be a conditional sale, it will not, on demurrer, be held a mortgage; and if circumstances making it in fact a mortgage do not appear from the bill, they must be set up by plea or answer.⁶⁴

Statutory provisions. Statutes providing that all deeds of conveyance, obligations conditioned or defeasible, bills of sale, or other instruments in writing conveying or selling personal property to secure the payment of money shall be deemed mortgages, and shall be subject to the same rules of foreclosure and the same regulations, restraints, and forms prescribed for mortgages, should be liberally construed to carry out the legislative intent.⁶⁵ A statutory provision that the statute relating to chattel mortgages shall apply, when not inconsistent, to condi-

tional sales, does not make a conditional sale a mortgage.⁶⁶ A statute requiring a mortgage, when paid, to be satisfied, is inapplicable to a conditional bill of sale, where there is nothing to indicate an intention to give a mortgage;⁶⁷ and it has been held that a statutory provision, making a reservation of title as security for the purchase price a mortgage, does not apply under another statute making void mortgages on stocks of goods daily exposed for sale.⁶⁸ A statute regulating conditional sales does not apply where the parties make an absolute sale with a mortgage back to secure the purchase price.⁶⁹

b. Conditions Permitting Repurchase

The effect of a condition permitting the seller to repurchase the property, as affecting the character of the transaction as a mortgage or a conditional sale, is controlled by the intention of the parties as ascertained from the whole transaction.

A bill of sale with an agreement permitting a repurchase of the property by the seller may be such as to constitute either a mortgage or a conditional sale, its character depending on the surrounding circumstances and the intention of the parties,⁷⁰ a test generally accepted as decisive being the mutuality and reciprocity of the remedies of the parties.⁷¹

The fact that a bill of sale contains an agreement to resell the property to the seller at a fixed price or confers upon him an option to repurchase it does not, in itself, establish that the transaction is a

61. U.S.—*Martin v. Michigan Trust Co.*, C.C.A.Mich., 23 F.2d 609, affirming, D.C., *In re Thomas-Daggett Co.*, 20 F.2d 410.

Ala.—*Perkins v. Skates*, 124 So. 514, 220 Ala. 216.

Ind.—*Schneider v. Daniel*, 131 N.E. 816, 131 Ind. 59, 17 A.L.R. 1410.

Mo.—*International Harvester Co. v. Threlkeld*, 44 S.W.2d 182, 226 Mo. App. 600.

Tenn.—*Great American Indemnity Co. v. Utility Contractors, App.*, 111 S.W.2d 901—*Sweeney v. Mergenthaler Linotype Co.*, 3 Tenn. Civ.App., 244, 247.

Wash.—*Lahn & Simons v. Matzen Woolen Mills*, 266 P. 697, 147 Wis. 560—*West American Finance Co. v. Finstad*, 262 P. 636, 146 Wash. 315.

11 C.J. p 412 notes 9, 10.

"The reason is that no great injustice can be perpetrated so long as the creditor recovers his debt with legal interest, while much oppression may result by the inability of the debtor to repurchase the property at the time specified."—*Oden v. Vaughn*, 85 So. 779, 784, 204 Ala. 445.

62. Or.—*Kliks v. Courtemanche*, 43 P.2d 913, 916, 150 Or. 332, quoting *Corpus Juris*.

11 C.J. p 412 note 11.

63. N.Y.—*Powers v. Burdick*, 110 N.Y.S. 883, 126 App.Div. 179.

64. Fla.—*Smith v. Hope*, 35 So. 865, 47 Fla. 295.

65. Fla.—*Hull v. Burr*, 50 So. 754, 58 Fla. 432.

Statutory provisions as to reservation of title as security being mortgage see *infra* § 7 c (1).

66. Minn.—*Penchoff v. Walter E. Heller & Co.*, 223 N.W. 911, 176 Minn. 493.

67. Iowa.—*Stull v. S. Davidson & Bros.*, 233 N.W. 114, 211 Iowa 239.

68. Tex.—*International Harvester Co. of America v. Smith*, Civ.App., 91 S.W.2d 827, error dismissed.

69. N.Y.—*Gaul v. Goldberg Furniture & Carpet Co.*, 147 N.Y.S. 516, 85 Misc. 426.

Tenn.—*Sweeney v. Mergenthaler Linotype Co.*, 3 Tenn.Civ.App. 244.

70. Mont.—*Rairden v. Hedrick*, 129 P. 498, 46 Mont. 510.

Contract construed as sale with right to repurchase

Under English law governing its construction, a contract whereby plaintiff "sold and delivered" two paintings for a fair price, with the right to repurchase within a specified time for a specified price, plus

interest to the date of repurchase, on condition that his financial condition permits repurchase for his personal use, and that, in case, of repurchase, plaintiff would resell the paintings to defendant if at any time within ten years after purchase plaintiff or his representatives should care to dispose of them, constitutes a contract of sale with the right to repurchase, and not a mortgage.—*Yousoupoff v. Widener*, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.

Sale with lease and right to repurchase as not mortgage

Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

Under English law, one important difference between a sale with a right to repurchase and a mortgage is that, in the former the right to repurchase must be strictly followed to the letter, but a mortgage is construed against the letter.—*Yousoupoff v. Widener*, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.

71. Conn.—*Guilford-Chester Water Co. v. Town of Guilford*, 141 A. 880, 107 Conn. 519.

mortgage,⁷² especially when there is no debt to be secured and no obligation to repay.⁷³ The transfer, however, may be shown to be a mortgage by evidence that the seller's obligation continued,⁷⁴ that he bound himself to pay interest,⁷⁵ that the bill of sale was given to secure a loan,⁷⁶ or that the amount of consideration was inadequate as a purchase price.⁷⁷

c. Payment of Purchase Price as Condition

- (1) In general
- (2) Delivery or retention of possession
- (3) Option as to payment of purchase price
- (4) Permission to retake and sell property
- (5) Security for further obligations

(1) In General

By the weight of authority, a sale on condition that the title shall remain in the seller until the purchase price is fully paid is a conditional sale; but there is authority to the effect that such a sale may be shown to be, in fact, a mortgage, and by statute, in some states, such a reservation of title is regarded as a mortgage.

Where a contract of sale expressly provides that the title shall remain in the seller until the purchase price has been paid, the transaction is, according to the weight of authority, to be construed, between the parties at least, as a conditional sale, and not a mortgage;⁷⁸ and this rule applies where the seller of a motor vehicle reserves title until the purchase price has been paid.⁷⁹ In the absence of anything in the instrument inconsistent with a conditional sale, the condition for reservation of title should be given its primary and natural meaning as denoting such a sale,⁸⁰ even though it stipulates that it is a mortgage,⁸¹ and even though the con-

72. U.S.—First Nat. Bank v. Young's Estate, C.C.A.Mich., 41 F. 2d 8.

Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

11 C.J. p 413 note 16.

For amount paid plus interest

That contract provides for repurchase for amount paid plus interest does not necessarily indicate mortgage instead of sale with right to repurchase.—Youssouff v. Widener, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.

73. Conn.—Guilford-Chester Water Co. v. Town of Guilford, 141 A. 880, 107 Conn. 519.

11 C.J. p 413 note 17.

Under English law, although the indebtedness to be secured need not appear in express terms in the contract to make it a mortgage instead of a sale with a right to repurchase, it must be shown in some way, as by surrounding circumstances.—Youssouff v. Widener, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.

74. Ky.—Townsend v. Frazer, 54 S. W. 722, 21 Ky.L. 1183.

11 C.J. p 413 note 18.

75. S.C.—Fountain v. Bryce, 33 S.C. Eq. 234.

11 C.J. p 413 note 19.

76. Cal.—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.

11 C.J. p 413 note 20.

77. Ala.—Rapier v. Gulf City Paper Co., 77 Ala. 126.

11 C.J. p 413 note 21.

78. Ala.—Brooks v. Dial, 107 So. 744, 214 Ala. 267.

Ark.—Howell v. Thew Shovel Co., 43 S.W.2d 366, 184 Ark. 777.

Fla.—Dodson Printers' Supply Co. v. Corbett, 82 So. 804, 78 Fla. 257.

Idaho.—Pease v. Teller Corporation, 128 P. 981, 22 Idaho 807.

Iowa.—Stull v. S. Davidson & Bros., 233 N.W. 114, 211 Iowa 239—Kammeier v. Chauvet, 171 N.W. 165, 186 Iowa 958.

Mich.—J. L. Hudson Co. v. Apartment Inv. Corporation, 221 N.W. 630, 244 Mich. 529—In re Parkstone Apartment Co., 220 N.W. 780, 243 Mich. 401—Federal Commercial & Savings Bank v. International Clay Machinery Co., 203 N.W. 166, 230 Mich. 33, 43 A.L.R. 1245.

N.Y.—Interstate Ice & Power Corporation v. U. S. Fire Ins. Co., 152 N.E. 476, 243 N.Y. 95, affirming 213 N.Y.S. 826, 215 App.Div. 768—Sisson v. First Nat. Bank, 254 N.Y.S. 527, 233 App.Div. 506—George A. Ohl & Co. v. Standard Steel Sections, 167 N.Y.S. 184, 179 App.Div. 637.

R.I.—Lennon v. L. A. W. Acceptance Corporation of Rhode Island, 138 A. 215, 48 R.I. 363—Arnold v. Chandler Motors of Rhode Island, 123 A. 85, 45 R.I. 469.

Tenn.—Williamson Bros. v. Daniel, App., 110 S.W.2d 1028.

Wis.—John Deere Plow Co. of Moline v. Edgar Farmer Store Co., 143 N.W. 194, 154 Wis. 490.

11 C.J. p 413 note 22.

Instrument held conditional sales

An instrument executed by buyer of personalty to seller, agreeing that title is to remain in seller until paid for, and that buyer, on default of payment of notes when due, shall be responsible for delivery to seller, and shall hold property as bailee for hire, is not a bill of sale from buyer to the seller, but is a conditional sale by seller to buyer, it being a con-

tract of sale with a reservation of title to secure the indebtedness; and it is not converted into a bill of sale from buyer to seller by additional provision that buyer sells, transfers, and conveys property to seller and warrants the title.—Kelley v. Overland Sales Co., 103 S.E. 41, 25 Ga. App. 277.

79. U.S.—U. S. v. Montgomery, D.C. Ariz., 289 F. 125.

Ariz.—McArthur Bros. Mercantile Co. v. Hagihara, 194 P. 386, 22 Ariz. 100, 13 A.L.R. 1038.

Ark.—Sternberg v. City Nat. Bank of Ft. Smith, 233 S.W. 691, 149 Ark. 432.

Ga.—Raddenberry v. Fouche, 102 S. E. 869, 25 Ga.App. 148.

Iowa.—Northern Finance Corporation v. Meinhardt, 226 N.W. 168, 209 Iowa 895.

Mich.—Nelson v. Vieregiver, 203 N. W. 164, 230 Mich. 38.

Miss.—Mitchell v. Williams, 124 So. 430, 155 Miss. 343.

Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.

N.D.—Tickfer v. Investment Corporation of Fargo, 249 N.W. 702, 63 N.D. 613.

Pa.—Jacob Dold Packing Co. v. Potter Title, etc., Co., 79 Pa.Super. 112.

R.I.—Robert W. Powers, Inc. v. Packard, 149 A. 611, 50 R.I. 499.

42 C.J. p 756 notes 83, 84.

80. Mich.—Uhl v. Wexford Co., 256 N.W. 438, 268 Mich. 473.

Lien provision in such a contract, although seemingly inconsistent with title reservation, must be considered and, if possible, reconciled with conflicting provisions so as to give effect to the dominant purpose of the contract.—In re Berghoff Printing Co., C.C.A.Mich., 62 F.2d 493.

81. Ga.—Bacon v. Hanesley, 90 S. E. 1033, 19 Ga.App. 69.

tract contains no provision for retaking the property in case of default.⁸²

According to some decisions, however, a reservation of title until the purchase price has been paid is not conclusive of the character of the transaction, and it may be shown to be a mortgage by other provisions in the instrument or by the surrounding circumstances,⁸³ as where the contract imports an intention to retain title merely as security,⁸⁴ and the taking and holding of additional security and the enforcement of statutory liens are not inconsistent with such a reservation as security.⁸⁵ A contract of sale of an automobile wherein the seller retains title to secure the payment of the purchase price

is a mortgage,⁸⁶ or at least may be regarded and treated as such at the election of the seller, and when such election is made it is binding and vests title in the purchaser, subject to a lien for the purchase money.⁸⁷ The fact that the one claiming the contract to be a conditional sales contract seeks by action to recover possession only does not import that the transaction was a conditional sale rather than a mortgage;⁸⁸ and in any event it would seem that, to enable a conditional seller to enforce his claim of title to the property on nonpayment of the price, he must have been in fact the owner of the property and must have made a bona fide sale thereof to a bona fide purchaser, by which the actual possession was changed in fact.⁸⁹ An

82. Mich.—Uhl v. Wexford Co., 256 N.W. 488, 268 Mich. 473.

83. U.S.—In re Caver, Caver & Co., D.C.Miss., 42 F.2d 293—Martin v. Michigan Trust Co., C.C.A.Mich., 23 F.2d 609, affirming, D.C., In re Thomas-Daggett Co., 20 F.2d 410—In re Ulrop-Huff Co., D.C.N.Y., 9 F.2d 922, affirmed, C.C.A., 9 F.2d 924.

Kan.—Minneapolis Threshing Machine Co. v. Nash, 176 P. 628, 103 Kan. 871.

Mich.—Petition of Hume, 245 N.W. 514, 260 Mich. 555—First State Savings Bank v. Russell, 221 N.W. 142, 244 Mich. 298—Riverside Machinery Depot v. American Steel Supply Syndicate, 204 N.W. 766, 232 Mich. 22.

Miss.—Employer's Fire Ins. Co. v. Greenville Bank & Trust Co., 177 So. 534.

Mont.—First Nat. Bank v. Marlowe, 230 P. 374, 71 Mont. 461.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S. C. 243.

Wash.—Lahn & Simons v. Matzen Woolen Mills, 266 P. 697, 147 Wash. 560—West American Finance Co. v. Finstad, 262 P. 636, 146 Wash. 315.

11 C.J. p 414 note 23.

Contracts held to be mortgages

(1) A contract of sale, whereby the seller retains title, with the usual reserved rights of taking possession, until the debt is fully discharged, amounts to nothing more than a mortgage by the purchaser to secure the unpaid purchase price, provided the purchaser himself duly executes the contract.—Cable Piano Co. v. Lewis, 243 S.W. 924, 195 Ky. 666.

(2) An order for goods, stating title should remain in plaintiff until paid for as per note and mortgage, showed reservation of title by mortgage, rather than by conditional sale

pleaded.—Skates v. Perkins, 141 So. 687, 225 Ala. 33—Perkins v. Skates, 124 So. 514, 220 Ala. 216.

(3) A contract under which store fixtures were delivered to bankrupt, in which he was called "buyer" and the other party "seller," and by which he was absolutely obligated to pay the "purchase price" in installments, with interest, which also contained a provision retaining title in the seller until full payment, with the option in case of default to rescind the contract, or affirm and sue "as for a breach," constituted a conveyance of title with a reservation, intended to operate as a mortgage.—In re Ames, D.C.Mich., 283 F. 465, reversed, C.C.A., 289 F. 208. 11 C.J. p 414 note 23 [a].

Property to "stand good for debt"

An agreement complete on its face for the sale of a car and the payment of the purchase price in deferred installments which contains the provision, "car stands good for the debt," does not amount to a reservation of title, and creates a lien only.—Yale Auto. Co. v. Walker, 224 S.W. 632, 145 Ark. 344.

In Kentucky, all conditional sales contracts are regarded as mortgages. U.S.—In re Draughn & Steele Motor Co., D.C.Ky., 49 F.2d 636, affirmed, C.C.A., Commercial Inv. Trust Corporation v. Wilson, 58 F.2d 910.

Ky.—A. C. Morris & Co. v. Heaton, 29 S.W.2d 617, 235 Ky. 66—Gas & Electric Shop v. Corey-Scheffel Lumber Co., 13 S.W.2d 1009, 227 Ky. 657, 62 A.L.R. 208—Morrow Mfg. Co. v. Race Creek Coal Co., 2 S.W.2d 662, 222 Ky. 807—Kelley v. Brack, 282 S.W. 190, 214 Ky. 9—United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 206 S.W. 806, 182 Ky. 473.

84. U.S.—In re Bonk, D.C.Mich., 268 F. 1012.

Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451.

As absolute sale with retention of lien as security

(1) Execution of instrument purporting to reserve title in seller, where intention is to give security, is in effect absolute sale with retention of lien as security, that is, a mortgage.—Forgan v. Blythe, 242 N.W. 811, 258 Mich. 689—National Cash Register Co. v. Paul, 182 N.W. 44, 213 Mich. 609, 17 A.L.R. 1416—Young v. Phillips, 169 N.W. 822, 203 Mich. 566, affirming 168 N.W. 549, 202 Mich. 480.

(2) An instrument purporting to reserve title in seller, and also to give seller right of action to recover the debt without passing title, will be construed to make an absolute sale with the reservation of a lien by way of security, the two provisions being inconsistent.—Peter Schuttler Co. v. Gunther, 192 N.W. 661, 222 Mich. 430—Heyman Co. v. Buck, 190 N.W. 631, 221 Mich. 225—Young v. Phillips, supra.

85. Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451.

86. N.C.—Harris v. Seaboard Air Line R. Co., 130 S.E. 319, 190 N.C. 480.

Holmes' notes given in partial payment for the purchase price of a motor truck is equivalent in effect to a mortgage.—Drake v. Nickerson, 121 A. 86, 123 Me. 11.

87. Fla.—Varn v. Ashbrook, 94 So. 384, 84 Fla. 626.

88. Wash.—West American Finance Co. v. Finstad, 262 P. 636, 146 Wash. 315.

89. Miss.—Payne v. Parker, 48 So. 335, 95 Miss. 375.

As against bona fide purchaser of car

Where retail automobile dealer bought automobile for cash, and bill of lading was sent with draft attached, and defendant paid draft and delivered bill of lading to dealer, and next day gave dealer conditional bill of sale to secure the money

election by the seller, as permitted by the contract, to take a mortgage does not terminate the title retention provision until a valid mortgage has been delivered and filed.⁹⁰

Statutory provisions in some states place all reservations of title as security for the payment of the purchase price of chattels on the general footing of mortgages.⁹¹

Same instrument as conditional sale and mortgage. The same instrument may evidence a conditional sale of specific chattels retaining title in the seller until payment is made and a mortgage of other property for further security as to the payment of the purchase price;⁹² but the relation of conditional seller and buyer and of mortgagor and mortgagee cannot subsist as to the same property at the same time.⁹³

Equitable relief. Where a contract of conditional sale reserves title to the property in the seller until it is fully paid for, and gives the seller the right to declare a forfeiture on default of payment, a court of equity has power under some circumstances to declare such contract a mere security, and to protect the purchaser from unconscionable forfeiture.⁹⁴

Rights of third persons. A contract which by its terms is a mortgage, ordinarily cannot be a con-

ditional sale between the parties and a mortgage when the rights of third persons are involved.⁹⁵ A third person, however, may be entitled in equity to assert that what between the parties is a conditional sale is as to him a mortgage, but this will be permitted only on equitable grounds, and to prevent fraud.⁹⁶

(2) Delivery or Retention of Possession

A conditional sale with retention of possession by the seller is in effect a chattel mortgage. If possession is delivered to the buyer, by some decisions, it may be regarded as a conditional sale, but other decisions are to the contrary.

A conditional sale contract of personal property the possession of which remains in the seller is in effect a chattel mortgage.⁹⁷

The fact that the possession of the property is delivered to the buyer will not prevent a transaction from being regarded as a conditional sale where title is reserved in the seller until payment,⁹⁸ and the purchaser may be given the possession and use of the property for the purpose of securing funds with which to pay the purchase price.⁹⁹ It has also been held to be a conditional sale where the chattels are deposited with a trustee to be returned to the seller on the payment of a specified amount.¹ A conditional sale, however, accompanied

advanced, insufficient as a chattel mortgage, which bill was recorded, the transaction was void as against plaintiff, a bona fide purchaser.—*Lyon v. Nourse*, 176 P. 359, 104 Wash. 309.

90. D.C.—*In re Berghoff Printing Co.*, C.C.A.Mich., 62 F.2d 493.

91. U.S.—*John Hetherington & Sons v. Rudisill*, C.C.A.N.C., 28 F.2d 713, 62 A.L.R. 377.

Fla.—*Voges v. Ward*, 123 So. 785, 93 Fla. 304.

Idaho.—*Schleiff v. McDonald*, 237 P. 1108, 41 Idaho 50.

11 C.J. p 415 note 24.

In Texas, under the express provisions of Rev.St.1925 art 5489 and prior similar statutes, a contract of sale reserving title in the seller until the purchase price is paid is a mortgage.—*Moore v. B. & M. Chevrolet Co.*, Civ.App., 72 S.W.2d 945—*Malchoff v. Austin-Morris Co.*, Civ. App., 52 S.W.2d 682—*Kuntz v. Spence*, Civ.App., 48 S.W.2d 413, reversed on other grounds, Com.App., 67 S.W.2d 254—*National Automatic Mach. Co. v. Smith*, Civ.App., 32 S.W. 2d 678—*Maloney v. G. A. Stowers Furniture Co.*, Civ.App., 28 S.W.2d 306, error dismissed—*Sussdorf v. Lee*, Civ.App., 2 S.W.2d 344, error dismissed—*Buchanan-Vaughan Auto Co. v. Woosley*, Civ.App., 218 S.W.

554, dismissed for want of jurisdiction.

11 C.J. p 415 note 24 [a].

92. Fla.—*Mizell Live Stock Co. v. J. J. McCaskill Co.*, 51 So. 547, 59 Fla. 322.

N.Y.—*Bartholomew v. Barton*, 199 N. Y.S. 399, 129 Misc. 627.

93. Ala.—*Perkins v. Skates*, 124 So. 514, 220 Ala. 216.

Mich.—*Burroughs Adding Mach. Co. v. Wieselberg*, 203 N.W. 160, 162, 230 Mich. 15.

94. Fla.—*Malone v. Meres*, 109 So. 677, 91 Fla. 709.

Iowa.—*Gigray v. Mumper*, 118 N.W. 393, 141 Iowa 396.

95. Wash.—*Raymond Bros. Impact Pulverizer Co. v. Thomas*, 294 P. 219, 159 Wash. 550.

96. Ill.—See *West Suburban Finance & Thrift Co. v. Graham*, 3 N.E.2d 172, first case, 285 Ill.App. 587, followed in 3 N.E.2d 172, second case, 285 Ill.App. 587.

Ind.—*Dunbar v. Rawles*, 28 Ind. 225, 92 Am.D. 311.

Buyer, mortgagor, as having equitable interest

One who owns a chattel covered by mortgage is its sole and unconditional owner, but, where title is retained by mortgagee, mortgagor has only a beneficial or equitable interest.—

C. I. T. Corporation v. Guy, Va., 195 S.E. 659.

97. U.S.—*Haupt v. Moore*, C.C.A. Cal., 77 F.2d 456.

Cal.—*Wehrle v. Marks*, 25 P.2d 51, 134 Cal.App. 141—*Mercantile Acceptance Corporation v. Pioneer Credit Indemnity Co.*, 12 P.2d 988, 124 Cal.App. 593.

98. U.S.—*In re Ulrop-Huff Co.*, D.C. N.Y., 9 F.2d 922, affirmed, C.C.A., 9 F.2d 924—*Southern Hardware, etc., Co. v. Clark*, Fla., 201 F. 1, 119 C.C.A. 339.

Ark.—*Sternberg v. City Nat. Bank*, 233 S.W. 691, 149 Ark. 432—*Starnes v. Boyd*, 142 S.W. 1143, 101 Ark. 469.

Ill.—*Tufts v. Koumoungis*, 73 Ill. App. 210.

99. N.Y.—*Strong v. Taylor*, 2 Hill 326.

11 C.J. p 415 note 32.

1. U.S.—*Graham v. J. D. Spreckels & Bros. Co.*, C.C.A.Or., 243 F. 66, 160 C.C.A. 206, certiorari denied 38 S.Ct. 427, 247 U.S. 507, 62 L.Ed. 1241.

As condition of settlement

Where to adjust difficulties between the parties and terminate pending litigation, complainant entered into a contract with the principal defendant whereby securities, deeds, and releases of claims were

by delivery has been held to pass title to the buyer with a lien to the seller for the unpaid purchase money,² and it will not be regarded as a conditional sale, instead of a mortgage, because of a provision that in case of default the buyer's possession shall be that of bailee for the seller;³ and even though the contract reserves title, if it is followed by a delivery of possession on the execution of a mortgage for the unpaid purchase price, the delivery of possession is a transfer of title subject to the mortgage, and not a conditional sale.⁴

(3) Option as to Payment of Purchase Price

By the weight of authority, a transaction may be a conditional sale notwithstanding the buyer is obligated absolutely to pay the purchase price.

According to the weight of authority, a transaction may constitute a conditional sale, although the purchaser is obligated absolutely to pay the purchase price;⁵ but in some jurisdictions a contrary view is taken,⁶ and under this view, where notes are given for the purchase price, it is held to evi-

dence an absolute sale with a chattel mortgage back.⁷

(4) Permission to Retake and Sell Property

By some decisions a contract may be a conditional sale although it authorizes the seller, on the buyer's default, to take possession of the chattel, sell it, and account for any surplus or hold the buyer responsible for any deficiency; but there is authority to the contrary.

The transaction may be construed as a conditional sale, although it contains the provision usually found in chattel mortgages authorizing the seller, on default of payment, to take possession of the property, sell it, and account to the purchaser for any surplus over the amount to be paid,⁸ or hold him responsible for any deficiency in the purchase price.⁹ According to some decisions, however, such a provision is a strong, if not in fact a controlling, indication of the intention of the parties that the title shall pass depriving the transaction of its character as a conditional sale, and making it, at least in effect, a mortgage.¹⁰

deposited with a trustee under an agreement that if complainant should pay a large sum of money within six months they should be returned to him, and, if not, they should become the absolute property of the principal defendant, the contract must be deemed a conditional sale of the securities and claims deposited with the trustee.—Graham v. J. D. Spreckels & Bros. Co., *supra*.

2. Ky.—Taylor Motor Sales Co. v. Automobile Ins. Co. of Hartford, Conn., 294 S.W. 773, 220 Ky. 6.

3. Colo.—J. I. Case Threshing Mach. Co. v. Rominger, 238 P. 63, 77 Colo. 595.

4. Mo.—State v. Griffin, 228 S.W. 800.

5. U.S.—Vander Lei v. Blakely, C. C.A.Mich., 284 F. 516.

Cal.—Bice v. Harold L. Arnold, Inc., 243 P. 468, 75 Cal.App. 629.

Mich.—Mills Novelty Co. v. Morett, 254 N.W. 163, 266 Mich. 451—Federal Commercial & Savings Bank v. International Clay Machinery Co., 203 N.W. 166, 230 Mich. 33, 43 A.L.R. 1245—Nelson v. Vieregger, 203 N.W. 164, 230 Mich. 38—Burrroughs Adding Mach. Co. v. Wieselberg, 203 N.W. 160, 230 Mich. 15.

11 C.J. p 415 note 33.

6. Wash.—West American Finance Co. v. Finstad, 262 P. 636, 146 Wash. 315.

11 C.J. p 415 note 34.

7. Colo.—Clark v. Bright, 69 P. 506, 30 Colo. 199.

11 C.J. p 416 note 35.

8. U.S.—Monitor Drill Co. v. Mer-

cer, Minn., 163 F. 943, 90 C.C.A. 303, 20 L.R.A.N.S., 1035, 16 Ann. Cas. 214.

Ariz.—McArthur Bros. Mercantile Co. v. Hagihara, 194 P. 336, 22 Ariz. 100, 13 A.L.R. 1038.

Ark.—Howell v. Thew Shovel Co., 43 S.W.2d 366, 134 Ark. 777.

Fla.—Dodson Printers' Supply Co. v. Corbett, 82 So. 804, 78 Fla. 257.

Idaho.—Pease v. Teller Corporation, 128 P. 981, 22 Idaho 807.

Ill.—Herbert v. Rhodes-Burford Furniture Co., 106 Ill.App. 583.

Ind.—Schneider v. Daniel, 131 N.E. 816, 17 A.L.R. 1410.

Me.—Franklin Motor Car Co. v. Hamilton, 92 A. 1001, 113 Me. 63.

Minn.—Bradley v. Benson, 100 N.W. 670, 93 Minn. 91.

Ohio.—Call v. Seymour, 40 Ohio St. 670.

Wis.—John Deere Plow Co. of Moline v. Edgar Farmer Store Co., 143 N.W. 194, 154 Wis. 490.

11 C.J. p 416 note 36.

Application of proceeds to unpaid purchase price

Conditional sales contract authorizing seller to resell property and apply proceeds on unpaid installments did not convert instrument into a mortgage.—Tickler v. Investment Corporation of Fargo, 249 N.W. 702, 63 N.D. 613.

In absence of actual fraud, a condition reserving title in an automobile in the vendor until payment therefor, and authorizing him to retake and sell it at any time he considered his rights endangered, did not render the sale absolute, and will be enforced as against third parties as well as between the parties as

conditional.—Arnold v. Chandler Motors of Rhode Island, 123 A. 85, 45 R.I. 469.

9. Ill.—Horvitz v. Leibowitz, 274 Ill. App. 196.

Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.

10. Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599—Beatrice Creamery Co. v. Sylvester, 179 P. 154, 65 Colo. 569, 13 A.L.R. 441.

Ky.—United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 206 S.W. 806, 182 Ky. 473.

N.C.—State v. Stinnett, 167 S.E. 63, 203 N.C. 829—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480—Chas. Hackley Piano Co. v. Kennedy, 67 S.E. 488, 152 N.C. 196.

Tex.—Malchoff v. Austin-Morris Co., Civ.App., 52 S.W.2d 682—Maloney v. G. A. Stowers Furniture Co., Civ.App., 28 S.W.2d 806, error dismissed—O'Neal v. Allison, Civ. App., 292 S.W. 269.

11 C.J. p 416 note 37.

Contracts held mortgages

(1) Where the purchaser of an automobile enters into a conditional sales contract, authorizing the seller to retake possession on the purchaser's default, and sell it and charge the purchaser with the costs, attorney's fees, and deficiency, and further authorizing concurrent remedies, the contract is in effect a mortgage, and title passes to the purchaser at the time the contract is made, entitling him to sue for damages at the time he was in de-

The distinction has been made that if, under the contract, the seller, on default of the buyer, may retake the property, retain payments made and, by acceleration of other payments, recover any deficiency in the contract price, the transaction is not a conditional sale, but is at least in effect a mortgage.¹¹ If, however, it is apparent either from the contract or the surrounding circumstances that these remedies are alternative and not cumulative, that is, that the seller may either recover possession

or recover the unpaid purchase price, but not both, it is a conditional sale;¹² and this is also true where on retaking the property, the seller may sue only for its rental value or for the nonperformance of the contract.¹³ The contract, in such a case, is not converted into a mortgage by the fact that the seller has an election, on retaking possession, to retain part payments, already made, as liquidated damages,¹⁴ or by a clause subjecting the chattel to a lien for insurance premiums paid by the seller.¹⁵

fault.—*Gervasi v. Seattle & R. V. Ry. Co.*, 269 P. 1050, 148 Wash. 635.

(2) Where it is agreed that the owner of a car who, by a bill of sale, has borrowed money thereon shall retain possession of the car until the loan becomes due, and that on default in payment the car shall pass to the lender and become his property, or may be retaken by him and sold, the transaction is a mortgage.

Nev.—*State v. Bacha*, 194 P. 1066, 44 Nev. 373.

Or.—*Snodgrass v. Wallowa Milling & Grain Co.*, 227 P. 294, 111 Or. 402.

Plumbing contract

Provision in contract for sale and installation of plumbing in apartment building that in addition to other remedies materialman might in case of default remove materials installed is in effect, a mortgage and valid as between parties thereto.—*Hannin v. Fisher*, 43 P.2d 815, 5 Cal. App.2d 673.

Effect of passing of title generally see *infra* § 7 d.

11. U.S.—In re *Berghoff Printing Co.*, C.C.A.Mich., 62 F.2d 493—In re *Central States Freight Corporation*, D.C.Mich., 46 F.2d 545—*Webster, Showcase & Fixture Co. v. Waugh*, D.C.Wash., 42 F.2d 515—*Cooper v. Michigan Artificial Ice Products Co.*, D.C.Mich., 1 F.Supp. 741, affirmed, C.C.A., *Westerlin & Campbell Co. v. Chapman*, 61 F.2d 1046, certiorari denied *Westerlin & Campbell Co. v. Michigan Artificial Ice Products Co.*, 53 S.Ct. 400, 288 U.S. 608, 77 L.Ed. 983—In re *Goorman*, D.C.Mich., 283 F. 119—In re *American Steel Supply Syndicate*, D.C.Mich., 256 F. 876—*D. A. Tompkins Co. v. Monticello Cotton Oil Co.*, C.C.Ga., 137 F. 625.

Ky.—*Cartwright v. C. I. T. Corporation*, 70 S.W.2d 388, 253 Ky. 690.

Mich.—*Mills Novelty Co. v. Morett*, 254 N.W. 163, 266 Mich. 451—*Bal-lard v. Mackinac Island Hotel Co.*, 250 N.W. 297, 264 Mich. 522—*For-gan v. Blythe*, 242 N.W. 811, 258 Mich. 689—*Grand Rapids Electro-type Co. v. Powers-Tyson Corporation*, 224 N.W. 609, 245 Mich. 669, certiorari denied *Ostrander-Seymour Co. v. Grand Rapids Electro-*

type Co., 50 S.Ct. 35, 280 U.S. 585, 74 L.Ed. 634—*Plummer v. Dilley*, 193 N.W. 792, 223 Mich. 372—*Thomas Spacing Mach. Co. v. Security Trust Co.*, 193 N.W. 790, 223 Mich. 164—*Heyman Co. v. Buck*, 190 N.W. 631, 221 Mich. 225—*Ni-man v. Story & Clark Piano Co.*, 181 N.W. 1017, 213 Mich. 397.

N.Y.—*Edson & Co. v. Hudson Motor Car Co.*, 228 N.Y.S. 582, 132 Misc. 223.

Wash.—*Robert Morton Organ Co. v. Armour*, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462—*Roberts v. Speck*, 16 P.2d 463, 170 Wash. 324—*Raymond Bros. Impact Pulver-izer Co. v. Thomas*, 294 P. 219, 159 Wash. 550—*Gervasi v. Seattle & R. V. Ry. Co.*, 269 P. 1050, 148 Wash. 635—*Lahn & Simons v. Matzen Woolen Mills*, 266 P. 697, 147 Wash. 560.

"The right to retake the property, retain payments made, estimate wear and tear, compute damage, and look to the buyer for deficiency in the agreed price, is consonant only with remedies under instruments providing for security in the nature of a chattel mortgage; for in such a case the security is but an incident of a debt absolutely due from the buyer to the seller."—*Burroughs Adding Machine Co. v. Wieselberg*, 203 N.W. 160, 230 Mich. 15.

12. U.S.—In re *Central States Freight Corporation*, D.C.Mich., 46 F.2d 545—*Cooper v. Michigan Artificial Ice Products Co.*, D.C.Mich., 1 F.Supp. 741, affirmed, C.C.A., *Westerlin & Campbell Co. v. Chapman*, 61 F.2d 1046, certiorari denied *Westerlin v. Michigan Artificial Ice Products Co.*, 53 S.Ct. 400, 288 U.S. 608, 77 L.Ed. 983—In re *Ames*, C.C.A.Mich., 289 F. 208, reversing, D.C., 283 F. 465.

Mich.—*Galion Iron Works & Mfg. Co. v. Service Coal Co.*, 249 N.W. 852, 264 Mich. 298—*Petition of Hume*, 245 N.W. 514, 260 Mich. 555—*Burroughs Adding Mach. Co. v. Wieselberg*, 203 N.W. 160, 230 Mich. 15.

Wash.—*Seaboard Securities Co. v. Berg*, 17 P.2d 446, 170 Wash. 681, 92 A.L.R. 297—*Allis-Chalmers Mfg.*

Co. v. Hadlund Lumber & Mfg. Co., 2 P.2d 708, 164 Wash. 296.

"The alternative provision in the repossession clause, to the effect that the holder of the notes and contract may, in addition to retaking possession, sell the property, apply the proceeds on the debt, and then hold the purchaser liable for any deficiency, is, as to the last provision, incompatible with the true theory of a conditional sale. . . . He may, on default, repossess the property, and, if he so desires, sell it; but he cannot take the property and also pursue the purchaser for the debt. When he elects to retake the property as owner, this necessarily precludes any recovery of the balance due on the debt."—*Voges v. Ward*, 123 So. 785, 794, 98 Fla. 304.

Contract for sale of motor truck, providing for the retention of title in the seller and giving a right to the holder of unmatured notes and contract to declare the notes due and payable on default, and providing that the seller might enforce payment of the notes without waiving his right to take possession of the car on default, can be upheld as a conditional sales contract, on eliminating the provision for the alternative remedy of recovering the price and taking possession of the property, notwithstanding a statutory provision that bills of sale conveying or selling property for the purpose of securing the payment of money shall be deemed mortgages.—*Voges v. Ward*, *supra*.

Option to invoke lien laws

Conditional seller's reserving option to invoke local lien laws rather than contractual right to repossess property on default is not inconsistent with conditional sales agreement.—*Galion Iron Works & Mfg. Co. v. Service Coal Co.*, 249 N.W. 852, 264 Mich. 298.

13. U.S.—In re *Berghoff Printing Co.*, C.C.A.Mich., 62 F.2d 493.

14. U.S.—In re *Berghoff Printing Co.*, *supra*—In re *Tyrrell*, D.C. Mich., 285 F. 69.

Mich.—*Contractors' Equipment Co. v. Reasner*, 219 N.W. 713, 242 Mich. 589.

15. U.S.—In re *Berghoff Printing Co.*, C.C.A.Mich., 62 F.2d 493.

(5) Security for Further Obligations

A transaction may be a conditional sale although the property is to stand as security for other obligations.

An agreement may be construed as a conditional sale although it contains a stipulation that, in case the buyer shall make other purchases, the property in question shall stand as security for the price,¹⁶ or that it shall stand as security for other debts.¹⁷ On the other hand it has been held that where the seller may retain title until not only the contract price but also other debts are paid, and may sue and obtain judgment and yet retain title, it constitutes a chattel mortgage.¹⁸

d. Effect of Passing of Title

Where title is passed to the buyer the transaction generally constitutes a mortgage.

A distinction sometimes made is that in a conditional sale title to the property remains in the seller, while a mortgage assumes title in the mortgagor with a lien in favor of the mortgagee.¹⁹ Where, therefore, the intention is evident that the title shall pass to the buyer, the transaction is a mortgage and cannot be regarded as a conditional sale;²⁰ hence, where goods are delivered to the buyer under an agreement whereby the property and the goods are transferred with the reservation of a lien to secure the purchase price, the transaction is a mortgage.²¹ An assignment of his interest by the conditional seller of a motor vehicle to secure a debt transfers title subject to the right of redemption by the conditional buyer, and is in effect

a mortgage.²²

The passing of title, however, is dependent on the nature of the condition relative thereto, whether it is precedent or subsequent; if it is precedent, and remains so regardless of subsequent events, except the right to pass title by suit for the agreed purchase price, it is consonant with a conditional sale; but, if it is subsequent, to be ruled by events, and remedies are open to enforce payment of the purchase price with the chattel as a security, it is security in the nature of a mortgage.²³ Accordingly where a contract, under which property is transferred with reservation of title, provides that the seller may enforce payment of the purchase price without passing title to the purchaser, it is not a conditional sale, but an absolute sale with reservation of a lien as security.²⁴

§ 8. — Lease

A clause in a lease reserving a lien for rent and other indebtedness on personality is generally held to be, at least in effect, a mortgage. A lease of personal property is not a mortgage, unless it is given as security.

A clause in a lease reserving a lien for rent, on crops or personal property on the premises, does not necessarily change the nature of the instrument and cause it to become a chattel mortgage;²⁵ but where such a clause is inserted, as providing security for rent or other indebtedness, it has generally been held that the instrument operates as a mortgage or is in legal effect a mortgage of such

16. U.S.—Southern Hardware, etc., Co. v. Clark, Fla., 201 F. 1, 119 C. C.A. 339.

17. Nev.—Studebaker Bros. Co. v. Witcher, 195 P. 334, 44 Nev. 442.

18. Mich.—Itleson v. Hagan, 222 N.W. 145, 245 Mich. 56.

19. U.S.—Robinson v. Bowe, C.C.A. S.D., 73 F.2d 238—Intertype Corporation v. Pulver, D.C.Fla., 2 F. Supp. 4, affirmed, C.C.A., 65 F.2d 419, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571.

Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.

20. U.S.—John Deere Plow Co. v. Mowry, Cal., 222 F. 1, 137 C.C.A. 539.

N.Y.—Sheeley v. Holmes Music Co., 179 N.Y.S. 202, 139 App.Div. 756. 11 C.J. p 417 note 39.

21. U.S.—Sweeney v. Medler, C.C.A. N.M., 78 F.2d 148.

Colo.—Farmers' State Bank of Brighton v. Anglo American Mill Co., 231 P. 156, 76 Colo. 309.

Ky.—A. C. Morris & Co. v. Heaton, 29 S.W.2d 617, 235 Ky. 66.

R.I.—Arnold v. Chandler Motors of

Rhode Island, 123 A. 85, 45 R.I. 469.

11 C.J. p 417 note 40.

That contract provides for retaking of property in event of default to apply proceeds on obligation of buyer is strongly persuasive that contract is absolute sale with reserved lien.—Lahn & Simons v. Matzen Woolen Mills, 266 P. 697, 147 Wash. 560.

22. Conn.—Armstrong v. Greenwich Motors Corporation, 165 A. 598, 116 Conn. 487.

Mass.—Worcester Morris Plan Co. v. Mader, 128 N.E. 777, 236 Mass. 435. Tex.—Universal Credit Co. v. Ratliff, Civ.App., 57 S.W.2d 238.

Wis.—Burnett County Abstract Co. v. Eau Claire Citizens' Loan & Investment Co., 255 N.W. 890, 216 Wis. 35.

23. Mich.—Burroughs Adding Mach. Co. v. Wieselberg, 203 N.W. 160, 162, 230 Mich. 15.

Contract held to pass title

Provision in conditional sale that suit could be brought against buyer and judgments recovered and title

and ownership remain in seller until judgments were paid carries with it transfer of title to purchaser.—Nelson v. Viergiver, 203 N.W. 164, 230 Mich. 38.

Contract held not to pass title

An agreement by which the owner gave the lender a bill of sale of an automobile to secure a loan, providing that the property should become the mortgagee's absolutely on failure to pay the indebtedness, cannot be construed to pass title as under an ancient common-law mortgage, but leaves the mortgagor an equity of redemption.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

24. U.S.—In re Harmony Theatre Co., D.C.Mich., 298 F. 662—Petition of National Cash Register Co., C. C.A.Mich., 283 F. 742, 744, reversing In re Nader, D.C., 276 F. 123.

Mich.—Forgan v. Blythe, 242 N.W. 811, 258 Mich. 689—Phillips-Michigan Co. v. Field Body Corporation, 190 N.W. 682, 221 Mich. 17.

25. Fla.—Vanderpool Properties v. Hess & Slager, 130 So. 457, 458, 100 Fla. 933, quoting Corpus Juris. 11 C.J. p 417 note 41.

property,²⁶ and this rule applies where the lien is reserved on exempt property of the tenant.²⁷ A provision in a farm lease reserving title to, or giving a lien on, the tenant's share of the crop as security for his indebtedness to the landowner is, in effect, a mortgage.²⁸

A lease of personalty for a fixed term, reserving title in the lessor, is not a mortgage.²⁹ A contract for the lease of personal property for a rental, the aggregate installments of which equal the stipulated value of the article, has been held to be a conditional sale and not a mortgage,³⁰ although substantially similar contracts in contemplation of a sale of the property and to secure payment thereof, have been held to be chattel mortgages.³¹

§ 9. — Trust Receipts; Deeds of Trust

A "trust receipt" is an instrument whereby a banker advancing money for the purchase of merchandise takes and retains title thereto in his own name, as security until the amount advanced has been repaid, and delivers possession of the merchandise to the customer to hold in trust for the banker until such time. The

transaction is generally regarded by the later decisions as a mortgage. A chattel mortgage may also be in the form of a deed of trust.

A "trust receipt" is a well-known instrument in common use whereby an arrangement, more or less frequent in modern business relations, is made by which a banker, advancing money to enable a customer to purchase merchandise, takes the title or bill of lading in his own name and thereafter surrenders possession to the customer, who gives a trust receipt, under which it is agreed that the title to the merchandise shall remain in the banker as security until he is repaid the amount advanced, and that the proceeds of any sale of the merchandise shall be applied to the repayment of the advances made by the banker on account of the original purchase price.³² This form of transaction was originally employed in the importing trade, but has come into quite general use in the marketing of motor vehicles, where the purchase of cars by a dealer from a manufacturer or distributor is financed by a corporation which advances the purchase price in whole or in part.³³ Transactions of this

26. Fla.—Vanderpool Properties v. Hess & Slager, *supra*.

Mo.—K-M Supply Co. v. Moran, App., 53 S.W.2d 419.

Mont.—Barth v. Ely, 278 P. 1002, 85 Mont. 310.

Tex.—Leonard v. Burton, Civ.App., 11 S.W.2d 688.

11 C.J. p 417 note 42.

In hotel lease, a provision giving lessor a lien on the building and furniture for unpaid rents created in equity a mortgage on the property.—Cook v. Cave, 260 S.W. 49, 163 Ark. 407.

27. Iowa.—Brownlee v. Masterson, 247 N.W. 481, 215 Iowa 993.

In addition to statutory lien

A lease which in addition to the statutory lien makes the rent charge a lien on the property of the tenant on the premises, whether exempt from execution or not, constitutes in effect a "chattel mortgage."—Beh v. Tilk, Iowa, 269 N.W. 751.

28. U.S.—In re American Cork Industries, C.C.A.N.Y., 54 F.2d 740—Farmers' State Bank of Polk, Neb., v. Benston, C.C.A.Colo., 29 F.2d 902—Swenson v. Laird, C.C.A.Neb., 14 F.2d 917.

Ark.—Mitchell v. Badgett, 33 Ark. 387.

Idaho.—Smith v. Washburn-Wilson Seed Co., 232 P. 574, 40 Idaho 191.

Me.—Kelley v. Goodwin, 50 A. 711, 95 Me. 538.

Minn.—Nelson v. McDonald, 191 N. W. 281, 153 Minn. 474—Ward v. Rippe, 100 N.W. 386, 93 Minn. 36—McNeal v. Rider, 81 N.W. 830, 79 Minn. 153, 79 Am.S.R. 437.

Mont.—Crone v. Occident Elevator Co., 224 P. 659, 70 Mont. 211.

Neb.—Wilcox & Co. v. Deines, 230 N.W. 682, 119 Neb. 692.

N.Y.—Nestell v. Hewitt, 19 Abb.N. Cas. 282.

29. Ohio.—Cooperider v. Myre, 175 N.E. 235, 37 OhioApp. 502.

Lease of personal property, as bailment, distinguished from mortgage see Bailments §§ 2, 4.

30. Colo.—Gerow v. Castello, 19 P. 505, 11 Colo. 560, 7 Am.S.R. 260.

11 C.J. p 417 note 43.

Conditional sale distinguished from mortgage see *supra* § 7.

31. N.J.—Rapoport v. Rapoport Express Co., 107 A. 822, 90 N.J.Eq. 519.

11 C.J. p 417 note 44.

Lease to secure payment for motor vehicle

(1) An instrument in the form of a lease contract of a motor vehicle is a mortgage where a sale of the vehicle is in contemplation and the lease contract is taken to secure payment.—Willys-Overland Co. of California v. Chapman, Tex.Civ.App., 206 S.W. 978.

(2) Where all purported rental installments were paid on a lease of an automobile truck, providing for its sale to lessee at expiration of lease for one dollar, and it was taken from lessee's possession by an officer at lessor's instance for a claim under the garage lien law, and a new lease was then executed fixing aggregate rentals by amount due lessor for repairs, etc., on other cars as well as that leased, and an addi-

tional sum was arbitrarily added by lessor, and truck was then returned to lessee, transaction was really a mortgage.—Rapoport v. Rapoport Express Co., 107 A. 822, 90 N.J.Eq. 519.

32. Conn.—Armstrong v. Greenwich Motors Corporation, 165 A. 598, 600, 116 Conn. 487.

Mass.—Simons v. Northeastern Finance Corporation, 171 N.E. 643, 644, 271 Mass. 285—T. D. Downing Co. v. Shawmut Corporation, 139 N.E. 525, 245 Mass. 106, 27 A. L.R. 1522.

11 C.J. p 418 note 47.

See also Banks and Banking § 179.

Similar definition

"A trust receipt is a well-known instrument of commerce whereby a banker advancing the money on an importation takes title directly to himself, and as owner delivers the goods to the dealer in whose behalf he is acting secondarily and to whom the title ultimately is to go when the primary right of the banker has been satisfied, the title remaining in the banker until the price is paid to him."—People's Nat. Bank v. Mulholland, 117 N.E. 46, 47, 228 Mass. 152.

Rights of banker under trust receipt as against third persons see *infra* § 202.

33. Conn.—Armstrong v. Greenwich Motors Corporation, 165 A. 598, 116 Conn. 487.

"Trust receipts, financing importations, have long been employed and accorded judicial sanction, but adoption of the scheme with reference to automobiles is quite modern and

nature while similar in effect vary considerably in form,³⁴ and have generally been regarded as legal and valid contracts;³⁵ but a trust receipt which mentions no consideration, although essentially a mortgage, is void as to creditors although it is recorded as a conditional sale.³⁶

The effect of a trust receipt transaction is that the banker, advancing money for the merchandise purchased, takes title directly to himself, and retains such title, as security, until the amount advanced is repaid,³⁷ and is under an obligation to transfer the title to the customer or to his order when his advances have been paid.³⁸ Meanwhile the merchandise is delivered to the customer in or-

der that he may carry out his own commercial plans in respect thereto;³⁹ but until the advances have been repaid the customer has no title to the merchandise, and is entitled only to hold it or to deal with it according to the agreement in trust for the banker.⁴⁰

There has been some difference of opinion as to the exact nature of a trust receipt transaction, which nature is to be determined from the facts and circumstances of the entire transaction,⁴¹ and in doing so, the trust receipt, accepted draft, bill of sale, and note, all relating to the same transaction should be considered together.⁴² It has been held that the transaction is not a mortgage,⁴³

without serious difficulty unless rights of bona fide purchasers from the trust receptor intervene and the so-called trust is secret."—*Motor Bankers' Corporation v. C. I. T. Corporation*, 241 N.W. 911, 912, 258 Mich. 301.

In Massachusetts, the only kind of trust instrument which we have recognized and called a trust receipt is one where the banker at the request of the importer buys goods directly from the foreign seller and takes title in his own name from the foreign seller and then turns the goods which he has thus bought directly in his own name over to the importer upon a trust receipt in order that the latter may carry on his own commercial adventure. An agreement under which a seller purchases an automobile with a limited right of resale is not a trust receipt.—*Simons v. Northeastern Finance Corporation*, 171 N.E. 643, 644, 271 Mass. 285.

34. U.S.—*In re Cattus*, N.Y., 183 F. 733, 106 C.C.A. 171.
11 C.J. p 418 note 48.

35. Mass.—*T. D. Downing Co. v. Shawmut Corporation*, 139 N.E. 525, 245 Mass. 106, 27 A.L.R. 1522.
—*People's Nat. Bank v. Mulholland*, 117 N.E. 46, 228 Mass. 152.

Trust receipt from automobile dealer

Trust receipts, taken by acceptance corporation from automobile dealer for money advanced on purchase price of cars before delivery thereof to dealer by manufacturer, evidenced legal contracts binding on dealer.

U.S.—*Singletary v. General Motors Acceptance Corporation*, C.C.A.Ga., 73 F.2d 453.

Ga.—*General Motors Acceptance Corporation v. Dunn Motors*, 158 S.E. 626, 43 Ga.App. 275, conforming to answer to certified questions 157 S.E. 627, 172 Ga. 400.

36. N.J.—*General Contract Purchase Corporation v. Bickert*, 161 A. 830, 10 N.J.Misc. 958.

37. Mass.—*T. D. Downing Co. v. Shawmut Corporation*, 139 N.E. 525, 245 Mass. 106, 27 A.L.R. 1522.
Mo.—*Globe Securities Co. v. Gardner Motor Co.*, 85 S.W.2d 561.
11 C.J. p 418 notes 49, 50.

Denial of ownership

Dealer using finance company's money to purchase automobiles could not deny finance company's ownership as acknowledged in trust receipt because company never had possession.—*General Motors Acceptance Corporation v. Dunn Motors*, 157 S.E. 627, 172 Ga. 400, answers conformed to 158 S.E. 626, 43 Ga.App. 275.

One of principal tests by which to determine whether transaction whereby dealer receives automobiles from distributor and executes trust receipt and note to finance company for unpaid purchase price, results in a security, or whether there is retention of ownership, is binding promise to pay on part of dealer.—*General Motors Acceptance Corporation v. Seattle Ass'n of Credit Men*, 67 P.2d 832, 190 Wash. 284.

Trust receipt as security

Where dealer received automobiles from distributor after paying ten per cent of purchase price and executing trust receipt and note to finance company for unpaid portion of purchase price, finance company held trust receipt as security, whether transaction be considered, in effect, a mortgage or conditional bill of sale.—*General Motors Acceptance Corporation v. Seattle Ass'n of Credit Men*, supra.

38. Mass.—*T. D. Downing Co. v. Shawmut Corporation*, 139 N.E. 525, 526, 245 Mass. 106, 27 A.L.R. 1522.

39. "Banker has no part in the commercial adventure of the importer. The banker expects and is entitled to receive only the advances, while the profit belongs wholly to the importer."—*T. D. Downing Co. v. Shawmut Corporation*, supra.

40. U.S.—*In re A. E. Fountain, Inc.*, C.C.A.N.Y., 282 F. 816.

Mass.—*Simons v. Northeastern Finance Corporation*, 171 N.E. 643, 271 Mass. 285.—*T. D. Downing Co. v. Shawmut Corporation*, 139 N.E. 525, 245 Mass. 106, 27 A.L.R. 1522.
—*People's Nat. Bank v. Mulholland*, 117 N.E. 46, 228 Mass. 152.
Mo.—*Globe Securities Co. v. Gardner Motor Co.*, 85 S.W.2d 561.

Equitable concept of trust receipt is that of a declaration of trust, that the debtor holds his own property in trust for the creditor, the finance company, as security for the debt.—*Vonhof v. General Contract Purchase Corporation*, 170 A. 239, 115 N.J.Eq. 239.

41. Wash.—*General Motors Acceptance Corporation v. Seattle Ass'n of Credit Men*, 67 P.2d 832, 190 Wash. 284.

42. Mich.—*Motor Bankers' Corporation v. C. I. T. Corporation*, 241 N.W. 911, 258 Mich. 301.
N.C.—*General Motors Acceptance Corporation v. Mayberry*, 142 S.E. 767, 195 N.C. 508.

43. Conn.—*Armstrong v. Greenwich Motors Corporation*, 165 A. 598, 116 Conn. 487.

11 C.J. p 418 note 52.

Reason for rule

It is not a mortgage because title to the property passes directly to the bank or acceptance corporation, and possession of the property does not pass to the dealer until after he has executed a trust receipt, under which the dealer cannot use the property, nor sell, loan, deliver, pledge, mortgage or otherwise dispose of it, until after the payment of amounts shown on the dealer's record of purchase and release.—*In re Otto-Johnson Mercantile Co.*, D.C.N.M., 52 F.2d 678, 680.

Criticism of mortgage theory

The theory that a trust receipt transaction constitutes a mortgage "hardly seems a logical position for these reasons: Where the finance company secured its legal title from

pledge,⁴⁴ or conditional sale,⁴⁵ but there is authority for regarding the transaction as a conditional sale, or in the nature thereof.⁴⁶ In other cases, the transaction has been regarded as a species of bailment, as announced in the title Bailments § 3 b, or as creating an anomalous contract relation.⁴⁷ By the weight of authority, however, as expressed in modern decisions, a trust receipt transaction is

generally regarded as a mortgage,⁴⁸ particularly where, under the circumstances, title never passed to the banker;⁴⁹ and, accordingly, a transaction whereby a dealer receives motor vehicles from a manufacturer or distributor and executes a trust receipt to a banker or finance company as security for money advanced for unpaid purchase money has been held, at least in effect, a mortgage.⁵⁰

the wholesale automobile distributor, the dealer's position under a trust receipt cannot be that of a mortgagor for he never had legal title and never conveyed it to the so-called mortgagee. Moreover, the mortgagee may regain possession only on default, whereas the trust receipt permits repossession of the car at any time. This is also contrary to the theory on which has been developed the law of trust receipts in their original field as governing the relation of an importer of goods to his banker who buys from the foreign seller and takes title to himself."—*Handy v. C. I. T. Corporation*, 197 N.E. 64, 291 Mass. 157, 101 A.L.R. 447.

Motor vehicle transaction

Transaction whereby dealer received automobiles from distributor, after executing trust receipt in which dealer agreed to hold automobiles in trust for credit corporation which financed transaction, was not "chattel mortgage" invalid as against dealer's receiver, although credit corporation never had possession.—*Armstrong v. Greenwich Motors Corporation*, 165 A. 598, 116 Conn. 487.

44. N.Y.—*Moors v. Kidder*, 12 N.E. 818, 106 N.Y. 32.

11 C.J. p 418 note 53.

45. Utah.—*Jones v. Commercial Investment Trust*, 228 P. 896, 64 Utah 151.

11 C.J. p 418 note 54.

Conditional sale and trust receipt distinguished

"In this connection the difference between these transactions and true conditional sales is apparent. In cases of true conditional sale, where it has been held that the vendor having reclaimed and sold the goods cannot afterwards sue for his deficiency, it is pointed out by the courts that by retaking the goods the whole consideration has failed or been terminated, and that there is no further consideration upon which to sue. . . . When a banker advances money for the purchase of goods the result is different, because the consideration is different. The consideration is not the supplying of goods, but the supplying of funds. The goods themselves are no essential element in the contract, being merely security for its execution. . . . Certainly a banker never intends that the amount of his recov-

ery shall depend upon the value of the goods. He is concerned only with getting back his advance, with interest and commissions. That is his business. Just as he has to return any surplus after a sale of the security, so he has a right of action for any deficiency which may result. It is clear enough that in the ordinary case, where the banker has not parted with possession of the goods under trust receipt or otherwise and is forced to realize upon them at a loss, he is entitled to claim for a deficiency, and there is no reason why, because he has given them up and retaken them, his rights should be any less. If further illustration were needed of the difference between the transaction in question and a conditional sale, it can be found in this view of it: At whose risk is the property from the inception of the transaction? No one will pretend that if the goods were destroyed . . . without insurance (there being no agreement for insurance) the loss would fall upon the bank. Yet, if the transaction were a conditional sale, the risk of loss would be upon the bank until it delivered the goods to the importer."—*Charavay & Bodvin v. York Silk Mfg. Co.*, C.C.N.Y., 170 F. 819, 824.

46. Cal.—*Mohr v. First Nat. Bank*, 232 P. 748, 69 Cal.App. 756.

Iowa.—*Ohio Sav. Bank & Trust Co. v. Schneider*, 211 N.W. 248, 202 Iowa 938.

11 C.J. p 418 note 55.

Transaction held conditional sale

Where, under a bill of sale executed by a manufacturer, an acceptance corporation became the owner of an automobile and as such owner delivered the automobile to a purchaser, taking his note payable to the order of plaintiff and requiring the purchaser to execute a trust receipt, whereby the latter on payment of its note to plaintiff should acquire title to the automobile sold, the agreement constituted a conditional sale.—*General Motors Acceptance Corporation v. Mayberry*, 142 S.E. 767, 195 N.C. 508.

47. Utah.—*Jones v. Commercial Inv. Trust*, 228 P. 896, 64 Utah 151.

11 C.J. p 418 note 57.

48. U.S.—*Commercial Inv. Trust Corporation v. Wilson*, C.C.A.Ky., 58 F.2d 910, affirming, D.C., in re

Draughn & Steele Motor Co., 49 F. 2d 636—In re *Schuttig*, D.C.N.J., 1 F.2d 443.

Ky.—*General Motors Acceptance Corporation v. Sharp Motor Sales Co.*, 25 S.W.2d 405, 233 Ky. 290.

Mass.—*Hartford Accident & Indemnity Co. v. Callahan*, 171 N.E. 820, 271 Mass. 556.

N.J.—*Harding v. First-Mechanics Nat. Bank of Trenton*, 166 A. 142, 113 N.J.Eq. 129.

Common-law mortgages

Trust receipts are common-law mortgages.—*Smith v. Commercial Credit Corporation*, 165 A. 637, 113 N.J.Eq. 12, affirmed *Morrow v. Smith*, 170 A. 607, 115 N.J.Eq. 310.

Transaction held mortgage

Where a bank, to which a debtor had pledged a warehouse receipt for goods to secure an indebtedness, surrendered the warehouse receipt and took from the debtor a trust receipt, containing an agreement to hold the goods as the property of the bank, with liberty to sell the goods for the bank's account, and in such case to turn over the avails to apply on the indebtedness, the instrument was a mortgage or a conveyance intended to operate as such.—In re *A. E. Fountain, Inc.*, C.C.A.N.Y., 282 F. 816.

49. U.S.—*Scandinavian-American Bank v. Sabin, Or.*, 227 F. 579, 142 C.C.A. 211.

11 C.J. p 419 note 58.

50. U.S.—*Universal Credit Co. v. Fortinberry*, C.C.A.Tex., 63 F.2d 71—In re *James, Inc.*, C.C.A.N.Y., 30 F.2d 555, reversing, D.C., 30 F.2d 551.

Cal.—*Pacific Finance Corporation v. Hendley*, 284 P. 736, 103 Cal.App. 335, hearing denied and opinion modified on other grounds 285 P. 1048.

Kan.—*Habegger v. Skalla*, 34 P.2d 113, 140 Kan. 166.

N.H.—*General Motors Acceptance Corporation v. Berry*, 167 A. 553, 86 N.H. 280.

N.J.—*Vonhof v. General Contract Purchase Corporation*, 170 A. 239, 115 N.J.Eq. 239—*Smith v. Commercial Credit Corporation*, 165 A. 637, 113 N.J.Eq. 12, affirmed *Morrow v. Smith*, 170 A. 607, 115 N.J.Eq. 310—*Karkuff v. Mutual Securities Co.*, 148 A. 159, 108 N.J.Eq. 128, affirmed 148 A. 160, 108 N.J.Eq. 128. Tex.—*Universal Credit Co. v. Gasow-*

Distinctions. The difference between the true trust receipt situation and the ordinary mortgage is the fact that in the trust receipt title passes to the banker from the seller of the goods as security for the debt of a third party, while in the ordinary mortgage title passes to the mortgagee directly from the party owing the debt.⁵¹

A pledge is distinguishable from a trust receipt or special form of "security title," apart from any common-law form of security, which is given as security for advances of the purchase price of imports and arises out of the modern conditions of trade and commerce, and which is not dependent on possession of the goods imported.⁵²

Deed of trust. One of the common forms which a mortgage takes is a deed of trust, and the fact that the transfer assumes this form does not affect the nature of the transaction or make it any the less a mortgage.⁵³ Furthermore, a trust deed like a common-law mortgage passes the legal title in

those jurisdictions in which a mortgage so operates.⁵⁴

§ 10. — Power

An instrument giving a creditor the right to take possession, sell, and apply the proceeds to a debt is a mere power and not a mortgage.

An instrument giving a creditor a right to take possession of goods, to sell them, and to apply the proceeds to the satisfaction of a debt, is not a mortgage but a mere power, for it transfers no title.⁵⁵

§ 11. — Evidence as to Character of Transaction

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

An instrument, whether a mortgage or another form of transaction, is presumed to be what, on its face, it

Howard Motor Co., Civ.App., 73 S.W.2d 909, error dismissed—General Motors Acceptance Corporation v. Bettes, Civ.App., 57 S.W.2d 263 error refused—Carrollton Acceptance Co. v. Wharton, Civ.App., 22 S.W.2d 985—General Motors Acceptance Corp. v. Boddeker, Civ. App., 274 S.W. 1016.

Transactions held mortgages

(1) "A trust receipt, accompanied by the obligation of the receiptor, to pay an agreed price for an automobile, possession of which is changed, and which permits suit upon the obligation accompanying the trust receipt or the retaking and resale of the car, with application of proceeds in reduction of obligation to pay and right to hold the receiptor for the balance, is security in the nature of a chattel mortgage."—Motor Bankers' Corporation v. C. I. T. Corporation, 241 N.W. 911, 912, 258 Mich. 301.

(2) A trust receipt stating that the dealer agrees to hold motor vehicles in trust for a finance company as its property and to return any and all of the vehicles to the finance company on demand, and that the finance company might at any time cancel the trust and take possession of the vehicles without notice or demand, constitutes a mortgage, since the finance company has nothing to do with the sale of the vehicles to the dealer and it has no arrangement with either the seller or the bank to which the price draft was forwarded with respect to payment thereof.—McLeod Nash Motors v. Commercial Credit Trust, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296.

Construction

In determining meaning and intent of parties to transaction whereby automobile dealer received automobiles from distributor and executed trust receipt and note to finance company for unpaid portion of purchase price, court would look beyond the form and from evidence determine what was the real transaction.—General Motors Acceptance Corporation v. Seattle Ass'n of Credit Men, 67 P.2d 882, 190 Wash. 284.

Fleeting and proof

Where an action to enforce a superior lien on motor vehicles under trust receipts proceeds expressly on the theory that plaintiff holds only a mortgage, the action is governed by the rule that a transaction designed to hold personal property as mere security for a debt is regarded as a mortgage, regardless of its name or form, and a different legal status of trust receipt need not be considered.—General Motors Acceptance Corporation v. Sharp Motor Sales Co., 25 S.W.2d 405, 233 Ky. 290.

51. U.S.—In re Schuttig, D.C.N.J., 1 F.2d 443, 444—In re A. E. Fountain, Inc., C.C.A.N.Y., 282 F. 816, 823.

Conn.—Armstrong v. Greenwich Motors Corporation, 165 A. 598, 600, 116 Conn. 487.

N.H.—General Motors Acceptance Corporation v. Berry, 167 A. 553, 86 N.H. 280.

Similar statement of distinction

"In the case of a chattel mortgage the security is dependent upon the title, and the instrument must contain a defeasance clause. In the case of a trust receipt, title has

never been taken in the debtor, and consequently he cannot convey such title back to the holder of the trust receipt. In the last mentioned, the title remains in the party secured, while the possession is intrusted to one who has a certain interest as yet indefinite in the property."—Globe Securities Co. v. Gardner Motor Co., Mo., 35 S.W.2d 561, 567.

52. U.S.—In re Richheimer, Ill., 221 F. 16, 136 C.C.A. 542, certiorari denied Arbutnot v. Central Trust Co., 35 S.Ct. 662, 238 U.S. 624, 59 L.Ed. 1494.

53. U.S.—Hunt v. Springfield F. & M. Ins. Co., App.D.C., 25 S.Ct. 179, 196 U.S. 47, 49 L.Ed. 381.

11 C.J. p 419 note 59.

Instrument conveying both real and personal property to a trustee as security for a debt is a mortgage.—Harriman v. Woburn Electric Light Co., 39 N.E. 1004, 163 Mass. 85.

Trust deed executed by individuals and purporting to pledge as security personal property owned or acquired and used by the grantors in the conduct of business in the mortgaged property is as to such personal property a mortgage.—Fisher v. Norman Apartments, Colo., 72 P.2d 1092.

54. Miss.—Elson v. Barrier, 56 Miss. 394.

55. Fla.—McGriff v. Porter, 5 Fla. 373.

Mass.—Shaw v. Silloway, 14 N.E. 733, 145 Mass. 503.

Mich.—Holmes v. Hall, 8 Mich. 66, 77 Am.D. 444.

Power defined see the C.J.S. title Powers § 1, also 49 C.J. p 1248 note 2.

purports to be, and the burden of rebutting the presumption is on the party asserting the contrary.

The presumption is that the instrument is what, on its face, it purports to be,⁵⁶ and the burden of rebutting this presumption lies on him who asserts the contrary.⁵⁷

b. Admissibility

Parol evidence is admissible to show whether the transaction in question was intended to be a mortgage, but not to vary its terms. A bill of sale, absolute on its face, may generally be shown by parol or extrinsic evidence to be in fact a mortgage.

Under the rule that parol evidence is admissible for the purpose of explaining and showing the true nature and character of the transaction evidenced by a written contract, as announced in the C.J.S. title Evidence § 1015, also 22 C.J. p 1259 note 95, it is generally held that parol testimony is admissible to show that the real purpose of the parties to a transfer was that it should operate as a mortgage, but it is inadmissible to vary the terms of the writing.⁵⁸ So, where the question is whether the transaction constitutes a mortgage or a conditional sale, if the intention is not clearly expressed in the written instrument, and this is not the whole contract of the parties, parol evidence is admissible to

show what their real agreement was;⁵⁹ and this is true also in case of a writing in the nature of a bill of parcels or receipt, and not of a bill of sale.⁶⁰ Where, however, an instrument is, from its face, clearly a mortgage, parol evidence is inadmissible to show it to be something different.⁶¹

Absolute bill of sale as mortgage. As a general rule, parol or extrinsic evidence is admissible in equity to show that a bill of sale, absolute on its face, is in fact a mortgage,⁶² although there are decisions which apparently confine the rule to cases in which there is an allegation of fraud,⁶³ and under the express provisions of some statutes, where a bill of sale is absolute on its face and is accompanied by possession of the property, the parties cannot prove it to be a mortgage by parol evidence unless fraud in its procurement is the issue to be tried.⁶⁴

In actions at law in some states, parol evidence is not admissible to show that an absolute bill of sale is in fact a mortgage;⁶⁵ but the more generally accepted rule is in favor of the admission of such evidence,⁶⁶ particularly under statutes allowing equitable defenses to be asserted in actions at law,⁶⁷ and under code provisions abolishing the distinc-

58. N.J.—*Cake v. Shull*, 16 A. 434, 45 N.J.Eq. 208.

11 C.J. p 419 note 63.

Prima facie an absolute conveyance is the effect of a bill of sale.—*Jameson v. Diggs*, 276 P. 969, 47 Idaho 478.

57. Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

11 C.J. p 419 note 64.

As being genuine mortgage

In mortgagees' action against mortgagor's purchaser to recover mortgaged automobile following default in purchase-money mortgage, where purchaser claimed that title had remained in mortgagees, and that mortgagor had sold automobile as mortgagees' agent, mortgagees had the burden of proving that the mortgage under which they claimed title was a genuine mortgage to secure an outright sale of the automobile to mortgagor.—*Harper v. Abercrombie*, 105 S.E. 749, 115 S.C. 360.

If transaction is in form of conditional sale, the burden of proof is on the party asserting it to be a mortgage.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

Persons executing bill of sale reciting actual transfer have burden of showing that instrument was intended as a mortgage and not to convey actual title.—*Shobe v. Sykes*, 288 P. 1072, 144 Okl. 18.

58. N.D.—*Harney v. Wirtz*, 152 N.W. 803, 30 N.D. 292.

Or.—*Barber v. Motor Inv. Co.*, 298 P. 216, 136 Or. 361.

11 C.J. p 419 notes 66, 67.

59. U.S.—*Fruehauf Trailer Co. v. Bridge*, C.C.A.Mich., 84 F.2d 660. Fla.—*Baer v. General Motors Acceptance Corporation*, 132 So. 817, 101 Fla. 913.

11 C.J. p 419 note 68.

60. Me.—*Grant v. Frost*, 13 A. 881, 80 Me. 202.

11 C.J. p 420 note 73 [a].

61. Me.—*Whitney v. Lowell*, 33 Me. 318.

11 C.J. p 420 note 69.

62. U.S.—*Fruehauf Trailer Co. v. Bridge*, C.C.A.Mich., 84 F.2d 660. Md.—*State v. Maryland Casualty Co.*, 163 A. 856, 164 Md. 69.

Mich.—*Klingensmith v. James B. Clow & Sons*, 259 N.W. 312, 270 Mich. 460, reversed on other grounds 262 N.W. 644, 273 Mich. 48.

N.Y.—*Lipe v. Beech-Nut Packing Co.*, 277 N.Y.S. 832, 243 App.Div. 433.

11 C.J. p 420 note 70.

Intended as security for debt

Where an instrument appears on its face to be an absolute bill of sale to personalty, but contains no defeasance clause, and is not accompanied by actual or constructive delivery of the property to the buyer, extrinsic evidence is admissible to

show that it was intended only as a security for debt.—*Avera Loan & Investment Co. v. Yopp*, 103 S.E. 42, 25 Ga.App. 279.

63. Ill.—See *Gordon v. Brucker*, 208 Ill.App. 188.

Ky.—*Marshall v. Cox*, 7 J.J.Marsh. 133.

11 C.J. p 420 note 71.

64. Miss.—*Armstrong v. Owens*, 35 So. 320, 83 Miss. 10.

11 C.J. p 420 note 72.

65. Me.—*Grant v. Frost*, 13 A. 881, 80 Me. 202.

11 C.J. p 420 note 73.

66. U.S.—*Fruehauf Trailer Co. v. Bridge*, C.C.A.Mich., 84 F.2d 660. Fla.—*Cary & Co. v. Hyer*, 107 So. 684, 91 Fla. 322.

Md.—*Winakur v. Sapourn*, 145 A. 342, 156 Md. 662.

Neb.—*Omaha Book Co. v. Sutherland*, 6 N.W. 367, 10 Neb. 334.

Or.—*Barber v. Motor Inv. Co.*, 298 P. 216, 136 Or. 361.

11 C.J. p 420 note 74.

In *replevin* action brought by the holder of a bill of sale, parol evidence is admissible to prove that the bill of sale was intended only as a pledge to secure the repayment of a debt.—*Winakur v. Sapourn*, 145 A. 342, 156 Md. 662.

67. Ind.T.—*Rogers v. Nidiffer*, 82 S.W. 673, 5 Ind.T. 55.

11 C.J. p 421 note 75.

tions between actions at law and in equity.⁶⁸ However, it has been held that although a stranger to the transaction may at law assert and produce evidence to prove the transaction to have been a mortgage,⁶⁹ parol evidence is not admissible at law for such purpose as against a third person not a party to the transaction.⁷⁰

The principle on which parol evidence is admitted in these cases is similar to that under which extrinsic evidence is admitted to establish a resulting trust as against an absolute deed,⁷¹ and it is not received for the purpose of contradicting the terms of the instrument but to raise an equity paramount to its mere form.⁷²

Where parol evidence is regarded as admissible, it is proper to show the circumstances under which the instrument was made;⁷³ the practical construction given to it by the parties;⁷⁴ all the facts of

the transaction;⁷⁵ conversations between the parties at the time;⁷⁶ whether or not it has been filed as a chattel mortgage;⁷⁷ the disposition of the property by the parties;⁷⁸ the value of the property transferred;⁷⁹ and the retention or cancellation of the debt,⁸⁰ but not of transactions with third persons.⁸¹

c. Weight and Sufficiency

Clear, unequivocal, and convincing evidence is generally required to show that a bill of sale, or other transfer, was intended to be a mortgage.

The evidence, generally, must be clear, unequivocal, and convincing, in order to establish that a particular instrument or transaction is a mortgage,⁸² such as to warrant the conclusion that a bill of sale, although absolute in form, was intended as a mortgage,⁸³ or that the transaction was a

68. Fla.—Cary & Co. v. Hyer, 107 So. 684, 91 Fla. 322.

Wis.—Smith v. Pfruger, 105 N.W. 476, 126 Wis. 253, 110 Am.S.R. 911, 2 L.R.A., N.S., 783.

69. Or.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

11 C.J. p 421 note 77.

Landlord claiming lien on automobiles, and who was not party to trust receipts, covering cars purporting to vest title in credit company, could show true intent of company and tenant in executing and delivering such documents and that such trust receipts were mere mortgages.—Universal Credit Co. v. Gasow-Howard Motor Co., Tex.Civ.App., 73 S.W.2d 909, error dismissed.

70. Md.—Henderson v. Mayhew, 2 Gill 393, 41 Am.D. 434.

11 C.J. p 421 note 78.

71. Ind.—Seavy v. Walker, 9 N.E. 347, 108 Ind. 78.

11 C.J. p 421 note 79.

72. Md.—Cochrane v. Price, 8 A. 361—Booth v. Robinson, 55 Md. 419.

Nev.—Saunders v. Stewart, 7 Nev. 200.

73. N.J.—Thoss v. Olb, 121 A. 707, 98 N.J.Law 842.

N.Y.—Lipe v. Beech-Nut Packing Co., 277 N.Y.S. 832, 243 App.Div. 433.

11 C.J. p 421 note 81.

74. Mont.—Rairden v. Hedrick, 129 P. 498, 46 Mont. 510.

11 C.J. p 421 note 82.

75. Tex.—Runnels Chevrolet Co. v. Travis, Civ.App., 62 S.W.2d 225.

Facts to be considered

Bill of sale of furniture in house, assignment of rentals, and options to repurchase furniture, constituting part of same transaction, may be considered together in ascertaining

whether parties intended bill as a mortgage.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

76. N.Y.—Gilroy v. Everson-Hickok Co., 103 N.Y.S. 620, 118 App.Div. 733, affirmed 83 N.E. 1125, 190 N.Y. 551.

77. Mich.—Black v. Simon, 74 N.W. 527, 116 Mich. 382—Wessels v. Beeman, 49 N.W. 483, 87 Mich. 481.

78. Kan.—Eby v. Winters, 33 P. 471, 51 Kan. 777.

Inadequacy of consideration as tending to establish mortgage rather than conditional sale see supra § 7 a.

79. Tex.—Harris v. Staples, Civ. App., 89 S.W. 801.

11 C.J. p 421 note 86.

80. Neb.—Weber v. Towle, 149 N.W. 406, 97 Neb. 233.

81. Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.

Evidence held inadmissible

Evidence of dealings and transactions between an automobile dealer and third persons in the purchase of cars is irrelevant and inadmissible to prove that the dealer's bill of sale represented merely security for a loan, in a replevin action against a purchaser from the dealer by one furnishing the dealer with the purchase price of the car and taking a bill of sale thereto.—Winakur v. Sapourn, supra.

82. Idaho.—Schleiff v. McDonald, 264 P. 866, 45 Idaho 620.

Evidence held sufficient to show that note and mortgage were executed as matter of form, with no intention that they should constitute real agreement as to payment for automobiles.—Standard Motor Co. v. Miller, Tex.Civ.App., 45 S.W.2d 786.

Filling out and acknowledging memorandum

Evidence that defendants filled out and acknowledged an unsigned memorandum, which they admitted in their answer was intended for a mortgage on a tractor, also executing a note to plaintiff, justified a finding that the memorandum was intended as a mortgage.—Kearns v. Davis Bros., 120 S.E. 52, 186 N.C. 522.

Overcoming face of instrument

In action to have two written instruments declared to be mortgages and for foreclosure thereof, where fact that instruments operated in law to create a mortgage arose from face thereof, such fact was not overcome by defendant's testimony of mortgagee's alleged statements that instruments were executed for defendant's protection.—Walsh v. Gray, 212 N.Y.S. 230, 214 App.Div. 296.

83. Ga.—Wilson v. Voche, 172 S.E. 672, 48 Ga.App. 173.

Iowa.—Scott v. Menin, 250 N.W. 457, 216 Iowa 1211.

Tex.—Gomez v. Ruiz, Civ.App., 66 S.W.2d 380.

11 C.J. p 421 note 88.

Evidence held sufficient to show that bill of sale was intended to be a mortgage.

Cal.—Sterman v. Ziem, 62 P.2d 160, 17 Cal.App.2d 414.

Mo.—Smith v. Dickerson, 199 S.W. 956.

Wash.—Kenworthy Grain & Milling Co. v. Green Meadow Cheese Factory & Dairy Co., 18 P.2d 489, 171 Wash. 513—Kelly v. Price, 269 P. 842, 148 Wash. 542.

Wis.—Holak v. Southard, 196 N.W. 769, 182 Wis. 494.

Evidence held not sufficiently clear and convincing to show that bill of sale was intended as a mortgage.—

mortgage and not a conditional sale.⁸⁴ It has been held, however, that this rule applies only in equity where the cause is tried to the chancellor, and that where questions of fact are submitted to a jury they are to be determined by the simple preponderance of the evidence;⁸⁵ and it has also been held that it does not require the same strictness of proof to declare a bill of sale, or an instrument in the form of a conditional sale, to be a mortgage as it does to determine a deed to be a mortgage.⁸⁶ There is also authority for the statement that even in equity if there is a reasonable doubt as to whether a transfer is a mortgage or an absolute conveyance it will be held to be a mortgage.⁸⁷

§ 12. — Questions of Law and Fact

The intention of the parties as to whether the in-

strument or transaction constitutes a mortgage is generally a question of fact.

Where the evidence is conflicting or of a doubtful nature, the intention of the parties, as controlling the character of the transaction when disputed, presents a question of fact which, in cases tried to a jury, is to be determined by the jury under appropriate instructions,⁸⁸ as, for example, the determination of whether a transaction is a mortgage or an absolute sale,⁸⁹ a conditional sale,⁹⁰ or a pledge.⁹¹ If, on the other hand, the entire contract of the parties is contained in a written instrument, and the language thereof is clear, its construction as to whether it is in legal effect a mortgage is a question of law for the court.⁹²

II. WHAT LAW GOVERNS

§ 13. In General

Where the parties reside and the property is located at the place where the mortgage is executed, the law of that place governs its validity, construction, and effect.

Where the parties reside, and the property is located, at the place where the mortgage is executed, its validity, construction, and effect are determined by the law of that place,⁹³ unless there is no evi-

Scott v. Menin, 250 N.W. 457, 216 Iowa 1211.

Parol evidence

(1) Parol evidence must be clear, unequivocal, and convincing that writing, absolute on its face, was intended as mortgage only.—Central Chemical Co. v. Virginia-Carolina Chemical Corporation, 168 A. 279, 114 N.J.Eq. 48—Coke v. Shull, 16 A. 434, 45 N.J.Eq. 208.

(2) Parol testimony of a witness, who does not appear to be an attorney at law or one versed in, and familiar with, the niceties of legal definitions and distinctions, that a bill of sale to described property was executed, does not by itself alone demand the inference that the instrument conveyed and passed title to the property.—Wilson v. Voche, 172 S.E. 672, 48 Ga.App. 173.

84. N.Y.—Youssoupoff v. Widener, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174. Tex.—Employers' Casualty Co. v. Helm, Civ.App., 295 S.W. 955.

Evidence that purchaser was never willing to make loan on the merchandise bought has been held sufficient to negative the contention that, although the contract was in form a sale with a limited repurchase option, it was intended by the parties to be a mere loan on security.—Youssoupoff v. Widener, 158 N.E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App.Div. 712, which affirmed 215 N.Y.S. 24, 126 Misc. 491.

85. Iowa.—McAnnulty v. Seick, 13 N.W. 743, 59 Iowa 586. Okl.—Shobe v. Sykes, 288 P. 1072, 144 Okl. 18. 11 C.J. p 422 note 89.

86. U.S.—Fruehauf Trailer Co. v. Bridge, C.C.A.Mich., 84 F.2d 660. Mich.—Seligman v. Ten Eyck, 42 N.W. 134, 74 Mich. 525.

Evidence held sufficient to show that instrument in form of conditional sale was intended to be mortgage.—Fruehauf Trailer Co. v. Bridge, C.C.A.Mich., 84 F.2d 660.

87. Fla.—Pittman v. Milton, 68 So. 658, 69 Fla. 304.

88. Idaho.—Schleiff v. McDonald, 237 P. 1108, 41 Idaho 50. Mo.—Bruce v. Kays, 1 S.W.2d 214, 222 Mo.App. 77. 11 C.J. p 422 note 91.

89. Idaho.—Deichert v. Euerby, 27 P.2d 981, 54 Idaho 14. Or.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

Tex.—Lomax v. Trull, Civ.App., 232 S.W. 861, dismissed for want of jurisdiction. 11 C.J. p 422 note 93.

Bill of sale of motor vehicle

Where an automobile dealer gave a bill of sale to an automobile to one to whom he was indebted, and the purchaser registered the car in his name and procured fire and theft insurance thereon, but left the car in the show rooms of the dealer, who subsequently sold and delivered the car to another creditor, in an action for the car, the court ruled correctly

in refusing to nonsuit or direct a verdict for defendant, and in submitting to the jury the question whether the bill of sale given was an absolute bill of sale, or a conditional bill of sale in the nature of a mortgage.—Thoss v. Olb, 121 A. 707, 98 N.J.Law 842.

90. Idaho.—Schleiff v. McDonald, 264 P. 866, 45 Idaho 620.

Tex.—Employers' Casualty Co. v. Helm, Civ.App., 295 S.W. 955. 11 C.J. p 422 note 94.

91. Idaho.—Schleiff v. McDonald, 264 P. 866, 45 Idaho 620—Schleiff v. McDonald, 237 P. 1108, 41 Idaho 50. 11 C.J. p 422 note 95.

92. Fla.—Baer v. General Motors Acceptance Corporation, 132 So. 817, 101 Fla. 913.

Mich.—Banasiak v. Coffin, 206 N.W. 321, 233 Mich. 161.

Tex.—Walker v. Wilmore, Com.App., 212 S.W. 655, reversing, Civ.App., 174 S.W. 921. 11 C.J. p 422 note 96.

93. Ark.—Bonner v. Stroud Bros. Gin, 289 S.W. 766, 172 Ark. 569.

Cal.—Mercantile Acceptance Corporation v. Frank, 265 P. 190, 191, 203 Cal. 433, 57 A.L.R. 696, quoting Corpus Juris—Sullivan v. Shannon, 77 P.2d 498, 501, 25 Cal.App.2d 422—Motor Acceptance Co. v. Finn, 13 P.2d 761, 124 Cal.App. 766.

Colo.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

Ill.—Illinois Refining Co. v. Welch, 173 N.E. 345, 341 Ill. 292—Doumas v. Mormella, 251 Ill.App. 397.

dence as to the law of such place;⁹⁴ and the general rule applies to the validity and operation of the mortgage as to after-acquired property.⁹⁵ A statute requiring mortgages to be executed in a prescribed manner,⁹⁶ or requiring mortgages or other instruments dealing with personal property to be recorded where the mortgagors reside,⁹⁷ does not apply to mortgages made in another state where the parties and the property are at the time, the *lex loci contractus* governing in such cases.

§ 14. Property Not Present at Place of Execution or Domicile of Parties

The validity, operation, and effect of a mortgage, executed in one state by parties resident or present therein, on property located in another state is, as a general rule, governed by the law of the state where the property is located.

Ind.—Struble-Werneke Motor Co. v. Metropolitan Securities Corporation, 178 N.E. 460, 93 Ind.App. 416.
Mont.—Walker Motor Exchange v. Lindberg, 284 P. 270, 86 Mont. 513.
N.M.—Hart v. Oliver Farm Equipment Sales Co., 21 P.2d 96, 37 N.M. 267, 87 A.L.R. 962.
Okl.—Haltom v. Nichols & Shephard Co., 166 P. 745, 64 Okl. 184.
Pa.—Commonwealth v. Mathis, 5 Pa. Dist. & Co. 191.
11 C.J. p 422 note 97.

Corpus Juris is quoted in *Dodd v. Edwards*, 173 S.E. 633, 635, 172 S.C. 213.

Agreement not chattel mortgage

Agreement whereby debtor consigned goods to creditor without delivery under agreement made in another state was not mortgage in state, where not a mortgage in state where made.—*Mill Factors Corporation v. Guardian Trust Co.*, 154 A. 420, 107 N.J.Law 529.

Conflict of laws not in issue

Where automobiles involved were situated in state and parties intended them to remain therein, bills of sale, trust receipts, and promissory notes were all executed in state, no question of conflict of laws was raised in replevin action.—*General Motors Acceptance Corporation v. Berry*, 187 A. 553, 86 N.H. 280.

Mortgage given by absconder

Where a person owing money absconded from the state, and when pursued gave his debtor a mortgage, while he resided in another state, which was payable in his home state, and agreed to return to that state with the property, but the wife did not sign the mortgage, it nevertheless created a valid lien on the property, since at the time of its execution the mortgagor and his wife were nonresidents and could make no claims to exemptions in their home state, and under the statute of the

resident state the wife's signature was not requisite to the validity of the mortgage.—*Dickson v. Cooper*, 164 N.W. 734, 181 Iowa 337.
Effect of removal of property to another state see *infra* § 15.

94. Governed by common law of other state

Where, in a case in Massachusetts, loan to take up draft attached to bill of lading was made and trust receipt and mortgage executed and delivered, in New York, but there was no evidence as to law of that state, rights of parties must be determined by common law of Massachusetts.—*Davis v. Smith-Springfield Body Corporation*, 145 N.E. 434, 250 Mass. 278.

95. U.S.—*Mason v. Citizens' Nat. Trust & Savings Bank of Los Angeles*, C.C.A.Cal., 71 F.2d 246—*Grimes v. Clark, Md.*, 234 F. 604, 148 C.C.A. 370, affirming, D.C., *Clark v. Grimes*, 232 F. 190.
Ark.—*Bonner v. Stroud Bros. Gin*, 289 S.W. 766, 172 Ark. 569.

96. Cal.—*Motor Acceptance Co. v. Finn*, 13 P.2d 761, 124 Cal.App. 766.

97. Cal.—*Mercantile Acceptance Co. v. Frank*, 265 P. 190, 203 Cal. 483, 57 A.L.R. 696—*Motor Acceptance Co. v. Finn*, 13 P.2d 761, 124 Cal. App. 766—*Motor Inv. Co. v. Breslau*, 221 P. 700, 64 Cal.App. 230.
N.M.—*Hart v. Oliver Farm Equipment Sales Co.*, 21 P.2d 96, 37 N.M. 267, 87 A.L.R. 962.
11 C.J. p 423 note 98.

Corpus Juris is quoted in *Dodd v. Edwards*, 173 S.E. 633, 635, 172 S.C. 213.

98. Conn.—*General Credit Corporation of Rohde*, 187 A. 676, 122 Conn. 100.

Ill.—*Doumas v. Mormella*, 251 Ill. App. 397—*Snow v. Breene*, 248 Ill. App. 518.

Minn.—*Goldberg v. Brule Timber Co.*, 168 N.W. 22, 140 Minn. 335.

While, as announced in the C.J.S. title *Conflict of Laws* § 18, also 12 C.J. p 470 note 12—p 471 note 16, it is often stated that personal property has no situs but follows the domicile of its owner, this fiction of law is ordinarily disregarded in the case of mortgages, and the property is considered as having an actual situs at the place where it is located, hence, where a mortgage is executed in one state by parties resident or present therein, and the property mortgaged is at the time located in another state, it is held, as a general rule, that the law of the state where the property is located will control as to the validity and effect of the mortgage,⁹⁸ the necessity of recording and the effect on creditors of a failure to record,⁹⁹ and as to the question of its priority as between different lienholders.¹ It should be noted that by an application of the *lex loci contractus* the

Mo.—*Steckel v. Swift & Co.*, App., 56 S.W.2d 806.

N.J.—*Farmer & Ochs Co. v. Ginsburg*, 137 A. 444, 5 N.J.Misc. 572.

Wis.—*National Bank of Commerce of Milwaukee v. Brogan*, 253 N.W. 335, 214 Wis. 378.

11 C.J. p 423 notes 1, 2.

Securities in Mexico

Any interest created by a deed of trust in securities in Mexico is governed by the Mexican law.—*New York Trust Co. v. Island Oil & Transport Co.*, C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007.

99. N.J.—*Farmer & Ochs Co. v. Ginsburg*, 137 A. 444, 5 N.J.Misc. 572.

11 C.J. p 423 note 3.

Mortgage executed and delivered in one state and recorded in another state is invalid as against a subsequent attachment in the former state, where there is no evidence that the property was ever in the latter state.—*Doumas v. Mormella*, 251 Ill.App. 397.

1. Ill.—*Doumas v. Mormella*, *supra*.
N.M.—*Hart v. Oliver Farm Equipment Sales Co.*, 21 P.2d 96, 37 N.M. 267, 87 A.L.R. 962.

Pa.—*Commonwealth v. Mathis*, 5 Pa. Dist. & Co. 191.

11 C.J. p 423 note 4.

Mortgages and garnishee

Rights of mortgagee of personal property and garnishee of same property are governed by law of state in which property is situated.—*National Bank of Commerce of Milwaukee v. Brogan*, 253 N.W. 335, 214 Wis. 378.

Mortgage, under mortgage recorded in foreign state in county where property was situated at time, is entitled to property as against subsequent assignee, mortgagee having priority in foreign state.—*Davis v. Standard Acc. Ins. Co.*, 278 P. 384, 35 Ariz. 392.

courts, in some instances, have reached a conclusion identical in effect with the foregoing application of the *lex rei sitae*.² Where the owner of property sends it into another state, he impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.³

In some states, however, it has been held that the rights of the parties to the mortgage are governed by the law of the state where the mortgage is executed and payable regardless of the situs of the property,⁴ and that where all of the parties live in one state, the situs of the property is there, notwithstanding it is actually located in another state, and if the mortgage is made and recorded in the former state it must be construed as a contract of that state.⁵

§ 15. Removal of Property from State

By weight of authority a mortgage, if valid and properly executed and recorded according to the law of the state where the mortgage is executed and the property at the time is located, will be held valid even as against

bona fide creditors and purchasers in another state to which the property is removed by the mortgagor, unless it contravenes the statute or settled law or policy of the forum.

As stated in *Corpus Juris*, frequently quoted with approval, the weight of authority is to the effect that a mortgage, properly executed and recorded according to the law of the state where the mortgage is executed and the property is located, will, if valid there, be held valid even as against creditors and purchasers in good faith in another state to which the property is removed by the mortgagor, unless the transaction contravenes the statute or settled law or policy of the forum; and under this rule, the due execution and recordation of the mortgage, in the state where made and where the property is located, operates as at least constructive notice of the mortgage lien to all persons dealing with the property in the state to which it is removed, and, in the absence of a statute to the contrary, the mortgage is enforceable in the state to which the property has been removed, although it is not recorded there,⁶ and even though the mortgagor's re-

Situs fixed by mortgage

The recording in New York of a chattel mortgage on an automobile delivered in that state, but having its situs fixed in New Jersey by the terms of the mortgage, even though properly recorded there, is not effective to defeat a garage keeper's lien in New Jersey.—*Farmer & Ochs Co. v. Ginsburg*, 137 A. 444, 5 N.J. Misc. 572.

2. Conn.—*Chillingworth v. Eastern Tinware Co.*, 33 A. 1009, 66 Conn. 306.

11 C.J. p 423 note 5.

3. U.S.—*Hervey v. Rhode Island Locomotive Works*, Ill., 93 U.S. 664, 23 L.Ed. 1002.

Effect of consent to removal of property to another state see *infra* § 15.

4. Iowa.—*Kusser v. Sioux City Horse & Mule Co.*, 200 N.W. 404, 199 Iowa 200.

S.D.—*Holt v. Mahoney*, 244 N.W. 98, 60 S.D. 158—*Grieme v. Robkes*, 188 N.W. 745, 746, 45 S.D. 480, citing *Corpus Juris*.

5. Ala.—*Smith v. Mixon*, 149 So. 721, 25 Ala.App. 521.

6. U.S.—*Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank*, C.C.A.Idaho, 69 F.2d 418—*Walters v. Slimmer*, C.C.A.Ill., 272 F. 435—*Hoyt v. Zibell*, Ill., 259 F. 186, 187, 170 C.C. A. 254.

Ariz.—*Davis v. Standard Acc. Ins. Co.*, 278 P. 384, 35 Ariz. 392—*Forgan v. Bainbridge*, 274 P. 155, 34 Ariz. 408.

Ark.—*Nelson v. Forbes & Sons*, 261

S.W. 910, 164 Ark. 460—*Wray Bros. v. H. A. White Auto Co. of Memphis, Tenn.*, 244 S.W. 18, 155 Ark. 153—*Wilson-Ward Co. v. Farmers' Bank & Trust Co.*, 240 S.W. 1082, 1083, 153 Ark. 368, citing *Corpus Juris*.

Cal.—*Mercantile Acceptance Co. v. Frank*, 265 P. 190, 192, 203 Cal. 483, 57 A.L.R. 696, quoting *Corpus Juris*—*Motor Acceptance Co. v. Finn*, 13 P.2d 761, 124 Cal.App. 766—*Deposit Guaranty State Bank v. Hessel Motor Car Co.*, 265 P. 954, 90 Cal.App. 428—*Motor Inv. Co. v. Breslauer*, 221 P. 700, 64 Cal.App. 230.

Colo.—*Thomas v. First Nat. Bank*, 51 P.2d 589, 97 Colo. 474—*Mosko v. Matthews*, 284 P. 1021, 37 Colo. 55—*Turnbull v. Cole*, 201 P. 887, 889, 70 Colo. 364, quoting *Corpus Juris*.

Conn.—*General Credit Corporation v. Rohde*, 187 A. 676, 122 Conn. 100.

Del.—*In re Shannahan & Wrightson Hardware Co. of Talbot County*, 118 A. 599, 2 W.W.Harr. 37, quoting *Corpus Juris*.

D.C.—*Smith's Transfer & Storage Co. v. Reliable Stores Corporation*, 58 F.2d 511, 61 App.D.C. 106.

Idaho.—*Moore v. Keystone Driller Co.*, 163 P. 1114, 30 Idaho 220, L.R. A.1917D 940—*Smith v. Consolidated Wagon & Machine Co.*, 163 P. 609, 30 Idaho 148.

Ill.—*National Bond & Investment Co. v. Larsh*, 262 Ill.App. 363.

Ind.—*Struble-Werneke Motor Co. v. Metropolitan Securities Corporation*, 178 N.E. 460, 93 Ind.App. 416.

Iowa.—*First Nat. Bank v. Ripley*, 215 N.W. 647, 649, 204 Iowa 590, quoting *Corpus Juris*—*Wertheimer &*

Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

Ky.—*Perkins v. National Bond & Investment Co.*, 5 S.W.2d 475, 224 Ky. 65—*Herold Motorcar Co. v. Commonwealth*, 287 S.W. 939, 216 Ky. 335—*Kelley v. Brack*, 282 S.W. 190, 214 Ky. 9—*Cable Plano Co. v. Lewis*, 243 S.W. 924, 925, 195 Ky. 666, quoting *Corpus Juris*.

Minn.—*Silver v. McDonald*, 215 N.W. 844, 172 Minn. 458.

Mo.—*Metzger v. Columbia Terminals Co.*, 50 S.W.2d 680, 227 Mo.App. 135—*Adamson v. Fogelstrom*, 300 S.W. 841, 844, 221 Mo.App. 1243, quoting *Corpus Juris*—*Finance Service Corporation v. Kelly*, App., 235 S.W. 146.

Mont.—*Walker Motor Exchange v. Lindberg*, 284 P. 270, 86 Mont. 513.

N.M.—*Hart v. Oliver Farm Equipment Sales Co.*, 21 P.2d 96, 98, 37 N.M. 267, 87 A.L.R. 962, quoting *Corpus Juris*.

N.Y.—*Farnham v. Eichin*, 246 N.Y.S. 133, 230 App.Div. 639.

N.C.—*W. H. Applewhite Co. v. Etheridge*, 187 S.E. 588, 210 N.C. 433.

Okl.—*Haltom v. Nichols & Shepard Co.*, 166 P. 745, 64 Okl. 184.

Tenn.—*Bankers' Finance Corporation v. Locke & Massey Motor Co.*, '91 S.W.2d 297, 170 Tenn. 28—*Great American Indemnity Co. v. Utility Contractors*, App., 111 S.W.2d 901—*South Knoxville Contracting & Const. Co. v. Brakebill & Hamilton*, 10 Tenn.App. 325.

W.Va.—*Cunningham v. Donelson*, 158 S.E. 705, 110 W.Va. 331—*Ashland Finance Co. v. Dudley*, 127 S.E. 33, 98 W.Va. 255, quoting *Corpus Juris*.

moval of the property was felonious.⁷ The general rule, of course, does not apply where the mortgage is not properly executed, filed, and recorded in the state where it is made.⁸ A removal, within the meaning of the general rule, is one of a permanent rather than a merely temporary or transient nature.⁹

The recognition and enforcement of a lien of a mortgage executed in a foreign state is, however, a matter resting purely in comity;¹⁰ and although

statutes regulating the execution and recording of mortgages are generally regarded as not applying to personalty brought in the state and which at the time is incumbered by a valid lien elsewhere created,¹¹ a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state,¹² and, al-

Wyo. — Union Securities Co. v. Adams, 236 P. 513, 514, 33 Wyo. 45, citing *Corpus Juris*.

11 C.J. p 424 note 7, p 425 note 8. Record of mortgage as notice generally see *infra* § 164.

Removal of goods as affecting recordation generally see *infra* § 155.

Corpus Juris is quoted in Commercial Banking Corp. v. Berkowitz, 159 A. 214, 215, 104 Pa.Super. 523.

Other statement of rule

"The American Law Institute, in its Restatement of the Conflict of Laws, § 287, states the rule thus: 'If a chattel is validly mortgaged in accordance with the law of the state where it is situated at the time of the execution of the mortgage and is then taken into another state, the mortgagee's interest in the chattel is recognized in the second state.'"—First Nat. Bank v. Ripley, 215 N.W. 647, 649, 204 Iowa 590.

Interest of mortgagee not divested

If, after a chattel is validly mortgaged, it is taken into another state without the consent of the mortgagee, the interest of the mortgagee is not divested as a result of any dealings with the chattel in the second state.—General Credit Corporation v. Rohde, 187 A. 676, 122 Conn. 100.

Motor vehicle left for repairs

Where an automobile purchased in Kansas City, Mo., on which a chattel mortgage duly recorded in Jackson county, Mo., was in force, was left in Kansas garage for repairs for another than the original purchaser, the lien of the chattel mortgage was good.—Willys Overland Co. v. Evans, 180 P. 235, 104 Kan. 632.

Place of recordation

The fact that a car owned by a nonresident of the state is frequently brought to the state where the mortgage is made, and that at the time of the execution thereof it is in fact within the county, does not warrant a finding that it is situated and kept within the county so that recordation of the mortgage therein would be notice to third parties.—Vervaris v. Egan, 226 Ill.App. 500.

7. Colo.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

8. Ohio.—North British & Mercan-

tile Ins. Co. v. Garber, 27 Ohio N. P.N.S., 175.

W.Va.—Cunningham v. Donelson, 158 S.E. 705, 110 W.Va. 331.

11 C.J. p 424 note 7 [d].

Mortgage executed with defective acknowledgment in one state will not be enforced against an attaching and execution creditor of the mortgagor in another state.—Great American Indemnity Co. v. Utility Contractors, Tenn.App., 111 S.W.2d 901.

Failure to file with secretary of state

Failure of mortgagee of California live stock to comply with California statutes, requiring certificate of record to be filed with secretary of state, precluded recovery in conversion against innocent purchaser in Nevada.—Southwest Cattle Loan Co. v. Nevada Packing Co., 292 P. 587, 53 Nev. 55.

Lien of artisan for repairing automobile at owner's request was superior to lien of prior chattel mortgage of which artisan had no knowledge, where mortgage was not recorded in artisan's county, but only in sister state in which mortgage was given.—National Bond & Investment Co. v. Haas, 247 N.W. 563, 124 Neb. 631, 88 A.L.R. 1180.

9. Ill.—Vervaris v. Egan, 226 Ill. App. 500.

N.C.—W. H. Applewhite Co. v. Etheridge, 187 S.E. 583, 210 N.C. 433.

Occasional trips of motor vehicle not removal

(1) Where a motor vehicle mortgage is recorded in one state, occasional trips across the state line to a neighboring town in another state do not constitute a removal to such other state, requiring recording of the mortgage there.—Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

(2) Mortgage, validly executed and legally registered in another state wherein mortgagor resided and property presumptively was situated, is entitled to priority over lien of resident attaching creditor of mortgagor, notwithstanding mortgage holder's knowledge that automobile was being used in making regular trips into another state. — Bankers' Finance Corporation v. Locke & Mas-

sey Motor Co., 91 S.W.2d 297, 170 Tenn. 28.

10. U.S.—Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 413—Hoyt v. Zibell, Ill., 259 F. 186, 170 C.C.A. 254.

Cal.—Motor Inv. Co. v. Breslau, 221 P. 700, 64 Cal.App. 230.

Colo.—Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

Idaho.—Moore v. Keystone Driller Co., 163 P. 1114, 30 Idaho 220, L. R.A.1917D 940—Smith v. Consolidated Wagon & Machine Co., 163 P. 609, 30 Idaho 148.

Ky.—Cable Piano Co. v. Lewis, 243 S.W. 924, 925, 195 Ky. 666, quoting *Corpus Juris*.

Mo.—Metzger v. Columbia Terminals Co., 50 S.W.2d 680, 227 Mo.App. 135.

Mont.—Walker Motor Exchange v. Lindberg, 284 P. 270, 86 Mont. 513. 11 C.J. p 425 note 11.

11. D.C.—Smith's Transfer & Storage Co. v. Reliable Stores Corporation, 58 F.2d 511, 61 App.D.C. 106.

12. U.S.—Hervey v. Rhode Island Locomotive Works, Ill., 93 U.S. 664, 23 L.Ed. 1003—Shapard v. Hynes, Ind.T., 104 F. 449, 45 C.C.A. 271, 52 L.R.A. 675.

Ky.—Herold Motorcar Co. v. Commonwealth, 287 S.W. 939, 216 Ky. 335—Cable Piano Co. v. Lewis, 243 S.W. 924, 925, 195 Ky. 666, quoting *Corpus Juris*.

Miss.—Vines v. Sparks, 114 So. 222, 148 Miss. 219.

As against creditor or purchaser without notice

(1) Where a car mortgaged in one state is removed into another state, and acquires a situs there, but is not recorded there as required by statute, and a creditor of the car owner, without notice of the mortgage, attaches the car there, he has a superior right over the mortgagee.—Vines v. Sparks, *supra*.

(2) Where mortgaged personalty was removed from North Carolina, where chattel mortgage was recorded, into Virginia, without recording mortgage there in accordance with Virginia law, bona fide purchaser for value without notice, who bought and paid for personalty in Virginia

though the requirement that an instrument conveying or affecting movable chattels shall be recorded in the place where the property is situated may not be in strict harmony with the common-law doctrine that the disposition of movables is to be governed by the law of the domicile of the owner, it is certainly competent for a state to adopt a modification of this kind to the disposition of any property within its territorial limits.¹³

Mortgagee's consent to, or knowledge of, removal. In some cases, the general rule has been held to apply without regard to the presence or absence of consent or knowledge on the part of the mortgagee as to the removal;¹⁴ but by the better authority it seems that, where the mortgagee has consented to the removal of the property, he will forfeit his right to assert the validity and priority of his lien unless he takes such steps as are required for its

protection by the statutes of the state into which the property is removed,¹⁵ or unless he records his mortgage in the state to which the property is removed,¹⁶ or ships the property in his own name;¹⁷ and this general rule has been applied where the mortgagee has knowledge of, although he does not actually consent to, the removal and fails to assert his rights under the mortgage within a reasonable time.¹⁸

Minority rule. In a few states, however, the doctrines of the general rule, as announced above, are not recognized, and unless a foreign mortgage has the advantage of prior recordation within the state to which the property is removed, the rights of the foreign mortgagee will not be upheld as to innocent purchasers and attaching creditors, although the property has been removed from its original location and brought within such states, without his knowledge or consent,¹⁹ and without negligence on

and removed it to North Carolina, obtained title free from mortgagee's lien.—*W. H. Applewhite Co. v. Etheridge*, 187 S.E. 588, 210 N.C. 433.

13. Ky.—*Cable Piano Co. v. Lewis*, 243 S.W. 924, 925, 195 Ky. 666, quoting *Corpus Juris*.

11 C.J. p 426 note 13.
Corpus Juris is quoted in *Commercial Banking Corp. v. Berkowitz*, 159 A. 214, 215, 104 Pa.Super. 523.

14. W.Va.—*Cunningham v. Donelson*, 158 S.E. 705, 706, 110 W.Va. 331, quoting *Corpus Juris*.

11 C.J. p 425 note 9.
Corpus Juris is cited in *Flora v. Julesburg Motor Co.*, 193 P. 545, 69 Colo. 238.

15. Mo.—*Adamson v. Fogelstrom*, 300 S.W. 841, 844, 221 Mo.App. 1243, citing *Corpus Juris*—*Geiser Mfg. Co. v. Todd*, App., 224 S.W. 1006—*Hollipeter, Shonyo & Co. v. Maxwell*, 224 S.W. 113, 114, 205 Mo.App. 357, citing *Corpus Juris*—*Geiser Mfg. Co. v. Todd*, App., 204 S.W. 287, 289, quoting *Corpus Juris*.

Tenn.—*Bankers' Finance Corporation v. Locke & Massey Motor Co.*, 91 S.W.2d 297, 170 Tenn. 28—*South Knoxville Contracting & Const. Co. v. Brakebill & Hamilton*, 10 Tenn.App. 325.

11 C.J. p 425 note 10.

Reasons for rule

"By such consent the mortgagee negligently places it in the power of the mortgagor to deceive and defraud innocent people in the state into which the property is taken. He should be and he is deemed to have waived his lien against such innocent parties upon the principle that where one of two persons must suffer by reason of the wrongful act of a third, the injury must be borne by him by whose conduct the wrongful

act has been made possible."—*Moore v. Keystones Driller Co.*, 163 P. 1114, 30 Idaho 220, L.R.A.1917D 940—11 C.J. p 425 note 10 [al].

Diligence of mortgagee

Where mortgagee knows that mortgagor has removed property from state, he is not required to exercise diligence to recover property.—*First Nat. Bank v. Ripley*, 215 N.W. 647, 204 Iowa 590.

Evidence of oral consent held admissible

U.S.—*Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank*, C.C.A.Idaho, 69 F.2d 418.

Mortgage on property sold for removal

The validity of a purchase-money mortgage on property, sold for removal to, and possession and enjoyment by, the mortgagor in another state, where he has his domicile, is governed by the laws of the latter state and not by the laws of the state where the mortgage was executed. Except for the recording law of such state, a seller has the right to sell and take back a chattel mortgage for the purchase price of property in one state, for removal to, and possession by, the mortgagor in another state, without giving notice of his lien.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

Written consent

(1) An Idaho statute providing that removal of mortgaged chattels from county in which mortgage is recorded shall not affect validity of mortgage unless property is removed by mortgagee's written consent does not regulate rights of parties where removal is from state, but in such case mortgagee's rights are established in state to which property is removed by principle of comity.—

Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 418.

(2) In an earlier case, however, in the state court it was held that if, under such a statute, the mortgagee gave no written consent to the shipment of mortgaged grain out of the state, although he knew thereof, he did not lose his lien.—*Hopkins v. Hemsley*, 22 P.2d 138, 53 Idaho 120.

16. Mo.—*Adamson v. Fogelstrom*, 300 S.W. 841, 844, 221 Mo.App. 1242, citing *Corpus Juris*.

17. Mo.—*Adamson v. Fogelstrom*, supra.

18. U.S.—*Hoyt v. Zibell*, Ill., 259 F. 186, 170 C.C.A. 254.

Tenn.—*Bankers' Finance Corporation v. Locke & Massey Motor Co.*, 91 S.W.2d 297, 170 Tenn. 28.

Knowledge and acquiescence

Where mortgagee in other state knew that mortgaged automobile was being brought into Missouri, or after it was so moved acquiesced therein, and took no steps to follow automobile into Missouri, or to file or record his lien therein, and permitted the rights of innocent third persons to attach in this state, it could not recover automobile as against such innocent third persons.—*Hollipeter, Shonyo & Co. v. Maxwell*, 224 S.W. 113, 205 Mo.App. 357.

Removal to third state without knowledge

The fact that the mortgagee knew that the property had been removed to one state does not deprive him of the right to assert the priority of his lien in a third state to which the property has been removed without his knowledge.—*Hoyt v. Zibell*, Ill., 259 F. 186, 170 C.C.A. 254.

19. La.—*Devant v. Pecou*, 128 So. 700, 13 La.App. 594.

his part in failing to ascertain the fact of removal.²⁰ In these states, the record of a chattel mortgage in another state is not constructive notice thereof to a subsequent purchaser or attaching creditor;²¹ and an attaching creditor has been held entitled to prevail against a foreign mortgage, although he had notice of the existence of the mortgage at the time

of his attachment.²²

Statutory provisions. Under the express provisions of some statutes, foreign mortgages must be filed or recorded within a reasonable or specified time after the property is brought into the state, in order to preserve the lien against creditors or purchasers.²³ Recording and filing generally see *infra* §§ 130-174.

Tex.—*Farmer v. Evans*, 233 S.W. 101, 111 Tex. 283, answering questions certified, Civ.App., 192 S.W. 342. 11 C.J. p 426 notes 14-17.

Reason for rule

"It is a hard rule to deprive him [the mortgagee] of his reservation of title or lien upon the property without any negligence on his part. Also it is a hard rule to deprive an innocent purchaser for value of the property when he has been at no fault. The difference between them is this: While it works a hardship upon the mortgagee, yet he trusts the property to the possession of the mortgagor, and thereby puts it within the power of the mortgagor to dispose of the property to one who has no notice of his claim. The mortgagee takes the risk incident to such possession, and, while he has done no wrong and may not be negligent in regard to trying to protect his rights in the property, yet he makes it possible for a third person to be defrauded if it should be held that the rights of the third person are subject to his prior claim, of which said purchaser has no knowledge or notice."—*Consolidated Garage Co. v. Chambers*, 231 S.W. 1072, 1073, 1074, 111 Tex. 293, affirming *Chambers v. Consolidated Garage Co.*, Civ.App., 210 S.W. 565, citing *Corpus Juris*.

In Pennsylvania

(1) "The rights of a foreign mortgagee will not be upheld as to innocent purchasers and attaching creditors, although the property has been removed from its original location and brought within [Pennsylvania] without his knowledge or consent."—*Commercial Banking Corp. v. Berkowitz*, 159 A. 214, 216, 104 Pa. Super. 523.

(2) Mortgages generally are contrary to Pennsylvania's public policy and will not prevail against claims of bona fide purchasers or creditors, even though executed in another jurisdiction, where such instruments are recognized and given full effect. —*Kaufmann & Baer v. Monroe Motor Line Transp.*, 187 A. 296, 124 Pa. Super. 27—11 C.J. p 426 note 16.

(3) A statute requiring surrender of certificate of title to motor vehicle on change of ownership by operation of law and judicial sale, is not applicable in action to assert lien of valid foreign mortgage on trucks against Pennsylvania attaching cred-

itor.—*Kaufmann & Baer v. Monroe Motor Line Transp.*, *supra*.

20. Tex.—*Farmer v. Evans*, 233 S.W. 101, 111 Tex. 283, answering questions certified, Civ.App., 192 S.W. 342.

21. Tex.—*General Motors Acceptance Corporation v. Fowler*, Civ. App., 36 S.W.2d 589—*Trans-Continental Freight Co. v. Packard North Texas Motor Co.*, Civ.App., 11 S.W.2d 362.

Purchase from holder of registration card

Purchaser of automobile from one surrendering dealer's registration card is not charged with constructive notice of chattel mortgage recorded in another state as matter of law.—*General Motors Acceptance Corporation v. Fowler*, Tex.Civ.App., 36 S.W.2d 589.

22. Pa.—*Kaufmann & Baer v. Monroe Motor Line Transp.*, 187 A. 296, 124 Pa.Super. 27—*Commonwealth v. One Studebaker Light Six Coupe*, 86 Pa.Super. 532.

Notice of incumbrance

Mortgagee's averments that creditor, who attached trucks in Pennsylvania as property of New York corporation, had knowledge that debtor was New York corporation with principal place of business in New York, and that certificate of title listing mortgage had been issued in Pennsylvania, are insufficient to show notice to creditor of existence of incumbrances on trucks.—*Kaufmann & Baer v. Monroe Motor Line Transp.*, 187 A. 296, 124 Pa.Super. 27.

23. Ga.—*North v. Goebel*, 76 S.E. 46, 138 Ga. 739.

N.C.—*W. H. Applewhite Co. v. Etheridge*, 187 S.E. 588, 210 N.C. 433. Okl.—*Arnold v. Witte*, 227 P. 132, 99 Okl. 236.

Va.—*C. I. T. Corporation v. Guy*, 195 S.E. 659, 662, citing *Corpus Juris*. 11 C.J. p 426 note 18.

As applying only to removal to another county by resident

A provision that a conveyance for security ceases to have effect against a creditor of the grantor without notice, if it is not recorded within three months after removal to a county other than the grantor's residence, applies only to a grantor residing in the state and removing property to a different county in the state.—*Finney v. Dryden*, 108 So. 13, 214 Ala. 370.

In attachment suit, wherein intervenor claimed property under mortgage, requested charges which asserted that the bringing of mortgaged property into the state where it is brought for shipment only is not within the recording statute, although property remains in state more than three months, was properly refused, there being no such exception in the statute.—*Cornelius Lumber Co. v. Lawhorn-Smith & Co.*, 105 So. 713, 21 Ala.App. 118, certiorari dismissed *Ex parte Cornelius Lumber Co.*, 105 So. 714, 213 Ala. 553.

Protection for limited period

(1) Under a statutory provision that, when a mortgaged chattel is moved into the state, any previous filing of the mortgage shall not operate as notice for a period longer than one hundred and twenty days after such removal, where mortgaged property is brought into and permanently located in any county, and the mortgage has been executed and recorded according to the laws of another state, the mortgagee will be protected as against creditors of mortgagor for a period of one hundred twenty days; but such registration in another state ceases to be constructive notice after the expiration of one hundred twenty days from the time the property is permanently located in such county.—*Arnold v. Wittie*, 227 P. 132, 99 Okl. 236.

(2) Under Code 1907 § 3394, as amended by Acts 1911 p 115, providing that, where property conditionally sold is brought into the state, the conditional sale contract, to be good as against mortgagees without notice, must be recorded in the county into which the property is brought and remains, it was held that, where a conditionally sold automobile was, on the day it was sold, brought into a county in the state and mortgaged, and the mortgage immediately recorded, and thereafter the automobile remained in that county without record of the sale contract, the question became material whether the vendor had repossessed the car within the three months' period.—*McNeill v. Motor Sales Co.*, 94 So. 365, 208 Ala. 310.

Retention of title contract

(1) Where property sold under retention of title contract, without being attested or recorded, is brought into Georgia and mortgaged to one

§ 16. Matters Relating to Procedure

The law of the forum governs as to all matters of procedure.

In proceedings pertaining to chattel mortgages

the *lex fori*, or the law of the place where the relief is sought or the action brought, will control as to all questions of form, process, and practice;²⁴ and the aid of the court may be invoked and this law applied wherever the property may be traced.²⁵

III. ESSENTIAL ELEMENTS

§ 17. Parties

The capacity and assent of parties to chattel mortgages in general is considered in § 93 *infra*. Questions as to who may make a chattel mortgage, who must join in the making of a mortgage, and to whom a mortgage may be made, are considered in §§ 18, 19, and 20 *infra*, respectively.

Examine pocket parts for later cases.

§ 18. — Persons Who May Make Mortgage in General

Under a statute requiring a mortgage to be acknowledged in the district of the mortgagor's residence, a non-resident cannot execute a valid mortgage.

Where a statute requires a chattel mortgage to be acknowledged in the district in which the mortgagor resides, it has been held that a valid mortgage cannot be executed by a nonresident.²⁶

The validity of a mortgage as affected by the title and interest of the mortgagor is considered in § 23 *infra*, and the capacity of parties in general, in

§ 93 *infra*.

Whether a mortgage may be made by one other than the debtor is considered, in § 37 *infra*, in connection with the nature of the debt which a mortgage may secure.

§ 19. — Persons Who Must Join in Mortgage

Under some statutes, both husband and wife must join in a mortgage of household goods, and an attempted mortgage without the wife's joinder is void, except that her joinder in purchase-money mortgages of household goods or of exempt property is not required.

Under statutes providing in effect that a wife must join in her husband's mortgage of household goods, or that either spouse must join in such a mortgage by the other, it is held that an attempted mortgage without the joinder of the wife is void;²⁷ but where such a statute is regarded as penal all the elements of avoidance named in the statute must affirmatively appear.²⁸ Such a statute has been held a valid exercise of the police power.²⁹

who properly records his mortgage, and is given possession without notice of the contract, the contract holder cannot recover possession from the mortgagee.—*Olmstead v. Carolina Portland Cement Co.*, 117 S. E. 255, 30 Ga.App. 126, affirmed 121 S.E. 637, 157 Ga. 669.

(2) One purchasing personal property brought into the state from another state buys it under the law permitting holder of mortgage or note retaining title to record the instrument within six months.—*Burgsteiner v. Street-Overland Co.*, 117 S.E. 268, 30 Ga.App. 140.

24. Colo.—*Mosko v. Matthews*, 284 P. 1021, 87 Colo. 55. N.Y.—*Halladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141. 11 C.J. p 426 note 19.

25. Colo.—*Mosko v. Matthews*, 284 P. 1021, 87 Colo. 55. 11 C.J. p 426 note 20.

Law of other state ineffective

Law of Ohio, permitting assignee for benefit of creditors to contest rights of chattel mortgagee under an unfiled mortgage to property situated in Ohio, is ineffective, where defendants have submitted themselves to jurisdiction of New York court, as

contradictory law of New York governs as to remedies.—*Halladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141.

26. Colo.—*Cook v. Hager*, 3 Colo. 386.

Necessity and sufficiency of acknowledgment see *infra* § 82.

27. Ill.—*Olds v. Adams Clark Bldg. Corporation*, 277 Ill.App. 157. N.C.—*Thomas v. Sandlin*, 91 S.E. 1028, 173 N.C. 329. 11 C.J. p 427 note 27.

What constitutes household goods

(1) The statutory terms should include property dedicated to the convenience and comfort of the home which is adequate and adapted to that purpose, having due regard to owner's means and station in life. Ill.—*Peter Schoenhofen Brewing Co. v. Merriam*, 67 Ill.App. 123. N.C.—*Thomas v. Sandlin*, 91 S.E. 1028, 173 N.C. 329.

(2) As so defined, a piano is within the terms of the statute.—*Thomas v. Sandlin*, *supra*.

(3) In at least one jurisdiction, it must appear that the goods were in use by the family as well as in their possession.—*Dunham v. Cramer*, 51

A. 1011, 63 N.J.Eq. 151—*Green v. McCrane*, 37 A. 318, 55 N.J.Eq. 436.

(4) Whether the property covered by a mortgage was household goods is a question of fact.—*Chiles v. Kahle*, 65 Ill.App. 361.

(5) Household goods as subject matter of chattel mortgage see *infra* § 34.

Goods held used for household purposes, and not for business purposes solely.—*Olds v. Adams Clark Bldg. Corporation*, 277 Ill.App. 157.

Where a husband abandoned his wife, a mortgage executed by her without his signature was, nevertheless, declared void.—*McKelvy v. Kolbe*, 89 Ill.App. 661.

Friety examination of wife required N.C.—*Thomas v. Sandlin*, 91 S.E. 1028, 173 N.C. 329.

28. N.J.—*Dunham v. Cramer*, 51 A. 1011, 63 N.J.Eq. 151.

29. N.C.—*Thomas v. Sandlin*, 91 S.E. 1028, 1030, 173 N.C. 329.

Such statute is "designed and calculated to maintain the peace and comfort of the home and to protect the wife and children therein from the ill-considered action of an improvident husband."—*Thomas v. Sandlin*, *supra*.

Where this requirement appeared in an "act undertaking to regulate the business of a loan broker," it was held to apply only to chattel mortgages given to such brokers, and not to those given to other persons.³⁰

Purchase-money mortgages of household goods are not subject to the requirement stated above, and are valid without the wife's joinder;³¹ and this exception has also been recognized under a statute requiring the wife's joinder in a mortgage of exempt personal property.³²

§ 20. — Persons to Whom Mortgage May Be Made

Whether or not a chattel mortgage may be made to one other than the creditor of the mortgagor is considered in § 37 *infra*, and whether it may be made to a person other than the one furnishing the

consideration, in § 42 b (1) *infra*.

Examine pocket parts for later cases.

§ 21. Subject Matter

In the absence of statutes to the contrary, any personal property capable of being sold may be the subject of a mortgage, but not a mere personal privilege.

The general rule, said to be correctly stated in *Corpus Juris*, is that, in the absence of statutory provisions to the contrary, any personal property which is capable of being sold may be the subject of a mortgage.³³

In addition to the particular kinds of property considered in §§ 30–36 *infra*, and those referred to in connection with the discussion of related matters in §§ 23–29, other items or types of personal property have been held proper subjects of chattel mortgages.³⁴

A mere personal privilege cannot be made the subject of a chattel mortgage.³⁵

30. Tex.—*Mason v. Green*, Civ.App., 226 S.W. 829, 830.

31. Tex.—*Mason v. Green*, *supra*—*Strickland v. Dobbs*, Civ.App., 200 S.W. 1125.

11 C.J. p 427 note 28 [a] (4).

32. Kan.—*State Bank of Kingman v. Shepherd*, 182 P. 653, 105 Kan. 206, 9 A.L.R. 1014.

Consent of husband or wife to transfer or encumbrance of exempt property see C.J.S. title Exemptions § 98, also 25 C.J. p 108 notes 52–70.

33. Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 813, 23 Ariz. 517, citing *Corpus Juris*.

Iowa.—*Equitable Life Ins. Co. of Iowa v. Brown*, 262 N.W. 124, 220 Iowa 585.

Kan.—*International News Service v. Gazette Printing Co.*, 173 P. 980, 103 Kan. 402.

S.C.—*Alford v. Martin*, 180 S.E. 13, 176 S.C. 207.

Tex.—*Bowyer v. Beardon*, 291 S.W. 219, 116 Tex. 337.

11 C.J. p 427 note 29.

Subject matter of sale see the C.J.S. title Sales §§ 13–20, also 55 C.J. p 61 note 20–p 66 note 98.

"Word 'chattel' is of no special significance when applied to a mortgage of chattels. 'It is a very comprehensive term in our law, and includes every species of property which is not real estate or a freehold'—a definition borrowed from 2 Kent's Commentary, 340; *Gilchrist Transp. Co. v. Phoenix Ins. Co.*, C.C.A., 170 F. 279."—*Bowyer v. Beardon*, 291 S.W. 219, 222, 116 Tex. 337.

34. Property subject to mortgage:

Exempt property see the C.J.S.

title Exemptions § 96, also 25 C.J. p 107 note 37—p 108 note 48.

Intoxicating liquors see the C.J.S. title Intoxicating Liquors § 493, also 33 C.J. p 665 notes 3–5.

Railroad property see the C.J.S. title Railroads § 284, also 11 C.J. p 427 note 29 [b] (1), 51 C.J. p 828 note 64—p 830 note 95.

Vessels see the C.J.S. title Shipping § 24, also 11 C.J. p 427 note 29 [b] (2), 58 C.J. p 90 note 59—p 101 note 77.

Equity of redemption

Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 23 Ariz. 517.

Equitable right to accounting

Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, *supra*.

Furniture in building, where not a fixture.

Iowa.—*Bacon v. Thompson*, 14 N.W. 312, 60 Iowa 284.

N.Y.—*Metropolitan Concert Co. v. Sperry*, 44 Hun 630, 9 N.Y.S. 342, affirmed 23 N.E. 1152, 120 N.Y. 620.

Good will of business

(1) A mortgage of the good will of a business together with its tangible assets is valid; "when no attempt is made to sever the intangible assets, or to mortgage or pledge them independently of the tangible assets, intangible assets may be pledged."—*Hoffmann v. Kimmel*, 20 P.2d 393, 394, 142 Or. 397.

(2) But in the absence of an established business or tangible property, it was held that a mortgage could not be foreclosed as to the good will alone; for "while the good will of a business is property that may be sold or mortgaged, yet it is

property of a very peculiar and exceptional character. It is intangible property which, in the nature of things, can have no existence apart from a business of some sort that has been established and carried on at a particular place; and it cannot be sold by judicial decree or otherwise unless it be in connection with a sale of the business on which it depends."—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, C.C.Mo., 36 F. 722, 724, affirmed 13 S.Ct. 944, 149 U.S. 436, 37 L.Ed. 799.

Jewelry

Md.—*Salabes v. Castelberg*, 57 A. 20, 98 Md. 645, 64 L.R.A. 800.

Rents, issues, and profits

Iowa.—*Equitable Life Assur. Soc. of U. S. v. Hastings*, 278 N.W. 908—*Equitable Life Ins. Co. of Iowa v. Brown*, 262 N.W. 124, 220 Iowa 585.

Trade-mark with right to manufacture and sell a preparation under a trade name and according to a secret formula.—*Tuttle v. Blow*, 75 S.W. 617, 620, 176 Mo. 158, 98 Am.S.R. 488.

Vehicles

U.S.—*Asher v. Ingels*, D.C.Cal., 13 F.Supp. 654.

35. N.J.—*Feigenspan v. Mulligan*, 51 A. 191, 63 N.J.Eq. 179, affirmed 53 A. 1124, 64 N.J.Eq. 792.

Liquor licenses

(1) "It is well settled that whether a liquor license can be mortgaged depends upon the qualities imparted to it by the local law. Where it is a mere privilege and not a property right, it is incapable of being the subject of a chattel mortgage."—*In re Flaherty*, D.C.Va., 184 F. 962, 964—11 C.J. p 427 note 30 [a].

(2) Where by statute a license

§ 22. — Statutory Provisions

Statutes providing generally what property may be the subject of a chattel mortgage have been variously construed as allowing the mortgage of tangible property only, or chattels only, or all personal property, or all property other than real estate. Under statutes specifying the mortgageable property, a mortgage of other property has been held void; but other authorities hold it valid as between the parties, and as against others except creditors and subsequent purchasers in good faith and for value.

Statutes providing that a chattel mortgage may be made of all personal property,³⁶ or of all kinds of personal property,³⁷ have been held to refer only to tangible property, or property which may be taken into possession. However, in at least one jurisdiction it has been held by statutory construction that all personal property may be mortgaged;³⁸ and, under a statute so providing, crops and all

property, goods, or chattels not defined by statute to be real estate may be mortgaged.³⁹

A statute providing that goods and chattels may be mortgaged has been held to refer only to chattels, and not to personal property generally.⁴⁰

Where the statute specifically states what property may be subject to a chattel mortgage, there is authority that a valid mortgage cannot be given on property other than such as is described;⁴¹ but under other authority a mortgage of property not specified in the statute is, nevertheless, valid as between the parties,⁴² and as against all other persons except creditors of the mortgagor and subsequent purchasers in good faith and for value.⁴³

In addition to the statutory provisions considered here generally, statutory provisions are considered

was declared to "confer a personal privilege to transact the business which may be the subject of the license," it was held not to be mortgageable in spite of the fact that it was assignable by the licensee, if assigned in compliance with certain statutory regulations.—*In re Flaherty*, supra.

(3) But where the statute recognizes the right to transfer the license from one person to another, and where the right is a valuable one capable of being surrendered and reduced to money, the license is more than a mere personal privilege, and has all the attributes of property except tangibility, and must be treated as property.

Tex.—*Nicolini v. Langermann*, Civ. App., 104 S.W. 501.

Wash.—*Degginger v. Seattle Brewing, etc., Co.*, 83 P. 898, 41 Wash. 385, 4 L.R.A.N.S., 626.

11 C.J. p 427 note 30 [a] (3).

(4) Where liquor licenses were held to be negotiable and subject to mortgage, it was held that the privilege of renewing the license was a privilege to be exercised by the mortgagor only, so that the renewal privilege could not be mortgaged.—*Foorman v. Weber*, 196 P. 147, 59 Mont. 185.

36. Vt.—*Woodward v. Laporte*, 41 A. 443, 70 Vt. 399.

11 C.J. p 428 note 32.

37. Wash.—*Heermans v. Blakeslee*, 167 P. 128, 97 Wash. 647, affirming 161 P. 489, 93 Wash. 595.

11 C.J. p 428 note 33.

38. Mont.—*Stewart v. Hoffman*, 81 P. 3, 31 Mont. 184.

39. Idaho.—*Beeler v. C. C. Mercantile Co.*, 70 P. 943, 8 Idaho 644, 60 L.R.A. 283, 1 Ann.Cas. 310 and note.

40. U.S.—*In re Leslie-Judge Co.*, C. C.A.N.Y., 272 F. 886, certiorari de-

nied *Green v. Felder*, 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, construing New York statute.

N.Y.—*Niles v. Mathusa*, 57 N.E. 184, 162 N.Y. 546, affirming 47 N.Y.S. 38, 20 App.Div. 483.

Copyrights, good will, and trade marks are not chattels, and are, therefore, not covered by a chattel mortgage.—*In re Leslie-Judge Co.*, C.C.A.N.Y., 272 F. 886, certiorari denied *Green v. Felder*, 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, construing New York statute.

Since liquor-tax certificate is not a chattel within the purview of the New York Chattel Mortgage Act, a transfer thereof as security for a loan is valid as against subsequent creditors of the assignor, even though it is not filed as a chattel mortgage.—*Niles v. Mathusa*, 57 N.E. 184, 162 N.Y. 546, affirming 47 N.Y.S. 38, 20 N.Y.App.Div. 483.

41. Idaho.—*Beeler v. C. C. Mercantile Co.*, 70 P. 943, 8 Idaho 644, 60 L.R.A. 283, 1 Ann.Cas. 310.

Mortgageable and nonmortgageable property in same mortgage see infra § 97.

42. Cal.—*McLeod v. Barnum*, 63 P. 924, 131 Cal. 605.

11 C.J. p 428 note 36.

But it has been held that the statute is to be construed strictly, and a mortgage of property not within the statute has apparently been held void.—*Gassner v. Patterson*, 23 Cal. 299.

Furniture in hotels

(1) Under a statutory amendment providing that a mortgage may be made on furniture in hotels, lodgings, and boarding houses to secure the purchase money therefor, a mortgage may be given to secure money advanced to make the purchase.—*Blaisdell v. McDowell*, 27 P. 656, 91 Cal. 285, 25 Am.S.R. 178.

(2) Under this amendment, it was held that the furniture must actually have been used in a hotel or boarding house.—*Stringer v. Davis*, 30 Cal. 318.

(3) The use of billiard tables in a saloon does not meet the statutory requirements.—*Gassner v. Patterson*, 23 Cal. 299.

Soda fountain

A statutory amendment, authorizing the mortgaging of "Machinery, casks, pipes, tubes and utensils used in the manufacture or storage of wine, fruit brandy, fruit syrup or sugar; also wines, fruit brandy, fruit syrup or sugar, with the cooperation in which the same are contained" was held not to embrace a soda fountain, candy machines, and other confectionery store furniture.—*In re Grainger*, Cal., 160 F. 69, 72, 87 C.C.A. 225, construing California statute.

43. Cal.—*Perkins v. Maier, etc., Brewery*, 65 P. 1030, 133 Cal. 496.—*Ukiah v. Moore*, 39 P. 1071, 106 Cal. 673.

Purchaser with notice is bound by the mortgage.—*Tomlinson v. Ayres*, 49 P. 717, 117 Cal. 568.—*Ukiah Bank v. Gibson*, 41 P. 1008, 109 Cal. 197.

Valuable consideration

A mortgage of property not mortgageable under the statute is valid as to a purchaser who did not part with valuable consideration.—*Ukiah Bank v. Gibson*, supra.

Under later amendment to the statute, providing that such a mortgage is valid as between the parties, and as against others who, before parting with value, have actual notice, it was held that such a mortgage is invalid, and the amendment inapplicable, as against a creditor whose debts existed prior to the execution of the mortgage.—*Old Settlers Inv. Co. v. White*, 110 P. 922, 158 Cal. 236.

in §§ 23-35, *infra*, in connection with their effect on mortgages of particular kinds of personal property, or of personal property under particular circumstances.

§ 23. — Title or Interest of Mortgagor in General

- a. Necessity of title or interest
- b. Sufficiency of interest
- c. Presumption or representation as to ownership or interest
- d. Effect of loss of interest

44. Ill.—John Hancock Mut. Life Ins. Co. v. Watson, 200 Ill.App. 315.

Iowa.—O'Bryon v. Weatherly, 206 N.W. 828, 201 Iowa 190.

Kan.—Winchester Packing Co. v. Moyer, 187 P. 680, 681, 106 Kan. 311, quoting *Corpus Juris*.

Mo.—Wrather v. Salyer, App., 274 S.W. 1106.

N.Y.—Shelton Holding Corporation v. 150 East Forty-Eighth St. Corporation, 191 N.E. 8, 264 N.Y. 339, reversing 264 N.Y.S. 994, 239 App. Div. 898, motion denied 193 N.E. 291, 265 N.Y. 502—Cohen v. Savoy Restaurant, 189 N.Y.S. 71.

Okl.—Hayes v. Frank Rowe, Inc., 75 P.2d 882, 181 Okl. 598—Scrivner v. Pope, 289 P. 311, 143 Okl. 246.

Or.—Wade v. Johnson, 227 P. 466, 111 Or. 468.

S.D.—Hyde County State Bank v. State Bank of Seneca, 198 N.W. 558, 47 S.D. 316.

Tex.—Compton v. W. F. & J. F. Barnes Lumber Co., Civ.App., 99 S.W.2d 634, error dismissed—Brod v. Guess, Civ.App., 211 S.W. 299.

Wash.—Bauer v. Commercial Credit Co., 300 P. 1049, 1051, 163 Wash. 210, quoting *Corpus Juris*—First Guaranty Bank v. Western Cross-Arm & Mfg. Co., 247 P. 1027, 139 Wash. 614.

11 C.J. p 428 note 41.

Interest in land on which crop raised see *infra* §§ 24, 25.

Mortgage of crops not yet planted see *infra* § 32 a (2).

Purchaser at foreclosure sale

(1) Title of defendant in replevin acquired from a purchaser at previous chattel mortgage sale, depended on ownership of mortgagor at time of giving the mortgage.—Wrather v. Salyer, Mo.App., 274 S.W. 1106.

(2) Plaintiff, claiming ownership of lumber as mortgage foreclosure sale purchaser, was required to prove that mortgagor had legal and beneficial title to the lumber.—Day v. Jade Contracting Co., 135 N.Y.S. 550.

Provisions of Sales Act

Where, by virtue of provisions of a Sales Act, nothing further was required to be done by vendor of lumber, after it was piled in yard of vendee and invoiced to it, in order to pass title, vendee, on piling of lumber in its yard and delivery of invoices, had right to mortgage it.—Shapiro v. Park Trust Co., 149 N.E. 313, 253 Mass. 383.

Materialman

Where furnish of material for a house made no effort to claim lien, but advanced materials on builder's personal credit, lien of materialman's chattel mortgage subsequently given was held to depend entirely on mortgagor's title.—O'Bryon v. Weatherly, 206 N.W. 828, 201 Iowa 190.

45. U.S.—Lerner v. Gladstone, C.C. A.N.J., 1 F.2d 89.

Ariz.—Valley Chevrolet Co. v. O. S. Stapley Co., 72 P.2d 945.

Ark.—Nelson v. Forbes & Sons, 261 S.W. 910, 164 Ark. 460.

Cal.—Merriman v. Martin, 298 P. 95, 93, 113 Cal.App. 167, citing *Corpus Juris*.

Ga.—W. A. Patterson Co. v. People's Loan & Savings Co., 123 S.E. 704, 158 Ga. 503, answer to certified questions conformed to 124 S.E. 79, 32 Ga.App. 470.

Idaho.—Lords v. Lava Hot Springs State Bank, 256 P. 761, 763, 44 Idaho 316, citing *Corpus Juris*.

Ind.—Howrey v. Farm Land Inv. Co., 125 N.E. 61, 72 Ind. App. 339.

Kan.—Winchester Packing Co. v. Moyer, 187 P. 680, 106 Kan. 311.

Mass.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

Mich.—Fidelity Corporation of Michigan v. Post, 263 N.W. 775, 273 Mich. 697—Petition of Hume, 245 N.W. 514, 260 Mich. 555.

Mont.—Swanberg v. Schaefer, 289 P. 561, 87 Mont. 16.

N.M.—Encino State Bank v. Tenorio, 206 P. 698, 28 N.M. 65.

N.Y.—Shelton Holding Corporation v.

a. Necessity of Title or Interest

Since a mortgagor can convey only that interest in property which he possesses, a mortgage of property in which the mortgagor has no title or interest is ordinarily invalid; it may be valid if made with the true owner's consent, but is not validated, at least as against third persons, by his subsequent ratification.

A chattel mortgagor can convey by mortgage only that interest which he possesses in property.⁴⁴ Thus, with qualifications as to property not yet acquired or in existence, appearing in § 26 *infra*, the rule is that a mortgagor cannot give a valid mortgage on property which he does not own or in which he possesses no interest,⁴⁵ as where he exe-

150 East Forty-Eighth St. Corporation, 191 N.E. 8, 11, 264 N.Y. 339, reversing 264 N.Y.S. 994, 239 App. Div. 898, motion denied 193 N.E. 291, 265 N.Y. 502—Cohen v. Savoy Restaurant, 189 N.Y.S. 71.

N.D.—Ravely v. Klenk, 204 N.W. 975, 53 N.D. 102.

Ohio.—General Motors Acceptance Corporation v. Ferguson, 191 N.E. 834, 47 Ohio App. 251.

Okl.—Scrivner v. Pope, 289 P. 311, 143 Okl. 246.

Or.—Ontario Nat. Bank v. Rouse, 52 P.2d 176, 152 Or. 71.

Tex.—Compton v. W. F. & J. F. Barnes Lumber Co., Civ.App., 99 S.W.2d 634, error dismissed—Guaranty Finance Co. v. Burnam, Civ. App., 294 S.W. 686—Cullum v. Lub-Tex Motor Co., Civ.App., 267 S.W. 322—Brod v. Guess, Civ.App., 211 S.W. 299—Williams v. King, Civ. App., 206 S.W. 106.

Wash.—Tope v. Brattain, 21 P.2d 241, 242, 172 Wash. 556, citing *Corpus Juris*.

11 C.J. p 428 note 42.

Mortgage of fixtures by tenant see *infra* § 33.

It is clear that mortgagor must possess some interest in mortgaged property in order that lien may be created by mortgage.

Cal.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

Wash.—Tope v. Brattain, 21 P.2d 241, 172 Wash. 556.

It seems to be elementary that a valid chattel mortgage may not be executed by anyone on property which the mortgagor does not own. Mass.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424.

Mich.—Fidelity Corporation of Michigan v. Post, 263 N.W. 775, 273 Mich. 697.

Tex.—Williams v. King, Civ.App., 206 S.W. 106.

By statute

Under a statute providing, among other things, that a mortgage may embrace all personal property of which the mortgagor has possession or the right to possession at the

cutes the mortgage after transferring title to the chattels to a third person;⁴⁶ and the mortgagee of a mortgage of such property is not entitled to foreclosure.⁴⁷

It is the duty of the mortgagee,⁴⁸ or his assignee,⁴⁹ to see that the mortgagor has good title

to the property which he undertakes to mortgage.

Consent of, or ratification by, owner. It has been held that a mortgage made by one lacking interest in the property is valid where it was made with the consent of the true owner;⁵⁰ thus, a mortgage, executed by a person who has no interest in

time, it was held that a clause covering after-acquired property cannot be made to include personalty of which the mortgagor has neither possession nor right of possession.—*Real Estate Bank & Trust Co. v. Baldwin Locomotive Works*, 90 S. E. 49, 145 Ga. 831.

Mortgage by agent

(1) A mortgage by an agent, where title remained in the principal, was held not to be effective against the principal.

Kan.—*Baldwin Piano Co. v. Lyon County State Bank*, 268 P. 859, 126 Kan. 519.

Mo.—*Globe Securities Co. v. Gardner Motor Co.*, 85 S.W.2d 561, 337 Mo. 177.

(2) Where goods purchased by corporation for its use are delivered to it, but paper title lodged for an instant in name of its agent, his chattel mortgage to vendor, who has knowledge of all the facts, is void as against creditors of corporation. "To permit parties to purchase goods and to have apparent legal title lodged for an instant of time in an agent, and have that agent give a chattel mortgage, which, upon being recorded, would be valid, as against creditors of the purchaser would open the door to fraud, and would in effect nullify the recording provisions of the Chattel Mortgage Act. The goods sold never were the property of . . . [the agent], but were from the time of purchase the property of the . . . [principal]. . . . [The agent] never had a present property, either actual or potential, in the things mortgaged."—*Cross v. Printing Corporation*, 104 A. 727, 728, 89 N.J.Eq. 378.

(3) Authority of agent to mortgage principal's property see Agency § 111.

Mortgage by bailee

(1) Where lease agreement makes lessee a mere bailee, in absence of statute, lessor's claim to thing leased is superior to claim of mortgagee of lessee.—*Wasatch Livestock Loan Co. v. Nielson*, 61 P.2d 616, 90 Utah 331, amending 56 P.2d 613, 90 Utah 307.

(2) Contract for loaning of oil well equipment was "bailment," precluding mortgagee under chattel mortgage executed by borrower from recovering from owner for alleged conversion of equipment.—*Keystone Pipe & Supply Co. of Texas v. Her-*

bert Oil Corporation, Tex.Civ.App., 62 S.W.2d 606.

(3) Power of bailee to mortgage bailor's property see Bailments § 32.

Mortgage by husband of joint owner

(1) A mortgage on crops made by the husband of one of the joint owners of the land on which the crop was grown creates no lien on the crop.—*Louisville Joint Stock Land Bank v. Watts*, 66 S.W.2d 39, 251 Ky. 832.

(2) Mortgage of crops generally see *infra* § 32.

(3) Husband's power to mortgage wife's separate property see the C. J.S. title Husband and Wife § 237, also 30 C.J. p 847 note 4—p 848 note 14.

Possession under partido contract

A mortgage, made by one in possession of animals under a partido contract under which he was to care for the cattle, title remaining in the owner by statutory provision, is void as against the owner.—*Encino State Bank v. Tenorio*, 206 P. 698, 28 N.M. 65.

Violation of Bulk Sales Law

Where a merchant sold his stock of goods and fixtures when indebted over four thousand dollars, in violation of the Bulk Sales Law, and the purchaser borrowed two thousand dollars from a bank for use as part payment, and gave a mortgage on the property which the bank thereafter recorded, the bank, having taken the mortgage, must yield to the secured claim of creditor which had proceeded by attachment and later by execution, as the chattel mortgagor, having no title at law, could transfer none.—*Winchester Packing Co. v. Moyer*, 187 P. 680, 106 Kan. 311.

Evidence held to show no sale to mortgagor

Tex.—*Wright Inv. Co. v. Powell*, Civ. App., 27 S.W.2d 321.

46. Ark.—*Nelson v. Forbes & Sons*, 261 S.W. 910, 164 Ark. 460.

Ga.—*W. A. Patterson Co. v. People's Loan & Savings Co.*, 123 S.E. 704, 158 Ga. 503, answer to certified questions conformed to 124 S.E. 79, 32 Ga.App. 470.

Ill.—*Pate v. Rodman*, 254 Ill.App. 372.

Kan.—*Warner v. Carter*, 198 P. 960, 109 Kan. 285.

Mich.—*Fidelity Corporation of Michigan v. Post*, 263 N.W. 775, 273 Mich. 697.

Mont.—*Swanberg v. Schaefer*, 289 P. 561, 87 Mont. 16.

N.D.—*Ravely v. Klenk*, 204 N.W. 975, 53 N.D. 102.

Effect of retaining possession

But where the mortgagor had, prior to giving a mortgage to a creditor, given a bill of sale of the property to another creditor, it was held that "if the seller remains in possession of the goods, the sale is fraudulent as to creditors of the seller without notice of the sale," and the mortgagees "obtained a valid title to the personal property in question under their recorded chattel mortgage if they had no knowledge of the existence of the bill of sale;" nor is this result affected by the provisions of the Uniform Sales Act.—*Doty v. O'Neill*, 272 Ill.App. 212, 217, 218.

47. Okl.—*Scrivner v. Pope*, 289 P. 311, 143 Okl. 246.

Tex.—*Guaranty Finance Co. v. Burnam*, Civ.App., 294 S.W. 686.

Right to foreclose generally see *infra* § 355.

As against innocent purchaser an assignee of recorded mortgage on automobile by person not owner, where assignor as owner sold automobile, is not entitled to foreclosure.—*Southwest Sec. Co. v. Jacques*, Tex. Com.App., 42 S.W.2d 232, affirming, Civ.App., 31 S.W.2d 1098.

Purchaser at foreclosure of chattel mortgage executed by one not owner cannot retain property against owner's mortgagee, seeking to foreclose.—*Minneapolis Threshing Mach. Co. v. First State Bank of Ft. Yates*, 218 N.W. 603, 56 N.D. 637.

48. Mass.—*Essex County Acceptance Corporation v. Pierce-Arrow Sales Co. of Boston*, 192 N.E. 604, 288 Mass. 270, 95 A.L.R. 1314.

Ohio.—*General Motors Acceptance Corporation v. Ferguson*, 191 N. E. 834, 836, 47 Ohio App. 251.

Inspection of bill of sale

"Certainly it is not imposing too great a burden to require a mortgagee to trace by inspection of a bill of sale title to the car mortgaged."—*General Motors Acceptance Corporation v. Ferguson*, *supra*.

49. Ohio.—*General Motors Acceptance Corporation v. Ferguson*, *supra*.

50. Cal.—*Winne v. Ford*, 263 P. 545, 88 Cal.App. 308.

Automobile mortgage, executed by debtor with consent of son, the reg-

the property and is employed as a mere intermediary through whom to transmit the lien, may be valid as between the parties,⁵¹ and as against all persons having knowledge of the transaction.⁵²

A mortgage purporting to convey property to which the mortgagor has no title cannot be validated by a subsequent ratification by the true owner, at least as against the rights of third persons;⁵³ but a mortgage made for the benefit of the true owner, who subsequently transferred the property to the mortgagor and expressly recognized the mortgage, was held valid.⁵⁴

b. Sufficiency of Interest

- (1) In general
- (2) In particular circumstances

(1) In General

A limited or special interest in property, such as an

interested owner, was good as against defendant constable, who sold automobile under execution against debtor.—*Winne v. Ford*, supra.

51. Okl.—*Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket*, R. I., 172 P. 924, 926, 70 Okl. 1, 11 C.J. p 429 note 46.

Bill of sale without consideration

Where the owner of personalty, without fraud, executed a bill of sale without consideration to obtain money, and the buyer, with the owner's knowledge, executed mortgages on the personalty and delivered the proceeds to the owner, it was held that the mortgagor "was the mere agent of . . . [the owner], a mere vehicle by which in effect . . . [the owner] executed the mortgages," and that "said mortgages were valid and binding obligations as against all parties having actual notice of the transaction."—*Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket*, R.I., supra.

False representation as to transfer

Where the owner of personal property falsely represents that it has been transferred to another, with whom he joins in applying for a loan secured by a chattel mortgage executed by the alleged purchaser on the property represented to have been sold, and indorses the note secured by the mortgage, the mortgage, being duly recorded, is valid between the parties, and as against a third party who subsequently obtains a mortgage on the same property from the true owner, the first mortgagee having acted in good faith.—*Wogan v. Sivey*, 149 P. 411, 95 Kan. 774.

52. Okl.—*Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket*, R. I., 172 P. 924, 70 Okl. 1.

Subsequent mortgagee of owner

A mortgage made by one as agent

or intermediary for the owner is valid as against a subsequent mortgagee of the owner with knowledge of the prior mortgage and the manner in which it was brought about.—*Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket*, R. I., supra.

53. Mass.—*Lewis v. Buttrick*, 102 Mass. 412.

Wis.—*Maier v. Davis*, 15 N.W. 187, 57 Wis. 212.
11 C.J. p 430 note 64.

54. U.S.—*Howell v. War Finance Corporation*, C.C.A.Ariz., 71 F.2d 237.

55. Cal.—*Merriman v. Martin*, 298 P. 95, 113 Cal.App. 167.

Or.—*Wade v. Johnson*, 227 P. 466, 469, 111 Or. 468, citing *Corpus Juris*.

Tex.—*Calvit v. Avery State Bank*, Civ.App., 283 S.W. 322, 324, citing *Corpus Juris*.

Wash.—*Tope v. Brattain*, 21 P.2d 241, 242, 172 Wash. 556, citing *Corpus Juris*.
11 C.J. p 429 note 43.

Rule "well established"

Or.—*Wade v. Johnson*, 227 P. 466, 469, 111 Or. 468.

56. U.S.—*Blue v. Herkimer Nat. Bank*, C.C.A.N.Y., 30 F.2d 256.

Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 23 Ariz. 517.

Cal.—*Merriman v. Martin*, 298 P. 95, 113 Cal.App. 167.

Mo.—*State v. Griffin*, 228 S.W. 800.
S.C.—*Miller v. Eagle Star & British Dominions Ins. Co., Limited*, of London, England, United States Branch, New York, 143 S.E. 663, 146 S.C. 123.

S.D.—*Hyde County State Bank v. State Bank of Seneca*, 198 N.W. 558, 47 S.D. 316.

Tex.—*Calvit v. Avery State Bank*, Civ.App., 283 S.W. 322, 324, citing *Corpus Juris*.

11 C.J. p 429 note 44.

equitable interest or ownership of an undivided share, is sufficient to support chattel mortgage.

While, as stated in § 23 *supra*, a mortgagor can convey by mortgage only that interest in property which he possesses, a limited or special interest in the property mortgaged is sufficient to support a mortgage,⁵⁵ as where the mortgagor has an equitable interest in the property,⁵⁶ or owns an undivided share.⁵⁷

(2) In Particular Circumstances

A mortgagor may mortgage property which he has purchased but not paid for, which he has purchased under a contract of sale on trial, which he has agreed to sell under an executory contract of sale, which he has already made subject to an existing mortgage, which he has bought under a conditional sales contract, or, until payments are completed, which he has sold under a conditional sales contract. A mortgage of property acquired by fraud may validly be made to a bona fide mortgagee without notice of the fraud. Where, under a

Equitable interest in land on which crops to be grown see *infra* § 24.

57. Idaho.—*Mahoney v. Citizens' Nat. Bank of Salmon*, 271 P. 935, 47 Idaho 24.

Tex.—*Calvit v. Avery State Bank*, Civ.App., 283 S.W. 322, 324, citing *Corpus Juris*.
11 C.J. p 429 note 45.

Mortgage by:

Joint tenant generally see the C.J. S. title Joint Tenancy § 16, also 33 C.J. p 914 notes 40-46.

Tenant in common generally see the C.J.S. title Tenancy in Common § 116, also 62 C.J. p 542 note 14-p 544 note 22.

Mortgage of undivided share of crops see *infra* § 25.

Mortgage on partnership interest
was not avoided because name of partnership was thereafter changed.—*Ellis Jones Drug Co. v. Coker*, 117 So. 545, 151 Miss. 102, 59 A.L.R. 285.

Half interest in future crops

(1) Mortgage is not invalid because purporting to convey only mortgagor's one-half interest in future crops.—*Samples v. Grizzell*, 160 So. 538, 230 Ala. 176.

(2) Mortgages of future crops generally see *infra* § 32.

Half interest in increase of live stock

(1) The lessor and lessee of live stock, under a lease whereby the lessee was to get one half of the increase, are tenants in common, and "the lessee's share interest in the common property was subject to mortgage, and the mortgage would carry the part allotted to him in any partition subsequently made."—*Mahoney v. Citizens' Nat. Bank of Salmon*, 271 P. 935, 936, 47 Idaho 24.

(2) Mortgage of animals and increase generally see *infra* § 30.

statute regulating the sale of motor vehicles, a sale is void, a mortgage by the purchaser is also void, as it is where he rescinds the sale.

The fact that goods purchased have not been paid for will not prevent the purchaser from executing a mortgage thereon.⁵⁸

Under a contract of sale on trial or approval, the vendee has a mortgageable interest before payment of the purchase money.⁵⁹

Executory contract of sale. A valid chattel mortgage may be made of chattels which the mortgagor is under an executory contract to sell to another when title has not yet passed;⁶⁰ but a mortgage made by the vendee under an executory contract of sale cannot affect the vendor's ownership.⁶¹

Existing mortgage. A mortgagor of personal property under an existing mortgage still has an

interest in the property which he may mortgage,⁶² even though the first mortgagee is in possession.⁶³ Even after default a mortgagor in possession,⁶⁴ or, it has been held, even where the first mortgagee is in possession,⁶⁵ has a mortgageable interest in the property. The right of such mortgagor in possession continues at least until foreclosure by sale or perhaps by lapse of time,⁶⁶ and, it has been intimated, may exist even after foreclosure by sale, as where a surplus remains in the hands of the first mortgagee.⁶⁷ A second mortgage of personal property has been held a mortgage merely of an equity of redemption.⁶⁸

A valid second mortgage may be made notwithstanding a statute makes the mortgagor guilty of a crime if he sells or disposes of mortgaged property without the consent of the holder of the mortgage.⁶⁹

58. Tex.—Livezey v. Putnam Supply Co., Civ.App., 30 S.W.2d 902, error refused.

Purchase on credit in usual course of business

U.S.—Lippincott v. Shaw Carriage Co., C.C.Ind., 25 F. 577.

59. Neb.—Peters v. Parsons, 24 N. W. 687, 18 Neb. 191.

60. Me.—Diamond Cork Co. v. Maine Jobbing Co., 100 A. 7, 116 Me. 67. Or.—Wade v. Johnson, 227 P. 466, 469, 111 Or. 468, citing *Corpus Juris*.

11 C.J. p 429 note 49.

Rule "well established"

Or.—Wade v. Johnson, 227 P. 466, 469, 111 Or. 468.

Title retained until delivery

Under a contract to sell sheep, title to which was to pass when they were delivered free on board the freight cars, the seller, prior to such delivery, retained the same interest in the sheep that he possessed before executing the contract, and could validly mortgage them.—Wade v. Johnson, *supra*.

A contract of sale of a crop to be grown has been held merely an executory contract to sell, under a provision of the Uniform Sales Act to the effect that title to property to which something must be done in order to put the property into deliverable condition does not pass by a sale until such thing is done, so that a mortgage of the crop when growing is valid.—Dysart v. Hamilton, 11 Tenn.App. 43.

61. Cal.—Greene v. Carmichael, 140 P. 45, 24 Cal.App. 27.

62. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Colo.—Farmers' State Bank of

Brighton v. Anglo American Mill Co., 231 P. 156, 76 Colo. 309.

Me.—Smith v. Smith, 24 Me. 555.

Mich.—Lyon v. Ballentine, 29 N.W. 837, 63 Mich. 97, 6 Am.S.R. 284.

Okl.—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95.

S.D.—Hyde County State Bank v. State Bank of Seneca, 198 N.W. 558, 47 S.D. 316.

Priority between mortgages see *infra* §§ 294-296.

Under the lien theory, the mortgagor retains title to the mortgaged property, and the second mortgagee acquires a valid lien, subject only to that of the first mortgagee.—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95.

Under the recording acts whereby a properly recorded mortgage, if otherwise valid, is effectual without a formal delivery of the property, a valid second mortgage on the property may be made which will be effective against all but the first mortgagee and his assigns.

Me.—Smith v. Smith, 24 Me. 555. Mich.—Lyon v. Ballentine, 29 N.W. 837, 63 Mich. 97, 6 Am.S.R. 284.

Conditional sale as sale with mortgage

Where an apparent conditional sale of property is regarded in legal effect as an absolute sale with a chattel mortgage back, a subsequent chattel mortgage is nevertheless valid.—Farmers' State Bank of Brighton v. Anglo American Mill Co., 231 P. 156, 76 Colo. 309.

Right to share in proceeds

Where goods were mortgaged, with power to sell and possession delivered to the mortgagee, the mortgagor reserving one half of the proceeds of sales to be made during a certain month, and afterward the mortgagor

executed a second mortgage subject to the former, the second mortgagee acquired the right to the share of the proceeds.—Burnham v. Citizens' Bank, 40 P. 912, 55 Kan. 545.

63. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Kan.—Burnham v. Citizens' Bank, 40 P. 912, 55 Kan. 545.

64. Mo.—White v. Quinlan, 30 Mo. App. 54.

Wis.—J. I. Case Threshing Mach. Co. v. Johnson, 139 N.W. 445, 152 Wis. 8—Smith v. Coolbaugh, 21 Wis. 427.

65. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Right to accounting

After a mortgagor has defaulted in payment of the note secured by chattel mortgages, and the mortgagee has taken possession of property for the purpose of sale, the mortgagor's interest in the property, even if only an equitable right to an accounting, is one which it could mortgage by a second chattel mortgage.—Central Finance Corporation v. Norton-Morgan Commercial Co., *supra*.

66. Mo.—White v. Quinlan, 30 Mo. App. 54.

Wis.—J. I. Case Threshing Mach. Co. v. Johnson, 139 N.W. 445, 152 Wis. 8—Smith v. Coolbaugh, 21 Wis. 427.

67. Mo.—White v. Quinlan, 30 Mo. App. 54.

68. Iowa.—Tootle v. Taylor, 21 N. W. 115, 64 Iowa 629.

S.D.—Hyde County State Bank v. State Bank of Seneca, 198 N.W. 558, 47 S.D. 316.

11 C.J. p 429 note 53.

69. Iowa.—Tootle v. Taylor, 21 N. W. 115, 64 Iowa 629.

11 C.J. p 429 note 52.

Contract of conditional sale. A buyer under a conditional sales contract, reserving title in the chattel in the seller until the purchase price is paid, has an interest in the property which he may mortgage,⁷⁰ at least if it is partially paid for,⁷¹ even without the seller's consent,⁷² and even though the contract of conditional sale prohibits the encumbering of the chattel sold.⁷³ The mortgagee's interest depends on the rights of the mortgagor under the contract,⁷⁴ and his rights become complete on performance of the condition by the mortgagor,⁷⁵ and the mortgage will be valid against attaching creditors and subsequent mortgagees whose mortgages were given after the property was paid for,⁷⁶ but such a mortgage cannot impair the rights or interests of the vendor.⁷⁷

Even after default in payment under the contract a vendee in possession may make a valid mort-

gage,⁷⁸ and where the vendor repossesses the chattel, but the vendee tenders full payment, so that, under governing statute, title passes to the vendee, his mortgagee's lien attaches.⁷⁹

Until the purchase price is paid the conditional vendor likewise has such an interest as may be mortgaged.⁸⁰

Title acquired by fraud. A valid mortgage may be made of property the title to which was acquired by fraud, provided the mortgagee was not a party to, and had no knowledge of, the fraud, and accepted the mortgage in good faith;⁸¹ but where the mortgagee is not an innocent purchaser, the mortgage is invalid.⁸² However, it has been held in equity, without reference to notice to the mortgagee, that a chattel mortgage of after-acquired property acquired by fraud cannot be enforced.⁸³

70. U.S.—Blue v. Herkimer Nat. Bank, C.C.A.N.Y., 30 F.2d 256—In re Russell Falls Co., D.C.Mass., 249 F. 260, affirmed Keefe v. Worcester Trust Co., 253 F. 536, 165 C.C.A. 206, in which certiorari is denied 39 S.Ct. 259, 249 U.S. 602, 63 L.Ed. 797.

Ark.—Howell v. Thew Shovel Co., 43 S.W.2d 366, 184 Ark. 777.

Cal.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 1065, 139 Cal.App. 427, citing *Corpus Juris*.

Mass.—Worcester Morris Plan Co. v. Mader, 128 N.E. 777, 236 Mass. 435.

Mo.—State v. Griffin, 228 S.W. 800.

Mont.—Hoeller v. Moog, 198 P. 367, 60 Mont. 74.

N.J.—Bainbridge v. Warburton, 129 A. 474, 98 N.J.Eq. 81.

N.Y.—Auto Mortgage Co. v. Montigny, 168 N.Y.S. 670.

Wash.—Tope v. Brattain, 21 P.2d 241, 242, 172 Wash. 556, citing *Corpus Juris*.

11 C.J. p 430 note 58—42 C.J. p 760 note 66—55 C.J. p 1213 note 69.

"The interest of a purchaser under conditional sales contract in the subject-matter of the contract, though a limited or special interest, is sufficient to support a chattel mortgage."—Tope v. Brattain, *supra*.

So by statute

N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845—Meisel Tire Co. v. Fishman, 296 N.Y.S. 882, 163 Misc. 883.

Effect of statutory prohibition

Even though a statute provides that a conditional vendee shall not "sell, mortgage or otherwise dispose of his interest in the goods" unless notice be given the conditional vendor, the mortgage is effectual as between the mortgagor and mortgagee in the absence of a further provision that any such mortgage shall be

void.—Bainbridge v. Warburton, 129 A. 474, 475, 98 N.J.Eq. 81.

Where the condition has been waived the buyer may execute a valid mortgage.—Wheeler, etc., Mfg. Co. v. Irish American Dime Sav. Bank, 31 S.E. 48, 105 Ga. 57—11 C.J. p 430 note 62.

71. Ark.—Roachell v. Gates, 47 S.W. 2d 35, 185 Ark. 350—Loden v. Faris Auto Co., 296 S.W. 78, 174 Ark. 720.

11 C.J. p 430 note 60.

Equity for amount paid

The buyer of an automobile under a conditional sale contract has an equity therein for the amount he has paid, although the legal title remains in the seller, and he can execute a valid chattel mortgage covering such equity as security for the payment of the balance of the purchase price.—State v. Griffin, Mo., 228 S.W. 800.

72. Ark.—Fairbanks, Morse & Co. v. Parker, 269 S.W. 42, 167 Ark. 654, 55 C.J. p 1213 note 69.

73. U.S.—In re Russell Falls Co., D.C.Mass., 249 F. 260, affirmed Keefe v. Worcester Trust Co., 253 F. 536, 165 C.C.A. 206, in which certiorari is denied 39 S.Ct. 259, 249 U.S. 602, 63 L.Ed. 797.

N.Y.—Meisel Tire Co. v. Fishman, 296 N.Y.S. 882, 163 Misc. 883.

Wash.—Tope v. Brattain, 21 P.2d 241, 172 Wash. 556.

Payment accelerated by execution of mortgage

A provision of a conditional sales contract under which execution of chattel mortgage accelerated payment of balance due did not render mortgage executed by conditional buyer illegal and void at its inception.—Meisel Tire Co. v. Fishman, 296 N.Y.S. 882, 163 Misc. 883.

Objection by one not party to contract

Provision in conditional sales con-

tract wherein seller retains title in himself and forbids transfer of buyer's interest may not be invoked by judgment creditor of buyer not party to contract.—Tope v. Brattain, 21 P.2d 241, 172 Wash. 556.

74. Okl.—Hayes v. Frank Rowe, Inc., 75 P.2d 882, 181 Okl. 598.

75. Cal.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 139 Cal.App. 427.

11 C.J. p 430 note 58.

76. Wash.—Hinchman v. Point De fiance R. Co., 44 P. 867, 14 Wash. 349.

77. Cal.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 1065, 139 Cal.App. 427, citing *Corpus Juris*—Greene v. Carmichael, 140 P. 45, 24 Cal.App. 27.

S.C.—Taylor v. Barker, 9 S.E. 115, 30 S.C. 238.

11 C.J. p 423 note 41 [b].

If the purchase price is not paid, the seller's right to recover the property is not prejudiced by such mortgage.—Clinton v. Ross, 159 S.W. 1103, 108 Ark. 442.

78. Mass.—Chase v. Ingalls, 122 Mass. 381.

79. Del.—Pisculli v. Bellanca Aircraft Corporation, 150 A. 81, 17 Del.Ch. 151, reversing 149 A. 418, 17 Del. 73, and affirmed Bellanca Aircraft Corporation v. Pisculla, 156 A. 508, 18 Del.Ch. 427.

80. Mass.—Worcester Morris Plan Co. v. Mader, 128 N.E. 777, 236 Mass. 435.

11 C.J. p 430 note 57—42 C.J. p 760 note 65—55 C.J. p 1213 note 75.

81. Ill.—Payne v. Brownlee, 196 Ill. App. 108.

82. Ill.—Payne v. Brownlee, *supra*. 11 C.J. p 430 note 63.

Mortgagee as bona fide purchaser see *infra* §§ 307-309.

83. N.J.—Nischne v. Firestone Tire

Statute regulating sale of motor vehicles. Where, by reason of failure to comply with a statute regulating the sale of motor vehicles, a sale is void, a chattel mortgage given by the purchaser is also void;⁸⁴ and, where the sale may be rescinded by the purchaser, a mortgage made by him is unenforceable after repudiation of the sale;⁸⁵ but where the sale is not avoided by such want of compliance a mortgage given is valid⁸⁶ and suit may be maintained to foreclose it.⁸⁷

c. Presumption or Representation as to Ownership or Interest

Under some authorities, giving a chattel mortgage does not prove, or create a presumption, that the mortgagor owns the property; under others, such giving implies that he has title, and he thereby represents that he has a mortgageable interest.

Under some authorities, the mere giving of a chattel mortgage does not prove that the mortgagor owns the property mortgaged;⁸⁸ nor does it create a presumption of such ownership,⁸⁹ at least in controversies between a mortgagee and a stranger.⁹⁰ Other authorities hold that the giving of a chattel mortgage implies,⁹¹ or carries with it the inference,⁹² that title is in the mortgagor; further, that a mortgagor, by executing a mortgage of personal property, represents to the mortgagee that he has an interest subject to mortgage.⁹³

& Rubber Co., 173 A. 341, 116 N.J. Eq. 305, affirmed *Mischne v. Firestone Tire & Rubber Co.*, 183 A. 213, 119 N.J. Eq. 541.

84. Tex.—*Cullum v. Lub-Tex Motor Co.*, Civ.App., 267 S.W. 322.

Statute as to secondhand automobiles

Attempted mortgage by purchaser of secondhand automobile, where sale was void for failure to conform to statutory provisions regulating such sales, is void, mortgagor having no legal interest therein.—*Cullum v. Lub-Tex Motor Co.*, Tex.Civ.App., 267 S.W. 322.

85. N.J.—*Shinn v. Cohen*, 132 A. 81, 99 N.J. Eq. 418.

86. Ohio.—*Commercial Credit Co. v. Schreyer*, 166 N.E. 808, 120 Ohio St. 568, 63 A.L.R. 674.

Mortgage to secure purchase price Tex.—*LeSage v. Maxie*, Civ.App., 286 S.W. 612.

87. Tex.—*LeSage v. Maxie*, supra.

88. Iowa.—*Bensen & Marxer v. Regger*, 168 N.W. 881, 186 Iowa 19, modified on other grounds *Benson & Marxer v. Same*, 172 N.W. 166, 186 Iowa 19.

11 C.J. p 431 note 72 [a].

89. Iowa.—*Lee County Sav. Bank v. Snodgrass Bros.*, 166 N.W. 680, 182 Iowa 1387.

11 C.J. p 431 note 72.

Presumption of ownership as aid to description see *infra* § 64.

90. Iowa.—*Syck v. Bossingham*, 94 N.W. 920, 921, 120 Iowa 363. Neb.—*Booknau v. Clark*, 79 N.W. 159, 58 Neb. 610.

"Where . . . the controversy is between a mortgagee and a stranger, who is not bound, of course, by the terms of the written instrument to which he is not a party and with which he is not in privity . . . there are stronger grounds for saying . . . that there is no such presumption than where a controversy arises as between the parties to an instrument."—*Syck v. Bossingham*, supra.

91. Mo. — *International Harvester Co. v. Threlkeld*, 44 S.W.2d 182, 226 Mo.App. 600.

92. Cal.—*Mathew v. Mathew*, 71 P. 344, 138 Cal. 334.

93. Ala.—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 383.

Estoppel of persons in particular capacities to deny mortgagor's title:

✓ Mortgagee see the C.J.S. title *Estoppel* § 16, also 11 C.J. p 430 note 70.

✓ Mortgagor see the C.J.S. title *Estoppel* § 14, also 21 C.J. p 1069 note 10.

✓ True owner see the C.J.S. title *Estoppel* § 91, also 11 C.J. p 430

d. Effect of Loss of Interest

The right to mortgage an interest in property continues until it is lost.

The mortgagor's right to mortgage his interest in property continues until such interest is lost;⁹⁴ and if he has an interest in the property at the time the mortgage is executed, his subsequent lack of interest is immaterial.⁹⁵

§ 24. — Ownership of Land on Which Crop Is Raised in General

In some jurisdictions the validity of a mortgage of crops to be grown depends on the mortgagor's having an interest, when the mortgage is made, in the land on which they are to be grown. In others, such interest is not required at the time of making the mortgage, provided the mortgagor subsequently acquires an interest, or provided the crops, or land on which they are to be grown, are in the parties' contemplation, or that the mortgagor contemplated acquiring them. The nature of the interest required has been variously stated; it is sufficient that the mortgagor is in possession of the land or has an equitable interest therein.

In some jurisdictions a mortgage on crops to be grown in the future on land which the mortgagor does not own and in which he possesses no interest at the time of the execution of the mortgage is regarded as invalid, or as not creating a lien,⁹⁶ at

notes 66, 67, 21 C.J. p 1157 notes 24-34.

94. Kan.—*Davidson & Case Lumber Co. v. Anderson*, 187 P. 872, 106 Kan. 213.

95. Ala.—*Stinson v. Faircloth-Byrd Co.*, 57 So. 143, 3 Ala.App. 607.

Interest at time of levy

The right of a chattel mortgagee depends wholly on whether the mortgagor had the right to encumber the property when he executed the mortgage, and his interest at the time a levy was had in detinue by the mortgagee for the recovery of the property is immaterial.—*Stinson v. Faircloth-Byrd Co.*, 57 So. 143, 3 Ala.App. 607.

96. Ala.—*Shaw v. Kinney*, 149 So. 227, 227 Ala. 170—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 383—*Avondale Mills v. Abbott Bros.*, 108 So. 31, 214 Ala. 368—*E. W. & J. W. Moring v. Helms*, 97 So. 647, 210 Ala. 175—*Gray v. Burdette*, 86 So. 95, 17 Ala.App. 432, certiorari denied *Ex parte Gray*, 86 So. 96, 204 Ala. 358—*Johnson v. Coosa Mfg. Co.*, 81 So. 141, 16 Ala.App. 649.

11 C.J. p 431 note 77. Mortgages of crops not yet planted see *infra* § 32 a (2).

Mortgage a "nullity"

Ala.—*E. W. & J. W. Moring v. Helms*, 97 So. 647, 210 Ala. 175.

ast as against third persons,⁹⁷ since the crops to be grown have no potential existence.⁹⁸ Conversely, if the mortgagor does own, or have an interest in, the land, a mortgage of crops to be grown in the future,⁹⁹ or of crops already planted,¹ is regarded as valid, and as an exception to the rule, considered in § 26 *infra*, that one cannot mortgage property not yet acquired or existing.²

In other jurisdictions, a mortgage of crops to be

grown on land in which the mortgagor has no interest when the mortgage is made is valid if he subsequently actually acquires an interest therein.³

Nature of interest required. In those jurisdictions requiring the mortgagor to have some interest in the land on which the crops to be mortgaged are to be grown, the nature of the interest required has been variously stated in particular cases.⁴ It has been held sufficient that the chattel mortgagor is in

7. Ala.—Windham v. Wilson, 98 So. 15, 210 Ala. 330—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478—Sewell v. Richardson, 104 So. 139, 20 Ala.App. 569—Hamner & Son v. Johnson, 77 So. 446, 16 Ala. App. 296.

1 C.J. p 431 note 77.

To create a specific lien on crops, such as will prevail against third persons subsequently acquiring a specific interest therein, the crops must be the contemplated product of the land in which the mortgagor had at the time a definite present interest.—Windham v. Wilson, 98 So. 15, 210 Ala. 330—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478—Sewell v. Richardson, 104 So. 139, 20 Ala.App. 569.

As against later mortgagees

Ala.—Hamner & Son v. Johnson, 77 So. 446, 16 Ala.App. 296.

As against purchaser from mortgagor

(1) In an action by a mortgagee against a purchaser from the mortgagor, it was held that "a mortgagor of a crop to be grown must have some interest in the land on which the crop is to be grown at the time of the execution of the mortgage."—Johnson v. Coosa Mfg. Co., 81 So. 141, 142, 16 Ala.App. 649.

(2) And the mortgagee, having failed to show such interest in the mortgagor, cannot recover from the purchaser.—Alexander v. Garland, 96 So. 138, 209 Ala. 267—Johnson v. Coosa Mfg. Co., 81 So. 141, 16 Ala. App. 649.

98. Ala.—Avondale Mills v. Abbott Bros., 108 So. 31, 32, 214 Ala. 368—Gray v. Burdette, 86 So. 95, 17 Ala.App. 432, certiorari denied *Ex parte* Gray, 86 So. 96, 204 Ala. 358.

"No title or lien could attach . . . without the required character of title or potential existence sufficient for the lien at the time the relation of mortgagor and mortgagee was created."—Avondale Mills v. Abbott Bros., *supra*.

Doctrine of potential existence see *infra* § 26 b.

99. Ala.—Buchmann v. Callahan, 131 So. 799, 222 Ala. 240—Metcalf v. Clemmons-Powers & Co., 76 So. 9, 200 Ala. 243—First Nat. Bank v. Crawford, 149 So. 230, 231, 25 Ala.

App. 463, certiorari denied 149 So. 228, 227 Ala. 188—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala. App. 130—Kilgore v. Jones, 73 So. 832, 15 Ala.App. 472.

Mass.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

Under a statutory provision that a "mortgage of unplanted crops of agricultural products, executed on or after the first day of January of the year in which such crops are grown, conveys the legal title thereto," it was held that "where there is a potential interest in the mortgagor at the time of the giving of a mortgage, the title to such crops as are raised on the land by him or his tenants is in the mortgagee."—First Nat. Bank v. Crawford, *supra*.

In equity; equitable title

(1) "This court from the beginning down to the present time has held that mortgages and deeds of trusts on crops to be produced in subsequent years on land which the mortgagor owns or in which he has an interest in possession are good in equity."—Coffey v. Land, Miss., 167 So. 49, 50.

(2) Under the common law a mortgage executed on an unplanted crop to be grown on land in which the mortgagor had a present interest at the time of its execution vested in the mortgagee only an equitable title to the crops subsequently planted and matured by the mortgagor. Ala.—Shaw v. Kinney, 149 So. 227, 227 Ala. 170.

Miss. — Butler Mercantile Co. v. Cruise, 166 So. 325, 326, 175 Miss. 200.

1. Ala.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130. Idaho.—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.

Vt.—Kimball v. Sattley, 55 Vt. 285, 287, 45 Am.R. 614.

Mortgages of planted crops see *infra* § 32 a (1).

"Although the crop intended to be conveyed is not at the time of the mortgage in actual matured existence and in that form actually belonging to the mortgagor, yet it potentially belongs to him as an in-

cident of other property then in existence and belonging to him."—Kimball v. Sattley, *supra*.

Potential interest in crops

"The rule has always been, even at law, that a crop sown, but not yet grown or harvested, is the proper subject of a chattel mortgage, if the mortgagor, at the time of giving the mortgage, has the ownership or right to the continued possession of the soil, since he has then a potential interest in the crops grown."—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 33, 44 Idaho 332, 54 A.L.R. 1527.

2. Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 582, 258 Mass. 157.

Vt.—Kimball v. Sattley, 55 Vt. 285, 45 Am.R. 614.

"The general rule is, that a person cannot grant or mortgage property of which he is not possessed and to which he has no title. But this rule has been so extended as to give a person a right to mortgage property of which he has the potential possession like . . . crops to be raised on the mortgagor's land."—West Springfield Trust Co. v. Hinckley, *supra*.

3. Wash.—Community State Bank v. Martin, 258 P. 498, 500, 501, 144 Wash. 483.

11 C.J. p 431 note 81.

Contrary view criticized

"The Supreme Court of Alabama . . . adheres to the doctrine that a chattel mortgage is invalid unless the thing covered thereby at the time of making the mortgage had at least a potential existence. . . . It seems to us that the better rule is that a mortgage may be made upon crops when the mortgagor at the time does not have an interest in the land, providing he thereafter acquires an interest. It is difficult to see in what way this would operate unjustly if the mortgage is otherwise sufficient."—Community State Bank v. Martin, *supra*.

4. Interest under cropping contract as sufficient see *infra* § 25 b. Leasehold as sufficient see *infra* § 25 a.

"A definite present interest as distinguished from a mere possible or expectant future interest."—Windham v. Wilson, 98 So. 15, 210 Ala.

possession of the land,⁵ as, for example where he is the mortgagor of land, in possession,⁶ even after condition broken,⁷ or that he has an equitable interest in the land.⁸

Question for jury. Whether a mortgagor of crops at the time of the execution of the mortgage had the necessary interest in the land on which they are to be raised is a question for the jury.⁹

In Texas, while a mortgage made on crops to be grown in the future on land in which the mortgagor has an interest is valid,¹⁰ the existence of such an interest in the land, when the mortgage is made,

is, in equity, not essential to the validity of a mortgage of a future crop,¹¹ being merely a circumstance tending to identify the crop mortgaged,¹² provided, however, at the time of the execution of the mortgage the crops,¹³ or some particular land on which they were to be grown,¹⁴ were in the contemplation of the parties, or the mortgagor contemplated acquiring the crops.¹⁵

§ 25. — Leases and Cropping Contracts

- a. Leases generally
- b. Land cultivated on shares

330—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478—Gilliland Co. v. Pond Bros., 66 So. 480, 482, 189 Ala. 542, L.R.A.1917C 15.

Ownership or right to continued possession

Idaho.—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.

"Potential interest"

Ala.—First Nat. Bank v. Crawford, 149 So. 230, 231, 25 Ala.App. 463, certiorari denied 149 So. 228, 227 Ala. 188—Hamner & Son v. Johnson, 77 So. 446, 447, 16 Ala.App. 296.

"Present interest"

Ala.—Shaw v. Kinney, 149 So. 227, 227 Ala. 170—Windham v. Wilson, 98 So. 15, 210 Ala. 330—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

"Present interest in the usufruct period"

"A present interest in land cannot give present potential ownership to anything that is intended to be produced thereon after that interest shall have terminated. The 'present interest' which the principle requires is a present interest in the usufruct period."—Vinson Bros. v. Finlay, 90 So. 310, 311, 206 Ala. 478.

"Present or potential interest"

Ala.—Sewell v. Richardson, 104 So. 139, 20 Ala.App. 569.

5. Ala.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340—Buchmann v. Callahan, 131 So. 799, 222 Ala. 240—Metcalf v. Clemmons-Powers & Co., 76 So. 9, 200 Ala. 243—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130—Kilgore v. Jones, 73 So. 332, 15 Ala. App. 472.

Ark.—Eades v. Simpson, 191 S.W. 953, 127 Ark. 162.

Vt.—Kimball v. Sattley, 55 Vt. 285, 45 Am.R. 614.

Ownership of crop raised by trespasser see the C.J.S. title Crops § 8, also 17 C.J. p 381 note 34—p 382 note 37.

Possession for ten years

Ala.—Kilgore v. Jones, 73 So. 332, 15 Ala.App. 472.

Tenant in possession

Where the tenant of one claiming to be the owner of land, although in fact he was not, planted, cultivated, and harvested a crop while in possession, he had a good title and his mortgage was valid.—Eades v. Simpson, 191 S.W. 953, 127 Ark. 162.

6. Ala.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340—Buchmann v. Callahan, 131 So. 799, 222 Ala. 240—Metcalf v. Clemmons-Powers & Co., 76 So. 9, 200 Ala. 243—W. B. Smith & Sons v. Gay, 106 So. 214, 216, 21 Ala.App. 130.

Vt.—Kimball v. Sattley, 55 Vt. 285, 45 Am.R. 614.

"A mortgagor in possession of land is, as to all the world except the mortgagee, the owner, and until default has such a potential interest in the land, as that a mortgage of crops growing or to be grown on such land conveys either the legal title or an equitable lien . . . as the facts may establish."—W. B. Smith & Sons v. Gay, supra.

As tenant at will

Mortgagor holding possession as tenant at will has such interest as would authorize mortgage of crop.—Buchmann v. Callahan, 131 So. 799, 222 Ala. 240.

7. Ala.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340.

Vt.—Kimball v. Sattley, 55 Vt. 285, 45 Am.R. 614.

8. Ala.—Fields v. Karter, 25 So. 800, 121 Ala. 329.

A person in possession as purchaser, who has not yet paid the purchase price, and consequently has only an equitable interest therein may give a valid mortgage.—Russell v. Stevens, 12 So. 330, 70 Miss. 685—Stadeker v. Loeb, 6 So. 637, 67 Miss. 200.

9. Ala.—Littleton v. Abernathy, 70 So. 282, 195 Ala. 65.

10. Tex.—First Nat. Bank v. American Trust & Savings Bank of El Paso, Civ.App., 1 S.W.2d 437—Watters v. B. F. Ellington & Co., Civ. App., 289 S.W. 417.

11. Tex.—South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ.App., 269 S.W. 1097, affirmed South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521.

11 C.J. p 431 note 81.

12. Tex.—South Texas Implement & Machinery Co. v. Anahuac Canal Co., supra.

Description of land on which crop is to be grown see infra § 67.

13. Tex.—Bowyer v. Beardon, 291 S.W. 219, 116 Tex. 337.

14. Tex.—First Nat. Bank v. American Trust & Savings Bank of El Paso, Civ.App., 1 S.W.2d 437, 438. 11 C.J. p 431 note 81.

Inference from ownership

"In this state it is now too late to question the validity of a mortgage upon crops for the current and succeeding years to be grown upon a definitely described tract of land owned by the mortgagor, or in which he has an interest, from which it can be reasonably inferred that it was within the contemplation of the parties that crops would be planted and grown upon the premises by the mortgagor during the current and succeeding years."—First Nat. Bank v. American Trust & Savings Bank of El Paso, supra.

Land not yet rented

But a mortgage of a crop to be grown on land which the mortgagor had not rented, or had not contemplated renting, when the mortgage was made, was held invalid.—Senterfitt v. Bradley, Tex.Civ.App., 60 S.W. 2d 815.

15. Tex.—Perkins v. Alexander, Civ. App., 209 S.W. 789, 790.

"A chattel mortgage lien given on crops not then in existence and to be grown on land to which the mortgagor has no lease at the time or does not own may be enforced in equity on the crops when they do come into possession of the mortgagor, if their acquisition was contemplated at the time the mortgage was made."—Perkins v. Alexander, supra.

a. Leases Generally

A tenant under a lease has a mortgageable interest in crops growing, or to be grown, on the leased land, but the landlord has not. The tenant's right to mortgage the crops depends on the continuance of the lease; and the mortgagee's interest in the crops, under the tenant's mortgage, is subject to the terms of the lease, and terminates with the termination of the lessee's rights.

A landlord has no such interest in, or title to, crops grown on rented land as can be made the subject of a valid mortgage;¹⁶ but a tenant under a lease has such an interest, and may make a valid mortgage of the crops growing, or to be grown, thereon.¹⁷ However, the right of a tenant to mort-

gage the crops depends on the continuance of the lease¹⁸ and the interest of the mortgagee under a mortgage given by a lessee is subject to the terms of the lease,¹⁹ and terminates with the termination of the lessee's rights.²⁰

Thus, a tenant cannot mortgage crops to be grown at a later time than that for which he has hired the premises;²¹ nor can a person who expects to rent land give a valid mortgage on crops to be raised, before the renting actually takes place.²² Further, where a lease is terminated by forfeiture upon default by the tenant,²³ or by the occurrence of events which, according to the pro-

16. Ala.—Killian v. Hall Auto Co., 149 So. 716, 25 Ala.App. 518.

11 C.J. p 431 note 83.

But, where the landlord reserved title in the crop as security for the payment of rent, it was held that, the rent not having been paid, the landlord's mortgage thereafter created a valid lien as against an attaching creditor of the lessee.—Smith v. Atkins, 18 Vt. 461.

Mortgagor's interest in land on which crop is raised generally see supra § 24.

No legal title in landlord

"It is elementary that the landlord had no legal title to the crops as the title is in the tenant, and he alone can make a valid mortgage thereon."—Killian v. Hall Auto Co., 149 So. 716, 25 Ala.App. 518.

17. Ala.—Killian v. Hall Auto Co., supra.

Tex.—Bowyer v. Beardon, 291 S.W. 219, 116 Tex. 337—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Civ.App., 268 S.W. 776.

11 C.J. p 431 note 84.

But, under an agreement whereby a bank furnished a tenant farmer with seed wheat, the resulting crop to belong to the bank unless the tenant bought the crop by executing a chattel mortgage on it to the bank, it was held that, in the absence of the tenant's exercising his option to buy the crop, he had no mortgageable interest in it, and a mortgage thereon was void.—Penalosa State Bank v. Calista Grain & Mercantile Co., 276 P. 70, 128 Kan. 132.

Actual property right

"On April 20, 1920, at the time the mortgage in this case was executed, the mortgagor was in possession of the land rented by him for the year 1920, and had most of his crops planted. He having not only a potential, but an actual property right in said crops, all of said crops constituted property subject to a valid mortgage."—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Tex.Civ.App., 268 S.W. 776, 778.

18. Ala.—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

11 C.J. p 431 note 86.

19. Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 137 Or. 529, 83 A.L.R. 108.

Wash.—Woody v. Wagner, 154 P. 819, 89 Wash. 429.

Lease terminable by sale

Under a mortgage of a growing crop by a tenant holding under a lease which provides that the lease may be terminated by the sale of the land by the owner, the mortgagee takes subject to such condition.—Woody v. Wagner, supra.

20. Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 533, 137 Or. 529, 83 A.L.R. 108.

"It is a rule of law that upon the termination of the lessee's rights all interests of third persons acquired and held by them under the lessee are also terminated, for they can acquire no rights in the premises other or greater than the original lessee has."—Francis Bros. v. Schallberger, supra.

If the crops are growing when the lease expires, the mortgagee may have them.—Fry v. Miller, 45 Pa. 441.

21. Ala.—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

11 C.J. p 431 note 86, p 432 note 87.

But under a statute, providing that all mortgages "on crops already planted, or to be planted, shall have the same force and effect to bind such crops and their products as other mortgages have to bind property already in being" it was held that "potential interest" or "potential existence" was no longer essential, so that a mortgage on a crop, to be grown after the mortgagor's term under parol agreement expired, was valid.—Smith v. LaFayette, 119 P. 979, 980, 29 Okl. 671, applying statute of Indian Territory.

Lease for indeterminate period

Where a landowner on renting in 1915 took a mortgage from the tenant on crops raised during the current year and every succeeding year

on the rented premises or any place rented by the tenant, and the lease was for one year only, with an agreement to rent for succeeding years if the parties could agree upon terms, the tenant did not have such an interest in the land as to make the mortgage valid against third persons as to a crop raised in 1920; "such a contract falls far short of creating a present interest in the land covering the period of intended production."—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

22. Ala.—E. W. & J. W. Moring v. Helms, 97 So. 647, 210 Ala. 175—Sellers, etc., Co. v. Hardaway, 66 So. 460, 138 Ala. 388.

"If a tenant should mortgage such crops as might be raised or grown by him on some indefinite place which he expected to rent, the conveyance would, we apprehend, be inoperative and void, as an attempted conveyance of a mere possibility or expectancy, not coupled with any interest in, or growing out of property."—E. W. & J. W. Moring v. Helms, supra quoting Burns v. Campbell, 71 Ala. 288.

Negotiating for lease

Ala.—Sellers, etc., Co. v. Hardaway, supra.

23. Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 533, 137 Or. 529, 83 A.L.R. 108.

"The rights of purchasers or mortgagees of growing unharvested crops are terminated by the lessee's forfeiture of his term, for such rights are and necessarily must be held between them subject to the performance of the terms and conditions fastened upon the tenant's estate by the provisions of his lease. . . . If this were not so it would be tantamount to granting to the tenant the power to create by voluntary or involuntary sales or liens, rights in third persons inconsistent with and beyond his own estate and would authorize the defeat of the contract rights of the lessor or owner."—Francis Bros. v. Schallberger, supra.

As against subsequent lessee

Mortgagee under mortgage on

visions of the lease, were to terminate it,²⁴ or where the tenant honestly surrenders, or by legal proceedings loses, possession of the land,²⁵ the mortgagee's interest in the growing crop is held to be extinguished, although there is authority for the view that a voluntary surrender by the tenant does not extinguish his mortgagee's interest in the crops.²⁶

On the other hand, a tenant remaining in possession and holding over after the expiration of his lease, and before making a new one,²⁷ or a tenant under an oral lease, which, on account of the statute of frauds, could be avoided after the execution of the mortgage,²⁸ has been held to have a sufficient interest in the land to render his mortgage of crops to be grown thereon valid.

growing crop given by tenant dispossessed for default in rent is not entitled to crop as against subsequent lessee harvesting crop by landlord's permission.—Francis Bros. v. Schallberger, supra.

24. Wash.—Woody v. Wagner, 154 P. 819, 89 Wash. 429.

Liability of landlord or purchaser

On the termination of a lease, under a provision that it might be terminated by a sale of the land, neither the landlord nor the purchaser was held liable to the mortgagee for the value of the crop covered by the mortgage, even though at the time of the sale of the land the lessee or chattel mortgagor received payment for his work and the value of the growing crop.—Woody v. Wagner, supra.

25. S.D.—J. I. Case Plow Works Co. v. Farmers' Co-op. Union Elevator Co., 219 N.W. 888, 890, 53 S.D. 9.

Owner of land becomes owner of crop. "free from any claim of the mortgagee."—J. I. Case Plow Works Co. v. Farmers' Co-op. Union Elevator Co., supra.

What constitutes good faith

Where tenants, in arrears in rent, unable to raise money, and with the uncertainty attending the raising of a crop, surrendered possession of the land and accepted a contract to work for wages, it was held not to be imprudent, and therefore, apparently, to be in good faith.—J. I. Case Plow Works Co. v. Farmers' Co-op. Union Elevator Co., supra.

26. Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 533, 137 Or. 529, 83 A.L.R. 108.

"Though the surrender operates between the tenant and the landlord as an extinguishment of the interest which is surrendered, it does not extinguish the rights in third persons arising from purchase or mortgage of the crop growing upon the premises. As to them the surrender operates only as a grant subject to the

rights of the mortgagee or purchaser in the property."—Francis Bros. v. Schallberger, supra.

27. Ala.—Windham v. Wilson, 98 So. 15, 210 Ala. 330.

28. Ala.—Sitz v. Robertson, 101 So. 749, 212 Ala. 99—White v. Kinney, 101 So. 426, 211 Ala. 624. 11 C.J. p 431 note 85.

29. Iowa.—Pierre v. Pierre, 232 N. W. 633, 210 Iowa 1304. 11 C.J. p 432 note 92.

Mortgages of unplanted crops see *infra* § 32 a (2).

In Texas

(1) Where the landlord was to receive a share of the tenant's crop as rent, it was held that "one cannot mortgage that which he does not own, so as to create a lien thereon prior to his becoming such owner. A landlord is not the owner of any part of a growing crop being raised by his tenant before it is divided, or, if there is an agreement to divide, before it is matured and ready to be divided."—Williams v. King, Civ. App., 206 S.W. 106, 107, citing *Corpus Juris*.

(2) Where the rental contract provided that the landlord's share of the crops grown was to be converted into cash and deposited to his credit, the same result was reached, and the language quoted in (1) supra was adopted.—Brod v. Guess, Civ.App., 211 S.W. 299, 301.

(3) But where, under a rental contract by which the landlord was to receive a share of tenant's crop as rent, the landlord assigned the contract as security for a debt, it was held that the crop rent "may be sold or mortgaged even though at the time of the sale or mortgage the crop has not actually been planted."—Sanger Bros. v. Hunsucker, Civ.App., 212 S.W. 514, 516, 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443.

(4) "The holdings in . . . [the Williams-King and Brod-Guess Cases, supra, on the one hand and San-

b. Land Cultivated on Shares

Where the landlord is to receive a share of the crop grown by the tenant, he may mortgage such share before division. The tenant or employee under a crop-sharing lease or contract may mortgage his interest before division; but authorities differ as to whether a tenant or cropper under such a lease or contract has a mortgageable interest in crops while title thereto remains in the landlord.

Where by the terms of a lease of land the landlord is to receive a portion of the crop grown by the tenant, as rent for the use of the demised premises, the landlord can mortgage his share of the crop before division,²⁹ although it would seem that, if the landlord is to receive a share of the cash proceeds from the sale of the crops, he does not have a mortgageable interest in the crops.³⁰

ger Bros.-Hunsucker, supra, on the other] are not necessarily, or at all, in conflict. In Williams-King and Brod-Guess the cases appear to be those of ordinary landlord and tenant, where the landlord had no interest in any specific part of the crops to be produced. . . . While in Sanger Bros. v. Hunsucker, the relation of the parties appears to be that of crop sharing, in which the owner of course has a fixed interest in a specific part of the crops raised. In such a case he is as much the owner of his share as the tenant is owner of his share. We know of no reason why either may not execute a chattel mortgage upon his definite interest in such specific property. . . . Whether . . . [the owner] was to be paid his rentals in cotton or cash, or partly in cotton and partly in cash, the right to receive such payment in any event is property subject to . . . chattel mortgage."—Bowyer v. Beardon, 291 S.W. 219, 222, 223, 116 Tex. 337—West v. U. S. Fidelity & Guaranty Co., Civ.App., 298 S.W. 652.

(5) With reference to the cases of Williams v. King and Brod v. Guess, among others, it was stated that "our Supreme Court has approved an opinion . . . in the case of Bowyer v. Beardon, supra, which without expressly overruling those decisions, does . . . in principle, overrule them."—West v. U. S. Fidelity & Guaranty Co., supra.

(6) A purchaser of land may mortgage the share of crops, or of the proceeds of crops, which he is to receive as rent.—Bowyer v. Beardon, supra—American Trust & Savings Bank v. Whitaker, Civ.App., 2 S.W.2d 356, error dismissed.

30. Mass.—Orcutt v. Moore, 134 Mass. 48, 51, 45 Am.R. 278.

Indefinite contract

Where a landlord leased his farm by a parol agreement providing, among other things, that the tenant

A tenant or employee under a crop-sharing lease or contract may mortgage his interest in the crop,³¹ even before the crop has been planted,³² and an employee who is to receive a share of the proceeds from the sale of the crop has a right to mortgage his interest therein.³³

Where, by the terms of the lease,³⁴ or by virtue of the contract of hiring,³⁵ or because of the abandonment of the premises by a tenant on shares be-

fore the crop is complete,³⁶ title to the crop is in the landlord when the mortgage is executed, the tenant or cropper has been held, in some jurisdictions, not to have a mortgageable interest in the crop. In other jurisdictions, even though, under the terms of the lease³⁷ or contract,³⁸ or under statute,³⁹ title to the crop remains in the landowner until division, the tenant or cropper has been held to have some interest in the crops which he can mortgage. This

was "to carry on the farm at halves," the contract was held not entirely clear as to whether the crops were to be divided in kind, so that it could not be said, as a matter of law, that the landlord had a mortgageable interest in the crops.—*Orcutt v. Moore*, *supra*.

31. Cal.—*Merriman v. Martin*, 298 P. 95, 113 Cal.App. 167.

N.D.—*First State Bank of Barton v. St. Anthony & Dakota Elevator Co.*, 250 N.W. 778, 64 N.D. 138—*Minneapolis Iron Store Co. v. Brannum*, 162 N.W. 543, 36 N.D. 355, L.R.A.1917E 298.

S.C.—*Miller v. Eagle Star & British Dominions Ins. Co., Limited*, of London, England, United States Branch, New York, 143 S.E. 663, 146 S.C. 123.

Tex.—*Bowyer v. Beardon*, 291 S.W. 219, 116 Tex. 337.

11 C.J. p 432 notes 93, 94.

Consent of landlord

Under a statute providing that a mortgage by an employee or tenant of his share in a crop is invalid unless made with the consent of the landlord or employer, it was held that, after his share has been set aside for him, the tenant or laborer may mortgage or dispose of his share as he will, independently of the landlord's consent.—*Parks v. Webb*, 3 S.W. 521, 48 Ark. 293.

If relationship of tenants in common exists between the parties to a farming contract, and they have an interest in the crops as such, they may mortgage their interests therein.—*Smith v. Stamford Gin Co.*, Tex. Civ.App., 74 S.W.2d 519, error dismissed—36 C.J. p 712 note 81.

32. Tex.—*Sanger Bros. v. Hunsucker*, Civ.App., 212 S.W. 514, 516.

"If a tenant, under a valid contract with the owner of the soil, agrees to pay a crop rent and thereafter actually plants and cultivates the specified crop, the same may be sold or mortgaged even though at the time of the sale or mortgage the crop has not actually been planted."—*Sanger Bros. v. Hunsucker*, *supra*. Mortgages of future crops generally see *infra* § 32.

33. Ark.—*Bourland v. McKnight*, 96 S.W. 179, 79 Ark. 427, 4 L.R.A., N.S., 693.

But if, under a farming contract, one party is merely a servant whose compensation is measured by a percentage of the proceeds derived from the sale of the crops, he has no interest sufficient to support a mortgage.—*Smith v. Stamford Gin Co.*, Tex.Civ.App., 74 S.W.2d 519, error dismissed.

34. Tenn.—*Meacham v. Herndon*, 6 S.W. 741, 86 Tenn. 366.

11 C.J. p 432 note 95.

Payment of advances

Where title to the crops is to remain in the landlord until certain advances are paid, the tenant has no mortgageable interest therein until such advances are paid.—*Hawkins v. Beakes*, 30 N.Y.S. 91, 80 Hun 292, affirmed in 44 N.E. 1124, 150 N.Y. 562—11 C.J. p 432 note 95 [b].

Right to sell crops

Reservation to the landlord, by parol lease, of the right to sell the crops to pay for advances made by him, was held not to convey legal title, and not to prevent the tenant from mortgaging the crops.—*Wilkinson v. Kettler*, 69 Ala. 435.

35. Wis.—*Herried v. Broadhead*, 248 N.W. 470, 211 Wis. 512.

11 C.J. p 432 note 95.

Under a statutory provision to that effect, an arrangement by which one party furnishes land, teams, and feed to another, who is to perform the labor of raising a crop to be equally divided, constitutes a contract of hiring; and hence the title to the crop is in the owner of the land, and not the party doing the work, and the latter's mortgage on his share before it is gathered conveys no interest therein.—*Foust v. Bains*, 52 So. 743, 167 Ala. 115—*Vandergrift v. Hawkins*, 49 So. 754, 160 Ala. 430.

36. N.C.—*Beacom v. Boing*, 35 S.E. 250, 16 N.C. 136.

37. Cal.—*Merriman v. Martin*, 298 P. 95, 98, 113 Cal.App. 167.

N.D.—*Minneapolis Iron Store Co. v. Brannum*, 162 N.W. 543, 553, 36 N.D. 355, L.R.A.1917E 298, overruling *Herrmann v. Minnekota El. Co.*, 145 N.W. 821, 27 N.D. 235, and *Bidgood v. Monarch El. Co.*, 84 N.W. 561, 9 N.D. 627, 81 Am.S.R. 604, "in so far as they announce the doctrine that a lessee under such

lease [containing a provision that title shall remain in the lessor until the conditions of the lease have been complied with by the lessee] has no interest in the grain to which a mortgage lien can attach until after a division of the crop has been made."

36 C.J. p 712 note 82.

"In numerous instances it has been decided by the courts of various American jurisdictions that an occupant of land, who holds under an instrument that gives him a specified share of the crops to be produced on the land, has an interest in the crops that is capable of being the subject of a mortgage, even though the legal title is reserved in the landowner."—*Merriman v. Martin*, *supra*.

After the crop comes into existence, the mortgage passes the interest of the tenant.—*National Bank of Wheaton, Minn. v. Elkins*, 159 N.W. 60, 37 S.D. 479, distinguishing *Larchwood Sav. Bank v. Canfield*, 81 N.W. 630, 12 S.D. 330, in that in that case legal and not equitable title was considered.—*Iverson v. Soo El. Co.*, 119 N.W. 1006, 22 S.D. 638—*Lyon v. Phillips*, 108 N.W. 554, 20 S.D. 607.

Effect of breach

But, if the tenant's right to the crops depends on performance by him of all the terms of the lease, a breach thereof will make void a mortgage previously given by him.—*Hawk v. Konouzki*, 84 N.W. 563, 10 N.D. 37.

38. Cal.—*Merriman v. Martin*, 298 P. 95, 113 Cal.App. 167.

N.D.—*First State Bank of Barton v. St. Anthony & Dakota Elevator Co.*, 250 N.W. 778, 64 N.D. 138.

S.C.—*Miller v. Eagle Star & British Dominions Ins. Co., Limited*, of London, England, United States Branch, New York, 143 S.E. 663, 146 S.C. 123.

39. In Georgia, a cropper has a mortgageable interest in growing crops which he is cultivating, although a statute provides that the title, right of possession, and control of the crop shall remain in the landlord until he has received his part of the crop and is fully paid for all advances made by him to defendant in making the crop.—*Fountain v. Fountain*, 66 S.E. 1020, 7 Ga.App. 361.

interest of the tenant⁴⁰ or cropper⁴¹ has been held to be an equitable interest, which attaches to the legal interest upon settlement and division with the landlord, no matter in whose possession the crop may be at the time.⁴²

*One furnishing supplies to a lessee of land in return for a share of the lessee's share of the crops was held to have a mortgageable interest after the crop was planted and practically matured.*⁴³

§ 26. — Property Not Yet Acquired or Existing

- a. In general
- b. Doctrine of potential existence or interest
- c. Mortgage as executory agreement to mortgage
- d. Ratification or new act after acquisition of property
- e. Rule in equity
- f. Statutory provisions generally
- g. Renewals of, or additions to, stock or equipment

40. N.D.—*Minneapolis Iron Store Co. v. Branum*, 162 N.W. 543, 553, 36 N.D. 355, L.R.A.1917E 298.

11 C.J. p 432 note 99.

"Where a lease of a farm on shares gives to the lessee a certain share of the crop, but contains a provision to the effect that title shall remain in the lessor until the conditions of the lease have been complied with by the lessee, he (the lessee) has an equitable interest in the crop, even prior to the performance of the conditions, which equitable interest may be mortgaged."—*Minneapolis Iron Store Co. v. Branum*, supra. Equitable interest as subject of mortgage see supra § 23 b.

41. S.C.—*Miller v. Eagle Star & British Dominions Ins. Co., Limited*, of London, England, United States Branch, New York, 143 S.E. 663, 666, 146 S.C. 123.

"A share cropper has no title to any portion of the crop until there is a division and he has received his share of the crop . . . but he has an equitable interest and can maintain an action in equity for a settlement and division of the crop. Further, an equitable interest in property may be mortgaged."—*Miller v. Eagle Star & British Dominions Ins. Co., Limited*, of London, England, United States Branch, New York, supra.

42. S.D.—*National Bank of Wheaton, Minn., v. Elkins*, 159 N.W. 60, 37 S.D. 479.

11 C.J. p 433 notes 1, 2.

14 C.J.S.—40

43. Tex.—*Calvit v. Avery State Bank, Civ.App.*, 283 S.W. 322.

44. Idaho.—*Dover Lumber Co. v. Case*, 170 P. 108, 31 Idaho 276. Equitable principles as affecting mortgages of future property see infra § 26 e.

Mortgages on unplanted crops see infra § 32 a (2).

45. Minn.—*Ludlum v. Rothschild*, 43 N.W. 137, 41 Minn. 218.

"This rule obtains in nearly all of the States of the Union."—*New England Nat. Bank v. Northwestern Nat. Bank*, 71 S.W. 181, 171 Mo. 307, 323, 60 L.R.A. 256.

46. U.S.—*In re P. J. Sullivan Co.*, D.C.N.Y., 247 F. 139, affirmed 254 F. 660, 166 C.C.A. 158, applying New York law—*Grimes v. Clark, Md.*, 234 F. 604, 148 C.C.A. 370, affirming, D.C., *Clark v. Grimes*, 232 F. 190, applying Maryland law. *Mass.—Davis v. Smith-Springfield Body Corporation*, 145 N.E. 434, 250 Mass. 278.

Neb.—Nelson v. State, 238 N.W. 110, 121 Neb. 658—*State Bank of Gering v. Grover*, 193 N.W. 765, 110 Neb. 421.

N.J.—Hodes v. Mooney, 152 A. 205, 8 N.J.Misc. 351, 9 N.J.Misc. 48.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 739, 36 N.M. 332, citing *Corpus Juris*.

N.Y.—Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co., 170 N.E. 887, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App.Div. 299, and reargument denied 172-N.

a. In General

Some authorities hold that a mortgage of after-acquired property is invalid, at least as against third persons, others that it is valid, at least as between the parties, and against persons claiming through the mortgagor voluntarily or with notice; and conditions have been placed upon validity, such as that the intention to mortgage the property be clear and that its acquisition be anticipated.

Whether a chattel mortgage on property subsequently to be acquired is valid is a question upon which the authorities are divided.⁴⁴ It has been said that at common law a mortgage could operate only on property actually in existence when the mortgage was given, and then actually belonging to the mortgagor;⁴⁵ but, as will appear in § 26 b infra, some authorities include the doctrine of potential existence in their statement of the common-law rule.

In the absence of, or apart from, statutes relating thereto, the effect of which is considered in § 26 f infra, many authorities hold that a mortgage of property to be subsequently acquired by the mortgagor is invalid, or does not create a lien,⁴⁶ at least

E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722—*Diana Paper Co. v. Wheeler-Green Electric Co.*, 240 N.Y.S. 108, 228 App.Div. 577.

Wash.—Straus v. Wilsonian Inv. Co., 31 P.2d 516, 177 Wash. 167.

11 C.J. p 434 note 20.

Dictum Solter v. Macmillan, 128 A. 356, 147 Md. 580.

Increase of animals see infra § 30.

Reasons for rule

(1) "A mortgage on after-acquired property is void in law because it has nothing to operate upon."—*Straus v. Wilsonian Inv. Co.*, 31 P. 2d 516, 518, 177 Wash. 167.

(2) "The reason of this rule at law is, that a mortgage is a conveyance of the title to the mortgagee, and title can not be conveyed where the mortgagor has none, or where the property conveyed is not in esse."—*Richardson v. Washington*, 31 S.W. 614, 88 Tex. 339, 344.

In Georgia, "subject only to the statutory exceptions, it has long been the general rule in this state that any mortgage on after-acquired personal property is invalid."—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, 188 S.E. 913, 914, 54 Ga.App. 832.

After-acquired crops

(1) Mortgage covering crops raised by mortgagor in a certain year is not valid as to crops acquired by mortgagor on another place subsequent to execution of mortgage.—*Polytinsky v. Lindsey*, 106 So. 70, 21 Ala.App. 128.

as against third persons,⁴⁷ such as subsequent purchasers⁴⁸ or creditors.⁴⁹

The common-law doctrine has been said to have been founded upon a technical rule and to have been frequently evaded or modified, as by the invention of the doctrines of "potential existence" and "intervening act," and the holding that a mortgage may be treated as an executory agreement to mortgage,⁵⁰ which are considered, respectively, in § 26 b, § 26 d, and § 26 c, *infra*. Some authorities have

gone beyond the doctrine of potential existence and have adopted the rule applied in equity, holding that, where there is a clear intention to create a lien on property, not then owned, but to be subsequently acquired by the mortgagor, whether then in being or not, a lien will be created.⁵¹ Other authorities, without reference to the doctrine of potential existence or the equity rule, have held that a mortgage of property subsequently to be acquired, or to come into existence, is valid,⁵² at least as between the parties thereto,⁵³ and against all persons claiming

(2) Mortgage of unplanted crops see *infra* § 32 a. (2).

Title in holder of draft

Where party obtaining loan to take up draft attached to bill of lading for automobile and giving trust receipt to lender gave mortgage to surety while title was still in holder of draft, mortgage was one on after-acquired property creating no lien.—*Davis v. Smith-Springfield Body Corporation*, 145 N.E. 434, 250 Mass. 278.

Title not conveyed; equitable lien created

Mo.—*Clayton v. Gentle*, App., 14 S.W. 2d 672.

47. Kan.—*Concordia First Nat. Bank v. McIntosh, etc., Live Stock, etc., Co.*, 84 P. 535, 72 Kan. 603. 11 C.J. p 434 note 20.

48. Kan.—*Concordia First Nat. Bank v. McIntosh, etc., Live Stock, etc., Co.*, *supra*. 11 C.J. p 434 note 20.

49. U.S.—*Rockwell v. New York United Hotels, C.C.A.N.Y.*, 79 F.2d 81, certiorari denied *Donahue v. Rockwell*, 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462—*Cunningham v. Sizer Steel Corporation, D.C.N.Y.*, 1 F.2d 337—*Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y.*, 291 F. 863. N.Y.—*Prudence-Bonds Corporation v. 1000 Island House Co.*, 252 N.Y.S. 60, 141 Misc. 39. 11 C.J. p 434 note 20.

Leading case

Mass.—*Jones v. Richardson*, 10 Metc. 481.

Mortgage securing purchase price; partial delivery

(1) Such a mortgage, is void against subsequent purchasers and attaching creditors, even though given to secure the purchase price of the articles mortgaged, if a part only of the goods has been delivered to the mortgagor.

Mass.—*Pettis v. Kellogg*, 7 Cush. 456.

N.Y.—*Brunswick-Balke-Collender Co. v. Stevenson*, 4 N.Y.S. 123.

(2) The later delivery of the goods does not validate the mortgage any more than in the ordinary case

of after-acquired property.—*Brunswick-Balke-Collender Co. v. Stevenson*, *supra*.

Provision in lease of hotel site that all furniture of hotel should be surrendered to lessor on termination of lease by default is invalid as mortgage on hotel's furniture as against general and execution creditors, since all of hotel's furniture was after-acquired property.—*Rockwell v. New York United Hotels, C.C.A.N.Y.*, 79 F.2d 81, certiorari denied *Donahue v. Rockwell*, 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462, applying New York law.

So whether mortgagor was partner or sole owner

Mass.—*J. P. Manning Co. v. Kempainen*, 173 N.E. 532, 273 Mass. 298.

50. Minn.—*Ludlum v. Rothschild*, 43 N.W. 137, 41 Minn. 218.

"This doctrine [that one could not at common law mortgage property which was not in existence, or which he did not own] was perhaps well enough for our English ancestors in the early days of that nation, but as trade grew apace it was found to hamper commercial transactions, and the courts, ever equal to the emergency, began to find means to relax its rigor. This was accomplished by inventing the doctrine of 'potential existence' . . . and of 'intervening act.'"—*Barron v. San Angelo Nat. Bank, Tex.Civ.App.*, 138 S.W. 142, 144.

51. U.S.—*Title Guaranty, etc., Co. v. Witmire, Mich.*, 195 F. 41, 115 C.C.A. 43, applying Minnesota law. Minn.—*Hogan v. Atlantic El. Co.*, 69 N.W. 1, 66 Minn. 344—*Ludlum v. Rothschild*, 43 N.W. 137, 139, 41 Minn. 218.

Rule in equity see *infra* § 26 e.

"Prevailing doctrine"

This rule "was announced in this country . . . by Judge Story in *Mitchell v. Winslow*, 2 Story 430, and has long been the doctrine of the federal courts, notably in the administration and distribution of estates in bankruptcy. It is becoming, if it is not already, the prevailing doctrine in the state courts."—*Ludlum v. Rothschild*, *supra*.

52. U.S.—*Howell v. War Finance Corporation, C.C.A.Ariz.*, 71 F.2d 237—*Petition of Post, C.C.A.Mass.*, 17 F. 2d 555, reversing, D.C., *In re Robert Jenkins Corporation*, 11 F.2d 979, certiorari denied *Levy v. Post*, 48 S.Ct. 20, 275 U.S. 527, 72 L.Ed. 407, applying Massachusetts law. Iowa.—*Equitable Life Ins. Co. of Iowa v. Brown*, 262 N.W. 124, 220 Iowa 585—*Farmers' Trust & Savings Bank of Laurens v. Miller*, 214 N.W. 546, 203 Iowa 1380—*National Bank of Milton v. O'Brien*, 195 N.W. 611, 196 Iowa 865—*Live Stock Nat. Bank of Sioux City v. Julius*, 174 N.W. 489, 137 Iowa 748. S.C.—*Clowney v. Rivers*, 123 S.E. 759, 129 S.C. 58.

Tenn.—*Judge v. Jones*, 42 S.W. 4, 99 Tenn. 20.

Commencement of lien on after-acquired property see *infra* § 290.

Necessity of expressing intention to cover after-acquired property see *infra* § 60.

"Federal courts repeatedly have held that, if the intention to do so is clearly expressed, a chattel mortgage may include after-acquired property."—*Howell v. War Finance Corporation, C.C.A.Ariz.*, 71 F.2d 237, 245.

53. Idaho.—*Dover Lumber Co. v. Case*, 170 P. 108, 31 Idaho 276.

N.D.—*Hellstrom v. First Guaranty Bank*, 209 N.W. 379, 54 N.D. 322.

Or.—*Keeney v. Hurlburt*, 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann. Cas.1918E 737, modified on other grounds 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737. 11 C.J. p 435 note 22.

Citing *Corpus Juris* in connection with effect of a contract to give a mortgage on a crop to be sown.—*Danville State Bank v. May*, 271 P. 302, 304, 126 Kan. 714—*Beall v. Spear*, 189 P. 938, 106 Kan. 690.

Mortgagor's receiver

Where a receiver has been appointed for the mortgagor company, it has been held that he stands in no better position than the mortgagor, and hence as against him the mortgagee's title to the after-acquired property is good.—*Perkins v. Batterson*, 21 N.Y.S. 815, 66 Hun 583.

under the mortgagor voluntarily,⁵⁴ or with notice or knowledge.⁵⁵ Such a mortgage has been held valid where the mortgage provides therefor,⁵⁶ or contains "appropriate language,"⁵⁷ or the property is after-acquired in the usual and ordinary course of business,⁵⁸ or if, at the time the mortgage was executed, the acquisition of the property by the grantor was anticipated and the parties intended that it be subject to the mortgage,⁵⁹ or if definite property mortgaged, although not yet in existence, is in the contemplation of the parties,⁶⁰ and even though the mortgagor retains possession.⁶¹

Acquisition of title and giving of mortgage simultaneous. Where a mortgage is given simultaneously with the mortgagor's acquisition of the property, or in contemplation of the immediate acquisition of the property, it cannot be said to be a mortgage of after-acquired property,⁶² as, for example, where a purchase-money mortgage is given simul-

taneously with the taking of title and is a part of the same transaction.⁶³

b. Doctrine of Potential Existence or Interest

Under the doctrine of potential existence or interest, things may be mortgaged which, although lacking identity or separate entity, are the natural product, growth, or increase of property which has at the time a corporeal existence, and in which the mortgagor has a present interest. Things having neither actual nor potential existence cannot be mortgaged.

Although the unqualified statement has been made that property not in being cannot be mortgaged,⁶⁴ it is more commonly held that things which are the natural product, growth, or increase of property which has at the time of the making of the mortgage a corporeal existence, and in which the mortgagor has a present interest, may be the subject of a valid mortgage, the mortgagor being regarded as having a potential interest in such things, and they as having a potential existence.⁶⁵ Where the thing

The mortgagor's trustee in bankruptcy is not a party within the meaning of this rule.—*In re Hurley*, D.C.Mass., 185 F. 851.

As common-law pawn

If a mortgage of after-acquired chattels is not authorized by statute it is valid as a contract for a common-law pawn, and good between the parties, and the debtor is estopped from denying the creditor's rights to apply such property according to the agreement.—*Commonwealth Trust Co. v. Salem Light, etc., Co.*, 89 A. 452, 77 N.H. 146.

54. Ky.—*Cheatham v. Tennell*, 186 S.W. 128, 170 Ky. 429.
Minn.—*Ludlum v. Rothschild*, 43 N.W. 137, 41 Minn. 218.

55. Idaho.—*Dover Lumber Co. v. Case*, 170 P. 108, 31 Idaho 276.
N.D.—*Hellstrom v. First Guaranty Bank*, 209 N.W. 379, 54 N.D. 322.
11 C.J. p 435 note 24.

But it has been held that a sale of personal property will confer title good as against a mortgage purporting to cover the same, but executed before the mortgagor had title thereto, even though the purchaser had knowledge of the existence of the mortgage at the time of making the purchase.—*Netzorg v. National Supply Co.*, 28 Ohio Cir.Ct. 112.

Garnishee creditor of mortgagor with full notice of the mortgage is postponed to the mortgagee.—*Fuller v. Rhodes*, 43 N.W. 1085, 78 Mich. 36.

Agreement for mortgage

A stipulation in a mortgage of a farm, that the mortgagee should have a lien on all wood cut, and should have delivered to him such mortgages as should be necessary to protect his lien, while not in itself

constituting a mortgage, was a valid agreement for a mortgage which might be enforced against the mortgagor and all persons claiming through him with notice of the lien, including an execution creditor of the mortgagor.—*Wood v. Lester*, 29 Barb., N.Y., 145.

56. Ill.—*Southern Surety Co. v. People's State Bank of Astoria*, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

57. Tex.—*Monroe v. Hall*, Civ.App., 290 S.W. 289, 292.

58. Mich.—*Fidelity Corporation of Michigan v. Post*, 263 N.W. 775, 273 Mich. 697.

59. Tex.—*Senterfitt v. Bradley*, Civ. App., 60 S.W.2d 815, 816.

60. Tex.—*Bowyer v. Beardon*, 291 S.W. 219, 116 Tex. 337.
Rule applied to unplanted crops see supra § 24.

61. U.S.—*Petition of Post*, C.C.A. Mass., 17 F.2d 555, 556, reversing, D.C., *In re Robert Jenkins Corporation*, 11 F.2d 979, certiorari denied *Levy v. Post*, 48 S.Ct. 20, 275 U.S. 527, 72 L.Ed. 407, applying Massachusetts law.

62. Okl.—*Chattanooga State Bank v. Lawton Citizens' State Bank*, 134 P. 954, 39 Okl. 255.
11 C.J. p 429 note 48.

63. Mich.—*Greenaway v. Fuller*, 11 N.W. 384, 47 Mich. 557.

64. U.S.—*In re Imperial Textile Co.*, D.C.N.Y., 255 F. 199.
Tex.—*Richardson v. Washington*, 31 S.W. 614, 88 Tex. 339.

Wis.—*Kohler Improvement Co. v. Preder*, 259 N.W. 833, 217 Wis. 641.

65. Ala.—*Vinson Bros. v. Finlay*, 90 So. 310, 206 Ala. 478.

Ill.—*American Trust & Savings Bank v. Gladu*, 258 Ill.App. 156.

Iowa.—*Lee County Savings Bank v. Snodgrass Bros.*, 166 N.W. 630, 182 Iowa 1387.

Mass.—*West Springfield Trust Co. v. Hinckley*, 154 N.E. 580, 258 Mass. 157.

11 C.J. p 437 notes 34, 35.

Mortgage of increase of animals see infra § 30.

Ownership of land on which crop is to be raised see supra § 24.

"Principle underlying the cases which hold that a potential existence is sufficient is that the right to the property when it comes into actual existence is a present vested right."—*American Trust & Savings Bank v. Gladu*, 258 Ill.App. 156, 159.

"Potential possession"

"The general rule is, that a person cannot grant or mortgage property of which he is not possessed and to which he has no title. But this rule has been so extended as to give a person a right to mortgage property of which he has the potential possession like the wool growing on sheep which he owns at the time of the grant, or the crops to be raised on the mortgagor's land."—*West Springfield Trust Co. v. Hinckley*, 154 N.E. 580, 582, 258 Mass. 157.

"Prospective existence"

"The general rule is that in the absence of statutory provisions to the contrary any personal property . . . which has an actual or prospective existence may be mortgaged."—*Equitable Life Ins. Co. of Iowa v. Brown*, 262 N.W. 124, 127, 220 Iowa 585.

At law as well as in equity

(1) "There has been a tendency

to be mortgaged meets these requirements, it is not necessary that it have identity or separate entity.⁶⁶ Things which have neither an actual nor a potential existence are not the subject of mortgage.⁶⁷

The doctrine of potential existence or interest has been said to be an exception to the rule that a mortgage of property to be acquired is void as against subsequent purchasers and attaching creditors,⁶⁸ and to have been invented by the courts to evade the common-law rule that a mortgage could operate only on property then actually in existence and owned by the mortgagor,⁶⁹ although some authorities include in their statement of the common-law rule the doctrine of potential interest as applied to property in existence and in which the mortgagor has a potential interest.⁷⁰

Future accounts. A mortgage of future accounts

has been held valid;⁷¹ but other authority is to the contrary, on the ground that property not in being cannot be mortgaged.⁷²

Future earnings. Mortgages of future earnings have been recognized as valid,⁷³ but, by some authorities, only where the earnings are referable to an existing contract.⁷⁴

c. Mortgage as Executory Agreement to Mortgage

A mortgage of property to be acquired has been construed as an executory agreement for a mortgage, authorizing the contractee to take possession of the property when acquired by the contractor, provided he does so before third persons acquire rights.

In some cases it is held that a mortgage of property to be acquired in the future will be construed as an executory agreement for a mortgage,⁷⁵ which

in all states recognizing a chattel mortgage as a mere lien, to extend the law of mortgages so as to recognize as valid, for all purposes, both in law and equity, mortgages which formerly were upheld in equity only. And the courts of many states recognize the validity at law of a mortgage given upon property not then owned by the mortgagor, but which is in existence, and also recognize mortgages upon property not in existence where the mortgagor is the owner of the source from which this property must come."—*Iverson v. Soo El. Co.*, 119 N.W. 1006, 22 S.D. 638, 643.

(2) Although it has been contended that this rule is applicable only in equity, "many authorities tend to the conclusion that this result occurs at law, and not merely in equity."—*Parsons v. American Agr. Chemical Co.*, 182 N.E. 863, 864, 280 Mass. 424.

Mere belief, hope, or expectation on the part of the mortgagor that he will in the future acquire an interest in the property to be mortgaged is not sufficient to bring the property within the scope of this rule.

Ala.—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

Ill.—American Trust & Savings Bank v. Gladu, 253 Ill.App. 156. 11 C.J. p 437 note 35 [a].

Interest in ancestor's estate

Agreement purporting to assign interest in estate of living ancestor for purpose of securing debt constitutes mortgage.—*Kaylor v. Kaylor*, 45 P.2d 743, 172 Okl. 535.

66. Ala.—Vinson Bros. v. Finlay, 90 So. 310, 206 Ala. 478.

Ill.—American Trust & Savings Bank v. Gladu, 253 Ill.App. 156. 11 C.J. p 437 note 35.

67. Ill.—American Trust & Savings Bank v. Gladu, 253 Ill.App. 156.

Miss.—Butler Mercantile Co. v. Cruise, 166 So. 325, 326, 175 Miss. 200.

11 C.J. p 437 note 36.

"A mortgage on a thing that has neither actual nor potential existence is void; it is nothing."—*Butler Mercantile Co. v. Cruise*, supra.

68. N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738.

69. Minn.—Ludlum v. Rothschild, 43 N.W. 137, 41 Minn. 218.

Tex.—Barron v. San Angelo Nat. Bank, Civ.App., 138 S.W. 142.

70. Ill.—American Trust & Savings Bank v. Gladu, 253 Ill.App. 156.

Mont.—Hackney v. Birely, 215 P. 642, 67 Mont. 155.

Okl.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.

Wash.—Straus v. Wilsonian Inv. Co., 31 P.2d 516, 177 Wash. 167.

It requires no citation of authorities to support statement that, at common law, a mortgage can operate only on property in existence at time mortgage is given, and then only if such property actually belongs to mortgagor, or potentially belongs to him as an incident of, or accession to, other property then in existence and belonging to him.

Ill.—American Trust & Savings Bank v. Gladu, supra.

Mont.—Hackney v. Birely, 215 P. 642, 67 Mont. 155.

Okl.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.

Wash.—Straus v. Wilsonian Inv. Co., 31 P.2d 516, 177 Wash. 167.

71. N.J.—Gerard Trust Co. v. Standard Gas Co., 115 A. 910, 93 N. J.Eq. 307—*Commercial Trust Co. v. L. Wertheim Coal & Coke Co.*, 102 A. 448, 451, 88 N.J.Eq. 143.

11 C.J. p 438 note 38.

Mortgages of choses in action generally see infra § 31.

Substituted chattels and book accounts

(1) A mortgage of "all after-acquired chattels and book accounts that should be substituted in the regular course of business for those existing at the date of the mortgage" was held a valid lien on such chattels and accounts as against creditors.—*Commercial Trust Co. v. L. Wertheim Coal & Coke Co.*, supra.

(2) Mortgage of substituted stock and equipment see infra § 26 g.

72. U.S.—In re Imperial Textile Co., D.C.N.Y., 255 F. 199, reversing, D. C., 239 F. 775.

11 C.J. p 438 note 37.

73. Iowa.—Equitable Life Ins. Co. of Iowa v. Brown, 262 N.W. 124, 127, 220 Iowa 585.

11 C.J. p 438 note 39.

Mortgages of future earnings under statutes see infra § 26 f.

"A valid chattel mortgage may be given . . . for claim upon money not earned."—*Equitable Life Ins. Co. of Iowa v. Brown*, supra.

74. Ala.—Purcell v. Mather, 35 Ala. 570, 76 Am.D. 307.

Minn.—Dyer v. Schneider, 118 N.W. 1011, 106 Minn. 271, 130 Am.S.R. 615, 20 L.R.A., N.S., 505.

But, without reference to the existence of a contract, it was held that "the profits arising out of the use of a personal chattel, may be made the subject of a mortgage."—*Stewart v. Fry*, 3 Ala. 573, 577.

75. Ala.—Burns v. Campbell, 71 Ala. 271, 288—*First Nat. Bank v. T. J. Perry & Son*, 140 So. 614, 25 Ala. App. 6, certiorari dismissed 140 So. 616, 224 Ala. 13, first case, and certiorari denied 140 So. 616, 224 Ala. 420, second case.

Mass.—West Springfield Trust Co. v.

authorizes the contractee to take possession of the property as soon as it is acquired by the contractor, provided he does so before third persons acquire rights.⁷⁶ The adoption of this doctrine has been said to be one of the methods by which the common-law rule that a mortgage could operate only on property actually in existence at the time of giving it, and then belonging to the mortgagor, was evaded or modified.⁷⁷

d. Ratification or New Act after Acquisition of Property

A mortgage of future property may become effective when a new act intervenes after the mortgagor acquires the property, as where he surrenders possession to the mortgagee; and it has been held sufficient that the mortgagee takes possession under a provision in the mortgage empowering him to do so. It has also been held, without reference to the provisions of the mortgage, that the mortgagee's taking possession, or starting an equity

proceeding to subject the property to the mortgage, will make it effective.

The doctrine of "intervening act" is said to have been invented by the courts as one of the means for relaxing the vigor of the common-law rule that one could not mortgage property which was not in existence or which he did not own.⁷⁸ Thus, a mortgage of future property may become effective on the intervention of some new act, after the mortgagor has acquired the property,⁷⁹ such as an act by him in furtherance of the original grant, showing an intention to have the property pass thereby,⁸⁰ as, for example, where he surrenders possession of the after-acquired property to the mortgagee;⁸¹ and the general rule is that an actual transfer of possession to the mortgagee, either by voluntary delivery by the mortgagor or by the exercise of a power to take possession contained in the mortgage, constitutes an effectuation of the mortgage.⁸² It has fur-

Hinckley, 154 N.E. 580, 258 Mass. 157.

11 C.J. p 438 note 42.

"A mortgage of subsequently acquired property . . . which is not the product, increase or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage."—Burns v. Campbell, supra—First Nat. Bank v. T. J. Perry & Son, supra.

"As between the parties to the chattel mortgage, the mortgage operated as a contract to give a lien on the property to be acquired."—Burton v. Klein, 239 N.Y.S. 103, 106, 135 Misc. 571—11 C.J. p 435 note 22 [c] (1).

76. Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

11 C.J. p 438 note 42.

Effect of mortgagee's taking possession see infra §§ 212–213.

77. Minn.—Ludlum v. Rothschild, 43 N.W. 137, 41 Minn. 218.

78. Tex.—Barron v. San Angelo Nat. Bank, Civ.App., 138 S.W. 142, 144.

79. Neb.—Nelson v. State, 238 N.W. 110, 112, 121 Neb. 658—State Bank of Gering v. Grover, 193 N.W. 765, 110 Neb. 421.

As applied to mortgage of unplanted crop see infra § 32 a (2).

"A chattel mortgage . . . upon property not in esse is ineffectual to create a lien, either legal or equitable, in favor of mortgagee, until the intervention of some new act."—Nelson v. State, supra—State Bank of Gering v. Grover, supra.

As against creditors

It is, of course, settled that the New York rule is that a mortgage of after-acquired personal property is

ineffective as against creditors of the mortgagor, and in order to make it an effective lien as against creditors some further act is necessary.—Cunningham v. Sizer Steel Corporation, D.C.N.Y., 1 F.2d 337, applying New York law—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 291 F. 863, applying New York law—Pintch Compressing Co. v. Buffalo Gas Co., C.C.A.N.Y., 230 F. 830, applying New York law.

80. U.S.—Howell v. War Finance Corporation, C.C.A.Ariz., 71 F.2d 237, 246, citing *Corpus Juris*.

11 C.J. p 438 note 43.

81. N.Y.—Zartman v. Waterloo First Nat. Bank, 32 N.E. 127, 189 N.Y. 267, 12 L.R.A., N.S., 1083.

11 C.J. p 438 note 44.

Actual change of possession must take place, so that where the mortgagor delivers the goods to the mortgagee who immediately returns them, the mortgagor continuing to retain possession and control, no title will have passed as against attaching creditors.—Griffith v. Douglass, 73 Me. 532, 40 Am.R. 395.

Effect of mortgage provision authorizing taking of possession

(1) By a development of this doctrine, it is held that a provision in a mortgage authorizing the mortgagee to take possession of the mortgaged property is a continuing agreement, and that the taking of possession of after-acquired property, by virtue of the previous consent of the mortgagor given in the mortgage, is equivalent to a delivery of possession by the mortgagor, and the mortgagee's lien is thereby made good without any new act or consent on the part of the mortgagor.—Burrill v. Whitcomb, 61 A. 678, 100 Me. 286, 109 Am.S.R. 498, 1 L.R.A., N.S.,

451, distinguishing Griffith v. Douglass, 73 Me. 532, 40 Am.R. 395, on the ground that, in that case, the mortgagee's possession was only instantaneous, and was immediately resumed by the mortgagor, and disapproving Head v. Goodwin, 37 Me. 181—11 C.J. p 438 note 45.

(2) "A stipulation in the mortgage authorizing the mortgagee to take possession at any time, is not a mere license revocable at the pleasure of the mortgagor, but a valid and binding contract which continues in force until performed."—Burrill v. Whitcomb, 61 A. 678, 681, 100 Me. 286, 109 Am.S.R. 498, 1 L.R.A., N.S., 451—11 C.J. p 438 note 45 [a].

(3) It has been held, however, that the license granted by the mortgagor to the mortgagee to take possession of the property is revocable.—Chynoweth v. Tenney, 10 Wis. 397—11 C.J. p 440 note 49.

(4) Under other authority, where the power is coupled with an interest, as, for example, where it covers existing property, the license is irrevocable.—McCaffrey v. Woodlin, 65 N.Y. 459, 22 Am.R. 644.

82. Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

Or.—Kenney v. Hurlburt, 172 P. 490, 88 Or. 688, Ann.Cas.1918E 737, modified on other grounds 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737.

11 C.J. p 439 note 46.

On breach of condition

Mortgagee's possession of property on breach of condition validates mortgage as to after-acquired property, if mortgage so provides.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

ther, been held, without reference to the provisions of the mortgage, that the mortgage will become effective on the mortgagee's taking possession of the property,⁸³ or on his commencing a proceeding in equity to subject the specific property to the lien and to enforce the lien,⁸⁴ and that a mortgagee who takes possession before the rights of third persons intervene,⁸⁵ or before a petition in bankruptcy is filed,⁸⁶ has valid title to the property.

It follows that the mortgagee's failure to take possession of the after-acquired property before the rights of an innocent third party attach renders a provision covering such property void as against such a party;⁸⁷ and where the mortgagor receives a discharge in bankruptcy, or makes an assignment for the benefit of his creditors, before possession is taken by the mortgagee, the opportunity for completing the lien is gone.⁸⁸

e. Rule in Equity

In equity, while there is some authority to the contrary, a mortgage of future property is commonly held to be valid, or to create a lien which equity will enforce, except as against purchasers for value without notice, or except where creditors' rights intervene, no further act being necessary in most jurisdictions. The mortgage operates as a contract to grant a lien, on the acquisition, or the coming into existence, of the property, which contract will, in most jurisdictions, be enforced as a lien on the property.

While a contrary rule prevails in some jurisdictions,⁸⁹ according to the weight of authority a mortgage of property not yet acquired, or not yet existing, at the time of the execution of the mortgage, even where it would be held invalid in law, is valid in equity, or creates a lien which equity will enforce,⁹⁰ when an intention that the mortgage shall cover such property clearly appears from the face of the instrument,⁹¹ at least as between the parties or against the mortgagor,⁹² and against all persons

83. Neb.—State Bank of Gering v. Grover, 193 N.W. 765, 110 Neb. 421. N.Y.—Medina Gas, etc., Co. v. Buffalo Loan, etc., Co., 104 N.Y.S. 625, 119 App.Div. 245, affirmed 85 N.E. 801, 193 N.Y. 92.

As applied to mortgage of substitutions for, or additions to, stock or equipment on hand see *infra* § 26 g.

Defects cured by mortgagee's taking possession generally see *infra* §§ 212–213.

84. N.Y.—Medina Gas, etc., Co. v. Buffalo Loan, etc., Co., *supra*.

85. U.S.—Petition of Post, C.C.A. Mass., 17 F.2d 555, reversing, D.C., *In re Robert Jenkins Corporation*, 11 F.2d 979, and certiorari denied *Levy v. Post*, 48 S.Ct. 20, 275 U.S. 527, 72 L.Ed. 407.

86. U.S.—Petition of Post, *supra*.

87. Mo.—Steckel v. Swift & Co., App., 56 S.W.2d 806.

Actual notice or knowledge

Packing company, purchasing cattle on open market in good faith, without actual notice or knowledge of chattel mortgage covering after-acquired property after execution of which mortgagor acquired cattle, is not liable for conversion to mortgagee, who never took possession thereof.—*Steckel v. Swift & Co.*, *supra*.

88. Hawaii.—Phillips v. McChesney, 8 Hawaii 289.

11 C.J. p 440 note 48.

89. Wis.—Case v. Fish, 15 N.W. 808, 58 Wis. 56.

11 C.J. p 440 note 51.

90. U.S.—Howell v. War Finance Corporation, C.C.A. Ariz., 71 F.2d 237.

Ark.—Jordan v. Wilkerson & Carroll Cotton Co., 238 S.W. 780, 152 Ark. 533.

Miss.—Prentiss Mercantile Co. v. Thurman, 161 So. 746, 173 Miss. 6. Mo.—Clayton v. Gentle, App., 14 S.W. 2d 672—Langford v. Fanning, App., 7 S.W.2d 726, 728, citing *Corpus Juris*.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 740, 36 N.M. 332, quoting *Corpus Juris*.

Tex.—Watson v. D. A. Paddleford & Son, Civ.App., 220 S.W. 779, certified questions answered 221 S.W. 569, 110 Tex. 525.

Wash.—Straus v. Wilsonian Inv. Co., 31 P.2d 516, 177 Wash. 167.

W.Va.—Benson v. Wood Motor Parts Corporation, 174 S.E. 895, 115 W. Va. 200.

11 C.J. p 440 note 52.

Equitable principles applied to mortgages of unplanted crops see *infra* § 32 a (2).

Necessity and sufficiency of description of after-acquired property see *infra* § 60.

"It is settled that an 'after-acquired' property clause in a mortgage or deed of trust is valid and enforceable in equity."—*Prentiss Mercantile Co. v. Thurman*, 161 So. 746, 173 Miss. 6.

In absence of fraud

Ind.—Irwin's Bank v. Fletcher Savings & Trust Co., 145 N.E. 869, 195 Ind. 669, modified on other grounds 146 N.E. 909, 195 Ind. 669.

"Equitable lien"

One taking mortgage on property not in esse acquires "equitable lien" when property comes into existence, enforceable against mortgagor and persons with notice.—*Langford v. Fanning*, Mo.App., 7 S.W.2d 726, 728.

Enforcement only by foreclosure

"An after-acquired title of a mortgagor creates an equitable lien or charge upon the property in favor of

his mortgagee, and such a lien cannot be enforced by replevin in a court of law, but must be enforced by foreclosure proceedings in a court of equity."—*Jordan v. Wilkerson & Carroll Cotton Co.*, 238 S.W. 780, 781, 152 Ark. 533.

So as to mortgages in form of deed of trust

Tenn.—Galloway v. Blue Springs Min. Co., Ch.A., 37 S.W. 1016.

Va.—Braxton v. Bell, 23 S.E. 289, 92 Va. 229.

W.Va.—Triumph Electric Co. v. Empire Furniture Co., 73 S.E. 325, 70 W.Va. 164.

11 C.J. p 440 note 52 [b].

Leading case

U.S.—Mitchell v. Winslow, C.C.Me., 17 F.Cas.No.9,673, 2 Story 630, 644.

Under codes

(1) As to whether the equitable rule will be applied in actions under a code by which remedies at law and in equity are blended and administered in the same courts and often in the same proceedings is a question on which the courts are not agreed.—*Francisco v. Ryan*, 43 N.E. 1045, 54 Ohio St. 307, 56 Am.S.R. 711.

(2) There are decisions which indicate that in such jurisdictions the equitable rule is to be applied in all cases.

Mo.—Swinney v. Gouty, 83 Mo.App. 549—Thompson v. Foerstel, 10 Mo. App. 290.

Tex.—Richardson v. Washington, 31 S.W. 614, 88 Tex. 339.

91. Idaho.—Hudson v. Kootenai Fox Farms Co., 272 P. 704, 47 Idaho 58—Dover Lumber Co. v. Case, 170 P. 108, 31 Idaho 276.

92. Ariz.—Valley Chevrolet Co. v. O. S. Stapley Co., 72 P.2d 945.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d

asserting a claim under him,⁹³ but not as against purchasers for value without notice,⁹⁴ or where the rights of creditors intervene.⁹⁵ It is not essential to validity in equity that an additional mortgage be executed or that the mortgagee take possession of the property after it is acquired by the mortgagor,⁹⁶ although in at least one jurisdiction the mortgage is ineffectual to create a lien in favor of

the mortgagee until the intervention of some new act.⁹⁷

The mortgage operates as a present contract to grant a lien as soon as the mortgagor acquires the property, or it comes into existence, which contract, in most jurisdictions, is enforced in equity as a lien on the property,⁹⁸ attaching, as will appear in §

738, 740, 36 N.M. 332, quoting **Corpus Juris**.

Tex.—Richardson v. Washington, 31 S.W. 614, 88 Tex. 339—Williams v. King, Civ.App., 206 S.W. 106, 11 C.J. p 440 note 52.

Dictum Miller v. Sooy, 242 P. 140, 141, 120 Kan. 81, citing **Corpus Juris**.

93. N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 740, 36 N.M. 332, quoting **Corpus Juris**.

Tex.—Richardson v. Washington, 31 S.W. 614, 88 Tex. 339—Williams v. King, Civ.App., 206 S.W. 106, 11 C.J. p 440 note 52.

94. U.S.—In re Alabama Braid Corporation, D.C.Ala., 13 F.Supp. 336, applying Alabama law.

Idaho.—Hudson v. Kootenai Fox Farms Co., 272 P. 704, 47 Idaho 58 —Dover Lumber Co. v. Case, 170 P. 108, 31 Idaho 276.

11 C.J. p 440 note 52 [d].

As against purchasers with notice

"In Titusville Iron Co. v. City of New York et al., 100 N.E. 806, 207 N.Y. 203, the Court of Appeals of this state [New York] expressly held that mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice."

U.S.—In re P. J. Sullivan Co., D.C. N.Y., 247 F. 139, 143, affirmed 254 F. 660, 166 C.C.A. 158, applying New York law.

N.Y.—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 109, 228 App.Div. 577.

95. U.S.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 291 F. 863, applying New York law—In re P. J. Sullivan Co., D.C.N.Y., 247 F. 139, affirmed 254 F. 660, 166 C.C.A. 158, applying New York law.

N.Y.—Titusville Iron Co. v. City of New York, 100 N.E. 806, 207 N.Y. 203—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

11 C.J. p 441 note 55.

Citing Corpus Juris, with reference to effect of a contract to give a mortgage on a wheat crop to be sown.—Danville State Bank v. May, 271 P. 302, 304, 126 Kan. 714.

Who are creditors

(1) "'Creditors' means 'attaching or execution creditors', and not general creditors." — Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 110, 228 App.Div. 577.

(2) But "it was directly held, in . . . [Zartman v. Waterloo First National Bank, 82 N.E. 127, 189 N.Y. 267, 12 L.R.A., N.S., 1083], that creditors whose claims accrued before possession was taken under such a mortgage may reach the property thus taken, notwithstanding that judgment in an action at law to perfect the right to assail the transfer was not obtained until afterward." —Burmeister v. Koster, 107 N.Y.S. 636, 637, 56 Misc. 373.

(3) A "trustee in bankruptcy of the mortgagor, has the same rights as a creditor armed with an attachment or execution." —Zartman v. Waterloo First Nat. Bank, 82 N.E. 127, 129, 189 N.Y. 267, 12 L.R.A., N.S., 1083, affirming 96 N.Y.S. 633, 109 App.Div. 406.

"Third parties" as creditors

(1) The mortgage as a contract to give a lien "is effectual in equity as between the parties when the property comes into existence and no rights of creditors or innocent third parties intervene." —Anchor Brewing Co. v. Burns, 52 N.Y.S. 1005, 1006, 32 App.Div. 272.

(2) "It is only when the rights of third parties will not be prejudiced that equity, treating as done that which was agreed to be done, will turn a contract to give a mortgage on property to be acquired into an equitable mortgage on such property as fast as it is acquired, and enforce the same accordingly against the mortgagor, his representatives and assigns. In other words, the agreement and intention of the parties to a mortgage upon property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee, who entered into the stipulation, but equity closes its doors and refuses relief if the interests of creditors are involved."

U.S.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 291 F. 863, 871, 872, applying New York law.

N.Y.—Zartman v. Waterloo First Nat. Bank, 82 N.E. 127, 128, 189 N.

Y. 267, 12 L.R.A., N.S., 1083, affirming 96 N.Y.S. 633, 109 App.Div. 406.

(3) With reference to the statement quoted in (2) above, it was said: "The expression ['third parties'] must be construed as referring to creditors, even though the broader proposition stated by way of dictum may be regarded as sound." —Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., supra, applying New York law.

(4) Holders of notes or bonds of a mortgagor corporation secured by a subsequent mortgage are "third parties," in the sense that creditors are third parties.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., supra, applying New York law.

Creditor as second mortgagee

Where a creditor took a second mortgage on property, it was held that his rights to attack the first mortgage, as being on property to be acquired, were merged in the mortgage.—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

96. U.S.—In re Alabama Braid Corporation, D.C.Ala., 13 F.Supp. 336, applying Alabama law.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 740, 36 N.M. 332, quoting **Corpus Juris**.

11 C.J. p 440 note 52.

97. Neb.—Nelson v. State, 238 N.W. 110, 121 Neb. 658—State Bank of Gering v. Grover, 193 N.W. 765, 110 Neb. 421.

Intervening act generally see the preceding subdivision of this section.

98. U.S.—In re Alabama Braid Corporation, D.C.Ala., 13 F.Supp. 336 —Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 291 F. 863—In re P. J. Sullivan Co., D.C.N.Y., 247 F. 139, affirmed 254 F. 660, 166 C.C.A. 158.

Ind.—Irwin's Bank v. Fletcher Savings & Trust Co., 145 N.E. 869, 195 Ind. 669, modified on other grounds 146 N.E. 909, 195 Ind. 669.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 36 N.M. 332.

N.Y.—Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co., 170 N.E. 887, 253 N.Y. 190, modify-

290 *infra*, when the property comes into being or is acquired by the mortgagor, and, as will appear in § 291, to the interest which the mortgagor then has in the property; but it has also been held that a mortgage of future property will be enforced only as a right under the contract and not as a trust attached to the property.⁹⁹

Doctrine of potential existence. Mortgages of future property have also been held valid in equity under the doctrine of potential existence, the doctrine being apparently regarded as an equitable one.¹

ing 235 N.Y.S. 127, 226 App.Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722—*Diana Paper Co. v. Wheeler-Green Electric Co.*, 240 N.Y.S. 108, 228 App.Div. 577.

Wash.—*Straus v. Wilsonian Inv. Co.*, 31 P.2d 516, 518, 177 Wash. 167.

W.Va. — *Benson v. Woods Motor Parts Corporation*, 174 S.E. 895, 115 W.Va. 200.

11 C.J. p 438 note 42 [a], p 441 note 53.

"Although a mortgage on after-acquired property is void in law because it has nothing to operate upon, still equity treats such conveyance as in the nature of an executory contract to take effect and attach to the subject-matter as soon as it comes into existence, and the agreement ripens into an actual transfer, for equity considers as done that which the mortgagor has positively agreed to do."—*Straus v. Wilsonian Inv. Co.*, *supra*.

Citing Corpus Juris in connection with effect of a contract to give a mortgage on a crop to be sown.—*Beall v. Spear*, 189 P. 938, 106 Kan. 690.

The basis for the rule is the maxim that equity considers as done that which ought to be done.

N.M.—*Morrison & Pardue v. Roberts-Dearborne Hardware Co.*, 14 P.2d 738, 36 N.M. 332.

Wash.—*Straus v. Wilsonian Inv. Co.*, 31 P.2d 516, 177 Wash. 167.
11 C.J. p 441 note 53.

Belief as specific performance

"The relief is in the nature of specific performance, and is applicable only where the contract is such as, under the circumstances, would be the subject of a decree for specific performance against the mortgagor, or his assignee with notice, as to such chattels as his mortgagor had purchased and then assigned."—*Fidelity Trust Co. v. Staten Island Clay Co.*, 67 A. 1078, 1080, 70 N.J. Eq. 550.

Property as feeding mortgage

"In the absence of intervening equities forbidding such a use, the

property, when acquired, is deemed to feed the mortgage, as if in existence at the beginning."—*Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co.*, 170 N.E. 887, 890, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App.Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

Holder of legal title as trustee

"Any holder of the legal title to such property, with notice of such equitable title, holds such legal title as trustee for the holder of such equitable title." — *In re Alabama Braid Corporation*, D.C.Ala., 13 F. Supp. 336, 339, applying Alabama law.

Lien granted in deed

"A deed executed by both the grantor and grantee, which grants a lien upon after-acquired property of the grantee that may be taken upon the premises granted from the grantor, will be upheld in a court of equity as a contract to grant a lien upon such property when acquired."—*Benson v. Wood Motor Parts Corporation*, 174 S.E. 895, 115 W.Va. 200.

99. N.Y.—*Otis v. Sill*, 8 Barb. 102.
11 C.J. p 441 note 54.

1. Mass.—*Parsons v. American Agr. Chemical Co.*, 182 N.E. 863, 864, 280 Mass. 424.

"In general one cannot sell or mortgage what he does not own. . . . An exception has been established, however, permitting a sale or mortgage of personalty not actually in existence but likely to come into being as the product, growth or increase of property in which the vendor or mortgagor has a present interest."—*Parsons v. American Agr. Chemical Co.*, *supra*.

Same result at law

(1) "Many authorities tend to the conclusion that this result occurs at law, and not merely in equity."—*Parsons v. American Agr. Chemical Co.*, *supra*.

(2) Doctrine of potential existence as applied at law see *supra* § 26 b.

2. U.S.—*Stockyards Loan Co. v. Nichols*, Okl., 243 F. 511, 156 C.C.

f. Statutory Provisions Generally

Under a statutory provision that an agreement may be made to create a lien on future property, mortgages of such property are held valid; under a provision permitting mortgages of growing crops and all personalty, property having a potential existence may be mortgaged.

In some jurisdictions, under statutory provisions to the effect that an agreement may be made to create a lien on property not yet acquired or not yet in existence, mortgages on such property have been held valid,² at least as between the par-

A. 209, 1 A.L.R. 547, applying Oklahoma statute—*In re Los Angeles Mfg. Co.*, D.C.Cal., 7 F.Supp. 567, construing California statute.

Mont.—*Security State Bank of Havre v. Mariette*, 223 P. 114, 69 Mont. 536—*Hackney v. Birely*, 215 P. 642, 67 Mont. 155.

N.D.—*Hellstrom v. First Guaranty Bank*, 209 N.W. 379, 54 N.D. 322 —*First Guaranty Bank v. Rex Theatre Co.*, 195 N.W. 564, 50 N.D. 322.

Okl.—*Union Nat. Bank v. Leidecker Tool Co.*, 178 P. 690, 72 Okl. 121 —*Mitchell v. Guaranty State Bank of Okmulgee*, 172 P. 47, 63 Okl. 110.
11 C.J. p 442 note 65.

General provision as to property mortgageable

(1) A section of the California code that property "not capable of manual delivery" may not be mortgaged "relates only to the kind of property which may be mortgaged," and does not prevent mortgages of after-acquired property under another section of the code.—*In re Los Angeles Mfg. Co.*, D.C.Cal., 7 F.Supp. 567, 568.

(2) Under provisions that "any interest in personal property which is capable of being transferred may be mortgaged," and that "an agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence," it was held that "as to 'property not yet acquired by the party agreeing to give the lien,' the necessary implication is that it must be such property capable of delivery, and such as may be taken possession of by the mortgagee upon its acquisition by the mortgagor."—*Security State Bank of Havre v. Mariette*, 223 P. 114, 115, 69 Mont. 536.

After-acquired cattle

Mortgage on cattle, including cattle added to the herd by purchase, is valid under such a statute.—*Stockyards Loan Co. v. Nichols*, Okl., 243 F. 511, 156 C.C.A. 209, 1 A.L.R. 547, applying Oklahoma statute.

In Louisiana, under a statute making a contract of sale "valid be-

ties;³ and a provision to the effect that mortgages may be made on growing crops and any and all kinds of personalty, with some exceptions, was held to permit the mortgaging of property having a potential existence at the time of the creation of the mortgage.⁴ A statute sanctioning mortgages of after-acquired property and property not in existence applies to personal, as well as real, property, in the absence of language restricting its application to real property.⁵

Statutes governing mortgages of renewals of, or additions to, stock or equipment are considered in the following subdivision of this section.

Future earnings. Under statutes declaring what property may be mortgaged, without reference to future property, mortgages of future earnings have been held valid.⁶

tween the parties even though the property has not been delivered," and a statute making a mortgage on after-acquired property valid "if the debtor should ever acquire the ownership of the property," it was held that, where a mortgagor, having ordered property from the mortgagee, was to receive the property after the making and recording of a mortgage thereon, the mortgagor "was the owner of the property in so far as concerned the . . . [mortgagee] and itself, as soon as its order was accepted, therefore the subsequent mortgage was valid between the parties as soon as it was executed."—*Remington-Rand v. Profits Island Gravel Co.*, La.App., 144 So. 636, 637, opinion reinstated 150 So. 76.

In Mississippi

(1) Under a statutory provision by which it was "intended to make valid deeds of trust or mortgages on chattels (not including merchandise) in which the grantor has no present or potential interest," and providing that a mortgage or deed of trust made on property "owned at the time of the execution of the instrument and on such property of like kind as may be acquired during a stated period not to exceed twelve months . . . shall be a valid lien against all creditors of the grantor," and that "the grantor shall have the right to pay the indebtedness thus secured with interest at any time, though not then due," it was held that, "being in derogation of the common law, the statute is to be strictly construed," so that mortgages covering lumber stacked in yards and all that might thereafter be stacked were not valid, not being

property "to be acquired by the mortgagor during a stated period not to exceed twelve months."—*Coffeeville Bank v. Stone*, 121 So. 816, 817, 153 Miss. 811, denying suggestion of error 118 So. 413, 151 Miss. 482.

(2) Under such statute, it was held that a deed of trust may be given upon after-acquired chattel, acquired within twelve months thereafter.—*Tabb v. People's Bank & Trust Co.*, 133 So. 137, 139, 160 Miss. 22.

(3) But a later statute, identical with the one appearing in (1) above except that the clause stating the purpose of the act was omitted, was held not to limit mortgages to property acquired within twelve months; the statute "does not grant the right to execute mortgages on after-acquired property, but provides only (1) when such mortgages shall be valid as to creditors, and (2) that the mortgagors may pay the secured debts before the maturity thereof."—*Prentiss Mercantile Co. v. Thurman*, 161 So. 746, 747, 173 Miss. 6.

3. Cal.—*Bank of California v. McCoy*, App., 72 P.2d 923.

4. Cal.—*State Bank of Ramona v. Clelland*, 175 P. 649, 38 Cal.App. 138.

5. U.S.—*In re Los Angeles Mfg. Co.*, D.C.Cal., 7 F.Supp. 567.

6. N.D.—*Sykes v. Hannawalt*, 65 N.W. 682, 5 N.D. 335.

S.D.—*Flanders v. French*, 106 N.W. 54, 20 S.D. 316.

Wash.—*Heermans v. Blakeslee*, 161 P. 489, 491, 93 Wash. 595.

Mortgages of future earnings gener-

g. Renewals of, or Additions to, Stock or Equipment

While in some jurisdictions a mortgage of after-acquired property in renewal of, or in addition to, stock or equipment on hand, or purchased with the proceeds of the sale thereof, is valid, in others it is void. Such a mortgage is generally held valid between the parties, and may be valid as against third persons, at least where the additions become part of the stock, or possession is taken by the mortgagee, before their rights have intervened. Such mortgages have been held valid under governing statutes.

Apart from statutory provisions, hereinafter referred to, in some jurisdictions a chattel mortgage of after-acquired property which is in renewal of, in substitution for, or in addition to, stock or equipment on hand when the mortgage was executed, or which is purchased with the proceeds of the sale of such goods, is valid,⁷ if the intention to cover such property is clearly expressed in the mortgage, so as to charge with notice persons dealing with the stock,⁸ while in others such a mortgage is void and ineffectual.⁹ Such mortgages are generally held

ally see *supra* subdivision b of this section.

By construction

A clause in a statute providing that "all kinds of personal property" may be mortgaged, followed by a particular enumeration of different kinds of property, was held not to be limited by the rule of *ejusdem generis* so as to exclude a mortgage of future earnings. — *Heermans v. Blakeslee*, *supra*.

7. U.S.—*In re Dagwell*, D.C.Mich., 263 F. 406, 408, applying Michigan law.

N.J.—*Commercial Trust Co. v. L. Wertheim Coal & Coke Co.*, 102 A. 448, 88 N.J.Eq. 143.

11 C.J. p 436 note 28.

Mortgage of stock in trade generally see *infra* § 35.

"A chattel mortgage covering after-acquired property of the same kind as, and to be added to, property actually owned by the mortgagor, and covered by such chattel mortgage at the time of its execution, such as additions to a stock of merchandise, to be purchased by the mortgagor after the time of the execution of the mortgage and added to such stock, is valid both as between the parties thereto and as against third parties, in the same manner and to the same extent as any other kind of chattel mortgage."—*In re Dagwell*, *supra*.

8. Iowa.—*In re Thompson*, 145 N.W. 76, 164 Iowa 20, Ann.Cas.1916D 1210.

9. U.S.—*Grimes v. Clark*, Md., 234 F. 604, 143 C.C.A. 370, affirming, D.C., *Clark v. Grimes*, 232 F. 190, applying Maryland law.

11 C.J. p 436 note 30.

valid between the parties.¹⁰ They have also been held valid as against third persons,¹¹ except subsequent purchasers and creditors acquiring specific liens,¹² at least where the additions become part of the general stock,¹³ or the mortgagee takes possession,¹⁴ before the rights of the third persons have intervened; however, in at least one jurisdiction, where mortgages of after-acquired property are held void, the taking of possession by the mortgagee, even before the rights of third persons intervene, does not change the rule.¹⁵

Statutes. Mortgages of after-acquired property in substitution for, or in addition to, stock or equipment on hand have been held valid within the terms of governing statutes.¹⁶

§ 27. — Possession of Mortgagor

Property not in the mortgagor's actual possession may be mortgaged, if held by one not claiming title, or whose claim is subordinate to the acknowledged owner's right; and property taken from his possession by legal process may be mortgaged.

It is not essential to the validity of a chattel mortgage that the property be in the actual pos-

session of the mortgagor;¹⁷ it is sufficient that it be held by a third person who does not claim title,¹⁸ or whose claim is subordinate to, and by virtue of, the general property and right of the acknowledged owner.¹⁹

Property in custodia legis. Even though the possession of the property has been taken from the mortgagor under process of law pending determination of the ownership thereof,²⁰ or on execution,²¹ the interest remaining in the mortgagor is sufficient to support a mortgage, the mortgagee taking subject to the lien, if any, created by the levy of process.²²

§ 28. — Property Subsequently Severed from the Realty

Growing trees, grass, and shrubs may be conveyed by chattel mortgage, the mortgage working a severance from the realty; but this is not true of articles which are part of the soil.

Growing trees,²³ grass,²⁴ and shrubs,²⁵ although regarded as part of the realty, see the C.J.S. title Property § 7, also 50 C.J. p 753 notes 31-34, have nevertheless been held subject to conveyance by a

Exhaustive discussion

"In *Hamilton v. Rogers*, 3 Md. 301, the subject is exhaustively discussed."—*Grimes v. Clark*, Md., 234 F. 604, 606, 148 C.C.A. 370, affirming, D.C., *Clark v. Grimes*, 232 F. 190, applying Maryland law.

10. U.S.—In re *Dagwell*, D.C.Mich., 263 F. 406, applying Michigan law. Ark.—*Farrow v. Farrow*, 206 S.W. 134, 136 Ark. 140.
Or.—*Kenney v. Hurlburt*, 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann. Cas.1918E 737, modified on other grounds 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737. 11 C.J. p 436 note 31.

11. U.S.—In re *Dagwell*, D.C.Mich., 263 F. 406, applying Michigan law. But it has been held that a provision in a mortgage on stock in trade, which was permitted to remain in mortgagor's possession for sale, that goods purchased to replace those sold should become subject to mortgage, is invalid as against creditor becoming such after execution of mortgage and did not entitle mortgagee to preference to proceeds in hands of receiver.—*Sandy Valley Grocery Co. v. Patrick*, 103 S.W.2d 307, 267 Ky. 768.

12. Ark.—*Farrow v. Farrow*, 206 S.W. 134, 136 Ark. 140.
11 C.J. p 436 note 31 [a] (1).

13. Kan.—*Campbell v. Quinton*, 45 P. 914, 4 Kan.App. 317.

14. Idaho.—*Kettenbach v. Walker*,

186 P. 912, 914, 32 Idaho 544, citing *Corpus Juris*.

Or.—*First Nat. Bank v. Frazier*, 22 P.2d 325, 143 Or. 662.
11 C.J. p 436 note 32.

Defects cured by taking possession generally see *infra* §§ 212-213.

15. U.S.—*Clark v. Grimes*, D.C.Md., 232 F. 190, affirmed *Grimes v. Clark*, 234 F. 604, 148 C.C.A. 370, applying Maryland law.

16. U.S.—In re *Kolb Carton Co.*, C. C.A.Conn., 9 F.2d 706, 709, mandate amended 11 F.2d 1011, applying Connecticut statute.
11 C.J. p 436 note 29.

17. Cal.—*Mitchell v. Wood*, 174 P. 677, 37 Cal.App. 329.
11 C.J. p 433 note 6.

The doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust on personal property not in the possession of the grantor, but in the possession of a third party.—*Fletcher v. Drath*, 66 Mo. 126.

18. Ill.—*Hughes v. Stubblefield*, 21 Ill.App. 216.

19. Ill.—*Hughes v. Stubblefield*, *supra*.

Iowa.—*Brown v. Allen*, 35 Iowa 306.
Ky.—*McCalla v. Bullock*, 2 Bibb 288.

20. Ky.—*Pindell v. Grooms*, 18 B. Mon. 501.

11 C.J. p 433 note 9.
Alienation of property under attachment see Attachment § 240.

21. Ill.—*Gardner v. Bunn*, 23 N.E. 1072, 132 Ill. 403, 7 L.R.A. 729.

Tex.—*Brant v. Lane*, 118 S.W. 229, 139 S.W. 768, 54 Tex.Civ.App. 425.

22. N.Y.—*Thompson v. Van Vechten*, 19 N.Y.Super. 373, modified on other grounds 27 N.Y. 568.

23. Mass.—*Douglas v. Shumway*, 13 Gray 498—*Claffin v. Carpenter*, 4 Metc. 580, 33 Am.D. 381.

Tex.—*Boykin v. Rosenfield*, 9 S.W. 318, 69 Tex. 115.

Mortgages of fruit crops see *infra* § 32 b.

Severance as changing nature of property see the C.J.S. title Logs and Logging § 2, also 50 C.J. p 769 note 19-p 770 note 49, and the C.J.S. title Property § 11, also 50 C.J. p 768 note 91-p 769 note 18.

A mortgage on standing timber, however, is a mortgage on an interest in land.—*Williams v. Hyde*, 57 N.W. 98, 98 Mich. 152.

24. Kan.—*Rath v. Ponsor*, 219 P. 285, 114 Kan. 370.

11 C.J. p 445 note 92 [a] (1).

Hay to be grown from roots already in the ground.—*Nestell v. Hewitt*, 19 Abb.N.Cas.N.Y., 282.

25. N.Y.—*Duffus v. Bangs*, 43 Hun 52, affirmed 25 N.E. 980, 122 N.Y. 423.

A nursery stock, consisting of trees, shrubs, etc., planted for the purpose of trade, is personal property and a chattel mortgage thereof works a severance and is valid.—*Duffus v. Bangs*, *supra*.

Wine plants were held mortgageable.—*Wintermute v. Light*, 46 Barb. N.Y., 278.

chattel mortgage, the mortgage working a severance; but the rule that a chattel mortgage may be valid as working a severance has not been applied to such articles as are parts of the soil itself, such as clay for the making of bricks²⁶ and ores or minerals that have not yet been produced.²⁷

§ 29. — Realty and Personality in Same Mortgage

An instrument mortgaging both realty and personality may be a valid chattel mortgage as to the personality.

An instrument mortgaging both real and personal property may be a valid chattel mortgage as to the personal property included,²⁸ such as rents, issues, use, and profits of land, and crops raised thereon,²⁹ or at least creates a sufficient lien, as between the parties, on the property described.³⁰

§ 30. — Animals

Despite authority opposed, it is settled that the un-

born offspring of domestic animals may be mortgaged along with, or separately from, the females giving them birth, at least if the mortgagor has a present interest in the parent animals. The mortgagee, although having title as against the mortgagor, must take possession of the increase before the nurture period passes to have valid title against third persons.

It has been said that a mortgage of the increase of animals is an exception to the rule that mortgages of after-acquired property are void;³¹ so, although there is authority to the contrary,³² it is well settled that the unborn offspring of domestic animals may properly be mortgaged along with,³³ or even separately from,³⁴ the females which give them birth, at least if such increase is expressly included in the terms of the mortgage,³⁵ and if the mortgagor has a present interest in the animals whose future increase is being mortgaged.³⁶

Possession by mortgagee. Although a chattel mortgage gives the mortgagee title to the increase

26. Kan.—T. B. Townsend Brick, etc., Co. v. Allen, 62 P. 1008, 62 Kan. 311, 84 Am.S.R. 388, 52 L.R.A. 323.

11 C.J. p 446 note 93.

27. Cal.—Western Oil & Refining Co. v. Venango Oil Corporation, App., 16 P.2d 190, 193, quoting the entire section from *Corpus Juris*. Tenn.—Galloway v. Blue Springs Min. Co., Ch.A., 37 S.W. 1016.

28. Cal.—Durst v. Battson, 69 P.2d 992, 9 Cal.2d 156—Bank of Perris v. Sandor, App., 75 P.2d 87.

Colo.—Fisher v. Norman Apartments, 72 P.2d 1092, 101 Colo. 173.

Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908.

11 C.J. p 446 note 99.

Mortgage of realty and personality as realty mortgage see the C.J.S. title Mortgages § 71, also 41 C.J. p 372 notes 33, 34.

"The best test for ascertaining whether or not this instrument constitutes a chattel mortgage is to strike therefrom all of that part which constitutes a real estate mortgage, and then determine whether or not what is left will constitute a valid chattel mortgage."—Farmers' Trust & Savings Bank of Laurens v. Miller, 214 N.W. 646, 547, 203 Iowa 1380.

An instrument containing a trust indenture and chattel mortgage covering real and personal property was held not invalid, as against contention that same instrument could not transfer title to realty and create only mortgage lien on personal property.—Durst v. Battson, Cal., 69 P.2d 992, 9 Cal.2d 156.

29. Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908—Capital City State Bank

v. Riser, 246 N.W. 763, 215 Iowa 680—Farmers' Trust & Savings Bank of Laurens v. Miller, 214 N.W. 546, 203 Iowa 1380.

30. Cal.—Perris v. Sandor, App., 75 P.2d 87.

Mortgage including fixtures

A chattel mortgage was not rendered invalid as between the parties because it included a Diesel engine and a pump which allegedly were fixtures attached to realty.—Bank of Perris v. Sandor, supra.

31. Ariz.—Hagan v. Cowan, 278 P. 68, 35 Ariz. 334.

Kan.—Stockgrowers State Bank v. Park, 54 P.2d 950, 143 Kan. 293.

Mortgages of after-acquired property generally see supra § 26.

Ownership of animals and their increase see Animals § 3.

Doctrine of potential existence

(1) In criticizing Battle Creek Valley Bank v. Madison First Nat. Bank, 88 N.W. 145, 62 Neb. 325, 56 L.R.A. 124, it was declared that the court in that case overlooked one of the qualifications of the rule as to after-acquired property, and that "the increase of cattle would seem logically" to be property "potentially belonging to . . . [the mortgagor] as an incident of other property then in existence and belonging to him."—Hagan v. Cowan, 278 P. 68, 70, 35 Ariz. 334.

(2) Doctrine of potential existence generally see supra § 26 b.

"Familiar rule of law"

That things not in esse at the time a contract, including a chattel mortgage, is made cannot be the subject thereof is the rule within limits, "but there has also been a familiar rule of law in this state for fifty years that a chattel mortgage covering

domestic animals 'and their increase' is valid."—Stockgrowers State Bank v. Park, 54 P.2d 950, 951, 143 Kan. 293.

Analogy to crops not yet planted

(1) "In reason, the same rule should apply to a mortgage of crops not yet planted, as to a mortgage of cattle not yet in utero. And it has been almost universally held that the owner of land might mortgage crops not yet in esse but to be raised in the future."—Hagan v. Cowan, 278 P. 68, 70, 35 Ariz. 334.

(2) Mortgages of unplanted crops see infra § 32 a (2).

32. Iowa.—Thorpe v. Cowles, 7 N.W. 677, 55 Iowa 408.

Neb.—Battle Creek Valley Bank v. Madison First Nat. Bank, 88 N.W. 145, 62 Neb. 325, 56 L.R.A. 124.

33. Cal.—United Bank & Trust Co. of California v. Powers, 265 P. 403, 89 Cal.App. 690.

Ill.—American Trust & Savings Bank v. Gladu, 258 Ill.App. 156.

Kan.—Stockgrowers State Bank v. Park, 54 P.2d 950, 143 Kan. 293.

11 C.J. p 444 note 76.

This rule is grounded on the common-law maxim, Partus sequitur ventrem.—Packwood v. William Atkinson, etc., Co., 31 So. 337, 79 Miss. 646.

Chickens hatched in incubators

Ill.—American Trust & Savings Bank v. Gladu, 258 Ill.App. 156.

34. Me.—Sawyer v. Gerrish, 70 Me. 254, 35 Am.R. 323.

11 C.J. p 444 note 77.

35. Ariz.—Hagan v. Cowan, 278 P. 68, 35 Ariz. 334.

36. Iowa.—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.

as against the mortgagor,³⁷ the mortgagee must take possession of the increase before the period of nurture has passed in order to obtain a valid title as against third persons;³⁸ and, where the mortgage covers a stated number of animals in a larger herd, the mortgagee, in order to preserve the lien, must make a selection during nurture before it becomes impossible to identify the young by reason of their having separated from their mothers.³⁹

§ 31. — Choses in Action

Except where particular statutory provisions are construed otherwise, a chose in action is commonly held mortgageable.

In the absence of statutory restrictions, a chose in action is commonly held a proper subject of a chattel mortgage,⁴⁰ as in the case of book accounts,⁴¹ another chattel mortgage,⁴² a fund in court to be paid to heirs,⁴³ an interest under an executory contract,⁴⁴ a life insurance policy,⁴⁵ a note,⁴⁶ and shares of stock.⁴⁷ However, in some

jurisdictions, under the construction of particular statutory provisions,⁴⁸ or without reference to statutes,⁴⁹ the contrary rule obtains.

§ 32. — Crops

- a. In general
- b. Fruit crops

a. In General

- (1) Crops already planted or growing
- (2) Unplanted crops

(1) Crops Already Planted or Growing

A growing crop is a proper subject of a chattel mortgage even where regarded as part of the realty; and a part of a crop may be mortgaged. A crop is a growing one, in some jurisdictions, when the seed is planted, while other authority requires that it be up.

It has been said to be universally recognized⁵⁰ that a growing crop is a proper subject of a chattel mortgage.⁵¹ This rule has prevailed even where

37. Vt.—Desany v. Thorp, 39 A. 309, 70 Vt. 31.

38. Vt.—Desany v. Thorp, supra. 11 C.J. p 445 note 81.

39. Tex.—Avery v. Popper, Tex., 48 S.W. 572, appeal dismissed 21 S.Ct. 94, 179 U.S. 305, 45 L.Ed. 203.

40. Ky.—Webster v. Industrial Acceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.

S.C.—Alford v. Martin, 180 S.E. 13, 176 S.C. 207.

11 C.J. p 433 note 14.

Mortgages of property not yet acquired or existing generally see supra § 26.

41. Iowa.—Equitable Life Ins. Co. of Iowa v. Brown, 262 N.W. 124, 220 Iowa 585.

N.J.—Gerard Trust Co. v. Standard Gas Co., 115 A. 910, 93 N.J.Eq. 307 —Commercial Trust Co. v. L. Wertheim Coal & Coke Co., 102 A. 448, 88 N.J.Eq. 143—Nugent v. John McNeil Shoe Co., 50 A. 628, 62 N.J.Eq. 583.

11 C.J. p 433 note 15.

But it has been said, "To a mortgage of book accounts I do not understand that the chattel mortgage act applies."—Nash v. Hall, N.J.Ch., 39 A. 374, 376, affirmed 43 A. 633, 58 N.J.Eq. 554.

Mortgage of future accounts see supra § 26 b.

42. S.C.—Alford v. Martin, 180 S.E. 13, 176 S.C. 207.

Tangible chattels included

A chattel mortgage the subject matter of which consisted of furniture and chattel mortgages on furniture which had been sold was held valid.—Alford v. Martin, supra.

43. Ky.—Webster v. Industrial Ac-

ceptance Corporation, 28 S.W.2d 959, 234 Ky. 613.

44. Ky.—Forman v. Proctor, 9 B. Mon. 124.

45. N.Y.—King v. Van Vleck, 16 N. E. 547, 109 N.Y. 363.

46. Iowa.—Equitable Life Ins. Co. of Iowa v. Brown, 262 N.W. 124, 220 Iowa 585.

47. Ind.—Manns v. Brookville Nat. Bank, 73 Ind. 243.

11 C.J. p 433 note 18.

48. La.—Boyd v. Hendrickson, 143 So. 332, 175 La. 377.

11 C.J. p 433 note 13.

Negotiable notes

Vt.—Woodward v. Laporte, 41 A. 443, 70 Vt. 399.

Unpaid legacy

Ohio.—Kilbourne v. Fay, 29 Ohio St. 264, 23 Am.R. 741.

Interest in partnership

Statute providing for mortgage of specific physical things "and all other movable property not specifically named herein" held not to cover interest in partnership.—Boyd v. Hendrickson, 143 So. 332, 333, 175 La. 377.

49. Me. — Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 108 Me. 206.

Ohio.—In re Ehler, 10 Ohio Dec. (Reprint) 439, 21 Cinc.L.Bul. 140, Ohio Prob. 186.

"In enumerating choses in action as personal property that is mortgageable, it is evident that law writers sometimes mean that they are subject to common law mortgages and assignments without reference to chattel mortgages."—Woodward v. Laporte, 41 A. 443, 444, 70 Vt. 399, 402.

Mortgage as pledge or assignment

Me.—Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 845, 108 Me. 206.

Ohio.—In re Ehler, 10 Ohio Dec. (Reprint) 439, 21 Cinc.L.Bul. 140, Ohio Prob. 186.

50. Wash.—Kirby v. First Nat. Bank, 239 P. 556, 136 Wash. 214, setting aside departmental opinion on rehearing 229 P. 305, 131 Wash. 204.

51. Ariz.—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188.

Colo.—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

Mont.—N Bar N Land & Livestock Co. v. Taylor, 22 P.2d 313, 314, 94 Mont. 350, citing *Corpus Juris*—

Moccasin State Bank v. Waldron, 264 P. 940, 81 Mont. 579—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 80 Mont. 593.

Tex.—Sanger Bros. v. Hunsucker, Civ.App., 212 S.W. 514, error dismissed 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443.

Wash.—Kirby v. First Nat. Bank, 239 P. 556, 136 Wash. 214, setting aside departmental opinion on rehearing 229 P. 305, 131 Wash. 204. 11 C.J. p 442 note 68.

"At the common law a mortgage upon a crop already planted was recognized as valid."—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188.

So under statute

Mont.—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 80 Mont. 593.

Amount of labor necessary to be performed by the mortgagor before the fruit of his labor may be reaped is immaterial.—Thomas v. Prairie

the crop was regarded as part of the realty.⁵² A part of a crop may be mortgaged provided it be sufficiently described.⁵³

The requirement, in some jurisdictions, that the mortgagor have some interest in the land on which the crop is to be raised, at the time of the execution of the mortgage, is considered in § 24 supra.

What constitutes growing crop. A crop has been held to be a growing one, within the rule that a mortgage may be made on a growing crop, from the time when the seed is placed in the ground,⁵⁴ but in at least one jurisdiction a mortgage cannot be given on a crop before it is up or presents the appearance of a growing crop.⁵⁵

(2) Unplanted Crops

At law, apart from controlling statutes, it is the general rule that a mortgage of unplanted crops is valid, in some instances on the theory that the crop has a potential existence; but some jurisdictions hold such mortgages void as being on property not in existence. In equity, such a mortgage is held valid between the parties and against persons other than bona fide purchasers or incumbrancers without notice. Authorities differ on whether a new act, such as the mortgagee's taking possession after the planting, is necessary.

At law, it is the general rule, said to be followed in most jurisdictions,⁵⁶ that a mortgage of crops to be grown in the future from seeds not yet sown is regarded as valid,⁵⁷ covering the crops upon

Home Co-operative Co., 237 N.W. 673, 676, 121 Neb. 603, citing *Corpus Juris*.

52. Mont.—Demers v. Graham, 93 P. 263, 36 Mont. 402, 122 Am.S.R. 384, 14 L.R.A., N.S., 431, 13 Ann.Cas. 97. Mortgages of fruit crops regarded as part of realty see *infra* § 32 b. Property subsequently severed from realty see *supra* § 23.

Potential interest in land

"At the common law growing crops were a part of the realty and passed with the title, but by a fiction of the law now created by statute and judicial decision crops growing or to be grown on land may be severed where the mortgagor has a potential interest in the land at the time the mortgage is given. When this is done the crops become chattels and subject to the rules governing that branch of the law."—Sugg v. Davis, 115 So. 152, 153, 22 Ala.App. 281, certiorari denied 115 So. 153, 217 Ala. 191.

53. Minn.—Prentice v. Nutter, 25 Minn. 484.

Mont.—Ford v. Sutherland, 2 Mont. 440.

Tenn.—Williamson v. Steele, 3 Lea 527, 31 Am.R. 652.

Sufficiency of description of part of crop see *infra* § 67.

54. Ala.—Wilkinson v. Ketler, 69 Ala. 435, 440.

11 C.J. p 442 note 69.

Reason for rule

"When must a planted crop be treated as a growing crop? If we were to enter upon the inquiry, what time is necessary for the germination of planted seed, we should encounter difficulties the shrewdest sagacity can not foreknow. Attending conditions enter materially into this inquiry. The many species of seeds employed in agriculture, have different periods for germination. The seasons—heat and moisture, or their absence—are factors in the solution of this problem. We think the only reasonable solution is, to hold

that the crop must be treated as growing, from the time the seed is deposited in the ground."—Wilkinson v. Ketler, *supra*.

55. Wis.—Kohler Improvement Co. v. Preder, 259 N.W. 833, 217 Wis. 641—Comstock v. Scales, 7 Wis. 159.

Mortgage as revocable license

Rule that crop cannot be mortgaged before it is in existence is not in conflict with statute providing that parties may effect a present sale of future goods, since neither mortgagee nor buyer of future goods has a right to specific performance, the buyer being confined to an action for breach of contract, while clause in chattel mortgage covering after-acquired property is a mere license, revocable at will of mortgagor, uncoupled with any interest.—Kohler Improvement Co. v. Preder, 259 N.W. 833, 217 Wis. 641.

Hay crop

Under chattel mortgage executed March 26, 1933, which gave mortgagee a lien on crops to be raised on a farm, mortgagee held entitled to a lien on the hay crop, which was seeded in 1932, produced a crop in 1932, and reproduced a crop in 1933.—Kohler Improvement Co. v. Preder, *supra*.

56. Ariz.—Hagan v. Cowan, 278 P. 63, 35 Ariz. 334.

Tenn.—Cunningham v. Moore, 29 S.W.2d 654, 161 Tenn. 128.

57. U.S.—In re Cook, D.C.Md., 9 F. Supp. 764, applying Maryland law. Ariz.—Hagan v. Cowan, 278 P. 63, 35 Ariz. 334—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 138.

Cal.—First Nat. Bank of Oakdale v. Brashear, 253 P. 143, 200 Cal. 389. Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908, 911, quoting the entire section from *Corpus Juris*—Equitable Life Ins. Co. of Iowa v. Brown, 262 N.W. 124, 220 Iowa 585—Fawcett Inv. Co. v. Rullestad, 253 N.W. 131,

218 Iowa 654, 94 A.L.R. 800—Equitable Life Ins. Co. v. Read, 246 N.W. 779, 215 Iowa 700—Farmers' Trust & Savings Bank of Laurens v. Miller, 214 N.W. 546, 203 Iowa 1380—Weyrauch v. Johnson, 208 N.W. 706, 201 Iowa 1197.

Mich.—In re Miller, 221 N.W. 146, 244 Mich. 302.

Mont.—Moccasin State Bank v. Waldron, 264 P. 940, 81 Mont. 579.

Tenn.—Cunningham v. Moore, 29 S.W.2d 654, 161 Tenn. 128—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn.App. 436.

Tex.—Bowyer v. Beardon, 291 S.W. 219, 116 Tex. 337—South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521, affirming South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ.App., 269 S.W. 1097—First Nat. Bank v. American Trust & Savings Bank of El Paso, Civ.App., 1 S.W.2d 437—Waters v. B. F. Ellington & Co., Civ.App., 289 S.W. 417—Sanger Bros. v. Hunsucker, Civ.App., 212 S.W. 514, error dismissed 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443—Williams v. King, Civ.App., 206 S.W. 106.

11 C.J. p 444 note 73.

Difficulty of description

(1) "As will be apparent from an examination of the authorities, the difficulty in those cases of chattel mortgage upon crops to be planted and the like has not been one of the legality of the subject-matter, but rather one of describing or identifying any property at all."—Bowyer v. Beardon, 291 S.W. 219, 222, 116 Tex. 337.

(2) Sufficiency of description of crops not yet planted see *infra* § 67.

Effect of subsequent events

Validity of crop mortgage for current and succeeding years is not, in the absence of other circumstances, affected by mortgagee's refusal to finance mortgagor in succeeding year, and "the mortgages being valid when executed, they remain so, unaffected by subsequent events and develop-

their being planted⁵⁸ or when they come into existence,⁵⁹ on the theory that the crop has a potential existence sufficient to give the mortgage validity;⁶⁰ in some jurisdictions, however, such a mortgage is held invalid at law as being a mortgage on property not in existence.⁶¹

In equity, a mortgage of unplanted crops has been regarded as valid as between the parties, or as conferring a lien on the crop, on its coming into existence, which a court of equity will enforce against persons other than bona fide purchasers or encumbrancers without notice;⁶² and an agree-

ments of that nature."—First Nat. Bank v. American Trust & Savings Bank of El Paso, Tex.Civ.App., 1 S. W.2d 437, 438.

Sales Act provision against sale of future goods of which seller has potential possession is inapplicable to chattel mortgage on crops to be grown.—Cunningham v. Moore, 29 S. W.2d 654, 161 Tenn. 128.

As between original parties

A chattel mortgage upon an unplanted crop, which is afterward planted and grown, may be enforced as between the original parties, where no rights of third persons are thereby affected.—Beall v. Spear, 189 P. 938, 106 Kan. 690.

As to third parties

"In a very few jurisdictions it seems to be the law that mortgages of crops not yet planted are void as to third parties. The vast majority of the cases, however, is opposed to this view."—First Nat. Bank v. Johnson, 297 S.W. 724, 725, 221 Mo. App. 31.

Subsequent mortgagee with notice

A mortgage of unplanted crops is valid as against a subsequent mortgagee with actual notice of the previous mortgage.—J. I. Case Threshing Mach. Co. v. Glass & Bryant Mercantile Co., 223 P. 35, 74 Colo. 535.

In New Mexico

(1) Where a statute, repealing a former statute, made growing crops mortgageable, it was held that the validity of mortgages of crops not yet planted was to be determined by the common law.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 739, 36 N.M. 332, citing *Corpus Juris*.

(2) In interpreting the same statutes it has also been held in a Texas case that "the plain implication was that unplanted crops remained not subject to mortgage."—American Trust & Savings Bank v. Cotton Finance & Trading Corporation, Tex. Civ.App., 10 S.W.2d 186.

58. Ariz.—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188. Tex.—Williams v. King, Civ.App., 206 S.W. 106.

59. Iowa.—Farmers' Trust & Savings Bank of Laurens v. Miller, 214 N.W. 546; 203 Iowa 1380.

Tex.—Waters v. B. F. Ellington & Co., Civ.App., 289 S.W. 417.

Mortgagor's loss of right to crop

Where mortgagor of his potential

interest in unplanted crop subsequently loses his right to the crop prior to time crop is planted, mortgagee of such crop from such person acquires no interest therein, since a crop does not come into existence until planted.—Zeigler v. Citizens' Bank of Venus, Tex.Civ.App., 79 S.W. 2d 662, error refused.

60. Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn. App. 486.

Tex.—Sanger Bros. v. Hunsucker, Civ.App., 212 S.W. 514, 516, error dismissed 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443.

11 C.J. p 444 note 73.

Dictum Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 33, 44 Idaho 332, citing *Corpus Juris*.

"The crop is considered as having a potential existence, and, having such potential existence, it may be assigned or mortgaged before the crop is actually planted, as well as thereafter while growing."—Sanger Bros. v. Hunsucker, supra.

Doctrine of potential existence see supra § 26 b.

61. U.S.—Swenson v. Laird, C.C.A. Neb., 14 F.2d 917, applying Nebraska law.

Colo.—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

Kan.—Danville State Bank v. May, 271 P. 302, 126 Kan. 714.

Ky.—Hutchinson v. Ford, 9 Bush 318, 15 Am.R. 711.

Wis.—Kohler Improvement Co. v. Preder, 259 N.W. 333, 217 Wis. 641. 11 C.J. p 443 note 70.

Mortgage of property not yet acquired or existing generally see supra § 26.

At common law

(1) "The authorities all agree that under the strict and ancient common law an unplanted crop was not the subject of a valid deed of trust or mortgage, even as between the parties thereto."—Coffey v. Land, Miss., 167 So. 49.

(2) At common law a mortgage of a crop not planted at the date of giving mortgage was invalid. "The reason . . . was because a mortgage under the common law was treated as a conveyance that had the effect of changing the title of property from the mortgagor to the mortgagee; it was a sale of the property to the mortgagee with a defeasance clause. Since a sale or transfer of property not in esse

could have nothing to operate on, a mortgage of it was considered and treated as ineffectual to pass title, and therefore void."—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188.

Mortgage clause in farm lease

U.S.—Swenson v. Laird, C.C.A.Neb., 14 F.2d 917.

In New York

(1) A mortgage on future crops is void against a subsequent purchaser at an execution sale.—Rochester Distilling Co. v. Rasey, 37 N.E. 632, 142 N.Y. 570, 40 Am.S.R. 635, affirming 65 Hun 512, 20 N.Y.S. 583.

(2) A mortgage on a crop not planted is invalid at law as against a purchaser after it was gathered.—Cressey v. Sabre, 17 Hun 120.

(3) It has, however, been held that a provision in a lease for a lien on crops to be raised on the leased premises, securing the payment of rent to the landlord, is valid.—Smith v. Taber, 46 Hun 313—11 C.J. p 443 note 70 [b] (3).

"A contract to give a mortgage on a crop of wheat not yet sown and not in existence is not valid or effective in law as against third parties who have had no notice."—Schmidt v. Plummer, 37 P.2d 1, 140 Kan. 436.

Trust deed given three years before planting of crop could not be considered chattel mortgage thereof, since "a chattel mortgage, to be valid, must be of a crop then growing."—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

62. Ariz.—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 278, 30 Ariz. 188, citing *Corpus Juris*.

Colo.—J. I. Case Threshing Mach. Co. v. Glass & Bryant Mercantile Co., 223 P. 35, 74 Colo. 535, quoting *Corpus Juris*—First Nat. Bank v. Felter, 176 P. 496, 65 Colo. 370. Iowa.—Equitable Life Assur. Soc. v. Hastings, 273 N.W. 908, 911, quoting *Corpus Juris*.

Mass.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424.

Mo.—Langford v. Fanning, App., 7 S. W.2d 726, 728, citing *Corpus Juris*—First Nat. Bank v. Johnson, 297 S.W. 724, 221 Mo.App. 31—Klebba v. Missouri Meerscham Co., App., 257 S.W. 174.

N.M.—Morrison & Pardue v. Roberts-Dearborne Hardware Co., 14 P.2d 738, 36 N.M. 332.

ment, with respect to a crop not yet planted, to execute a mortgage upon it when it is growing, may likewise be enforced in equity, as between the parties, in proper circumstances.⁶³

In some jurisdictions having statutory provisions

relating to mortgages of unplanted crops, such mortgages have been held valid or invalid, pursuant to or apart from, or without reference to, the statutory provisions.⁶⁴

The requirement, in some jurisdictions, that the

Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

Tex.—Perkins v. Alexander, Civ.App., 209 S.W. 789.

11 C.J. p 443 note 71.

Commencement of lien generally see infra § 290.

Interest to which lien attaches generally see infra § 291.

"General rule"

"In some jurisdictions mortgages of future crops are specifically legalized by statute, and in jurisdictions that do not have such a statute, as in this state, the general rule is that in equity a mortgage on unplanted crops is enforceable and an equitable lien is thereby created."—First Nat. Bank v. Johnson, 297 S.W. 724, 725, 221 Mo.App. 31.

As equitable mortgage

(1) "If, after giving such a mortgage [on crops to be grown], the mortgagor goes ahead and plants the crops contemplated and intended to be mortgaged, and thereby gives it potential existence, we believe the courts generally hold the instrument from that time to be an equitable mortgage, and good not only as to the parties, but also as to purchasers and incumbrancers with notice."—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 278, 30 Ariz. 188.

(2) "The crops . . . had what is termed a 'potential existence,' and a mortgage of them, though not good as a conveyance or a reservation, was valid as an executory agreement. . . . Such an agreement is enforceable in equity, and hence is called an 'equitable mortgage.'"—Kelley v. Goodwin, 50 A. 711, 712, 95 Me. 538.

Under lien theory

"If under the common law, where the mortgagee took legal title, his mortgage upon an unplanted crop, although invalid when given, becomes valid in equity upon the planting of crop and binding upon the parties and all persons having notice, the same result must follow in those jurisdictions holding the mortgagee's interest limited to a lien," and a mortgage given before crop was planted becomes operative immediately on planting crop.—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188.

Validity as against particular persons

(1) Subsequent mortgagee with notice.—Morrison & Pardue v. Rob-

erts-Dearborne Hardware Co., 14 P. 2d 738, 36 N.M. 332.

(2) Mortgagor's administrator.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424.

(3) Mortgagor's assignee.—Cheatham v. Tennell, Ky., 186 S.W. 128.

63. Kan.—Danville State Bank v. May, 271 P. 302, 126 Kan. 714.
Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598.

64. In Alabama

(1) Under a statutory provision to the effect that a mortgage of unplanted crops executed during the year in which the crops are grown conveys the legal title thereto, such a mortgage conveys legal title to the crop from the moment of execution.—First Nat. Bank v. Crawford, 149 So. 228, 227 Ala. 188, denying certiorari 149 So. 230, 25 Ala.App. 463—11 C.J. p 443 note 72 [a] (1).

(2) Thus a mortgage on 1931 crops, executed in January and payable in March, was not void on ground mortgage became due before 1931 crops could be raised and gathered.—First Nat. Bank v. Crawford, supra.

(3) It has also been held under this provision that a mortgage of unplanted crops, executed after January 1 of year in which crops are to be grown, conveys legal title thereto only when "crops" have potential existence.—First Nat. Bank v. Crawford, supra.

(4) Under such provision, or without reference thereto, a mortgage of crops to be grown in subsequent years is held not to pass the legal title to such crops, but merely an equitable right or lien.—White v. Kinney, 101 So. 426, 211 Ala. 624—Butler Cotton Oil Co. v. Collins, 75 So. 975, 200 Ala. 217—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala. App. 130—Sansom v. Covington County Bank, 87 So. 406, 17 Ala.App. 556, certiorari denied Ex parte Sansom, 87 So. 408, 205 Ala. 54—11 C.J. p 443 note 72 [a] (2).

(5) And a mortgage on crops grown during one year, and thereafter until indebtedness secured was paid, conveyed title to crops for that year and created lien on crops for subsequent years.—Whaley v. Bright, 66 So. 644, 189 Ala. 134—W. B. Smith & Sons v. Gay, supra.

(6) The mortgage or lien has been held valid as against third persons with notice thereof.—Houston Nat. Bank of Dothan v. J. T. Edmonson

& Co., 75 So. 568, 200 Ala. 120—Kilgore v. Jones, 73 So. 832, 15 Ala.App. 472.

(7) Thus a court of equity will protect and enforce the lien of a chattel mortgage on crops to be planted as against any subsequent purchaser with notice.—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., supra.

(8) And the contract rights of a daughter in crops raised on land rented by her father, of which crops she became a tenant in common, were held subordinate to the father's crop mortgage if the daughter had notice of the mortgage at the time of contracting.—Kilgore v. Jones, supra.

(9) When a crop to be grown comes into existence, and is delivered to the mortgagee, his legal title has been held to be complete.—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., supra.

(10) Construing an amendment to the above provision which provided that "mortgages of crops to be grown in the year subsequent to the year in which the debt secured by the mortgage matures, and all contracts to execute such mortgage shall be null and void," it was held that "the purpose and effect of the . . . [amendment] was to deny the power to such mortgagors to incumber their crops, by equitable lien or title, except as to crops grown on land which the mortgagor owned or had a present interest in when the mortgage was given, during the year or years in which the debt secured by the mortgage, by its terms, matured."—Shaw v. Kinney, 149 So. 227, 227 Ala. 170.

(11) Thus, where mortgage on crops was executed by landowner in December, 1930, securing debt maturing in 1931, mortgage vested in mortgagee equitable title to 1931 crops.—Shaw v. Kinney, supra.

(12) Prior to the statute, a mortgage on an unplanted crop did not convey legal title, but created an equitable title and interest.—Whittleshoffer v. Strauss, 3 So. 524, 83 Ala. 517—11 C.J. p 443 note 72 [a] (4).

In Arkansas

(1) Under statutory provisions to the effect that mortgages on planted and unplanted crops shall be as effective as mortgages on property in being, and that such mortgages are valid as to crops grown within twelve months from the execution of the mortgage, mortgages of unplanted

mortgagor have some interest in the land on which the crop is to be raised, at the time of the execution of the mortgage, is considered in § 24 supra. *Intervention of new act.* Some authorities re-

ed crops are held valid.—*Delta Cotton Co. v. Arkansas Cotton Oil Co.*, 97 S.W. 440, 80 Ark. 431—11 C.J. p 443 note 72 [b] (1).

(2) It will not be presumed that the parties contracted for crops to be grown after such time.—*Word v. Cole*, 183 S.W. 757, 122 Ark. 457.

(3) Prior to the statute, mortgages on unplanted crops were void.—*Roberts v. Jacks*, 31 Ark. 597, 25 Am.R. 584—*Tomlinson v. Greenfield*, 31 Ark. 557—*Hamlett v. Tallman*, 30 Ark. 505.

In Dakota Territory, under a statutory provision to the effect that an agreement may be made to create a lien on property not yet acquired or existing, a mortgage of crops not yet planted was held valid.—*Grand Forks Nat. Bank v. Minnesota, etc.*, El. Co., 43 N.W. 806, 6 Dak. 357—11 C.J. p 443 note 72 [c].

In Georgia

(1) Under a statutory provision that "a mortgage given to secure advances for the purpose of making and gathering crops, shall embrace and cover crops before the same are planted or growing of such mortgagor, when it is so stipulated therein, within the limit of the calendar year such crops may be planted," a crop mortgage executed on December 20 for making a crop to be grown during the following year is valid, since the advances, not the mortgage, must be given during the calendar year.—*J. S. Cowart & Son v. Talliaferro*, 163 S.E. 271, 272, 45 Ga. App. 93.

(2) Not only must the mortgage stipulate that it was given to secure such advances, but the advances must actually be given for that purpose.—*Dawson Nat. Bank v. Bank of Dawson*, 155 S.E. 791, 42 Ga.App. 300.

(3) Without reference to the statute, it has been held that a mortgage of unplanted crops is invalid unless given in consideration of advances made for the cultivation of the crops.—*First Joint Stock Land Bank v. Moultrie Banking Co.*, 176 S.E. 791, 49 Ga.App. 759.

(4) Prior to the statute referred to in (1) supra, a mortgage of an unplanted crop was invalid.—*Cusseta Bank v. Ellaville Guano Co.*, 85 S.E. 119, 143 Ga. 312.

(5) However, a lien under a statute providing for a special lien for fertilizers was held not subject to the rule that mortgages of unplanted crops are invalid.—*Hardwick v. Burtz*, 59 Ga. 773.

In Idaho

(1) Under a statutory provision to the effect that a chattel mortgage may be made upon crops to be grown

and sown in the future, such mortgages have been held valid.—*Collins v. Brown*, 114 P. 671, 19 Idaho 360.

(2) So apart from statute.—*Twin Falls Bank & Trust Co. v. Weinberg*, 257 P. 31, 44 Idaho 332.

(3) A chattel mortgage executed in January, 1890, upon the crop of wheat that might be sown and grown during that year was held a valid lien on the crop under the governing statutes.—*Pierce v. Langdon*, 28 P. 401, 3 Idaho 141.

In Minnesota

(1) Under a statutory provision to the effect that mortgages of unplanted crops, more than one year before the seed is sown, are void, unless the mortgage is given to secure the purchase price of the land on which the crops may be planted, a mortgage not satisfying the statutory conditions is void.—*Ward v. Rippe*, 100 N.W. 386, 93 Minn. 36.

(2) Under this statute a mortgage executed August 15 of crops to be grown for the next year is good.—*Piano Mfg. Co. v. Halberg*, 63 N.W. 1114, 61 Minn. 528.

(3) Subject to the limitations imposed by this statute, and before its enactment, chattel mortgages on crops not yet planted have been sustained.—*Hogan v. Atlantic El. Co.*, 69 N.W. 1, 66 Minn. 344—11 C.J. p 443 note 72 [e] (3).

In Mississippi

(1) It has been held, under a statute so providing, that a mortgage can be made on crops to be produced within fifteen months after the execution of the mortgage.—*Betts v. Ratliff*, 50 Miss. 561.

(2) But mortgages of crops to be produced have been held valid independently of such statute.—*White v. Thomas*, 52 Miss. 49—11 C.J. p 443 note 72 [d].

(3) Without reference to statute, a mortgage has been held valid only if it is on crops of a certain year to secure advances made during that year to produce such crops; and if a mortgage of unplanted crops covers the crops of subsequent years, it constitutes, as to such crops, an equitable mortgage enforceable only between the parties.—*Butler Mercantile Co. v. Cruise*, 166 So. 325, 175 Miss. 200.

(4) It has also been held that "a mortgage or deed of trust may be given, good at law, upon a crop to be produced during the year in which the deed of trust or mortgage is executed, and this may be before the crop of that particular year is planted, and may be given even before the beginning of the year, if so closely connected both in point of time and

in purpose that it may be said that preparations were then being made for the planting and production of the particular next succeeding annual crop."—*Coffey v. Land*, 167 So. 49, 51.

In North Carolina

(1) Under, or without reference to, a statute providing that a lien may be had, by one advancing money for the cultivation of crops, on the crops made within one year from the date of the agreement for the lien, a chattel mortgage on crops to be grown during the following year is held valid.—*Warrington v. Hardison*, 116 S.E. 166, 185 N.C. 76—*Hurley v. Ray*, 76 S.E. 234, 160 N.C. 376—11 C.J. p 443 note 72 [f] (1).

(2) If the conveyance is silent as to how long the mortgage is intended to continue, it is valid only as to the crops raised during the year next after its execution.—*Smith v. Coor*, 10 S.E. 466, 104 N.C. 139—*Wooten v. Hill*, 3 S.E. 846, 98 N.C. 48.

In North Dakota, under statutory provisions to the effect that an agreement may be made to create a lien on property not yet acquired or existing, and that such a lien by contract shall attach only to the crop next maturing after the delivery of such contract, a mortgage of unplanted crops next maturing after the execution and delivery of the mortgage is valid.—*Thompson Yards v. Richardson*, 199 N.W. 863, 51 N. D. 241—11 C.J. p 443 note 72 [g].

In Oklahoma

(1) A mortgage of unplanted crops has been held valid under a statute providing in effect that a mortgage of planted or unplanted crops shall have the same force and effect to bind the crops as other mortgages have to bind property in being.—*Smith v. La Fayette*, 119 P. 979, 29 Okl. 671.

(2) Such a mortgage is also valid under an apparently different statute to the effect that an agreement may be made to create a lien on property not yet acquired or existing.—*Allis Chalmers Mfg. Co. v. Security Elevator Co.*, 38 P.2d 138, 140 Kan. 580, applying Oklahoma statute.—*Eckles v. Ray*, 75 P. 286, 13 Okl. 541.

In South Dakota, under a statute providing, among other things, that an agreement may be made to create a lien on property not yet acquired or not in existence, a tenant's interest in crops to be grown under a crop-sharing lease is mortgageable.—*National Bank of Wheaton, Minn. v. Elkins*, 159 N.W. 60, 37 S.D. 479.

In Washington, under statutory provisions to that effect, a mortgage made on a crop before it is planted, is valid as to crops grown within

gard a mortgage as ineffective to convey the legal title to unplanted crops,⁶⁵ or to create a lien thereon,⁶⁶ until the intervention of some new act, such as the mortgagee's taking possession,⁶⁷ actual or constructive,⁶⁸ of the crop after it has been planted, and before the rights of third parties become fixed;⁶⁹ but there is also authority for the view that such a mortgage is valid without any new act.⁷⁰

b. Fruit Crops

A fruit crop is held a proper subject of a chattel mortgage, whether regarded as realty or as personalty. Under governing statutes, a mortgage of a growing fruit crop has been held mortgageable, but mortgages of fruit

crops to be grown have been variously held valid and invalid.

In the absence of statute, a fruit crop, whether regarded as a perennial crop and part of the realty,⁷¹ or as the same as an annual crop, and, therefore, personalty,⁷² is held to be a proper subject of a chattel mortgage.

Where mortgages of fruit crops are held to be authorized only by a statute authorizing the mortgaging of growing crops, a growing fruit crop may be the proper subject of a chattel mortgage.⁷³ Under such construction, chattel mortgages of fruit crops not yet growing are held void;⁷⁴ but under a stat-

twelve months from the execution thereof.—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483.

65. Ala.—Hurst v. Bell, 72 Ala. 336. Mo.—Langford v. Fanning, App., 7 S.W.2d 726.

Requirement of new act as to mortgages of after-acquired property generally see *supra* § 26 d.

66. Neb.—Nelson v. State, 238 N.W. 110, 112, 121 Neb. 658—State Bank of Gering v. Grover, 193 N.W. 765, 766, 110 Neb. 421.

Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

The rule is well established in this state that a chattel mortgage on an unplanted crop is ineffectual to create a lien, either legal or equitable, in favor of the mortgagee until the intervening of some new act, as where the mortgagee takes possession of the property after being planted.—Nelson v. State, 238 N.W. 110, 112, 121 Neb. 658—State Bank of Gering v. Grover, 193 N.W. 765, 766, 110 Neb. 421.

67. Mo.—Langford v. Fanning, App., 7 S.W.2d 726.

Neb.—Nelson v. State, 238 N.W. 110, 121 Neb. 658—State Bank of Gering v. Grover, 193 N.W. 765, 110 Neb. 421.

68. Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

69. Mo.—Langford v. Fanning, App., 7 S.W.2d 726.

70. Mass.—Parsons v. American Agr. Chemical Co., 182 N.E. 863, 280 Mass. 424.

Neither delivery nor possession

A recorded mortgage of a future crop is valid as against the mortgagor's administrator notwithstanding the mortgagee never received delivery nor took possession of the crop.—Parsons v. American Agr. Chemical Co., *supra*.

71. Ga.—A. J. Evans Marketing Agency v. Federated Growers'

Credit Corporation, 165 S.E. 114, 118, 175 Ga. 294.

Analogy to turpentine crop

(1) "A peach crop is very similar . . . to a crop of turpentine. The turpentine, until separated from the tree, is a part of the realty. After such separation it is personalty. . . . No one can doubt that turpentine in pine trees may be sold or incumbered before the trees are even cut."—A. J. Evans Marketing Agency v. Federated Growers' Credit Corporation, *supra*.

(2) Property subsequently severed from realty see *supra* § 28.

Foreclosure after crop gathered

After peaches are gathered, mortgage liens against peach crop may be foreclosed as on personalty.—A. J. Evans Marketing Agency v. Federated Growers' Credit Corporation, *supra*.

72. Cal.—Congdon v. G. M. H. Wagner & Sons, 278 P. 863, 865, 207 Cal. 373.

Idaho.—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 33, 44 Idaho 332, 54 A.L.R. 1527.

"A growing crop of fruit occupied the same relation to the land as a growing crop of grain, and as fructus industriales was personal property which might properly be subjected to a chattel mortgage."—Congdon v. G. M. H. Wagner & Sons, *supra*.

"That an apple crop is personal property, and would be subject to chattel mortgage in the absence of statute, is, no doubt, the modern rule."—Twin Falls Bank & Trust Co. v. Weinberg, *supra*.

73. Wash.—Stuhlmiller v. Stuhlmiller, 248 P. 393, 140 Wash. 175—Kennewick Supply & Storage Co. v. Hembree, 233 P. 660, 133 Wash. 697, affirmed 236 P. 808, 133 Wash. 341—Kennewick Supply & Storage Co. v. Fry, 233 P. 658, 133 Wash. 341, affirmed 236 P. 808, 133 Wash. 341.

What constitutes "growing" fruit crop

(1) A fruit crop "is not a growing

crop within the meaning of our chattel mortgage statute at any time prior to the preceding dormant winter period."—Stuhlmiller v. Stuhlmiller, 248 P. 393, 394, 140 Wash. 175.

(2) As applied to a fruit crop, the words "growing crops" must be held to relate only to crops grown and harvested the year the chattel mortgage is given.—Kennewick Supply & Storage Co. v. Hembree, 233 P. 660, 133 Wash. 697, affirmed 236 P. 808, 133 Wash. 341—Kennewick Supply & Storage Co. v. Fry, 233 P. 658, 133 Wash. 341, affirmed 236 P. 808, 133 Wash. 341.

(3) "It cannot be held that the commencement of the formation of the 'fruit buds' in a given year constitutes a portion of the period of the growing of the crop of the succeeding year any more than it can be held that the growth of the tree in other respects during the prior years of its life constitutes a part of the period of the growing of the crop of succeeding years."—Stuhlmiller v. Stuhlmiller, *supra*—Kennewick Supply & Storage Co. v. Hembree, 233 P. 660, 133 Wash. 697, affirmed 236 P. 808, 133 Wash. 341—Kennewick Supply & Storage Co. v. Fry, 233 P. 658, 133 Wash. 641, affirmed 236 P. 808, 133 Wash. 341.

74. Wash.—Stuhlmiller v. Stuhlmiller, 248 P. 393, 140 Wash. 175—Kennewick Supply & Storage Co. v. Hembree, 233 P. 660, 133 Wash. 697, affirmed 236 P. 808, 133 Wash. 341—Kennewick Supply & Storage Co. v. Fry, 233 P. 658, 133 Wash. 341, affirmed 236 P. 808, 133 Wash. 341.

Fruit crop not grown from seed sown or planted

Under a statute permitting mortgages "upon growing crops and upon crops before the seed thereof shall have been sown or planted," with the provision as to crops grown from seed sown or planted that the mortgaging for more than a year in advance is forbidden, it was held that a crop of fruit was not a crop grown from "seed that are sown or planted" and that, therefore, only a

ute permitting chattel mortgages of crops to be "sown and grown," a chattel mortgage of fruit crops not yet grown is valid.⁷⁵

§ 33. — Fixtures

Chattels incorporated with the land as fixtures will not pass by chattel mortgage, but attached chattels remaining personalty may be so encumbered; thus a building may be the subject of a chattel mortgage if movable by agreement with the landowner. A chattel mortgagee may not remove a chattel or building, or foreclose on a building, if his mortgagor does not obtain, or has lost, the right of removal.

Where chattels have been so incorporated with the land as to assume the character of fixtures, they will not pass under a chattel mortgage;⁷⁶ but if their character as personalty is retained, they may be so encumbered, although attached to the realty.⁷⁷ Thus, although ordinarily, a building on land is not regarded as the proper subject of a chattel mortgage,⁷⁸ yet, if a building is erected by one person on the land of another, under an agreement with the owner of the land that it may be moved, it re-

mains personalty, and may be the subject of a chattel mortgage,⁷⁹ as where it is erected by a lessee under such agreement,⁸⁰ although prima facie a part of the freehold.⁸¹

Mortgagor's lack of right of removal. As is stated in § 23 a supra, a mortgagor can convey by mortgage only that interest in property which he possesses; thus, if the mortgagor is a tenant of the realty to which a chattel is annexed,⁸² or on which a building is erected,⁸³ and does not obtain, or has lost, the right to remove the property, his mortgagee does not have that right; nor can the mortgagee of a building which became the property of the landowner, and which the tenant could neither remove or sell, foreclose his mortgage thereon.⁸⁴

Under a statute providing that any interest in real property capable of being transferred may be mortgaged, it has been held that personal property which, through being attached to land, has become a part of the realty may still be mortgaged separately from the land itself;⁸⁵ and under a statute

"growing" fruit crop could be mortgaged.—*Stuhlmiller v. Stuhlmiller*, 248 P. 393, 140 Wash. 175—*Kennewick Supply & Storage Co. v. Hembree*, 233 P. 660, 133 Wash. 697, affirmed 236 P. 808, 133 Wash. 341—*Kennewick Supply & Storage Co. v. Fry*, 233 P. 658, 133 Wash. 341, affirmed 236 P. 808, 133 Wash. 341.

75. Idaho. — *Twin Falls Bank & Trust Co. v. Weinberg*, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527, not following *Stuhlmiller v. Stuhlmiller*, 248 P. 393, 140 Wash. 175, and *Kennewick Supply & Storage Co. v. Fry*, 233 P. 658, 133 Wash. 341, affirmed 236 P. 808, 133 Wash. 341.

76. U.S.—*Humboldt F. Ins. Co. v. W. H. Ashley Silk Co.*, N.J., 185 F. 54, 107 C.C.A. 274. 11 C.J. p 445 note 83.

77. Ohio.—*Frigidaire Sales Corporation v. Katz*, 29 Ohio N.P., N.S., 595. 11 C.J. p 445 note 84.

Contract preserving personalty status

Where electric refrigerators were sold under a contract containing a chattel mortgage provision and stipulating that the refrigerators were to be so installed as to be removable without damage to the premises, the provisions of the contract preserved the status of the property as personalty, and the mortgage was valid.—*Frigidaire Sales Corporation v. Katz*, supra.

78. Me.—*Simpson v. Emery*, 183 A. 842, 843, 134 Me. 213, quoting *Corpus Juris*.

Okl.—*Scrivner v. Pope*, 289 P. 311, 143 Okl. 246. 11 C.J. p 445 note 89.

79. U.S.—*In re Ballard*, D.C.Tex., 279 F. 574.

Me.—*Simpson v. Emery*, 183 A. 842, 843, 134 Me. 213, quoting *Corpus Juris*.

N.D.—*Thompson Yards v. Bunde*, 196 N.W. 312, 50 N.D. 408, 30 A.L.R. 538.

Okl.—*Widick v. Phillips Petroleum Co.*, 49 P.2d 132, 134, 173 Okl. 325, 104 A.L.R. 228, citing *Corpus Juris*.

S.D.—*Coughlin v. Brumwell*, 219 N. W. 256, 52 S.D. 551.

11 C.J. p 445 note 90.

Vendee of land

Where a vendee, under a contract for the sale of land, purchased his building material for use in constructing a granary under an agreement with the seller of such building material that the building to be constructed therefrom should be deemed personalty, and the building is constructed in such manner that it can be removed from the realty without material injury thereto, a chattel mortgage given on such building is enforceable, the building not being real property and the vendee being deemed the owner in equity; and the mortgage is not rendered invalid by a provision in the contract of sale to the effect that all buildings erected or placed thereon shall not be removed therefrom, but shall be and remain the absolute property of vendor until the contract has been fully performed by vendee. — *Thompson Yards v. Bunde*, 196 N.W. 312, 50 N. D. 408, 30 A.L.R. 538.

80. U.S.—*In re Ballard*, D.C.Tex., 279 F. 574.

Okl.—*Widick v. Phillips Petroleum*

Co., 49 P.2d 132, 173 Okl. 325, 104 A.L.R. 228.

But it has been held that a building erected by lessees on land of which they held a lease for a definite term, which lease provided that the lessees were to have the right to remove the building on the termination of the lease, became real property, and did not pass by a chattel mortgage, since "whenever the owner of a building has any estate in the land, the title to the building attaches to that estate, and is as much real estate as that in the land is."—*In re Rogers & Woodward*, D.C. Vt., 132 F. 560, 562, applying Vermont law.

81. Me.—*Simpson v. Emery*, 183 A. 842, 843, 134 Me. 213, quoting *Corpus Juris*. 11 C.J. p 445 note 90.

82. Neb.—*Fuller v. Brownell*, 67 N. W. 6, 48 Neb. 145.

11 C.J. p 445 note 85.

83. Tex.—*Compton v. W. F. & J. F. Barnes Lumber Co.*, Civ.App., 99 S. W.2d 634, error dismissed.

Materialman

Where a building erected by a tenant became part of the realty, a chattel mortgage on the building, given to the materialman who furnished part of the lumber therefor, conveyed no right of removal to the mortgagee, for the tenant did not have that right.—*Compton v. W. F. & J. F. Barnes Lumber Co.*, supra.

84. Okl.—*Scrivner v. Pope*, 289 P. 311, 143 Okl. 246.

85. U.S.—*Brodrick v. Kilpatrick*, C. Cal., 82 F. 138, applying California statute.

granting the right to mortgage "movables," a mortgage of fixtures, or "movables immobilized by destination," was held valid.⁸⁶

§ 34. — Household Goods

Under a statute specifying that upholstery, furniture, and household goods may be mortgaged, such property is mortgageable without qualification or limitation.

Under a statute specifying that, among other things, "upholstery, furniture, and household goods" may be mortgaged, the right to mortgage such property is without qualification or limitation.⁸⁷

The requirement that the mortgagor's spouse join in a mortgage of household goods is considered in § 19 *supra*.

§ 35. — Stock in Trade

Apart from statute, a mortgage of a stock in trade has been held valid, at least as between the parties, but void as against purchasers and creditors of the mortgagor; the validity of such a mortgage may, however, be and is in some jurisdictions controlled by express statutes.

In the absence of statutory restrictions, while a

mortgage of a stock in trade has been held valid,⁸⁸ at least as between the parties,⁸⁹ such a mortgage is void as against purchasers and creditors of the mortgagor.⁹⁰ The effect on the validity of an agreement that the mortgagor may continue to sell the merchandise without accounting to the mortgagee for the proceeds of the sales is considered in §§ 202-207 *infra*.

Under a statute providing in effect that a mortgage of a stock of goods exposed to sale in the regular course of business, which the mortgagor is to continue to possess, control, and sell, is void, such a mortgage is void as against innocent third parties,⁹¹ but has been held valid as between the parties.⁹²

Under a statute specifying what property may be the subject of a mortgage, and making no reference to stock in trade, personalty held for sale,⁹³ or in transit, to be placed on sale when received,⁹⁴ was held mortgageable; and under a statute expressly permitting the mortgaging of stock in trade, a bill of sale of such stock, given as security for the payment of a debt, is valid.⁹⁵

86. La.—Bank of White Castle v. Clark, 159 So. 409, 411, 181 La. 303.

Effect of special statute

Such a mortgage is not limited to the situation considered in "a special statute providing for the issuance of bonds on rural real estate and the movables forming part of the real estate and securing the same by mortgage and chattel mortgage on the property affected." — Bank of White Castle v. Clark, *supra*.

87. Cal.—Old Settlers Inv. Co. v. White, 110 P. 922, 925, 158 Cal. 236.

Statutory provisions specifying mortgageable property generally see *supra* § 22.

Goods in warehouse

"A mortgage upon property of that description would be valid, if properly executed and recorded, as well where the property was stored in a warehouse or not devoted to any use, as where it was in actual use in a dwelling, lodging house, or hotel." — Old Settlers Inv. Co. v. White, *supra*.

Soda fountain and other utensils in a candy store are not within the meaning of the statute.—In re Grainger, Cal., 160 F. 69, 87 C.C.A. 225.

88. Wash.—Lung v. Bank of California, N. A., 221 P. 293, 127 Wash. 615.

Renewals of, or additions to, stock or equipment see *supra* § 26 g.

89. Okl. — Union State Bank of Shawnee v. Housel, 256 P. 29, 124 Okl. 294.

90. Va.—Boice v. Finance & Guar-

anty Corporation, 102 S.E. 591, 592, 593, 127 Va. 563, 10 A.L.R. 654.

"May be void as against creditors." — Union State Bank of Shawnee v. Housel, 256 P. 29, 30, 124 Okl. 294.

"From . . . 1825, until the present time, it has been uniformly held by this court that such a mortgage . . . on a stock of goods, wares, and merchandise . . . is 'null and void as against creditors and purchasers' of the grantor. . . . Property bought for the express purpose of daily indiscriminate sale to the general public, exposed for such sale at the place of business of a licensed dealer, and over which the dealer is permitted to exercise the dominion of owner, cannot be made the subject of a valid chattel mortgage." — Boice v. Finance & Guaranty Corporation, *supra*.

"Reason of the rule is that it is a fraud upon third persons. To uphold such a mortgage would give to the mortgagor a fictitious credit and allow him to pose before the world as the owner of goods when such is not the fact." — Boice v. Finance & Guaranty Corporation, *supra*.

Character of article sold immaterial

(1) "Neither size, value, nor identification marks can exempt an article from the application of the principle involved." — Boice v. Finance & Guaranty Corporation, *supra*.

(2) Thus, automobiles are not exempt.—Boice v. Finance & Guaranty Corporation, *supra*.

91. Ariz.—Hartford Fire Ins. Co. v. Jones, 250 P. 248, 31 Ariz. 8, rehearing denied 252 P. 192, 31 Ariz. 289.

Provision limited to stock of "merchant"

Under a code provision, excepting from goods which may be subjected to mortgage "the stock in trade of a merchant," a mortgage on the goods of a company engaged in their manufacture was valid, since one who simply manufactures an article and sells it is not a merchant.—Phillips v. Byers, 209 P. 557, 189 Cal. 665 667.

92. Ariz.—Hartford Fire Ins. Co. v. Jones, 250 P. 248, 31 Ariz. 8, rehearing denied 252 P. 192, 31 Ariz. 289.

Reason for rule

"It is obvious that . . . [the purpose [of the provision] is to protect the innocent purchaser of merchandise exposed to sale in the regular course of business from taking it subject to a hidden and superior lien. . . . the very use of the word 'fraudulent' in the section would seem to imply that it was the rights of such third parties only which the Legislature was attempting to protect." — Hartford Fire Ins. Co. v. Jones, *supra*.

93. La. — Palmisano v. Louisiana Motors Co., 117 So. 446, 166 La. 416.

94. La. — Palmisano v. Louisiana Motors Co., *supra*.

95. U.S.—Hardwick Bank & Trus

§ 36. — Chattels Real

A chattel real is not mortgageable by chattel mortgage.

A chattel real is not the proper subject of a chattel mortgage.⁹⁶

§ 37. Debt or Liability Secured

A debt or liability which it is given to secure is an essential of a mortgage; as between the parties at least it may be due to or from others than the mortgagee or mortgagor and a single mortgage may secure several debts to several persons.

In order that a transaction may constitute a chattel mortgage it is essential that there be a debt or liability,⁹⁷ the nature of which is considered below in this section and in §§ 38-41 *infra*, and that

a transfer of property be made to secure such debt or liability.⁹⁸

A chattel mortgage may be given to secure a debt of any kind,⁹⁹ as, for example, an unliquidated debt,¹ nor need the debt have had its inception in, or be evidenced by, a note;² but a mortgage given to secure a note cannot exist as an independent security.³

Parties' relationship to debt. It has been declared that where there is no relationship of debtor and creditor, a chattel mortgage is ordinarily held fraudulent and void as to third persons, although as between parties it may be valid.⁴ A mortgage may be given to one person to secure a debt owed by the mortgagor to another,⁵ as where it is given to a

Co. v. McFarland, C.C.A.Ga., 43 F. 2d 807, reversing, D.C., *In re Vining*, 37 F.2d 103.

96. U.S.—*In re Fulton*, D.C.N.Y., 153 F. 664.

Chattel real as subject of real estate mortgage see the C.J.S. title Mortgages § 71, also 41 C.J. p 372 note 32.

Chattels real defined and distinguished from chattels personal see the C.J.S. title Property § 8, also 11 C.J. p 385 note 6—p 386 note 23, 50 C.J. p 763 notes 23-29.

97. Fla.—*Holmberg v. Hardee*, 108 So. 211, 90 Fla. 787.

Miss.—*Mitts v. Price*, 92 So. 163, 129 Miss. 554.

Tex.—*Trott v. Flato*, Civ.App., 244 S. W. 1085.

11 C.J. p 446 notes 2, 4.

Chattel mortgage to secure usurious loan see the C.J.S. title Usury § 63, also 66 C.J. p 246 note 39—p 247 note 47.

Definition of chattel mortgage as including intention to secure debt see *supra* § 1.

Intention to secure debt as distinguishing chattel mortgage from other transactions see *supra* §§ 3-7.

Necessity and sufficiency of consideration for mortgage see *infra* § 42.

Cancellation of debt

Where plaintiff conveyed cotton-ginning plant to trustee under agreement that corporation should be formed and stock issued to his creditors in cancellation of the debts, with the option to him of purchasing the stock by paying the creditors, the transaction did not constitute a mortgage, since the debts were canceled and not continued.—*Trott v. Flato*, Tex.Civ.App., 244 S.W. 1085.

Making of payment

"A feature essential to a mortgage is an indebtedness which it is designed to secure. The existence of this is not implied in a provision

that a bill of sale shall be void if the grantors shall 'pay' a certain sum of money by a certain day. Payment of money does not necessarily imply a previous binding obligation to pay, but may be made as the recompense or equivalent for some present benefit, the procurement of which is optional with the payer."—*Holmberg v. Hardee*, 108 So. 211, 219, 90 Fla. 787—*Smith v. Hope*, 35 So. 865, 47 Fla. 295.

"In Delaware a valid chattel mortgage may be given to secure a debt, or to make (that is, give) indemnity, or it may be given for both purposes."—*Jefferson v. Stuckert*, 104 A. 781, 782, 12 Del.Ch. 45.

98. Ala. — *Dothan Guano Co. v. Ward*, 31 So. 748, 132 Ala. 380. 11 C.J. p 446 note 3.

Existence of independent security

The validity of a mortgage is not affected by the fact that the mortgagee holds independent collateral security.—*Ayres v. Wattson*, 57 Pa. 360.

99. Or.—*Schwary v. Schwary*, 7 P.2d 986, 138 Or. 690.

1. Cal.—*Hayashi v. Pacific Fruit Exchange*, 186 P. 174, 176, 43 Cal. App. 677.

Meaning of "unliquidated debt"

"An 'unliquidated debt,' however, within the meaning of that expression as it is used in the sense that its payment is capable of being secured by a mortgage, is a debt which, while not actually existing when the contract of hypothecation is made, is, from the nature of the contract and the whole subject-matter thereof, inherently capable of coming into existence. It simply means a debt the exact amount of which cannot be known at the time that the mortgage is given."—*Hayashi v. Pacific Fruit Exchange*, *supra*.

2. Ill.—*Schweer v. Schwabacher*, 17 Ill.App. 78, 80.

Or.—*Schwary v. Schwary*, 7 P.2d 986, 138 Or. 690.

Description of debt or liability secured see *infra* §§ 72-76.

"A mortgage is good without any note. If a bona fide debt exists, and is sufficiently described in the mortgage to protect creditors and third parties from being misled, it is sufficient."—*Schweer v. Schwabacher*, *supra*.

3. Ill.—*Elvin v. Wuchetich*, 157 N.E. 243, 244, 326 Ill. 235—*Gaff v. Harding*, 48 Ill. 148, 150.

"It has been often decided that a mortgage cannot exist as an independent security in the hands of one person while the note which it is given to secure belongs to another."—*Elvin v. Wuchetich*, *supra*—*Gaff v. Harding*, *supra*.

But, where a creditor took a note from a debtor who was a member of a partnership, sold it to a bank with his indorsement, and when the note fell due took a new note signed by both partners, payable to him, which he used in taking up the first note, transferring it to the same bank, and taking a chattel mortgage to secure himself, it was held that the mortgage was not defective because the bank was the owner of the note at the time it was given, the creditor being at all times liable thereon.—*Farmers' & Merchants' State Sav. Bank of Manchester v. Kriegel*, 195 N.W. 624, 196 Iowa 833.

4. Mo.—*United Film Ad Service v. Roach*, App., 297 S.W. 91, 93, citing *Corpus Juris*.

5. U.S.—*Petition of Jackson*, C.C.A. Ohio, 18 F.2d 462—*In re Pilot Radio & Tube Corporation*, D.C. Mass., 5 F.Supp. 453, affirmed, C. C.A., 72 F.2d 316, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 548, 79 L.Ed. 680. 11 C.J. p 447 note 8.

But it has been held that "an essential feature of a mortgage . . . is, that the title or possession is

trustee for the creditor,⁶ although in some jurisdictions such a mortgage is regarded as fraudulent and void as to third persons.⁷ It has also been held that a mortgage may be made by one person to secure a loan made to another.⁸ A chattel mortgage may be made to cover separate debts owing to different persons.⁹

Statutory limitation on term of credit. Under a statute requiring a renewal affidavit to be filed at the expiration of a prescribed period of time after record of a mortgage, it has been held that a mortgage is not rendered invalid because the mortgage provides for a term of credit longer than the period prescribed.¹⁰

§ 38. — Future Advances

A mortgage given to secure future advances or in-

debtedness, or future and existing debts, is valid, in the absence of fraud.

A mortgage given to secure future advances or indebtedness,¹¹ or to secure a future debt together with an existing debt,¹² is valid, in the absence of fraud or bad faith.¹³ Such mortgages have been held enforceable to the extent of the amount due at the time when adverse rights attach to the property,¹⁴ or when the mortgagee exercises his right to take possession.¹⁵

Where a statute provides that the parties to a chattel mortgage must make oath that the debt is a just debt, honestly due and owing from the mortgagor to the mortgagee, it is obvious that a valid mortgage cannot be made to secure a debt to be thereafter contracted.¹⁶

vested in or held by the person to whom the debt is due which the property is intended to secure. If the intention of the parties had been to attach . . . the incidents of a mortgage, the bill of sale would have been made directly to . . . the creditor." — *Munroe v. Merchants' Bank*, 11 Allen, Mass., 216, 221.

Mortgagee held real party in interest
Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

6. U.S.—*In re Pilot Radio & Tube Corporation*, D.C.Mass., 5 F.Supp. 453, affirmed, C.C.A., 72 F.2d 316, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 548, 79 L.Ed. 680.

11 C.J. p 447 note 8.

One creditor as trustee for all

Employer's mortgage to employee as trustee, to secure payment of wages to latter and other employees, is valid.—*Petition of Jackson, C.C.A. Ohio*, 18 F.2d 462.

7. Ill.—*Martin v. Sexton*, 112 Ill. App. 199.

Vt.—*Herald, etc., Assoc. v. Clere Clothing Co.*, 84 A. 23, 86 Vt. 141.

Under statute

(1) Where a statute required that the mortgage be accompanied by an affidavit executed by both parties describing the liability or agreement to be secured, and verifying the "validity, truth and justice of such liability or agreement," it was held that a mortgage given to a stranger to secure the debt owed to a third person was invalid as against creditors of the mortgagor; but it was intimated that such a mortgage would be valid as between the parties.—*Parker v. Morrison*, 46 N.H. 280, 283.

(2) Affidavit accompanying mortgage see *infra* § 84.

8. N.Y.—*Hincks v. Field*, 14 N.Y.S. 247, affirmed 29 N.E. 1080, 129 N. Y. 633.

9. Neb.—*Skinner v. First Nat. Bank of Pawnee City*, 80 N.W. 42, 43, 59 Neb. 17.

11 C.J. p 447 note 10.

"The mortgage to the sixty-five creditors was in all respects the legal equivalent of a separate mortgage to each of such creditors."—*Skinner v. First Nat. Bank of Pawnee City*, *supra*.

10. Ill.—*Busch v. Tatar*, 271 Ill. App. 8.

11 C.J. p 447 note 12.

11. Cal.—*Hayashi v. Pacific Fruit Exchange*, 186 P. 174, 43 Cal.App. 677.

Ga.—*Miller v. Blitch*, 74 Ga. 360—*Albany Loan & Finance Co. v. Tift*, 160 S.E. 661, 43 Ga.App. 789.

Ill.—*Melody v. Arcola State Bank*, 249 Ill.App. 85.

Tex.—*Cason, Monk & Co. v. Baker*, Civ.App., 62 S.W.2d 592—*Massachusetts Mut. Life Ins. Co. v. Stockyards Nat. Bank*, Civ.App., 50 S.W.2d 425, error dismissed—*H. W. Williams & Co. v. Bell*, Civ.App., 8 S.W.2d 745—*Askey v. Stroud*, Civ.App., 240 S.W. 339 — *G. M. Carleton Bros. & Co. v. Bowen*, Civ.App., 193 S.W. 732, 733.

11 C.J. p 447 note 13.

Future advances as consideration see *infra* § 42 b (5).

"A mortgage to secure an indebtedness which may be incurred by reason of future advances, or other future indebtedness, is valid."—*G. M. Carleton Bros. & Co. v. Bowen*, *supra*.

As against third persons with notice

(1) Mortgage will be effective against subsequent purchasers and lienholders with notice.—*H. W. Williams & Co. v. Bell*, Tex.Civ.App., 8 S.W.2d 745.

(2) Mortgage will be good, as to purchasers from the mortgagor with notice.—*Askey v. Stroud*, Tex.Civ. App., 240 S.W. 339.

11 C.J. p 447 note 13 [b] (1).

Mortgage to cover renewal notes
Mich.—*Pinconning State Bank v. Henry*, 241 N.W. 913, 258 Mich. 44.

Kinds of future indebtedness

"A mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe . . . or to secure indorsements made and to be made . . . or to secure payment for merchandise, not exceeding a specified amount, to be delivered at different intervals of time in the future."—*Hayashi v. Pacific Fruit Exchange*, 186 P. 174, 176, 43 Cal.App. 677.

12. Ga.—*Albany Loan & Finance Co. v. Tift*, 160 S.E. 661, 43 Ga.App. 789.

Ill.—*Melody v. Arcola State Bank*, 249 Ill.App. 85.

Tex.—*Massachusetts Mut. Life Ins. Co. v. Stockyards Nat. Bank*, Civ. App., 50 S.W.2d 425, error dismissed.

11 C.J. p 448 note 14.

Present, past, and future debts

"An instrument in the form of a bill of sale may be so worded as to secure a present, past, or future indebtedness; that is, any or all of such indebtedness."—*Albany Loan & Finance Co. v. Tift*, 160 S.E. 661, 43 Ga.App. 789.

As between parties

Or.—*Carnes v. Manning*, 248 P. 137, 118 Or. 665.

Charge for repairs not yet completed
Ill.—*Melody v. Arcola State Bank*, 249 Ill.App. 85.

13. Mich.—*Pinconning State Bank v. Henry*, 241 N.W. 913, 258 Mich. 44.

11 C.J. p 447 note 13.

14. Tex.—*Bullard v. Stewart*, 102 S. W. 174, 46 Tex.Civ.App. 49.

11 C.J. p 448 note 15.

15. N.Y.—*Fairbanks v. Bloomfield*, 12 N.Y.Super. 434.

16. N.H.—*Page v. Ordway*, 40 N.H. 253—*North v. Crowell*, 11 N.H. 251.

§ 39. — Performance of Contract or Other Obligation

A mortgage may be given to secure performance of a contract, duty, or obligation which can be reduced to a money value.

In general, a mortgage may be given to secure the faithful performance of a contract duty, or obligation resting on the mortgagor, if such contract, duty, or obligation is capable of being reduced to a money value;¹⁷ and it has been held competent for parties to make a chattel mortgage to secure the payment of damages which may be occasioned by the breach of a contract,¹⁸ although there is authority to the contrary effect.¹⁹

§ 40. — Indemnity Mortgages

A mortgage may be given to indemnify another against a future and contingent liability; so given, it is valid against an attaching creditor even though the liability becomes absolute after attachment.

A mortgage may be given for the purpose of indemnifying another against a future and contingent liability,²⁰ as, for example, to secure the mortgagor's indorsee,²¹ surety,²² or cosurety.²³

Such a mortgage is valid as against an attaching

creditor even though the contingent liability does not become absolute until after the attachment;²⁴ nor is such a mortgage, made to a number of mortgagees jointly, rendered invalid by the fact that no two of the mortgagees are liable on the same paper.²⁵

§ 41. — Fees and Costs

A provision allowing attorney's fees to be added to the mortgage debt has been held not to avoid the mortgage, and to be enforceable; but some authorities hold such stipulations void, at least if a fixed sum, or fixed percentage of the amount due, is stipulated. The mortgagee must actually have employed an attorney to act for him, and the reasonable value of the services will determine the fee.

Under some authorities, a provision allowing attorney's fees charged against the mortgagee to be added to the mortgage debt does not avoid a chattel mortgage,²⁶ and may be enforced in the usual manner,²⁷ even though the foreclosure has been enjoined;²⁸ by other authorities, a stipulation for the allowance of attorney's fees in case of foreclosure is held void without qualification.²⁹ In at least one jurisdiction, while a stipulation for the allowance of a fixed sum, or a fixed percentage of the amount due, is void, a stipulation for the allowance of such

11 C.J. p 448 note 17.

Necessity and sufficiency of affidavit accompanying mortgage see *infra* § 84.

17. Idaho.—Dover Lumber Co. v. Case, 170 P. 108, 111, 31 Idaho 276, citing *Corpus Juris*.

Or.—Backhaus v. Buells, 72 P. 976, 73 P. 342, 43 Or. 558.

11 C.J. p 448 note 20.

Alternative condition for money payment

But a mortgage given to secure the delivery of goods need not be conditioned in the alternative for the payment of their money value, although the presence of such an alternative stipulation does not alter the character of the transaction as a mortgage.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380.

18. Or.—McNeff v. Southern Pac. Co., 120 P. 6, 61 Or. 22.

19. Cal.—Hayashi v. Pacific Fruit Exchange, 186 P. 174, 176, 43 Cal. App. 677.

Reason for rule

"Whether there will be any debt at all, is problematical and remote, for it must depend first upon whether there is a breach of the agreement, and, if so, upon the very uncertain result of the trial in court of a disputed question of fact, or of law, or both. The result would have to be reduced to a judgment to make it amount to a debt."—Hayashi v. Pacific Fruit Exchange, *supra*.

20. Cal.—Hayashi v. Pacific Fruit Exchange, *supra*.

Del.—Jefferson v. Stuckert, 104 A. 781, 12 Del.Ch. 45.

Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195.

Iowa.—Farmers' & Merchants' State Sav. Bank of Manchester v. Kriegel, 195 N.W. 624, 196 Iowa 833.

11 C.J. p 448 note 23.

To secure debt and to indemnify

Del.—Jefferson v. Stuckert, 104 A. 781, 12 Del.Ch. 45.

21. Cal.—Hayashi v. Pacific Fruit Exchange, 186 P. 174, 176, 43 Cal. App. 677.

Iowa.—Farmers' & Merchants' State Sav. Bank of Manchester v. Kriegel, 195 N.W. 624, 196 Iowa 833.

"A mortgage may be given . . . to secure indorsements made and to be made."—Hayashi v. Pacific Fruit Exchange, *supra*.

22. Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

11 C.J. p 448 note 23 [b], [c].
Becoming surety as consideration for mortgage see *infra* § 42 b (2).

Transfer of title as mortgage

An instrument whereby contractors, better to secure a surety on their bond, transferred property to the surety is a chattel mortgage,

since "a transfer of title to secure a contingent liability is a valid chattel mortgage."—Southern Surety Co. v. People's State Bank of Astoria, *supra*.

23. Mo.—Steele v. Farber, 37 Mo. 71.

24. Mass.—Rogers v. Abbott, 128 Mass. 102.

25. Me.—Wheeler v. Nichols, 32 Me. 233.

26. Cal.—Fell v. Frierson, 153 P. 229, 171 Cal. 351.

11 C.J. p 449 note 31.

27. Ga.—Sheffield v. Bainbridge Oil Co., 59 S.E. 725, 3 Ga.App. 200.

28. U.S.—Fechheimer v. Baum, C.C. Ga., 43 F. 719.

29. Ark.—Jarvis v. Southern Grocery Co., 38 S.W. 148, 63 Ark. 225.
11 C.J. p 449 note 34.

As against public policy

U.S.—In re Chadwick, D.C. Ohio, 140 F. 674, reversed on other grounds 148 F. 975, 78 C.C.A. 597, 18 L.R.A., N.S., 1233, appeal dismissed 28 S.Ct. 760, 209 U.S. 542, 52 L.Ed. 918, applying Ohio law.

Effect of statute as to notes

A statute permitting a stipulation for attorney's fee in a note, in certain circumstances, is not applicable to chattel mortgages, and such a stipulation in a chattel mortgage is invalid.—In re Chadwick, *supra*, construing Ohio statute.

a fee as the court may adjudge reasonable will be held valid.³⁰

A provision in a note, secured by a mortgage, for payment of an attorney's fee has been held to create a lien on the mortgaged property for the services rendered, not exceeding the amount agreed upon.³¹

Necessity for actual expenditure. An attorney's fee cannot be added to the mortgage debt unless the mortgagee has in fact employed an attorney³² to act with respect to the foreclosure of the mortgage within the terms of the stipulation.³³

Amount of fee. If there is doubt as to the mode of computing counsel fees, the mode most favorable to the debtor must be adopted.³⁴ Only the reasonable value of the services rendered may be considered in determining the fee to be allowed,³⁵ and, under a statute so providing, the court, in a foreclosure action, will disregard a stipulation in the mortgage, and will determine the attorney's fee on the basis of reasonable compensation.³⁶ The failure of a legitimate effort to get hold of the proper-

ty does not affect the validity of the charge.³⁷

A statute limiting the amount to be allowed as attorney's fees applicable to actions pending in court has been held inapplicable to foreclosures on notice and sale.³⁸

An agreement by an attorney to withdraw his claim as a preferred claimant in so far as it affects the rights of a certain creditor does not affect the validity of the mortgage as to other creditors thereby secured.³⁹

§ 42. Consideration

- a. Necessity
- b. Sufficiency
- c. Evidence

a. Necessity

A chattel mortgage is invalid and unenforceable in the absence, or upon failure, of consideration.

A chattel mortgage to be valid and enforceable must be supported by a consideration;⁴⁰ thus, in the absence,⁴¹ or upon the failure,⁴² of consider-

30. Or.—Commercial Nat. Bank v. Davidson, 22 P. 517, 18 Or. 57—Balfour v. Davis, 12 P. 89, 14 Or. 47.

11 C.J. p 449 note 38.

31. U.S.—Tawney v. Clemson, C.C.A. Md., 81 F.2d 300, 303, applying Maryland law.

32. Minn.—Benson Bank v. Hove, 47 N.W. 449, 45 Minn. 40.

33. Okl.—Moore v. Calvert, 58 P. 627, 8 Okl. 358.

34. Okl.—Keokuk Falls Impr. Co. v. Kingsland, etc., Mfg. Co., 47 P. 484, 5 Okl. 32.

35. Iowa. — Aultman, etc., Co. v. Shelton, 57 N.W. 857, 90 Iowa 288.

Amount actually paid

Thus an offer to prove the amount actually paid was properly refused. —Aultman, etc., Co. v. Shelton, supra.

36. Cal.—Grangers' Business Assoc. v. Clark, 23 P. 1081, 84 Cal. 201.

37. Minn.—Reisan v. Mott, 43 N.W. 691, 42 Minn. 49, 18 Am.S.R. 489.

38. Iowa. — Aultman, etc., Co. v. Shelton, 57 N.W. 857, 90 Iowa 288.

39. U.S.—Mills v. Pessels, Tex., 55 F. 588, 5 C.C.A. 215, applying Texas law.

40. N.J.—Collerd v. Tully, 77 A. 1079, 77 N.J.Eq. 439, affirmed 80 A. 491, 78 N.J.Eq. 557, Ann.Cas. 1912C 78.

Tex.—Jenkins v. First Nat. Bank, Civ.App., 101 S.W.2d 845, 849.

11 C.J. p 449 note 43.

But it has been held that "a personal property mortgage is, of

course, a conveyance, and as such does not need to be supported by any such consideration as is essential to a contract not under seal."—In re Pilot Radio & Tube Corporation, D. C.Mass., 5 F.Supp. 453, 455, affirmed, C.C.A., 72 F.2d 316, certiorari denied Eckhardt v. Ball, 55 S.Ct. 98, 293 U. S. 584, 79 L.Ed. 680.

"The law is settled that there must be a consideration for a mortgage as contradistinguished from the debt."—Jenkins v. First Nat. Bank, supra.

Equitable mortgage

(1) An equitable mortgage has been required to be supported by a valuable consideration as well as created by an express agreement. —Cotten v. Blocker, 6 Fla. 1.

(2) However, an agreement under which legal title to property was obtained on trust to liquidate a debt has been held not to require consideration, the trust established being in the nature of an equitable mortgage.—Knowlton v. Fourth-Atlantic Nat. Bank, 171 N.E. 721, 271 Mass. 343.

Effect of absence of consideration

(1) It has been held that, where a mortgage is without consideration, the mortgagee has no right to possession of the property.—McGhee v. Tobias First Nat. Bank, 58 N.W. 537, 40 Neb. 92.

(2) Nor can the mortgagee foreclose the mortgage.—Krag-Reynolds Co. v. Oder, 52 N.E. 458, 21 Ind.App. 333.

41. Mass.—McNamara v. Consoli-

dated Hotels Corporation, 136 N.E. 647, 243 Mass. 22.

Equity will not aid mortgagee, purchasing property upon foreclosure sale, to recover possession thereof where mortgage without consideration. — McNamara v. Consolidated Hotels Corporation, supra.

Cancellation of mortgage

Mortgagor has been held entitled to cancellation of note and chattel mortgage on equipment in building purchased from prior loan by same mortgagee amply secured, apparently, as was claimed, because they were without consideration.—Domboorian v. Woodruff, 214 N.W. 113, 239 Mich. 1.

42. Kan. — Emerson-Brantingham Implement Co. v. Willhite, 169 P. 549, 102 Kan. 56.

N.D.—Baird v. Elliott, 249 N.W. 894, 63 N.D. 738, 91 A.L.R. 1274.

Note founded on void contract

A mortgage securing a note founded upon a contract which was void because of noncompliance with the statute of frauds, is unenforceable, since, consideration for the note having failed, it failed for the mortgage as well.—Baird v. Elliott, supra.

Breach of guaranty

Where machine is sold with guaranty to perform intended work, and notes are given secured by chattel mortgage on machine and other property, "an utter failure of it to do the work for which it was knowingly sold by the vendor was a total failure of consideration," and extinguished the mortgage. — Emerson-

ation, chattel mortgages have been held invalid or unenforceable.

Mortgage part of general agreement. An agreement to execute a mortgage, made as part of a general agreement, is supported by the consideration which supports the agreement as an entirety, and needs no independent consideration.⁴³

b. Sufficiency

- (1) By whom furnished; for whose benefit
- (2) Assuming or releasing obligation
- (3) Forbearance of legal right
- (4) Preëxisting indebtedness
- (5) Future advances
- (6) Other consideration

(1) By Whom Furnished; for Whose Benefit

The consideration may move from one other than the mortgagee, and benefit one other than the mortgagor.

The consideration for a chattel mortgage may move from a person other than the mortgagee,⁴⁴ and may benefit one other than the mortgagor.⁴⁵

(2) Assuming or Releasing Obligation

That the mortgagee becomes a surety or guarantor, or releases one who was a surety, or assumes the primary liability, on an obligation of the mortgagor, is sufficient consideration for a mortgage. A surety's liability

may constitute consideration for a second mortgage securing him.

It constitutes a valid consideration to support a chattel mortgage that the mortgagee becomes a surety or guarantor on an obligation of the mortgagor⁴⁶ or releases one who was formerly surety for the payment of an obligation;⁴⁷ and with even greater reason the assumption of primary liability for the debt or obligation of another will afford a valid consideration,⁴⁸ although the assumed obligation has not been discharged.⁴⁹

A third person's guaranty of payment of an obligation owed by the mortgagee to the mortgagor has been held sufficient consideration for a mortgage so made.⁵⁰

Liability already secured. Where a surety already secured by a mortgage of indemnity takes another, the liability for the debt constitutes a sufficient consideration for each mortgage.⁵¹

(3) Forbearance of Legal Right

The forbearance of a legal right, as by granting an extension of time to discharge a debt, constitutes consideration.

The forbearance of a legal right may constitute sufficient consideration for a chattel mortgage;⁵² so a mortgage given in consideration of an agreement to forego a right of foreclosure of a realty mortgage,⁵³ or not to sue on an overdue note,⁵⁴ has been held valid.

Brantingham Implement Co. v. Willhite, 169 P. 549, 550, 102 Kan. 56.

43. Wash.—*Klitten v. Stewart*, 215 P. 513, 125 Wash. 186.

Mortgage as "new contract"

Under a statute providing that "a natural obligation is a sufficient consideration for a new contract," it was held that a mortgage given to secure the performance of an agreement to purchase land was part of the original agreement, and not a "new contract," the original agreement being invalid, the mortgage was without consideration, and the mortgage note was canceled.—*Kidd v. Talbot*, La.App., 147 So. 825, 826.

44. Ill.—*Citizens' State Bank of Manteno v. Senesac*, 267 Ill.App. 238.

11 C.J. p 450 note 45, p 451 note 57 [a].

Debt secured see supra § 37.

45. Mo.—*United Film Ad Service v. Roach*, 297 S.W. 91, 93, 222 Mo. App. 339.

"A benefit to a third person secured by a contractual promise is a sufficient consideration therefor . . . and it may be added, in law, is as much a consideration to the prom-

isor, as a direct benefit to him."—*United Film Ad Service v. Roach*, supra.

46. Ill.—*Melody v. Arcola State Bank*, 249 Ill.App. 85.

Iowa.—*Palo Sav. Bank v. Cameron*, 168 N.W. 769, 184 Iowa 183.

Mass.—*Shay v. Gagne*, 176 N.E. 200, 275 Mass. 386.

Mich.—*Sobin v. Frederick*, 211 N.W. 71, 236 Mich. 501.

11 C.J. p 450 note 49.

Indemnity mortgage see supra § 40.

Guaranty of payment of mortgagor's account

Mich.—*Sobin v. Frederick*, 211 N.W. 71, 236 Mich. 501.

Sureties on separate obligations

A chattel mortgage executed to secure surety on mortgagor's note, and to secure another surety on his bond for the payment the latter was obliged to make thereon, and also cash advanced by such surety to mortgagor, held based on good consideration.—*Palo Sav. Bank v. Cameron*, 168 N.W. 769, 184 Iowa 183.

47. Neb.—*Henry v. Vliet*, 49 N.W. 1107, 33 Neb. 130, 29 Am.S.R. 478, 19 L.R.A. 590.

11 C.J. p 450 note 50.

48. N.Y.—*Smith v. Post*, 1 Hun 516. N.C.—*Walker, etc. v. Cooper*, 63 S.E. 681, 150 N.C. 128.

49. N.Y.—*Smith v. Post*, 1 Hun 516.

50. Ala.—*Rogers v. Whittle*, 74 So. 96, 15 Ala.App. 550.

Mortgagor previously indebted

Guaranty by third person of payment of rent by proposed mortgagee if proposed mortgagor would give a mortgage to secure payment of his debt already existing to such mortgagee was sufficient consideration.—*Rogers v. Whittle*, 74 So. 96, 15 Ala. App. 550.

51. N.M.—*Kitchen v. Schuster*, 89 P. 261, 14 N.M. 164.

52. U.S.—*Cinema Schools v. Westchester Fire Ins. Co.*, D.C.Cal., 1 F. Supp. 37.

Vt.—*Gilfillan's Adm'r v. Bixby*, 139 A. 250, 100 Vt. 468.

53. Mich.—*Mutual Ben. Life Ins. Co. v. Wetsman*, 269 N.W. 189, 277 Mich. 322.

54. N.Y.—*Berner v. Kaye*, 35 N.Y.S. 181, 14 Misc. 1.

11 C.J. p 451 note 55.

Extension of time. The granting of an extension of time for the payment or discharge of a debt,⁵⁵ which constitutes a forbearance of a legal right,⁵⁶ or of time for the performance of a conditional contract of sale,⁵⁷ furnishes a sufficient consideration to support a chattel mortgage.

(4) Preexisting Indebtedness

While there is authority to the contrary, a preexisting debt is generally held sufficient consideration for a chattel mortgage, at least as between the parties. Under statutes so providing, the value of the debt must not be disproportionately smaller than the value of the mortgage.

While there is authority to the contrary,⁵⁸ a preexisting debt is generally held to be a sufficient consideration for a chattel mortgage given to secure it,⁵⁹ at least as between the parties;⁶⁰ and such a mortgage is not per se fraudulent as to creditors.⁶¹

Whether such a mortgagee stands in the position of a bona fide purchaser is considered in § 309 infra.

A valid chattel mortgage may be given to secure an indebtedness contracted under an arrangement that a chattel mortgage to secure the same shall be thereafter executed.⁶²

Under statute. A mortgage securing a preexisting debt has been held valid under a statute providing that an antecedent debt is valid consideration for an obligation securing it provided the amount of the debt is not disproportionately small as compared with the amount of the obligation.⁶³

Consideration for note secured. A mortgage securing a note has been held valid where the note, given in consideration of a preexisting debt, was held valid.⁶⁴

55. U.S.—*Cinema Schools v. Westchester Fire Ins. Co.*, D.C.Cal., 1 F.Supp. 37.

Cal.—*Ramsey v. Furlott*, 57 P.2d 1007, 14 Cal.App.2d 145.

Ga.—*Washington Loan & Banking Co. v. National Bank of Wilkes*, 116 S.E. 657, 30 Ga.App. 77.

Mich.—*Sobin v. Frederick*, 211 N.W. 71, 236 Mich. 501.

Tex.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307—*Watson v. D. A. Paddleford & Son*, Civ.App., 220 S.W. 779, certified questions answered 221 S.W. 569, 110 Tex. 525.

11 C.J. p 451 note 53.

56. U.S.—*Cinema Schools v. Westchester Fire Ins. Co.*, D.C.Cal., 1 F.Supp. 37.

57. Ind.—*Sinker, Davis & Co. v. Green*, 15 N.E. 263, 113 Ind. 600—*Sinker, Davis & Co. v. Green*, 15 N.E. 266, 113 Ind. 264.

58. Tex.—*Jenkins v. First Nat. Bank*, Civ.App., 101 S.W.2d 845, 849.

"A mortgage to secure an existing debt without any contemporaneous renewal or extension of the debt is without consideration."—*Jenkins v. First Nat. Bank*, supra.

59. U.S.—*In re Pilot Radio & Tube Corporation*, D.C.Mass., 5 F.Supp. 453, affirmed, C.C.A., 72 F.2d 316, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

Tex.—*Harris v. N. Parker & Son*, Civ.App., 23 S.W.2d 745.

Wis.—*Schwenker v. Johnson*, 224 N.W. 117, 198 Wis. 300.

Preexisting liability as consideration for contracts generally see the C.J.S. title Contracts § 122, also 13 C.J. p 362 note 40—p 363 note 47.

60. Conn.—*Terzano v. Clemente*, 167 A. 825, 117 Conn. 267.

S.C.—*Fairey v. Haynes*, 96 S.E. 694, 111 S.C. 132.

S.D.—*Knudson v. Powers*, 230 N.W. 282, 56 S.D. 613.

Wyo.—*Dinkelspeel v. Lewis*, 62 P.2d 294, 304, 50 Wyo. 380, quoting *Corpus Juris*, rehearing denied 65 P.2d 246, 50 Wyo. 380.

11 C.J. p 451 note 57.

In absence of intent to delay creditors

"A pre-existing indebtedness is a sufficient consideration for a promissory note . . . and a chattel mortgage given to secure such an indebtedness is valid between the parties, and also as to third parties, when not given and received with intent to hinder and delay creditors."—*Wade v. Johnson*, 227 P. 466, 469, 111 Or. 468.

Debt previously secured

A mortgage gave rise to a claim to the personality covered, although when defendant executed it he was already bound to pay the amount secured, and had previously executed other mortgages as security for his indebtedness to plaintiff.—*Fairey v. Haynes*, 96 S.E. 694, 111 S.C. 132.

Securing prior note

(1) Where note was given by one partner to other as voluntary settlement of rights between themselves, chattel mortgage subsequently executed to secure note was valid as between parties, where rights of third persons were not involved.—*Dinkelspeel v. Lewis*, 62 P.2d 294, 50 Wyo. 380, rehearing denied 65 P.2d 246, 50 Wyo. 380.

(2) A mortgage, securing a note previously issued, executed after the note had fallen due, was held valid.—*Streeter v. Johnson*, 44 P. 819, 23 Nev. 194.

61. Kan.—*Hosea v. McClure*, 22 P. 317, 42 Kan. 403.

11 C.J. p 451 note 58.

Conveyance in consideration of preexisting debt as fraudulent as to creditors see the C.J.S. title Fraudulent Conveyances § 155, also 27 C.J. p 534 note 43—p 539 note 94.

62. Kan.—*Missouri Valley Trust Co. v. Whitelaw Inv. Co.*, 66 P.2d 374, 145 Kan. 629.

11 C.J. p 451 note 60.

63. Mass.—*Shay v. Gagne*, 176 N.E. 200, 201, 275 Mass. 386.

Prior indorsements

Under the statute described in the text, it was held that a chattel mortgage, received as security against contingent liabilities, not "disproportionately small" in amount, resulting from prior indorsements, was supported by consideration.—*Shay v. Gagne*, supra.

Becoming surety as consideration see supra § 42 b (2).

Reduction of liabilities

That mortgagor's liabilities were reduced after mortgage was given is immaterial on question of consideration.—*Shay v. Gagne*, supra.

64. U.S.—*Cinema Schools v. Westchester Fire Ins. Co.*, D.C.Cal., 1 F.Supp. 37, 39.

Preexisting indebtedness as consideration for note see *Bills and Notes* § 150.

Under Negotiable Instruments Law

An antecedent debt being held sufficient consideration for a note securing it, under a section of the Negotiable Instruments Law so providing, a mortgage securing the note was also held valid.—*Cinema Schools v. Westchester Fire Ins. Co.*, supra.

Debt reduced to judgment

That the antecedent debt "has been reduced to judgment, does not lessen the sufficiency of the debt as a consideration" for a note given, not

(5) Future Advances

Failure to make future advances in consideration of which a mortgage was given has been held to render the mortgage a nullity or to prevent a lien from attaching to the property.

Where a mortgage is given in consideration of advances to be made in the future, the failure to make such advances has been held to render the instrument, a nullity,⁶⁵ or to prevent any lien from attaching to the property described therein;⁶⁶ but where some of the advances agreed on were made, and in addition the mortgage secured a past-due debt,⁶⁷ or where the mortgagee had already taken possession of the mortgaged property and had sold it in foreclosure proceedings,⁶⁸ it was held that the mortgagor could maintain an action for damages resulting from the breach of the agreement to make advances, unless he had waived that right.⁶⁹

in satisfaction of the judgment or debt, but merely as collateral security for the debt; and a mortgage securing the note is also valid.—*Cinema Schools v. Westchester Fire Ins. Co.*, supra.

65. N.Y.—*Kommel v. Herb-Gner Const. Co.*, 176 N.E. 413, 415, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App.Div. 96.

"An instrument purporting to secure the repayment of advances made according to the terms of a certain bond, in the hands of a mortgagee named, who has neither made advances nor caused them to be made, is not a legal instrument; it is not a mortgage; nor is its holder a mortgagee."—*Kommel v. Herb-Gner Const. Co.*, supra.

Future advances as debt secured by mortgage see supra § 38.

66. Or.—*Backhaus v. Buells*, 72 P. 976, 73 P. 342, 43 Or. 553—*Coffin v. Taylor*, 18 P. 638, 16 Or. 375.

67. Tex.—*Harris v. N. Parker & Son*, Civ.App., 23 S.W.2d 745, 746.

"Where . . . the mortgage secures a past-due debt as well as future advances in supplies, and the agreement to furnish the supplies is partly complied with, the situation is materially different. The failure of the . . . [mortgagee] to fully perform his agreement did not make the mortgage a nullity, but constituted a breach of his contract, which gave . . . the mortgagor, a right to claim such damages as he sustained."—*Harris v. N. Parker & Son*, supra.

68. Mass.—*Glassman v. Ficksman*, 181 N.E. 316, 238 Mass. 580.

Question for jury

In mortgagor's action for damages for mortgagee's failure to make advances as agreed, conflicting evidence makes it a question for jury whether there was accounting be-

tween parties.—*Glassman v. Ficksman*, supra.

69. Mass.—*Glassman v. Ficksman*, supra.

Question of fact

Whether the mortgagor relinquished his right to damages by executing another mortgage for a similar amount securing the same debt is a question of fact.—*Glassman v. Ficksman*, supra.

70. Surrender of old note and mortgage

Kan.—*Habegger v. Skalla*, 34 P.2d 113, 140 Kan. 166.

Furnishing purchase money

Wash.—*Otto v. England*, 169 P. 964, 99 Wash. 529.

Delivery of trust receipts

U.S.—*Harding v. Federal Nat. Bank*, C.C.A.Mass., 81 F.2d 914.

Machinery purchased for use in raising and harvesting crop mortgaged was good consideration.—*Schmidt v. Plummer*, 37 P.2d 1, 140 Kan. 436.

Purchase of note of third party, secured by a mortgage, which the mortgagee had refused to buy until he was given a mortgage, made by the mortgagor, as additional security, was sufficient consideration for the additional mortgage.—*United Film Ad Service v. Roach*, 297 S.W. 91, 222 Mo.App. 339.

Other considerations see 11 C.J. p 450 note 47.

71. Moral obligation

Ill.—*Munson v. Commercial State Bank of Windsor*, 246 Ill.App. 371.

Bill of sale, void by statute

N.J.—*Shinn v. Cohen*, 132 A. 81, 99 N.J.Eq. 418.

Assignment of leasehold, possession of which was guaranteed to the mortgagor, mortgagee lacking title thereto.—*Cahill v. Martynick*, 143 A. 344, 103 N.J.Eq. 319.

(6) Other Consideration

Other considerations than those already specifically considered have been held sufficient or insufficient under rules applicable to contracts generally.

In addition to the classes of consideration considered in preceding subdivisions of this section, various considerations have been held sufficient⁷⁰ or insufficient⁷¹ to support chattel mortgages.

c. Evidence

The rebuttable presumption is that a chattel mortgage was given for a consideration. In particular circumstances, the admissibility and sufficiency of the evidence as to consideration is governed by general rules.

It has been said to be a universally recognized principle⁷² that a chattel mortgage implies, or is presumed to have been given for, a consideration,⁷³

Statement confirming mortgage

A statement, in cancellation and surrender of lease, ratifying and confirming mortgage and acknowledging its validity based on original consideration, did not constitute sufficient consideration for it when other consideration had failed.—*Shinn v. Cohen*, 132 A. 81, 99 N.J.Eq. 418.

Use of instrument, with mortgagee's consent, where such consent was in fact unnecessary, was not consideration for a mortgage.—*Baker v. Bockelman*, 225 N.W. 411, 208 Iowa 254.

Other considerations see 11 C.J. p 450 note 48.

72. Mo.—*Von Schleinitz v. North Hotel Co.*, 23 S.W.2d 64, 81, 323 Mo. 1110.

11 C.J. p 451 note 62.

73. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360.

Kan.—*Missouri Valley Trust Co. v. Whitelaw Inv. Co.*, 66 P.2d 374, 145 Kan. 629.

Mo.—*Von Schleinitz v. North Hotel Co.*, 23 S.W.2d 64, 81, 323 Mo. 1110.

11 C.J. p 451 notes 62, 63.

Prima facie evidence

"The mere introduction of a chattel mortgage in evidence constitutes prima facie evidence that it was given by the mortgagor for a consideration moving to the mortgagee."—*Von Schleinitz v. North Hotel Co.*, supra.

Mortgage securing note

A chattel mortgage is prima facie executed for a good consideration when it is given to secure a note because the note itself imports a valuable and sufficient consideration.—*Ede v. Johnson*, 15 Cal. 53.

Mortgage for future advances

As between the immediate parties, a chattel mortgage containing a recital that it is given for future ad-

at least where it is in writing⁷⁴ or under seal;⁷⁵ however, this presumption is not conclusive and may be rebutted.⁷⁶

In an action to foreclose a mortgage, the mortgagor has been held to have the burden of proving that there was no consideration for the mortgage.⁷⁷

Where a chattel mortgage is executed as collateral security for a balance due on a prior mortgage, the prior mortgage is competent evidence to show the consideration for the subsequent mortgage.⁷⁸

The presumption that a chattel mortgage is given for valid consideration is not dispelled by testimony of vague and uncertain meaning.⁷⁹

vances in a specified sum is prima facie executed for a good consideration.—*Dyer v. State*, 7 So. 267, 88 Ala. 225.

Recital in mortgage sufficient

In a controversy between parties to the mortgage or their representatives, involving simply the title to the property, it is not necessary to show a consideration beyond the recital in the mortgage.—*Webb v. Mann*, 3 Mich. 139—11 C.J. p 450 note 44.

74. Tex.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307.

75. S.C.—*Fox v. Fox*, 92 S.E. 477, 107 S.C. 250.

Seal as prima facie evidence

Seal on note and chattel mortgage securing it is prima facie evidence of consideration.—*Fox v. Fox*, supra.

Corporate seal

In a proceeding by mortgagees to determine whether they had a lien on the proceeds of the sale of chattels on which they had a mortgage executed by a corporation under its seal, it was held error to hold that the conveyance was without consideration.—*In re Pilot Radio & Tube Corporation*, C.C.A.Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

76. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360. Mo.—*Von Schleinitz v. North Hotel Co.*, 23 S.W.2d 64, 323 Mo. 1110. S.C.—*Fox v. Fox*, 92 S.E. 477, 107 S.C. 250.

11 C.J. p 451 note 63.

Mortgage to protect property from debt

(1) Where chattel mortgage was given as device to protect mortgagor's property from a debt, and mortgagee orally agreed to sell property for mortgagor, want of consideration could be shown.—*Hartman v. Gann's Adm'r*, 10 S.W.2d 1115, 226 Ky. 367.

(2) Whether mortgage was given for protection of mortgagor, and was without consideration, was for jury.—*Hartman v. Gann's Adm'r*, supra.

77. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360. Tex.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307.

Parol evidence as to consideration see the C.J.S. title Evidence §§ 948–958, also 22 C.J. p 1157 note 53—p 1173 note 39.

Extension of time

Mortgagor had burden of proving that no extension of time for payment of debt was granted, or other consideration given.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Tex. Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307.

78. Ala.—*Winston v. Farrow*, 40 So. 53.

79. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360.

80. Giving of note by the mortgagor and its acceptance by the mortgagee was held to be evidence to show that mortgagee granted extension of time for payment of debt which constituted valuable consideration for mortgage.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Tex. Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307.

81. Action of foreclosure

In an action by the assignee of two mortgages to foreclose them, evidence that the mortgagee was secretary of the mortgagor corporation and as such secretary signed the note and second mortgage, that the note was in arrears when assigned, and that the mortgagor was insolvent when the action was started, had closed down its business, and was about to have its property levied on, was held to warrant a finding of no

Particular acts or circumstances have been held sufficient to show the presence of consideration,⁸⁰ or sufficient⁸¹ or insufficient⁸² to show the lack of consideration.

§ 43. Conditions

Various conditions or stipulations governing performance or other phases of chattel mortgages have been held valid; but a vague and indefinite provision is invalid.

Conditions or stipulations which, as contained in, or annexed to, chattel mortgages, have been held valid and effective include provisions that performance is to be in a certain manner,⁸³ that the

consideration for note and mortgage.—*Coconut Grove Exchange Bank v. Fleming Novelty Works*, 144 So. 337, 107 Fla. 1.

82. Agreement to give mortgage

Where a loan was made on an agreement that a chattel mortgage should be given, evidence that no money was received at the immediate time of the execution of the mortgage, that there was no extension or renewal of an obligation, or waiver of anything of value, that the bonds to secure which the mortgage was given had been previously issued and the money derived therefrom used, and that the mortgagor executed the mortgage simply because the mortgagee's agent had requested him to, was held insufficient to sustain a defense of lack of consideration.—*Missouri Valley Trust Co. v. Whitelaw Inv. Co.*, 66 P.2d 374, 145 Kan. 629.

Existence of indebtedness

Where the facts showed "the actual existence of the indebtedness for which the mortgage was given," and there was "no evidence of insolvency of . . . [the mortgagor], nor of any fact which would interfere with his right to give or the right of . . . [the mortgagee] to receive the chattel mortgage which was executed to secure that indebtedness," a finding of lack of consideration was not sustained.—*Smart v. Sosey*, 193 F. 167, 46 Cal. App. 332.

Other circumstances

Iowa.—*Rogers v. Hale*, 218 N.W. 264, 205 Iowa 557.

83. Ala.—*Gernert v. Limbach*, 50 So. 903, 163 Ala. 413.

11 C.J. p 451 note 68.

Stipulations waiving right of redemption see *infra* § 434.

Selling mortgaged property as built

A mortgage on computing scales, then in process of building, would not be void, as between the parties because it provided that mortgagor might sell the scales as they were completed, and pay twenty-five dol-

mortgage is not to become operative until the happening of a certain contingency,⁸⁴ that the maturity date is to be accelerated on the happening of certain events,⁸⁵ that the mortgagee shall have no remedy by sale of the property until he has paid the debt,⁸⁶ and that the mortgagor is to replenish the mortgaged stock of goods, and keep it at a certain percentage of the indebtedness;⁸⁷ but a vague and indefinite provision is invalid.⁸⁸

§ 44. — Insurance of Property

A condition that a mortgagor in possession shall insure the property for the mortgagee is valid; but, unless so provided, failure to insure does not cause forfeiture of possession.

A condition in a mortgage that a mortgagor left in possession shall insure goods for the mortgagee's benefit will be given effect.⁸⁹ However, in the absence of an express provision in the mortgage, the failure to insure does not constitute a default so that the mortgagor forfeits his right to possession,⁹⁰ especially where the mortgage also provides that,

on failure of the mortgagor to insure, the mortgagee might do so and add the premiums to the mortgage debt.⁹¹ The failure to insure will be excused if it is caused by the action of the mortgagee's agent;⁹² but the procuring of insurance by the mortgagee does not satisfy a stipulation that the mortgagor shall insure so as to cure the breach on his part.⁹³

§ 45. — Stipulation against Second Mortgage

A provision that no second mortgage shall be given without written consent, which is neither asked nor given, cannot be asserted by the mortgagor or claimants under him against a second mortgage.

A provision of a chattel mortgage that no second mortgage shall be given without written consent, which is neither asked nor given, cannot be asserted by the mortgagor or those claiming under him as against a second mortgage given in violation thereof.⁹⁴

IV. FORM AND CONTENTS

§ 46. General Statement

The discussion of the formal requisites and contents of a chattel mortgage contained in the following sections, §§ 47–76, must of necessity be considered in connection with the discussion of the essential elements of such a mortgage, *supra* §§ 17–45, and the rules of construction which are discussed *infra* §§ 104–129, more particularly with reference to the parties whose debts or liabilities are secured, §§ 107–115, and as to the property conveyed, §§ 116–129.

§ 47. Form of Instrument in General

Unless the contrary is provided by statute, no particular form of words is necessary to create a chattel mortgage, and any language showing an intention to create a lien as security or indicating a transfer of property coupled with an intention that such transfer is for security will be sufficient.

The rule is well settled that, unless the contrary is provided by statute, no particular form of words is necessary to the creation of a mortgage;⁹⁵ any language is sufficient which indicates an intention

lars per scale on the mortgage.—*Highland Inv. Co. v. Kansas City Computing Scales Co.*, 209 S.W. 895, 277 Mo. 365.

84. U.S.—*Coggin v. Hartford Accident & Indemnity Co.*, D.C.N.C., 9 F.Supp. 785, 791, reversed on other grounds, C.C.A., *Hartford Accident & Indemnity Co. v. Coggin*, 78 F.2d 471, certiorari denied *Coggin v. Hartford Accident & Indemnity Co.*, 56 S.Ct. 141, 296 U.S. 620, 80 L. Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440, citing *Corpus Juris*.

Neb.—*Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 74 N.W. 837, 54 Neb. 410.

Mortgagor to determine contingency

A mortgage containing a condition that it is not to become a completed contract or lien until the happening of some contingency, the sufficiency of which is to be determined by the mortgagor, does not become operative as a mortgage or lien on the

property until the happening of the contingency.—*Midland State Bank v. Kilpatrick-Koch Dry Goods Co.*, 74 N.W. 837, 54 Neb. 410.

85. Ind.—*Leader Pub. Co. v. Grant Trust, etc., Co.*, 91 N.E. 498, 174 Ind. 192.

11 C.J. p 451 note 69.

Acceleration clause in note

It was competent for the parties to a mortgage to provide by the terms of a note secured thereby that, on default in payment of interest, the whole sum of both principal and interest shall become due at the option of the holder of the note secured by the mortgage.—*Swan v. Jones*, 173 P. 249, 88 Or. 706.

86. Ala.—*Tarver v. Roffe*, 7 Ala. 873.

87. Mich.—*Crowley v. Langdon*, 86 N.W. 391, 127 Mich. 51.

Matters to appear in newspaper

A clause in a mortgage on a newspaper establishment to the effect that matters should not be published in such paper detrimental to the

reputation or business of the mortgagee, being vague and indefinite, is invalid.—*Fowler v. Hoffman*, 31 Mich. 215.

89. Mich.—*Crowley v. Langdon*, 86 N.W. 391, 127 Mich. 51.

11 C.J. p 452 note 73.

90. Mich.—*Fowler v. Hoffman*, 31 Mich. 215.

Mo.—*Kerbs v. Zumwalt*, 86 Mo.App. 128.

11 C.J. p 452 note 74.

91. Mo.—*Baldrige v. Dawson*, 9 Mo.App. 527.

92. Mich.—*Crowley v. Langdon*, 86 N.W. 391, 127 Mich. 51.

93. Mich.—*Fowler v. Hoffman*, 31 Mich. 215.

94. Okl.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349, 41 Okl. 275.

95. U.S.—*Federal Finance Corporation v. Reed*, C.C.A.Mass., 296 F. 1, reversing, D.C., *Reed v. Federal Finance Corporation*, 291 F. 679,

to create a lien on chattels to secure a debt⁹⁶ or which indicates a transfer of such property, coupled with the intention of the parties that such transfer is for security,⁹⁷ but the creation of a lien must be clearly indicated.⁹⁸ So it has been held that a mortgage is created by reserving a lien in an instrument,⁹⁹ or by creating a charge against the property in the nature of a mortgage.¹

Use of wrong form. The mere fact that the parties use a wrong blank form in making the mortgage, and that it contains certain recitals that are not true and not erased, will not change the nature of the transaction² or render the mortgage void for uncertainty,³ although it may have such effect where the instrument is so contradictory that it does not show that the parties intended that it should be a mortgage.⁴

Where the statute expressly so provides, no particular form is essential to the creation of a mort-

gage as between the parties,⁵ but, where the statute provides a form, it must be substantially followed in order to render the mortgage valid as to creditors and purchasers.⁶

§ 48. Equitable Mortgage

In general, any agreement entered into for the purpose of pledging property or some interest therein as security for a debt, informal and insufficient as a common-law mortgage, will, provided the essential features of a mortgage are present, be enforced in equity as an equitable mortgage where it appears to be intended as a mere security for a debt.

As a general rule, any agreement entered into by the parties for the purpose of pledging the property or some interest therein as security for a debt, which is informal and insufficient as a common-law mortgage, will nevertheless be enforced in equity as an equitable mortgage, where it appears that it was intended by the parties as a mere security for a debt;⁷ but, unless the essential features of a mort-

certiorari denied 44 S.Ct. 637, 265 U.S. 593, 68 L.Ed. 1196—In re B. & B. Motor Sales Corporation, D.C.N.J., 277 F. 808.

Ala.—Collins v. Hodges Lumber & Mfg. Co., 97 So. 424, 210 Ala. 6.

N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575—Kearns v. Davis Bros., 120 S.E. 52, 186 N.C. 522—Britt v. Harrell, 10 S.E. 902, 105 N.C. 10—Harris v. Jones, 83 N.C. 317.

Tex.—Leonard v. Burton, Civ.App., 11 S.W.2d 668—Fourmentin v. Scott, Civ.App., 216 S.W. 901.

11 C.J. p 452 note 80.
Absolute bill of sale as mortgage see supra § 6.

Trust deed as mortgage see supra § 9.

Trust receipts see supra § 9.

Where the right of redemption exists, the form of a conveyance is not controlling as to whether or not it is a mortgage.—In re B. & B. Motor Sales Corporation, D.C.N.J., 277 F. 808.

Transactions held mortgages

(1) An instrument reciting that a note therein set out was given for a certain mule which should remain the property of the seller and payee until the note was paid and that on nonpayment of the note the seller might sell the property and pay the surplus to the buyer.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575.

(2) Other transactions see 11 C.J. p 452 note 80 [a].

96. Tex.—Leonard v. Burton, Civ. App., 11 S.W.2d 668—Fourmentin v. Scott, Civ.App., 216 S.W. 901.

97. N.C.—Noland v. Osborne, 97 S.E. 714, 177 N.C. 14.
11 C.J. p 452 note 81.

Retention of title note

Ala.—Echols v. Snider, 94 So. 189, 19 Ala.App. 35.

Informal instruments held mortgages

(1) A receipt for a certain amount of money containing an agreement by the maker thereof "to deliver on demand . . . cotton seed to cover and secure the above amount money advanced to me."—State v. Smith, 93 S.E. 250, 108 S.C. 37.

(2) Other instruments see 11 C.J. p 452 note 81 [b].

98. N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575—Britt v. Harrell, 10 S.E. 902, 105 N.C. 10—Harris v. Jones, 83 N.C. 317.

Tex.—Fourmentin v. Scott, Civ.App., 216 S.W. 901.

Fact that rents and profits are pledged as security for mortgage indebtedness does not necessarily convert such proviso in a mortgage of realty into a chattel mortgage on such rents and profits.—First-Trust Joint Stock Land Bank of Chicago v. Ferguson, 267 N.W. 103, 105, 221 Iowa 987.

Recital that note is for purchase money of certain property does not thereby constitute it a purchase-money mortgage.—Bush v. Kimbrell, 103 S.E. 686, 25 Ga.App. 424.

99. Ga.—Howard v. Rumble, 61 S.E. 297, 4 Ga.App. 327.
11 C.J. p 453 note 82.

Reservation in lease of lien for rent see supra § 8.

Defective crop lien

Written instruments in the form of mortgages which were intended to give a statutory lien on crops but were ineffectual for failure to comply with the statute have been held to operate as mortgages.—Hamilton

v. Maas, 77 Ala. 283—11 C.J. p 453 note 84.

1. Me.—Sawyer v. Gerrish, 70 Me. 254, 35 Am.R. 323.

2. Ala.—Collins v. Hodges Lumber & Mfg. Co., 97 So. 424, 210 Ala. 6.
11 C.J. p 453 note 85.

Crop mortgage form used

Ala.—Collins v. Hodges Lumber & Mfg. Co., supra.

11 C.J. p 453 note 85 [a].

3. Tex.—Fourmentin v. Scott, Civ. App., 216 S.W. 901.

Conditional sales contract form

Tex.—Fourmentin v. Scott, supra.

4. Ga.—Bray v. McKenzie, 147 S.E. 406, 39 Ga.App. 397.

5. Ga.—Stewart v. Jaques, 3 S.E. 283, 77 Ga. 365, 4 Am.S.R. 86—Howard v. Rumble, 61 S.E. 297, 4 Ga.App. 327.

11 C.J. p 454 note 94.

6. Cal.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 139 Cal.App. 427.

11 C.J. p 454 note 95.

An instrument in the form of an assignment or bill of sale which recited that it was given as security for a note set out therein has been held sufficiently to comply with the requirements of a statutory form for a mortgage, even though it did not strictly follow the statutory language.—Pacific States Savings & Loan Co. v. Strobeck, supra.

7. Cal.—Motor Acceptance Co. v. Finn, 13 P.2d 761, 124 Cal.App. 766.
S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

Tex.—Bolton v. Baldwin, Civ.App., 57 S.W.2d 957, error dismissed, quoting Corpus Juris.
11 C.J. p 453 note 86.

gage are present, such as the existence of a debt due, or to become due, or some contingent liability for which the instrument is intended as a security, it cannot be sustained as an equitable mortgage.⁸ In application of these rules it has been held that an equitable mortgage is created by an agreement founded on a valuable consideration to give a mortgage,⁹ by depositing property as security,¹⁰ by the reservation of a lien for purchase money,¹¹ by authorizing one advancing money to hold a lien on property,¹² by giving an irrevocable power of attorney to collect rents,¹³ by giving an absolute bill

of sale as security,¹⁴ or by transferring property on trust to liquidate a debt.¹⁵

§ 49. Necessity for Writing

Subject to limitations imposed by the statutes of frauds and other and express statutory provisions, an oral chattel mortgage is ordinarily valid as between the parties and against those having actual notice of its existence, provided it otherwise contains the elements of a chattel mortgage.

Subject to the limitations, if any, imposed by the statutes of frauds and by other express statutory provisions, a mortgage, although not in writing; is ordinarily held to be valid as between the parties,¹⁶

Mortgage on unplanted crops as equitable lien see supra § 32.
Validity in equity of mortgage of future property see supra § 26.

Equitable lien

"There is no distinction of substantial importance between equitable liens and equitable mortgages on personal property." — *Dorman v. Crooks State Bank*, 225 N.W. 661, 664, 667, 55 S.D. 209, 64 A.L.R. 614.

Parties against whom enforceable

"Equitable mortgages on personal property are good . . . between the parties and those having actual knowledge of the existence and terms of the contract."—*Dorman v. Crooks State Bank*, supra.

A farm lease, clearly expressing the lessee's intention to give the lessor a lien on chattels belonging to, and in the possession of, the former for the payment of rent creates an equitable mortgage.—*Dorman v. Crooks State Bank*, supra.

Assignment of defective mortgage

By the assignment of a mortgage invalid for want of parties, the assignor being both mortgagor and mortgagee therein, and by guaranty of the payment of the note secured by the mortgage which was likewise assigned, an equitable mortgage on the property described in the original mortgage was created enforceable as between the parties despite the defect in the original mortgage.—*Motor Acceptance Co. v. Finn*, 13 P.2d 761, 124 Cal.App. 766.

A statute declaring that transfer of property as security for performance of another act shall be deemed "mortgage" does not impliedly deny validity of equitable mortgages on personalty.—*Dorman v. Crooks State Bank*, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

8. Tex.—*Newsom v. Beard*, 45 Tex. 151.
11 C.J. p 453 note 87.

9. Mo.—*Page v. Riggins*, App., 20 S. W.2d 164.

Mont.—*Scott v. Tuggle*, 241 P. 229, 231, 74 Mont. 476, citing *Corpus Juris*.

Neb.—*Kelly v. Kannarr*, 225 N.W. 230, 118 Neb. 472—*American State Bank of Scottsbluff v. Keller*, 200 N.W. 999, 112 Neb. 761—*Weigand v. Hyde*, 192 N.W. 198, 200, 109 Neb. 678.

Okl.—*Union Nat. Bank v. Leidecker Tool Co.*, 178 P. 690, 72 Okl. 121.

Tex.—*Sparkman v. First State Bank of Handley*, 244 S.W. 127, 112 Tex. 33, answers to certified questions conformed to, Civ.App., 246 S.W. 724—*Runnels Chevrolet Co. v. Travis*, Civ.App., 62 S.W.2d 225.
11 C.J. p 453 note 88.

Verbal agreement

(1) "A verbal agreement to give a chattel mortgage creates an equitable lien."—*Sparkman v. First State Bank of Handley*, 244 S.W. 127, 130, 112 Tex. 33, answers to certified questions conformed to, Civ.App., 246 S.W. 724.

(2) Under a statute inhibiting verbal chattel mortgages, a verbal agreement to execute a written mortgage is not enforceable in equity as an equitable mortgage.—*Palmer v. James*, 99 So. 109, 210 Ala. 641.

(3) Verbal agreements generally see infra § 49.

An equitable mortgage is created

(1) By a valid promise in a lease or other contract to give a mortgage upon a crop to be raised.—*Kelly v. Kannarr*, 225 N.W. 230, 118 Neb. 472.

(2) Where buyer at time of sale and as part of transaction agrees to give seller a mortgage to secure purchase price.—*Union Nat. Bank v. Leidecker Tool Co.*, 178 P. 690, 72 Okl. 121.

(3) Where a tenant agreed to give his landlord a mortgage on certain chattels sold to him by his landlord, and his lease required him to give such a mortgage.—*Page v. Riggins*, Mo.App., 20 S.W.2d 164.

(4) Where purchaser, permitted to remain in possession of purchased land after notice of intention to cancel and terminate contract, agreed in writing to give a new note secured by mortgage on crops raised on the

purchased land.—*Scott v. Tuggle*, 241 P. 229, 74 Mont. 476.

An equitable mortgage is not created by provision in an executory contract for the sale of realty requiring the purchaser to execute a chattel mortgage in favor of the vendor on crops to be grown during the life of the contract, when "the contract shows that the parties clearly understood that a lien could not be and was not created by the contract."—*Atkinson v. Melcher*, 294 P. 567, 568, 160 Wash. 94.

Void mortgage

A crop mortgage, being a nullity as to crops grown on a place in which mortgagor, at the time of the execution of the mortgage, had no interest or agreement to acquire an interest, cannot be given effect as an agreement to mortgage.—*E. W. & J. W. Moring v. Helms*, 97 So. 647, 210 Ala. 175.

10. Ala.—*Alabama State Bank v. Barnes*, 2 So. 349, 82 Ala. 607.
11 C.J. p 454 note 89.

11. Ala.—*Bradford v. Proctor*, 96 So. 203, 209 Ala. 299.
Tex.—*Runnels Chevrolet Co. v. Travis*, Civ.App., 62 S.W.2d 225.
11 C.J. p 454 note 90.

12. U.S.—*Hauseit v. Harrison*, Pa., 105 U.S. 401, 26 L.Ed. 1075.

Tex.—*Mason v. Bumpass*, 1 Tex.A. Civ.Cas. § 1338.
11 C.J. p 454 note 91.

13. R.I.—*Joseph Smith Co. v. McGuinness*, 14 R.I. 59.

14. Ga.—*Avera Loan & Investment Co. v. Yopp*, 103 S.E. 42, 25 Ga. App. 279.

15. Mass.—*Knowlton v. Fourth-Atlantic Nat. Bank*, 171 N.E. 721, 271 Mass. 343—*Knowlton v. Fourth-Atlantic Nat. Bank*, 162 N.E. 356, 264 Mass. 181.

16. Iowa.—*Todd v. Farmers' & Merchants' Bank of Aurora*, 193 N. W. 7.

Kan.—*State Bank of Downs v. Abbott*, 179 P. 326, 104 Kan. 344.

Ky.—*Hart County Deposit Bank v. Hatfield*, 33 S.W.2d 660, 236 Ky. 725.

and against those having actual notice of its existence,¹⁷ provided the oral agreement contains the elements necessary to constitute a valid written mortgage.¹⁸ The effect of the recording acts ordinarily is to render an oral mortgage invalid as against creditors and subsequent purchasers in good faith,¹⁹ and under some statutes as against purchasers with notice;²⁰ but, even under the recording acts, an oral mortgage is commonly regarded as valid where there is an immediate delivery of the property to the mortgagee, followed by an actual and continued change of possession.²¹

In some jurisdictions statutory provisions expressly²² or impliedly²³ requiring a mortgage to be in writing have been construed or applied in a number of cases.

§ 50. Words of Conveyance

Words of conveyance are not essential to a mortgage, although the absence of such words may be important in determining whether or not a transaction is a mortgage.

It is not essential that a mortgage contain words of conveyance,²⁴ although the absence of words showing an intention to transfer title has frequent-

Mont.—Barth v. Ely, 278 P. 1002, 85 Mont. 310.

Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598.

N.C.—Kearns v. Davis Bros., 120 S. E. 52, 186 N.C. 522.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204—Gilfillan's Adm'r v. Bixby, 139 A. 250, 100 Vt. 463.

11 C.J. p 454 note 98.

In Texas

(1) The rule stated in the text is followed by the most recent cases.

U.S.—Border Nat. Bank v. Coupland, Tex., 240 F. 355, 153 C.C.A. 281, applying Texas law.

Tex.—Sparkman v. First State Bank of Handley, Com.App., 244 S.W. 127, 112 Tex. 33, answers to certified questions conformed to, Civ. App., 246 S.W. 724—Gordon v. Ball, Civ.App., 73 S.W.2d 890—Moore v. B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945—Gillett v. Talley, Civ. App., 60 S.W.2d 868—Bolton v. Baldwin, Civ.App., 57 S.W.2d 957, 964, error dismissed, citing *Corpus Juris*.

(2) There is no Texas statute which "in any way" modifies this rule.—Sparkman v. First State Bank of Handley, supra.

(3) The rule is unaffected by particular statutes providing as follows: That any reservation or limitation of use in goods where the possession remains in another is fraudulent as to creditors, unless declared by will or written instrument duly recorded; that all reservations of title in chattels as security for the purchase price, being declared mortgages, are void as to certain third parties unless in writing and registered; that all mortgages not properly registered are void as against certain third parties; and that a written transfer shall accompany the transfer of certain personal property, possession without such written transfer being deemed prima facie illegal.—Sparkman v. First State Bank of Handley, supra.

(4) As a consequence of the rule a written mortgage may be enlarged by a contemporaneous or subsequent

oral agreement.—Moore v. B. & M. Chevrolet Co., supra.

(5) Prior to the above pronouncements it was settled that, under the statute a valid mortgage might be made by a verbal reservation of title in personal property to secure payment of the purchase price thereof.—Crews v. Harlan, 87 S.W. 656, 99 Tex. 93, 13 Ann.Cas. 863.

(6) But as to the validity of a verbal mortgage generally, there apparently was no authoritative decision.—Sparkman v. First State Bank of Handley, supra—11 C.J. p 454 note 98 [a] (2).

(7) The court of civil appeals had sustained such a mortgage as between the parties.—Edwards v. Mayes, Civ.App., 136 S.W. 510.

(8) But still earlier cases had indicated strong intimations to the contrary.—Lazarus v. Henrietta Nat. Bank, 10 S.W. 252, 72 Tex. 354—Gay v. Hardeman, 31 Tex. 245—Hastings v. Kellogg, Civ.App., 36 S.W. 821—Harold v. Barwish, 30 S.W. 498, 10 Tex.Civ.App. 138.

Delivery of property unnecessary

"A party may give an oral mortgage . . . which will be valid as between the parties . . . without delivery of the property mortgaged."—State Bank of Downs v. Abbott, 179 P. 326, 104 Kan. 344.

17. Ky.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598.

11 C.J. p 455 note 99.

"Under the law of Texas a verbal mortgage . . . is valid . . . as against purchasers with notice and creditors other than lien creditors."—Border Nat. Bank v. Coupland, Tex., 240 F. 355, 357, 153 C.C.A. 281, applying Texas law.

18. Kan.—Cherryvale Inv. Co. v. Dillman, 11 P.2d 681, 682, 135 Kan. 699, citing *Corpus Juris*—State Bank of Downs v. Abbott, 179 P. 326, 104 Kan. 344.

11 C.J. p 455 note 1.

19. Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598.

11 C.J. p 455 note 2.

20. Mo.—Oyler v. Renfro, 86 Mo. App. 321—Kollock v. Emmert, 43 Mo.App. 566.

21. Ark.—Wilson v. Chittenden County Bank, etc., Co., 135 S.W. 885, 98 Ark. 379.

Iowa.—Hinton Bank v. Swan, 137 N. W. 1032, 156 Iowa 715.

Neb.—Buckstaff Bros. Mfg. Co. v. Snyder, 74 N.W. 863, 54 Neb. 538.

11 C.J. p 455 note 4.

Defects cured by taking possession see infra §§ 212, 213.

22. Cal.—Grangers Business Assoc. v. Clark, 23 P. 1081, 84 Cal. 201.

Idaho.—Willows v. Rosenstein, 48 P. 1067, 5 Idaho 305.

In Alabama

(1) Under the code, a mortgage is not valid unless made in writing.—Abbeville Live Stock Co. v. Walden, 96 So. 237, 209 Ala. 315—Dickey v. Vaughn, 73 So. 507, 198 Ala. 283—11 C.J. p 455 note 5 [a] (1).

(2) Prior to the act of Jan. 22, 1885, Code 1896, § 2151, an equitable mortgage of personal property might be created by a verbal agreement.—Williams v. Davis, 45 So. 908, 154 Ala. 422—Jackson v. Rutherford, 73 Ala. 155.

(3) There are numerous decisions sustaining such mortgages.—Hill v. Nelms, 5 So. 796, 86 Ala. 442—11 C. J. p 455 note 5 [a] (3).

(4) Equitable mortgages generally see supra § 48.

23. Me.—Day v. Swift, 48 Me. 368 11 C.J. p 455 note 6.

24. Ala.—Richards v. Montgomery, 160 So. 706.

11 C.J. p 455 note 7.
But it has been held that "the first requisite . . . [of a mortgage] is a defeasible conveyance of the title."—Central State Bank v. Commercial Building & Securities Co., 218 N.W. 622, 624, 206 Iowa 75.

Sufficiency of words of transfer

(1) A valid mortgage sufficient to pass title is created by a note providing that the maker had "deposited as collateral security for the pay-

ly been held to be of great, if not indeed controlling, importance in determining that an informal transaction was not in fact a mortgage.²⁵

§ 51. Promise to Pay Debt

Questions pertaining to promises in mortgages to pay the mortgage debt ordinarily arise in reference to the existence of a deficiency and personal liability and are considered in § 419 infra.

§ 52. Statement as to Consideration

In some jurisdictions statutes require an affidavit stating the consideration for the instrument to accompany the mortgage; these affidavits are considered in § 84 infra.

§ 53. Defeasance or Statement of Condition

A mortgage should contain a defeasance clause, but, while its presence or absence is significant in determining whether an instrument is a mortgage, it is not essential to its validity nor need there be a provision enabling the mortgagee to take possession on default.

A characteristic of a mortgage is that there should be a defeasance,²⁶ and the absence of such a clause is a significant circumstance in determining whether or not an informal instrument or a bill of

sale was intended as a mortgage;²⁷ but a defeasance clause is not essential to the validity of a mortgage.²⁸ If, from the nature of the instrument, standing alone, or read in the light of the surrounding circumstances, it appears to have been given as a security it must be considered as a mortgage,²⁹ or if an express defeasance is lacking one may be implied from the terms of the instrument.³⁰

As appears in § 6, supra, the defeasance may be contained in a separate instrument, but ordinarily the condition on the performance of which the transfer is to become void should be contained in the instrument by which the property is conveyed.³¹ It is not necessary that the mortgage contain a provision enabling the mortgagee to take possession in case of default,³² nor need it stipulate the time when the mortgagee shall take possession.³³

§ 54. Statement as to Mortgage in Obligation Secured

A note secured by a mortgage must, when the statute so provides, so state on its face or the mortgage is rendered void on the assignment of the note.

Under the Illinois statute, a note secured by a mortgage must so state on its face or the mortgage is rendered void on the assignment of the note.³⁴

ment of this note' certificate No. 95," although such certificate was not in fact deposited.—*Richards v. Montgomery*, Ala., 160 So. 706, 707.

(2) Other words held sufficient see 11 C.J. p 455 note 7 [a].

Inadvertent cancellation of words of conveyance

Where a mortgage is executed in duplicate, the mortgagor signing both papers, one being filed with the register of deeds and the other retained by mortgagee, each paper is an original, and the filed instrument may be enforced without a formal correction of an inadvertent cancellation of the words of conveyance in the other.—*Emick v. Swafford*, 191 P. 490, 107 Kan. 209.

25. Iowa.—*Central State Bank v. Commercial Building & Securities Co.*, 218 N.W. 622, 206 Iowa 75. 11 C.J. p 455 note 8.

26. Ind.—*Fletcher American Nat. Bank v. McDermid*, 128 N.E. 685, 76 Ind.App. 150.

Iowa.—*Central State Bank v. Commercial Building & Securities Co.*, 218 N.W. 622, 206 Iowa 75.

Mo.—*Globe Securities Co. v. Gardner Motor Co.*, 85 S.W.2d 561, 337 Mo. 177.

N.C.—*Grier v. Weldon*, 172 S.E. 200, 205 N.C. 575—*Britt v. Harrell*, 10 S.E. 902, 105 N.C. 10—*Harris v. Jones*, 83 N.C. 317.

Tex.—*Trott v. Flato*, Civ.App., 244 S.W. 1085.

11 C.J. p 455 note 9.

27. Ind.—*Fletcher American Nat. Bank v. McDermid*, 128 N.E. 685, 76 Ind.App. 150.

Tex.—*Trott v. Flato*, Civ.App., 244 S.W. 1085.

11 C.J. p 456 note 10.

Sale distinguished from mortgage see supra § 5.

Conveyance with option to purchase stock

Where a debtor conveyed his cotton-ginning plant to a trustee under an agreement that a corporation should be formed and stock issued to his creditors with the option to him of purchasing the stock by paying the creditors, it was held that the transaction, since it contained no element of defeasance, did not constitute a chattel mortgage.—*Trott v. Flato*, Tex.Civ.App., 244 S.W. 1085.

28. U.S.—*Reagan v. Aiken*, Tex., 11 S.Ct. 283, 138 U.S. 109, 34 L.Ed. 892.

11 C.J. p 456 notes 11, 12.

29. U.S.—*Dillon Bank v. Murchison*, S.Ct., 213 F. 147, 129 C.C.A. 499.

11 C.J. p 456 note 11.

30. U.S.—*Reagan v. Aiken*, Tex., 11 S.Ct. 283, 138 U.S. 109, 34 L.Ed. 892.

11 C.J. p 456 note 12.

31. Conn.—*Williams v. Chadwick*, 50 A. 720, 74 Conn. 252.

32. N.C.—*Woodlief v. Harris*, 95 N.C. 211.

11 C.J. p 452 note 81 [a].

33. Ala.—*Dothan Guano Co. v. Ward*, 31 So. 748, 132 Ala. 380.

34. Ill.—*Mattoon Grocery Co. v. Stuckemeyer & Olson*, 158 N.E. 422, 326 Ill. 602, reversing on other grounds *Stuckemeyer & Olson v. Wyrick*, 240 Ill.App. 64. See *Einstein v. Ft. Dearborn Motor Cartage Co.*, 207 Ill.App. 321.

11 C.J. p 476 note 43.

Construction of statute

(1) The statute, although providing that "any chattel mortgage securing notes which do not state upon their face the fact of such security shall be absolutely void," applies only to instances where an assignment of the notes has taken place.—*Sellers v. Thomas*, 57 N.E. 10, 11, 185 Ill. 384, reversing 85 Ill.App. 58—*Ohio Power Shovel Co. v. Bond*, 267 Ill.App. 271, 277—*Schillo v. White*, 207 Ill.App. 390, 392—11 C.J. p 476 note 46.

(2) To construe the statute otherwise would necessitate holding it invalid as not embraced within its title. "An act to regulate the assignment of notes secured by chattel mortgages."—*Hogan v. Akin*, 55 N.E. 137, 138, 181 Ill. 448, reversing *Thompson v. Akin*, 81 Ill.App. 62.

(3) In an early case it was held that the statute applied even in the

§ 55. Description of Parties

As against third persons, the parties must be identifiable from the instrument or from inquiries suggested by it. Such defects as a misnomer of the mortgagor, where the mortgage is correctly signed and executed, or a misuse of the term "party of the first part," where the meaning is not confused, or a designation of a party by but one of several names by which he is known are not fatal.

A mortgage, to be effectual against third persons, must point out the parties so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify them;³⁵ but the courts frequently look beyond the description in the paper itself in determining the parties secured by a mortgage, and construe it to embrace or to exclude the persons contemplated on general legal principles, by the substance of the transaction.³⁶

A mortgage is not invalidated by a mistake in the name of the mortgagor if it is correctly signed and

executed,³⁷ by designating the mortgagor by but one of several names by which he is known,³⁸ or by omitting the word "corporation" from the name of a corporate mortgagee in the mortgage.³⁹

The construction and application of various statutes requiring the mortgage to show the profession, trade, occupation, residence, or address of the parties are considered in the note.⁴⁰

Misuse of the term "party of the first part" does not render a mortgage invalid when the meaning of the instrument is not confused thereby;⁴¹ but, if the mortgage plainly designates one as party of the second part, the court cannot say by construction that "party of the first part" was intended.⁴²

Third person signing mortgage. By signing his name to a mortgage a third person may become bound as a party thereto, even though he is not elsewhere mentioned therein, it being necessary, however, that the intention that he be so bound be

absence of an assignment of the mortgage note.—*Quaintance v. Badham*, 68 Ill.App. 87.

Sufficiency of statement of security

(1) A note reciting that it "covers deferred installments under a chattel mortgage made this day between the payee and maker thereof" sufficiently shows that the note was secured by a chattel mortgage.—*Blake-Silkwood Motor Co. v. Spires*, 245 Ill.App. 148, 152.

(2) A recital in a note that another note secured by a mortgage was pledged as collateral security therefor does not meet the statutory requirement.—*Chance v. Hudson*, 233 Ill.App. 542.

As between the parties it has been held that compliance with the statute is not essential if possession of the mortgaged property is taken before the lien of a third party attaches.—*Springer v. Lipsis*, 70 N.E. 641, 209 Ill. 261.

35. Va.—*Elgin v. Dehart*, 132 S.E. 323, 144 Va. 311.

11 C.J. p 456 note 18.

Mortgage to or from partnership see the C.J.S. title Partnership § 66, also 47 C.J. p 737 notes 33, 34.

Description of grantees as trustees in trust mortgage

Failure to describe grantees as trustees in granting clause of trust mortgage did not deprive instrument of trust character where habendum clause provided for holding property in trust.—*In re Pilot Radio & Tube Corporation*, C.C.A.Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

Mortgagor described as "a Trust"
A mortgage made by the "Cicero

Rubber Company, a Trust," sufficiently identifies the "Cicero Rubber Company" as the mortgagor, the words "a Trust" being merely descriptive and not an essential part of the name.—*Sedlak v. Standard Oil Co.*, 229 Ill.App. 378, 383.

36. Kan.—*Emporia First Nat. Bank v. Ridenour*, 27 P. 150, 46 Kan. 707, 26 Am.S.R. 167.

11 C.J. p 456 note 19.

37. U.S.—*In re Allee*, C.C.A.Ill., 55 F.2d 76.

11 C.J. p 456 note 20, p 477 note 65 [a].

38. Ark.—*First Nat. Bank v. Lewis*, 257 S.W. 730, 162 Ark. 54.

39. Ala.—*Spicer v. State*, 133 So. 58, 59, 24 Ala.App. 162, certiorari denied 133 So. 59, 222 Ala. 515.

40. Statement as to occupation

(1) Where statutory provisions require the mortgage to show the profession, trade, or occupation of the parties, these requirements must be regarded as matters of description intended for the purpose of identification and not as indispensable requisites of the mortgage without which it can have no effect as against third persons.—*Ede v. Johnson*, 15 Cal. 53.

(2) Thus an omission of a statement as to the occupation of the parties is not fatal, as no "one could be prejudiced by such variations from the statutory form."—*Pacific States Savings & Loan Co. v. Strobeck*, 33 P.2d 1063, 1066, 139 Cal. App. 427.

Statement as to residence or address

(1) A statute making a mortgage invalid except as between the parties unless, among other things, "the res-

idence of the mortgagor and mortgagee . . . shall be set out in the mortgage," does not require such facts to be expressly stated, it being sufficient if they can be ascertained from the language of the mortgage as a whole.—*Garner v. Arizona Egyptian Cotton Co.*, 197 P. 231, 232, 22 Ariz. 318.

(2) Under a statute requiring mortgages substantially to comply with the form set out therein, which provides for, among other matters, a statement as to the residence of the mortgagor and mortgagee, such statement is not essential to substantial compliance with the statute and may be omitted.—*Pacific States Savings & Loan Co. v. Strobeck*, 33 P.2d 1063, 139 Cal.App. 427.

(3) A statute providing that "no mortgage shall be received for record . . . which does not contain the post office address of the mortgagee" has been construed to apply to real estate mortgages only, and not to chattel mortgages.—*J. I. Case Co. v. Sax Motor Co.*, 256 N.W. 219, 220, 64 N.D. 757.

41. Mich.—*Louden v. Vinton*, 66 N.W. 222, 108 Mich. 313.

Mortgage enforceable without reformation

Where a blank form of mortgage containing the printed name of a bank as the mortgagee, wherever reference is made to the second party, is used in making a mortgage to an individual and such printed name is not changed except where it first occurs, the mortgage may be enforced without reformation.—*Rath v. Ponsor*, 219 P. 285, 114 Kan. 370.

42. Iowa.—*Kern v. Wilson*, 35 N.W. 594, 73 Iowa 490.

apparent from the mortgage after the application of the accepted rules of construction;⁴³ and in such case it is immaterial that the mortgage is worded in the singular.⁴⁴

§ 56. Description of Property

A mortgage must specify or describe the property mortgaged, but, in the absence of statutes otherwise providing, no particular manner of description is essential.

It is obvious that a mortgage must specify or describe the property mortgaged;⁴⁵ but, in the absence of statutes otherwise providing, it is not essential that the property be described in any particular manner.⁴⁶

§ 57. — Sufficiency in General

- a. In general
- b. Statutory provisions
- c. All property of a particular kind or location
- d. Motor vehicles

a. In General

(1) General rules of description

- (2) As between parties
- (3) As against third persons

(1) General Rules of Description

The rules as to the sufficiency of a description in a mortgage of chattels are less rigid than those applicable in the case of realty. The entire instrument and description, as well as the nature of the property, should be considered. An insufficiency of description as to part of the property or obliteration of the descriptive marks as to part will not invalidate the entire description.

As stated in *Corpus Juris*, which statement has been quoted and cited with approval, while the courts recognize well established principles for determining the sufficiency of the description of the property,⁴⁷ they also recognize the impossibility of fixing inflexible rules therefor.⁴⁸ Further, the rules generally applicable to chattel mortgages as to description are less rigid than those applied to conveyances of realty.⁴⁹ While it is the better practice to describe specifically the property mortgaged,⁵⁰ a general description is sufficient if specific enough to identify the property conveyed.⁵¹

In determining the sufficiency of the description, the entire description⁵² and instrument⁵³ should be

43. Okl.—*Stoutz v. Wilson Motor Co.*, 55 P.2d 990, 176 Okl. 316.

Signature of no effect

A third person's signature to mortgage executed as security for note given in payment of automobile has been held to be of no effect where signer's name was not mentioned in body of mortgage, and signer was not obligated by any of its terms, and acquired no ownership interest in automobile. — *Deins' Adm'r v. Gibbs*, 78 S.W.2d 346, 257 Ky. 469.

Capacity in which mortgage signed

The fact that the words "official title, if company" appear below an individual's signature in a printed mortgage will not cause the mortgage to be regarded as being in any other than his individual capacity, particularly since such words create no ambiguity as to the capacity in which such mortgage is signed. — *Stoutz v. Wilson Motor Co.*, 55 P.2d 990, 176 Okl. 316.

44. Okl.—*Stoutz v. Wilson Motor Co.*, supra.

45. U.S.—*In re Coleman & Brown*, D.C.Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254.
Ga.—*Paradies & Rich v. Warren Co.*, 186 S.E. 438, 53 Ga.App. 457—*Stevens Hardware Co. v. Bank of Byromville*, 129 S.E. 172, 34 Ga. App. 268—*Hicks v. Walker Bros. Co.*, 120 S.E. 694, 31 Ga.App. 395.
Tex.—*Fourmentin v. Scott*, Civ.App., 216 S.W. 901.

11 C.J. p 456 note 24.

Mortgagor's interest

A mortgage, in substance, conveying a described truck as security for a note therein included is not so indefinite and incomplete as to preclude foreclosure, although it contains the phrase "this note is given for my interest in said truck to secure the . . . amount due . . . [mortgagee]," since such phrase does not indicate that some one else than the mortgagor has an interest in the truck.—*Allen v. Dickey*, 188 S.E. 273, 274, 54 Ga.App. 451.

46. Ariz.—*C. I. T. Corporation v. Naudack*, 38 P.2d 310, 44 Ariz. 413.

47. Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617.
Ky.—*Goodin & Barney Coal Co. v. Southern Elkhorn Coal Co.*, 294 S.W. 792, 794, 219 Ky. 827, quoting *Corpus Juris*.

Or.—*Cook v. Van Buskirk*, 271 P. 728, 127 Or. 206.

Tenn.—*Odum v. Adkins*, 76 S.W.2d 648, 168 Tenn. 215, quoting *Corpus Juris*.

11 C.J. p 456 note 26.

48. Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617.

Or.—*Cook v. Van Buskirk*, 271 P. 728, 127 Or. 206.

11 C.J. p 456 note 27.

49. Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617.

Ky.—*Hauseman Motor Co. v. Napierella*, 3 S.W.2d 1084, 223 Ky. 433.

Or.—*Cook v. Van Buskirk*, 271 P. 728, 127 Or. 206.

Tenn.—*Stoll v. Schneider*, 13 S.W.2d 325, 158 Tenn. 341.

11 C.J. p 456 note 28.

Legal standard substantially the same

"The legal standard as to the sufficiency of a description in a mortgage of personal property, although less rigid, is substantially the same as is applied to conveyances of realty."—*Hauseman Motor Co. v. Napierella*, 3 S.W.2d 1084, 1085, 223 Ky. 433.

50. Md.—*U. S. Fire Ins. Co. v. Merrick*, 190 A. 335.

51. N.J.—*Bankers' Trust Co. v. Maxson*, 134 A. 875, 100 N.J.Eq. 1.

Sawmill equipment

"In the operation of a sawmill and use of a logging outfit, it would be practically impossible to describe all the machines, tools, and apparatus, specifically in a trust deed or mortgage so that the property could be identified by a stranger by such description alone, and a general description which suggests inquiries, which, if pursued, will disclose the property mortgaged, is sufficient."—*Immel v. Albany Iron Works*, 271 P. 53, 56, 127 Or. 118.

52. Iowa.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

Kan.—*Ehrke v. Tucker*, 160 P. 985, 99 Kan. 52.

53. U.S.—*Des Moines Nat. Bank v.*

considered, as well as the character of the property intended to be mortgaged.⁵⁴ Further, the sufficiency of the description very frequently depends on the status of the person against whom the mortgage lien is sought to be asserted.⁵⁵

Partial insufficiency. An insufficient description of a portion of the property covered by the mortgage does not render the mortgage invalid as to the part which is correctly described.⁵⁶

Obliteration of marks. The mere fact that the distinguishing marks of personal property are obliterated or changed will not invalidate a description which is good when given.⁵⁷

Where successive mortgage deeds are given, the same general principles govern descriptions as where only one mortgage exists.⁵⁸

(2) As between Parties

As between the parties a description of the property mortgaged is sufficient if it so identifies the chattels that the mortgagee may say, with reasonable certainty, what is subject to his lien; a specific description is unnecessary.

As between the parties a description of the property mortgaged is sufficient if it so identifies the chattels that the mortgagee may say, with a reasonable degree of certainty, what property is subject to his lien,⁵⁹ and a specific description is unnecessary in cases not involving the rights of strangers, without notice.⁶⁰ Accordingly, a description insufficient as against third persons without notice may be amply sufficient as between the parties.⁶¹

Equitable mortgages. In case of an equitable mortgage there must be an identification of the

Council Bluffs Sav. Bank, Iowa, 150 F. 301, 80 C.C.A. 189.
11 C.J. p 471 note 85.

54. N.D.—Teigen v. Occident Elevator Co., 200 N.W. 38, 51 N.D. 563.

55. Ga.—Nussbaum v. Waterman Co., 70 S.E. 259, 9 Ga.App. 56.

56. Mo.—Kelvinator St. Louis v. Schader, 39 S.W.2d 385, 225 Mo. App. 479.
11 C.J. p 471 note 82.

Admissibility in evidence

A mortgage sufficiently describing a part of the property intended to be covered by it is not inadmissible in evidence merely because all the property is not sufficiently described.—Kelvinator St. Louis v. Schader, supra.

57. Mass.—Comins v. Newton, 10 Allen 518.

Minn.—Adamson v. Horton, 43 N.W. 849, 42 Minn. 161.
11 C.J. p 460 note 41.

Change of appearance of animals see infra § 65.

58. N.C.—Dixon v. Coke, 77 N.C. 205.

W.Va.—Claffin v. Foley, 22 W.Va. 434.

11 C.J. p 459 note 39.

59. Colo.—Lowdermilk v. People, 202 P. 118, 120, 70 Colo. 459, citing *Corpus Juris*.

Conn.—Hartford-Connecticut Trust Co. v. Puritan Laundry, 111 A. 149, 151, 95 Conn. 172, citing *Corpus Juris*.

Fla.—Richardson v. Myers, 143 So. 157, 158, 106 Fla. 136, citing *Corpus Juris*—First Nat. Bank of Panama City v. First Nat. Bank of Chipley, 106 So. 422, 424, 90 Fla. 617, citing *Corpus Juris*.

Mont.—Garry v. Musselshell Mercantile Co., 31 P.2d 293, 296, 96 Mont. 468, quoting *Corpus Juris*—Arro Oil & Refining Co. v. Montana & Dakota Grain Co., 286 P. 1115, 87

Mont. 259—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

N.D.—First State Bank of Grace City v. Dahly, 209 N.W. 655, 54 N.D. 309.

Or.—Cook v. Van Buskirk, 271 P. 728, 127 Or. 206.

S.D.—Security Nat. Bank v. White Co., 211 N.W. 452, 50 S.D. 598.
11 C.J. p 457 note 29.

60. Ky.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

N.D.—First State Bank of Grace City v. Dahly, 209 N.W. 655, 54 N.D. 309.

Or.—Cook v. Van Buskirk, 271 P. 728, 127 Or. 206.

Tex.—H. O. Wooten Grocer Co. v. Wade Meat Co., Civ.App., 37 S.W. 2d 1090.

Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431—First Nat. Bank of Chelsea v. Fitts, 30 A. 697, 67 Vt. 57.

11 C.J. p 457 note 30.

Mortgagor may not complain of an insufficient description of the property mortgaged.—Brenneke v. Smallman, 83 P. 302, 2 Cal.App. 306.

Expression of parties' intention

It is only required, as between the parties, that the description of the property "be sufficient to express . . . [their] purpose and intention."—Live Stock Nat. Bank of Sioux City v. Julius, 174 N.W. 489, 490, 187 Iowa 748.

Knowledge of property covered

(1) "As between the parties, any description is good, if the parties at the time knew and understood what the mortgage covered."—Symes v. Fletcher, 115 A. 502, 504, 95 Vt. 431.

(2) Insufficient description is good as between parties, where they have agreed what property is covered by it.—Lowdermilk v. People, 202 P. 118, 70 Colo. 459—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 1035, 68 Colo. 274.

Sufficiency for constructive notice

As between the parties to a mortgage, it is not required that the description of the property mortgaged be sufficiently definite to impart constructive notice to third parties.—National Bank of Milton v. O'Brien, 195 N.W. 611, 196 Iowa 865—Live Stock Nat. Bank of Sioux City v. Julius, 174 N.W. 489, 187 Iowa 748.

Interpreted in light of known facts

"In passing upon the validity of a chattel mortgage as between the parties for lack of proper description of the property . . . such descriptions are to be interpreted in the light of the facts known to and in the minds of the parties at the time."—Lunsford v. Pearce, Tex.Civ. App., 19 S.W.2d 71, 74.

Description sufficient as to

(1) Engine.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

(2) Linoleum, carpet, and felt paper.—Webb City Furniture Co. v. Herrod, Mo.App., 14 S.W.2d 668.

(3) Property described as mortgagor's one-third interest in printing company.—Messenger Pub. Co. v. Overstreet, 137 S.E. 125, 36 Ga.App. 458.

61. Ala.—Abernathy v. Worthy, 129 So. 472, 221 Ala. 527.

Ky.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

N.D.—First State Bank of Grace City v. Dahly, 209 N.W. 655, 54 N.D. 309.

Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431—First Nat. Bank of Chelsea v. Fitts, 30 A. 697, 67 Vt. 57.

Va.—Hardaway v. Jones, 41 S.E. 957, 100 Va. 481, 483.

11 C.J. p 457 note 30.

"As between the parties . . . the rule of certainty in description is not so exacting as when a third

property, so that the equitable mortgagee may say, with a reasonable degree of certainty, what it is that is subject to his lien.⁶²

(3) As against Third Persons

As against third persons, except those without interest in the property or with actual knowledge of the property conveyed, who stand in the same position as the mortgagor, the description must point out the property mortgaged so that they may identify it.

As against third persons the description in the mortgage must point out its subject matter so that such persons may identify the chattels covered,⁶³ to the exclusion of all other like property.⁶⁴ It is not essential, however, that the description be so specific that the property may be identified by it alone;⁶⁵ but it is sufficient if it suggests inquiries or means of identification which, if pursued, will

party is involved."—*Abernathy v. Worthy*, 129 So. 472, 221 Ala. 527.

62. N.Y.—*Payne v. Wilson*, 74 N. Y. 348.

Or.—*Lee v. Cole*, 21 P. 819, 17 Or. 559.

11 C.J. p 459 note 40.

63. U.S.—*Hartford Accident & Indemnity Co. v. Coggin*, C.C.A.N.C., 78 F.2d 471, reversing, D.C., *Coggin v. Hartford Accident & Indemnity Co.*, 9 F.Supp. 785, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—*J. M. & L. A. Osborn Co. v. Wells*, C.C.A.Ohio, 69 F.2d 970, applying Ohio law—*Liquid Carbonic Corporation v. Phillips*, C.C.A. Miss., 68 F.2d 515—*In re Oliver C. Putney Granite Corporation*, D.C. Md., 14 F.Supp. 31.

Ala.—*Dutton v. Gibson*, 131 So. 567, 222 Ala. 191—*Avondale Mills v. Abbott Bros.*, 108 So. 31, 214 Ala. 368—*J. A. Lindsey & Co. v. Steenson*, 79 So. 11, 201 Ala. 589.

Cal.—*Pacific Nat. Agr. Credit Corporation v. Wilbur*, 42 P.2d 314, 2 Cal.2d 576—*Pacific States Savings & Loan Co. v. Hoffman*, 25 P.2d 1007, 134 Cal.App. 604.

Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 424, 90 Fla. 617, citing *Corpus Juris*.

Ill.—*Southern Surety Co. v. People's State Bank of Astoria*, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195.

Iowa.—*Pierre v. Pierre*, 232 N.W. 633, 210 Iowa 1304—*Panama Sav. Bank v. De Cou*, 228 N.W. 35, 209 Iowa 450—*First Nat. Bank v. Maxwell*, 200 N.W. 401, 198 Iowa 813.

Ky.—*Hauseman Motor Co. v. Napierella*, 3 S.W.2d 1084, 1087, 223 Ky. 433, citing *Corpus Juris*.

Md.—*State for Use of Horsey v. Maryland Casualty Co.*, 163 A. 856, 164 Md. 69.

Mass.—*West Springfield Trust Co. v. Hinckley*, 154 N.E. 580, 253 Mass. 157.

Mo.—*Schell v. F. E. Ransom Coal & Grain Co.*, App., 79 S.W.2d 543—*Cummins v. King*, 266 S.W. 748, 217 Mo.App. 371—*Kibble v. Ragland*, App., 263 S.W. 507—*Humphreys Sav. Bank v. Carpenter*, 250 S.W. 618, 213 Mo.App. 390.

Mont.—*Talmage-Sayer Co. of Joliet v. Smith*, 7 P.2d 536, 91 Mont. 289.

N.D.—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 51 N.D. 563.

Or.—*Immel v. Albany Iron Works*, 271 P. 53, 55, 127 Or. 118, quoting *Corpus Juris*.

Tenn.—*Stoll v. Schneider*, 13 S.W.2d 325, 158 Tenn. 341—*Maryville Furniture Co. v. Rowen*, 1 Tenn.App. 184.

Tex.—*Oklahoma Wheat Pool Elevator Corporation v. Sylvester*, Civ. App., 65 S.W.2d 398—*Plains Tractor & Equipment Co. v. Great West Mill & Elevator Co.*, Civ.App., 60 S.W.2d 856, error refused—*First State Bank of Kingsville v. First State Bank of George West*, Civ. App., 32 S.W.2d 378.

Vt.—*Barton Sav. Bank & Trust Co. v. Hamblett*, 178 A. 900, 107 Vt. 311—*Sargent, Osgood & Roundy Co. v. Kelly*, 132 A. 135, 99 Vt. 350—*Symes v. Fletcher*, 115 A. 502, 95 Vt. 431—*Wells v. Blodgett*, 104 A. 146, 92 Vt. 330.

Va.—*Elgin v. Dehart*, 132 S.E. 323, 144 Va. 311.

Wash.—*Community State Bank v. Martin*, 258 P. 498, 144 Wash. 483. 11 C.J. p 457 note 34.

"The description should be sufficiently specific to enable a third person to go to the place indicated and set the property apart."

Iowa.—*Farmers', etc., Bank v. Stockdale*, 96 N.W. 732, 733, 121 Iowa 748.

Tex.—*Plains Tractor & Equipment Co. v. Great West Mill & Elevator Co.*, Civ.App., 60 S.W.2d 856, 857, error refused.

The description of personal property in a chattel mortgage must be sufficient to identify subject matter intended to be granted with reasonable certainty, according to nature of the subject.

U.S.—*In re Oliver C. Putney Granite Corporation*, D.C.Md., 14 F.Supp. 31.

Md.—*State for Use of Horsey v. Maryland Casualty Co.*, 163 A. 856, 164 Md. 69.

Sufficiency of description of fixtures immaterial

In a mortgage covering certain real estate as well as personal property located on the realty, the sufficiency of the description of the personal property is immaterial in so far as such personalty constitutes fixtures which would pass "under the mortgage by the operation of law

[as realty], irrespective of their inclusion and description in the mortgage as personal property."—*In re Oliver C. Putney Granite Corporation*, D.C.Md., 14 F.Supp. 31, 33.

64. U.S.—*Floyd v. C. Nelson Mfg. Co.*, C.C.A.Miss., 93 F.2d 857—*In re Caver, Caver & Co.*, D.C.Miss., 42 F.2d 293, 294—*In re Tucker*, D.C. Miss., 1 F.Supp. 18.

Iowa.—*Iowa Automobile Supply Co. v. Tapley*, 171 N.W. 710, 186 Iowa 1341—*Commercial Sav. Bank v. Brooklyn Lumber & Grain Co.*, 160 N.W. 817, 173 Iowa 1206.

Miss.—*National Foods v. Friedrich*, 163 So. 126, 173 Miss. 717—*Garmon v. Fitzgerald*, 151 So. 726, 168 Miss. 532—*Kelly v. Reid*, 57 Miss. 89.

11 C.J. p 456 note 25.

Descriptions held insufficient

(1) A description in a buyer's original order, which was treated as a mortgage, simply designating "generically certain articles which the seller is requested to ship" without setting out the particular articles in stock . . . to be delivered."—*In re Caver, Caver & Co.*, D.C.Miss., 42 F.2d 293, 294.

(2) "Fish and Poultry Display case complete, # 5018," where it did not appear that the stated number separated the case from all other cases of like kind.—*National Foods v. Friedrich*, 163 So. 126, 127, 173 Miss. 717.

(3) "Two Underwood Typewriters; three chairs; 1 steel filing cabinet . . . ; five gross half pint bottles" and other similarly described property.—*Garmon v. Fitzgerald*, 151 So. 726, 168 Miss. 532.

65. U.S.—*In re Coleman & Brown*, D.C.Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254. Ark.—*Eades v. Simpson*, 191 S.W. 953, 127 Ark. 162.

Cal.—*Pacific Nat. Agr. Credit Corporation v. Wilbur*, 42 P.2d 314, 2 Cal.2d 576.

Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617.

Ga.—*Paradies & Rich v. Warren Co.*, 186 S.E. 483, 53 Ga.App. 457—*Stevens Hardware Co. v. Bank of Byromville*, 129 S.E. 172, 34 Ga. App. 268—*Hicks v. Walker Bros. Co.*, 120 S.E. 694, 31 Ga.App. 395—*Askev v. Wilson*, 99 S.E. 537, 23 Ga.App. 771.

disclose the property conveyed.⁶⁶ This rule is based | on the maxim, That is certain, which is capable of

La.—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658.

Okl.—Black, Sivalls & Bryson v. Loofburrow, 57 P.2d 836, 176 Okl. 506—Phelan v. Stockyards Bank, 276 P. 175, 134 Okl. 13—Crowl v. Ross, 241 P. 1105, 113 Okl. 291—Hillery v. Waurika Nat. Bank, 226 P. 1051, 100 Okl. 34—First Nat. Bank of Washington, Okl., v. Haines, 185 P. 441, 76 Okl. 301—Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199.

Tex.—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ. App., 65 S.W.2d 398—Radford v. Bacon Securities Co., Civ.App., 18 S.W.2d 848.

Vt.—Barton Sav. Bank & Trust Co. v. Hamblett, 178 A. 900, 107 Vt. 311.

11 C.J. p 458 note 35.

66. U.S.—V. M. & L. A. Osborn Co. v. Wells, C.C.A.Ohio, 69 F.2d 970—In re Lowry, C.C.A.Va., 40 F.2d 321—In re Coleman & Brown, D.C. Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254—In re Petersen, D.C.Nev., 252 F. 849.

Ala.—Dutton v. Gibson, 131 So. 567, 568, 222 Ala. 191, citing **Corpus Juris**—Stewart v. Clemens, 124 So. 863, 220 Ala. 224, 66 A.L.R. 1454—Avondale Mills v. Abbott Bros., 108 So. 31, 214 Ala. 368—Hammond v. Cabaniss, 104 So. 320, 213 Ala. 221—J. A. Lindsey & Co. v. Steenson, 79 So. 11, 201 Ala. 589.

Ark.—Blankenship v. Modglin, 6 S.W.2d 531, 177 Ark. 388—Beckler v. Snerly, 273 S.W. 9, 169 Ark. 317—Eades v. Simpson, 191 S.W. 953, 127 Ark. 162.

Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 320, 2 Cal.2d 576; quoting **Corpus Juris**—Pacific Nat. Agricultural Credit Corporation v. Wilbur, App., 34 P. 2d 212, 217, quoting **Corpus Juris**—United Bank & Trust Co. of California v. Powers, 265 P. 403, 407, 89 Cal.App. 690, quoting **Corpus Juris**.

Fla.—First Nat. Bank of Panama City v. First Nat. Bank of Chipley, 106 So. 422, 90 Fla. 617.

Ga.—Paradies & Rich v. Warren Co., 186 S.E. 438, 53 Ga.App. 457—Stevens Hardware Co. v. Bank of Byromville, 129 S.E. 172, 34 Ga. App. 268.

Idaho.—Kerby v. Robinson, 80 P.2d 33, 35, citing **Corpus Juris**—Livestock Credit Corporation v. Corbett, 22 P.2d 874, 53 Idaho 190—McConnell v. Langdon, 28 P. 403, 3 Idaho, Hasb., 157.

Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195—Chicago Title & Trust Co. v. Corporation of Fine Arts Bldg., 123 N.E. 300, 288 Ill. 142,

reversing In re Thurber's Estate, 209 Ill.App. 533—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

Iowa.—Producers Livestock Marketing Ass'n v. John Morrell & Co., 263 N.W. 242, 220 Iowa 948—Pierre v. Pierre, 232 N.W. 633, 210 Iowa 1304—Panama Sav. Bank v. De Cou, 228 N.W. 35, 209 Iowa 450—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 313—Liscomb State Sav. Bank v. Akers, 197 N.W. 890, 197 Iowa 706—Church v. Brown, 193 N.W. 414, 195 Iowa 1112—Bowman-Boyer Co. v. Burgett, 192 N.W. 795, 195 Iowa 674—Iowa Sav. Bank v. Graham, 181 N.W. 771, 192 Iowa 96.

Kan.—Security State Bank v. Jones, 247 P. 862, 121 Kan. 396—Jacquart v. Jennings, 235 P. 101, 102, 118 Kan. 224, citing **Corpus Juris**.

Ky.—Hauseman Motor Co. v. Napierella, 3 S.W.2d 1084, 223 Ky. 433.

La.—Burglass v. Manfre, App., 168 So. 328—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658.

Me.—Gould v. Huff, 154 A. 574, 576, 130 Me. 226, citing **Corpus Juris**.

Minn.—Munson v. Bensel, 211 N.W. 838, 169 Minn. 434.

Mo.—Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543—Bruce v. Kays, 1 S.W.2d 214, 222 Mo.App. 77—White v. Meiderhoff, 281 S.W. 101, 220 Mo.App. 171—Cummins v. King, 266 S.W. 748, 217 Mo.App. 371—Kibble v. Ragland, App., 263 S.W. 507—Humphreys Sav. Bank v. Carpenter, 250 S.W. 618, 213 Mo.App. 390.

Mont.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289.

Neb.—Security State Bank v. Schomberg, 230 N.W. 487, 119 Neb. 598.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

N.D.—Teigen v. Occident Elevator Co., 200 N.W. 38, 51 N.D. 563.

Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548—In re Rice, 18 Ohio N.P., N.S., 489.

Okl.—Ake v. General Grain Co., 72 P. 2d 735—Black, Sivalls & Bryson v. Loofburrow, 57 P.2d 836, 176 Okl. 506—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—Wilson & Co. v. Russell, 290 P. 1106, 144 Okl. 284—Phelan v. Stockyards Bank, 276 P. 175, 134 Okl. 13—Aikins v. Huff, 272 P. 1025, 133 Okl. 268—Crowl v. Ross, 241 P. 1105, 113 Okl. 291—Neal Gin Co. of Marietta v. Trades-

men's Nat. Bank of Oklahoma City, 239 P. 615, 111 Okl. 154—Hillery v. Waurika Nat. Bank, 226 P. 1051, 1052, 100 Okl. 34, quoting **Corpus Juris**—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83—First Nat. Bank of Washington, Okl., v. Haines, 185 P. 441, 76 Okl. 301—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110—Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199.

Or.—Immel v. Albany Iron Works, 271 P. 53, 127 Or. 118.

Tenn.—Stoll v. Schneider, 13 S.W.2d 325, 153 Tenn. 341—Maryville Furniture Co. v. Rowen, 1 Tenn.App. 184.

Tex.—Coppard v. Glasscock, Com. App., 46 S.W.2d 298, 300, citing **Corpus Juris**—McKeever v. Brooks-Davis Chevrolet Co., Civ.App., 74 S.W.2d 311, error dismissed—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ.App., 65 S.W.2d 398, 399, quoting **Corpus Juris**—Plains Tractor & Equipment Co. v. Great West Mill & Elevator Co., Civ.App., 60 S.W.2d 856, error refused—H. O. Wooten Grocer Co. v. Wade, Civ.App., 37 S.W. 2d 1090, 1092, quoting **Corpus Juris**—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71—Radford v. Bacon Securities Co., Civ.App., 18 S.W.2d 848—Handley v. McDonald & Ely Gin Co., Civ.App., 9 S.W.2d 372—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Civ.App., 263 S.W. 776—Childress v. First State Bank of Barnhart, Civ.App., 264 S.W. 350—Houston Nat. Exch. Bank v. Osceola Irrigating Co., Civ.App., 261 S.W. 561—Rus v. Farmers' Nat. Bank of Sealy, Civ. App., 228 S.W. 985—Ferrell-Michael Abstract & Title Co. v. McCormac, Civ.App., 184 S.W. 1081, affirmed, Com.App., 215 S.W. 559.

Vt.—Barton Sav. Bank & Trust Co. v. Hamblett, 178 A. 900, 107 Vt. 311—Sargent, Osgood & Roundy Co. v. Kelly, 132 A. 135, 99 Vt. 350—Wells v. Blodgett, 104 A. 146, 92 Vt. 330—Symes v. Fletcher, 115 A. 502, 95 Vt. 431—First Nat. Bank of Chelsea v. Fitts, 30 A. 697, 67 Vt. 57.

Va.—Mack International Motor Truck Corporation v. Jones & Combs, 149 S.E. 544, 153 Va. 183—Elgin v. Dehart, 132 S.E. 323, 144 Va. 311.

Wash.—Fisher v. Thumert, 76 P.2d 1018—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483. 11 C.J. p 458 note 36.

"Although the description may be meager and even defective, if it fairly gives a clue to the identity of the property so that third parties by reasonable investigation may ascertain the property which the parties

being made certain.⁶⁷ So, a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified.⁶⁸ *Persons without interest in mortgaged property.*

intended to include in the mortgage, the instrument must be regarded as a valid lien."—Security State Bank v. Jones, 247 P. 862, 863, 121 Kan. 396.

Description is insufficient as a matter of law only when it "is manifestly too meager and imperfect or uncertain to serve as an adequate means of identification."—American Bank & Trust Co. v. Feeney Tool Co., 137 A. 756, 757, 106 Conn. 159.

Rule applicable alike to chattel and land mortgages

Rule that description must be sufficiently specific to afford, third persons the means of identifying property refers to chattel mortgages as well as to mortgages of land.—Chicago Title & Trust Co. v. Corporation of Fine Arts Bldg., 123 N.E. 300, 288 Ill. 142, reversing *In re Thurber's Estate*, 209 Ill.App. 533—First Nat. Bank of Joliet v. Adam, 28 N.E. 955, 138 Ill. 483—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

Rule applicable alike to chattel mortgage and conditional sale

Tenn.—Stoll v. Schneider, 13 S.W.2d 325, 158 Tenn. 341.

Persons against whom definite description required

(1) "The strictness of the rules applied to chattel mortgages as to definiteness of description is only applied between the mortgagee and attaching creditors, subsequent incumbrancers and purchasers in good faith and for value."—Stoddard v. Ploeger, 247 P. 791, 793, 42 Idaho 688.

(2) As against persons having no interest in property mortgaged see infra § 57 c (3).

To avoid mortgage because of indefiniteness in the description of the property mortgaged, there must be uncertainty which remains after the mortgage has been interpreted in the light of the attendant circumstances and the parties' intent.—Abernathy v. Worthy, 129 So. 472, 221 Ala. 527—Smith v. Fields, 79 Ala. 335.

Pursuit of suggested inquiries required

Where a description is sufficient to put third persons on inquiry, from which inquiry the mortgaged property may be ascertained, such persons must inquire as to what property is covered by the mortgage.—Beckler v. Snerly, 273 S.W. 9, 169 Ark. 317.

In general, omnibus or roving descriptions in mortgages are too indefinite, general, and uncertain to furnish, through constructive notice thereof, means of identification, and furnish neither guide nor protection to either purchaser or seller, concerning specific chattels.

Ky.—Hauseman Motor Co. v. Napierella, 3 S.W.2d 1084, 223 Ky. 433. N.D.—Teigen v. Occident Elevator Co., 200 N.W. 38, 51 N.D. 563.

Insufficient description as merely preventing constructive notice

(1) It has been held that an "insufficient description [of the property] in the mortgage, which was valid between the parties operated merely to deprive the instrument of its character as constructive notice by reason of the recordation" of the instrument.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 662, 236 Ky. 725.

(2) Necessity of sufficient description to constitute record of mortgage constructive notice see infra § 164.

Description held sufficient as to

(1) Abstract books and appurtenances.—Ferrell-Michael Abstract & Title Co. v. McCormac, Tex.Civ.App., 184 S.W. 1081, affirmed, Com.App., 215 S.W. 559.

(2) Apples.—Fisher v. Thumliert, Wash., 76 P.2d 1013.

(3) Bales of cotton.—Nelson v. Forbes & Sons, 261 S.W. 910, 164 Ark. 460.

(4) Display counter and meat refrigerator.—H. O. Wooten Grocer Co. v. Wade Meat Co., Tex.Civ.App., 37 S.W.2d 1090.

(5) Drilling rig and accessories.—Brooks Supply Co. v. Gallinger, Tex. Civ.App., 279 S.W. 524.

(6) Engine.—Security State Bank v. Jones, 247 P. 862, 121 Kan. 396.

(7) Farm equipment. Iowa.—Bowman-Boyer Co. v. Burgett, 192 N.W. 795, 195 Iowa 674. Mo.—Cook v. Wheeler, App., 218 S.W. 929.

(8) Garage equipment and automobile parts.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.

(9) Gasoline tank — Munson v. Bensei, 211 N.W. 838, 169 Minn. 434.

(10) Hay in barn.—Rath v. Ponsor, 219 P. 285, 114 Kan. 370.

(11) Hotel fixtures and furniture.—Soady Bldg. Co. v. Collins, 137 So. 631, 18 La.App. 164.

(12) Lumber.—Mellen Produce Co. v. Fink, Wis., 273 N.W. 538.

(13) Oil well supplies and equipment.—Black, Sivalis & Bryson v. Loofburrow, 57 P.2d 836, 176 Okl. 506.

(14) Refrigerating plant.—Radford v. Bacon Securities Co., Tex.Civ.App., 18 S.W.2d 848.

(15) Steam rollers.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

(16) Wool.—Citizens' Bank of Clovis v. Cowart, Mo.App., 255 S.W. 931.

(17) Other items of personal property see 11 C.J. p 458 note 36 [a].

Descriptions held insufficient as to

(1) Barbecue oven, coffee urn, and other articles.—New Way Family Laundry v. Lebo, 133 So. 463, 16 La. App. 157.

(2) Farming tools, harvested corn and hay.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

67. Tex.—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Civ.App., 268 S.W. 776—Childress v. First State Bank of Barnhart, Civ.App., 264 S.W. 350, 351, quoting Corpus Juris. 11 C.J. p 459 note 37.

68. U.S.—In re Coleman & Brown, D.C.Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254. Ark.—Eades v. Simpson, 191 S.W. 953, 127 Ark. 162.

Ga.—Paradies & Rich v. Warren Co., 186 S.E. 438, 53 Ga.App. 457—Stevens Hardware Co. v. Bank of Byromville, 129 S.E. 172, 34 Ga.App. 268—Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

Ky.—Hauseman Motor Co. v. Napierella, 3 S.W.2d 1084, 1087, 223 Ky. 433.

N.J.—Huber v. Cloud, 130 A. 562, 563, 102 N.J.Law 181, quoting *Corpus Juris*.

Okl.—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.

11 C.J. p 459 note 38.

"A description, assisted by external evidence that does not add to or contradict the terms of the contract, which will enable a third party to identify the property, is sufficient."—Hauseman Motor Co. v. Napierella, *supra*.

It is well settled that the rule requiring that a mortgage shall specify property on which it is to take effect does not require that description shall serve to identify property without the aid of parol evidence, where the instrument indicates within itself some method by which description, with aid of extrinsic evidence, can be defined and limited.—Paradies & Rich v. Warren Co., 186 S.E. 438, 53 Ga.App. 457—Stevens Hardware Co. v. Bank of Byromville, 129 S.E. 172, 34 Ga.App. 268. Admissibility of parol evidence to identify property see the C.J.S. title Evidence § 1007, also 22 C.J. p 1265 note 25.

Property described as that then sold to mortgagor

A mortgage, although describing the articles mortgaged too generally to identify them by the description

Any description of the property mortgaged sufficient as between the parties to the mortgage is sufficient as against a trespasser⁶⁹ or a stranger to the title;⁷⁰ and third persons without any rights or interest in the mortgaged property cannot complain of a description in a mortgage⁷¹ sufficient as between the parties thereto.⁷²

A description that is not sufficient to make the mortgage valid as against a bona fide purchaser without notice, or against an attaching creditor, may nevertheless be sufficient as between the mortgagee and a trespasser⁷³ or a stranger to the title.⁷⁴ So, when the holder of an unrecorded chattel mortgage by failing to record it loses his right of priority, the only question as to the sufficiency of the

description in another recorded mortgage thereafter given is whether it was sufficient between the parties thereto.⁷⁵

Actual knowledge. Persons with actual knowledge of the property covered by the mortgage stand in no better position than the mortgagor in respect to their right to object to an insufficient description in the mortgage.⁷⁶ Thus, as against a third person purchasing the mortgaged property with actual notice of the mortgage lien thereon, the mortgage description of the property is sufficient if it constitutes a good description as between the parties thereto.⁷⁷

The fact that a third person has actual knowledge of the existence of the mortgage is, however,

alone, is generally sufficient as against a third person where the instrument contains words identifying the property as that then sold or delivered to the debtor or purchased by him, as the identification may thereby be completed through the admission of parol testimony.—*Paradies & Rich v. Warren Co.*, 186 S.E. 438, 53 Ga.App. 457.

69. *Mont.*—*Arro Oil & Refining Co. v. Montana & Dakota Grain Co.*, 286 P. 1115, 1116, 87 Mont. 259—*Moore v. Crittenden*, 204 P. 1035, 62 Mont. 309.

11 C.J. p 457 note 30.

70. *N.D.*—*Wilson v. Rustad*, 75 N.W. 260, 7 N.D. 330, 66 Am.S.R. 649. 11 C.J. p 457 note 30.

71. *Tex.*—*Starr Piano Co. v. Jimmerson*, Civ.App., 279 S.W. 302.

72. *Colo.*—*Thomas v. First Nat. Bank*, 51 P.2d 589, 97 Colo. 474. *Mont.*—*Moore v. Crittenden*, 204 P. 1035, 62 Mont. 309.

11 C.J. p 457 note 30, p 471 note 84. It is only where rights of innocent third parties have intervened that a defective description can be availed of to defeat rights of mortgagee.

Mont.—*Moore v. Crittenden*, supra. *Neb.*—*South Omaha Nat. Bank v. Stewart*, 106 N.W. 969, 75 Neb. 717, 719.

Attaching judgment creditor

(1) A judgment creditor of the mortgagor, securing a lien by seizing the mortgaged property, is not precluded from questioning the sufficiency of the description of the property in the mortgage.

Ga.—*Reynolds v. Tifton Guano Co.*, 92 S.E. 389, 20 Ga.App. 49.

La.—*Pittsburg Plate Glass Co. v. Lepow*, 120 So. 795, 10 La.App. 38.

(2) As against such a creditor, the sufficiency of the mortgage description is governed by the rule which obtains as against third persons generally.—*Reynolds v. Tifton Guano Co.*, supra.

(3) Sufficiency of description of property as against third persons generally see supra § 57 c.

73. *U.S.*—*O'Brien v. Miller*, C.C. Conn., 117 F. 1000.

S.D.—*Longerbeam v. Huston*, 105 N.W. 743, 20 S.D. 254.

74. *N.D.*—*Wilson v. Rustad*, 75 N.W. 260, 7 N.D. 330, 66 Am.S.R. 649.

75. *Mo.*—*Humphreys Sav. Bank v. Carpenter*, 250 S.W. 618, 619, 213 Mo.App. 390, quoting *Corpus Juris*. 11 C.J. p 457 note 33.

76. *Colo.*—*Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co.*, 226 P. 868, 75 Colo. 478.

Me.—*Gould v. Huff*, 154 A. 574, 130 Me. 226.

N.Y.—*Sisson v. First Nat. Bank of Hamden*, 254 N.Y.S. 527, 528, 233 App.Div. 506, citing *Corpus Juris*.

N.D.—*First State Bank of New Salem v. Farmers' Co-op. Elevator Co.*, 231 N.W. 859, 59 N.D. 699.

Tex.—*H. O. Wooten Grocer Co. v. Wade Meat Co.*, Civ.App., 37 S.W. 2d 1090—*Colley v. H. L. Edwards & Co.*, Civ.App., 258 S.W. 191. 11 C.J. p 460 note 42.

"Description in a chattel mortgage may be imperfect but still be sufficient to bind one who has actual notice of it."—*Corder v. G. B. Sprouse & Co.*, 100 S.W.2d 1001, 1003, 20 Tenn. App. 486.

Sufficiency of description immaterial *Colo.*—*Littell v. Brayton Motor, etc., Co.*, 201 P. 34, 70 Colo. 286.

Tex.—*Oklahoma Wheat Pool Elevator Corporation v. Sylvester*, Civ. App., 65 S.W.2d 398.

Sufficiency as constructive notice not essential

Mo.—*Kissick v. Kissick*, 279 S.W. 764, 221 Mo.App. 420.

What is actual notice

(1) "Notice is actual within the meaning of the law where the purchaser knows of the existence of the adverse claim, or is conscious of

having the means of knowledge, and does not use them, whether his knowledge is the result of a direct communication or is gathered from the facts and circumstances."—*Bowman-Boyer Co. v. Burgett*, 192 N.W. 795, 195 Iowa 674, 797.

(2) Where a commission company selling the mortgagor's cattle was informed, prior to the disposition of the proceeds from the sale, by a commission man and friend of the mortgagee that the cattle were covered by the latter's mortgage, such information "constituted notice of the mortgage" to the commission company, which could not regard the information as coming from a stranger having no actual knowledge of the facts.—*Kissick v. Kissick*, 279 S.W. 764, 766, 221 Mo.App. 420.

Inquiry not effective

Where a third person has knowledge of sufficient facts to place him on inquiry as to what property is covered by a mortgage description sufficient as between the parties but insufficient as against third persons without notice, a proper inquiry on his part failing to disclose the property covered by the mortgage acquits him of any knowledge of the property actually covered thereby.—*American State Bank of Harrisburg v. Harding*, Tex.Civ.App., 233 S.W. 102, dismissed for want of jurisdiction.

Knowledge of sheriff

Where the mortgage description was insufficient as against third persons without notice, and the mortgaged property had been seized by a sheriff on behalf of a judgment creditor of the mortgagor, it was immaterial that immediately prior to the sale by the sheriff he was informed of the mortgage.—*Crescent Realty Corporation of Delaware v. McFlynn*, La.App., 159 So. 461.

77. *Ga.*—*Messenger Pub. Co. v. Overstreet*, 137 S.E. 125, 36 Ga.App. 458.

immaterial where the mortgage is void, even as between the parties thereto, for uncertainty in the description of the property mortgaged.⁷⁸

b. Statutory Provisions

Statutory requirements as to the sufficiency of the description must in general be complied with.

Statutes, expressly regulating, in some jurisdictions, the sufficiency of the description in a chattel mortgage have been construed and applied in a number of cases.⁷⁹

78. Mont.—Arro Oil & Refining Co. v. Montana & Dakota Grain Co., 286 P. 1115, 1117, 87 Mont. 259.

"Actual knowledge of the existence of the mortgage would impart only such notice as the mortgage itself gave, and such other information as might have been obtained upon pursuing the inquiry which the mortgage itself suggested."—Arro Oil & Refining Co. v. Montana & Dakota Grain Co., *supra*.

79. In Connecticut, that description in mortgage is too general and indefinite to comply with a statute requiring a "particular description" of the mortgaged property does not render the mortgage invalid as between the mortgagor and mortgagee.—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 150, 95 Conn. 172.

In Louisiana

(1) Under a statute requiring a mortgage to set out "a full description of . . . [the] property . . . mortgaged, so that same may be identified" . . . it is not necessary that the . . . mortgage should contain such a description of the . . . property as will itself identify it but it is sufficient if the . . . [property] may be identified . . . from the description contained in the act [mortgage] together with information derived from inquiries suggested by it."—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658, 659.

(2) "All mortgages under . . . [the above statute] . . . must so describe the property as to permit identification without outside assistance except such as is otherwise admissible under the general law of evidence."—In re Ratcliff, D.C.La., 2 F.Supp. 193.

(3) It has, however, also been held that as against third persons "identification must be possible from the face of the instrument of mortgage."—Roberts v. Atkins, 141 So. 427, 428, 19 La.App. 634.

(4) The description of beauty shop equipment in a particular mortgage has been held sufficiently to meet the requirements of the statute set out in (1) *supra*.—Union Bldg. Cor-

poration v. Burmeister, 173 So. 752, 186 La. 1027.

(5) So as to a description of office furniture and equipment.—Remington-Rand, Inc., v. Profits Island Gravel Co., App., 144 So. 636, opinion reinstated 150 So. 76.

(6) So as to a description of a refrigerator counter, cooler coil, valve, condensing unit, grocer refrigerator, and meat cooler.—Maroun v. Marrs, App., 178 So. 723.

(7) The description of pole pilings in a particular mortgage has been held insufficiently to comply with the statute set out in (1) *supra*.—Christian v. Langford, 124 So. 593, 11 La.App. 652.

(8) So as to a description of a refrigerator.—Consolidated Cos. v. Laws, 124 So. 775, 11 La.App. 676.

In Maryland "the description of the personal property conveyed by a bill of sale required by the Maryland Code (article 21, § 41) is only a general description by its location, ownership, and general characteristics."—In re Durham, D.C.Md., 114 F. 750, 754.

In South Carolina

(1) The property must be described in writing or typewriting, but not printing; otherwise it is void. U.S.—In re Manning, D.C.S.C., 206 F. 685.

S.C.—State v. Perry, 70 S.E. 304, 87 S.C. 535—Rose v. Harlee, 48 S.E. 541, 69 S.C. 523.

(2) But, if the mortgage description is in writing, the instrument is valid, although other words of conveyance are printed.—State v. Perry, *supra*.

(3) This statute has been held to be valid and constitutional.—Rose v. Harlee, *supra*.

80. In Connecticut

(1) A designation of the subject matter of a mortgage as all machinery, tools, equipment, and fixtures located on certain premises of the mortgagor or in a specified city is, where the mortgagor retains possession, insufficient as against third persons under a statute requiring a particular description of such property when possession thereof is re-

c. All Property of a Particular Kind or Location

A description of the property as all of the mortgagor's property of a certain kind, or of every kind, in a specified locality or in his possession, is, unless there is a contrary statutory provision, sufficient as against third persons.

In the absence of statutory requirements to the contrary,⁸⁰ a description designating the subject matter as all the mortgagor's property of a certain kind in a specified locality⁸¹ or in his posses-

sion by the mortgagor.—City Nat. Bank v. Stoeckel, 132 A. 20, 103 Conn. 732—11 C.J. p 460 note 43.

(2) Such a designation is, however, sufficient as between the parties to the mortgage.—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172—11 C.J. p 460 note 43.

In Louisiana, under a statute requiring a mortgage to set out "a full description of . . . [the] . . . property . . . mortgaged, so that the same may be identified," a description of the property as all the mortgagor's property, or as all the mortgagor's property of a certain kind, located at a specified place, is insufficient. —Continental Bank & Trust Co. v. Succession of McCann, 92 So. 55, 56, 151 La. 555—Durel v. Buchanan, 86 So. 189, 147 La. 804—Le Corgne v. Garner, 7 La.App. 148.

81. U.S.—Hartford Accident & Indemnity Co. v. Coggin, C.C.A.N.C., 78 F.2d 471, reversing, D.C., Coggin v. Hartford Accident & Indemnity Co., 9 F.Supp. 785, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—Murphy Hotels Corporation v. Central Nat. Bank Savings & Trust Co., C.C.A.Ohio, 18 F.2d 719, certiorari denied Central Nat. Bank Savings & Trust Co. v. Murphy Hotels Corporation, 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—In re Oliver C. Putney Granite Corporation, D. C.Md., 14 F.Supp. 31.

Fla.—First Nat. Bank of Panama City v. First Nat. Bank of Chipley, 106 So. 422, 90 Fla. 617.

Ga.—Griffin Banking Co. v. Macon Nat. Bank, 126 S.E. 848, 33 Ga.App. 503.

Kan.—Kohler v. Harlow, 268 P. 122, 126 Kan. 215—Emick v. Swafford, 191 P. 490, 491, 107 Kan. 209, quoting *Corpus Juris*.

Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135. Mont.—Moore v. Crittenden, 204 P. 1035, 1037, 62 Mont. 309, citing *Corpus Juris*.

Neb.—Leisy v. Kane, 259 N.W. 526, 527, 128 Neb. 594, citing *Corpus Juris*.

sion⁸² is generally considered sufficient as against third persons; and a description merely describing the property conveyed as all the mortgagor's property of a certain kind,⁸³ or of every kind of which he is possessed,⁸⁴ is sufficient as between the parties; but, while there is authority to the contrary,⁸⁵ a description covering all the mortgagor's personal property of every kind is, standing alone, insufficient as against third persons,⁸⁶ although such a description has been held sufficient where it contains additionally a statement as to the location⁸⁷ and possession⁸⁸ of the property mortgaged.

The effect of a specific statement of the location of the property as curing an otherwise insufficient general description is considered in § 64 infra.

d. Motor Vehicles

A description of a motor vehicle is sufficient if a third person aided by such inquiries as the mortgage suggests can identify the vehicle intended. A misdescription of the motor or serial number is fatal.

While a motor vehicle should be described in a mortgage by giving as fully as possible the details furnishing the means of identification,⁸⁹ a descrip-

N.J.—Bankers' Trust Co. v. Maxson, 134 A. 875, 100 N.J.Eq. 1.

S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

Tex.—McKeever v. Brooks-Davis Chevrolet Co., Civ.App., 74 S.W. 2d 311, error dismissed—Harding v. San Saba Nat. Bank, Civ.App., 13 S.W.2d 121, error dismissed—Childress v. First State Bank of Barnhart, Civ.App., 264 S.W. 350.

Wash.—Goddard v. Morgan, 74 P.2d 894.

Wis.—Prentiss-Wabers Stove Co. v. Millers' Mut. Fire Ins. Ass'n of Alton, Ill., 211 N.W. 776, 778, 192 Wis. 623, supplemented on rehearing 213 N.W. 632, 192 Wis. 623, citing *Corpus Juris*.

11 C.J. p 461 note 57.

But, where cattle were described as "all other cattle owned by me" in a specified county, it was held that "there was no way to identify the cattle, and, as the words 'all other cattle' followed the description of three horses, it might be surmised that 'all other cattle' were horses."—First State Bank of Kingsville v. First State Bank of George West, Tex.Civ.App., 32 S.W.2d 378, 379. Crop mortgages see infra § 67. Effect of nonexistence of other like property generally see infra § 59. Stock in trade see infra § 68.

Rule applied to particular classes of property

(i) Billiard parlor furniture and equipment.—Murphy Hotels Corporation v. Central Nat. Bank Savings & Trust Co., C.C.A.Ohio, 18 F.2d 819, certiorari denied Central Nat. Bank Savings & Trust Co. v. Murphy Hotels Corporation, 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

(2) Canned goods.—Griffin Banking Co. v. Macon Nat. Bank, 126 S.E. 848, 33 Ga.App. 503.

(3) Contractor's tools, plant, equipment, and materials.—Hartford Accident & Indemnity Co. v. Coggin, C.C.A.N.C., 78 F.2d 471, reversing, D.C., Coggin v. Hartford Accident & Indemnity Co., 9 F.Supp. 785, certiorari denied 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

(4) Livestock.—Childress v. First State Bank of Barnhart, Tex.Civ.App., 264 S.W. 350.

(5) Description of animals generally see infra § 65.

(6) Pecans.—Harding v. San Saba Nat. Bank, Tex.Civ.App., 13 S.W.2d 121, error dismissed.

(7) Property used in operation of bowling alleys.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 220, 268 Ky. 135.

(8) Property used in operation of farm.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

(9) Property used in operation of stone-cutting plant.—In re Oliver C. Putney Granite Corporation, D.C.Md., 14 F.Supp. 31.

(10) Restaurant fixtures and furniture.

Kan.—Kohler v. Harlow, 268 P. 122, 126 Kan. 215.

Wash.—Goddard v. Morgan, 74 P.2d 894.

(11) Steel, iron, and brass.—Prentiss-Wabers Stove Co. v. Millers' Mut. Fire Ins. Ass'n of Alton, Ill., 211 N.W. 776, 192 Wis. 623, supplemented on rehearing 213 N.W. 632, 192 Wis. 623.

Sufficient description of lessee's buildings

A mortgage covering "all improvements" of the mortgagor located on specified premises leased by him is a sufficient description of the mortgagor's buildings located on such premises.—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

82. Ala.—Dutton v. Gibson, 131 So. 567, 568, 222 Ala. 191, overruling Stewart v. Clemens, 124 So. 863, 220 Ala. 224, 66 A.L.R. 1454, citing *Corpus Juris*.

Ga.—Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

Possession generally see infra § 64.

Livestock

(1) A description covering all livestock in the possession of, and owned by, the mortgagor is sufficient.—Dutton v. Gibson, 131 So. 567, 222 Ala. 191, overruling Stewart v. Clemens,

124 So. 863, 220 Ala. 224, 66 A.L.R. 1454.

(2) Description of animals generally see infra § 65.

Tools

Ga.—Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

83. Ala.—Davis v. Elba Bank & Trust Co., 106 So. 595, 214 Ala. 100.

84. N.D.—First State Bank of Grace City v. Dahly, 209 N.W. 655, 656, 54 N.D. 309.

85. Ga.—Bennett v. Green, 119 S.E. 620, 622, 156 Ga. 572.

Tantamount to specific description

"A general description of this kind is tantamount to a specific description of each unit composing the whole."—Bennett v. Green, supra.

86. Iowa.—Reinig v. Johnson, 212 N.W. 59, 202 Iowa 1366—Farmers', etc., Bank v. Stockdale, 96 N.W. 732, 121 Iowa 748.

S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

"Certainly, neither a designation nor a description of any property is afforded by a sweeping statement to the effect that the instrument . . . is intended as a conveyance of all the property the mortgagor has, and all that he ever expects to have."—Farmers', etc., Bank v. Stockdale, 96 N.W. 732, 121 Iowa 748, 751.

87. Kan.—Franklin v. Jennings, 264 P. 1041, 125 Kan. 553.

Or.—Immel v. Albany Iron Works, 271 P. 53, 127 Or. 118.

Location generally see infra § 64.

88. Kan.—Emick v. Swafford, 191 P. 490, 107 Kan. 209.

Possession generally see infra § 64.

89. Minn.—Walker v. Fitzgerald, 196 N.W. 269, 157 Minn. 319, affirmed 197 N.W. 259, 157 Minn. 319.

Sufficiency of description of motor vehicle in conditional sale see the C.J.S. title Sales § 562, also 55 C.J. p 1203 note 27 [g].

"The best description of a motor vehicle is the one required by the laws . . . in connection with an application for its registration."—Walker v. Fitzgerald, 197 N.W. 259, 157 Minn. 319, affirming 196 N.W. 269, 157 Minn. 319.

tion is generally held to be sufficient if it will enable a third person, aided by such inquiries as the instrument itself indicates and suggests, to identify the vehicle intended to be mortgaged.⁹⁰ Thus an automobile has been held to be sufficiently described, for the purposes of an action to enforce a lien or as against purchasers and third persons, when it is designated by make or name and model, and as the only one kept by the party at a certain place;⁹¹ by make, model, and age;⁹² by make, model, and engine number;⁹³ and as having been purchased from a named person on a given date;⁹⁴ by make and engine number alone;⁹⁵ by state license number, seal number, and engine number;⁹⁶ or by make and location, and as being of a certain age⁹⁷ or horse power;⁹⁸ and, as against third persons, a truck has been held to be sufficiently described by specifying its make and capacity, when it is shown that the mortgagor had but one truck of that description,⁹⁹ or by designating it by the owner's name, the county of its location, and the purpose for which it is used.¹ A description of an automobile by make and year is sufficient as against a third person with notice.²

As between the parties, a description is sufficient which describes a truck by make, model, and style

alone,³ or an automobile by make and model, although the number or location is not stated, where it is the only car owned by the party;⁴ but, if the vehicle intended cannot be identified from the description, the instrument is ineffectual and cannot be enforced.⁵

A description has been held to be insufficient as against third persons which describes an automobile merely by make and capacity,⁶ and as being in the mortgagor's possession in a certain county;⁷ by make and style,⁸ or by make, model, and style;⁹ or which describes a truck merely by make and capacity;¹⁰ or by make, style, and capacity.¹¹

Under a statute requiring a full description of the property mortgaged so that it may be identified, a description of an automobile by make, style, color, and model, without giving the motor or serial number, is insufficient as against third persons;¹² and a description by style and number alone, without specifying the make and designating the number as being the motor number, is likewise insufficient.¹³

Erroneous description. Since the motor and serial numbers are the distinctive marks by which cars of the same make are identified one from the other,¹⁴ an erroneous designation of the motor¹⁵ or

90. Iowa.—Iowa Sav. Bank v. Graham, 181 N.W. 771, 192 Iowa 96.
Okl.—Hillery v. Waurika Nat. Bank, 226 P. 1051, 100 Okl. 34.

Vt.—Sargent, Osgood & Roundy Co. v. Kelly, 132 A. 135, 99 Vt. 350—Wright v. Lindsay, 104 A. 148, 92 Vt. 335.

42 C.J. p. 758 note 36.

Description may be sufficient without designating the serial number.
Tex.—Harding v. Jesse Dennett, Inc., Civ.App., 17 S.W.2d 862, error refused.

91. Vt.—Sargent, Osgood & Roundy Co. v. Kelly, 132 A. 135, 99 Vt. 350. Effect of nonexistence of other property generally see *infra* § 59.

92. Okl.—Hillery v. Waurika Nat. Bank, 226 P. 1051, 100 Okl. 34.

93. Tenn.—Owen v. George Cole Motor Co., 292 S.W. 1, 155 Tenn. 250. 42 C.J. p. 758 note 38.

94. Vt.—Wright v. Lindsay, 104 A. 148, 92 Vt. 335.

95. Colo.—Sowards v. Jones, 223 P. 747, 75 Colo. 25.

96. Tex.—Smith v. Farmers' State Bank, Civ.App., 262 S.W. 835.

97. S.C.—Garris v. Commercial Credit Co., 147 S.E. 601, 149 S.C. 498.

Location generally see *infra* § 64.

98. Okl.—Stiles v. City State Bank, 156 P. 622, 56 Okl. 572.

99. Ga.—Hicks v. Walker Bros. Co., 120 S.E. 694, 31 Ga.App. 395. Effect of nonexistence of other property generally see *infra* § 59.

1. Va.—Mack International Motor Truck Corporation v. Jones & Combs, 149 S.E. 544, 153 Va. 183.

2. Ky.—Clark v. Ford, 201 S.W. 344, 179 Ky. 797.

3. Minn.—Walker v. Fitzgerald, 197 N.W. 259, 157 Minn. 319, affirming 196 N.W. 269, 157 Minn. 319.

4. Mo.—Humphreys Sav. Bank v. Carpenter, 250 S.W. 618, 213 Mo. App. 390.

5. Tex.—Farmers' State Bank v. Valley Motors Co., Civ.App., 246 S.W. 712.

6. Iowa.—Iowa Automobile Supply Co. v. Tapley, 171 N.W. 710, 186 Iowa 1841.

Particular description held insufficient.

Iowa.—Iowa Automobile Supply Co. v. Tapley, *supra*.

7. Iowa.—Iowa Automobile Supply Co. v. Tapley, *supra*.

Location and possession generally see *infra* § 64.

8. Md.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.

9. Iowa.—Commercial Sav. Bank v. Brooklyn Lumber & Grain Co., 160 N.W. 817, 178 Iowa 1206.

Compared to description of animals

(1) To say that an automobile is of a certain make, model, and style "would aid in identification no more than the color of a horse or its age or weight, for presumably there are more than one of the kind described."—Commercial Sav. Bank v. Brooklyn Lumber & Grain Co., *supra*.

(2) Description of animals see *infra* § 65.

10. Ky.—Hauseman Motor Co. v. Napierella, 3 S.W.2d 1084, 223 Ky. 433.

11. Minn.—Walker v. Fitzgerald, 196 N.W. 269, 157 Minn. 319, affirmed 197 N.W. 259, 157 Minn. 319.

12. U.S.—In re Ratcliff, D.C.La., 2 F.Supp. 193.

13. La.—Valley Securities Co. v. Stafford, 8 La.App. 607, 608.

"1 Roadster No. 14525832" is an insufficient description.—Valley Securities Co. v. Stafford, *supra*.

14. La.—Valley Securities Co. v. De Roussel, 133 So. 405, 16 La.App. 115.

Mass.—Wise v. Kennedy, 142 N.E. 755, 248 Mass. 83.

15. La.—Valley Securities Co. v. De Roussel, 133 So. 405, 16 La.App. 115—Exchange Nat. Bank v. Palace Car Co., 1 La.App. 307.

Mass.—Wise v. Kennedy, 142 N.E. 755, 248 Mass. 83.

serial¹⁶ number is generally held to render the mortgage insufficient as against third persons, particularly when other parts of the description are likewise erroneous.¹⁷

It has also been held that an intrinsically false and misleading description renders the mortgage invalid¹⁸ and ineffective to create a mortgage lien.¹⁹

§ 58. — Reference to Other Instruments

Although there is authority to the contrary, it is generally held that the description of the mortgaged property may be contained in a separate writing which is attached or referred to.

Although there is authority to the contrary,²⁰ the description of the property mortgaged may be contained in a separate writing,²¹ as in a schedule attached to the mortgage²² at the place where the property would otherwise have been described;²³

and, where such writing is attached to the mortgage, it has been held that it need not be specifically referred to.²⁴ Further, the description may be completed by reference to a bill of sale²⁵ which is to be recorded,²⁶ or may be contained in another mortgage which is on record and is referred to,²⁷ even though the mortgage referred to was satisfied and withdrawn from record a few days after the execution of the later mortgage,²⁸ or although it does not specifically mention the fact that the mortgage referred to is on file.²⁹ Likewise a reference to a schedule attached to another mortgage which is on file is sufficient.³⁰ Failure to attach a schedule referred to as attached, however, is fatal to the validity of the description,³¹ unless the property is otherwise sufficiently described.³²

Where the description of the property is contained in a separate writing attached to the mort-

Mo.—First Nat. Bank v. Gardner, 5 S.W.2d 1115, 222 Mo.App. 858.

S.D.—Alberts v. Alberts, 221 N.W. 80, 53 S.D. 463.

42 C.J. p 759 note 49.

Curing defective description see infra § 70.

Misdescription or false description generally see infra § 69.

Misdesignation of car numbers in conditional sale see the C.J.S. title Sales § 562, also 42 C.J. p 759 note 48.

"Positively misleading"

An erroneous description of the motor number of a vehicle "is positively misleading, for admittedly it not only fails to show the true individual number of the car, but gives another which it does not bear."—First Mortgage Loan Co. v. Durfee, 188 N.W. 777, 778, 193 Iowa 1142.

"The discrepancy . . . cannot be treated as a mere clerical error"

S.D.—Alberts v. Alberts, 221 N.W. 80, 53 S.D. 463.

Not sufficient as matter of law to charge subsequent mortgagee with notice of lien.—Pinson-Brunson Motor Co. v. Bank of Danielsville, 151 S.E. 549, 40 Ga.App. 793.

16. La.—Valley Securities Co. v. De Roussel, 133 So. 405, 16 La.App. 115.

Mo.—First Nat. Bank v. Gardner, 5 S.W.2d 1115, 222 Mo.App. 858.

17. Misdesignation of style and number

A description of a four-passenger automobile of a certain make and number as a five-passenger automobile of the same make but a different number is not such similarity as to be notice to third persons that the same car was intended.—McQueen v. Tenison, Tex.Civ.App., 177 S.W. 1053.

18. N.M.—Shephard v. Van Doren, 60 P.2d 635, 40 N.M. 380.

19. S.D.—Security Nat. Bank v. White Co., 211 N.W. 452, 50 S.D. 598.

Touring car described as truck

A description covering "5 1-ton White trucks, models G. B. B. E.," "is so utterly lacking in anything that could create a lien on" a White touring car, model G. F., "that . . . as a matter of law . . . said car was never mortgaged to the [mortgagee]."—Security Nat. Bank v. White Co., supra.

20. La.—Le Corgne v. Garner, 7 La. App. 148.

21. N.H.—Belknap v. Wendell, 21 N. H. 175.

Construction of description referring to other instruments see infra § 116

Outstanding trust deed

A statement in a mortgage acknowledging a prior outstanding trust deed in favor of a named person is insufficient as a designation of an instrument in which the description of the property may be found where such instrument is neither adequately described, made a part of the mortgage, nor referred to therein for a more adequate description of the property.—Garmon v. Fitzgerald, 151 So. 726, 168 Miss. 532.

22. Ind.—Voigt v. Ludlow Typograph Co., 12 N.E.2d 499.

Kan.—Jacquart v. Jennings, 235 P. 101, 102, 118 Kan. 224, citing *Corpus Juris*.

N.J.—Page v. Kendig, Ch., 7 A. 878. Ohio.—In re Rice, 18 Ohio N.P., N.S., 489.

11 C.J. p 461 note 46.

A part of the mortgage

(1) A schedule annexed to the mortgage and referred to therein "becomes a part and parcel of the

mortgage itself,—as much so as though the very words had been incorporated in the body of the mortgage."—Page v. Kendig, N.J.Ch., 7 A. 878.

(2) An attached schedule is a part of the mortgage despite the fact that it appears after the acknowledgment and signature, since the acknowledgment and signature need not be at the end of the mortgage.—Voigt v. Ludlow Typograph Co., Ind., 12 N.E. 2d 499.

Effect of failure to attach schedule

To be a part of the mortgage description "the schedule . . . should be attached to the mortgage, and if not, it becomes only a means of identification suggested by the description."—In re Rice, 18 Ohio N. P., N.S., 489, 495.

23. Kan.—Jacquart v. Jennings, 235 P. 101, 118 Kan. 224.

24. N.H.—Belknap v. Wendell, 21 N. H. 175.

25. Ohio.—In re Rice, 18 Ohio N.P., N.S., 489.

Tex.—Pullen v. Berkley, Civ.App., 27 S.W.2d 924.

26. Tex.—Pullen v. Berkley, supra.

27. Iowa.—Thompson v. Anderson, 63 N.W. 355; 94 Iowa 554.

11 C.J. p 461 note 48.

28. S.D.—Slimmer v. Meade County Bank, 147 N.W. 734, 34 S.D. 147.

29. Wis.—Newman v. Tymeson, 13 Wis. 172, 80 Am.D. 735.

30. Wis.—Newman v. Tymeson, supra.

31. N.W.Terr.—Svaigher v. Rotaru, 3 West.L.R. 486.

11 C.J. p 461 note 52.

32. Wash.—Goddard v. Morgan, 74 P.2d 894.

11 C.J. p 461 note 53.

gage, such writing will, in the absence of proof to the contrary, be presumed to have been attached prior to the execution of the mortgage.³³

§ 59. — Effect of Nonexistence of Other Like Property

The scarcity or plenitude of chattels of a similar kind is a factor in determining the sufficiency of the description, which when indefinite may be aided by the nonexistence of other property to which the terms of the mortgage could apply.

The scarcity or plenitude of chattels similar to those mortgaged is an element to be considered in determining the sufficiency of the description of the chattels covered by the mortgage,³⁴ and the nonex-

istence of other property to which the terms of the mortgage could apply frequently renders valid a description in a mortgage which otherwise would be too indefinite.³⁵

§ 60. — Property Not Yet Acquired or in Existence

To cover after-acquired property, the mortgage must clearly express such intent and describe the property so that it may be identified.

If the mortgage is designed to cover after-acquired property, whether in esse or not, it is necessary that such an intent be clearly³⁶ expressed,³⁷ and that the property be described so that it may be identified,³⁸ for example, by stating that it is to

33. N.H.—Belknap v. Wendell, 21 N. H. 175.

11 C.J. p 461 note 54.

34. Or.—Immel v. Albany Iron Works, 271 P. 53, 55, 127 Or. 118, quoting *Corpus Juris*.

11 C.J. p 461 note 55.

35. U.S.—In re Joe H. Moore Motor Co., D.C.Tex., 49 F.2d 292—In re Coleman & Brown, C.C.A.Ga., 2 F. 2d 254, reversing, D.C., 291 F. 280. Ga.—Hicks v. Walker Bros. Co., 120 S.E. 694, 31 Ga.App. 395.

Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill. App. 554.

Iowa.—Liscomb State Sav. Bank v. Akers, 197 N.W. 890, 197 Iowa 706. Mass.—Simmons v. Carroll, 122 N.E. 408, 232 Mass. 428.

Mont.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

Tenn.—Klimes v. Jones, 7 Tenn.App. 583.

Tex.—Hartman v. First Nat. Bank, Civ.App., 97 S.W.2d 969—Glenn v. Green, Civ.App., 268 S.W. 1056.

11 C.J. p 461 note 56.

Description covering all mortgagor's property see supra § 57 i.

Larger number than mortgagor owns see infra § 62.

36. U.S.—In re Drag, D.C.Mich., 254 F. 474, applying Michigan law.

Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 166 Minn. 383—Campbell Implement Co. v. Nelson, 198 N.W. 401, 159 Minn. 163—Montgomery v. Chase, 14 N. W. 586, 30 Minn. 132.

Mo.—Clayton v. Gentle, App., 14 S. W.2d 672.

N.C.—Twin City Motor Co. v. Rouzer Motor Co., 148 S.E. 461, 197 N.C. 371—Merchants' & Farmers' Bank v. Pearson, 120 S.E. 210, 186 N.C. 609—Hickson Lumber Co. v. Gay Lumber Co., 63 S.E. 1045, 150 N.C. 282, 21 L.R.A., N.S., 843.

Okl.—Hivick v. Oklahoma-Colorado Oil & Gas Co., 212 P. 420, 89 Okl. 181.

Tex.—Hamilton Nat. Bank v. Harris, Civ.App., 260 S.W. 318.

Utah.—Fisher v. Bank of Spanish Fork, 74 P.2d 659.

11 C.J. p 436 note 28, p 461 note 59.

37. U.S.—In re Ballard, D.C.Tex., 279 F. 574.

Ill.—W. H. Collins Ice Cream Co. v. Talmage, 210 Ill.App. 374.

Mass.—Hallfors v. Gove, 114 N.E. 314, 225 Mass. 266.

Ohio.—In re Rice, 18 Ohio N.P., N.S., 489.

Okl.—Intertype Corporation v. Stro- snider, 211 P. 1022, 88 Okl. 68— Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.

11 C.J. p 461 note 59.

Validity of mortgage see supra § 26.

Intent sufficiently disclosed

(1) Where chattels particularly described in a mortgage were acquired by the mortgagor soon after the execution of the mortgage, the intent to mortgage such after-acquired property is sufficiently disclosed in the absence of evidence of a contrary intent.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.

(2) Where, in a mortgage on the equipment of a newspaper plant described in a number of separate items, only some of such items were followed by words indicating an intent to include after-acquired property, but the mortgage further provided that "in case of foreclosure . . . each and every . . . thing . . . used in the equipment of said newspaper . . . shall be deemed as described . . . herein," it was held that the intention to include all property subsequently acquired for use in the plant was sufficiently disclosed by the mortgage language.—Watson v. Koochiching Realty Co., 208 N.W. 11, 12, 166 Minn. 383.

(3) "All increase and additions" to described livestock.—Live Stock Nat. Bank of Sioux City v. Julius, 174 N. W. 489, 490, 187 Iowa 748.

(4) Other instances see 11 C.J. p 461 note 59 [d].

Intent insufficiently disclosed

(1) A mortgage on hotel furnishings and equipment reciting, "all of said property being that described in . . . [the mortgagor's] . . . articles of incorporation and that subsequently added to said furnishings and equipment" does not cover property acquired after the mortgage was given.—Clayton v. Gentle, Mo. App., 14 S.W.2d 672, 673.

(2) Other instances see 11 C.J. p 461 note 59 [e].

38. Mont.—Hackney v. Birely, 215 P. 642, 67 Mont. 155.

Tex.—Hamilton Nat. Bank v. Harris, Civ.App., 260 S.W. 318, 319, citing *Corpus Juris*—Watson v. D. A. Paddleford & Son, Civ.App., 220 S. W. 779, certified questions answered, Sup., 221 S.W. 569.

11 C.J. p 462 note 60.

Crops to be grown see infra § 67.

Sufficient descriptions

(1) "All increase and additions" to described livestock.—Live Stock Nat. Bank of Sioux City v. Julius, 174 N. W. 489, 490, 187 Iowa 748.

(2) "All . . . live stock . . . now or hereafter belonging to the mortgagor, and now or thereafter situated on" certain realty.—Bank of California v. McCoy, Cal.App., 72 P. 2d 923, 924.

(3) "Any increase of all property, real or personal, that may be hereafter acquired by the parties . . . by purchase or otherwise."—Prentiss Mercantile Co. v. Thurman, 161 So. 746, 173 Miss. 6.

(4) Other descriptions.

Ga.—Wardlaw v. Mayer, 77 Ga. 620. Idaho.—Dover Lumber Co. v. Case, 170 P. 108, 81 Idaho 276.

11 C.J. p 461 note 59 [d].

Insufficient descriptions

(1) "Also all . . . livestock situated in said county aforesaid now owned or that may be hereafter acquired by said mortgagor until this

be acquired in the business conducted by the mortgagor, or that it will be put in a certain building, place, or locality.³⁹ The equitable rule is sometimes stated to be that the mortgage will be held to extend to after-acquired property if the court under the terms of the mortgage would have decreed specific performance of a contract to sell or pledge it.⁴⁰ Where the mortgaged property is described as in esse or by words denoting the past or present tense, words of futurity will not be added by intendment, to pass future-acquired property.⁴¹

Exempt property. In some jurisdictions the sufficiency of the description is not affected by the fact that it covers property of the mortgagor to be acquired in the future which may be exempt from levy and sale under execution,⁴² although the contrary rule prevails in at least one other jurisdiction.⁴³

Future earnings of animals or machines. A mortgage of the future earnings of an animal⁴⁴ or a machine,⁴⁵ to be valid against third persons, must specifically describe the property to be used and the time and place the earnings are to accrue.

mortgage is released in full."—Hamilton Nat. Bank v. Harris, Tex. Civ.App., 260 S.W. 318.

(2) A clause in a mortgage of definitely described lambs merely stating the mortgagor's "intent . . . to mortgage all property of like kind . . . hereafter . . . acquired . . . including that acquired by . . . purchase," is not a sufficient description of other lambs subsequently purchased by the mortgagor.—Hackney v. Birely, 215 P. 642, 643, 67 Mont. 155.

(3) Other descriptions see 11 C.J. p 461 note 59 [e].

39. Miss.—Maryland Fidelity, etc., Co. v. B. F. Sturtevant Co., 38 So. 783, 86 Miss. 509, 109 Am.S.R. 716.

40. N.J.—Bankers' Trust Co. v. Maxson, 134 A. 875, 100 N.J.Eq. 1. Wyo.—P. J. Black Lumber Co. v. Turk, 62 P.2d 519, 521, 50 Wyo. 361, rehearing denied 63 P.2d 805, 50 Wyo. 361, citing *Corpus Juris*. 11 C.J. p 462 note 63.

41. Mo.—Clayton v. Gentle, App., 14 S.W.2d 672. 11 C.J. p 462 note 64.

42. U.S.—In re National Grocer Co., Mich., 181 F. 33, 104 C.C.A. 47, 30 L.R.A.,N.S., 982. 11 C.J. p 462 note 65.

43. U.S.—In re Schuller, D.C.Wis., 108 F. 591.

44. Iowa.—McArthur v. Garman, 32 N.W. 14, 71 Iowa 34. Description of animals see *infra* § 65.

45. S.D.—Flanders v. French, 106 N. W. 54, 20 S.D. 316. 11 C.J. p 463 note 63.

46. Ky.—Sparks v. Paris Deposit Bank, 74 S.W. 185, 115 Ky. 461, 24 Ky.L. 2333, 78 S.W. 171, 25 Ky.L. 1481. Tex.—Oxsheer v. Watt, Civ.App., 42 S.W. 121.

As against persons without notice

"The authorities are in conflict upon the question of whether a description of property which constitutes a part of a greater quantity of a like kind is sufficient as against parties having no knowledge or notice of a prior chattel mortgage thereon."—Nichols v. Jackson County Bank, 298 P. 903, 910, 136 Or. 302.

47. Tex.—Dallas Joint Stock Land Bank v. Henry & Younce, Civ.App., 78 S.W.2d 725—Griffin v. Mangrum, Civ.App., 267 S.W. 279, 280, citing *Corpus Juris*—Farmers' & Merchants' Nat. Bank v. Jones, Civ. App., 254 S.W. 251. 11 C.J. p 463 note 70.

Selection equivalent to identification

(1) A subsequent mutual selection by the parties of the chattels mortgaged is itself such an identification of the mortgaged property as to render the mortgage valid as between the parties, irrespective of the sufficiency of the description.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856—Theodore Hamm Brewing Co. v. Flagstad, 166 N.W. 289, 182 Iowa 826.

(2) So, also, a selection prior to

§ 61. — Part of Larger Number or Quantity

Except as to chattels of uniform quality and value, a mortgage of an undefined portion of a larger number or quantity of a like kind is, while usually upheld as between the parties, ordinarily regarded as invalid as to third persons although the defect may be cured by a subsequent identification of the property intended to be covered. The subsequent commingling of the mortgaged property with other like property does not, unless assented to by the mortgagee, affect the validity of the description.

The decisions are not uniform as to the sufficiency of a description of property constituting a part of a larger number or quantity of a like kind.⁴⁶ As between the parties such mortgages, although indefinitely phrased, are usually upheld since the mortgagee, or his assignee, has the right of selection.⁴⁷ However, when the rights of third persons become involved, the great weight of authority supports the rule that a mortgage of a specified number of chattels out of a larger number, or of a specified quantity out of a larger mass, which does not furnish data for the separation of the mortgaged chattels, is, when there is no separation or delivery, void for uncertainty,⁴⁸ except as to claimants with actual no-

the execution of the mortgage renders it valid between the parties as to chattels thus selected, notwithstanding the indefiniteness of the description thereof.—Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478.

Provision permitting selection as not invalidating mortgage

A mortgage on a specified number of cattle, stipulating that if the mortgagor owned a larger number the mortgagee should have a right of selection, is not rendered invalid as between the parties, when it appears that the mortgagor had a larger number of similar cattle, on the theory that a mortgage of chattels to be selected confers no title until selection where the mortgaged cattle had been selected and identified prior to the execution of the mortgage.—Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., *supra*.

48. U.S.—In re Joe H. Moore Motor Co., D.C.Tex., 49 F.2d 292—Brown v. Camp, C.C.A.Ga., 275 F. 612—In re Petersen, D.C.Nev., 252 F. 849.

Idaho.—First Nat. Bank v. Crane Creek Sheep Co., 273 P. 945, 47 Idaho 149.

Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 253 Mass. 157.

Mo.—Barnard State Bank v. Lankford, 11 S.W.2d 1084, 1087, 223 Mo. App. 519—Kibble v. Ragland, App., 263 S.W. 507.

N.C.—Forehand v. Edenton Farmers' Co., 175 S.E. 183, 206 N.C. 827.

tice that the property claimed by them is covered by the mortgage,⁴⁹ although in some jurisdictions such a mortgage is upheld on the theory that the mortgagee has the right of selection,⁵⁰ and in at least one jurisdiction it has been upheld under applicable statutory provisions.⁵¹

A defect in a mortgage, from lack of separation or other identification of the property meant to be covered, may be cured by such subsequent action of the parties as removes doubt as to the identity of the property mortgaged.⁵² So, if the mortgage provides that the part mortgaged is to be subsequently separated and delivered at a certain place, and these conditions have been complied with, the description is sufficient.⁵³ The mere fact that the mortgaged property is kept in the same place as other similar property of other owners will not invalidate it as against third persons if the mortgaged property can be identified.⁵⁴

Chattels of uniform quality and value. Where the mortgaged chattels are of a uniform quality and value, such as are ascertained by weight, measure, or count, and the constituent parts, which make up

the mass, are not distinguished by any physical difference in size, shape, or quality, a mortgage of a part of the undivided whole is valid for all purposes.⁵⁵

Subsequent confusion of chattels. If when the mortgage was given the property mortgaged was separate, the fact that it is afterward commingled with other similar property does not affect the validity of the description⁵⁶ unless the confusion of the property occurs with the consent of the mortgagee, in which case the mortgage will be valid only with respect to those articles which can be identified.⁵⁷

§ 62. — Larger Number or Quantity than Mortgagor Owns

The fact that the mortgage describes a larger number or quantity of particular chattels than the mortgagor possesses does not render it uncertain.

When the description covers a larger number or quantity of particular chattels than the mortgagor possesses, there is no other property of the same kind from which a selection is to be made, and therefore no uncertainty.⁵⁸

Ohio.—*Everson v. Rule*, 32 Ohio N. P., N.S., 501.

11 C.J. p 463 note 71.

Delivery curing defective description see *infra* § 70.

Part of crop see *infra* § 67.

Reasons for rule

(1) "There is no way of telling what part of the property was intended to be covered in the mortgage."—*Kibble v. Ragland*, Mo.App., 268 S.W. 507, 510.

(2) "It is the fact that no title passed or could possibly pass, to any of the cotton until designated by the selection of the grantor's, that gives the creditor the better right."

Ark.—*Dodds v. Noel*, 41 Ark. 70, 74. Tenn.—*Williamson v. Steele*, 3 Lea 527, 530, 31 Am.R. 652.

Mortgage covering corn in "3 round cribs" would be sufficiently definite if there were but three large cribs, notwithstanding small pile with wire placed around it, but if there were four cribs the mortgage would be void.—*Barnard State Bank v. Lankford*, 11 S.W.2d 1084, 1087, 223 Mo.App. 519.

Rule inapplicable to description covering an undivided interest in a described mass of property.—*Mahoney v. Citizens' Nat. Bank of Salmon*, 271 P. 935, 47 Idaho 24.

Assumption of existence of larger number

In testing the sufficiency of a mortgage description covering a specified number of chattels, it will not be assumed that the mortgagor had

more than the number specified, such fact being a matter of defense in impeachment of the mortgage.—*Wells v. Blodgett*, 104 A. 146, 92 Vt. 330.

49. *Ariz.*—*Wightman v. King*, 250 P. 772, 774, 31 Ariz. 89, citing *Corpus Juris*.

Colo.—*Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co.*, 226 P. 863, 75 Colo. 473.

Idaho.—*Mahoney v. Citizens' Nat. Bank of Salmon*, 271 P. 935, 47 Idaho 24.

Or.—*Nichols v. Jackson County Bank*, 298 P. 908, 910, 136 Or. 302. 11 C.J. p 463 note 72.

Animals

As against a purchaser with actual notice that the sheep purchased were mortgaged, a mortgage of a specified number of sheep having a certain brand is sufficient, although the mortgagor has a larger number of sheep answering to such description.—*Nichols v. Jackson County Bank*, 298 P. 908, 136 Or. 302.

50. *U.S.*—*In re Ballard*, D.C.Tex., 279 F. 574, applying Texas law. 11 C.J. p 463 note 73.

51. **In Connecticut**, under a statute providing that no chattel mortgage "shall be invalid as to any item of personal property included therein, by reason of its being described as consisting of less than its true number or quantity; and, if foreclosed the court may make a just order of division," a mortgage of a specified number of chattels out of a larger number is valid although failing to

furnish the means for the separation of the mortgaged chattels.—*American Bank & Trust Co. v. Feeney Tool Co.*, 137 A. 756, 757, 106 Conn. 159.

52. *Kan.*—*Inter-State Galloway Cattle Co. v. McLain*, 22 P. 728, 42 Kan. 680.

11 C.J. p 464 note 74.

Curing defective descriptions generally see *infra* § 70.

53. *Ark.*—*Person v. Wright*, 35 Ark. 169.

Ga.—*Stephens v. Tucker*, 55 Ga. 543.

54. *Kan.*—*Waggoner v. Oursler*, 37 P. 973, 54 Kan. 141.

Me.—*Elder v. Miller*, 60 Me. 118.

55. *Kan.*—*Burton v. Cochran*, 47 P. 569, 5 Kan.App. 508.

Mich.—*DeGraff v. Byles*, 29 N.W. 487, 63 Mich. 25.

Neb.—*McCormick Harvesting Mach. Co. v. Reynolds*, 88 N.W. 130, 62 Neb. 392.

11 C.J. p 464 note 77.

56. *Idaho.*—*Blackfoot City Bank v. Clements*, 226 P. 1079, 39 Idaho 194.

11 C.J. p 464 note 79.

Retention and sale in ordinary course of business see *infra* §§ 203-207.

57. *N.Y.*—*Caring v. Richmond*, 28 Hun 25.

11 C.J. p 464 note 80.

58. *Cal.*—*United Bank & Trust Co. of California v. Powers*, 265 P. 403, 39 Cal.App. 690.

§ 63. — Exceptions or Reservations from Description

Specific articles may be definitely excepted from a general description by which they would otherwise be included, but a general exception of exempt property, without designation of the property claimed as exempt, is not in all jurisdictions sufficient.

Where there is a sufficient designation of the property included it is permissible for a mortgage of a mass of property to except certain articles which would be included under the general description,⁵⁹ but excepting such articles as the mortgagor's vendor may desire to retain,⁶⁰ or stock in trade to a certain value,⁶¹ has been held too vague and renders the mortgage void for uncertainty.

In some jurisdictions, it is held that a chattel mortgage is not rendered void by the fact that it excepts from the description of the property those articles which are exempt from sale under execution without specifying what articles are claimed to be exempt,⁶² while in other jurisdictions the contrary rule prevails.⁶³

§ 64. — Location, Ownership, and Possession

- a. Necessity of stating
- b. Sufficiency of statement
- c. Effect of statement
- d. Subsequent removal of property

a. Necessity of Stating

The location of the property must be stated to validate the mortgage as against third persons without notice if it is not or cannot be otherwise sufficiently identified, and generally a failure to state either the location, ownership, or possession of the property is fatal.

When neither the location, the ownership, nor the possession of the property is stated in the mortgage, it is ordinarily fatal to the description;⁶⁴ and in all cases the location of the property mortgaged must be stated, where the property cannot otherwise be sufficiently identified,⁶⁵ or it is not otherwise sufficiently described,⁶⁶ and in such case an erroneous statement of the location invalidates the mortgage as to third persons without notice.⁶⁷

Ordinarily, however, a statement of location is

Mo.—Kibble v. Ragland, App., 263 S. W. 507.

11 C.J. p 464 note 81.

Mortgage of crops see *infra* § 67.

Live stock

A description covering sixty head of two-year-old black steers in the mortgagor's possession is sufficiently definite when there were only twenty-one head of that description in his possession.—Kibble v. Ragland, *supra*.

59. Me.—Cayford v. Brickett, 35 A. 1018, 89 Me. 77.

11 C.J. p 464 note 82.

60. La.—Durel v. Buchanan, 86 So. 189, 147 La. 804.

61. Wis.—Fowler v. Hunt, 4 N.W. 481, 48 Wis. 345.

Stock in trade generally see *infra* § 68.

62. N.C.—Norman v. Craft, 90 N.C. 211.

11 C.J. p 464 note 85.

After-acquired exempt property see *supra* § 60.

Mortgage of part of larger number of chattels see *supra* § 62.

63. U.S.—In re Schuller, D.C.Wis., 108 F. 591.

Wis.—Fowler v. Hunt, 4 N.W. 481, 48 Wis. 345.

11 C.J. p 464 note 86.

64. Iowa.—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813.

Tex.—Graham Nat. Bank v. Beavers, Civ.App., 286 S.W. 604, affirmed, Com.App., 290 S.W. 529.

11 C.J. p 465 note 87.

Important descriptive detail

(1) "The situs of the property is usually regarded as an important fact in its identification."—In re Petersen, D.C.Nev., 252 F. 849, 851.

(2) "A most important detail in the description of mortgaged property is its location."—Burglass v. Manfre, La.App., 168 So. 328, 329.

Statute requiring recorder to state location

A statute requiring the recorder to specify in his books, among other things, "the particular place where . . . [the mortgaged property] is located," tends to show that the property's location should be stated in the mortgage.—Roberts v. Atkins, 141 So. 427, 428, 19 La.App. 634—Pittsburg Plate Glass Co. v. Lepow, 120 So. 795, 796, 10 La.App. 38.

Statement of location not required by statute

Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill. App. 554.

Description of live stock, farm equipment, or produce in chattel mortgage should refer to present ownership, source of title, present physical possession, usual location, or some particular description sufficient to identify it.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

65. La.—Burglass v. Manfre, App., 168 So. 328, 330, quoting *Corpus Juris*.

11 C.J. p 465 note 88.

66. Ala.—Stewart v. Clemens, 124

So. 863, 220 Ala. 224, 66 A.L.R. 1454.

Iowa.—Reinig v. Johnson, 212 N.W. 59, 202 Iowa 1366.

S.C.—Bank of Williston v. Gamble, 145 S.E. 626, 148 S.C. 49.

11 C.J. p 465 note 89.

Statute requiring a "full description"

La.—Union Bldg. Corporation v. Burmeister, 173 So. 752, 755, 186 La. 1027—Burglass v. Manfre, App., 168 So. 328, 329—Roberts v. Atkins, 141 So. 427, 428, 19 La.App. 634—Pittsburg Plate Glass Co. v. Lepow, 120 So. 795, 796, 10 La. App. 38.

Particular classes of property

(1) Household goods.—Burglass v. Manfre, La.App., 168 So. 328—Pittsburg Plate Glass Co. v. Lepow, 120 So. 795, 10 La.App. 38.

(2) Restaurant equipment.—Roberts v. Atkins, 141 So. 427, 19 La. App. 634.

(3) Animals.—Bank of Williston v. Gamble, 145 S.E. 626, 148 S.C. 49.

(4) Animals generally see *infra* § 65.

67. Iowa.—Slimmer & Thomas v. Lawler, 218 N.W. 516, 205 Iowa 813.

11 C.J. p 465 note 90.

Curing defective description generally see *infra* § 70.

Misdescription or false description generally see *infra* § 69.

Statute requiring a "full description"

La.—Burglass v. Manfre, 168 So. 328, 329—Crescent Realty Corporation of Delaware v. McFlynn, App., 159 So. 461.

but one of several elements of the description,⁶⁸ and where the property is otherwise sufficiently described it may be omitted,⁶⁹ or, if erroneously stated, may be rejected as surplusage,⁷⁰ unless misleading.⁷¹ In any event, as between the parties, an erroneous statement of the location will not affect its validity.⁷²

b. Sufficiency of Statement

According to some authorities, but not all, the statement may be aided by the presumption that the mortgagor is the owner of the property which he assumes to mortgage. Location is ordinarily regarded as sufficiently stated if the instrument suggests inquiries which will lead to the information.

As a general rule, the location of the mortgaged property is sufficiently stated if the instrument suggests inquiries which, if pursued, would enable third persons to ascertain the situation thereof at the time of the execution of the mortgage.⁷³ Ordinarily it is not sufficient merely to state that the property is located in a certain county,⁷⁴ or that the mortgagor is of a certain county,⁷⁵ or that the property is located in a certain town⁷⁶ or territory.⁷⁷ On the other hand, the location of the property is sufficiently indicated by a recital that the mortgagor is the owner and has possession, and that he resides at a stated place,⁷⁸ or where such facts may be

68. Ala.—Dutton v. Gibson, 131 So. 567, 222 Ala. 191.
11 C.J. p 465 note 91.

69. Ala.—Dutton v. Gibson, *supra*.
Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill. App. 554.

Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140—
Iowa Sav. Bank v. Graham, 181 N.W. 771, 192 Iowa 96.

Vt.—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.
11 C.J. p 465 note 92.

70. Ill.—Melody v. Arcola State Bank, 249 Ill.App. 85—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 572, 573, 202 Iowa 1140, citing *Corpus Juris*.

Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.
11 C.J. p 465 note 93.

71. Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 573, 202 Iowa 1140.

Statements held not misleading

(1) Erroneously naming "Garland," instead of "Garwin," as the town in "Tama county" near which the mortgaged cattle were to be kept, there being no town by the name of "Garland" in such county.—Wertheimer & Degen v. Shultice, *supra*.

(2) Where a mortgage recited that the mortgaged cattle, purchased on the day of its execution at a distant place, were "to be kept" on certain described premises belonging to the mortgagor, a subsequent unfilled form paragraph in the mortgage stating that the "cattle are kept on my premises on section No. as above, in township No. —, range No. —," is not misleading, as indicating "that the cattle were then on a place not described."—Wertheimer & Degen v. Shultice, *supra*.

72. Iowa.—Slimmer & Thomas v.

Lawler, 218 N.W. 516, 205 Iowa 813.

11 C.J. p 465 note 94.

73. Tex.—Calvit v. Avery State Bank, Civ.App., 283 S.W. 322.
11 C.J. p 465 note 95.

Approximate certainty of description

"The location of the mortgaged property is not required to be described with such particularity or so completely certain as to preclude the necessity of extraneous inquiry as to third persons; approximate certainty of description of locality suffices."—Calvit v. Avery State Bank, Tex.Civ.App., 283 S.W. 322, 324.

Location inferred from instrument

"It is enough that the location of the property may be determined by fair inference drawn from the entire instrument."—Elgin v. Dehart, 132 S.E. 323, 325, 144 Va. 311.

"To be kept"

A mortgage statement that the mortgaged cattle "are to be kept" on certain described premises is not a statement of their existing location at the time of the execution of the mortgage.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 573, 202 Iowa 1140.

Incorrect address of double house

An incorrect statement that the mortgaged property is located at 536 S. H. street, when in fact it is located at 538 S. H. street, is not rendered sufficient as a statement of location by the fact that both addresses represented but the respective sides of a double house resting upon one foundation and covered by one roof.—Burglass v. Manfre, La. App., 168 So. 328.

Location sufficiently designated

(1) Property described as shipped to the mortgagor "corner of Texas & Spring streets, Shreveport, Caddo Parish, Louisiana." — Maroun v. Marrs, La.App., 178 So. 723, 726.

(2) Household goods "contained in the property situate on the northeast corner of" designated streets in a named town.—Pacific States Savings & Loan Co. v. Hoffman, 25 P. 2d 1007, 1008, 134 Cal.App. 604.

(3) A mortgage on bakery equipment recorded in the county of the property's location reciting that in case of default the property is to be sold in a certain civil district in that county, sufficiently shows the location of the property where it appears that the mortgagor had but one bakery. — Klimes v. Jones, 7 Tenn.App. 583.

Location insufficiently designated

(1) A recital that the mortgaged animals were "located on the above place," when four different places were described in the mortgage, without designating which was intended.—Bank of Williston v. Gamble, 145 S.E. 626, 627, 148 S.C. 49.

(2) Casing described as located on the "McLaren" lease when there were other leases in the same vicinity known by the same name.—Graham Nat. Bank v. Beavers, Tex. Civ.App., 286 S.W. 604, 606, affirmed, Com.App., 290 S.W. 529.

74. Iowa.—Reinig v. Johnson, 212 N.W. 59, 202 Iowa 1366—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813—Iowa Automobile Supply Co. v. Tapley, 171 N.W. 710, 186 Iowa 1341.

11 C.J. p 465 note 96.

75. Colo.—Street v. Sederburg, 92 P. 29, 41 Colo. 128.

76. Iowa.—Gilchrist v. McGhee, 67 N.W. 392, 98 Iowa 508.

11 C.J. p 465 note 98.

On railroad right of way in named town

A recital that mortgaged pole pilings were located on the right of way of a certain railroad in a named town does not sufficiently state the location of the property.—Christian v. Langford, 124 So. 593, 11 La.App. 652.

77. Kan.—Golden v. Cockril, 1 Kan. 259, 81 Am.D. 510.

78. Kan.—Corbin v. Kincaid, 7 P. 145, 33 Kan. 649—Shaffer v. Pickrell, 22 Kan. 619.

Tex.—Pitluk v. Butler, Civ.App., 156 S.W. 1136.

Description of crops see *infra* § 67.

reasonably inferred from the entire instrument.⁷⁹ It has also been held sufficiently definite that the instrument show that the mortgagor is a resident of a certain county, and that the property is in his possession,⁸⁰ or is to remain in his possession, until default in payment.⁸¹ Likewise, where the mortgage contains an additional provision forbidding removal of the chattel from a certain county, it has been held sufficient.⁸² Further, where the property is specifically located as being on certain land, the failure to state the county⁸³ and state⁸⁴ where the land is situated has been held not fatal when the mortgage, in compliance with the law, is recorded in the county where the property is located.

Presumption of ownership. The description may be aided by the presumption that the mortgagor is the owner of the property.⁸⁵ There is, however, authority to the contrary.⁸⁶

c. Effect of Statement

An accurate statement of the location and possession of the property may cure an otherwise insufficient description and is controlling.

79. U.S.—Alfernitz v. Ingalls, C.C. Nev., 88 F. 964.
- Mo.—City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo.App. 123.
80. Ark.—McGarry v. McDonnell, 47 N.W. 966, 82 Iowa 732.
- 11 C.J. p 466 note 3.
81. Iowa.—Wheeler v. Becker, 28 N. W. 40, 68 Iowa 723.
- 11 C.J. p 466 note 4.
82. Mo.—Kibble v. Ragland, App., 263 S.W. 507—Shanks v. Tinder, 257 S.W. 188, 216 Mo.App. 173.
- 11 C.J. p 466 note 5.
83. Okl.—Ake v. General Grain Co., 72 P.2d 735.
84. N.D.—Union Nat. Bank v. Oium, 54 N.W. 1024, 3 N.D. 193, 44 Am. S.R. 533.
85. Ky.—Hauseman Motor Co. v. Napiereella, 3 S.W.2d 1084, 1085, 223 Ky. 433, citing *Corpus Juris*.
- Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.
- Tex.—H. O. Wooten Grocer Co. v. Wade, Civ.App., 37 S.W.2d 1090, 1092, quoting *Corpus Juris*.
- Vt.—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.
- 11 C.J. p 431 note 76, p 466 note 7.
- Presumption of ownership in establishing mortgageable interest see *supra* § 23.
86. Iowa.—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813.
- 11 C.J. p 466 note 8.
87. Vt. — Joslyn v. Moose River Lumber Co., 74 A. 385, 83 Vt. 49, 14 C.J.S.—43
- 138 Am.S.R. 1067, 21 Ann.Cas. 1024.
- 11 C.J. p 466 note 9.
88. U.S.—In re Petersen, D.C.Nev., 252 F. 849.
- Cal.—Ramsey v. Furlott, 57 P.2d 1007, 14 Cal.App.2d 145.
- Kan.—Security State Bank v. Jones, 247 P. 862, 121 Kan. 396.
- Mo.—White v. Meiderhoff, 281 S.W. 101, 220 Mo.App. 171—Cummins v. King, 266 S.W. 748, 217 Mo.App. 371.
- Or.—Elwert v. Hansen, 173 P. 939, 39 Or. 399.
- S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L. R. 614.
- Tex.—Thorndale Mercantile Co. v. Continental Gin Co., Civ.App., 217 S.W. 1059, error refused.
- 11 C.J. p 466 note 10.
- But a description of livestock and farm equipment in general terms, although aided by a recital that the property is located on a certain described farm, has been held insufficient.—Schell v. F. E. Ransom Coal & Grain Co., Mo.App., 79 S.W.2d 543.
89. U.S.—In re Joe H. Moore Motor Co., D.C.Tex., 49 F.2d 292.
- Ala.—Hammond v. Cabaniss, 104 So. 320, 213 Ala. 221.
- Iowa.—Church v. Brown, 193 N.W. 414, 416, 195 Iowa 1112.
- Mo.—White v. Meiderhoff, 281 S.W. 101, 220 Mo.App. 171.
- Va.—Elgin v. Dehart, 132 S.E. 323, 144 Va. 311.
- "A mortgage upon a herd of white faced steers or short horns or a team of bay horses or other such general terms, without more, would be clearly void; but the reason for so hold-
- Where the description of the property is general, its location becomes an important element, since it may be the only means of adequate identification,⁸⁷ and in such case a specific statement of its location,⁸⁸ and possession,⁸⁹ if accurate,⁹⁰ will cure an otherwise insufficient description. Where the exact location of the mortgaged property is stated, the description is thus limited, and will not cover property situated in a place independent of, or different from, that designated in the mortgage.⁹¹

d. Subsequent Removal of Property

The subsequent removal of the mortgaged property without fraud between the parties will not affect the validity of the description.

The subsequent removal of the mortgaged property from the premises described in the mortgage will in no wise affect or destroy its validity,⁹² unless done in accordance with the fraudulent connivance of the mortgagor and the mortgagee.⁹³

§ 65. — Animals

A description of animals by characteristics, marks,

ing disappears if the mortgage is upon a herd of white-faced steers, now in my possession in my feed yard, on my home farm, or upon the span of bay horses now in my barn or now owned and used by me in said county."—Church v. Brown, *supra*.

Possession in mortgagor sufficiently shown

Clauses in a chattel mortgage in the form of a deed of trust providing that the trustee might take possession on default or on belief that the security was in danger, sufficiently show that the mortgagor was in possession until condition broken.—Hammond v. Cabaniss, 104 So. 320, 213 Ala. 221.

90. Iowa.—Commercial Sav. Bank v. Brooklyn Lumber & Grain Co., 160 N.W. 817, 178 Iowa 1206.

91. Iowa.—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.

11 C.J. p 466 note 11.

Reason for rule

By stating the exact location of the property, the mortgage makes an affirmative representation that the mortgagee has no interest under the mortgage in property located elsewhere.—Lee County Sav. Bank v. Snodgrass Bros., *supra*.

92. Minn.—Adamson v. Horton, 43 N.W. 849, 42 Minn. 161.

11 C.J. p 466 note 12.

Stock in trade generally see *infra* § 68.

93. Mo.—McNichols v. Fry, 62 Mo. App. 13.

or brands, particularly in connection with their location, ownership, or possession, which will enable the animals to be identified is sufficient although they may be subsequently changed in appearance.

Although the courts recognize certain general principles determining the sufficiency of the description of animals in a chattel mortgage, they are not uniform in the application of such principles when the rights of third persons become involved.⁹⁴ In general a description is sufficient which suggests inquiries which, if pursued, would enable third persons to identify the mortgaged property.⁹⁵ Thus a description by the animals' characteristics together with a statement as to their location, ownership,

or possession has been held to be sufficient.⁹⁶ Many cases, however, hold that animals are sufficiently described by merely stating their characteristics with respect to age, color, height, sex, and weight,⁹⁷ or by indicating their marks and brands,⁹⁸ while other cases have held such description to be insufficient, as against third persons, in the absence of a statement as to location, ownership, or possession,⁹⁹ or some other additional means of identification.¹ A description merely designating animals by species or class and the number mortgaged is insufficient;² but such a description has been held sufficient when reference is made to the location of

94. Ga.—Reynolds v. Jones, 66 S.E. 395, 7 Ga.App. 123.

Ind.—Kaase v. Johnston, 82 S.W. 680, 5 Ind.App. 76.

After-acquired property see supra § 60.

Location, ownership, and possession see supra § 64.

Mortgage of all grantor's property see supra § 57.

Part of a larger number see supra § 61.

95. Ala.—Dutton v. Gibson, 131 So. 567, 222 Ala. 191—Hammond v. Cabaniss, 104 So. 320, 213 Ala. 221—J. A. Lindsey & Co. v. Steenson, 79 So. 11, 201 Ala. 589.

Kan.—Ehrke v. Tucker, 160 P. 985, 99 Kan. 52.

Mo.—Bruce v. Kays, 1 S.W.2d 214, 222 Mo.App. 77.

Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110—Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199.

Vt.—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.

11 C.J. p 467 note 16.

Descriptions held sufficient

(1) Description of mules by reference to location, ownership, possession, value, and seller's name.—Cass County Bank v. Hulen, Mo.App., 195 S.W. 74.

(2) Description of mules by height, age, and name, followed by a statement that they are "known as the Talley mules."—Pullen v. Berkeley, Tex.Civ.App., 27 S.W.2d 924, 926.

(3) Other descriptions.

Iowa.—Producers Livestock Marketing Ass'n v. John Morrell & Co., 263 N.W. 242, 220 Iowa 948—Bowman-Boyer Co. v. Burgett, 192 N.W. 795, 195 Iowa 674.

Mo.—Central Missouri Trust Co. v. Wulfert, 199 S.W. 724, 198 Mo. App. 85.

S.D.—Hosmer State Bank v. First State Bank of Onaka, 204 N.W. 166, 48 S.D. 320.

Wash.—Schneller v. Vincent, 229 P. 737, 131 Wash. 238, affirmed 237 P. 1119, 135 Wash. 698.

Descriptions held insufficient

(1) "13 head horses and mules and all that I now own. 2 horse colts coming two years old. All the above property can be identified by G. [one of the mortgagees]. . . . All . . . [located and] to be kept in S. county."—State v. Norman, Mo., 232 S.W. 452.

(2) Listing cows with ages, colors, and values.—Hart v. Farmers' Bank of Bates County, Mo.App., 28 S.W.2d 121, 124.

96. Iowa.—Wertheimer & Degen v. Parsons, 229 N.W. 829, 209 Iowa 1241—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

La.—Commercial Bank of Arcadia v. Simmonds, 2 La.App. 658.

Tex.—Hamilton Nat. Bank v. Harris, Civ.App., 260 S.W. 318—Oak Cliff State Bank & Trust Co. v. Travis, Civ.App., 219 S.W. 286.

Vt.—Niles v. Fuller, 144 A. 375, 101 Vt. 471.

But a mortgage describing animals by sex, color, and approximate age and weight, and stating that such animals are then in the mortgagor's possession at a named town has been held insufficient as to the description of the animals.—Milner Banking Co. v. Adair, 90 S.E. 170, 18 Ga.App. 575.

Location, ownership, and possession generally see supra § 64.

Sufficient descriptions

(1) By sex, color, and location.—Niles v. Fuller, 144 A. 375, 101 Vt. 471.

(2) By color, height, and situs.—Oak Cliff State Bank & Trust Co. v. Travis, Tex.Civ.App., 219 S.W. 286.

97. Mo.—Bruce v. Kays, 1 S.W.2d 214, 222 Mo.App. 77.

Okl.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47, 68 Okl. 110.

Vt.—Niles v. Fuller, 144 A. 375, 101

Vt. 471—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.

11 C.J. p 467 note 17.

Mule as "mare"

A mortgage of "one yellow mare six years old, about 15 hands high," followed by an agreement that the seller and mortgagee did not warrant the soundness of "said mule," sufficiently showed a lien upon a mule of that description.—Rountree v. J. N. Chrisman & Co., 93 S.E. 511, 20 Ga.App. 815.

98. Ga.—Thomason v. Decatur County Bank, 111 S.E. 578, 28 Ga. App. 422.

11 C.J. p 467 note 18.

99. U.S.—In re Petersen, D.C.Nev., 252 F. 849.

Iowa.—First Nat. Bank v. Maxwell, 200 N.W. 401, 198 Iowa 813.

Ky.—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

Tex.—Haslet State Bank v. Carper, Civ.App., 273 S.W. 289.

11 C.J. p 467 note 19.

General description as cured by statement of location see supra § 64.

1. Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

Ky.—Hart County Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

Tex.—Burlington State Bank v. Marlin Nat. Bank, Civ.App., 207 S.W. 954, 957.

"A mortgage of an animal which is described only by its age, height and color, the same being common to animals of that species, is void."—Burlington State Bank v. Marlin Nat. Bank, supra.

Seller's name and address as curing insufficiency

A description by color, although alone insufficient, is rendered sufficient by a further description of the animals as being bought of the mortgagee whose residence is stated in the mortgage.—Burlington State Bank v. Marlin Nat. Bank, supra.

2. U.S.—In re Petersen, D.C.Nev., 252 F. 849.

the animals,³ although it has also been held otherwise.⁴ A reference to a herd book in which animals are registered has been held sufficient in connection with a statement of location.⁵

As between the parties to the mortgage⁶ and as against third persons with notice,⁷ various descriptions considered in the notes have been held sufficient.

Change in appearance. If the description of the mortgaged animal was originally sufficient, the mortgagee does not lose his right to enforce his lien because of a change in its appearance.⁸

Error in description. Where the description is otherwise sufficient, errors⁹ such as in stating the

age,¹⁰ color,¹¹ weight,¹² or brand,¹³ or the number included under a certain brand,¹⁴ will not vitiate the mortgage unless such errors are confusing and misleading.¹⁵

§ 66. — Book Accounts

Book accounts should be identified ordinarily by the names of the debtors and amounts or by the transactions from which they will arise.

Book accounts sought to be mortgaged should be sufficiently described so that they may be identified.¹⁶ Thus, as to existing book accounts, the names of the debtors and the several amounts which they owe should be stated;¹⁷ and, as to future accounts, the transactions whereby such accounts are to arise should be specified.¹⁸

Ga.—Reynolds v. Tifton Guano Co., 92 S.E. 389, 20 Ga.App. 49.
S.C.—Bank of Williston v. Gamble, 145 S.E. 626, 627, 148 S.C. 49.

Insufficient description

"(35) mules and (2) horses."—Bank of Williston v. Gamble, supra.

3. Ala.—Payne v. Boutwell, 164 So. 753, 26 Ala.App. 573, certiorari denied 164 So. 755, 231 Ala. 311.

Mo.—Cook v. Wheeler, App., 218 S.W. 929.

Description held sufficient

"16 head of dairy milch cows of various kinds, colors and descriptions now located on my dairy in West Elba."—Payne v. Boutwell, 164 So. 753, 26 Ala.App. 573, certiorari denied 164 So. 755, 231 Ala. 311.

Indefinite number

A description covering "about forty stock hogs" located on a certain farm is insufficient.—Panama Sav. Bank v. De Cou, 228 N.W. 35, 36, 209 Iowa 450.

4. Ga.—Sheffield v. Dean, 135 S.E. 109, 36 Ga.App. 56.

"30 head of horses now located at the residence of . . . [the mortgagor]," in a named district of a certain county is too vague and indefinite.—Sheffield v. Dean, supra.

5. Iowa.—Boone City Bank v. Ratkey, 44 N.W. 362, 79 Iowa 215.

Unpublished herd book

A description which refers to a herd book which was not published for a year or so after the execution of the mortgage is insufficient.—Taylor v. Gilbert, 61 N.W. 203, 92 Iowa 587.

6. By enumeration, location, and seller's name

(1) "Eighty-four . . . cattle located on" specifically described premises, followed by the names of the persons from whom the animals were bought and the number purchased from each.—Theodore Hamm Brewing Co. v. Flagstad, 166 N.W. 289, 290, 182 Iowa 826.

(2) So holding under the laws of South Dakota. — Theodore Hamm Brewing Co. v. Flagstad, supra.

"One suckling colt; . . . six brood sows; four pigs" Vt.—Symes v. Fletcher, 115 A. 502, 503, 95 Vt. 431.

"150 yearling ewe lambs"

Or.—Carnes v. Manning, 248 P. 137, 140, 118 Or. 665.

7. By species, location, and possession

"140 head of horses and mares, all ages and colors," in mortgagor's possession on described farm.—Kusser v. Sioux City Horse & Mule Co., 200 N.W. 404, 199 Iowa 200.

8. Ala.—Stickney v. Dunaway, 53 So. 770, 169 Ala. 464.

Changes by growth or otherwise

N.C.—Turpin v. Cunningham, 37 S.E. 453, 127 N.C. 508, 80 Am.S.R. 308, 51 L.R.A. 800.

9. Iowa.—Packers' Nat. Bank v. Chicago, etc., R. Co., 87 N.W. 653, 114 Iowa 621.

Mo.—Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commn. Co., 84 S.W. 142, 109 Mo.App. 249.

Curing defective description generally see infra § 70.

Errors in location see supra § 64.

Misdescription or false description generally see infra § 69.

10. Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P. 843, 168 Okl. 400.

11 C.J. p 467 note 24.

11. Minn.—Adamson v. Fagan, 47 N. W. 56, 44 Minn. 439.

N.C.—Harris v. Woodard, 1 S.E. 544, 96 N.C. 232.

12. Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P. 2d 843, 168 Okl. 400.

13. Okl.—Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199.

11 C.J. p 467 note 26.

Description suggesting inquiries as to different brand

A description of cattle in a mortgage by classification, age, color, and a certain brand, followed by statements that the described cattle comprise all cattle owned by the mortgagor and that the mortgage covers all the mortgagor's cattle "in the above brand or description or in any brand of the above classification," casts upon a third person the duty of inquiring as to whether cattle of a brand different from that stated in the mortgage are covered thereby.—Hourigan v. Home State Bank, 162 P. 699, 700, 62 Okl. 199.

14. Tex.—Ft. Worth Nat. Bank v. Red River Nat. Bank, 19 S.W. 517, 84 Tex. 369.

15. Kan.—Ehrke v. Tucker, 160 P. 985, 99 Kan. 52.

11 C.J. p 467 note 28.

Misdescriptions held fatal

(1) A description of "native Kansas steers" by age, brand, and location is insufficient to give notice that it embraced cattle not bearing the designated brand and found in a location other than that specified in the mortgage.—Ehrke v. Tucker, 160 P. 985, 986, 99 Kan. 52.

(2) Errors in location generally see supra § 64.

(3) Other misdescriptions see 11 C. J. p 467 note 28 [a].

16. U.S.—In re Brinson, D.C.Fla., 8 F.2d 667.

17. Iowa.—Lawrence v. McKenzie, 55 N.W. 505, 88 Iowa 432.

Insufficient description

"All . . . accounts in my place of business" located in a designated city.—In re Brinson, D.C.Fla., 8 F.2d 667.

18. Iowa.—Davis v. Pitcher, 65 N. W. 1005, 97 Iowa 13, 59 Am.S.R. 392.

11 C.J. p 468 note 30.

§ 67. — Crops

- a. In general
- b. Sufficiency of description
- c. Part of crop

a. In General

A mortgage covering crops growing or to be grown must designate with certainty the time and year of growth and the land on which the crop is to be produced. It is not essential to specify in terms the nature and kind of crop conveyed.

When a growing crop, or one to be planted, is conveyed by a chattel mortgage, the description must designate with certainty the time or year of growth,¹⁹ and the land on which the crop is to be produced;²⁰ but it is not necessary for the mortgage to specify or state in terms the nature and kind of crop intended to be conveyed to the mortgagee,²¹ and a mortgage on crops to be grown on land, which is to be subsequently selected, is sufficient in equity to create a lien on such crops.²²

b. Sufficiency of Description

- (1) In general
- (2) Time of growth
- (3) Place of growth

(1) In General

The description is sufficient as against third persons if it, together with inquiries suggested thereby, enables a prudent, disinterested person to identify the property. As between the parties a description is sufficiently definite when so treated by them, and as against third persons with actual notice of the crop mortgaged the sufficiency of the description is immaterial. Generally, a description covering a larger quantity than grown is not void.

As against third persons the description of a crop is sufficient if it be such that a prudent, disinterested person, aided and directed by such inquiries as the instrument itself suggests, is able to identify the property.²³ Thus, a mortgage covering all or the entire crop of the mortgagor, taken in connection with the mortgagor's residence or the

19. U.S.—*In re Wilcox*, D.C.Me., 21 F.2d 753, applying Maine law.
Cal.—*McCormick v. Farmers' Grain & Milling Co.*, 197 P. 429, 51 Cal. App. 557.

Iowa.—*Sonka v. Yonkers*, 180 N.W. 876, 191 Iowa 599.

Me.—*Corinna Seed Potato Farms v. Corinna Trust Co.*, 131 A. 307, 125 Me. 131.

Mo.—*Barnard State Bank v. Lankford*, 11 S.W.2d 1084, 223 Mo.App. 519.

N.D.—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 51 N.D. 563.

Okl.—*Strong City Gin Co. v. Herring & Young*, 79 P.2d 582, 182 Okl. 628, citing *Corpus Juris*.

S.C.—*Robinson v. Saxon Mills*, 117 S.E. 424, 124 S.C. 415.

S.D.—*Dinneen v. Farmers' Co-op. Elevator Co.*, 214 N.W. 811, 812, 51 S.D. 411, citing *Corpus Juris*.

Tex.—*Smith v. Coburn*, Civ.App., 222 S.W. 344.

Utah.—*Fisher v. Bank of Spanish Fork*, 74 P.2d 659, 93 Utah 514.
11 C.J. p 468 note 31.

But it has been held that it is not absolutely necessary to state the year in which crops are to be grown since what the parties contemplated at the time controls.—*Perkins v. Alexander*, Tex.Civ.App., 209 S.W. 789.

Statutory requirement

Under a statute invalidating a mortgage covering crops other than those raised during the year in which the mortgage is given, "it is essential that the inhibition of the statute be negated by naming the year."—*Robinson v. Saxon Mills*, 117 S.E. 424, 124 S.C. 415.

20. U.S.—*In re Wilcox*, D.C.Me., 21 F.2d 753, applying Maine law.

Ala.—*Wiles v. Moore*, 79 So. 310, 202 Ala. 12.

La.—*Fairbanks, Morse & Co. v. Bienvenu*, 5 La.App. 613.

Me.—*Corinna Seed Potato Farms v. Corinna Trust Co.*, 131 A. 307, 125 Me. 131.

N.D.—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 51 N.D. 563—*First State Bank of New Leipzig v. Kellogg Commission Co.*, 170 N.W. 635, 41 N.D. 269.

Tex.—*Watson v. D. A. Paddleford & Son*, Tex., 221 S.W. 569, 110 Tex. 525, answering certified questions, Civ.App., 220 S.W. 779, and 223 S.W. 1117—*Smith v. Coburn*, Civ. App., 222 S.W. 344.
11 C.J. p 468 note 32.

Statute requiring full description

(1) A statute providing that valid crop mortgages may be created if "the lands upon which said crops are grown . . . or are to be grown . . . are fully described in said mortgage," does not completely prohibit the making of valid crop mortgages in other than the statutory form.—*Weber v. Belle Mead Development Corporation*, 150 So. 594, 595, 112 Fla. 368.

(2) Compliance with the statute is not essential as between the parties to the mortgage.—*Tippins v. Belle Mead Development Corporation*, 150 So. 719, 112 Fla. 372—*Weber v. Belle Mead Development Corporation*, supra.

(3) As against third persons without notice, the mortgage, to be effective, must describe the land as required by the statute.—*Weber v. Belle Mead Development Corporation*, supra.

21. N.C.—*Gallop v. Elizabeth City*

Milling Co., 100 S.E. 130, 178 N.C. 1.

Wash.—*Community State Bank v. Martin*, 258 P. 498, 144 Wash. 483.
11 C.J. p 468 note 33.

Crop in part particularly described

A mortgage describing the crop as "my entire crop of Irish and sweet potatoes, corn, etc.," grown on described lands, sufficiently describes all the crop of every description, it being unnecessary "to mention in detail every article of the crop."—*Gallop v. Elizabeth City Milling Co.*, 100 S.E. 130, 178 N.C. 1.

"The following described crops"

A mortgage covering "the following described crops now growing . . . upon" described lands is not rendered invalid by the fact that the mortgage fails to describe particularly the crops to be grown.—*Community State Bank v. Martin*, 258 P. 498, 144 Wash. 483.

22. Ala.—*Keith v. Ham*, 7 So. 234, 89 Ala. 590, 593.
11 C.J. p 468 note 34.

23. Ark.—*Blankenship v. Modglin*, 6 S.W.2d 531, 177 Ark. 388—*Bonner v. Stroud Bros. Gin*, 289 S.W. 766, 172 Ark. 569—*Beckler v. Snerly*, 273 S.W. 9, 169 Ark. 317.
Cal.—*Metzler v. Foster Holding Co.*, 54 P.2d 447, 5 Cal.2d 278—*McCormick v. Farmers' Grain & Milling Co.*, 197 P. 429, 51 Cal.App. 557, quoting *Corpus Juris*.

Idaho.—*Livestock Credit Corporation v. Corbett*, 22 P.2d 874, 53 Idaho 190.

Kan.—*Martinek v. Carlson*, 264 P. 735, 125 Kan. 434.

Minn.—*Helgeson v. Farmers' Co-op. Ass'n, Jackson*, 199 N.W. 821, 160 Minn. 109.

location of the land on which it is to be grown, is ordinarily sufficient to suggest such inquiries.²⁴

As between the parties it has been held that a description is sufficiently definite when so treated by them,²⁵ and, as against a third person who has actual knowledge that the crop is mortgaged, the sufficiency of the description is immaterial.²⁶

Larger quantity than grown. Where the description of a crop covers a larger quantity than is grown on the land, it is generally held that there

is no uncertainty and hence the mortgage is not rendered void thereby,²⁷ although in some jurisdictions the contrary rule prevails.²⁸

(2) Time of Growth

The time or year of growth is sufficiently stated if it may be inferred from the terms of the mortgage. A mortgage is not rendered indefinite by covering successive crops until the debt is paid.

It is sufficient that the time or year of growth may be inferred from the terms of the mortgage, although not stated in express language.²⁹ A mort-

Neb.—Security State Bank v. Schomberg, 230 N.W. 487, 119 Neb. 598.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

Okl.—Ake v. General Grain Co., 72 P.2d 735—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548—Neal Gin Co. of Marietta v. Tradesmen's Bank of Oklahoma City, 239 P. 615, 111 Okl. 154.

Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn.App. 486.

Tex.—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ. App., 65 S.W.2d 398—Plains Tractor & Equipment Co. v. Great West Mill & Elevator Co., Civ.App., 60 S.W.2d 856, error refused—Handley v. McDonald & Ely Gin Co., Civ. App., 9 S.W.2d 372—South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ.App., 269 S.W. 1097, 1100, quoting *Corpus Juris*.

Wash.—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483. 11 C.J. p 468 note 35.

As compared to description of other property

(1) A description sufficient as to ordinary personal property may be insufficient as to crops growing or to be grown.—Teigen v. Occident Elevator Co., 200 N.W. 88, 51 N.D. 563—First State Bank of New Leipzig v. Kellogg Commission Co., 170 N.W. 635, 41 N.D. 269.

(2) Sufficiency of description of property in general see supra § 57.

Particular descriptions held sufficient
Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

Ga.—First Joint Stock Land Bank v. Moultrie Banking Co., 176 S.E. 791, 49 Ga.App. 759—Lane v. American Agr. Chemical Co., 161 S.E. 646, 44 Ga.App. 432—Peterson v. Vidalla Chemical Co., 156 S.E. 468, 42 Ga.App. 490—Williamson v. Read Phosphate Co., 149 S.E. 175, 40 Ga. App. 219—Winder Nat. Bank v. Hendrix, 136 S.E. 801, 36 Ga.App. 362.

Minn.—First Nat. Bank v. Cargill Elevator Co., 192 N.W. 111, 155 Minn. 30.

Tex.—South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521, affirming South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ. App., 269 S.W. 1097—Hilker v. Agricultural Bond & Credit Corporation, 96 S.W.2d 544, Civ.App., error dismissed—Citizens' Nat. Bank of Ennis v. First Guaranty State Bank of Palmer, Civ.App., 275 S.W. 860.

24. Minn.—Helgeson v. Farmers' Co-op. Ass'n, Jackson, 199 N.W. 821, 160 Minn. 109.

Neb.—Security State Bank v. Schomberg, 230 N.W. 487, 119 Neb. 598.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

Okl.—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548—Neal Gin Co. of Marietta v. Tradesmen's Bank of Oklahoma City, 239 P. 615, 111 Okl. 154.

Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn. App. 486, quoting *Corpus Juris*.

Tex.—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ. App., 65 S.W.2d 398—Handley v. McDonald & Ely Gin Co., Civ.App., 9 S.W.2d 372—Farmers' & Merchants' Nat. Bank of Kaufman v. Howell, Civ.App., 268 S.W. 776.

Wash.—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483. 11 C.J. p 468 note 35.

Location and ownership of property generally see supra 64.

25. Tex.—First Nat. Bank v. First State Bank of Campbell, Civ.App., 252 S.W. 1089.

Sufficiency of description as between the parties generally see supra § 57.

"All crops for 1921"

A mortgage containing no other description of the crops than the term "all crops for 1921" is not void as between the parties because of insufficiency of description when "the parties treated it as valid and applying to . . . specific [crops]."—First Nat. Bank v. First State

Bank of Campbell, Tex.Civ.App., 252 S.W. 1089.

26. Tex.—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ.App., 65 S.W.2d 398.

Effect of actual knowledge generally see supra § 57.

27. Ark.—Bonner v. Stroud Bros. Gin, 289 S.W. 766, 767, 172 Ark. 569.

11 C.J. p 469 note 38.

Larger number or quantity than mortgagor owns generally see supra § 62.

An uncertain description of a crop as "30 acres cotton" to be grown by the mortgagor on a particular farm is cured by the fact that only fifteen acres were thus grown.—Bonner v. Stroud Bros. Gin, supra.

28. Miss.—Redfield v. Montgomery, 14 So. 199, 71 Miss. 113, overruling Draper v. Perkins, 57 Miss. 277.

11 C.J. p 469 note 39.

29. Cal.—McCormick v. Farmers' Grain & Milling Co., 197 P. 429, 51 Cal.App. 557.

Idaho.—Livestock Credit Corporation v. Corbett, 22 P.2d 874, 876, 53 Idaho 190, quoting *Corpus Juris*.

Okl.—Strong City Gin Co. v. Herring & Young, 79 P.2d 582, 583, 182 Okl. 628, citing *Corpus Juris*.

S.C.—Robinson v. Saxon Mills, 117 S.E. 424, 124 S.C. 415.

Wash.—Myers-Shepley Co. v. Milwaukee Grain Elevator Co., 214 P. 1051, 1053, 124 Wash. 583, quoting *Corpus Juris*.

11 C.J. p 469 note 40.

Description of crop as growing

(1) A description of a corn crop as growing without a specification of the year has been held a sufficient description of the crop with respect to its year of growth.—McCormick v. Farmers' Grain & Milling Co., 197 P. 429, 51 Cal.App. 557—11 C.J. p 469 note 40 [a] (4).

(2) A mortgage on a hay crop executed December, 1917, not stating the year in which the crop is to be raised, has been held insufficient to cover the crop grown and harvested in 1918 under the theory that such crop was growing at the time of execution of the mortgage.—Sonka v. Yonkers, 180 N.W. 876, 191 Iowa 599.

gage is not rendered indefinite by the fact that it covers successive crops until the debt is paid.³⁰

Where a mortgage expressly states the time of growth as two successive seasons, the inclusion of crops for the second season prohibited by a statute does not invalidate the mortgage as to crops for the first season permitted thereby.³¹

(3) Place of Growth

A description of the place of growth of a crop is ordinarily sufficient if the mortgage states that it is to be raised on land in a certain county, township, range, and section, or refers to the land as owned by a certain person in a named county or township. In general merely designating the county is insufficient. An error in location does not invalidate the mortgage unless mis-

leading and nothing remains to suggest inquiries which will identify the property.

A description of the place of growth of a crop is sufficient if the mortgage states that it is to be raised on land in a certain county, township, range, and section,³² although in some jurisdictions a more particular description is required;³³ or refers to the land as belonging to a certain person³⁴ in a named county³⁵ or township;³⁶ or describes it as the land of a certain person located a stated distance and direction from a particular town in a named county³⁷ or state.³⁸ As a general rule, however, a mere statement of the county in which the crop is to be raised is not sufficient to put third persons on inquiry,³⁹ although in some jurisdictions

(3) A description covering "all hay grown . . . during the life of this mortgage," the mortgage expiring in less than a year after its execution, sufficiently described the year of growth of the crop.—*Livestock Credit Corporation v. Corbett*, 22 P.2d 874, 875, 53 Idaho 190.

Inference aided by statute

(1) Under a statute providing that a mortgage on unsown crops shall be void unless the crops are to be sown within one year from the time of the execution of the mortgage, a mortgage on such a crop not specifying the year of growth sufficiently describes a crop sowed during the year following the date of the mortgage as it cannot be presumed that the parties intended a crop subsequent to that year which would render the mortgage void under the statute.—*Myers-Shepley Co. v. Milwaukee Grain Elevator Co.*, 214 P. 1051, 124 Wash. 583.

(2) A crop mortgage in which the year of growth is not stated is not rendered certain by a statute providing that a chattel mortgage shall attach only to the crop next maturing after the delivery of the mortgage, where the statute exempts from its provisions mortgages securing particular debts, as a third person is not bound to assume that the mortgage is not within the exemptions of the statute.—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 51 N.D. 563.

Inference from maturity of indebtedness

(1) A mortgage covering crops not yet sown without specifying the year in which the crops were to be grown, but stating it was given to secure a note which would mature the following fall, is sufficient to indicate that the crop covered thereby was that to be planted during the current year, so that the mortgage was not void for indefiniteness or uncertainty.—*Myers-Shepley Co. v. Milwaukee Grain Elevator Co.*, 214 P. 1051, 124 Wash. 583.

(2) Where a crop mortgage fails to state the year in which the crop is to be raised, it may be concluded from the fact that the mortgage secured an indebtedness due later in the same year in which the mortgage was given that the crops secured thereby was one to be raised during that year.—*Robinson v. Saxon Mills*, 117 S.E. 424, 124 S.C. 415.

30. Tex.—*Waters v. B. F. Ellington & Co.*, Civ.App., 289 S.W. 417. 11 C.J. p 469 note 41.

31. Minn.—*Strandin v. Spreiter*, 208 N.W. 26, 166 Minn. 396.

Particular statute applied

A statute declaring that "any provision in a mortgage . . . [covering] any crop . . . grown later than during the season beginning May 1 next following the date thereof shall be void . . . but such provision shall not affect the validity of any other . . . provision of the mortgage," does not render a crop mortgage covering crops "grown . . . during the year 1922-23" invalid "as to the crops raised during the season of 1922."—*Strandin v. Spreiter*, supra.

32. Kan.—*Muse v. Lehman*, 1 P. 804, 30 Kan. 514.

11 C.J. p 469 note 43. Location, ownership, or possession generally see supra § 64.

33. N.D.—*First State Bank of New Leipzig v. Kellogg Commission Co.*, 170 N.W. 635, 41 N.D. 269.

Identification from record with reasonable certainty required

"The description of the land, crops upon which are mortgaged, should be sufficiently definite, in order to be notice to purchasers of such crops for value, so that one examining the record could, with reasonable certainty, identify and know where the crop really is which is mortgaged."—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 39, 51 N.D. 563.—*First State Bank of New Leipzig v. Kellogg Commission Co.*, 170 N.W. 635, 636, 41 N.D. 269.

34. Ark.—*Blankenship v. Modglin*, 6 S.W.2d 531, 177 Ark. 388.

Owner of several farms

A crop mortgage describing the place of growth as the farm of a named third person is not rendered insufficient in description by the fact that such third person owns several farms in the county in which the mortgage was filed when inquiries suggested by the mortgage would have identified the particular farm intended to be described.

Ark.—*Blankenship v. Modglin*, 6 S.W.2d 531, 177 Ark. 388.

Okl.—*Ake v. General Grain Co.*, 72 P.2d 735, 181 Okl. 117.

35. Tex.—*Spiller v. Mann*, Civ.App., 187 S.W. 1014—*Durham v. Atwell*, Civ.App., 27 S.W. 316.

36. Ark.—*Eades v. Simpson*, 191 S.W. 953, 127 Ark. 162.

Title held adversely

A description in a crop mortgage describing the crop as "to be grown on the farm of Bob Earl," in a named township, is sufficient where the crop was raised in an inclosure known as the "Bob Earl field," although on land in fact belonging to another, but which Earl held adversely during the period of the mortgagor's possession which was not disturbed until after the crop had been gathered and sold.—*Eades v. Simpson*, supra.

37. N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P.2d 918, 919, 41 N.M. 341.

"My place 10 miles northwest of Clovis, in Curry County," is sufficiently definite.—*Security State Bank v. Clovis Mill & Elevator Co.*, supra.

38. Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

39. Iowa.—*Muir v. Blake*, 11 N.W. 621, 57 Iowa 662.

S.D.—*Commercial State Bank v. Interstate El. Co.*, 85 N.W. 219, 14 S.D. 276, 86 Am.S.R. 760.

11 C.J. p 469 note 45.

such a general description has been held sufficient when it covers all of the crops⁴⁰ or all of a particular crop⁴¹ grown by the mortgagor, while others have held it sufficient when the mortgage also contains a recital that the land is owned⁴² or rented⁴³ by the mortgagor. It has also been held sufficient if the mortgage recites that the crop is in the possession of the mortgagor or is not to be removed from a county stated.⁴⁴ Other descriptions of the place of growth which have been held sufficient⁴⁵ or insufficient⁴⁶ will be found in the notes hereto.

It is not essential that the county,⁴⁷ section,⁴⁸ township,⁴⁹ or range⁵⁰ in which the crop is to be raised should be stated in the mortgage if it contains other adequate elements of identification.

Statutory provisions. Under a statute requiring

that the land on which the crop is to be grown shall be "described or mentioned," it has been held that it is not necessary that the land be described by metes and bounds, it being sufficient if the ownership of the land is mentioned,⁵¹ or the name of the land is stated together with its location with reference to a particular town.⁵² However, under such statute a description of the property as "all my crops," etc., without mention of the land, is insufficient.⁵³ Under another statute requiring the land on which the crop is grown to be "fully described," a description merely stating the county in which the land is located is insufficient.⁵⁴

Erroneous statement as to location. An error in the statement of the location of the land on which the crop is grown does not invalidate the mortgage as against third persons⁵⁵ unless the discrepancy is

In Texas

(1) A description covering "any three bales of cotton to be planted and cultivated by me in the year 1912 on the place known as the _____ farm, _____ miles from R., or any other farm in C. county," is insufficient as it points out no particular land on which the cotton was to be produced.—*Watson v. D. A. Paddleford & Son*, 221 S.W. 569, 110 Tex. 525, answering certified questions, Civ.App., 220 S.W. 779, and 223 S.W. 1117.

(2) A similar description as that stated above, except that it covered all the crops thus raised by the mortgagor, has been held to indefinite as not describing any particular place in the named county, in the absence of proof of the parties' intention to subject to the mortgage crops raised on a particular place.—*Smith v. Coburn*, Tex.Civ.App., 222 S.W. 344.

(3) But a mortgage on "all . . . crops . . . grown by [the mortgagor] . . . on any land cultivated by [him] in" a named county is sufficient in description as to crops raised on land in the named county in the possession of, and being cultivated by, the mortgagor at the date of the mortgage.—*Houston Nat. Exch. Bank v. Osceola Irrigating Co.*, Civ.App., 261 S.W. 561.

(4) And as to crops raised on land in the possession of the mortgagor at the execution of the mortgage a description covering "all crops for the year 1920 in K. county" is sufficient.—*Farmers' & Merchants' Nat. Bank of Kaufman v. Howell*, Civ. App., 268 S.W. 776, 778.

40. Miss.—*Staple Cotton Co.-op. Ass'n v. Thorne*, 138 So. 597, 162 Miss. 649.
Okl.—*Neal Gin Co. of Marietta v.*

Tradesmen's Nat. Bank of Oklahoma City, 239 P. 615, 111 Okl. 154.
11 C.J. p 469 note 46.

Mortgage covering all or entire crop of mortgagor as suggesting inquiries, etc., see supra § 67 b (1).

So held as between the parties

Ala.—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 383.

41. Ala.—*Roy v. Grell*, 77 So. 64, 16 Ala.App. 226.

Ark.—*Lesser-Goldman Cotton Co. v. Hembree*, 259 S.W. 5, 163 Ark. 88.

42. Idaho.—*Livestock Credit Corporation v. Corbett*, 22 P.2d 874, 53 Idaho 190.
11 C.J. p 469 note 47.

43. Miss.—*Wetlin v. Mount*, 19 So. 201, 73 Miss. 526.
N.C.—*Woodlief v. Harris*, 95 N.C. 211.

44. Mo.—*Mayer v. Keith*, 55 Mo. App. 157.

11 C.J. p 469 note 49.

45. Particular description held sufficient

"Mortgagor's 'interest in 80 acres of cotton,' located 'on the Calvit farm on Red river' in" a named county.—*Calvit v. Avery State Bank*, Tex.Civ. App., 283 S.W. 322, 324.

46. Particular descriptions held insufficient

(1) "25 acres of wheat south of the north 100 acres of section 23."—*Hagen v. Dwyer*, 162 N.W. 699, 701, 36 N.D. 346.

(2) "Any land I might work or have worked during" a certain year.—*Prator v. Washington*, Tex.Civ. App., 277 S.W. 704.

(3) Where the mortgagor cultivated several farms, a mortgage covering "all crops . . . on said farm," without describing the particular farm, was void "because of uncertainty as distinguished from indefiniteness which could be made

certain by parol."—*Wiles v. Moore*, 79 So. 310, 311, 202 Ala. 12.

47. Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

Okl.—*Ake v. General Grain Co.*, 72 P.2d 735, 181 Okl. 117.

"One of the elements to be considered" where a crop mortgage fails to recite the name of the county in which the crops are located "is the fact that the mortgage was filed . . . [in compliance with the law] in the county in which . . . the property . . . [was] actually located."—*Ake v. General Grain Co.*, supra.

48. N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P. 2d 918, 41 N.M. 341.

Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

49. N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P. 2d 918, 41 N.M. 341.

Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

50. N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P.2d 918, 41 N.M. 341.

51. S.C.—*Livingston v. Seaboard Airline Co.*, 84 S.E. 303, 100 S.C. 18.

52. S.C.—*People's Bank of Rock Hill v. People's Bank of Anderson*, 115 S.E. 736, 122 S.C. 476.

53. S.C.—*Kimbrell v. Mills, etc., Co.*, 84 S.E. 996, 100 S.C. 443.

54. Ala.—*Smith v. Mixon*, 149 So. 721, 722, 25 Ala.App. 521, applying Florida statute.

55. Ark.—*Lesser-Goldman Cotton Co. v. Hembree*, 259 S.W. 5, 163

misleading,⁵⁶ and nothing remains to suggest inquiries which will identify the mortgaged property.⁵⁷ A mortgage with an error in the description as to the location of the property will be upheld against third persons with actual knowledge that the property is mortgaged.⁵⁸

c. Part of Crop

A mortgage of an undivided portion of a crop as such may properly so describe it, but where the mort-

gage covers a distinct or segregated part of a crop it must ordinarily so describe such part, or furnish data, so that it may be identified. An indefinite description may be cured by a subsequent separation.

A mortgage of an undivided portion of a crop as such may properly so describe it,⁵⁹ but where a mortgage is intended to cover a distinct or segregated part of the crop it must, although there is authority to the contrary,⁶⁰ so describe such part that it may be identified,⁶¹ or furnish data for sep-

Ark. 88.—Eades v. Simpson, 191 S. W. 953, 127 Ark. 162.

Ill.—Melody v. Arcola State Bank, 249 Ill.App. 85.

Okl.—Ake v. General Grain Co., 72 P.2d 735, 181 Okl. 117—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548.

Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn.App. 486.

11 C.J. p 469 note 54.

Location generally see supra § 64.

Misdescription or false description generally see infra § 69.

Curing defective description generally see infra § 70.

Misdescription of township

A description of the location of the land as being in a certain township is not rendered insufficient by the fact that a resurvey shows part of the land to be in another township where the description is otherwise sufficient as notice to third persons of the land intended to be included in the mortgage.—Eades v. Simpson, 191 S.W. 953, 127 Ark. 162.

Misstatement of place or township immaterial

In a mortgage on the entire crop of the mortgagor grown in a named county, it is "immaterial whether there was a mistake in naming the place on which the . . . [crop] was grown or the township in which the place was situated."—Lesser-Goldman Cotton Co. v. Hembree, 259 S.W. 5, 6, 163 Ark. 88.

Mislocation in section

A mortgage is not rendered insufficient as against a third person by the fact that it erroneously described the land as located in a certain part of a correctly described section, the land being in fact located in another part of that section, when the mortgage suggests inquiries which, when pursued, would lead to the ascertainment of the property intended to be included in the mortgage.—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548.

Misstatement of ownership

(1) A misstatement of the name of the owner of the lands on which the crop is to be grown does not render the description insufficient when the description is otherwise "sufficient to enable anyone to identify

the crop."—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn. App. 486.

(2) The fact that "M. Story," described in a crop mortgage as the owner of the land on which the crop was located, was also known as "Dave Story," did not render the description insufficient when the land could be identified from inquiries suggested by the mortgage.—Ake v. General Grain Co., 72 P.2d 735, 181 Okl. 117.

Location and ownership inaccurately stated

A description of cotton in a recorded mortgage as all the mortgagor's crop of eighty acres on "The Porter Walker farm" was sufficiently definite to put a buyer on inquiry, who knew the crop had been grown there and believed it subject to a landlord's lien, although the farm's location was inaccurately stated and the farm belonged to Fred Walker, Porter Walker's lessor.—Matthews v. Melasky, Tex.Civ.App., 240 S.W. 641, 642.

56. Okl.—Ake v. General Grain Co., 72 P.2d 735, 181 Okl. 117.

Wash.—Bair v. Wiese, 215 P. 61, 124 Wash. 691.

11 C.J. p 470 note 55.

Government subdivision misnamed

Where by mistake a mortgage described the crop as located in a particular quarter of a named section, while in fact the crop was located in another quarter in a different section, although the township and range was correctly stated, the description was insufficient as against a third person who had no knowledge of such mistake.—Bair v. Wiese, 215 P. 61, 124 Wash. 691.

Description held not misleading

A description in a crop mortgage was not so misleading as to be insufficient as against a third person because of the use of the words "T. K. Treckel and M. Story Farm" in stating the location of the crop, rather than "T. K. Treckel and M. Story farms," which was correct, when reasonable inquiries suggested by the mortgage would have identified the property covered by the mortgage.—Ake v. General Grain Co., 72 P.2d 735, 736, 181 Okl. 117.

57. Minn.—Wadena First Nat. Bank

v. Hendrickson, 63 N.W. 725, 61 Minn. 293.

58. Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn. App. 486.

11 C.J. p 470 note 57.

59. Iowa.—Pierre v. Pierre, 232 N. W. 633, 210 Iowa 1304.

Minn.—Helgeson v. Farmers' Co-op. Ass'n, Jackson, 199 N.W. 821, 160 Minn. 109.

11 C.J. p 470 note 58.

Sufficient description of undivided interest

A mortgage covering "all interest in and to any and all crops" grown during a named year on described lands sufficiently describes the mortgagor's undivided three-fifths interest in the crop.—Helgeson v. Farmers' Co-op. Ass'n, Jackson, supra.

60. S.C.—Robinson v. Saxon Mills, 117 S.E. 424, 426, 124 S.C. 415.

"One . . . bale of cotton" out of larger number

(1) A description covering "One 500-pound bale of 'good middling cotton'" to be grown on a described place is sufficient, even though the mortgagor raised a larger number of bales on the described land.—Robinson v. Saxon Mills, supra.

(2) In the above description it was held that the grade of the cotton was not designated "as a matter of description, but as a basis of security," and therefore the description covered "as much cotton as would have amounted in value to . . . [the] grade and quantity" specified.—Robinson v. Saxon Mills, supra.

61. Colo.—International Harvester Co. of America v. McFerson, 37 P. 2d 390, 95 Colo. 482, citing *Corpus Juris*.

Kan.—Martinek v. Carlson, 264 P. 735, 736, 125 Kan. 434, citing *Corpus Juris*.

Mo.—Klebb v. Missouri Meerscham Co., App. 257 S.W. 174.

Mont.—Arro Oil & Refining Co. v. Montana & Dakota Grain Co., 286 P. 1115, 87 Mont. 259.

N.C.—Atkinson v. Graves, 91 N.C. 99. 11 C.J. p 470 note 59.

In Texas

(1) "Any three bales of cotton to be . . . cultivated by me in the year 1912 on the place known as"

arating the mortgaged part from the whole,⁶² particularly where the crop is not uniform in quality or value.⁶³ So a mortgage covering crops growing on a certain number of acres in a larger tract, without specifying the particular part intended, is void for uncertainty,⁶⁴ even as between the parties themselves;⁶⁵ but, when the mortgage covers an undivided interest in the whole of the crop, it is not necessary that it designate the manner in which the interest conveyed should be separated from the balance.⁶⁶

Subsequent separation. A description which is indefinite may be cured if the part mortgaged is subsequently separated so as to be capable of identification.⁶⁷

Excepting part of crop. As between the parties

the description of a mortgage has been held sufficient where it covers all of the grantor's crop except an unsegregated part,⁶⁸ or where it reserves what the law exempts.⁶⁹

§ 68. — Stock in Trade

Stock in trade may be described in a mortgage thereof by general terms, a schedule or particular enumeration being ordinarily unnecessary; but if the description misstates or fails to state the property's location or the person in possession thereof it is insufficient as against third persons.

Ordinarily, stock in trade may be described in a mortgage thereof, by general terms,⁷⁰ as all the property of that nature in a certain store,⁷¹ or all of the mortgagor's goods in a certain place,⁷² and a schedule or particular enumeration of the mortgaged chattels is unnecessary;⁷³ but in some ju-

etc., "is not such a description as will identify any particular cotton that might be raised by the mortgagor."—*Watson v. D. A. Paddleford & Son*, Civ.App., 220 S.W. 779, 780, certified questions answered 221 S.W. 569, 110 Tex. 525.

(2) "The first four bales of cotton and cotton seed" grown on a particular farm in a certain year is sufficiently definite and specific to segregate the part mortgaged from the other part of the crop.—*Ross v. Schultz*, Civ.App., 198 S.W. 672, 673.

(3) But on the theory that the mortgagee has the right of selection, a mortgage covering "twenty . . . [bales of cotton] raised" on described lands during a certain year, is not rendered uncertain and void by the fact that about one hundred bales were thus raised.—*Citizens' Nat. Bank of Ennis v. First Guaranty State Bank of Palmer*, Tex. Civ.App., 275 S.W. 860, 862.

62. Ark.—*Norman v. S. L. Joseph Mercantile Co.*, 239 S.W. 728, 153 Ark. 127.

11 C.J. p 470 note 60.

63. Kan.—*Clark v. Voorhees*, 12 P. 529, 36 Kan. 144.—*Souders v. Voorhees*, 12 P. 526, 36 Kan. 138.

Neb.—*Wattles v. Cobb*, 83 N.W. 195, 60 Neb. 403, 83 Am.S.R. 537.

64. Ark.—*Norman v. S. L. Joseph Mercantile Co.*, 239 S.W. 728, 153 Ark. 127.

Colo.—*International Harvester Co. of America v. McPerson*, 37 P.2d 390, 95 Colo. 482.

Kan.—*Martinek v. Carlson*, 264 P. 735, 125 Kan. 434.

Mo.—*Klebba v. Missouri Meerschbaum Co.*, App., 257 S.W. 174.

Mont.—*Arro Oil & Refining Co. v. Montana & Dakota Grain Co.*, 286 P. 1115, 87 Mont. 259.

N.D.—*Hagen v. Dwyer*, 162 N.W. 699, 36 N.D. 346.

11 C.J. p 470 note 62.

Authorities reviewed

Mont.—*Arro Oil & Refining Co. v. Montana & Dakota Grain Co.*, 286 P. 1115, 87 Mont. 259.

Sufficiency of particular description

A mortgage covering a crop grown in a stated year on "one hundred . . . acres lying in the northwest part of the northwest quarter" of a described section "is so indefinite . . . as to render the mortgage void" if the whole quarter section referred to was cropped; but if only "approximately 108 acres" of such quarter section was cropped the description would be reasonably definite.—*Hagen v. Dwyer*, 162 N.W. 699, 700, 36 N.D. 346.

65. Mo.—*Klebba v. Missouri Meerschbaum Co.*, App., 257 S.W. 174.

Mont.—*Arro Oil & Refining Co. v. Montana & Dakota Grain Co.*, 286 P. 1115, 87 Mont. 259.

66. Ind.—*Zehner v. Aultman*, 74 Ind. 24.

Iowa.—*Johnson v. Rider*, 50 N.W. 36, 84 Iowa 50.

Kan.—*Sims v. Mead*, 29 Kan. 124.

Minn.—*Melin v. Reynolds*, 19 N.W. 81, 32 Minn. 52.

67. Ark.—*Person v. Wright*, 35 Ark. 169.

Ga.—*Stephens v. Tucker*, 55 Ga. 543.

68. Vt.—*Chelsea First Nat. Bank v. Fitts*, 30 A. 697, 67 Vt. 57.

11 C.J. p 470 note 65.

Exceptions and reservations from description generally see supra § 63.

69. Vt.—*Chelsea First Nat. Bank v. Fitts*, supra.

Excepting exempt property generally see supra § 63.

70. U.S.—*In re Coleman & Brown*, C.C.A.Ga., 2 F.2d 254, 255, reversing, D.C., 291 F. 280.

Additions and substituted stock see infra § 126.

After-acquired property see supra § 60.

"A description of a stock of goods in general terms serves to identify as well as would an attempt at detailed description."—*In re Coleman & Brown*, supra.

In Louisiana, under "Act No. 198 of 1918, which provides for . . . the manner of granting chattel mortgages," a description of a stock of goods and fixtures in general terms together with a statement of its location is sufficient, especially as between the parties.—*Hooper v. Miller*, 125 So. 77, 78, 12 La.App. 9.

Sufficient description

"Our stock of merchandise consisting of dry goods, shoes, clothing, groceries and hardware," where it was shown that the mortgagor was a well-known firm and had only one stock of goods, which was located in the town where the mortgage was executed.—*In re Coleman & Brown*, C.C.A.Ga., 2 F.2d 254, reversing, D.C., 291 F. 280.

Omission of "after-acquired property" clause

The fact that a mortgage on a stock of merchandise "does not contain the usual clause applicable to after-acquired property" does not invalidate the mortgage as to goods in stock when the mortgage was made.—*Petition of McLaughlin*, C.C.A. Mass., 1 F.2d 5, 7.

71. Ind.—*McKinney v. Cabell*, 57 N. E. 598, 24 Ind.A. 676.

11 C.J. p 470 note 68.

Location, ownership, and possession generally see supra § 64.

72. Tex.—*Crow v. Red River County Bank*, 52 Tex. 362.

11 C.J. p 471 note 69.

73. Ala.—*Cooper v. Berney Nat. Bank*, 11 So. 760, 99 Ala. 119.

11 C.J. p 471 note 70.

risdictions it has been held that as to a shifting stock of trade the description should identify the mortgaged chattels with such particularity as to permit their ascertainment without difficulty and uncertainty,⁷⁴ and that a description by general terms is insufficient.⁷⁵ Where the description of the property is otherwise sufficient, a failure to annex a contemplated schedule of the property does not render the description insufficient or affect the validity of the mortgage.⁷⁶

It has been held that a mortgage on property displayed in the market place must be in substantial harmony with the rules as to ownership, location and possession considered in § 64 supra,⁷⁷ and, if the description misstates or fails to state the place where the property is situated or the person in possession thereof, it is insufficient as against third persons;⁷⁸ however, the subsequent removal of the stock of goods to another building will not invalidate the mortgage when it suggests inquiries which, if pursued, would enable a third person to identify the mortgaged property.⁷⁹

§ 69. — Misdescription or False Description

An error in the description of mortgaged property is not fatal when the remaining description is otherwise sufficient to suggest inquiries enabling third persons to identify the property. A misstatement of the controlling descriptive element, or a wholly false or misleading description, is, however, fatal. A misdescription of a portion of the mortgaged property does not affect the portion correctly described.

An error in the description of the mortgaged property is not fatal when the part remaining is otherwise sufficient to suggest inquiries which, if pursued, would enable third persons to identify the property,⁸⁰ although a misstatement of the controlling element in the description is fatal.⁸¹ A mortgage has been upheld where the weight⁸² or number⁸³ of mortgaged chattels is understated, or a general description given which does not apply to all the units included under the mortgage.⁸⁴ A description which is misleading⁸⁵ or wholly false⁸⁶ vitiates the mortgage; but a misdescription of a portion of the property covered by the mortgage does not render the mortgage invalid as to the part which is correctly described.⁸⁷ The fact that by mistake the description includes in part property

74. Wash.—*Miller v. Scarbrough*, 185 P. 625, 108 Wash. 646.

75. Ohio.—*In re Rice*, 18 Ohio N.P., N.S., 489, 494.

Sufficient at time of execution

A mortgage on "all stock in trade" and "merchandise" situated in a certain building, although good at the time of execution, is, in a continuous business, later void for uncertainty since the stock would be constantly changing.—*In re Rice*, supra.

76. Mo.—*Holmes v. Strayhorn-Hutton-Evans Comm. Co.*, 81 Mo.App. 97.

11 C.J. p 471 note 71.

77. U.S.—*In re Joe H. Moore Motor Co.*, D.C.Tex., 49 F.2d 292.

78. U.S.—*Jaffrey v. Brown*, C.C.Ga., 29 F. 476.

Kan.—*Tootie v. Lyster*, 26 Kan. 589.

79. S.D.—*Albien v. Smith*, 123 N.W. 675, 24 S.D. 203.

11 C.J. p 471 note 73.

80. Ga.—*Jones v. Avant*, 152 S.E. 264, 41 Ga.App. 211.

Iowa.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

Kan.—*Ehrke v. Tucker*, 160 P. 985, 90 Kan. 52.

Mass.—*E. M. Blunt, Inc. v. Giles*, 193 N.E. 43, 288 Mass. 515.

Minn.—*Munson v. Benschel*, 211 N.W. 838, 169 Minn. 434.

Mo.—*First Nat. Bank v. Gardner*, 5 S.W.2d 1115, 222 Mo.App. 858.

Okl.—*Harp v. First Nat. Bank*, 37 P. 2d 930, 169 Okl. 648.

Wis.—*Mellen Produce Co. v. Fink*, 273 N.W. 538.

11 C.J. p 471 note 75.

"The test in such case is that, where the property can be readily identified after rejecting false or inaccurate recitals, effect may be given to the mortgage." — *E. M. Blunt, Inc. v. Giles*, 193 N.E. 43, 44, 288 Mass. 515.

Misstatements held not fatal

(1) Erroneous statement as to the dimensions of a rug and the thickness of a screen.—*E. M. Blunt, Inc. v. Giles*, supra.

(2) Misstating capacity of mortgaged gasoline tank. — *Munson v. Benschel*, 211 N.W. 838, 169 Minn. 434.

(3) Misstating the origin of mortgaged lumber as being cut from logs from a specified tract of land.—*Mellen Produce Co. v. Fink*, Wis., 273 N.W. 538.

(4) An erroneous designation of the number of an engine, otherwise sufficiently described as between the parties, does not invalidate the mortgage as against a trespasser.—*Moore v. Crittenden*, 204 P. 1035, 62 Mont. 309.

(5) Other misstatements see 11 C.J. p 471 note 75 [a].

81. N.J.—*Huber v. Cloud*, 130 A. 562, 563, 102 N.J.Law 181, quoting *Corpus Juris*.

11 C.J. p 471 note 76.

82. Mass.—*Barry v. Bennett*, 7 Metc. 354.

11 C.J. p 471 note 77.

83. U.S.—*Pollard v. Saltonstall*, C. Mass., 56 F. 861, reversed on other grounds 65 F. 848, 13 C.C.A. 171.

11 C.J. p 471 note 78.

84. Mich.—*Fordyce v. Neal*, 40 Mich. 705.

11 C.J. p 471 note 79.

85. Iowa.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140—*First Mortgage Loan Co. v. Durfee*, 188 N.W. 777, 193 Iowa 1142.

N.M.—*Shephard v. Van Doren*, 60 P. 2d 635, 40 N.M. 380.

S.D.—*Alberts v. Alberts*, 221 N.W. 80, 53 S.D. 463—*Security Nat. Bank v. White Co.*, 211 N.W. 452, 50 S. D. 598.

Statement held not misleading

A statement in a mortgage that the mortgaged property is free of encumbrances is not rendered misleading by the fact that, in subsequently shipping the mortgaged property to the mortgagor's residence, the shipping carrier may have acquired a lien for carrying charges.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

86. S.D. — *Security Nat. Bank v. White Co.*, 211 N.W. 452, 50 S.D. 598.

11 C.J. p 471 note 80.

87. Wis.—*Molle v. Kewaskum Mut. F. Ins. Co.*, 114 N.W. 798, 134 Wis. 404.

11 C.J. p 471 note 81.

not intended to be conveyed by the mortgage does not operate to defeat the mortgage as to the part intended to be subjected thereto.⁸⁸

§ 70. — Curing Defective Description

A defective description may, and ordinarily must, be cured by a reformation of the instrument in equity or by a delivery of the property to the mortgagee except as against intervening rights; further, some defects may be supplied by the court from a construction of the instrument.

Ordinarily, as appears in the C.J.S. title Reformation of Instruments § 42, also 53 C.J. p 965 note 19, a material error in the description may be corrected in a court of equity, and, in order for a mortgagee to recover possession of mortgaged property which is erroneously described, he must resort to equity to have the instrument reformed;⁸⁹ but equity will not amend a mortgage entered into under a misapprehension of the facts so as to make an agreement which either of the parties might have declined to execute had both been cognizant of all the facts.⁹⁰ Where the mortgagee claims that

after-acquired property was omitted from the description of the mortgaged property by mistake, he must show by clear and convincing proof that the true intention of the parties was not expressed in the mortgage, and that the omission was by mutual mistake.⁹¹

Delivery to mortgagee. A defective description is cured by subsequent delivery of the property to the mortgagee, as against persons who had no right or interest in the property at the time of the delivery,⁹² provided the delivery is such an actual transfer of possession and control of the property that if it were destroyed the loss would be that of the mortgagee.⁹³

Subsequent placing of property in location designated. Where property intended to be placed in a particular location is described as therein, it would seem that the description is good when the property is placed in such location,⁹⁴ at least as against persons with actual notice,⁹⁵ or except as against intervening rights,⁹⁶ and it is not necessary that the variance be corrected in equity.⁹⁷

88. **Crops not owned by mortgagor** Neb.—Burns v. Corn Exch. Nat. Bank of Omaha, Neb., 240 P. 683, 33 Wyo. 474.

89. Minn.—Wadena First Nat. Bank v. Hendrickson, 63 N.W. 725, 61 Minn. 293.

11 C.J. p 471 note 88.

90. Ala.—Comer v. Lehman, 6 So. 264, 87 Ala. 362.

91. N.C.—J. F. White Co. v. Carroll, 61 S.E. 196, 147 N.C. 330.

11 C.J. p 472 note 90.

92. Colo.—Bank of Vernal v. Bank of Grand Junction, 232 P. 923, 76 Colo. 448, citing **Corpus Juris**—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

Conn.—American Bank & Trust Co. v. Feeney Tool Co., 137 A. 756, 758, 106 Conn. 159, citing **Corpus Juris**.

Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill. App. 195—State Bank of Warrensburg v. Keck, 229 Ill.App. 230.

Iowa.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856.

Kan.—Jacquart v. Jennings, 235 P. 101, 118 Kan. 224.

Mo.—State v. Norman, 232 S.W. 452 —Schell v. F. E. Ransom Coal & Grain Co., App., 79 S.W.2d 543.

Tex.—Jones v. State Nat. Bank of Garland, Civ.App., 290 S.W. 925.

11 C.J. p 472 note 91.

"A description is sufficient if possession of the property embraced in the mortgage has been taken by the mortgagee."—Southern Surety Co. v. People's State Bank of Astoria, 163

N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

Defects cured by taking possession generally see infra §§ 212, 213.

Reason for rule

The taking of possession is an identification and appropriation of the specific property to the mortgage.—Bank of Vernal v. Bank of Grand Junction, 232 P. 923, 76 Colo. 448—11 C.J. p 472 note 91 [a].

Equitable mortgage

(1) If the failure of an intelligent description constitutes a chattel mortgage an equitable mortgage, the mortgagee must nevertheless take possession of the property mortgaged to maintain his rights thereunder as against third persons.—Schell v. F. E. Ransom Coal & Grain Co., Mo.App., 79 S.W.2d 543.

(2) Equitable mortgages generally see supra § 48.

Joint possession by mortgagees

Where the mortgagor's entire herd of two thousand one hundred fifty sheep were mortgaged separately to two different mortgagees, one mortgage covering one thousand three hundred fifty sheep, the other eight hundred, the subsequent joint possession by the two mortgagees of the entire herd cured the defective mortgage descriptions which failed to distinguish the sheep covered by the respective mortgages, both as between the parties to the respective mortgages and as against a third person whose rights did not attach before the delivery of possession.—Bank of Vernal v. Bank of Grand Junction, 232 P. 923, 76 Colo. 448.

Contractor's mortgage on equipment and payments

A mortgage executed by a contractor describing the mortgaged property as all the contractor's equipment and materials used in connection with a particular construction contract and all moneys due or to become due under such contract, sufficiently described the property so as to make the mortgage a lien thereon after the mortgagee had taken possession thereof.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659, 332 Ill. 362, reversing 243 Ill.App. 195.

93. Kan.—Parsons Sav. Bank v. Sargent, 20 Kan. 576.

94. Wash.—Otto v. England, 169 P. 964, 99 Wash. 529.

11 C.J. p 472 note 93.

Logs subsequently placed in described boom

A chattel mortgage describing logs as in the mortgagor's boom, although they did not reach the boom for twelve days thereafter, is good as between the parties, and as against third persons not acquiring rights before they reached the boom.—Otto v. England, 169 P. 964, 99 Wash. 529.

95. Mo.—J. H. North Furniture, etc., Co. v. Davis, 76 Mo.App. 512.

96. Wash.—Otto v. England, 169 P. 964, 99 Wash. 529.

11 C.J. p 472 note 95.

97. Ga.—Wardlaw v. Mayer, 77 Ga. 620.

Wash.—Anderson v. City of Seattle, 169 P. 964, 966, 99 Wash. 556, quoting **Corpus Juris**.

Knowledge of a prior mortgage on the same property prevents such a one from complaining about an inaccurate description of the property.⁹⁸

Supplying defects. A mortgage will not be declared void on the ground of uncertainty, unless after reading and interpreting it in the light of the circumstances under which it was made, and after supplying or rejecting words necessary to carry into effect the reasonable intention of the parties, their intention cannot be fairly collected and effectuated;⁹⁹ but when the description of the property mortgaged is so deficient that the court cannot supply the defects without danger of making a different contract from that intended by the mortgagor, the mortgage is invalid.¹ However, where punctuation marks are omitted, in order to give ef-

fect to the intention of the parties the court may supply such marks. Likewise, where it is manifest from the context that a word has been omitted it may be supplied by the court if it can be ascertained with reasonable certainty.²

§ 71. — Questions of Law and Fact

The sufficiency of the description contained in a chattel mortgage is a question of law, but, if reasonable men could draw different conclusions from the evidence, the identity of the property is one of fact.

The sufficiency of the description contained in a chattel mortgage is a question of law,³ but, if reasonable men could draw different conclusions from the evidence,⁴ the identity of the property is one of fact.⁵ So also whether a third person has actual knowledge of the property covered by a chat-

98. Ill.—Morrison v. Elzy, 190 Ill. App. 374.

99. Ala.—Holst v. Harmon, 26 So. 157, 122 Ala. 453.

Inadvertent omissions from written mortgage

In view of the fact that a chattel mortgage need not be in writing to be valid as between the parties and those having actual notice, an inadvertent omission from a written chattel mortgage, such as a description of the property, may be supplied by oral testimony as against a third person having actual knowledge of the property mortgaged.—Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson, Tex.Civ.App., 200 S.W. 197, error refused.

(2) Necessity for writing generally see supra § 49.

1. Iowa.—Kern v. Wilson, 35 N.W. 594, 73 Iowa 490—Cray v. Currier, 17 N.W. 760, 62 Iowa 535.
11 C.J. p 472 note 99.

2. Ala.—Seay v. McCormick, 68 Ala. 549.
11 C.J. p 472 note 2.

3. U.S.—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696, 698, citing *Corpus Juris*.

Ga.—Thomason v. Decatur County Bank, 111 S.E. 578, 28 Ga.App. 422 —Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

Iowa.—Wertheimer & Degen v. Parsons, 229 N.W. 829, 209 Iowa 1241.

Kan.—First Nat. Bank & Trust Co. of Oklahoma City, Okl., v. Morganroth, 300 P. 1061, 1064, 133 Kan. 474, citing *Corpus Juris*.

Tex.—Chapman v. Head, Civ.App., 279 S.W. 906.

11 C.J. p 472 note 3.

But it has been broadly stated that the sufficiency of the description of property in a mortgage is a question of fact.—Mathis v. Guaranty Nat.

Bank of Forum, 231 P. 500, 105 Okl. 69.

Sufficiency of language used to put a reasonable prudent person on inquiry as to property covered is a question of law.—Chapman v. Head, Tex.Civ.App., 279 S.W. 906.

4. U.S.—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696.

Evidence held insufficient to make jury question.—American State Bank v. Dayton, 184 N.W. 665, 48 N.D. 353.

If third person could identify property covered, question is for jury.—Sikes v. Riga, 297 S.W. 727, 221 Mo.App. 152.

To justify a directed verdict, the alleged insufficiency of the description of mortgaged property must be so patent that the court may say, as a matter of law, that it is so manifestly indefinite and uncertain that, even when aided by inquiries which the instrument itself suggests, the items intended to be covered cannot be fairly identified or ascertained.

Iowa.—First Nat. Bank v. Maxwell, 200 N.W. 401, 402, 198 Iowa 813—Church v. Brown, 193 N.W. 414, 415, 195 Iowa 1112.

Okla.—Ake v. General Grain Co., 72 P.2d 735, 737, 181 Okl. 117.

5. U.S.—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696.

Colo.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274—Strauss v. Austgen, 184 P. 299, 67 Colo. 207.

Ga.—Thomason v. Decatur County Bank, 111 S.E. 578, 28 Ga.App. 422 —Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

Iowa.—Wertheimer & Degen v. Fuller, 212 N.W. 118—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140—Church v. Brown, 193 N.W. 414, 195 Iowa 1112.

Kan.—First Nat. Bank & Trust Co.

of Oklahoma City, Okl. v. Morganroth, 300 P. 1061, 133 Kan. 474 —People's Nat. Bank of Kansas City v. Edmunds, 237 P. 911, 119 Kan. 212.

Md.—United States Fire Ins. Co. v. Merrick, 190 A. 335, 340, citing *Corpus Juris*.

Mo.—Deer v. People's Bank of Springfield, App., 47 S.W.2d 787—White v. Meiderhoff, App., 3 S.W. 2d 1031—Sikes v. Riga, 297 S.W. 727, 221 Mo.App. 152—White v. Meiderhoff, 281 S.W. 101, 220 Mo. App. 171.

Okla.—Phelan v. Stockyards Bank, 276 P. 175, 134 Okl. 13—Gerlach Bank of Woodward v. Herd, 159 P. 901, 60 Okl. 186.

S.C.—Smith v. Pettit, 117 S.E. 590, 124 S.C. 225.

Utah.—Malia for Use and Benefit of Creditors of North Sampete Bank v. Seelye, 57 P.2d 357, 89 Utah 262.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.

11 C.J. p 472 note 4, p 617 note 96.

"The question as to the identity of the particular articles, as distinguished from chattels which may not be covered by the mortgage and yet intermingled with chattels which are, is a question for the jury."—U. S. Fire Ins. Co. v. Merrick, Md., 190 A. 335, 340.

Questions held for jury

(1) Whether cattle were increase of mortgaged cattle.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

(2) Whether mortgage covering part of crop was void for uncertainty as to attaching creditor.—White v. Meiderhoff, 281 S.W. 101, 220 Mo. App. 171.

(3) Whether mortgagor had other cattle bearing the brands borne by the cattle actually mortgaged.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

tel mortgage, so as to cure an insufficient description, is a question of fact.⁶ Where extrinsic evidence adduced to identify the property shows a misdescription rather than an insufficient one, the jury may determine whether or not it is sufficient, notwithstanding the false recitals, to put a third person on sufficient inquiry to lead to a discovery of the property covered by the mortgage.⁷

§ 72. Description of Debt or Liability Secured

While there must be a specification of the debt or liability secured, a general description sufficient to place third persons on inquiry and to preclude a substitution of other debts is in general all that is required.

While a chattel mortgage should specify the debt secured thereby,⁸ and it is usual for it to set forth the amount thereof,⁹ literal accuracy in describing the debt is not required;¹⁰ it is enough that there be a general description sufficient to embrace the liability intended to be secured and to place a third person on inquiry directing him to the proper source

for more minute and particular information of the amount of the encumbrance;¹¹ and further, that the character of the debt and the extent of the encumbrance be shown with such reasonable certainty as to preclude the parties from substituting other debts than those described, and thereby making the mortgage a means of fraud on creditors.¹² A description may be sufficient as between the parties, although insufficient as against purchasers or creditors to afford constructive notice.¹³

Time of payment. In general in the absence of statute it is not necessary to state the time for performance of the mortgage obligation.¹⁴

*A statute invalidating a chattel mortgage, except as between the parties, unless it sets out the sum secured, the rate of interest to be paid, and the place and time of payment, has been construed not to require such facts to be expressly stated if they may be ascertained from the language of the mortgage as a whole.*¹⁵

(4) Whether inquiries suggested by the mortgage would lead to a discovery of the property covered thereby.—*J. A. Lindsey & Co. v. Steenson*, 79 So. 11, 201 Ala. 589.

6. Colo.—*Zinn v. Denver Live Stock Commission Co.*, 187 P. 1033, 68 Colo. 274.

Me.—*Gould v. Huff*, 154 A. 574, 130 Me. 226.

The proper procedure is to admit the mortgage and facts bearing on defendant's actual knowledge of what the mortgage covers, and leave the question of sufficiency of proof to the jury.—*Gould v. Huff*, 154 A. 574, 130 Me. 226.

7. Colo.—*Central Sav. Bank & Trust Co. v. Hall*, 213 P. 116, 73 Colo. 17.

Iowa.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

Neb.—*State Bank of Omaha v. Murphy*, 194 N.W. 442, 110 Neb. 526.

S.D.—*Nelson v. Robinson*, 205 N.W. 40, 48 S.D. 436.

11 C.J. p 472 note 5.

Change of motors

Whether a recorded chattel mortgage was constructive notice to a subsequent mortgagee, where the motors of a mortgaged truck had been changed, was a question of fact.—*R. P. Harris Motor Co. v. Bailey*, 121 So. 33, 219 Ala. 8, 63 A.L.R. 1453.

8. N.C.—*Grier v. Weldon*, 172 S.E. 200, 205 N.C. 575—*Britt v. Harrell*, 10 S.E. 902, 105 N.C. 10—*Harris v. Jones*, 83 N.C. 317.

Tex.—*Fourmentin v. Scott*, Civ.App., 216 S.W. 901.

False statements as to consideration or debt secured as badge of fraud see the C.J.S. title Fraudulent Con-

veyances § 81, also 27 C.J. p 485 note 47—p 486 note 52.

Mortgage not applied to security bill of sale

A mortgage statute providing that a mortgage must specify the debt to be secured applies to a bill of sale given as security for the payment of a debt.—*Dingfelder v. Georgia Peach Growers Exchange*, 192 S.E. 188, 184 Ga. 569.

Statute inapplicable to chattel mortgage

A statute providing that "no mortgage shall be received for record . . . which does not in full describe the indebtedness secured" thereby, has been construed to apply to realty and not to chattel mortgages.—*J. I. Case Co. v. Sax Motor Co.*, 256 N.W. 219, 64 N.D. 757.

9. Iowa.—*Magirl v. Magirl*, 56 N.W. 510, 39 Iowa 342.

11 C.J. p 473 note 7.

Stating amount of note secured see infra § 73.

10. Iowa.—*Farmers' Sav. Bank of Williamsburg v. Cash*, 200 N.W. 603, 199 Iowa 597.

Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250.

11 C.J. p 473 note 8.

11. Iowa.—*Farmers' Sav. Bank of Williamsburg v. Cash*, 200 N.W. 603, 199 Iowa 597.

Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250.

11 C.J. p 473 note 9.

"Where the language used does not tend to deceive or mislead as to the nature or amount of the debt, and where the description is enough to direct attention to sources of accurate and complete information as to the debt, a misdescription of the

debt may be corrected and an imperfect description completed by parol evidence, and the mortgage held a good security for the real debt intended to be protected."—*Owen v. George Cole Motor Co.*, supra.

12. Ind.—*New v. Sailors*, 16 N.E. 609, 114 Ind. 407, 5 Am.S.R. 632.

13. Ky.—*Cincinnati Leaf Tobacco Warehouse v. Combs*, 58 S.W. 420, 109 Ky. 21, 22 Ky.L. 523.

11 C.J. p 474 note 11.

14. U.S. — In re *George Seton Thompson Co.*, C.C.A.III., 297 F. 934, 936.

Ill.—*Polo State Bank v. Typer*, 249 Ill.App. 604. See *Snite v. Gehrke*, 189 Ill.App. 382.

11 C.J. p 474 note 12.

"The great weight of authority is that it is not necessary to state the due date." — In re *George Seton Thompson Co.*, supra.

Not required by statute

Under the Illinois Chattel Mortgage Act it is not required that the due date of the indebtedness be disclosed in the mortgage. — In re *George Seton Thompson Co.*, supra.

15. Ariz.—*Albert Steinfeld & Co. v. Southern Arizona Bank & Trust Co.*, 236 P. 713, 28 Ariz. 242—*Gartner v. Arizona Egyptian Cotton Co.*, 197 P. 231, 22 Ariz. 318.

Designation of place of payment

Ariz.—*Federal Reserve Bank of Dallas v. Live Stock & Agricultural Loan Co. of New Mexico*, 250 P. 770, 31 Ariz. 116.

Language sufficiently showing place of payment

(1) Where the residence of the parties and the location of the property mortgaged were stated in the

Rules applicable to real estate mortgages. With regard to the sufficiency of the description of the debt, obligations, and undertakings intended to be secured thereby, a common-law chattel mortgage has been held to be governed by the same rules applicable to similar questions arising in connection with real estate mortgages.¹⁶ The same rule has been applied to the description in a chattel mortgage executed under the provisions of a statute allowing valid mortgages to be made of certain chattels, although unaccompanied by a change of possession, but requiring such mortgages to be executed, acknowledged, and recorded in all respects as mortgages of lands are required to be.¹⁷

mortgage to be in a certain county, and the mortgage was acknowledged, verified, and recorded in such county, it was held that the mortgage was not invalidated by the statute above referred to because of failure to set out specifically the place of payment, it being apparent from the mortgage that the debt secured thereby was payable in such county.—*Garner v. Arizona Egyptian Cotton Co.*, 197 P. 231, 22 Ariz. 313.

(2) Sufficient compliance with the statutory requirement above referred to is had by a statement in the mortgage of the residence of the maker and payee of the note secured thereby, it being presumed that the note was payable at the residence of the payor.—*Federal Reserve Bank of Dallas v. Live Stock & Agricultural Loan Co. of New Mexico*, 250 P. 770, 31 Ariz. 116.

(3) But a chattel mortgage securing notes, not stating where the sum secured was payable, has been held invalid under the above statute where it did not appear whose notes the mortgage was given to secure, as the court could not presume that the mortgagee was the payee of the notes or that the mortgagor was the payor.—*Albert Steinfeld & Co. v. Southern Arizona Bank & Trust Co.*, 236 P. 713, 28 Ariz. 242.

16. Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250. 11 C.J. p 474 note 15.

17. Conn.—*Rood v. Welch*, 28 Conn. 157.

18. U.S.—*Wood v. Weimar*, Mich., 104 U.S. 786, 26 L.Ed. 779. 11 C.J. p 474 note 17.

Sufficient descriptions

(1) That mortgage is given "to secure a note that I have this day executed to J. P. Owen," the mortgagee.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250.

(2) A recital in a mortgage that it secures up to a specified amount "any notes already signed and past due and given by the [mortgagor] . . . to the [mortgagee]."—*State*

Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 581, 582, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.

"The validity of a mortgage depends upon the genuine character of the debt which the mortgage is to secure and not upon the description of the debt contained in the mortgage other than as required by . . . [statute], nor upon the form of the instrument given to represent the debt."—*State Bank of Wheatland v. Bagley Bros.*, supra.

19. In California

(1) Under a statute providing that "in the event the mortgage is given to secure the payment of a note, . . . [it] is to contain a description of said note," it has been held that a mortgage which does not on its face give notice as to the due date of the debt secured thereby is insufficient as against third persons.—*Kahrman v. Jones*, 263 P. 537, 203 Cal. 254.

(2) Under the statute above referred to it has been held, however, that a chattel mortgage is not void because the name of the payee was not inserted in a copy of the note contained in the mortgage, where the mortgagee was in fact the payee of the note secured thereby and the mortgage provided that it was given as security for the payment of a named sum according to the terms of one certain promissory note of even date therewith.—*Schaeffer v. Casey*, C.C.A.Cal., 77 F.2d 808.

In Colorado

(1) Since certain sections of the Chattel Mortgage Act of Colorado referring to the extension of a mortgage and the continuation of the lien thereof "indicate, and are upon the assumption, that the maturity of the mortgage debt should be set forth in the mortgage," it appears that in that jurisdiction "a mortgage, in describing the mortgage debt, should give the date of its maturity."—*Metropolitan State Bank v. Wright*, 209 P. 804, 807, 72 Colo. 106.

(2) A chattel mortgage not stating

§ 73. — Note or Evidence of Debt

It is sufficient that the note secured be described with reasonable certainty without giving all of the particulars thereof unless it is so required by statute.

All the particulars of a note secured need not be stated in the mortgage if enough is given to identify it with reasonable certainty.¹⁸ Thus, in the absence of statutes to the contrary,¹⁹ an omission of the date,²⁰ amount,²¹ or time of payment²² is not fatal, nor even an omission of the names of the payee and maker,²³ the reason being that extrinsic evidence is admissible to identify the debt secured.²⁴ Further, where several notes are secured a statement of their gross amount is sufficient.²⁵

the due date of the note secured thereby is insufficient to put a third person on inquiry as to the date of maturity and such a person is warranted in concluding that the mortgage and note secured thereby became due and payable at the time of the execution of the mortgage, particularly when the mortgage additionally stated the amount of the debt owed incorrectly.—*Metropolitan State Bank v. Wright*, supra.

20. Wis.—*Weber v. Illing*, 27 N.W. 834, 66 Wis. 79.

21. Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250. Misstatement of amount see infra § 76.

22. U.S. — In re *George Seton Thompson Co.*, C.C.A.Ill., 297 F. 934.

Ill.—*Polo State Bank v. Typer*, 249 Ill.App. 604. See *Snite v. Gehrke*, 189 Ill.App. 382.

Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 155 Tenn. 250. Time of payment generally see supra § 72.

Dates of payment sufficiently specified

A chattel mortgage describing the note secured thereby as payable in specified installments "due every two weeks with interest . . . from the date of the mortgage," although failing to specify the date of the note, has been held sufficiently to specify the dates of payment as beginning on the date of the mortgage.—*Zalapi v. Holcomb & Hoke Mfg. Co.*, 241 Ill.App. 102, 107.

23. Ill.—*Polo State Bank v. Typer*, 249 Ill.App. 604. 11 C.J. p 474 note 19.

24. Tenn.—*Owen v. George Cole Motor Co.*, 292 S.W. 1, 2, 155 Tenn. 250. 11 C.J. p 474 note 20.

Parol evidence to show connection between obligation and collateral security see the C.J.S. title Evidence § 946, 22 C.J. p 1157 notes 50, 51.

25. Iowa.—*Clark v. Hyman*, 7 N.W. 386, 55 Iowa 14, 39 Am.R. 160. 11 C.J. p 474 note 21.

§ 74. — Future Indebtedness or Advances

The generally adopted rule is that the mortgage need not state on its face that it secures future indebtednesses or advances or specify the amount or time of accrual thereof, although the description should be sufficient to afford notice to third persons and to direct them to the proper source for further information.

While a contrary rule prevails in some jurisdictions,²⁶ in the absence of statutory requirements to the contrary,²⁷ or fraudulent intent, it is not, according to the weight of authority, necessary that a mortgage given to secure future advances should state such fact on its face.²⁸ However, according to some decisions a mortgage reciting as a present indebtedness the amount of future advances which it is intended to secure is void as to creditors.²⁹ Again, according to the weight of authority, it is not necessary to state the specific amount of such advances which it is intended to secure³⁰ or definitely to fix the time within which they are to accrue,³¹ although the description should at least be sufficient to afford notice to third persons, and to

direct them to the proper source for more minute and specific information.³²

A provision that the mortgage shall constitute a lien for future advances does not impose an obligation on the mortgagee to make them.³³

Indemnity mortgages. The validity of a mortgage given to indemnify another against a future and contingent liability is not in the absence of statute³⁴ affected by the fact that the mortgage does not appear on its face to have been given for a contingent liability.³⁵

§ 75. — Misdescription of Debt

A misdescription, as distinguished from a false description, is not necessarily fatal, and in a proper case erroneous portions of the description may be disregarded.

In the absence of statutes to the contrary,³⁶ the weight of authority is that a misdescription in the mortgage of the nature of the debt is not necessarily fatal,³⁷ and a clerical inaccuracy which does

26. Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.
Ga.—Albany Loan & Finance Co. v. Tift, 160 S.E. 661, 43 Ga.App. 789.
2 C.J. p 1011 note 69—11 C.J. p 474 note 23.

Rule limited

A security deed or bill of sale given to secure future advances must indicate such fact, "unless the instrument be in the form of an absolute conveyance, as distinguished from a sale as security for a debt."—Albany Loan & Finance Co. v. Tift, 160 S.E. 661, 43 Ga.App. 789.

27. In Colorado

Under a statute requiring a mortgage given to secure future advances to specify the ultimate amount to be advanced and secured, the date prior to which such advances shall be completed, and the date of maturity of the debt secured, and providing that no such mortgage shall secure any advance made after the date specified for the completion of the advances, a mortgage giving the date, amount, terms, and date of maturity of each note secured thereby, although not mentioning the fact that it was intended, in part, to secure future advances, is not rendered invalid as to that part of the debt secured which was due at the time the mortgage was executed.—Thimmig v. Segel, 3 P.2d 303, 89 Colo. 385.

28. Ala.—Manchuria S. S. Co. v. Harry G. G. Donald & Co., 77 So. 12, 200 Ala. 638.
11 C.J. p 474 note 24.

29. N.Y.—Divver v. McLaughlin, 2 Wend. 596, 20 Am.D. 655.

30. Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.
Tex.—H. W. Williams & Co. v. Bell, Civ.App., 8 S.W.2d 745.
11 C.J. p 474 note 26.

As between the parties

"Whatever contention, if any, might be made . . . by a third party" with respect to an insufficient description as to the amount of advances secured by a chattel mortgage, no such contention can be of any consequence between the parties to the mortgage, since "when the advances were made by . . . [the mortgagee] and accepted by . . . [the mortgagor], the amount became to that extent certain, by their own act."—Smith v. Thomas, 245 P. 399, 401, 42 Idaho 375.

Advances exceeding amount stated

It has been held that a mortgage to secure advances on an unplanted crop would be protected and upheld in a court of equity, although the advances exceeded the amount named in the mortgage, where the evident intent was to secure all that should be required for raising the crop.—Bell v. Radcliff, 32 Ark. 645.

31. Tex.—H. W. Williams & Co. v. Bell, Civ.App., 8 S.W.2d 745.
32. Iowa.—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 196 Iowa 1205.
11 C.J. p 475 note 27.

Mortgage securing "any . . . indebtedness"

A mortgage given to secure a three thousand dollar note and "any other indebtedness that . . . [the mortgagor] may owe [the] mortgagees or their assigns during the time . . . [the] mortgage is in force" is sufficient to put a subsequent

mortgagee on inquiry as to the exact amount of indebtedness secured thereby.—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 967, 196 Iowa 1205.

33. U.S.—Boatman's Bank of St. Louis, Mo., v. Fritzlen, Kan., 221 F. 145, 137 C.C.A. 45.

34. In New Hampshire, under a statute requiring a mortgage given to indemnify the mortgagee against any liability assumed, to state such liability specifically in the condition of the mortgage, a failure of a mortgage given to indemnify the mortgagees as sureties on a note to mention in the condition the fact that the mortgagees were sureties is not cured by a statement in the beginning of the mortgage that it is given in consideration of liability incurred for the mortgagor by the mortgagees.—Phillips v. Johnson, 10 A. 819, 64 N.H. 393.

35. Vt.—Sherman v. Estey Organ Co., 32 A. 483, 67 Vt. 550.
11 C.J. p 449 note 24.

Sufficient identifications of notes creating contingent liability

A chattel mortgage stating that it was given to secure the mortgagees against loss "because of her signature on 'notes,' bankable," given to a named motor company in full payment for a described automobile, has been held to sufficiently identify the notes signed by the mortgagee as surety.—Clark v. Ford, 201 S.W. 344, 346, 179 Ky. 797.

36. N.H.—Phillips v. Johnson, 10 A. 819, 64 N.H. 393.
11 C.J. p 475 note 31.

37. U.S.—Schaeffer v. Casey, C.C.A. Cal., 77 F.2d 808.
Colo.—Wolf v. Larimer County Bank

not in fact mislead may be disregarded;³⁸ but a wholly false description of the debts secured prevents foreclosure of the mortgage as drawn³⁹ and transfers no title to the property by virtue of which the mortgagee can assert a claim in an action at law.⁴⁰ In a proper case, however, the mortgagee may have the instrument reformed in a court of equity, if no rights are thereby cut off.⁴¹ The fact that a renewal note has been given is sufficient to account for a misdescription of the debt secured by a mortgage.⁴²

Although a mortgage appears on its face to be given as security for an absolute indebtedness, it is

not rendered invalid merely because the debt is in fact contingent,⁴³ evidence being admissible to show the true nature of the obligation.⁴⁴

Erroneous portions of the description may be omitted and the true portions alone may be regarded, when that of itself is sufficient to designate the debt secured.⁴⁵

§ 76. — Misstatement of Amount

A mortgage is not invalidated in the absence of fraud by an understatement or overstatement of the amount secured unless a statute may otherwise provide.

Except as statutes may otherwise provide,⁴⁶ the

& Trust Co., 246 P. 285, 79 Colo. 376—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.
Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597—Iowa Sav. Bank v. Graham, 181 N.W. 771, 192 Iowa 96.
Or.—Schwary v. Schwary, 7 P.2d 986, 138 Or. 690.
Tex.—Southwestern Drug Corporation v. First Nat. Bank, Civ.App., 45 S.W.2d 424, 425, quoting *Corpus Juris*.
Wash.—First Nat. Bank v. Oppenheimer, 212 P. 164, 123 Wash. 290.
Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.
11 C.J. p 475 note 29.
"Unless the misdescription is of such serious character as to indicate . . . that the parties . . . intended to perpetrate a fraud."—Wolf v. Larimer County Bank & Trust Co., 246 P. 285, 286, 79 Colo. 376 — Metropolitan State Bank v. Wright, 209 P. 804, 805, 72 Colo. 106.

Date of note

Where mortgage correctly stated the amount, but incorrectly stated the date of note secured it was not invalid.—Iowa Sav. Bank v. Graham, 181 N.W. 771, 192 Iowa 96—11 C.J. p 475 note 29 [b].

Unsigned note

A mortgage to secure payment of existing debts is not invalidated by the failure of the mortgagor to execute the note recited.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597—10 C.J. p 475 note 29 [c].

Notes nonexistent

A mortgage securing up to a specified amount certain notes dated "August 5th, 1927 and Dec. 31st, 1927 and Dec. 31st, 1927 or any notes already signed and past due" is not rendered invalid by the fact that "the two notes thus mentioned as dated in December, 1927, were nonexistent."—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 581, 44 Wyo. 456.

Rate of interest and payee

Where a mortgage was given to secure a note bearing "10 per cent. interest" and executed by the mortgagor to its secretary and by him indorsed to the mortgagee, an erroneous recital in the mortgage that it was made to secure a note bearing "8 per cent. interest" and payable "to the mortgagee" does not render the mortgage invalid.—First Nat. Bank v. Oppenheimer, 212 P. 164, 165, 123 Wash. 290.

Party to whom debt owed misnamed

A mortgage in effect describing certain notes secured thereby as owed, or given, to the mortgagee is not rendered invalid because such notes were in fact owed and given by the mortgagor to a bank after being indorsed by the mortgagee as surety, the latter having accepted the mortgage to secure him against loss as such surety.—West Grove Sav. Bank v. Dunlavy, 181 N.W. 404, 190 Iowa 1054.

Mortgage appearing as cosigner of note

The fact that the note was not signed by the mortgagee, while the chattel mortgage securing the note contained a copy of the note in which by inadvertence the name of the mortgagee appeared as a cosigner, does not render the mortgage void or prevent it from sufficiently complying with the California statute relating to chattel mortgages.—Schaeffer v. Casey, C.C.A. Cal., 77 F.2d 808.

Cancellation and replacement of described note

A subsequent cancellation of the note described in the mortgage and substitution of a new note for the same amount containing an earlier maturity date does not render the mortgage void for uncertainty as to the debt secured thereby.—In re George Seton Thompson Co., C.C.A. Ill., 297 F. 934.

38. Ill.—Kaysing v. Hughes, 64 Ill. 123.
11 C.J. p 475 note 30.

39. Ill.—Whiting Paper Co. v. Busse, 95 Ill.App. 288.

Mortgage securing nonexistent note

A mortgage purporting to secure a note which does not exist cannot be foreclosed as drawn, although an indebtedness actually existed at the time it was executed.—Whiting Paper Co. v. Busse, supra.

40. Me.—Jewett v. Preston, 27 Me. 400.

Substitution of other notes

Where the notes described were not executed, other notes held by the mortgagee against the mortgagor could not be substituted therefor.—Jewett v. Preston, supra.

41. Conn.—Bramhall v. Flood, 41 Conn. 68.

Wis.—Follett v. Heath, 15 Wis. 601.

Rights of creditors

The correction of such a mistake would not affect the rights of creditors who obtained a lien by attachment while it continued.—Bramhall v. Flood, 41 Conn. 68.

42. Me.—Barrows v. Turner, 50 Me. 127.

Mass.—Clark v. Houghton, 12 Gray 38.

43. Ill.—Citizens' State Bank of Manteno v. Senesac, 267 Ill.App. 288.

11 C.J. p 475 note 34.

44. Ill.—Goodheart v. Johnson, 88 Ill. 58.

11 C.J. p 475 note 34.

45. N.Y.—Dodge v. Potter, 18 Barb. 193.

Wis.—Lierman v. O'Hara, 140 N.W. 1057, 153 Wis. 140, 44 L.R.A., N.S., 1153.

46. In Connecticut

(1) The purpose of a statute providing that, where a person loans money on a note secured by mortgage on personal property in which the sum of money loaned is stated to be greater than the amount actually loaned, the note and mortgage shall be void, "is not primarily the protection of the borrower against an exaction made possible by his necessity, but to insure the veracity

fact that a chattel mortgage states a sum greater than the actual liability of the mortgagor to the mortgagee does not of itself render the mortgage void at law,⁴⁷ but an overstatement of the amount always requires an explanation,⁴⁸ and, as appears in the C.J.S. title Fraudulent Conveyances § 81, also 27 C.J. p 487 note 61, is a circumstance from which

a jury may infer fraud, in which case the mortgage is rendered invalid as against creditors of the mortgagor;⁴⁹ but it will be presumed that the amount of the debt is correctly recited in the mortgage.⁵⁰

An understatement of the amount due does not affect the validity of the mortgage,⁵¹ but the sum stated limits the amount secured.⁵²

V. EXECUTION AND DELIVERY

§ 77. In General

Execution of a chattel mortgage in accordance with statutory provisions is ordinarily requisite to its validity as to third persons, but not as between the parties.

While a chattel mortgage not executed in the manner and form prescribed by statute is good as between the parties in the absence of express statutory provisions, to the contrary,⁵³ it is ordinarily held that statutory provisions as to execution must be strictly complied with in order to render a chattel mortgage valid as to third persons,⁵⁴ even though, under some authority, they have notice of

the existence of the mortgage.⁵⁵ Accordingly, statutes providing that chattel mortgages shall be executed in like manner as mortgages of real estate must be strictly complied with.⁵⁶ Under a statute providing that a mortgage on a named type of goods shall be "absolutely void and of no effect or validity" if not executed as required, a mortgage not so executed is a nullity, and not merely voidable at the option of the injured party.⁵⁷

The application of these rules to particular elements in the execution of the instrument is considered at appropriate points in §§ 78-84 infra.

and reliability of . . . [the] recording system."—*Mozwish v. Sirus*, 154 A. 166, 167, 113 Conn. 141—11 C.J. p 475 note 36.

(2) Under the statute above referred to it has been held that a chattel mortgage and note secured thereby and described therein as in the amount of eighteen hundred dollars are not rendered invalid by the fact that when the note and mortgage were delivered to the mortgagee the latter had furnished the mortgagor with but seventeen hundred dollars in cash and services, where the mortgagee had bound himself by enforceable agreement to furnish the balance, as the entire transaction was regarded by the parties as a cash transaction.—*Mozwish v. Sirus*, supra.

(3) In spite of the statute above referred to, a note for two hundred and seventy-five dollars and a chattel mortgage for that amount to secure payment of a loan for two hundred and fifty dollars have been held valid.—*Sinclair v. Miller*, 68 A. 257, 80 Conn. 303.

47. Cal.—*Metzler v. Foster Holding Co.*, 54 P.2d 447, 5 Cal.2d 278.
Tex.—*Southwestern Drug Corporation v. First Nat. Bank*, Civ.App., 45 S.W.2d 424, error refused.
11 C.J. p 475 note 36.

To render a chattel mortgage void in law because taken for a greater sum than in fact due the mortgagee, it must appear that it was so taken intentionally and not by mere mistake in computation or otherwise.—*Kalk v. Fielding*, 7 N.W. 296, 50 Wis. 339.

Second mortgage not securing additional debt

A second chattel mortgage is not invalid merely because, by failing to disclose the fact that the debt it secured was also included in a first mortgage on other chattels, it appeared to secure an independent debt in addition to that secured by the first mortgage.—*Van Zele v. Cleaveland*, 208 Ill.App. 397.

48. Mich.—*Louden v. Vinton*, 66 N.W. 222, 108 Mich. 313.
11 C.J. p 476 note 37.

49. Cal.—*Tully v. Harloe*, 35 Cal. 302, 95 Am.D. 102.
Kan.—*Wallach v. Wylie*, 28 Kan. 138.
N.Y.—*Bailey v. Burton*, 8 Wend. 339.

50. Iowa.—*Price v. Fertig*, 122 N.W. 314, 144 Iowa 178.

51. N.H.—*Cushman v. Luther*, 53 N.H. 562.

N.Y.—*Beers v. Waterbury*, 21 N.Y. Super. 396.

52. N.Y.—*Beers v. Waterbury*, supra.

53. Cal.—*Lemon v. Wolff*, 53 P. 801, 121 Cal. 272.

Ill.—See *Kennedy Furniture Co. v. Griffin*, 194 Ill.App. 530.

11 C.J. p 476 note 47.

"While our statutes require certain formalities in the execution and filing of mortgages, as affecting the rights of others, as between the parties, no formalities are required."—*Barth v. Ely*, 278 P. 1002, 1008, 85 Mont. 310.

Notice of contents by broker

The failure of a person engaged in the business of lending money on

personal property to comply with a statute requiring personal property brokers to give to borrowers notice of the contents of notes and chattel mortgages given to secure loans does not invalidate the chattel mortgage and note taken as security.—*Wood v. Krepps*, 143 P. 691, 168 Cal. 382, L.R.A.1915B 851—11 C.J. p 476 note 50.

54. Ill.—*Southern Surety Co. v. People's State Bank of Astoria*, 243 Ill. App. 195, reversed on other grounds 163 N.E. 659, 332 Ill. 362. See *Kennedy Furniture Co. v. Griffin*, 194 Ill.App. 530.

Mont.—*Reynolds v. Fitzpatrick*, 57 P. 452, 23 Mont. 52.
N.J.—*Frascella v. Raphael*, 158 A. 96, 10 N.J.Misc. 181 — *Tarangioli v. Raphael*, 158 A. 95, 10 N.J.Misc. 171.

11 C.J. p 476 note 48.

Curse of defects in execution by taking possession see infra § 212.

So as to purported conditional sale contract which, by reason of its language, is a chattel mortgage.—*Raymond Bros. Impact Pulverizer Co. v. Thomas*, 294 P. 219, 159 Wash. 550—*Schultz v. Wells Butchers' Supply Co.*, 275 P. 737, 151 Wash. 382.

55. Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 329 Ill. 403.

11 C.J. p 477 note 53 [a].

56. Idaho.—*Willows v. Rosenstein*, 48 P. 1067, 5 Idaho 305.

11 C.J. p 476 note 49.

57. N.J.—*Frascella v. Raphael*, 158 A. 96, 10 N.J.Misc. 181—*Tarangioli v. Raphael*, 158 A. 95, 10 N.J.Misc. 171.

Instruments conveying both real and personal property, it has been held, must be executed as chattel mortgages in order to be valid as to the personal property conveyed.⁵⁸

Place of execution. A mortgage on property in one state cannot be said to show on its face that it was executed there, although it is headed with a reference to the state and a county thereof, where the signature of the mortgagor is witnessed by a notary of a named county in a named other state.⁵⁹

§ 78. Execution in Blank

Blanks in a mortgage delivered to the mortgagee may be filled by him in the manner contemplated by the parties.

An instrument may be a chattel mortgage even though it contains a blank.⁶⁰ A mortgagor who signs and delivers a blank chattel mortgage to the mortgagee thereby constitutes the mortgagee his agent to fill the blanks,⁶¹ in the absence of proof of fraud;⁶² but the mortgagee may exercise this authority only in the manner contemplated by the parties.⁶³

§ 79. Date

- a. Necessity and legal effect
- b. Presumptions as to date

a. Necessity and Legal Effect

Apart from statutory requirement, a chattel mortgage may be valid although undated; hence a mis-

take in dating, or antedating without fraudulent intent, will not void it.

In the absence of a statute requiring it, a date is not necessary to the validity of a chattel mortgage;⁶⁴ hence neither a mere mistake in dating the instrument⁶⁵ nor antedating it without fraudulent intent⁶⁶ will void it.

b. Presumptions as to Date

The date of a chattel mortgage is presumably the date of execution, the presumption being *prima facie*.

While the date of a chattel mortgage is presumably the date of the execution,⁶⁷ this presumption is merely *prima facie*.⁶⁸

Date of execution. An undated mortgage, in the absence of proof of the date of its execution, cannot be assumed to have been executed prior to the date when it was proved by the subscribing witness.⁶⁹

§ 80. Signature and Seal

- a. Signature
- b. Seal

a. Signature

A mortgage is not invalidated by informalities in the signature, as where the mortgagor does not sign in his own proper name, or where the signature is by mark, or his name is misspelled. Signature by the mortgagor only is ordinarily all that is required.

Under a statute so providing, a mortgage must

58. Ill.—Long v. Cockern, 21 N.E. 201, 128 Ill. 29, affirming 29 Ill.App. 304.

11 C.J. p 477 note 51.

59. Ala.—Covey Cotton Oil Co. v. Bank of Ft. Gaines, 74 So. 87, 15 Ala.App. 529, certiorari denied 75 So. 1003, 200 Ala. 695.

60. Mo.—Roe v. Town Mut. F. Ins. Co., 78 Mo.App. 452.

61. Mo.—David Plaut Securities Co. v. Cooper, App., 258 S.W. 455—Roe v. Town Mut. F. Ins. Co., 78 Mo. App. 452.

Particular blanks which may be filled

(1) Dates and amounts of payments.—Ward v. Watson, 39 N.W. 615, 24 Neb. 592.

(2) Description of property.—Roe v. Town Mut. F. Ins. Co., 78 Mo.App. 452.

(3) Name of mortgagee.—David Plaut Securities Co. v. Cooper, Mo. App., 258 S.W. 455.

62. N.Y.—Holzwasser & Co. v. Gotman, 169 N.Y.S. 505.

63. Mo.—David Plaut Securities Co. v. Cooper, App., 258 S.W. 455—Roe

v. Town Mut. F. Ins. Co., 78 Mo. App. 452.

N.Y.—Holzwasser & Co. v. Gotman, 169 N.Y.S. 505.

11 C.J. p 477 note 55.

64. Ga.—Todd v. Hurst Supply Co., 86 S.E. 255, 17 Ga.App. 98.

11 C.J. p 477 note 57.

Parol evidence may be used to supply an absent date.—Burditt v. Hunt, 25 Me. 419, 43 Am.D. 289.

Instrument setting out note

"Though the date of . . . [the] execution [of the instrument] is not stated, yet it sets out verbatim the note which it secures, thereby giving the date of the obligation and the date of the maturity thereof, and must evidently have been executed either on the same date with the note or at some time between that date and the time when the affidavit of good faith and the acknowledgment, both of which are dated, were attached to it. In these circumstances the omission of the date of execution does not appear to us material."—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 1066, 139 Cal.App. 427.

65. Me.—Partridge v. Swazey, 46 Me. 414.

11 C.J. p 477 note 58.

66. Mich.—Johnson v. Stellwagen, 34 N.W. 252, 67 Mich. 10.

11 C.J. p 477 note 62.

67. Ind.—Briggs v. Fleming, 14 N.E. 86, 112 Ind. 313.

11 C.J. p 477 note 59.

Mortgages executed on same day

(1) "Where two chattel mortgages were executed on the same day, and there is no evidence that one was executed at an earlier hour than the other, they will be presumed to have been executed contemporaneously."—Sheldon v. Brown, 75 N.W. 709, 72 Minn. 496.

(2) In these circumstances, "the fact that one was filed before the other raises no presumption that it was executed first."—Sheldon v. Brown, supra.

68. Or.—Alberson v. Elk Creek Min. Co., 65 P. 978, 39 Or. 552.

11 C.J. p 477 note 60.

69. N.J.—Metropolitan Store, etc., Fixture Co. v. Albrecht, 56 A. 237, 70 N.J.Law 149.

be signed by the mortgagor.⁷⁰ Since, as appears in § 49 supra, a valid mortgage may, apart from statute, be created by parol, informalities in the signature of a written mortgage will not invalidate it;⁷¹ the rule that a person is said to "sign" a document when he writes or marks thereon something in evidence or token of his intention to be bound by its contents, and that any mark is sufficient if it shows an intent to be bound by the document, has been applied to chattel mortgages.⁷² The validity of a mortgage has been held unaffected by the fact that the mortgagor does not sign the instrument with his own proper name;⁷³ but the mortgagor's signature must be sufficiently identified,⁷⁴ and must be affixed with an intent to be bound by the mortgage.⁷⁵

In accordance with these rules, courts have held mortgages valid where the signature was in an assumed name,⁷⁶ or, in the absence of statutes prohibiting such signature,⁷⁷ by mark,⁷⁸ or by another at the mortgagor's request and in his presence,⁷⁹ or, at least as between the parties,⁸⁰ where the mortgagor's name was wrongly or erroneously stated⁸¹ or misspelled.⁸²

The necessity for attestation of the mortgagor's signature is considered infra § 81, description of parties generally in § 55 supra, and the record of a mortgage executed in a wrong or fictitious name as notice in § 164 infra.

Signing schedule or affidavit. Where a statute requires that a mortgage be subscribed, signing at the bottom of a schedule annexed thereto has been held not necessary;⁸³ where it is required that a chattel mortgage be accompanied by an affidavit, it has been held that a chattel mortgage, when duly recorded, is valid, although signed at the end of the appended affidavit, and not at the end of the mortgage proper.⁸⁴

Alteration of mortgage. Where a mortgage, subscribed by the mortgagor in conformity with statute, is altered by the parties by an interlineation changing part of the property covered, the mortgage is valid without a resubscription.⁸⁵

Where a mortgagor's signature by mark is required to be witnessed, the witness has been required to sign his name as witness, rather than sign by mark.⁸⁶

*The failure of a wife to sign a mortgage executed by her husband before his marriage does not affect its validity.*⁸⁷

Signature by a trustee, although material on the question of acceptance by him, is not essential to the validity of a deed of trust by way of mortgage.⁸⁸

A mortgage in the form of an indenture may be valid even though executed by the mortgagor alone.⁸⁹

70. Okl.—Guarantee State Bank v. Moore, 163 P. 272, 63 Okl. 133.

71. Ala.—Alabama Warehouse Co. v. Lewis, 56 Ala. 514.
11 C.J. p 477 note 64.

72. Ala.—Barksdale v. Bullington, 69 So. 891, 194 Ala. 624.

73. Ala.—Barksdale v. Bullington, supra.

Mich.—Walrath v. Campbell, 28 Mich. 111.

Miss.—Campbell v. Doggett, 23 So. 371.

11 C.J. p 477 note 65.

74. Ala.—Barksdale v. Bullington, 69 So. 891, 194 Ala. 624.

75. Miss.—Campbell v. Doggett, 23 So. 371.

76. Mo.—Crawford v. Benoist, 70 S. W. 1098, 97 Mo.App. 219.

"Matters of contract or obligation may be entered into by a person by any name he may choose to assume. All the law looks to is the identity of the individual and when that is ascertained and clearly established the act will be binding upon him and others."—Taylor v. Bowen, 84 Mo. App. 613, 620.

77. Ala.—Alabama Warehouse Co. v. Lewis, 56 Ala. 514.

78. Ala.—Barksdale v. Bullington, 69 So. 891, 194 Ala. 624.

11 C.J. p 478 note 69.

79. Ala.—Hollimon v. McGregor, 143 So. 902, 225 Ala. 517.

80. Ohio.—Baker v. Coffman, 24 Ohio N.P., N.S., 259.

81. Mich.—Walrath v. Campbell, 28 Mich. 111.

Mo.—Taylor v. Bowen, 84 Mo.App. 613.

Where a corporate mortgagor erroneously signed as "The Trustees of the Orthodox Congregational Church of Middleville" instead of "The First Orthodox Congregational Society of Middleville," the court, in deciding the validity of the mortgage, said: "The great object of a corporate name, like that of an individual, is to identify the corporation, and it may be known by several names, as well as a natural person; and when the variance from the exact designation given by the statute is no greater than it is here, I can see no good reason to doubt the propriety of parol evidence tending to identify the corporation whose organization was shown by the certificate, with that which executed the mortgage."—Walrath v. Campbell, 28 Mich. 111, 121.

82. Ala.—Barksdale v. Bullington, 69 So. 891, 194 Ala. 624.

Omission of letter

Ala.—Barksdale v. Bullington, supra.

83. U.S.—American Surety Co. of New York v. Worcester Cycle Mfg. Co., C.C.Conn., 100 F. 40, construing Connecticut statute.
11 C.J. p 477 note 66.

84. Ariz.—Clifton First Nat. Bank v. Clifton Armory Co., 128 P. 810, 14 Ariz. 360, Ann.Cas.1915A 1061.

85. Ala.—Winslow v. Jones, 7 So. 262, 38 Ala. 496.

86. Ala.—Barksdale v. Bullington, 69 So. 891, 194 Ala. 624—Morris v. Attalla Bank, 45 So. 219, 153 Ala. 352—Houston v. State, 21 So. 813, 114 Ala. 15.

87. Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 662, 46 Idaho 231.

Reason for rule

"Rights created by the mortgage at the date of the mortgage could not be destroyed by the subsequent marriage of one of the parties."—Forbush v. San Diego Fruit and Produce Co., supra.

88. Ala.—Dewoody v. Hubbard, 1 Stew. & P. 9.

89. Mass.—Esson v. Tarbell, 9 Cush. 407.

b. Seal

At common law, a chattel mortgage need not be under seal although it may be.

It is not, at common law, necessary to the validity of a chattel mortgage that a seal be affixed to it,⁹⁰ although the instrument is not vitiated by adding a seal unnecessarily;⁹¹ but where the statute requires a seal it is essential.⁹²

§ 81. Attestation

a. In general

b. Competency of witnesses

a. In General

In the absence of statutes to other effect, attestation is not essential to the validity of a chattel mortgage, at least between the parties and as to others having actual

notice; but it is essential, under some statutes, to admission to record. Strict compliance with statutory requirements regarding attestation has been required.

Attestation of a chattel mortgage has been defined as the solemn or official declaration of the fact of the identity of the mortgagor's signature.⁹³

In the absence of statutory provisions to other effect, attestation or witnessing is not essential to the validity of a chattel mortgage, at least as between the parties to the mortgage, or as to others having actual notice or knowledge thereof;⁹⁴ nor, apart from statute, is attestation essential to its admission to registration;⁹⁵ but under some statutes, attestation is essential to the admission of a chattel mortgage to record.⁹⁶ Strict compliance with statutory requirements regarding attestation has been required.⁹⁷

90. Md.—Wm. S. Tyler Co. v. O'Ferrall, 138 A. 249, 153 Md. 353, citing *Corpus Juris*.

11 C.J. p 478 note 71.

91. U.S.—Davis v. Turner, N.C., 120 F. 605, 56 C.C.A. 669.

11 C.J. p 478 note 72.

92. Md.—Wm. S. Tyler Co. v. O'Ferrall, 138 A. 249, 153 Md. 353.

93. Okl.—First Nat. Bank v. Devore, 234 P. 734, 110 Okl. 283.

Attestation defined generally see Attestation, 7 C.J.S. p 692.

94. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383—Stewart v. Clemens, 124 So. 863, 220 Ala. 224, 66 A.L.R. 1454—Winslow v. Jones, 7 So. 262, 88 Ala. 496—Alabama Warehouse Company v. Lewis, 56 Ala. 514.

Ga.—Smith v. Camp, 10 S.E. 539, 84 Ga. 117—Carithers v. Whitehead & Gholston, 118 S.E. 578, 30 Ga.App. 614—Futch v. Taylor, 96 S.E. 183, 22 Ga.App. 441.

La.—Dainello v. McCoy, 131 So. 608, 14 La.App. 358.

Minn.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85.

Okl.—Lhevine v. Tulsa Industrial Loan & Investment Co., 239 P. 632, 113 Okl. 104—Lankford v. First Nat. Bank, 183 P. 56, 75 Okl. 159—Chase v. Cable Co., 170 P. 1172, 67 Okl. 322.

Wyo.—Stockmen's Nat. Bank of Casper v. Lukis Candy Co., 33 P.2d 254, 47 Wyo. 127.

11 C.J. p 478 notes 73, 84.

Reason for rule

"The title to personal property will pass without writing, and a verbal mortgage of such property will be enforced."—Alabama Warehouse Company v. Lewis, 56 Ala. 514, 515.

Disqualified witness

Wyo.—Huber v. Glenrock State Bank, 231 P. 63, 32 Wyo. 357, re-

hearing denied 234 P. 31, 32 Wyo. 357.

Forgery of the signature of an attesting witness is immaterial.—Chase v. Cable Co., 170 P. 1172, 67 Okl. 322.

The words "signed and validated," as used in a statute providing that the mortgagor's signature "may either be attested by acknowledgment . . . or . . . may be signed and validated by the signature of two persons not interested therein," refer to the attestation and not to the execution of a mortgage, and therefore attestation is requisite only to the recording of the instrument and not to its validity as between the parties.—Lankford v. First Nat. Bank, 183 P. 56, 75 Okl. 159.

95. S.C.—Milford v. Aiken, 39 S.E. 233, 61 S.C. 110.

Tex.—Neely-Harris-Cunningham Co. v. Lacy, Civ.App., 152 S.W. 441.

96. U.S.—Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, Utah, 237 F. 763, 150 C.C.A. 517, applying Utah statutes.

Ga.—Futch v. Taylor, 96 S.E. 183, 22 Ga.App. 441.

Mont.—Walker Motor Exchange v. Lindberg, 284 P. 270, 86 Mont. 513, applying Oklahoma statute.

N.D.—J. I. Case Threshing-Mach. Co. v. Olson, 86 N.W. 718, 10 N.D. 170—Donovan v. St. Anthony & D. Elevator Co., 80 N.W. 772, 8 N.D. 585, 73 Am.S.R. 779, 46 L.R.A. 721.

Okl.—Lankford v. First Nat. Bank, 183 P. 56, 75 Okl. 159—Chase v. Cable Co., 170 P. 1172, 67 Okl. 322—Guarantee State Bank v. Moore, 163 P. 272, 63 Okl. 133—Thompson v. Crosby, 82 P. 643, 16 Okl. 316. S.D.—Fisher v. Porter, 77 N.W. 112, 11 S.D. 311—Walter A. Wood Mowing, etc., Mach. Co. v. Lee, 57 N.W. 238, 4 S.D. 495.

11 C.J. p 478 note 77.

Record of insufficiently attested mortgage as notice see *infra* § 164.

Crop mortgages

(1) In a jurisdiction where a growing crop is considered to be part of the realty, and two attesting witnesses, one an official, are required for admission of real property mortgages to record, a mortgage on such a crop is not entitled to record unless so attested.—Farmers' Warehouse Co. v. First Nat. Bank, 109 S.E. 900, 152 Ga. 262—Whatley v. Virginia-Carolina Chemical Co., 120 S.E. 436, 31 Ga.App. 226—A. C. Kelly & Sons v. Monroe Cotton Mills, 118 S.E. 593, 30 Ga.App. 609—Carithers v. Whitehead & Gholston, 118 S.E. 578, 30 Ga.App. 614.

(2) This requirement applies to mortgages executed prior to the enactment of a statute declaring growing crops to be personalty, so that mortgages upon them could be taken as chattel mortgages.—A. C. Kelly & Sons v. Monroe Cotton Mills, *supra*—Carithers v. Whitehead & Gholston, *supra*.

(3) Necessity for record of crop mortgage see *infra* § 150.

97. Conn.—Bickart v. Sanditz, 136 A. 580, 105 Conn. 766.
11 C.J. p 478 note 78.

"When a statute prescribes no precise form of words to be used in the certificate [of attestation], it is sufficient if the words used have the same meaning, and are in substance the same, as was intended by the statute."—De Smet First Nat. Bank v. Northwestern El. Co., 57 N.W. 77, 4 S.D. 409.

Conformity to statute as to realty mortgage

A statutory provision that a mortgage of personal property with retention of possession by the mortgagor shall be "executed, acknowledged and recorded as mortgages of

Attestation by mark. A mortgage is not invalidated because attested by witnesses making their marks unless a statute prohibits the execution of chattel mortgages in that mode.⁹⁸

A mortgagor's signature by mark has been required, under governing statutes, to be witnessed.⁹⁹

Attestation by acknowledgment, as provided for by statute, is sufficient where the certificate of acknowledgment, whatever its form, reasonably discloses the identity of the mortgagor's signature.¹

"Notarial act." A statute providing that a chattel mortgage, "in order to affect third persons without notice . . . must be passed by notarial act," has been construed in several cases.²

The correction of a defective attestation renders the instrument valid, as to third persons only from the date of such correction.³

land" shows the legislative intention "that a chattel mortgage should conform, in all respects, to the manner of execution and acknowledgment of a mortgage of land," so that, if another provision requires all conveyances of land to be "attested by two witnesses," a chattel mortgage must also be so attested.—*Bickart v. Sanditz*, 136 A. 580, 582, 105 Conn. 766.

Affidavit by one not witness

Under a statutory provision that a mortgage "must be executed in the presence of, and attested by, or proved before, a notary public, or justice," an affidavit of execution made before a notary public by one who was not an attesting witness is insufficient as "proof" which may substitute the due attestation.—*In re Smith*, D.C.Ga., 281 F. 574, 575, applying Georgia statute.

Making known contents; signature of witness

Under statutory provisions that the execution of the instrument shall be acknowledged or proved, and that "it is sufficient if it be 'proved' before one of the officials named in the statute, by one or more of the subscribing witnesses . . . that the grantor 'signed, sealed and delivered it as his voluntary act and deed,' a certificate of proof of execution . . . is not defective either for failure of the officer to certify that he made known the contents of the instrument to the subscribing witness making the proof, nor for lack of signature of the said subscribing witness."—*Van Houten v. Dainty Quality Laundry Corporation*, 171 A. 549, 550, 115 N.J.Eq. 516.

98. Ala.—*Alabama Warehouse v. Lewis*, 56 Ala. 514.

99. Ala.—*Dutton v. Gibson*, 148 So.

397, 226 Ala. 657—*Hollimon v. McGregor*, 143 So. 902, 225 Ala. 517. 11 C.J. p 478 note 81.

Sufficiency of signature of attesting witness see supra § 80 a.

Superfluous signature

Where a person signing a crop mortgage by mark has no mortgageable interest, so that his name and mark are superfluous, the mortgage is not void because his signature by mark is witnessed by one witness instead of two, as required by statute.—*Bell v. Central Bank of Imperial Valley*, 265 P. 551, 89 Cal.App. 551.

1. Okl.—*First Nat. Bank v. Devore*, 234 P. 734, 110 Okl. 283.

Mixed mortgage

Where acknowledgment dispenses with the necessity of attesting witnesses in mortgages of real estate, attestation of a mortgagor's mark, in a mortgage of both realty and personalty, is unnecessary, in order to pass the personal property, if the instrument is acknowledged before a proper officer by whom it is duly certified.—*Breene v. McCrary*, 52 Ala. 154.

2. Meaning of "notarial act"

"The notarial act referred to . . . is one signed and executed by the mortgagor before a notary public, who also signs, and two attesting witnesses."—*Wessell v. Kite*, La.App., 142 So. 363, 365.

A mortgage not signed before a notary public is insufficient as a notarial act although signed by the mortgagor in the presence of two witnesses and proved by affidavit of one witness before a notary, since it does not "possess the self-proving qualities of a notarial act."—*Wessell v. Kite*, La.App., 142 So. 363, 365.

As between the parties a chattel mortgage is valid although not pass-

b. Competency of Witnesses

While there is some disagreement, it is more commonly held that neither the mortgagee, nor a stockholder in a corporation mortgagee, nor a partner in a partnership mortgagee, is competent to attest the mortgage; but an agent, employee, or relative of the mortgagee may be a competent witness.

The general rule that all persons of proper age and sound mind, who are not proved to be disqualified, are competent subscribing witnesses to the execution of a written instrument has been applied to chattel mortgages.⁴ While it has been held that a mortgagee⁵ or a stockholder in a mortgagee corporation⁶ is not disqualified from attesting a chattel mortgage because of his interest, and that the fact that the official witness is a "party at interest" does not affect the validity of the mortgage as between the parties,⁷ more common holdings are that a person is incompetent to attest a mortgage of which he is the mortgagee,⁸ or which is executed to a

ed by notarial act.—*Dainello v. McCoy*, 131 So. 608, 14 La.App. 358.

As against third persons without notice, a mortgage not passed by notarial act is invalid although recorded.—*Thigpen v. Wall Printing Corporation*, La.App., 145 So. 714—*Wessell v. Kite*, La.App., 142 So. 363—*Leiber v. Watts*, 139 So. 778, 19 La. App. 650, overruling *Shevlin v. Grimmer*, 119 So. 894, 10 La.App. 393—*Dainello v. McCoy*, 131 So. 608, 14 La.App. 358—*Union Securities Co. v. Neal*, 121 So. 316, 9 La.App. 494.

Who may attack authenticity of act

Landlord claiming lien on automobile covered by mortgage, not being party to notarial act, could attack its authenticity.—*Dainello v. McCoy*, 131 So. 608, 14 La.App. 358.

3. Va.—*Jennings v. Atty.-Gen.*, 4 Hen. & M. 424, 14 Va. 424.

4. U.S.—*Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, Utah*, 237 F. 763, 150 C.C.A. 517.

5. S.D.—*Fisher v. Porter*, 77 N.W. 112, 11 S.D. 311.

11 C.J. p 479 note 88.

6. Ala.—*Morris v. Attalla Bank*, 45 So. 219, 153 Ala. 352.

Later statute not applicable

The validity of an executed chattel mortgage competently attested by a stockholder in the mortgagee corporation is not affected by the subsequent taking effect of a statute disqualifying interested persons from attesting such instruments.—*Ames Bank v. Lehr*, 130 P. 238, 37 Okl. 1.

7. Ga.—*Lane v. American Agr. Chemical Co.*, 161 S.E. 646, 44 Ga. App. 432.

8. N.D.—*Donovan v. St. Anthony, etc., El. Co.*, 80 N.W. 772, 8 N.D. 585, 73 Am.S.R. 779, 46 L.R.A. 721. 11 C.J. p 479 note 89.

partnership in which he is a partner,⁹ or to a corporation in which he is a stockholder;¹⁰ but the fact that the attesting witness is an agent or an employee,¹¹ or a relative,¹² of the mortgagee does not disqualify him.

Attestation may be made by a notary public in his individual, as well as in his official, capacity.¹³ If he acts officially, it is no objection that he is also attorney for the mortgagee,¹⁴ or that his official seal is not affixed to his attestation.¹⁵

Proof of disqualification. It has been held that a mortgage purporting on its face to be duly executed is properly received for record, and that disqualification of the witnesses must be shown by proof in the case.¹⁶

§ 82. Acknowledgment

- a. Necessity
- b. Sufficiency

a. Necessity

(1) In general

9. Minn.—Beckner v. D'Evelyn, 137 N.W. 1097, 119 Minn. 246.

10. Ga.—Betts-Evans Trading Co. v. Bass, 59 S.E. 3, 2 Ga.App. 718. Apparently so holding, In re Coleman & Brown, D.C.Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254.

11. U.S.—Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, Utah, 237 F. 763, 150 C.C.A. 517. 11 C.J. p 479 note 93.

President of corporation

Ga.—Winder Nat. Bank v. Hendrix, 136 S.E. 801, 36 Ga.App. 362.

Cashier of bank

U.S.—In re Coleman & Brown, D.C. Ga., 291 F. 280, reversed on other grounds, C.C.A., 2 F.2d 254. Ala.—Morris v. Attalla Bank, 33 So. 804, 142 Ala. 638.

Clerk in bank

U.S.—In re Virgin, D.C.Ga., 224 F. 128.

"Assistant credit man . . . who, in the discharge of his duty to secure and collect . . . claims . . . procured and recorded the mortgage."—Johnson-Baillie Shoe Co. v. Bardsley, Elmer & Nichols, Utah, 237 F. 763, 150 C.C.A. 517.

12. Ga.—Welsh v. Lewis, 71 Ga. 387.

Brother-in-law

Ga.—Welsh v. Lewis, *supra*.

13. Ga.—Janes v. Penny, 76 Ga. 796.

14. Ga.—Jones v. Howard, 27 S.E. 765, 99 Ga. 451, 59 Am.S.R. 231, distinguishing Nichols v. Hampton, 46 Ga. 253—Wardlaw v. May-er, 77 Ga. 620.

15. Ga.—Lamar v. Coleman, 14 S.E. 608, 88 Ga. 417.

16. Okl.—Watts v. El Reno First Nat. Bank, 58 P. 732, 8 Okl. 645.

17. Ala.—Winslow v. Jones, 7 So. 262, 88 Ala. 496.

18. U.S.—In re Hylbert, D.C.Ill., 26 F.2d 672, applying Illinois rule. Ark.—Atlas Supply Co. v. McAmis, 51 S.W.2d 982, 185 Ark. 1168—Bank of Weiner v. Jonesboro Trust Co., 271 S.W. 952, 168 Ark. 859.

Cal.—Sullivan v. Vera, 13 P.2d 770, 125 Cal.App. 303.

Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145—Lampman v. Lamping, 199 P. 418, 419, 70 Colo. 167, citing *Corpus Juris*—Machette v. Wanless, 2 Colo. 169.

Idaho.—Grandview State Bank v. Torrance, 221 P. 145, 38 Idaho 388.

Ill.—Karchiunes v. Mitsias, 257 Ill. App. 95. See Kennedy Furniture Co. v. Griffin, 194 Ill.App. 530.

Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 232 N.W. 487, 210 Iowa 1153—National Bank of Milton v. O'Brien, 195 N.W. 611, 196 Iowa 865.

Minn.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85.

N.J.—Seacoast Finance Corporation v. Cornell, 138 A. 695, 104 N.J.Law 24.

Okl.—Lankford v. First Nat. Bank, 183 P. 56, 75 Okl. 159.

Wash.—Woods v. Young Lumber Co., 181 P. 865, 107 Wash. 432.

Wyo.—Stockmen's Nat. Bank of Casper v. Lukis Candy Co., 33 P.2d 254, 47 Wyo. 127.

1 C.J. p 752 note 66—11 C.J. p 479 note 2.

(2) Acts making acknowledgment unnecessary

(3) Reacknowledgment

(1) In General

A chattel mortgage may be valid and binding between the parties even though not acknowledged or defectively acknowledged; but acknowledgment is ordinarily necessary as against creditors, subsequent purchasers, and other third persons, particularly those not having notice of the mortgage, unless they are not within the protection of the statutes requiring acknowledgment. Acknowledgment is commonly essential to the admission of a chattel mortgage to record.

While it has been broadly stated that acknowledgment before an officer is not essential to the valid execution of a mortgage of personal property,¹⁷ and as between the parties to the mortgage, it may be valid and binding even though defectively acknowledged or not acknowledged,¹⁸ under the statutory provisions concerning chattel mortgages, acknowledgment is ordinarily essential to the validity and effectiveness of the mortgage as against creditors,¹⁹ subsequent purchasers,²⁰ subsequent

Conditional sales contracts regarded as chattel mortgages.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.

Mortgage executed by corporation and acknowledged by president personally held good as between mortgagor and mortgagee.—N Bar N Land & Livestock Co. v. Taylor, 22 P.2d 313, 94 Mont. 350.

19. U.S.—Albert Pick & Co. v. Willson, C.C.A.Iowa, 19 F.2d 18, applying Iowa statute.

Cal.—Noyes v. Bank of Italy, 274 P. 68, 206 Cal. 266—Wehrle v. Marks, 25 P.2d 51, 134 Cal.App. 141.

Colo.—J. D. Best & Co. v. Wolf Co., 185 P. 371, 67 Colo. 42, 29 A.L.R. 899.

Ill.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403—Fisher v. Bollman, 258 Ill.App. 461—Watkins v. Dunbar, 232 Ill.App. 1—Baldwin Co. v. Keeley, 198 Ill. App. 287.

Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 232 N.W. 487, 210 Iowa 1153.

N.J.—Seacoast Finance Corporation v. Cornell, 138 A. 695, 104 N.J.Law 24.

Wash.—Woods v. Young Lumber Co., 181 P. 865, 107 Wash. 432.

11 C.J. p 479 note 99.

Prior as well as subsequent creditors.—Noyes v. Bank of Italy, 274 P. 68, 206 Cal. 266.

20. U.S.—Albert Pick & Co. v. Willson, C.C.A.Iowa, 19 F.2d 18, applying Iowa statute.

Cal.—Noyes v. Bank of Italy, 274 P. 68, 206 Cal. 266.

lienors,²¹ encumbrancers,²² and "third persons" or "third parties" generally.²³ However, an unacknowledged or defectively acknowledged chattel mortgage is valid and effective as against third persons not within recording or other statutes requiring acknowledgment for the protection of third persons;²⁴ so, where such a statute names the classes of persons to which it applies, acknowledgment is not essential to the validity or effectiveness of the mortgage as against a person not coming within any of such classes, such as, under particular statutes, a creditor taking a mortgage to secure a pre-existing indebtedness,²⁵ a prior mortgagee,²⁶ creditors of a subsequent purchaser who assumed the

mortgage debt,²⁷ the heirs at law of the mortgagor,²⁸ persons "neither creditors . . . nor subsequent purchasers or incumbrancers of the property in good faith,"²⁹ or a third person having actual notice of the mortgage, or not in good faith.³⁰

Mortgages not acknowledged or defectively acknowledged have been held void as against particular classes of third persons without notice thereof,³¹ and, in a few jurisdictions, even as against third persons having actual notice.³²

Requirement for recording. Acknowledgment is commonly essential to the admission of a chattel mortgage to record.³³

Ill.—See *Kennedy Furniture Co. v. Griffin*, 194 Ill.App. 530.

Wash.—*Brady v. Frigidaire Sales Corporation*, 40 P.2d 166, 180 Wash. 472—*Robert Morton Organ Co. v. Armour*, 38 P.2d 257, 179 Wash. 392—*Robert Morton Organ Co. v. Armour*, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462.
11 C.J. p 479 note 99.

Instrument called conditional sales contract

Wash.—*West American Finance Co. v. Finstad*, 262 P. 636, 146 Wash. 315.

21. U.S.—*In re Caslon Press, C.C.A. Ill.*, 229 F. 133.

22. Cal.—*Noyes v. Bank of Italy*, 274 P. 68, 206 Cal. 266.

Ill.—*Baldwin Co. v. Keeley*, 198 Ill. App. 287.

Ind.—*Citizens State Bank v. Michel*, App., 7 N.E.2d 44.

11 C.J. p 479 note 99.

23. U.S.—*In re Hyilbert, D.C.Ill.*, 26 F.2d 672, applying Illinois rule.

Ark.—*Atlas Supply Co. v. McAmis*, 51 S.W.2d 982, 185 Ark. 1168—*Bank of Weiner v. Jonesboro Trust Co.*, 271 S.W. 952, 168 Ark. 859.

Colo.—*J. D. Best & Co. v. Wolf Co.*, 185 P. 371, 372, 67 Colo. 42, 29 A. L.R. 899.

Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 547, 329 Ill. 403—*Watkins v. Dunbar*, 232 Ill.App. 1, 10. See *Cermak v. Royal Furniture Co.*, 199 Ill.App. 413.
11 C.J. p 479 note 99.

24. Fla.—*Hardesty v. Wellington Finance Corporation*, 157 So. 423.

Idaho.—*Nohrnberg v. Boley*, 246 P. 12, 42 Idaho 48.

Iowa.—*Chariton & Lucas County Nat. Bank v. Taylor*, 232 N.W. 487, 210 Iowa 1153—*National Bank of Milton v. O'Brien*, 195 N.W. 611, 196 Iowa 865.

Wash.—*Robert Morton Oregon Co. v. Armour*, 23 P.2d 887, 173 Wash.

462, remittitur recalled 27 P.2d 1119, 173 Wash. 462.

25. Iowa.—*Chariton & Lucas County Nat. Bank v. Taylor*, 232 N.W. 487, 210 Iowa 1153.

26. Wash.—*Chace v. Tacoma Box Co.*, 39 P. 639, 11 Wash. 377.

27. Cal.—*Talcott v. Hurlbert*, 76 P. 647, 143 Cal. 4.

28. Fla.—*Hardesty v. Wellington Finance Corporation*, 157 So. 423.

29. Idaho.—*Nohrnberg v. Boley*, 246 P. 12, 42 Idaho 48.

30. Colo.—*J. D. Best & Co. v. Wolf Co.*, 185 P. 371, 67 Colo. 42, 29 A. L.R. 899.

Idaho.—*Nohrnberg v. Boley*, 246 P. 12, 42 Idaho 48.

Wash.—*Robert Morton Organ Co. v. Armour*, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462.

11 C.J. p 479 notes 99, 1, p 480 note 3.

31. Attaching creditor

Colo.—*J. D. Best & Co. v. Wolf Co.*, 185 P. 371, 67 Colo. 42, 29 A.L.R. 899.

Subsequent chattel mortgagee

Ind.—*Citizens State Bank v. Michel*, App., 7 N.E.2d 44.

Subsequent lienor

U.S.—*Albert Pick & Co. v. Wilson, C.C.A.Iowa*, 19 F.2d 18, applying Iowa statute.

Ill.—*Baldwin Co. v. Keeley*, 198 Ill. App. 287.

Subsequent purchaser

Ill.—See *Kennedy Furniture Co. v. Griffin*, 194 Ill.App. 530.

Wash.—*Brady v. Frigidaire Sales Corporation*, 40 P.2d 166, 180 Wash. 472—*Robert Morton Organ Co. v. Armour*, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462—*West American Finance Co. v. Finstad*, 262 P. 636, 146 Wash. 315.

Trustee in bankruptcy

U.S.—*Albert Pick & Co. v. Wilson, C.C.A.Iowa*, 19 F.2d 18, applying Iowa statute.

Cal.—*Noyes v. Bank of Italy*, 274 P. 68, 206 Cal. 266.

32. Ark.—*Bank of Weiner v. Jonesboro Trust Co.*, 271 S.W. 952, 168 Ark. 859.

Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 329 Ill. 403.

1 C.J. p 753 notes 77 [b], 80 [b]—11 C.J. p 480 note 4.

Attaching creditor

Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 329 Ill. 403.

Prior mortgages of land on which mortgaged crop grew.—*Bank of Weiner v. Jonesboro Trust Co.*, 271 S.W. 952, 168 Ark. 859.

33. U.S.—*In re Caslon Press, C.C.A. Ill.*, 229 F. 133.

Ark.—*Bank of Weiner v. Jonesboro Trust Co.*, 271 S.W. 952, 168 Ark. 859.

Iowa.—*Chariton & Lucas County Nat. Bank v. Taylor*, 232 N.W. 487, 210 Iowa 1153.

Neb.—*Hooker v. Hammill*, 7 Neb. 231.

N.J.—*Seacoast Finance Corporation v. Cornell*, 138 A. 695, 104 N.J.Law 24—*Pincus v. U. S. Dyeing & Cleaning Works*, 133 A. 66, 99 N.J. Eq. 160.

Okl.—*Guarantee State Bank v. Moore*, 163 P. 272, 63 Okl. 133.

11 C.J. p 479 note 1.

In Texas

(1) If the original mortgage is deposited, it is not necessary that it be acknowledged or proved.—*Chator v. Brunswick-Balke-Collender Co.*, 10 S.W. 250, 251, 71 Tex. 588—*Hicks v. Ross*, 9 S.W. 315, 316, 71 Tex. 358.

(2) The statute providing that a certified copy may be admitted in evidence does not dispense with the necessity for the acknowledgment of an original mortgage filed on agreement that it shall be given in evidence as a certified copy.—*Baxter v. Howell*, 26 S.W. 453, 7 Tex.Civ.App. 193.

(2) Acts Making Acknowledgment Unnecessary

Acknowledgment may be made unnecessary by due witnessing, or the mortgagee's taking possession before third parties' rights intervene, but not by an affidavit of good faith.

The necessity of acknowledgment may, under some authorities, be removed by having the instrument duly witnessed,³⁴ or by the mortgagee's taking possession of the mortgaged property before the rights of third parties intervene.³⁵

The presence of an affidavit of good faith does not render acknowledgment unnecessary.³⁶

(3) Reacknowledgment

A mortgage invalidated by alteration after being acknowledged must be reacknowledged before being again placed on record; but reacknowledgment is not required, in order to effect a lien, when mortgaged chattels are removed to another state.

A mortgage invalidated by an alteration by consent of the parties after having been acknowledged, must be reacknowledged before being again placed on the record.³⁷ A mortgage altered to include other property and then reacknowledged has been held to take effect, as to the property originally included, from the time of the original acknowledgment.³⁸

Where mortgaged chattels are removed from the state where the mortgage was acknowledged and registered, reacknowledgment by the mortgagor in the state to which the property is brought is not

necessary in order to effect a lien on the property.³⁹

b. Sufficiency

- (1) In general
- (2) Place
- (3) Who may make
- (4) Who may take
- (5) Certificate

(1) In General

Statutes relative to acknowledgment of chattel mortgages are required by some authorities to be strictly, by others liberally, construed; but substantial compliance is sufficient.

Statutes relative to the acknowledgment of chattel mortgages are required by some authorities to be strictly construed, as being in derogation of the common law⁴⁰ and the statute of frauds;⁴¹ but a broad and liberal construction to uphold the validity of a mortgage has been required by other authority,⁴² and a substantial compliance with the statutory requirements as to acknowledgment is held sufficient.⁴³

Entry of memorandum on docket. Decisions under a former statute of Illinois requiring the officer taking an acknowledgment by a resident of the state to enter a memorandum thereof in the docket or some book kept for the purpose, which was repealed by Act June 29, 1933, L.1933 p 717 § 2, are treated in the note.⁴⁴

34. U.S.—Hodgson v. Butts, C.C.D. C., 3 Cranch 139, 2 L.Ed. 391.
S.D.—Fisher v. Porter, 77 N.W. 112, 11 S.D. 311.
11 C.J. p 480 note 7.

Admission to record

"The mortgage made and filed in Oklahoma was not acknowledged, but it was signed in the presence of two witnesses, and, under the laws of that state (section 7655, Comp. Stat.Okl.1921), this entitled the instrument to a place in their public records, the same as if acknowledged."—Mosko v. Matthews, 284 P. 1021, 1022, 87 Colo. 55.

35. Colo.—McClain v. Saranac Mach. Co., 23 P.2d 1009, 94 Colo. 145—Bogdon v. Fort, 225 P. 247, 75 Colo. 231.

Ill.—Southern Surety Co. v. People's State Bank of Astoria, 163 N.E. 659; 332 Ill. 362—Doty v. O'Neill, 272 Ill.App. 212—Zola v. Zacher, 220 Ill.App. 123.

11 C.J. p 480 note 5, p 587 note 85.
Defects cured by taking possession generally see *infra* § 212.

36. Cal.—Bell v. Sage, 212 P. 404, 60 Cal.App. 149.

11 C.J. p 480 note 8.

37. U.S.—Harvey v. Crane, C.C.Ill., 11 F.Cas.No.6,178, 2 Biss. 496.

38. N.J.—Milton v. Boyd, 22 A. 1078, 49 N.J.Eq. 142.

39. U.S.—In re Davies, D.C.Tenn., 256 F. 52, 54.

Statute as to conveyances of realty not applicable.—In re Davies, *supra*.

40. Colo.—J. D. Best & Co. v. Wolf Co., 185 P. 371, 67 Colo. 42, 29 A. L.R. 899.

Ill.—Baldwin Co. v. Keeley, 198 Ill. App. 287.

11 C.J. p 480 note 11.

41. Colo.—J. D. Best & Co. v. Wolf Co., 185 P. 371, 67 Colo. 42, 29 A. L.R. 899.

42. U.S.—In re Universal Storage & Transfer Co., D.C.Md., 4 F.Supp. 425, affirmed, C.C.A., Skutch v. Buch, 70 F.2d 107, applying Maryland statute.

43. U.S.—Advance-Rumley Thresher Co. v. Wagner, C.C.A.Iowa, 29 F.2d 984, 988, applying Iowa statute—In re Universal Storage & Transfer Co., D.C.Md., 4 F.Supp. 425, affirmed, C.C.A., Skutch v. Buch, 70 F.2d 107, applying Maryland statute.

Colo.—J. D. Best & Co. v. Wolf Co., 185 P. 371, 67 Colo. 42, 29 A.L.R. 899.

Iowa.—Milner v. Nelson, 53 N.W. 405, 406, 86 Iowa 452, 458, 461, 19 L.R.A. 279, 41 Am.S.R. 506.
11 C.J. p 480 note 12.

Omission of word "consideration," or words of similar import, from the acknowledgment held to render the mortgage invalid as to third parties. —Atlas Supply Co. v. McAmis, 51 S.W.2d 982, 185 Ark. 1168.

44. "The object of the statute . . . was to afford notice to such persons as might prefer to examine the record of the justice of the peace within their township in preference to going to the county records."—Pease v. L. Fish Furniture Co., 52 N. E. 932, 933, 176 Ill. 220, affirming 70 Ill.App. 138.

Statute applied generally; sufficiency of memorandum

Ill.—Pease v. L. Fish Furniture Co., *supra*—11 C.J. p 481 note 34.

Entry presumed to have been made in the absence of evidence to the contrary.—Harlow v. Birger, 30 Ill. 425—Woodward v. Donovan, 167 Ill.

(2) Place

Statutory provisions as to place where the mortgage may or must be acknowledged must be conformed to.

A mortgagor not a resident of the state in which property is situated may, under a statute of that state so permitting, acknowledge the mortgage at his residence before any officer there authorized to take acknowledgments;⁴⁵ but a mortgage acknowledged within a state by one not a resident thereof is rendered invalid by a statutory requirement that a mortgage be acknowledged before an officer at the place where the mortgagor resides.⁴⁶

Under statutory provisions that chattel mortgages shall be acknowledged as are conveyances of land, and that acknowledgments of deeds to realty shall be before a justice of the peace of the county in which the realty is situated, acknowledgment of such mortgage must be before a justice residing in the county where the chattels are situated, even though the owner is domiciled in another county.⁴⁷

Under the Illinois statute governing the place of acknowledgment, which statute has been said to

have been changed many times,⁴⁸ acknowledgment must be before a justice of the peace, or a county judge, of the place of the mortgagor's residence.⁴⁹ In the application of the statute, recitals or representations as to the place of the mortgagor's residence are not conclusive.⁵⁰

(3) Who May Make

It has been held that only the mortgagor can acknowledge a chattel mortgage, except where a statute authorizes acknowledgment under a power of attorney.

Decisions in at least one jurisdiction are to the effect that only the mortgagor can acknowledge a chattel mortgage, acknowledgment for him by a third person, including an attorney in fact, being insufficient,⁵¹ unless such acknowledgment comes within the operation of a statute authorizing acknowledgment under a power of attorney;⁵² and certification by a justice of the peace of the acknowledgment of a mortgagor who did not appear before him or acknowledge the instrument is of no effect.⁵³

Under a statute requiring merely the joint con-

App. 503—Calumet Paper Co. v. Knight, etc., Co., 43 Ill.App. 566.

The record of the mortgage did not render this requirement unnecessary.—Koplin v. Anderson, 88 Ill. 120.

Superfluous matter did not void the entry.—Hamilton v. Seeger, 75 Ill.App. 599.

Entry unnecessary as between parties

Ill.—Badger v. Batavia Paper Mfg. Co., 70 Ill. 302—Frank v. Miner, 50 Ill. 444—Porter v. Dement, 35 Ill. 478.

45. Ill.—Hewitt v. General Electric Co., 45 N.E. 725, 164 Ill. 420, reversing 61 Ill.App. 168.

Acknowledgment by a foreign corporation of a mortgage on personality within the state may be made at its home office, before any officer authorized to take acknowledgments.—Hewitt v. General Electric Co., 45 N.E. 725, 164 Ill. 420, reversing 61 Ill.App. 168.

46. Colo.—Cook v. Hager, 3 Colo. 386.

Persons who may make mortgage in general see supra § 18.

Mortgage by foreign corporation
Colo.—Cook v. Hager, supra.

47. Mo.—McDaniel v. Harris, 27 Mo.App. 545.

48. Ill.—Watkins v. Dunbar, 232 Ill. App. 1.

History of legislation

Ill.—Lyons v. People's Bank of Lexington, 147 N.E. 398, 317 Ill. 44—Watkins v. Dunbar, 232 Ill.App. 1.

49. Ill.—Talty v. Schoenholz, 154 N.

E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635—Lyons v. People's Bank of Lexington, 147 N.E. 398, 317 Ill. 44—Watkins v. Dunbar, 232 Ill.App. 1.
1 C.J. p 812 note 81 [b]—11 C.J. p 480 note 13.

Place of business or dwelling

"As between a man's place of business and his dwelling house, his residence is at his dwelling house."—Lassen v. Lake, 132 Ill.App. 609, 611.

The mortgagor's temporary residence does not constitute his legal residence for the purpose of the acknowledgment.—Lassen v. Lake, 132 Ill.App. 609.

Mortgagors in different districts

Where there were several mortgagors who resided in different districts, it was held that acknowledgment in a district in which one of them resided, and in which the property was situated, satisfied the statute.—Funk v. Staats, 24 Ill. 632.

50. Ill.—Lassen v. Lake, 132 Ill.App. 609.

11 C.J. p 480 note 13 [a] (5).

51. Ill.—Baldwin v. Keeley, 198 Ill. App. 287. See Cermak v. Royal Furniture Co., 199 Ill.App. 413—Kennedy Furniture Co. v. Griffin, 194 Ill.App. 530—Turgrimson v. J. P. Seebury Piano Co., 192 Ill.App. 512.

11 C.J. p 480 note 17.

Acknowledgment by party executing instrument generally see Acknowledgments § 32.

52. Ill.—Merchants' & Manufactur-

ers' Securities Co. v. Graydon, 248 Ill.App. 201—Krysiak v. Egan, 243 Ill.App. 310—Albert Pick & Co. v. Spoor, 212 Ill.App. 612—Baldwin Co. v. Keeley, 198 Ill.App. 287.

Acknowledgment prior to statute

A mortgage acknowledged by an attorney in fact under a power of attorney prior to the enactment of a statute authorizing such acknowledgment is invalid as to those not parties or privies thereto.—Baldwin Co. v. Keeley, 198 Ill.App. 287.

Acknowledgment before deputy clerk

An acknowledgment by an attorney in fact before a deputy clerk of court, in the name of the clerk, is proper, even though his power of attorney authorizes his appearance before the clerk of the court.—Albert Pick & Co. v. Spoor, 212 Ill.App. 612.

Power of attorney must be acknowledged by mortgagor

Ill.—Krysiak v. Egan, 243 Ill.App. 310.

Appointment sufficiently acknowledged

A chattel mortgage containing a clause appointing an attorney in fact to acknowledge it is valid where the mortgagor acknowledged the instrument before an officer empowered to take the acknowledgment of the appointment but not of the mortgage, and the attorney in fact later executed an acknowledgment before the proper officer.—Merchants' & Manufacturers' Securities Co. v. Graydon, 248 Ill.App. 201.

53. U.S.—In re Hylbert, D.C.Ill., 26 F.2d 672, applying Illinois rule.

sent of husband and wife, it is not necessary that both join in the acknowledgment of the mortgage.⁵⁴

(4) Who May Take

Statutory provisions as to the officers who may take acknowledgments must be complied with.

Statutory provisions prescribing the officers before whom chattel mortgages are required to be acknowledged have been applied in several cases.⁵⁵ As more fully appears in §§ 52-57 of the C.J.S. title Acknowledgments, the officer is ordinarily required to be a disinterested party in order that the act may be valid.⁵⁶

Acknowledgment before a de facto officer has been held valid.⁵⁷

(5) Certificate

- (a) In general
- (b) Signature and seal of officer
- (c) Acknowledgment by corporation

(a) In General

In determining the sufficiency of a certificate of ac-

knowledge of a chattel mortgage, it is to be fairly and reasonably construed. Where no form is prescribed, the certificate need only identify and attest the mortgagor's signature. Pertinent statutory provisions as to the content of the certificate must be complied with.

The form of the certificate of acknowledgment of a chattel mortgage has been said to be immaterial where the substantial directions of the law are observed.⁵⁸ In determining the sufficiency of the certificate, a fair and reasonable construction should be placed on it;⁵⁹ but a certificate regular in form, if shown to be false, makes the mortgage void as to creditors of the mortgagor⁶⁰ and third persons acting in good faith.⁶¹ Redundancy or surplusage does not vitiate the certificate,⁶² nor does a mistake in date as to the year when the acknowledgment was taken.⁶³ Where no form of certificate is prescribed, a certificate of acknowledgment need only identify and attest the mortgagor's signature,⁶⁴ and may be in the form of an affidavit by the mortgagor.⁶⁵

In some jurisdictions, a certificate of acknowledgment must show that the mortgagor himself acknowledged the mortgage.⁶⁶ Where the statute so

54. Mo.—Brown v. Koenig, 74 S.W. 407, 99 Mo.App. 653.

55. Clerk of municipal court
Ill.—Merchants' & Manufacturers' Securities Co. v. Graydon, 248 Ill. App. 201.

County recorder
Ind.—Hamilton v. Mitchell, 6 Blackf. 131.

Justice of peace; county judge
Ill.—Talty v. Schoenholz, 154 N.E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635—Lyons v. People's Bank of Lexington, 147 N.E. 398, 317 Ill. 44—Long v. Cockern, 21 N.E. 201, 128 Ill. 29—Watkins v. Dunbar, 232 Ill.App. 1—11 C.J. p 480 note 13.

Notary public
Ind.—Citizens State Bank v. Michel, App., 7 N.E.2d 44.

Police magistrate
Ill.—Ticknor v. McClelland, 84 Ill. 471—Herkeleirath v. Stookey, 58 Ill. 21.

Foreign acknowledgment
A statute requiring a foreign acknowledgment to be made before the mayor of the town near which the mortgagor resided is not satisfied by a certificate of acknowledgment by two justices authenticated by the clerk of the county court.—Miller v. Henshaw, 4 Dana, Ky., 325.

56. Iowa.—Farmers', etc., Bank v. Stockdale, 96 N.W. 732, 121 Iowa 748.
11 C.J. p 481 note 21.

57. Ill.—Nelson v. Kessinger, 16 Ill. App. 185.

58. Ill.—Schroeder v. Keller, 84 Ill. 46.

Omitting the words "and entered by me," after the words "acknowledged before me," from the certificate of acknowledgment does not render the acknowledgment invalid if the justice in fact made the entry upon his docket as required by law.—Harvey v. Dunn, 89 Ill. 585—Schroeder v. Keller, 84 Ill. 46—Harlow v. Birger, 30 Ill. 425.

59. Fla.—Einstein v. Shouse, 5 So. 380, 24 Fla. 490.
Ind.—Brown v. Corbin, 23 N.E. 276, 121 Ind. 455.
11 C.J. p 481 note 29.
Certificate of acknowledgment generally see Acknowledgments §§ 83-124.

Use of wrong form

The mere fact that the officer who took an acknowledgment by the mortgagor used the form of certificate for an acknowledgment by an attorney in fact does not render the acknowledgment insufficient.—Ohio Power Shovel Co. v. Bond, 267 Ill. App. 271.

Mixed mortgage; relinquishment of dower

Where the certificate of the acknowledgment by a wife of execution of a mortgage of land and chattels merely recites that she acknowledges the relinquishment of her right of dower in the land, such acknowledgment is insufficient to entitle the mortgage, as to the personality, to be filed for record.—Carle v. Wall, Ark., 16 S.W. 293.

60. Ill.—Fahndrich v. Hudson, 76 Ill.App. 641.

61. Ill.—McDowell v. Stewart, 83 Ill. 538.

62. Wash. — Brady v. Frigidaire Sales Corporation, 40 P.2d 166, 180 Wash. 472.
11 C.J. p 481 note 30.

63. Ill.—Durfee v. Grinnell, 69 Ill. 371.

64. Okl.—First Nat. Bank v. Devore, 234 P. 734, 110 Okl. 283—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74—Dabney v. Hathaway, 152 P. 77, 51 Okl. 658.
"Any acknowledgment which does this complies with the requirements of the law."—Dabney v. Hathaway, 152 P. 77, 79, 51 Okl. 658.

65. Ark.—Bonner v. Stroud Bros. Gin et al., 289 S.W. 766, 172 Ark. 569, applying Oklahoma law.
Okl.—First Nat. Bank v. Devore, 234 P. 734, 110 Okl. 283.

Admission of genuineness of signature

Where the certificate is in such form, the signature of the mortgagor is sufficiently identified if therefrom it reasonably appears that the mortgagor admitted or declared that the signature appended to the mortgage was his own.—First Nat. Bank v. Devore, supra.

66. Colo.—Russell v. First Nat. Bank, 211 P. 372, 72 Colo. 312.
N.D.—Tennet Co. v. Thomas, 237 N.W. 710, 61 N.D. 202.
11 C.J. p 481 note 24.

Effect of omitting mortgagor's name
(1) If the mortgage and certifi-

requires, the certificate must state that the contents of the mortgage were made known to the party acknowledging its execution,⁶⁷ and that he acknowledged signing and executing it.⁶⁸

Statement of venue. While it has been required that the venue be stated in the certificate,⁶⁹ such a statement has been held unnecessary in at least one jurisdiction.⁷⁰

(b) Signature and Seal of Officer

The certificate should be signed by the officer taking the acknowledgment, and sealed.

The certificate of acknowledgment of a chattel mortgage should be signed by the officer taking the acknowledgment⁷¹ and sealed with the official seal.⁷²

(c) Acknowledgment by Corporation

Substantial compliance with a statute governing the certificate of acknowledgment by a corporation is required, such compliance to appear from the certificate.

cate sufficiently show that the mortgagor and no one else appeared and acknowledged the mortgage, the omission by the notary to insert in his certificate the name of the mortgagor will not invalidate it.

Colo.—Russell v. First Nat. Bank, 211 P. 372, 72 Colo. 312.
Iowa.—Tennis v. Gifford, 110 N.W. 586, 133 Iowa 372.

(2) So a certificate containing the statement, "This mortgage was acknowledged before me this 1st day of Dec., A. D. 1920, by —, mortgagor," has been held sufficient where the mortgagor's name appeared in the mortgage as mortgagor; and he signed both the mortgage and an affidavit of ownership.—Russell v. First Nat. Bank, *supra*.

(3) But a certificate reading, "On this 27th day of March A. D., 1883, personally appeared before me —, known to me, who acknowledged that he executed the foregoing instrument freely and voluntarily, and for the uses and purposes therein set forth," is invalid for failure to set forth who came before the notary.—Lenehan v. Akana, 6 Hawaii 538, 540.

67. N.J.—Longley v. Sperry, 66 A. 1062, 72 N.J.Eq. 537.

68. Ind.—Guyer v. Union Trust Co. of Indianapolis, 104 N.E. 82, 55 Ind.App. 472.

69. Iowa.—Willard v. Cramer, 36 Iowa 22.

70. Ill.—Martin v. Heilman Mach. Works, 89 Ill.App. 159.

Judicial notice of location of town

Where the caption of the acknowledgment of a chattel mortgage omits the name of the county, but the offi-

cer signs himself as justice of the peace for a certain incorporated town, it is a valid acknowledgment, since the court will take judicial notice of the county in which the town is located, and that the officer is a justice in that county.—Gilbert v. National Cash-Register Co., 52 N.E. 22, 176 Ill. 288.

Acknowledger shown to be resident

Under a statute providing that, when acknowledgment is made by a resident, the justice shall certify that the instrument was "entered" by him, it will be presumed, where such certificate is made, that the person acknowledging the instrument was a resident.—Gilbert v. National Cash-Register Co., 52 N.E. 22, 176 Ill. 288.

71. N.H.—Hill v. Gilman, 39 N.H. 88.

A deputy need not sign his own name after the name of the officer.—Woodward v. Donovan, 167 Ill.App. 503.

72. Iowa.—Gammon v. Bull, 53 N.W. 340, 86 Iowa 754.

Minn.—Evans v. Smith, 44 N.W. 880, 43 Minn. 59.—Thompson v. Scheid, 38 N.W. 801, 39 Minn. 102, 12 Am. S.R. 619.

11 C.J. p 481 note 27.

Use of another notary's seal

The fact that the notary taking an acknowledgment uses a general seal belonging to another notary, and having no peculiar marks or names on it, will not invalidate the acknowledgment.—Muncie Nat. Bank v. Brown, 14 N.E. 358, 112 Ind. 474.

73. Wash.—Bank of Commerce of Anacortes v. Kelpine Products Co., 10 P.2d 238, 167 Wash. 592.

1 C.J. p 849 notes 76 [a], 78 [a].

Substantial compliance with a statute governing the certificate of acknowledgment of a chattel mortgage by a corporation is required,⁷³ and such compliance must appear from the certificate itself.⁷⁴ Under governing statutory provisions, the certificate has been required to show that the person signing was known by the notary to be an officer of the corporation which executed the mortgage,⁷⁵ that he had authority to execute the mortgage on behalf of the corporation⁷⁶ and authority to acknowledge,⁷⁷ that he acknowledged the mortgage to be the free and voluntary act of the corporation⁷⁸ and of himself,⁷⁹ and that the seal affixed was the corporate seal.⁸⁰

§ 83. Affixing Revenue Stamp

Omission of revenue stamps will not invalidate a chattel mortgage unless made to evade the statute. An unstamped mortgage has been held inadmissible in evidence, at least where the omission is proved fraudulent.

A chattel mortgage is not invalidated by the omis-

Acknowledgment by officer for corporation

The statement in a certificate, "This mortgage was acknowledged before me by I. W. Hottel," does not substantially comply with a statute requiring that the certificate of acknowledgment by a corporation "show that the president or other head officer acknowledged it for the corporation;" the statement should be, "This mortgage was acknowledged before me this 16th day of October, 1915, by I. W. Hottel, the secretary and general manager for the Farmers' Mill and Elevator Company, a corporation, mortgagor."—J. D. Best & Co. v. Wolf Co., 185 P. 371, 374, 67 Colo. 42, 29 A.L.R. 899.

74. Colo.—J. D. Best & Co. v. Wolf Co., *supra*.

75. Wash.—Yukon Inv. Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.

76. Wash.—Bank of Commerce of Anacortes v. Kelpine Products Co., 10 P.2d 238, 167 Wash. 592.—Yukon Investment Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.

77. N.J.—Pincus v. U. S. Dyeing & Cleaning Works, 133 A. 66, 99 N.J.Eq. 160.

78. Wash.—Yukon Investment Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.

79. Wash. — Brady v. Frigidaire Sales Corporation, 40 P.2d 166, 180 Wash. 472.

80. Wash.—Bank of Commerce of Anacortes v. Kelpine Products Co., 10 P.2d 238, 167 Wash. 592.—Yukon Investment Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.

sion of the proper revenue stamps,⁸¹ unless it affirmatively appears that the omission is the result of an attempt to evade the statute.⁸² An unstamped chattel mortgage has been held inadmissible,⁸³ but under other authority the omission of required stamps is no bar to reading the instrument in evidence in the absence of proof that the omission was fraudulent.⁸⁴

§ 84. Affidavit Accompanying Instrument

- a. Necessity
- b. Sufficiency

a. Necessity

- (1) In general
- (2) Effect of notice or knowledge of mortgage

(1) In General

Under governing statutes, which are strictly con-

strued, the annexation of an affidavit as to the good faith of, or consideration for, a chattel mortgage is, with some qualifications, essential to validity as against creditors and subsequent purchasers, but not as between the parties. The want of, or a defect in, an affidavit is cured by the mortgagee's taking possession of the property before third parties' rights intervene.

Where a statute providing all that is required to complete the execution of a chattel mortgage makes no reference to an affidavit of good faith, execution is complete, and the mortgage is entitled to recordation, without such affidavit.⁸⁵ Under particular governing statutes, however, the annexation of an affidavit as to the good faith of, or the consideration for, the mortgage, or both is requisite to its registration or recordation,⁸⁶ and, subject to qualifications later appearing, to its validity as to subsequent purchasers for value and in good faith,⁸⁷ a subsequent mortgagee in good faith,⁸⁸ and creditors of the mortgagor.⁸⁹ As between the par-

81. S.D.—Plunkett v. Hanschka, 85 N.W. 1004, 14 S.D. 454.

Stamp taxes on written instruments generally see the C.J.S. title Internal Revenue §§ 89-99, also 33 C.J. p 315 note 28-p 321 note 16.

82. Me.—Brown v. Thompson, 59 Me. 372.

S.D.—Plunkett v. Hanschka, 85 N.W. 1004, 14 S.D. 454.

83. Hawaii.—Hardy v. Ruggles, 1 Hawaii 457.

N.H.—Janvrin v. Fogg, 49 N.H. 340.

84. Wis.—Fenelon v. Hogoboom, 31 Wis. 172.

85. Mont.—Walker Motor Exchange v. Lindberg, 284 P. 270, 86 Mont. 513, applying Oklahoma statute.

86. U.S.—Petition of International Harvester Co. of America, C.C.A. Mich., 9 F.2d 299, applying Michigan statute.

Mont.—Hansen v. Johnson, 4 P.2d 1088, 90 Mont. 597—Fergus County v. First State Bank of Hilger, 213 P. 1114, 67 Mont. 1.

Ohio.—Central Acceptance Co. v. Mundy, 29 Ohio N.P., N.S., 527.

11 C.J. p 481 note 45.

Chattel mortgage not accompanied by proper affidavit as affording notice see *infra* § 164.

"Mischief intended to be remedied by . . . [such a statute] was the giving of colorable mortgages by debtors for the purpose of covering up their property and hindering and delaying honest creditors in pursuit of their legal remedies against them. The statement required by this section to be made under oath by the mortgagee on the mortgage as to the amount of his claim, and that it is just and unpaid, is vital to the spirit of the statute, in the light of the mischief it was intended to prevent. It subjects the conscience of the par-

ties to the severe test of an oath as to the amount and justice of his claim to be secured by the mortgage."—Benedict v. Peters, 51 N.E. 37, 58 Ohio St. 527, 534—Central Acceptance Co. v. Mundy, 29 Ohio N.P., N.S., 527, 530.

Original affidavit, not a copy, required to be attached to filed mortgage or copy thereof, under Michigan statute.—Petition of International Harvester Co. of America, C.C.A. Mich., 9 F.2d 299.

87. Wash.—Robert Morton Organ Co. v. Armour, 38 P.2d 257, 179 Wash. 392—Robert Morton Organ Co. v. Armour, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462—Seaboard Securities Co. v. Sullivan, 16 P.2d 836, 170 Wash. 699—Sullivan v. Mahl, 16 P.2d 836, 170 Wash. 699—Sullivan v. Lewis, 16 P.2d 834, 170 Wash. 413—West American Finance Co. v. Finstad, 262 P. 636, 146 Wash. 315.

11 C.J. p 481 note 45.

88. Mont.—Fergus County v. First State Bank of Hilger, 213 P. 1114, 67 Mont. 1.

89. U.S.—Haupt v. Moore, C.C.A. Cal., 77 F.2d 456, applying California statute—In re De Witt, D.C. Mich., 18 F.2d 791, applying Michigan statute—In re Empire Refining Co., D.C. Cal., 1 F.Supp. 548, applying California statute—In re Jesse, C.C.A. Wash., 286 F. 305, applying Washington statute.

Cal.—Wehrle v. Marks, 25 P.2d 51, 134 Cal.App. 141.

N.J.—Central Chemical Co. v. Virginia-Carolina Chemical Corporation, 168 A. 279, 114 N.J.Eq. 48—Lion Shoe Co. v. Price, 155 A. 775, 108 N.J.Eq. 553—Sherman v. Union County Wholesale Tobacco & Can-

dy Co., 155 A. 615, 108 N.J.Eq. 477—Fitzpatrick v. Barnard, Phillips & Co., 123 A. 245, 95 N.J.Eq. 363—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158—Unger v. Hochman, 133 A. 180, 4 N.J.Misc. 445.

Wash.—Seaboard Dairy Credit Corporation v. Paulsen, 25 P.2d 974, 174 Wash. 594—Kliks v. Tenet Mortg. Co., 299 P. 367, 162 Wash. 514—Pacific States Securities Corporation v. Austin, 263 P. 732, 146 Wash. 492—First Guaranty Bank v. Western Cross-Arm & Mfg. Co., 247 P. 1027, 139 Wash. 614—Woods v. Young Lumber Co., 181 P. 865, 107 Wash. 432.

11 C.J. p 481 note 45.

Object of statute

(1) "With the object of preventing fraud in the pledging of chattels by mortgage and as a means of authenticating and verifying the contents of the mortgage, many states provide by statute that a chattel mortgage to be valid shall be accompanied by an affidavit made by one of the parties, either showing that the mortgage is made without intent to hinder and defraud creditors or disclosing the consideration, and indicating as nearly as possible the amount due and to grow due. The provisions, as well as the interpretation of such statutes, depend in different jurisdictions very largely upon the light in which chattel mortgages are regarded as a security."—In re Novelty Web Co., N.J., 236 F. 501, 503, 149 C.C.A. 553, affirming, D.C., 228 F. 1007.

(2) "The legislative purpose in the enactment . . . was to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, under oath, when he made his mortgage a matter of record, suf-

ties,⁹⁰ however, and as against third persons in privity with the parties to the transaction leading to mortgage,⁹¹ or having no rights against the mortgagor,⁹² no affidavit is necessary; and no affidavit describing the debt for which the mortgage was given is necessary to a common-law mortgage.⁹³

The statutes above referred to are held to require strict construction, as being in derogation of the common law.⁹⁴ They apply to instruments which, although in some other form or called by some other name, are, in fact chattel mortgages,⁹⁵ but not, of course, to instruments not such in fact.⁹⁶

Cases passing on the sufficiency of the accompanying affidavit, as dealt with in subdivision a of this section, support by inference the proposition

that an affidavit is necessary.

The omission of a proper affidavit is not remedied by a subsequent affidavit without again recording the instrument,⁹⁷ or by an affidavit of renewal stating the requisite facts, including the averment of good faith,⁹⁸ or by the fact that the mortgagor went before a notary public for the purpose and with the intent of performing every act required by law to make the instrument a valid mortgage.⁹⁹

Affirmation by the mortgagor may be sufficient if he has conscientious scruples against the taking of an oath.¹

Effect of mortgagee's taking possession. The want of,² or a defect in,³ an affidavit is cured where

ficiently precise and specific to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by judicial investigation or otherwise, whether the mortgage was an honest security or a mere fraudulent cover."—*Bateman Bros. v. Jones*, 154 A. 4, 5, 109 N.J.Eq. 8.

Attaching creditor

N.J.—*Central Chemical Co. v. Virginia-Carolina Chemical Corporation*, 168 A. 279, 114 N.J.Eq. 48.

Mortgagor's trustee in bankruptcy

U.S.—*Haupt v. Moore*, C.C.A.Cal., 77 F.2d 456, applying California statute—*In re Empire Refining Co.*, D. C.Cal., 1 F.Supp. 548, applying California statute—*In re Jesse*, C.C.A. Wash., 286 F. 305, applying Washington statute.

Purchaser from mortgagor's trustee in bankruptcy

Wash. — *First Guaranty Bank v. Western Cross-Arm & Mfg. Co.*, 247 P. 1027, 139 Wash. 614.

90. U.S.—*Haupt v. Moore*, C.C.A. Cal., 77 F.2d 456, applying California statute.

Mont.—*Hansen v. Johnson*, 4 P.2d 1088, 90 Mont. 597.

Vt.—*Gillfillan's Adm'r v. Bixby*, 139 A. 250, 100 Vt. 468.

Wash.—*Woods v. Young Lumber Co.*, 181 P. 865, 107 Wash. 432.

11 C.J. p 482 note 49.

Between mortgagor and mortgagee's assignee

Wash.—*Pacific States Securities Corporation v. Austin*, 263 P. 732, 146 Wash. 492.

So as to trust receipt executed in a transaction presenting "all the essential elements of a chattel mortgage."—*General Motors Acceptance Corporation v. Berry*, 167 A. 553, 555, 86 N.H. 280.

Where parties made alterations in the mortgage after its execution, the mortgage was valid as to the parties, although no new affidavit was made.

—*Adams v. Rice*, 18 A. 652, 65 N.H. 186.

91. Cal.—*Beckjord v. Traeger*, 39 P. 2d 523, 524, 3 Cal.App.2d 385, rehearing denied 41 P.2d 172.

Reason for rule

"Both of these sections of the Civil Code are for the protection of creditors not in privity with the parties to an obligation."—*Beckjord v. Traeger*, supra.

92. Mont.—*Marcum v. Coleman*, 19 P. 394, 8 Mont. 196.

93. Vt.—*Thompson v. Fairbanks*, 56 A. 11, 75 Vt. 361, 104 Am.S.R. 899, affirmed 25 S.Ct. 306, 196 U.S. 516, 49 L.Ed. 577.

94. Mont.—*Reynolds v. Fitzpatrick*, 57 P. 452, 23 Mont. 52—*Milburn Mfg. Co. v. Johnson*, 24 P. 17, 9 Mont. 537.

95. "Manifestly, if the law were otherwise, the requirement as to the affidavit of good faith accompanying the execution of a chattel mortgage could be easily avoided and its purpose wholly defeated."—*Kato v. Union Oil Co. of California*, 159 P. 692, 695, 92 Wash. 473.

Assignment

Wash. — *First Guaranty Bank v. Western Cross-Arm & Mfg. Co.*, 247 P. 1027, 139 Wash. 614.

Bill of sale

N.J.—*Central Chemical Co. v. Virginia-Carolina Chemical Corporation*, 168 A. 279, 114 N.J.Eq. 48—*Unger v. Hochman*, 133 A. 180, 4 N.J.Misc. 445.

Wash.—*Seaboard Securities Co. v. Sullivan*, 16 P.2d 836, 170 Wash. 699—*Sullivan v. Mahl*, 16 P.2d 836, 170 Wash. 699—*Sullivan v. Lewis*, 16 P.2d 834, 170 Wash. 413—*Pacific States Securities Corporation v. Austin*, 263 P. 732, 146 Wash. 492—*Kato v. Union Oil Co. of California*, 159 P. 692, 92 Wash. 473. 11 C.J. p 481 note 45 [a] (1).

Conditional sales contract

U.S.—*Haupt v. Moore*, C.C.A.Cal., 77 F.2d 456.

Cal.—*Wehrle v. Marks*, 25 P.2d 51, 134 Cal.App. 141.

Wash.—*Seaboard Dairy Credit Corporation v. Paulsen*, 25 P.2d 974, 174 Wash. 954—*West American Finance Co. v. Finstad*, 262 P. 636, 146 Wash. 315.

Mortgage of real and personal property

Wash.—*Manhattan Trust Co. v. Seattle Coal, etc., Co.*, 48 P. 333, 16 Wash. 499.

Mortgage of book accounts

N.J.—*Nash v. Hall, Ch.*, 39 A. 374, affirmed 43 A. 683, 58 N.J.Eq. 554.

Trust receipt

U.S.—*In re Ford-Rennie Leather Co.*, D.C.Del., 2 F.2d 750.

Provision in a lease for the giving of a chattel mortgage to secure its performance does not make it part of the mortgage, and an affidavit, therefore, is not necessary to the lease.—*Goddard v. Morgan*, Wash., 74 P.2d 894.

97. Cal.—*Alferitz v. Scott*, 62 P. 735, 130 Cal. 474.

11 C.J. p 482 note 46.

98. Mont.—*Butte First Nat. Bank v. Beley*, 80 P. 256, 32 Mont. 291.

99. U.S.—*In re Johnston*, D.C.Cal., 220 F. 218.

1. N.J.—*Wilson v. Lippincott, Ch.*, 44 A. 989.

2. N.H.—*General Motors Acceptance Corporation v. Berry*, 167 A. 553, 86 N.H. 280.

11 C.J. p 482 note 53.

Defects cured by taking possession generally see *infra* § 212.

3. Vt.—*Bean v. Parker*, 96 A. 17, 89 Vt. 532.

Possession taken after levy by sheriff will not supply the place of an insufficient affidavit.—*Bonnet v. Hope Mfg. Co.*, 26 A. 685, 51 N.J.Eq.

the mortgagee takes possession of the property before the rights of third persons intervene.

General creditor's remedy. A mortgagee seizing and selling a chattel under a mortgage void because the annexed affidavit fails to comply with the governing statute is liable to account to the mortgagor's general creditors for the proceeds of the sale.⁴ A general creditor of the mortgagor has been held unable to set aside such a deficient mortgage until he has himself acquired a specific interest in, or claim on, the particular property involved;⁵ but a different result has been reached under controlling statutory language.⁶

(2) Effect of Notice or Knowledge of Mortgage

The authorities are not in accord as to whether notice or knowledge of a mortgage lacking an affidavit will validate it as against third persons.

Under particular statutes requiring an affidavit,

162, reversed on other grounds 28 A. 601, 51 N.J.Eq. 615.

Action to foreclose as possession

Unless possession is taken in behalf of the mortgagee, an execution levied before entry of the decree but after commencement of an action to foreclose a mortgage having an insufficient affidavit is superior to the foreclosure, since a foreclosure is not an equitable levy effecting a transfer of possession.—*Kato v. Union Oil Co. of California*, 159 P. 692, 92 Wash. 473.

4. N.J.—*Lion Shoe Co. v. Price*, 155 A. 775, 108 N.J.Eq. 553.

5. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 799, 133 Cal.App. 163.

Nature of interest or claim required

"The interest in or claim upon the property involved which must be acquired by a general creditor in order to enable him to successfully attack a prior mortgage not executed in full conformity with the statutes must be one arising from some legal proceeding or one in the nature of some process authorizing an immediate seizure of the property, and . . . something more is required than the lien of a subsequent mortgage securing a note not yet due which is taken with notice."—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, supra.

Judgment creditor issuing execution may attack a mortgage not properly verified by the mortgagee's affidavit.—*Unger v. Hochman*, 133 A. 180, 4 N.J.Misc. 445—11 C.J. p 486 note 99 [a].

6. In Washington, "under the statute . . . a mortgage of personalty, not supported by the required af-

fidavit . . . is 'void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property.'" — *Kilks v. Tenet Mortg. Co.*, 299 P. 367, 371, 162 Wash. 514.

7. Wash.—*Robert Morton Organ Co. v. Armour*, 38 P.2d 257, 179 Wash. 392.

8. Md. — *Goldsborough v. Tinsley*, 113 A. 861, 138 Md. 411.

9. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 133 Cal.App. 163.
11 C.J. p 482 note 56 [a] (4).

10. Ohio.—*Whitaker v. Westfall*, 2 Ohio Cir.Ct. 321, 1 Ohio Cir.Dec. 509.

In Montana

(1) Such a mortgage is valid as to a subsequent mortgagee with actual knowledge.—*Fergus County v. First State Bank of Hilger*, 213 P. 1114, 67 Mont. 1.

(2) Under a prior statute, such a mortgage was held invalid as to all persons other than the parties thereto, irrespective of notice or knowledge.—*Milburn Mfg. Co. v. Johnson*, 24 P. 17, 9 Mont. 537, 542.

11. N.H.—*Roberts v. Crawford*, 58 N.H. 499.

Wash.—*Robert Morton Organ Co. v. Armour*, 23 P.2d 887, 173 Wash. 462, remittitur recalled 27 P.2d 1119, 173 Wash. 462.

11 C.J. p 482 note 56 [a] (5).

Subsequent purchaser assuming mortgage debt

Mont.—*Reynolds v. Fitzpatrick*, 57 P. 452, 23 Mont. 52.

12. U.S.—*American L. & T. Co. v. Olympia Light, etc., Co.*, C.C.Wash.,

notice or knowledge of a mortgage lacking a proper affidavit has been held to validate it as against a transferee,⁷ creditor,⁸ incumbrancer,⁹ subsequent mortgagee,¹⁰ or subsequent purchaser.¹¹

Under some of the statutes, however, a distinction has been made between creditors on the one hand and subsequent purchasers and incumbrancers on the other,¹² such a mortgage being held void as to creditors with notice,¹³ whether they become such before or after the giving of the mortgage,¹⁴ although valid, as stated heretofore, as against incumbrancers and purchasers having notice. The subsequent acceptance of mortgage security by a creditor has been held not to take him out of the rule making a mortgage without affidavit void as against a creditor with notice;¹⁵ but there is authority to the contrary.¹⁶

b. Sufficiency

(1) Time of execution

72 F. 620, applying Washington statute.

13. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 133 Cal.App. 163.
11 C.J. p 482 note 56 [a] (2).

"The words 'for value and in good faith' were not employed in the statute to create a condition affecting the rights of creditors."—*American L. & T. Co. v. Olympia Light, etc., Co.*, C.C.Wash., 72 F. 620, 621.

14. Wash.—*Smith v. Allen*, 138 P. 683, 78 Wash. 135, Ann.Cas.1915D 300—*Blumauer v. Clock*, 64 P. 844, 24 Wash. 596.

15. Wash.—*Seaboard Dairy Credit Corporation v. Paulsen*, 25 P.2d 974, 174 Wash. 954.

11 C.J. p 482 note 56 [a] (6).

Reason for rule

"It seems to us that the more reasonable and just construction of the law would be to construe the term 'creditor' with reference to the inception of the obligation of the debtor, rather than to conditions which might afterwards arise."—*Blumauer v. Clock*, 64 P. 844, 24 Wash. 596, 600, 85 Am.S.R. 966.

16. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 133 Cal.App. 163.

Reason for rule

"The statute makes a distinction between a creditor and an incumbrancer, in so far as the matter of notice is concerned, but it makes no distinction between an incumbrancer who with notice enters into a new transaction and one who with notice relies upon and takes security for a prior obligation."—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 800, 133 Cal. App. 163.

- (2) Who may make
- (3) Who may take
- (4) Form and contents
- (5) Signature of affiant
- (6) Jurat

(1) Time of Execution

An affidavit may be effectual whether executed before or after the execution of the mortgage.

The execution of the affidavit before the mortgage does not render it ineffectual to support the mortgage when it is subsequently executed.¹⁷ Conversely, an affidavit executed and attached subsequently to the execution of a mortgage will render it valid, except as against intervening rights and claims.¹⁸

(2) Who May Make

Statutory provisions prescribing the persons who may make the required affidavit must be complied with.

Under the varying provisions of statutes, the affidavit may be required to be made by the mortgagee, his agent, or attorney,¹⁹ the holder of the mortgage, his agent, or attorney,²⁰ the mortgagor or some person for him having knowledge of the facts,²¹ or both the mortgagor and the mortgagee.²² In the construction of particular statutes, it has been held that a trustee may make the necessary affidavit,²³ that an affidavit by an agent²⁴ or an attorney in fact,²⁵ or by one selectman in behalf of a town,²⁶ may be sufficient, that one of several comortgagees has authority to make the affidavit as agent for the others,²⁷ and, with respect to a crop mortgage, that only the person recognized as the sole tenant, and no other occupant, need sign the affidavit.²⁸

In the case of a corporation, if no particular officer is designated in the statute as the person who shall execute the affidavit, it may be made by any one of its officers or agents;²⁹ but it must be made

17. Ohio.—Engleright v. Annesser, 19 Ohio Cir.Ct. 73, 10 Ohio Cir. Dec. 406—In re Wise, 9 Ohio S. & C. P. 760, 7 Ohio N.P. 103.

18. U.S.—Allen v. American L. & T. Co., Wash., 79 F. 695, 25 C.C.A. 147. Cal.—Alferitz v. Scott, 62 P. 735, 130 Cal. 474.

19. U.S.—Wells v. Rutkowski, C.C. A.Ohio, 69 F.2d 143, applying Ohio statute. 11 C.J. p 483 note 63 [b].

Real party in interest

Mortgage held not void for the reason that "the sworn statement thereon required by law was made by the agent of the . . . [mortgagee] and not by the agent of the real party in interest."—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 657, 46 Ohio App. 548.

20. U.S.—Haines v. Keating, C.C.A. N.J., 296 F. 896, applying New Jersey statute.

N.J.—Moore v. Preiss Trading Corporation, 184 A. 521, 120 N.J.Eq. 214, affirming 182 A. 824, 119 N.J. Eq. 366—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598—Pincus v. U. S. Dyeing and Cleaning Works, 133 A. 66, 99 N.J. Eq. 160—Lessler v. Paterson Nat. Bank, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428. 11 C.J. p 483 note 63 [a].

21. U.S.—In re De Witt, D.C.Mich., 18 F.2d 791, applying Michigan statute.

22. U.S.—Haupt v. Moore, C.C.A. Cal., 77 F.2d 456, applying California statute.

N.H.—Gibbs v. Parsons, 6 A. 93, 64 N.H. 66. 11 C.J. p 483 note 63 [c].

23. U.S.—Petition of Jackson, C.C. A.Ohio, 18 F.2d 462, applying Ohio statute. 11 C.J. p 483 note 64.

Corpus Juris statement cited in connection with the contention that the sworn statement was not made by the agent of the real party in interest.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 657, 46 Ohio App. 548.

Beneficiary need not join where the mortgage does not disclose the trusteeship.—Cope v. Minnesota Type Fdy. Co., 49 P. 387, 20 Mont. 67.

24. N.J.—Watson v. Rowley, 52 A. 160, 63 N.J.Eq. 195. 11 C.J. p 483 note 66.

Agency must relate to holding of mortgage

N.J.—Watson v. Rowley, 52 A. 160, 63 N.J.Eq. 195.

Absence of mortgagee must be accounted for.—Cope v. Minnesota Type Fdy. Co., 49 P. 387, 20 Mont. 67—Leopold v. Silverman, 16 P. 580, 7 Mont. 266—11 C.J. p 483 note 68.

Mortgagor cannot act as the agent of the holder, at least as long as the former retains his interest in the property.—Watson v. Rowley, 52 A. 160, 63 N.J.Eq. 195.

25. Wash.—Jesseph v. Carroll, 219 P. 429, 126 Wash. 661.

26. N.H.—Sumner v. Dalton, 58 N. H. 295.

27. Ohio.—Voss v. Murray, 32 N.E. 1112, 50 Ohio St. 19.

Mortgages acting for several lenders Where ten individuals contributed a sum of money, which was delivered to a bank cashier to be loaned to the bankrupt, and the cashier, in

making the loan, took a note payable to himself, secured by a chattel mortgage, the affidavit of the mortgagor and mortgagee, that the mortgage was to secure a just debt due and owing from the mortgagor to the mortgagee, was true, since the mortgagee was the only one authorized at law to collect the debt, although the contributors could have sought equitable relief to compel him to pay them the amount recovered.—In re Caledonian Co., C.C.A. Vt., 272 F. 972, applying Vermont statute.

28. Cal.—Bell v. Central Bank of Imperial Valley, 265 P. 551, 89 Cal. App. 551.

29. Cal.—Old Settlers' Inv. Co. v. White, 110 P. 922, 158 Cal. 236—Yost v. Santa Anna Commercial Bank, 29 P. 358, 94 Cal. 494. 11 C.J. p 484 note 74.

Mistake in designation of affiant

Where the chattel mortgage on the property of a corporation was acknowledged by the secretary, an affidavit by the same individual, describing him as secretary, and stating that he was the individual mortgagor, and that it was made in good faith, was manifestly intended to be made on behalf of the corporation, and does not invalidate the mortgage.—First Nat. Bank v. Oppenheimer, 212 P. 164, 123 Wash. 290.

In New Jersey

(1) Under a statute requiring that the affidavit be made "by the holder of said mortgage, his agent, or attorney," it was held that, "when an affidavit is taken by a corporation through an attorney or agent, the fact of agency must be verified in the affidavit, and when taken by the

to appear in the affidavit that a representative of the corporation actually made an oath as to the facts.³⁰

A partner making the affidavit of good faith for the firm must identify himself as a member of the firm,³¹ or sign the firm name.³² Where partners act as individuals, each individual must sign the affidavit.³³

The spouse of the mortgagor need not join in the affidavit unless a necessary party to the mortgage.³⁴

A third person who is secured by a mortgage must have some one make an affidavit in his behalf as to the validity of his claim.³⁵

(3) Who May Take

It should sufficiently appear that the affidavit was taken by a competent officer.

It should sufficiently appear that the affidavit was taken by a competent officer.³⁶ An affidavit is not rendered invalid by the fact that the notary pub-

lic before whom it was executed was affiant's attorney.³⁷

(4) Form and Contents

- (a) In general
- (b) Statement of consideration
- (c) Description of parties

(a) In General

Substantial compliance with statutes governing the form or contents of the affidavit is sufficient; the affidavit should be liberally construed, and technical skill in drawing not required, but a substantial or material falsity in the affidavit voids the mortgage. The affidavit and mortgage may be read together, at least if the former refers to the latter.

Ordinarily, where the affidavit contains the facts required by the statute, the form in which they are stated is immaterial.³⁸ Statutory requirements as to form or contents must be substantially, but need not be literally, complied with;³⁹ and the affidavit

corporation per se by a duly qualified officer of the corporation his official capacity must appear either in the body of the affidavit or in the signature thereto."—*Moore v. Preiss Trading Corporation*, 184 A. 521, 522, 120 N.J.Eq. 214, affirming 182 A. 824, 119 N.J.Eq. 366.

(2) So, an affidavit by "Elias Preiss of Preiss Trading Corporation," signed "Elias Preiss," is insufficient for failure to show that affiant was an officer or agent of the corporation mortgagee.—*Moore v. Preiss Trading Corporation*, 184 A. 521, 120 N.J.Eq. 214, affirming 182 A. 824, 119 N.J.Eq. 366.

(3) So, also, an affidavit, reciting that the corporation mortgagee swore to its contents and signed by the corporation by its secretary, without showing that the secretary was the agent of the corporation, is defective. "In the Lessler case [infra (4)] the affidavit was made by the president. . . . Acts of a president or vice president of a mortgagee corporation are in legal contemplation the acts of the corporation. Those of a secretary or agent may or may not be."—*Pincus v. U. S. Dyeing & Cleaning Works*, 133 A. 66, 67, 99 N.J.Eq. 160.

(4) "An affidavit of consideration . . . made by the president of a corporation, the mortgagee, need not affirm that he is the agent (president); he is in contemplation of law the corporation. . . . The president's affidavit is in legal contemplation the affidavit of the bank, and not that of an agent or attorney."—*Lessler v. Paterson Nat. Bank*, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428.

(5) Likewise, an affidavit taken by

secretary and treasurer of corporate mortgagee is sufficient, where he is so described in the affidavit.—*Locke Cotton Mills Co. v. Plasket*, 183 A. 682, 119 N.J.Eq. 598.

(6) But an affidavit of mortgagor's vice president is not a sufficient compliance with such statute, in the absence of a showing that he executed such affidavit as the agent of the mortgagee.—*Haines v. Keating*, C.C.A.N.J., 296 F. 896, applying New Jersey statute.

30. U.S.—*In re Empire Refining Co.*, D.C.Cal., 1 F.Supp. 548.

Statement that corporation was sworn is insufficient.—*In re Empire Refining Co.*, D.C.Cal., 1 F.Supp. 548.

31. Cal.—*Modesto Bank v. Owens*, 53 P. 552, 121 Cal. 223.

Mont.—*Baker v. Gans*, 16 P. 590, 7 Mont. 329—*Baker v. Power*, 16 P. 589, 7 Mont. 326.

11 C.J. p 483 note 71.

32. N.H.—*Randall v. Baker*, 20 N. H. 335.

33. Mont.—*Cope v. Minnesota Type Fdy. Co.*, 49 P. 387, 20 Mont. 67—*Butte Hardware Co. v. Sullivan*, 16 P. 588, 7 Mont. 307.

11 C.J. p 483 note 73.

34. Wash.—*Harker v. Woolery*, 39 P. 100, 10 Wash. 484.

11 C.J. p 484 note 75.

35. Mont.—*Leopold v. Silverman*, 16 P. 580, 7 Mont. 266.

36. Cal.—*Ede v. Johnson*, 15 Cal. 53.

Justice of the peace in another state is competent where "the statute does not in terms require the affidavit to be signed or the oath administered within the state."—*Gibbs v. Parsons*, 6 A. 93, 95, 64 N.H. 66.

37. U.S.—*Petition of Jackson*, C.C.A. Ohio, 18 F.2d 462.

38. Ohio.—*Gardiner v. Parmalee*, 31 Ohio St. 551—*In re Merling*, 5 Ohio S. & C. P. 390, 1 Ohio N.P. 35.

39. U.S.—*Wells v. Rutkowski*, C.C.A. Ohio, 69 F.2d 143—*In re De Witt*, D.C.Mich., 18 F.2d 791—*Lerner v. Gladstone*, C.C.A.N.J., 1 F.2d 89—*Haines v. Keating*, C.C.A.N.J., 296 F. 896—*In re McCullough Trucking Co.*, C.C.A.N.J., 292 F. 103—*McCullough v. McCrea*, C.C.A.N.J., 287 F. 342—*In re Novelty Web Co.*, N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007.

N.J.—*Shupe v. Taggart*, 107 A. 50, 93 N.J.Law 123—*Kaufman v. Utility Trucking Co.*, 187 A. 155, 120 N.J.Eq. 576—*Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank*, 162 A. 917, 111 N.J.Eq. 535—*Sherman v. Union County Wholesale Tobacco & Candy Co.*, 155 A. 615, 108 N.J.Eq. 477—*Bateman Bros. v. Jones*, 154 A. 4, 109 N.J.Eq. 8—*Abeles v. Guelick*, 137 A. 853, 101 N.J.Eq. 180—*Fitzpatrick v. Barnard, Phillips & Co.*, 123 A. 245, 95 N.J.Eq. 363—*Hunt v. Ludwig*, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 339, 94 N.J.Eq. 153—*Patrisco v. Nolan's Point Amusement Co.*, 159 A. 620, 10 N.J.Misc. 397—*Dawson v. Pine*, 143 A. 89, 6 N.J.Misc. 774.

11 C.J. p 484 note 79.

Omission of material clause from the statutory form will render the affidavit invalid.—*Sherman v. Union County Wholesale Tobacco & Candy Co.*, 155 A. 615, 108 N.J.Eq. 477—11 C.J. p 484 note 84.

Former rule in New Jersey

Prior to the decision of this court in *American Soda Fountain Co. v.*

should be liberally, not technically, construed.⁴⁰ Further, an affidavit cannot be impeached because drawn inartificially or without a high degree of technical skill,⁴¹ or because of mere surplusage.⁴² On the other hand, an insufficiency cannot be cured or explained by extrinsic evidence.⁴³

Statements in mortgage as aiding affidavit. Under a number of authorities, an insufficient affidavit cannot be aided by statements contained in the mortgage, unless reference is made to the body of the mortgage in the affidavit, in which case they may be read together;⁴⁴ but it has been held that where the bona fides of the transaction is not in question, slight circumstances will justify a reading of the affidavit and the mortgage as one,⁴⁵ and other cases declare without qualification that the affidavit and the recitals in the body of the mortgage should, or must, be read together to ascertain whether there has been a sufficient compliance with the terms of the statute.⁴⁶

Stolzenbach, N.J., 68 A. 1078, 16 L.R.A.N.S., 703, the statutory affidavit of consideration of a chattel mortgage had been construed by the courts below as "a statutory requirement of considerable technicality," but in that case that doctrine was squarely rejected, it being held that, in the absence of fraud, instruments so common in the course of commercial transactions by laymen as chattel mortgages should be sustained whenever there was an honest and substantial compliance with the statute.

U.S.—Haines v. Keating, C.C.A.N.J., 296 F. 896, 897—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103—McCullough v. McCrea, C.C.A.N.J., 287 F. 342—In re Novelty Web Co., N.J., 236 F. 501, 159 C.C.A. 553, affirming, D.C., 228 F. 1007.
N.J.—Bateman Bros. v. Jones, 154 A. 4, 109 N.J.Eq. 8—Howell v. Stone, 71 A. 914, 75 N.J.Eq. 289—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 10 N.J.Misc. 397.

Trustee's statement of claim held literal compliance

U.S.—Petition of Jackson, C.C.A.Ohio, 18 F.2d 462, applying Ohio statute.

Affidavit of good faith held sufficient
Cal.—Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380.

40. N.J.—Shupe v. Taggart, 107 A. 50, 93 N.J.Law 123—Dawson v. Pine, 143 A. 89, 6 N.J.Misc. 774.
Wash.—First Nat. Bank v. Oppenheimer, 212 P. 164, 123 Wash. 290. 11 C.J. p 484 note 80.

41. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103, applying New Jersey statute—McCullough v. McCrea, C.C.A.N.J., 287 F. 342, applying New Jersey statute—In re Swain, D.C.N.J., 259 F.

900—In re Novelty Web Co., N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007, applying New Jersey statute.

N.J.—Shupe v. Taggart, 107 A. 50, 51, 93 N.J.Law 123—Bateman Bros. v. Jones, 154 A. 4, 109 N.J.Eq. 8—Abeles v. Guelick, 137 A. 853, 101 N.J.Eq. 180—Hunt v. Ludwig, 116 A. 699, 700, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 484 note 82.

"The affidavit is not to be tested by the rules of pleading, nor treated as a technical requirement."—Shupe v. Taggart, supra.

42. N.J.—Lessler v. Paterson Nat. Bank, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428.

43. N.J.—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 484 note 85.

44. N.J.—Douglass v. Williams, Ch., 48 A. 222.

11 C.J. p 484 notes 86, 87, p 485 note 88.

45. N.J.—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 622, 10 N.J.Misc. 397.

46. N.J.—Shupe v. Taggart, 107 A. 50, 93 N.J.Law 123—Abeles v. Guelick, 137 A. 853, 101 N.J.Eq. 180.

47. U.S.—Lerner v. Gladstone, C.C.A.N.J., 1 F.2d 89, applying New Jersey statute—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103—McCullough v. McCrea, C.C.A.N.J., 287 F. 342—In re Swain, D.C.N.J., 259 F. 900—In re Novelty Web Co., N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007.
N.J.—Kauffman v. Utility Trucking Co., 187 A. 155, 120 N.J.Eq. 576—McDonald v. H. B. McDonald

False affidavit. Falsity in the affidavit generally, or any substantial or material deviation from the truth therein, voids the mortgage,⁴⁷ even though such deviation was not intentional or in bad faith;⁴⁸ and an affidavit false in part will not support a chattel mortgage even as to that part which it truthfully represents.⁴⁹ However, an affidavit is not objectionable if true as of the date of the recording of the mortgage,⁵⁰ or if the error is immaterial.⁵¹

(b) Statement of Consideration

aa. In general

bb. Description of consideration or obligation

aa. In General

Statutes requiring the annexed affidavit to verify the consideration stated in the mortgage must be complied with. Likewise, where the affidavit itself is required to state the consideration, the statement thereof must be true and adequate, although it need not be

Const. Co., 175 A. 87, 117 N.J.Eq. 181—Sherman v. Union County Wholesale Tobacco & Candy Co., 155 A. 615, 108 N.J.Eq. 477—Stanber v. Sims Magneto Co., 129 A. 710, 98 N.J.Eq. 38, affirming Heine v. Hayden, 132 A. 922, 99 N.J.Eq. 455—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 485 note 89.

Erroneous statement of consideration see infra § 84 b (4) (b).

48. U.S.—McCullough v. McCrea, C.C.A.N.J., 287 F. 342—In re Swain, D.C.N.J., 259 F. 900—In re Novelty Web Co., N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007.
N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158—Boice v. Conover, 35 A. 402, 54 N.J.Eq. 531, reversed on other grounds 53 A. 910, 63 N.J.Eq. 278.

Under Ohio statute, the contrary has been held, in the absence of a claim that fraud was perpetrated on creditors.—In re Morgan, C.C.A.Ohio, 26 F.2d 183.

49. U.S.—In re Swain, D.C.N.J., 259 F. 900, 901.

N.J.—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598.

"The affidavit stands or falls as a whole; if a part is defective, the whole fails."—In re Swain, supra.

50. N.J.—Heine v. Hayden, 132 A. 922, 99 N.J.Eq. 455, affirming Stanber v. Sims Magneto Co., 129 A. 710, 98 N.J.Eq. 38.

51. N.J.—Lessler v. Paterson Nat. Bank, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428. 11 C.J. p 484 note 81.

technical. A statement of the consideration as consisting of advances may be sufficient.

Under governing statutory provisions, the affidavit annexed to the mortgage has been variously required to state substantially and truthfully⁵² that the consideration set forth in the mortgage is true and bona fide,⁵³ that the consideration is actual, adequate, and given in good faith,⁵⁴ or that the mortgage was made for the bona fide purpose of securing a debt or making indemnity, as the case may be,⁵⁵ or to conform substantially to the purpose of the mortgage and verify the truth, justice,

and validity of the debt sought to be secured thereby.⁵⁶

Statutes requiring that the affidavit itself contain a statement of the consideration,⁵⁷ or of the amount of the claim or liability,⁵⁸ must be complied with. While a substantial, as differing from a technical, statement of the consideration may be acceptable,⁵⁹ the affidavit must, either alone or read in connection with the mortgage,⁶⁰ truthfully and adequately set it forth.⁶¹ So, the mortgage will be void if the statement of consideration overstates⁶² or only partially states⁶³ the consideration, or conceals a bo-

52. Md.—Marlow v. McCubbin, 40 Md. 132, 137.

Necessity of following "exact and literal" words

"It has never been decided there must be an exact and literal following or incorporation of the words of the statute in the affidavit or otherwise it will be insufficient. On the contrary a substantial compliance, a compliance which meets and subserves the purpose and design of the Act is all that the law requires. . . . We think it very clear . . . that falsity in the consideration as stated in this mortgage, would warrant the assignment of perjury upon this affidavit. It therefore appears to us to be a substantial compliance with the requirements of the statute."—Marlow v. McCubbin, supra.

53. Md.—Denton v. Griffith, 17 Md. 301, 304.

"Purpose of this law was to prevent fraudulent transfers of property, upon false or pretended considerations, and to that end required an affidavit as to the truth and good faith of the consideration expressed in the deed."—Denton v. Griffith, supra.

54. U.S.—In re De Witt, D.C.Mich., 18 F.2d 791, applying Michigan statute.

55. Del.—Jefferson v. Stuckert, 104 A. 781, 12 Del.Ch. 45.

56. Vt.—Potter v. Foss, 130 A. 586, 99 Vt. 8.

Notes made after mortgage

Where mortgage was given to secure payment of note described and any sum which may "hereafter become due on any and all forms of indebtedness," accompanying affidavit that mortgage was to secure debt specified in the conditions thereof, did not verify debts sought to be secured other than note described.—Potter v. Foss, 130 A. 586, 99 Vt. 8.

57. U.S.—In re Novelty Web Co., N. J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007, applying New Jersey statute.

N.J.—De Yoe v. Harper Bros., 191 A. 851, 121 N.J.Eq. 599—Kauffman v.

Utility Trucking Co., 187 A. 155, 120 N.J.Eq. 576.

11 C.J. p 485 note 91.

58. U.S.—In re Morgan, C.C.A.Ohio, 26 F.2d 183, applying Ohio statute. Ohio.—Blandy v. Benedict, 42 Ohio St. 295.

59. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103, applying New Jersey statute. N.J.—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598—Meyer v. Clinton Shirt & Blouse Co., 167 A. 518, 113 N.J.Eq. 454.

Reference to unsigned copies of agreement and note annexed does not render an affidavit insufficient where there is a statement that there was an agreement and a note, indicating that both papers were completed by signature.—Swift & Co. v. Walstein, 142 A. 175, 6 N.J.Misc. 534.

60. N.J.—Shupe v. Taggart, 107 A. 50, 93 N.J.Law 123—Horowitz v. Weidner, Ch., 31 A. 771—Abeles v. Guelick, 137 A. 853, 101 N.J.Eq. 180—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 10 N. J.Misc. 397.

11 C.J. p 485 note 94.

61. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103—McCullough v. McCrea, C.C.A.N.J., 237 F. 342—In re Swain, D.C., 259 F. 900—In re Novelty Web Co., N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007.

N.J.—Kauffman v. Utility Trucking Co., 187 A. 155, 120 N.J.Eq. 576—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181—Felin v. Arrow Mach. Co., 124 A. 448, 96 N.J.Eq. 44—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 485 note 94.

False affidavit generally see supra § 84 b (4) (a).

Effect of allowing substantial compliance; mistake

(1) "The rule of substantial compliance in no way lessens the substantive requirements of the Chattel Mortgage Act; the final and controlling inquiry, in the light of all the

facts, is whether the real consideration has been honestly and adequately set forth in the affidavit."—Bate-man Bros. v. Jones, 154 A. 4, 5, 109 N.J.Eq. 8.

(2) Requirements of statute are not lessened nor is its mandate weakened by rule of substantial compliance. The command of the statute is imperative that "unless the mortgage, when recorded, is accompanied by an affidavit which states fully and plainly (completely and truthfully) the consideration on which it is founded . . . the courts shall treat the mortgage as absolutely void as against the creditors of the mortgagor," irrespective of mistake, bad faith, and intention to defraud.

U.S.—In re Novelty Web Co., N.J., 236 F. 501, 504, 149 C.C.A. 553, affirming, D.C., 228 F. 1007, applying New Jersey statute. N.J.—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, 317, affirmed 118 A. 839, 94 N.J.Eq. 158.

62. N.J.—De Yoe v. Harper Bros., 191 A. 851, 121 N.J.Eq. 599—Finkel v. Famous Lunch Room Co., 135 A. 51, 100 N.J.Eq. 85—Hunt v. Ludwig, 118 A. 839, 94 N.J.Eq. 158, affirming 116 A. 699, 93 N.J.Eq. 314.

63. N.J.—De Yoe v. Harper Bros., 191 A. 851, 121 N.J.Eq. 599—Moore v. Preiss Trading Corporation, 182 A. 824, 119 N.J.Eq. 366, affirmed 184 A. 521, 120 N.J.Eq. 214—Hornich v. Hornich-Towers Co., 168 A. 866, 114 N.J.Eq. 473—Meyer v. Clinton Shirt & Blouse Co., 167 A. 518, 113 N.J.Eq. 454—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, 162 A. 917, 111 N.J.Eq. 535—Lion Shoe Co. v. Price, 155 A. 775, 108 N.J.Eq. 553.

11 C.J. p 484 note 84 [b].

Dual consideration

Where a chattel mortgage secured the payment of a note and the performance of a contract and was not to become effective until the contract was executed, an affidavit which mentioned only the note as a consideration was defective.—Bollschweiler v. Packer House Hotel Co., 91 A. 1027, 83 N.J.Eq. 459.

nus,⁶⁴ or untruthfully alleges the relation of creditor and debtor between the mortgagor and mortgagee,⁶⁵ or falsely asserts that the consideration came from affiant,⁶⁶ or that money has been advanced and is due,⁶⁷ or is so indefinite as to wholly fail to disclose the nature or verify the truth of the consideration;⁶⁸ but an immaterial error will not void the mortgage.⁶⁹ An affidavit that a cash loan was made on the date a check was delivered is not false.⁷⁰

An affidavit has been held sufficiently true if the consideration stated was paid after the affidavit was made, but before the mortgage was recorded,⁷¹ and it has been declared that it is not necessary for the consideration to be entirely paid prior to or at the time the affidavit is made, if it is made in good faith;⁷² but under other authority an affidavit al-

leging payment of a certain sum of money is false, and the mortgage void against creditors, where no money was paid on the date of execution of the mortgage.⁷³

Advances. An affidavit may be sufficient which states the consideration to be a sum certain agreed to be advanced by the mortgagee,⁷⁴ or approximately estimates, instead of exactly stating, the amount of advances made,⁷⁵ or states the total amount of several advances made at different times,⁷⁶ or includes in the total indebtedness stated to be due an advance set forth as consideration but not stated to be due,⁷⁷ or states the total sum advanced to the mortgagors on their joint credit as partners, although intended partly for individual use.⁷⁸

New mortgage for old. Where a new mortgage

Agreement made as inducement to loan, and not as security therefor, need not be referred to as part of the consideration, which is the loan itself.—*Abeles v. Guelick*, 137 A. 853, 101 N.J.Eq. 180.

64. U.S.—*In re Feifer Bros.*, D.C.N.J., 21 F.Supp. 620—*McCullough v. McCrea*, C.C.A.N.J., 287 F. 342, applying New Jersey statute.
N.J.—*Felin v. Arrow Motor Mach. Co.*, 124 A. 448, 96 N.J.Eq. 44.

Reason for rule

"To the extent of the bonus, the affidavit was a fraud upon the creditors of the mortgagor. The purpose of the statute was to prevent fraud. When intentional concealment, bad faith, or fraud appears in an affidavit purporting to state the true consideration and the amount honestly due and to grow due on a mortgage, it is evident that the mortgage must be declared void as against the creditors of the mortgagor."—*McCullough v. McCrea*, C.C.A.N.J., 287 F. 342, 345.

65. U.S.—*In re Novelty Web Co.*, N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007, applying New Jersey statute.

66. N.J.—*Heine v. Hayden*, 132 A. 922, 99 N.J.Eq. 455, affirming *Stanber v. Sims Magneto Co.*, 129 A. 710, 98 N.J.Eq. 38.

Affidavit by dummy holder

N.J.—*Heine v. Hayden*, 132 A. 922, 99 N.J.Eq. 455, affirming *Stanber v. Sims Magneto Co.*, 129 A. 710, 98 N.J.Eq. 38.

Consideration advanced for mortgagee's account

The fact that money consideration was advanced by another for the mortgagee's account does not make false an affidavit that consideration was a loan by the mortgagee.—*Weiss v. Central Cafeteria*, 164 A. 15, 112 N.J.Eq. 232.

67. U.S.—*In re Swain*, D.C.N.J., 259 F. 900, applying New Jersey statute.

68. U.S.—*In re Novelty Web Co.*, N.J., 236 F. 501, 149 C.C.A. 553, affirming, D.C., 228 F. 1007, applying New Jersey statute.

Affidavit held not ambiguous

N.J.—*Abeles v. Guelick*, 137 A. 853, 101 N.J.Eq. 180.

Affidavit held sufficient although indefinite

N.J.—*Riedinger v. Mack Mach. Co. of Harrison*, 175 A. 790, 117 N.J.Eq. 334.

69. N.J.—*Lessler v. Paterson Nat. Bank*, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428 —*Patrisco v. Nolan's Point Amusement Co.*, 159 A. 620, 10 N.J.Misc. 397.

70. N.J.—*Abeles v. Guelick*, 137 A. 853, 101 N.J.Eq. 180.

Inability to make check good

The fact that the mortgagee "did not advance the money, and did not have it to advance, or to make good the check on the day as represented in the affidavit, is a substantial departure from the truth. . . . That money five days later was deposited, so that the fact then accorded with the representation, cannot legalize a void mortgage."—*Lerner v. Gladstone*, C.C.A.N.J., 1 F.2d 89, 91, applying New Jersey statute.

71. N.J.—*Heine v. Hayden*, 132 A. 922, 99 N.J.Eq. 455, affirming *Stanber v. Sims Magneto Co.*, 129 A. 710, 98 N.J.Eq. 38.

Reason for rule

"The affidavit is not objectionable if it be true as of the date of the recording of the mortgage."—*Stanber v. Sims Magneto Co.*, 129 A. 710, 711, 98 N.J.Eq. 38, affirmed *Heine v. Hayden*, 132 A. 922, 99 N.J.Eq. 455.

72. U.S.—*In re Morgan*, C.C.A.Ohio, 26 F.2d 183, applying Ohio statute.

Cash loan with future obligation

Mortgagee's affidavit that mortgage secured three thousand dollars was held to state amount of consideration, although only one thousand dollars was actually advanced with the obligation to take up notes totalling two thousand dollars.—*In re Morgan*, supra.

73. N.J.—*Kauffman v. Utility Trucking Co.*, 187 A. 155, 156, 120 N.J.Eq. 576.

Mortgagee's "intention to give credit when the delivery was made, together with a subsequent delivery of the consideration, does not cure the defect."—*Kauffman v. Utility Trucking Co.*, supra.

74. N.J.—*Higgins v. Schmidt*, 169 A. 522, 115 N.J.Eq. 64.

"Advance" distinguished from "to be advanced"

"The contention on behalf of the mortgagee that the word 'advanced,' used in the affidavit in relation to the moneys loaned, can and should be held to mean 'to be advanced,' is not tenable. . . . The defect is not that the affidavit is artificially drawn or lacking in technical precision. Its defect is the positive assertion that specified sums of money had been advanced to the mortgagor . . . which was untrue to the knowledge of the affiant."—*In re Swain*, D.C.N.J., 259 F. 900, 901, applying New Jersey statute.

75. N.J.—*Fitzpatrick v. Barnard Phillips & Co.*, 123 A. 245, 95 N.J.Eq. 363.

76. N.J.—*Sadler v. Banaff*, 96 A. 361, 85 N.J.Eq. 335.

77. N.J.—*Dawson v. Pine*, 143 A. 89, 6 N.J.Misc. 774.

78. N.J.—*Schneider v. Schmidt, Ch.*, 70 A. 633.

is given as a substitute for a former one, it is not necessary that the affidavit state such fact;⁷⁹ it is sufficient if the affidavit describes the indebtedness of the old mortgage.⁸⁰

bb. Description of Consideration or Obligation

An affidavit annexed to a mortgage given to secure a debt, liability, or agreement, including liability as surety, should contain facts making clear the nature of the transaction. Insufficient averments as to consideration will not be aided by an inference that a loan was made.

According as the mortgage is given to secure a debt, liability, or agreement, the affidavit must be so

varied as to verify the real transaction between the parties.⁸¹ Under governing statutory provisions, the affidavit should show how the debt or obligation arose,⁸² how the relation of debtor and creditor was created between the mortgagee and the mortgagee,⁸³ whose obligation is secured and to whom it accrues,⁸⁴ the nature of any services to be performed,⁸⁵ the amount of the indebtedness⁸⁶ and as nearly as possible, the amount due and to grow due in respect thereof.⁸⁷

A mere averment that the consideration is a sum certain in cash,⁸⁸ an existing indebtedness,⁸⁹ or acceptance of the mortgagor's note⁹⁰ or bond,⁹¹ or

79. N.J.—Sadler v. Banaff, 96 A. 361, 85 N.J.Eq. 335.
11 C.J. p 485 note 96.

Balance due on prior encumbrances

Where consideration for mortgage, or part thereof, consists of balance due on prior like encumbrances covering same property, which were surrendered, failure to state such facts in affidavit will not invalidate mortgage, since "the statute only requires that the consideration shall be stated in the affidavit."—McKesson-Roeber-Kuebler Co. v. Richter, 170 A. 636, 637, 112 N.J.Law 339.

80. N.J.—Sadler v. Banaff, 96 A. 361, 85 N.J.Eq. 335.
11 C.J. p 485 note 97.

81. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103, applying New Jersey statute.

N.J.—Van Houten v. Dainty Quality Laundry Corporation, 171 A. 549, 115 N.J.Eq. 516—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 485 note 98.
Debt or liability secured generally see supra §§ 37-41.

82. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103, applying New Jersey statute.

N.J.—Shupe v. Taggart, 107 A. 50, 93 N.J.Law 123—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598—Van Houten v. Dainty Quality Laundry Corporation, 171 A. 549, 115 N.J.Eq. 516—Hornich v. Hornich-Towers Co., 168 A. 866, 114 N.J.Eq. 473—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, 162 A. 917, 111 N.J.Eq. 535—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 486 note 99.

83. N.J.—Shupe v. Taggart, 107 A. 50, 93 N.J.Law 123—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598—Meyer v. Clinton Shirt & Blouse Co., 167 A. 518, 113 N.J.Eq. 454—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.

11 C.J. p 486 note 1.

84. U.S.—In re McCullough Trucking Co., C.C.A.N.J., 292 F. 103, applying New Jersey statute.

85. U.S.—In re McCullough Trucking Co., supra.

Explanatory clause

An affidavit that the mortgagee is to undertake certain duties as "general manager" is rendered sufficient by a clause explaining such duties and limiting them to those actually undertaken. — In re McCullough Trucking Co., supra.

86. N.J.—Van Houten v. Dainty Quality Laundry Corporation, 171 A. 549, 115 N.J.Eq. 516—Hunt v. Ludwig, 116 A. 699, 93 N.J.Eq. 314, affirmed 118 A. 839, 94 N.J.Eq. 158.
11 C.J. p 486 note 2.

Proceeds of notes minus discounts

Failure to state that only the proceeds of notes after payment of discounts were paid to the mortgagor will not render an affidavit false where the consideration is stated to be a loan of the face amount of the notes, and the transaction is set forth in detail, since a discount paid for, and on behalf of, the mortgagor forms part of the loan, and the aggregate makes up the total sworn to.—Flockhart Foundry Co. v. Cox Automatic Pipe Bending Co., 124 A. 925, 96 N.J.Eq. 396, affirming 123 A. 151, 95 N.J.Eq. 382.

87. N.J.—Van Houten v. Dainty Quality Laundry Corporation, 171 A. 549, 115 N.J.Eq. 516—Sherman v. Union County Wholesale Tobacco & Candy Co., 155 A. 615, 103 N.J.Eq. 477—Lessler v. Paterson Nat. Bank, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428—Fitzpatrick v. Barnard Phillips & Co., 123 A. 245, 95 N.J.Eq. 363—Horowitz v. Weidner, Ch., 31 A. 771.

Meaning of "due"

It has been repeatedly held that the meaning of the word "due" is not necessarily "owing and payable," and that "it is often used to signify merely the present existence of a debt to be paid hereafter."—Abeles v. Guelick, 137 A. 853, 855, 101 N.

J.Eq. 180—Lessler v. Paterson Nat. Bank, 128 A. 800, 97 N.J.Eq. 396, affirmed 131 A. 923, 99 N.J.Eq. 428.

"Adjusted interest"

An affidavit containing a statement that "adjusted interest" shall be paid may accurately set forth the amount due and to grow due on the mortgage, since the presumption exists that interest in excess of the lawful rate is not intended.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.

Statement of contingent liability may sufficiently apprise an intending creditor of the liability.—Dawson v. Pine, 143 A. 89, 6 N.J.Misc. 774.

88. N.J.—Hornich v. Hornich-Towers Co., 168 A. 866, 114 N.J.Eq. 473—Cross v. Printing Corporation, 104 A. 727, 89 N.J.Eq. 378.

89. N.J.—Locke Cotton Mills Co. v. Plasket, 183 A. 682, 119 N.J.Eq. 598.

Affidavit setting out articles and amounts due thereon sufficiently sets forth the consideration.—Pincus v. U. S. Dyeing & Cleaning Works, 133 A. 66, 99 N.J.Eq. 160.

90. N.J. — Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, 162 A. 917, 111 N.J.Eq. 535.

Renewal note

"The affidavit is defective in respect of the averment that the consideration is the acceptance of . . . the renewal note. It merely shows a state of facts, not a consideration. It discloses that the bank held the evidence of indebtedness, the notes, for which the renewal was given, in part, but it fails to state how the indebtedness arose, what the consideration was upon which the notes were given, a loan of money, the value of work done; the price of things sold, or the like."—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, supra.

91. N.J.—Warner v. Cranford Printing & Publishing Co., 172 A. 808, 116 N.J.Eq. 166.

a statement merely setting forth notes or checks,⁹² is insufficient, since such an averment or statement fails to set forth the consideration for the mortgage⁹³ or the instrument secured,⁹⁴ and a loan will not be inferred.⁹⁵

Liability as surety. An affidavit to a mortgage securing a liability as surety should state that fact, and what the liability is,⁹⁶ and that the mortgage was taken in good faith;⁹⁷ a statement that the claim on which the mortgagee is surety is just and unpaid is insufficient.⁹⁸

Where the mortgagee is a surety on notes, the affidavit should state the name of the payee or holder, the amount and date of each note, and the fact that they are still outstanding.⁹⁹ Where the liability secured by the mortgage is an accommodation liability, that it is partly as maker and partly as indorser, instead of solely as indorser, as stated in the affidavit, does not render false an otherwise truthful statement of the consideration.¹ A mortgagee's affidavit showing the consideration to be his liability as an accommodation indorser has not been required to state the consideration for the indorsed notes;² but there is authority to the contrary.³

(c) Description of Parties

The affidavit should describe the parties by giving their names.

The affidavit should describe the parties by giving their names;⁴ but in particular circumstances an affidavit has been held to comply substantially with the statute, notwithstanding erroneous recitals as to the identity of the parties.⁵

Trustee. One to whom a mortgage is given as a trustee need not, in his sworn statement of claim, name the beneficiaries of his trust or specify the interest of each beneficiary therein.⁶

(5) Signature of Affiant

By the weight of authority, the affiant's signature is unnecessary in the absence of statute or court rule requiring it.

In a few jurisdictions it is held that the affidavit must bear the signature of affiant in order to make it valid;⁷ but according to the decided weight of authority, the signature of affiant is unnecessary, in the absence of a rule of court or a statute requiring it.⁸

(6) Jurat

A jurat is essential to the affidavit although particular omissions or defects may or may not be fatal.

The absence of a jurat from the affidavit has been held fatal to the validity of the mortgage as against creditors of the mortgagor⁹ and subsequent

92. N.J.—Lion Shoe Co. v. Price, 155 A. 775, 108 N.J.Eq. 553.

93. N.J.—Hornich v. Hornich-Towers Co., 168 A. 866, 114 N.J.Eq. 473.

94. N.J. — Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368 —Warner v. Cranford Printing & Publishing Co., 172 A. 808, 116 N.J.Eq. 166—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, 162 A. 917, 111 N.J.Eq. 535 —Lion Shoe Co. v. Price, 155 A. 775, 108 N.J.Eq. 553.

95. N.J.—Hornich v. Hornich-Towers Co., 168 A. 866, 114 N.J.Eq. 473—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, 162 A. 917, 111 N.J.Eq. 535.

Statute does not allow us to infer that consideration of chattel mortgage to bank was for money loaned, any more than one to shoemaker was for shoes, but exacts from all holders of such instruments, alike, that they state, under oath, how obligation intended to be secured came into existence.—Hornich v. Hornich-Towers Co., supra—Wisner Mfg. Co. v. Second Nat. Bank & Trust Co. of Red Bank, supra.

96. Ohio.—Blandy v. Benedict, 42 Ohio St. 295—Winslow v. Hart, 4 Ohio Dec., Reprint, 567, 2 Clev.L. Rep. 337.

97. Ohio.—Blandy v. Benedict, 42 Ohio St. 295—Nesbit v. Worts, 37 Ohio St. 378.

98. Ohio.—Blandy v. Benedict, 42 Ohio St. 295—Nesbit v. Worts, 37 Ohio St. 378.

99. N.J.—Thropp v. Knight, Ch., 28 A. 1037.

1. N.J.—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 623, 10 N.J.Misc. 397.

2. N.J.—Simpson v. Anderson, 73 A. 493, 75 N.J.Eq. 531—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 10 N.J.Misc. 397.

3. N.J.—Meyer v. Clinton Shirt & Blouse Co., 167 A. 518, 113 N.J. Eq. 454.

4. Cal.—Sanborn v. Cunningham, 33 P. 894, 4 Cal.Unrep.Cas. 95. 11 C.J. p 486 note 4.

5. An affidavit as to amount, justice, and nonpayment of mortgagee's claim has been held substantially to comply with the governing statute, notwithstanding erroneous recitals as to mortgagee's and mortgagor's identity.—Wells v. Rutkowski, C.C.A. Ohio, 69 F.2d 143, applying Ohio statute.

Misnomer of mortgagor in body of affidavit is immaterial where the mortgage purports to be made, and is signed by the same person as is

the affidavit.—Sanborn v. Cunningham, 33 P. 894, 4 Cal.Unrep.Cas. 95.

6. U.S.—Petition of Jackson, C.C.A. Ohio, 18 F.2d 462.

7. N.H.—Gibbs v. Parsons, 6 A. 93, 64 N.H. 66.

11 C.J. p 486 note 10.

Writing names in body insufficient
It is not a sufficient compliance with a statute requiring both mortgagor and mortgagee to make and "sign" an affidavit to a chattel mortgage, if they write their names in the body of the affidavit.—Stone v. Marvel, 45 N.H. 481.

8. Cal.—Pacific States Savings & Loan Co. v. Hoffman, 25 P.2d 1007, 134 Cal.App. 604.

Mont.—International Harvester Co. of America v. Embody, 298 P. 348, 39 Mont. 402.

11 C.J. p 486 note 11.

Writing name at beginning of affidavit held sufficient, where there was no doubt that the notary public administered the oath to the affiant and afterward certified the fact.—International Harvester Co. of America v. Embody, supra.

9. Mich.—Peo. v. Burns, 125 N.W. 740, 161 Mich. 169, 137 Am.S.R. 466. 11 C.J. p 487 note 17.

False jurat voids the affidavit.—Central Acceptance Co. v. Mundy, 29 Ohio N.P., N.S., 527.

encumbrancers in good faith and for value;¹⁰ and such absence cannot be supplied by oral evidence that affiant was sworn.¹¹

The jurat should indicate the person who took the oath to the affidavit¹² and the officer before whom it was taken.¹³ The signature or seal of an officer authorized to administer oaths has been held essential to the jurat,¹⁴ and a seal has been declared insufficient in the absence of a signature,¹⁵ but other authority holds a seal unnecessary.¹⁶ The notary need not specify his official capacity,¹⁷ at least where it appears in the imprint of his seal,¹⁸ and his failure to specify his place of residence is not fatal where he gives it in certifying to the acknowledgment;¹⁹ nor is the mortgage invalidated by the omission of the words "So help us God" at the end of the affidavit.²⁰ The fact that the date of the jurat is not that on which the affidavit was made does not affect the validity of the affidavit.²¹

An imperfection in the jurat has been held not to render the mortgage ineffectual as notice when it is acknowledged as deeds of conveyances of realty are required to be.²²

§ 85. Confirmation or Ratification of Defective Instrument

Except where the rights of third persons intervene, a subsequent acceptance or ratification will relate back and validate a mortgage which was not delivered or assented to.

Where a mortgage is not delivered or assented to, a subsequent acceptance or a ratification will relate back and validate it as to persons whose rights

subsequently accrued,²³ but a subsequent assent does not validate the mortgage as against parties acquiring interests in the mortgaged property prior to such assent.²⁴ Where a creditor once refuses to accept a mortgage, he cannot afterward accept it without the debtor's consent.²⁵ A mortgage given for corrective purposes will not relate back to the aid of prior defective mortgages where the corrective mortgage is itself void.²⁶

§ 86. Delivery

Particular matters in regard to delivery will be discussed in detail in the sections immediately following.

§ 87. — Necessity

Delivery of a mortgage to the mortgagee or his agent is essential to its validity.

An actual or constructive delivery of a mortgage to the mortgagee or to his duly authorized agent is essential to its validity.²⁷ Although there may be no valid delivery of a mortgage at the time of its execution, however, a subsequent delivery will avail against those who have not in the meantime acquired rights to the property or an interest in it.²⁸ An erasure made before delivery will not invalidate the mortgage.²⁹

§ 88. — Sufficiency and Effect

No particular form of delivery is required, as long as it appears that the mortgagor parted with the control of the instrument with the intention that it should become operative. A return of the instrument to the mortgagor will not avoid a valid delivery.

No definite or specific formality is required by

10. Idaho.—Grandview State Bank v. Torrance, 221 P. 145, 146, 38 Idaho 388, citing *Corpus Juris*.

11. Idaho.—Grandview State Bank v. Torrance, *supra*.

Ohio.—Benedict v. Peters, 58 Ohio St. 527.

12. Mich.—Peo. v. Burns, 125 N.W. 740, 161 Mich. 169, 137 Am.S.R. 466.

Mont.—Marcum v. Coleman, 24 P. 701, 10 Mont. 73.

11 C.J. p 487 note 13.

13. Cal.—Yost v. Santa Ana Commercial Bank, 29 P. 858, 94 Cal. 494.

14. Mont.—Reynolds v. Fitzpatrick, 57 P. 452, 23 Mont. 52.

One seal for acknowledgment and jurat

Where a notary's certificate of acknowledgment of a chattel mortgage and his jurat, certifying to the subscribing and swearing to an affidavit of good faith, both of which were

made by the mortgagor's president, were each signed by the notary and were on the same instrument, although but one impression of the notarial seal was made, the instrument was valid.—Woods v. Young Lumber Co., 181 P. 865, 107 Wash. 432.

15. U.S.—In re Jesse, C.C.A.Wash., 256 F. 305.

16. Ohio.—Ashley v. Wright, 19 Ohio St. 291.

17. N.J.—Magowan v. Baird, 33 A. 1054, 53 N.J.Eq. 656.

18. Cal.—Beckjord v. Traeger, 39 P. 2d 523, 3 Cal.App.2d 385, rehearing denied 41 P.2d 172.

19. Wash.—Vincent v. Snoqualmie Mill Co., 35 P. 396, 7 Wash. 566.

20. N.H.—Corney v. Pickering, 63 N. H. 126.

21. Ariz.—Stock Growers' Finance Corporation v. Hildreth, 249 P. 71, 30 Ariz. 505.

22. N.J.—Whitehead v. Hamilton Rubber Co., 32 A. 377, 53 N.J.Eq. 454.

23. Mich.—Field v. Fisher, 32 N.W. 838, 65 Mich. 606.

11 C.J. p 490 note 67.

24. Tex.—Whitaker v. Sanders & Samuels, Civ.App., 223 S.W. 256. 11 C.J. p 490 note 68.

25. Or.—Grant County First Nat. Bank v. McCreary, 132 P. 718, 66 Or. 484.

26. U.S.—Holmgren v. Keene Oil Co., D.C.N.H., 10 F.Supp. 211.

27. Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635—Meredith v. Beadle, 233 N.W. 512, 211 Iowa 390. N.D.—Tenney Co. v. Thomas, 237 N. W. 710, 61 N.D. 202.

11 C.J. p 487 note 20.

28. Or.—Grant County First Nat. Bank v. McCreary, 132 P. 718, 66 Or. 484.

29. Colo.—Chapman v. Sargent, 40 P. 849, 6 Colo.App. 433.

law for a delivery,³⁰ it being largely a matter of intention, as disclosed by all the surrounding circumstances.³¹ Anything which clearly manifests the intent of the parties that the instrument shall presently become effective, and that the maker loses all control over it, and that, by it, the person to whom it is made becomes possessed of the estate, constitutes a sufficient delivery.³² Manual transfer of the document from the hands of the mortgagor to the hands of the mortgagee is not essential.³³ It may be delivered by words without acts, or by acts without words, or by both combined.³⁴

Delivery should be made by the mortgagor or by some one acting under his directions.³⁵ Delivery may be made to the mortgagee himself³⁶ or to some one authorized to receive the document for him,³⁷ or under certain circumstances to a stranger for the use and benefit of the mortgagee without the latter's authority, as in the case of a mortgagee under legal disability.³⁸ Delivery to one of several mortgagees named in an instrument renders it effective as to all and cannot be restrained by the use of words on the part of the mortgagor so as to take effect as to one only.³⁹

Recording as delivery. Recording a mortgage at the instance of the mortgagor and without the knowledge or consent of the mortgagee does not amount to a delivery to him.⁴⁰ Where, however, a mortgage is executed in pursuance of a previous agreement to give security, and the recording is in

accordance with the mortgagor's direction or with the understanding of the parties, the registration of the instrument constitutes a sufficient delivery.⁴¹ The execution of a mortgage in payment of, or as security for the payment of, a bona fide indebtedness, and its filing for record is, as between the mortgagor and the mortgagee, a sufficient delivery, although the mortgagee has no knowledge of the transaction, but, if the rights of the other parties intervene between the filing of such instrument and the acceptance by the mortgagee, the filing of the mortgage is not a sufficient delivery as against such parties.⁴² If the instrument is not actually recorded, however, a mere agreement on the part of the mortgagor to file the mortgage will not avail the mortgagee unless it is carried out.⁴³

Where a mortgagee ratifies the act of the mortgagor in sending for record, this constitutes the registration a sufficient delivery as effectively as a previous agreement for the giving of the mortgage would have done.⁴⁴

Effect of delivery. After delivery has once been made a return of the instrument to the mortgagor will not avoid it.⁴⁵

§ 89. — Delivery of Copy to Mortgagor

Under some statutes the mortgagee must give the mortgagor a copy of the mortgage, and the mortgagor must give a receipt therefor which must be attached to the mortgage.

30. Ill.—Talty v. Schoenholz, 224 Ill. App. 158.

11 C.J. p 487 note 23.

31. Or.—Zoharopoulos v. Hamilton, 216 P. 184, 108 Or. 201.

S.C.—Fox v. Fox, 92 S.E. 477, 107 S. C. 250.

32. Ill.—Talty v. Schoenholz, 224 Ill. App. 158.

11 C.J. p 487 note 24.

Pasting the mortgage on the front page of an account book, the accounts in which it assumed to convey, has been held to be sufficient.—Lydia Pinkham Medicine Co. v. Gibbs, 33 S.E. 945, 108 Ga. 138.

33. Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.

11 C.J. p 488 note 25.

34. Ill.—Talty v. Schoenholz, 224 Ill. App. 158.

11 C.J. p 488 notes 26–28.

35. Neb.—Rogers v. Heads Iron Fdy., 70 N.W. 527, 51 Neb. 39, 37 L.R.A. 429.

Ohio.—Johnson v. Nelson, 2 Ohio Dec. (Reprint) 487, 3 West.L. Month. 306.

11 C.J. p 488 note 30.

36. Neb.—Rogers v. Heads Iron Fdy., 70 N.W. 527, 51 Neb. 39, 37 L.R.A. 429.

Refusal of trustee to accept trust does not defeat a deed of trust given for security purposes, at least where the deed was delivered to the beneficiary.—Walker v. Johnson, 37 Tex. 127.

37. Ill.—Ottawa Public Finance Corporation v. Blackley-Gould Corporation, 281 Ill.App. 447.

Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635.

11 C.J. p 488 note 32.

38. Neb.—Rogers v. Heads Iron Fdy., 70 N.W. 527, 51 Neb. 39, 37 L.R.A. 429.

39. Mass.—Hubby v. Hubby, 5 Cush. 516, 52 Am.D. 742.

40. Mo.—Taylor v. Connecticut Fire Ins. Co., App., 285 S.W. 1012.

11 C.J. p 488 note 36.

Subsequent removal from record

Record is not equivalent to delivery where the mortgage was taken off the records in a short time, and the mortgagor told the recording clerk that it was merely to protect the property from creditors, and the mortgagee had no knowledge of the

execution of the instrument.—McCourt v. Myers, 8 Wis. 236.

41. Ill.—Talty v. Schoenholz, 224 Ill.App. 158.

Mo.—Taylor v. Connecticut Fire Ins. Co., App., 285 S.W. 1012.

Tex.—Red River Nat. Bank v. Summers, Civ.App., 30 S.W.2d 726, 728 quoting Corpus Juris.

11 C.J. p 488 note 38.

42. Wis.—Welch v. Sackett, 12 Wis. 243.

11 C.J. p 488 note 39.

43. Iowa.—Mull v. Dooley, 56 N.W. 513, 89 Iowa 312.

11 C.J. p 488 note 40.

44. D.C.—Storrs v. Sharp, 9 D.C. 549.

"The intent is important, and delivery for record, although no known by the grantee, is, if followed by his assent, good delivery."—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 607, 199 Iowa 597.

45. Minn.—Berlin Mach. Works v. Security Trust Co., 61 N.W. 113; 60 Minn. 161.

Mo.—Kuh v. Garvin, 28 S.W. 847, 12 Mo. 547.

To enable the mortgagor to detect any changes or alterations in the original instrument, by statute the mortgagee may be required to deliver to the mortgagor a full and complete copy of the mortgage,⁴⁶ and the mortgagor may be required to surrender to the mortgagee a receipt, which is to be attached to the original mortgage, showing that the mortgagee has surrendered to him a copy of such mortgage.⁴⁷ Where a correct copy of the mortgage is surrendered to the mortgagor,⁴⁸ unless the statute expressly renders the mortgage void,⁴⁹ the mortgage is valid as between the parties, however, even though the mortgagee is not given such a receipt.⁵⁰ In the absence of a statutory provision that the mortgage shall be void if the mortgagor does not receive a copy thereof, where the mortgagor signed a receipt that he received a copy of the mortgage, that he did not in fact receive a copy does not invalidate the mortgage.⁵¹

Under some statutes the borrower must be given a memorandum or notice of the contents of the note and mortgage.⁵²

46. N.D.—Security State Bank v. Burnstad Farmers' Elevator Co., 232 N.W. 295, 60 N.D. 43.
S.D.—Citizens' State Bank of Trosky, Minn. v. Christiansen, 217 N.W. 203, 52 S.D. 183.
11 C.J. p 489 note 49.

The acknowledgment of the mortgage must be shown in the copy given the mortgagor.—Security State Bank v. Burnstad Farmers' Elevator Co., 232 N.W. 295, 60 N.D. 43.

47. Mont.—Doering v. Selby, 244 P. 485, 75 Mont. 416.

Incorporation in instrument

(1) Where the receipt is incorporated in the body of the mortgage, and the mortgagor signs but once, and in the usual place at the end of the body of the instrument, this is not a substantial compliance with the statute and the filing of such an instrument is not notice to anyone.—Stoffel v. Sullivan, 193 N.W. 45, 45 N.D. 695.

(2) Where, however, the receipt was at the end of the instrument, and the mortgagor signed it twice, it was a sufficient receipt.—Baird v. Wilton Elevator Co., 237 N.W. 695, 61 N.D. 165.

Mortgages included

Such a statute applies only to mortgages proper, such as are commonly used and recognized as chattel mortgages, intended to secure a debt or the performance of an act. Farm leases are not within the statute.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

§ 90. Acceptance

Acceptance of the mortgage by the mortgagor is essential to its validity.

Acceptance on the part of the mortgagee is essential to make a mortgage a valid instrument.⁵³ The failure, however, of some of several creditors included in the mortgage to accept it does not invalidate it or render it any the less forceful in favor of those who do accept it.⁵⁴ It has been held that a mortgage in the form of a deed of trust must be accepted by the beneficiaries named therein;⁵⁵ acceptance by the trustee is insufficient⁵⁶ unless authorized by the beneficiaries.⁵⁷ The acceptance, by the creditor, however, is sufficient when communicated to the trustee without notifying the mortgagor.⁵⁸

It is a sufficient acceptance of a mortgage if a creditor to whom it is executed is notified of its execution and does nothing which shows an intention to reject it,⁵⁹ but does some act which shows his acquiescence thereto,⁶⁰ or ratifies some act of an unauthorized agent in assuming to recognize or pro-

Place of receipt

The mere fact that such receipt appears above the acknowledgment and affidavit does not render the mortgage insufficient, as the receipt cannot be construed only as a receipt of a copy of so much of the instrument as precedes it in point of arrangement.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

48. N.D.—Lakota Mercantile Co. v. Balsley, 236 N.W. 631, 60 N.D. 768.
49. S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

50. Mont.—Hansen v. Johnson, 4 P. 2d 1088, 90 Mont. 597.

51. S.D.—Citizens' State Bank of Trosky, Minn. v. Christiansen, 217 N.W. 203, 52 S.D. 183.

Informative of right

Receipt for copy of mortgage, standing above mortgagor's signature, is sufficient to inform mortgagor of his statutory right to copy.—Citizens' State Bank of Trosky, Minn. v. Christiansen, 217 N.W. 203, 52 S.D. 183.

52. Cal.—Wood v. Krepps, 143 P. 691, 168 Cal. 382, L.R.A.1915B 851.
11 C.J. p 489 note 50.

53. Ill.—Talty v. Schoenholz, 154 N. E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635.
11 C.J. p 489 note 51.

In Louisiana it is held, however, that an absent person has the benefit of a mortgage in his favor executed and recorded by the mortgagor, although not accepted by the mortga-

gee.—Shevlin v. Grimmer, 119 So. 394, 10 La.App. 393.

54. Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.
11 C.J. p 489 note 52.

55. Iowa.—Burlington Nat. State Bank v. Sweeney, 73 N.W. 476.
11 C.J. p 489 note 53.

Conduct held to constitute acceptance

Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.

Effect of acceptance

Although trust mortgage was to protect each creditor in proportion that his debt bore to whole property mortgaged, and provided that payments made to trustee should be so divided between creditors, only creditor who accepted was entitled to have lien established in full amount of claim when trust had not been carried out.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.

56. Tex.—Alliance Milling Co. v. Eaton, 25 S.W. 614, 86 Tex. 401, 24 L.R.A. 369.
11 C.J. p 489 note 54.

57. Tex.—Wallace v. Bagley, 26 S. W. 519, 6 Tex.Civ.App. 484.

58. Tex.—McLaughlin v. Carter, 37 S.W. 666, 13 Tex.Civ.App. 694.

59. Iowa.—Wadsworth v. Barlow, 27 N.W. 775, 68 Iowa 599.
11 C.J. p 489 note 57.

60. Ill.—Talty v. Schoenholz, 224 Ill.App. 158.
11 C.J. p 489 note 53.

cure the mortgage.⁶¹ Acceptance must be with full knowledge of the facts.⁶²

The parties may by previous agreement constitute an agent to accept the mortgage.⁶³ Among such agents may be the recorder⁶⁴ or the mortgagor himself.⁶⁵ Whether or not an agent has been appointed must be determined by the jury.⁶⁶

§ 91. Evidence

In a proper case delivery and acceptance of a chattel mortgage may be presumed.

While acceptance will be presumed when the mortgage was executed in pursuance of a previous agreement,⁶⁷ such an inference cannot be drawn from the beneficial character of the instrument to the detriment of intervening creditors.⁶⁸ The execution, acknowledgment, and recording of a chattel mortgage, however, which is beneficial to the mortgagee has been held to raise a presumption of acceptance,⁶⁹ and, where the mortgage is in the form of a deed of trust, the assent of a cestui que trust is presumed, until renunciation, if the trust be for his benefit.⁷⁰

A delivery will be presumed when the note and the mortgage are found in the possession of the

mortgagee.⁷¹ A presumption of delivery arises from the fact that a mortgage is on record,⁷² and delivery may be inferred from the acts of the mortgagee assenting to and adopting a recorded mortgage.⁷³ The presumption of delivery and acceptance, however, is not a conclusive one, but is prima facie only. It may be shown, if such be the fact, that the mortgagee never accepted the instrument but rejected the same when apprised of its existence.⁷⁴

Time of delivery. In the absence of evidence giving rise to another inference,⁷⁵ the law presumes that a mortgage is delivered on the day of its date.⁷⁶

Proof of document. If the subscribing witness to a mortgage, because of either physical or legal obstacles, cannot be produced, the mortgage may be proved by other evidence.⁷⁷

§ 92. Questions of Law and Fact

On conflicting evidence, questions as to the execution and delivery of a mortgage are for the determination of the jury.

In actions wherein the execution and delivery of a mortgage is in issue, unless the evidence is undisputed,⁷⁸ questions as to whether a mortgage was

61. Mich.—Field v. Fisher, 32 N.W. 838, 65 Mich. 606.

Mo.—Kuh v. Garvin, 28 S.W. 847, 125 Mo. 547.

N.Y.—Brown v. Platt, 21 N.Y.Super. 324.

62. Iowa.—Burlington Nat. State Bank v. Morse, 34 N.W. 803, 73 Iowa 174, 5 Am.S.R. 670.
11 C.J. p 489 note 60.

Knowledge of existence of mortgage
Ill.—Talty v. Schoenholz, 154 N.E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635.

63. Mass.—Jordan v. Farnsworth, 15 Gray 517—Thayer v. Stark, 6 Cush. 11.

Mich.—Field v. Fisher, 32 N.W. 838, 65 Mich. 606.

64. Mo.—Kuh v. Garvin, 28 S.W. 847, 125 Mo. 547.
11 C.J. p 490 note 62.

65. Wis.—Sargeant v. Solberg, 22 Wis. 132.
11 C.J. p 490 note 63.

66. Mass.—Jordan v. Farnsworth, 15 Gray 517—Molineux v. Coburn, 6 Gray 124.

67. Iowa.—In re Guyer, 29 N.W. 826, 69 Iowa 585.
Wash.—Day v. Sines, 46 P. 1048, 15 Wash. 525.
11 C.J. p 490 note 65.

68. Mo.—Kuh v. Garvin, 28 S.W. 847, 125 Mo. 547.
11 C.J. p 490 note 66.

69. Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321—Talty v. Schoenholz, 154 N.E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635.

70. U.S.—In re Pilot Radio & Tube Corporation, C.C.A.Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied Eckhardt v. Ball, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

71. Ill.—Wickler v. People, 68 Ill. App. 282.

Me.—Foster v. Perkins, 42 Me. 168.
Mass.—Molineux v. Coburn, 6 Gray 124.

72. Ill.—Talty v. Schoenholz, 224 Ill.App. 158.

Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.

Prima facie evidence

The execution, acknowledgment, and recording of a mortgage is prima facie evidence of its delivery.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321—Talty v. Schoenholz, 154 N.E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing 238 Ill.App. 635.

73. Mass.—Thayer v. Stark, 6 Cush. 11.

Wis.—Sargeant v. Solberg, 22 Wis. 132.

11 C.J. p 489 note 43.

74. Neb.—Rogers v. Heads Iron Fdy., 70 N.W. 527, 51 Neb. 39, 37 L. R.A. 429.

75. Delivery on payment

Where the purchaser of a piano executed a mortgage, reciting possession thereof, but such piano was not received by the purchaser until the following day, when the first payment was made under the installment contract covering it, such discrepancy raises a presumption that the mortgage was actually delivered on receipt of the first payment.—Sheeley v. Holmes Music Co., 179 N. Y.S. 202, 189 App.Div. 756.

76. Ind.—Briggs v. Fleming, 14 N. E. 86, 112 Ind. 313.

N.D.—Schweinber v. Great Western El. Co., 81 N.W. 35, 9 N.D. 113.

77. Ala.—Jones v. Hough, 77 Ala. 437.

S.C.—Swancey v. Parrish, 40 S.E. 554, 62 S.C. 240.

S.D.—Schouweiler v. McCaull, 99 N. W. 95, 18 S.D. 70.

11 C.J. p 479 note 85.

78. Matters, under evidence, held questions of law

(1) Time of execution.—Curb v. Dabbs & Tannehill, 97 So. 109, 19 Ala.App. 149, certiorari denied Ex parte Curb, 97 So. 111, 210 Ala. 45.

(2) Whether a mortgage was delivered.—Ward v. Allen, 163 N.W. 749, 133 Minn. 1.

11 C.J. p 489 note 46.

fraud is asserted within a reasonable time after the discovery thereof,⁸⁹ irrespective of the mortgagor's certificate or declaration that the mortgage is valid.⁹⁰ Also, where a sale is induced by fraud, a chattel mortgage for the purchase price executed as a part of the same transaction is voidable.⁹¹

In accordance with the general rule as to alterations of instruments, as discussed in Alteration of Instruments § 5, an intentional and fraudulent insertion of additional property in a chattel mortgage by the mortgagee renders the instrument void.⁹²

Duress. Under the rules applicable to contracts generally, a chattel mortgage may be voidable because executed under influence of duress of person⁹³ or property,⁹⁴ and, in some jurisdictions, because of any compulsion such as to deprive the mortgagor of the exercise of his free will.⁹⁵ Although a mortgage executed under threats of arrest or prosecution is void as against public pol-

icy,⁹⁶ a mere threat to institute legal proceedings, in case security is not given, will not constitute duress invalidating a chattel mortgage given because of such threat.⁹⁷

Duress, to invalidate the mortgage, must be shown to have continued up to the time of its execution,⁹⁸ and is waived unless asserted within a reasonable time after the removal thereof.⁹⁹

§ 96. Illegality

A mortgage given for a purpose in violation of public policy or violating mandatory statutory requirements is void.

A mortgage given for a purpose violative of public policy,¹ or failing to comply with mandatory statutes as to form and contents,² is void. Particular mortgages have been held not to be invalid as contrary to statute in respect of the maturity of the debt secured,³ the right of the mortgagee to take

sion as tenant's agent, and then later, when convinced that tenant was not going to repay him his money or return, took possession under his mortgage.—*Menefee v. Scally*, Mo. App., 247 S.W. 259.

Necessity for satisfaction of requirements of Bulk Sales Act see the C. J.S. title *Fraudulent Conveyances* § 482, also 27 C.J. p 884 notes 50-65.

89. Me.—*Williams v. Noyes, etc.*, Mfg. Co., 92 A. 482, 112 Me. 408, Ann.Cas.1916D 1224.

90. N.Y.—*Wilcox v. Howell*, 44 N. Y. 398.
11 C.J. p 490 note 74.

91. N.C.—*Case Threshing Mach. Co. v. Feezer*, 67 S.E. 1004, 152 N.C. 516.

92. Ga.—*Bedgood-Howell Co. v. Moore*, 51 S.E. 420, 123 Ga. 336.
Iowa.—*Hollingsworth v. Holbrook*, 45 N.W. 561, 80 Iowa 151, 20 Am. S.R. 411.

Tex.—*Bowser v. Cole*, 11 S.W. 1131, 74 Tex. 222.

93. Mich.—*Beyerle v. A. Fochtman Department Store*, 214 N.W. 214, 239 Mich. 256.
11 C.J. p 491 note 79.

Threat of arrest

(1) Where a sheriff, after levying an attachment on household goods late at night, threatened to remove such goods and to arrest the mortgagor if he interfered, a chattel mortgage executed under such threats was invalid.—*Beyerle v. A. Fochtman Department Store*, supra.

(2) However, where there was no threat of arrest, but merely a statement that the mortgagor was liable to fine and imprisonment, the evidence was insufficient to overturn

the mortgage for duress.—*Reichle v. Bentele*, 70 S.W. 919, 97 Mo.App. 52.

94. Mich.—*Van Dusen v. King*, 64 N.W. 9, 106 Mich. 133.
11 C.J. p 491 note 80.

Avoidance of levy

(1) Where the oppressive use of a writ of attachment prevents the mortgagor from exercising his free will, the mortgage is invalid.—*Beyerle v. A. Fochtman Department Store*, 214 N.W. 214, 239 Mich. 256.

(2) However, a note and chattel mortgage given to avoid lawful levy of execution on property not shown to be exempt and to avoid annoyance and humiliation resulting therefrom are valid and enforceable.—*Koeberle v. Coit*, 189 P. 727, 46 Cal.App. 641.

95. Neb.—*Iowa Sav. Bank v. Frink*, 92 N.W. 916, 1 Neb., Unoff., 14.
11 C.J. p 491 note 81.

96. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360.
11 C.J. p 491 note 84.

Independent consideration

An agreement by the mortgagee to refrain from prosecuting the mortgagor in consideration of the execution of the mortgage to secure a valid, existing debt will support the mortgage, particularly where the prosecution was for the violation of a void statute.—*Bankhead v. Shed*, 61 S.E. 425, 80 S.C. 253, 16 L.R.A., N.S., 971, 15 Ann.Cas. 308.

97. Me.—*Williams v. Noyes, etc.*, Mfg. Co., 92 A. 482, 112 Me. 408, Ann.Cas.1916D 1224.
11 C.J. p 491 note 82.

98. U.S.—*National City Bank v. Wagner*, Ill., 216 F. 473, 132 C.C.A. 533, certiorari denied 35 S.Ct. 199, 235 U.S. 698, 59 L.Ed. 431.

99. Me.—*Williams v. Noyes, etc.*,

Mfg. Co., 92 A. 482, 112 Me. 408, Ann.Cas.1916D 1224.

1. Cal.—*Simon Newman Co. v. Woods*, 259 P. 460, 85 Cal.App. 360.

Fraud on federal land bank

The policy of the government, in making loans through the federal land bank, is to assist debtors unable to meet their obligations by securing the creditor's agreement to scale down the indebtedness. Consequently, where the creditor agreed to scale down the indebtedness and release his security, a mortgage taken to secure the amount the creditor agreed to relinquish is void as against public policy.—*Jones v. McFarland*, Miss., 173 So. 296.

Mortgage executed contemporaneously with sale is not invalid, as there is no reason why a seller cannot execute a bill of sale for chattels and take back a mortgage to secure the purchase price.—*Voigt v. Ludlow Typograph Co., Ind.*, 12 N. E.2d 499.

2. Ala.—*Rice v. Garnett*, 84 So. 557, 17 Ala.App. 239, certiorari denied Ex parte Garnett, 85 So. 921, 204 Ala. 698.

Mortgagee held in money lending business so as to render mortgage void for failure to comply with statute.—*Rice v. Garnett*, supra.

3. Dependent on renewal affidavits

A statute, providing that the maturity of the debt secured by the mortgage shall not exceed three years from the filing of the mortgage for record, unless within ninety days after the expiration of the three years the mortgagor shall file a renewal affidavit, does not render a mortgage void ab initio because it secures an indebtedness due after the expiration of three years from

possession should he deem his security insecure,⁴ or the manner of foreclosure on default.⁵

§ 97. Partial Invalidity

Invalidity of a severable part does not invalidate the entire mortgage.

An unlawful severable provision in an otherwise valid mortgage invalidates only that particular part of the mortgage which contains the unlawful provision, and does not render the mortgage void in its entirety.⁶ Accordingly, in the absence of a statute to the contrary,⁷ a mortgage may be good to transfer title to a portion of the property described in it, although it is void as to other portions which it assumes to transfer,⁸ as where some of the property assumed to be covered by a mortgage cannot legally be made the subject thereof.⁹ A provision in a mortgage, however, containing a valid clause inseparably connected with an invalid clause is void in its entirety.¹⁰

Consideration. A mortgage given to secure notes, the consideration of which is in part unlawful, as forbidden by statute or by the common law, is void in its entirety.¹¹ However, there are cases holding that, where a mortgage is given to secure two separate debts, only one of which is unlawful, the mortgage may be enforced to the extent of the valid indebtedness.¹² Also, where two notes secured by mortgage are given for a consideration which is

in part unlawful, and the unlawful portion of the consideration is less than either of the notes, although there is authority to the contrary,¹³ it has been held that the holder may apply all the unlawful consideration to one of the notes and recover on the other.¹⁴

§ 98. Persons Who May Assert Invalidity

A third person cannot attack the validity of a mortgage unless he is a subsequent mortgagee, a purchaser from the mortgagor, or an attaching creditor. Fraud in procurement and duress are defenses personal to the mortgagor.

A third person cannot impeach the validity of a mortgage,¹⁵ unless he is a subsequent mortgagee,¹⁶ a subsequent purchaser from the mortgagor, see *infra* § 263, or a creditor who has laid hold of the property by an appropriate legal proceeding.¹⁷

Personal defenses. The right to attack the mortgage on the ground that it was procured by false representations is personal to the mortgagor.¹⁸ Likewise, the defense of duress is personal to the mortgagor, and cannot be raised by his creditors for the purpose of having the mortgage set aside.¹⁹

§ 99. Estoppel or Waiver as to Defects or Objections

A person may by his conduct waive, or be estopped to assert, the invalidity of a mortgage.

the time the mortgage is filed for record, its validity after the three years depending on the filing of a renewal affidavit in conformity with the act.—*Busch v. Tatar*, 271 Ill.App. 8.

4. Not illegal charge

A mere provision in a small loan mortgage, authorizing the lender to take possession of the mortgaged chattel should he deem his security insufficient or insecure, is not of itself an illegal charge within the meaning of statutes prohibiting excessive charges for such loans.—*Mason v. City Finance Co.*, 151 So. 521, 113 Fla. 73.

5. Provision held valid

Provision that chattel mortgage might be foreclosed in manner provided by law for foreclosure where manner of foreclosure was not specified in mortgage and consideration does not exceed \$500, did not render mortgage for greater sum invalid.—*First Nat. Bank v. Frazier*, 22 P.2d 325, 143 Or. 662.

6. Power of attorney

A power of attorney contained in a mortgage in violation of a statute does not invalidate the mortgage itself, provided it is otherwise valid, but merely renders the particular

provision containing the power of attorney invalid.—*Mason v. City Finance Co.*, 151 So. 521, 113 Fla. 73.

7. Purchase-money mortgages, under some statutes, used to secure the purchase money of anything other than that covered by the mortgage, are void.—*Duffey v. Shields*, 63 Cal. 332.

8. Wis.—Stradling v. Nelson, 202 N. W. 691, 186 Wis. 308.

11 C.J. p 491 note 91.
Partial invalidity in retention of possession with power of sale see *infra* § 207.

9. Ark.—Lewis v. Arnn, 206 S.W. 757, 136 Ark. 424.

11 C.J. p 428 note 39, p 491 notes 92, 93.
Subject matter generally see *supra* §§ 21-36.

Property not owned by mortgagor

The fact that it is attempted to embrace in a mortgage property not owned by the mortgagor at the time of the execution of the mortgage does not invalidate the mortgage as to property owned by the mortgagor at the time of its execution.—*Ruth v. Cox*, 291 P. 371, 134 Or. 200—11 C. J. p 491 note 91 [a].

10. Cal.—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.

11. Mass.—Brigham v. Potter, 14 Gray 522.

11 C.J. p 491 note 88.

12. Ark.—Atkinson v. Burt, 53 S.W. 404, 65 Ark. 316.

Vt.—Shaw v. Carpenter, 54 Vt. 155, 41 Am.R. 837.

13. Kan.—State v. Wilson, 80 P. 639, 84 P. 737, 73 Kan. 334, 117 Am.S.R. 479.

14. Miss.—Carradine v. Willson, 61 Miss. 573.

15. Neb.—Thies v. Weible, 254 N.W. 420, 126 Neb. 720.

11 C.J. p 491 note 94.

16. Minn.—Ellingboe v. Brakken, 30 N.W. 659, 36 Minn. 156.

Necessity of recording as against subsequent mortgagees see *infra* § 142.

Priorities as between mortgages see *infra* §§ 294-296.

17. Minn.—Ellingboe v. Brakken, *supra*.

Necessity of recording as against creditors see *infra* § 136.

18. Mich.—Soule v. Harrington, 97 N.W. 357, 135 Mich. 155.

19. Mo.—Marion Distilling Co. v. Ellis, 63 Mo.App. 17.

The mortgagor²⁰ or mortgagee²¹ may be estopped by his conduct to assert the invalidity of the mortgage. However, where a statute prescribing the essentials of a mortgage is enacted for the protection of the public, the mortgagor cannot, by estoppel, be prevented from asserting the invalidity of his mortgage, in that it fails to comply with the statute.²² One who has assumed the mortgage debt as a portion of the purchase price of chattels cannot assert informalities in the execution of the mortgage in order to relieve himself from liability to perform his agreement.²³

Waiver. It has been held that the mortgagor²⁴, or the creditors of the mortgagor²⁵ may waive the invalidity of the mortgage, as where the mortgagor renews the indebtedness for which the mortgage is security.²⁶

§ 100. Ratification of Voidable Mortgage

Examine Pocket Parts for later cases.

§ 101. Rescission

As a general rule, a party desiring to rescind a mortgage must place the other party in statu quo.

A party desiring to rescind a mortgage must, as a general rule, place the other party in statu quo;²⁷ but the necessity for surrendering the mortgage in-

strument to the mortgagor, as a condition to rescission, may be waived by the mortgagor.²⁸ The mortgagee must rescind in toto; he cannot affirm that part of the contract which is in his favor, and rescind the rest.²⁹

§ 102. Evidence

Although one claiming under a mortgage has the original burden of showing its validity, a mortgage in the hands of the mortgagee is presumptively valid, and the person asserting its invalidity has the burden of proof thereof by clear and convincing evidence.

One claiming under a mortgage, or basing an action thereon, has the original burden of showing every fact on which its validity depends.³⁰ There is a presumption, however, that a mortgage in the hands of the mortgagee is valid,³¹ and a mortgage duly executed, acknowledged, and filed is presumed to express the terms and purpose of the instrument in its true light.³² Consequently, the burden of proving the invalidity of a mortgage rests on the person who asserts it.³³ A mortgage which has been foreclosed must be presumed to have been valid.³⁴

Admissibility. As bearing on the question of fraud in securing the execution of a mortgage, evidence of the circumstances surrounding the transaction is admissible;³⁵ and, where duress is alleged,

20. Minn.—Jumiska v. Andrews, 92 N.W. 470, 87 Minn. 515.
11 C.J. p 491 note 2.

Character of property as personality

By giving a mortgage on personal property annexed to a freehold, the mortgagor estops himself to deny its character as personality.—Widick v. Phillips Petroleum Co., 49 P.2d 132, 173 Okl. 325, 104 A.L.R. 228—11 C.J. p 445 note 87, p 491 note 2 [a] (2).

Inability to discover fraud

In replevin to recover personality given as security for payment of note, defendant was not estopped to deny that note and mortgage were given without consideration where plaintiff was vice president of bank with which defendant dealt and defendant was unable by exercise of ordinary diligence of reasonable person of his ability to have discovered fraud practiced on him.—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473.

Partial payment and execution of renewal mortgages with additional security may constitute estoppel.—Ashby v. Shoptaw, 93 S.W.2d 136, 192 Ark. 550.

21. Kan.—Dendy v. Cobleskill First Nat. Bank, 91 P. 682, 76 Kan. 301.
11 C.J. p 492 note 3.

Acceptance of proceeds

The mere facts that the mortgagee suggests that the mortgagor borrow money and accepts a portion of the

proceeds of a second mortgage are insufficient to estop him to assert the invalidity of the second mortgage.—Fife v. Ohio Inv. Co., 100 N. E. 392, 52 Ind.App. 108.

Bank acting as agent for mortgagee cannot, as against subsequent mortgagee, question validity of mortgage.—Ohio Power Shovel Co. v. Bond, 267 Ill.App. 271.

22. S.C.—Rose v. Harlike, 48 S.E. 541, 69 S.C. 523.

23. U.S.—Pope v. Porter, C.C.Iowa, 33 F. 7.

24. Tex.—Davenport v. San Antonio Machine & Supply Co., Civ.App., 59 S.W.2d 207, error refused.

25. U.S.—Rockwell v. New York United Hotels, C.C.A.N.Y., 79 F.2d 81, certiorari denied Donahue v. Rockwell, 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.

Acceptance of inferior position

Where a creditor of the mortgagor has accepted a position even worse than that which the mortgage gives him, he thereby waives his right to attack the mortgage.—Rockwell v. New York United Hotels, supra.

26. Tex.—Davenport v. San Antonio Machine & Supply Co., Civ.App., 59 S.W.2d 207, error refused.

27. Ala.—Snead v. Scott, 62 So. 36, 182 Ala. 97.

11 C.J. p 492 note 8.

28. Ala.—Batson v. Alexander City Bank, 60 So. 313, 179 Ala. 490.

29. N.H.—Heath v. West, 28 N.H. 101.

11 C.J. p 492 note 10.

30. Mo.—State v. O'Neill, 52 S.W. 240, 151 Mo. 67.

31. S.C.—Ex parte Citizens' Bank of Fairfax, 119 S.E. 903, 126 S.C. 291.

32. Minn.—Summit Mercantile Co. v. Daigle, 178 N.W. 588, 146 Minn. 218.

33. W.Va.—Harris v. Coliver, 141 S. E. 791, 793, 105 W.Va. 174, citing *Corpus Juris*.

11 C.J. p 492 note 13.

Matters required to be proved

(1) Fraud or want of consideration.—Stotts v. Carney, 242 P. 675, 78 Colo. 472.

(2) That the execution of the mortgage was a mere pretense to deceive creditors.—Summit Mercantile Co. v. Daigle, 178 N.W. 588, 146 Minn. 218.

34. Wash. — Johnsen v. Pheasant Pickling Co., 24 P.2d 628, 174 Wash. 236, rehearing denied and amended 27 P.2d 587, 174 Wash. 236.

35. Mich.—Walsh v. Taitt, 105 N.W. 544, 142 Mich. 127.

the facts leading up to the transaction are admissible.³⁶ Evidence as to fraud must, however, be relevant to the issues presented.³⁷

Weight and sufficiency. The usual rules as to the weight and sufficiency of evidence in civil proceedings generally apply.³⁸

The proof must be clear and convincing to show a mutual mistake in the description of the property conveyed by a mortgage,³⁹ or in the debt secured;⁴⁰ and a like degree of proof is required to establish fraud or duress.⁴¹

§ 103. Questions of Law and Fact

The validity of a mortgage, where resort to extrinsic evidence is unnecessary, is a question for the court; but, on conflicting evidence, it is a question of fact for the jury.

Generally, where resort to extrinsic facts is unnecessary, the validity of a mortgage is a question of law for the court.⁴² On conflicting evidence, whether the execution of a chattel mortgage has been procured by fraud,⁴³ duress,⁴⁴ or misrepresentation⁴⁵ is a question of fact for the determination of the jury.

VII. CONSTRUCTION

A. IN GENERAL

§ 104. General Rules of Construction

In construing chattel mortgages the general rules as to the construction of contracts apply, the object being to uphold the mortgage and to give effect to the intention of the parties.

Chattel mortgages are governed by the rules of construction applicable to contracts generally.⁴⁶ Accordingly, the primary object in construing a chattel mortgage must be to ascertain the intention

36. S.C.—Riggs v. Wilson, 8 S.E. 848, 30 S.C. 172.

37. Cal.—Breuner Co. v. King, 98 P. 1077, 9 Cal.App. 271.

38. Establishment of validity

Undisputed evidence that a mortgage was acknowledged and recorded, and that it was offered and received in evidence without any objections, establishes its validity.—National Bond & Inv. Co. v. Zakos, 230 Ill.App. 608.

Evidence held sufficient

(1) To show acquiescence in, or waiver of, fraud.—Richter v. Schuett, 145 N.E. 402, 314 Ill. 127.

(2) To show that parties were engaged in a joint adventure and that mortgages given in pursuance thereof were valid.—Croft State Bank v. Girardey, 232 P. 1076, 117 Kan. 585.

Evidence held insufficient

(1) To establish want of sufficient mental capacity.—Walker v. Citizens' Nat. Bank of Okmulgee, 25 P.2d 68, 165 Okl. 97.

(2) To show want of consideration.—Stotts v. Carney, 242 P. 675, 78 Colo. 472.

(3) To show want of title in mortgagor. — Dworkin v. Weingarten Bros., 184 A. 419, 120 N.J.Eq. 25.

(4) To show that mortgage was given in settlement of criminal prosecution.

Cal.—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360.

Ga.—Kitchens v. Latimer, 95 S.E. 371, 22 Ga.App. 40.

(5) To show acquiescence in or waiver of fraud.—Bacon v. First Nat. Bank, 216 N.W. 274, 204 Iowa 887.

39. N.C.—White Co. v. Carroll, 61 S.E. 196, 147 N.C. 330.

Tenn.—Wright v. Market Bank, Ch. A., 60 S.W. 623.

40. Ky.—Hearn v. Lander, 11 Bush 669.

41. Minn.—Summit Mercantile Co. v. Daigle, 178 N.W. 588, 146 Minn. 218.

11 C.J. p 492 note 19.

Reason for rule

The reason for the rule is that formally executed written contracts will not under the law be lightly set aside or held as sham and fictitious.—Summit Mercantile Co. v. Daigle, supra.

Evidence held sufficient

(1) To show fraud.

Minn.—Farmers' & Merchants' Nat. Bank of Ivanhoe v. Przymus, 200 N.W. 931, 161 Minn. 85—Farmers' & Merchants' State Bank of Correll v. Kohler, 198 N.W. 413, 159 Minn. 35.

N.D.—First Nat. Bank v. Weiss, 211 N.W. 979, 54 N.D. 883.

11 C.J. p 492 note 19 [a].

(2) To sustain finding that mortgages were not executed under duress. — Rhodes v. Farmers' State Bank, Cathay, 226 N.W. 943; 58 N.D. 651.

Evidence held insufficient

(1) To show fraud.

Cal.—Koeberle v. Coit, 189 P. 727, 46 Cal.App. 641.

Colo.—Ramstetter v. MacGinnis, 68 P.2d 454, 100 Colo. 494—Stotts v. Carney, 242 P. 675, 78 Colo. 472.

Idaho.—West v. Prater, 67 P.2d 273, 57 Idaho 583.

Mich.—Burch v. Stringham, 177 N.W. 147, 210 Mich. 48.

Okl.—Bass Furniture & Carpet Co. v. Finley, 263 P. 130, 129 Okl. 40.

Or.—Yokota v. Lindsay, 242 P. 613, 116 Or. 641.

Tex.—Wallace v. Burson, Civ.App., 86 S.W.2d 803, error granted—Board v. Emerson-Brantingham Implement Co., Civ.App., 203 S.W. 421, error refused.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

(2) To show duress.

Cal.—Koeberle v. Coit, 189 P. 727, 46 Cal.App. 641.

Colo.—Walker v. Dearing, 63 P.2d 513, 100 Colo. 28.

Ga.—Swint v. Adams, 157 S.E. 249, 42 Ga.App. 705.

42. U.S.—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696.

43. Ala.—Sullivan v. Miller, 140 So. 606, 224 Ala. 395—Jernigan v. Cox, 74 So. 736, 15 Ala.App. 619.

11 C.J. p 492 note 20.

44. Ala.—Sullivan v. Miller, 140 So. 606, 224 Ala. 395.

45. Ala.—Sullivan v. Miller, supra—Moore v. Oneonta Motor Co., 137 So. 301, 223 Ala. 510.

46. U.S.—Coggin v. Hartford Accident & Indemnity Co., D.C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

The force and validity of mortgages and the transfer of title are, except as modified by statute, to be tested by the common law touching sales of personal property.—Atlantic Transp. Co. v. Alexander Shipping Co., 157 N.E. 725, 261 Mass. 1.

of the parties,⁴⁷ and, where such intention is clear and unambiguous, no rule of construction can defeat it,⁴⁸ since it is the duty of the court to enforce the mortgage as made, not to make a new mortgage.⁴⁹ The intention of the parties is to be gathered from the language employed by them,⁵⁰ and, unless there is ambiguity in such language, it is not permissible to look beyond the face of the mortgage.⁵¹ Matters suggested by the language of the mortgage, however, although ascertained by outside inquiries, are legally within its terms.⁵² The mortgage must be considered as a whole⁵³ and, unless entirely unavoidable,⁵⁴ every clause and provision of it must be given effect,⁵⁵ although immaterial and unassisting language may be ignored whenever necessary to a proper construction of the mortgage.⁵⁶ Where the meaning of the mortgage is not clear, it will be construed in the light of the surrounding circumstances,⁵⁷ such as the situation and conduct of the parties⁵⁸ and the subject matter and nature and purpose of the mortgage.⁵⁹

Where the good faith of the transaction surrounding the execution of a mortgage is not questioned, it is the aim of the courts to preserve and not to destroy the mortgage.⁶⁰ If a chattel mort-

gage is ambiguous and susceptible of different constructions, one of which would give an unreasonable and unjust effect to it, any other construction which is reasonable and consistent with its purpose and the meaning of its provisions will be adopted;⁶¹ and it should be strictly construed against the mortgagee,⁶² as it is usually made most favorably to him, because of his position to dictate terms on account of the necessities of the mortgagor.⁶³

Construing instruments together. Where there are two instruments which are parts of the same transaction, they must be construed together in order to determine the nature of the contract,⁶⁴ even though the mortgage bears a later date than the other instrument, at least where the evidence discloses an intention to make it a part of the same transaction.⁶⁵ Where, however, the mortgagor executes a subsequent instrument to which the mortgagee is not a party it will not be presumed that it was the mortgagor's intention to limit or change his liability to the mortgagee.⁶⁶

Preliminary agreements and negotiations. A written chattel mortgage supersedes all preliminary negotiations and agreements leading to its execu-

47. Idaho. — Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.
S.C.—Clowney v. Rivers, 123 S.E. 759, 129 S.C. 58.
11 C.J. p 492 note 22.

48. Iowa.—Chambers v. First State Bank & Trust Co. of Fort Dodge, 254 N.W. 309, 218 Iowa 63.

Mortgage held unambiguous

Iowa.—Chambers v. First State Bank & Trust Co. of Fort Dodge, supra.

49. Ind.—General Highways System v. Thompson, 155 N.E. 262, 88 Ind. App. 179, rehearing denied 156 N. E. 407, 88 Ind.App. 179.

50. Okl.—Ladd v. Ardmore State Bank, 143 P. 170, 48 Okl. 502.
11 C.J. p 493 note 24.

Meaning of words

Where the action is at law the mortgage must be considered as meaning what its words import.—Hare & Chase of Toledo v. Hoag, 161 N.E. 224, 27 Ohio App. 326.

51. U.S.—In re Sentenne & Green Co., D.C.N.Y., 120 F. 436.

52. Tex. — Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ.App., 65 S.W.2d 398.

53. Ala.—Winston v. Farrow, 40 So. 53.
11 C.J. p 492 note 23.

54. Ala.—Gernert v. Limbach, 50 So. 908, 163 Ala. 413.

55. Vt.—Wright v. Lindsay, 104 A. 148, 92 Vt. 335.

56. U.S.—In re Joe H. Moore Motor Co., D.C.Tex., 49 F.2d 292.

57. N.C.—Ferguson v. Twisdale, 49 S.E. 914, 137 N.C. 414.
11 C.J. p 493 note 25.

58. Mass.—Kilkus v. Shakman, 150 N.E. 186, 254 Mass. 274.
11 C.J. p 493 note 26.

59. Ala.—Winston v. Farrow, 40 So. 53.

N.C.—Ferguson v. Twisdale, 49 S.E. 914, 137 N.C. 414.

60. N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.

Should be sustained

In the absence of fraud, a mortgage should be sustained whenever there is an honest and substantial compliance with the law governing it.

Ariz.—Garner v. Arizona Egyptian Cotton Co., 197 P. 231, 22 Ariz. 318.
N.J.—American Soda Fountain Co. v. Stolzenbach, 68 A. 1078, 75 N.J. Law 721, 16 L.R.A., N.S., 703, 127 Am.S.R. 822.

61. Mass. — Pettis v. Kellogg, 7 Cush. 456.
11 C.J. p 493 note 28.

62. Ill.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403. See Kennedy Furniture Co. v. Griffin, 194 Ill.App. 530.
11 C.J. p 493 note 29.

In Alabama, however, a mortgage is construed most strongly against

the mortgagor.—Gernert v. Limbach, 50 So. 903, 163 Ala. 413—Johnson v. Buckhaults, 77 Ala. 276—Seay v. McCormick, 68 Ala. 549—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 608, 24 Ala.App. 202, reversed on other grounds 132 So. 611, 222 Ala. 239.

63. Mo.—Feller v. McKillip, 81 S.W. 641, 109 Mo.App. 61.

64. Ala.—Perkins v. Skates, 124 So. 514, 220 Ala. 216—Hodge v. Joy, 92 So. 171, 207 Ala. 198.

Fla.—Intertype Corporation v. Pulver, 132 So. 830, 101 Fla. 1177.

N.Y.—Walsh v. Gray, 212 N.Y.S. 230, 214 App.Div. 296.
11 C.J. p 493 note 33.

Instruments construed together and held not to vest mortgagees with power to run garage as retail business.—Terry v. Witherspoon, Tex. Civ.App., 255 S.W. 471, affirmed Witherspoon v. Terry, Com.App., 267 S.W. 973 — Terry v. Witherspoon, Tex.Civ.App., 239 S.W. 300.

To determine validity and priority

Deed, mortgage securing purchase price, and chattel mortgage on crop, contemporaneously executed, are to be construed together. — American Trust & Savings Bank v. Whitaker, Tex.Civ.App., 2 S.W.2d 356, error dismissed.

65. Ala.—Perkins v. Skates, 124 So. 514, 220 Ala. 216.

66. N.C.—Union Bank v. Redwine, 88 S.E. 378, 171 N.C. 559.

tion.⁶⁷

Recitals. A distinct recital of a particular fact in a chattel mortgage is to be taken as at least prima facie evidence of such fact.⁶⁸

The statutory provisions governing a chattel mortgage constitute a part of the mortgage and bind the parties;⁶⁹ and such provisions extend, not only to every instrument which is by its terms a mortgage, but also to every conveyance which is intended to operate as such.⁷⁰

Writing and printing. Where a mortgage is partly printed and partly written, the written matter controls that which is printed,⁷¹ but typewriting takes no precedence over handwriting.⁷²

§ 105. Evidence to Aid Construction

Examine Pocket Parts for later cases.

B. PARTIES AND DEBTS OR LIABILITIES SECURED

§ 107. Parties Secured

Generally, the intention of the mortgagor, as gathered from the mortgage determines what parties are secured thereby.

The question as to what parties are secured by the mortgage generally depends on the intention of the mortgagor as gathered from the language of

The admissibility of parol or extrinsic evidence to contradict or vary the terms of a mortgage is considered in the C.J.S. title Evidence §§ 922-923, also 22 C.J. p 1133 note 98-p 1135 note 18.

§ 106. Questions of Law and Fact

Unless resort must be had to extrinsic evidence to determine the intention of the parties, the construction to be given a chattel mortgage is a question of law.

The construction to be given a chattel mortgage is, when determined by facts apparent on its face, a question of law,⁷³ as, for example, questions as to property⁷⁴ or debt covered.⁷⁵ Where, however, it is necessary to resort to extrinsic evidence to ascertain the intention of the parties, the intention, as established by such evidence, may become a question of fact.⁷⁶

the mortgage instrument.⁷⁷ In the absence of fraud, however, a mortgage may be held for the security of a party not named in the instrument as mortgagee.⁷⁸ A chattel mortgage given to two or more persons to secure their demands is several and not joint.⁷⁹ Where a chattel mortgage contains an express covenant for further assurance to extend the

67. Ill.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292.
Tex.—*Zerr v. Howell*, Civ.App., 84 S.W.2d 867, error refused.
Vt.—*Paska v. Saunders*, 153 A. 451, 103 Vt. 204.

Negotiations as to property covered by mortgage

Where the evidence showed that before a chattel mortgage was executed there was correspondence between the parties with reference to the pledging of the earnings of the mortgaged property in payment of the principal and interest of the mortgage, but the mortgage made no provision for such payment, the mortgage superseded all negotiations leading to its execution, and therefore the earnings were not pledged to the payment of the mortgage.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292.

68. Iowa.—*Price v. Fertig*, 122 N.W. 814, 144 Iowa 178.
11 C.J. p 493 note 32.

69. Mich.—*Wilson v. Montague*, 24 N.W. 851, 57 Mich. 638.
Wash.—*A. H. Averill Mach. Co. v. Allbritton*, 97 P. 1082, 51 Wash. 30.

70. N.J.—*Dunham v. Cramer*, 51 A. 1011, 63 N.J.Eq. 151.

71. Iowa.—*Chambers v. First State Bank & Trust Co. of Fort Dodge*, 254 N.W. 309, 218 Iowa 103.
11 C.J. p 493 note 27.

Typewriting

Where there is a conflict between typewritten clauses and those appearing in the printed blank, the typewriting prevails. — *Hagen v. Dwyer*, 162 N.W. 699, 36 N.D. 346.

72. Iowa.—*Chambers v. First State Bank & Trust Co. of Fort Dodge*, 254 N.W. 309, 218 Iowa 63.

73. Okl.—*First Nat. Bank v. Devore*, 234 P. 734, 110 Okl. 283.
S.C.—*Clowney v. Rivers*, 123 S.E. 759, 129 S.C. 58.
11 C.J. p 508 note 45.

74. Iowa.—*Chipman v. Weiny*, 84 N.W. 905, 112 Iowa 702.
11 C.J. p 509 note 46.
Sufficiency of description see supra § 71.

75. Ga.—*Skinner v. Elliott*, 87 S.E. 759, 17 Ga.App. 511.

76. Mo.—*White v. Meiderhoff*, App., 3 S.W.2d 1031.
S.C.—*Clowney v. Rivers*, 123 S.E. 759, 129 S.C. 58.
11 C.J. p 509 note 48.

Questions held for jury

(1) Whether a mortgage of crops was intended to cover cotton there-after accruing to mortgagor as rent from crops grown by his tenants.—*Clowney v. Rivers*, supra.

(2) Whether purported mortgage secured defendant's note.—*Bruce v. Kays*, 1 S.W.2d 214, 222 Mo.App. 77.

(3) Whether mortgagees of garage

in possession under bill of sale or contract with mortgagor were to conduct business as going concern or sell it as whole.—*Witherspoon v. Terry*, Tex.Com.App., 267 S.W. 973, affirming *Terry v. Witherspoon*, Civ. App., 255 S.W. 471.

77. Mich.—*World Mfg. Co. v. Hamilton-Kenwood Cycle Co.*, 82 N.W. 523, 123 Mich. 620.
11 C.J. p 494 note 35.

78. Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

Reason for rule is that the provisions of the mortgage are not necessarily personal to the mortgagee named.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, supra.

Mortgage in trust for creditors

Where a chattel mortgage was executed in favor of trustees for the benefit of creditors of the mortgagor, the creditors could properly be regarded as beneficiaries of the trust, although they were not named as parties in either the mortgage or trust instrument.—*In re Pilot Radio & Tube Corporation*, D.C.Mass., 5 F. Supp. 453, affirmed, C.C.A., 72 F.2d 316, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L. Ed. 680.

79. Neb.—*Skinner v. Pawnee City*

lien to after-acquired goods, and a new mortgage is executed on after-acquired goods to one of the mortgagees to secure a separate debt, it inures as additional security to the original mortgage.⁸⁰ A mortgage given to secure the performance of a contract inures to the benefit of all persons interested in the contract.⁸¹

§ 108. Debt or Liability Secured

A mortgage is security only for such demands or indebtednesses as are within the contemplation of the parties at the time of its execution.

It is a well recognized rule of construction that a mortgage is security only for such demands or indebtednesses as are in the contemplation of the parties at the time of its execution;⁸² but where, as is usually the case, a mortgage is given to secure the payment of money the language of the mortgage is ordinarily so construed as to enable it to cover all obligations from the mortgagor to the mortgagee which were intended to be secured.⁸³ While a round sum secured by a chattel mortgage may be shown to be made up of certain specific items of liability due the mortgagee from the mortgagor,⁸⁴ where the mortgage is security for all sums due the mortgagee, it is immaterial whether the balance due is considered as one debt or as several debts.⁸⁵ The fact that a definite sum is mentioned as the consideration for the execution of the mortgage does

not limit the amount of the debt secured thereby.⁸⁶

If the mortgage fails to specify what portion of a debt it secures, it is presumed to have been given to secure the part that is due.⁸⁷ Any presumption that a chattel mortgage covers a particular debt is rebutted by the fact that such debt was included in a subsequent mortgage on other property.⁸⁸ Except as restrained by the parol evidence rule, aliunde proof may be received to identify the indebtedness or to show what is in fact secured by the mortgage.⁸⁹

§ 109. — Maturity of Debt

In the absence of any stipulation as to the time of payment, the mortgage must be paid within a reasonable time; but a mortgage securing an existing debt is due as soon as given.

When no time is specified in a mortgage for the performance of the obligation on which it is conditioned, the law will require it to be performed within a reasonable time;⁹⁰ but where the mortgage secures an existing debt and no time for payment is specified it is due as soon as given.⁹¹ In case of irreconcilable conflict between the mortgage and the note, as to the time when the note is payable the date of the note will govern.⁹² Where the last day of grace on the note secured by the mortgage is Saturday, there is no breach until the next Monday.⁹³

First Nat. Bank, 80 N.W. 42, 59 Neb. 17.

11 C.J. p 494 note 36.

80. Wis.—Hunter v. Bosworth, 43 Wis. 583.

11 C.J. p 494 note 37.

81. Mich.—Jenks v. Wells, 51 N.W. 636, 90 Mich. 515.

82. Okl.—First Nat. Bank v. Gillam, 273 P. 261, 134 Okl. 237.

11 C.J. p 494 note 39.

General recitals

(1) The fact that a mortgage given to secure a specifically described indebtedness also contains a general expression that it is to secure all other indebtedness of the mortgagor to the mortgagee will not render it a security for a prior or contemporaneous indebtedness not within the contemplation of the parties at the time of the execution of the mortgage.

Ark.—First Nat. Bank v. Corning Bank & Trust Co., 268 S.W. 606, 168 Ark. 17.

Okl.—Farmers Nat. Bank of Cherokee v. De Fever, 61 P.2d 245, 177 Okl. 561—American Nat. Bank v. Hensley, 39 P.2d 34, 170 Okl. 109—First Nat. Bank v. Gillam, 273 P. 261, 134 Okl. 237.

(2) Where a chattel mortgage covered advances made at the time of the execution of the mortgage, a clause extending it to any other debt to become due before payment did not cover rents payable in kind, the parties having treated the rent as a distinct demand from the mortgage.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

83. S.C.—Davis v. Barwick, 70 S.E. 1007, 88 S.C. 355.
11 C.J. p 494 note 40.

Particular mortgages construed

(1) A provision in a lease that "all crops growing . . . shall be security for all sums due or to become due from party of the second part to party of the first part, as evidenced by book account or note held by the party of the first part," adequately refers to and covers any indebtedness of the lessee owing to the lessor at the time of the execution of the lease, which was then evidenced by note or book account held by the lessor.—Dorman v. Crooks State Bank, 225 N.W. 661, 668, 55 S. D. 209, 64 A.L.R. 614.

(2) Where a chattel mortgage recited that it was executed to secure a note of even date, but did not refer specifically to a book account,

which was the only indebtedness then existing, it was held that the mortgage was intended to secure the book account and also any future advances that might be made, it appearing that the note had not been executed.—Myers v. Shain Lumber Co., 10 S.W.2d 20, 178 Ark. 174.

84. Mass.—Hills v. Farrington, 6 Allen 80.

85. Cal.—Lawrence v. Oakes, 3 P.2d 334, 117 Cal.App. 32.

86. Mo.—Kidd v. Mason, 125 S.W. 559, 141 Mo.App. 327.

87. Vt.—Calkins v. Clement, 54 Vt. 635.

88. Ky.—Berryman v. Brumback, 7 Ky.Op. 366.

89. Ga.—Skinner v. Elliott, 87 S.E. 759, 17 Ga.App. 511.

90. Mass.—Avery v. Bushnell, 123 Mass. 349.

11 C.J. p 495 note 46.

Necessity of stating time for maturity of debt see supra § 72.

91. Mich.—McGraw v. Bishop, 48 N. W. 167, 85 Mich. 72.

11 C.J. p 495 note 47.

92. Mich.—Ferris v. Johnson, 98 N. W. 1014, 136 Mich. 227.

93. Ill.—Arnold v. Stock, 81 Ill. 407.

An agreement between the parties to extending the time of payment of the note secured does not render other provisions of the note inoperative.⁹⁴

§ 110. — Future Advances or Indebtedness

Where such is the intention of the parties, a chattel mortgage will stand as security for future indebtedness of the mortgagor to the mortgagees.

A chattel mortgage will stand as security for a future indebtedness of the mortgagor to the mortgagee if that is the intention of the parties,⁹⁵ but, in order for it so to operate, there must be an unequivocal agreement to that effect.⁹⁶ Where the mortgage contains such an agreement, it will secure only those advances which were within the contemplation of the parties at the time the mortgage was executed;⁹⁷ but an express stipulation in the mortgage that future transactions shall be based on the same security is broad enough to cover every transaction by which the mortgagor becomes indebted to the mortgagee,⁹⁸ and such an instrument

has been held to secure advances made after the maturity of the mortgage.⁹⁹ If, however, the time within which advances are to be made is limited by the terms of the mortgage, the instrument secures no advances made after expiration of that time.¹ A mortgage given to secure a note executed as a basis of future credit to the mortgagor, nothing being then due, and also to secure future indebtedness, will not secure debts incurred after the payment of the indebtedness contemplated at the time the mortgage was executed;² but a mortgage given to secure a present indebtedness and also future advances operates as security by way of a continuing guaranty for an indebtedness incurred after a date when there is a balance in favor of the mortgagor, if the latter fails to have the mortgage canceled.³

Amount and character of advances secured. A mortgage to secure future advances must, as to the advances which are secured, be construed in accordance with the general terms of the contract, the apparent intention of the parties and the general trade usage, if any.⁴ The sum specified in a mortgage se-

94. Tex.—Knudsen v. J. I. Case Co., Civ.App., 86 S.W.2d 794.

95. Iowa.—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 196 Iowa 1205.

S.C.—Behrmann v. Brown, 118 S.E. 273, 122 S.C. 39.

Tex.—H. W. Williams & Co. v. Bell, Civ.App., 8 S.W.2d 745.

Wash.—Shoemaker v. White-Dulaney Co., 230 P. 162, 131 Wash. 347, affirmed 232 P. 695, 131 Wash. 347, 132 Wash. 699.

11 C.J. p 495 note 51.

Validity of mortgage to secure future advances see supra § 38.

Mortgages held to secure future advances

(1) A mortgage securing the payment of a note due October 15, 1915, "and all such other sums as I may owe him on account notes, or otherwise, on or after the said 15th day of October, 1915."—Nix v. Hopper, 90 So. 35, 18 Ala.App. 240.

(2) A mortgage executed to secure a particular amount presently due and "any other sum . . . [mortgagor] might owe payee before the law day."—Farmers' Union Warehouse Co. v. Barnett Bros., 116 So. 810, 22 Ala.App. 524, certiorari denied 118 So. 286, 218 Ala. 165.

(3) A mortgage executed "as security for the performance . . . of each and every obligation and the payment . . . of all sums to be paid . . . under and pursuant to a contract."—Parkford v. Union Drilling & Petroleum Co., 5 P.2d 440, 443, 118 Cal.App. 538.

(4) A mortgage to secure "all

amounts . . . expended by the mortgagees . . . for the maintenance or transportation of the said property or for any purpose connected therewith."—Shoemaker v. White-Dulaney Co., 230 P. 162, 131 Wash. 347, affirmed 232 P. 695, 131 Wash. 347, 132 Wash. 699.

Under statute providing that "a mortgage given to secure advances for the purpose of making and gathering crops, shall embrace and cover crops before the same are planted or growing of such mortgagor, when it is so stipulated therein, within the limit of the calendar year such crops may be planted," the mortgage need not be actually executed within the calendar year within which the crops are planted or growing, but the mortgage must be one securing advances for the purpose of making and gathering the crops only where such advances are made during the calendar year within which the crops may be planted. Accordingly, a crop mortgage executed on December 20, although reciting that it was to secure advances for making crop of present year, must be construed as securing advances for crop during following year.—J. S. Cowart & Son v. Tallaferro, 163 S.E. 271, 272, 45 Ga.App. 93.

96. Wash.—Inland Trading Co. v. Edgecombe, 106 P. 768, 57 Wash. 257.

11 C.J. p 495 note 52.

Failure to fill blanks

Failure to fill in the blanks in the future advances clause of a deed in which all the other blanks are filled

indicates an intention that that clause should not become operative. —Lore v. Smith, 133 So. 214, 161 Miss. 579.

97. Cal.—Moran v. Gardemeyer, 23 P. 6, 82 Cal. 96.

11 C.J. p 495 note 55.

Payments by mortgagee held not advancements

Payments made by a mortgagee for fish purchased from the mortgagor were not advancements within the meaning of a chattel mortgage covering future advances.—Wakabashi v. Stafford Packing Co., 200 P. 392, 186 Cal. 632.

98. Mo.—Holmes v. Strayhorn-Hutton-Evans Commn. Co., 81 Mo.App. 97.

99. Ala.—Hill v. Nelms, 5 So. 796, 86 Ala. 442.

11 C.J. p 496 note 57.

1. Ark.—Word v. Cole, 183 S.W. 757, 122 Ark. 457.

11 C.J. p 496 note 58.

2. Tex.—Cantrell v. Cawyer, Civ. App., 162 S.W. 919—John E. Morrison Co. v. Butler, Civ.App., 158 S.W. 1185.

11 C.J. p 496 note 59.

3. Cal.—Frank H. Buck Co. v. Buck, 122 P. 466, 162 Cal. 300.

4. "Picking advances" and "ginning advances" included money advanced to pay wages of weigher, cost of sacks, renting sleeping tents for pickers, and transporting cotton.—Schumann v. California Cotton Credit Corporation, 286 P. 1068, 105 Cal. App. 136.

curing future advances has been held to be the limit of the amount of advances which the instrument will secure,⁵ although as between the parties such a mortgage is valid for whatever advances may be made by the mortgagee and accepted by the mortgagor, if it appears that it was the intention of the parties thereto that such additional amount should be secured by the mortgage.⁶ Also, where the mortgage is to secure a stated amount "more or less" it is not limited to the amount stated.⁷ Where the mortgage is to secure advances of goods to a certain amount, and the price at which the goods are to be furnished is not stated, it will be implied that the price is to be what the goods are reasonably worth at the time and place of the sale.⁸

A mortgage providing that it shall secure in addition to the debt mentioned all other amounts which may thereafter become due will cover only debts of the general kind of those specifically secured,⁹ but an express provision that the mortgage shall secure future indebtedness of any kind will cover any character of debt that the mortgagor may owe the mortgagee during the existence of the mortgage.¹⁰

Advances at option of mortgagee. Although future advances are optional with the mortgagee, he will be protected beyond the sum which he has actually advanced at the date when a junior lien is placed on record, if made without actual notice of the second encumbrance.¹¹ Where the amount and kind of the advances are at the option of the mortgagee, it has been held that he cannot exercise such options arbitrarily;¹² but the failure of the mortga-

gee to advance all that he promised does not, in the absence of evidence that the mortgagor has suffered damage, relieve the mortgagor from liability for advances actually made.¹³

§ 111. — Payment of Debt

Examine Pocket Parts for later cases.

§ 112. — Performance of Contract or Other Obligation

The intention of the parties as expressed in the mortgage determines the extent of the security afforded by a mortgage to secure the performance of a contract by the mortgagor.

The extent of the security afforded by a mortgage to secure the performance of a contract or other obligation by the mortgagor depends on the intention of the parties as expressed in the mortgage instrument.¹⁴ Unless the language of the mortgage is clear and unambiguous, it will not ordinarily be construed to secure the performance of a contract or obligation other than to pay money as stipulated in the mortgage.¹⁵ A mortgage given to secure the performance of a contract which is subsequently broken by the mortgagee is unenforceable by him.¹⁶

§ 113. — Indemnity Mortgages

The intention of the parties determines whether the mortgage secures the mortgagee against his liability as surety for the mortgagor.

Whether the mortgage secures the mortgagee against his liability as surety for the mortgagor depends on the intention of the parties.¹⁷

5. *Ariz.*—Security Trust & Savings Bank v. June, 1 P.2d 970, 38 *Ariz.* 513.

Ky.—Bondurant v. Tally's Trustee, 229 S.W. 377, 191 Ky. 202. 11 C.J. p 496 note 61.

6. *Tex.*—G. M. Carleton Bros. & Co. v. Bowen, Civ.App., 193 S.W. 732.

Increasing amount by oral agreement
The parties may thereafter increase the stipulated amount by oral agreement, and such agreement as between the parties thereto will be enforced where the mortgage provides that the mortgagee may, at his option, furnish an additional amount and he does so; but, in the absence of proof to the contrary, such oral agreement will be presumed to have been made after the amount stipulated in the mortgage has been furnished.—G. M. Carleton Bros. & Co. v. Bowen, supra.

7. *Miss.*—Candler v. Cromwell, 57 So. 554, 101 *Miss.* 161.

8. *Miss.*—Paxton v. Meyer, 58 *Miss.* 445.

9. *Ark.*—Page v. American Bank of Commerce & Trust Co., 269 S.W. 561, 167 *Ark.* 607.

11 C.J. p 496 note 63.

10. *Tex.*—Freiberg v. Magale, 7 S.W. 684, 70 *Tex.* 116.

11 C.J. p 496 note 64.

11. *U.S.*—The Seattle, Wash., 170 F. 284, 95 C.C.A. 480.

12. *S.C.*—McNeill v. Conyers, 61 S.E. 1063, 80 S.C. 571.

11 C.J. p 496 note 66.

13. *S.C.*—McNeill v. Conyers, supra.

14. *Or.*—McNeff v. Southern Pac. Co., 120 P. 6, 61 *Or.* 22.

11 C.J. p 496 note 70.

15. *U.S.*—Lillenthal v. McCormick, Or., 117 F. 89, 54 C.C.A. 475.

11 C.J. p 496 note 71.

Performance of marketing contract
Provisions in a mortgage that mortgagee should have right to market mortgaged crops and receive therefor commissions, and that the mortgagor should purchase supplies from the mortgagee, etc., were in-

corporated into the instrument only for the purpose of protecting and preserving the security for payment of the note, and were separable from the mortgage contract proper, so that, upon payment of the note which the mortgage was given to secure, the mortgage was discharged, and would not continue in existence as security for the performance of the marketing contract.—Hayashi v. Pacific Fruit Exchange, 186 P. 174, 43 *Cal.App.* 677.

16. *Me.*—Williams v. Dunn, 115 A. 276, 120 *Me.* 506.

17. *Tex.*—Warren v. Johnson, Civ. App., 218 S.W. 104, error refused. 11 C.J. p 497 note 73.

Parties secured see supra § 107. Substitution of new notes as evidence of mortgage debt see infra § 115.

Particular mortgages construed

(1) Where a mortgage is in fact given to secure the mortgagee against his liability as surety on the mortgagor's note, the subsequent

§ 114. — Fees and Costs

The intention of the parties governs in determining whether costs and expenses paid or incurred by the mortgagee are secured by the mortgage.

In determining whether costs and expenses paid or incurred by the mortgagee are secured by the mortgage, the intention of the parties governs, as in case of other debts and liabilities.¹⁸ Of course, costs unnecessarily incurred by the mortgagee are not secured by the mortgage.¹⁹

§ 115. — Extension to Other Debts or Liabilities

As a general rule, subject to some qualifications, a chattel mortgage to secure a specific expressed indebtedness cannot be extended to secure another and different indebtedness.

As a general rule, a chattel mortgage given to secure a certain indebtedness therein expressed cannot be extended to become a lien for another and different indebtedness,²⁰ at least as against subsequent purchasers or encumbrancers.²¹ However, the substitution of new notes as evidence of the mortgage debt does not render a mortgage open to

the objection that it has been extended to cover a new indebtedness,²² especially where such a substitution was contemplated at the time of giving the mortgage.²³

On the other hand, where there has been a compliance with any controlling statute as to the varying of written instruments,²⁴ the parties may agree that the mortgage shall stand as security for a different debt from that described.²⁵ As between the parties, such an agreement is valid as a mortgage, although not executed with the formalities required as to such an instrument,²⁶ but it cannot be enforced to the detriment of creditors or junior encumbrancers.²⁷ The parties cannot, however, by a subsequent parol agreement, extend the mortgage so as to secure debts not contemplated at the time the instrument was executed,²⁸ although such an agreement may amount to a new mortgage in parol,²⁹ and it has been held, where the consideration of a mortgage and note has failed, that the mortgage may be retained, under a parol agreement, as security for future advances to be made under a new agreement.³⁰

substitution of the mortgagee's personal note for that of the mortgagor entitles the mortgagee to the benefit of the mortgage security.—*Patrisco v. Nolan's Point Amusement Co.*, 159 A. 620, 10 N.J.Misc. 397.

(2) An indemnity mortgage expressly authorizing the surety to take possession and sell the mortgaged property should a judgment be rendered against the mortgagor and he fail to appeal, does not authorize a seizure and sale in the event of a judgment against the mortgagor from which he does appeal.—*Warren v. Johnson*, Tex.Civ.App., 218 S.W. 104, error refused.

(3) Other mortgages construed see 11 C.J. p 497 note 73 [a].

18. U.S.—*In re Liberty Doll Co.*, D.C.N.Y., 242 F. 695.
11 C.J. p 497 note 74.

Right of mortgagee to collect attorney's fee in:

Foreclosure action see *infra* § 431.
Possessory action see *infra* § 245.

Particular mortgages construed

(1) A chattel mortgage providing that, in the event of default and sale, the mortgagee might retain interest and "all charges touching the same and the keeping and sale thereof," did not entitle the mortgagee to counsel fees.—*In re Murcott Steel Products Co.*, C.C.A.N.Y., 294 F. 84.

(2) A chattel mortgage given as security for advances under a contract providing for the payment of all reasonable attorney's fees entitles a mortgagee, who was compelled

to defend the validity of the mortgage in bankruptcy proceedings, to a reasonable attorney's fee.—*In re Liberty Doll Co.*, D.C.N.Y., 242 F. 695.

(3) Other mortgages construed see 11 C.J. p 497 note 74 [a].

19. Wyo.—*H. E. Wright & Co. v. Douglas*, 183 P. 786; 26 Wyo. 365.

20. Kan.—*Sowder v. Lawrence*, 281 P. 921, 129 Kan. 135.

N.Y.—*Central Trust Co. of Rochester v. Rochester Foundation Co.*, 231 N.Y.S. 422, 133 Misc. 309.

Okl.—*Kyser v. Norris-Williams & Co.*, 41 P.2d 644, 645, 171 Okl. 6, citing *Corpus Juris*.

S.D.—*Aalseth v. Simpson*, 231 N.W. 289, 57 S.D. 118.

Wash.—*Inland Trading Co. v. Edgcombe*, 106 P. 763, 57 Wash. 257.
11 C.J. p 497 note 76.

Partnership notes

Chattel mortgage to secure notes already signed by named partner did not cover notes signed by another partner.—*State Bank of Wheatland v. Bagley Bros.*, 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.

21. Kan.—*Sowder v. Lawrence*, 281 P. 921, 129 Kan. 135.

22. Conn.—*Pond v. Clarke*, 14 Conn. 334.

23. N.Y.—*McKinster v. Babcock*, 26 N.Y. 378, reversing 37 Barb. 265.

24. In South Dakota

(1) Under a statute applicable to written contracts generally, the provisions of a chattel mortgage can be extended to items of indebtedness

not covered by the writing only by a contract in writing or by an executed oral agreement.—*Aalseth v. Simpson*, 231 N.W. 289, 57 S.D. 118.

(2) A grant of property to secure a debt cannot be said to be executed within the meaning of such a statute until actual application of the property or its proceeds in payment of the debt has been made.—*Aalseth v. Simpson*, *supra*.

25. Kan.—*Sowder v. Lawrence*, 281 P. 921, 129 Kan. 135.

Mont.—*Union Bank & Trust Co. v. Wieck*, 29 P.2d 384, 96 Mont. 132.

26. Mont.—*Union Bank & Trust Co. v. Wieck*, *supra*.

27. Kan.—*Sowder v. Lawrence*, 281 P. 921, 129 Kan. 135.

11 C.J. p 497 notes 78, 79.

28. Ark.—*First Nat. Bank of Corning v. Corning Bank & Trust Co.*, 268 S.W. 606, 168 Ark. 17.

Okl.—*First Nat. Bank v. Gillam*, 273 P. 261, 134 Okl. 237.

Wis.—*In re Dunlap's Estate*, 199 N.W. 387, 184 Wis. 345.

11 C.J. p 495 note 54.

29. Ala.—*Hill v. Nelms*, 5 So. 796, 86 Ala. 442.—*Marcus v. Robinson*, 76 Ala. 550.

Iowa.—*Wright v. Voorhees*, 108 N.W. 753, 131 Iowa 408, 117 Am.S.R. 429, 9 Ann.Cas. 1149.

Okl.—*First Nat. Bank v. Gillam*, 273 P. 261, 134 Okl. 237.

Tex.—*Groos v. Iowa Park First Nat. Bank*, Civ.App., 72 S.W. 402.

30. N.D.—*Scofield Impl. Co. v. Minot Farmers' Grain Assoc.*, 154 N.W. 527, 31 N.D. 605.

Expenses. Money properly and necessarily paid by a chattel mortgagee to protect his rights under the mortgage becomes a part of, or of equal dignity with, the secured debt.³¹

C. PROPERTY CONVEYED

§ 116. General Rules of Construction

In determining what property is included within the description of a chattel mortgage, the intention of the parties is controlling, and such intention is to be gathered from the words used in the instrument, giving them their ordinary signification if technical terms are not therein employed, and from the surrounding circumstances where necessary.

In determining what property is included by the description of a chattel mortgage, the intention of the parties will govern, as ascertained from the entire instrument,³² and from the words which the parties have employed, considered, when necessary, with reference to facts and circumstances surrounding the transaction.³³ If possible, that construction should be given which will admit of some meaning being given to each of the words used.³⁴

General and particular description. While the rule is not conclusive,³⁵ ordinarily, if words of gen-

eral description are followed by a specific and minute description, the latter limits the former to the property particularly described.³⁶ Under the doctrine of ejusdem generis, where general words follow the enumeration of particular property in a chattel mortgage, the general words will be so construed as to include property of the same kind and nature as that particularly described,³⁷ and to exclude property falling within a different category.³⁸ This rule is, however, not conclusive³⁹ and it should not be resorted to unless the meaning of the language used is obscure or doubtful.⁴⁰

Construction in connection with other instruments. An inventory or schedule of the mortgaged property referred to in the mortgage is to be construed in connection with the description contained in the mortgage,⁴¹ and may extend the mortgage to property not specifically described therein,⁴² or may

31. Mo.—Munday v. Britton, 222 S. W. 504, 205 Mo.App. 153.

Feed bill paid by mortgagee to get possession of mortgaged animals from third person hired by mortgagor to care for them was not a lien on animals where they were not depreciating in value so as to justify mortgagee in declaring a default; but, if they were depreciating in value to such an extent that possession by mortgagee would have been necessary to protect his rights, the amount so paid would become a part of secured debt or be of equal dignity therewith and be a lien on the property.—Munday v. Britton, supra.

Insurance

Where a chattel mortgage requires the mortgagor to keep the property insured for the benefit of the mortgagee, upon the failure or refusal of the mortgagor to effect such insurance the mortgagee or his assignee may properly procure it and obtain reimbursement for its cost as a part of the mortgage debt. Where, however, the mortgage contains no covenant to insure, the mortgagor is not liable therefor.—James B. Drake & Sons v. Nickerson, 121 A. 86, 123 Me. 11—11 C.J. p 498 note 34—42 C.J. p 762 notes 13—15.

Taxes

(1) A statute giving a mortgagee of real estate a lien for taxes paid by him is not applicable to a chattel mortgage, and taxes paid by the mortgagee cannot be added to the debt. — Dunsmuir v. Port Angeles Gas, etc., Co., 63 P. 1095, 24 Wash. 104.

(2) However, under statutes imposing a tax on sales of commodities such as electricity, the tax is considered a part of the purchase price and is secured by a mortgage executed to secure payment of the purchase price.—Arkansas Power & Light Co. v. Roth, 104 S.W.2d 207, 193 Ark. 1015.

32. Iowa.—Johnson v. Turnholt, 203 N.W. 715, 199 Iowa 1331.
Vt.—Sargent, Osgood & Roundy Co. v. Kelly, 132 A. 135, 99 Vt. 350.
11 C.J. p 498 notes 86, 87.

Curing defective description see supra § 70.
Sufficiency of description in general see supra § 57.

33. Wash.—Mott v. Payne, 191 P. 844, 112 Wash. 18.
11 C.J. p 498 notes 88, 89.

34. Ala.—Comer v. Lehman, 6 So. 264, 87 Ala. 362.

35. S.D.—Smith v. Donahoe, 83 N. W. 264, 13 S.D. 334.
11 C.J. p 498 note 92.

Conveyance of all debtor's mules under general description in chattel mortgage is not affected by subsequent specific designation of twelve mules.—Abernathy v. Worthy, 129 So. 472, 221 Ala. 527.

Mortgage of "live stock"

A mortgage, describing property as "live stock," including steers, cows, etc., would cover horses and mules, although not enumerated.—Lee County Sav. Bank v. Spodgrass Bros., 166 N.W. 680, 132 Iowa 1387.

36. Tex.—D. S. Cagle & Co. v. South-

ern Rice Growers' Ass'n, Civ.App., 218 S.W. 78.

11 C.J. p 498 note 91.

Property situated in particular county

A mortgage on a printed form prepared by mortgagee covering mortgagor's property "situated in Elmore county . . . to wit, all its live stock, wagons . . . and all personal property of every kind and description," did not cover property in another county.—Brooks v. Bank of Wetumpka, 98 So. 907, 210 Ala. 689.

37. Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

Mortgage covering sugar beets and all crops of every nature and description grown on land was not limited to sugar beets.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., supra.

38. N.J.—Camden Safe Deposit & Trust Co. v. Cape May Illuminating Co., 140 A. 672, 102 N.J.Eq. 351.
N.D.—Gaustad v. Nygaard, 256 N.W. 230, 64 N.D. 785.

39. N.H.—Sumner v. Blakslee, 59 N. H. 242, 47 Am.R. 196.

40. Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

41. N.J.—Page v. Kendig, Ch., 7 A. 878.

11 C.J. p 500 note 18.

Sufficiency of description by reference to other instruments see supra § 58.

42. N.J.—Page v. Kendig, supra.
11 C.J. p 500 note 19.

limit it to the property specifically described in the schedule.⁴³

In a proper case, descriptions of the mortgaged property in successive mortgages may be considered in determining what property is included in the mortgage.⁴⁴ However, although the description of property in successive mortgages is substantially the same, they may be held to cover different property by reason of the fact of their discrepancy in details of description,⁴⁵ although where several mortgages are given on the same property, a slight variance in the description of the property in the last mortgage will not limit its operation, when it is apparent that the parties intended to include the property described in the prior mortgages.⁴⁶ The fact that certain exemptions are expressly reserved in a mortgage does not affect a later mortgage containing no provision as to exemptions.⁴⁷

Particular words. As a general rule, the words used are to be understood in their usual and ordinary meaning,⁴⁸ in order to sustain the instrument,⁴⁹ and are not to be construed in a frivolous or ineffectual sense.⁵⁰ However, words mutually

employed by the parties without regard to their proper and logical meaning will be construed according to the manifest intention of the parties.⁵¹ The general rule is applied to such terms as apparatus,⁵² appendages,⁵³ appliances,⁵⁴ appurtenances,⁵⁵ cattle,⁵⁶ equipment,⁵⁷ fixtures,⁵⁸ foundry,⁵⁹ furniture,⁶⁰ improvements,⁶¹ live stock,⁶² machinery,⁶³ supplies,⁶⁴ sawmill,⁶⁵ separator,⁶⁶ and threshing machine.⁶⁷

Going business. Where it is the evident intention of the parties to mortgage a going business it will cover all property used in connection therewith for the convenient operation thereof,⁶⁸ but it has been held that a mortgage of the entire assets of a business does not necessarily include its good will.⁶⁹

Exempt property is not included in a general description covering all of the mortgagor's property.⁷⁰ To include such property, the intent should be made manifest and not left to conjecture or doubt.⁷¹

When a word is used in a technical or peculiar sense, as applicable to some trade or business, it will be construed according to the meaning thus at-

43. N.Y.—Haffen Brewing Co. v. Cohen, 138 N.Y.S. 426, 78 Misc. 366.

11 C.J. p 500 note 20.

44. Tex.—Scott v. Llano County Bank, 89 S.W. 749, 99 Tex. 221, reversing. Civ.App., 85 S.W. 301.

Printing establishment

Kan.—International News Service v. Gazette Printing Co., 173 P. 980, 103 Kan. 402.

45. Iowa.—Gammon v. Bull, 53 N.W. 340, 86 Iowa 754.

11 C.J. p 501 note 23.

46. Tex.—Scott v. Llano County Bank, 89 S.W. 749, 99 Tex. 221, reversing. Civ.App., 85 S.W. 301.

47. Iowa.—Chambers v. First State Bank & Trust Co. of Fort Dodge, 254 N.W. 309, 218 Iowa 63.

48. Kan.—International News Service v. Gazette Printing Co., 173 P. 980, 103 Kan. 402.

Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

11 C.J. p 499 note 93.

49. Miss.—Draper v. Perkins, 57 Miss. 277.

50. Vt.—Chelsea First Nat. Bank v. Fitts, 30 A. 697, 67 Vt. 57.

51. Ga.—Brooks v. Folds, 126 S.E. 554, 33 Ga.App. 409.

52. Mich. — Ramsdell v. Citizens Electric Light, etc., Co., 61 N.W. 275, 103 Mich. 89.

11 C.J. p 499 note 96.

53. N.Y.—Miller v. Hart, 32 Hun 639.

11 C.J. p 499 note 97.

54. Iowa.—Van Patten v. Leonard, 8 N.W. 334, 55 Iowa 520.

11 C.J. p 499 note 98.

55. S.D.—Dixon v. Ladd, 142 N.W. 259, 32 S.D. 163, 46 L.R.A., N.S., 206, Ann.Cas.1916A 253.

11 C.J. p 499 note 99.

53. Calves as "cattle"

"Calves running with their mothers are cattle and are included under that description in a chattel mortgage made by one who in the mortgage expresses the intention of including therein all his cattle, branded and unbranded."—Peterson v. Citizens' Bank of Stuart, 220 N.W. 575, 117 Neb. 327.

57. Miss.—Landau v. Sykes, 54 So. 3, 98 Miss. 495, Ann.Cas.1913B 197.

11 C.J. p 499 note 1.

A mortgage on an automobile and "all equipment" covers any and all equipment that goes with or belongs to the automobile.—Irwin v. Auto Finance Co., Tex.Civ.App., 40 S.W.2d 871, reversed on other grounds Rogers v. Irwin, Com.App., 60 S.W.2d 192.

58. Pa.—Klaus v. Majestic Apartment House Co., 95 A. 451, 250 Pa. 194.

11 C.J. p 499 note 2.

59. S.C.—Eason v. Miller, 15 S.C. 194.

11 C.J. p 499 note 3.

60. Iowa.—Brady v. Chittenden, 76 N.W. 1009, 106 Iowa 524.

11 C.J. p 499 note 4.

61. **Buildings on land are included in "improvements."**—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

62. **Horses and mules are embraced within the term "live stock" notwithstanding the term also includes cows and steers.**—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.

63. R.I.—Doty v. Oriental Print Works Co., 67 A. 586, 28 R.I. 372.

Vt.—Holt v. Ladd, 44 A. 69, 71 Vt. 204.

11 C.J. p 500 note 6.

64. Tex.—Conner v. Littlefield, 15 S. W. 217, 79 Tex. 76.

11 C.J. p 500 note 7.

65. Tex.—McGregor v. Fort Huron Engine, etc., Co., Civ.App., 120 S. W. 1128.

11 C.J. p 500 note 8.

66. S.D.—Erickson v. Carlberg Co., 223 N.W. 195, 54 S.D. 296.

67. Neb.—Osborne v. McAllister, 19 N.W. 510, 15 Neb. 428.

11 C.J. p 500 note 9.

68. Miss.—Landau v. Sykes, 54 So. 3, 98 Miss. 495, Ann.Cas.1913B 197.

N.J.—Arnett v. Trimmer, 11 A. 487, 43 N.J.Eq. 488.

11 C.J. p 500 note 10.

69. N.M.—Santa Fé Electric Co. v. Hitchcock, 50 P. 332, 9 N.M. 156.

70. Ky.—Boulevard v. Pendleton, 6 Ky.L. 727.

Tex.—Seiling v. Gunderman, 35 Tex. 544.

11 C.J. p 500 note 13.

Exception or reservation of exempt property see supra § 63.

71. Ky.—Boulevard v. Pendleton, 6 Ky.L. 727.

tached to it,⁷² and when a word is used in a technical or peculiar sense, as applicable to any trade or business, it is proper to receive testimony to show the meaning attached to it.⁷³

§ 117. Property Included in Description in General

A mortgage will include all of the mortgagor's property ascertainable from the description therein.

In general, a mortgage will include all the property ascertainable from the description therein; but property not so ascertainable and not within the description will not pass under it.⁷⁴ The description will be liberally construed in determining what property is included.⁷⁵ Thus, where the mortgaged property is particularly described, the description will be so construed as to cover all property falling within the description, and not merely a portion of it;⁷⁶ but it will not be construed so as to include

property not owned by the mortgagor and not intended to be conveyed.⁷⁷

Location. The domicile of the mortgagor fixes the location of personal property included in the description in the mortgage.⁷⁸

The date given in a chattel mortgage becomes a part of the description of the property.⁷⁹

§ 118. After-Acquired Property or Interests

The intention of the parties governs in determining whether after-acquired property is covered by the mortgage; but the description will not be extended beyond its terms.

In determining whether a mortgage covers after-acquired property, the court will, as nearly as possible, carry out the intention of the parties.⁸⁰ The description will not, however, be extended beyond its terms.⁸¹ Although a mortgage expressly covers future acquisitions to the property described

72. Wash.—Lawrence v. Times Printing Co., 61 P. 166, 22 Wash. 482.

11 C.J. p 500 note 15.

73. Iowa.—Brody v. Chittenden, 76 N.W. 1009, 106 Iowa 524.

Wash.—Lawrence v. Times Printing Co., 61 P. 166, 22 Wash. 482.

74. Tex.—Ross v. Schultz, Civ.App., 198 S.W. 672.

Particular mortgages construed

(1) Lumber of certain dimension "from woods run logs" from certain tract and "now located" thereon covered lumber sawed on execution of mortgage.—Mellen Produce Co. v. Fink, 273 N.W. 538, 225 Wis. 90.

(2) All live stock and personal property now in my possession, including "mules," embraced mules in the mortgagor's possession.—Abernathy v. Worthy, 129 So. 472, 221 Ala. 527.

(3) All mill machinery and equipment covered stored machinery and motor sold to third person.—Immel v. Albany Iron Works, 271 P. 53, 127 Or. 118.

(4) Unplanted crops, covered rent claims or obligations of tenants.—First Nat. Bank v. Crawford, 149 So. 228, 227 Ala. 188, denying certiorari 149 So. 230, 25 Ala.App. 463.

(5) "Together with all rights, liens, and claims to and on said crops," constitutes an equitable assignment of the notes of subtenant for rent.—H. & C. Newman, Inc. v. Delta Grocery & Cotton Co., 104 So. 157, 138 Miss. 683, overruling suggestion of error 103 So. 373, 138 Miss. 683.

(6) "All personal property of every description except that covered by legal exemptions," following a specific enumeration of property to be covered by a mortgage is for the

purpose of accomplishing an addition to the property otherwise included in the mortgage, and is not in the nature of a subtraction.—Chambers v. First State Bank & Trust Co. of Fort Dodge, 254 N.W. 309, 218 Iowa 63.

75. Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548—In re Rice, 13 Ohio N.P., N.S., 489.

The reason for the rule is the diverse and varied character of property usually sought to be covered and the attendant difficulty in obtaining a full and exact description.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

76. Ga.—Askew v. Wilson, 99 S.E. 537, 23 Ga.App. 771.

Kan.—Johnston v. Johnston, 283 P. 617, 129 Kan. 483.

77. La.—Continental Bank & Trust Co. v. Succession of McCann, 92 So. 55, 151 La. 555.

Miss.—H. & C. Newman, Inc. v. Delta Grocery & Cotton Co., 104 So. 157, 138 Miss. 683, overruling suggestion of error 103 So. 373, 138 Miss. 683.

78. Tex.—Glasscock v. Coppard, Civ. App., 29 S.W.2d 414, reversed on other grounds Coppard v. Glasscock, Com.App., 46 S.W.2d 298.

79. Me.—Snow v. Ulmer, 39 A. 993, 91 Me. 324, 64 Am.S.R. 237.

80. N.Y.—Burton v. Klein, 239 N.Y.S. 103, 135 Misc. 571.

11 C.J. p 501 note 26.
Scope and extent of lien generally see *infra* § 291.

Particular after-acquired property held covered

(1) Cattle and live stock.

U.S.—Stockyards Loan Co. v. Nichols, Okl., 243 F. 511, 156 C.C.A. 209.

Iowa.—L. & L. F. Zeller v. Malottki, 206 N.W. 101—National Bank of Milton v. O'Brien, 195 N.W. 611, 196 Iowa 865—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 196 Iowa 1205—Live Stock Nat. Bank of Sioux City v. Julius, 174 N.W. 489, 187 Iowa 748.

(2) Crops.—Monroe v. Hall, Tex. Civ.App., 290 S.W. 289.

(3) Leases and rent notes.—Equitable Life Ins. Co. of Iowa v. Brown, 262 N.W. 124, 210 Iowa 585.

(4) Lumber.—Merchants' & Farmers' Bank v. Pearson, 120 S.E. 210, 186 N.C. 609.

(5) Portable steam boiler.—Reichel v. Schneider & Brown Lumber Co., 196 N.W. 614, 226 Mich. 24.

(6) Well casing and supplies.—Wagner Supply Co. v. Bateman, 13 S.W.2d 1052, 118 Tex. 498, reversing in part and affirming in part, Civ. App., 260 S.W. 672.

Particular after-acquired property held not covered

(1) Locomotive.—Real Estate Bank & Trust Co. v. Baldwin Locomotive Works, 90 S.E. 49, 145 Ga. 831.

(2) Stock of merchandise.—In re Drag, D.C.Mich., 254 F. 474.

(3) Stonecutting machinery.—In re John Little Cut Stone Co., D.C.N.Y., 242 F. 691.

(4) Stove.—Clayton v. Gentle, Mo. App., 14 S.W.2d 672.

81. Okl.—Hivick v. Oklahoma-Colorado Oil & Gas Co., 212 P. 420, 421, 89 Okl. 181, citing *Corpus Juris*. Wyo.—P. J. Black Lumber Co. v. Turk, 62 P.2d 519, 521, 50 Wyo. 361, citing *Corpus Juris*.

11 C.J. p 501 note 27.

therein, it does not include all property thereafter acquired by the mortgagor,⁸² unless such property is within the description applicable to after-acquired property.⁸³ Accordingly, where the property to be acquired in the future is expressly limited to a certain class, or to a use in a certain business, the mortgage will not extend to another class, or use in a new and distinct branch of the business.⁸⁴ A description of after-acquired property in a schedule annexed to a chattel mortgage or property designated therein will be given the same effect as if it had been inserted in the body of the instrument.⁸⁵

Statutes relating to liens on property not yet acquired and providing that no lien or mortgage shall be created upon the future earnings of any machine operated with men or animal, have no application to an assignment of rights under an existing contract.⁸⁶

§ 119. Change in Character or Identity of Property

Examine Pocket Parts for later cases. Loss of

lien on mortgaged crop by severance see *infra* § 326.

§ 120. Accessions to, or Products of, Existing Chattels

Accessions and additions to the mortgaged chattels ordinarily belong to the mortgagee, unless they are so extensive as to destroy the identity of the original chattels.

As a general rule, the increment of, and accessions to, the mortgaged chattels belong to the mortgagee.⁸⁷ Under this rule, when a mortgage is given on raw material or goods in a state of partial completion, the finished product will be subject to the mortgage,⁸⁸ even though the increase in value has been large,⁸⁹ provided the original chattel can still be identified.⁹⁰ Likewise, new material or articles added to the mortgaged articles by way of replacement or repairs pass under the mortgage,⁹¹ although the contrary may be true where the new article is a distinct and independent item of personal

82. Iowa.—Wright v. Voorhees, 108 N.W. 758, 131 Iowa 408, 117 Am. S.R. 429, 9 Ann.Cas. 1149.

83. N.Y.—Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co., 170 N.E. 887, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App. Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

However alien it may be in quality or function to the property presently subjected to the lien, property subsequently acquired by the mortgagor will be subject to the mortgage, if within the covenant applicable to after-acquired property.—Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co., *supra*.

Mere acquisition insufficient

The mere acquisition of after-acquired property by the mortgagor is insufficient to subject it to the mortgage where it does not come within the description therein.—H. O. Wooten Grocer Co. v. Wade Meat Co., Tex.Civ.App., 37 S.W.2d 1090.

84. U.S.—In re Sentenne & Green Co., D.C.N.Y., 120 F. 436.

Mich.—West Michigan Sav. Bank v. Dater, 205 N.W. 113, 115, 232 Mich. 409, citing *Corpus Juris*.
11 C.J. p 501 note 30.

85. N.J.—Collard v. Tully, 77 A. 1079, 77 N.J.Eq. 439.

86. N.D.—International Harvester Co. of America v. Hanson, 161 N.W. 608, 36 N.D. 78.

87. Ala.—R. P. Harris Motor Co. v. Bailey, 121 So. 33, 34, 219 Ala. 8,

63 A.L.R. 1453, quoting *Corpus Juris*.

11 C.J. p 501 note 33, p 504 notes 68-70.

Executory right insufficient

"Title by accession imports something more . . . than an executory right to acquire a lien in the future through the judgment of a court of equity. It imports a lien or interest presently valid alike in equity and at law."—Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co., 170 N.E. 887, 893, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App.Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

Rule recognized but held inapplicable

Tex.—Stevenson v. Record Pub. Co., Civ.App., 107 S.W.2d 462, 466, error dismissed, citing *Corpus Juris*.

88. Mass.—Putnam v. Cushing, 10 Gray 334.

11 C.J. p 501 note 34.

Manufacture as accession see Accession § 8 a.

Conversion of lumber

The mortgagee does not lose his lien where lumber is converted into furniture, in accordance with the intention of the parties.—Dehority v. Paxson, 97 Ind. 253.

Where living plants and shrubs are mortgaged, cuttings and plants grown from them pass to the mortgagee by accession, notwithstanding severance from the original subject of the mortgage.—Bryant v. Pennell, 61 Me. 108, 14 Am.R. 550.

89. N.H.—Perry v. Pettingill, 33 N.H. 433.

11 C.J. p 502 note 35.

90. Mass.—Harding v. Coburn, 12 Metc. 333, 46 Am.D. 680.

11 C.J. p 502 note 36.

91. Okl.—Davy v. State, 265 P. 626, 130 Okl. 91.

11 C.J. p 502 note 37.

Repairs as accession see Accession § 3 b.

Commingled after-acquired property

It is the rule in Michigan that a chattel mortgage does not include after-acquired property, unless the property to which it is added is so mingled with it as not to be readily distinguishable therefrom.—In re Drag, D.C.Mich., 254 F. 474.

Mechanical or industrial plant

(1) Property added to an industrial or mechanical plant, which becomes an essential and integral part thereof, passes under a mortgage of the entire property constructed or to be constructed.—In re East Stroudsburg Glass Co., D.C.Pa., 247 F. 614—11 C.J. p 502 note 38.

(2) This rule applies as well as under a clause including machinery and appliances thereafter to be placed in such a plant for the purpose of maintenance and repair.—Mackall-Paine Veneer Co. v. Vancouver Plywood Co., 32 P.2d 530, 177 Wash. 503.—Straus v. Wilsonian Inv. Co., 31 P. 2d 516, 177 Wash. 167.—Bank of California v. Clear Lake Lumber Co., 264 P. 705, 146 Wash. 543—11 C.J. p 502 note 39.

(3) This is true even though the additions are made by an assignee or

property and in no sense an article of repair.⁹² The doctrine of accession has no application to feed and services furnished to mortgaged live stock while it is in the sheriff's possession after the commencement of foreclosure proceedings.⁹³

§ 121. — Increase of Animals

A mortgage expressly covering the increase of animals will be enforced. In the absence of such an express provision, whether or not such increase is covered generally depends on whether the mortgagee secures a lien on or title to the mortgaged property.

A mortgage of an animal which expressly covers the increase will be enforced according to its terms,⁹⁴ and, where the increase is mentioned, it will be construed as future increase⁹⁵ and not as increase in existence at the time of the mortgage.⁹⁶ An express agreement between the mortgagor and the mortgagee that the offspring of animals shall be subject to the mortgage will be enforced, notwithstanding a statutory provision that the lien of a chattel mortgage shall not cover the offspring of a mortgaged animal.⁹⁷

In determining whether or not a mortgage of an animal, which contains no express reference to the increase thereof, covers such increase, the nature of the mortgage, as passing title to the animal or as merely creating a lien thereon, must be considered. In those jurisdictions in which the mortgagee is vested with the legal title to the mortgaged property, it is generally held that the lien of a chattel mortgage on domestic animals extends to the increase of the animals during the life of the mortgage, even though the mortgage is silent as to the increase.⁹⁸ The same rule also applies, at least as between the parties, in some jurisdictions where a mortgage is considered a mere lien.⁹⁹ Generally, however, in those jurisdictions where the mortgage creates a mere lien without passing title, particularly where a statute so provides, the lien does not cover the increase of the animals mortgaged unless expressly included, and the mortgagor in possession may control and dispose of such increase.¹ The rule as to trust deeds is the same as in the case of chattel mortgages.²

grantee of the mortgagor.—*Straus v. Wilsonian Inv. Co.*, *supra*.

(4) Where, however, the additions and alterations in a mortgaged plant are so extensive as to destroy the identity of the old plant and result in an entirely new plant, the lien of the mortgage does not apply to the new plant.—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, Mo., 13 S. Ct. 944, 149 U.S. 436, 37 L.Ed. 799. 11 C.J. p 502 note 40.

92. Drive belt

An after-acquired drive belt used in connection with a steam threshing outfit is an entirely distinct and independent article of manufacture from the engine, separator, or other parts of the outfit covered by a chattel mortgage.—*Campbell Implement Co. v. Nelson*, 198 N.W. 401, 159 Minn. 163.

93. Wash.—*Schafer v. Giese*, 238 P. 3, 135 Wash. 464.

94. Ariz.—*Hagan v. Cowan*, 278 P. 68, 35 Ariz. 334.

Iowa.—*Chambers v. First State Bank & Trust Co. of Fort Dodge*, 254 N. W. 309, 218 Iowa 63.

Utah.—*Reader v. Roberts*, 214 P. 299, 61 Utah 472. 11 C.J. p 502 note 45.

Increase of animals subsequently acquired

Iowa.—*Johnson v. Turnholt*, 203 N. W. 715, 199 Iowa 1331.

Particular language unnecessary

Under the rule stated in the text, the use of particular wording to include the increase within the terms of the mortgage is not necessary, it being sufficient if the language em-

ployed fairly imports such an intention.—*Brown v. Schwab*, 233 P. 593, 594, 27 Ariz. 457, 39 A.L.R. 150.

In Nebraska

(1) It has been held that "a provision in a mortgage of domestic animals, assuming to give the mortgagee a lien on the increase to be thereafter begotten, is nothing more than an agreement for a lien, which, without possession, vests no legal right to, or interest in, such increase."—*Battle Creek Valley Bank v. Madison First Nat. Bank*, 88 N.W. 145, 62 Neb. 825, 56 L.R.A. 124.

(2) But this rule has no application to a mortgage given during gestation and such a mortgage creates a lien upon the animals resulting from such gestation.—*Leisy v. Kane*, 259 N.W. 526, 128 Neb. 594.—*Peterson v. Citizens' Bank of Stuart*, 220 N.W. 575, 117 Neb. 327.

95. Iowa.—*Hopkins Fine Stock Co. v. Reid*, 75 N.W. 656, 106 Iowa 78. 11 C.J. p 502 note 46.

96. Neb.—*Peterson v. Citizens' Bank of Stuart*, 220 N.W. 575, 117 Neb. 327.

97. Ark.—*Howell v. Walker*, 164 S. W. 746, 111 Ark. 362.

98. Ill.—*O'Brien v. First Galesburg Nat. Bank & Trust Co.*, 194 N.E. 562, 359 Ill. 415, affirming 275 Ill. App. 176.—*Van Zele v. Cleveland*, 208 Ill.App. 387, 396.

Vt.—*Paska v. Saunders*, 153 A. 451, 103 Vt. 204.

11 C.J. p 503 note 49.

Chattel mortgage as passing title or creating lien see *supra* § 1.

Rule not limited to first increase

The rule is not limited to the first increase of the mortgaged animals, but includes the increase of the increase during the existence of the mortgage.—*O'Brien v. First Galesburg Nat. Bank & Trust Co.*, 275 Ill. App. 176, affirmed 194 N.E. 562, 359 Ill. 415.

99. Tex.—*First Nat. Bank of Austin v. Western Mortg. & Inv. Co.*, 26 S. W. 488, 86 Tex. 636, reversing 24 S.W. 691, 6 Tex.Civ.App. 59. 11 C.J. p 503 note 50.

1. Ariz.—*Glaspie v. Williams*, 51 P. 2d 254, 46 Ariz. 381.—*Brown v. Schwab*, 233 P. 593, 27 Ariz. 457, 39 A.L.R. 150, citing *Corpus Juris*. Ga.—*Dixon v. Pierce*, 95 S.E. 995, 22 Ga.App. 291.

N.D.—*Minneapolis Threshing Mach. Co. v. First State Bank of Ft. Yates*, 218 N.W. 603, 56 N.D. 637. 11 C.J. p 503 notes 51, 52.

Increase held covered

Mortgage of "all cattle and horses branded O X O, /o," running on particular range, which was followed by statement, "The mortgagor agrees not to sell any more cattle than the amount of increase each year," covered increase of such cattle, and contemplated that such increase would be branded in like manner.—*Brown v. Schwab*, 233 P. 593, 27 Ariz. 457, 39 A.L.R. 150.

2. Mo.—*Edmonston v. Wilson*, 49 Mo.App. 491.

Tenn.—*Latta v. Fowlkes*, 29 S.W. 124, 94 Tenn. 219.

Va.—*Gannaway v. Tate*, 37 S.E. 768, 98 Va. 789.

Where, under the circumstances, the lien of a mortgage extends to the increase of animals, it has been applied to sheep,³ hogs,⁴ cattle,⁵ and horses.⁶

Exempt property. Where the increase of animals comes within the express terms of the mortgage, such increase, although exempt property, is covered by the mortgage.⁷

Duration of lien. As against a subsequent mortgagee⁸ or a purchaser without actual or constructive knowledge of the mortgage,⁹ the lien on increase does not continue after a suitable period of nurture has elapsed. However, as between the parties the lien may continue;¹⁰ and it has been held that the fact that a chattel mortgage specifically covers the increase of live stock will cause the lien to continue during the existence of the mortgage.¹¹

§ 122. — Wool Grown on Mortgaged Sheep

Where a chattel mortgage is considered as a lien, in the absence of an expression of intention to the contrary, a mortgage of sheep does not extend to wool thereafter shorn from them.

In jurisdictions which consider a chattel mortgage a mere lien, a mortgage of sheep does not extend to the wool thereafter shorn from them,¹² even where the mortgage includes the "increase,"¹³ although such term has been construed to include wool thereafter shorn.¹⁴ A trust deed or mortgage of sheep, including the increase and all appendages, includes the wool on the sheep,¹⁵ and where a mortgage expressly includes the wool clipped from certain ewes, it refers to wool thereafter to be clipped.¹⁶

§ 123. Specific Kinds of Property

Examine Pocket Parts for later cases.

§ 124. — Crops

The intention of the parties governs as to what crops are included therein. If the mortgaged crop is to be grown by the mortgagor, it will not include crops grown by other persons.

The question as to what crops are included in a mortgage depends on the intention of the parties as ascertained from the whole instrument,¹⁷ giving it a reasonable construction.¹⁸

3. U.S.—Northwestern Nat. Bank v. Freeman, *Ariz.*, 19 S.Ct. 36, 171 U.S. 620, 43 L.Ed. 307.

Va.—Gannaway v. Tate, 37 S.E. 768, 98 Va. 789.

4. Ill.—O'Brien v. First Galesburg Nat. Bank & Trust Co., 275 Ill. App. 176, affirmed 194 N.E. 562, 359 Ill. 415.
11 C.J. p 503 note 54.

5. Ill.—O'Brien v. First Galesburg Nat. Bank & Trust Co., *supra*.
Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.
11 C.J. p 503 note 55.

6. Mich.—Kellogg v. Lovely, 8 N.W. 699, 46 Mich. 131, 41 Am.R. 151.
11 C.J. p 504 note 56.

7. Iowa.—Chambers v. First State Bank & Trust Co. of Fort Dodge, 254 N.W. 309, 213 Iowa 63.
Tex.—Guaranty Bond State Bank of San Angelo v. Duncan, Civ.App., 19 S.W.2d 400, error dismissed.

8. Neb.—Leisy v. Kane, 259 N.W. 526, 128 Neb. 594.

Lien on the increase of mortgaged cows continues while the calves are being nurtured by their mother during a reasonable period.—Leisy v. Kane, *supra*—Peterson v. Citizens' Bank, 220 N.W. 575, 117 Neb. 327.

9. Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

11 C.J. p 444 note 78, p 504 note 58.

10. Vt.—Paska v. Saunders, *supra*.
11 C.J. p 444 note 79, p 504 note 59.

11. Kan.—Holt v. Lucas, 96 P. 30,

77 Kan. 710, 127 Am.S.R. 459, 17 L.R.A.,N.S., 203.

11 C.J. p 504 note 60.

12. Cal.—Santa Ana First Nat. Bank v. Erreca, 47 P. 926, 116 Cal. 81, 58 Am.S.R. 133.

11 C.J. p 504 note 63.

13. Cal.—Alferitz v. Borgwardt, 58 P. 460, 126 Cal. 201.
11 C.J. p 504 note 64.

14. U.S.—Alferitz v. Ingalls, C.C. Nev., 83 F. 964.

15. Tex.—Hobbs v. Big Springs First Nat. Bank, 39 S.W. 331, 15 Tex.Civ.App. 398.

16. N.M.—Vorenberg v. Bosserman, 130 P. 438, 17 N.M. 433.
11 C.J. p 504 note 67.

17. Ariz.—First Nat. Bank v. Yuma Nat. Bank, 245 P. 277, 30 Ariz. 188.
Cal.—California Packing Corporation v. Stone, 222 P. 193, 64 Cal.App. 438.

Kan.—Danielson v. Reichert, 164 P. 184, 100 Kan. 291.

Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

S.D.—Blomquist v. Southern Minnesota Joint Stock Land Bank of Redwood Falls, Minn., 220 N.W. 876, 53 S.D. 414.

Tex.—American Trust & Savings Bank v. Cotton Finance & Trading Corporation, Civ.App., 10 S.W.2d 186—Miller v. White, Civ.App., 264 S.W. 176—Citizens' Guaranty State Bank v. Johnson, Civ.App., 211 S.W. 271, error refused—Burlington State Bank v. Marlin Nat. Bank,

Civ.App., 207 S.W. 954—Ross v. Schultz, Civ.App., 198 S.W. 672—Hunter v. Abernathy, Civ.App., 188 S.W. 269.

11 C.J. p 505 note 72.

Description of crops generally see *supra* § 67.

Greater planting

Having executed a valid mortgage on cotton to be grown on thirty acres, mortgage lien attached to seventy acres planted in lieu thereof, and the mortgagee could select any thirty acres to satisfy his lien.—Colley v. H. L. Edwards & Co., Tex.Civ. App., 258 S.W. 191.

Mutual mistake

Where crops are included in a chattel mortgage through a mutual mistake of the parties, and the parties agree that such crops were not intended to be mortgaged, such crops will not be covered by the mortgage, although within its express terms.—Wolf v. G. M. Carlton Bros. & Co., Tex.Civ.App., 10 S.W.2d 200, error dismissed.

18. Tex.—Knudsen v. J. I. Case Co., Civ.App., 86 S.W.2d 794.

Mortgagor's interest

Where essential to the validity of the mortgage, it will be construed, if possible, as a mortgage of the mortgagor's interest in the crop, and not as a mortgage on the interests of others.

Cal.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

Minn.—Helgeson v. Farmers' Co-op. Ass'n, Jackson, 199 N.W. 821, 160 Minn. 109.

The acceptance of a crop mortgage containing a covenant that the premises and crop are free from all other encumbrances does not estop the mortgagee from showing that a prior mortgage did not cover the crops grown and to be grown on the premises.¹⁹

Location or ownership of land. Where the land on which the crop is to be grown is definitely located, the mortgage will not cover crops grown on other lands,²⁰ even though the mortgagor fails to cultivate a crop on the land designated.²¹ Likewise, a mortgage on crops to be grown on land owned by the mortgagor will ordinarily not include crops on other land rented by him;²² but where the mortgage refers in general terms to the entire crop grown by the mortgagor or which he may aid in the cultivation of, it is broad enough to include his interest in crops grown on lands rented by him,²³ except as against subsequent mortgagees.²⁴ A mortgage of crops on "all my lands" has been held to include a parcel claimed by the mortgagor, although shortly after the execution of the mortgage, in an action against him, it was decided that he was not the owner thereof;²⁵ but a mortgage describing the property as "my entire crop to be grown on my own land, or any other land in a certain county," does not include lands subsequently purchased by the mortgagor.²⁶

Person by whom crops are to be grown. As a general rule, where the mortgage purports to cover crops to be grown by the mortgagor it will not include crops grown by his tenants or other persons,²⁷ but will cover the crops grown by him on the land designated.²⁸ A mortgage, however, on crops to be

grown during a certain year, on certain land, will include crops grown on the premises by tenants and sharecroppers of the mortgagor.²⁹ A mortgage on all crops grown by the mortgagor or "his family" will cover crops grown by a minor son of the mortgagor, even though the mortgagor subsequently emancipated his minor son who continued to be a member of his family;³⁰ and a mortgage embracing all crops grown by the mortgagor, or under his direction, on his land, will cover a crop grown by the mortgagor and his sister who subsisted on supplies furnished by the mortgagee under the mortgage.³¹ Likewise, where a part of the tenant's crop is grown by his son without a cropper's agreement the whole is subject to the tenant's crop mortgage.³²

The individual crop of a mortgagor, grown on his land, will not be covered by a mortgage executed jointly with another, designating crops to be grown by them jointly in a partnership transaction;³³ nor will crops grown by the husband be covered by a mortgage given by the wife on crops to be grown by her on certain land and to secure a debt by her, even though he joins in the execution of the instrument.³⁴

Time of growth. A mortgage on all crops to be grown on certain land, during a certain year, will include crops subsequently planted that year;³⁵ and when the mortgage is given to secure a note due in the fall of the year after its execution there is a presumption that the crop of that year is intended.³⁶ While a mortgage covering crops raised during a certain year and until the debt secured is fully paid, will not cover crops raised during succeeding years,³⁷ a mortgage covering crops to be

19. Fla.—Haines City Citrus Growers' Ass'n v. Petteway, 145 So. 183, 107 Fla. 344.

20. Kan.—Danielson v. Reichert, 164 P. 184, 100 Kan. 291.

S.C.—Carroll & Byers Co. v. Gaffney Mfg. Co., 146 S.E. 604, 149 S.C. 192.

Tex.—Prator v. Washington, Civ. App., 277 S.W. 704.

11 C.J. p 505 note 74.

21. Tex.—Prator v. Washington, supra.

11 C.J. p 505 note 75.

22. Tex.—Prator v. Washington, supra.

11 C.J. p 505 note 76.

23. Ala.—Cobb v. Daniel, 16 So. 882, 105 Ala. 335.

11 C.J. p 505 note 77.

24. Tex.—Prator v. Washington, Civ. App., 277 S.W. 704, 705.

Description of place of growth as putting third persons on inquiry see supra § 67.

25. N.C.—Brown v. Miller, 13 S.E. 167, 108 N.C. 395—Rawlings v. Hunt, 90 N.C. 270.

26. Ala.—Paden v. Bellenger, 6 So. 351, 87 Ala. 575.

27. Ark.—Belcher v. Winter, 233 S.W. 803, 804, 130 Ark. 33, quoting Corpus Juris.

11 C.J. p 505 notes 80, 82, 83.

Tenant's crops not included in

(1) A mortgage on all crops which may be made by the mortgagor.—Norfleet v. Baker, 42 S.E. 544, 131 N.C. 99.

(2) A mortgage on all crops made by the mortgagor assisted by his family and hired help.—Blount v. Lewis, Tex.Civ.App., 59 S.W. 293.

28. N.C.—Graves v. Currie, 43 S.E. 897, 132 N.C. 307.

11 C.J. p 505 note 81.

29. Ark.—Delta Cotton Co. v. Arkansas Cotton Oil Co., 97 S.W. 440, 80 Ark. 431.

30. Ala.—Hughes, etc., Supply Co. v. Bussey, App., 70 So. 997.

31. Ala.—Hoist v. Harmon, 26 So. 157, 122 Ala. 453.

32. Ala.—Maybank v. Lumpkin, 66 So. 584, 189 Ala. 559.

33. N.C.—Ferguson v. Twisdale, 49 S.E. 914, 137 N.C. 414, 417.

11 C.J. p 505 note 90.

34. Miss.—Mills-Guy Co. v. Dickerson, 48 So. 404, 94 Miss. 874.

11 C.J. p 505 note 91.

35. Iowa.—Norris v. Hix, 38 N.W. 395, 74 Iowa 524.

36. N.C.—Taylor v. Hodges, 11 S.E. 156, 105 N.C. 344.

37. U.S.—Zaring v. Strauss & Co., C.C.A.Idaho, 30 F.2d 313.

Utah.—Fisher v. Bank of Spanish Fork, 74 P.2d 659.

"Until paid" construed

The words "until paid" mean no more than that the lien on the crop specifically mentioned subsists until the payment of the debt.

grown by the mortgagor on leased land for a certain year, "and every year thereafter," until the mortgage debt is paid, will cover all crops grown on such lands by the mortgagor during the life of the lease.³⁸ A mortgage on all the crops grown on certain premises during the life of the mortgage does not cover crops grown after the mortgagor's death.³⁹

Under statutory provisions, in some states the lien of a mortgage on growing crops or crops to be grown attaches only to the crops next maturing after the execution of such mortgage.⁴⁰ Under a statute providing that a mortgage of future crops shall be valid against crops planted within twelve months after its execution, a mortgage of a future crop will be presumed to cover only the year immediately following the mortgage.⁴¹

§ 125. — Household Goods

Examine Pocket Parts for later cases.

§ 126. — Stocks in Trade

The question as to what property is included in a mortgage of a stock in trade depends on the intention of the parties. In order to cover additions to, or substitutions for, the stock existing when the mortgage was made, an intention to that effect must be expressed in the mortgage.

As a general rule, the question as to what property is included in a mortgage of a stock in trade depends on the intention of the parties as expressed

in the mortgage, and considered in the light of all the surrounding facts and circumstances.⁴² However, a mortgage of a stock of goods, as such, will not include property which is not a part of the stock and is not offered for sale in the ordinary course of business.⁴³ Where the mortgage describes the nature of the merchandise, it will cover only such goods as clearly come within its terms.⁴⁴ Where a description of the place containing the stock is alone relied on to identify it, goods must actually come within the place in order to come within the description.⁴⁵ The mere fact, however, that the stock was subsequently removed does not take it out of the operation of the mortgage, where it remained identifiable and where the parties intended that it should continue to be covered.⁴⁶

Additions to, or substitutions for, stock. A mortgage of a stock in trade under a general description covers only such goods as are in stock at the time of the execution of the mortgage⁴⁷ especially where words are used which limit the application to the stock then on hand,⁴⁸ and when mixed or confused with goods subsequently acquired, as against third persons claiming the stock of goods, the burden is on the mortgagee to identify the part covered by the mortgage.⁴⁹ In order to cover additions to, or substitutions for, the stock existing when the mortgage was made such an intention must be expressed in the mortgage.⁵⁰ When the

U.S.—Zaring v. Strauss & Co., C.C.A. Idaho, 30 F.2d 313.

Utah.—Fisher v. Bank of Spanish Fork, 74 P.2d 659.

33. Ala.—Whaley v. Bright, 66 So. 644, 189 Ala. 134.

39. Iowa.—Fawcett Inv. Co. v. Rulstad, 253 N.W. 131, 218 Iowa 654, 94 A.L.R. 800.

40. Mont.—Moccasin State Bank v. Waldron, 264 P. 940, 81 Mont. 579.—Crone v. Occident Elevator Co., 224 P. 659, 70 Mont. 211.

41. Ark.—Word v. Cole, 183 S.W. 757, 122 Ark. 457.

In South Carolina under a statute, subsequently repealed, providing that "no mortgage of . . . crops shall be . . . effective to convey to the mortgagee any interest in any crop or crops other than the . . . crops to be raised during the year in which said mortgage is given," a mortgage executed during a particular year creates no lien on crops raised the following year.—Virginia-Carolina Chemical Co. v. Wellbrock, 141 S.E. 103, 143 S.C. 51.

42. N.D.—Madson v. Rutten, 113 N.

W. 872, 16 N.D. 281, 13 L.R.A., N.S., 554.

11 C.J. p 506 note 1.

43. Iowa.—Van Patten v. Leonard, 8 N.W. 334, 55 Iowa 520.

Mich.—Curtis v. Phillips, 5 Mich. 111.

11 C.J. p 506 note 2.

Property held not to be included

(1) Fixtures.

U.S.—In re Eldredge, C.C.Wis., 8 F. Cas.No.4,330, 2 Biss. 362.

Mich.—Curtis v. Phillips, 5 Mich. 112.

(2) Notes and debts due the mortgagor.—Kemp v. Carnley, 10 N.Y. Super. 1.

(3) Goods which have been contracted for but not received.—Curtis v. Wilcox, 13 N.W. 803, 49 Mich. 425.

11 C.J. p 506 note 5.

44. Kan.—Clement v. Hartzell, 46 P. 961, 57 Kan. 482.

11 C.J. p 506 note 7.

45. U.S.—In re Vining, D.C.Ga., 37 F.2d 103, reversed on other grounds, C.C.A., Hardwick Bank & Trust Co. v. McFarland, 43 F.2d 807.

11 C.J. p 506 note 12.

Store

Where the mortgage designates the

stock as being located in a certain store, it will not include merchandise stored in a different building used as a warehouse.—Robinson v. Norton, 34 S.E. 147, 108 Ga. 562—11 C. J. p 506 note 6.

46. U.S.—Hardwick Bank & Trust Co. v. McFarland, C.C.A.Ga., 43 F. 2d 207, reversing In re Vining, D. C., 37 F.2d 103.

47. Okl.—Union State Bank of Shawnee v. Housel, 256 P. 29, 124 Okl. 294—Snow v. Cody, 220 P. 578, 96 Okl. 81.

11 C.J. p 506 note 9.

48. Mo.—Thomas v. American Central Ins. Co., App., 207 S.W. 982, 984, citing *Corpus Juris*.

11 C.J. p 506 note 10.

49. U.S.—In re Doran, Ky., 154 F. 467, 83 C.C.A. 265.

Mo.—Kolkmeier v. J. S. Merrill Drug Co., 141 S.W. 1164, 162 Mo.App. 1.

11 C.J. p 506 note 11.

50. Okl.—Snow v. Cody, 220 P. 578, 96 Okl. 81.

11 C.J. p 506 note 12.

Additions held included

(1) In a mortgage in which the mortgagor "is given the right to conduct a grocery business in the or-

mortgage recites that the proceeds from sales of stock shall be applied to the purchase of new goods to be substituted for the stock sold, as between the parties, it is sufficient to cover such after-acquired property,⁵¹ even though part of the goods were purchased on credit instead of cash realized from sales out of the original stock;⁵² and where the mortgagor exchanges the goods mortgaged for other goods, the mortgagee may ratify the transaction and hold the goods received in exchange subject to the lien of his mortgage.⁵³ A chattel mortgage of a stock of goods permitting the mortgagors to make retail sales and to buy for cash other goods to replace those sold, however, will not cover goods purchased on credit and not for the purpose of replacing part of the mortgaged stock previously sold.⁵⁴ In some jurisdictions, under statutory provisions, a mortgage of a stock in trade will cover purchases made to supply the place of those sold in the usual course of business.⁵⁵

In some jurisdictions a mortgage of a stock of goods and the additions thereto will be binding on successive subsequent purchasers from the mortgagor and will cover additions to the stock made by each purchaser,⁵⁶ while in other jurisdictions it has been held that such a mortgage will cover only those additions made by the mortgagor.⁵⁷

ordinary manner, and all increase of said stock."—*In re Dagwell*, D.C. Mich., 263 F. 406.

(2) Under a recital in the mortgage that the stock is to be kept up to a certain value.

U.S.—*In re Simpson*, D.C. Idaho, 81 F.2d 317, affirmed, C.C.A., *Patnott v. Simpson & Co.*, 35 F.2d 840.

Mich.—*Loupee v. Michigan Cent. R. Co.*, 219 N.W. 727, 248 Mich. 144, 11 C.J. p 507 note 13.

Description otherwise limited

Additions to stock are not included in a mortgage where the mortgagor agrees to keep the stock up to a certain value where the description is otherwise limited.—*West Michigan Sav. Bank v. Dater*, 205 N.W. 113, 232 Mich. 409—11 C.J. p 507 note 14.

51. Me.—*Williams v. Noyes, etc., Mfg. Co.*, 92 A. 482, 112 Me. 408, Ann.Cas.1916D 1224, 11 C.J. p 507 note 15.

52. Me.—*Conley v. Murdock*, 76 A. 682, 106 Me. 266.

53. Me.—*Abbott v. Goodwin*, 20 Me. 408.

54. Me.—*Conley v. Murdock*, 76 A. 682, 106 Me. 266—*Allen v. Goodnow*, 71 Me. 420.

55. In Georgia

(1) Under statute existing in this jurisdiction, a mortgage or bill of sale or deed of trust to secure a

debt covering a stock of goods or other things in bulk, changing in specifics, attaches to additional goods purchased in the usual course of business to replenish such stock irrespective of any express provision to that effect in the instrument itself.—*Hardin v. Rubin*, 151 S.E. 31, 169 Ga. 608—*Merchants' & Mechanics' Bank v. Beard*, 134 S.E. 107, 162 Ga. 446, answers to certified questions conformed to 134 S.E. 479, 35 Ga.App. 692—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, 188 S.E. 913, 54 Ga.App. 832—*Downing Co. v. Jones*, 176 S.E. 904, 50 Ga.App. 9—11 C.J. p 507 note 19.

(2) The statute does not relate to an entire change of stock of goods in bulk, but to a change in a stock of goods in bulk changing in specifics.—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, supra.

(3) Accordingly, where a mortgage or bill of sale to secure debt is created on a stock of goods which is totally destroyed by fire, and another new, separate, and distinct stock of goods is purchased, it would not come within the lien of the instrument covering the totally destroyed stock.—*Peoples Credit Clothing Co. v. Scottish Union & National Ins. Co.*, supra.

(4) "A mortgage upon certain articles particularly described therein,

§ 127. — Fixtures

A chattel mortgage of fixtures covers only such fixtures as were within the contemplation of the parties at the time the mortgage was executed.

A chattel mortgage of fixtures will cover only such fixtures as were in the contemplation of the parties at the time the mortgage was executed.⁵⁸ Where a manufacturing plant is mortgaged, all the machines and tools necessary to constitute it a manufacturing plant, whether fast or loose, pass under the mortgage.⁵⁹

§ 128. — Book Accounts

A mortgage of book accounts will cover only those which the parties intended to include.

A mortgage of book accounts will cover only those which the parties intended to include as appears from the instrument.⁶⁰ While in some jurisdictions a chattel mortgage on book accounts covers also the proceeds of such accounts, where they are in the hands of the mortgagor, whether or not used to replenish the stock,⁶¹ in other jurisdictions it is held that the money collected on such accounts will not be subject to the lien of a mortgage.⁶² A mortgage of book accounts does not cover the amount due from a factor with whom goods have been

though valid as such, is not a mortgage upon a stock of goods changing in specifics, so that the lien would be lost upon such mortgaged articles as might be disposed of in the regular course of trade."—*National City Bank of Rome v. Adams*, 117 S.E. 285, 30 Ga.App. 219.

56. N.J.—*Stoll v. Sibson*, 56 A. 710, 65 N.J.Eq. 552.

57. Ga.—*Anderson v. Howard*, 49 Ga. 313.

Ind.—*Stewart v. Long*, 44 N.E. 63, 16 Ind.App. 164.

11 C.J. p 507 note 21.

58. Fixtures held not covered

A chattel mortgage covering fixtures in grocery business did not cover fixtures subsequently acquired and used in meat business.—*H. O. Wooten Grocer Co. v. Wade Meat Co.*, Tex.Civ.App., 37 S.W.2d 1090.

59. Machines and hand molds held covered

U.S.—*In re East Stroudsburg Glass Co.*, D.C.Pa., 247 F. 614.

60. N.J.—*Buvinger v. Evening Union Printing Co.*, 65 A. 482, 72 N.J.Eq. 321.

11 C.J. p 507 note 22.

61. Wyo.—*McCord v. Albany County Nat. Bank*, 48 P. 1058, 7 Wyo. 9—*McCord v. Albany County Nat. Bank*, 46 P. 1093, 6 Wyo. 507.

62. N.J.—*Nugent v. John McNeil Shoe Co.*, 50 A. 628, 62 N.J.Eq. 583.

placed by the mortgagor for sale.⁶³

Future accounts. A mortgage of book accounts will not include future accounts unless such an intention is clearly expressed in the mortgage.⁶⁴ A mortgage of future accounts, however, includes all unpaid accounts which are the proper subject of book entry, whether or not such entry has been made.⁶⁵ A mortgage of a stock of goods, together with the accounts which may accrue from the sale thereof and all other accounts not theretofore transferred, will be construed to cover all accounts receivable arising from sales of the mortgaged stock; but it will not be construed, at least as against third persons, as covering general accounts or choses in action not receivable from and on account of sales made from the stock.⁶⁶

§ 129. Extension to or Substitution of Other Property

An agreed substitution of other property for that orig-

inally covered by the mortgage is valid between the parties to the instrument.

While the lien of a mortgage will ordinarily not be extended so as to include property not particularly described therein,⁶⁷ an agreed substitution of other property for that originally covered by the mortgage,⁶⁸ although the agreement is oral,⁶⁹ is valid as between the parties and those having constructive notice thereof,⁷⁰ but invalid as to third persons, including creditors and subsequent purchasers without notice,⁷¹ unless the substituted property passes under the doctrine of accession.⁷² A stipulation to exchange the chattels embraced in the mortgage for others will be strictly construed and will not be extended beyond its plain terms.⁷³ If the property substituted for that originally mortgaged is so changed that it cannot be identified by the original description, the lien of the mortgage will not attach to it.⁷⁴ An agreement that the mortgaged property shall be sold and the proceeds ap-

63. Mo.—Stieglitz v. O. J. Lewis Mercantile Co., 76 Mo.App. 275.

64. Iowa.—Lormer v. Allyn, 21 N.W. 149, 64 Iowa 725.
11 C.J. p 507 note 26.

65. Mich.—Dunn v. Michigan Club, 73 N.W. 386, 115 Mich. 409.
Mo.—Page v. Gardner, 20 Mo. 507.

66. U.S.—Dillon Bank v. Murchison, S.C., 213 F. 147, 129 C.C.A. 499.

67. Ill.—Scott v. Judd, 255 Ill.App. 553, 567.

Exchanged book case

Where a book case mentioned in the act of mortgage was later exchanged for another, the latter was not covered by the mortgage.—Remington-Rand v. Profits Island Gravel Co., La.App., 144 So. 638, opinion reinstated 150 So. 76.

Mortgage of cattle

Where cattle covered by chattel mortgage ceased to exist and there was no increase thereof, and those which mortgagors had at time of commencement of mortgage foreclosure action were entirely different cattle, and mortgage did not cover after-acquired property, prima facie mortgagee had no lien on such cattle.—P. J. Black Lumber Co. v. Turk, 62 P.2d 519, 50 Wyo. 361, rehearing denied 63 P.2d 805, 50 Wyo. 361.

Proceeds of insurance or indemnities

The lien of a chattel mortgage which contains no provisions as to insurance or indemnity does not extend to money paid the mortgagor for the condemnation and destruction of the mortgaged property.—Scott v. Judd, 255 Ill.App. 558.

68. Mo.—Clough & Warren Co. v. Madden, App., 201 S.W. 938.
Okla.—Intertype Corporation v. Stro-

snider, 211 P. 1022, 1024, 88 Okl. 68.

11 C.J. p 507 note 32.

Agreement essential

"In order to come within the provisions of the law relative to substitution there must be an agreement between the parties whereby substitution is agreed upon."—Intertype Corporation v. Strosnider, supra.

Substituted article different in kind and value

The rule applies although the substituted article is different in kind and value and notwithstanding it is acquired from a source other than the mortgagee.—Clough & Warren Co. v. Madden, Mo.App., 201 S.W. 938.

69. Mich.—Stram v. Jackson, 226 N.W. 888, 248 Mich. 171.

Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

11 C.J. p 508 note 32 [a] (1).

This is on theory that equity treats as done that which the parties intended should be done.

Ark.—Howell v. Walker, 164 S.W. 746, 111 Ark. 362.

Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

Agreement as oral mortgage

Oral agreement permitting mortgagor to sell mortgaged cattle provided he replaces them constitutes oral mortgage on substitute cattle.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

Under statutes requiring writing and subscription

(1) Where a statute requires that mortgages of personal property be in writing subscribed by the mortgagor, the parties to the mortgage cannot by parol agreement substitute per-

sonal property not embraced in the mortgage for property included in the mortgage, so as to transfer the lien to the substituted property.—Bloch v. Edwards, 22 So. 600, 116 Ala. 90.

(2) They may, however, effect such substitution by interlineation by the mortgagor without a resubscription.—Winslow v. Jones, 7 So. 262, 88 Ala. 496.

11 C.J. p 508 note 37.

70. Mo.—Williams v. W. W. Kimball Co., 176 S.W. 478, 188 Mo.App. 646.
11 C.J. p 508 note 33.

71. Tenn.—Rodes v. Haynes, 33 S.W. 564, 95 Tenn. 673.
11 C.J. p 508 note 34.

72. Conn.—Holly v. Brown, 14 Conn. 255.

Mich.—Fowler v. Hoffman, 31 Mich. 215.

N.Y.—Southworth v. Isham, 5 N.Y. 448.

Accessions to, or products of, existing chattels see supra § 120.

73. Mo.—Croghan v. Savings Trust Co., App., 85 S.W.2d 239, 243, quoting *Corpus Juris*.

11 C.J. p 508 note 38.

Covenant as to "trade or exchange" of chattels

However, a chattel mortgage containing a covenant that if the mortgagor should "trade or exchange" any of the mortgaged property, the property so obtained shall be held as security in place of that disposed of, includes whatever the mortgagor acquires in the place of the property disposed of, whether acquired by purchase or by "trade or exchange."—Hulsizer v. Opdyke, N.J.Ch., 7 A. 879.

74. U.S.—New York Metropolitan Nat. Bank v. St. Louis Dispatch

plied on the mortgage debt will not extend the lien of the mortgage to the proceeds of property not included therein.⁷⁵ An agreement to pay,⁷⁶ or an actual part payment of,⁷⁷ the mortgage debt, by a third person, will not extend the mortgage so as to include property owned by such person.

Necessity of delivery. Where other property is substituted for that originally included in a mortgage it has been held that a formal delivery of such substituted property is necessary to make the mortgage valid as to it.⁷⁸

Ratification of the exchange by the mortgagee has been held to render the substituted property subject to the lien of the mortgage, although there is no exchange of possession and no refileing of the mortgage.⁷⁹

Laches; waiver. Laches on the part of the mortgagee in claiming substituted property will deprive him of his rights thereto.⁸⁰ A mortgagee's failure to exercise a power of selection as to the property covered by his mortgage constitutes a voluntary relinquishment or waiver thereof.⁸¹

VIII. RECORDING, FILING, OR REGISTRATION

§ 130. General Statement

Statutory provisions generally require that mortgages be recorded, the object being the protection of innocent third persons who may acquire rights in the mortgaged property.

The statutes concerning mortgages generally make it necessary, in order that the mortgage may be valid as to designated persons, that it either be spread on the records, or the mortgage itself, or a true copy thereof, be filed in a place designated by the statute.⁸² Requirements as to registration being entirely of statutory origin, the statute must in each case be examined to determine what instruments are to be recorded, the sufficiency of recording, and the effect of a failure to record,⁸³ and such a statute will be strictly construed.⁸⁴ In some jurisdictions it is held that such statutes must be strictly complied with⁸⁵ while, in other jurisdic-

tions, a substantial compliance is sufficient.⁸⁶

The object of a statute requiring registration or recordation where possession of the mortgaged chattel is left with the mortgagor is to protect innocent persons and prevent fraud and deception by precluding a mortgagor of personal property from holding himself out to the world as an unqualified owner,⁸⁷ and to make the recording of the mortgage equivalent, as near as may be, to physical possession by the mortgagee.⁸⁸ A statute requiring recordation will not validate mortgages declared invalid by a previously enacted statute concerning assignments for the benefit of creditors.⁸⁹

A statute referring to the recording of mortgages conveying legal title is not applicable to a mortgage of an equitable title;⁹⁰ nor does a statute providing for the filing or recording of mortgages ap-

Co., Mo., 13 S.Ct. 944, 149 U.S. 436, 37 L.Ed. 799, affirming, C.C., 36 F. 722.

11 C.J. p 508 note 39.

75. Minn.—O'Connor v. Einfeldt, 205 N.W. 268, 164 Minn. 422.

76. Mich.—Keables v. Christie, 11 N.W. 400, 47 Mich. 594.

Tex.—Slagle v. First State Bank of Paris, Civ.App., 189 S.W. 847.

77. Mich.—Keables v. Christie, 11 N.W. 400, 47 Mich. 594.

78. U.S.—McDermott v. Yeatman, C.C.Pa., 16 F.Cas.No.8,749.

79. N.C.—Hubbard v. Winborne, 20 N.C. 226.

Recording and filing generally see infra §§ 130-174.

80. U.S.—New York Metropolitan Nat. Bank v. St. Louis Dispatch Co., Mo., 13 S.Ct. 944, 149 U.S. 436, 37 L.Ed. 799, affirming, C.C., 36 F. 722.

81. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

82. Tex.—Brothers v. Mundell, 60 Tex. 240.

11 C.J. p 509 note 50.

83. U.S.—Pryor Creek Citizens' Bank v. Keys, 33 S.Ct. 642, 229 U.S. 179, 57 L.Ed. 1140, affirming 104 P. 346, 22 Okl. 174, 18 Ann.Cas. 152.

11 C.J. p 509 note 51.

84. Alaska.—In re Minkove, 6 Alaska 68.

Me.—Hayden v. Russell, 109 A. 485, 119 Me. 38.

85. Ind.—Roudebush v. Nash, 177 N.E. 335, 93 Ind.App. 283.

11 C.J. p 509 note 52.

86. Ark.—Gasconade Development Co. v. McIlroy Bank & Trust Co., 112 S.W.2d 653—Reitz v. Nowlin, 110 S.W.2d 690.

11 C.J. p 509 note 53.

87. U.S.—In re Sachs, C.C.A.Md., 30 F.2d 510, affirming in part and reversing in part, D.C., 21 F.2d 984—In re Universal Storage & Transfer Co., D.C.Md., 4 F.Supp. 425, affirmed, C.C.A., Skutch v. Buch, 70 F.2d 107.

Ill.—Leopold v. Universal Credit Co., 8 N.E.2d 727, 290 Ill.App. 305.

N.J.—Smith v. Commercial Credit Corporation, 165 A. 637, 118 N.J.Eq. 12, affirmed Morrow v. Smith, 170 A. 607, 115 N.J.Eq. 310.

N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.

N.D.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526—Farmers' State Bank of Gwinner v. First Nat. Bank of Forman, 199 N.W. 961, 965, 51 N.D. 225, citing *Corpus Juris*.

Okl.—Morgan v. Stanton Auto Co., 285 P. 962, 142 Okl. 116.

11 C.J. p 509 note 55.

Protection of creditors

Statute requiring recording of mortgages was enacted to protect bona fide innocent creditors against danger of being misled into extending credit to debtor with secret lien on his property.—Ransom & Randolph Co. v. Moore, 261 N.W. 128, 272 Mich. 31.

88. U.S.—In re Packard Press, C.C. A.N.Y., 5 F.2d 633.

89. Tex.—Duncan v. Taylor, 63 Tex. 645.

90. Ky.—State Bank v. Vance, 4 Litt. 168.

ply to a transaction which is a pledge.⁹¹ Mortgages have been held not embraced by a statute requiring a record of all deeds of trust and "mortgages whatsoever,"⁹² nor by a statute relating to liens on merchandise or the proceeds thereof,⁹³ but an act requiring deeds and conveyances of personal property to be recorded has been held to apply to mortgages.⁹⁴

Authority to record. Where a mortgage is executed pursuant to an agreement the mortgagor is authorized to file it for record,⁹⁵ and a person to whom he delivers it for this purpose is authorized as his agent to file it.⁹⁶ So, the mortgagor may act as the agent of the mortgagee in delivering the mortgage for record.⁹⁷

The failure to file or refile a mortgage does not deprive the mortgagee of his interest in the mortgage but merely makes it void as against the persons designated by the recording act.⁹⁸ An instrument may operate as evidence of an indebtedness, although inoperative as a mortgage because not filed.⁹⁹

§ 131. Statutory Provisions

The validity, applicability, and repeal of statutory provisions requiring recordation are determined by the general rules applicable.

The law as to filing, in force at the time the mortgage is executed, is applicable,¹ and changes in the requirements of the recording acts cast no additional duties on a mortgagee who, prior to its

passage, has filed or recorded his instrument in conformity with the then recording laws.² When statutory provisions relating to the recording of chattel mortgages have been enacted at different times, the later enactment will control in the event of any repugnancy between the provisions.³

Where the repeal by implication of a recording act is asserted, the general rules against such repeals will be applied;⁴ and a recording statute will not be regarded as affected by another act which does not provide for its repeal and is not inconsistent with it.⁵ Provisions of a recording act, omitted from a codification adopted as the law of the jurisdiction, are regarded as repealed.⁶

As affecting rights. No matter how strict the requirements of the recording act are, they are not objectionable as interfering with the right of property.⁷ A provision making void as to bona fide purchasers an unrecorded mortgage even when executed in a state where registration is not required does not deny the citizens of such a state any rights in that it fails to give full faith and credit to the public acts of such other state.⁸

§ 132. Instruments Entitled to Record

To be entitled to record the instrument must be of such nature and so executed as to come within the provisions of the statute.

In order that a mortgage may be admitted to record, it must be proved in the manner provided by statute.⁹ A provision that a mortgage, required to

91. U.S.—Dale v. Pattison, Ohio, 34 S.Ct. 785, 234 U.S. 399, 58 L.Ed. 1870, affirming 199 F. 987, 117 C.C.A. 663.

92. U.S.—Hodgson v. Butts, D.C., 3 Cranch 140, 2 L.Ed. 391.

93. N.Y.—Utica Trust & Deposit Co. v. Decker, 155 N.E. 665, 244 N.Y. 340, reversing 215 N.Y.S. 669, 217 App.Div. 137.

94. Ala.—Magee v. Carpenter, 4 Ala. 469, 11 C.J. p 510 note 61.

95. Iowa.—In re Guyer, 29 N.W. 826, 69 Iowa 585.

96. Iowa.—In re Guyer, supra.

97. Wis.—Marlet v. Hinman, 45 N.W. 953, 77 Wis. 136, 20 Am.S.R. 102.

98. N.Y.—Blumberg v. Marks, 87 N.Y.S. 514, 11 C.J. p 510 note 66.

99. Philippine.—McMicking v. Kimura, 12 Philippine 98.

1. Minn.—Lienau v. Moran, 5 Minn. 482.

2. Okl.—Keys v. Claremore First Nat. Bank, 104 P. 346, 22 Okl. 174,

18 Ann.Cas. 152, affirmed 33 S.Ct. 642, 229 U.S. 179, 57 L.Ed. 1140.

3. Or.—Pattee v. Harbaugh, 171 P. 221, 87 Or. 612.

4. Wash.—Merritt v. Russell, 87 P. 70, 44 Wash. 143, 11 C.J. p 510 note 62.

5. Ala.—W. S. Brown Mercantile Co. v. Yielding Bros. Department Store, 76 So. 4, 200 Ala. 412.

Statutes held not affecting recording acts

(1) Acts providing for issuance of certificates of title of motor vehicles. Mich.—Nelson v. Vieregiver, 203 N.W. 164, 230 Mich. 38.

N.C.—Whitehurst v. Garrett, 144 S.E. 835, 196 N.C. 154—Carolina Discount Corporation v. Landis Motor Co., 129 S.E. 414, 190 N.C. 157.

Okl.—King-Godfrey, Inc., v. Rogers, 11 P.2d 935, 157 Okl. 216.

(2) Motor Vehicles Act requiring recording of mortgages on motor vehicles.—Bush v. Bank of America Nat. Trust & Savings Ass'n, 37 P.2d 168, 1 Cal.App.2d 588.

(3) Uniform Warehouse Receipts Act.

Ala.—W. S. Brown Mercantile Co. v.

Yielding Bros. Department Store, 76 So. 4, 200 Ala. 412.

Miss.—Marine Bank & Trust Co. v. Greenville Savings Bank & Trust Co., 97 So. 526, 133 Miss. 91.

6. Ga.—Saunders v. Citizens' First Nat. Bank of Albany, 142 S.E. 744, 38 Ga.App. 141, conforming to answers to certified questions 142 S.E. 127, 165 Ga. 558.

7. R.I.—Burdick v. Coates, 48 A. 389, 22 R.I. 410.

8. Tex.—Willys-Overland Co. of California v. Chapman, Civ.App., 206 S.W. 978.

9. U.S.—In re Smith, D.C.Ga., 281 F. 574.

N.J.—Seacoast Finance Corporation v. Cornell, 138 A. 695, 104 N.J.Law 24.

Okl.—Lankford v. First Nat. Bank, 183 P. 56, 75 Okl. 159.

11 C.J. p 510 note 68.

Purpose of probate
Requirement of Civ.Code 1912 § 1352, that mortgage be probated before it is recorded is to secure the authenticity of the instrument.—J. W. Dillon & Son Co. v. Oliver, 91 S.E. 304, 106 S.C. 410.

be filed in the office of the recorder of the county where the property is located, may also be filed in the office of the secretary of state but that such filing shall have no effect unless the mortgage has been filed in the county, does not require filing with the county recorder as a condition to filing in the office of the secretary of state.¹⁰

Instruments which have been held not entitled to filing or recording as a mortgage include agreements in writing to execute a mortgage,¹¹ and bills of sale,¹² but a contract to grant a lien on property to be acquired by the grantee creates an equitable lien and is entitled to be recorded, under a statute providing for recording of such liens.¹³

§ 133. Necessity in General

a. In general

b. Exempt property

Mortgage without affidavit attached

Where a mortgage for purchase price of stock of merchandise, not followed by delivery of possession to mortgagee, was filed for record with the city clerk and the register of deeds, as required by Comp.L.Mich. 1915 § 11983, but the so-called affidavit attached to the instrument filed in the office of the city clerk, although signed by the mortgagor, did not contain any jurat signed by a notary or other officer authorized to take oaths, the mortgage was void as against creditors under such statute, prohibiting city clerk and register of deeds from accepting such instrument for filing unless affidavit is attached thereto.—*In re Jarnol*, D.C. Mich., 283 F. 547.

Where officer and witnesses not disqualified

Where it does not appear from face of a mortgage that officer taking the acknowledgment or the subscribing witnesses are legally disqualified within Rev.L.1910 § 4036, by their interest in property, the mortgage may properly be received for record.—*Lankford v. First Nat. Bank*, 183 P. 56, 75 Okl. 159.

10. Idaho.—*State v. Lukens*, 283 P. 527, 48 Idaho 357.

11. Neb.—*American State Bank of Scottsbluff v. Keller*, 200 N.W. 999, 112 Neb. 761.

12. Ark.—*Taylor v. Hildebrand Poster Advertising Co.*, 58 S.W.2d 211, 187 Ark. 53.

13. W.Va.—*Benson v. Wood Motor Parts Corporation*, 174 S.E. 895, 115 W.Va. 200.

14. U.S.—*Dale v. Pattison*, Ohio, 34 S.Ct. 785, 234 U.S. 399, 58 L.Ed. 1370, 52 L.R.A.,N.S., 754.

11 C.J. p 510 note 70.

Mortgage covering future advances

A mortgage which secured a two thousand dollar debt and contem-

plated future advances of money was not valid as to three thousand five hundred fifty dollars because of recitals that mortgage was subject to another mortgage and other liens and that if mortgagee paid or retired any of them mortgagee would become subrogated to rights of owners of mortgage or liens, since essential purpose of statute voiding chattel mortgages covering future advances as against creditors and subsequent purchasers unless mortgage is filed is to enable third persons to know from examination of records precise amount of indebtedness secured by chattel mortgages. The aim of statute voiding chattel mortgages covering future advances as against creditors and subsequent purchasers or mortgagees unless mortgage or copy thereof is filed was to obviate difficulty and uncertainty in determining amount of liens existing against property subject to chattel mortgage.—*Timmer v. Talbot*, D.C.Mich., 19 F.Supp. 687, affirmed, C.C.A., *Lemmen v. Timmer*, 89 F.2d 1011.

Conditional sale

Reservation of title to automobile sold until all payments were made, not being a "mortgage," but "conditional sale," is not required to be recorded.—*Mitchell v. Williams*, 124 So. 430, 155 Miss. 343.

In Washington, the statute providing that a mortgage for three hundred dollars or more "may" be recorded, but "must" be filed, makes recordation of such chattel mortgage optional, but filing and indexing is essential.—*Goddard v. Morgan*, 74 P. 2d 894, 193 Wash. 83.—*First Nat. Bank v. White-Dulany Co.*, 209 P. 861, 121 Wash. 386—11 C.J. p 510 note 70 [b].

15. Va.—*C. I. T. Corporation v. Guy*, 195 S.E. 659, 662, 170 Va. 16, citing *Corpus Juris*.

Necessity as between the parties or

a. In General

Recording is essential only as required by statute.

The recording or registration of a mortgage is essential only as required by statute,¹⁴ and unless required is unnecessary even as against creditors or purchasers.¹⁵ In any event, a failure to record the instrument is available only to persons having some right or interest in the property¹⁶ and not to mere strangers¹⁷ or trespassers.¹⁸ Where, however, recording is required and for any reason the statute cannot be complied with, then the mortgagee must take possession of the mortgaged property to preserve his rights.¹⁹ A statute requiring filing of a mortgage covering future advances applies to extensions of credit for sales of merchandise or for

as against third persons see *infra* §§ 134-142.

16. Cal.—*Schwartzler v. Lemas*, 53 P.2d 1039, 11 Cal.App.2d 442.

Mo.—*K-M Supply Co. v. Moran*, App., 53 S.W.2d 419.

11 C.J. p 510 note 75.

Interest to be shown

Where a complaint, in a suit to foreclose mortgage, does not show that defendants, other than mortgagor, are creditors of latter or subsequent purchasers or encumbrancers, they cannot question sufficiency of mortgage by demurrer for absence of allegation that it was recorded.—*Rummelsburg v. McDonald*, 226 P. 412, 66 Cal.App. 380.

17. Mo.—*Elliott v. Washington*, 119 S.W. 42, 137 Mo.App. 526.

11 C.J. p 510 note 76.

Creditor of vendor of mortgagor

Claim to property levied on, based on mortgage executed by transferee of defendant in execution, is not affected by failure promptly to record mortgage, since mortgage was good as between mortgagor and mortgagee and as against one who was a creditor of the person who sold the property to the mortgagor, but was not creditor of, or purchaser from, mortgagor, without filing and without recording.—*Samuelson v. Weisberg*, 177 A. 254, 13 N.J.Misc. 193.

Purchaser not for value

That mortgage on automobile was not registered when automobile was delivered to purchaser from mortgagor does not effect mortgagee's ownership, absent showing purchase for value.—*Chandler v. Conabeer*, 153 S. E. 313, 198 N.C. 757.

18. Iowa.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

11 C.J. p 510 note 77.

19. Mich.—*Allison v. Teeters*, 142 N.W. 340, 176 Mich. 216.

11 C.J. p 510 note 78.

other things of value as well as to cash.²⁰

Possession of mortgagor. Under a statute requiring recording where actual possession is retained by the mortgagor, "actual possession" is held to mean a real, as distinguished from a theoretical, possession.²¹

Partial invalidity. Failure to register a mortgage will not invalidate it as to property embraced therein concerning which the statute does not require registration, although it may be invalid as to other property.²²

Goods at sea or abroad. When so provided by statute, it is not necessary to the validity of a mortgage of a ship or vessel, nor of goods at sea or abroad, that the mortgage be recorded if the mortgagee takes possession of them as soon as may be after their arrival in the state.²³

b. Exempt Property

A mortgage of property exempt from seizure by creditors need not be recorded, unless nonexempt property is included therein.

Where the property covered by a mortgage is exempt from seizure by the mortgagor's creditors, it is not necessary that the mortgage be recorded to be good against creditors, even though possession is not transferred;²⁴ but it has been held that, where the mortgage covers both exempt and nonexempt property, it must be recorded.²⁵

§ 134. Necessity as between the Parties

Unless so required by statute, recording is not essential to the validity of the mortgage as between the parties thereto.

Filing, record, or registration is not, in the absence of statute, essential to the validity of a mortgage as between the parties,²⁶ and the mortgagor's

20. U.S.—Timmer v. Talbot, D.C. Mich., 13 F.Supp. 666.
21. Iowa.—King v. Wallace, 42 N. W. 776, 78 Iowa 221.
11 C.J. p 511 note 79.
22. U.S.—In re Bernard & Katz, C. C.A.N.Y., 38 F.2d 40.
- Lien on accounts receivable* was not invalidated by fact that lien attempted to be created on returned merchandise was void for want of recording.—In re Bernard & Katz, supra.
23. Mass.—Taber v. Hamlin, 97 Mass. 489, 93 Am.D. 113.
11 C.J. p 511 note 81.
24. Mich.—Waite v. Mathews, 15 N. W. 524, 50 Mich. 392.
25. Tex.—Baughn v. Allen, Civ.App., 68 S.W. 207.
26. U.S.—American Nat. Bank of Sapulpa v. Harris, C.C.A.Okla., 84 F.2d 181—Haupt v. Moore, C.C.A. Cal., 77 F.2d 456—In re American Cork Industries, C.C.A.N.Y., 54 F. 2d 740—In re Glover Specialties Co., D.C.Conn., 18 F.2d 314—Sample v. Getman-McDonnell-Summers Drug Co., D.C.Okla., 14 F.2d 170—Coggin v. Hartford Accident & Indemnity Co., D.C.N.Y., 9 F.Supp. 785, reversed on other grounds, C. C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F.2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—In re Myers Motor Sales Co., D.C.Tex., 1 F.Supp. 509—In re Triangle Printing Co., D.C.Okla., 1 F.Supp. 329—In re Stucky Trucking & Rigging Co., D.C.N.J., 240 F. 427.
- Ala.—Hill v. Rentz, 78 So. 881, 201 Ala. 527.
- Alaska.—Courtney v. Brenneman, 6 Alaska 233.
- Cal.—Wolpert v. Gripton, 2 P.2d 767, 213 Cal. 474—Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380.
- Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145—Robinson v. Wright, 9 P.2d 618, 80 Colo. 417.
- Conn.—Marciel v. Berman, 132 A. 397, 104 Conn. 165.
- Ill.—Leopold v. Universal Credit Co., 8 N.E.2d 727, 290 Ill.App. 305.
- Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.
- Kan.—American Indemnity Co. v. Peak, 274 P. 227, 127 Kan. 606—Hammond Motor Co. v. Warren, 213 P. 810, 113 Kan. 44.
- Ky.—Eastern Const. Co. v. Carson Const. Co.'s Trustee, 47 S.W.2d 67, 242 Ky. 648.
- Mass.—Rowe Vending Mach. Co. v. Morris, 177 N.E. 112, 276 Mass. 274—Atlantic Transp. Co. v. Alexander Shipping Co., 157 N.E. 725, 261 Mass. 1.
- Mich.—Westerlin & Campbell Co. v. Detroit Milling Co., 206 N.W. 371, 233 Mich. 384.
- Mo.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832—K-M Supply Co. v. Moran, App., 53 S.W.2d 419—First Nat. Bank v. Johnson, 297 S.W. 724, 221 Mo.App. 31—Emerson-Brantingham—Implement Co. v. Rogers, App., 216 S.W. 994.
- Mont.—Herd v. Freeman, 273 P. 1047, 84 Mont. 32—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 60 Mont. 593—Doering v. Selby, 244 P. 485, 75 Mont. 416—First Nat. Bank of Galata v. Montana Emporium Co., 197 P. 994, 59 Mont. 584—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.
- Neb.—Security State Bank v. Schomberg, 230 N.W. 487, 119 Neb. 598.
- N.H.—General Motors Acceptance Corporation v. Berry, 167 A. 553, 86 N.H. 280.
- N.J.—Bankers' Trust Co. v. Maxson, 134 A. 875, 100 N.J.Eq. 1—W. D. Cashin & Co. v. Alamac Hotel Co., 131 A. 117, 121, 98 N.J.Eq. 432, citing *Corpus Juris*—Samuelson v. Weisberg, 177 A. 254, 13 N.J.Misc. 193.
- N.D.—Godman v. Olson, 165 N.W. 515, 38 N.D. 360.
- Ohio.—Metropolitan Securities Co. v. Warren State Bank, 158 N.E. 81, 117 Ohio St. 69—Calder v. Bliss Auto Sales Co., 18 Ohio App. 242.
- Okla.—Kaylor v. Kaylor, 45 P.2d 743, 172 Okl. 535—Morgan v. Stanton Auto Co., 285 P. 962, 142 Okl. 116—Fiegel v. First Nat. Bank, 214 P. 181, 90 Okl. 26.
- Or.—First Nat. Bank v. Wegener, 186 P. 41, 94 Or. 818.
- R.I.—Roberts v. Golden Flake Doughnut Shops, 167 A. 259, 53 R. I. 465.
- S.C.—Ward v. Greer, 152 S.E. 678, 155 S.C. 426.
- Tex.—Sparkman v. First State Bank of Handley, 244 S.W. 127, 112 Tex. 33, answers to certified questions conformed to, Civ.App., 246 S.W. 724—Gillett v. Talley, Civ.App., 60 S.W.2d 868—Merchants' & Manufacturers' Securities Co. v. Wright, Civ.App., 59 S.W.2d 1097, error refused—Boody v. Star Furniture Co., Civ.App., 45 S.W.2d 291—Glasscock v. Coppard, Civ.App., 29 S.W.2d 414, reversed on other grounds Coppard v. Glasscock, Com.App., 46 S.W.2d 298—Self Motor Co. v. First State Bank of Crowell, Civ.App., 226 S.W. 428—Cameron v. Jones, 90 S.W. 1129, 41 Tex.Civ.App. 4.
- Va.—F. D. Cummer & Son Co. v. R.

obligation under the unrecorded mortgage remains unchanged even though he has contracted other obligations which cannot be paid except by recourse to the mortgaged property.²⁷ A creditor of the mortgagor, himself a party to the mortgage, cannot avail himself of the invalidity of the mortgage because of failure of the mortgagee to file it or take possession of the mortgaged property.²⁸

As a general rule, the representatives of a deceased party stand on the same footing as the original parties with reference to the validity of an unrecorded mortgage,²⁹ although it has been held that, in case of the death of an insolvent mortgagor while in possession of the property, his representatives might claim the property as against the mortgagee.³⁰

§ 135. Necessity as against Assignee of Mortgagor

The necessity for recording mortgages as against

an assignee of the mortgagor for benefit of creditors is considered in the title Assignments for Benefit of Creditors § 187, and as against a trustee in insolvency in the C.J.S. title Insolvency § 11, also 32 C.J. p 853 note 92 et seq.

§ 136. Necessity as against Creditors

Unrecorded mortgages are ordinarily void as against creditors of the mortgagee.

While in the absence of statute an unfiled mortgage is a valid lien against general creditors from the time of its execution and delivery,³¹ the effect of the recording acts generally is to render void as to creditors an unrecorded mortgage, unless possession has been taken by the mortgagee thereunder.³² Hence, the property covered by such a mort-

M. Hudson Co., 127 S.E. 171, 141 Va. 271.

11 C.J. p 511 note 82.

Valid as at common law

Unfiled mortgage is valid between parties only to extent it is valid as it would be at common law.—In re Rambler Cafeteria, C.C.A.N.Y., 9 F.2d 861, certiorari denied *Well v. Trustee of Bankruptcy of Rambler Cafeteria*, 46 S.Ct. 355, 270 U.S. 660, 70 L.Ed. 785.

Evidence of promise to secure payment of debt

Where note, and mortgage securing it, represented transactions entered into in good faith, the note evidenced a debt, and the mortgage, although not filed in accordance with laws of Ohio, where property was situated, was good as between the parties and evidenced debtor's promise to give creditor a lien on collection.—*Halladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141.

Assignee of mortgagee

Assignee of note reciting that note was secured by goats had mortgage lien on goats as against maker, although note was not registered.—*Lindig v. Johnson City State Bank*, Tex.Com.App., 41 S.W.2d 222, reversing *Johnson City State Bank v. Lindig*, Civ.App., 26 S.W.2d 658.

27. Ariz.—*Moore v. Chilson*, 224 P. 818, 26 Ariz. 244.

28. U.S.—*Cornelius v. C. C. Pictures, Inc.*, D.C.N.Y., 296 F. 437, affirmed, C.C.A., 296 F. 490.

29. Ind.—*Mayer v. Myers*, 27 N.E. 740, 129 Ind. 386.

11 C.J. p 511 note 83.

30. Mass.—*Hartford Accident & In-*

demnity Co. v. Callahan, 171 N.E. 820, 271 Mass. 556.

11 C.J. p 512 note 84.

31. U.S.—In re Myers, 19 F.2d 600, modified on other grounds, C.C.A., 24 F.2d 349.

32. U.S.—*Elk Creek Lumber Co. v. Hamby*, C.C.A.N.C., 84 F.2d 144—*Haupt v. Moore*, C.C.A.Cal., 77 F.2d 456—In re *Excelsior Macaroni Co.*, D.C.N.Y., 55 F.2d 406—In re *American Cork Industries*, C.C.A.N.Y., 54 F.2d 740—In re *Herkimer Mills Co.*, D.C.N.Y., 39 F.2d 625—*First Nat. Bank v. Raleigh Sav. Bank & Trust Co.*, C.C.A.N.C., 37 F.2d 301—*Blue v. Herkimer Nat. Bank*, C.C.A.N.Y., 30 F.2d 256—*Farmers' State Bank of Polk, Neb. v. Benston*, C.C.A.Colo., 29 F.2d 902—*Holt v. Albert Pick & Co.*, C.C.A.N.C., 25 F.2d 373, certiorari denied *Albert Pick & Co. v. Holt*, 49 S.Ct. 9, 278 U.S. 602, 73 L.Ed. 530—*Albert Pick & Co. v. Wilson*, C.C.A.Iowa, 19 F.2d 18—*Mitchell v. Nelson*, C.C.A.Md., 16 F.2d 767, modified on other grounds 18 F.2d 1018, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328—In re *Uirup-Huff Co.*, D.C.N.Y., 9 F.2d 922, affirmed, C.C.A., 9 F.2d 924—In re *Cook*, D.C.Md., 9 F.Supp. 764—*Continental Bank & Trust Co. of New York v. Webster Hall Corporation of America*, D.C.Pa., 4 F.Supp. 337, affirmed, C.C.A., *Webster Hall Corporation of America v. Continental Bank & Trust Co. of New York*, 66 F.2d 553—In re *Griffin*, D.C.Fla., 294 F. 296—In re *A. E. Fountain, Inc.*, C.C.A.N.Y., 282 F. 816—In re *P. J. Sullivan Co.*, N.Y., 254 F. 660, 166 C.C.A. 153, affirming, D.C., 247 F. 139—In re *Schilling*, D.C.Ohio, 251 F. 966.

Ala.—*Finney v. Dryden*, 108 So. 13, 214 Ala. 370—*Bain v. Dalrymple*, 114 So. 673, 22 Ala.App. 265.

Alaska.—*Lieman v. Northern Commercial Co.*, 6 Alaska 536.

Cal.—*Mohr v. First Nat. Bank*, 232 P. 743, 69 Cal.App. 756.

Colo.—*Anglo-American Mill Co. v. First Nat. Bank*, 230 P. 118, 76 Colo. 57—*Bogdon v. Fort*, 225 P. 247, 75 Colo. 231.

Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617—*Berlein v. Eddy*, 104 So. 780, 89 Fla. 484.

Ill.—*Wilson v. Person*, App., 13 N.E.2d 814.

Ind.—*Powell v. Totten*, 162 N.E. 418, 93 Ind.App. 442—*Automobile Funding Co. v. Lewis*, 132 N.E. 261, 76 Ind.App. 297.

La.—*Alphonse Brenner Co. v. Williams*, 8 La.App. 320.

Mass.—*Arnold v. Chandler Motors of New England*, 138 N.E. 574, 244 Mass. 210.

Mich.—*Peter Schuttler Co. v. Gunther*, 192 N.W. 661, 222 Mich. 430.

Minn.—*Clark v. B. B. Richards Lumber Co.*, 71 N.W. 389, 68 Minn. 282.

Mo.—*Barnard State Bank v. Lankford*, 11 S.W.2d 1084, 223 Mo.App. 519.

N.H.—*Kendall v. Hastings*, 125 A. 484, 81 N.H. 280.

N.J.—*Unger v. Hochman*, 133 A. 180, 4 N.J.Misc. 445.

N.Y.—*Rotkowitz v. Sohn*, 239 N.Y.S. 639, 136 Misc. 265.

N.C.—*Sneeden v. Nurnberger's Market*, 135 S.E. 328, 192 N.C. 439—*Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Ohio.—*Winters Nat. Bank & Trust*

gage is subject to seizure on attachment³³ or on execution issued on a judgment recovered against the mortgagor.³⁴ The invalidity of an unfiled mortgage applies only to the creditors of the original mortgagor and does not extend to the creditors of an assignee of the mortgagor in the absence of a novation.³⁵ The necessity for recording exists under these acts regardless of the intention of the parties or the presence or absence of good faith,³⁶ or even though the mortgage was given and received in good faith, to secure a loan which did not add to the amount of the obligation of the mortgagor;³⁷ nor is it necessary for a subsequent creditor to show affirmatively that he was deceived or misled by the failure of a mortgagee to record his mortgage, unless the statute relating to the recording of mortgages makes such condition.³⁸ A creditor who, as such, is entitled to protect his rights, as against an unfiled mortgage, is not prevented from so doing by the fact that he takes a mortgage to secure his indebtedness, although he is not in a position to be protected as a bona fide encumbrancer.³⁹ The ne-

cessity for recording as against creditors of the mortgagor may be implied from a provision that the mortgage must be renewed or refiled in a certain time to be valid against creditors.⁴⁰ An agreement not in fact a mortgage is not invalid as to creditors because not recorded as a mortgage.⁴¹

Burden on creditor. Where it is made to appear on the trial that a mortgage of chattels is bona fide, it devolves on a creditor to establish his superior equity by showing that he belongs to the class of creditors who are entitled to challenge the validity of the mortgage as against them, because not duly or seasonably recorded.⁴²

Time of creation of debt. Ordinarily, the recording acts are construed to apply to creditors who were such prior to the execution of the mortgage as well as to those who become creditors subsequent thereto;⁴³ but in some jurisdictions the contrary has been held and an unrecorded mortgage is regarded as valid as against creditors who became such prior to the execution of the mortgage.⁴⁴ A

Co. v. Midland Acceptance Corporation, 191 N.E. 889, 47 Ohio App. 324.

R.I.—Roberts v. Golden Flake Doughnut Shops, 167 A. 259, 53 R.I. 465.

S.D.—First Nat. Bank v. Veglahn, 231 N.W. 601, 57 S.D. 127.

Tex.—Texas Bank & Trust Co. v. Teich, Civ.App., 283 S.W. 552, motion dismissed 286 S.W. 577—Self Motor Co. v. First State Bank of Crowell, Civ.App., 226 S.W. 428.

Wash.—Kliks v. Tenet Mortg. Co., 299 P. 367, 162 Wash. 514—Keyes v. Sabin, 172 P. 335, 101 Wash. 618.

11 C.J. p 513 note 95.

Landlord with statutory lien for rent is "creditor," within mortgage statute.—Cave v. Talley Co., Tex.Civ. App., 298 S.W. 912.

Pledgee of warehouse receipts for value in regular course of business, without notice of unrecorded trust receipts, obtained superior lien.—General Motors Acceptance Corporation v. Sharp Motor Sales Co., 25 S.W.2d 405, 233 Ky. 290.

Repairman's lien on automobile is superior to lien of a mortgage recorded after repairman began work.—Bostic v. Workman, 31 S.W.2d 215, 224 Mo.App. 645.

Supplies furnished

Lien for supplies furnished was superior to lien of unrecorded crop mortgage.—Erwin v. Stackhouse, 300 S.W. 407, 175 Ark. 1169.

Creditor in possession of property

General creditor has no right to seize property of his debtor with-

out legal process; but, if he obtains peaceable possession thereof, he cannot be disturbed in that possession by mortgagee, whose mortgage, as to such creditor, is void for failure to record mortgage.—Pearson v. Lafferty, 193 S.W. 40, 197 Mo.App. 123.

Rights of mortgagees

Where creditors sold goods to dealers while mortgage on equipment was unrecorded, mortgagee could have lien for balance on mortgage debt after deducting creditors' liens.—Cudahy Packing Co. v. Mylan, 228 N.W. 374, 56 S.D. 275.

33. Neb.—New Home Sewing Machine Co. v. Beals, 62 N.W. 1092, 44 Neb. 816.

11 C.J. p 514 note 96.

34. N.J.—Unger v. Hochman, 133 A. 180, 4 N.J.Misc. 445.

11 C.J. p 514 note 97.

35. U.S.—In re Bonk, D.C.Mich., 268 F. 1012.

36. Mich.—People v. Burns, 125 N. W. 740, 161 Mich. 169, 137 Am.S. R. 466.

11 C.J. p 514 note 98.

37. N.Y.—Ledoux v. East River Silk Co., 44 N.Y.S. 489, 19 Misc. 440.

38. Mo.—Harrison v. South Carthage Min. Co., 68 S.W. 963, 95 Mo. App. 80.

39. Mich.—Ving v. Millar, 74 N.W. 459, 116 Mich. 144.

11 C.J. p 514 note 2.

40. N.M.—Vorenberg v. Bosserman, 130 P. 438, 17 N.M. 433.

41. Tex.—Stewart v. Woods Electric Co., Civ.App., 73 S.W.2d 657.

42. N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.

11 C.J. p 514 note 4.

43. Wash.—Kliks v. Tenet Mortg. Co., 299 P. 367, 162 Wash. 514.

W.Va.—Pepsi-Cola Bottling Co. v. Indian Rock Bottling Co., 126 S.E. 715, 98 W.Va. 269.

11 C.J. p 514 note 5.

"All creditors" construed

Landlord, who secured a valid pledge of tenant's tobacco crop to secure a prior indebtedness prior to recording of defendants' mortgage thereon, was entitled to priority over defendants in proceeds of tobacco, "all creditors," as used in Amendment of 1916 to Ky.St. § 496, providing that no debt or mortgage conveying legal or equitable title to real or personal estate shall be valid against creditors without recording, meaning all subsequent creditors, and such antecedent creditors as have secured, prior to the recording, some equity in the property.—Mason & Moody v. Scruggs, 268 S.W. 833, 207 Ky. 66.

44. U.S.—Cozart v. Barnes, S.C., 240 F. 935, 153 C.C.A. 621.

Ala.—Singer v. Alexander City Bank, 138 So. 263, 223 Ala. 677—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144—Hill v. Rentz, 78 So. 881, 201 Ala. 527.

Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346—Lakota Mercantile Co. v. Balsley, 236 N.W. 631, 60 N.D. 768—Moen v. Kilzer Lumber Co., 184 N.W. 989, 48 N.D. 420.

11 C.J. p 515 note 6.

creditor's claim is regarded as having arisen during the time for which a mortgage was withheld from record where, during that time, he has renewed or extended an existing debt.⁴⁵

Contingent liabilities. The term "creditors" has been held to include indorsers, guarantors, or sureties for the mortgagor,⁴⁶ but as to sureties there is authority to the contrary;⁴⁷ and such term will not include an indorsee where the liability of the indorsers has not become fixed.⁴⁸

Creditors of mortgagees and purchasers. Creditors of the mortgagee cannot avail themselves of a failure to file the mortgage where the only interest of the mortgagee in the property was secured by reason of such mortgage.⁴⁹ Where the mortgaged property is sold subject to the mortgage, it is held that the recording statutes protect creditors of the purchaser, since the purchaser becomes a mortgagor within the meaning of the statute,⁵⁰ although

there is authority to the contrary.⁵¹

Proceeds of sale. Although the mortgage is void as to creditors it is good as between the parties. Hence, the mortgagor, while in possession and before levy has been made by creditors on the property, may sell the chattels with the consent of the mortgagee, and the proceeds when paid to the mortgagee cannot be reached by the creditors.⁵²

§ 137. — Necessity for Lien

In many, but not in all, jurisdictions the failure to record the mortgage renders it void only as to creditors who, prior to its filing for record, have obtained a lien on the mortgaged property.

Although recording statutes usually provide that an unrecorded mortgage is void as to creditors, the prevailing doctrine makes the mortgage void only against those creditors who obtain a lien on the mortgaged property by attachment, execution, or otherwise before the instrument is filed for record.⁵³

Where creditor garnishes person-
ality covered by unrecorded trust agreement executed before service of garnishment process, he does not acquire a lien superior to that of trustees and beneficiary under Comp.L. 1913 § 6753, where the debt existed before the execution of the trust agreement, and the creditor has not since altered his position to his detriment.—*Petrie v. Wyman*, 159 N. W. 616, 35 N.D. 126.

Judgment creditor

Mortgage of automobile, executed and delivered November 13, and recorded November 15, is prior to judgment against mortgagor, filed and registered on November 14, where debt to judgment creditor was contracted before execution and delivery of mortgage, Code 1907, § 3386 declaring conveyances of personalty to secure debts inoperative against creditors and purchasers without notice until recorded being inapplicable.—*Birmingham News Co. v. Barron G. Collier, Inc.*, 103 So. 339, 212 Ala. 655.

45. Mich.—*Cutler v. Steele*, 48 N.W. 631, 85 Mich. 627.
11 C.J. p 515 note 7.

46. Mich.—*Cutler v. Steele*, supra.

47. Tex.—*Self Motor Co. v. First State Bank of Crowell*, Civ.App., 226 S.W. 428.

48. N.Y.—*Karst v. Gane*, 16 N.Y.S. 385, 61 Hun 533, affirmed 32 N.E. 1073, 136 N.Y. 316.
11 C.J. p 515 note 9.

49. Tex.—*Adoue v. Jemison*, 65 Tex. 680.

50. N.J.—*Stevens v. People's Home Journal*, 167 A. 769, 113 N.J.Eq. 516.

11 C.J. p 515 note 11.

51. Cal.—*Talcott v. Hurlbert*, 76 P. 647, 143 Cal. 4.
11 C.J. p 515 note 12.

52. N.J.—*New York Nat. Shoe, etc., Bank v. August*, 33 A. 803, 54 N. J.Eq. 182, affirmed 39 A. 1114, 55 N.J.Eq. 590.
11 C.J. p 515 note 14.

53. U.S.—*In re Dederick*, C.C.A.Kan., 91 F.2d 646—*Elk Creek Lumber Co. v. Hamby*, C.C.A.N.C., 84 F.2d 144—*First Nat. Bank v. Live Stock Nat. Bank*, C.C.A.Neb., 31 F.2d 416—*Sample v. Getman-McDonnell-Summers Drug Co.*, D.C.Okl., 14 F.2d 170—*In re Hopkins*, D.C. Wyo., 1 F.2d 394—*Coggin v. Hartford Accident & Indemnity Co.*, D. C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F.2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U. S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440—*In re Myers Motor Sales Co.*, D.C.Tex., 1 F.Supp. 509—*Bradley v. Robie*, C.C.A.Minn., 266 F. 884.

Cal.—*Chelhar v. Acme Garage*, 61 P. 2d 1232, 18 Cal.App.2d Supp. 775—*Wolpert v. Gripton*, 2 P.2d 767, 213 Cal. 474.

Colo.—*Glass & Bryant Mercantile Co. v. Farmers' State Bank of Ft. Morgan*, 265 P. 682, 83 Colo. 193.

Fla.—*Southern Bank & Trust Co. v. Mathers*, 106 So. 402, 404, 90 Fla. 542, citing *Corpus Juris*.

Iowa.—*Soehren v. Hein*, 243 N.W. 330, 214 Iowa 1060.

Kan.—*Campbell v. Killion*, 257 P. 752, 124 Kan. 124.

Minn.—*Munck v. Security State Bank*

of Owatonna, 220 N.W. 400, 175 Minn. 47.

N.D.—*Hansboro State Bank v. Imperial Elevator Co.*, 179 N.W. 669, 46 N.D. 363.

S.D.—*Barkley v. Boardman*, 221 N.W. 288, 53 S.D. 556—*Brown Grain Co. v. Coughlin*, 220 N.W. 151, 53 S.D. 66.

Tex.—*Alsbury v. Alsbury*, Civ.App., 211 S.W. 650.

Utah.—*Commercial Sec. Bank of Ogden v. Chimes Press*, 42 P.2d 990, 88 Utah 148.

Wis.—*Graham v. Perry*, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.
11 C.J. p 515 note 15.

Execution lien superior to mortgage

(1) Judgment creditor who levies execution on property covered by unfiled mortgage acquires lien superior to mortgage. In conversion action against sheriff, lien acquired by levy of execution on judgment is superior to claim of bank under oral understanding with depositor that bank should own business, as such oral agreement amounts to no more than an unfiled mortgage.—*First Nat. Bank v. Veglahn*, 231 N.W. 601, 57 S.D. 127.

(2) Where judgment creditor caused execution to issue and be levied on automobile in possession of judgment debtor, his lien attached at time of levy and was superior to lien of unregistered mortgage on automobile of which he had no notice at such time, notwithstanding notice at time of execution sale.—*Alsbury v. Alsbury*, Tex.Civ.App., 211 S.W. 650.

Garnishment liens

Under *Remington & B.Code* § 3660, declaring unrecorded mortgages void against subsequent creditors, garnishment liens on funds due a judg-

The rule is in most jurisdictions held to apply only to creditors who became such before the mortgage was executed, and where credit was extended to the mortgagor during the time that the mortgage was withheld from record, it has been held that the mortgage is void alike as to creditors with or without liens;⁵⁴ and in some jurisdictions the protection is extended even to creditors whose claims existed prior to the execution of the mortgage.⁵⁵ On the other hand, in some jurisdictions such mortgages are valid against all third parties who have not acquired a lien prior to the recording thereof.⁵⁶ A statute providing that a mortgage shall be void as against the creditors of the mortgagor unless filed does not in itself create a lien in favor of creditors prior to the lien of the mortgage.⁵⁷

§ 138. — Sufficiency of Lien

The sufficiency of the lien necessary to enable a creditor to attack an unrecorded mortgage depends on the provisions of the recording acts and the proper establishment of the necessary lien.

A statute giving priority to all liens obtained pri-

ment debtor are superior to prior unrecorded assignments by said debtor of its future income.—*Heermans v. Blakeslee*, 161 P. 489, 93 Wash. 595.

Lien acquired by judicial process or otherwise is under Remington & B.Code § 3660, as to recording chattel mortgages, superior to an unrecorded chattel mortgage.—*Heermans v. Blakeslee*, supra.

Wrongful seizure by creditor will not take the place of the lien required before he can assert the invalidity of the mortgage.—*Leopold v. Universal Credit Co.*, 8 N.E.2d 727, 290 Ill.App. 305.

54. Mich.—*Ransom & Randolph Co. v. Moore*, 261 N.W. 128, 272 Mich. 31.

Minn.—*Goldberg v. Brune Timber Co.*, 168 N.W. 22, 140 Minn. 335.

11 C.J. p 516 note 16.

55. N.J.—*Brockhurst v. Cox*, 64 A. 182, 71 N.J.Eq. 703, affirmed 73 A. 1117, 72 N.J.Eq. 950.

11 C.J. p 516 note 17.

In New York

(1) An unfiled chattel mortgage, there being no change of possession, is void as against all creditors although they have obtained no judgments in their favor and stand in the condition of simple contract creditors. A statute making mortgage not filed and not accompanied by transfer void against creditors of mortgagor is not limited to judgment creditors or creditors armed with process authorizing seizure.—*Wagar v. Roaser*, 190 N.Y.S. 677, 109 App.Div. 130.—*In re Shay's Estate*, 285 N.Y.S. 379, 157 Misc. 615.—*Rot-*

kowitz v. Sohn, 239 N.Y.S. 639, 136 Misc. 265.—*Stich v. Pirkel*, 166 N.Y.S. 440, 100 Misc. 594.—*Parker v. Wagoner*, 166 N.Y.S. 625, affirmed 169 N.Y.S. 1107, 183 App.Div. 912—11 C.J. p 516 note 17 [a] (1).

(2) Ordinarily, only judgment creditors can attack mortgage's validity.—*Stich v. Pirkel*, supra.

(3) A creditor by simple contract, as well as a judgment creditor, is within the protection of the statute; but until he has a judgment and lien or a right to a lien on the specific property he is in no condition to assert his right by action as a creditor.—*Wagar v. Roaser*, supra.—*Halladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141—11 C.J. p 516 note 17 [a] (3).

(4) The right to contest an unrecorded mortgage on decedent's household furniture is not possessed by his widow by virtue of her payment of his funeral expenses, as such expenses were never a debt against the husband, and hence the widow in such case is not a judgment creditor or a creditor with a lien especially in view of Code Civ. Proc. § 2686, and Decedent Estate Law (Consol.Laws, c. 13) § 176, added by L.1920, c. 919. The widow, therefore, is entitled to have the exempt property set off to her, but subject to the mortgage, for a person in possession of personal property cannot withhold it from a mortgagee, whose mortgage is unrecorded.—*Holmes v. Utter*, 188 N.Y.S. 83, 196 App.Div. 594.

(5) Execution is lien on car su-

perior to mortgage filed day after delivery of execution unless mortgage was executed in good faith and without notice.—*Jones v. Huter*, 239 N.Y.S. 221, 136 Misc. 49.

(6) Lien of warehouseman is superior to lien of chattel mortgagee failing to file mortgage.—*Buckley-Newhall Co. v. Bangs*, 224 N.Y.S. 71, 130 Misc. 293.

56. U.S.—*In re Bolstad*, D.C.Wash., 224 F. 283.

11 C.J. p 517 note 18.

§ 139. — Remedies on Ground of Nullity of Transfer

Creditors may maintain appropriate actions to recover the value or the proceeds of sale of the mortgaged goods where the mortgage is void as to them, or such other actions as the exigencies of the case permit.

In Washington

(1) By virtue of statute an unrecorded mortgage is void as to creditors, existing and subsequent, whether or not they have a lien.—*Atkinson v. Melcher*, 294 P. 567, 160 Wash. 94.

(2) Prior to this statute the rule of the text was adhered to.—*Asbury v. Miller*, 232 P. 360, 132 Wash. 235.

57. Mich.—*Peter Schuttler Co. v. Gunther*, 192 N.W. 661, 222 Mich. 430.

11 C.J. p 517 note 19.

58. Ga.—*Saunders v. Citizens' First Nat. Bank of Albany*, 142 S.E. 744, 38 Ga.App. 141, conforming to answers to certified questions 142 S.E. 127, 165 Ga. 558.

59. Utah.—*Commercial Sec. Bank of Ogden v. Chimes Press*, 42 P.2d 990, 88 Utah 148.

60. Ala.—*Singer v. Alexander City Bank*, 138 So. 263, 223 Ala. 677.

61. Tex.—*Gholson v. Northside Chevrolet Co.*, Civ.App., 90 S.W.2d 579.

Where a mortgage, although recorded, is void because the accompanying affidavit is defective, creditors of the mortgagor may compel the mortgagee to account in equity for the value of the chattels if sold by the mortgagee, or the price received on the sale;⁶² and a judgment creditor's action may be maintained in a proper case to recover the proceeds of sale of property under a mortgage void because not recorded.⁶³

§ 140. — Actions to Determine and Establish Rights

The rights of creditors and mortgagees may be determined by such action or suit as may be appropriate to the particular case.

The rights as between creditors and mortgagees to the property mortgaged or the proceeds thereof may be determined in various actions such as accounting,⁶⁴ garnishment,⁶⁵ trover,⁶⁶ replevin,⁶⁷ suit to try the right of property,⁶⁸ and actions to determine priority of claims, which are considered *infra* § 310.

A suit for accounting for the value of the chattels or the price at which they were sold by the mortgagee under a mortgage void as to creditors cannot

be maintained by a creditor until he has issued execution on his judgment against the mortgagor establishing his claim.⁶⁹

§ 141. — Actions to Set Aside Mortgages

In a proper case an action or suit to cancel an unrecorded mortgage may be maintained.

In a proper case creditors may bring a suit in equity to cancel an unrecorded mortgage, and neither actual notice of the mortgage acquired subsequent to the origin of his debt, nor a failure to show injury as a result of the withholding from record, nor absence of an agreement between the mortgagee and the mortgagor to withhold, nor absence of a fraudulent intent, nor a subsequent recording of the mortgage, will impair the vested right of the creditor to have such mortgage canceled.⁷⁰ In such a suit it is not necessary for plaintiff to allege that he was deceived by the failure to record and that he was induced to act to his injury and that he would not have acted had he known of the mortgage.⁷¹ A purchaser from the trustee for creditors of the mortgagor stands in the shoes of the creditors so far as his right to seek cancellation of the mortgage is concerned.⁷²

62. N.J.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368.

63. N.Y.—Reynolds v. Webb, 166 N. Y.S. 668, affirmed 169 N.Y.S. 1110, 183 App.Div. 915.

64. N.J.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368.

65. Sufficiency of evidence

(1) To establish debt owing by defendant to intervener, rendering intervener's mortgage on property valid, an action wherein plaintiff garnished proceeds of auction sale of defendant's property.—Ruble v. Nyseth, 239 N.W. 625, 61 N.D. 623.

(2) To establish that funds in hands of garnishee constituted proceeds of auction sale of property covered by prior mortgage.—Ruble v. Nyseth, *supra*.

66. Questions for court and jury

(1) In trover by a mortgagee for a mule mortgaged by N to plaintiff, taken by defendant on execution against N and W, when there was evidence supporting defendant's contention that the mule belonged to W and that mortgage was void as against creditors, affirmative charge for plaintiff should not have been given.—Chenault v. Stewart, 73 So. 501, 198 Ala. 288.

(2) In claimant's trover action against a mortgagee and an officer levying execution issued upon affidavit to foreclose and against mortgagee, a directed verdict for

defendants is proper where the mortgagee is not in possession and the officer is not liable.—Phillips v. Evans, 165 S.E. 140, 45 Ga.App. 440.

67. Admissibility of evidence

Where the mortgagor of cattle leased them with lands to defendant under agreement that defendant should not only receive compensation for care, but one half of the increase, defendant was a stranger to the mortgage; and, where it had not been properly filed, it is inadmissible in evidence against him in a replevin suit by the mortgagee, and the mortgagee, having taken the cattle, is liable just as if the mortgagor had broken his contract.—Bankers' Trust Co. v. Hudson, 232 S.W. 587, 149 Ark. 472.

Sufficiency of evidence

(1) Testimony that mortgagee of grain under unrecorded mortgage nailed up doors of granaries containing it was sufficient to sustain finding of actual possession by him defeating levy of attachment subsequent to mortgage.—Cummins v. King, 266 S.W. 748, 217 Mo.App. 371.

(2) In replevin against constable, evidence held sufficient to sustain finding that possession of farm machinery subject to unrecorded mortgage had not passed to mortgagee at time of levy of attachment.—Cummins v. King, *supra*.

(3) Evidence held sufficient to

show that automobile, seized and sold by defendant, was one on which plaintiff held mortgage.—Roberts v. Robertson, 254 P. 1026, 123 Kan. 222.

68. Burden of proof

When only subsequent creditors are protected by the recording act, the creditor has the burden, in a claim suit to try the right of property to the goods covered by an unrecorded mortgage, of proving he is a subsequent creditor.—Hill v. Rentz, 78 So. 881, 201 Ala. 527.

Sufficiency of evidence

Evidence held insufficient to show foreclosure of a mortgage in a proceeding to try the right to the property covered by the mortgage as between the mortgagee claiming title through the alleged foreclosure and a judgment creditor who levied execution on the property.—Sedlak v. Standard Oil Co., 229 Ill.App. 378.

69. N.J.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368.

70. Mo.—Thesen v. Parker, App., 274 S.W. 853.

71. Mo.—Thesen v. Parker, *supra*.

72. Mo.—Thesen v. Parker, *supra*.

Petition and evidence held sufficient to show that mortgagee had waived his right to assert unrecorded chattel mortgage against purchaser of mortgaged property from trustee for creditors of mortgagor, even if it had not been invalid, and was estopped to assert his mort-

§ 142. Necessity as against Purchasers and Encumbrancers

Generally a mortgage, to be valid as against subsequent purchasers or mortgagees, must be filed or recorded.

Ordinarily the statutes render it necessary, where possession is retained by the mortgagor, that the mortgage be filed in order to be valid as against subsequent purchasers⁷³ or mortgagees,⁷⁴ and, when the statutes do not expressly include subsequent mortgagees, they are regarded as included by the word "purchasers."⁷⁵

An assignee of a subsequent mortgage has also been regarded as a purchaser,⁷⁶ as have also pur-

chasers on sales under attachment⁷⁷ or execution against the mortgagor,⁷⁸ and officers seizing the property under an attachment.⁷⁹ A mechanic's lienholder has been held not to be a subsequent purchaser.⁸⁰

It has been held that such statutes contemplate only contract purchasers,⁸¹ and hence exclude a wrongdoer or a trespasser on the property against whom a judgment has been recovered for the value of the property, and who has acquired title by operation of law on payment of the judgment.⁸²

The purchase must be from the owner when the mortgage was executed,⁸³ or from some one holding

gage as a lien against mortgaged property.—*Thesen v. Parker*, supra.

73. U.S.—*Elk Creek Lumber Co. v. Hamby*, C.C.A.N.C., 84 F.2d 144—*In re American Cork Industries, C.C. A.N.Y.*, 54 F.2d 740—*In re Schilling*, D.C. Ohio, 251 F. 966.

Ala.—*Finney v. Dryden*, 108 So. 13, 214 Ala. 370—*Howe v. Simison*, 81 So. 837, 17 Ala.App. 59.

Ark.—*Haney v. Johnson*, 200 S.W. 788, 132 Ark. 166.

Fla.—*First Nat. Bank of Panama City v. First Nat. Bank of Chipley*, 106 So. 422, 90 Fla. 617—*Berlein v. Eddy*, 104 So. 780, 89 Fla. 484.

La.—*Booth Motor Co. v. Gamburg*, 118 So. 854, 9 La.App. 60.

Mass.—*Simons v. Northeastern Finance Corporation*, 171 N.E. 643, 271 Mass. 285—*Atlantic Transp. Co. v. Alexander Shipping Co.*, 157 N.E. 725, 261 Mass. 1.

Mich.—*Peter Schuttler Co. v. Gunther*, 192 N.W. 661, 222 Mich. 430—*Lee & Cady v. Farr*, 162 N.W. 983, 196 Mich. 492.

Mont.—*Crone v. Accident Elevator Co.*, 224 P. 659, 70 Mont. 211.

N.C.—*Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 190 N.C. 480.

R.I.—*New England Auto Inv. Co. v. St. Germaine*, 121 A. 398, 45 R.I. 225.

Tex.—*Blanton v. Nelms*, Civ.App., 40 S.W.2d 1117—*Hobart Mfg. Co. v. Joyce & Mitchell*, Civ.App., 4 S.W. 2d 185—*Cotton Finance & Trading Corporation v. Henderson*, Civ. App., 293 S.W. 831—*Wooten v. Arnett's Auto Parts Co.*, Civ.App., 286 S.W. 667—*McLendon Hardware Co. v. J. A. Hill & Son*, Civ.App., 226 S.W. 825—*Self Motor Co. v. First State Bank of Crowell*, Civ.App., 226 S.W. 423.

Wash.—*Lowman v. Guie*, 228 P. 845, 130 Wash. 606.

11 C.J. p 517 note 20.

Mortgage by conditional seller

(1) Assignment by conditional seller of motor truck of interest which transferred legal title subject to additional buyer's right of

redemption, being in effect bill of sale, given as security for payment of debt constituted mortgage invalid, as against holder of another bill of sale from conditional seller when not recorded.—*Worcester Morris Plan Co. v. Mader*, 128 N.E. 777, 236 Mass. 435.

(2) Conditional vendor's transfer of purchase-money notes and conditional sales agreement as security for payment of debt owed by it being unrecorded, was valid as between the parties, but void as to persons thereafter deriving title to mortgaged chattels under or through mortgagor.—*J. H. Gerlach Co. v. Noyes*, 147 N. E. 24, 251 Mass. 558, 45 A.L.R. 961.

In Oklahoma buyer of automobile from mortgagor within one hundred twenty days after its removal from county in which mortgage was filed had constructive notice of mortgage and acquired no title as against mortgagee.—*Stuart v. First Nat. Bank*, 50 P.2d 297, 174 Okl. 292.

74. U.S.—*In re American Cork Industries, C.C.A.N.Y.*, 54 F.2d 740—*In re Ballard*, D.C.Tex., 279 F. 574—*In re Schilling*, D.C. Ohio, 251 F. 966.

Ill.—*Veach v. Stegmeyer*, 233 Ill.App. 559.

Iowa.—*Soehren v. Hein*, 243 N.W. 330, 214 Iowa 1060—*Heitzman v. Hannah*, 221 N.W. 470, 206 Iowa 775—*Iowa State Bank of Ft. Madison v. Bradfield*, 215 N.W. 602, 204 Iowa 488.

Mich.—*Peter Schuttler Co. v. Gunther*, 192 N.W. 661, 222 Mich. 430—*Lee & Cady v. Farr*, 162 N.W. 983, 196 Mich. 492.

Mont.—*Crone v. Occident Elevator Co.*, 224 P. 659, 70 Mont. 211.

Ohio.—*Metropolitan Securities Co. v. Warren State Bank*, 158 N.E. 81, 117 Ohio St. 69.

Tex.—*Self Motor Co. v. First State Bank of Crowell*, Civ.App., 226 S. W. 428.

Mortgagee as bona fide purchaser see infra § 307.

11 C.J. p 517 note 21.

Motor vehicle mortgage

Statute requiring deposit of mortgage with county recorder applies to motor vehicle mortgage unaccompanied by change of possession.—*Metropolitan Securities Co. v. Warren State Bank*, 158 N.E. 81, 117 Ohio St. 69.

Unrecorded pledge

In a suit to cancel a purported release on the ground that it was obtained by fraud and to have the mortgage declared a first lien, a cross bill filed by appellant setting up a prior contract under which the property was pledged to appellant, was properly dismissed, where the contract set up by appellant was not recorded as required by the Chattel Mortgage Act, and complainant had no notice thereof.—*Veach v. Stegmeyer*, 233 Ill.App. 559.

Where mortgage recorded

Sale of mortgaged property, although made to innocent purchaser in county other than county where mortgage is recorded, will not divest mortgagee's title.—*C. M. Ferguson & Son v. Lesser Cotton Co.*, 55 S.W.2d 79, 186 Ark. 660.

75. Fla.—*Spellman v. Beeman*, 70 So. 589, 70 Fla. 575, L.R.A.1916D 240 and note.

11 C.J. p 517 note 22.

76. Iowa.—*Slimmer & Thomas v. Lawler*, 218 N.W. 516, 205 Iowa 813.

11 C.J. p 517 note 23.

77. Neb.—*Rothchild v. Van Alstine*, 133 N.W. 843, 90 Neb. 441.

78. Or.—*Pattee v. Harbough*, 171 P. 221, 37 Or. 612.

11 C.J. p 518 note 25.

79. Mo.—*Cummins v. King*, 266 S.W. 748, 217 Mo.App. 371.

80. Iowa.—*Fletcher v. Kelly*, 55 N. W. 474, 88 Iowa 575, 21 L.R.A. 347.

81. Tex.—*Scott v. Cox*, 70 S.W. 802, 30 Tex.Civ.App. 190.

82. Tex.—*Scott v. Cox*, supra.

83. Ala.—*Couch v. Holmes*, 43 So. 853, 151 Ala. 503.

under him,⁸⁴ or who has authority from him to sell,⁸⁵ and not from one who has no title to the property.⁸⁶

An antecedent purchaser is not within the protection of recording acts unless expressly included in their terms,⁸⁷ and one who claims to have purchased from the mortgagor cannot be an innocent purchaser where the property was not sold to the mortgagor until after the date of the alleged purchase and the mortgage was recorded on the day of sale to the mortgagor.⁸⁸

Purchaser or mortgagee subject to mortgage. One who acquires his interest under a judgment of foreclosure, providing that the interest shall be sold subject to the lien of a certain mortgage, is not a purchaser in good faith as against such mortgage;⁸⁹ but a second mortgage reciting that it was subject to a first mortgage of a portion of the prop-

erty does not take precedence over the first mortgage, which was unrecorded, so as to deprive the first mortgagee of any share in the proceeds of sale of the mortgaged property.⁹⁰

Subpurchasers. Failure to record operates equally in favor of immediate purchasers and subpurchasers.⁹¹

Subsequent mortgage not filed. It has been held that an unrecorded mortgage is void as against a subsequent mortgagee in good faith, even though the subsequent mortgage is not filed, and possession is not taken under it.⁹²

§ 143. — Good Faith and Consideration

To be protected as against an unfiled mortgage the transfer must be bona fide and for a valuable consideration.

A transfer which will be protected as against an unfiled mortgage must be bona fide,⁹³ and for a

84. Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

11 C.J. p 518 note 30.

85. Mo.—Elliott v. Washington, 119 S.W. 42, 137 Mo.App. 526.

11 C.J. p 518 note 31.

86. Mo.—Johnston v. Brown Bros. Iron & Metal Co., 231 S.W. 1011, 208 Mo.App. 189.

42 C.J. p 762 note 32.

87. S.D.—La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co., 86 N.W. 641, 14 S.D. 597, 83 N.W. 331, 18 S.D. 301.

11 C.J. p 518 note 33.

88. Tex.—Glenn v. Green, Civ.App., 268 S.W. 1056.

89. N.Y. — Clements v. Congress Hall, 132 N.Y.S. 16, 72 Misc. 519.

90. Mo.—Ingersoll Co. v. Belt, App., 71 S.W.2d 118.

Agreements or understandings as to priority see infra § 296.

91. Ala.—Williams v. Vining, 43 So. 744, 150 Ala. 482.

11 C.J. p 518 note 32.

92. Kan.—Dixon v. Tyree, 139 P. 1026, 92 Kan. 137.

11 C.J. p 518 note 34.

93. Cal.—Fred C. Silverthorn & Sons v. Pacific Finance Corporation, 23 P.2d 798, 133 Cal.App. 163.

Minn.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85—Griffin v. Minnesota Sugar Co., 202 N.W. 445, 162 Minn. 240.

Tex.—Lindig v. Johnson City State Bank, Com.App., 41 S.W.2d 222, reversing Johnson City State Bank v. Lindig, Civ.App., 26 S.W.2d 658.

11 C.J. p 518 note 36.

"Good faith" as used in recording acts has been construed to mean

"without notice."—Lee & Cady v. Farr, 162 N.W. 983, 196 Mich. 492.

"Bona fide purchaser"

(1) A bona fide purchaser must have purchased the property for value in good faith and without notice, either actual or constructive.

Mich.—Pinconning State Bank v. Henry, 241 N.W. 913, 258 Mich. 44. Okl.—National Bond & Investment Co. v. Central Nat. Bank of Enid, 285 P. 328, 142 Okl. 96.

Wis.—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.

(2) To constitute "good faith" of purchaser of mortgaged property, there must be absence of notice of facts calculated to put ordinary business man on inquiry.—Security Trust Co. v. Tuller, 220 N.W. 795, 243 Mich. 570.

Purchaser from vendor after repossession

Where, because conditional sales contracts were not filed in county where autobusses were given a situs, subsequent mortgage executed by buyer vested good title to busses in mortgagee, defendant acquired title from conditional seller subject to lien of mortgage whose validity defendant could not question on ground of lack of acknowledgment, where defendant did not show himself to be good-faith purchaser for value without notice.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85.

Purchaser under agreement to defend against mortgage

Lawyer who procured bill of sale from mortgagor for purpose of enabling him to defend against the collection of the notes and mortgage, under agreement to share equally with mortgagor whatever he could save out of the property, was not an innocent purchaser, or any kind of

purchaser, but was merely the agent and attorney of mortgagor.—Emerson-Brantingham Implement Co. v. Rogers, Mo.App., 216 S.W. 994.

Subsequent encumbrancer in good faith

A good faith mortgagee is one who takes without actual or constructive notice of the prior unrecorded mortgage.

Mont.—Hansen v. Johnson, 4 P.2d 1088, 90 Mont. 597—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

Tex.—First Nat. Bank v. Todd, Com. App., 231 S.W. 322, reversing, Civ. App., 212 S.W. 219.

Wis.—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.

Transactions held bona fide

(1) Contract with tenant of another to purchase sugar beets to be raised was executory contract of sale of crop to be grown, and in view of Gen.St.1923 §§ 8380 and 8450, relating to present sale of future goods, purchaser, after paying large part upon contract in good faith without notice of unfiled lease containing mortgage clause, is protected by § 8345.—Griffin v. Minnesota Sugar Co., 202 N.W. 445, 162 Minn. 240.

(2) Where one purchased an automobile in good faith and received therefor a bill of sale, which he presented to the register of deeds, and received a certificate of title, under L.1919 c 510, taking immediate possession, and where prior thereto the seller gave a bill of sale, without witnesses or acknowledgment to another as security for a debt, which instrument was in fact a mortgage, and the register of deeds issued a certificate of ownership, but the bill of sale was not filed in the manner provided by statute; and the seller

valuable consideration.⁹⁴ In some jurisdictions the consideration must have been paid or become a fixed liability,⁹⁵ while in others it is sufficient if the purchaser parts with something of value for the thing purchased.⁹⁶ The giving of a note in payment does not show the payment of a valuable consideration unless the note is negotiable.⁹⁷ It has been held that a mortgagee cannot be regarded as a purchaser, without notice, where the consideration of his mortgage is contaminated by usury.⁹⁸

Preëxisting indebtedness. While there is authority to the contrary,⁹⁹ it is usually held that a preëxisting indebtedness does not constitute a valuable consideration,¹ although an exception has been recognized in some jurisdictions, where an existing debt is paid by the transfer;² but where, in connection with an existing indebtedness, there is a

further consideration the purchaser or mortgagee is protected,³ as where there is an extension of the original indebtedness,⁴ or an agreement for future advances.⁵ Further, some courts have held that a mortgage taken to secure a preëxisting debt may be in good faith, within the meaning of a statute, as distinguished from one on a valuable consideration.⁶

Where purchase money has not been paid. In order to entitle a subsequent purchaser to prevail against the mortgagee, he must have paid the purchase money before receiving notice of the unrecorded mortgage;⁷ but where a negotiable note is given by a purchaser having no notice, actual or constructive, of the mortgage, he is a purchaser for value notwithstanding he discovers the existence of the mortgage and a foreclosure judgment thereon before the note has been paid.⁸

retained possession of the automobile until sold to the second purchaser, under a provision that an unfiled mortgage without change of possession is void as to subsequent good-faith purchasers, the second purchaser is the owner of the automobile, and entitled to possession.—*Kelly-Duluth Co. v. Reed*, 194 N.W. 103, 156 Minn. 39.

Transactions held not bona fide

(1) One who purchased cattle after they had been attached, deposit made to cover a mortgage in compliance with Rev. Codes § 5766, dismissal of suit, and return of cattle, was not an innocent purchaser, although mortgagee wrongfully canceled the mortgage of record, for, to be an "innocent purchaser," a vendee must in good faith pay a valuable consideration without notice of outstanding legal or equitable rights.—*Degenhart v. Cartier*, 192 P. 259, 58 Mont. 245.

(2) One cannot claim to be a purchaser in good faith by the fact that no encumbrance is of record in the county in which the purchase is made, when he knows that the seller's residence is in another county, from which the car has been brought for the purpose of sale, and in which an encumbrance is duly recorded.—*Stephenville First Nat. Bank v. Thompson*, Tex. Com. App., 265 S.W. 884, affirming, Civ. App., 251 S.W. 818.

94. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 133 Cal. App. 163.

Fla.—*Berlein v. Eddy*, 104 So. 780, 89 Fla. 484.

Kan.—*Latenser v. Schied*, 268 P. 855, 126 Kan. 490.

Mo.—*Emerson-Brantingham Implement Co. v. Rogers*, App., 216 S.W. 994.

Tex.—*Lindig v. Johnson City State Bank*, Com. App., 41 S.W.2d 222, reversing *Johnson City-State Bank v.*

Lindig, Civ. App., 26 S.W.2d 658—*First Nat. Bank v. Todd*, Com. App., 231 S.W. 322, reversing, Civ. App., 212 S.W. 219.

11 C.J. p 518 note 37.

95. Wis.—*Funk v. Paul*, 24 N.W. 419, 64 Wis. 35, 54 Am.R. 576.

11 C.J. p 518 note 38.

96. Ala.—*Donahoo Horse, etc., Co. v. Durick*, 69 So. 545, 193 Ala. 456.

11 C.J. p 518 note 39.

97. Ala.—*Donahoo Horse, etc., Co. v. Durick*, supra.

11 C.J. p 518 note 40.

98. Ala.—*Morris v. Attalla Bank*, 38 So. 804, 142 Ala. 638.

11 C.J. p 518 note 41.

99. Mont.—*Hackney v. Birely*, 215 P. 642, 67 Mont. 155.

N.C.—*Weil v. Herring*, 175 S.E. 836, 207 N.C. 6.

Wis.—*Cremer v. Banking Commission*, 272 N.W. 40.

11 C.J. p 519 note 43.

1. Iowa.—*Soehren v. Hein*, 243 N.W. 330, 214 Iowa 1060—*National Bank of Emmetsburg v. Chapman*, 234 N.W. 198, 212 Iowa 561—*Chariton & Lucas County Nat. Bank v. Taylor*, 232 N.W. 487, 210 Iowa 1153.

Me.—*Hayden v. Russell*, 109 A. 485, 486, 119 Me. 38, citing *Corpus Juris*.

N.Y.—*Schutzbank v. Colonial Discount Co.*, 289 N.Y.S. 33, 248 App. Div. 828.

Tex.—*Lindig v. Johnson City State Bank*, Com. App., 41 S.W.2d 222, reversing *Johnson City State Bank v. Lindig*, Civ. App., 26 S.W.2d 658—*Keystone Pipe & Supply Co. v. Milner*, Civ. App., 6 S.W.2d 771—*American Law Book Co. v. Dykes*, Civ. App., 278 S.W. 247.

11 C.J. p 519 note 44.

2. N.Y.—*Button v. Rathbone*, 23 N.E. 122, 118 N.Y. 666.

11 C.J. p 519 note 45.

Transfer to creditor to pay debt

Unrecorded mortgage on stove was unenforceable against creditor who took stove in good faith with authority from buyer to apply it to payment of the buyer's indebtedness.—*United Furniture Stores v. Rogers*, 129 So. 377, 14 La. App. 529.

3. Neb.—*Large, etc., Co. v. Nott*, 95 N.W. 484, 1 Neb. (Unoff.) 147.

11 C.J. p 519 note 46.

4. Okl.—*Abraham v. American Nat. Bank*, 17 P.2d 480, 161 Okl. 87.

Tex.—*First Nat. Bank v. Todd*, Com. App., 231 S.W. 322, reversing, Civ. App., 212 S.W. 219—*Lone Star Finance Corporation v. Fulbright*, Civ. App., 61 S.W.2d 562.

11 C.J. p 519 note 47.

5. Ala.—*Forbes Piano Co. v. Reynolds*, 56 So. 270, 1 Ala. App. 501.

6. Neb.—*Lushton State Bank v. O. S. Kelley Co.*, 66 N.W. 619, 47 Neb. 678.

11 C.J. p 519 note 49.

7. Ala.—*Gay v. Steverson*, 110 So. 411, 215 Ala. 309.

11 C.J. p 518 note 42.

Unpaid note

Defendant, whose note for transfer of chattel mortgage was unpaid when prior mortgagee sued to recover property, is not innocent purchaser for value where he could rescind the transaction and have his note returned to him, and has not been prejudiced by any defect in the recording.—*Gay v. Steverson*, 110 So. 411, 215 Ala. 309.

Part payment

Where purchaser of an automobile encumbered by unrecorded mortgage did not pay the full purchase price, he was not a bona fide purchaser as respects the mortgage.—*Law v. Smith*, 113 S.E. 298, 120 S.C. 468.

8. Tex.—*Taylor v. Tillotson*, Civ. App., 272 S.W. 323.

§ 144. Effect of Change of Possession

Ordinarily recording of a mortgage is not necessary where the mortgaged property is placed in the possession of the mortgagee before rights of other persons have intervened.

Although transfer of possession may, under the terms of a statute providing for recording mortgages, be insufficient to obviate the necessity of recording,⁹ where possession of the mortgaged property is transferred to the mortgagee at the time of the execution of the mortgage, it is not, in the absence of express statutory requirement, necessary that the mortgage be recorded, and the statutes ordinarily provide for recordation as an express alternative to a change of possession,¹⁰ since an immediate and continuous change of possession is the best possible notice of the mortgagee's rights.¹¹ It is not, however, necessary that the mortgagee take possession immediately on execution of the mortgage, as long as he takes possession before his failure so to take results in injury to a third person,¹² and possession taken subsequently to the execution of the mortgage cures any defect in failing to acknowledge and record the instrument as against creditors and third persons who have not acquired

enforceable liens by execution or attachment, or by contract prior to the taking of possession;¹³ but a mortgagee cannot defeat the rights of creditors who, prior to his taking possession, secured liens on the property.¹⁴ Change of possession will not avail a mortgagee whose mortgage was not filed, when, prior to his taking possession, a second mortgage was given, even though he takes possession before the second mortgage was filed.¹⁵

Possession must be possession in the capacity of mortgagee, and not in some other capacity, if the requirement of registration is not complied with.¹⁶

The burden of proving a transfer of possession is on the person who claims under the unrecorded mortgage.¹⁷

§ 145. Effect and Sufficiency of Other Notice

Except as otherwise provided by statute, an unrecorded mortgage is binding on all persons having actual notice of it.

The invalidity of an unrecorded mortgage, particularly as to purchasers and encumbrancers, under the usual provisions of the recording acts, arises

After foreclosure but before sale

Where unrecorded mortgage had been foreclosed, but sale thereunder had not been made, mortgagee did not get legal title, but only a lien on property, and title passed to an innocent purchaser from the mortgagor without notice of lien.—Taylor v. Tillotson, *supra*.

9. Mass.—Leahy v. George, 173 N.E. 421, 273 Mass. 130.

10. U.S.—American Nat. Bank of Sapulpa v. Harris, C.C.A.Okl., 34 F. 2d 181—Coggin v. Hartford Accident & Indemnity Co., D.C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F.2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

Colo.—Bogdon v. Fort, 225 P. 247, 75 Colo. 231.

Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635.

Kan.—Farmers' & Drovers' Nat. Bank v. Hannaman, 223 P. 478, 115 Kan. 370.

Mo.—State v. Norman, 232 S.W. 452.

N.H.—General Motors Acceptance Corporation v. Berry, 167 A. 553, 86 N.H. 280.

N.Y.—Halladay v. Worthington, 163 N.Y.S. 362, 99 Misc. 141.

Ohio.—Calder v. Bliss Auto Sales Co., 18 Ohio App. 242.

R.I.—Millard v. Hall, 135 A. 855, 11 C.J. p 519 note 50.

Possession under other instrument

Where a bill of sale in effect a mortgage, was given as security, but was never filed nor possession taken thereunder, and mortgage was subsequently given, seizure thereunder was not a taking of possession under the bill of sale, so as to make it valid.—Lake View State Bank v. Jones, Wis., 242 F. 821, 155 C.C.A. 409.

Where mortgagor is deceased, rule requiring recording and filing of mortgage to make it valid as against other creditors of deceased did not apply when property was in the hands of the mortgagee.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635.

11. Mich.—Parsell v. Thayer, 39 Mich. 467.

11 C.J. p 520 note 51.

Continuous possession essential

Possession of mortgagee to be effective under defectively recorded mortgage must continue until hostile rights are asserted.—Drolette v. Russell, 163 A. 565, 105 Vt. 53.

12. U.S.—In re Schilling, D.C.Ohio, 251 F. 972.

Wis.—Waterman v. Hantke, 207 N.W. 946, 190 Wis. 1, rehearing denied 208 N.W. 992, 190 Wis. 1.

13. U.S.—Sample v. Gettman-McDonnell-Summers Drug Co., D.C.Okl., 14 F.2d 170.

Colo.—Bogdon v. Fort, 225 P. 247, 75 Colo. 231.

14. Cal.—Chelhar v. Acme Garage, 61 P.2d 1232.

Invalidly recorded mortgage

Where mortgage covering tow car was recorded in recorder's office but copy thereof was not deposited in department of motor vehicles and mortgagee was not registered as legal owner, and where mortgagee took possession on mortgagor's default, conducted sale, and became purchaser of tow car, such a mortgage and foreclosure sale are invalid as against mortgagor's subsequent execution creditor who seized tow car in mortgagee's possession.—Chelhar v. Acme Garage, Cal., 61 P.2d 1232.

15. Iowa.—Iowa State Bank of Ft. Madison v. Bradfield, 215 N.W. 602, 204 Iowa 488.

16. U.S.—Coggin v. Hartford Accident & Indemnity Co., D.C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F.2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

17. Mo.—Rice v. Sally, 96 S.W. 1030, 198 Mo. 682.

11 C.J. p 520 note 52.

However, a mortgage being valid as between parties, mortgagor's receivers had burden of proving that mortgaged securities were not "immediately delivered" as required.—New York Trust Co. v. Island Oil & Transport Co., C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007.

merely from the absence of notice of the lien,¹⁸ and as to all parties having actual knowledge thereof of the mortgage is binding, although not recorded, in the absence of a statute to the contrary,¹⁹ but, under some statutes, failure to record a mortgage renders it invalid as to all strangers to the mortgage notwithstanding they may have actual notice of its existence.²⁰

§ 146. — On Rights of Purchasers and Mortgagees

In most jurisdictions an unrecorded or unfiled mortgage is valid as against subsequent purchasers or mortgagees with notice thereof, although in some jurisdictions the contrary rule prevails.

18. N.Y. — Niagara County Nat. Bank v. Lord, 33 Hun 557.

19. N.D.—Godman v. Olson, 165 N. W. 515, 38 N.D. 360.

Okl.—Kaylor v. Kaylor, 45 P.2d 743, 172 Okl. 535—Morgan v. Stanton Auto Co., 235 P. 962, 142 Okl. 116. 42 C.J. p 764 note 59.

20. U.S.—Brandes v. Barber, C.C.A. Ark., 13 F.2d 65—Standard Computing Scale Co. v. Adam, C.C.A. Mo., 287 F. 347.

21. U.S.—In re Triangle Printing Co., D.C.Okl., 1 F.Supp. 329—Stockyards Loan Co. v. Nichols, Okl., 243 F. 511, 156 C.C.A. 209.

Ala.—Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 353.

Cal.—Treat v. Burns, 13 P.2d 724, 216 Cal. 216—Fred C. Silverthorn & Sons v. Pacific Finance Corporation, 23 P.2d 798, 133 Cal.App. 163.

Colo.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

Ga.—McLendon v. Ricks, 95 S.E. 471, 22 Ga.App. 15.

Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

Kan.—Commercial Loan & Mortgage Co. v. Jones, 261 P. 555, 556, 124 Kan. 649, quoting *Corpus Juris*.

Ky.—Eastern Const. Co. v. Carson Const. Co.'s Trustee, 47 S.W.2d 67, 242 Ky. 648—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

Neb.—First Nat. Bank v. Young, 247 N.W. 586, 588, 124 Neb. 598, quoting *Corpus Juris*.

N.J.—Higgins v. Schmidt, 169 A. 522, 115 N.J.Eq. 64.

N.Y.—Meisel Tire Co. v. Ralph, 1 N. Y.S.2d 143, 164 Misc. 845.

Ohio.—Toledo Pulp Plaster Co. v. Chambers, 11 Ohio App. 176.

S.C.—Law v. Smith, 113 S.E. 298, 120 S.C. 468.

Tex.—Stewart v. Woods Electric Co., Civ.App., 73 S.W.2d 657—Weeks v. First State Bank of De Kalb, Civ. App., 207 S.W. 973—Clark & Boice Lumber Co. v. Commercial Nat.

Bank of Jefferson, Civ.App., 200 S. W. 197, error refused.

Wash.—Robert Morton Organ Co. v. Armour, 38 P.2d 257, 179 Wash. 392.

11 C.J. p 520 note 54.

Notice of unenforceable mortgage

Although a mortgage is unenforceable for failure to record the same within the time prescribed by statute, equity will uphold it as against a purchaser of the property with notice of the attempt to create a valid lien, and will regard him a trustee for the mortgagee to the extent of the latter's interest.—Howard v. McPhail, 91 A. 12, 37 R.I. 21.

Purchaser as converter

Successive buyer of mortgaged hay in county to which it was removed, who, with knowledge of removal, disposed thereof long before time within which recording therein was required, would be liable as joint converter.—Union State Bank of Wapato v. Warner, 248 P. 394, 140 Wash. 220.

22. Cal.—Fred C. Silverthorn & Sons v. Pacific Finance Corporation, 23 P.2d 798, 133 Cal.App. 163.

Ky.—Holt v. Farmers' Loose Leaf Tobacco Warehouse Co., 256 S.W. 6, 201 Ky. 184.

Neb.—First Nat. Bank v. Young, 247 N.W. 586, 588, 124 Neb. 598, quoting *Corpus Juris*.

Ohio.—Metropolitan Securities Co. v. Warren State Bank, 158 N.E. 81, 117 Ohio St. 69.

Tex.—Commercial Credit Co. v. Schlegel-Storseth Motor Co., Com. App., 23 S.W.2d 702.

Wash.—Asbury v. Miller, 232 P. 360, 132 Wash. 235.

11 C.J. p 520 note 55.

Statutory provisions construed

(1) "Bona fide purchaser," as used in Chattel Mortgage Law, embraces holder of contract lien such as a chattel mortgage lien.—Lindig v. Johnson City State Bank, Tex.Com. App., 41 S.W.2d 222, reversing, Civ. App., Johnson City State Bank v. Lindig, 26 S.W.2d 658.

(2) Where statute provided that

Under the express wording or the judicial construction of the recording statutes, a mortgage is, in most jurisdictions, valid as against a subsequent purchaser with notice thereof, although it has not been filed or recorded,²¹ and a subsequent mortgagee is ordinarily regarded as standing on the same footing as a subsequent purchaser.²² However, the wording of some recording statutes has been so distinct and the declaration that unrecorded mortgages are void has been put in such unambiguous language that in those jurisdictions a purchaser or subsequent mortgagee is not affected by notice of an unrecorded mortgage,²³ unless an actual intent to

unrecorded mortgage should be void as against subsequent encumbrancer in good faith and for value, term "good faith" must be construed according to equity jurisprudence, since foreclosure of mortgage is an equitable proceeding, and hence knowledge precludes "good faith." Where purpose of statute providing that mortgage on motor vehicle was invalid as against subsequent encumbrancer, unless registered, was to furnish constructive notice of mortgage to subsequent encumbrancer, the statute means that mortgage was void when not registered as against subsequent encumbrancer in good faith for value without previous knowledge of prior mortgage and not as to one having knowledge.—Bush v. Bank of America Nat. Trust & Savings Ass'n, 37 P.2d 168, 1 Cal.App.2d 588.

(3) The legislature by Comp.L. 1909 § 4422, partly carried into Rev. L.1910 § 4031, and, in view of § 4035, did not intend to make an unfiled mortgage invalid as against a purchaser for value having notice of the mortgage, but used words "purchasers, and incumbrancers . . . for value" in first part of § 4031 in same sense as words "purchaser or incumbrancers . . . in good faith for value" in last part of the section.—Blevins v. W. A. Graham Co., 182 P. 247, 72 Okl. 308.

23. La.—Washington Bank & Trust Co. v. Cowan-Kerr Lumber Co., 99 So. 381, 155 La. 1076.

Me.—Hayden v. Russell, 109 A. 485, 119 Me. 38.

Mass.—Connecticut Valley Union Co. v. Pielock, 183 N.E. 526, 281 Mass. 287.

Mo.—Humphreys Sav. Bank v. Carpenter, 250 S.W. 618, 213 Mo.App. 390—Emerson-Brantingham Implement Co. v. Rogers, App., 216 S.W. 994.

N.C.—Smith v. Turnage-Winslow Co., 193 S.E. 685, 212 N.C. 310—Jordan v. Wetmur, 162 S.E. 610, 202 N. C. 279—Carolina Discount Corpo-

defraud is shown;²⁴ but it has been held that such parties can by their recognition of the mortgage render it valid as to them.²⁵

Where mortgages were purchased with notice that they were covered by another mortgage, the mortgagee of the covering mortgage was held entitled to surrender of the mortgages so purchased on payment of the price paid for them and to moneys collected thereunder by the purchaser, who was not entitled to the reasonable expense of making such collections.²⁶

Subpurchasers and mortgagees. A subpurchaser without notice of the unrecorded mortgage will take free from such encumbrance, even though his vendor had notice.²⁷ It is also held that a subpurchaser with notice of the unrecorded mortgage will nevertheless take the property free from encumbrance when the vendor,²⁸ execution creditor,²⁹ or attaching creditor,³⁰ through whom he claims, obtained his rights against the property without notice of, or free from, the adverse interests. One who pur-

chases from a second mortgagee with knowledge of a prior unrecorded mortgage and of the claims to preference made by the holders thereof will be postponed to the first mortgage.³¹

§ 147. — On Rights of Creditors

While in some jurisdictions a creditor's knowledge of the existence of an unrecorded mortgage is immaterial, in others such a creditor is postponed to the rights of the mortgagee.

Where, as seen supra § 146, a purchaser is not affected by his knowledge of an unrecorded mortgage, a creditor's knowledge is also immaterial, and to this list must be added jurisdictions which distinguish between purchasers and creditors and make notice material with respect to the former and immaterial as to the latter.³² There remain some jurisdictions, however, where creditors are put on a par with purchasers and are held to be postponed to an unrecorded mortgage of which they had actual knowledge.³³

ration v. Landis Motor Co., 129 S. E. 414, 190 N.C. 157.

Wis.—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267—

Baierl v. Riesenecker, 227 N.W. 9, 201 Wis. 454, reversed on other grounds 230 N.W. 605, 201 Wis. 454—Holak v. Southard, 196 N.W. 769, 182 Wis. 494.

11 C.J. p 521 note 56.

24. Me.—Hayden v. Russell, 109 A. 485, 119 Me. 38.

25. Mo.—Musselman v. Joplin, App., 180 S.W. 1058.

26. S.C.—Alford v. Martin, 180 S.E. 13, 176 S.C. 207.

27. S.C.—London v. Youmans, 9 S.E. 775, 31 S.C. 147, 17 Am.S.R. 17. 11 C.J. p 521 note 58.

28. Mo.—Emerson-Brantingham Improvement Co. v. Rogers, App., 216 S.W. 994.

11 C.J. p 521 note 59.

Rights of purchaser

Where automobile was sold before mortgage thereon was filed to bona fide purchaser, who thereafter sold the automobile after mortgage was filed, the second purchaser took unencumbered title, and was bound to assert such title against mortgagee, and on failure so to do could not recover for breach of warranty against encumbrances, under Rev.Code 1919 § 941.—Kurtz v. Adrian, 191 N.W. 188, 46 S.D. 125.

29. S.C.—Herring v. Cannon, 21 S.C. 212, '53 Am.R. 661.

30. N.H.—Piper v. Hilliard, 52 N.H. 209.

31. N.J.—Hoagland v. Shampamore, 37 N.J.Eq. 588.

11 C.J. p 521 note 62.

32. U.S.—Standard Computing Scale Co. v. Adam, C.C.A.Mo., 287 F. 347.

Ark.—Ebbing v. Hassler, 68 S.W.2d 96, 188 Ark. 766.

Cal.—Fred C. Silverthorn & Sons v. Pacific Finance Corporation, 23 P. 2d 798, 133 Cal.App. 163.

Conn.—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172.

Mo.—Miller v. Tallent, App., 212 S.W. 73.

N.J.—Higgins v. Schmidt, 169 A. 522, 115 N.J.Eq. 64.

N.C.—Smith v. Turnage-Winslow Co., 193 S.E. 685, 212 N.C. 310.

Wash.—Embaga v. Northwestern Improvement Co., 172 P. 834, 101 Wash. 558.

However, a garage man seizing for repairs an automobile with knowledge of purchase-money mortgage, mistakenly filed in another county than that in which purchaser resided, is liable to mortgagee for its value.—North Pacific Bank v. Pacific Mercantile Agency Collectors, 279 P. 103, 153 Wash. 37—11 C.J. p 521 note 64.

Attaching creditor

Under Rev.St.1919 § 2256, levy of attachment on property in hands of mortgagor subject to unrecorded chattel mortgage takes precedence over mortgage, even if constable knew of existence thereof prior to levy. Such a mortgage has no effect against attaching creditor unless possession of mortgaged property has been taken by mortgagee before levy of attachment, and fact that constable has actual knowledge of mortgage before levy does not render attachment ineffective.—Cum-

mins v. King, 266 S.W. 748, 217 Mo. App. 371.

Mortgage in other parish

Mortgage is subordinate to lien of mortgagor's judgment creditor acquired by seizure of mortgaged automobile in another parish, before mortgage recordation there, although judgment creditor had actual knowledge of mortgage.—Krivos v. Simmons, 134 So. 727, 16 La.App. 421.

Prior creditor

Creditor would not be affected by statute rendering mortgage valid as to one having actual notice thereof if creditors' debt existed before mortgage was executed.—Chelhar v. Acme Garage, 61 P.2d 1232, 13 Cal. App.2d 775—11 C.J. p 521 note 64 [b].

33. U.S.—In re Triangle Printing Co., D.C.Okl., 1 F.Supp. 329.

Iowa.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.

Ky.—Eastern Const. Co. v. Carson Const. Co.'s Trustee, 47 S.W.2d 67, 242 Ky. 648—Hart County Deposit Bank v. Hatfield, 33 S.W.2d 660, 236 Ky. 725.

Md.—Burton v. Jennings, 148 A. 424, 158 Md. 254—Goldsborough v. Tinsley, 113 A. 861, 138 Md. 411.

Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

N.D.—First State Bank of New Salem v. Farmers' Co-op. Elevator Co., 231 N.W. 859, 59 N.D. 699.

Okl.—Lhevine v. Tulsa Industrial Loan & Investment Co., 239 P. 632, 113 Okl. 104—Fiegel v. First Nat. Bank, 214 P. 181, 90 Okl. 26.

11 C.J. p 522 note 65.

Creditor taking mortgage. When a creditor of the mortgagor, who became such without notice of a prior unrecorded mortgage, which was therefore void as to him, takes a mortgage to secure his claim after learning of the prior mortgage, his notice of the mortgage does not operate to postpone his rights to those of the holder of the prior unrecorded mortgage,³⁴ but it has been held that a creditor who takes a mortgage to secure a preëxisting indebtedness, having knowledge of a prior unrecorded mortgage, is not a creditor within the rule holding creditors unaffected by notice;³⁵ and a general creditor taking a mortgage with notice of a prior unrecorded mortgage, while not losing his rights as

creditor, cannot, when relying on his mortgage, attack the prior mortgage.³⁶

§ 148. — What Constitutes Notice

Knowledge of facts sufficient to put a prudent man on inquiry may constitute notice of an unrecorded mortgage.

The principles of notice, whether applied to mortgages of real or personal property, are the same.³⁷ A person claiming in competition with a mortgagee will usually be regarded as having notice if he knows facts which would put a prudent man on inquiry, and which, if followed up, would lead to a discovery of the unrecorded mortgage.³⁸ Fail-

Notice in second mortgage taken as security

Although first mortgage covering both realty and chattels was not filed as chattel mortgage, it was not void as to such chattels as against persons extending credit after filing as chattel mortgage of second mortgage expressly providing that second was subordinate to first mortgage and reciting that first mortgage covered both realty and chattels. The trustee under the second mortgage, in such case, cannot by waiving rights to security under second mortgage, which was filed as second mortgage, avoid notice given of chattel provisions of first mortgage.—*Detroit Trust Co. v. Detroit City Service Co.*, 247 N.W. 76, 262 Mich. 14.

34. U.S.—*Mitchell v. Nelson*, C.C.A.Md., 16 F.2d 767, modified on other grounds 18 F.2d 1018, and certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.

35. Tex.—*Lindig v. Johnson City State Bank*, Com.App., 41 S.W.2d 222, reversing, *Johnson City State Bank v. Lindig*, Civ.App., 26 S.W.2d 658.

36. Cal.—*Fred C. Silverthorn & Sons v. Pacific Finance Corporation*, 23 P.2d 798, 133 Cal.App. 163.

37. Okl.—*Nation v. Planters', etc.*, Bank, 119 P. 977, 29 Okl. 819.

Duty to inquire

(1) Information leading prudent man, using ordinary diligence, to make investigation resulting in knowledge of unrecorded mortgage, puts him on inquiry.—*Brandeis Machinery & Supply Co. v. St. Matthews Financing Co.*, 15 S.W.2d 502, 228 Ky. 506.

(2) Whether party was put on inquiry and charged with constructive notice of mortgage depends on circumstances of particular case.—*General Motors Acceptance Corporation v. Fowler*, Tex.Civ.App., 36 S.W.2d 589.

38. Ky.—*Brandeis Machinery &*

Supply Co. v. St. Matthews Financing Co., 15 S.W.2d 502, 228 Ky. 506. 11 C.J. p 522 note 67.

Circumstances held to show notice

(1) Mortgagee, knowing of mortgagor's indebtedness to prior mortgagee of property in county outside the state wherein both mortgages were recorded, had constructive notice of prior mortgage unrecorded in the state.—*Brandeis Machinery & Supply Co. v. St. Matthews Financing Co.*, supra.

(2) Purchasers of second note issue had notice of chattel mortgage provision of realty mortgage, although such mortgage was not filed as chattel mortgage, where the purchaser of the second note issue was affiliated with the parent company who was the mortgagee.—*Detroit Trust Co. v. Detroit City Service Co.*, 247 N.W. 76, 262 Mich. 14.

(3) From recitals in preliminary agreement, purchasers had notice sufficient to put them on inquiry regarding whether trust mortgage covered furniture and furnishings.—*Security Trust Co. v. Tuller*, 220 N.W. 795, 243 Mich. 570.

(4) Investment bankers who purchased first note issue which appeared simultaneously with first bond issue, also purchased by such brokers, had notice of chattel provisions of realty mortgage securing bonds, although mortgage was not filed as chattel mortgage.—*Detroit Trust Co. v. Detroit City Service Co.*, supra.

(5) Notice in abstracts of title examined by purchasers' attorney bound him to ascertain whether trust mortgage covered furniture and furnishings.—*Security Trust Co. v. Tuller*, supra.

(6) Second mortgagee taking mortgage which referred to a mortgage other than the prior mortgage given to plaintiff was held guilty of conversion in selling cattle under second mortgage.—*United Bank & Trust Co. of California v. Powers*, 265 P. 403, 89 Cal.App. 690.

(7) A buyer of a mortgaged piano, who was told by the seller that there was a mortgage in another state on the piano and given the name of the mortgagee, was charged with actual knowledge of the existence of the mortgage, although also told falsely by the seller that the mortgage had been discharged by payment, as he failed to investigate at his peril.—*Cable Piano Co. v. Lewis*, 243 S.W. 924, 195 Ky. 666.

11 C.J. p 522 note 67 [c].

Circumstances held not to show notice

(1) Circumstances, which may merely arouse suspicion of reasonably prudent person, are generally insufficient to charge party with constructive notice of chattel mortgage.—*General Motors Acceptance Corporation v. Fowler*, Tex.Civ.App., 36 S.W.2d 589.

(2) Statement of conditional vendee of automobile to his chattel mortgagee that he had not fully paid for the car, coupled with exhibit of receipt for part payment, did not constitute notice that it was sold under conditional bill of sale.—*Auto Mortgage Co. v. Montigny*, 168 N.Y.S. 670.

(3) A license registration number on an automobile at the time it is sold is not constructive notice of an encumbrance held by the owner, in whose name the car was registered, regardless of the county or place where the car may be owned or sold, whether within or without the state.—*Kurtz v. Adrian*, 191 N.W. 188, 46 S.D. 125.

(4) Buyer of automobile, subject to unfilled chattel mortgage executed by person in whose name car was registered at time of purchase by such buyer, was not, by reason of the license number on automobile, chargeable with constructive notice of the mortgage.—*Kurtz v. Adrian*, supra.

11 C.J. p 522 note 67 [b].

Knowledge of existence of chattel mortgage is sufficient to put person

ure to inquire of the mortgagor as to prior encumbrances must arise from bad faith, and not merely from negligence, in order to charge a person with constructive notice.³⁹

Where a prospective mortgagee, advised of a prior mortgage by the mortgagor, examines the proper records and discovers such prior mortgage does not cover the property on which he proposes to take a mortgage, he need not inquire of the prior mortgagee, and will not be regarded as having notice of an unrecorded mortgage on such property.⁴⁰

Where the original seller, to whom the unrecorded mortgage was given was a corporation, an officer of the corporation is charged with notice of the mortgage and cannot become an innocent purchaser of the mortgaged property;⁴¹ and, where such officer takes a deed of trust from the corporation on its property to secure a debt to him, he is presumed to have actual notice of a prior deed of trust on parts of its property.⁴²

Actual notice of a real estate mortgage does not constitute notice of an equitable chattel mortgage

lien on after-acquired property provided for therein unless there is specific notice of the clause on which the claimed lien is based.⁴³

§ 149. Form of Instrument as Affecting Necessity for Record

The form of the instrument in no wise affects the necessity for recording, and regardless of form any instrument intended to operate as a mortgage comes within the provisions of the recording acts.

Statutes requiring mortgages to be recorded are not affected by the form of the instrument, but they apply not only to instruments which are strictly such in form, but also to other instruments intended to operate as mortgages;⁴⁴ and if an instrument presents a case of security in the nature of a mortgage, then it is to be held, when rights of third parties intervene, to come within the law relating to the recording of such an instrument.⁴⁵ Thus, it has been held necessary to record instruments, such as bills of sale given as security, or conditional sales which are in effect mortgage securities,⁴⁶ or a sale of the property accompanied by a lease back to vendor,⁴⁷ or a lease⁴⁸ or a contract,⁴⁹

intending to deal with mortgagor on inquiry.—*Talmage-Sayer Co. of Joliet v. Smith*, 7 P.2d 536, 91 Mont. 289.

39. Mich.—*Millar v. Olney*, 37 N.W. 553, 69 Mich. 560.

40. N.D.—*Farmers' State Bank of Gwinner v. First Nat. Bank*, 199 N.W. 961, 51 N.D. 225.

41. Tex.—*Merchants' & Manufacturers' Securities Co. v. Wright*, Civ. App., 59 S.W.2d 1097, error refused.

42. W.Va.—*Clarksburg Casket Co. v. Valley Undertaking Co.*, 94 S.E. 549, 81 W.Va. 212, 3 A.L.R. 660.

43. Ohio.—*Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate*, 189 N.E. 654, 46 Ohio App. 548.

44. R.I.—*Royal Plan v. Reliable Auto Finance Corporation*, 195 A. 510.

45. Mich.—*Burroughs Adding Mach. Co. v. Wieselberg*, 203 N.W. 160, 230 Mich. 15.

46. U.S.—*Fruehauf Trailer Co. v. Bridge*, C.C.A.Mich., 84 F.2d 660—*In re Baumgartner*, C.C.A.Wis., 55 F.2d 1041—*In re Draughn & Steele Motor Co.*, D.C.Ky., 49 F.2d 636, affirmed, C.C.A., *Commercial Inv. Trust Corporation v. Wilson*, 58 F.2d 910—*In re Central States Freight Corporation*, D.C.Mich., 46 F.2d 545.

Cal.—*Wehrle v. Marks*, 25 P.2d 51, 134 Cal.App. 141—*Commercial Securities Corporation Consol. v. Lindsay Mercantile Co.*, 267 P. 766, 92 Cal.App. 91.

Mich.—*Ballard v. Mackinac Island Hotel Co.*, 250 N.W. 297, 264 Mich. 522—*Grand Rapids Electrotype Co. v. Powers-Tyson Corporation*, 224 N.W. 609, 245 Mich. 669, certiorari denied *Ostrander-Seymour Co. v. Grand Rapids Electrotype Co.*, 50 S.Ct. 35, 280 U.S. 585, 74 L.Ed. 634—*Heyman Co. v. Buck*, 190 N.W. 631, 221 Mich. 225—*Young v. Phillips*, 168 N.W. 549, 202 Mich. 480, affirmed on rehearing 169 N.W. 822, 203 Mich. 566. Mo.—*Bentrup v. Johnson*, 14 S.W.2d 537, 223 Mo.App. 299—*Purvey-Meyer Grocer Co. v. Cardwell Bank*, App., 4 S.W.2d 489.

Neb.—*Nethaway v. Clark*, 202 N.W. 622, 113 Neb. 206.

N.J.—*Harding v. First-Mechanics Nat. Bank of Trenton*, 166 A. 142, 113 N.J.Eq. 129.

R.I.—*Royal Plan v. Reliable Auto Finance Corporation*, 195 A. 510—*Arnold v. Chandler Motors of Rhode Island*, 123 A. 85, 45 R.I. 469.

Wash.—*Olsen v. Legal Adjustment Bureau*, 253 P. 643, 142 Wash. 446, 11 C.J. p 523 note 70.

In Massachusetts

(1) A statutory provision for recording conditions for redemption of bills of sale given for security is inapplicable to personal property mortgages.—*In re Pilot Radio & Tube Corporation*, C.C.A.Mass., 72 F.2d 316, affirming, D.C., 5 F.Supp. 453, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 630—11 C.J. p 523 note 70 [a].

(2) Unrecorded mortgage arising from execution of fictitious conditional sales contract to secure advances, is not valid except as between parties thereto.—*Hartford Accident & Indemnity Co. v. Callahan*, 171 N.E. 820, 271 Mass. 556.

In Texas, mortgage registration statute applies where person delivers chattels to another but retains title until payment of price.—*Universal Credit Co. v. Fortinberry*, C.C.A.Tex., 63 F.2d 71.

47. N.Y.—*Dickinson v. Oliver*, 88 N.E. 44, 195 N.Y. 238, 11 C.J. p 523 note 71.

48. U.S.—*Rockwell v. New York United Hotels*, C.C.A.N.Y., 79 F.2d 81, certiorari denied *Donahue v. Rockwell*, 56 S.Ct. 309, 296 U.S. 650, 80 L.Ed. 462.

N.J.—*Rapoport v. Rapoport Express Co.*, 107 A. 822, 90 N.J.Eq. 519, 11 C.J. p 523 note 72.

49. Colo.—*Bogdon v. Fort*, 225 P. 247, 75 Colo. 231.

Cash rent contract

Where an owner delivered sheep to J under a cash rent contract, reserving the right to retake possession for default and repay himself from the proceeds in full, the balance, if any, to be paid to J, and the deficiency, if any, to be paid by J, the agreement was one for security for indebtedness, and hence a mortgage, which, not being recorded, was of no force against mortgagees of J.—*Clay, Robinson & Co. v. Martinez*, 218 P. 903, 74 Colo. 10.

or a receipt⁵⁰ or a trust receipt,⁵¹ or an assignment,⁵² or a note⁵³ intended to operate as a mortgage; and no evasion of the recording act will be tolerated, and the court will look to the real transaction between the parties notwithstanding the terms of the instrument.⁵⁴ An agreement to give a mortgage, in order to be enforceable as an equitable mortgage, it has been held, must be recorded, in case recordation would be essential to the validity of the mortgage when executed in accordance with the agreement.⁵⁵

However, a preliminary credit agreement which

does not create a lien need not be recorded.⁵⁶ Where an absolute bill of sale is given as security, it is not necessary that the note secured should be recorded as well as the bill of sale.⁵⁷

Schedules or inventories. It follows, from the necessity of a recorded description which sufficiently identifies the property conveyed or affected, that when it is necessary to the identification of the property affected by a mortgage that a schedule or inventory of the chattels, which is referred to in the mortgage, be examined, the schedule must be recorded,⁵⁸ but if the schedule is not necessary to

Sales with retention of title until payment

(1) Vendor's reservation of title to lumber, cut by purchaser of land and timber, until payment of amount due, created a mortgage, which was voidable under North Carolina registration law as against mortgagor's creditors and purchasers from him until registered.—*Elk Creek Lumber Co. v. Hamby*, C.C.A.N.C., 84 F.2d 144.

(2) A contract for sale of store fixtures to a merchant, to be paid for in installments, providing for the giving of notes for deferred payments, and retaining title in the seller "as security for the payment" of such notes, was in effect a mortgage, and, not having been recorded, void as to creditors of the purchaser, under Mich.Comp.L.1915 § 11988.—*In re Bonk*, D.C.Mich., 268 F. 1012.

(3) Contract whereby seller of silos retains right to retake silos, and whereby buyer agrees that silos are to retain their status as personal property after annexation, may be regarded as in effect a mortgage, which is void as to third parties, where not acknowledged and recorded as required by Chattel Mortgage Act.—*Beatrice Creamery Co. v. Sylvester*, 179 P. 154, 65 Colo. 569, 13 A. L.R. 441.

Secret lien in absolute sale

Where transaction between buyer and seller is absolute sale, written contracts reserving secret lien constitute a mortgage which, when unrecorded, is void as to third persons.—*Anglo-American Mill Co. v. First Nat. Bank*, 230 P. 118, 76 Colo. 57.

Accelerating payments

Contract of sale whereby seller reserved power to accelerate payments on buyer's default, right to sue for unpaid balance, and title to machinery not intended for resale, is "chat-
tel mortgage," as against receivers for lack of proper record.—*Cooper v. Michigan Artificial Ice Products Co.*, D.C.Mich., 1 F.Supp. 741, affirmed, C. C.A., *Westerlin & Campbell Co. v. Chapman*, 61 F.2d 1046, certiorari denied *Westerlin & Campbell Co. v. Michigan Artificial Ice Products Co.*,

53 S.Ct. 400, 288 U.S. 608, 77 L.Ed. 983.

50. N.Y.—*Wagar v. Roaser*, 190 N. Y.S. 677, 199 App.Div. 130.
11 C.J. p 524 note 73.

51. U.S.—*Universal Credit Co. v. Fortinberry*, C.C.A.Tex., 63 F.2d 71
—*In re Cullen*, D.C.Md., 282 F. 902
—*In re A. E. Fountain, Inc.*, C.C.A. N.Y., 282 F. 816.

Kan.—*Habegger v. Skalla*, 34 P.2d 113, 140 Kan. 166.

Mass.—*Hartford Accident & Indemnity Co. v. Callahan*, 171 N.E. 820, 271 Mass. 556.

Mich.—*Motor Bankers' Corporation v. C. I. T. Corporation*, 241 N.W. 911, 258 Mich. 301.

N.J.—*Vonhof v. General Contract Purchase Corporation*, 170 A. 239, 115 N.J.Eq. 239—*Smith v. Commercial Credit Corporation*, 165 A. 637, 113 N.J.Eq. 12, affirmed *Morrow v. Smith*, 170 A. 607, 115 N.J.Eq. 310
—*Karkuff v. Mutual Securities Co.*, 148 A. 159, 108 N.J.Eq. 128, affirmed 148 A. 160, 108 N.J.Eq. 128.

Tex.—*General Motors Acceptance Corporation v. Bettles*, Civ.App., 57 S.W.2d 263, error refused.

Wash.—*General Motors Acceptance Corporation v. Seattle Ass'n of Credit Men*, 67 P.2d 832, 190 Wash. 284.

Rights of holder of trust receipt

(1) A holder of a trust receipt has no better standing as respects creditors than the holder of an unfiled mortgage, on delivery of the property to the obligor to act as his fiduciary, unless he derives his security title from a person other than the one responsible for the satisfaction of the obligation which the property secures.—*In re A. E. Fountain, Inc.*, C.C.A.N.Y., 282 F. 816.

(2) However, if the holder of the trust receipt derives his security title from a person other than the one responsible for the satisfaction of the obligation which the property secures, the trust receipt need not be filed.—*In re James, Inc.*, C.C.A.N.Y., 30 F.2d 555, reversing, D.C., 30 F. 2d 551.

As against landlord's lien unrecorded trust receipts, being chattel

mortgages, are void.—*Carrollton Acceptance Co. v. Wharton*, Tex.Civ. App., 22 S.W.2d 985.

52. U.S.—*In re Bonk*, D.C.Mich., 270 F. 657—*In re P. J. Sullivan Co.*, D.C.N.Y., 247 F. 139, affirmed 254 F. 660, 166 C.C.A. 158.

N.J.—*Stulz-Sickles Co. v. Fredburn Const. Corporation*, 169 A. 27, 114 N.J.Eq. 475—*David Straus Co. v. Commercial Delivery Co.*, 112 A. 417, 95 N.J.Eq. 290, affirming, Ch., 113 A. 604.

Wis.—*National Bank of Commerce of Milwaukee v. Brogan*, 253 N.W. 385, 214 Wis. 378—*Carpenter v. Forbes*, 247 N.W. 857, 211 Wis. 648.

11 C.J. p 524 note 74.

Indemnity agreement which transferred chattels as security is "chat-
tel mortgage," and when not recorded is void as against a third person.—*U. S. Fidelity & Guaranty Co. v. Thompson*, 41 P.2d 269, 47 Wyo. 519—*Sterling Lumber Co. v. Thompson*, 41 P.2d 264, 47 Wyo. 552—*State Bank of Wheatland v. Bagley Bros.*, 11 P.2d 592, 44 Wyo. 307.

Indorsement on invoices for cement by individual defendant, reciting sale, assignment, and transfer of cement to bank, executed at time of loan to corporate contractor, being not a sale, but at most a mortgage, was void as against original seller for lack of filing.—*Knickerbocker Portland Cement Co. v. State*, 217 N.Y.S. 652, 218 App.Div. 22.

53. Me.—*Holt v. Knowlton*, 29 A. 1113, 86 Me. 456.

11 C.J. p 524 note 75.

54. N.J.—*Rapoport v. Rapoport Express Co.*, 107 A. 822, 90 N.J.Eq. 519.

55. Me.—*Thurlough v. Dresser*, 56 A. 654, 98 Me. 161.

11 C.J. p 524 note 76.

56. Iowa.—*Clement v. Swanson*, 81 N.W. 233, 110 Iowa 106.

57. Ark.—*Greeson v. German Nat. Bank*, 95 S.W. 439, 78 Ark. 141.

58. Me.—*Sawyer v. Pennell*, 19 Me. 167.

11 C.J. p 524 note 79.

the identification of the property, it need not be recorded.⁵⁹

Collateral agreements. Although a mortgage is accompanied by a collateral agreement, the latter need not be filed for record where it does not constitute part of the mortgage,⁶⁰ and lack of record of the accompanying agreement has been held not to prevent the court from construing the agreement and the mortgage to be a single contract.⁶¹ However, under a statute permitting a bill of sale to be considered as a mortgage although in terms an absolute conveyance, but requiring the recording of the instrument or writing limiting its character in order that the recording of the bill of sale be effective, consignment agreements executed at the same time as the bill of sale and operating as a defeasance or as an explanation of intention that the bill operate as a mortgage must be filed.⁶²

§ 150. Subject Matter of Mortgage as Affecting Necessity for Record

- a. In general
- b. Choses in action
- c. Mixed mortgages
- d. Crops
- e. Leasehold interests
- f. Fixtures

a. In General

Generally, unless the terms of the particular statute require otherwise, a mortgage need be recorded only when the property mortgaged is capable of manual delivery.

Record or registration under the statutes being ordinarily regarded as a substitute for a change of possession, it is, according to the general rule, nec-

essary only where the property mortgaged is capable of manual delivery.⁶³ Where, however, the statutes do not contemplate a change of possession in any instance, under the mortgage before condition is broken, a requirement that mortgages shall be registered is applicable to mortgages of property not capable of a manual delivery.⁶⁴ Further, distinction has been drawn between the necessity of record under statutes requiring the recordation of mortgages of goods and chattels, and statutes requiring the recordation of mortgages of personal property, it being held that statutes of the latter class cannot be confined to mortgages of tangible property.⁶⁵ The rule that recordation is not required as to mortgages of property not capable of passing by manual delivery has been applied to mortgages of property not in esse,⁶⁶ and to an equitable mortgage of a vested remainder in personality.⁶⁷ Where the statute does not require recording unless the subject matter of the mortgage is of a particular specified kind, failure to record does not affect the lien of the mortgagee on property not of that kind.⁶⁸

b. Choses in Action

Unless required by statute, mortgages of choses in action need not be recorded.

Mortgages of choses in action need not be recorded, according to the generally accepted doctrine, where the recording acts merely require the recordation of mortgages of "goods and chattels."⁶⁹ So, it has been held that a mortgage of corporate stocks, bonds, or other securities,⁷⁰ or of a liquor tax certificate,⁷¹ need not be recorded. Under other statutes, however, recordation of mortgages of choses in action has been held necessary.⁷²

59. Ark.—Lund v. Fletcher, 39 Ark. 325.

11 C.J. p 524 note 80.

60. U.S.—In re Pilot Radio & Tube Corporation, C.C.A.Mass., 72 F.2d 318, affirming, D.C., 5 F.Supp. 453, certiorari denied Eckhardt v. Ball, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

11 C.J. p 524 note 81.

61. Wis.—Blakeslee v. Rossman, 43 Wis. 116.

62. U.S.—In re Sachs, C.C.A.Md., 30 F.2d 510, affirming in part and reversing in part, D.C., 21 F.2d 984.

63. Wis.—Rommerdahl v. Jackson, 78 N.W. 742, 102 Wis. 444.

11 C.J. p 524 note 83.

64. N.D.—Sykes v. Hannawalt, 65 N.W. 682, 5 N.D. 335.

11 C.J. p 524 note 84.

65. N.D.—Sykes v. Hannawalt, supra.

66. N.Y.—Frost v. Willard, 9 Barb. 440.

11 C.J. p 525 note 86.

67. N.Y.—Tilden v. Tilden, 57 N.Y. S. 864, 26 Misc. 672.

68. Wis.—Stradiing v. Nelson, 202 N.W. 691, 186 Wis. 308.

69. U.S.—In re B. & B. Motor Sales Corporation, D.C.N.J., 277 F. 808.

Mich.—In re United Fuel & Supply Co., 230 N.W. 164, 250 Mich. 325.

11 C.J. p 525 note 89.

70. U.S.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 288 F. 221.

11 C.J. p 525 note 90.

Mortgage to secure payment of bonds

Where a corporation executed a mortgage covering its securities to secure the payment of its corporate bonds, but the mortgage contained no provision that the stocks and bonds covered thereby were to be delivered to the lender on the day

the loan was made, the mortgage was not required to be filed under N. Y. Lien L. § 90, as amended by L. 1909, c 38, Consol.L. c 33, which provided that the section providing that the requirement of filing should not apply to mortgage or pledge of, or lien on, stocks or bonds mortgaged or pledged to secure the payment of a loan, which stocks or bonds were to be delivered to the lender on the day such loan was made, and made such mortgage valid as against the creditors, with a provision that, if the securities were not delivered the mortgage should be filed.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., supra.

71. N.Y.—Niles v. Mathusa, 57 N.E. 184, 162 N.Y. 546, affirmed 47 N.Y. S. 38, 20 App.Div. 483.

72. Tenn.—Woodward v. Crump, 32 S.W. 195, 96 Tenn. 369.

11 C.J. p 525 note 92.

c. Mixed Mortgages

A mortgage covering real and personal property must be recorded as a chattel mortgage to give the mortgagee a valid lien on the personality, unless by statute such recording is unnecessary.

While the contrary has been held under the provisions of some statutes,⁷³ as a general rule, where a mortgage covers both real and personal property, it seems to be necessary to record it as a chattel mortgage in order to give the mortgagee a valid lien against a creditor on the personal property included.⁷⁴ However, although failure so to file the mortgage may invalidate it as a chattel mortgage, it does not affect its validity as a lien on the real estate,⁷⁵ and a failure to record the instrument does not affect its validity as between the parties.⁷⁶ It has also been held that an unverified and unrecorded chattel mortgage cannot be rendered valid by an agreement between the parties to treat the property as real estate, where it is not in fact attached to the realty.⁷⁷

d. Crops

Mortgages on crops must be recorded as required by statute.

Where the statute provides for the registration of all mortgages and deeds of trust of personal property, it has been held that mortgages of growing crops are included.⁷⁸ Under the provisions of

other statutes, mortgages on growing crops are to be recorded in the manner of mortgages on real estate.⁷⁹

e. Leasehold Interests

Mortgages of leasehold interests are not within the terms of statutes relating to registration of chattel mortgages.

The statutes relating to registration of chattel mortgages apply only to mortgages of personal property and not to mortgages of leasehold interests or of chattels real,⁸⁰ which must ordinarily be registered as mortgages of real estate,⁸¹ for the determination of the place of record depends on the subject matter of the mortgage rather than on the interest of the party in it.⁸²

f. Fixtures

Necessity for recording of mortgages on fixtures depends on the terms of the statute and whether the fixtures have retained their character of personality.

A mortgage of fixtures which retain the character of personality is properly recorded as a chattel mortgage.⁸³ A mortgage of an interest in land and fixtures annexed to such land need not be recorded as a chattel mortgage, and, if so recorded, the record will not be notice to a subsequent purchaser;⁸⁴ but the rule is otherwise where recording as a chattel mortgage is required by statute.⁸⁵

73. U.S.—Anthony v. Butler, R.I., 13 Pet. 423, 10 L.Ed. 229. 11 C.J. p 525 note 93.

74. Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14. 11 C.J. p 525 note 94.

Mortgage of land providing lien on rents

Subsequent purchaser of land for value has lien on rents prior to that of trustee in first mortgage providing for lien on rents but not indexed as chattel mortgage.—Soehren v. Hein, 243 N.W. 330, 214 Iowa 1060.

Mortgage recorded as real estate mortgage only

Holder of mortgage on real estate and shares of stock in ditch company, recorded only as a real estate mortgage, is not entitled to foreclose on stock as against defendant, under evidence disclosing that defendant was a bona fide purchaser for value of the stock.—Woolley v. Dowse, 41 P.2d 709, 86 Utah 221.

75. N.Y.—Hardin v. Dolge, 61 N.Y. S. 753, 46 App.Div. 416.

76. N.J.—W. D. Cashin & Co. v. Alamac Hotel Co., 131 A. 117, 98 N.J.Eq. 432.

11 C.J. p. 525 note 96.

77. Ohio.—Graydon v. Atlantic Phonograph Co., 35 Ohio Cir.Ct. 260 —Graydon v. Atlantic Phonograph Co., 17 Ohio Cir.Ct., N.S., 236.

78. Tenn.—Woodward v. Crump, 32 S.W. 195, 95 Tenn. 369—Butler v. Hill, 1 Baxt. 375.

79. Fla.—Weber v. Belle Mead Development Corporation, 150 So. 594, 112 Fla. 368—Plant City Agr. Credit Co. v. Pool, 139 So. 595, 103 Fla. 806. 11 C.J. p 526 note 1.

Failure to record fruit crop mortgage until after suit to foreclose real estate mortgage, not covering crop, and filing lis pendens therein, did not defeat crop mortgagee's prior right to proceeds of crop, as the real estate mortgagee, whose mortgage did not cover the crop, was not within the terms of the statute declaring an unrecorded mortgage void as to subsequent purchasers or encumbrancers.—Haines City Citrus Growers' Ass'n v. Petteway, 145 So. 133, 107 Fla. 344.

80. Mass.—Freedman v. Bloomberg, 114 N.E. 827, 225 Mass. 491, L.R.A. 1917C 628.

11 C.J. p 526 note 4.

81. U.S.—In re Rogers & Woodward, D.C.Vt., 132 F. 560.

11 C.J. p 526 note 5.

82. S.C.—Connolly v. Stewart, 1 Brev. 271.

83. Ill.—Sword v. Low, 13 N.E. 826, 122 Ill. 487. 11 C.J. p 526 note 7.

Filing with village clerk

A chattel mortgage consisting of a bill of sale of an undivided one-half interest of all furniture and fixtures of a restaurant as security and of "all the stock now in and in the future to be bought and kept as stock," which formed but an insignificant part of value of furniture and fixtures, does not come within requirements of St.1923 § 2314, requiring chattel mortgages to be filed with register of deeds, or of § 2316b, as to affidavits as to subsequent sales of property covered by a chattel mortgage, but is valid when filed with the village clerk.—In re Dunlap's Estate, 199 N.W. 387, 184 Wis. 345.

84. N.J.—Potts v. New Jersey Arms, etc., Co., 17 N.J.Eq. 395. 11 C.J. p 526 note 8.

85. Mass.—Quincy Oil Co. v. New England Road Machinery Co., 174 N.E. 670, 274 Mass. 419.

§ 151. Place of Filing or Recording

- a. In general
- b. Character and evidence of residence as controlling
- c. Mortgages by nonresidents
- d. Instruments executed by joint mortgagors

a. In General

Recording must be at the place required by statute, which may be the residence of the mortgagor, or the situs of the property, or both, or either.

A mortgage must be filed or recorded at the place prescribed by statute,⁸⁶ and if the mortgage is recorded in the wrong place the filing is not constructive notice.⁸⁷ Statutes frequently require the mort-

gage to be filed or recorded within the particular geographical limits such as the town, township, or county, as the case may be, in which the mortgagor resides⁸⁸ at the time of the execution of the instrument,⁸⁹ provided the mortgagor is a resident of the state,⁹⁰ and it is immaterial where the mortgagee resides,⁹¹ where he conducts his business,⁹² or where the mortgaged property is located.⁹³

However, while the mortgagor's place of residence would seem to be the most appropriate place, as conserving the convenience of the greatest number of persons likely to be interested in the property,⁹⁴ under the statutes in some jurisdictions the place for recordation is determined by the situs of the property,⁹⁵ or of the situs of a greater part

86. Ind.—Bergman v. Columbia Securities Co., 151 N.E. 367, 84 Ind. App. 403.

11 C.J. p 526 note 11.

87. Ark.—Combs v. Owen, 31 S.W.2d 127, 182 Ark. 217—Hall v. Cartwright, 20 S.W.2d 124, 179 Ark. 1082.

Mo.—Bank of Malden v. Wayne Heading Co., 200 S.W. 693, 198 Mo. App. 601.

R.I.—In re Kenyon, 160 A. 918, 52 R. I. 298.

Wis.—Baierl v. Riesenecker, 227 N. W. 9, 201 Wis. 454, reversed on other grounds 230 N.W. 605, 201 Wis. 454.

11 C.J. p 526 note 12.

88. Ala.—Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 358.

Ark.—Combs v. Owen, 31 S.W.2d 127, 182 Ark. 217—Hall v. Cartwright, 20 S.W.2d 124, 179 Ark. 1082.

Ga.—Henderson Lumber Co. v. Chatham Bank & Trust Co., 149 S. E. 385, 169 Ga. 139.

Ind.—Bergman v. Columbia Securities Co., 151 N.E. 367, 84 Ind. App. 403.

Mo.—Garner v. Holloway, App. 77 S.W.2d 650—Bank of Malden v. Wayne Heading Co., 200 S.W. 693, 198 Mo. App. 601.

N.C.—Foy & Shemwell v. Hurley, 90 S.E. 582, 172 N.C. 575.

R.I.—In re Kenyon, 160 A. 918, 52 R.I. 298.

Vt.—Drolet v. Russell, 163 A. 565, 105 Vt. 58.

11 C.J. p. 526 note 13.

False statements as to residence

Where horse dealer sold horse and took notes and mortgage, having it recorded in town in which the purchaser falsely said he resided, record of mortgage was invalid as against bona fide purchaser in such town, and dealer could not retake horse under Rev.St. c 96 § 1, as to recording chattel mortgages.—Martin v. Green,

102 A. 977, 117 Me. 133—11 C.J. p 526 note 13 [a].

Residence of corporation

(1) Under a recording act requiring recording in the county where the mortgagor resides, where corporation had office in county designated in its articles and certificate of incorporation, mortgage recorded in another county in which manufacturing plant and business office were located is void as against attaching creditors.—Bank of Malden v. Wayne Heading Co., 200 S.W. 693, 198 Mo. App. 601.

(2) "Residence" of Ohio corporation within statute for filing mortgages is county where by articles corporation is located and transacts principal business.—Sweeney v. Keystone Driller Co., 170 N.E. 436, 122 Ohio St. 16.

11 C.J. p 526 note 13 [c].

89. Iowa.—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.

Wis.—Cappon v. O'Day, 162 N.W. 655, 165 Wis. 486, 1 A.L.R. 1657.

11 C.J. p 527 note 14.

90. Kan.—Golden v. Cockril, 1 Kan. 259, 81 Am.D. 510.

11 C.J. p 527 note 15.

91. N.H.—Stowe v. Meserve, 13 N. H. 46.

11 C.J. p 527 note 16.

92. N.C.—Weaver v. Chunn, 6 S.E. 370, 99 N.C. 431.

93. Mo.—Rice v. Sally, 75 S.W. 398, 176 Mo. 107.

11 C.J. p 527 note 18.

Property in possession of third person

Since the recording act applies to cases where the mortgagor retains actual possession, it was not necessary to record the mortgage in the county where the property was located in charge of a third person, in order to constitute constructive notice of what the mortgage in fact

contained.—National Bank of Milton v. O'Brien, 195 N.W. 611, 196 Iowa 865.

94. Tex.—Griffith v. Morrison, 58 Tex. 46.

95. U.S.—Beaver Creek Consol. Coal Co. v. Porter Mining Co., D.C.Ky., 60 F.2d 602.

Ill.—Farmers' State Bank v. Rasmussen, 254 Ill.App. 136.

Minn.—Dower Lumber Co. v. Rodewald, 196 N.W. 473, 157 Minn. 314.

Mont.—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

N.D.—Hansboro State Bank v. Imperial Elevator Co., 179 N.W. 669, 46 N.D. 363.

Or.—Bankers' Discount Corporation v. Noe, 242 P. 610, 116 Or. 570.

Tex.—First State Bank of Kingsville v. First State Bank of George West, Civ.App., 32 S.W.2d 378.

11 C.J. p 527 note 20.

Property to be removed immediately

(1) Where a mortgage of a car describes it as situated in another county than the place where the mortgage is made, and it is understood that it is to be immediately taken there, such other county is the proper place for recording the instrument.—Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

(2) Where a resident of Colorado sold a motor truck to a farmer in Nebraska, and the mortgage taken for the purchase price described the chattel as situated in D county, Neb., and it was understood that it was to be immediately taken there, such county was the proper place to record the mortgage.—Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

Property in transit

Under a provision that property mortgaged while in transit to the residence of the mortgagor or the place where the property is to be used is, during a reasonable time for trans-

thereof.⁹⁶

Under other statutes record both at the place of the mortgagor's residence and of the situs of the property is required;⁹⁷ under others the recording must be at the place of his residence and where he principally transacts his business;⁹⁸ while under still others it is sufficient to record the mortgage at either place;⁹⁹ and under others it must be recorded where the property is located unless immediately removed to the county of the grantor's residence.¹

Where under the statute the mortgage cannot be

properly recorded or filed as to all the property conveyed in a single place, it must be filed or recorded in the additional places indicated or it will be invalid *pro tanto*.²

A mortgage recorded in the county where the chattels are situated, as required by statute, is valid as to them although not recorded in any other county.³

Where the mortgage shows on its face that it is entitled to record in the county in which it is pre-

portation considered to be in the county of residence or of use, a mortgagee of horses, etc., shipped to a county for use on farm, has constructive notice of plaintiff's prior mortgage, taken when the horses were in a car billed to that county and previously recorded in that county, so that his own mortgage, taken in another county where the horses were temporarily stabled, was inferior.—*First Nat. Bank of Canton v. Baldrige*, 159 N.W. 130, 37 S.D. 606.

Property to become fixtures

The rights of the holder of a mortgage on an engine and boiler given to secure the purchase price are superior to those of lien claimants charged with notice of the mortgage by filing thereof in the county where the mortgaged property was to be annexed to realty before it was so annexed.—*Dower Lumber Co. v. Rodewald*, 196 N.W. 473, 157 Minn. 314.

Mortgagor's residence not proper place

Mortgage on personalty, permanently located in another county than that of mortgagor's residence, should be recorded in former county.—*Beaver Creek Consol. Coal Co. v. Porter Mining Co.*, D.C.Ky., 60 F.2d 602.

Stipulations

Where at the time an automobile was sold it was known that the purchaser was a resident of W county, and it was stipulated that he was to retain possession of the car in W county, and not to permit it to be removed therefrom, the parties in effect stipulated that the car was delivered in W county, and the situs of the car at the time the mortgage was given should be deemed to be in W county, so that W county was the proper place to file mortgage thereon.—*Muller v. Bardshar*, 205 P. 845, 119 Wash. 252.

Error in description of location

Where mortgaged chattels were actually in county at time of execution, delivery, and filing of mortgage, that part of such chattels was described as being in another county was immaterial.—*State Bank of*

Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.

Mistake as to situs

Under Code 1906, §§ 2785, 2787, *Hemingway Code* §§ 2289, 2291, requiring mortgages and deeds of trust on personal property to be recorded in the county in which the property may remain, a deed of trust to secure purchase price of property which was immediately carried to, and thereafter remained in, the county in which purchaser resided, was not constructive notice to a subsequent purchaser for a valuable consideration unless recorded in such county, although recorded in county of seller's residence, and although seller did not know buyer was a resident of such other county.—*McLarty v. Ashmore*, 91 So. 421, 128 Miss. 735.

Mortgage of property by public service corporations

Ohio.—*Thompson v. Chagrin Falls Electric Co.*, 21 Ohio Cir.Ct., N.S., 291.

Effect of change of statute

A statute repealing a provision for recording in the county where the mortgagor resides and substituting a provision requiring a mortgage to be filed in the county where the property was situated does not impair the validity of a mortgage previously filed, in accordance with the law then in force, in the county where the mortgagor resided.—*Chester State Bank v. Great Northern Ry. Co.*, 190 P. 136, 58 Mont. 44.

96. Colo.—*Tabor v. Sampson*, 4 P. 45, 7 Colo. 426.

97. Ala.—*Kinney Bros. v. Cole*, 77 So. 242, 16 Ala.App. 246.
11 C.J. p 527 note 22.

Property removed to county of residence

Where a mule, purchased in Thomas county, upon which a mortgage was thereupon executed, was taken by the buyer to Grady county, where he resided, and where the mule was thereafter kept, the recording of the mortgage in Grady county was notice to a subsequent mortgagee, notwithstanding *Civ.Code* 1910 §

3259, relative to recording the mortgage in the county in which the property is located when the mortgage is executed and in the county where the mortgagor resides.—*Grady Trading Co. v. Ireland*, 114 S.E. 86, 29 Ga.App. 172.

98. Mass.—*Alexander v. F. L. Smithe Mach. Co.*, 143 N.E. 321, 248 Mass. 436.

Construction of statute

(1) Words "principally transacts his business" in a statute requiring that a mortgage be recorded on records of town where mortgagor resides and principally transacts his business when mortgage is made do not include "trade, calling, regular occupation, work and employment" as used in earlier statutes but omitted in the statute under consideration.—*Bankers of Massachusetts v. Reid, Murdoch & Co.*, Mass., 8 N. E.2d 19.

(2) In *Gen.L.Mass. c 255 § 1*, requiring mortgages to be recorded in the town where the mortgagor resides when the mortgage is made and also in the town where he then principally transacts his business, the word "resides" means the place of his permanent abode, and not the place where he may be temporarily living. A chattel mortgage made by a bankrupt, whose place of business and permanent residence was in Boston, where the mortgage was recorded, held not invalid, under the law of Massachusetts, because it was not also recorded in the town where bankrupt was living temporarily when it was made.—*Petition of McLauchlan*, C.C.A.Mass., 1 F.2d 5.

99. Kan.—*Toronto State Bank v. Guy*, 187 P. 865, 106 Kan. 244.
Tex.—*McCarty Motor Co. v. R. F. Finance Corporation*, Civ.App., 41 S.W.2d 258.
11 C.J. p 527 note 23.

1. Ala.—*Wells v. Wright*, 122 So. 167, 219 Ala. 261.

2. U.S.—*Guras v. Porter*, D.C.Cal., 118 F. 668.

11 C.J. p 527 note 24.

3. Or.—*Bankers' Discount Corporation v. Noe*, 242 P. 610, 116 Or. 570.

sented for record, the recorder of that county has no alternative but to record.⁴

b. Character and Evidence of Residence as Controlling

Where recording is required at the place where the mortgagor resides, the usual rules for determination of residence are applicable.

Where the statute requires that a mortgage of chattels shall be recorded at the place where the mortgagor resides, the question involved is not one of domicile but of residence,⁵ which is largely a question of intention.⁶ Residence means something more than a mere presence in a place, particularly where the mortgagor has at the same time a permanent place of abode in another locality.⁷ A mere temporary or casual absence on business or pleasure will not render the person a nonresident.⁸ The fact of actual residence is to be determined by the ordinary and obvious indicia of residence.⁹

Effect of recitals. Although recitals in the instrument as to residence have been held to be sufficient to make out a prima facie case,¹⁰ the better rule is that such recitals are to be disregarded,¹¹ and do not preclude third persons from showing that such place was not in fact the residence of the mortgagor.¹²

Burden of proof. Where the mortgagor's residence controls as to the proper place of record, one claiming under the mortgage must establish that the mortgagor's residence was such as to render the filing proper.¹³

Admissibility and sufficiency of evidence. As bear-

ing on the question of residence, the contemporaneous acts of the parties showing their intention are admissible.¹⁴ Evidence that the mortgagor left his family and permanent abode and went to another county is insufficient to show his residence in the latter county so as to make recording there proper.¹⁵

c. Mortgages by Nonresidents

In general a mortgage on property in a state other than that in which the mortgagor resides must be recorded at the situs of the property.

Nonresidents of the state have been denied the advantages of provisions in recording statutes and compelled to rely on a change of possession,¹⁶ but by statute, in many jurisdictions, in the absence of the mortgagor from the state, the mortgage is to be recorded where the mortgaged property is located,¹⁷ at the time of the execution and delivery of the mortgage.¹⁸ Where the mortgagor is a nonresident and the mortgaged property is not within the state, although described in the mortgage as being so located, the recording of the mortgage in the state is not valid as to third persons.¹⁹

d. Instruments Executed by Joint Mortgagors

Mortgages by joint mortgagors must ordinarily be recorded at the place of residence of each of them, where residence of the mortgagor determines the place of recording.

In those jurisdictions in which the place of record is determined by the residence of the mortgagor, an instrument executed by several persons residing in different counties or towns must be recorded in each place in which such persons reside;²⁰

4. Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321.

5. Ga.—Farmer v. Phillips, 78 S.E. 353, 12 Ga.App. 732.
11 C.J. p 527 note 25.

A mortgage by a corporation is properly recorded or filed in the county where by its articles the corporation is located and transacts its principal business.—Sweeny v. Keystone Driller Co., 170 N.E. 436, 122 Ohio St. 16—11 C.J. p 527 note 25 [a].

6. Kan.—Strackeljohn v. Campbell, 12 P.2d 829, 136 Kan. 145.

7. Ga.—Farmer v. Phillips, 78 S.E. 353, 12 Ga.App. 732.
11 C.J. p 527 note 26.

8. Kan.—Strackeljohn v. Campbell, 12 P.2d 829, 136 Kan. 145.
11 C.J. p 528 note 28.

9. Ark.—Combs v. Owen, 31 S.W.2d 127, 182 Ark. 217.
11 C.J. p 528 note 29.

Determination of residence

(1) Chattel mortgagor's residence,

as respects proper place of filing mortgage to create notice, is determinable from the facts and circumstances of the particular case.—In re Wilson, D.C.Minn., 18 F.2d 108.

(2) Where circumstances concur with mortgagor's declared intention to fix residence for indefinite time, finding that such place constitutes legal residence within registration statute will not be disturbed.—Strackeljohn v. Campbell, 12 P.2d 829, 136 Kan. 145.

10. Ind.—Brown v. Corbin, 23 N.E. 276, 121 Ind. 455.

11 C.J. p 528 note 30.

11. U.S.—Stewart v. Platt, N.Y., 101 U.S. 731, 25 L.Ed. 816.
11 C.J. p 528 note 31.

12. N.Y.—Baumann v. Libetta, 23 N.Y.S. 1, 3 Misc. 513.
11 C.J. p 528 note 32.

13. Ark.—Combs v. Owen, 31 S.W. 2d 127, 182 Ark. 217.
11 C.J. p 528 note 33.

Proof of invalidity of recording see infra § 166.

14. Mich.—Loeser v. Jorgenson, 100 N.W. 450, 137 Mich. 220.

11 C.J. p 528 note 34.

15. Ark.—Combs v. Owen, 31 S.W. 2d 127, 182 Ark. 217.

16. Ind.T.—McFadden v. Blocker, 54 S.W. 873, 3 Ind.T. 224, 58 L.R.A. 894.

11 C.J. p 528 note 35.

17. N.J.—Mill Factors Corporation v. Guardian Trust Co., 154 A. 420, 107 N.J.Law 529—Farmer & Ochs Co. v. Ginsburg, 137 A. 444, 5 N.J.Misc. 572.

11 C.J. p 528 note 36.

18. Mich.—Marquette First Nat. Bank v. Weed, 50 N.W. 864, 89 Mich. 357.

19. Ill.—Vervaris v. Egan, 226 Ill. App. 500.

20. Wis.—Cappon v. O'Day, 162 N.W. 655, 165 Wis. 486, 1 A.L.R. 1657.
11 C.J. p 528 note 38.

and if some of them are nonresidents and some residents, then in the places where the residents reside.²¹

A chattel mortgage given by a partnership, the partners residing in different places, must be filed in each recording district in which any one of the partners resides,²² unless some of them are nonresidents of the state.²³

§ 152. — Recording Districts

Recording must be made within the proper recording district.

Ordinarily, recording districts are determined by county, town, or township lines, and there is no difficulty in determining their exact boundaries,²⁴ and, if these geographical divisions are not observed in recording the mortgage, its recordation is of no effect as to third persons.²⁵ If the mortgage is deposited for record in the office of the recorder of the district in which the property is located at the time, a subsequent change of the boundary of the recording district will not affect the validity of the prior recordation.²⁶

§ 153. — Unorganized Counties

Where unorganized localities or counties are joined to others for recording purposes, a mortgage executed in the unorganized place must be recorded as required; but where not so joined possession must be taken by the mortgagee.

In many jurisdictions unorganized places or counties are joined to others for registration purposes, and such provisions have been upheld,²⁷ but if not so joined the mortgagee must take possession to be protected against the claims of third persons.²⁸ If the statute applies in terms to real estate mortgages, it will not be extended by implication to chattel mortgages.²⁹

§ 154. — Effect of Removal of Mortgagor

Removal of the mortgagor from the district where he resided and the mortgage was recorded does not invalidate the recording; nor will his removal to the place where the mortgage was improperly recorded validate the recording.

The removal of the mortgagor from the district in which he resided when the mortgage was executed and where it was duly recorded, and the taking of the mortgaged property with him, do not invalidate the record of the mortgage or necessitate the recording of it in the district to which he has removed,³⁰ except where recording in the new locality may be required because of the removal of the property thereto, as stated *infra* § 155. Where the mortgagor after the execution and before the recording of a mortgage removes to another county, the latter county is the proper place of record.³¹ If the mortgage has been recorded in a town where the mortgagor does not reside, his subsequent removal to such town will not validate the mortgage as to third persons.³²

§ 155. — Effect of Removal of Goods

Ordinarily, by statute, where goods are removed from the place where the mortgage is recorded the mortgage must be recorded in the place to which the goods are removed.

Where the situs of the mortgaged property is made a controlling element with reference to the place of filing or registration, as discussed *supra* § 151, the situs intended is that existing at the time when the instrument is executed, and not where it may thereafter be removed.³³ In the absence of any specific statutory provision regarding the removal of mortgaged property, the record of a mortgage in the town or county where it is required to be originally filed for record is held to be constructive notice to all the world, and the mortgage is valid without refileing even though the property may be removed to another town or county.³⁴

21. N.J.—*De Courcey v. Collins*, 21 N.J.Eq. 357.

11 C.J. p 523 note 39.

22. U.S.—*Brandes v. Barber*, C.C.A. Ark., 13 F.2d 65.

11 C.J. p 529 note 40.

23. Mich.—*Hubbardston Lumber Co. v. Covert*, 35 Mich. 254.

11 C.J. p 529 note 41.

24. Ala.—*Griffin v. Karter*, 22 So. 484, 116 Ala. 160.

11 C.J. p 529 note 42.

25. Ala.—*Griffin v. Karter*, *supra*.

11 C.J. p 529 note 43.

26. Mont.—*Chester State Bank v. Great Northern Ry. Co.*, 190 P. 136, 58 Mont. 44.

11 C.J. p 529 note 44.

27. Tex.—*Portales First Nat. Bank*

v. McElroy, 112 S.W. 801, 51 Tex. Civ.App. 284.

11 C.J. p 529 note 46.

28. Me.—*Peaks v. Smith*, 71 A. 884, 104 Me. 315.

29. Tex.—*Portales First Nat. Bank v. McElroy*, 112 S.W. 801, 51 Tex. Civ.App. 284.

30. Mo.—*Shanks v. Tinder*, 257 S.W. 188, 216 Mo.App. 173.

Wis.—*Black Hawk State Bank v. Kinzler*, 215 N.W. 433, 194 Wis. 29.

11 C.J. p 529 note 49.

31. S.C.—*Avery v. Wilson*, 25 S.E. 286, 47 S.C. 78.

11 C.J. p 529 note 50.

32. Vt.—*Drolette v. Russell*, 163 A. 565, 105 Vt. 58.

Wis.—*Baerl v. Riesenecker*, 227 N. W. 9, 201 Wis. 454, reversed on other grounds 230 N.W. 605, 201 Wis. 454—*Cappon v. O'Day*, 162 N. W. 655, 165 Wis. 486, 1 A.L.R. 1657.

33. N.D.—*Hansboro State Bank v. Imperial Elevator Co.*, 179 N.W. 669, 46 N.D. 363.

11 C.J. p 529 note 52, p 530 note 53.

However, filing of mortgage after its execution in county to which property was subsequently removed constitutes notice, although mortgage had not been filed in county wherein property was situated at time of execution thereof.—*Mitchell v. Guaranty State Bank of Okmulgee*, 172 P. 47, 68 Okl. 110.

34. U.S.—*Globe Grain & Milling Co.*

or even to another state, as shown *supra* § 15. However, by statute it is ordinarily required that if the mortgaged property is removed to another county the mortgage must be refiled or recorded anew in the county to which it is removed, otherwise it is ineffectual as against creditors and innocent purchasers of the property in the latter county.³⁵

Generally the statutes requiring filing or record-

ing of mortgages in the county into which the mortgaged property is removed allow the mortgagee a certain time within which to so file or record his mortgage after removal of the goods, and failure to do so within the prescribed time renders the mortgage unprotected in such county;³⁶ but until such time has expired the filing of the mortgage operates as constructive notice to subsequent creditors, purchasers or encumbrancers in such county,³⁷ and

v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 418—*Evans v. First Nat. Bank & Trust Co. of Oklahoma City*, C.C.A.Tex., 49 F.2d 125.
 Colo.—*Walker v. Mathis*, 242 P. 68, 78 Colo. 384.
 Idaho.—*Young v. Boise Payette Lumber Co.*, 264 P. 873, 874, 45 Idaho 671, citing *Corpus Juris*.
 Ky.—*Hauseman Motor Co. v. Napierella*, 3 S.W.2d 1084, 223 Ky. 433.
 Tex.—*A. H. Karcher & Co. v. Davis*, Civ.App., 278 S.W. 302.
 Vt.—*Sargent, Osgood & Roundy v. Kelly*, 132 A. 135, 99 Vt. 350.
 11 C.J. p 530 note 54.

35. La.—*Gulf Finance & Securities Co. v. Taylor*, 107 So. 705, 160 La. 945—*Wilson v. Lowrie*, 101 So. 549, 156 La. 1062—*Tex-La Realty Co. v. Earnest*, 124 So. 558, 11 La.App. 617—*Gulf Finance Securities Co. v. Taylor*, 2 La.App. 473.
 Okl.—*Continental Gin Co. v. Sims*, 229 P. 818, 103 Okl. 191—*Snodgrass v. J. I. Case Threshing Mach. Co.*, 174 P. 515, 70 Okl. 303.
 Tex.—*Taylor v. Tillotson*, Civ.App., 272 S.W. 323.
 Wash.—*Muller v. Bardshar*, 205 P. 845, 119 Wash. 252.
 11 C.J. p 530 notes 56, 57.

Purpose of statute relating to removal of mortgaged chattels from county is to protect mortgagee and innocent purchasers or encumbrancers or attachment or judgment creditors in case property is removed without mortgagee's knowledge or consent from county in which chattel mortgage is recorded.—*Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank*, C.C.A.Idaho, 69 F.2d 418.

Filing not notice outside parish

Statutory requirements of mortgage as to third persons without notice refers to third persons in parish where property is located or where mortgagor resides and not in a parish to which the property is removed.—*Krivos v. Simmons*, 134 So. 727, 16 La.App. 421.

Filing of duplicate original chattel mortgage in county to which property was removed and indexing of same was sufficient to continue lien.—*In re Neil*, D.C.Wash., 44 F.2d 666.

Permanent location

Where chattels mortgaged in one

county were removed by mortgagor to another county and there used in his business for more than one hundred twenty days, they were "permanently located" in latter county within Rev.L.1910 § 4032, requiring refiling of mortgage in county where mortgaged property is permanently located.—*First Nat. Bank v. Guess*, 179 P. 29, 72 Okl. 125.

Temporary removal

Lien of mortgage was not lost by temporary removal for pastureage purposes of mortgaged cattle from one county into another.—*Evans v. First Nat. Bank & Trust Co. of Oklahoma City*, C.C.A.Tex., 49 F.2d 125.

Time of purchase

(1) Under a provision invalidating a mortgage lien where property is removed to another county unless the mortgagee within thirty days re-records the mortgage, the lien of the mortgage is lost when the mortgage was not filed within the thirty-day period, although the purchase was within the thirty-day period.—*Muller v. Bardshar*, 205 P. 845, 119 Wash. 252.

(2) One appropriating property covered by mortgage within thirty days after removal from county was guilty of conversion.—*Pacific Fruit Exchange v. F. E. Booth Co.*, 283 P. 944, 103 Cal.App. 54.

Return to first county immaterial

A mortgage is void against third party where automobile remained without county where mortgaged over thirty days, although being repaired and thereafter returned.—*Kahrman v. Fitzgerald*, 259 P. 90, 85 Cal.App. 180.

Prior creditors

Where mortgage is properly filed in county where mortgaged property was located at time mortgage was made, and thereafter property is permanently removed to another county with mortgagee's consent, mortgage need not be refiled in county to which property is removed to preserve its validity as against creditors whose claims arose prior to execution of mortgage.—*Burkdoll v. Simpson*, 48 P.2d 1072, 173 Okl. 397, 103 A.L.R. 195.

Effect on other rights

Where mortgaged sheep were removed from county and converted within thirty days after removal,

mortgagee, although he could not sustain mortgage lien without filing copy of mortgage in county to which sheep were removed, was not required to file such copy to recover for conversion.—*Schneller v. Vincent*, 229 P. 737, 131 Wash. 238, affirmed 237 P. 1119, 135 Wash. 698.

36. Okl.—*Continental Supply Co. v. Badgett*, 242 P. 209, 114 Okl. 1—*Snodgrass v. J. I. Case Threshing Mach. Co.*, 174 P. 515, 70 Okl. 303.

Removal to third county

Under Code 1907 § 3376, requiring mortgage to be recorded in county to which mortgaged property is removed within three months from removal, where property remained in county to which it was removed for five months without recording it therein, and was thereafter removed to a third county, and sold to purchaser for value and without actual notice within a month after removal, without reporting it in third county, original recordation was insufficient constructive notice, having lost its effect in second county.—*Howe v. Simison*, 81 So. 837, 17 Ala.App. 59.

Time of removal controls

Under Rev.St.1911 art 6841, where mortgage on mules was given to the sellers thereof by the buyers, and the mules were moved to Louisiana, where the lien of the mortgage was recorded, the sellers' liens become inferior to the liens of a bank, acquired after the mules were brought back into another county of Texas and recorded there before the sellers' mortgage was recorded, the recording of the mortgage by the sellers in the county into which the mules were brought back not having been within four months after the removal of the mules from another county where the lien was first recorded, into Louisiana on the original sale.—*Hart Bros. v. Kirkes*, Tex.Civ.App., 225 S.W. 870.

37. Ala.—*Cole v. Gay & Bruce*, 104 So. 774, 20 Ala.App. 643.

Okl.—*Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City*, 31 P.2d 843, 168 Okl. 400—*National Bond & Investment Co. v. Central Nat. Bank of Enid*, 285 P. 828, 142 Okl. 96—*Farmers' State Bank of Wheatland v. North Oklahoma State Bank of Britton*, 230 P. 914, 104 Okl. 248

a purchaser before the expiration of the time limit does not become a purchaser in good faith because of the failure of the mortgagee to file in such county thereafter.³⁸

Statutes regulating the filing of mortgages in other counties to which the property may be removed apply the same test of good faith and valuable consideration to creditors,³⁹ subsequent purchasers,⁴⁰ and mortgagees,⁴¹ in such counties as in the original county.

Statutes requiring a refiling after removal apply only to cases where the removal was made with the consent of the mortgagee; the mortgage need not be refiled where the property was removed without the mortgagee's consent,⁴² although the contrary has been held.⁴³ Where the mortgagee has consented to the removal of the mortgaged property to another state, or county, his subsequent filing of the mortgage in the county of the original situs of the property is ineffective.⁴⁴ Due registration after the removal of the property renders the mortgage effectual against subsequent purchasers and credi-

tors, although there was no registry in the county where the property was when the mortgage was executed.⁴⁵

Under a statute requiring filing in the county where the property is located unless immediately removed to the county of the grantor's residence, failure to remove immediately will destroy the effect of the record in the latter county as constructive notice.⁴⁶

§ 156. Time of Filing or Recording

Where no time for filing or recording after execution is prescribed by the statute, a reasonable time is allowed; but statutory prescriptions as to time must be complied with.

A mortgage must, according to the general trend of the authorities, be filed or recorded within a reasonable time after execution, where the statute requiring such thing or recordation is silent as to the time therefor.⁴⁷ However, where a statute provides that a mortgage must be filed or recorded within a specified number of days after its execution, compliance with the statute is essential,⁴⁸ and

—Continental Gin Co. v. Sims, 229 P. 818, 103 Okl. 191.

11 C.J. p 530 note 56 [a], [c].

38. Okl. — Cassity v. First Nat. Bank, 287 P. 392, 143 Okl. 42—Morgan v. Stanton Auto Co., 285 P. 962, 142 Okl. 116.

39. Tex.—Biggerstaff v. McGill, Civ. App., 175 S.W. 711.

40. Tex.—Biggerstaff v. McGill, supra.

41. Tex.—Biggerstaff v. McGill, supra.
11 C.J. p 530 note 60.

42. U.S.—Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 418.

Colo.—Rocky Mountain Seed Co. v. McArthur, 272 P. 1117, 85 Colo. 1.

Idaho. — Young v. Boise Payette Lumber Co., 264 P. 873, 45 Idaho 671.

La.—See First Nat. Bank v. Hutto, 121 So. 325, 10 La.App. 448, construing Texas statute.

Miss.—Cole-McIntyre-Norfleet Co. v. Du Bard, 99 So. 474, 135 Miss. 20.
N.J.—Farmer & Ochs Co. v. Ginsburg, 137 A. 444, 5 N.J.Misc. 572.

N.D.—Hansboro State Bank v. Imperial Elevator Co., 179 N.W. 669, 670, 46 N.D. 363, quoting *Corpus Juris*.

Tex.—McCarty Motor Co. v. R. F. Finance Corporation, Civ.App., 41 S.W.2d 258—Paschal v. Harris Motor Co., Civ.App., 280 S.W. 614—A. H. Karcher & Co. v. Davis, Civ. App., 278 S.W. 302.

11 C.J. p 531 note 62.

Effect of knowledge

(1) A statute making chattel mortgages void against bona fide creditors, etc., where mortgagee permits property to be removed to another county and fails to record the mortgage there within four months, is inapplicable to property removed without mortgagee's consent, but with his knowledge.—Guaranty State Bank of Tyler v. Reeves, Tex.Civ. App., 213 S.W. 285, dismissed for want of jurisdiction.

(2) Where chattel mortgagee's agent knew that mortgagor had removed mortgaged horses from county, but made no effort to place mortgage in registry of county of removal, or to take possession, after sleeping on rights for three years mortgagee cannot claim rights over subsequent mortgagee.—Haslet State Bank v. Carper, Tex.Civ.App., 273 S.W. 289.

43. La.—Gulf Finance & Securities Co. v. Taylor, 107 So. 705, 160 La. 945.

Permanent location necessary

Mortgaged mules sometimes taken from the county held not permanently located in county to which at different times removed. — Farmers' State Bank of Wheatland v. North Oklahoma State Bank of Britton, 230 P. 914, 104 Okl. 248.

44. Cal.—Fassett v. Wise, 47 P. 47, 1095, 115 Cal. 316, 36 L.R.A. 505.
11 C.J. p 531 note 63.

45. Tex.—Ames Iron Works v. Chinn, 38 S.W. 247, 15 Tex.Civ. App. 88.

46. Ala.—Wells v. Wright, 122 So. 167, 219 Ala. 261.

47. U.S.—In re Excelsior Macaroni Co., D.C.N.Y., 55 F.2d 406—In re Henningsen, C.C.A.N.Y., 297 F. 821, affirming, D.C., 291 F. 684.

N.Y.—Trimble v. Broun-Green Co., 172 N.Y.S. 762, 105 Misc. 210—Stich v. Pirkel, 166 N.Y.S. 440, 100 Misc. 594.

11 C.J. p 531 note 65.

Existing statute governs

Rights of mortgagee, filing mortgage too late, are governed by existing statute, whether or not repeal of earlier statute revived common law rule.—In re Myers, C.C.A.N.Y., 24 F.2d 349, modifying, D.C., 19 F. 2d 600.

After debt due

Where the statute does not prescribe the time for filing, a mortgage ordinarily may be recorded after debt secured is due, although it would not be valid as against subsequent purchasers for value without notice or creditors who had obtained liens before recordation.—Southern Bank & Trust Co. v. Mathers, 106 So. 402, 90 Fla. 542.

48. Ind.—Roudebush v. Nash, 177 N. E. 335, 93 Ind.App. 283.

Wash.—Robinson, Thieme & Morris v. Whittier, 191 P. 763, 112 Wash. 6.

11 C.J. p 531 note 66.

Purchase before expiration

Where a specified number of days is provided by statute for the recording of the mortgage after its execution, the mortgagee may recover the property from a purchaser

if the time has expired the redating and reacknowledging of the mortgage without again swearing to the affidavit of good faith required by the statute for valid execution is not such execution that filing within the statutory time thereafter will amount to compliance with the statute.⁴⁹

Under statutes requiring that recordation shall be "forthwith," or "immediate," it has been held that the mortgage must be filed as soon as it can be with

reasonable diligence and exertion,⁵⁰ and if not so filed is void as against creditors and subsequent purchasers and encumbrancers in good faith⁵¹ although valid as between the parties to it.⁵²

In accordance with well-settled general principles, the question as to what is a reasonable time depends on the circumstances of the particular case.⁵³ Where a certain number of days is given in which to record a mortgage, the period begins to

who bought the property after execution of the mortgage but before it was recorded.—*Hillgoss v. Thorpe*, 141 N.E. 797, 80 Ind.App. 614.

Proof of compliance

Where the date stated in a mortgage is incomplete, the note secured may be referred to, for the purpose of determining whether the mortgage was recorded within the time required by statute.—*In re Jennings*, D.C.Mass., 284 F. 729.

49. Wash. — *Robinson, Thieme & Morris v. Whittier*, 191 P. 763, 112 Wash. 6.

50. U.S.—*In re Webster Loose Leaf Filing Co.*, D.C.N.J., 240 F. 779.

N.J.—*New Brunswick Motor Truck Sales v. Scott*, 176 A. 375, 114 N.J. Law 231, affirmed 181 A. 45, 115 N.J. Law 520.—*Locke Cotton Mills Co. v. Plasket*, 183 A. 682, 119 N. J. Eq. 598.—*Stanber v. Sims Magneto Co.*, 129 A. 710, 98 N.J. Eq. 38, affirmed *Heine v. Hayden*, 132 A. 922, 99 N.J. Eq. 455.

Tex.—*Collins v. McFarland*, Civ.App., 60 S.W.2d 334, error refused.—*McVey v. United Timber & Kaolin Ass'n*, Civ.App., 270 S.W. 572.

11 C.J. p 531 notes 67-69—42 C.J. p 763 note 37.

Holder of landlord's lien against tenant is a "creditor" within Chattel Mortgage Act providing that to be valid against "creditors" chattel mortgage must be forthwith filed.—*Collins v. McFarland*, Tex.Civ.App., 60 S.W.2d 334, error refused.

Filing held timely

Where mortgage was executed in the afternoon and filed at nine o'clock the next morning, a finding that it was filed within a reasonable time was justified.—*Oakes v. Freeman*, Tex.Civ.App., 204 S.W. 360—11 C.J. p 531 note 67 [a].

Filing held too late

The landlord being a subsequent creditor and lienholder in good faith, his lien on tenant's property in the building at time of lease takes priority under *Vernon's Sayles Civ.St. Annot.* 1914 art 5655, over prior mortgage thereon not forthwith deposited and filed in county clerk's office as thereby required, but filed three months later, and subsequent to the lease.—*Ingram v. Lattimore*, Tex. Civ.App., 210 S.W. 297.

Recording held immediate

Mortgage held immediately recorded, where deposited with register immediately after mortgagor's acknowledgment was certified, although twelve days elapsed between execution and recording.—*Mitschele-Baer, Inc. v. Livingston Sand & Gravel Sales Co.*, 154 A. 752, 108 N.J. Eq. 286.

Recording held not immediate

(1) Mortgage transmitted for recording without prepayment of fees and held for recording until fees were received four days thereafter.—*In re Webster Loose Leaf Filing Co.*, D.C.N.J., 240 F. 779.

(2) Delay of seven days.—*Morehouse v. Keyport Auto Sales Co.*, 179 A. 279, 118 N.J. Eq. 368.

(3) Recording nine days after execution.—*Riedinger v. Mack Mach. Co. of Harrison*, 175 A. 790, 117 N. J. Eq. 334.

(4) Lapse of seventeen days between execution and delivery and recording.—*Pincus v. U. S. Dyeing & Cleaning Works*, 133 A. 66, 99 N.J. Eq. 160.

Requirement of statute absolute

Requirements of a statute that mortgage be recorded immediately is absolute, and delay reasonably explained and satisfactory to the parties is not compliance therewith.—*In re Webster Loose Leaf Filing Co.*, D.C.N.J., 240 F. 779.

Unexcused delay

Under *Vernon's Sayles Civ.St. Annot.* 1914 art 5655, declaring mortgages not accompanied by immediate delivery and followed by actual change of possession of the property mortgaged void as against subsequent purchasers in good faith, unless "forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated," such a mortgage not deposited and filed in the clerk's office in a small town where mortgagee's place of business must have been at no great distance from the courthouse, for nearly two weeks after it was executed, was void as to subsequent purchasers.—*First Nat. Bank v. Thompson*, Tex.Civ.App., 251 S.W. 818, affirmed, Com.App., 265 S. W. 884.

51. N.J.—*Kramer v. Yocum*, 144 A. 188, 104 N.J. Eq. 79.
42 C.J. p 763 note 38.

Creditors at time of record

Mortgage, not recorded until one month after its date, was invalid as against all of mortgagor's creditors who had claims existing at time of recording of the mortgage.—*Cross v. Printing Corporation*, 104 A. 727, 89 N.J. Eq. 378.

Prior and subsequent creditors

Under Civ.Code Cal. § 2957, requiring a mortgage to be recorded immediately to be valid as against creditors, delay in recording invalidates mortgage, not only as against creditors who became such between the dates of the execution and the recording of the mortgage, but as against creditors who were such at the time the mortgage was executed.—*In re Hansen*, D.C.Cal., 268 F. 904.

52. N.J.—*Kramer v. Yocum*, 144 A. 188, 104 N.J. Eq. 79.

53. U.S.—*In re Fraser*, D.C.N.Y., 261 F. 558.

N.Y.—*Trimble v. Broun-Green Co.*, 172 N.Y.S. 726, 105 Misc. 210.
11 C.J. p 532 note 70.

Delay held reasonable

Under the rule that a mortgage, to be valid against creditors, must be filed within a reasonable time, a delay of six weeks before filing was not unreasonable, where it was understood that the mortgage should not become effective until the mortgagee had satisfied himself as to prior liens.—*In re Henningsen*, D.C. N.Y., 291 F. 684, affirmed, C.C.A., 297 F. 821.

Delay held unreasonable

(1) Mortgage is void, as against judgment creditor of mortgagor, where there is no actual, continual change of possession under it, and, through inadvertence, it is not filed until thirty-nine days after execution, since due diligence required by act in filing mortgage was not exercised.—*Reynolds v. Webb*, 166 N.Y. S. 668, affirmed 169 N.Y.S. 1110, 183 App.Div. 915.

(2) Delay of ten months is concededly unreasonable. — *Stich v. Pirkel*, 166 N.Y.S. 440, 100 Misc. 594.

(3) Delay of over a year in filing mortgage was unreasonable as matter of law. — *Weiss v. Imperator*

run only from the time when the instrument is delivered,⁵⁴ unless the statute otherwise provides,⁵⁵ and in computing time the day of execution is excluded and the day of recording included.⁵⁶

Two mortgages bearing different dates are regarded as filed simultaneously when both are delivered to the recording officer outside his office and he carries them within the office and notes the time of filing.⁵⁷

Recording after death of mortgagor. A mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it.⁵⁸ However, a mortgage which was recorded after the mortgagor's death was held void as to other creditors, since the property had passed to the administrator.⁵⁹

§ 157. — Effect of Delay

- a. In general
- b. As indicium of fraud
- c. Agreements to withhold from record

a. In General

Delay in filing or recording will not, in the absence of statute, render the mortgage void, but the rights of the mortgagee will be postponed to those of third persons accruing between the time of execution and the recording.

The mere withholding of a mortgage from record does not invalidate it,⁶⁰ and it cannot be attacked on this ground by one who has acquired no rights or interest during the period between execution and recordation,⁶¹ or who knew of the existence of the mortgage even though not filed,⁶² although it is postponed to intervening rights of purchasers⁶³ or creditors,⁶⁴ and as soon as the filing is completed

Realty Co., 209 N.Y.S. 218, 124 Misc. 745.

54. Wash. — Myers-Shepley Co. v. Milwaukee Grain Elevator Co., 214 P. 1051, 124 Wash. 583.
11 C.J. p 532 note 71.

Date on mortgage immaterial

Under a statute requiring a mortgage to be filed within ten days from the time of its execution, a crop mortgage is not executed until the date on which it was verified and acknowledged, although it was dated before that date, since there can be no presumption that it was delivered before it was acknowledged, and the date stated in the mortgage does not necessarily determine the day of its execution. — Myers-Shepley Co. v. Milwaukee Grain Elevator Co., supra.

55. Mass.—Old Colony Trust Co. v. Medfield, etc.; R. Co., 102 N.E. 484, 215 Mass. 156.

11 C.J. p 532 note 72.

56. Ind.—Towell v. Hollweg, 81 Ind. 154.

11 C.J. p 532 note 73.

57. N.C.—McHan v. Dorsey, 92 S.E. 598, 173 N.C. 694.

58. Fla.—Southern Bank & Trust Co. v. Mathers, 106 So. 402, 404, 90 Fla. 542, citing *Corpus Juris*.
11 C.J. p 532 note 76.

Delay not unreasonable

Where mortgage was given to secure indorser on note due thirty days after execution, was filed for record within four days after mortgagee's liability as indorser had accrued, and two days after death of mortgagor, but before appointment of administrator, there was no unreasonable delay or laches in absence of showing of prejudice.—Southern Bank & Trust Co. v. Mathers, supra.

59. Wash.—Spokane Merchants' As-

soc. v. Colville First Nat. Bank, 150 P. 434, 86 Wash. 367.
11 C.J. p 532 note 77.

60. Cal.—Wolpert v. Gripton, 2 P.2d 767, 213 Cal. 474—Williams v. Bel-ling, 245 P. 455, 76 Cal.App. 610.

R.I. — Roberts v. Golden Flake Doughnut Shops, 167 A. 259, 53 R. I. 465.

11 C.J. p 532 note 80.

61. Ariz.—Moore v. Chilson, 224 P. 818, 26 Ariz. 244.

Cal.—Wolpert v. Gripton, 2 P.2d 767, 213 Cal. 474—Schwartzler v. Le-mas, 53 P.2d 1039, 11 Cal.App.2d 442.

Iowa.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.

Mo. — General Motors Acceptance Corporation v. Farm & Home Sav-ings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832—Green v. Powell, App., 46 S.W.2d 915.

Date of delivery of chattel mort-gage, rather than date of its execu-tion, controls in application of statu-te providing that chattel mortgage is void as against creditors and sub-sequent purchasers and encumbranc-ers, unless filed. — Tenney Co. v. Thomas, 237 N.W. 710, 61 N.D. 202.

62. Cal.—Wolpert v. Gripton, 2 P.2d 767, 213 Cal. 474.

Kan.—People's Nat. Bank of Kansas City v. Edmunds, 237 P. 911, 119 Kan. 212.

63. Ala.—Citizens' Bank of Gunters-ville v. Pearson, 116 So. 350, 217 Ala. 391.

Fla.—Southern Bank & Trust Co. v. Mathers, 106 So. 402, 90 Fla. 542.

Iowa.—Meredith v. Beadle, 233 N.W. 512, 211 Iowa 390.

Wash.—Fleming v. Lincoln Trust Co., 214 P. 5, 124 Wash. 317.

11 C.J. p 532 note 81.

64. U.S.—Swift v. Higgins, C.C.A.

Cal., 72 F.2d 791—In re Wisconsin Refining Corporation, C.C.A.Wis., 63 F.2d 159—Hodiamont Bank v. Livingstone, C.C.A.Mo., 35 F.2d 18 —In re Ideal Steel Wheel Co., C.C. A.N.Y., 25 F.2d 651—National Bank of Bakersfield v. Moore, Cal., 247 F. 913, 160 C.C.A. 103, certiorari denied 38 S.Ct. 427, 247 U.S. 507, 62 L.Ed. 1241.

Fla.—Southern Bank & Trust Co. v. Mathers, 106 So. 402, 90 Fla. 542.

Ga.—Merchants' & Mechanics' Bank v. Beard, 134 S.E. 107, 162 Ga. 446, answers to certified questions con-formed to 134 S.E. 479, 35 Ga.App. 692.

Mo.—Birmingham v. Carr, 197 S.W. 711, 196 Mo.App. 411.

N.Y.—Reynolds v. Webb, 166 N.Y.S. 668, affirmed 169 N.Y.S. 1110, 183 App.Div. 915.

S.C.—Tucker v. Hudgens, 129 S.E. 77, 132 S.C. 374.

Wash.—Keyes v. Sabin, 172 P. 835, 101 Wash. 618.

11 C.J. p 532 note 82.

Execution of new note immaterial

Invalidity of mortgages withheld from record continued to inhere therein as regarded creditors, re-gardless of execution of new note.—Hodiamont Bank v. Livingstone, C. C.A.Mo., 35 F.2d 18.

In contest for distribution of fund between recorded general execution superior to subsequently recorded bill of sale to secure debt, but in-ferior to lien of prior unrecorded general execution, junior recorded execution is entitled to first priority, bill of sale to second, and senior un-recorded general execution to bal-ance thereof.—Merchants' & Mechan-ics' Bank v. Beard, 134 S.E. 107, 162 Ga. 446, answers to certified ques-tions conformed to 134 S.E. 479, 35 Ga.App. 692.

the general rule is that the mortgage becomes valid and operative against general creditors of the mortgagor whose claims antedate the execution of the mortgage.⁶⁵ A fortiori, late filing has this effect where the claim arose subsequently to the registration of the instrument.⁶⁶ Where a statute declares a mortgage to be void as to subsequent purchasers in good faith when not filed within the time prescribed, a mortgage filed after expiration of the time allowed is void as to a purchaser in good faith although it was filed before the purchase, but the belated filing may carry actual notice to a subsequent purchaser, so as to take him out of the protection of the good faith clause of the statute.⁶⁷ In some jurisdictions, however, a mortgage made in good faith is valid against all parties who, previous to date of day of record, have not acquired lien by attachment, levy, or some such proceeding, even though there is a delay in having the mortgage recorded.⁶⁸

Where a mortgagee records his mortgage within a reasonable time after execution, the statute fixing no specific time for recordation, it is not void as to creditors of the mortgagor becoming such between the time of the execution of the mortgage and the

time of its recordation,⁶⁹ or when no adverse rights are acquired nor prejudice suffered during the interval between its execution and recordation.⁷⁰

A mortgage executed after a prior mortgage has been filed may prevail as against such mortgage where the subsequent mortgage is taken for a debt contracted while the prior mortgage remained unfilled.⁷¹ As between two mortgages, neither of which has been recorded within the time required by statute, the one under which possession is first taken and retained will prevail.⁷²

Where a mortgage is delivered to a third party, to be delivered to the mortgagee at a future day if the debt secured is not sooner paid, and nothing remains to be done by the mortgagee to entitle him to the mortgage, the doctrine of delivery in escrow cannot be invoked to uphold it against creditors as against a contention of delay in filing.⁷³

b. As Indicium of Fraud

Mere withholding from record is not of itself a badge of fraud.

The mere withholding of a mortgage from record is not, in itself, a badge of fraud,⁷⁴ but where

Surety of mortgagor taking possession

Surety, taking over equipment on road contractor's default without notice of unrecorded mortgage, is not liable for conversion.—Citizens' Bank of Guntersville v. Pearson, 116 So. 350, 217 Ala. 391.

65. Iowa.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.

Mo.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.

Utah.—Hansen v. Daniels, 272 P. 941, 78 Utah 142.

11 C.J. p 533 note 83.

66. U.S.—In re Ideal Steel Wheel Co., C.C.A.N.Y., 25 F.2d 651.—In re Myers, C.C.A.N.Y., 24 F.2d 349, modifying, D.C., 19 F.2d 600.

Cal.—United Bank & Trust Co. of California v. Powers, 265 P. 403, 89 Cal.App. 690.

Ga.—Merchants' & Mechanics' Bank v. Beard, 134 S.E. 107, 162 Ga. 146, answers to certified questions conformed to 134 S.E. 479, 35 Ga.App. 692.

N.J.—Riedinger v. Mack Mach. Co. of Harrison, 175 A. 790, 117 N.J. Eq. 334.—Warner v. Cranford Printing & Publishing Co., 172 A. 808, 116 N.J.Eq. 166.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Ohio.—Krusse & Bahlman Co. v. Brower, 19 Ohio App. 29.

Tex.—McKee v. Brooks-Davis Chevrolet Co., Civ.App., 74 S.W.2d 311, error dismissed.—Boody v. Star Furniture Co., Civ.App., 45 S.W.2d 291.—McCarty Motor Co. v. R. F. Finance Corporation, Civ. App., 41 S.W.2d 258.

Wyo.—Carroll v. Anderson, 218 P. 1038, 1041, 30 Wyo. 217, citing

Corpus Juris.

11 C.J. p 533 note 84.

Subsequent mortgage

That mortgage executed on Saturday, June 9, 1934, was not filed until June 12, 1934, was held not an unreasonable delay as matter of law, and hence, such mortgage prevailed over subsequent mortgage, where otherwise valid.—Schutzbank v. Colonial Discount Co., 289 N.Y.S. 33, 248 App.Div. 828.

Purchaser subsequent to recording

A mortgage on an automobile, filed under the Lien Law, was valid as against a buyer of automobile who took subsequent to filing of mortgage, but without actual knowledge thereof, notwithstanding mortgage was not filed for three weeks after it was executed, since "subsequent" as used in Lien Law making mortgages void as against subsequent purchasers in good faith, unless filed, refers to time of filing and not to time of making mortgage.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.

67. Wash.—Clark v. Kilian, 199 P. 721, 116 Wash. 532.

68. U.S.—Firestone Tire & Rubber Co. v. Cross, C.C.A.S.C., 17 F.2d 417.

11 C.J. p 533 note 86.

69. N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.

11 C.J. p 533 note 87.

Fourteen days' delay between delivery of mortgage and its recordation, if not excusable, rendered mortgage void as to encumbrancers whose claims were created during interval.—Williams v. Belling, 245 P. 455, 76 Cal.App. 610.

70. Iowa.—Davis Gasoline Engine Works Co. v. McHugh, 88 N.W. 948, 115 Iowa 415.

11 C.J. p 533 note 88.

71. Mich.—Dempsey v. Pforzheimer, 49 N.W. 465, 86 Mich. 652, 13 L. R.A. 388.

11 C.J. p 533 note 89.

72. Mass.—Keepers v. Fleitmann, 100 N.E. 333, 213 Mass. 210.

73. N.Y.—Tooker v. Siegel-Cooper Co., 87 N.E. 778, 194 N.Y. 442, affirming 110 N.Y.S. 1147, 126 App. Div. 913, affirming 106 N.Y.S. 277, 55 Misc. 68.

74. U.S.—In re McCormick, D.C.Fla., 279 F. 916.

N.Y.—Halladay v. Worthington, 163 N.Y.S. 362, 99 Misc. 141.

11 C.J. p 533 note 92.

Reason other than extension of credit
Withholding from record for reasons other than acquisition of credit was not fraud as against sub-

so provided by statute, withholding from record raises a presumption of fraud which must be rebutted.⁷⁵

c. Agreements to Withhold from Record

Agreements to withhold a mortgage from record will invalidate the mortgage as to those who extend credit to the mortgagor as a result of the concealment of the mortgage.

The withholding of a mortgage from record, by an agreement between the mortgagor and the mortgagee, for the purpose of sustaining the mortgagor's credit, is generally held to be such a fraud on the creditors of the mortgagor as will invalidate the mortgage as to them.⁷⁶ In some jurisdictions, however, this rule is extended only to those creditors who became such during the period when the mortgage was withheld from record,⁷⁷ or to prior creditors who have dealt with the mortgagor, after its execution, in a manner other than they would have dealt had the mortgage been recorded.⁷⁸ Even under a statute requiring record as between the parties, agreements to withhold from record for a limited time not unreasonably long have been held to be valid as between the parties.⁷⁹

A mortgagee who agrees to the withholding of the mortgage from record to enable the mortgagor to obtain a lease cannot defeat the lessor's lien on the mortgaged property on the ground that the de-

lay was the result of fraud and coercion, although the lessor refused to make the lease unless the recording was delayed.⁸⁰

§ 158. — Relation Back

Filing or recording may in a proper case relate back to the time of execution of the mortgage.

While the contrary has been held under the provisions of some statutes,⁸¹ as a general rule, where there has been compliance with the requirement of a statute, either that a mortgage should be filed "forthwith," "within a reasonable time," or within a specified time, the filing relates back to the time the instrument was executed and cuts out intermediate claimants.⁸²

§ 159. Sufficiency of Filing or Recording

To be a valid filing or recording, the statutory requirements must be complied with; but, generally, when the mortgagee has done all that is required of him, the mortgage is regarded as validly filed or recorded although, in fact, error or mistake has been committed by the recording officer.

In general, to constitute a valid filing or record of a mortgage, there must be a compliance with the statutory requirements, as a provision that the mortgage shall be inoperative until recorded means recorded as required by statute.⁸³ Thus, it is necessary to comply with the requirements as to the officer with whom the instrument is to be deposit-

sequent creditors.—*Baxter v. Baxter*, 217 N.W. 231, 204 Iowa 1321.

75. N.Y.—*Briggs v. Gelm*, 106 N.Y.S. 693, 122 App.Div. 102.

76. U.S.—*In re McCormick*, D.C.Fla., 279 F. 916—*Hawkins v. Dannenberg Co.*, Ga., 253 F. 529, 165 C.C.A. 199—*Hawkins v. Dannenberg*, D.C.Ga., 234 F. 752.

Iowa.—*Baxter v. Baxter*, 217 N.W. 231, 204 Iowa 1321.
11 C.J. p 534 note 94.

77. Iowa.—*Palo Sav. Bank v. Cameron*, 168 N.W. 769, 184 Iowa 183.
11 C.J. p 534 note 95.

Prior creditor with knowledge subsequently acquired

Withholding from record is not fraudulent as to mortgagor's creditor on demand note made before execution of mortgage, where creditor made no demand for payment for several months after mortgage was recorded, and after full notice of the mortgage extended mortgagor further credit in way of overdrafts.—*Palo Sav. Bank v. Cameron*, supra.

78. Neb.—*Carpenter Paper Co. v. News Pub. Co.*, 87 N.W. 1050, 63 Neb. 59.

11 C.J. p 534 note 96.

79. Fla.—*Logan v. Slade*, 10 So. 25, 28 Fla. 699.

80. La.—*Spremich v. Somerfield*, App., 166 So. 630.

81. Mass.—*Harrison v. J. J. Warren Co.*, 66 N.E. 589, 183 Mass. 123.
11 C.J. p 534 note 98.

82. Tex.—*Baker v. Smelser*, 29 S.W. 377, 88 Tex. 26, 33 L.R.A. 163 and note, reversing 26 S.W. 905, 6 Tex. Civ.App. 751.
11 C.J. p 534 note 99.

83. Ala.—*Howe v. Simison*, 81 So. 837, 17 Ala.App. 59.

Cal.—*Eckhardt v. Morley*, 30 P.2d 423, 220 Cal. 229.

11 C.J. p 534 note 1—42 C.J. p 764 note 58.

Term "file" within statute authorizing filing of chattel mortgages, means handing of mortgage to county clerk with required fee.—*Shaffer v. McCulloh*, 29 P.2d 486, 38 N.M. 179.

Presentation to officer and immediate withdrawal

A mere presentation to the county clerk of an original mortgage and the immediate withdrawal of it without recording or leaving a copy in its stead cannot be a filing within L. 1915 c 71, as amended by L. 1917 c 36, 74, requiring the clerk to retain the mortgage or the copy, even

though the clerk puts his file mark on it, to "file" an instrument being to present it to the proper officer to be kept as an archive of his office.—*Nations v. Lowenstern*, 204 P. 60, 27 N.M. 613.

Recording alternative to filing

Recording mortgage, without filing or minuting, is sufficient constructive notice thereof, under a statute providing for recording as an alternative to filing.—*Spurgeon v. Hughes*, 258 P. 350, 32 N.M. 436.

Deposit with officer insufficient

Where the statutory requirements have not been complied with, the mere deposit of the mortgage with the recording officer does not operate as a recording, and the mortgage will become effective only on actual registration following the subsequent compliance with the statute.—*Eckhardt v. Morley*, 30 P.2d 423, 220 Cal. 229.

Effect of change of statute

Filing of mortgage with county clerk, notwithstanding repeal before effective date of statute authorizing such filing and supreme court's decision holding statute ineffective, protects the mortgagee.—*Angelone v. Jones*, 182 N.E. 684, 43 Ohio App. 147.

ed,⁸⁴ the office in which the deposit is to be made,⁸⁵ the payment of the recording fee,⁸⁶ and the sufficiency of the copy where a copy is filed.⁸⁷

Further, the deposit of the instrument must be

accompanied by proper directions to the officer to file or to record it.⁸⁸ A chattel mortgage filed in the recorder's office, with directions not to record it, is not filed for record;⁸⁹ and if it is subsequent-

84. Ky.—Carter Guaranty Co. v. Cumberland & Manchester R. Co., 292 S.W. 812, 219 Ky. 207. 11 C.J. p 534 note 2.

85. Ky.—Carter Guaranty Co. v. Cumberland & Manchester R. Co., supra. 11 C.J. p 535 note 3.

Delivery to officer out of office

Delivery to the register of deeds outside his office is not a filing, and becomes such only when the register carries it within his office and makes a record thereof.—McHan v. Dorsey, 92 S.E. 598, 173 N.C. 694.

In Michigan

(1) Under a statute requiring mortgages to be filed in the office of the township clerk of township, or city clerk of city, where goods are located, and, if of a stock of merchandise, then "also" in the office of the register of deeds of county where goods are located, the filing of a mortgage in the office of the register of deeds, who had the affidavit required by such statute attached thereto, did not cure the illegal filing in the office of the city clerk of an instrument without such affidavit, since the mortgage, to comply with such statute, was required to be filed in both the office of the city clerk and that of the register of deeds.—In re Jarnol, D.C.Mich., 288 F. 547.

(2) Mortgage on stock of drugs and trade fixtures, filed with city clerk but not with register of deeds, is valid as to trade fixtures only, but the partial invalidity because of defective filing does not affect valid portions.—McKerregan v. Alpena Nat. Bank, 220 N.W. 671, 243 Mich. 481.

(3) As to fixtures not purchased for resale at retail, in mortgage covering stock and fixtures, filing of mortgage with township clerk was sufficient, although if purchased for such purpose it also would have been necessary to file the mortgage in the office of the register of deeds of the county where the goods were located.—Cudahy Bros. Co. v. John W. Free State Bank, 221 N.W. 621, 244 Mich. 523.

(4) Where a sales agreement for wagons retained in seller the right to require payment at any time, being for security and intended to operate as a mortgage, it is governed as to filing by Comp.L.1915 § 11988, requiring a mortgage or copy thereof to be filed with both the township clerk and the register of deeds.—Peter Schuttler Co. v. Gunther, 192 N.W. 661, 222 Mich. 430.

86. Ky.—Carter Guaranty Co. v. Cumberland & Manchester R. Co., 292 S.W. 812, 219 Ky. 207.

Fee payable in advance

Under a statute providing that no mortgage on a motor vehicle shall be valid until the mortgagee is registered as the legal owner, and a provision that transfer of registration will be made only on payment of the correct fee, fees for transfer of registration of automobiles must be paid in advance, and prior thereto chattel mortgage on automobile need not be registered.—Eckhardt v. Morley, 30 P.2d 423, 220 Cal. 229.

87. U.S.—Union Stockyards Bank of Wichita, Kan. v. Hamilton, Ky., 246 F. 580, 158 C.C.A. 550.

11 C.J. p 535 note 4.

True copy

(1) A statute providing that a copy of a mortgage may be filed instead of the original, contemplates a true copy, a "copy" of an instrument being a duplication or reproduction of it.—Nations v. Lowenstein, 204 P. 60, 27 N.M. 613.

(2) Carbon copy, exact duplicate of original, except that maker's signature was omitted, is a "true copy" within filing statute, and not misleading to other mortgagee knowing facts of transaction.—Harrington v. Interstate Securities Co., Mo.App., 57 S.W.2d 438.

Authenticated copy

To be an authenticated copy, as required by the Oklahoma statute, the copy filed in county in which part of mortgaged property is located, must be duly certified by county clerk, and original mortgage must be lawfully on file with clerk, when such certificate is made, and withdrawal is permissible only when mortgage is to be canceled as provided by the statute. Where county clerk, at mortgagee's request, or with his knowledge and consent, fails to file original chattel mortgage when presented to him, but returns it to mortgagee, and in lieu thereof files an unauthenticated copy, the error is one of mortgagee as well as clerk, and the filing is a nullity.—New Era Milling Co. v. Thompson, 230 P. 486, 107 Okl. 114.

Duplicate originals

Where mortgaged cattle are in two counties, and where duplicate original mortgages are filed in both counties, each mortgage so filed being original, filing thereof is valid.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

88. Ark.—Continental Supply Co. v. Thomas, 197 S.W. 683, 130 Ark. 287.

11 C.J. p 535 note 5.

Indorsement of instructions on mortgage

(1) Under the provisions of the Arkansas statute, a mortgage to create and maintain a lien good as against strangers must either be filed with clerk for record or bear indorsement directing filing signed by mortgagee, his agent or attorney.—Continental Supply Co. v. Thomas, supra.

(2) There must be some indorsement upon a mortgage by the mortgagee, either written or printed, intended as his signature, following the notation that the instrument is to be filed but not recorded, in order to constitute it a lien as against a third party without being recorded.—Gasconade Development Co. v. McIlroy Bank & Trust Co., Ark., 112 S.W.2d 653.

(3) Mortgagee's signature above printed indorsement of words, "this instrument is to be filed but not recorded," with line drawn from such signature to dotted line under indorsement, was substantial compliance with statute.—Reitz v. Nowlin, Ark., 110 S.W.2d 690.

(4) The printing of the firm name of mortgagee on the back of the mortgage, under an indorsement, "This instrument is to be filed but not recorded," is a signature within the statute.—Lesser-Goldman Cotton Co. v. Hembree, 259 S.W. 5, 163 Ark. 88.—Leach v. Bald Knob State Bank, 259 S.W. 3, 163 Ark. 91.

(5) Where indorsement was not followed by the signature of the mortgagee either written or printed, and the name of mortgagee appeared only once in the caption of the mortgage showing the parties, the mortgage was not properly indorsed to comply with the statute and constitute it a lien as against a third party.—Gasconade Development Co. v. McIlroy Bank & Trust Co., supra.

(6) Transmission to circuit clerk of mortgage with letter requesting same to be filed is not an indorsement on the instrument by mortgagee that it should be filed.—Continental Supply Co. v. Thomas, 197 S.W. 683, 130 Ark. 287. 11 C.J. p 535 note 5 [a].

89. N.H.—Town v. Griffith, 17 N.H. 165.

11 C.J. p 535 note 6.

ly recorded without further instructions, the record is unauthorized and void, unless ratified before other claims attach.⁹⁰

When the mortgagee has complied with the statute, so far as lies within his power, the mortgage is regarded as filed or recorded from the time it was so deposited;⁹¹ and the mortgagee is not affected by the errors or omissions of the recording officer.⁹² So, where the statute provides for an actual transcription of the mortgage on the records, the mortgagee, under the general rule, is not affected by the failure of the officer so to transcribe.⁹³ Further, independently of the rule of nonliability of the mortgagee for errors and omissions of the recording officer, and even in those jurisdictions where the rule is disapproved, such errors and omissions are generally held not to invalidate the mortgage as against third persons if the record is sufficient to give them notice,⁹⁴ or if they have actual knowledge of the existence of the mortgage.⁹⁵ A chattel mortgage in the form of a conveyance, recorded in the record of deeds, instead of as a chattel mort-

gage, has been held void as against creditors.⁹⁶

Although the recording is defective, the rights of the mortgagee cannot be defeated by a third person asserting a fictitious claim against the mortgagor.⁹⁷

Transcription as filing. Where transcription is required, a mortgage will be effective as to third persons only when actually inscribed,⁹⁸ and when timely inscribed will be effective from the time of its filing.⁹⁹ The transcription of the instrument in extenso on the records in those jurisdictions where such transcription is not necessary has been held a sufficient compliance with a statute requiring the instrument, or a copy thereof, to be deposited with the recorder, to be kept in his office for inspection.¹ Where transcription is required, it has been held that the fact that it is in the handwriting of the mortgagor does not affect the validity of the registration.²

Mixed mortgages. Under the recording acts in some jurisdictions mortgages embracing both land and chattels may be recorded in the books kept for

90. Vt.—Blair v. Ritchie, 47 A. 1074, 72 Vt. 311.

91. U.S.—In re Neil, D.C.Wash., 44 F.2d 666—Stockyards Loan Co. v. Miller, C.C.A.Okl., 288 F. 176.

Fla.—George Mackay & Co. v. Marion Hardware Co., 131 So. 396, 397, 100 Fla. 1532, citing *Corpus Juris*.

Ill.—Eaton State Bank v. Flesher, 243 Ill.App. 532.

Ohio.—Angelone v. Jones, 182 N.E. 684, 43 Ohio App. 147.

11 C.J. p 535 note 8.

Delay in making index and entries

Notice of mortgage exists from time of filing, and not from time that clerk's index and entries are made.—Shackelford v. Clements, Tex. Civ.App., 300 S.W. 98.

92. U.S.—Stockyards Loan Co. v. Miller, C.C.A.Okl., 288 F. 176.

Ark.—Montague v. Craddock, 193 S. W. 268, 128 Ark. 59.

Fla.—First Nat. Bank v. Evans, 130 So. 18, 20, 100 Fla. 740, citing *Corpus Juris*.

Ga.—Blakely Artesian Ice Co. v. Clarke, 79 S.E. 526, 13 Ga.App. 574.

Ill.—Eaton State Bank v. Flesher, 243 Ill.App. 532.

Ind.—Voigt v. Mergenthaler Linotype Co., 12 N.E.2d 498.

Mo.—Emerson-Brantingham Implement Co. v. Rogers, App., 216 S.W. 994.

N.M.—Shaffer v. McCulloh, 29 P.2d 486, 38 N.M. 179.

Okl.—Guaranty State Bank of Fort Worth v. La Hay, 224 P. 189, 98 Okl. 29.

Tex.—Continental Gin Co. v. Herner,

Civ.App., 79 S.W.2d 670, 671, citing *Corpus Juris*.

11 C.J. p 535 note 9.

Erroneous date

Recorder's mistake in writing date instead of due date of note in recording mortgage does not affect the validity of the mortgage.—Eaton State Bank v. Flesher, 243 Ill.App. 532.

Omission of marginal note

Where a mortgage bore a marginal notation that the name of intervenor should be substituted wherever the name of the mortgagee appeared in the mortgage and the clerk in recording it omitted the marginal entry, the record of the mortgage was nevertheless sufficient to put all persons on inquiry.—Palmer v. Leivy, Mo.App., 205 S.W. 244.

93. Ind.—Voigt v. Mergenthaler Linotype Co., 12 N.E.2d 498.

11 C.J. p 536 note 10.

Error in transcription of acknowledgment

Where certificate of acknowledgment showed acknowledgment was taken in Indiana before notary whose seal appeared, and indicated date notary's commission expired, but did not affirmatively show notary was authorized to take acknowledgments in Indiana, mortgage was valid against subsequent execution purchaser who had actual notice of chattel mortgage, notwithstanding error in transcription in to the record.—Voigt v. Mergenthaler Linotype Co., supra.

In Louisiana, it being regarded as the duty of the mortgagee to see that his mortgage is properly registered, a mortgage, not filed, but re-

corded by the clerk, so as not to give real mortgagor's name as required by the statute, does not operate as lien.—Charrier v. Greenlaw Truck & Tractor Co., 2 La.App. 622.

94. Mo.—Palmer v. Leivy, App., 205 S.W. 244.

11 C.J. p 536 note 11.

95. Or.—Ayre v. Hixson, 98 P. 515, 53 Or. 19, 133 Am.S.R. 819, Ann. Cas.1913E 659.

11 C.J. p 536 note 12.

96. Wash.—First Guaranty Bank v. Western Cross-Arm & Mfg. Co., 247 P. 1027, 139 Wash. 614.

97. Vt.—Drolette v. Russell, 163 A. 565, 105 Vt. 58.

98. La.—Charrier v. Greenlaw Truck & Tractor Co., 2 La.App. 622.

Construction of statute

Where a constitutional provision requires recording, actual inscription in the record is necessary, and a statute, if construed to permit mortgages to affect third persons' property before being recorded in parish where property is situated, would be unconstitutional. — Whitney-Central Nat. Bank v. Cuneo, 7 La.App. 197.

99. La.—Whitney-Central Nat. Bank v. Cuneo, supra—Charrier v. Greenlaw Truck & Tractor Co., 2 La.App. 622.

1. Mo.—Strop v. Hughes, 101 S.W. 146, 123 Mo.App. 547.

11 C.J. p 537 note 19.

2. U.S.—Fowler v. Merrill, Ark., 11 How. 375, 13 L.Ed. 736, affirming, C.C., Merrill v. Dawson, 17 F.Cas. No.9,469, Hempst. 563.

real estate records, and this is held to constitute a sufficient record of the instrument as a chattel mortgage, notwithstanding the statute requires mortgages of chattels alone to be separately recorded in a book kept exclusively for chattel records;³ but in most jurisdictions in which separate books are designated for mortgages of land and for chattel mortgages, it is held that the record of a mixed mortgage in the real estate mortgage book alone will not suffice.⁴

Mortgage of written contract. When the mortgage of a written contract is deposited for record it has been held that the contract must be deposited with the mortgage.⁵

Where mortgage is withdrawn in order to perfect its attestation, a return of the instrument to the clerk's office has been held to constitute a "filing" for record.⁶

Affidavit and jurat. When the statute requires an affidavit by the parties to the mortgage, together with the certificate of the oath signed by the officer administering it, to be appended to the mortgage and recorded therewith, the papers constitute one instrument for record, and if the affidavit and certificate are omitted from the record the mortgage is not legally recorded.⁷

§ 160. — Defects in Copy Filed

Where a true copy of the mortgage is required to be filed, a substantially true copy will suffice.

The purpose of the statutes in requiring a true copy of the mortgage to be filed being to give notice to creditors and holders of after-acquired in-

terests, a copy which apprises them of the existence of the mortgage, the property mortgaged, and the material terms and conditions of the instrument, substantially complies with the law, notwithstanding clerical errors.⁸ However, a copy which shows no signature or acknowledgment is insufficient, and an unauthorized certificate of the clerk that it is a true copy will not aid an incomplete copy.⁹

§ 161. — Recording in Wrong Book

Recording of mortgage in the wrong book has been held not to make the recording invalid, but there is authority to the contrary.

Failure to record a mortgage in the book designated by statute for that purpose has been held not to affect the validity of the record;¹⁰ but the authorities are not in entire accord on this point, and in some jurisdictions where the books for recording instruments affecting chattels are kept separate and distinct from the records relating to real estate or other transactions, a chattel mortgage not recorded in the book kept exclusively for that purpose is held to be invalid as to third persons.¹¹ When the failure to record in the proper book is the fault of the mortgagee, his lien is void as against third persons.¹²

§ 162. — Indexing

Except as required by statute the mortgage need not be indexed; and generally failure to index it, or defectively indexing it, does not affect the validity of the filing or recording, even where the officer is required by statute to index.

In the absence of a statute requiring it the recording officer need not index a mortgage;¹³ and where

3. Ind.—Woodbury Glass Co. v. Beeson, 127 N.E. 573, 73 Ind.App. 385.

11 C.J. p 537 note 17.

4. Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App. 548.

11 C.J. p 537 note 18.

In Maryland, recording of mortgage covering both realty and personalty, prior to enactment of statute requiring land records and chattel records to be kept separately, among land records only, and indexing both among land records and chattel records, was proper.—In re Oliver C. Putney Granite Corporation, D.C.Md., 14 F.Supp. 31.

5. Pa.—Hilton's App., 9 A. 342, 116 Pa. 351.

11 C.J. p 538 note 21.

6. Ga.—Albany Nat. Bank v. Georgia Banking Co., 74 S.E. 267, 137 Ga. 776.

7. Vt.—Hunt v. Allen, 50 A. 1103, 73 Vt. 322.

8. Mo.—Harrington v. Interstate Securities Co., App., 57 S.W.2d 438, 439, citing *Corpus Juris*.

11 C.J. p 537 note 13.

Substantially true copy

Under Kan.Gen.St.1909 § 5224, requiring filing of the mortgage or a true copy thereof, a copy of mortgage on cattle deposited with register of deeds, which described them in terms of mortgage and as branded on right hip, but which omitted mention of brand, as stated in the mortgage, is sufficient.—Union Stockyards Bank of Wichita, Kan., v. Hamilton, Ky., 246 F. 580, 158 C.C.A. 550.

9. N.M.—Nations v. Lowenstern, 204 P. 60, 27 N.M. 613.

10. Mo.—Emerson-Brantingham Implement Co. v. Rogers, App., 216 S.W. 994.

11 C.J. p 537 note 15.

As against one having actual knowledge

Mortgage, recorded in wrong book, even if it should be considered void as against innocent purchaser, was

valid as against purchaser with actual notice, who did not, until after purchase, discover defect in recordation, where mortgagee had done his duty in filing instrument for record and paying recording fee.—Emerson-Brantingham Implement Co. v. Rogers, supra.

11. La.—Washington Bank & Trust Co. v. Cowan-Kerr Lumber Co., 99 So. 881, 155 La. 1076.

Va.—People's Bank of Southampton v. Merchants' & Farmers' Bank, 147 S.E. 220, 152 Va. 520.

11 C.J. p 537 note 16.

12. Tex.—Cave v. Talley Co., Civ. App., 298 S.W. 912.

Faulty indorsement

Clerk's failure properly to record mortgage is chargeable to mortgagee, and not to clerk, where the indorsement was a direction to file the mortgage as a mortgage on realty.—Cave v. Talley Co., supra.

13. Mo.—Dawson v. Cross, 88 Mo. App. 292.

the statute does impose on the officer the duty of making an index, it is generally held that it is not a part of the "filing," and that the mortgage will constitute notice, although the officer fails to index it, or indexes it in a defective manner.¹⁴ On the other hand, the index does not constitute notice when the mortgage or copy thereof by reason of defects is not entitled to be filed.¹⁵ A provision for indexing has been held sufficiently complied with when the mortgage has been indexed and cross-indexed in the front of the chattel mortgage book.¹⁶

When a real estate mortgage providing for a lien on rents is given on land lying in two counties, indexing it in one county as a chattel mortgage creates a lien on the land in that county as to the rents therefrom, although not on the land outside that county.¹⁷

§ 163. Operation and Effect of Filing or Recording

The effect of recording is generally the same whether the mortgagee is a resident or nonresident; and an invalid mortgage is not validated by recording.

The recordation of the mortgage will not validate it if it is otherwise invalid.¹⁸ Ordinarily, the statutes make no distinction between resident and

nonresident mortgagees as to the effect of record.¹⁹ The mere fact that a mortgage has been filed does not necessarily import that the mortgagee has actual knowledge thereof, or has any interest in the property on which the mortgage is alleged to create a lien.²⁰ A buyer of personalty subject to a mortgage of which he has constructive notice takes whatever title he may acquire in hostility to mortgagee, and does not become "purchaser in good faith for value" as against such mortgage.²¹

§ 164. — Record of Mortgage as Notice

- a. In general
- b. Persons affected by notice
- c. Instruments affording notice
- d. Crop mortgages

a. In General

In general the recording of a mortgage operates to give constructive notice of the mortgage and of everything disclosed by the record.

The record of a mortgage is not constructive notice of its existence or contents unless made so by statute,²² and recording under some statutes has been held not notice;²³ but where it is regarded as affording constructive notice the absence of actual notice becomes immaterial.²⁴ The record is

14. Mo.—Emerson-Brantingham Implement Co. v. Rogers, App., 216 S. W. 994.

N.Y.—Dodds v. O'Brien, 166 N.Y.S. 1065.

Tex.—McKeever v. Brooks-Davis Chevrolet Co., Civ.App., 74 S.W.2d 311, error dismissed.

11 C.J. p 538 note 24.

Right of purchaser

While the purchaser of property covered by a mortgage erroneously indexed as to the amount of the debt takes subject only to the lien of the mortgage as indexed, he must, in order to defend his possession as against the mortgagee, tender to the latter the amount so indexed.—Burriss v. Owen, 57 S.E. 542, 76 S.C. 481.

In Louisiana, recordation means recordation sufficient to enable public to ascertain whether mortgage was recorded, and a mortgage indexed under the name of another party is insufficient.—Charrier v. Greenlaw Truck & Tractor Co., 2 La.App. 622.

15. N.M.—Nations v. Lowenstern, 204 P. 60, 27 N.M. 613.

16. N.C.—Whitehurst v. Garrett, 144 S.E. 835, 196 N.C. 154.

17. Iowa.—Soehren v. Hein, 243 N. W. 330, 214 Iowa 1060.

18. Mich.—People v. Burns, 125 N. W. 740, 161 Mich. 169, 137 Am.S.R. 466.

11 C.J. p 538 note 26.

19. Me.—Foster v. Perkins, 42 Me. 168.

20. Ga.—Sims v. Scheussler, 64 S. E. 99, 5 Ga.App. 850.

21. Okl.—Stuart v. First Nat. Bank, 50 P.2d 297, 174 Okl. 292.

See also supra §§ 142, 143, 146, and infra § 164.

22. Kan.—Greer v. Newland, 78 P. 835, 70 Kan. 315, 109 Am.S.R. 424, 70 L.R.A. 554.

11 C.J. p 538 note 30.

23. N.Y.—Matthews v. Victor Hotel Co., 132 N.Y.S. 375, 74 Misc. 426, affirmed 135 N.Y.S. 1127, 150 App. Div. 928.

11 C.J. p 538 note 31.

In Connecticut

(1) Recording mortgage of personal property not within statutory exceptions does not operate as constructive notice to bona fide purchaser.—Bickart v. Sanditz, 136 A. 580, 105 Conn. 766.

(2) A truck, not being within the classes of personal property which a mortgagor is authorized to retain possession, upon compliance with conditions in Gen.St.1918 § 5206, there was no obligation upon parties to an instrument transferring the same from vendor to vendee to have it recorded, and, assuming it to have been a mortgage, the recording would not be notice to a bona fide purchaser.—Adler, Salzman & Adler v. Am-

merman Furniture Co., 123 A. 268, 100 Conn. 223.

(3) Recorded purchase-money mortgage of trucks used by bottling plant, containing replacement clause, held ineffective against bona fide purchaser of substituted trucks.—Bickart v. Sanditz, supra.

24. Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106. La.—Jeffcoat v. Hammons, App., 160 So. 182.

N.Y.—Meisel Tire Co. v. Ralph, 1 N. Y.S.2d 143, 164 Misc. 845.

Okl.—R-F Finance Corporation v. Summers, 32 P.2d 312, 168 Okl. 179.—Morgan v. Stanton Auto Co., 285 P. 962, 142 Okl. 116.—Hourigan v. Home State Bank, 162 P. 699, 62 Okl. 199.

S.D.—Nelson v. Robinson, 205 N.W. 40, 48 S.D. 436.

Wash.—Union State Bank of Wapato v. Warner, 248 P. 394, 140 Wash. 220.

11 C.J. p 538 note 32.

Extent of notice

Filing of mortgage on fixtures under Remington Code 1915 § 3662, making such filing "full and sufficient notice" to all persons dealing with the property, imports as much as actual notice to a subsequent purchaser of land of all its conditions, including agreement that property, although affixed to realty, shall be

not constructive notice of more than it itself discloses,²⁵ but one dealing with the property is chargeable with notice of all facts which would be discovered by any inquiry reasonably suggested by the record.²⁶ When the effect of the instrument is limited by another unrecorded instrument intended as a defeasance, the recording of the mortgage does not give constructive notice.²⁷ Examination of the record of a mortgage gives actual notice of everything which it discloses, but no more;²⁸ but one

cannot rely on the nondisclosure of matters of which he has actual knowledge.²⁹

The failure of the mortgagee to take proper measures to protect himself will not deprive him of the benefit of the constructive notice afforded by record.³⁰ A mortgagee is not charged with constructive notice of a mortgage filed after his.³¹

Record of a mortgage on a mortgage is not ordinarily notice to a purchaser or assignee of the paper so encumbered.³²

personal.—Boeringa v. Perry, 164 P. 773, 96 Wash. 57.

Mortgage by authorized officer of corporation

Where, secretary-treasurer by course adopted by corporation for transacting its business was authorized to execute a mortgage, constructive notice from recording the same will be imported to defendant, purchaser of mortgaged property, where his right to deny such notice rests solely on claim that officer's acts were ultra vires.—Peyton v. Sturgis, Tex.Civ.App., 202 S.W. 205.

25. U.S.—In re Universal Storage & Transfer Co., D.C.Md., 4 F.Supp. 425, affirmed, C.C.A., Skutch v. Buch, 70 F.2d 107.

Cal.—Pine v. Higgins, 256 P. 582, 83 Cal.App. 276.

Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.

La.—Veillon Motor Co. v. Veillon, App., 161 So. 199.

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395. N.D.—Teigen v. Occident Elevator Co., 200 N.W. 38, 40, 51 N.D. 563, citing *Corpus Juris*.

Wash.—Farmers' & Merchants' Bank of Walla Walla v. Small, 229 P. 531, 131 Wash. 197.

11 C.J. p 538 note 34.

Equities of mortgages

Filing of mortgage on unplanted crops, or agreement for such mortgage, will not operate as constructive notice of equitable rights of mortgagee.—American State Bank of Scottsbluff v. Keller, 200 N.W. 999, 112 Neb. 761.

Instrument modifying recorded mortgage

An unrecorded instrument ratifying and modifying a recorded mortgage gives subsequent encumbrancers no actual or constructive notice of matter therein which is not incorporated in the mortgage proper.—Lee v. Seals, 256 S.W. 830, 215 Mo. App. 582.

Mortgage on products to be produced

Where farm owners before sugar season and to secure overdue note gave mortgage on all maple products to be produced on farm for one year and mortgage was duly recorded, the record was constructive notice after

sap had run, to purchaser of maple syrup from mortgagor, and the mortgage and record were valid lien on syrup as against a purchaser.—Barton Sav. Bank & Trust Co. v. Hamblett, 178 A. 900, 107 Vt. 311.

Matters referred to in mortgage

(1) For the purpose of notice, a recorded mortgage may refer to other papers of record and in such case will be treated and considered as having set out the contents of such other papers.—Garner v. Arizona Egyptian Cotton Co., 197 P. 231, 22 Ariz. 318.

(2) Where the mortgage refers to the notes secured thereby, the purchaser is charged with notice that the notes contain provisions for the payment of attorney's fees.—Tuberville v. Simpson, 47 So. 784, 94 Miss. 154—11 C.J. p 538 note 34 [a].

(3) Where a recorded mortgage refers to a recorded bill of sale for description of the mortgaged property the purchaser is charged with constructive notice of the description in the bill of sale.—Pullen v. Berkeley, Tex.Civ.App., 27 S.W.2d 924.

(4) Mortgage on cotton without date, merely naming farms involved and amount of acreage, is valid as against mortgagor and intervener, claiming labor lien, where note was dated and referred to in the mortgage and intervener knew of mortgage.—Lunsford v. Pearce, Tex.Civ. App., 19 S.W.2d 71.

Recordation of trust deeds held notice of sureties' lien for payment of note for money borrowed to pay judgment on bond.—Fleming v. Branham, 139 S.E. 267, 148 Va. 510.

Property not described

Record of a mortgage applies only to property covered by it, and does not affect additional property not described therein, which is situated in another county in which it might be subsequently recorded.—Bankers' Discount Corporation v. Noe, 242 P. 610, 116 Or. 570.

26. Ala.—R. P. Harris Motor Co. v. Bailey, 121 So. 33, 219 Ala. 8, 63 A. L.R. 1453.

Iowa.—Wertheimer & Degen v. Parsons, 229 N.W. 829, 209 Iowa 1241.

27. U.S.—In re Sachs, C.C.A.Md., 30 F.2d 510, affirming in part and reversing in part, D.C., 21 F.2d 984. Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.

Agreement held defeasance

Plaintiff's unrecorded agreement for consignment of automobile to dealer authorized to sell and repay amount advanced is a "defeasance," which prevented operation of recorded bill of sale to plaintiff as constructive notice.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.

28. Colo.—J. D. Best & Co. v. Wolf Co., 185 P. 371, 67 Colo. 42, 29 A. L.R. 899.

Capacity of acknowledging party

When defendant examined the record, it had actual notice of everything which the record disclosed; but, where mortgage was acknowledged by the secretary and general manager for himself, there was no actual notice that he as secretary and general manager of the mortgagee corporation acknowledged the mortgage for the corporation.—J. D. Best & Co. v. Wolf Co., supra.

29. Colo.—Whittier v. First Nat. Bank, 214 P. 536, 73 Colo. 153.

30. Ala.—Metcalf v. Clemmons-Powers & Co., 76 So. 9, 200 Ala. 243.

Tex.—Weeks v. First State Bank of De Kalb, Civ.App., 207 S.W. 978. 11 C.J. p 538 note 33.

31. Ala.—Farmers' Union Warehouse Co. v. Barnett Bros., 137 So. 176, 223 Ala. 435.

11 C.J. p 539 note 35.

32. S.C.—Alford v. Martin, 180 S.E. 13, 176 S.C. 207.

Facts sufficient to make duty to inquire

Where furniture dealer had mortgaged his stock and mortgages taken from purchasers with proviso for sale of furniture in ordinary course of business and automatic transfer of lien to proceeds of sales, a buyer for thirty-five per cent of face value of numerous mortgages taken by dealer is thereby put on inquiry and charged with notice of recorded mortgage given by furniture dealer.—Alford v. Martin, supra.

As to after-acquired property, in some jurisdictions recording of the mortgage in the county in which the property is to be acquired constitutes notice of such mortgage from the date of its filing,³³ but it has been held that actual notice is essential and that the constructive notice furnished by recording is insufficient as against a bona fide purchaser.³⁴

b. Persons Affected by Notice

Generally the recordation of a mortgage is constructive notice to all persons subsequently dealing with the property.

Ordinarily, under the recording acts, the recordation of a mortgage as required by law is constructive notice as to all persons subsequently dealing with the property,³⁵ to subsequent purchasers or creditors³⁶ and mortgagees,³⁷ and there must be

33. U.S.—In re Alabama Braid Corporation, D.C.Ala., 13 F.Supp. 336.

34. Mo.—Steckel v. Swift & Co., App., 56 S.W.2d 806.

11 C.J. p 435 note 25.

Rule as to crop mortgages see infra subdivision d.

35. U.S.—In re Kramer Mercantile Co., D.C.Okl., 21 F.2d 614, reversed on other grounds, C.C.A., Clark v. Huckaby, 28 F.2d 154, 67 A.L.R. 1456, certiorari denied Huckaby v. Clark, 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 561.

Ala.—Kilgore v. Jones, 73 So. 832, 15 Ala.App. 472.

Cal.—Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 139 Cal.App. 427.

Fla.—George Mackay & Co. v. Marion Hardware Co., 131 So. 396, 100 Fla. 1532.

Idaho.—Hopkins v. Hemsley, 22 P.2d 138, 53 Idaho 120.

La.—Liquid Carbonic Corporation v. Leger, App., 169 So. 170—Remington-Rand v. Profits Island Gravel Co., App., 144 So. 636, opinion reinstated 150 So. 76.

Mass.—E. M. Blunt, Inc., v. Giles, 193 N.E. 43, 288 Mass. 515.

N.C.—Whitehurst v. Garrett, 144 S. E. 835, 196 N.C. 154.

Ohio.—City Loan & Savings Co. v. Dickison, 19 Ohio N.P., N.S., 215.

Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—U. S. Zinc Co. v. Colburn, 255 P. 688, 124 Okl. 249.

Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

Wash.—Goddard v. Morgan, 74 P.2d 894, 193 Wash. 83—Tope v. Brattain, 21 P.2d 241, 172 Wash. 556.

11 C.J. p 539 note 36.

Warehouseman is charged with constructive notice of recorded chattel mortgage covering grain delivered by mortgagor for storage.—Aas v. St. Anthony & Dakota Elevator Co., 249 N.W. 917, 63 N.D. 771.

Notice to carrier

Where a mortgage was registered, it was notice to a railroad shipping the mortgaged goods, as far as the ownership of the goods and the liability for freight were concerned.—Southern Ry. Co. v. W. A. Simpkins Co., 100 S.E. 418, 178 N.C. 273.

Recording as discharge of mortgagee's duty

Plaintiff, having placed her mort-

gage on record, discharged her full duty in the matter of notice, and was under no duty to prevent the mortgagor from selling, or personally to warn others not to buy, even if she had notice that they were about to do so.—Hattermer v. Davis, 91 So. 321, 206 Ala. 613.

As to property not in county

If mortgaged personality is not in county at time of execution and filing of mortgage but is intended to be removed to such county and later becomes situated therein, mortgage becomes constructive notice from date of arrival of property within county.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400.

36. Ala.—Chandler v. Citizens' Bank of Guntersville, 124 So. 234, 220 Ala. 82.

Ark.—Mitchell v. Mason, 44 S.W.2d 672, 184 Ark. 1000.

Ga.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

Ill.—American Trust & Savings Bank v. Gladu, 258 Ill.App. 156. See Cole Motor Co. v. Centaur Motor Co. of Illinois, 195 Ill.App. 317.

Iowa.—Farmers' Trust & Savings Bank of Laurens v. Miller, 214 N. W. 546, 203 Iowa 1380—Wertheimer & Degen v. Shultice, 211 N.W. 563, 202 Iowa 1140.

Kan.—Morrison v. Montgomery, 168 P. 674, 101 Kan. 670.

La.—Palmisano v. Louisiana Motors Co., 117 So. 446, 166 La. 416—Thompson v. King Motors, 140 So. 257, 19 La.App. 298.

Mich.—Pinconning State Bank v. Henry, 241 N.W. 913, 258 Mich. 44.

—Saginaw Financing Corporation v. Detroit Lubricator Co., 240 N. W. 44, 256 Mich. 441.

Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.

N.Y.—Burton v. Klein, 239 N.Y.S. 103, 135 Misc. 571.

N.C.—Whitehurst v. Garrett, 144 S. E. 835, 196 N.C. 154—Harrington v. Furr, 90 S.E. 775, 172 N.C. 610.

Ohio.—Commercial Credit Co. v. Schreyer, 166 N.E. 808, 120 Ohio St. 568, 63 A.L.R. 674.

Or.—Weatherly v. Hochfeld, 286 P. 583, 133 Or. 136.

Tex.—First Nat. Bank v. Thompson, Com.App., 265 S.W. 884, affirming Civ.App., 251 S.W. 818—Pullen v. Berkley, Civ.App., 27 S.W.2d 924—

Chapman v. Head, Civ.App., 279 S. W. 906.

Utah.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

Wash.—Hardin v. State Bank of Seattle, 205 P. 382, 119 Wash. 169.

11 C.J. p 539 note 37—42 C.J. p 763 note 49.

Mortgage by third person for benefit of debtor

A duly filed mortgage, given an individual who purchased for benefit of corporation that indorsed his notes and to which he executed bill of sale, is not invalid, under a statute requiring change of possession or filing, N. Y. Lien L. § 230, as fraud on the creditors of the corporation, who are charged with knowledge of the mortgage.—In re R. E. Taylor Corp., N. Y., 248 F. 223, 160 C.C.A. 301.

Purchaser at execution sale

Registration of a mortgage, valid in its description of the property and otherwise, which created a lien on the property in controversy, constituted constructive notice to parties seeking protection as innocent purchasers through an execution sale subsequently made upon a judgment.—Thorndale Mercantile Co. v. Continental Gin Co., Tex.Civ.App., 217 S.W. 1059, error refused.

Persons furnishing labor or materials

Recorded mortgage on automobile, under Gen.Code §§ 8560, 8561, is notice to persons performing labor or furnishing materials in repairing same, whose lien is inferior to mortgage.—Metropolitan Securities Co. v. Orlow, 140 N.E. 306, 107 Ohio St. 583, 32 A.L.R. 992.

Where mortgagor without title

Bona fide purchaser of automobile after owner filed bill of sale is not chargeable with notice of mortgage preceding the owner's obtaining and filing bill of sale, and the mortgagee, to protect his rights, must have taken possession prior to the transfer to the purchaser.—Ohio Finance Co. v. McReynolds, 160 N.E. 727, 27 Ohio App. 42.

Purchaser of movables

In Louisiana, notwithstanding chattel mortgage law, buyer of movables is not required to examine public records.—General Contract Purchase Corporation v. Barrow, 136 So. 902, 18 La.App. 621.

37. Mont.—Chester State Bank v.

very substantial grounds for denying it this effect.³⁸

Persons who are not subsequent purchasers or encumbrancers and are not within the terms of the statute, are not charged with constructive notice of the recorded mortgage;³⁹ and it has been held that only those acquiring some interest or right in the property under the grantor or mortgagor are charged with notice.⁴⁰

c. Instruments Affording Notice

The record of a mortgage, to constitute notice, must

be of an instrument entitled to record; and the mortgage must have been made by the owner of the property in his right name and must contain a proper description of the property, and the debt secured.

In order that the record may constitute constructive notice it must be of an instrument entitled to record under the statute.⁴¹ A mortgage which is not executed and recorded in conformity with the statute, although it is spread upon the record, is not notice,⁴² so the record is a nullity where mortgage is insufficiently or improperly acknowledged⁴³

Great Northern Ry. Co., 190 P. 136, 53 Mont. 44.

N.Y.—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

S.D.—Slimmer v. Meade County Bank of Sturgis, 161 N.W. 325, 33 S.D. 311, modified on other grounds and motion denied Slimmer & Thomas v. Meade County Bank of Sturgis, 162 N.W. 536, 39 S.D. 8.

11 C.J. p 539 note 38—42 C.J. p 763 note 49.

Mortgage filed same day

One taking mortgage is chargeable with notice of prior mortgage filed for record earlier on same day.—Farmers' Union Warehouse Co. v. Barnett Bros., 118 So. 286, 218 Ala. 165, denying certiorari 116 So. 810, 22 Ala.App. 524.

Mortgage of live stock

Mortgage covering all live stock in possession of, and owned by, mortgagor, when duly recorded, carried constructive notice, to subsequent mortgagee of mule, of mortgagor's possession.—Dutton v. Gibson, 131 So. 567, 222 Ala. 191.

Materialman taking mortgage

Where a lumber company sold lumber to a lessee of land holding under an agreement to remove the building at the end of the tenancy and the company took no lien on the building erected with the lumber furnished, and the lessee later executed a chattel mortgage on the building to a bank, which was duly recorded, and the lessee afterward purchased the land and executed a real estate mortgage to the lumber company for the lumber, and the bank foreclosed the chattel mortgage and took possession of the building, the rights of the bank were superior to those of the lumber company, which, having neglected to take a lien for more than eighteen months, was bound to take notice of the chattel mortgage.—Gafford Lumber & Grain Co. v. Eaves, 220 P. 512, 114 Kan. 576.

33. S.C.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

39. Mont.—First Nat. Bank v. Coit, 257 P. 469, 79 Mont. 463. 11 C.J. p 540 note 39.

Factors or commission merchants who handle mortgaged livestock are neither "subsequent purchasers" or "incumbrancers" within statute providing that filing of mortgage operates as notice thereof to all "subsequent purchasers" and "incumbrancers."

U.S.—Drovers' Cattle Loan & Investment Co. v. Rice, D.C.Iowa, 10 F. 2d 510.

S.D.—First Nat. Bank v. Siman, 275 N.W. 347.

40. Tex.—Rhea Mortgage Co. v. Lemmerman, Civ.App., 294 S.W. 959.

41. Ariz.—Valley Chevrolet Co. v. O. S. Stapley Co., 72 P.2d 945.

Ark.—Taylor v. Hildebrand Poster Advertising Co., 58 S.W.2d 211, 187 Ark. 53.

Mont.—Hansen v. Johnson, 4 P.2d 1038, 90 Mont. 597.

11 C.J. p 540 note 40.

Instrument entitled to record

Mortgage, attested by nonofficial witness, together with affidavit probating its execution, made before proper officer, was entitled to record constituting constructive notice of mortgage.—Winder Nat. Bank v. Hendrix, 136 S.E. 801, 36 Ga.App. 362.

42. Ala.—Albertville Trading Co. v. Brooks, 113 So. 473, 22 Ala.App. 147.

Conn.—Safford v. McNeil, 129 A. 721, 102 Conn. 634.

La.—General Finance Co. of Louisiana v. Warner, App., 169 So. 112.

N.J.—Seacoast Finance Corporation v. Cornell, 133 A. 695, 104 N.J. Law 24.

11 C.J. p 540 note 41.

Mortgage of land and personalty not executed, as required by Gen.St. 1913 §§ 5206, 5208, is not valid chattel mortgage as against attaching creditor, despite § 5095 making defectively executed real estate mortgage notice of equitable interest.—Safford v. McNeil, 129 A. 721, 102 Conn. 184.

Proof of propriety of place of recording

Recordation cannot be held to operate as notice, in absence of evidence of grantor's residence or loca-

tion of property.—Albertville Trading Co. v. Brooks, 113 So. 473, 22 Ala.App. 147.

Compliance with other statutes

Mortgagee's compliance with statute for sale of motor vehicles is not constructive notice to subsequent mortgagee without actual notice thereof, and a bill of sale of automobile intended as mortgage, filed with clerk of court, is not prior lien against subsequent mortgagee without actual notice, filing mortgage with county recorder.—Metropolitan Securities Co. v. Warren State Bank, 158 N.E. 81, 117 Ohio St. 69.

43. Ark.—Bank of Weiner v. Jonesboro Trust Co., 271 S.W. 952, 168 Ark. 859.

Cal.—Ramsey v. California Packing Corporation, 201 P. 481, 51 Cal. App. 517.

Colo.—McMinn v. Harrison, 23 P.2d 944, 93 Colo. 5.

Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 232 N.W. 437, 210 Iowa 1153—Lee County Sav. Bank v. Snodgrass Bros., 166 N.W. 680, 182 Iowa 1387.

Ky.—Smith v. Jackson, 22 S.W.2d 420, 232 Ky. 76.

Minn.—Hartkopf v. First State Bank of Correll, 256 N.W. 169, 191 Minn. 595.

Mo.—Cummins v. King, 266 S.W. 748, 217 Mo.App. 371.

N.J.—Pincus v. U. S. Dyeing & Cleaning Works, 133 A. 66, 99 N.J. Eq. 160.

N.D.—Tenney Co. v. Thomas, 237 N. W. 710, 61 N.D. 202.

Okl.—Maitland v. Republic Refining Co., 234 P. 754, 109 Okl. 55—Guarantee State Bank v. Moore, 163 P. 272, 63 Okl. 133—Merchants' Nat. Bank of Sallisaw v. Frazier, 159 P. 647, 60 Okl. 156.

Tenn.—Great American Indemnity Co. v. Utility Contractors, App., 111 S.W.2d 901.

Tex.—East Texas Motor Co. v. Baughman, Civ.App., 248 S.W. 802.

W.Va.—Clarksburg Casket Co. v. Valley Undertaking Co., 94 S.E. 549, 81 W.Va. 212, 3 A.L.R. 660.

11 C.J. p 540 note 42.

Acknowledgment by less than all mortgagors

Under Civ.Code § 1161, requiring

or attested,⁴⁴ or is not accompanied by proper affidavits as required by statute,⁴⁵ or is not indorsed as required.⁴⁶

Where the defect, whether in the acknowledgment or in the lack of proper attesting witnesses, does not appear upon the face of the instrument, some courts hold that when the instrument is fair upon its face, although there be a latent defect, the record thereof constitutes constructive notice under the recording acts.⁴⁷ Other courts take the opposite

view, and hold that the defect, although not apparent on the face of the instrument, may be shown by extrinsic evidence and the effect of the record overcome.⁴⁸

Mortgage by stranger or under fictitious name. The record of a mortgage of personal property made by one who is not the owner of the property is not constructive notice to one dealing with the owner.⁴⁹ Likewise, by the weight of authority, the record of a mortgage executed by the owner in a

that the execution of an instrument be acknowledged by the person executing it before recording it, the record of a mortgage acknowledged by only one of two or more mortgagors is constructive notice of its execution by him only.—*Bell v. Sage*, 212 P. 404, 60 Cal.App. 149.

Interest of officer

Under Comp.St. § 3311, providing that mortgage shall not pass property against creditors or purchasers for valuable consideration, except it be registered, mortgage acknowledged before mortgagee who was deputy clerk of court was ineffective to pass title as to creditors of mortgagor.—*Cowan v. Dale*, 128 S.E. 155, 189 N.C. 684.

Want of date

A mortgage filed for record is constructive notice, although the certificate of acknowledgment of the notary omitted the words "My commission expires —, 19—," required by statute.—*First Nat. Bank v. Car-gill Elevator Co.*, 192 N.W. 111, 155 Minn. 30.

As between parties

(1) Although the recording of a defectively acknowledged deed of trust does not give constructive notice, it is valid between the parties, and gives a preference over grantor's general creditors.—*Clarksburg Cas-ket Co. v. Valley Undertaking Co.*, 94 S.E. 549, 81 W.Va. 212, 3 A.L.R. 660.

(2) A mortgage on a cotton crop, good only between the parties to it, because it was not properly acknowledged to be entitled to record, was a legal mortgage, and could not be considered an equitable mortgage for purpose of determining rights as against mortgagee of land.—*Bank of Weiner v. Jonesboro Trust Co.*, 271 S.W. 952, 168 Ark. 859.

In Louisiana

(1) Recorded mortgage, regular on its face, but defective as notarial act because not signed by mortgagor in notary's presence, is not constructive notice thereof to third persons.—*General Finance Co. of Louisiana v. Warner*, App., 169 So. 112—*Wes-sell v. Kite*, App., 142 So. 363.

(2) If recorded, all persons except those having actual knowledge of in-

tent to grant chattel mortgage can take advantage of defective notarial character.—*Krivos v. Simmons*, 134 So. 727, 16 La.App. 421—*Dainello v. McCoy*, 131 So. 608, 14 La.App. 358.

(3) Recordation of mortgage executed before notary without witnesses being present is not constructive notice.—*Lieber v. Watts*, 139 So. 778, 19 La.App. 650.

(4) Where third person has no actual knowledge that property is mortgaged, his right can be affected only by formal, notarial acts, and by constructive notice resulting from timely recordation, and recording an act under private signature is not notice.—*Dainello v. McCoy*, supra.

(5) Lessor, having no actual or constructive knowledge of defectively recorded mortgage at time mortgaged property was placed on leased premises, had lien prior to mortgage, notwithstanding lessor's actual knowledge subsequently acquired.—*Lieber v. Watts*, supra.

(6) However, in a case in which the third person had actual notice, it was held, in spite of defective authentication, that a recorded mortgage was effective as to such third person, and its recording gave him constructive notice.—*Shevlin v. Grimmer*, 119 So. 894, 10 La.App. 393.

44. U.S.—*In re Smith*, D.C.Ga., 281 F. 574.

Okl.—*Guarantee State Bank v. Moore*, 163 P. 272, 63 Okl. 133—*Merchants' Nat. Bank of Sallisaw v. Frazier*, 159 P. 647, 60 Okl. 156.

S.D.—*J. I. Case Threshing Mach. Co. v. Goldberg*, 239 N.W. 745, 59 S. D. 289.

Tex.—*East Texas Motor Co. v. Baughman*, Civ.App., 248 S.W. 802, 11 C.J. p 540 note 43.

Witness mistakenly named mortga-gee

A provision that a mortgage be signed by mortgagor in presence of two witnesses in order to be filed was complied with, although name of one witness, by mistake, appeared as mortgagee, where mortgage showed that he had no beneficial interest, so that when filed it operated as notice to purchasers.—*Davis v. Caldwell*, 163 N.W. 275, 37 N.D. 1.

Competency of witnesses see supra § 31.

45. U.S.—*Holmgren v. Keene Oil Co.*, D.C.N.H., 10 F.Supp. 211, 11 C.J. p 540 note 44.

46. Ark.—*Atlas Supply Co. v. Mc-Amis*, 51 S.W.2d 982, 185 Ark. 1168—*Brittain v. Collum*, 45 S.W.2d 501, 184 Ark. 1193.

47. Ark.—*Nelson v. Forbes & Sons*, 261 S.W. 910, 164 Ark. 460.

Mont.—*Walker Motor Exchange v. Lindberg*, 284 P. 270, 86 Mont. 513. Okl.—*Lankford v. First Nat. Bank*, 183 P. 56, 75 Okl. 159.

S.C.—*J. W. Dillon & Son Co. v. Oliver*, 91 S.E. 304, 106 S.C. 410.

Tex.—*Farmers' Nat. Bank v. Dublin Nat. Bank*, Civ.App., 55 S.W.2d 567, reversed on other grounds *Oats v. Dublin Nat. Bank*, Com.App., 90 S. W.2d 824.

Wyo.—*Stockmen's Nat. Bank of Cas-per v. Lukis Candy Co.*, 33 P.2d 254, 47 Wyo. 127.

11 C.J. p 540 note 45.

48. Ala.—*Opp First Nat. Bank v. Hacoda Mercantile Co.*, 53 So. 802, 169 Ala. 476, 32 L.R.A., N.S., 243, Ann.Cas.1912B 599.

11 C.J. p 540 note 46.

49. Ohio.—*Baker v. Coffman*, 24 Ohio N.P.N.S., 259.

Okl.—*People's Finance & Thrift Co. v. Shirk*, 74 P.2d 379, 380, 181 Okl. 418, citing *Corpus Juris*.

Tex.—*Southwest Sec. Co. v. Jacques*, Com.App., 42 S.W.2d 232, affirming, Civ.App., 31 S.W.2d 1098—*Rhea Mortg. Co. v. Lemmerman*, Com. App., 10 S.W.2d 690, affirming, Civ. App., 294 S.W. 959—*Wunschel v. Farmers' State Bank of Burk-burnett*, Civ.App., 203 S.W. 924, 925, quoting *Corpus Juris*.

11 C.J. p 540 note 47.

Mortgage by agent disclosing principal

Where purchase-money mortgage was, for accommodation of purchaser, signed by his agent as purchaser and mortgagor, the contract reciting that pumps were to be used by true purchaser at a given address, the record of mortgage was notice to subsequent purchaser, since mortgage was within chain of title.—*S. F. Bowser & Co. v. Hartnett*, 273 S. W. 420, 217 Mo.App. 147.

wrong or fictitious name is not constructive notice to anyone dealing with the owner in his true name,⁵⁰ although the contrary has also been held.⁵¹ However, where a mortgagor has changed his name or has by usage acquired another name than that originally borne by him, the record of a mortgage executed by him under his new name by which he is known in the community is notice to a subsequent mortgagee taking a mortgage from the same person on the same property under another name by which he is also known and recognized in the community.⁵² Likewise one dealing with the mortgagor under the false name used in the mortgage is charged with constructive notice.⁵³

Change of name. A slight change in the mortgagor's name after the recording of the mortgage will not alter the rule as to notice, unless the parties subsequently dealing with the property are actu-

ally misled by reason thereof.⁵⁴

Description of property and debt. In order that the record of a mortgage may constitute notice, it is further necessary that the instrument contain a sufficient description of the property mortgaged⁵⁵ and of the debt secured.⁵⁶ However, the fact that the index of the mortgage does not sufficiently describe the mortgage is immaterial if the statute does not require description of the property in the index.⁵⁷

Mistakes in date of mortgage have been held not to vitiate the effect of the record.⁵⁸

d. Crop Mortgages

Generally the record of a crop mortgage operates to give constructive notice.

While there are cases to the contrary,⁵⁹ the record of a mortgage on crops to be grown is, accord-

Rights of assignee

Where owner of mortgaged automobile sold automobile after it had assigned recorded mortgage executed to it by one not owner of automobile, assignee could not recover automobile in replevin from innocent purchaser thereof.—*People's Finance & Thrift Co. v. Shirk*, 74 P.2d 379, 181 Okl. 418.

50. Ala.—*Ingram v. Watson*, 100 So. 557, 211 Ala. 410—*Ozark City Bank v. Planters' & Merchants' Bank*, 73 So. 72, 197 Ala. 427.

La.—*Crescent Realty Corporation of Delaware v. McFlynn*, App., 159 So. 461.

Mo.—*Windle v. Citizens' Nat. Bank*, 216 S.W. 1020, 1021, 204 Mo.App. 606, citing *Corpus Juris*.

Ohio.—*Baker v. Coffman*, 24 Ohio N. P.N.S., 259.

S.C.—*Brown v. Rankin*, 93 S.E. 327, 108 S.C. 105.

11 C.J. p 540 note 48.

When initials used

When the full Christian name of grantor in a mortgage is used, this imparts notice to one examining the records as to such grantor's identity, and error in the middle initial is immaterial; but, if initials only are used, they take the place of the Christian name, and in such case the correct initials are essential.—*McReynolds v. First Nat. Bank*, 245 S. W. 819, 156 Ark. 291.

51. Okl.—*Farmers' State Bank of Wheatland v. North Oklahoma State Bank of Britton*, 230 P. 914, 104 Okl. 248.

11 C.J. p 540 note 49.

Purchase-money mortgage

While the record of filing of mortgage executed by owner under fictitious name is not ordinarily notice of such mortgage to bona fide purchaser from owner selling under his

true name, a purchase-money mortgage executed by mortgagor under fictitious name, or for property sold to him under such name, is, when recorded, valid against subsequent mortgagee to whom such mortgagor has mortgaged it under his right name, although the subsequent mortgagee examined record and found none.—*Farmers' State Bank of Wheatland v. North Oklahoma State Bank of Britton*, supra.

52. Ala.—*Ingram v. Watson*, 100 So. 557, 211 Ala. 410.

Mo.—*Taylor v. Bowen*, 84 Mo.App. 613.

11 C.J. p 541 note 50.

53. Mo.—*Windle v. Citizens' Nat. Bank*, 216 S.W. 1020, 204 Mo.App. 606.

54. Ala.—*First Nat. Bank v. Farmers' Bank of Luverne*, 92 So. 639, 207 Ala. 402.

11 C.J. p 541 note 51.

55. U.S.—*In re Tucker*, D.C.Miss., 1 F.Supp. 18.

Ky.—*Hart County Deposit Bank v. Hatfield*, 33 S.W.2d 660, 236 Ky. 725.

La.—*Williams v. Miller*, App., 160 So. 165.

Mo.—*Schell v. F. E. Ransom Coal & Grain Co.*, App., 79 S.W.2d 543.

N.D.—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 51 N.D. 563.

Or.—*Elwert v. Hansen*, 173 P. 939, 89 Or. 399.

Tex.—*Pullen v. Berkley*, Civ.App., 27 S.W.2d 924.

11 C.J. p 541 note 52.

"A personality mortgage . . . through the act of filing, can fasten itself only to a person, and through that person upon his property, since there is no recording system preserving or perpetuating titles in personality."—*Teigen v. Occident Elevator Co.*, 200 N.W. 38, 40, 51 N.D. 563.

Sufficiency of description

After filing mortgage in recording office, as provided by law, third persons are charged with notice of contents as if they had actual notice and with notice of anything therein connected with the description which suggests inquiry as to identification of property which if pursued would lead to an identification thereof.—*First Nat. Bank v. Atchison*, T. & S. F. Ry. Co., 186 P. 1036, 77 Okl. 93—*First Nat. Bank of Washington*, Okl., v. Haines, 185 P. 441, 76 Okl. 301.

Location of property

Property covered by mortgage will not be held to be located in any other parish than parish recited in act of mortgage, nor will it be presumed that third persons dealing with mortgagor had actual notice of location of property in parish other than that recited in act of mortgage, in absence of proof as to actual location of property.—*Williams v. Miller*, La. App., 160 So. 165.

Mutual mistake of parties

A crop mortgage, executed and filed, erroneously, by mutual mistake of the parties, described the wrong property, was of no force or effect as against a general creditor of the mortgagor, and such a creditor was unaffected by the mortgage, whether he was a creditor existing or subsequent at the execution of the mortgage.—*Bair v. Wiese*, 215 P. 61, 124 Wash. 691.

56. Iowa.—*Corning First Nat. Bank v. Reid*, 98 N.W. 107, 122 Iowa 280. 11 C.J. p 541 note 53.

57. Iowa.—*Lowden Sav. Bank v. Zeller*, 194 N.W. 966, 196 Iowa 1205.

58. Mass.—*Amerige v. Hussey*, 24 N.E. 46, 151 Mass. 300. 11 C.J. p 541 note 54.

59. Colo.—*J. I. Case Threshing Mach. Co. v. Glass & Bryant Mer-*

ing to the generally accepted rule, operative as constructive notice,⁶⁰ even after the crops have been grown and severed,⁶¹ where the mortgage of this kind of property is held to be within the provisions of the recording acts;⁶² and this is true although the crop has been gathered and removed into another county.⁶³ Where a growing fruit crop is regarded as real property, a chattel mortgage thereon, filed and indexed as such, is not constructive notice of its contents.⁶⁴

When the owner of land gives a mortgage on his interest in crops to be grown, and thereafter leases the land to a tenant who mortgages the crop to him, his assignee of the tenant's mortgage is not chargeable with constructive notice of the owner's mortgage.⁶⁵

An agreement to give a mortgage on unplanted crops, incorporated into a mortgage on specifically described property, being wholly foreign to the sub-

ject of the mortgage, the filing of the mortgage will not give constructive notice of the agreement.⁶⁶

§ 165. Withdrawal from Files

In general, withdrawal of the mortgage from the files destroys the validity of the registration.

Since filing a mortgage often takes the place of the more elaborate and expensive operation of having it copied into a book of records, withdrawal from the files will destroy the validity of the registration, provided the mortgagee is responsible for such withdrawal⁶⁷ and has no valid excuse therefor.⁶⁸ In accordance with the general rule, that the mortgagee is not responsible for the misconduct of the recording officer, an unauthorized withdrawal will not impair the sufficiency of the recording.⁶⁹ After a mortgage has been recorded in extenso withdrawal of the original from the files does not impair the effect of the filing.⁷⁰ Where a mortgage has been filed, and before being spread on the rec-

cantile Co., 223 P. 35, 74 Colo. 535, quoting *Corpus Juris*—First Nat. Bank v. Felter, 176 P. 496, 497, 65 Colo. 370, quoting *Corpus Juris*.
11 C.J. p 541 note 56.

60. Ala.—Wilson v. Cowart, App., 167 So. 602, certiorari denied 167 So. 604, 232 Ala. 170.

Ariz.—First Nat. Bank of Yuma v. Yuma Nat. Bank, 245 P. 277, 278, criticizing First Nat. Bank v. Felter, 176 P. 496, 65 Colo. 370.

Iowa.—Weyrauch v. Johnson, 208 N. W. 706, 201 Iowa 1197.

Mo.—Langford v. Fanning, App., 7 S. W.2d 726, 728—First Nat. Bank v. Johnson, 297 S.W. 724, 221 Mo. App. 31—Lee v. Seals, 256 S.W. 830, 215 Mo.App. 532.

Mont.—U. S. Nat. Bank v. Great Western Sugar Co., 199 P. 245, 60 Mont. 342.

N.D.—Thompson Yards v. Richardson, 199 N.W. 863, 51 N.D. 241.

S.D.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S.D. 479.

Tex.—Wolf v. G. M. Carlton Bros. & Co., Civ.App., 10 S.W.2d 200, error dismissed—South Texas Implement & Machinery Co. v. Anahuac Canal Co., Civ.App., 269 S.W. 1097, affirmed South Texas Implement & Machine Co. v. Anahuac Canal Co., Com.App., 280 S.W. 521.
11 C.J. p 541 note 57.

In Georgia an instrument passing title to growing crops is not bill of sale of personalty, and when executed before only one witness its admission to record is improper and does not constitute constructive notice. Assuming that bill of sale of growing crops, on severance from reality, is transformed into bill of sale of personalty, its unauthorized record is

not a record of the transformed instrument.—Washington Loan & Banking Co. v. National Bank of Wilkes, 116 S.E. 657, 30 Ga.App. 77.

Defective description of land

A creditor without notice of a crop mortgage, which by reason of a misdescription of the land, the crops of which were intended to be mortgaged, was not bound by the recording thereof, was entitled to invoke the aid of the garnishment law, and thereby perfect a lien on the crop, and a lien so perfected, being effective from the time of its service, prevails over any secret or undisclosed equity of the mortgagee, and the mere filing by the mortgagee of an action in which such creditor was not a party could have no effect on his rights.—Bair v. Wiese, 215 P. 61, 124 Wash. 691.

61. Idaho.—Adams v. Caldwell Milling & Elevator Co., 197 P. 723, 33 Idaho 677.

11 C.J. p 541 note 58.

In Nebraska

(1) Filing mortgage on crop, executed after crop has been planted, operates as constructive notice, even after crop has been severed.—Thomas v. Prairie Home Co-Op. Co., 237 N.W. 673, 121 Neb. 603, 77 A.L.R. 566, overruling Gillilan v. Kendall, 42 N.W. 281, 26 Neb. 82, 18 Am.S.R. 766.

(2) The rule that mortgage on growing crops is not constructive notice of lien on the harvested product does not necessarily apply to mortgage on growing crop and also on harvested crops.—Security State Bank v. Schomberg, 230 N.W. 487, 119 Neb. 598.

(3) The statute providing that filing of lease containing chattel mort-

gage on unplanted crop shall constitute notice is intended to protect landlord against chattel mortgages given after crop is in esse.—Nelson v. State, 238 N.W. 110, 121 Neb. 658.
11 C.J. p 541 note 58 [a].

62. Vt.—Whiting v. Adams, 30 A. 32, 66 Vt. 679, 44 Am.S.R. 875, 25 L.R.A. 598.

11 C.J. p 541 note 59.

63. Ala.—Truss v. Harvey, 24 So. 927, 120 Ala. 636.

64. Okl.—Nicholson v. People's Nat. Bank of Checotah, 249 P. 336, 113 Okl. 113.

65. Minn.—Purdie v. Lekve, 230 N. W. 266, 180 Minn. 81.

66. Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598—American State Bank of Scottsbluff v. Keller, 200 N.W. 999, 112 Neb. 761.

67. Wis.—Schwenker v. Johnson, 224 N.W. 117, 198 Wis. 300—Black Hawk State Bank v. Kinzler, 215 N.W. 433, 194 Wis. 29.

11 C.J. p 541 note 61.

68. Neb.—Ward v. Watson, 39 N.W. 615, 24 Neb. 592.

11 C.J. p 541 note 62.

To permit recording of later mortgage

Mortgage, withdrawn from records of town clerk to permit recordation of later chattel mortgage, is void.—Schwenker v. Johnson, 224 N.W. 117, 198 Wis. 300.

69. Wis.—Marlet v. Hinman, 45 N. W. 953, 77 Wis. 136, 20 Am.S.R. 102.

11 C.J. p 541 note 63.

70. Wash.—Van Winkle v. Mitchum, 119 P. 748, 66 Wash. 296.

11 C.J. p 541 note 64.

ord is withdrawn by the mortgagee, the date of filing, for the purpose of giving notice, will be the day of its return.⁷¹ The withdrawal of a mortgage from the files merely for a temporary purpose will not, in itself, affect its validity or effect.⁷²

§ 166. Evidence

The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts.

The burden of proving that a mortgage has been recorded is on the mortgagee,⁷³ and the burden of proving the invalidity of its recordation is on the one who asserts it.⁷⁴ That the recordation was in the proper place may be proved by circumstantial evidence,⁷⁵ and testimony that the mortgaged property was in the state when the mortgage was recorded is sufficient to show it was there, in the absence of evidence to rebut the presumption created by the statute.⁷⁶ The fact that a mortgage has been recorded may be shown by the certificate of the recording officer,⁷⁷ or by his indorsement on the mortgage,⁷⁸ and the testimony of the recording officer is admissible to show that his failure to perform his duty with respect to the filing was the result of instructions from the mortgagee.⁷⁹ The certificate of the recording officer is conclusive evidence that the mortgage has been recorded,⁸⁰ also as to the time of record,⁸¹ and as to what the re-

corded instrument contained.⁸²

The presumption of proper recording is rebutted when the mortgage was taken from the custody of the recording officer before it had been transcribed.⁸³ In the absence of proof to the contrary, it will be presumed that a mortgage remained on file after its filing in the recorder's office of the proper county.⁸⁴

§ 167. Questions of Law and Fact

Questions of fact relative to recording are matters for determination by a jury, while questions of law are for the court.

Under proper instructions given by the court, questions of fact relating to recordation of mortgages are for the jury to determine, such as whether the record was prior to levy of execution;⁸⁵ whether a mortgage was recorded within a reasonable time;⁸⁶ whether the property had been delivered to the mortgagee so as to obviate the necessity of filing or recording;⁸⁷ whether a mortgage was withheld from record by agreement between the parties,⁸⁸ or by the question of the place of residence of the mortgagor,⁸⁹ or of the existence of actual notice;⁹⁰ whether the description of the property is sufficient to give constructive notice,⁹¹ or notice of sufficient facts to make it a purchaser's duty to inquire further before buying the property;⁹² whether one was a bona fide purchaser for value and without notice;⁹³ whether the name used by

71. Mo.—Dawson v. Cross, 88 Mo. App. 292.

11 C.J. p 542 note 65.

72. U.S.—In re Dagwell, D.C.Mich., 263 F. 406.

11 C.J. p 542 note 66.

73. Ind.—State v. Griffin, 45 N.E. 935, 16 Ind.App. 555.

11 C.J. p 542 note 67.

Evidence was insufficient to show execution of mortgage was not, in fact, complete until formal acceptance by mortgagee several days after date of execution recited in instrument as affects validity of mortgage under Remington Comp.St. Wash. § 3780, requiring recordation within ten days after execution.—Massachusetts Trust Co. v. Loon Lake Copper Co., C.C.A.Wash., 4 F.2d 847.

74. U.S.—In re Brannock, D.C.Iowa, 131 F. 819.

11 C.J. p 542 note 68.

75. S.C.—Charleston Live Stock Co. v. Collins, 60 S.E. 944, 79 S.C. 383.

11 C.J. p 542 note 69.

Evidence held sufficient

To uphold finding that party executing chattel mortgage was resi-

dent of county in which it was filed for record.—Roberts v. Robertson, 254 P. 1026, 123 Kan. 222.

76. Cal.—Motor Inv. Co. v. Breslauer, 221 P. 700, 64 Cal.App. 230.

77. Mass.—Fuller v. Cunningham, 105 Mass. 442.

11 C.J. p 542 note 70.

78. Ind.—Southern Finance Co. v. Mercantile Discount Corporation, 141 N.E. 250, 80 Ind.App. 436.

11 C.J. p 542 note 71.

79. U.S.—Stockyards Loan Co. v. Miller, C.C.A.Okla., 288 F. 176.

80. Mass.—Fuller v. Cunningham, 105 Mass. 442.

11 C.J. p 542 note 72.

81. Mass.—Jacobs v. Denison, 5 N.E. 526, 141 Mass. 117.

11 C.J. p 542 note 73.

82. Mass.—Adams v. Pratt, 109 Mass. 59.

11 C.J. p 542 note 74.

83. N.J.—Knickerbocker Trust Co. v. Penn Cordage Co., 58 A. 409, 66 N.J.Eq. 305, 105 Am.S.R. 640.

84. U.S.—Vanarsdale v. Hax, Kan., 107 F. 878, 47 C.C.A. 31.

11 C.J. p 542 note 76.

85. Mo.—Turner v. Langdon, 85 Mo. 438.

86. N.Y.—Trimble v. Broun-Green Co., 172 N.Y.S. 726, 105 Misc. 210.

11 C.J. p 542 note 77.

87. Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635.

88. Neb.—Godfrey, etc., Co. v. Citizens' Nat. Bank, 90 N.W. 239, 64 Neb. 477.

89. Mo.—Payne v. King, 124 S.W. 1066, 141 Mo.App. 246.

90. Or.—Snodgrass v. Wallowa Milling & Grain Co., 227 P. 294, 111 Or. 402.

11 C.J. p 542 note 81.

91. Ala.—Lowery v. Haley, 68 So. 539, 12 Ala.App. 448.

92. U.S.—Stockyards Loan Co. v. Nichols, Okla., 243 F. 511, 156 C.C.A. 209.

Tex.—General Motors Acceptance Corporation v. Fowler, Civ.App., 36 S.W.2d 589.

93. Mich.—Manistee First Nat. Bank v. Marshall, etc., Bank, 65 N.W. 604, 108 Mich. 114.

11 C.J. p 543 note 83.

the mortgagor was of sufficient notoriety to afford notice of his identity;⁹⁴ or whether the mortgagor of crops had, at the time of execution of the mortgage, a present interest in the land on which they were to be raised.⁹⁵

On the other hand, it is for the court to determine as a question of law the legal effect of a duly recorded mortgage,⁹⁶ or whether the facts show that the instrument was properly acknowledged and recorded.⁹⁷

§ 168. Renewal and Refiling or Re-recording

See *infra* §§ 169-174.

§ 169. — Statutory Provisions

The renewal or refiling of mortgages is a matter of statutory regulation in some jurisdictions.

The purpose of statutory provisions making it necessary to renew or refile mortgages is to clear the record, made by the filing statute, by raising the presumption of payment in the absence of notice that the mortgage has not been paid.⁹⁸ Such a provision is supplementary to, and subject to the same rules of construction as, a provision requiring the initial filing or recording.⁹⁹

The repeal of a statute requiring refiling obviates the necessity of such refiling as to existing mortgages of record where the time for refiling under the repealed statute has not yet accrued.¹

Where, however, it is provided that the repeal of an existing act shall not affect any accrued right under the statute repealed, an amendatory act extending the time for renewal is not applicable to a mortgage already filed.² On the other hand, an amendatory act adding new requirements to the provisions for the refiling of a mortgage is applicable to the refiling of the existing mortgages;³ and a similar application has been given to a statute altering the period within which a mortgage must be refiled.⁴

§ 170. — Necessity

- a. In general
- b. Effect of actual notice
- c. Possession taken by mortgagee
- d. Execution of new mortgage
- e. Claims or rights accruing before time for renewal or refiling

a. In General

Statutory provisions generally make it necessary to renew or refile mortgages before the expiration of stated periods in order to preserve their validity as against creditors and subsequent purchasers or incumbrancers in good faith.

When so required by statute, a mortgage, although filed or recorded, must be refiled or renewed before the expiration of a stated period in order that it may be valid as against creditors and subsequent purchasers or mortgagees in good faith.⁵ Un-

94. Ala.—Ingram v. Watson, 100 So. 557, 211 Ala. 410.

Instructions considered

In mortgagee's action to recover mortgaged property from subsequent mortgagee who had dealt with mortgagor under different name.—Ingram v. Watson, *supra*.

95. Ala.—Littleton v. Abernathy, 70 So. 282.

96. Mo.—Fahy v. Gordon, 34 S.W. 881, 133 Mo. 414.

97. Tex.—Hockaday-Gray Co. v. Jonett, Civ.App., 74 S.W. 71. 11 C.J. p 543 note 86.

98. N.D.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

Utah.—Commercial Sec. Bank of Ogden v. Chimes Press, 42 P.2d 990, 38 Utah 148.

99. N.D.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

Typographical error

In Rev.Code 1919 § 1587, as to unrenewed mortgage ceasing to be valid as against creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith, the word "incumbrances" means incumbrancers, the error being a typographical one.—First State Bank of

Buffalo v. Goodrich, 195 N.W. 1022, 47 S.D. 85.

1. Colo.—Cobb v. International State Bank, 186 P. 529, 530, 67 Colo. 488, citing *Corpus Juris*. 11 C.J. p 543 note 96.

Effect of saving clause

The saving clause of L.1917 p 126, repealing Rev.St.1908 § 515, as well as the rest of the Chattel Mortgage Act, merely preserves the validity of existing mortgages, and neither expressly nor by implication preserves the duty of the mortgagee to file sworn statements "annually" as provided in § 515. Where, under Rev. St.1908 § 515, plaintiff mortgagee was not required to file any sworn statement as to amount unpaid until in 1918, and in 1917 L.1917, p 127, § 7 went into effect, superseding § 515, plaintiff was not in default when § 7 went into effect, and no penalty had been incurred within a general saving clause as to repeal not extinguishing penalty "which shall have been incurred under such statute," so that such a clause did not have the effect of preserving plaintiff's duty to file annual statement.—Cobb v. International State Bank, *supra*.

2. Wis.—Pierce v. Westby State Bank, 261 N.W. 752, 218 Wis. 648. 11 C.J. p 544 note 97.

In enacting legislation enlarging time for filing affidavit of renewal of chattel mortgages, legislature presumably knew of statute making acts repealed operative to determine all limitations which shall have previously begun to run, unless repealing act otherwise expressly provides, and in not otherwise expressly providing, presumably intended that shorter time apply as to mortgages previously filed.—Pierce v. Westby State Bank, *supra*.

3. Colo.—Cobb v. International State Bank, 186 P. 529, 67 Colo. 488. 11 C.J. p 544 note 98.

4. Ohio.—Harvey v. Ciocco, 9 Ohio N.P., N.S., 126, affirmed 14 Ohio Cir. Ct., N.S., 232, 22 Ohio Cir.Dec. 379. 11 C.J. p 544 note 99.

5. U.S.—In re Triangle Printing Co., D.C.Okl., 1 F.Supp. 329—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., C.C.A.N.Y., 263 F. 532.

Idaho.—Walker v. Farmers' Bank of Kendrick, 238 P. 968, 41 Idaho 279. Mich.—Security Trust Co. v. Tuller, 220 N.W. 795, 243 Mich. 570.

der other statutes, however, the mortgage once recorded remains valid as against such third persons until it is canceled of record.⁶

As filing has the same legal effect as taking possession by the mortgagee, failure to refile as required has the same legal effect as if the property were returned by the mortgagee to the mortgagor.⁷ Failure to renew or refile as required is only available to those persons designated by, or within the contemplation of, the statute,⁸ and does not affect the validity of the instrument as between the parties,⁹ nor, according to the generally accepted rule, as toward mere general creditors who have not acquired a lien on the property,¹⁰ although in some jurisdictions a contrary rule prevails.¹¹ The protection given to purchasers by such statutes, it is held, is not limited to purchasers from the mortgagor, but includes a purchaser from the vendee of the mortgagor, or, in the case of the mortgagor's death, from the person or persons in whom title to the property would have vested but for the mortgage.¹²

Institution of a foreclosure suit has been held not to extend the life of a mortgage beyond the period within which the filing of the renewal affidavit is required;¹³ and the effect of a failure to refile as required is not avoided by a suit on the note for which the mortgage was given, where judgment was not obtained thereon until after expiration of the period although the suit was commenced before.¹⁴ However, it has been held that a mortgage, although not renewed, is good as against an attachment of a prior creditor having notice, at the time of attachment, of proceedings for foreclosure and sale under the mortgage.¹⁵

Impossibility of refileing. A statutory enactment that the mortgage shall cease to be valid unless refiled or renewed is not overcome by the fact that it has become impossible to comply with the statute, as where the mortgagor has removed from the state.¹⁶

Effect of default. The fact that there has been a default in the condition of the mortgage will not ob-

Neb.—State Bank of Beaver Crossing v. Mackley, 236 N.W. 165, 121 Neb. 28.

N.Y.—In re Shay's Estate, 285 N.Y. S. 379, 157 Misc. 615.

N.D.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

S.D.—First Nat. Bank v. Wagner, 195 N.W. 1020, 47 S.D. 80.

Utah.—Wasatch Livestock Loan Co. v. Nielson, 56 P.2d 613, 90 Utah 307, amended 61 P.2d 616, 90 Utah 331—Hansen v. Daniels, 272 P. 941, 73 Utah 142.

Wis.—Cremer v. Banking Commission, 272 N.W. 40—Pierce v. Westby State Bank, 261 N.W. 752, 218 Wis. 648—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.

11 C.J. p 543 note 87.

Failure to renew chattel mortgage as invalidating the mortgage as respects the mortgagor's trustee in bankruptcy see Bankruptcy § 242.

Provision applicable to all mortgages and not limited to chattel mortgages fixing original lien for more than designated time.—Stokes v. Kirk, 47 P.2d 686, 97 Colo. 96.

Who are creditors

(1) "Creditor," as used in statute providing for renewal, is one who, without notice that debt secured by unrenewed mortgage is unpaid, extends credit or alters his position as to debtor to his detriment.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

(2) "Creditors" as used in statute providing that mortgage shall be void as against creditors of mortgagor after expiration of statutory period of original filing unless mort-

gage is refiled includes creditors who became such during period of original filing.—Commercial Sec. Bank of Ogden v. Chimes Press, 42 P.2d 990, 88 Utah 148.

Subsequent encumbrancer in good faith, within statute providing for renewal, is creditor who takes security for his debt, and his character as encumbrancer is determined by notice he has when credit is extended or his position altered to his detriment, rather than notice had when security is taken.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

Death of mortgagor

Where chattel mortgage had not been refiled after expiration of one year and mortgagor died, mortgaged property became unencumbered assets of deceased mortgagor's estate and was required to be distributed to his general creditors, with mortgagee having no rights superior to others.—In re Shay's Estate, 285 N.Y.S. 379, 157 Misc. 615.

6. N.J.—Longley v. Sperry, 66 A. 1062, 72 N.J.Eq. 537.
11 C.J. p 543 note 88.

7. Utah.—Commercial Sec. Bank of Ogden v. Chimes Press, 42 P.2d 990, 88 Utah 148.

8. U.S.—Queenan v. Wiker, D.C.Okl., 21 F.Supp. 943, 946, quoting *Corpus Juris*.

Mont.—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

11 C.J. p 543 note 89.

Prior encumbrancer is not "third party" within chattel mortgage stat-

ute.—Beckman v. Alberts, 178 N.E. 367, 346 Ill. 74.

9. U.S.—In re Triangle Printing Co., D.C.Okl., 1 F.Supp. 329.

Mont.—Griffiths v. Thrasher, 26 P.2d 933, 95 Mont. 238—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

Okl.—Smith v. Curreather's Mercantile Co., 184 P. 102, 76 Okl. 170.

S.D.—Barkley v. Boardman, 221 N.W. 268, 53 S.D. 556.

11 C.J. p 543 note 90.

10. N.D.—Hanson v. Blum, 207 N.W. 144, 53 N.D. 526.

S.D.—Barkley v. Boardman, 221 N.W. 268, 53 S.D. 556—Guaranty State Bank of Claremont v. Lawrence, 211 N.W. 801, 51 S.D. 33.

Wis.—Graham v. Perry, 228 N.W. 135, 200 Wis. 211, 68 A.L.R. 267.

11 C.J. p 543 note 91.

11. Ohio.—Boyer v. Howland, 31 Ohio Cir.Ct. 139.

11 C.J. p 543 note 92.

12. N.Y.—Fox v. Burns, 12 Barb. 677.

11 C.J. p 543 note 94.

13. Utah.—Commercial Sec. Bank of Ogden v. Chimes Press, 42 P.2d 990, 88 Utah 148.

14. La.—Friedrich v. Handy Andy Community Stores of Louisiana, App., 164 So. 486.

15. Mich.—Kratzmer v. Detroit Lumber Co., 161 N.W. 817, 195 Mich. 570.

16. Okl.—Richardson v. Shelby, 41 P. 378, 3 Okl. 68.

11 C.J. p 544 notes 1, 2.

viate the necessity of refiling,¹⁷ unless the mortgagee has taken possession of the property¹⁸ or has caused it to be advertised for sale under the mortgage.¹⁹

b. Effect of Actual Notice

Renewal or refiling is generally unnecessary as to a purchaser or mortgagee having actual knowledge of the mortgage.

In some jurisdictions, it has been held that a subsequent purchaser or mortgagee cannot be a purchaser or mortgagee in good faith where he has actual notice of the existence of a prior mortgage, and that, in such case, renewal or refiling is, as to him, unnecessary;²⁰ and failure to file a renewal affidavit cannot be availed of to defeat the rights of the mortgagee by a purchaser having actual notice sufficient to put him on inquiry as to whether the property he purchased was covered by the mortgage;²¹ and a creditor cannot attack the validity of

a mortgage not renewed as required when the creditor was a party to the agreement as a result of which the mortgage was given.²² Where the statute makes the filing of a renewal statement imperative without regard to good faith on the part of third persons it has been held that actual notice will not obviate the necessity of refiling.²³ Actual notice, in order to take the place of renewal or refiling, must be notice not only of the original mortgages but also of the fact that the mortgage debt has not been paid.²⁴

c. Possession Taken by Mortgagee

Refiling is unnecessary when the mortgagee has taken possession of the property.

It is unnecessary to refile a mortgage when the mortgagee has taken possession before the time for refiling arrives,²⁵ or before the lien of the competing creditor has attached to the property,²⁶ even though after default by the mortgagor of the con-

17. N.Y.—*Steele v. Benham*, 84 N. Y. 634.

11 C.J. p 544 note 3.

18. N.Y.—*Otis v. Sill*, 8 Barb. 102.

19. N.Y.—*Otis v. Sill*, supra.

20. U.S.—*In re Triangle Printing Co.*, D.C.Okl., 1 F.Supp. 329.

Okl.—*Smith v. Curreather's Mercantile Co.*, 184 P. 102, 76 Okl. 170.

Wash.—*Cardwell v. Ruchert*, 59 P. 2d 1120, 187 Wash. 92—*First State*

Bank of La Crosse v. McGregor Land & Live Stock Co., 251 P. 865, 141 Wash. 549, 51 A.L.R. 585 —*Farmers' State Bank of Lind v. McCulley*, 233 P. 661, 133 Wash. 364—*Othello State Bank v. J. I. Case Threshing Mach. Co.*, 194 P. 563, 113 Wash. 680.

Wis.—*Pierce v. Westby State Bank*, 261 N.W. 752, 218 Wis. 648—*Bank of Viroqua v. First Nat. Bank*, 228 N.W. 139, 200 Wis. 224.

11 C.J. p 544 note 6.

Creditors

Words "in good faith" in statute, declaring mortgage invalid as against mortgagor's creditors, or subsequent purchaser or encumbrancer in good faith after two years and sixty days from filing thereof, are inapplicable to creditor of mortgagor, and a lien of attachment, levied on mortgaged personalty after two years and sixty days from filing of mortgage, not renewed, is superior to mortgage, although attachment creditor knew of pendency of foreclosure suit at time of levy. —*Griffiths v. Thrasher*, 26 P.2d 983, 95 Mont. 238.

Creditor taking mortgage as security

(1) In North Dakota it has been held that a creditor taking mortgage over three years after filing first mortgage, during which time

debt arose, is not "subsequent good-faith encumbrancer," within statute. —*Bank of North Dakota v. Bean*, 216 N.W. 575, 56 N.D. 191.

(2) In South Dakota it has been held that, by taking mortgage after expiration of three years, creditor of mortgagor may acquire rights superior to holder of unrenewed mortgage. —*Guaranty State Bank of Claremont v. Lawrence*, 211 N.W. 801, 51 S.D. 33.

(3) Under Rev.Code 1919 § 1587, a creditor who takes security for his debt after a mortgage thereon has lapsed, and who thereby becomes a "subsequent encumbrancer," does not cease to be a creditor, and his knowledge of the existence of the lapsed mortgage is immaterial. —*First State Bank of Buffalo v. Goodrich*, 195 N.W. 1022, 47 S.D. 85.

(4) The requirement of good faith on the part of an encumbrancer, to invalidate as to him a prior mortgage, not renewed, obtains only as respects a debt which is, when created, secured by his encumbrance; hence, where a mortgage is given to secure a prior unsecured debt, notice of an unrenewed mortgage is immaterial, although, in such case, notice is material as respects the priority of an additional advance to the mortgagor made by the mortgagee at the time of the subsequent mortgage, which advance is secured by such mortgage. —*First Nat. Bank v. Magner*, 195 N.W. 1020, 47 S.D. 80.

(5) Holder of junior mortgage suing for foreclosure is entitled to assert precedence, as execution creditor, over holder of defectively refiled first mortgage, in avoidance of defense that plaintiff was not a mortgagee in good faith because of

his knowledge of the prior mortgage, where plaintiff had reduced its claim to judgment and had levied execution on mortgaged property. —*Heilker v. Hotel Gibson Co.*, 194 N.E. 879, 49 Ohio App. 16.

Estoppel of subsequent mortgagee

Where a bank taking mortgage subject to purchase-money mortgage on threshing outfit after maturity of notes for purchase price was party to subsequent action on notes, and that action was dismissed on partial payment secured by the buyers from the bank, and it was stipulated on dismissal that purchase-money mortgage should be extended, but there was no affidavit of amount due, filed within two years after maturity as required, the bank was estopped to insist that its mortgage became prior by failure to comply with statute. —*Othello State Bank v. J. I. Case Threshing Mach. Co.*, 194 P. 563, 113 Wash. 680.

21. Mich.—*Security Trust Co. v. Tuller*, 220 N.W. 795, 243 Mich. 570.

22. Ill.—*Central Trust Co. of Illinois v. Sheridan Beach Hotel Bldg. Corporation*, 259 Ill.App. 404.

23. S.D.—*First Nat. Bank v. Magner*, 195 N.W. 1020, 47 S.D. 80. 11 C.J. p 544 note 7.

24. N.Y.—*Salmon v. Norris*, 81 N.Y. S. 892, 82 App.Div. 362. 11 C.J. p 544 note 8.

25. Colo.—*Cobb v. International State Bank*, 186 P. 529, 531, 67 Colo. 488, citing *Corpus Juris*.

Mich.—*Lawrence v. Beattie*, 176 N.W. 570, 209 Mich. 128.

N.Y.—*Prudence-Bonds Corporation v. 1000 Island House Co.*, 252 N.Y.S. 60, 141 Misc. 39.

11 C.J. p 544 note 9.

26. N.Y.—*Prudence-Bonds Corpora-*

dition of the mortgage,²⁷ or after the period for refiling has elapsed;²⁸ but where a mortgage expires without payment having been made, and it is not refiled as required by the statute, the lien becomes dead, and cannot be revived to the injury of creditors by the mortgagee taking possession of the property.²⁹ Correlatively if the mortgagee has renewed the mortgage in the manner provided, it is unnecessary that he should also take possession in order to protect his rights.³⁰

Sufficiency of change of possession. The change of possession to render refiling unnecessary must be actual and continuous; mere words will not effect a change in law where there is none in fact.³¹

d. Execution of New Mortgage

Ordinarily, execution of a new mortgage obviates the necessity for refiling.

It has been held that taking a new mortgage within the time for refiling the old one will continue the lien on the property if the transaction is bona fide;³² a copy refiled is to be regarded in effect as a new mortgage;³³ and a failure to refile will not invalidate a subsequent mortgage on the same property and between the same parties,³⁴ except as to those creditors who levied during the continuance of the default.³⁵

e. Claims or Rights Accruing before Time for Renewal or Refiling

Generally, a purchaser or encumbrancer becoming such during the original period of record or filing cannot take advantage of failure to renew or refile; but unless prevented by the terms of the statute creditors may do so.

Generally, a purchaser, or encumbrancer, who becomes such during the original period of filing or record is charged with notice and cannot afterward take advantage of a failure to refile or renew,³⁶ although there is authority to the contrary.³⁷ The term "subsequent" purchaser or encumbrancer in a renewal statute is ordinarily construed to mean purchasers or encumbrancers subsequent to the time of the refiling of the mortgage;³⁸ and a mortgagee, receiving a mortgage at a time when an earlier mortgage was on file and kept alive by renewal affidavits, cannot become a subsequent purchaser in good faith, even though the first mortgage is not thereafter renewed.³⁹ Where the statutes requiring refiling are not expressly restricted in their operation to subsequent creditors, a creditor who becomes such during the period of the original filing may take advantage of a failure to refile,⁴⁰ and may levy execution on the property.⁴¹

Under the generally accepted rule, the mortga-

tion v. 1000 Island House Co., supra.

11 C.J. p 544 note 10.

27. N.Y.—Porter v. Parmly, 34 N.Y. Super. 398, 13 Abb.Pr.,N.S., 104, reversed on other grounds 52 N. Y. 185, 14 Abb.Pr.,N.S., 16.

28. Kan.—Dayton v. People's Sav. Bank, 23 Kan. 421.

29. U.S.—In re Steffens, C.C.A.N.Y., 31 F.2d 660, 63 A.L.R. 589.

11 C.J. p 544 note 13.

30. Mont.—Miles City First Nat. Bank v. Marshall, 152 P. 36, 51 Mont. 224.

11 C.J. p 544 note 14.

31. N.Y.—Porter v. Parmley, 52 N. Y. 185, 14 Abb.Pr.,N.S., 16.

11 C.J. p 544 note 15.

32. Okl.—Aikins v. Huff, 272 P. 1025, 133 Okl. 268.

11 C.J. p 545 note 16.

Omission of part of property

Where first mortgage, covering brood sows and other personalty, was not renewed and filed but was surrendered to mortgagee on execution of another mortgage in lesser amount, omitting some of property and not expressly covering spring pigs since born, lien of first mortgage was not intended to be continued by other mortgage as to such pigs; hence, proceeds of spring pigs belonged to holder of intermediate

mortgage covering them.—C. F. Medaris Co. v. Deerfield State Bank of Deerfield, 251 N.W. 799, 265 Mich. 641.

33. N.Y.—Nitchie v. Townsend, 4 N. Y. Super. 299.

34. N.Y.—Lee v. Huntoon, Hoffm. 447.

35. N.Y.—Walker v. Henry, 85 N. Y. 130.

11 C.J. p 545 note 19.

36. Colo.—Conway v. Headquist, 34 P.2d 69, 95 Colo. 187.

Mont.—Foorman v. Weber, 196 P. 147, 59 Mont. 185—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 137, 58 Mont. 44, citing *Corpus Juris*.

S.D.—Guaranty State Bank of Claremont v. Lawrence, 211 N.W. 801, 51 S.D. 33.

11 C.J. p 545 note 21.

Buyer of mortgaged chattels from mortgagor before default is in no better position than mortgagor, and cannot profit by mortgagee's failure to take possession or to file statutory statement.—Conway v. Headquist, 34 P.2d 69, 95 Colo. 187.

Judgment creditor as purchaser

Where mortgagor's judgment creditor, at execution sale subject to mortgage, purchased mortgaged truck during original filing period of mortgage for small part of value of

truck, the mortgagee's rights are superior to those of creditor, although mortgage was not refiled as required by statute and mortgagee's replevin action was not brought within original filing period, notwithstanding fact that creditor's judgment was not wholly paid.—Grana v. Mehs, 274 N.Y.S. 341, 152 Misc. 828.

37. Wash.—Best v. Felger, 137 P. 334, 77 Wash. 115.

11 C.J. p 545 note 22.

38. S.D.—Aultman Engine, etc., Co. v. Young, 126 N.W. 245, 25 S.D. 212, Ann.Cas.1912B 1101.

11 C.J. p 545 note 23.

39. Mont.—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

40. Utah.—Commercial Sec. Bank of Ogden v. Chimes Press, 42 P.2d 990, 994, 995, 88 Utah 148, citing *Corpus Juris*.

11 C.J. p 545 note 24.

41. Utah.—Commercial Sec. Bank of Ogden v. Chimes Press, supra.

Knowledge at time of levy not shown That creditor's complaint in intervention in mortgagee's action to foreclose mortgage was filed same day that execution on judgment obtained by creditor in attachment suit was levied on mortgaged property, is insufficient to give rise to

gee's right of action against an officer levying on the mortgaged property before the expiration of the period of the original filing is not affected by his failure to refile,⁴² nor is his right of action as against one wrongfully taking possession of the property during such period.⁴³ Further, it has been held that the mortgagee need not refile his mortgage in order to protect his lien where, prior to the time for refiling, the property has been taken possession of by the assignee for creditors of the mortgagor.⁴⁴ Where both a first and an intervening mortgage have become invalid because of failure to renew, neither is entitled to preference in a distribution of assets of the mortgagor.⁴⁵

Subvendee. A purchaser in good faith, after the expiration of the time limited for the life of the original filing, from one who purchased within such time, acquires a title superior to the mortgagee.⁴⁶

§ 171. — Time for Renewal

The time for renewal or refiling is fixed by statute, and strict compliance therewith is required.

The time within which a mortgage must be refiled or renewed is fixed by the statutory provision re-

quiring such refiling or renewal, and such a provision must be strictly complied with.⁴⁷ Where a certain period, such as thirty days, is given within which to refile a mortgage, any effort to renew the record before the period commences is ineffectual,⁴⁸ and it has been held that refiling after the period has elapsed is likewise of no avail,⁴⁹ and that no revival of the mortgage is possible after a default in refiling;⁵⁰ but under some statutes late refiling will validate the mortgage in case no rights exist or have been acquired against the mortgaged property before such filing.⁵¹

An amendment increasing the time in which a mortgage must be renewed does not apply to mortgages filed before its enactment, although the amendment is passed before the renewal of the mortgage was necessary under the previous law,⁵² although the contrary has been held.⁵³

Computation of time. In accordance with well settled general rules, in computing the time for refiling, the first day is to be excluded,⁵⁴ and it has been held that days of grace are to be reckoned in if the instrument secured by the mortgage is entitled to grace.⁵⁵ Although the last day of the pe-

assumption that creditor had knowledge of existence of mortgage as unpaid obligation at time of levy under attachment or execution.—*Commercial Security Bank of Ogden v. Chimes Press*, supra.

42. Wis.—*Case v. Jewett*, 13 Wis. 498, 80 Am.D. 752.
11 C.J. p 545 note 25.

43. Kan.—*Corbin v. Kincaid*, 7 P. 145, 33 Kan. 649.

44. Ohio.—*Matter of Brocamp*, 5 Ohio Cir.Ct. 372, 1 Ohio Cir.Dec. 537.

45. Ohio.—*In re Wilson*, 13 Ohio Cir. Ct. 183, 7 Ohio Cir.Dec. 459.

46. N.Y.—*Dillingham v. Bolt*, 37 N. Y. 198, overruling *Dillingham v. Ladue*, 35 Barb. 38.
11 C.J. p 545 note 29.

47. U.S.—*In re Active Wet Wash Laundry Co.*, D.C.N.Y., 8 F.Supp. 964.—*In re Leslie-Judge Co.*, C.C.A. N.Y., 272 F. 886, certiorari denied *Green v. Felder*, 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180.

Colo.—*Lamon v. Harada*, 249 P. 267, 80 Colo. 89.
Kan.—*Wamberg v. Hart*, 246 P. 1010, 1012, quoting *Corpus Juris*.
11 C.J. p 545 notes 30, 31.

48. U.S.—*In re Steffens*, C.C.A.N.Y., 31 F.2d 660, 63 A.L.R. 539.—*In re Pearlman*, D.C.N.Y., 246 F. 874.
Colo.—*First Nat. Bank v. O'Connell*, 236 P. 1002, 77 Colo. 275.

Ill.—*McKesson-Fuller-Morrisson Co. v. Chapell Ice Cream Co.*, 2 N.E.2d

561, 562, 285 Ill.App. 472, quoting *Corpus Juris*.
Mich.—*Kratzmer v. Detroit Lumber Co.*, 161 N.W. 817, 195 Mich. 570.
11 C.J. p 546 note 32.

Maturity of debt

An affidavit for extension of prior mortgage executed and filed before maturity of debt secured by mortgage, is ineffective to extend lien as against holder of a junior mortgage, under a statute providing for extension within ninety days after maturity of the debt.—*McKesson-Fuller-Morrisson Co. v. Chapell Ice Cream Co.*, 2 N.E.2d 561, 285 Ill.App. 472.

49. N.Y.—*Maggio v. Acterno*, 200 N. Y.S. 741, 121 Misc. 30.
11 C.J. p 546 note 33.

50. Colo.—*Stokes v. Kirk*, 47 P.2d 686, 97 Colo. 96.
11 C.J. p 546 note 34.

51. Mich.—*Symons Bros. & Co. v. Brink*, 160 N.W. 638, 194 Mich. 389.
11 C.J. p 546 note 35.

Renewal before levy of execution

Refiling mortgage after expiration of period for filing renewal affidavit is effectual against execution creditor whose execution is not levied until after second filing.—*Prudence-Bonds Corporation v. 1000 Island House Co.*, 252 N.Y.S. 60, 141 Misc. 39.

52. Wis.—*Pierce v. Westby State Bank*, 261 N.W. 752, 218 Wis. 648.

53. Ohio.—*Central Ohio Paper Co. v. Postal Printing Co.*, 10 Ohio N. P.N.S., 519—*Harvey v. Ciocco*, 9 Ohio N.P., N.S., 126, affirmed 14 Ohio Cir.Ct., N.S., 232, 22 Ohio Cir. Dec. 379.

54. Okl.—*Smith v. La Fayette*, 119 P. 979, 29 Okl. 671.
11 C.J. p 546 note 36.

Renewal premature

A renewal notice filed January 16, following February 16, on which date first copy of mortgage was filed, is too soon, and is ineffective, under a statute providing for renewal "within thirty days next preceding the expiration."—*In re Pearlman*, D.C.N.Y., 246 F. 874.

From time of original filing

Term of one year, which must be renewed by filing renewal notice, under N.Y.Lien L. § 235, cannot be extended by delaying filing of copies of mortgage in county where property was located, and so, where renewal notices were filed within one year after filing of original mortgage, they were sufficient; a delay of six days in filing copy of mortgage in county where property was located, after filing in the county where the mortgagor resided, not rendering invalid original filing, in absence of evidence showing that any person was deceived, or that there was any intent to deceive by reason of such delay.—*In re Pearlman*, supra.

55. Ill.—*Gilbert v. Sprague*, 63 N.E. 993, 196 Ill. 444, reversing 88 Ill. App. 508.

riod be Sunday, it is to be counted nevertheless.⁵⁶ It has been held that fractions of a day are to be disregarded,⁵⁷ but the contrary has also been held.⁵⁸ It has also been held that the time for refileing is to be determined by reference to the next preceding, and not to the original, filing.⁵⁹

§ 172. — Sufficiency

- a. In general
- b. Renewal statement

a. In General

The statutory provisions governing the renewal or refileing must be strictly followed.

Statutory provisions requiring the refileing or renewal of mortgages must be strictly followed.⁶⁰ An insufficient filing is not cured by the filing of a renewal affidavit regular in form.⁶¹ Where a mortgage covers both real and personal property, it need not be refiled as a chattel mortgage in order to preserve its lien on the real property covered by it.⁶² The renewal statement required for the continuation of a mortgage may, by some statutes, be indorsed on the original mortgage, and the mortgage refiled.⁶³ Under a statute requiring the affidavit of renewal to be filed in the office where the mortgage is recorded, an affidavit so filed is sufficient, notwithstanding after recording of the mortgage in the county of the mortgagor's residence a change of boundaries put his residence in a new county.⁶⁴

There can be no proper extension or renewal of a mortgage where the mortgage has never been recorded, where the statute requires proper notation of the renewal on the record.⁶⁵

b. Renewal Statement

The renewal statement is ordinarily made by the mortgagee; but may be made by a duly authorized agent. The statement must contain all that is required by the statute. Unless otherwise required by statute, the statement for renewal may be sworn to before any officer authorized to administer an oath. In some jurisdictions the affidavit of extension must be entered on the docket.

The renewal statement is ordinarily required to be made by the mortgagee,⁶⁶ and a statement by one unauthorized to make it is insufficient to answer the requirements of the statute.⁶⁷ An affidavit of renewal may be made by an agent,⁶⁸ if the act of the agency is sworn to,⁶⁹ but an attempted extension by an agent in his own name as mortgagee is ineffectual.⁷⁰ In case the mortgagee is a corporation the affidavit must, of necessity, be made by an officer or agent of the corporation.⁷¹

Contents. The statutes requiring a renewal statement ordinarily prescribe what it must contain, and such requirements must be complied with.⁷² Under some statutes, the statement must set forth the mortgagee's interest in the mortgaged property,⁷³ which may be done on a separate paper, but so attached as to make substitution impossible;⁷⁴ and must contain a description of the mortgage,⁷⁵ the time when and place where filed,⁷⁶ the

56. Ohio.—Paine v. Mason, 7 Ohio St. 198.

11 C.J. p 546 note 38.

57. Mich.—Griffin v. Forrest, 13 N. W. 603, 49 Mich. 309.

11 C.J. p 546 note 39.

58. Kan.—Lockwood v. Crawford, 29 Kan. 286.

11 C.J. p 546 note 40.

59. Ohio.—In re Landman, 5 Ohio S. & C.P. 398, 7 Ohio N.P. 570.

60. U.S.—Voss v. Slayton, C.C.A. Ohio, 38 F.2d 475.

11 C.J. p 546 note 42.

Effect of mistake

Where renewal affidavit to preserve mortgage was made in duplicate, and one was executed, and filing indorsement was made on both, although by mistake office copy was left with register of deeds and attached to mortgage, lien of mortgage was good against execution to satisfy judgment in behalf of third party against mortgagor.—Wamber v. Hart, 246 P. 1010, 121 Kan. 218.

Refiling wherever filed

Under N.Y. Lien L. § 235, as amended by L.1915, c 608, a statement or copy of a mortgage must, where chattels are in New York City, be refiled every year in several offices in which mortgage or copies may have

been originally filed.—In re Pearlman, D.C.N.Y., 246 F. 874.

61. Okl.—Fritz v. Brown, 95 P. 437, 20 Okl. 263.

62. N.Y.—State Trust Co. v. Casino Co., 46 N.Y.S. 492, 19 App.Div. 344, affirming 41 N.Y.S. 1, 18 Misc. 327.

63. Ohio.—Paine v. Mason, 7 Ohio St. 198.

11 C.J. p 546 note 46.

64. Mont.—Chester State Bank v. Great Northern Ry. Co., 190 P. 136, 58 Mont. 44.

65. Colo.—Anglo-American Mill Co. v. First Nat. Bank, 280 P. 118, 76 Colo. 57.

66. U.S.—In re Signor, D.C.N.Y., 203 F. 753.

11 C.J. p 547 note 47.

67. Colo.—Conrad v. National Bank of Wray, 242 P. 676, 78 Colo. 485.

11 C.J. p 547 note 48.

Affidavit by stranger

Affidavit of extension of mortgage payment by stranger was held ineffectual and not to have affected right of junior mortgagee to satisfy debt out of mortgaged chattels, on failure of senior mortgagee to take possession of chattels within thirty days after maturity of debt.

—Conrad v. National Bank of Wray, supra.

68. U.S.—Wenstrand v. Albert Pick & Co., C.C.A.III., 38 F.2d 25, certiorari denied 50 S.Ct. 466, 281 U. S. 768, 74 L.Ed. 1175.

11 C.J. p 547 note 49.

69. Wis.—Chickering-Chase Bros. Co. v. White, 106 N.W. 797, 127 Wis. 83.

11 C.J. p 547 note 50.

70. Colo.—Stokes v. Kirk, 47 P.2d 686, 97 Colo. 96.

71. N.M.—Des Moines Home Sav. Bank v. Woodruff, 94 P. 957, 14 N.M. 502.

72. U.S.—Willcox v. Goess, D.C.N.Y., 16 F.Supp. 350.

11 C.J. p 547 note 53.

73. U.S.—Voss v. Slayton, C.C.A. Ohio, 38 F.2d 475—Willcox v. Goess, D.C.N.Y., 16 F.Supp. 350.

11 C.J. p 547 note 54.

74. U.S.—Voss v. Slayton, C.C.A. Ohio, 38 F.2d 475.

75. U.S.—In re Watts-Woodward Press, Inc., N.Y., 181 F. 71, 104 C.C.A. 105.

11 C.J. p 547 note 55.

76. N.Y.—David Stevenson Brewing Co. v. Eastern Brewing Co., 48 N.

names of the parties,⁷⁷ a description of the property,⁷⁸ the payments that have been made on the debt,⁷⁹ the amount that remains due and unpaid,⁸⁰ and the time to which the debt⁸¹ or the mortgage⁸² is to be extended. The actual amount of matured indebtedness on the date of renewal need not be stated so long as the obligations, matured and unmatured, exceed the amount stated, and the mortgage appears on its face to be for continuing indemnity.⁸³ While the statement of the mortgagee's interest in the property must be positive and distinct,⁸⁴ it is sufficient if it is made in good faith, with reasonable care, and is substantially accurate.⁸⁵ However, a statement is faulty which understates the amount due by a large amount,⁸⁶ or overstates it.⁸⁷ The statement and the affidavit may be read together when they refer to each other and it appears that such was the intention of the party; and, if together they contain the particulars required by the statute, the renewal is sufficient.⁸⁸

Jurat. In the absence of statutory provision to the contrary, the statement for renewal may be sworn to before any officer authorized to administer an oath.⁸⁹ Further, it has been held that the oath need not appear on the affidavit but may be shown by evidence aliunde that the statements were made on oath duly administered.⁹⁰ Where a jurat is attached to a renewal affidavit, it seems to be necessary that it state the venue of the proceedings.⁹¹ The fact that the affidavit is sworn to be-

fore a notary public who is a stockholder in the mortgagee corporation will not destroy its effect as extending the notice imparted by record of the mortgage.⁹²

Docketing. In some jurisdictions the justice must enter the affidavit of extension on the docket to make the renewed mortgage valid as to third persons.⁹³

§ 173. — Successive Renewals

Successive renewals may be had, depending on the terms of the permissive statute.

In some jurisdictions, there may be successive renewals, with the termination of the validity of the mortgage on the failure to refile at the end of any renewal period.⁹⁴ Under some statutes, however, but one period of renewal is provided for.⁹⁵

§ 174. — Operation and Effect

A valid renewal of a mortgage continues the lien thereof.

The lien of the mortgage continues during the period of renewal,⁹⁶ and the renewal mortgage has all the binding force of the original mortgage,⁹⁷ but under some statutes the life of the lien is limited strictly to the period of extension allowed by statute,⁹⁸ although under others the mortgagee is given a reasonable period in which to take or demand possession.⁹⁹ A void mortgage is not validated by a renewal.¹

Y.S. 89, 22 App.Div. 523, affirmed 59 N.E. 1121, 165 N.Y. 634, 11 C.J. p 547 note 56.

77. U.S.—In re Watts-Woodward Press, Inc., N.Y., 181 F. 71, 104 C. C.A. 105.

11 C.J. p 547 note 57.

Erroneous statement as to mortgagor
Erroneous statement by agent in affidavit for extension that affiant was mortgagor is not injurious to purchaser of mortgaged property, where the true facts appear on the face of the affidavit.—Wenstrand v. Albert Pick & Co., C.C.A.III., 38 F.2d 25, certiorari denied 50 S.Ct. 466, 281 U.S. 768, 74 L.Ed. 1175.

78. U.S.—Platt v. Stewart, C.C.N.Y., 19 F.Cas.No.11,220, 13 Blatchf. 481, reversed on other grounds 101 U.S. 731, 25 L.Ed. 816.
11 C.J. p 547 note 58.

79. Colo.—Ferris v. Chambers, 117 P. 994, 51 Colo. 368.
11 C.J. p 547 note 59.

80. U.S.—Willcox v. Goess, D.C.N.Y., 16 F.Supp. 350.
11 C.J. p 547 note 60.

81. Mont.—Rosenbaum v. Ryan Bros. Cattle Co., 84 P. 1120, 33 Mont. 424.
11 C.J. p 547 note 61.

82. Colo.—Ellison v. Tuckerman, 134 P. 163, 24 Colo.App. 322.

83. Mich.—Chafey v. Mathews, 62 N.W. 141, 104 Mich. 103, 27 L.R.A. 558.

84. Ohio.—Matter of Brocamp, 2 Ohio Cir.Ct. 372, 1 Ohio Cir.Dec. 537.
11 C.J. p 547 note 65.

85. N.Y.—Patterson v. Gillies, 64 Barb. 563.
11 C.J. p 547 note 66.

86. Wis.—Rice v. Kahn, 35 N.W. 465, 70 Wis. 323.
11 C.J. p 548 note 67.

87. N.Y.—Ely v. Carnley, 19 N. Y. 496.
11 C.J. p 548 note 68.

88. Ill.—Hamilton v. Seeger, 75 Ill. App. 599.
11 C.J. p 548 note 69.

89. Kan.—Fair v. Citizens' State Bank, 79 P. 144, 70 Kan. 612, 67 L.R.A. 851.
11 C.J. p 548 note 70.

90. Ill.—Cox v. Stern, 48 N.E. 906, 170 Ill. 442, 62 Am.S.R. 385, affirming 71 Ill.App. 194.

91. Mich.—Griffin v. Forrest, 13 N. W. 603, 49 Mich. 309.
11 C.J. p 548 note 72.

92. Kan.—Fair v. Citizens' State Bank, 79 P. 144, 70 Kan. 612, 67 L.R.A. 851.

93. Ill.—Van Zele v. Cleaveland, 208 Ill.App. 387, 396.
11 C.J. p 548 note 74.

94. N.Y.—David Stevenson Brewing Co. v. Eastern Brewing Co., 48 N. Y.S. 89, 22 App.Div. 523, 5 N.Y. Ann.Cas. 54, affirmed 59 N.E. 1121, 165 N.Y. 634.
11 C.J. p 548 note 75.

95. U.S.—Fallows v. Continental, etc., Trust, etc., Bank, Ill., 35 S. Ct. 29, 235 U.S. 300, 59 L.Ed. 238.
11 C.J. p 548 note 76.

96. Mich.—Wade v. Strachan, 39 N. W. 532, 71 Mich. 459.
11 C.J. p 548 note 77.

97. Tex.—G. M. Carleton Bros. & Co. v. Bowen, Civ.App., 193 S.W. 732.

98. Mont.—Rosenbaum v. Ryan Bros. Cattle Co., 84 P. 1120, 33 Mont. 424.

99. Colo.—Ellison v. Tuckerman, 134 P. 163, 24 Colo.App. 322.
11 C.J. p 548 note 79.

1. Mont.—Butte First Nat. Bank v. Beley, 80 P. 256, 32 Mont. 291.
11 C.J. p 548 note 80.

IX. POSSESSION, USE, AND CONVERSION OF PROPERTY

A. ESTATES AND INTERESTS OF PARTIES

§ 175. In General

The mortgagor is regarded as the owner of the mortgaged property as against all persons other than the mortgagee. A mortgagee's right and title is limited to that possessed by the mortgagor.

In some jurisdictions, as stated in § 1 supra, a chattel mortgage conveys the legal title in the property to the mortgagee, while in others it operates as a mere lien. In general, however, as against all persons other than the mortgagee, the mortgagor is regarded as the owner of the mortgaged property.² A mortgagee of a chattel acquires only such right and title to the property as his mortgagor had.³

Where the mortgage is given to secure the amount of the separate indebtedness of the mortgagor to each of several mortgagees, the persons named as mortgagees do not take as joint tenants, but as tenants in common; each taking an undivided interest as tenant in common of the property conveyed by the mortgage, in proportion to the respective debt of each.⁴

§ 176. After Default

Although there is authority to the contrary, the generally accepted rule is that legal title to the mortgaged property is vested in the mortgagee on default or breach of condition by the mortgagor.

There is authority that on default or breach of condition by the mortgagor the mortgagee is not vested with title and some further action on his part is necessary to divest the mortgagor of title,⁵ but the generally accepted rule, in the absence of statutory qualifications, is that after default or breach of condition the legal title to the mortgaged property is vested in the mortgagee, subject only to the right, if any, of the mortgagor to redeem,⁶ especially where the mortgagee takes possession of the mortgaged property,⁷ although the rule also applies if the property is not reduced to possession.⁸ The mortgagee is regarded as the absolute owner at least for the purpose of possession and foreclosure,⁹ but where a right of redemption exists, he does not acquire the absolute title in the sense

2. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 228 Ala. 137, reversed on other grounds 153 So. 465, 26 Ala.App. 70—First Nat. Bank v. Harden, 82 So. 655, 17 Ala. App. 165, certiorari denied In re First Nat. Bank of Alexander, 82 So. 422, 203 Ala. 172.

3. Cal.—Shintaffer v. Bank of Italy Nat. Trust & Savings Ass'n, 13 P. 2d 668, 216 Cal. 243.

N.Y.—Equitable Trust Co. of New York v. Majestic Hotel Co., 261 N.Y.S. 1, 237 App.Div. 166, affirmed 188 N.E. 31, 262 N.Y. 436, 11 C.J. p 549 note 82.

Chattel mortgagee of lessee is bound by the recorded lease and can obtain only the rights which the lessee has thereunder.

N.Y.—Equitable Trust Co. of New York v. Majestic Hotel Co., supra. Wyo.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.

4. Wis.—Ashland Lodge No. 63 I. O. O. F. v. Williams, 75 N.W. 954, 100 Wis. 223, 69 Am.S.R. 912, 11 C.J. p 549 note 83.

5. Fla.—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35. N.M.—American Mortg. Co. v. White, 287 P. 702, 34 N.M. 602.

N.D.—Hedrick v. Stockgrowers' Credit Corporation, 250 N.W. 539, 64 N. D. 101.

Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App. 291 S.W. 1088, reversing, Civ.App., 283 S.W. 224—Barr v. White, Civ.App., 47 S. W.2d 910—Mathes v. Huey-Philp

Hardware Co., Civ.App., 22 S.W.2d 1073.

11 C.J. p 550 note 85.

Trustee

In seizing and selling the chattels after default the mortgagee is a trustee for the mortgagor.—John E. Morris v. Co. v. O'Neal, Tex.Civ.App., 109 S.W.2d 1156.

6. U.S.—Goldstein v. Rusch, C.C.A. N.Y., 56 F.2d 10, modifying, D.C., 54 F.2d 86, and certiorari denied 53 S.Ct. 9, 237 U.S. 604, 77 L.Ed. 526 —In re Packard Press, C.C.A.N.Y., 5 F.2d 633.

Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591—International Harvester Co. of America v. Lawrence Inv. Co., 37 P.2d 529, 95 Colo. 523 —McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599.

N.Y.—Harrison v. Hall, 145 N.E. 737, 239 N.Y. 51, reversing on other grounds 202 N.Y.S. 626, 207 App. Div. 511—New York Yellow Cab Co. Sales Agency v. Courtlandt Garage & Realty Corporation, 227 N.Y.S. 315, 223 App.Div. 44—Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512—Liebman v. Brockway Motor Truck Corporation, 249 N.Y.S. 39, 140 Misc. 73—Sprague v. Glynn, 238 N.Y.S. 696, 136 Misc. 163—Holliday v. McGraw, 176 N.Y. S. 681, 106 Misc. 661—Willys-Overland v. Prudman Automobile Co., 196 N.Y.S. 487—Day v. Jade Contracting Co., 181 N.Y.S. 740—Altman v. Krumholtz, 172 N.Y.S. 126. N.C.—Sneed v. Nurnberger's Market, 135 S.E. 328, 192 N.C. 439. S.C.—Cherry v. Singer Sewing Mach.

Co., 164 S.E. 126, 165 S.C. 451—Lee v. National Furniture Stores, 161 S.E. 450, 163 S.C. 204—First Bank & Trust Co. v. Lancaster Cotton Mills, 126 S.E. 751, 131 S.C. 81—Dickerson v. Cleland, 112 S.E. 920, 120 S.C. 221—Rainwater v. Merchants' & Farmers' Bank of Cheraw, 93 S.E. 770, 108 S.C. 206 —Merchants' & Planters' Bank v. Brigman, 91 S.E. 332, 106 S.C. 362, L.R.A.1917E 925.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

11 C.J. p 549 note 84.

7. Ill.—Matson v. City Market Co., 262 Ill.App. 200—Callagan v. American Trust & Savings Bank, 196 Ill.App. 102.

Mo.—Brunke v. Salinger, App., 8 S. W.2d 88.

11 C.J. p 550 note 86.

Estate of mortgagee

After default and after possession taken by the mortgagee of personal property, the mortgagor has no estate in the mortgaged property.—Callagan v. American Trust & Savings Bank, 196 Ill.App. 102.

Void mortgage

The rule applies although the mortgage may have been void as to creditors.—Bowdish v. Page, 47 N.E. 44, 153 N.Y. 104—11 C.J. p 550 note 87.

8. N.Y.—Sprague v. Glynn, 238 N.Y.S. 696, 136 Misc. 163—Day v. Jade Contracting Co., 181 N.Y.S. 740.

9. Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117 —First Nat. Bank v. Witherspoon

that he can use the property as his own,¹⁰ and although he is the general owner, his ownership is restricted by the rights of the mortgagor.¹¹ The fact that a mortgage authorizes a mortgagee to sell the property on default does not prevent the title from becoming absolute in him without a sale.¹² An unaccepted tender of the mortgage debt, after breach of the condition, will not revest title in the

mortgagor.¹³

Under trust deeds. Where personal property is mortgaged under a trust deed to secure the payment of a debt, on default the mortgagee or trustee becomes vested with the legal title and the right of possession,¹⁴ and the trust continues as long as any part of the secured indebtedness is not discharged.¹⁵

B. POSSESSION, CONTROL AND USE OF PROPERTY

§ 177. Before Default

Before default, in the absence of statutory provisions or stipulations to the contrary, the general rule is that the mortgagee is entitled to possession but there are a number of jurisdictions which hold that the right to possession is vested in the mortgagor.

In a number of jurisdictions it is held, in some instances under statutes expressly so providing, that the mortgagor, in the absence of an agreement otherwise, is entitled to possession until default,¹⁶ but the general rule, in some instances so provided by statute, is that where there is no language in the mortgage and no other agreement to restrain or control, the mortgagees have the right to immedi-

ate possession of the property conveyed in all cases.¹⁷ The right of the mortgagee to possession is not impaired by the circumstance that no part of the debt secured or interest is due,¹⁸ or that a large part of it has been paid,¹⁹ or that he has possession of a part of the mortgaged property equal in value to the amount of the indebtedness.²⁰

The assignee of the mortgagee is, likewise, entitled to possession before default where the mortgage is silent as to possession.²¹ Possession when taken by the mortgagee will not be interfered with except where necessary for the protection of the rights of others.²² So, where the property is deliv-

Livestock Commission Co., 90 S.W. 2d 453, 230 Mo.App. 285—Zahner Mfg. Co. v. Harnish, 24 S.W.2d 641, 224 Mo.App. 370—Lange v. Midwest Motor Securities Co., App., 231 S.W. 272.

Qualified title

After condition broken the mortgagee acquires a qualified title to, or a qualified ownership of, the mortgaged property which is more than a lien.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194—First Nat. Bank v. Wegener, 186 P. 41, 94 Or. 318.

10. S.C.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

11. Ohio.—Commercial Credit Co. v. Standard Baking Co., 187 N.E. 251, 45 Ohio App. 403.

12. Iowa.—Bradley v. Redmond, 42 Iowa 452.

11 C.J. p 550 note 88.

13. S.C.—Wallingford v. Aiken, 22 S.E. 372, 44 S.C. 396.

11 C.J. p 550 note 89.

14. Ala.—Finney v. Dryden, 108 So. 13, 214 Ala. 370.

11 C.J. p 550 notes 90, 91.

15. Mo.—Holmes v. Strayhorn-Hutton-Evans Commn. Co., 81 Mo.App. 97.

16. Cal.—Kelley v. Cochran, 2 P.2d 434, 116 Cal.App. 359.

Fla.—Berlein v. Eddy, 104 So. 730, 89 Fla. 484—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35.

Idaho.—Hopkins v. Hemsley, 22 P.2d 138, 53 Idaho 120—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

Mo.—Adamson v. Fogelstrom, 300 S.W. 841, 221 Mo.App. 1243.

Or.—First Nat. Bank v. Wegener, 186 P. 41, 94 Or. 318.

Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S.W. 1088, reversing on other grounds, Civ.App., 283 S.W. 224—Terry v. Spearman, Com.App., 259 S.W. 563, reversing on other grounds, Civ.App., 246 S.W. 103.

11 C.J. p 551 notes 98, 99.

Mortgaged automobile

A chattel mortgagee of an automobile is not entitled to the possession thereof unless authorized by the express terms of the mortgage.

Cal.—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.

Fla.—J. G. White Engineering Corp. v. People's State Bank, 87 So. 753, 81 Fla. 35.

17. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 228 Ala. 137, reversing on other grounds 153 So. 465, 26 Ala.App. 70—Bank of Andalusia v. Freeman, 75 So. 325, 200 Ala. 13—Fraser v. R. W. Allen & Co., 94 So. 782, 19 Ala.App. 55—Phillips v. Hartselle, 81 So. 857, 17 Ala.App. 79.

Ind.—Sapirie v. Collins, 122 N.E. 679, 70 Ind.App. 529.

Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

Me.—Gallagher v. Aroostook Federation of Farmers, 197 A. 554—Gil-

patrick v. Chamberlain, 118 A. 481, 121 Me. 561.

Md.—Clemmitt v. Miehle Printing Press & Mfg. Co., 110 A. 713, 136 Md. 385.

N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575—State v. Stinnett, 167 S.E. 63, 203 N.C. 829—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Ohio.—Winters Nat. Bank & Trust Co. v. Midland Acceptance Corporation, 191 N.E. 889, 47 Ohio App. 324.

S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204—Mason v. Sault, 108 A. 267, 93 Vt. 412.

11 C.J. p 550 note 93.

Character of instrument not changed
Where chattel mortgagee takes possession of mortgaged property, character of the instrument as a chattel mortgage is not changed.—Winters Nat. Bank & Trust Co. v. Midland Acceptance Corporation, 191 N.E. 889, 47 Ohio App. 324.

18. Vt.—McLoud v. Wakefield, 43 A. 179, 70 Vt. 558.

19. Ind.T.—Webb v. McCain, 51 S.W. 957, 2 Ind.T. 305.

11 C.J. p 551 note 95.

20. Me.—Woodman v. Chesley, 39 Me. 45.

21. Ohio.—Robinson v. Fitch, 26 Ohio St. 659.

22. Mich.—Smith v. Menominee Cir. Judge, 19 N.W. 184, 53 Mich. 560.

ered by the grantor to a trustee under a deed of trust, he is entitled to possession of the property as against all third persons.²³

A second mortgagee is entitled to possession against everyone except the first mortgagee and those claiming under him.²⁴

The right of the mortgagor to remain in possession may be waived by him,²⁵ or lost,²⁶ such as by abandonment of the property,²⁷ by the bankruptcy of the mortgagor,²⁸ or by other acts or circumstances discussed in §§ 179-182 *infra*. Although the mortgagee believes that the mortgagor has abandoned the property, he does not have the right to enter the premises of the mortgagor without legal process and to take possession of the property.²⁹

Crops. In accordance with the general rule stated above, a mortgagee of crops has a right to possession of the crops after they are gathered.³⁰ A grant of possession of growing crops by the mortgagor thereof gives no right to the mortgagee to take possession of the land.³¹

Receivers. Under ordinary circumstances a mortgagee in possession will not be disturbed by the appointment of a receiver³² as long as any balance is due on the mortgage.³³ Where a receiver appointed in a suit between partners sells the partnership property, it does not affect the paramount

lien of a mortgagee who is a stranger to the record.³⁴

Maintenance of property. A chattel mortgagee is under no implied obligation to advance money to maintain the property, even though the execution of the mortgage may deprive the mortgagor of his ability to do so.³⁵ A mortgagor in possession of the property has the duty to protect the goods and is liable to the mortgagee for his failure to do so.³⁶

§ 178. — Agreements or Stipulations as to Possession in General

The parties to the mortgage may provide as to the possession of the property by agreement. Where the terms on which the mortgagee may take possession are specified, the mortgagor is vested with a possessory right until that time.

The parties to a chattel mortgage may provide for possession of the property, pending the maturity of the indebtedness, as they see fit,³⁷ and hence, may stipulate that the mortgagor shall retain possession of the mortgaged property until default, thus entitling the mortgagor to possession,³⁸ or may stipulate that the mortgagee shall be entitled to possession³⁹ or that he may take possession at any time.⁴⁰ Although there is no express agreement, a stipulation that the mortgagor may retain possession⁴¹ or that the mortgagee is entitled to possession⁴² may be implied from the terms of the mort-

23. Tex.—Jacoby v. Brigrman, Sup., 7 S.W. 366—Linz v. Atchison, 38 S.W. 640, 47 S.W. 542, 14 Tex.Civ. App. 647.

24. N.D.—James v. Wilson, 77 N.W. 603, 8 N.D. 186.
11 C.J. p 552 note 10.

25. Mich.—Hyde v. Shank, 43 N.W. 890, 77 Mich. 517.
11 C.J. p 552 note 21.

26. S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243.

Adverse claim

Tex.—Hall v. Harris, 11 Tex. 300.

27. Tex.—Glaser v. Henderson, Civ. App., 2 S.W.2d 987, 990, citing *Corpus Juris*.
11 C.J. p 552 note 24.

28. Hawaii.—Fallon v. Robinson, 2 Hawaii 227.

29. Mass.—McLeod v. Jones, 105 Mass. 403, 7 Am.R. 539.

30. Ala.—Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 358.

31. Wash.—Wynn v. Vessey, 221 P. 295, 127 Wash. 492.

32. N.Y.—Bayaud v. Fellows, 28 Barb. 451.
11 C.J. p 551 note 7.

33. Colo.—Hammond v. Soliday, 9 P. 781, 8 Colo. 610.
11 C.J. p 551 note 8.

34. Ind.—Lorch v. Aultman, 75 Ind. 162.

35. U.S.—St. Louis Boatmen's Bank v. Fritzlen, Kan., 221 F. 145, 137 C.C.A. 45.

36. Ark.—Chicago, etc., R. Co. v. Earl, 181 S.W. 925, 121 Ark. 514.

37. Ala.—Holman v. Ketchum, 45 So. 206, 153 Ala. 360.
11 C.J. p 552 note 14.

Binding contract

Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

38. Ala.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 239, reversing on other grounds 132 So. 608, 24 Ala.App. 202.

Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599.

Fla.—Mason v. City Finance Co., 151 So. 521, 113 Fla. 73.
N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575.
11 C.J. p 552 note 15.

39. Fla.—Mason v. City Finance Co., 151 So. 521, 113 Fla. 73.
Idaho.—Larsen v. Roberts, 187 P. 941, 32 Idaho 587.

Iowa.—Equitable Life Ins. Co. v. McNamara, 262 N.W. 466, 220 Iowa 297, supplementing opinion and denying rehearing Equitable Life Ins. Co. of Iowa v. McNamara, 259 N.W. 231, 220 Iowa 297.

40. Ala.—Holman v. Ketchum, 45 So. 206, 153 Ala. 360.
Minn.—Braley v. Byrnes, 21 Minn. 482.

11 C.J. p 552 note 16.

Effect of extension note

A stipulation empowering the mortgagee to seize the property before or after maturity is not nullified by an extension note expressly stating that it does not release the mortgage.—Bank of Andalusia v. Freeman, 75 So. 325, 200 Ala. 13.

41. Ala.—Hardison v. Plummer, 44 So. 591, 152 Ala. 619.

Neb.—Newlean v. Olson, 36 N.W. 155, 22 Neb. 717, 3 Am.S.R. 286.
11 C.J. p 552 note 17.

42. Idaho.—Larsen v. Roberts, 187 P. 941, 32 Idaho 587.

Possession of surety

Under a written contract providing that one should sign a note at a bank as surety, and that principal should thereupon buy certain material in the name of and for the sole use and benefit of the surety, and that on payment of the note the surety

gage as a whole. Where the mortgage specifies the terms under which the mortgagee may take possession, the mortgagor is vested with a possessory right until that time,⁴³ as where it is provided that the mortgagee may take possession on deeming himself insecure,⁴⁴ or on an attempt to remove the chattel from the state or county,⁴⁵ or on default.⁴⁶ If the mortgagor is given possession at the time of the execution of the mortgage, it will be presumed that the parties intended that he should retain it until condition broken;⁴⁷ but if the mortgagor is merely permitted to remain in possession, it has been held that the mortgagee may take possession at any time.⁴⁸ A stipulation will not be extended by construction beyond its plain terms.⁴⁹ The mortgagor's right to possession from an express or implied stipulation is a right personal to him and is not assignable.⁵⁰ Where a mortgage covering the accounts of the mortgagor permits him to remain in possession, he is entitled to sue in his own name on an account covered by the mortgage.⁵¹

§ 179. — Depreciation of Property as Authorizing Taking Possession

A mortgagor's right to possession may be lost by misuse of the property. A stipulation that the mortgagee may take possession in case of depreciation in the value

of the property contemplates a substantial or unreasonable depreciation.

A mortgagor's right to possession may be lost by such misuse of the mortgaged property as will necessarily injure its value.⁵² Where there is a stipulation in a mortgage that the mortgagee may take possession in case of a depreciation in the value of the property, this means a substantial or unreasonable depreciation, not a mere nominal diminution.⁵³ The standard is the value of the property at the time when the mortgage was executed,⁵⁴ and the jury determines whether the depreciation is sufficient to justify the mortgagee in taking possession.⁵⁵

§ 180. — Sale or Removal by Mortgagor as Authorizing Taking Possession

- a. In general
- b. Stipulation in mortgage

a. In General

A mortgagor's right to possession may be forfeited by a sale or disposition in derogation of the mortgagee's rights. Under statutes so providing, the mortgagee is entitled to possession where the mortgagor removes the chattel from the county.

A mortgagor's right to possession may be forfeited by a sale or disposition of the mortgaged prop-

should deliver and sell the property to a third person, the surety was prima facie entitled to possession of the property pending repayment of the note by the principal.—Larsen v. Roberts, *supra*.

43. Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

44. Ala.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 239, reversing on other grounds 132 So. 608, 24 Ala.App. 202.

Neb.—Newlean v. Olson, 36 N.W. 155, 22 Neb. 717, 3 Am.S.R. 286, 11 C.J. p 552 note 18.

45. Ala.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 239, reversing on other grounds 132 So. 608, 24 Ala.App. 202.

Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

46. Ala.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 239, reversing on other grounds 132 So. 608, 24 Ala.App. 202.

Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

Tex.—O'Neal v. Allison, Civ.App., 10 S.W.2d 257, 11 C.J. p 552 note 19.

However, it has also been held that the right of the mortgagee to possession before default is not im-

paired by the circumstance that the mortgage contains a provision permitting the mortgagee to take possession on maturity of the mortgage.—Ferguson v. Thomas, 26 Me. 499.

47. S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243.

Seizure immediately after delivery of possession

Where defendant sold an automobile to plaintiff by an order in which plaintiff stipulated that the title to, and right of, possession should remain in defendant until purchase price was fully paid, and plaintiff gave a chattel mortgage thereon to secure payment of part of purchase price, which did not provide for taking the automobile, if defendant felt itself insecure, a taking from plaintiff without his consent immediately after the sale and delivery was wrongful. — Sansone v. Studebaker Corporation of America, 187 P. 673, 106 Kan. 279.

48. Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204—McLoud v. Wakefield, 43 A. 179, 70 Vt. 558.

Possession permissive

Possession of a mortgaged chattel by the mortgagor, in the absence of stipulation, is permissive and not a matter of right.—Paska v. Saunders,

153 A. 451, 103 Vt. 204—Mason v. Sault, 108 A. 287, 93 Vt. 412—McLoud v. Wakefield, 43 A. 179, 70 Vt. 558.

49. Kan.—Lemaster v. Fisher, 108 P. 93, 82 Kan. 280.

11 C.J. p 553 note 27.

50. Ala.—Phillips v. Hartselle, 81 So. 857, 17 Ala.App. 79.

S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243, 11 C.J. p 553 note 28.

51. Mich.—Swan v. Thurman, 70 N.W. 1023, 112 Mich. 416.

52. Me.—Ripley v. Dolbier, 18 Me. 382.

53. Ill.—Solomon v. Friend, 42 Ill. App. 407.

11 C.J. p 553 note 31.

Failure to cultivate crops

Provisions authorizing mortgagee to take possession and sell, if mortgagor failed to cultivate crops, as in opinion of mortgagee they should be, did not authorize arbitrary opinion that mortgagor failed properly to cultivate crop.—Burns v. Broughton, 137 So. 418, 223 Ala. 527.

54. Mo.—Kerbs v. Zumwalt, 86 Mo. App. 128.

55. Mo.—Krebs v. Zumwalt, 91 Mo. App. 404—Hinton v. Spearman, 1 Mo.App. 501.

erty in derogation of the mortgagee's rights,⁵⁶ and in case of such a transfer, the mortgagee may re-take possession wherever he may find the property.⁵⁷

Statutory provisions preventing the removal of the mortgaged property from the county in which it is situated at the time of the execution of the mortgage gives the mortgagee, independent of any such provision in the mortgage, the right to the possession of the property in such case,⁵⁸ and after the mortgagee's death this statutory right may be exercised by his personal representative.⁵⁹ Such a statute does not apply where the chattel is removed from a temporary situs to the county stated in the mortgage to be the mortgagor's residence.⁶⁰

b. Stipulation in Mortgage

A stipulation that the mortgagee may take possession of the property if it is sold, assigned, or removed by the mortgagor is valid and enforceable although default in payment has not been made.

A stipulation that the mortgagee may take possession of the property if it is sold, assigned, or removed by the mortgagor is valid,⁶¹ and it is enforceable, if the alleged breach is sufficiently prov-

ed,⁶² and the condition is not waived⁶³ or modified by a subsequent stipulation or agreement,⁶⁴ although default in payment has not been made.⁶⁵ Under a clause authorizing the mortgagee to sell the property on any attempted disposition thereof by the mortgagor, such a disposition gives him an immediate right to possession,⁶⁶ and he can sue a third person who converts the property before the maturity of the mortgage debt.⁶⁷ The mortgagor is not in fault, however, for not delivering the goods if they are not demanded.⁶⁸

What constitutes a breach. It has been held sufficient to constitute a breach of a stipulation not to sell, remove, or dispose of the mortgaged property that the mortgagor sold a part thereof,⁶⁹ that a portion of the property was consumed,⁷⁰ that the property was converted by a third person,⁷¹ or that the mortgagor removed it out of the state, without regard to the purpose for which the removal was made;⁷² but a temporary loan of the mortgaged chattel,⁷³ the hiring of a person to keep charge of the property,⁷⁴ or a sale or removal not impairing the security,⁷⁵ is not a breach entitling the mortgagee to possession. A seizure on distress warrant,⁷⁶ and by levy of attachment,⁷⁷ or by vir-

56. S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243.

11 C.J. p 553 note 25.

57. S.C.—Hill v. Winnsboro Granite Corporation, *supra*.

11 C.J. p 553 note 29.

58. Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

Tex.—Self Motor Co. v. First State Bank of Crowell, Civ.App., 226 S.W. 428.

11 C.J. p 551 note 4.

Instrument in form of bill of sale

Civ.Code § 2966, authorizing mortgagee to take possession of the property and dispose of it as a pledge if mortgagor removes it from the county in which it was situated when mortgaged, is inapplicable where instruments are in form of bill of sale and conditional agreement of sale back, and give a lien only by reason of the nature of the transaction, one to secure a loan and its repayment. —Bonestell v. Western Automotive Finance Corporation, 232 P. 734, 69 Cal.App. 719.

59. Tex.—Kelly v. Wimbish, Civ. App., 65 S.W. 386.

60. Cal.—Bonestell v. Western Automotive Finance Corporation, 232 P. 734, 69 Cal.App. 719.

61. Minn.—Plano Mfg. Co. v. Hallberg, 63 N.W. 1114, 61 Minn. 528. 11 C.J. p 553 note 34.

62. Ala.—Watkins v. Citizens' Bank,

157 So. 438, 439, 229 Ala. 405, citing *Corpus Juris*.

Ind.—Automobile Discount Co. v. Ball, 151 N.E. 438, 84 Ind.App. 483. Mo.—Robinson-Hoover Cattle Loan Co. v. Sifferman, App., 37 S.W.2d 974.

N.Y.—Liebman v. Brockway Motor Truck Corporation, 249 N.Y.S. 39, 140 Misc. 73.

Tex.—Runnels Chevrolet Co. v. Clifton, Civ.App., 46 S.W.2d 426.

11 C.J. p 553 note 35.

Breach as to place of pasturing cattle

Mo.—Robinson-Hoover Cattle Loan Co. v. Sifferman, App., 37 S.W.2d 974.

Provision confers option

Ill.—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 148.

63. Minn.—Nash v. Larson, 83 N.W. 451, 80 Minn. 458, 81 Am.S.R. 272. 11 C.J. p 553 note 36.

64. Mo.—Holloway v. Arnold, 5 S.W. 277, 92 Mo. 293.

11 C.J. p 553 note 37.

65. Wyo.—Reynolds v. Morton, 154 P. 325, 23 Wyo. 528.

66. Tex.—Kelly v. Wimbish, Civ. App., 65 S.W. 386.

11 C.J. p 553 note 39.

Necessity that mortgagor be insolvent

Where the mortgagee has a right to take possession of the property on a sale by the mortgagor without the former's consent, such right becomes absolute on breach of the condition,

and it is not necessary, therefore, to show that the mortgagor was insolvent.—Conwell v. Jeger, 51 N.E. 733, 21 Ind.App. 110.

67. N.Y.—Balz v. Shaw, 34 N.Y.S. 5, 13 Misc. 181.

N.D.—Ellestad v. Northwestern El. Co., 69 N.W. 44, 6 N.D. 88.

68. Mich.—Cadwell v. Pray, 2 N.W. 52, 41 Mich. 307.

11 C.J. p 553 note 41.

69. Mich.—Lang v. Perrott, 12 N.W. 192, 48 Mich. 298.

11 C.J. p 554 note 43.

70. Ill.—Mathews v. Granger, 66 Ill. App. 121.

Feeding mortgaged crop to live stock Ill.—Mathews v. Granger, *supra*.

71. N.D.—Ellestad v. Northwestern El. Co., 69 N.W. 44, 6 N.D. 88.—Sandager v. Northern Pac. Elevator Co., 48 N.W. 438, 2 N.D. 3.

72. Minn.—King v. Wright, 30 N.W. 448, 36 Minn. 128.

73. Ind.—Jones v. Smith, 24 N.E. 368, 123 Ind. 585.

74. Mo.—Munday v. Britton, 222 S. W. 504, 205 Mo.App. 153.

75. Mo.—Citizens' Bank v. Tyler, App., 226 S.W. 603.

11 C.J. p 554 note 49.

Sale to purchase other equipment Mo.—Citizens' Bank v. Tyler, *supra*.

76. N.Y.—Conkey v. Hart, 14 N.Y. 22.

77. Mo.—Western Union State Bank v. Keeney, 114 S.W. 553, 134 Mo.

tue of a writ of execution,⁷⁸ or the fact that the mortgagor has filed a voluntary petition in bankruptcy,⁷⁹ have been regarded as a breach and sufficient to justify the mortgagee in taking possession; but it has also been decided that an attachment in due course of law is not a selling.⁸⁰ It has been held that the execution of a second mortgage on the property is a breach of this stipulation,⁸¹ but the contrary has also been held.⁸²

§ 181. — In Case of Levy on Chattels

A condition that the mortgagee may take possession in case a levy is made on the property is valid and enforceable although the debt is not yet due.

A condition in a mortgage that the mortgagor shall not permit a levy to be made on the property and that the mortgagee may take possession in case a levy is made is a valid stipulation,⁸³ and immediately on a levy being made the right of possession vests in the mortgagee,⁸⁴ even though the mortgage debt is not yet due.⁸⁵

§ 182. — Insecurity Clause in Mortgage

a. In general

b. When right may be exercised

a. In General

A stipulation giving the mortgagee a right to take possession of the property if he feels insecure is valid and enforceable, but the mortgagee must not secure possession by force or stealth.

A stipulation in a mortgage giving the mortgagee a right to take possession of the mortgaged chattels in case he feels insecure is valid⁸⁶ and enforceable⁸⁷ without the mortgagor's consent,⁸⁸ although the mortgage debt, or an installment thereof, is not due⁸⁹ or the time for payment thereof has been extended.⁹⁰ Under an insecurity clause a mortgagee has been allowed to maintain an action against a third person for the possession of the property before the maturity of the mortgage debt,⁹¹ or trover for its value;⁹² but he must not resort to force or stealth to secure possession from the mortgagor and is obliged to seek his remedy by action in the absence of consent.⁹³ When the right to repossess the property is exercised, the mortgagee must sell the property if the terms of the mortgage so provide.⁹⁴ An insecurity clause in a mortgage is not a personal covenant and hence it is transferable.⁹⁵

b. When Right May Be Exercised

Generally, to justify the exercise of the right to take possession under an insecurity clause the mortgagee must act reasonably and in good faith on probable cause to apprehend loss of the security, but in some jurisdictions he has an absolute discretion, at least if he exercises it in good faith.

The right of a mortgagee to take possession under an insecurity clause is operative when a substantial change has taken place in the security which places the mortgagee in a less favorable position.⁹⁶

App. 74—Kennedy v. Dodson, 44 Mo.App. 550.

78. Mo.—State v. Althaus, 60 Mo. App. 122.

Ohio.—Ashley v. Wright, 19 Ohio St. 291.

11 C.J. p 554 note 53.

79. U.S.—Moore v. Young, C.C.Ind., 17 F.Cas.No.9,782, 4 Biss. 128.

80. N.Y.—Carpenter v. Town, Lalor 72.

81. Mo.—Chrisman-Sawyer Baking Co. v. Strahorn-Hutton-Evans Commn. Co., 80 Mo.App. 438.

11 C.J. p 554 note 56.

82. Minn.—Donovan v. Sell, 66 N. W. 722, 64 Minn. 212.

83. N.Y.—Robertson v. Ongley Electric Co., 40 N.E. 390, 146 N.Y. 20, affirming 31 N.Y.S. 605, 82 Hun 585. 11 C.J. p 554 note 58.

84. Colo.—Hawkes v. First Nat. Bank, 224 P. 224, 75 Colo. 47. 11 C.J. p 554 note 59.

Lien for repairs

Under a mortgage on a truck, reciting that if it should be attached or claimed by any other person at any time before payment, the mortgagee might take immediate possession, the mortgagee's rights became fixed when a garageman claimed a lien for repairs.—Hawkes v. First Nat. Bank, *supra*.

85. Iowa.—Wells v. Chapman, 13 N. W. 841, 59 Iowa 658.

86. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570—R. P. Harris & Co. v. Thomas, 88 So. 51, 17 Ala.App. 634.

N.Y.—Carter v. Phillips, 217 N.Y.S. 621, 127 Misc. 903.

Tex.—Central Transfer & Storage Co. v. Wichita Falls Motor Co., Civ. App., 222 S.W. 683.

11 C.J. p 554 note 61.

87. Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136.

Tex.—Central Transfer & Storage Co. v. Wichita Falls Motor Co., Civ. App., 222 S.W. 683.

11 C.J. p 555 note 62.

88. Tex.—Jesse French Piano, etc., Co. v. Elliott, Civ.App., 166 S.W. 29.

89. Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136.

11 C.J. p 555 note 64.

90. Mich.—Beckman v. Noble, 73 N. W. 803, 115 Mich. 523.

11 C.J. p 555 notes 65, 66.

91. N.Y.—Chadwick v. Lamb, 29 Barb. 518.

11 C.J. p 555 note 67.

92. Mich.—McGraw v. Bishop, 48 N. W. 167, 85 Mich. 72.

11 C.J. p 555 note 68.

93. Mo.—See v. Automobile Discount Corporation, 50 S.W.2d 993, 330 Mo. 906.

11 C.J. p 555 note 69.

Unauthorized taking by sheriff

Automobile dealer's and discount corporation's repossessing car under insecurity clause of purchase mortgage before buyer's default, through an unauthorized act of the sheriff acting *colore officii*, was held forcible taking constituting civil trespass entitling buyer to damages.—See v. Automobile Discount Corporation, *supra*.

94. Ill.—Van Zele v. Cleaveland, 208 Ill.App. 397.

Taking possession of part only

A mortgagee cannot take possession of part only and retain his lien as to the remainder as to third persons, but must, as the insecurity clause requires, declare the whole debt due, sell the property, and account for the proceeds.—Van Zele v. Cleaveland, *supra*.

95. Ohio.—Johnson v. Thayer, 4 N. E.2d 172, 53 Ohio App. 25.

96. Ala.—R. P. Harris & Co. v. Thomas, 88 So. 51, 17 Ala.App. 634.

N.D.—Englund v. Souther, 133 N.W.

Although the ordinary wording of the insecurity clause is that the mortgagee may take possession whenever he "deems" himself insecure, the prevailing doctrine is that an arbitrary power is not conferred and he must act reasonably and have probable cause to apprehend the loss of his claim to justify a taking,⁹⁷ although if he acts in good faith with probable cause, he may determine for himself whether he is unsafe in his security,⁹⁸ and it is not necessary that the mortgage be actually insecure.⁹⁹ In some jurisdictions, however, a somewhat different doctrine has been adopted wherein the mortgagee has an absolute discretion in declaring a forfeiture of possession regardless of whether he has reasonable grounds for deeming it necessary,¹ at least if he, in fact, does feel insecure or believes in good faith that taking of possession is necessary to protect his security.² In determining

whether a mortgagee had reasonable ground to believe that he was in danger of losing his security, any competent relevant evidence may be admitted,³ and where the evidence is conflicting, the question of the mortgagee's good faith and the existence of reasonable grounds for his action are for the jury.⁴

§ 183. After Default in General

Subject to some authority to the contrary, the general rule is that the mortgagee is entitled to possession on default or breach of condition for the limited purpose of foreclosure and sale, if the right is not waived. A notice or demand for possession is unnecessary unless there is a stipulation therefor. A junior mortgagee has no higher right to possession than the mortgagor as against a senior mortgagee.

As a general rule, in some instances under statutes so providing, on default or breach in the condition of the mortgage, the mortgagee obtains an immediate right to possession of the property,⁵ with-

301, 22 N.D. 261, 265, Ann.Cas. 1914B 1095.

11 C.J. p 555 note 72 [a].

Abandonment by mortgagor

Under an insecurity clause, a mortgagee is justified in taking charge of stock abandoned by mortgagor.—Glaser v. Henderson, Tex. Civ.App., 2 S.W.2d 987, 989, citing *Corpus Juris*.

Subjecting property to liens

Mortgagee of a mule, sold to the mortgagor, a tenant, validly took possession under insecurity clause, where the tenant changed landlords and the second landlord was to make advances with incident liens taking priority of the mortgage.—R. P. Harris & Co. v. Thomas, 88 So. 51, 17 Ala.App. 634.

Conditions justifying writ of sequestration

An insecurity clause authorizes a seizure of the mortgaged property without reference to conditions legally justifying issuance of writ of sequestration.—Guaranty Securities Co. v. Brown, Tex.Civ.App., 254 S.W. 240, reversed on other grounds Brown v. Guaranty Securities Co., Com.App., 265 S.W. 547.

97. Ala. — Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 613, 222 Ala. 329, citing *Corpus Juris*—R. P. Harris & Co. v. Thomas, 88 So. 51, 17 Ala.App. 634.

Mont.—James v. Speer, 220 P. 535, 537, 69 Mont. 100, quoting *Corpus Juris*.

N.Y.—Carter v. Phillips, 217 N.Y.S. 621, 127 Misc. 903.

Tex.—Wallace v. Burson, Civ.App., 86 S.W.2d 803, 805, error granted, quoting *Corpus Juris*—Cleveland State Bank v. Turner, Civ.App., 278 S.W. 1107, 1112, citing *Corpus Juris*.

Wash.—Woodruff v. Stahl, 217 P. 1013, 1014, 126 Wash. 184, citing *Corpus Juris*.

11 C.J. p 555 notes 70, 71.

Change should reasonably appear

Under a mortgage authorizing the mortgagee to repossess automobile whenever he deems debt insecure, change in status of security, or of debtor affecting security, should reasonably appear.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 329, reversing 132 So. 608, 24 Ala.App. 202.

Mortgagee's good faith established

In an action by chattel mortgagors of stock, farm machinery, tools, etc., against the mortgagees, who were also mortgagees of the farm, for conversion of the mortgaged chattels, the fact that the hay and grain crops were practically failures, that mortgagors had sold some of the stock and were seeking to sell the hay, and that one of the mortgagors had virtually abandoned the property, were held to establish mortgagees' good faith in taking possession under insecurity clause.—Harvey v. Weaver, 201 N.Y.S. 274.

98. Ala. — Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 329, reversing 132 So. 608, 24 Ala.App. 202.

Mont.—James v. Speer, 220 P. 535, 69 Mont. 100.

99. Ala. — Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 329, reversing 132 So. 608, 24 Ala.App. 202.

11 C.J. p 555 note 72.

1. Wis.—Hill v. Merriman, 40 N.W. 399, 72 Wis. 483.

11 C.J. p 556 note 73.

2. Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App.

136—Johnson v. Thayer, 4 N.E.2d 172, 53 Ohio App. 25.

11 C.J. p 556 notes 73 [a], 74.

3. Ill.—Hogan v. Akin, 55 N.E. 137, 181 Ill. 448, reversing 81 Ill.App. 62.

11 C.J. p 556 note 75.

4. Mich.—Crowley v. Langdon, 86 N.W. 391, 127 Mich. 51.

11 C.J. p 556 note 76.

5. U.S.—White v. General Motors Acceptance Corporation, D.C.Ky., 2 F.Supp. 406.

Ala.—International Harvester Co. of America v. Pittman, 147 So. 144, 226 Ala. 355, citing *Corpus Juris*.

Ark.—Starling v. Hamner, 50 S.W.2d 612, 185 Ark. 930.

Colo.—International Harvester Co. of America v. Lawrence Inv. Co., 37 P.2d 529, 95 Colo. 523—McCormick v. First Nat. Bank, 299 P. 7, 88 Colo. 599—Rocky Mountain Seed Co. v. McArthur, 272 P. 1117, 85 Colo. 1.

D.C.—Rhodes v. Freeman, 14 F.2d 247, 56 App.D.C. 355.

Ill.—Greenspahn v. Ehrlich, 277 Ill. App. 322—Matson v. City Market Co., 262 Ill.App. 200.

Me.—Gilpatrick v. Chamberlain, 118 A. 481, 121 Me. 561.

Md.—Burton v. Jennings, 148 A. 424, 158 Md. 254—Clemmitt v. Miehle Printing Press & Mfg. Co., 110 A. 713, 136 Md. 385.

Mo.—Blake v. Keiser, App., 267 S.W. 94.

Nev.—State v. Bacha, 194 P. 1066, 44 Nev. 373.

N.Y.—Brockway Motor Truck Co. v. Selzer, 252 N.Y.S. 615, 141 Misc. 358, modified on other grounds Brockway Motor Truck Corporation v. Selzer, 255 N.Y.S. 982, 235 App.Div. 759.

Ohio.—Morris v. Commercial Credit Co., 9 N.E.2d 880, 55 Ohio App. 391

out consent on the part of the mortgagor,⁶ and regardless of possession of the mortgage note;⁷ but in some jurisdictions, under the theory that he still possesses merely a lien, the mortgagee is not entitled to possession before foreclosure, although default has been made in the conditions of the mortgage.⁸

The right of the mortgagee to the possession continues as long as any part of the mortgage debt remains due;⁹ and this right is not affected by partial payments having been made on the mortgage debt,¹⁰ by any agreement with the mortgagor that is not supported by a sufficient consideration,¹¹ or

by the appointment of a receiver.¹²

If the debt is past-due at the time of the execution of the mortgage, it is immediately payable, and the mortgagee is entitled to possession at once after the execution and delivery of the mortgage.¹³

Unless stipulated otherwise in the mortgage,¹⁴ the mortgagee's right to possession is not absolute but it is limited to possession for the purpose of foreclosure or sale,¹⁵ although it is not conditioned on his payment of the difference between the value of the property and the amount of the debt.¹⁶ His right to possession is not postponed by an agreement to extend the time for payment of the debt.¹⁷

—Commercial Credit Co. v. Standard Baking Co., 187 N.E. 251, 45 Ohio App. 403—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482.

Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194—Corbin v. Preston, 218 P. 917, 109 Or. 230.

S.C.—Cox v. Harrison, 172 S.E. 417, 171 S.C. 445—Cherry v. Singer Sewing Mach. Co., 164 S.E. 126, 165 S.C. 451—Lee v. National Furniture Stores, 161 S.E. 450, 163 S.C. 204—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257—Rainwater v. Merchants' & Farmers' Bank of Cheraw, 93 S.E. 770, 108 S.C. 205—Merchants' & Planters' Bank v. Brigman, 91 S.E. 332, 106 S.C. 362, L.R.A.1917E 925.

S.D.—Aalseth v. Simpson, 231 N.W. 289, 57 S.D. 118.

Vt.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

11 C.J. p 556 note 77—42 C.J. p 760 note 82.

In Texas

(1) After default or breach of condition, the mortgagee is entitled to take possession.—Terry v. Spearman, Com.App., 259 S.W. 563, reversing on other grounds, Civ.App., 246 S.W. 103—Moore-Hustead Co. v. Joseph W. Moon Buggy Co., Civ.App., 221 S.W. 1032.

(2) Under a former rule, the mortgagor was entitled to possession before foreclosure.—Groos v. Iowa Park First Nat. Bank, Civ.App., 72 S.W. 402.

(3) The early Texas rule was applied where the respective rights of the parties were to be determined by Texas law.—Roach v. St. Louis Type Fdy., 21 Mo.App. 118.

Effect of statute requiring sale

A statute which requires the mortgagee to sell at public auction impliedly authorizes him to take possession of the property for that purpose.—Wixom v. Davis, 207 P. 694, 57 Cal.App. 520.

Contract giving mortgagor use of property

Mortgages were held not superseded by a written contract in which the mortgagee gave the mortgagor the use of the property, so that the mortgagor was not given an absolute right of possession extending beyond the time at which the mortgagee demanded the return of the property.—Haddam State Bank v. McHenry, 213 P. 1059, 113 Kan. 39.

Mortgage of crops

When so provided by statute, a mortgage of crops which confers the legal title confers the right to possession after the last day.—Faulk v. Dorsey, 166 So. 792, 232 Ala. 85—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., 75 So. 568, 200 Ala. 120.

6. Mo.—Meyer Bros. Drug Co. v. Self, 77 Mo.App. 284.

11 C.J. p 557 note 78.

7. Iowa.—Peppers v. Harris, 124 N.W. 625, 145 Iowa 635.

8. Fla.—Snow v. Nowlin, 169 So. 598, 125 Fla. 166—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35—Louisville, etc., R. Co. v. Wang, 55 So. 73, 61 Fla. 299.

9. U.S.—People's Sav. Inst. v. Miles, S.D., 76 F. 252, 22 C.C.A. 152.

11 C.J. p 557 note 82.

10. Ala.—Burns v. Campbell, 71 Ala. 271.

S.C.—Wallingford v. Aiken, 22 S.E. 372, 44 S.C. 396.

11 C.J. p 557 note 83.

Application of proceeds of other chattels

(1) If mortgagee was authorized by mortgagor to apply proceeds of part of mortgaged property to payment of open account and then to mortgage debt, as against mortgagor and another mortgagee not asserting any rights, mortgagee was entitled to possession of sufficient of property to satisfy balance of mortgage debt.—Conrad Mercantile Co. v. Siler, 241 P. 617, 75 Mont. 36.

(2) Right to possession of mortgaged chattels was held not affected by failure to apply proceeds of other mortgaged chattels previously sold on mortgage notes which far exceeded such proceeds.—Sholes v. Citizens' State Bank of Holyoke, 261 P. 456, 82 Colo. 432.

11. Ala.—Black v. Slocumb Mule Co., 62 So. 308, 8 Ala.App. 440.

12. N.Y.—Gardner v. Smith, 29 Barb. 68.

S.D.—Albien v. Smith, 128 N.W. 714, 26 S.D. 551.

11 C.J. p 557 note 85.

13. Cal.—Summerville v. Stockton Milling Co., 76 P. 243, 142 Cal. 529.

11 C.J. p 557 note 81.

14. Tex.—Betty v. Tuer, Civ.App., 292 S.W. 271.

15. U.S.—White v. General Motors Acceptance Corporation, D.C.Ky., 2 F.Supp. 406.

Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591.

Ky.—Commercial Credit Co. v. Cooper, 55 S.W.2d 381, 246 Ky. 513.

Mo.—Munday v. Britton, 222 S.W. 504, 205 Mo.App. 153.

N.Y.—Brockway Motor Truck Co. v. Selzer, 252 N.Y.S. 615, 141 Misc. 383, modified on other grounds Brockway Motor Truck Corporation v. Selzer, 255 N.Y.S. 982, 235 App.Div. 759.

Tex.—Barr v. White, Civ.App., 47 S.W.2d 910—Tipper v. McClain, Civ. App., 223 S.W. 349.

Utah.—Morgan v. Layton, 208 P. 505, 60 Utah 280.

16. U.S.—Wagoner Nat. Bank v. Welch, 164 F. 813, 90 C.C.A. 589, reversing 104 S.W. 610, 7 Ind.T. 859.

17. Mo.—Bowens v. Benson, 57 Mo. 26—Connersville Buggy Co. v. Lowry, 77 S.W. 771, 104 Mo.App. 186.

A mortgagee cannot seize the chattel for failure to pay the indebtedness when due where on inquiry, he fails to inform the mortgagor as to the amount due, the amount being unascertained at the time of the execution of the mortgage, for under such circumstances the mortgagor is not in default.¹⁸

Where a bond to retain possession has been given by the mortgagor, the mortgagee is not entitled to possession.¹⁹

Where the mortgagor remains in possession after default with the permission and by the consent of the mortgagee, the mortgagor's rights and liabilities are those of a bailee.²⁰

A mortgagee is not required by law to pay off prior mortgages or to perform conditions necessary to perfect title to any of the mortgaged property, even though the property is lost through omission so to do,²¹ nor does he become liable for the debts of the mortgagor by taking over his property and business,²² and his possession is not conditioned on the assumption of any obligations or indebtedness incurred by the mortgagor.²³

Notice or demand. In the absence of a stipulation in the mortgage it is not necessary that the mortgagee should give notice of his intention to take possession on breach of condition,²⁴ nor make a prior demand.²⁵ However, where the debt secured by a mortgage is payable on demand, and the mortgagor is entitled to possession until breach of condition, the mortgage will not become absolute so that the mortgagee will have the right of possession

until demand for payment is made.²⁶ A demand is not necessary when the mortgage does not state when the debt is to be paid, since it is due immediately, and, payment not being made, the mortgagee's title becomes absolute.²⁷

Waiver or estoppel. Where the chattel mortgagee does not repossess the chattel after condition broken the presumption is that the right to declare condition broken is waived.²⁸ So, where the mortgagee receives payment of the indebtedness due, after default, he thereby waives his right to immediate possession,²⁹ but a mere demand for payment is not a waiver of the right to possession.³⁰ A mortgagee's right to possession of mortgaged cattle is not affected by the placing of different brands on the cattle after the execution of the mortgage where the branding has been done without the consent of the mortgagee.³¹

Mortgage securing several notes. Where several notes maturing at different dates are covered by the mortgage, and failure to pay any of the notes constitutes a breach of condition, the mortgagee may take possession on the first default³² or may delay until the maturity of the last note;³³ but where the mortgagor pays the mortgagee enough to satisfy the first of two notes covered by the mortgage, the mortgagee may not interfere with the property until the mortgagor's default in the payment of the second note.³⁴ In replevin by the mortgagee to recover the mortgaged chattels from the holder of a portion of the notes secured by the mortgage, it has been held that equities as between the

18. Tex.—Baughn v. Hensley, Civ. App., 14 S.W.2d 368.*

19. S.C.—Cox v. Harrison, 172 S.E. 417, 171 S.C. 445.

Possession during determination of amount due

In action to foreclose chattel mortgage given to secure one hundred fifty dollar note of mortgagor who executed bond to retain possession of property, allegations in answer that mortgagee paid mortgagor one hundred thirty dollars for note, and that mortgagor only owed mortgagee one hundred thirty dollars was held to raise issue of amount of mortgage debt, which must be determined by jury before mortgagee could have possession of property.—Cox v. Harrison, supra.

20. N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

21. Me. — Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 108 Me. 206.

22. Ill.—Klein v. Stubbe, 190 Ill. App. 211.

23. Me. — Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 108 Me. 206.
11 C.J. p 557 note 87.

24. N.Y. — Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512.
Okl.—Malone v. Darr, 62 P.2d 1254, 1256, 178 Okl. 443, quoting *Corpus Juris*.
11 C.J. p 558 note 92.

25. Okl.—Malone v. Darr, supra.
11 C.J. p 558 note 93.

26. N.Y.—Ely v. Carnley, 19 N.Y. 496—Carpenter v. Town, Lator 72.
11 C.J. p 558 note 94.

27. N.Y.—Howland v. Willett, 5 N.Y. Super. 607.

28. Ohio.—Commercial Credit Co. v. Standard Baking Co., 187 N.E. 251, 45 Ohio App. 403.

29. Mo.—Lange v. Midwest Motor Securities Co., App., 231 S.W. 272.
11 C.J. p 558 note 96.

Failure to receive offer of extension

Where mortgagor of automobile did not receive letter from mortgagee demanding payment of overdue installment note until after car had been taken by mortgagee, there was no acceptance of its offer by the mortgagor, who did not act on it to his injury, or part with any consideration for it, to effect a contract of extension of the note, or waiver of right to take possession.—Lipper v. McClain, Tex.Civ.App., 223 S.W. 349.

30. Me.—Greene v. Dingley, 24 Me. 131.

31. Tex.—Citizens' Loan Inv. Co. v. Young, Civ.App., 247 S.W. 662.

32. Ill.—Blake-Silkwood Motor Co. v. Spire, 245 Ill.App. 148.
Tex.—Lipper v. McClain, Civ.App., 223 S.W. 349.

11 C.J. p 558 note 1.

33. Ill.—Blake-Silkwood Motor Co. v. Spire, 245 Ill.App. 148.
11 C.J. p 558 note 2.

34. Mo.—Miller v. Biggs, App., 183 S.W. 713.

parties may be adjusted.³⁵ Where a chattel mortgage secures an aggregate indebtedness made up of notes payable to several mortgagees, and maturing at successive periods, no one mortgagee has the right to take possession of the property when his claim becomes due.³⁶

Note payable in installments. Where a note secured by a chattel mortgage is payable in installments, the mortgagee is not obligated to take possession on default in one of the installments, although he may do so,³⁷ or he may wait until the entire debt secured by the mortgage becomes due.³⁸

An equitable mortgage of chattels, containing no words of alienation, does not authorize the mortgagee to seize the property on default, but his remedy is in a court of equity.³⁹

Rights of junior encumbrancers. In the absence of fraud, a junior mortgagee, after condition broken, is entitled to possession of the property as against the whole world except the holder of the senior mortgage.⁴⁰ A junior mortgagee has no higher right to possession than the mortgagor as against the senior mortgagee.⁴¹ Where a second mortgage is executed after breach in the condition of the first mortgage, the second mortgagee cannot recover possession of the property from the mortgagor after default, his only remedy being to redeem from the first mortgage.⁴² A prior mortga-

gee is not bound to exercise diligence in acquiring possession of the property on the maturity of his mortgage, as against one who, after such maturity and with knowledge of its existence, takes another mortgage as security merely for a preëxisting debt.⁴³

After foreclosure. After foreclosure the mortgagee is entitled to take possession of the chattels covered by the mortgage for the purpose of delivering them to the purchaser under the foreclosure proceeding,⁴⁴ and to obtain possession for such purpose, the mortgagee has an implied, irrevocable license to enter the premises in a peaceable and reasonable manner and to take away the goods mortgaged.⁴⁵

§ 184. — Effect of Stipulations in Mortgage

The mortgagee is ordinarily regarded as entitled to possession after default or breach of condition where the mortgage so stipulates, although his taking possession does not confer ownership upon him or cut off the mortgagor's right of redemption.

A stipulation that on default or breach of condition the mortgagee may take possession is valid,⁴⁶ unless it is inseparable from an invalid provision of the mortgage,⁴⁷ and, as a general rule, the mortgagee is entitled to possession in accordance with its terms,⁴⁸ although in a jurisdiction where the mort-

35. Mo.—Campbell Printing Press, etc., Co. v. Roeder, 44 Mo.App. 324.

36. Ill.—Gaar v. Centralia First Nat. Bank, 20 Ill.App. 611.

37. Ill.—Keelin v. Postlewait Co., 102 N.E. 205, 259 Ill. 130, affirming 174 Ill.App. 71—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 148.

Waiver

That previous installments under a mortgage are accepted after default may constitute a waiver of the right to declare the entire indebtedness due for those defaults, but such fact will not constitute a waiver as to a default thereafter which is not waived.—Lange v. Midwest Motor Securities Co., Mo.App., 231 S.W. 272.

38. Ill.—Keelin v. Postlewait Co., 102 N.E. 205, 259 Ill. 130, affirming 174 Ill.App. 71—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 148.

39. S.C.—Davis v. Childers, 22 S.E. 784, 45 S.C. 133, 55 Am.S.R. 757. 11 C.J. p 558 note 91.

40. Mo.—Western Union State Bank v. Keeney, 114 S.W. 553, 134 Mo. App. 74.

N.J.—Finkel v. Lepkin, 41 A. 718, 62 N.J.Law 580.

41. S.C.—Dickerson v. Cleland, 112 S.E. 920, 120 S.C. 221.

42. S.C.—Martin v. Jenkins, 27 S.E. 947, 51 S.C. 42.

43. Colo.—Cassidy v. Harrelson, 29 P. 525, 1 Colo.App. 458.

44. Mo.—Pace v. Pierce, 49 Mo. 393.

45. Mass.—McNeal v. Emerson, 15 Gray 384.

11 C.J. p 558 note 7.

46. Tex.—Butler Motor Co. v. Neimeyer, Civ.App., 57 S.W.2d 228—Carter v. Haynes, Civ.App., 269 S.W. 216, 221, citing *Corpus Juris*.

11 C.J. p 559 note 10.

47. Cal.—Bonestell v. Western Auto Motive Finance Corp., 232 P. 734, 69 Cal.App. 719—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.

Attempt to give absolute title

(1) In a so-called lease, which was in effect a mortgage, and which gave the mortgagee the right to possession and absolute title on the mortgagor's default in making any payment, the provision giving absolute title was inseparable from that giving right to possession, and both were invalidated by the invalidity of the former.—Blodgett v. Rheinschild, *supra*.

(2) A provision in a mortgage that in case of default all rights of the mortgagor shall be forfeited and the possession of the car passed to the

mortgagee discharged from further liability is ineffectual, the stipulation purporting to give the mortgagee the right to take possession being so inseparably connected with the provision attempting to cut off the debtor's equity of redemption that it must be held void in toto.—Bonestell v. Western Auto Motive Finance Corp., 232 P. 734, 69 Cal. App. 719.

48. U.S.—White v. General Motors Acceptance Corporation, D.C.Ky., 2 F.Supp. 406.

Cal.—Bloomquist v. Haley, 268 P. 364, 204 Cal. 258—A. Paladini, Inc., v. Dorchman, 75 P.2d 553, 24 Cal. App.2d 440.

Colo.—McCormick v. First Nat. Bank of Mead, 299 P. 7, 10, 88 Colo. 599, citing *Corpus Juris*.

Kan.—Davidson & Case Lumber Co. v. Anderson, 187 P. 872, 106 Kan. 213.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Okl.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231.

Tex.—Clow Gasteam Heating Co. v. Hixson, Civ.App., 67 S.W.2d 619, error dismissed—Raymer v. Houghton, Civ.App., 39 S.W.2d 941, error dismissed—Butts v. Lucia,

gagee has no right to possession before foreclosure, it has been held that a stipulation does not confer this right.⁴⁹ In accordance with the general rule, a mortgagee who peaceably exercises his right to repossess the property cannot be held liable for damages or for conversion.⁵⁰ The stipulation may be enforced even against the personal representative of the mortgagor after the death of the latter,⁵¹ and is coupled with an interest and is irrevocable.⁵² The permission to take possession confers no greater right than the mortgagee would have had by operation of law,⁵³ and the taking of possession does not confer ownership upon the mortgagee or, other than enhancing his security, enlarge his interest,⁵⁴ or cut off the mortgagor's right of redemption.⁵⁵ After taking possession, the mortgagee must conform to the letter and the spirit of the mortgage.⁵⁶ If the mortgagee institutes foreclosure proceedings

instead of taking possession under the stipulation, he cannot claim title to the property under such provision.⁵⁷ A mortgagee has no right to possession where the mortgage reserves it to the mortgagor on default.⁵⁸ A statute which gives the mortgagee the right of immediate possession on default or breach of condition does not control where the parties provide by contract the terms and conditions under which the mortgagee is entitled to possession.⁵⁹ A contract postponing the date when the mortgagee is entitled to possession, founded on a valid consideration, is valid.⁶⁰

Installments and series of notes. The mortgagee of a chattel has the right to take possession thereof on default in payment of an installment or any of a series of notes, where the mortgage provides for taking possession in case of default,⁶¹ even in the absence of an acceleration clause.⁶²

Civ.App., 153 S.W. 686—Groos v. Iowa Park First Nat. Bank, Civ. App., 72 S.W. 402.
42 C.J. p 760 notes 84-86.

Attempt to defraud

Under an indemnity mortgage providing that the mortgaged property shall vest in the mortgagee when the mortgagor attempts to defraud, the mortgagee may take possession of the property in the event that the mortgagor attempts to defraud him by some act having a tendency to defeat the mortgage security.—Sidener v. Bible, 43 Ind. 230—11 C.J. p 560 note 20.

Deed in escrow

Where owner placed deed to mortgagee in escrow making return of deed dependent on owner's performance of certain conditions, on owner's violation of such conditions, mortgagee could take possession of mortgaged property under mortgage default clause, notwithstanding escrow period had not expired, as against assignee of owner's right in property who received no assignment of owner's rights under escrow agreement.—Woods Leasing Co. v. Funcheon, 25 P.2d 47, 134 Cal.App. 111.

Effect of unfilled blank in mortgage

That blank in mortgage authorizing mortgagee to take possession on default was not filled in did not deprive mortgagee of right to proceed under such provision.—Baierl v. Riesenecker, 230 N.W. 605, 201 Wis. 454, reversing on other grounds 227 N.W. 9, 201 Wis. 454.

49. Fla.—Snow v. Nowlin, 169 So. 598, 125 Fla. 166.

"Repossesses" as meaning "forecloses"

The word "repossesses" as used in mortgage in reference to right of mortgagee in case of mortgagor's default must be construed as having

been used as synonymous with "forecloses."—Snow v. Nowlin, supra.

Right to redeem

Provision in reference to right of mortgagee to repossess and sell in case of default does not affect right of mortgagor to redeem from foreclosure.—Snow v. Nowlin, supra.

50. Tex.—Butler Motor Co. v. Neimeyer, Civ.App., 57 S.W.2d 228—Phoenix Furniture Co. v. McCracken, Civ.App., 3 S.W.2d 545—Betty v. Tuer, Civ.App., 292 S.W. 271—Le Sage v. Maxie, Civ.App., 286 S.W. 612—Sabine Motor Co. v. W. C. English Auto Co., Civ.App., 283 S.W. 224, reversed on other grounds, Com.App., 291 S.W. 1088—J. M. Radford Grocery Co. v. Jamison, Civ.App., 221 S.W. 998.

42 C.J. p 760 note 87.
51. Okl.—Western Newspaper Union v. Thurmond, 111 P. 204, 27 Okl. 261, Ann.Cas.1912B 727.
S.D.—Purdin v. Archer, 54 N.W. 1043, 4 S.D. 54.

52. Ala.—Gilliland v. Martin, 42 So. 7, 149 Ala. 672.
S.C.—Willis v. Whittle, 64 S.E. 410, 82 S.C. 500.

53. Colo.—Chapin v. Whitsett, 3 Colo. 315.
11 C.J. p 559 note 15.

54. Cal.—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.
Tex.—Lipper v. McClain, Civ.App., 223 S.W. 349.
Wash.—Richter v. Buchanan, 92 P. 782, 48 Wash. 32.

Transfer of legal title

Mere possession, by a stipulation in the mortgage that the mortgagee shall have possession, does not necessarily transfer the legal title.—Richter v. Buchanan, supra.

Sale in defiance of mortgagor's rights

Where a mortgagee in possession

of a car sold and delivered it to a third person, such disposition being inconsistent with the continued existence of the mortgage lien, the mortgagee's right of possession was extinguished.—Blodgett v. Rheinschild, 206 P. 674, 56 Cal.App. 728.

55. Cal.—Blodgett v. Rheinschild, supra.

56. Colo.—International Harvester Co. of America v. Lawrence Inv. Co., 37 P.2d 529, 95 Colo. 523.

Sale by mortgagee to himself

Where mortgage authorizes mortgagee to sell at public or private sale, his possession thereunder cannot be interfered with so long as he stays within such authority, but he must not sell to himself at a private sale.—International Harvester Co. of America v. Lawrence Inv. Co., supra.

57. Mich.—Allison v. Teeters, 142 N.W. 340, 176 Mich. 216.

58. Ohio.—Hare & Chase of Toledo v. Hoag, 161 N.E. 224, 27 Ohio App. 326.

Failure to seek reformation

A mortgagee was held not entitled to possession of automobile on purchasers' default, where mortgage recited "mortgagor" could repossess on default, where the action was at law and no reformation was sought.—Hare & Chase of Toledo v. Hoag, supra.

59. Or.—Pedro v. Vey, 46 P.2d 582, 150 Or. 415.

60. Ala.—International Harvester Co. of America v. Pittman, 147 So. 144, 226 Ala. 355.

61. S.D.—Weiland v. Townsend, 238 N.W. 300, 59 S.D. 94.

Tex.—O'Neal v. Allison, Civ.App., 292 S.W. 269—Litchfield v. Fitzpatrick, Civ.App., 224 S.W. 926.
11 C.J. p 559 note 17 [a].

62. S.D.—Weiland v. Townsend, 238 N.W. 300, 59 S.D. 94.

§ 185. — Manner of Taking Possession

The mortgagee may bring an action for possession or he may take possession without an action providing he does so without force, threats, or violence.

After default a breach of condition the mortgagee may bring an action for possession,⁶³ or he may take possession peaceably without an action for the purpose⁶⁴ wherever he finds the chattel⁶⁵ and without the consent of the mortgagor,⁶⁶ but it has also been held that if the mortgagor does not consent judicial process for possession is necessary.⁶⁷

As a general rule, the only restriction on the mode by which the mortgagee shall secure possession of the mortgaged property after breach of condition is that he must act in an orderly manner and without creating a breach of the peace.⁶⁸ The mortgagee must not take possession by the use of force, threats, or violence,⁶⁹ nor, it has been held, by the use of fraud⁷⁰ or stealth,⁷¹ and if he is guilty of trespass in regaining possession he must respond in damages to the mortgagor.⁷² If no breach of the peace is involved the mortgagee may enter the mortgagor's premises and take the property,⁷³

63. Mo.—Blake v. Keiser, App., 267 S.W. 94—Leavel v. Johnston, 232 S.W. 1064, 209 Mo.App. 197.

S.C.—Lee v. National Furniture Stores, 161 S.E. 450, 163 S.C. 204—Greene v. Washington, 89 S.E. 649, 105 S.C. 137.

S.D.—Aalseth v. Simpson, 231 N.W. 289, 57 S.D. 118.

Tex.—Clow Gasteam Heating Co. v. Hixson, Civ.App., 67 S.W.2d 619, error dismissed.

Writ of sequestration

Where, by the terms of the mortgage, the mortgagee is entitled to possession of the property on default, he may secure possession by the issuance of a writ of sequestration.—French v. Meyer & Kiser, Tex. Civ.App., 277 S.W. 1114, reversed on other grounds Meyer & Kiser v. French, Com.App., 288 S.W. 405—11 C.J. p 560 note 23.

Remedies enumerated

The holder has three remedies which he may pursue separately or concurrently: An action at law to recover the debt; an appropriate action to recover the mortgaged property; and a foreclosure of the mortgage.—Greenspahn v. Ehrlich, 277 Ill.App. 322.

Materiality of other indebtedness

Indebtedness not affecting mortgage debt is immaterial in mortgagee's action to recover possession for foreclosure.—Aalseth v. Simpson, 231 N.W. 289, 57 S.D. 118.

64. Ala.—Sullivan v. Miller, 140 So. 606, 224 Ala. 395.

Colo.—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

Ohio.—Morris v. Commercial Credit Co., 9 N.E.2d 880, 55 Ohio App. 391.

Pa.—Barnhill's Estate, 28 Pa.Dist. & Co. 409.

S.C.—Lee v. National Furniture Stores, 161 S.E. 450, 163 S.C. 204—Greene v. Washington, 89 S.E. 649, 105 S.C. 137.

Mortgagee procuring abandonment of levy under execution issued by justice of peace against mortgaged automobile was held to have taken possession under mortgage.—Hoosier

Finance Co. v. Campbell, 155 N.E. 836, 86 Ind.App. 62.

65. Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117—Exchange Nat. Bank of Tulsa, Okl., v. Daley, App., 237 S.W. 846—Leavel v. Johnston, 232 S.W. 1064, 209 Mo.App. 197—Lange v. Midwest Motor Securities Co., App., 231 S.W. 272.

Parked automobile

(1) Where mortgagee, after default in mortgage on an automobile, took charge of and drove off with the automobile, which had been left parked by the mortgagor's husband, there was no conversion.—Lange v. Midwest Motor Securities Co., supra.

(2) Mortgagee was held not liable to mortgagor for repossession of automobile without notice while automobile was parked in a public parking place, in absence of showing that mortgagee committed breach of peace or acted with force, stealth, or fraud.—Malone v. Darr, 62 P.2d 1254, 178 Okl. 443.

66. Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117.

Okl.—Malone v. Darr, 62 P.2d 1254, 178 Okl. 443—Waggoner v. Koon, 168 P. 217, 67 Okl. 25.

Tex.—J. M. Radford Grocery Co. v. Jamison, Civ.App., 282 S.W. 278, 11 C.J. p 559 note 13.

Duty to surrender

Mortgagor, being in default, was bound to surrender automobile to assignee of mortgagee at its request.—Day v. National Bond & Investment Co., Mo.App., 99 S.W.2d 117.

67. Wash.—Roberts v. Speck, 16 P. 2d 463, 170 Wash. 324—McClellan v. Gaston, 51 P. 1062, 18 Wash. 472.

68. Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 523, 42 Ohio App. 482, citing *Corpus Juris*.

Okl.—Firebaugh v. Gunther, 233 P. 460, 106 Okl. 131—Waggoner v. Koon, 168 P. 217, 67 Okl. 25.

11 C.J. p 560 note 21.

Void process

A mortgagee is not liable to the mortgagor when he acquires posses-

sion of the property under process of a justice who did not have jurisdiction.—Atkinson v. Burt, 53 S.W. 404, 65 Ark. 316.

69. Ala.—Sullivan v. Miller, 140 So. 606, 224 Ala. 395.

Ill.—Greenspahn v. Ehrlich, 277 Ill. App. 322.

Mo.—See v. Automobile Discount Corporation, 50 S.W.2d 993, 995, 330 Mo. 906, citing *Corpus Juris*. Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482.

Okl.—Malone v. Darr, 62 P.2d 1254, 178 Okl. 443—First Nat. Bank & Trust Co. of Muskogee, Okl. v. Winter, 55 P.2d 1029, 1030, 176 Okl. 400, citing *Corpus Juris*—General Motors Acceptance Corporation v. Davis, 7 P.2d 157, 151 Okl. 255—Wilson Motor Co. v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17.

Tex.—Clow Gasteam Heating Co. v. Hixson, Civ.App., 67 S.W.2d 619, error dismissed—Barr v. White, Civ.App., 47 S.W.2d 910.

Justification by trial of right to property

Law will not permit mortgagee to threaten breach of peace by retaking mortgaged property and then justify conduct by trial of right to property. Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482.

Okl.—Wilson Motor Co. v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17.

70. Okl.—Malone v. Darr, 62 P.2d 1254, 178 Okl. 443.

11 C.J. p 560 note 21 [b].

71. Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482.

Okl.—Malone v. Darr, 62 P.2d 1254, 178 Okl. 443—Wilson Motor Co. v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17.

11 C.J. p 560 note 21 [b].

72. Ky.—Hawkins Furniture Co. v. Morris, 137 S.W. 527, 143 Ky. 738, 740.

11 C.J. p 559 note 17, p 560 note 22.

73. Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117.

11 C.J. p 559 note 11.

Possession of crops

The right to take possession of a crop on condition broken carries with

but he is not permitted to break and enter,⁷⁴ or to exclude the mortgagor from the premises.⁷⁵

The manner of taking possession under an insecurity clause in the mortgage is discussed in § 182 supra.

Employment of peace officer. The mortgagee must not intimidate by securing the aid of an officer who pretends to act *colore officii*,⁷⁶ but the mere fact that the mortgagee is accompanied by a constable or other officer who does not act under color of his office, and where it does not appear that any force or threats were used in taking possession, will not make the mortgagee liable for trespass.⁷⁷ It has been held, however, that it is not a voluntary turning over of possession where a constable, although not armed with process, demands the property as an officer, and asserts that it is his duty as such officer to take it.⁷⁸

§ 186. Use and Disposition of Property or Proceeds

A mortgagor in possession must not impair the rights of the mortgagee. A mortgagee in possession is liable for any loss for which he is responsible but he need not protect a junior mortgagee of whom he has no notice.

The mortgagor in possession of the property must

act so as not to impair the rights of the mortgagee,⁷⁹ and he may not over the objection of the mortgagee use the property in any unusual, unc customary, or unexpected way, particularly if such use injures the property or depreciates its value.⁸⁰ A mortgagee in possession is not liable for a loss suffered by the property which does not result from any fraud or negligence on his part,⁸¹ and likewise he is not liable for depreciation in the market value of the mortgaged chattel in the absence of anything done by him to prevent payment of the money or sale of the property.⁸² However, the loss, injury, or destruction of the mortgaged property while in the possession of the mortgagee, occurring through his neglect, will render him liable for damages or for a conversion.⁸³ In accordance with these rules, after default, while the right of redemption exists, a mortgagee in possession is liable for any injury or loss caused by his neglect in the management of the property,⁸⁴ but if he be without fault, he is not responsible, even though the property covered by the mortgage is destroyed.⁸⁵ A senior mortgagee who has no notice of a subsequent encumbrance owes no duty to the subsequent encumbrancer to care for or to protect the security.⁸⁶ Where by the terms of the contract the mortgagee

it the right of entry for such purpose.

Colo.—Fulton Inv. Co. v. Fraser, 230 P. 600, 76 Colo. 125.

S.C.—Owings v. Shaw, 92 S.E. 474, 107 S.C. 258.

74. La.—Reed v. Shreveport Furniture Co., 7 La.App. 134.

Ohio.—M. J. Rose Co. v. Lowery, 169 N.E. 716, 33 Ohio App. 488.

75. Mich.—Bearss v. Preston, 32 N. W. 912, 66 Mich. 11.

76. Okl.—Wilson Motor Co. v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17.—Firebaugh v. Gunther, 233 P. 460, 106 Okl. 131.—Waggoner v. Koon, 168 P. 217, 67 Okl. 25.

11 C.J. p 560 note 25.

77. Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117.

11 C.J. p 560 note 26.

78. Mo.—Kidd v. Johnson, 49 Mo. App. 486.

79. Colo.—Walker v. Mathis, 242 P. 68, 78 Colo. 384.

S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243.

Removal of tires from trucks

Mortgagor, through agent, had no right, when in default, to transfer tires from certain mortgaged trucks to other mortgaged trucks which agent subsequently bought from mortgagee.—Hillis v. International Harvester Co. of America, 10 P.2d

609, 139 Or. 513, modified on other grounds 12 P.2d 299, 139 Or. 513.

Insurance

Action of sellers of machinery in asking buyer if he had insured machinery was held the equivalent to a request that machinery be insured for benefit of sellers, in accordance with requirements of a chattel mortgage, and buyer's reply in affirmative was an assurance that he had so insured it.—Walter Connally & Co. v. Hopkins, Tex.Civ.App., 195 S.W. 656, affirmed Hopkins v. Walter Connally & Co., Com.App., 221 S.W. 1082.

Sale or consumption

That some of the property covered by a chattel mortgage was sold or consumed by the mortgagor before foreclosure is a matter for adjustment between the mortgagee and the mortgagor.—Talty v. Schoenholz, 224 Ill.App. 158.

80. Wash.—Wintler Abstract & Loan Co. v. Sears, 184 P. 309, 108 Wash. 461, 7 A.L.R. 152.

Photographs of mortgaged abstract books

A mortgagor of abstract books who remains in possession has no right to take photographs of the books and dispose of them, for such act would make the information in the books and records less valuable, and thus destroy the security.—Wintler Abstract & Loan Co. v. Sears, supra.

81. Tex.—National Cattle Loan Co. v. Ward, 255 S.W. 160, 113 Tex. 312.

Death or straying of cattle

A mortgagee of cattle is not liable for the value of cattle lost by death or straying, not due to any fraud or negligence on his part.—National Cattle Loan Co. v. Ward, supra.

82. Tex.—Caudle v. Eliasville State Bank, Civ.App., 93 S.W.2d 779.

83. Ala.—Torbert v. McFarland, 55 So. 311, 172 Ala. 117.

Mich.—International Wrecking, etc., Co. v. McMorran, 41 N.W. 510, 73 Mich. 467.

11 C.J. p 591 note 37.

Care of cattle

Mortgagee in lawful possession, must feed and care for cattle in proper and reasonable manner, and neglect renders him liable for resulting damages.—Sutley v. Polk County State Bank of Crookston, 202 N.W. 338, 162 Minn. 118.

84. U.S.—Wann v. Coe, C.C.Colo., 31 F. 369.

11 C.J. p 558 note 8.

85. Ala.—Morrow v. Turney, 35 Ala. 131.

11 C.J. p 558 note 9.

86. Kan.—Farmers' State Bank v. Bank of Inman, 254 P. 1038, 123 Kan. 238.

11 C.J. p 591 note 55.

may demand possession at any time, he is not liable to the mortgagor for depriving him of the use and possession of the chattel.⁸⁷

Acts of dominion over the chattel by the mortgagor or mortgagee inconsistent with the other's rights are considered in §§ 214-215 *infra*.

§ 187. — Income, Rents, and Profits

- a. Mortgagee in possession
- b. Mortgagor in possession
- c. Third person in possession

a. Mortgagee in Possession

A mortgagee in possession while the right of redemption exists is liable to account for the income, profits, and proceeds of the mortgaged property. If he is intrusted with the sale of the chattel he is more than a bailee or agent but rather is a trustee or factor.

While the right of redemption exists, a mortgagee in possession is liable to account for the income, profits, and proceeds of the mortgaged chattels,⁸⁸ and, if the nature of the property permits, he is bound to exercise reasonable diligence in keeping it employed,⁸⁹ but it has been held that he is chargeable for the usual hire only, and not for what was really made out of the use of the property.⁹⁰ Where the mortgagee wrongfully deprives the mortgagor of possession of the mortgaged chattel he is liable for the reasonable value of its use, but under an agreement which gives the mortgagee possession and provides that the profits shall be paid to the mortgagor or applied to the mortgage debt, the mortgagee is not liable for the use of the chattel but only for the profits actually earned.⁹¹

A mortgagee of real estate and personalty thereon, who has lawful possession of the real estate only, is not entitled to the rent of the personal property.⁹² If the property is destroyed while in the mortgagee's possession without fault on his part, he is accountable only for the net profits accruing before the loss.⁹³ Where the title to the mortgaged property remains in the mortgagor until divested by means of a foreclosure proceeding, after default by the mortgagor the mortgagee's right to use the chattels mortgaged is, in the absence of special agreement, merely such as is incident to the foreclosure proceeding.⁹⁴ An employee who accepts his employer's chattel mortgage as trustee for himself and other employees to secure the payment of wages due is required to account to the beneficiaries for any property or money received by him under the terms or provisions of the mortgage.⁹⁵

Sale of mortgaged property. Where the mortgagee is intrusted with the sale of the chattel he is a trustee for the mortgagor rather than a bailee for sale;⁹⁶ he is more than an agent and is in the relationship of a factor requiring great care, attention, and fidelity.⁹⁷ After the sale he must account to the mortgagor for the proceeds.⁹⁸ A mortgagee in possession of a mortgaged crop who agrees to sell it when the market price recovers is not required to sell at the highest price offered irrespective of whether the offer would bring enough to pay the debt.⁹⁹

b. Mortgagor in Possession

In the absence of a stipulation otherwise, a mortga-

87. Tex.—*Scott v. Industrial Finance Corporation*, Civ.App., 265 S. W. 181.

88. Tex.—*First State Bank of Rock Springs v. Sherrill*, Civ.App., 27 S. W.2d 258, error dismissed—*Sherrill v. First State Bank of Rock-springs*, Civ.App., 293 S.W. 317, reversing 289 S.W. 123.

11 C.J. p 561 note 33.

89. U.S.—*Bennett v. Butterworth*, Tex., 12 How. 367, 13 L.Ed. 1026. 11 C.J. p 161 note 34.

90. Ky.—*Davenport v. Tarlton*, 1 A. K.Marsh. 243.

91. Tex.—*Montgomery v. Gallas*, Civ.App., 202 S.W. 993, dismissed for want of jurisdiction.

92. Mass.—*Southbridge Theatre Operating Co. v. Rosenberg*, 171 N.E. 226, 271 Mass. 213.

93. Me.—*Covell v. Dolloff*, 31 Me. 104.

94. Neb.—*Murray v. Loushman*, 66 N.W. 413, 47 Neb. 256.

95. U.S.—*Petition of Jackson*, C.C. A. Ohio, 18 F.2d 462.

96. Tex.—*National Cattle Loan Co. v. Ward*, 255 S.W. 160, 113 Tex. 312.

Trustee of fund

In cases not involving possession or conversion, chattel mortgagee after condition broken and repossession of mortgaged chattel is trustee of fund to be created by sale of repossessed property.—*Commercial Credit Co. v. Standard Baking Co.*, 187 N.E. 251, 45 Ohio App. 403.

97. Me.—*Gallagher v. Aroostook Federation of Farmers*, 197 A. 554.

98. Ohio.—*Commercial Credit Co. v. Standard Baking Co.*, 187 N.E. 251, 45 Ohio App. 403.

Tex.—*National Cattle Loan Co. v. Ward*, 255 S.W. 160, 113 Tex. 312.

Burden on mortgagee

Where a mortgagor of cattle delivered them to the mortgagee to be sold, passing the legal title to such mortgagee, the burden was on the mortgagee to account for all the cattle so delivered, either by showing a sale of some of them and the number sold, or by showing that some

had been lost by death or straying, without fraud or negligence on its part, and the number so lost.—*National Cattle Loan Co. v. Ward*, *supra*.

Where mortgagee sold the property without authority, mortgagor could recover, in action for money had and received, difference between what it sold for and amount owing on the mortgage debt.—*Lineville Nat. Bank v. Weaver*, 73 So. 461, 16 Ala.App. 431.

Waiver of cash payment for chattel

If the maker of a note secured by chattel mortgage on wheat had the right to cash payment for the wheat from the holder of the note, he waived it by turning the wheat over to such holder without asking or requiring the cash payment, and then making an arrangement with him about shipping it in a car with his, the maker's grain, and that of another, for sale under a trust arrangement.—*Grant v. Knox*, Mo.App., 227 S.W. 661.

99. Ark.—*Lavoice v. De Loney*, 265 S.W. 361, 165 Ark. 599.

gor rightfully in possession of the mortgaged property is entitled to the use, rents, and profits thereof.

In the absence of a stipulation otherwise, a mortgagor rightfully in possession of the mortgaged property is entitled to the use thereof free of charge,¹ and cannot be made to account either at law or in equity for the rents and profits arising out of such use,² and, in some jurisdictions, even for the period after condition broken;³ but, in a jurisdiction where the mortgagor's right to possession of the mortgaged property terminates on his failure to perform the condition, he is liable for the hire thereof after the forfeiture of the conditions of the mortgage.⁴ The fact that the security is insufficient does not change the general rule.⁵ In an action to foreclose a mortgage against the administrator of the mortgagor, it has been held that, if the proceeds of the sale should not be sufficient to discharge the debt, the administrator should be required to account for the annual hire and labor of the property during the time that it was in his possession.⁶ A mortgagee of real estate and the rents, profits, and income therefrom is entitled to all such profits and income to be applied on the mortgage debt.⁷

c. Third Person in Possession

A third person in possession under an agreement to apply the profits to the mortgage debt is liable to account for the profits received. The purchaser of the mortgagor's interest, including the right of possession, is not liable for the rental value of the property prior to the maturity of the mortgage.

A third person in possession of the mortgaged

property under an agreement to apply the profits to the mortgage debt is liable to account for the profits received. The same rule applies to the personal representative of the mortgagor where the mortgage specifically pledges the rents and profits, and in such case the receipts may be reached in equity if they have been kept separate and can be distinguished from the general funds of the estate.⁸ Where a person acquires the interest of both the mortgagor and the first mortgagee and also obtains possession of the mortgaged property, he is not chargeable with the use and hire of such property prior to a demand on him by the second mortgagee who is entitled to possession.⁹ The purchaser at an execution sale of a mortgagor's interest in the property, including the right to possession, is not liable to the mortgagee for the rental value of the property prior to the maturity of the mortgage debt.¹⁰

§ 188. — Expenses Incurred and Charges against Property

A mortgagee in possession who does not assume to hold the property in his own right for his own uses is entitled to be credited with all reasonable expenses incurred in its care and management. Ordinarily, a mortgagor in possession is not entitled to reimbursement for caring for the property unless he has been employed by the mortgagee.

A mortgagee in possession of mortgaged property is entitled to be credited with all reasonable and actual expenses in caring for it,¹¹ if he does not assume to hold in his own right and for his own uses, but as bailee or trustee for the mortgagor.¹²

1. Mich.—State Bank of Beaverton v. Southern Surety Co., 245 N.W. 500, 501, 260 Mich. 482, citing *Corpus Juris*.

11 C.J. p 561 note 39.

2. Mich.—State Bank of Beaverton v. Southern Surety Co., 245 N.W. 500, 260 Mich. 482.

11 C.J. p 561 note 40.

Trade fixtures

Trustees under trust deed covering trade fixtures were held not entitled to rent prior to foreclosure and sale. —Krone v. Maestri, 43 S.W.2d 732, 184 Ark. 389.

Use of machinery in construction of highway

Mortgagee asserting no default in mortgage could not recover on bond of mortgagor and partners using mortgaged machinery in construction of highway.—State Bank of Beaverton v. Southern Surety Co., 245 N.W. 500, 260 Mich. 482.

3. Pa.—Maynard v. Shaw, 92 A. 204, 246 Pa. 330.

4. Miss.—Turnbull v. Middleton, 1 Miss. 413.

5. Ala.—Chambers v. Mauldin, 4 Ala. 477.

6. S.C.—North v. Drayton, 5 S.C.Eq. 34.

7. Iowa.—Equitable Life Ins. Co. v. McNamara, 262 N.W. 466, 220 Iowa 297, supplementing opinion and denying rehearing Equitable Life Ins. Co. of Iowa v. McNamara, 259 N.W. 231, 220 Iowa 297.

8. Ala.—Stewart v. Fry, 3 Ala. 573. 11 C.J. p 562 notes 46–48.

9. Ala.—Chambers v. Mauldin, 4 Ala. 477.

10. Ala.—Horton v. Hovater, 66 So. 939, 11 Ala.App. 413.

11 C.J. p 562 note 43.

11. Utah.—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 974, 67 Utah 60, citing *Corpus Juris*.

11 C.J. p 562 note 49.

Salaries of employees conducting business

Where a mortgage is given on a stock of dry goods, providing that the mortgagee have possession there-

of and conduct the business, and it is agreed that the mortgagee shall receive all money derived from sales or otherwise in the course of the conduct of the business, and shall apply all such money toward the payment of the debts secured thereby, except such as may be used in paying the expense of operating and purchasing new goods, and where the mortgagee employs persons to manage the business, the salary of such employees is properly chargeable as expense of the business if their employment was reasonably necessary in the proper operation thereof.—Tootle-Campbell Dry Goods Co. v. Mounts, 216 P. 113, 90 Okl. 40.

Expenditures in boarding laborers husking corn

Where a mortgagee of a corn crop is entitled to reimbursement for wages paid for husking the corn, he is also entitled to credit for his expenditures in boarding the laborers.—Kinkead v. Peet, 132 N.W. 1095, 153 Iowa 199.

12. Ala.—Zadek v. Burnett, 57 So. 447, 176 Ala. 80.

However, where the mortgagee holds adversely to the mortgagor and denies his right to redeem,¹³ or where he wrongfully seizes the property before the mortgage debt is due,¹⁴ he cannot charge the mortgagor for repairs or for the expense of keeping it, but even though, without authority, he seizes the property before default, after default he may charge the expense of keeping it until sold if the mortgage stipulates that he may reimburse himself for all expenses of taking possession and selling the property.¹⁵ Where the mortgagee is considered the owner of the chattel after taking possession on default, he can acquire no lien thereon for subsequent storage or repairs.¹⁶ A senior mortgagee of a crop who under authority of the mortgage takes possession of the crop and harvests and markets it, is entitled to reimbursement from the proceeds for his actual and reasonable expenses, and his claim takes precedence over the rights of a junior mortgagee.¹⁷ Likewise, it has been held that where the mortgagor of a farm and the crop thereon abandons possession and the mortgagee of the farm takes care of the crop, said mortgagee may be entitled to deduct his expenses incurred in the production of the crop from the proceeds thereof payable to the crop mortgagee.¹⁸

Ordinarily, the mortgagor is not entitled to reimbursement for expenses incurred by him in the management and keeping of the mortgaged chattel;¹⁹ but where the mortgagor is employed to look after the chattel he is entitled to payment for his services,²⁰ although not to payment out of the proceeds of the property in preference to the debt owing the mortgagee.²¹ Although the mortgagor is responsible for taxes,²² he does not have to allow the mortgagee the amounts of insurance premiums on the mortgaged goods in the absence of express stipulation.²³ An agreement in a chattel mortgage that the mortgagor is to pay the expenses of keeping the mortgaged property and is to have the reasonable use thereof will not impose liability on the mortgagor for the expense of the keeping of the property where he has been deprived of its use.²⁴ A mortgagee who fails to take possession will not be allowed credit for portions of the property sold by a junior mortgagee.²⁵

Where the mortgagor retains title to the chattel, he has the right to incur debt for its care and preservation without the mortgagee's authority.²⁶ In like manner, where the mortgagee under the terms of the mortgage may take care of mortgaged livestock, he is authorized to purchase feed for it

13. Iowa.—Howery v. Hoover, 66 N. W. 772, 97 Iowa 581.

Md.—Booth v. Baltimore Steam Packet Co., 63 Md. 39.

14. Me.—Gallagher v. Aroostook Federation of Farmers, 197 A. 554.
Mo.—Munday v. Britton, 222 S.W. 504, 505, 205 Mo.App. 153, citing *Corpus Juris*.

Tex.—Wilson v. Nand Singh, Civ. App., 42 S.W.2d 803.
11 C.J. p 563 note 53.

Eviction of crop mortgagee

Where the mortgagee of a crop wrongfully evicts the mortgagor, the latter cannot be charged with the expenses of cultivating and marketing the crop subsequent to the eviction.—Wilson v. Nand Singh, *supra*.

Storage of crop

Where evidence of past dealings between mortgagor and mortgagee showed that possession of mortgaged potato crops was retained by mortgagor who had adequate facilities for storage for which he was paying rent, mortgagee, who took possession of mortgaged potatoes prior to default in mortgage, could not claim on accounting all reasonable and actual expenses incurred in caring for potatoes prior to default in mortgage.—Gallagher v. Aroostook Federation of Farmers, Me., 197 A. 554.

15. Me.—Gallagher v. Aroostook Federation of Farmers, *supra*.

16. N.Y.—Bishop v. Spector, 269 N. Y.S. 76, 150 Misc. 360.

17. Kan.—Exchange State Bank of Kirwin v. Farmers' State Bank of Kirwin, 237 P. 936, 119 Kan. 70.

18. Utah.—Columbia Trust Co. v. Farmers' & Merchants' Bank, 22 P. 2d 164, 82 Utah 117.

Failure to realize profit from crop

Failure of receiver, appointed in suit to foreclose mortgage on land vacated by mortgagor, to realize profit from sale of crops mortgaged to another, did not deprive receiver and real estate mortgagee of right to reimbursement from proceeds of crops for labor and money expended in their production.—Columbia Trust Co. v. Farmers' & Merchants' Bank, *supra*.

19. Tex.—Rodgers v. Sturgis Nat. Bank, Civ.App., 153 S.W. 1176.

Compensation for picking cotton

The mortgagor is not entitled to retain from the proceeds of mortgaged cotton, compensation for the labor of himself and family in picking the crop without the consent of his surety, and of the holder of the mortgage.—Sallisaw First Nat. Bank v. Ballard, 139 P. 293, 41 Okl. 553.

Feeding and care of cattle

Where the mortgagor fed grain to mortgaged cattle and employed his minor son to care for them, it was held that he could not charge these expenses to the mortgagee.—Kreider v. Fanniry, 74 Ill.App. 237.

Duty to have automobile repaired

Mortgagor covenanting to keep

mortgaged automobile in first-class condition is under duty to have automobile repaired when wrecked.—National Bond & Investment Co. v. Haas, 247 N.W. 563, 124 Neb. 631, 88 A.L.R. 1180.

20. S.D.—Peyton v. Nielsen, 244 N. W. 384, 60 S.D. 351.

21. S.D.—Peyton v. Nielsen, *supra*.
Proceeds insufficient to pay debt

Where judgment was rendered, that mortgagor claiming agistor's lien for care of mortgaged property was entitled to judgment against foreclosing mortgagee for care of property, granting mortgagor's motion to have proceeds of sale of mortgaged property, insufficient to pay mortgagor's indebtedness, applied to judgment against mortgagee, was held error.—Peyton v. Nielsen, *supra*.

22. Ala.—Morrow v. Turney, 35 Ala. 131.

11 C.J. p 563 note 57.

23. Md.—Booth v. Baltimore Steam Packet Co., 63 Md. 39.

Wash.—Hidden v. German Sav., etc., Soc., 93 P. 668, 43 Wash. 384.

24. D.C.—Starkweather v. Prince, 8 D.C. 144.

25. Okl.—Wyman v. Herard, 59 P. 1009, 9 Okl. 35.

26. Tex.—Wool Growers' Cent. Storage Co. v. Bennett, Civ.App., 74 S. W.2d 279.

when necessary.²⁷ A chattel mortgage which gives the mortgagee a lien for advances which may be made for the maintenance of the property does not obligate him to make such advances.²⁸

Liability to third persons. Where the mortgagee personally delivers the property to a mechanic for repairs, and requests that they be made, he is lia-

ble to the mechanic for the value thereof.²⁹ In the absence of a contract a mortgagee of a crop is not liable to threshermen for services rendered.³⁰ The fact that the mortgagee, after notice that another person is asserting a lien for storage, permits the mortgagor to retain possession of the chattel does not confer implied authority upon the mortgagor to bind the mortgagee by a contract for storage.³¹

C. NECESSITY FOR TRANSFER OF POSSESSION

§ 189. In General

A retention of possession of the mortgaged property by the mortgagor will not invalidate an unrecorded mortgage as between the parties, but it will invalidate the mortgage or render it presumptively fraudulent as to other creditors.

As between the parties, authorities are agreed that a retention of possession of the mortgaged property by the mortgagor will not invalidate the

mortgage.³² However, all the jurisdictions are not strictly in accord as to the effect on the rights of creditors or of bona fide purchasers.³³ Generally stated, the prevailing rule, in many jurisdictions affirmed or announced by statute, is that retention of possession of the chattel by the mortgagor renders an unrecorded mortgage invalid or fraudulent per se as to other creditors or purchasers without notice,³⁴ but in other jurisdictions it renders a

27. Mo.—Citizens' Bank of Clovis v. Cowart, App., 255 S.W. 931.

Assignment of wool to secure advancement for feed

Where mortgage of sheep authorized mortgagees to take care of the sheep, if mortgagor failed in his obligation to care for them, the mortgagees were authorized to purchase feed for the sheep when it became necessary to do so because of the severity of the winter and because mortgagor could not be reached, and as agents of mortgagor they were authorized to make an assignment of the wool to secure an advancement from a bank to pay for the feed, especially as mortgagor thereafter ratified the agreement in a subsequent chattel mortgage.—Citizens' Bank of Clovis v. Cowart, *supra*.

28. U.S.—Boatmen's Bank v. Fritzlen, Kan., 221 F. 145, 137 C.C.A. 45. 11 C.J. p 563 note 56.

29. Philippine.—Bachrach v. Mantel, 25 Philippine 410.

30. Kan.—Farmers' State Bank v. Peters, 22 P.2d 457, 137 Kan. 786—Bird City State Bank v. Goodland Equity Exch., 216 P. 273, 113 Kan. 696.

31. Iowa.—A. G. Graben Motor Co. v. Brown Garage Co., 195 N.W. 752, 197 Iowa 453, 31 A.L.R. 832.

Estoppel

No estoppel arises against a mortgagee for failure to terminate an arrangement by which mortgagor has stored chattel, an automobile, with a garage keeper, who asserts a lien against the same for storage, where the only condition on which the garage keeper would yield possession was payment of the charges, for which mortgagee was not liable.—A. G. Graben Motor Co. v. Brown Garage Co., *supra*.

32. U.S.—Perpetual Building & Loan Ass'n v. Irving Trust Co., C.C.A. Pa., 52 F.2d 565—New York Trust Co. v. Island Oil & Transport Co., C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007.

Ark.—Cain v. Songer, 3 S.W.2d 315, 176 Ark. 551.

Cal.—Miller v. Struven, 218 P. 287, 63 Cal.App. 128.

Conn.—Pietrantonio v. Scalo, 181 A. 623—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172.

N.C.—Cowan v. Dale, 128 S.E. 155, 189 N.C. 634.

Or.—Kenney v. Hurlburt, 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann. Cas.1918E 737, modified on other grounds 173 P. 153, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737. 11 C.J. p 563 note 66.

33. N.J.—Pancoast v. Miller, 29 N.J. Law 250.

11 C.J. p 563 note 67.

34. U.S.—Fruehauf Trailer Co. v. Bridge, C.C.A.Mich., 84 F.2d 660—In re Milliron Const. Co., D.C.Pa., 48 F.2d 298.

Cal.—Wehrle v. Marks, 25 P.2d 51, 134 Cal.App. 141.

Colo.—Fisher v. Norman Apartments, 72 P.2d 1092.

Conn.—Bickart v. Sanditz, 136 A. 580, 105 Conn. 766—Adler, Salzman & Adler v. Ammerman Furniture Co., 123 A. 268, 100 Conn. 223.

Del.—Jefferson v. Stuckert, 104 A. 781, 12 Del.Ch. 45.

Fla.—Berlein v. Eddy, 104 So. 780, 89 Fla. 484.

N.J.—Mill Factors Corporation v. Guardian Trust Co., 154 A. 420, 107 N.J.Law 529—Stulz-Sickles Co. v. Fredburn Const. Corporation, 169 A. 27, 114 N.J.Eq. 475.

N.Y.—Rotkowitz v. Sohn, 239 N.Y.S. 639, 136 Misc. 265.

N.C.—Cowan v. Dale, 128 S.E. 155, 189 N.C. 634.

Pa.—Enterprise Wall Paper Co. v. Nilson Rantoul Co., 103 A. 923, 260 Pa. 540—Commonwealth v. Mathis, 5 Pa.Dist. & Co. 191.

R.I.—Millard v. Hall, 135 A. 855. 11 C.J. p 564 note 73.

Purpose of statute

Statute requiring immediate delivery of property is intended to prevent mortgagor obtaining spurious credit.—New York Trust Co. v. Island Oil & Transport Co., C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007.

After-acquired property

(1) A mortgage of after-acquired property where possession is not transferred is void as to creditors. U.S.—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., C.C.A.N.Y., 263 F. 532—In re P. J. Sullivan Co., D.C.N.Y., 247 F. 139, affirmed 254 F. 660, 166 C.C.A. 158. Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

(2) However, the rule does not apply if the mortgage is of crops to be raised.—West Springfield Trust Co. v. Hinckley, *supra*.

Notice to third persons

An unrecorded instrument to secure a loan, in effect an equitable mortgage between the parties, is not notice to third persons where the borrower keeps possession of the property.—Taylor v. Hildebrand Poster Advertising Co., 58 S.W.2d 211, 187 Ark. 53.

Property located in another state

A statute which requires change of possession to accompany mortgage of personalty in order to perfect title as against creditors or, or subsequent purchasers from, mortgagor, does not apply to property which

mortgage presumptively fraudulent under statutes providing therefor,³⁵ and it has been so held in some jurisdictions under the common law in the absence of statute,³⁶ in which jurisdictions the presumption of fraud has been held to be removable by evidence showing the transaction to be fair and honest, and by the giving of a reasonable explanation of the retention of possession.³⁷ In like manner under the common law in some jurisdictions, it has been held that no presumption arose from the fact of retention of possession, but that such retention was to be considered simply as a circumstance bearing generally upon the question of fraud.³⁸ Retention of possession as a circumstance indicating fraud applies only to cases in which the mortgagor retains a possession which he had prior to the mortgage and not where he has possession of property which was not his before the mortgage,³⁹ and to cases in which a change of possession is practicable.⁴⁰

A mortgagee of personal property is not required to accept possession on tender thereof by the mort-

gagor unless he is bound by contract to do so or equity might require such action to be taken to prevent fraud.⁴¹

Possession consistent with terms of deed. Many of the authorities holding that the retention of possession by the mortgagor did not render the mortgage fraudulent per se recognized a distinction in this regard between absolute and conditional sales,⁴² holding that a mortgage was removed from the operation of the rule relative to absolute sales by reason of the fact that possession by the mortgagor might be regarded as consistent with the terms of the deed.⁴³ Some cases of this character held that there need not be an express provision in the mortgage to the effect that the mortgagor might retain possession until default,⁴⁴ while other cases made such a provision essential.⁴⁵ In other jurisdictions, however, there was an express refusal to recognize the distinction between absolute and conditional sales,⁴⁶ even where there was an express provision that the mortgagor should remain in possession.⁴⁷ In still other jurisdictions, the distinction was held

was located in another state, where chattel mortgage was executed and was later brought into state without knowledge or consent of mortgagee.—*General Credit Corporation v. Rohde*, 187 A. 676, 122 Conn. 100.

Secret agreement

A chattel mortgage, given in connection with a secret agreement to keep its existence a secret for the purpose of protecting the mortgagor's credit, is fraudulent as to creditors.—*Moore v. Wood*, Tenn.Ch.A., 61 S.W. 1063.

Mortgage to mortgagor's father

Ill.—*Watkins v. Dunbar*, 232 Ill. App. 1.

Mortgage in form of sale

The presumption arising from retention of possession by vendor applies, 'in favor of creditors and purchasers,' to all transactions which are in the form of sales, but in fact mortgages or other security for the repayment of debt, unless within exceptions contained in Gen.St.1918 § 5206 authorizing the mortgagor to retain possession under certain conditions if the mortgage is recorded. Thus an agreement reciting that vendor conveyed, sold, and delivered a truck to vendee, was ineffective as against creditors or purchasers of vendor, where possession was permitted to be retained by vendor.—*Adler, Salzman & Adler v. Ammerman Furniture Co.*, 123 A. 268, 100 Conn. 223.

Effect of general conveying clause

Where property described in corporate mortgage is not such as to make it void, it cannot be attacked by subsequent creditors on ground

that general conveying clause includes property not proper to be mortgaged, possession of which is reserved to mortgagor.—*Morgan Bros. v. Dayton Coal & Iron Co.*, 183 S.W. 1019, 134 Tenn. 228.

35. Minn.—*Singer v. Farmers' State Bank of Goodridge*, 201 N.W. 414, 161 Minn. 301—*First Nat. Bank v. Wiggins*, 191 N.W. 264, 154 Minn. 84.

Effect of Uniform Fraudulent Conveyance Act

Such a statute protecting creditors against chattel mortgage where mortgagor remains in possession was held not repealed by implication by Uniform Fraudulent Conveyance Act.—*Glasser v. O'Brien*, 215 N.W. 517, 172 Minn. 355.

"Creditor" construed

(1) "Creditor," within such a statute for the protection of creditors, has been held not a general creditor but one who, under legal process, has laid hold of the mortgaged property.—*Singer v. Farmers' State Bank of Goodridge*, 207 N.W. 631, 166 Minn. 327.

(2) One sufficiently proving validity of attachment of mortgaged horses and cause of action was creditor, within the statute protecting him against mortgage taken in bad faith where mortgagor remains in possession.—*Glasser v. O'Brien*, 215 N.W. 517, 172 Minn. 355.

Declaration of common law

Statute making chattel mortgage without change of possession prima facie fraudulent merely declared common law.—*In re Myers*, C.C.A.N.

Y., 24 F.2d 349, modifying on other grounds, D.C., 19 F.2d 600.

36. Ky.—*Snyder v. Hitt*, 2 Dana 204, 11 C.J. p 563 notes 69, 70.

37. Kan.—*Arkansas City Bank v. Swift*, 46 P. 950, 57 Kan. 460, 11 C.J. p 563 note 71.

38. U.S.—*Fletcher v. Morey*, C.C. Mass., 9 F.Cas.No.4,864, 2 Story 555.

11 C.J. p 564 note 74.

39. U.S.—*Almy v. Wilbur*, C.C.R.I., 1 F.Cas.No.256; 2 Woodb. & M. 371, reversed on other grounds 12 How. 180, 13 L.Ed. 944.

40. U.S.—*Conrad v. Atlantic Ins. Co. of New York, Pa.*, 1 Pet. 386, 7 L. Ed. 189.

Pa.—*Luckenbach v. Brickenstein*, 5 Watts & S. 145.

41. Idaho.—*Colorado Nat. Bank of Denver v. Meadow Creek Live Stock Co.*, 211 P. 1076, 36 Idaho 509.

42. Mass.—*Homes v. Crane*, 2 Pick. 607.

11 C.J. p 564 note 77.

43. Me.—*Lunt v. Whitaker*, 10 Me. 310.

11 C.J. p 565 note 78.

44. Tenn.—*Maney v. Killough*, 7 Yerg. 440.

11 C.J. p 565 note 79.

45. Ill.—*Funk v. Staats*, 24 Ill. 632, 11 C.J. p 565 note 80.

46. Conn.—*Gaylor v. Harding*, 37 Conn. 508.

11 C.J. p 565 note 81.

47. Pa.—*Clow v. Woods*, 5 Serg. & R. 275, 9 Am.D. 346.

11 C.J. p 565 note 82.

not to remove the presumption of fraud but merely to render it rebuttable.⁴⁸

§ 190. Effect of Recording Acts

Generally, where the mortgage is recorded, a transfer of possession of the mortgaged property to the mortgagee is not necessary.

Under the recording acts generally, a transfer of possession of the mortgaged property is unnecessary where the mortgage is filed or recorded,⁴⁹ the purpose of registration being to take the place of a transfer of possession.⁵⁰ Hence, where the mortgage is filed or recorded, it is not invalidated by the fact that it contains a provision for the retention of the possession of the property by the mortgagor,⁵¹ and conversely, in some jurisdictions, where the mortgage expressly stipulates that the mortgagee shall have possession, the fact that the mortgagor retains possession will not invalidate it.⁵² A statute which provides for exceptions to the general rule requiring delivery of the property must be strictly complied with,⁵³ and when so provided by the statute, in order that the mortgagor may retain possession of the mortgaged property, it must be provided in the instrument itself that he is to retain possession.⁵⁴

The filing of a mortgage is only a substitute for the transfer of possession and it is not a protection against a secret fraud.⁵⁵

Presumption of fraud. Under the generally accepted rule, the registration of a chattel mortgage rebuts any inference of fraud which might otherwise arise from the continued possession of the grantor,⁵⁶ but in some jurisdictions the statutes, notwithstanding the recording acts, make the retention of possession by the mortgagor of the goods mortgaged prima facie evidence of fraud.⁵⁷ This presumption which arises only in favor of the persons contemplated by the statute⁵⁸ may be rebutted by proof of actual good faith,⁵⁹ and continues only as long as the mortgagor continues in possession.⁶⁰ Further, this presumption applies only to goods of which possession may be properly predicated, and not to choses in action.⁶¹ The statutory presumption against the mortgagee does not extend to his vendee, so that the latter need not prove affirmatively the good faith of the transfer in order to prevail against creditors of the mortgagor.⁶²

A failure to record the mortgage will reinstate the common-law presumption of fraud arising from retention of possession by the mortgagor,⁶³ in the absence of exceptions created by statute.⁶⁴

48. N.J.—Runyon v. Groshon, 12 N. J.Eq. 86.
11 C.J. p 565 note 83.

49. U.S.—In re Kolb Carton Co., C. C.A.Conn., 9 F.2d 706.
Conn.—Hartford Production Credit Ass'n v. Clark, 172 A. 266, 267, 118 Conn. 341, citing *Corpus Juris*.
11 C.J. p 565 note 84.

Mortgage to federal agency

Production credit association organized under Farm Credit Act to make loans for production and marketing of farm products whose stock was held by borrowing farmers and production credit corporation is a "federal agency" within statute validating chattel mortgage to federal agency upon recording mortgage without delivery of possession of mortgaged property to mortgagee.—Hartford Production Credit Ass'n v. Clark, 172 A. 266, 118 Conn. 341.

After-acquired property

When so provided by the recording statute, a transfer of possession of after-acquired property, sufficiently described and identified when recorded, is unnecessary to effect a valid mortgage thereof.—In re Kolb Carton Co., C.C.A.Conn., 9 F.2d 706.

50. U.S.—Morris v. Brush, C.C.Tex., 17 F.Cas.No.9,828, 2 Woods 354.
Ark.—Wilson v. Crittenden County Bank, etc., Co., 135 S.W. 835, 98 Ark. 379.
11 C.J. p 565 note 85.

51. U.S.—Hill v. Ryan Grocery Co., Miss., 78 F. 21, 23 C.C.A. 624.
11 C.J. p 566 note 86.

52. Mo.—State v. Cooper, 79 Mo. 464.
53. Conn.—Bickart v. Sanditz, 136 A. 580, 105 Conn. 766.
Ill.—Southern Surety Co. v. People's State Bank of Astoria, 243 Ill.App. 195, reversed on other grounds 163 N.E. 659, 332 Ill. 362.
Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

Property used and situated within manufacturing plant

(1) To come within statutes providing that a mortgagor's retention of personal property included in the mortgage of a manufacturing plant and equipment shall not affect the lien of the mortgagee, and extending the lien to similar after-acquired property, the property must be situated and used within the plant.—Bickart v. Sanditz, 136 A. 580, 105 Conn. 766.

(2) Motor trucks are not "used within plant," within such statutes.—Bickart v. Sanditz, supra—Alder, Salzman & Adler v. Ammerman Furniture Co., 123 A. 263, 100 Conn. 223.
54. Ill.—Southern Surety Co. v. People's State Bank of Astoria, 243 Ill.App. 195, reversed on other grounds 163 N.E. 659, 332 Ill. 362.
11 C.J. p 566 note 88.

55. U.S.—Calkins v. Lichtig, Mich., 251 F. 844, 164 C.C.A. 60.

56. Mont.—Heilbronner v. Lloyd, 42 P. 853, 17 Mont. 299.
11 C.J. p 566 note 89.

57. Neb.—Fred Krug Brewing Co. v. Healey, 99 N.W. 489, 101 N.W. 329, 71 Neb. 662.
11 C.J. p 566 note 90.

58. Minn.—Hazlett v. Babcock, 66 N. W. 971, 64 Minn. 254.
11 C.J. p 566 note 91.

59. Neb.—Denver First Nat. Bank v. Lowrey, 54 N.W. 937, 36 Neb. 290.
11 C.J. p 566 note 92.

60. Neb.—Fred Krug Brewing Co. v. Healey, 99 N.W. 489, 101 N.W. 320, 71 Neb. 662—Chaffee v. Atlas Lumber Co., 61 N.W. 637, 43 Neb. 224, 47 Am.S.R. 753.

61. N.Y.—Curtis v. Leavitt, 17 Barb. 309.
11 C.J. p 566 note 94.

62. Minn.—Marsh v. Armstrong, 20 Minn. 81, 18 Am.R. 355.

63. Cal.—Ruggles v. Cannedy, 53 P. 911, 59 P. 827, 127 Cal. 290, 46 L. R.A. 371.

N.J.—Fidelity Trust Co. v. Staten Island Clay Co., 63 A. 441, 70 N.J. Eq. 558.

Or.—Marks v. Miller, 28 P. 14, 21 Or. 317, 14 L.R.A. 190.
11 C.J. p 566 note 96.

64. Mont.—Stewart v. Hoffman, 77 P. 689, 81 P. 3, 31 Mont. 184.
Wis.—St. Louis Clay Products Co. v.

§ 191. Consumable and Perishable Property

Generally a mortgage of property which is consumable in its use is prima facie fraudulent if possession is reserved by the mortgagor and invalid or fraudulent per se if the right to use such property is also reserved.

While there are some authorities to the effect that articles subject in their nature to be consumed in their use may be mortgaged without any imputation of fraud,⁶⁵ and conversely it has been held that some property may be so transient in its nature that it cannot be mortgaged,⁶⁶ the general rule is that a mortgage of property which is consumable in its use is prima facie fraudulent, if possession is reserved by the mortgagor,⁶⁷ and that it is invalid or fraudulent per se if the right to use such property is also reserved.⁶⁸ The fact that the mortgagor is allowed to use property consumable in the use conveyed in the mortgage may likewise be conclusive proof of fraud where no permission for such use appears on the face of the mortgage.⁶⁹ However, it has been said that the rule must be applied, if possible, in a reasonable manner,⁷⁰ and it has been held that a mortgage is not fraudulent on its face because of the fact that it includes a relatively small portion of perishable or consumable property of which the mortgagor is allowed to retain the use.⁷¹ So, where the mortgage is on personalty not necessarily consumable in its use, it will not be held invalid unless it appears from the instrument, taken as a whole, that the reservation is inconsistent with the purposes of the instrument and for the benefit and advantage of the grantor.⁷²

According to one line of authorities where the mortgagor is allowed to remain in the possession and use of property, a part of which is consumable, the mortgage is invalid as a whole,⁷³ but under other authorities it is invalid only as to the consumable property.⁷⁴

Exempt property. An agreement permitting a mortgagor, a farmer, to use sufficient property covered by the mortgage for the actual subsistence of his family, such property being exempt under the statute, does not invalidate the mortgage.⁷⁵

Use of property for benefit of mortgagee. The rule that the mortgage is rendered fraudulent in law because of an agreement between the mortgagor and the mortgagee that the mortgagor may apply the mortgaged property to his own use is not applicable to a case where property is applied to the benefit of the mortgagee,⁷⁶ although it has been held that, where a mortgage covered cattle and grain, a permission to the mortgagor to use the grain in feeding the stock was in effect a provision allowing the consumption of the grain for the mortgagor's benefit, and fraudulent.⁷⁷

§ 192. Time of Taking Possession

The mortgagee is only required to take possession before any adverse rights attach to the property, but to cut off possible intervening creditors he must take possession at the time of the execution of the mortgage.

The mortgagee is only required to take possession before any adverse rights attach to the property,⁷⁸ but to cut off possible intervening creditors

Christopher, 140 N.W. 351, 152 Wis. 603.

11 C.J. p 567 note 97.

65. Me.—Googins v. Gilmore, 47 Me. 9, 74 Am.D. 472.

66. Mass.—Shurtleff v. Willard, 19 Pick. 202.

67. Mass.—Robbins v. Parker, 3 Metc. 117.

11 C.J. p 567 note 1.

Bonds and mortgage of corporation

The bonds and mortgage of a corporation may be attacked on the ground that they are invalid as conveying consumable property or reserving other benefits to the mortgagor, who is permitted to continue in possession, by subsequent creditors. —Morgan v. Dayton Coal, etc., Co., 183 S.W. 1019, 134 Tenn. 228.

68. U.S.—Coggin v. Hartford Accident & Indemnity Co., D.C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80

L.Ed. 472, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

Ill.—Meyer v. Martin, 184 N.E. 617, 351 Ill. 386, reversing on other grounds 268 Ill.App. 52—Talty v. Schoenholz, 154 N.E. 139, 323 Ill. 232, 49 A.L.R. 1487, reversing on other grounds 238 Ill.App. 635—Lawrence v. Elmwood Elevator Co., 258 Ill.App. 101.

11 C.J. p 567 note 2.

69. Tenn.—Morris v. Clark, Ch.A., 62 S.W. 673.

11 C.J. p 567 note 3.

70. N.Y.—Spurr v. Hall, 61 N.Y.S. 854, 46 App.Div. 454, affirmed 60 N. E. 1120, 168 N.Y. 593.

11 C.J. p 567 note 4.

71. Ill.—Meyer v. Martin, 184 N.E. 617, 351 Ill. 386, reversing 268 Ill. App. 52.

11 C.J. p 568 note 5.

72. Tenn.—Morgan v. Dayton Coal, etc., Co., 183 S.W. 1019, 134 Tenn. 228.

11 C.J. p 568 note 6.

73. N.Y.—Hedges v. Polhemus, 30 N.Y.S. 556, 9 Misc. 680.

Tenn.—Simpson v. Mitchell, 8 Yerg. 417—Sommerville v. Horton, 4 Yerg. 541, 26 Am.D. 242.

74. Ill.—Meyer v. Martin, 184 N.E. 617, 351 Ill. 386, reversing 268 Ill. App. 52.

11 C.J. p 569 note 20.

75. Minn.—Berkner v. Lewis, 158 N. W. 612, 133 Minn. 375.

11 C.J. p 567 notes 1 [c], 7.

76. Minn.—Berkner v. Lewis, supra. 11 C.J. p 568 note 8.

77. N.Y.—Smith v. Cooper, 27 Hun 565.

Wis.—Merchants', etc., Sav. Bank v. Lovejoy, 55 N.W. 108, 84 Wis. 601. 11 C.J. p 568 note 9.

78. U.S.—In re Riggi Bros. Co., C.C. A.Vt., 42 F.2d 174, certiorari denied Wood & Selick v. Todd, 51 S.Ct. 85, 232 U.S. 881, 75 L.Ed. 777.

N.Y.—Halladay v. Worthington, 163 N.Y.S. 362, 99 Misc. 141.

Wis.—Waterman v. Hantke, 207 N. W. 946, 190 Wis. 1, rehearing denied 208 N.W. 992, 190 Wis. 1.

11 C.J. p 568 note 12.

he must take possession at the time of the execution of the mortgage,⁷⁹ for, where the mortgagor has been allowed to retain possession, the mortgagee, by subsequently taking possession, cannot validate his mortgage as to creditors whose rights have intervened.⁸⁰ The requirement for an immediate change of possession is satisfied by a transfer as soon as it can reasonably be made.⁸¹

§ 193. Transfer of Part of Property

Ordinarily in the absence of statute delivery to the mortgagee of part of the property included in the mortgage will render it valid as to the part delivered.

Delivery to the mortgagee of part of the property included in a mortgage will ordinarily render it valid as to the part delivered;⁸² but under a statute declaring a mortgage void without delivery, transfer of part of the property has been held insufficient, and the mortgage was held void even as to that part which was delivered.⁸³

§ 194. Effect of Default

The mortgagee, to preserve his lien against interven-

ing rights, must take possession of the mortgaged property within a reasonable time after default.

A chattel mortgage is not, unless the statute so provides, void merely because the mortgagor is allowed to retain possession of the property after default,⁸⁴ but such possession may be prima facie evidence of fraud,⁸⁵ at least where unreasonably prolonged;⁸⁶ and in some jurisdictions it is a fraud per se to allow the property covered by a chattel mortgage to remain in the hands of the mortgagor for an unreasonable time after default.⁸⁷ Hence the mortgagee must use due diligence and take possession within a reasonable time after default, otherwise he may lose his lien against intervening rights.⁸⁸ What constitutes a reasonable time must depend on the circumstances of each case,⁸⁹ unless the time is fixed by statute.⁹⁰ It has likewise been held fraudulent to allow the property to remain in the mortgagor's hands after sale on foreclosure.⁹¹ The rule requiring the mortgagee to take possession within a reasonable time after default does not, however, apply as between the parties,⁹² or as against a purchaser from the mortgagor before maturity,⁹³ or as against the personal representatives of a deceased mortgagor,⁹⁴ or the divorced wife of

79. Mo.—Landis v. McDonald, 88 Mo.App. 335.

11 C.J. p 568 note 11.

80. U.S.—Goldstein v. Rusch, D.C. N.Y., 54 F.2d 86, modified on other grounds, C.C.A., 56 F.2d 10, certiorari denied 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526—Timmer v. Talbot, D.C.Mich., 19 F.Supp. 687, affirmed, C.C.A., Lemmen v. Timmer, 89 F.2d 1011.

Mich.—Ransom & Randolph Co. v. Moore, 261 N.W. 128, 272 Mich. 31. 11 C.J. p 569 note 15.

Junior mortgagee

Taking possession of the goods after a junior mortgage is executed but before its recordation will not give the senior mortgage preference—Swayne v. Tillotson, 127 N.W. 667, 148 Iowa 501.

81. N.J.—Hardcastle v. Stiles, 59 A. 1117, 70 N.J.Law 328, affirming 55 A. 104, 69 N.J.L. 551. 11 C.J. p 569 notes 13, 14 [a].

Stock certificates outside state

Lien of New York chattel mortgage on stock certificates delivered six months after mortgage was executed was good, where certificates were delivered immediately on entering New York.—New York Trust Co. v. Island Oil & Transport Co., C.C.A. N.Y., 33 F.2d 104, 79 A.L.R. 1007.

82. Iowa.—Stewart v. Smith, 14 N. W. 310, 60 Iowa 275.

83. N.Y. — Benedict v. Smith, 10 Paige 126—Goodhue v. Berrien, 2 Sandf.Ch. 630.

84. Colo.—Morse v. Morrison, 66 P. 169, 16 Colo.App. 449.

11 C.J. p 569 note 21.

85. Ala.—Steele v. Adams, 21 Ala. 534.

11 C.J. p 569 note 22.

86. Ala.—Mitcham v. Schuessler, 13 So. 617, 98 Ala. 635.

11 C.J. p 569 note 23.

87. Ill.—Williams v. Head, 219 Ill. App. 5—Logan Square Trust & Sav. Bank v. Traeger, 214 Ill.App. 513—Albert Pick & Co. v. Spoor, 212 Ill.App. 612.

11 C.J. p 569 note 24.

88. Colo.—Anglo-American Mill Co. v. First Nat. Bank, 230 P. 118, 76 Colo. 57.

Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321.

11 C.J. p 569 note 25.

89. Ill.—Albert Pick & Co. v. Spoor, 212 Ill.App. 612.

11 C.J. p 570 note 26.

Delay of two months

Under the statute making a chattel mortgage null and void as to third persons unless the mortgagee takes possession within a reasonable time after the maturity of the secured debt, a delay of two months after the maturity in taking possession was unreasonable.—Logan Square Trust & Sav. Bank v. Traeger, 214 Ill.App. 513.

90. U.S.—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965.

Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.

Ill.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 228, 95 A.L.R. 321—Merchants' & Manufacturers' Securities Co. v. Graydon, 248 Ill.App. 201.

Six days

Chattel mortgagee does not prejudice rights by waiting six days after default before taking possession of mortgaged taxicabs under a statute which provides that a chattel mortgage is a good lien until ninety days after default.—Merchants' & Manufacturers' Securities Co. v. Graydon, 248 Ill.App. 201.

Levy before expiration of time

A creditor is not authorized to levy an execution on the property within a period of thirty days after maturity where a statute allots that period of time for the mortgagee to take possession.—Whittier v. First Nat. Bank, 214 P. 536, 73 Colo. 153.

91. Ill.—Thompson v. Yeck, 21 Ill. 73.

92. U.S.—Hallack v. Tritch, C.C. Colo., 11 F.Cas.No.5,956, 17 Nat. Bankr.Reg. 293.

Ill.—Sondheimer v. Graeser, 50 N.E. 174, 172 Ill. 293, affirming 72 Ill. App. 41.

11 C.J. p 570 note 28.

93. Ill.—Sondheimer v. Graeser, supra.

11 C.J. p 570 note 29.

94. Ill.—Sumner v. McKee, 89 Ill. 127.

a mortgagor,⁹⁵ or generally to those standing in the same relation to the mortgagee as the mortgagor.⁹⁶

The institution of foreclosure proceedings with reasonable diligence rebuts any presumption of fraud arising from retention of possession by the mortgagor after default.⁹⁷

Junior mortgagee. Until maturity of a junior mortgage the junior mortgagee can derive no advantage from the delay of the first mortgagee to foreclose;⁹⁸ it is sufficient if the senior mortgagee actually takes possession before the junior mortgagee does;⁹⁹ but it has been held that after the expiration of the time for taking possession has elapsed, one of several successive mortgagees who first acquires possession is entitled to hold it.¹ So a second mortgagee who takes possession as soon as his debt is due will be preferred to a first mortgagee who has permitted the debtor to retain the property for an unreasonable time, or longer than the time fixed by statute, after his debt matured.²

Breach of stipulation by mortgagor. The requirement that the mortgagee take possession after default does not apply upon breach of a stipulation in the mortgage by the mortgagor before maturity of the debt.³

§ 195. Retention of Possession as Agent of Mortgagee

The mortgagor may retain possession as agent for the mortgagee.

It cannot be said as matter of law that the mort-

gagor can never retain possession as agent for the mortgagee.⁴

§ 196. Return of Possession to Mortgagor

After the title of the mortgagee has become absolute after default or after foreclosure, he may return possession of the property to the former mortgagor without prejudice to his rights as to creditors of the mortgagor, but such action is a circumstance from which fraud may be determined.

After the title of the mortgagee has been made absolute by foreclosure, there seems to be no objection to a return of the property into the custody of the former mortgagor,⁵ although it has been held that, while such an act does not amount to a fraud in fact,⁶ it is a badge of fraud,⁷ and a circumstance from which the jury may determine actual fraud.⁸ Where the mortgagee has taken possession after default, and has retained it for a time long enough to advise all parties of the change of ownership, the effect of his taking possession is not destroyed by the fact that he subsequently allows the property to pass into the possession of the mortgagor.⁹ Where a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, and his title thus becomes good against all the world, it has been held that he may lend or hire such chattels to the mortgagor for occasional or temporary use without prejudice to his security.¹⁰ Where, on default in some of a series of notes secured by a chattel mortgage, the mortgagee takes possession for the purpose of enforcing a payment of the amount due, he does not, by acceptance of payment of the notes which have matured, and by releasing the

95. Ill.—Root v. Utter, 173 Ill.App. 473.

96. Ill.—Sondheimer v. Graeser, 50 N.E. 174, 172 Ill. 293, affirming 72 Ill.App. 41.
11 C.J. p 570 note 32.

97. Ala. — Simerson v. Decatur Branch Bank, 12 Ala. 205.
11 C.J. p 570 note 37.

98. Ala.—Lanier v. Driver, 24 Ala. 149.

Ill.—Andrews v. Sarantakis, 185 Ill. App. 382—Cunningham v. N. O. Nelson Mfg. Co., 17 Ill.App. 510.
Wis.—Lyman v. Smith, 21 Wis. 674.

99. Ill.—Weber Impl. Co. v. Huthmacher, 161 Ill.App. 261—McCreary v. Hannah, 60 Ill.App. 449.

1. Colo.—Owen v. Owens, 117 P. 134, 51 Colo. 93.
11 C.J. p 570 note 35.

2. U.S.—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965.

Colo.—Broadhead v. Farmers' State Bank of Sedgwick, 211 P. 376, 72

Colo. 430—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.
11 C.J. p 570 note 36.

Effect of statute pertaining to notice
The rule that the holder of a first mortgage lien upon chattels loses his lien by failure to take possession of the mortgaged chattels within thirty days after the secured debt becomes due, or, in lieu thereof, to file an extension, as against the holder of a junior chattel mortgage lien, although the chattel mortgage creating such junior lien expressly provides that the same "is subject to the prior mortgage," is not affected by Chattel Mortgage Act 1917 § 4, providing that one who acquires an interest in property subject to an unrecorded mortgage, but who has actual knowledge of the mortgage, takes subject to the mortgage as if it had been recorded, the statute giving the mortgagee as against one with actual notice of the mortgage, the same, but no greater, rights than he has against one with constructive notice.—Broadhead v. Farmers' State Bank of Sedgwick, 211 P. 376, 72 Colo. 430.

3. Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

Removal from county

Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, supra.

4. Colo.—Rhodes v. Harmon, 231 P. 222, 76 Colo. 565.

Statute requiring transfer to mortgagee after default
Colo.—Rhodes v. Harmon, supra.

5. Ill.—Hanford v. Obrecht, 49 Ill. 146—Cunningham v. Hamilton, 25 Ill. 228—Funk v. Staats, 24 Ill. 632.

6. Ill.—Reynolds v. Patterson, 4 Ill. App. 183.

7. Ga.—Williams v. Kelsey, 6 Ga. 365.

Ill.—Reynolds v. Patterson, 4 Ill.App. 183.

8. Ill.—Reynolds v. Patterson, supra.

9. Ill.—Cunningham v. Hamilton, 25 Ill. 228.

11 C.J. p 571 note 47.

10. Ark.—Garner v. Wright, 12 S.W. 785, 52 Ark. 385, 6 L.R.A. 715.

property to the mortgagor, destroy his lien for deferred payments not yet due.¹¹ It has also been held that it is not conclusive of fraud for a mortgagee in possession of the mortgaged property to deliver the same to the mortgagor for the purpose of private sale, and to account for the proceeds; nor will his security be destroyed by such act, even though the sale of the mortgaged property is not conducted in the manner provided in the mortgage.¹²

Trust receipts. Where the mortgagee returns the chattels to the mortgagor and takes trust receipts from him, he cannot assert a lien as against creditors of the mortgagor.¹³

§ 197. Questions for Jury

Questions of fact as to such matters as fraud, retention of possession, and the reasonableness of the time within which the mortgagee has taken possession are for the jury.

The question of actual fraud in retention of possession should be submitted to a jury,¹⁴ and where there is a valid consideration for the mortgage the retention of possession by the mortgagor need not be explained in order that the question of fraud be submitted to the jury.¹⁵ Even in those states where the retention of possession is fraudulent per

se, the question of whether possession was retained must be submitted to the jury.¹⁶ The finding of the jury on the question of fraud is conclusive,¹⁷ except where the court is justified in granting a new trial.¹⁸

The question as to whether the mortgagee has taken possession within a reasonable time after the execution of the mortgage is for the jury.¹⁹

§ 198. Waiver or Estoppel

A creditor waives the necessity of a transfer of possession by extending credit when he has actual knowledge of the mortgage.

A creditor waives the necessity of a transfer of possession when, with actual knowledge of the mortgage, he extends credit to the mortgagor.²⁰

§ 199. Remedies of Creditors

Consult Pocket Parts for later cases.

§ 200. — Actions to Determine and Establish Rights

Consult Pocket Parts for later cases.

§ 201. — Actions to Set Aside Mortgages

Consult Pocket Parts for later cases.

D. RETENTION OF POSSESSION WITH POWER OF SALE

§ 202. In General

Where the mortgagor is permitted to remain in possession and sell the chattel, applying the proceeds to his own use, it is variously held that the mortgage is fraudulent per se or that it is presumptively void or that fraud is a question of fact.

Where the mortgagor is allowed to remain in pos-

session of the property, with power to sell it and to apply the proceeds to his own use, the general rule, in many instances affirmed or announced by statute, is that the transaction is fraudulent and void as to creditors,²¹ without regard to the actual intent of the parties.²² This has been held to be true, although the permission to sell extends only to

11. Ill.—Lange v. Cole, 87 N.E. 880, 239 Ill. 88, reversing 140 Ill.App. 545.

12. Mich.—Anderson v. Cook, 59 N.W. 423, 180 Mich. 621.
11 C.J. p 571 note 50.

13. Cal.—Arena v. Bank of Italy, 228 P. 441, 194 Cal. 195.

Trust receipts resting on no prior ownership

Where a person takes trust receipts for property resting on no prior ownership of the property by the creditor for whose benefit the so-called trust is created, and leaves the property in possession of the one giving the receipt, such arrangement is void as against creditors.—Arena v. Bank of Italy, *supra*.

14. U.S.—Bank of Dillon v. Murchison, S.C., 213 F. 147, 129 C.C.A. 499.

N.J.—Shreve v. Miller, 29 N.J.Law 250.

11 C.J. p 564 note 72, p 570 note 38.

15. N.Y.—Thompson v. Blanchard, 4 N.Y. 303.

11 C.J. p 570 note 39.

16. Ill.—Funk v. Staats, 24 Ill. 632.

17. N.Y.—Stewart v. Slater, 13 N.Y. Super. 83.

11 C.J. p 571 note 41.

18. N.Y.—Griswold v. Sheldon, 4 N.Y. 581.

19. Cal.—Chaffin v. Doub, 14 Cal. 384.

11 C.J. p 569 note 14.

20. Or.—Wiggins Co. v. McMinnville Motor Car Co., 225 P. 314, 111 Or. 123.

21. U.S.—In re Ackermann, C.C.A. Ohio, 82 F.2d 971—Lee v. State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45—Arbury v. Kocher, D.C.N.Y., 18 F.2d 588—In re Quality Garage,

C.C.A.Wis., 285 F. 878—In re Leslie-Judge Co., C.C.A.N.Y., 272 F. 886, certiorari denied Green v. Felder, 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180.

Colo.—Brown v. Driverless Car Co., 280 P. 488, 86 Colo. 216.

Ind.—Indiana Investment & Securities Co. v. Whisman, 138 N.E. 512, 85 Ind.App. 109.

Minn.—First Nat. Bank v. Wiggins, 191 N.W. 264, 154 Minn. 84.

Mo.—Osborn v. Standard Sec. Co., 4 S.W.2d 503, 222 Mo.App. 1186.

Wyo.—Stockmen's Nat. Bank of Casper v. Lukis Candy Co., 33 P.2d 254, 47 Wyo. 127.

11 C.J. p 571 note 52.

Rule not modified by statute

Minn.—First Nat. Bank v. Wiggins, 191 N.W. 264, 154 Minn. 84.

22. U.S.—Arbury v. Kocher, D.C.N.Y., 18 F.2d 588.

11 C.J. p 571 note 53.

a portion of the property,²³ but there is other authority that the mortgage may be valid as to property that is not permitted to be sold.²⁴ In some jurisdictions, such a transaction is merely presumptively void,²⁵ and in others the question of fraud is one of fact from all of the evidence.²⁶ As between the parties the mortgage is not invalidated by an agreement permitting the mortgagor to sell,²⁷ nor is it invalidated as to a third person whose claim is not based on a valuable consideration.²⁸

Application of proceeds to mortgage debt. An agreement that the mortgagor may sell the mortgaged property and apply the proceeds on the mortgage debt is not fraudulent per se,²⁹ but may be shown to be fraudulent by evidence aliunde.³⁰ So, a mortgage is not necessarily fraudulent because the mortgagee fails to sell in the manner pointed out in the mortgage, and permits the mortgagor to sell at a private sale and to account for the proceeds.³¹ A permission to the mortgagor to sell the property at public sale, and to pay over the proceeds to the mortgagee, will not render the mortgage void as to creditors.³²

Necessity of agreement. A sale by the mortgagor without the consent of the mortgagee will not invalidate the mortgage,³³ but the consent to sell need

not be incorporated in the mortgage,³⁴ and it may be implied.³⁵ Where the mortgaged articles do not constitute a stock of goods, permission to the mortgagor to use and enjoy them does not imply a power of sale rendering the mortgage void as to creditors.³⁶ A stipulation which will invalidate the mortgage if incorporated in it will have the same effect on its validity if otherwise agreed to at the time the mortgage is given.³⁷ Where a sale is permitted subject to conditions which show the mortgage to be bona fide, the mortgage will not be held fraudulent per se.³⁸

Sale and replacement. The fact that the mortgagor retains possession and exchanges some of the chattels for others of equal or greater value does not render the mortgage invalid,³⁹ and an agreement between a mortgagee and a mortgagor, by which the mortgagor may sell a part of the mortgaged property, and, with the proceeds, purchase other property of like kind, to be secured by the mortgage in lieu of that sold, is not void as between the parties.⁴⁰ Where, however, the recorded mortgage does not provide for replacements, the mortgage as to the replaced chattels, is invalid as to creditors.⁴¹ Where the mortgaged property is employed in a business from the nature of which it is subject to wear and tear and to the necessity of

23. U.S.—Lee v. State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45.—In re Leslie-Judge Co., C.C.A.N.Y., 272 F. 886, certiorari denied Green v. Felder, 41 S.Ct. 625, 256 U.S. 704, 65 L. Ed. 1180.

11 C.J. p 571 note 54.

Accounts receivable

Entire transfer of accounts receivable as security is vitiated, if assignor reserves right of disposition over part of property.—Lee v. State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45.

24. Wyo.—Stockmen's Nat. Bank of Casper v. Lukis Candy Co., 33 P. 2d 254, 47 Wyo. 127.

25. S.D.—Custer City First Nat. Bank v. Calkins, 93 N.W. 646, 16 S.D. 445.

11 C.J. p 571 note 55.

26. Ind.—Dice v. Irvin, 11 N.E. 488, 110 Ind. 561.

11 C.J. p 571 note 56.

Mortgage of accounts

In accordance with the rule applying in Michigan to stocks in trade a mortgage or assignment of accounts is not rendered invalid by provision authorizing mortgagor or assignor to apply proceeds of accounts in his business.—In re United Fuel & Supply Co., 230 N.W. 164, 250 Mich. 325.

27. Fla.—McCoy v. Boley, 21 Fla. 803.

Wyo.—Hasbrouck v. La Febre, 152 P. 168, 23 Wyo. 367.

28. Fla.—McCoy v. Boley, 21 Fla. 803.

11 C.J. p 571 note 58.

29. Or.—Snodgrass v. Wallowa Milling & Grain Co., 227 P. 294, 111 Or. 402.

11 C.J. p 572 note 64.

30. Kan.—Richardson v. Jones, 43 P. 1127, 56 Kan. 501, 54 Am.S.R. 594.

31. Mich.—Anderson v. Cook, 59 N. W. 423, 100 Mich. 621.

32. Ill.—Goodheart v. Johnson, 88 Ill. 58.

33. Colo.—People v. Central Sav. Bank & Trust Co., 236 P. 1011, 77 Colo. 451.

11 C.J. p 572 note 59.

Unauthorized consent of mortgagee's agent

Where mortgagee's agent, a bank, without authority permitted sale of part of mortgaged property and collected proceeds, and its president, without knowledge of mortgagee, appropriated proceeds to his own use, the fact that mortgagor was protected by his payment did not entitle attaching creditor to priority, on ground that mortgagee had consented to sale without application of proceeds to mortgage debt.—People

v. Central Sav. Bank & Trust Co., supra.

34. Kan.—Brown v. Barber, 28 P. 184, 47 Kan. 527.

11 C.J. p 572 note 60.

35. U.S.—Lee v. State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45.

11 C.J. p 572 note 61.

36. Colo.—Wilson v. Jones, 78 P. 622, 20 Colo.App. 317.

11 C.J. p 572 note 62.

37. Vt.—Wilson v. Wallace, 32 A. 501, 67 Vt. 646.

38. Ala.—Birmingham News Co. v. Barron G. Collier, Inc., 103 So. 339, 212 Ala. 655.

Agreement to pay mortgage before sale

Where an agreement provides that the mortgagor of an automobile will pay the mortgage in full before a sale of the car is completed the mortgage is valid.—Osborn v. Standard Sec. Co., 4 S.W.2d 503, 222 Mo. App. 1186.

39. Mo.—Strop v. Hughes, 101 S.W. 146, 123 Mo.App. 547, 101 S.W. 149, 123 Mo.App. 544.

11 C.J. p 572 note 69.

40. Kan.—Farmers' State Bank v. Bank of Inman, 254 P. 1038, 1039, 123 Kan. 238, citing Corpus Juris.

41. Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

replacement, a provision in the mortgage permitting the mortgagor to sell or dispose of property which may become worn or damaged or unsuitable to be used in the conduct of the business, provided that property equivalent in value is substituted therefor, is not fraudulent as to creditors.⁴²

Trust receipt. Where a bank becomes the owner of property purchased for another by virtue of advancing funds for that purpose and taking the bill of lading in its own name, the delivery of the property to the real purchaser against a trust receipt reserving title and providing that the proceeds of sale shall be applied to the repayment of advances made by the bank does not constitute a loss or waiver of its rights,⁴³ even though the bank delivers the property before it receives the trust receipt, or fails to insist on immediate payment of the proceeds when the goods are sold.⁴⁴ The use of trust receipts has become so common as to lead the courts to modify in some particulars the policy underlying the statute of frauds, by which the divorce of title from possession is declared either evidence of fraud or fraudulent per se,⁴⁵ and to resort to the doctrine that possession in one person, which is consistent with an agreement between the parties, is not incon-

sistent with the actual title in another, which will be supported for the purposes stated in the contract.⁴⁶ The rights and title of the bank in transactions of this character have been recognized and upheld against one to whom the purchaser attempted to pledge the goods,⁴⁷ the claim of a bailee holding the property for an antecedent debt,⁴⁸ the claim of an assignee for the benefit of creditors,⁴⁹ or the claim of a trustee in bankruptcy.⁵⁰

§ 203. Stocks in Trade

Where the mortgagor is permitted to retain possession and to make sales from a mortgaged stock in trade without accounting for the proceeds, the transaction is variously regarded as fraudulent per se, as presumptively fraudulent, or as amounting to a circumstance of fraud as to creditors and bona fide purchasers, but it is valid as between the parties.

Under the more generally accepted rule, in a number of jurisdictions embodied in an express statute, when the mortgagor of a stock in trade is permitted by the mortgagee to remain in possession and to make sales therefrom in the ordinary course of business, applying the proceeds to his own use if he see fit, the transaction is fraudulent per se or invalid as to creditors and purchasers without notice,⁵¹ without regard to the actual intent of the

42. U.S.—Murphy Hotels Corporation v. Central Nat. Bank Savings & Trust Co., C.C.A. Ohio, 18 F.2d 719, certiorari denied Central Nat. Bank Savings & Trust Co. v. Murphy Hotels Corporation, 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

11 C.J. p 572 note 68.

43. U.S.—Century Throwing Co. v. Muller, N.J., 197 F. 252, 116 C.C.A. 614.

11 C.J. p 572 note 71.

44. U.S.—In re Marks, N.Y., 222 F. 52, 137 C.C.A. 590.

45. U.S.—In re Killian Mfg. Co., D. C.Pa., 209 F. 498, affirming 215 F. 82, 131 C.C.A. 390.

11 C.J. p 572 note 74.

46. U.S.—Century Throwing Co. v. Muller, N.J., 197 F. 252, 116 C.C.A. 614.

11 C.J. p 573 note 75.

47. N.Y.—Moors v. Kidder, 12 N.E. 818, 106 N.Y. 32.

48. U.S.—Century Throwing Co. v. Muller, N.J., 197 F. 252, 116 C.C.A. 614.

11 C.J. p 573 note 77.

49. Mass.—Moors v. Wyman, 15 N.E. 104, 146 Mass. 60.

50. U.S.—In re Marks, N.Y., 222 F. 52, 137 C.C.A. 590.

11 C.J. p 573 note 79.

51. U.S.—In re Baumgartner, C.C.A. Wis., 55 F.2d 1041—In re Marsh, D.C. Idaho, 53 F.2d 400—Lee v.

State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45—Clark v. Huckaby, C.C.A. Okl., 28 F.2d 154, 67 A.L.R. 1456, reversing, D.C., In re Kramer Mercantile Co., 21 F.2d 614, certiorari denied Huckaby v. Clark, 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 561—Brown v. Leo, C.C.A.N.Y., 12 F.2d 350—U. S. v. Lankford, D.C.Va., 3 F.2d 52—In re Essen, D.C.Minn., 2 F.Supp. 646—In re McLean, D.C. Wash., 270 F. 348.

Ala.—Farmers' State Bank v. Kirkland & Brackin, 75 So. 894, 200 Ala. 146—Gray & Dudley Hardware Co. v. Guthrie, 75 So. 318, 200 Ala. 6.

Alaska.—In re Minkove, 6 Alaska 68.

Ark.—Coffman v. Citizens' Loan & Investment Co., 290 S.W. 961, 172 Ark. 889—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146.

Colo.—Glass & Bryant Mercantile Co. v. Farmers' State Bank of Ft. Morgan, 265 P. 682, 83 Colo. 193.

Idaho.—Kettenbach v. Walker, 186 P. 912, 32 Idaho 544.

Kan.—State v. Gorman, 216 P. 290, 292, 113 Kan. 740, citing *Corpus Juris*—Linn County Bank v. Davis, 175 P. 972, 103 Kan. 672, 9 A.L.R. 468.

Miss.—Simmons v. State, 135 So. 196, 160 Miss. 582.

Mo.—Forgan v. Bridges, App., 281 S.W. 134—Citizens' Trust Co. v. Elders, 259 S.W. 136, 212 Mo.App. 539—Liles v. Potter, App., 206 S.W. 582.

N.Y.—McHenry v. Heiderich, 236 N.Y.S. 1, 134 Misc. 546.

Or.—Harris v. Schnitzer, 27 P.2d 1010, 146 Or. 391—Wiggins Co. v. McMinnville Motor Car Co., 225 P. 314, 111 Or. 123.

Tex.—First Nat. Bank v. Thompson, Com.App., 265 S.W. 884, affirming, Civ.App., 251 S.W. 818—Ramsey v. Wahl, Com.App., 235 S.W. 838, reversing on other grounds Wahl v. Ramsey, Civ.App., 218 S.W. 559—Industrial Acceptance Corporation v. Corey, Civ.App., 19 S.W.2d 365, affirmed, Com.App., 29 S.W.2d 978—Rhea Mortg. Co. v. Lemmerman, Civ.App., 294 S.W. 959, affirmed, Com.App., 10 S.W.2d 690—General Motors Acceptance Corporation v. Boddeker, Civ.App., 274 S.W. 1016.

Wash.—Warner v. Hibler, 264 P. 423, 146 Wash. 651—Tahoma Finance Co. v. Shannon, 244 P. 271, 138 Wash. 90—State Bank of Connell v. John Deere Plow Co., 212 P. 148, 123 Wash. 167—Miller v. Scarborough, 185 P. 625, 108 Wash. 646.

Wis.—Morley-Murphy Co. v. Jodar, 264 N.W. 926, 220 Wis. 302—Ross v. State Bank of Trego, 224 N.W. 114, 198 Wis. 335, 73 A.L.R. 225.

Wyo.—Stockmen's Nat. Bank of Casper v. Lukis Candy Co., 33 P.2d 254, 257, 47 Wyo. 127, citing *Corpus Juris*.

11 C.J. p 573 note 81.

Statute as declaration of common law

A statute in conformity with the

parties to defraud;⁵² but in a number of jurisdictions, likewise under express statutes in some instances, such a mortgage is regarded merely as presumptively fraudulent as to creditors,⁵³ or, under another line of authorities, not even presumptively fraudulent, but the permission to retain possession and to sell is simply to be considered in connection with other attendant facts and circumstances in determining whether there is fraud in fact.⁵⁴ The general rule, where adopted, applies whether the permission to sell is express or implied,⁵⁵ oral or written,⁵⁶ or whether it appears from the face of the

mortgage,⁵⁷ or is the result of a collateral agreement;⁵⁸ but where the permission does not appear on the face of the mortgage, the instrument cannot be declared fraudulent per se, but the existence of the agreement to retain possession and to sell, applying the proceeds to the mortgagor's use, must be established as a question of fact.⁵⁹ The general rule has been held not to apply to a bona fide deed of trust wherein the stock in trade is only a small proportion of the total property which is the subject of the trust, and permitting sales from the stock supports the trust.⁶⁰ Likewise, purchase-

text has been held to be but a declaration of the common law.—*Trice v. American Trust & Savings Bank of El Paso*, Tex.Civ.App., 259 S.W. 993.

Statute strictly construed

Tex.—*Laredo Nat. Bank v. Steinhart*, Civ.App., 15 S.W.2d 130.

Object of statute proscribing placing of mortgage or other lien on merchandise offered daily for sale to retail trade is to enable public to purchase merchandise at retail with assurance that their title will be unencumbered by creditors' claims.—*Sinkin v. Butler Bros.*, Tex.Civ.App., 77 S.W.2d 298.

Necessity for mortgage of entire stock

It is not necessary that the entire stock be mortgaged to bring the case under the statute.—*Rhea Mortg. Co. v. Lemmerman*, Tex.Civ.App., 294 S.W. 959, affirmed, Com.App., 10 S.W.2d 690.

Notice to existing creditors

A mortgage of fixtures and merchandise not complying with law requiring mortgagor to furnish a cost inventory and a list of creditors, and mortgagee to give notice to each creditor of the intended mortgage, is void as against creditors.—*In re Laureate Co.*, C.C.A.N.Y., 294 F. 668.

Motor vehicles

Motor vehicles are goods, wares, and merchandise, within the rule of the common law or statutes.—*First Nat. Bank v. Thompson*, Tex.Com. App., 265 S.W. 884, affirming, Civ. App., 251 S.W. 818.—*Industrial Acceptance Corporation v. Corey*, Tex. Civ.App., 19 S.W.2d 365, affirmed, Com.App., 29 S.W.2d 978.—*Employers' Casualty Co. v. Helm*, Tex.Civ.App., 295 S.W. 955.—*Texas Bank & Trust Co. v. Teich*, Tex.Civ.App., 283 S.W. 552, motion dismissed 286 S.W. 577.—*General Motors Acceptance Corporation v. Boddeker*, Tex.Civ.App., 274 S.W. 1016.—*City Nat. Bank v. Morgan*, Tex.Civ.App., 267 S.W. 1078—42 C.J. p 758 note 22.

Mortgage of wheat held for manufacture into flour is not void, under a statute concerning mortgages on goods, wares, and merchandise ex-

posed for sale.—*In re Ballard*, D.C. Tex., 279 F. 574.

Interest in partnership

The rule does not apply to a mortgage on an interest in a partnership, even though the partners remain in possession, buying and selling and disposing of stock of goods.—*Ellis Jones Drug Co. v. Coker*, 117 So. 545, 151 Miss. 102, 59 A.L.R. 285.

Conveyance in trust

Chattel mortgage given to secure note not intended to create relation of borrower and lender, and which gave mortgagor unlimited power to sell mortgaged property for own purposes, is conveyance in trust for mortgagor, and invalid as to creditors of mortgagor.—*Harris v. Schnitzer*, 27 P.2d 1010, 146 Or. 391.

Evidence

In a suit to foreclose a mortgage on a stock of goods, attacked as fraudulent, the evidence was held to show that the mortgaged property was intended by both parties to be used in the mortgagor's business.—*Gray & Dudley Hardware Co. v. Guthrie*, 75 So. 318, 200 Ala. 6.

52. U.S.—*In re Essen*, D.C.Minn., 2 F.Supp. 646.

Ark.—*Baker-Matthews Lumber Co. v. Bank of Lepanto*, 232 S.W. 995, 170 Ark. 1146.

Okl.—*Turk v. Kramer*, 280 P. 266, 138 Okl. 35, 73 A.L.R. 229.

11 C.J. p 576 note 87.

53. U.S.—*In re Turley*, C.C.A.Ind., 92 F.2d 944.—*In re Joseph*, D.C. N.C., 43 F.2d 252.

11 C.J. p 576 note 38.

However, it has been said to be generally held that a chattel mortgage on stock of merchandise is fraudulent if mortgagor is indebted to other creditors at time of execution of mortgage, and if he does not retain property sufficient to satisfy those creditors, or if mortgagor is not required to account for proceeds derived from sale in satisfaction of mortgage.—*Wagner v. Peace*, D.C.N.C., 5 F.Supp. 899.

Rebuttal of presumption

Presumption mortgage on stock of merchandise sold in course of trade

was fraudulent must be rebutted by proof of no pre-existing debts or of sufficient other assets to pay debts.—*In re Joseph*, D.C.N.C., 43 F.2d 252—11 C.J. p 576 note 88 [a], [b].

Successful attack by preexisting creditor

If preexisting creditor successfully assails mortgage on a stock of merchandise as a fraudulent conveyance, it is void as to both preexisting and subsequent creditors.—*In re Joseph*, supra.

After-acquired property

Under Indiana law, if an agreement exists by which chattel mortgagor can sell mortgaged goods and divert proceeds from business or mortgagor does so with knowledge of mortgagee, no valid lien attaches to after-acquired property.—*In re Turley*, C.C.A.Ind., 92 F.2d 944.

54. U.S.—*Harding v. Federal Nat. Bank*, C.C.A. Mass., 31 F.2d 914.—*Jordan v. Federal Trust Co.*, D.C. Mass., 296 F. 738.

Mass.—*S. Samuels & Co. v. Charles E. Fogg Co.*, 155 N.E. 429, 258 Mass. 402.

Mich.—*In re United Fuel & Supply Co.*, 230 N.W. 164, 250 Mich. 325.

Wyo.—*Carroll v. Anderson*, 218 P. 1038, 30 Wyo. 217.

11 C.J. p 576 note 89.

55. Wis.—*Morley-Murphy Co. v. Jodar*, 264 N.W. 926, 220 Wis. 302.—*Ross v. State Bank of Trego*, 224 N.W. 114, 193 Wis. 335, 73 A.L.R. 225.

11 C.J. p 575 note 82.

56. Okl.—*Perry Bank v. Cooke*, 41 P. 628, 3 Okl. 534.

11 C.J. p 575 note 83.

57. U.S.—*In re Hartman*, D.C.N.Y., 185 F. 196.

11 C.J. p 575 note 84.

58. U.S.—*In re Kibbie*, D.C.N.H., 8 F.Supp. 809.

11 C.J. p 575 note 85.

59. Miss.—*Britton v. Criswell*, 63 Miss. 394.

11 C.J. p 576 note 86.

60. W.Va.—*Wyoming Coal Sales Co. v. Smith-Pocahontas Coal Co.*, 144 S.E. 410, 105 W.Va. 610, 62 A.L.R. 740.

money mortgages are in some jurisdictions made an exception to the general rule.⁶¹ In the absence of a statute providing otherwise, the recording of a mortgage on a stock in trade is not equivalent to the taking of possession by the mortgagee.⁶²

A mortgage of the nature under discussion is not invalid as between the parties,⁶³ or as to junior mortgagees who take expressly subject to the mortgage.⁶⁴ A voluntary assignee for the benefit of creditors cannot, in those jurisdictions in which he is regarded as standing in the place of the mortgagor, assert the invalidity of such a mortgage,⁶⁵ but a trustee in bankruptcy representing general creditors may take advantage of such invalidity.⁶⁶

Effect on subsequent mortgage. The fact that a mortgage on a stock of goods is void as to other creditors of the mortgagor, because it authorizes the mortgagor to sell the property and to use the proceeds in his business, does not affect the right of the mortgagor to give another mortgage to secure the debt, free from such infirmity.⁶⁷

§ 204. — Necessity and Sufficiency of Agreement Permitting Sale

In order that sales from a stock in trade may in-

validate the mortgage as to third persons, the sales must be with the express or implied consent of the mortgagee.

In order that sales by the mortgagor in the usual course of business, from a mortgaged stock in trade, for his own use and benefit may invalidate the mortgage as to third persons, they must be with the agreement and consent of the mortgagee,⁶⁸ although such agreement may be implied from the facts and circumstances surrounding the transaction⁶⁹ or from the terms of the mortgage.⁷⁰ Such an agreement cannot be implied from the mere character of the mortgaged property as merchandise,⁷¹ and, although there are decisions to the effect that permission to retain possession and use and enjoy a stock of goods implies a power of sale,⁷² there is other authority to the contrary.⁷³

§ 205. — Provision for Application of Proceeds to Debt

- a. In general
- b. Deduction from total proceeds generally
- c. Application of amount of proceeds not paid over
- d. Sale on credit

61. Ala.—Adkins v. Bynum, 19 So. 400, 109 Ala. 281.

Miss.—Dodds v. Pratt, 8 So. 167, 64 Miss. 123.

11 C.J. p 577 note 90.

Statutory provision as to mortgage by owner

A statute which provides that a mortgage on a stock in trade daily exposed to sale, given by the owner thereof, is fraudulent and void, does not apply to purchase-money mortgages where title is retained in the vendor.

U.S.—In re Varner, D.C.Tex., 297 F. 337.

Tex.—Commercial Credit Co. v. Schlegel-Storseth Motor Co., Com. App., 23 S.W.2d 702.

62. U.S.—National Bank of Bakersfield v. Moore, C.C.A.Cal., 247 F. 913, 160 C.C.A. 103, certiorari denied 38 S.Ct. 427, 247 U.S. 507, 62 L.Ed. 1241.

Okl.—Turk v. Kramer, 280 P. 266, 138 Okl. 35, 73 A.L.R. 229.

63. Kan.—State v. Gorman, 216 P. 290, 292, 113 Kan. 740, citing *Corpus Juris*.

Mo.—Forgan v. Bridges, App., 281 S. W. 134.

Nev.—Martin v. Duncan Automobile Co., 252 P. 322, 50 Nev. 91.

Tex.—Trice v. American Trust & Savings Bank of El Paso, Civ.App., 259 S.W. 993—Massachusetts Bonding & Insurance Co. v. Texas Finance Corporation, Civ.App., 258 S. W. 250.

11 C.J. p 577 note 91—42 C.J. p 758 notes 25-27.

As between administrator of the mortgagor's estate and mortgagee, the mortgage was not void for fraud.—Courtney v. Brenneman, 6 Alaska 233.

Plaintiff, having no interest in property, could not assert invalidity of mortgage because it covered goods daily exposed for sale.—Starr Piano Co. v. Jimmerson, Tex.Civ.App., 279 S.W. 302.

64. Idaho.—Wells v. Alturas Commercial Co., 56 P. 165, 6 Idaho 506.

65. Fla.—Einstein v. Shouse, 5 So. 380, 24 Fla. 490.

Minn.—Mann v. Flower, 25 Minn. 500.

Wyo.—Hasbrouck v. La Febre, 152 P. 168, 23 Wyo. 357.

66. U.S.—In re Standard Tel., etc., Co., D.C.Wis., 157 F. 106, affirmed 162 F. 675, 89 C.C.A. 467, affirmed 30 S.Ct. 142, 216 U.S. 545, 54 L.Ed. 610.

11 C.J. p 577 note 94.

67. N.Y.—Wise v. Rider, 34 N.Y.S. 782.

11 C.J. p 577 note 95.

68. U.S.—Border Nat. Bank v. Coupland, Tex., 240 F. 355, 153 C.C.A. 281.

11 C.J. p 577 note 96.

Express terms prohibiting sale

Mortgage of merchandise was not void as to creditors, where it pro-

vided in express terms that the mortgagor should not sell or dispose of any part of the mortgaged property without the consent of the mortgagee.—Lung v. Bank of California, N. A., 221 P. 293, 127 Wash. 615.

69. U.S.—In re Baumgartner, C.C.A. Wis., 55 F.2d 1041.

11 C.J. p 577 note 97.

Tacit agreement

A dealer's mortgage on automobiles, where dealer was permitted to retain possession, was held invalid as to creditors, where there was a tacit agreement that the mortgagor could sell the automobiles and use the proceeds.—In re Baumgartner, supra.

70. Mo.—St. Louis Drug Co. v. Robinson, 81 Mo. 18.

11 C.J. p 578 note 98.

71. Mo.—Weber v. Armstrong, 70 Mo. 217.

11 C.J. p 578 note 99.

72. Colo.—Wilson v. Voight, 13 P. 726, 9 Colo. 614.

11 C.J. p 578 note 1.

Presumption

There is no presumption that fixtures will be sold in the regular course of trade, but there is a presumption that a stock of merchandise will be sold.—Wagner v. Peace, D.C.N.C., 5 F.Supp. 899.

73. Ill.—Cleaves v. Herbert, 61 Ill. 126.

11 C.J. p 578 note 2.

a. In General

Generally, a mortgage of a stock in trade is not regarded as fraudulent per se where the proceeds are to be applied on the mortgage debt, but in some jurisdictions such a mortgage is void or presumptively fraudulent.

According to the great weight of authority, a mortgage is not fraudulent in law by reason of the fact that the mortgagor is left in possession of the mortgaged property with power to sell the same in the course of business in effect as agent or trustee for the mortgagee and is under the duty to account for and to pay over the proceeds in reduction of the mortgage debt.⁷⁴ This rule is obviously applicable to cases in which the stipulation for such accounting and payment by the mortgagor is contained in the mortgage,⁷⁵ and in some jurisdictions is limited to such cases;⁷⁶ but in other jurisdictions the arrangement may be established by evidence aliunde,⁷⁷ or it may be assumed upon compliance with certain statutory requisites.⁷⁸ The good faith of such a transaction is its controlling feature and is a question of fact.⁷⁹ Further such a mortgage may be shown to be fraudulent in fact,

although it provides that the proceeds of the goods are to be applied in reduction of the debt, where by extrinsic evidence it is shown that there is an agreement between the parties that the mortgagor may apply the proceeds to his own use,⁸⁰ or that the mortgagee does not enforce the provision for accounting.⁸¹ In some jurisdictions, notwithstanding an agreement to account for the proceeds, a mortgage providing that the mortgagor shall retain possession and sell the mortgaged goods in the ordinary course of business is void as to creditors,⁸² and in other jurisdictions it is presumptively fraudulent.⁸³

Under a statute making fraud a question of fact, a provision in a chattel mortgage authorizing the mortgagor to sell the mortgaged property and to apply the proceeds to the payment of the mortgage debt does not vitiate the mortgage,⁸⁴ and this rule applies where a parol agreement is made embodying the same provision.⁸⁵

Where the mortgage requires the mortgagor to apply the proceeds of sales to the payment of a prior mortgage debt, the second mortgagee will not

Deed of trust

Deed of trust given by a lumber company was held not void because there was included therein material on hand, where there was no reservation in deed of trust as to disposition of material in course of business.—*Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co.*, 152 So. 639, 169 Miss. 120.

74. U.S.—*Lee v. State Bank & Trust Co.*, C.C.A.N.Y., 38 F.2d 45—*Garrison v. Kurt, Kan.*, 249 F. 672, 161 C.C.A. 582.

Mo.—*Forgan v. Bridges*, App., 281 S.W. 134—*Martz v. Big Horn Glass Co.*, App., 269 S.W. 697, 699, citing *Corpus Juris*.

N.Y.—*Utica Trust & Deposit Co. v. Decker*, 215 N.Y.S. 669, 217 App. Div. 137, reversed on other grounds 155 N.E. 665, 244 N.Y. 340.

Or.—*First Nat. Bank v. Frazier*, 22 P.2d 325, 143 Or. 662—*Teshner v. Roome*, 210 P. 160, 106 Or. 382, affirmed 212 P. 473, 106 Or. 382.

Tex.—*Grimes v. Huntsville State Bank, Civ.App.*, 12 S.W.2d 1087, error refused—*Clark & Boice Lumber Co. v. Commercial Nat. Bank of Jefferson, Civ.App.*, 200 S.W. 197, error refused.

Wash.—*Yeatman v. Patrician*, 257 P. 622, 144 Wash. 241—*Simpson v. Combes*, 182 P. 566, 107 Wash. 575.

11 C.J. p 579 note 3.

Assignment of accounts receivable

Where assignor of accounts receivable did not have unrestricted do-

minion over returned merchandise, assignee's lien thereon under contract was not rendered void.—*Goldstein v. Rusch*, C.C.A.N.Y., 56 F.2d 10, modifying, D.C., 54 F.2d 86, and certiorari denied 53 S.Ct. 9, 237 U.S. 604, 77 L.Ed. 526.

75. Ala.—*Murray v. McNealy*, 5 So. 565, 86 Ala. 234, 11 Am.S.R. 33. 11 C.J. p 579 note 4.

76. Wash.—*Spokane Merchants' Ass'n v. Musselman*, 234 P. 1033, 134 Wash. 116—*General Mercantile Co. v. Waters*, 221 P. 299, 127 Wash. 481—*Miller v. Scarbrough*, 185 P. 625, 108 Wash. 646. 11 C.J. p 579 note 5—42 C.J. p 758 note 23.

77. N.D.—*Red River Valley Nat. Bank v. Barnes*, 79 N.W. 880, 8 N.D. 432.

11 C.J. p 579 note 6—42 C.J. p 758 note 24.

78. Wis.—*Vanden Wymelenberg v. Badger Furnace Co.*, 265 N.W. 718, 220 Wis. 473, 104 A.L.R. 1215.

Affidavits showing application of proceeds

Under statute rendering valid mortgages in ordinary form of stocks of goods provided affidavits are filed showing proper application of proceeds of sale, that proceeds of sale were to be applied in satisfaction of mortgage debt will be assumed, where chattel mortgage is silent as to disposition of proceeds of sale by mortgagor. The provision is not required to be incorporated in the

mortgage and mortgagee may be entitled to presume that mortgagor would hold proceeds of sales from mortgaged property for payment on mortgage debt until period for filing affidavit showing proper application of proceeds of sale had expired, in absence of evidence to contrary.—*Vanden Wymelenberg v. Badger Furnace Co.*, supra.

79. Idaho.—*Cauthorn v. Burley State Bank*, 144 P. 1108, 26 Idaho 532.

11 C.J. p 579 note 7.

80. U.S.—*Egan State Bank v. Rice*, S.D., 119 F. 107, 56 C.C.A. 157.

Minn.—*Citizens' State Bank v. Brown*, 124 N.W. 990, 110 Minn. 176.

81. Mo.—*Liles v. Potter*, App., 206 S.W. 582.

Mortgagee's knowledge of failure to account shown

Mo.—*Liles v. Potter*, supra.

82. Ill.—*Barchard v. Kohn*, 41 N.E. 902, 157 Ill. 579, 29 L.R.A. 803.

11 C.J. p 580 note 9.

83. Neb.—*Lepin v. Coon*, 74 N.W. 1079, 54 Neb. 664.

11 C.J. p 580 note 10.

84. Ind.—*Fletcher v. Martin*, 25 N.E. 886, 126 Ind. 55.

11 C.J. p 580 note 11.

85. Ind.—*Vermillion v. Greencastle First Nat. Bank*, 105 N.E. 530, 108 N.E. 370, 59 Ind.App. 35.

11 C.J. p 580 note 12.

lose his lien by the fact that the mortgagor fails to carry out the agreement when he has not consented to or permitted the misappropriation of the proceeds.⁸⁶

b. Deduction from Total Proceeds Generally

A provision permitting the mortgagor to apply the proceeds to the debt in part only has been held not to invalidate the mortgage as a matter of law, but there is other authority to the contrary.

The validity of a mortgage on a stock in trade which permits the mortgagee to apply the proceeds from sales in part only to the mortgage debt has been held to depend on the form of the arrangement and its good faith,⁸⁷ but there is some authority which holds it to be fraudulent per se and void as to creditors.⁸⁸ In particular instances a mortgage has been held void where the mortgagor was required to apply only half the proceeds;⁸⁹ or to apply only the wholesale price of that sold;⁹⁰ or to apply only the surplus, after deducting the expenses of carrying on the business,⁹¹ or a sum for his support or support of his family;⁹² or where he was permitted to retain surplus proceeds above certain installments.⁹³ On the other hand a mortgage has been held not invalidated by the fact that the mortgagor was allowed to deduct from the proceeds of sale a sum for his living expenses,⁹⁴ and provisions allowing the mortgagor compensation for his services in making sales have also been upheld.⁹⁵

Deductions for the replenishment of stock are considered in § 206 infra.

c. Application of Amount of Proceeds Not Paid Over

Although the proceeds are not paid over to the mortgagee, as against third persons they will be regarded as applied to the mortgage debt.

Where the mortgagor is allowed to remain in possession and to sell the mortgaged property for the purpose of applying the proceeds to the mortgage debt, he is held to act as the agent or trustee of the mortgagee,⁹⁶ and the proceeds of sale will, as against third persons, be regarded as applied and the debt pro tanto extinguished, although they may not in fact have been paid over to the mortgagee.⁹⁷ This rule, however, does not apply between the mortgagor and the mortgagee.⁹⁸ Where a second mortgagee makes sales from the mortgaged stock, the proceeds will not be held to be applied to the first mortgage debt, where the first mortgagee has not consented to the sales and the proceeds are not paid over to him.⁹⁹ Where a mortgage, covering a stock of goods and fixtures, contained provisions for the payment of the necessary expenses of operating the store, the mortgagee is entitled, as against the creditors of the mortgagor, to an allowance for the amount paid for fixtures which are reasonably necessary to the operation of the store.¹ Where the mortgagee requires regular payments to be made, but not an accounting which is necessary to make the mortgage valid against general creditors, he may be charged with the amount of sales made on credit but he is entitled to the lien of his mortgage for the balance of the debt where there is no other misapplication of proceeds.²

86. Kan.—Atchison Saddlery Co. v. Gray, 64 P. 987, 63 Kan. 79.

87. Kan.—Whitson v. Griffs, 17 P. 801, 39 Kan. 211, 7 Am.S.R. 546. Mont.—Noyes v. Ross, 59 P. 367, 23 Mont. 425, 75 Am.S.R. 543, 47 L.R.A. 400.

88. U.S.—In re Frey, D.C.Minn., 15 F.2d 871.

Colo.—Wile v. Butler, 34 P. 1110, 4 Colo.App. 154.

89. Ind.—General Highways System v. Thompson, 155 N.E. 262, 88 Ind. App. 179, rehearing denied 156 N.E. 407, 88 Ind.App. 179.

90. Minn.—Secord v. Northwestern Tire Co., 199 N.W. 84, 159 Minn. 473.

91. Minn.—Pabst Brewing Co. v. Butchart, 69 N.W. 809, 67 Minn. 191.

N.Y.—Skilton v. Codington, 77 N.E. 790, 185 N.Y. 80, 113 Am.S.R. 885, reversing 93 N.Y.S. 460, 105 App. Div. 617.

11 C.J. p 581 note 22.

92. Colo.—Wile v. Butler, 34 P. 1110, 4 Colo.App. 154. 11 C.J. p 581 note 23.

93. Okl.—Turk v. Kramer, 230 P. 266, 138 Okl. 35, 73 A.L.R. 229.

94. N.D.—Red River Valley Nat. Bank v. Barnes, 79 N.W. 880, 8 N.D. 432.

11 C.J. p 580 note 19.

Crediting sum as payment on debt

Where living expenses were permitted to be deducted, the mortgagee, as against third persons, was held credited with such amount in excess of the actual expense of the sale.—Vermillion v. Greencastle First Nat. Bank, 105 N.E. 530, 108 N.E. 370, 59 Ind.App. 35.

95. Kan.—Gleason v. Wilson, 29 P. 698, 48 Kan. 500. 11 C.J. p 581 note 24.

96. Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697. 11 C.J. p 580 note 13.

97. Ind.—General Highways System v. Thompson, 155 N.E. 262, 88 Ind.

App. 179, rehearing denied 156 N.E. 407, 88 Ind.App. 179. 11 C.J. p 580 note 14.

Absence of proceeds

Failure of mortgagor to account and apply proceeds of sales of mortgaged grocery stock to mortgage debt, as required by mortgage, was held not to remove the mortgagor's lien where the business was a losing venture and no proceeds were ever available for reducing the mortgage debt.—Asbury v. Miller, 232 P. 360, 132 Wash. 235.

98. N.Y.—Brackett v. Harvey, 91 N.Y. 214.

99. N.Y.—Sperry v. Baldwin, 46 Hun 120.

1. Ind.—Vermillion v. Greencastle First Nat. Bank, 105 N.E. 530, 108 N.E. 370, 59 Ind.App. 35. 11 C.J. p 580 note 17.

2. U.S.—In re McLean, D.C.Wash., 270 F. 348.

Written accounting

Testimony that the mortgagor of the stock of goods made the month-

d. Sale on Credit

The mortgagor may be allowed to sell on credit if the permission is granted in good faith.

When the mortgage is otherwise valid it has been held that the mortgagor may be allowed to sell on reasonable terms as to credit,³ if the permission is granted in good faith,⁴ and not as a means of keeping other creditors at bay.⁵

§ 206. — Sale and Replenishment of Stock

A mortgage on a stock of goods has been held not invalidated by the fact that the mortgagor is authorized to replenish the stock from the proceeds of the sales although there is authority to the contrary. As between the parties the mortgage is valid.

Under one line of decisions a mortgage of a stock in trade is not invalidated by the fact that the mortgagor is authorized to sell and to replenish the stock from the proceeds of the sales,⁶ especially when there is a provision that any surplus shall be applied to the mortgage debt,⁷ but under another line of authorities such a mortgage is fraudulent and void,⁸ and a mortgage which is valid on its

face is invalidated by a collateral permission to this effect.⁹

As between the parties the mortgage is valid¹⁰ and it may be upheld as to the after-acquired property.¹¹

§ 207. — Partial Invalidity

Where a portion only of the property is covered by a power of sale, the general rule is that the mortgage is not void in its entirety, but there is other authority to the contrary.

Where a portion only of the mortgaged property is covered by the power of sale the mortgage, although it may be held fraudulent and void as to the property with respect to which the power of sale exists, is not, according to the weight of authority, void in its entirety,¹² although in several jurisdictions a contrary rule prevails.¹³ For example, a mortgage of a stock and fixtures may, in some jurisdictions, be held void as to the stock and valid as to the fixtures,¹⁴ and in other jurisdictions void in toto.¹⁵

ly payments to the mortgagee as required and talked over his business in a general way, but made no statement in writing with relation to the sales of the mortgaged stock, shows a breach of the provision of the mortgage that the mortgagor should account to the mortgagee for sales of stock and apply the proceeds thereof to satisfaction of the mortgage.—*In re McLean*, supra.

3. *Mont.*—*Noyes v. Ross*, 59 P. 367, 23 *Mont.* 425, 75 *Am.S.R.* 543, 47 *L.R.A.* 400.

11 *C.J.* p 581 note 25.

4. *N.Y.*—*Caring v. Richmond*, 22 *Hun* 369.

5. *N.Y.*—*Rochester City Bank v. Westbury*, 16 *Hun* 453.

11 *C.J.* p 581 note 27.

6. *U.S.*—*In re Simpson*, D.C.Idaho, 31 *F.2d* 317, affirmed, C.C.A., *Patnott v. Simpson & Co.*, 35 *F.2d* 840. 11 *C.J.* p 581 note 28.

Priority as to after-acquired goods

An attaching creditor cannot have priority as to after acquired stock even though the mortgage does not provide that it shall cover after-acquired property where the amount and quantity of the goods sold and replaced is not fixed.—*Smith Bros. & Burdick Co. v. Goldberg*, 215 *N.W.* 956, 204 *Iowa* 816.

7. *Mo.*—*Liles v. Potter*, App., 206 *S.W.* 582.

11 *C.J.* p 581 note 29.

Absence of provision as to surplus

A mortgage on a shifting stock of goods which does not provide as to the surplus proceeds but merely pro-

vides that mortgagor shall at all times keep on hand goods of the value of at least a certain amount, is invalid, as against mortgagor's creditors.—*General Mercantile Co. v. Waters*, 221 *P.* 299, 127 *Wash.* 481.

8. *U.S.*—*In re Horwitz*, D.C.Minn., 32 *F.2d* 285—*In re Frey*, D.C.Minn., 15 *F.2d* 871.

Ky.—*Sandy Valley Grocery Co. v. Patrick*, 103 *S.W.2d* 307, 309, 267 *Ky.* 768, quoting *Corpus Juris*.

11 *C.J.* p 582 note 30.

However, it has been held that an agreement that the chattel mortgagor may use the proceeds of sale to replenish his stock does not invalidate the mortgage as to creditors where it is on condition that the new property be subjected to the mortgage lien by a renewal.—*Brackett v. Harvey*, 91 *N.Y.* 214—11 *C.J.* p 582 note 33.

9. *N.Y.*—*Baillargeon v. Dumoulin*, 148 *N.Y.S.* 443, affirmed 151 *N.Y.S.* 112, 165 *App.Div.* 730—*Robson v. Dailey*, 130 *N.Y.S.* 1036.

10. *Me.*—*Deering v. Cobb*, 74 *Me.* 332, 43 *Am.R.* 596—*Allen v. Goodnow*, 71 *Me.* 420.

11. *Me.*—*Williamson v. Nealey*, 17 *A.* 404, 81 *Me.* 447.

11 *C.J.* p 582 note 35.

12. *U.S.*—*Wagner v. Peace*, D.C.N.C., 5 *F.Supp.* 899.

Mo.—*Citizens' Trust Co. v. Elders*, 259 *S.W.* 136, 212 *Mo.App.* 589.

Wash.—*Lung v. Bank of California*, N. A., 221 *P.* 293, 127 *Wash.* 615.

Wis.—*Morley-Murphy Co. v. Jodar*, 264 *N.W.* 926, 220 *Wis.* 302—*Ross*

v. State Bank of Trego, 224 *N.W.* 114, 198 *Wis.* 335, 73 *A.L.R.* 225.

Wyo.—*Stockmen's Nat. Bank of Casper v. Lukis Candy Co.*, 33 *P.2d* 254, 257, 47 *Wyo.* 127, citing *Corpus Juris*.

11 *C.J.* p 582 note 36.

Property intermingled

Mortgagee, causing confusion of property subject to lien with other property, to detriment of creditors having right to resort to unencumbered property, has burden of distinguishing lienable items.—*Morley-Murphy Co. v. Jodar*, 264 *N.W.* 926, 220 *Wis.* 302.

13. *U.S.*—*In re Kibbie*, D.C.N.H., 8 *F.Supp.* 809—*In re Essen*, D.C. Minn., 2 *F.Supp.* 646.

Or.—*Harris v. Schnitzer*, 27 *P.2d* 1010, 146 *Or.* 391.

11 *C.J.* p 582 note 37.

A deed of trust which is void as to creditors, as to part of the property covered because of sales permitted or made by the grantor is void in its entirety.—*U. S. v. Lankford*, D.C. Va., 3 *F.2d* 52.

14. *U.S.*—*Wagner v. Peace*, D.C.N.C., 5 *F.Supp.* 899.

Mo.—*Citizens' Trust Co. v. Elders*, 259 *S.W.* 136, 212 *Mo.App.* 589.

Wis.—*Morley-Murphy Co. v. Jodar*, 264 *N.W.* 926, 220 *Wis.* 302—*Ross v. State Bank of Trego*, 224 *N.W.* 114, 198 *Wis.* 335, 73 *A.L.R.* 225.

11 *C.J.* p 583 note 38.

15. *U.S.*—*In re Kibbie*, D.C.N.H., 8 *F.Supp.* 809—*In re Essen*, D.C. Minn., 2 *F.Supp.* 646.

Or.—*Harris v. Schnitzer*, 27 *P.2d* 1010, 146 *Or.* 391.

11 *C.J.* p 583 note 39.

E. SUFFICIENCY OF TRANSFER OF POSSESSION

§ 208. In General

Ordinarily, a transfer of possession to be sufficient must be actual, visible, unequivocal, and substantial, so as to advise third persons of the change.

Ordinarily, a change of possession to be sufficient as such must be an actual transfer of possession and control,¹⁶ the question depending largely on the character and situation of the property.¹⁷ Mere words will not effect a change of possession in law when there is none in fact.¹⁸ The possession taken must be visible, unequivocal, and substantial, and such as to advise the world at large of the change.¹⁹ Some sort of continued custody in behalf of the mortgagee is essential, even though the property is in the open.²⁰ No particular ceremony or formality is required,²¹ and a delivery of possession which would answer in the case of an absolute sale is sufficient.²² The possession of the mortgagee must be exclusive,²³ and it should be continuous.²⁴ When the mortgagee comes into the lawful possession of the goods, his rights are perfected, although he does not receive possession through the agency of the mortgagor.²⁵ The question of whether possession has been taken by a mortgagee is, on conflicting evidence, one of fact.²⁶ Where the mortgagee has possession at the time of the execution of the mortgage, no further acts of delivery are necessary.²⁷

The possession of a receiver does not constitute a reduction to possession by a mortgagee, for the possession of the receiver is the possession of the court.²⁸

On default. A delivery and change of possession which would be sufficient as against creditors and purchasers on a sale of chattels will be sufficient on foreclosure of a chattel mortgage. In determining the sufficiency of the taking of possession on default, it is proper to consider the situation and nature of the property, and all the circumstances attending the transaction. Thus, what would be sufficient in the case of articles which are ponderous and unwieldy would not be effective in the case of articles which are light and portable.²⁹

§ 209. Constructive Delivery and Change of Possession

Ordinarily, a constructive delivery is insufficient unless an actual delivery is impossible or impractical.

Ordinarily, a constructive delivery is regarded as insufficient,³⁰ particularly under statutes requiring an actual and continued change of possession.³¹ A symbolical delivery, however, will be permitted where the property is of such a bulky character as not readily to permit of an actual delivery,³² so

16. U.S.—*Cornelius v. C. C. Pictures, Inc.*, C.C.A.N.Y., 5 F.2d 157—*Cornelius v. C. C. Pictures, Inc.*, C.C.A.N.Y., 297 F. 444—*In re Active Wet Wash Laundry Co.*, D.C.N.Y., 8 F.Supp. 966, affirmed, C.C.A., 73 F.2d 990.

11 C.J. p 583 note 40.

17. Ill.—*Crockett First Nat. Bank v. George R. Barse Live Stock Commn. Co.*, 64 N.E. 1097, 198 Ill. 232.

11 C.J. p 583 notes 41, 42.

18. U.S.—*In re Active Wet Wash Laundry Co.*, D.C.N.Y., 8 F.Supp. 966, affirmed, C.C.A., 73 F.2d 990.

11 C.J. p 583 note 43.

Instrument allegedly transferring possession is not sufficient.—*In re Active Wet Wash Laundry Co.*, supra.

19. U.S.—*In re Bonk*, D.C.Mich., 270 F. 657—*National Bank of Bakersfield v. Moore*, Cal., 247 F. 913, 160 C.C.A. 103, certiorari denied 38 S. Ct. 427, 247 U.S. 507, 62 L.Ed. 1241. Colo.—*McLagan v. Granato*, 252 P. 348, 80 Colo. 412.

Ill.—*Williams v. Head*, 219 Ill.App. 5.

Wis.—*Underwood Veneer Co. v. Lucia*, 232 N.W. 853, 202 Wis. 507, 79 A.L.R. 1012.

11 C.J. p 583 note 44.

Bulky articles

Wis.—*Underwood Veneer Co. v. Lucia*, supra.

Mortgage of fixtures to manager of store

U.S.—*In re Bonk*, D.C.Mich., 270 F. 657.

Change in methods of management of a business is not sufficient.—*Underwood Veneer Co. v. Lucia*, 232 N. W. 853, 202 Wis. 507, 79 A.L.R. 1012.

Placing crops in designated sheds will protect the title of mortgagee.—*West Springfield Trust Co. v. Hinckley*, 154 N.E. 580, 258 Mass. 157.

20. Ala.—*Wetzler v. Kelly*, 3 So. 747, 83 Ala. 440.

11 C.J. p 584 note 45.

21. Ill.—*Crockett First Nat. Bank v. George R. Barse Live Stock Commn. Co.*, 64 N.E. 1097, 198 Ill. 232.

Okl.—*Nichols etc., Co. v. Bishop*, 70 P. 188, 12 Okl. 250.

22. U.S.—*Duffy v. Charak*, Mass., 35 S.Ct. 264, 236 U.S. 97, 59 L.Ed. 483, reversing 200 F. 747, 119 C.C.A. 191.

11 C.J. p 584 note 47.

23. Colo.—*Atchison v. Graham*, 23 P. 876, 14 Colo. 217.

11 C.J. p 584 note 48.

24. Kan.—*Frankhouser v. Fisher*, 39 P. 705, 54 Kan. 738.

11 C.J. p 584 note 49.

25. Me.—*Wheeler v. Nichols*, 32 Me. 233.

11 C.J. p 584 note 50.

26. Mass.—*Haskell v. Merrill*, 60 N. E. 485, 179 Mass. 120.

11 C.J. p 584 note 52.

27. U.S.—*New York Trust Co. v. Island Oil & Transport Co.*, C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007.

28. U.S.—*New York Cent. Trust Co. v. Worcester Cycle Mfg. Co.*, C.C. Mass., 110 F. 491—*New York Cent. Trust Co. v. Worcester Cycle Mfg. Co.*, Conn., 93 F. 712, 35 C.C.A. 547.

29. Ill.—*Funk v. Staats*, 24 Ill. 632, 646.

11 C.J. p 560 note 28—p 561 note 31.

30. Wis.—*George Walter Brewing Co. v. Lockery*, 114 N.W. 120, 134 Wis. 81.

11 C.J. p 584 note 53.

31. U.S.—*Cornelius v. C. C. Pictures, Inc.*, C.C.A.N.Y., 297 F. 444.

11 C.J. p 584 note 54.

32. Ark.—*Wilson v. Crittenden County Bank, etc., Co.*, 135 S.W. 885, 98 Ark. 379.

11 C.J. p 585 note 55.

that it is sufficient for the mortgagee to accept a constructive delivery of the property and then continue his control over it by means of a custodian or keeper,³³ or by retaining the key to the room where the property is stored.³⁴ However, even in the case of such articles, there must be such a clear and unequivocal designation thereof that creditors or subsequent purchasers cannot be misled, or be in doubt as to the nature of the transaction.³⁵ Again a symbolical or constructive delivery may be permitted where the property is so situated that an actual delivery is impossible or impractical,³⁶ as where the chattels are at a great distance.³⁷ In the nature of things the requirements as to actual, visible change of possession cannot apply to property that has only a potential existence, such as the increase of animals.³⁸ The pendency of a foreclosure suit does not accomplish a constructive change of possession.³⁹

§ 210. Property in Hands of Third Person

Generally, where the property is in the hands of a third person not holding for the mortgagor, an actual delivery is not required.

Where the mortgaged property is in the hands of a third person holding adversely to the mortgagor, so that no better delivery can be made, the mortgage may be good without an actual delivery.⁴⁰

The same rule is applied to cases where the property is in the possession of a bailee of the mortgagor,⁴¹ and it has been held applicable under statutory provisions requiring the actual and continued transfer of possession, where the possessor of the property is an independent party,⁴² but not where he is a tenant or successor in title of the mortgagor.⁴³ So, where the property is in the hands of a third person holding for the mortgagor, a notice by the mortgagor to him to hold the property for the mortgagee is sufficient.⁴⁴ Such a notice is generally necessary,⁴⁵ although there are cases to the contrary.⁴⁶ The consent of the agent or the bailee to hold for the mortgagee is unnecessary.⁴⁷

§ 211. Taking and Retaining Possession Through Agent

The mortgagee may take and retain possession through an agent, but the mortgagor, or one in his employ, is generally regarded as incompetent to act as such agent.

If the mortgagee takes and retains possession through the medium of an agent, in such a manner as to indicate an intention of depriving the mortgagor of his apparent ownership and possession, it is sufficient to protect the property from the claims of third parties.⁴⁸ The agent must have authority to act for his principal in the premises,⁴⁹ and must not act in his own interest or behalf.⁵⁰

33. Ill.—Crockett First Nat. Bank v. George R. Barse Live Stock Commn. Co., 64 N.E. 1097, 193 Ill. 232, affirming 99 Ill.App. 193.
11 C.J. p 585 note 56.

34. Mass.—Drury v. Moors, 50 N.E. 618, 171 Mass. 252.
11 C.J. p 585 note 57.

35. Ark.—Wilson v. Crittenden County Bank, etc., Co., 135 S.W. 885, 98 Ark. 379.
11 C.J. p 585 note 58.

Delivery of bill of sale may be sufficient.—Farmerville State Bank v. Harmon, 75 S.W.2d 1010, 189 Ark. 1029.

36. Tex.—Fox v. Young, Civ.App., 91 S.W.2d 857.
11 C.J. p 585 note 59.

Heavy machine

Mortgagor's letter purporting to deliver possession of machine weighing five hundred and fifty pounds to mortgagee's assignee, who executed receipt therefor and notified persons in charge of café in which machine was located, was held sufficient, with assignee's conduct, to show "delivery."—Fox v. Young, Tex.Civ.App., 91 S.W.2d 857.

37. N.H.—Patrick v. Meserve, 18 N. H. 300.
11 C.J. p 585 note 60.

38. N.J.—Cumberland Bank v. Baker, 41 A. 704, 57 N.J.Eq. 569.

39. Mont.—Griffiths v. Thrasher, 26 P.2d 983, 95 Mont. 238.

40. Me.—Wheeler v. Nichols, 32 Me. 233.
11 C.J. p 585 note 62.

41. U.S.—Cornelius v. C. C. Pictures, Inc., C.C.A.N.Y., 5 F.2d 157, 159, quoting *Corpus Juris*.
11 C.J. p 585 note 63.

42. U.S.—Cornelius v. C. C. Pictures, Inc., C.C.A.N.Y., 5 F.2d 157.

Stored cinema films

Where firm with which cinema films were stored was notified of mortgage and told to make prints only on mortgagee's orders, and indorsed on its records a notation to that effect, it was held that there was an actual and continued change of possession within N.Y.Lien L. § 230, sufficient to validate mortgage although not recorded.—Cornelius v. C. C. Pictures, Inc., C.C.A.N.Y., 5 F.2d 157.

However, in two earlier cases it was held that a sufficient transfer was not accomplished.—Cornelius v. C. C. Pictures, Inc., C.C.A.N.Y., 297 F. 444—Cornelius v. C. C. Pictures,

Inc., D.C.N.Y., 296 F. 487, affirmed, C. C.A., 296 F. 490.

43. U.S.—Cornelius v. C. C. Pictures, Inc., C.C.A.N.Y., 5 F.2d 157.
11 C.J. p 585 note 64.

44. Mich.—Buhl Iron Works v. Teuton, 35 N.W. 804, 67 Mich. 623.

45. U.S.—Duffy v. Charak, 35 S.Ct. 264, 236 U.S. 97, 59 L.Ed. 483.
11 C.J. p 586 note 66.

46. Iowa.—Case v. Burrows, 7 N.W. 130, 54 Iowa 679.

N.H.—Corning v. Records, 46 A. 462, 69 N.H. 390, 76 Am.S.R. 178.
11 C.J. p 586 note 67.

47. Mich.—Buhl Iron Works v. Teuton, 35 N.W. 804, 67 Mich. 623.

48. Iowa.—Smith Bros. & Burdick Co. v. Goldberg, 215 N.W. 956, 204 Iowa 816.
11 C.J. p 586 note 70.

49. Ga.—Redd v. Burrus, 53 Ga. 574.
11 C.J. p 586 note 71.

Violation of instructions of mortgagor by mortgagee's drayman without knowledge or authority of mortgagee does not change possession.—Robinson, Thieme & Morris v. Whittier, 191 P. 763, 112 Wash. 6.

50. Iowa.—King v. Wallace, 42 N.W. 776, 78 Iowa 221.

Who may be agents. Although it cannot be said, as a matter of law, that the mortgagor can never retain possession as agent for the mortgagee,⁵¹ he is generally regarded as incompetent to act as agent in accepting a delivery of the property,⁵² at least as long as he retains his interest in the property.⁵³ One in possession who is not in the employ of the mortgagor may be appointed a custodian for the mortgagee,⁵⁴ but it is usually insufficient for the mortgagee to retain possession through a servant or an employee of the mortgagor,⁵⁵ although there

is no objection to having the same clerks or salesmen continue their previous employment,⁵⁶ and the mortgagee may even retain the mortgagor to assist him in the sale of the mortgaged property.⁵⁷ Where the mortgagee has taken possession of a stock of goods by his agent, the fact that the sign of the mortgagors is allowed to remain over the place of business is not fatal to the sufficiency of taking of possession,⁵⁸ nor is the fact that the same books of accounting are used.⁵⁹

F. DEFECTS CURED BY TAKING POSSESSION

§ 212. In General

Minor defects or informalities attending a mortgage may be cured by the mortgagee's taking possession of the property.

Where a mortgage is valid as between the parties, it will be good as against third persons notwithstanding minor defects or informalities attending it, where possession has been taken before their rights have accrued,⁶⁰ as, for example, where it is attended by defects in its formal execution⁶¹ or acknowledgment,⁶² or in the accompanying affidavit,⁶³ or in recording,⁶⁴ or where it is absolute on its face,⁶⁵ or amounts merely to an executory contract,⁶⁶ or fails to follow the statutory form,⁶⁷ or is verbal,⁶⁸ or gives the mortgagee a power to sell at private

sale,⁶⁹ or where the note secured fails to state that it is secured by chattel mortgage.⁷⁰ However, possession taken after rights of creditors have become fixed can detract nothing from the rights of such creditors.⁷¹ A mortgage which is intrinsically void as a fraud on creditors cannot be cured by taking possession.⁷²

Taking possession as curing a defective description is considered in § 70 supra.

§ 213. Permission to Mortgagor to Use or Sell Property

A mortgage invalid as to creditors because of the right of the mortgagor to use or dispose of the property may under some authority be validated by the mortga-

51. Colo.—Rhodes v. Harmon, 231 P. 222, 76 Colo. 565.
11 C.J. p 586 note 73.
52. Ill.—Rinck v. U. S. Rubber Co., 262 Ill.App. 357.
11 C.J. p 586 note 74.
53. N.J.—Watson v. Rowley, 52 A. 160, 63 N.J.Eq. 195.
54. Colo.—Rhodes v. Harmon, 231 P. 222, 76 Colo. 565.
55. Iowa.—Raybourn v. Creger, 216 N.W. 272, 204 Iowa 961.
11 C.J. p 587 note 77.
56. Mass.—Henshaw v. Bellows Falls Bank, 10 Gray 568.
11 C.J. p 587 note 78.
57. Wis.—Schneider v. Kraby, 73 N. W. 61, 97 Wis. 519.
11 C.J. p 587 note 79.
58. Ill.—Read v. Wilson, 22 Ill. 376, 74 Am.D. 159.
11 C.J. p 587 note 80.
59. Ill.—Martin v. Sexton, 112 Ill. App. 199.
60. U.S.—Sample v. Getman-McDonnell-Summers Drug Co., D.C.Okl., 14 F.2d 170—Hirschfeld v. Nogle, D.C.Ill., 5 F.Supp. 234.
Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.
Ill.—Zola v. Zacher, 220 Ill.App. 123.
Kan.—Farmers' & Drivers' Nat. Bank

- v. Hannaman, 223 P. 478, 115 Kan. 370.
N.J.—Riley & Downer v. United Pepsin Gum Co., 129 A. 478, 98 N.J. Eq. 99.
N.C.—Cowan v. Dale, 129 S.E. 155, 158, 189 N.C. 684, citing *Corpus Juris*.
Okl.—Union State Bank of Shawnee v. Housel, 256 P. 29, 124 Okl. 294.
Tex.—Trice v. American Trust & Savings Bank of El Paso, Civ.App., 259 S.W. 993.
Vt.—Gilfillan's Adm'r v. Bixby, 139 A. 250, 100 Vt. 468.
11 C.J. p 587 note 83.
61. Ill.—Cermak v. Cable Piano Co., 211 Ill.App. 219.
11 C.J. p 587 note 84.
62. Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.
Ill.—Zola v. Zacher, 220 Ill.App. 123.
11 C.J. p 587 note 85.
63. N.J.—Riley & Downer v. United Pepsin Gum Co., 129 A. 478, 98 N.J. Eq. 99.
11 C.J. p 587 note 86.
64. Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145—Bogden v. Fort, 225 P. 247, 75 Colo. 231.
Wash.—Haskins v. Fidelity Nat. Bank, 159 P. 1198, 93 Wash. 63.
65. Mass.—Coggan v. Ward, 102 N. E. 336, 215 Mass. 13.

66. Ohio.—Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am.D. 518.
67. Wash.—Sheehan v. Levy, 23 P. 302, 1 Wash. 149.
68. Ark.—Wilson v. Crittenden County Bank, etc., Co., 135 S.W. 885, 98 Ark. 379.
Vt.—Mower v. McCarthy, 64 A. 578, 79 Vt. 142, 118 Am.S.R. 942, 7 L. R.A.N.S., 418.
69. Wash.—Sheehan v. Levy, 23 P. 302, 1 Wash. 149.
70. Ill.—Springer v. Lipsis, 70 N.E. 641, 209 Ill. 261, affirming 110 Ill. App. 109.
71. U.S.—Sample v. Getman-McDonnell-Summers Drug Co., D.C.Okl., 14 F.2d 170.
Minn.—Goldberg v. Brule Timber Co., 168 N.W. 22, 140 Minn. 335.
Premature refile
Taking possession does not validate a prematurely filed mortgage as to creditors existing before possession is taken.—In re Steffens, C.C.A. N.Y., 31 F.2d 660, 63 A.L.R. 589.
72. Colo.—First Nat. Bank of Ft. Collins v. Daniels Mercantile Co., 172 P. 3, 64 Colo. 408—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1, 64 Colo. 388, L.R.A.1918E 636.
Wash.—Warner v. Hibler, 264 P. 423, 146 Wash. 651.

gee's taking of possession before adverse rights attach, although there is authority to the contrary.

Where the mortgage contains a stipulation regarding the use or disposition of the property which would render it invalid against creditors, it has been held that such invalidity will be cured by a transfer of possession to the mortgagee before adverse rights attach to the property;⁷³ but a contrary view is held in some jurisdictions,⁷⁴ and the rule does not apply where the mortgagee holds the posses-

sion of the goods under a mortgage which is found to be actually fraudulent; that is, where it was executed for the express purpose of cheating or defrauding the creditors of the mortgagor.⁷⁵ Where the mortgagee has in good faith, and for the purpose of satisfying a bona fide indebtedness secured by the mortgage, taken possession and foreclosed the mortgage in due form, the property cannot be pursued by creditors into the hands of a bona fide purchaser for full value at the foreclosure sale.⁷⁶

G. CONVERSION OF, OR INJURY TO, PROPERTY

§ 214. By Mortgagor

A wrongful exercise of dominion over the mortgaged property by the mortgagor with intent to deprive the mortgagee thereof constitutes a conversion.

Where the mortgagor wrongfully appropriates the mortgaged chattels to his own use, he is liable for conversion.⁷⁷ In order to constitute a conversion, the acts of the mortgagor must amount to an exercise of dominion over the mortgaged goods with intent to deprive the mortgagee thereof,⁷⁸ as where he denies the mortgagee's interest in the property

after a default in the condition of the mortgage,⁷⁹ or changes the form of mortgaged property,⁸⁰ or sells the property in denial of the mortgagee's interest, see *infra* § 261. So, a mortgagor may be liable to a first mortgagee for conversion where he gives another mortgage and permits the second mortgagee to take possession.⁸¹ The mere refusal of the mortgagor to consent to the mortgagee's taking possession of the mortgaged chattels, pursuant to the terms in the mortgage, on breach of its conditions, is not sufficient to constitute a conversion.⁸²

73. U.S.—*Patnott v. Simpson & Co.*, C.C.A.Idaho, 35 F.2d 840, affirming, D.C., *In re Simpson*, 31 F.2d 317. Idaho.—*Kettenbach v. Walker*, 186 P. 912, 32 Idaho 544.

Mo.—*Jones v. Bank of Excelsior Springs*, 213 S.W. 892, 201 Mo.App. 545.

Ohio.—*Kruse & Bahlman Co. v. Brower*, 19 Ohio App. 29.

Okl.—*Snow v. Cody*, 220 P. 578, 96 Okl. 81.

Or.—*First Nat. Bank v. Frazier*, 22 P.2d 325, 143 Or. 662—*Kenney v. Hurlburt*, 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737, modified on other grounds 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737.

11 C.J. p 588 note 93.

In Wisconsin

(1) Due to statutory enactments this is now the rule.—*Waterman v. Hantke*, 207 N.W. 946, 190 Wis. 1, rehearing denied 208 N.W. 992, 190 Wis. 1.

(2) The former rule was otherwise.—*Durr v. Wildish*, 84 N.W. 437, 108 Wis. 401—*Blakeslee v. Rossman*, 43 Wis. 116.

(3) However, where the mortgagor of stock of goods, permitted by mortgage to make sales, fails to file statement of sales as required by St. 1923 § 2316b, and mortgagee permits fifteen days after expiration of time for filing to elapse without action on his part, as against other creditors, he must be deemed to have lost lien for all time, although he subsequently takes possession.—*Thomas Pro-*

duce Co. v. Soyck, 199 N.W. 79, 184 Wis. 211.

Oral agreement permitting sale

At common law, unless third person's rights intervene, mortgagee's seasonably taking possession of mortgaged cattle validates, as against all persons, oral agreement permitting mortgagor to sell mortgaged cattle if he replaces them.—*Paska v. Saunders*, 153 A. 451, 103 Vt. 204.

Mortgagee mindful of creditor's claims

Fact that lender who took chattel mortgage on fluctuating stock as security, when he took possession under stipulation of mortgage and proceeded to sell at private sale, was not unmindful of claims of unsecured creditors and proposed to get all he could for them, did not lessen nor defeat his security.—*Kenney v. Hurlburt*, 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737, modified on other grounds 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas.1918E 737.

Claims without attachment or seizure

Mere existence of claims of creditors of mortgagor without attachment or seizure on execution was not intervention of rights of third persons, preventing subjection of goods to lien of chattel mortgage on mortgagee's taking possession before rights of third persons intervened.—*Kenney v. Hurlburt*, *supra*.

74. Wash.—*Warner v. Hibler*, 264 P. 423, 146 Wash. 651—*Tahoma Fi-*

nance Co. v. Shannon, 244 P. 271, 138 Wash. 90.

11 C.J. p 588 note 94.

75. U.S.—*Wells v. Langbein*, C.C. Iowa, 20 F. 183.

Mo.—*State v. O'Neill*, 52 S.W. 240, 151 Mo. 67—*Antram v. Burch*, 84 Mo.App. 256.

76. N.D.—*Madison v. Rutten*, 113 N. W. 872, 16 N.D. 281, 13 L.R.A., N. S., 554.

77. Cal.—*Mills v. Brown*, 269 P. 636, 205 Cal. 38.

11 C.J. p 588 note 97.

78. Ind.—*Jones v. Smith*, 24 N.E. 368, 123 Ind. 585.

11 C.J. p 588 note 98.

Grinding and replacement of wheat

Where a miller gave mortgages on specified quantities of wheat in his bins, the grinding of wheat from the bottom of the bins, and replacing of it by new wheat at the top of the bins, was not a conversion, so long as there was sufficient on hand at all times to satisfy the mortgages.—*In re Ballard*, D.C.Tex., 279 F. 574.

79. Cal.—*Mathew v. Mathew*, 71 P. 344, 138 Cal. 334.

Ind.—*Mattingly v. Paul*, 88 Ind. 95.

Mo.—*Roach v. St. Louis Type Fdy.*, 21 Mo.App. 118.

80. Minn.—*Mankato Nat. Citizens' Bank v. McKinley*, 136 N.W. 579, 118 Minn. 162.

81. Mich. — *Matter of Hicks*, 20 Mich. 280.

R.I.—*Millar v. Allen*, 10 R.I. 49.

82. Okl.—*J. I. Case Threshing Mach. Co. v. Barney*, 154 P. 674.

The duty of the mortgagor to care for the property while in his possession is considered in § 186 supra.

§ 215. By Mortgagee

- a. In general
- b. By senior mortgagee
- c. By junior mortgagee

a. In General

An exercise of dominion over the property by the mortgagee inconsistent with the rights of the mortgagor or the relationship between the parties will constitute a conversion.

Where the mortgagee is in possession, the exercise by him of any dominion over the property, in-

consistent with the rights of the mortgagor or with the relation which he justly sustains to the property, will constitute a conversion in case the mortgagor elects so to treat it;⁸³ and this is true, even though the mortgagee is not actually in possession, if he exercises acts of dominion over the property and participates by aiding and abetting one in actual possession.⁸⁴ So a mortgagee is liable for conversion where he wrongfully takes or retains possession,⁸⁵ or is guilty of fraud or breach of the peace in obtaining possession,⁸⁶ or where he disposes of the property in denial of the title or interest of the mortgagor,⁸⁷ as where he sells without foreclosure; when foreclosure is required by the statute or terms of the mortgage,⁸⁸ where he sells under the mort-

83. Cal. — *Lindsey v. Commercial Discount Co.*, 55 P.2d 896, 897, 12 Cal.App.2d 345, citing *Corpus Juris*.

Or.—*Reid v. Wentworth & Irwin*, 63 P.2d 210, 155 Or. 265.

S.C. — *General Motors Acceptance Corporation v. Hanahan*, 143 S.E. 820, 146 S.C. 257.

Tex.—*Block Motor Co. v. Melia*, Civ. App., 247 S.W. 666.

11 C.J. p 589 note 5.

Contract to sell after foreclosure

An executory contract by a mortgagee, in possession, proceeding to foreclose, to resell mortgaged goods to third person if he acquired title did not constitute conversion.—*Reid v. Wentworth & Irwin*, Or., 73 P.2d 381.

84. N.Y.—*Burghen v. Purdy*, 50 N.Y. S. 546, 27 App.Div. 460.

11 C.J. p 589 note 6.

85. Ala.—*Sullivan v. Miller*, 140 So. 606, 224 Ala. 395.

Mass.—*Glassman v. Ficksman*, 131 N. E. 316, 238 Mass. 580—*Jones v. Goodwillie*, 9 N.E. 639, 143 Mass. 281.

S.D.—*Styke v. Sioux Falls Motor Co.*, 244 N.W. 387, 60 S.D. 358.

Tex.—*Stidham v. Lewis*, Civ.App., 23 S.W.2d 851.

11 C.J. p 589 note 19.

Retention by purchase-money mortgagee after return for repair

Where buyer of piano, who had a purchase-money mortgage, shipped piano back to seller's factory for repairs under seller's agreement to make repairs without cost and return the piano to buyer, the seller could not retain the piano because of buyer's default in payment of purchase-money installments when due, but was required to foreclose the mortgage in the regular way, and such retention amounted to a conversion.—*Cable Co. v. Greenfield*, 244 S.W. 692, 196 Ky. 314.

Property left in mortgagor's possession after levy

Where a warrant, issued in a mort-

gagor's suit against a cropper, commanded the sheriff to seize grain on which the landowner claimed a lien, and the sheriff, after levy on the cropper's interest, left the grain in the landowner's granary, taking his oral assurance that it would be safe, there was no conversion by the mortgagee, and, in the absence of other evidence, it was not liable to the landowner.—*Citizens' State Bank of Pingree v. Sorlien*, 185 N.W. 269, 48 N.D. 487.

86. Ohio.—*Bear v. Colonial Finance Co.*, 182 N.E. 521, 42 Ohio App. 482.

Okl. — *General Motors Acceptance Corporation v. Davis*, 7 P.2d 157, 151 Okl. 255.

11 C.J. p 590 note 22.

87. Ill.—*Cowan v. Terrell*, 273 Ill. App. 194.

Me.—*Drummond v. Trickey*, 108 A. 72, 118 Me. 296.

Okl.—*First Nat. Bank v. Wesson*, 235 P. 595, 109 Okl. 225—*Rogers v. Benford*, 201 P. 646, 83 Okl. 270.

Or.—*Barber v. Motor Inv. Co.*, 298 P. 216, 136 Or. 361.

Tex.—*Draper v. Presley*, Civ.App., 111 S.W.2d 1124, error dismissed—*R-F Finance Corporation v. Jones*, Civ.App., 50 S.W.2d 475.

Wyo.—*Wettlin v. Jones*, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 247, 32 Wyo. 446.

11 C.J. p 589 notes 7, 19.

Sale contrary to agreement

Where automobile buyer in default on purchase-money note secured by mortgage surrendered possession to seller's agent who agreed in writing to hold automobile for ten days and to deliver it to buyer upon payment of installments due and expense item incurred by seller, sale of automobile during ten-day period by seller was a "conversion."—*Draper v. Presley*, Tex.Civ.App., 111 S.W.2d 1124, error dismissed.

Sale while action pending

(1) A mortgagee is liable for conversion for selling personal property pledged to it under chattel mortgage

while action in claim and delivery is pending, since the property is technically in possession of the law.—*United Bank & Trust Co. of California v. Hunt*, 64 P.2d 477, 18 Cal. App.2d 112, amending and denying rehearing 62 P.2d 1391, 18 Cal.App.2d 112.

(2) Where mortgagee instituting replevin action to foreclose mortgage obtains possession of property by filing replevin bond, sale thereof at foreclosure sale prior to determination of issues constitutes conversion.—*Tingley v. Smith*, 72 P.2d 729, 181 Okl. 84—*Scott v. Standridge*, 245 P. 591, 117 Okl. 111—*Mid-Continent Motor Securities Co. of Tulsa v. Art Harris Transfer & Storage Co. of Muskogee*, 223 P. 130, 97 Okl. 139—*Salisbury v. First Nat. Bank*, 221 P. 444, 99 Okl. 138.

(3) In such case plaintiff and his sureties were liable to defendants for conversion, notwithstanding defendants did not claim return of property.—*Tingley v. Smith*, supra.

Proceedings after sequestration

Where seller of motorcycle took chattel mortgage thereon from buyer and on failure to pay installment instituted suit and sequestered machine, and later replevied it, his dismissal of sequestration suit did not relieve him of conditions of replevy bond so as to permit him to sell machine to himself under power of sale in chattel mortgage without rendering himself liable to buyer for conversion.—*Trehan v. Dunnigan*, Tex. Civ.App., 297 S.W. 1102.

88. Cal.—*Metheny v. Davis*, 290 P. 91, 107 Cal.App. 137.

Idaho.—*Boomer v. Isley*, 246 P. 966, 42 Idaho 547, 47 A.L.R. 578.

Minn.—*McLeod Nash Motors v. Commercial Credit Trust*, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296.

Okl.—*Oklahoma State Bank of Enid v. Buckner*, 217 P. 189, 90 Okl. 109.

11 C.J. p 589 note 8.

Effect of consent to taking

Although a chattel mortgagor con-

gage but not in accordance with its terms,⁸⁹ where he forecloses before the debt is due,⁹⁰ where proceedings as to sale or foreclosure do not comply with the statute,⁹¹ where he sells more than sufficient of the property to satisfy the mortgage debt,⁹² or if he fails to account for surplus money arising on the sale,⁹³ where he does not use all fair and reasonable means to obtain the best price at the sale⁹⁴ or sells under a void mortgage,⁹⁵ or after a release⁹⁶ or a satisfaction⁹⁷ of the mortgage, or after notice that his mortgagor had no title or interest in the chattels.⁹⁸ It also constitutes conversion for the mortgagee to receive and sell the mortgaged

chattels after the debt and mortgage have been assigned.⁹⁹ Likewise the taking possession¹ and sale² of property not covered by the mortgage is a conversion thereof. A wrongful refusal to allow the mortgagor to redeem the mortgaged chattels constitutes a conversion,³ as does a refusal to restore possession after the mortgagor has redeemed.⁴

A mortgagee who wrongfully takes possession cannot escape liability by parting with his interest in the property,⁵ nor will a subsequent default by the mortgagor justify his acts.⁶ A mortgagor need

sented to the taking of the mortgaged property by the mortgagee, where he did not waive foreclosure, and the statute was not followed as to notice or public sale, the mortgagee was liable to account for the reasonable value of the property.—Schreiner v. Shanahan, 181 N.W. 536 105 Neb. 525.

Private sale after election to foreclose

Finance company which procured possession of automobile mortgaged to it through suit and a receiver is guilty of conversion in thereafter treating automobile as its own and disposing of it at private sale, notwithstanding mortgage authorized them to take possession of and sell automobile at private sale upon default of mortgagor, since finance company's action in invoking processes of court to foreclose mortgage amounted to election of remedy.—Home Service Finance Co. v. White, Tex.Civ.App., 86 S.W.2d 815, error dismissed.

89. Ark. — Perryman v. Abston, Wynne & Co., 261 S.W. 622, 164 Ark. 280.
11 C.J. p 589 note 9.

Conditional sale by mortgagee in possession with right to sell outright, is a technical conversion.—Montgomery County Nat. Bank v. Wherry, 169 P. 1146, 102 Kan. 224.

Sale prior to default

Seller's seizing and selling motorcycle to himself under power of sale in chattel mortgage, in absence of buyer's default, constitutes wrongful conversion. — Trehan v. Dunnigan, Tex.Civ.App., 297 S.W. 1102.

90. Idaho.—Gunnell v. Largilliere Co., Bankers, 269 P. 412, 415, 46 Idaho 551, citing *Corpus Juris*—First Savings Bank of Pocatello v. Sherman, 195 P. 630, 631, 33 Idaho 343, citing *Corpus Juris*.

91. Idaho.—Peterson v. Halley Nat. Bank, 6 P.2d 145, 51 Idaho 427.
Mont.—Trudell v. Hingham State Bank of Hingham, 205 P. 667, 62 Mont. 557.

Okl.—Parks v. Thompson & Wilkerson, 264 P. 607, 129 Okl. 256.

Or.—Laam v. Green, 211 P. 791, 106 Or. 311.

11 C.J. p 589 note 10.

Failure to demand peaceable possession before delivering affidavit to sheriff for further proceedings, is conversion.—Peterson v. Halley Nat. Bank, 6 P.2d 145, 51 Idaho 427.

Sale to third person

If mortgage is irregularly foreclosed and property sold to another than the mortgagee, the mortgagor may treat the action as a conversion by the mortgagee.—National Bank of Commerce of Porum v. Jackson, 170 P. 474, 69 Okl. 93.

Resale after void foreclosure

Where mortgagee purchased property at void foreclosure, and sold part thereof to third person for an amount in excess of the mortgage debt, the sale was a conversion.—Jankowitz v. Kaplan, 165 N.W. 275, 138 Minn. 452.

92. Neb.—Skow v. Locke, 101 N.W. 340, 72 Neb. 681.
11 C.J. p 589 note 11.

93. Ark.—Anderson v. Joseph, 130 S. W. 165, 95 Ark. 573.

Idaho.—Unfried v. Libert, 119 P. 885, 20 Idaho 708.

Mich.—Bearss v. Preston, 32 N.W. 912, 66 Mich. 11.

94. Wis.—Kellogg v. Malick, 103 N. W. 1116, 125 Wis. 239, 4 Ann.Cas. 893.

11 C.J. p 589 note 13.

Duty to make equitable disposition

Where mortgagee-seller, upon default on mortgage debt, subjected mortgaged property to its claim, then received written notice from third person, not named mortgagor in instrument or buyer in bill of sale of interest in the property together with offer of payment of mortgage debt, mortgagee was under duty to make such disposition thereof as would be fair and equitable to rights of all parties of whose interest it had notice.—John E. Morriss Co. v. O'Neal, Tex.Civ.App., 109 S.W.2d 1156.

95. Minn.—Wetherell v. Stewart, 29 N.W. 196, 35 Minn. 496.

96. Mich.—Avery v. Midwest Commercial Credit Co., 236 N.W. 798, 254 Mich. 324.

11 C.J. p 589 note 15.

97. La.—Ferrara v. Polito, App., 167 So. 120.

11 C.J. p 589 note 16.

98. Neb.—Charles P. Kellogg Co. v. Horkey, 86 N.W. 497, 61 Neb. 751.

N.Y.—Tasker v. Ryan, 40 N.Y.S. 942, 4 App.Div. 616.

11 C.J. p 589 note 17.

Assignment by mortgagor

Sale of mortgaged cars taken from assignee of mortgagors in foreclosure suit, to which assignee was not party was held conversion, and the mortgagee acted at his peril in disposing of the property.—Sabine Motor Co. v. W. C. English Auto Co., Tex.Com.App., 291 S.W. 1088, reversing, Civ.App., 233 S.W. 224.

99. Mo.—City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo. App. 123.

1. Mo.—Butcher v. Bell, App., 198 S. W. 1123.

Grounds for rescission of sale

Where the seller of live stock to whom the buyer executed a chattel mortgage to secure the purchase price wrongfully takes possession of the increase, such a taking will constitute grounds for a rescission of the sale and render the mortgagee liable for taking it.—Glaspie v. Williams, 51 P.2d 254, 46 Ariz. 381.

2. Cal.—Abrott v. Athanasatos, 61 P.2d 982, 18 Cal.App.2d Supp. 769.
11 C.J. p 589 note 18.

3. Wis.—Gauche v. Milbrath, 69 N. W. 999, 94 Wis. 674.

4. Minn.—Latusek v. Davies, 82 N. W. 587, 79 Minn. 279.

5. Cal.—Bonestell v. Western Automotive Finance Corporation, 232 P. 734, 69 Cal.App. 719.

Tex.—Frankfurt v. Grayson, Civ. App., 80 S.W.2d 486.

6. Mo.—Miller v. Biggs, App., 183 S. W. 713.

not accept property which has once been converted,⁷ nor is he under an obligation to take affirmative steps to repossess the chattels,⁸ but he may waive the conversion.⁹

There is no conversion where the mortgagee rightfully takes or retains possession,¹⁰ or where the property is sold with the consent of the mortgagor¹¹ or in accordance with the terms of the mortgage,¹² or if the mortgagee's interest in the property clearly exceeds its value;¹³ nor is it a conversion that mortgaged property is not sold at the place where it is taken into possession,¹⁴ nor that it is sold on credit.¹⁵ The mortgagee is not liable for conversion by his assignee of property not included in the mortgage or assignment.¹⁶ An

act done to preserve and protect the property, in order that it may remain subject to the lien, and which is equally beneficial to those having subordinate rights, and not in antagonism thereto, is not a wrongful conversion.¹⁷

The duty of the mortgagee to preserve or protect the property and his liability for loss is considered in § 186 supra.

Delay or failure in selling or foreclosing. A mortgagee is liable for a conversion where he takes possession under the mortgage and refuses to sell in accordance with its terms,¹⁸ or delays for an unreasonable time after default or beyond the period specified by statute,¹⁹ and he is liable to the mortga-

Or.—Becker v. McKenzie, 144 P. 434, 73 Or. 313.

11 C.J. p 590 note 20.

7. Wyo.—Wetlin v. Jones, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 247, 32 Wyo. 446.

8. Neb.—Schreiner v. Shanahan, 181 N.W. 536, 105 Neb. 525.

Failure to apply for restraining order to stop sale of horse and wagon under execution on mortgage which had been paid was held not to relieve mortgagee of liability to make restitution for value of horse and wagon.—Ferrara v. Polito, La. App., 167 So. 120.

9. Ariz.—Crosby v. Murray, 210 P. 1046, 24 Ariz. 446.

S.C.—E. Sternberger Co. v. Summerford, 131 S.E. 322, 134 S.C. 63.

11 C.J. p 589 note 5 [a].

10. Ga.—General Motors Acceptance Corporation v. Dunn Motors, 157 S.E. 627, 172 Ga. 400, answers conformed to 158 S.E. 626, 43 Ga.App. 275—Taylor Iron Works & Supply Co. v. Everett, 150 S.E. 855, 40 Ga. App. 683.

Mo.—Day v. National Bond & Investment Co., App., 99 S.W.2d 117.

N.Y.—Liebman v. Brockway Motor Truck Corporation, 249 N.Y.S. 39, 140 Misc. 73.

Ohio.—Calder v. Bliss Auto Sales Co., 18 Ohio App. 242.

Okl.—Producers' & Refiners' Corporation v. De Hart, 232 P. 386, 107 Okl. 221.

S.C.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

Tex.—Witherspoon v. Terry, Com App., 267 S.W. 973, affirming Terry v. Witherspoon, Civ.App., 255 S.W. 471—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610—John E. Morriss Co. v. O'Neal, Civ.App., 109 S.W.2d 1156—Pipkin v. Rico, Civ.App., 83 S.W.2d 1045.

Wash.—Reinhardt v. Sprague, 63 P. 2d 350, 188 Wash. 663.

Claim of conversion by landlord

A landlord whose lien for the storage of the chattel is subordinate to the lien of the mortgage cannot sustain claim of conversion by mortgagee, where mortgagor cannot.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

11. Conn.—Clark v. Whitaker, 18 Conn. 543, 46 Am.D. 337.

Iowa.—W. A. Jordan Co. v. Sperry, 119 N.W. 692, 141 Iowa 225.

If mortgagor was mentally incompetent by reason of excessive intoxication produced and induced by the mortgagee when he signed instruments consenting to a taking and sale of the property at private sale by the mortgagee before maturity, he was not bound thereby.—Schreiner v. Shanahan, 181 N.W. 536, 105 Neb. 525.

12. Cal.—Lindsey v. Commercial Discount Co., 55 P.2d 896, 12 Cal. App.2d 345.

Conn.—Pietrantonio v. Scalo, 181 A. 628.

Ill.—Howard v. Hartman Furniture & Carpet Co., 208 Ill.App. 562.

S.C.—E. Sternberger Co. v. Summerford, 131 S.E. 322, 134 S.C. 63.

11 C.J. p 590 note 24.

Sale after condition broken

Mortgagee in possession is not liable in trover to mortgagor, if he sells property at private sale after condition broken, though not in way provided by Gen.L. 2803 et seq., as legal title vests absolutely in mortgagee in such case; Laws 1878 No. 51 § 13, Gen.L. 2801, and §§ 2802, 2803, 2805, being intended to fix certain time within which one entitled to redeem may act, and provide method for speedy determination of his and mortgagee's rights.—Campbell v. Bryant, 129 A. 299, 98 Vt. 486.

Failure to procure price

Mortgagee, selling chattel at private sale under power in mortgage,

although at allegedly too low a price, was not guilty of conversion.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.

13. Mich.—Botsford v. Murphy, 11 N.W. 375, 47 Mich. 536.

14. Mich.—Croze v. St. Mary's Canal Mineral Land Co., 107 N.W. 92, 313, 143 Mich. 514, 114 Am.S.R. 677. 11 C.J. p 590 note 26.

15. Mich.—Croze v. St. Mary's Canal Mineral Land Co., supra.

16. Tex.—Smith v. Texas, etc., R. Co., 108 S.W. 819, 101 Tex. 405.

17. Cal.—Summerville v. Stockton Milling Co., 76 P. 243, 142 Cal. 529.

11 C.J. p 590 note 23.

18. Tex.—Ragland v. Cone, Civ.App., 114 S.W.2d 620.

11 C.J. p 590 note 29.

19. Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

Ky.—Cartwright v. C. I. T. Corporation, 70 S.W.2d 388, 253 Ky. 690.

Mo.—Southern Missouri Trust Co. v. Crow, App., 272 S.W. 1040.

N.D.—Hedrick v. Stockgrowers' Credit Corporation, 250 N.W. 539, 64 N. D. 101.

11 C.J. p 590 note 30.

In California

(1) Mere delay without proof of injury to the mortgagor has been held not to amount to a conversion of the property.—Woods Leasing Co. v. Funcheon, 25 P.2d 47, 134 Cal. App. 111.

(2) In an earlier case there is dictum that a delay for an unreasonable time would constitute a conversion.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal.App. 46.

Short delay

Conversion of automobile did not result from failure at once to proceed to foreclosure after taking possession on default in a single monthly note.—Lipper v. McClain, Tex.Civ. App., 223 S.W. 349.

gor for the difference between the value of the property and the amount of the mortgage debt.²⁰ Where the mortgagee does not take possession and it is not delivered to him,²¹ or where he holds the property until the outcome of a suit to determine his rights therein,²² or where the goods are lawfully taken by the mortgagee from the mortgagor, and no demand is made on the mortgagee for a compliance with the terms of the mortgage or the return of the property,²³ or no tender of the amount due accompanies the demand for a return of the property,²⁴ or where, after the property is taken over, there are negotiations toward effecting a settlement,²⁵ or where foreclosure is enjoined by the mortgagor,²⁶ the mortgagee is not guilty of conversion in detaining the goods. Where sale is delayed with consent of the parties in interest, the mortgagee is not liable for the value of the property at the time of taking possession, although such value is greater than the price obtained at the sale.²⁷

Mortgagee of partial interest. A mortgagee of a partial interest in the property who after sale refuses to pay the proceeds of another's interest to him is liable for conversion.²⁸

b. By Senior Mortgagee

A senior mortgagee with notice of junior mortgages

must not act in a manner inconsistent with the rights of the junior mortgagees.

A senior mortgagee owes to subsequent mortgagees good faith in the enforcement of his mortgage provided he has notice of their rights.²⁹ If by fraud or gross negligence he permits the security to be destroyed, lost, or removed he must make good the loss,³⁰ but he is not liable for a removal by the mortgagor where he is not guilty of fraud or gross negligence.³¹ The first mortgagee might become liable for conversion by reason of a void foreclosure sale,³² or because he sells the property without foreclosure and at private sale,³³ or converts the property to his own use when he has the duty to sell it,³⁴ or attaches the mortgaged property,³⁵ or refuses a tender of the amount due on the first mortgage,³⁶ or where he takes possession although under the statutes, his mortgage merely passes an equitable title as against the legal title vesting in the junior mortgagee.³⁷ Where after he has assigned his mortgage and retains no interest therein the senior mortgagee seizes the property, he is guilty of conversion as against the holder of a junior mortgage who has reduced the mortgaged property to his possession.³⁸

A first mortgagee who is rightfully in possession of the mortgaged property is not liable in conver-

20. Mo.—General Motors Acceptance Corporation v. Holland, App., 30 S. W.2d 1087.

11 C.J. p 590 note 31.

21. Okl.—McCrary v. Thompson, 37 P.2d 632, 169 Okl. 447.

22. Colo.—Grattan v. Wilson, 259 P. 6, 82 Colo. 239.

23. Ark.—Atkinson v. Burt, 53 S.W. 404, 65 Ark. 316.

11 C.J. p 590 note 32.

24. Mich.—Card v. Fowler, 79 N.W. 925, 120 Mich. 646.

N.Y.—Rudemien v. Bershadsky, 121 N.Y.S. 595.

25. Okl.—J. I. Case Threshing Mach. Co. v. Barney, 154 P. 674, 54 Okl. 686.

26. Colo.—Grattan v. Wilson, 259 P. 6, 82 Colo. 239.

11 C.J. p 590 note 35.

27. Kan.—Harrison Nat. Bank v. Leslie, 83 P. 984, 72 Kan. 401.

28. Ark.—First Nat. Bank v. Farmers' & Merchants' Bank of Marked Tree, 252 S.W. 34, 159 Ark. 384.

Payment to mortgagee by receiver

A mortgagee had no lien on, or right to, proceeds of sale of cotton, grown on mortgagor's lands not covered by mortgage, so that taking and appropriation of such cotton and payment of proceeds thereof to mortgagee by receiver of mortgaged lands

in violation of mortgagor's instructions to sell it and pay United States government crop loans, secured by mortgages on crops, from proceeds, vested cause of action as for conversion in government, which was entitled to judgment against mortgagee for value of such cotton on its intervention in suit to foreclose mortgage on lands.—U. S. v. Western & Southern Life Ins. Co., Ark., 114 S. W.2d 36, 39, quoting *Corpus Juris*.

29. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

After assignment of mortgage

Assignor of first mortgage of seed and one aiding and abetting him held guilty of conversion against second mortgagee by selling seed and distributing its proceeds without his knowledge or consent among farm laborers who filed no claim of lien.—Nornberg v. Boley, 246 P. 12, 42 Idaho 48.

Constructive notice arising from record is not sufficient.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

30. Ala.—Kelley v. Cassels, supra.

31. Ala.—Shields v. Kimbrough, 64 Ala. 504.

32. S.D.—La Crosse Boot, etc., Co. v. Mons Anderson Co., 83 N.W. 331, 13 S.D. 301.

11 C.J. p 591 note 46.

33. Iowa.—Money v. Somers Sav.

Bank, 209 N.W. 275, 276, 202 Iowa 106 citing *Corpus Juris*.

S.D.—Hanover Nat. Bank v. Farmers' & Merchants' State Bank, 227 N. W. 67, 55 S.D. 598.

11 C.J. p 591 note 47.

34. Iowa.—Perego v. Wheeler, 55 N.W. 462, 88 Iowa 732.

Removal with consent of junior mortgagee

If the first mortgagee removes the property from the state with the consent of a junior mortgagee for the purpose of having it sold to satisfy the mortgages, but after its removal uses it for his own purposes instead of selling it, he is liable to the junior mortgagee for the value of the property in excess of the senior mortgage debt.—Perego v. Wheeler, supra.

35. Mont.—Chicago Title, etc., Co. v. O'Marr, 46 P. 809, 47 P. 4, 18 Mont. 568.

36. Mich.—Schmittiel v. Moore, 79 N.W. 195, 120 Mich. 199.

Mo.—Williamson v. Gottschalk, 1 Mo. App. 425.

37. Ala.—Pinckard v. Cassels, 70 So. 153, 195 Ala. 353.

11 C.J. p 591 note 51.

38. N.Y.—Schwab Mfg. Co. v. Aizenman, 94 N.Y.S. 729, 106 App.Div. 473.

sion to a subsequent mortgagee,³⁹ especially where the junior mortgagee consented to the alleged conversion.⁴⁰ A senior mortgagee who receives the mortgaged property from the mortgagor in good faith and at a fair price for the purpose of paying his mortgage is not liable to a junior mortgagee for conversion;⁴¹ nor is he liable where the property is fairly sold and the proceeds applied to his debt⁴² and the surplus proceeds, after deducting the expenses of the sale, turned over to the junior mortgagee.⁴³ Although a prior mortgage is fraudulent, a second mortgagee cannot recover for a depreciation in the value of property which is not consumable by use, while it is in the hands of the first mortgagee under an arrangement with the mortgagor, where the mortgagor or his grantee has a right to the use of the property until a demand by the mortgagee.⁴⁴

The duty of a senior mortgagee in possession to protect the interest of a junior mortgagee by tak-

ing care of the property is considered in § 186 supra.

c. By Junior Mortgagee

A junior mortgagee with notice of a senior mortgage who appropriates or sells the property in derogation of the rights of the senior mortgagee is liable for conversion.

A junior mortgagee with notice of a senior mortgage is liable to the senior mortgagee for conversion where he takes possession of the property and appropriates it to his own use,⁴⁵ where he receives the property and puts it beyond the reach of execution under the senior mortgage,⁴⁶ where he sells or assists in the sale of the property for a full consideration and without recognizing the rights of the prior mortgagee,⁴⁷ where he induces a purchaser to buy from the mortgagor,⁴⁸ or where after a legitimate foreclosure sale he resells the property, in which case no demand for the return of the property is necessary.⁴⁹ So, where a junior mortgagee

39. Mass.—Clapp v. Campbell, 124 Mass. 50.

Property in possession of second mortgagee

A first mortgagee is not liable for taking possession under his mortgage, although the property is in the joint possession of the mortgagor and a second mortgagee.—Coty v. Barnes, 20 Vt. 78.

40. Colo.—Atkins v. Boyle, 80 P. 1067, 33 Colo. 434.

41. Ga.—Harris v. Grant, 23 S.E. 390, 96 Ga. 211.

Chattel worth less than debt

Mortgagee who receives possession of truck worth less than debt in satisfaction of the debt is not liable for conversion to junior mortgagee not offering to redeem.—People's Nat. Bank of Nocona v. Jones, Tex.Civ.App., 34 S.W.2d 346.

42. Minn.—Carity Motors v. Eichsten, 249 N.W. 190, 189 Minn. 310.

Advance in price after sale

Where one of mortgagees, asserting conflicting claims to crop of wheat, under stipulation for reimbursement, advanced money for harvesting, such mortgagee was entitled to have wheat sold at best price obtainable and to sell it when it saw fit, provided it acted in good faith, and was not liable, because after sale wheat advanced in price.—Farmers' & Merchants' Bank of Walla Walla v. Small, 229 P. 531, 131 Wash. 197.

43. Kan.—Exchange State Bank of Kirwin v. Farmers' State Bank of Kirwin, 237 P. 936, 119 Kan. 70.

Payment of wages

The act of a senior mortgagee whose mortgage had expired by limitation and had not been renewed, in

applying the proceeds of the sale of a part of the mortgaged cattle which had come into his hands as a stakeholder to the payment of wages of the mortgagor's ranch hands was held not a conversion by him of the property, nor to render him accountable to a junior mortgagee for the money so dispensed by him.—Atkins v. Boyle, 80 P. 1067, 33 Colo. 434.

Payment to share croppers

Second mortgagee could not recover from holder of first crop mortgage amount he paid, without knowledge of second mortgagee's claim, to share croppers as their share of proceeds of cotton delivered to him by mortgagors and sold by first mortgagee.—Harris v. Pruett, 32 S.W.2d 300, 182 Ark. 554.

44. Tenn.—Moore v. Wood, Ch.A., 61 S.W. 1063.

45. Ind.—Burton v. Tannehill, 6 Blackf. 470.
11 C.J. p 591 note 56.

46. Ga.—Harris v. Grant, 23 S.E. 390, 96 Ga. 211—Todd v. Hurst Supply Co., 86 S.E. 255, 17 Ga.App. 98.

Voluntary surrender by mortgagor

Fact that agent of mortgagor voluntarily surrendered, possession to holder of trust receipt, which was recorded subsequent to recording of mortgage, was held not to relieve holder of trust receipt from liability to mortgagee for conversion.—General Motors Acceptance Corporation v. Wilcox, Tex.Civ.App., 95 S.W.2d 1368.

47. Ala.—Bank of Odenville v. Union State Bank, 101 So. 666, 212 Ala. 52.

Cal.—Hopkins v. Anderson, 21 P.2d

560, 562, 218 Cal. 62, citing *Corpus Juris*.

S.D.—First Nat. Bank of Canton v. Baldridge, 159 N.W. 130, 37 S.D. 606.

Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing on other grounds Farmers' Nat. Bank v. Dublin Nat. Bank, Civ. App., 55 S.W.2d 567—General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W.2d 1368—American Trust & Savings Bank & Whitaker, Civ.App., 2 S.W.2d 356, error dismissed.

Wash.—Davin v. Dowling, 262 P. 123, 146 Wash. 137.

11 C.J. p 591 note 58.

Good faith

The rule applies whether or not the junior mortgagee acts in good faith.—Eade v. First Nat. Bank, 242 P. 833, 117 Or. 47, 43 A.L.R. 374.

Part of crop

A chattel mortgage on half of a crop of cotton to be raised on certain land, mortgagor to have cotton ginned and baled, was held to contemplate that lien was to cover and apply to one half of bales of cotton, that might be raised, and not an undivided one-half interest in crop, thus giving mortgagee right to elect which bales she should take or sell; and a second mortgagee, who had sequestered and sold the part of the crop before first mortgagee selected her bales, is liable in conversion to the extent of the full value of the part taken.—Citizens' Guaranty State Bank v. Johnson, Tex.Civ.App., 211 S.W. 271, error refused.

48. Ala.—Henderson v. Foy, 11 So. 441, 96 Ala. 205.

49. Ind.—Koehring v. Aultman, etc., Co., 35 N.E. 30, 7 Ind.App. 475.

fraudulently deals with the mortgaged property so as to defeat the rights of the senior mortgagee, the latter has a right of action against him for damages, although the junior mortgagee may have acted solely for the purpose of securing his own debt.⁵⁰ In some jurisdictions it is held that no actual knowledge is necessary, but that constructive notice arising from the record of the prior mortgage,⁵¹ or from a recital to the junior mortgage that it is expressly subject to a prior mortgage,⁵² is sufficient to render the junior mortgagee liable; but in other jurisdictions it is held that a junior mortgagee is not liable for conversion unless he has actual knowledge of the prior mortgage.⁵³ A prior mortgagee cannot sue a subsequent mortgagee for conversion where the latter takes possession of and sells the property with the consent of the prior mortgagee, notwithstanding a misunderstanding on the part of the prior mortgagee as to the rights of the parties to the proceeds of the sale, if such misunderstanding was not created by fraud on the

part of the second mortgagee.⁵⁴ The mere receiving of the proceeds of the sale does not constitute conversion,⁵⁵ and where a junior mortgagee with knowledge of the prior mortgage consents to a sale of the chattels by the mortgagor, receiving the proceeds of sale by virtue of his mortgage, the proceeds of such sale will be held in trust for the first mortgagee.⁵⁶

§ 216. By Third Persons

A third person with actual or constructive notice who wrongfully interferes with a mortgaged chattel may be liable for damages or for a conversion.

A third person wrongfully interfering with a mortgaged chattel may be liable for a conversion,⁵⁷ as where he appropriates it to his own use,⁵⁸ or destroys it,⁵⁹ or wrongfully sells or disposes of it,⁶⁰ or assists in a wrongful use or disposition of the property by the mortgagor,⁶¹ or after default by the mortgagor refuses to deliver it to the mortgagee upon demand.⁶² Likewise, a third person may be

50. Ga.—DeVaughn v. Harris, 29 S. E. 613, 103 Ga. 102.

51. Ala.—Bank of Odenville v. Union State Bank, 101 So. 666, 212 Ala. 52.

Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567—General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W. 2d 1368.

11 C.J. p 592 note 62.

52. Ind.—McFadden v. Hopkins, 81 Ind. 459.

Tex.—Godair v. Tillar, 47 S.W. 553, 19 Tex.Civ.App. 541.

53. Ga.—DeVaughn v. Harris, 29 S. E. 613, 103 Ga. 102.

54. Wis.—Anderson v. Case, 28 Wis. 505.

55. Wash.—Schneller v. Vincent, 269 P. 793, 148 Wash. 661—Davin v. Dowling, 262 P. 123, 146 Wash. 137.

56. Ill.—Morrison v. Elzy, 190 Ill. App. 374.

57. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

Ark.—U. S. v. Western & Southern Life Ins. Co., 114 S.W.2d 36, 39, quoting *Corpus Juris*.

Ky.—Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co., 45 S.W.2d 470, 241 Ky. 779.

La.—J. H. McMahon & Co. v. Winn Motor Co., 8 La.App. 775.

Mo.—Johnston v. Brown Bros. Iron & Metal Co., 231 S.W. 1011, 1012, 208 Mo.App. 189, citing *Corpus Juris*.

Mont.—Labbitt v. Bunston, 277 P.

805, 84 Mont. 579—First Nat. Bank v. Coit, 257 P. 469, 79 Mont. 468.

R.I.—Franklin Service Stations v Sterling Motor Truck Co. of N. E. 147 A. 754, 50 R.I. 336.

S.D.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S. D. 479.

11 C.J. p 592 note 63.

Alteration by bailee

If the mortgagor's bailee materially alters the condition of the property, it is a conversion of it and the mortgagee has his action.

Me.—Ribley v. Dolbier, 18 Me. 382.

Mich.—Campbell v. Quackenbush, 33 Mich. 287.

Identification of property

Where taking and removal of mortgaged property was undisputed, mortgagee was not required, in order to recover for conversion, to go and identify property.—Bridgeport Mach. Co. v. Geers, Tex.Civ.App., 36 S.W.2d 1047, error dismissed.

Removal of cattle by feeder

Tex.—Scott v. Cassidy Southwestern Commission Co., Civ.App., 240 S. W. 1041.

Removal of property from state

Okl.—U. S. Zinc Co. v. Colburn, 255 P. 638, 124 Okl. 249.

11 C.J. p 592 note 70.

58. Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 475, 133 Ark. 173, citing *Corpus Juris*.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

Ky.—Ruby v. Cox & Grayot, 229 S. W. 127, 191 Ky. 162.

Vt.—Simonds v. Bishop, 196 A. 754.

59. Idaho.—Forbush v. San Diego

Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

50. Cal.—Walker v. Houston, 12 P. 2d 952, 215 Cal. 742, 87 A.L.R. 937.

Mo.—Bank of Willard v. Young, App., 41 S.W.2d 195.

N.D.—Nathan v. Sax Motor Co., 256 N.W. 228, 64 N.D. 773—Hart v. First State Bank of Mott, 163 N.W. 530, 37 N.D. 9.

Sale by lienholder without notice to mortgagee

Sale of car by garage keeper to satisfy lien without notice to mortgagee constituted conversion.—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422.

Payment of proceeds to mortgagor

Landlord, knowing of deed of trust on tenant's share of crop, who sold the crop in his own name, kept part of the proceeds to reimburse himself for money due him and paid the rest to the tenant, was held guilty of a conversion.—Evans v. Carpenter, 76 So. 550, 115 Miss. 572.

61. Kan.—Patrick v. Pettit Grain Co., 297 P. 673, 674, 132 Kan. 764, citing *Corpus Juris*.

Tex.—Hunter v. Abernathy, Civ.App., 188 S.W. 269.

Wyo.—Wettlin v. Jones, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 247, 32 Wyo. 446.

11 C.J. p 592 note 69.

62. Cal.—Mitchell v. Wood, 174 P. 677, 37 Cal.App. 329.

Kan.—Latenser v. Brumfield, 28 P. 2d 778, 138 Kan. 787.

N.D.—First State Bank of New Salem v. Farmers' Co-op. Elevator Co., 231 N.W. 859, 59 N.D. 699.

held liable for damages where he injures⁶³ or destroys⁶⁴ the mortgaged property, or sells it in defiance of the mortgagee's superior lien.⁶⁵ All persons who join with the principal in the conversion are jointly liable with him,⁶⁶ including factors or agents,⁶⁷ although one who merely loans money to another purchasing the property from the mortgagor without acquiring an interest in the chattel is not liable for conversion.⁶⁸

A third person whose acts with relation to the mortgaged chattel are proper or authorized, and who does not prejudice the mortgagor's or mortgagee's rights, is not liable for damages or for conversion.⁶⁹ So a purchaser in good faith from a first mortgagee with power to sell is not guilty of

conversion as to a second mortgagee.⁷⁰ If the mortgagee consented to the alleged acts of conversion he cannot complain.⁷¹ After a conversion has taken place the mortgagee may waive the tort.⁷²

Purchase of property from the mortgagor as conversion is considered in § 264 infra.

Notice. To be guilty of conversion, actual notice of the mortgage is not necessary if it is recorded.⁷³ A third person without notice who takes possession before the mortgage is recorded is not liable for conversion to the mortgagee.⁷⁴

§ 217. — Attachment or Execution Creditors

A seizure and sale of the mortgaged property under

Detention under excessive lien claim
N.Y.—C. I. T. Corporation v. Solomon, 273 N.Y.S. 563, 152 Misc. 833.

63. Tex.—Carter v. Haynes, Civ. App., 269 S.W. 216.

64. Mont.—Robison v. Dover Lumber Co., 191 P. 383, 58 Mont. 231.

Property forfeitable to government
Wrongful act in destroying mortgaged timber flume is not excused by provision of the mortgagor's contract with United States whereby it would have become the property of the government if not removed before a given date.—Robison v. Dover Lumber Co., supra.

65. Del.—Pisculli v. Bellanca Aircraft Corporation, 150 A. 81, 17 Del.Ch. 151, reversing 149 A. 418, 17 Del.Ch. 73, and affirmed Bellanca Aircraft Corporation v. Pisculli, 156 A. 508, 18 Del. 427.

Ga.—Blanchard v. Farmers' State Bank, 124 S.E. 695, 158 Ga. 780.

La.—Black v. O. K. Radiator & Sheet Metal Works, App., 152 So. 782.

66. Tex.—Bowers v. Bryant-Link Co., Com.App., 15 S.W.2d 593, affirming, Civ.App., 6 S.W.2d 788. 11 C.J. p 592 note 74.

Mortgagee's assignee and purchaser
The mortgagee's assignee may be held jointly liable with the purchaser to whom he sold it for a wrongful conversion of the mortgaged property.—Hawkins Furniture Co. v. Morris, 137 S.W. 527, 143 Ky. 738.

67. Tex.—Hunter v. Abernathy, Civ. App., 138 S.W. 269. 11 C.J. p 592 note 76.

68. Ala.—Argo v. Sylacauga Mercantile Co., 68 So. 534, 12 Ala.App. 442.

69. Ark.—National Stock Yards Nat. Bank v. Williamson, 7 S.W.2d 321, 177 Ark. 366.

Ill.—See Frame v. Harder's Fireproof Storage & Van Co., 201 Ill.App. 490.

La.—Black v. O. K. Radiator & Sheet Metal Works, App., 152 So. 782.

Mich.—Public Fire Ins. Co. v. Detroit Garages, 250 N.W. 290, 264 Mich. 500.

Mont.—Frost v. J. B. Long & Co., 228 P. 75, 71 Mont. 141.

Tex.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ.App., 30 S.W.2d 364.

Utah.—Columbia Trust Co. v. Farmers' & Merchants' Bank, 22 P.2d 164, 82 Utah 117.

11 C.J. p 592 note 71.

Satisfaction of prior lien

Where the proceeds of that part of the mortgaged property which defendant directed the mortgagee to sell were applied to satisfy his superior lien as landlord, he was not liable for conversion.—Dixie Fertilizer Co. v. Teasley, 69 So. 988, 14 Ala.App. 283.

Landlord in possession of abandoned chattels

Where tenant abandoned premises and turned key over to landlord, without removing property which was subject to chattel mortgages landlord became "involuntary bailee" of assets left on premises by tenant, and he was entitled to time to investigate such property, to examine chattel mortgages, to make inventory, to protect itself from liability on account of having become involuntary bailee, to keep one chattel mortgagee from taking property of another chattel mortgagee, and to protect itself in so far as its own blanket mortgage lien for past-due rent was concerned. In doing so he was not liable for conversion and the fact that in a letter to chattel mortgagee who had been denied key to premises he stated that he was holding tenant's property under lien for rent was held insufficient to show conversion of mortgagee's property where letter recognized superiority of lien of chattel mortgage.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., Mo.App., 88 S.W.2d 254.

70. Ala.—Home Supply Co. v. Almon, 76 So. 473, 16 Ala.App. 189.

71. Mich.—Hopkins v. Grand Rapids Trust Co., 247 N.W. 175, 262 Mich. 261.

11 C.J. p 592 note 72.

Agreement as to deposit in court

Landlord's taking possession of crop under agreement with tenant's chattel mortgagee that proceeds should be deposited in court for benefit of person entitled thereto was not "conversion."—Labbitt v. Bunston, 277 P. 805, 84 Mont. 579.

72. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

Acceptance of proceeds of sale

Mortgagee of cattle, accepting proceeds from sale of portion knowing that they were sold in violation of mortgage, and continuing to transact business with mortgagor, was held estopped from suing commission firm for alleged conversion of cattle because of such sale.—Campbell & Rosson Live Stock Commission Co. v. Border Nat. Bank of El Paso, Tex.Com.App., 270 S.W. 539, reversing Border Nat. Bank of El Paso v. Campbell & Rosson Live Stock Commission Co., Civ.App., 248 S.W. 780.

73. Tex.—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed.

Knowledge of money owed for chattel

Garage keeper, who had actual notice from mortgagor that automobile was purchased through mortgagee and that he still owed money on account of purchase price was held put on inquiry as to respective rights of mortgagor and mortgagee before selling car to satisfy lien for repairs and storage, under Lien L. §§ 184, 201, 202.—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422.

74. Mo.—Barnard State Bank v. Lankford, 11 S.W.2d 1084, 223 Mo. App. 519.

fraudulently deals with the mortgaged property so as to defeat the rights of the senior mortgagee, the latter has a right of action against him for damages, although the junior mortgagee may have acted solely for the purpose of securing his own debt.⁵⁰ In some jurisdictions it is held that no actual knowledge is necessary, but that constructive notice arising from the record of the prior mortgage,⁵¹ or from a recital to the junior mortgage that it is expressly subject to a prior mortgage,⁵² is sufficient to render the junior mortgagee liable; but in other jurisdictions it is held that a junior mortgagee is not liable for conversion unless he has actual knowledge of the prior mortgage.⁵³ A prior mortgagee cannot sue a subsequent mortgagee for conversion where the latter takes possession of and sells the property with the consent of the prior mortgagee, notwithstanding a misunderstanding on the part of the prior mortgagee as to the rights of the parties to the proceeds of the sale, if such misunderstanding was not created by fraud on the

part of the second mortgagee.⁵⁴ The mere receiving of the proceeds of the sale does not constitute conversion,⁵⁵ and where a junior mortgagee with knowledge of the prior mortgage consents to a sale of the chattels by the mortgagor, receiving the proceeds of sale by virtue of his mortgage, the proceeds of such sale will be held in trust for the first mortgagee.⁵⁶

§ 216. By Third Persons

A third person with actual or constructive notice who wrongfully interferes with a mortgaged chattel may be liable for damages or for a conversion.

A third person wrongfully interfering with a mortgaged chattel may be liable for a conversion,⁵⁷ as where he appropriates it to his own use,⁵⁸ or destroys it,⁵⁹ or wrongfully sells or disposes of it,⁶⁰ or assists in a wrongful use or disposition of the property by the mortgagor,⁶¹ or after default by the mortgagor refuses to deliver it to the mortgagee upon demand.⁶² Likewise, a third person may be

50. Ga.—DeVaughn v. Harris, 29 S. E. 613, 103 Ga. 102.

51. Ala.—Bank of Odenville v. Union State Bank, 101 So. 666, 212 Ala. 52.

Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567—General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W. 2d 1368.

11 C.J. p 592 note 62.

52. Ind.—McFadden v. Hopkins, 81 Ind. 459.

Tex.—Godair v. Tillar, 47 S.W. 553, 19 Tex.Civ.App. 541.

53. Ga.—DeVaughn v. Harris, 29 S. E. 613, 103 Ga. 102.

54. Wis.—Anderson v. Case, 28 Wis. 505.

55. Wash.—Schneller v. Vincent, 269 P. 793, 148 Wash. 661—Davin v. Dowling, 262 P. 123, 146 Wash. 137.

56. Ill.—Morrison v. Elzy, 190 Ill. App. 374.

57. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

Ark.—U. S. v. Western & Southern Life Ins. Co., 114 S.W.2d 36, 39, quoting *Corpus Juris*.

Ky.—Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co., 45 S.W.2d 470, 241 Ky. 779.

La.—J. H. McMahon & Co. v. Winn Motor Co., 8 La.App. 775.

Mo.—Johnston v. Brown Bros. Iron & Metal Co., 231 S.W. 1011, 1012, 208 Mo.App. 189, citing *Corpus Juris*.

Mont.—Labbitt v. Bunston, 277 P.

805, 84 Mont. 579—First Nat. Bank v. Coit, 257 P. 469, 79 Mont. 468.

R.I.—Franklin Service Stations v. Sterling Motor Truck Co. of N. E. 147 A. 754, 50 R.I. 336.

S.D.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S. D. 479.

11 C.J. p 592 note 68.

Alteration by bailee

If the mortgagor's bailee materially alters the condition of the property, it is a conversion of it and the mortgagee has his action.

Me.—Ribley v. Dolbier, 18 Me. 382.

Mich.—Campbell v. Quackenbush, 33 Mich. 287.

Identification of property

Where taking and removal of mortgaged property was undisputed, mortgagee was not required, in order to recover for conversion, to go and identify property.—Bridgeport Mach. Co. v. Geers, Tex.Civ.App., 36 S.W.2d 1047, error dismissed.

Removal of cattle by feeder

Tex.—Scott v. Cassidy Southwestern Commission Co., Civ.App., 240 S. W. 1041.

Removal of property from state

Okl.—U. S. Zinc Co. v. Colburn, 255 P. 688, 124 Okl. 249.

11 C.J. p 592 note 70.

58. Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 475, 133 Ark. 173, citing *Corpus Juris*.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

Ky.—Ruby v. Cox & Grayot, 229 S. W. 127, 191 Ky. 162.

Vt.—Simonds v. Bishop, 196 A. 754.

59. Idaho.—Forbush v. San Diego

Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

60. Cal.—Walker v. Houston, 12 P. 2d 952, 215 Cal. 742, 87 A.L.R. 937.

Mo.—Bank of Willard v. Young, App. 41 S.W.2d 195.

N.D.—Nathan v. Sax Motor Co., 256 N.W. 228, 64 N.D. 773—Hart v. First State Bank of Mott, 163 N.W. 530, 37 N.D. 9.

Sale by lienholder without notice to mortgagee

Sale of car by garage keeper to satisfy lien without notice to mortgagee constituted conversion.—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422.

Payment of proceeds to mortgagor

Landlord, knowing of deed of trust on tenant's share of crop, who sold the crop in his own name, kept part of the proceeds to reimburse himself for money due him and paid the rest to the tenant, was held guilty of a conversion.—Evans v. Carpenter, 76 So. 550, 115 Miss. 572.

61. Kan.—Patrick v. Pettit Grain Co., 297 P. 673, 674, 132 Kan. 764, citing *Corpus Juris*.

Tex.—Hunter v. Abernathy, Civ.App., 188 S.W. 269.

Wyo.—Wetlin v. Jones, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 247, 32 Wyo. 446.

11 C.J. p 592 note 69.

62. Cal.—Mitchell v. Wood, 174 P. 677, 37 Cal.App. 329.

Kan.—Latenser v. Brumfield, 28 P. 2d 778, 138 Kan. 787.

N.D.—First State Bank of New Salem v. Farmers' Co-op. Elevator Co., 231 N.W. 859, 59 N.D. 699.

held liable for damages where he injures⁶³ or destroys⁶⁴ the mortgaged property, or sells it in defiance of the mortgagee's superior lien.⁶⁵ All persons who join with the principal in the conversion are jointly liable with him,⁶⁶ including factors or agents,⁶⁷ although one who merely loans money to another purchasing the property from the mortgagor without acquiring an interest in the chattel is not liable for conversion.⁶⁸

A third person whose acts with relation to the mortgaged chattel are proper or authorized, and who does not prejudice the mortgagor's or mortgagee's rights, is not liable for damages or for conversion.⁶⁹ So a purchaser in good faith from a first mortgagee with power to sell is not guilty of

conversion as to a second mortgagee.⁷⁰ If the mortgagee consented to the alleged acts of conversion he cannot complain.⁷¹ After a conversion has taken place the mortgagee may waive the tort.⁷²

Purchase of property from the mortgagor as conversion is considered in § 264 *infra*.

Notice. To be guilty of conversion, actual notice of the mortgage is not necessary if it is recorded.⁷³ A third person without notice who takes possession before the mortgage is recorded is not liable for conversion to the mortgagee.⁷⁴

§ 217. — Attachment or Execution Creditors

A seizure and sale of the mortgaged property under

Detention under excessive lien claim
N.Y.—C. I. T. Corporation v. Solomon, 273 N.Y.S. 563, 152 Misc. 333.

63. Tex.—Carter v. Haynes, Civ. App., 269 S.W. 216.

64. Mont.—Robison v. Dover Lumber Co., 191 P. 383, 58 Mont. 231.

Property forfeitable to government
Wrongful act in destroying mortgaged timber flume is not excused by provision of the mortgagor's contract with United States whereby it would have become the property of the government if not removed before a given date.—Robison v. Dover Lumber Co., *supra*.

65. Del.—Pisculli v. Bellanca Aircraft Corporation, 150 A. 81, 17 Del.Ch. 151, reversing 149 A. 418, 17 Del.Ch. 73, and affirmed Bellanca Aircraft Corporation v. Pisculli, 156 A. 508, 18 Del. 427.

Ga.—Blanchard v. Farmers' State Bank, 124 S.E. 695, 158 Ga. 780.

La.—Black v. O. K. Radiator & Sheet Metal Works, App., 152 So. 782.

66. Tex.—Bowers v. Bryant-Link Co., Com.App., 15 S.W.2d 598, affirming, Civ.App., 6 S.W.2d 788. 11 C.J. p 592 note 74.

Mortgagee's assignee and purchaser
The mortgagee's assignee may be held jointly liable with the purchaser to whom he sold it for a wrongful conversion of the mortgaged property.—Hawkins Furniture Co. v. Morris, 187 S.W. 527, 143 Ky. 738.

67. Tex.—Hunter v. Abernathy, Civ. App., 188 S.W. 269. 11 C.J. p 592 note 76.

68. Ala.—Argo v. Sylacauga Mercantile Co., 68 So. 534, 12 Ala.App. 442.

69. Ark.—National Stock Yards Nat. Bank v. Williamson, 7 S.W.2d 321, 177 Ark. 366.

Ill.—See Frame v. Harder's Fireproof Storage & Van Co., 201 Ill.App. 490.

La.—Black v. O. K. Radiator & Sheet Metal Works, App., 152 So. 782.

Mich.—Public Fire Ins. Co. v. Detroit Garages, 250 N.W. 290, 264 Mich. 500.

Mont.—Frost v. J. B. Long & Co., 228 P. 75, 71 Mont. 141.

Tex.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ.App., 30 S.W.2d 364.

Utah.—Columbia Trust Co. v. Farmers' & Merchants' Bank, 22 P.2d 164, 82 Utah 117.

11 C.J. p 592 note 71.

Satisfaction of prior lien

Where the proceeds of that part of the mortgaged property which defendant directed the mortgagee to sell were applied to satisfy his superior lien as landlord, he was not liable for conversion.—Dixie Fertilizer Co. v. Teasley, 69 So. 988, 14 Ala.App. 283.

Landlord in possession of abandoned chattels

Where tenant abandoned premises and turned key over to landlord, without removing property which was subject to chattel mortgages landlord became "involuntary bailee" of assets left on premises by tenant, and he was entitled to time to investigate such property, to examine chattel mortgages, to make inventory, to protect itself from liability on account of having become involuntary bailee, to keep one chattel mortgagee from taking property of another chattel mortgagee, and to protect itself in so far as its own blanket mortgage lien for past-due rent was concerned. In doing so he was not liable for conversion and the fact that in a letter to chattel mortgagee who had been denied key to premises he stated that he was holding tenant's property under lien for rent was held insufficient to show conversion of mortgagee's property where letter recognized superiority of lien of chattel mortgage.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., Mo.App., 38 S.W.2d 254.

70. Ala.—Home Supply Co. v. Almon, 76 So. 473, 16 Ala.App. 189.

71. Mich.—Hopkins v. Grand Rapids Trust Co., 247 N.W. 175, 262 Mich. 261.

11 C.J. p 592 note 72.

Agreement as to deposit in court

Landlord's taking possession of crop under agreement with tenant's chattel mortgagee that proceeds should be deposited in court for benefit of person entitled thereto was not, "conversion."—Labbitt v. Bunston, 277 P. 805, 84 Mont. 579.

72. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

Acceptance of proceeds of sale

Mortgagee of cattle, accepting proceeds from sale of portion knowing that they were sold in violation of mortgage, and continuing to transact business with mortgagor, was held estopped from suing commission firm for alleged conversion of cattle because of such sale.—Campbell & Rosson Live Stock Commission Co. v. Border Nat. Bank of El Paso, Tex.Com.App., 270 S.W. 539, reversing Border Nat. Bank of El Paso v. Campbell & Rosson Live Stock Commission Co., Civ.App., 248 S.W. 780.

73. Tex.—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed.

Knowledge of money owed for chattel

Garage keeper, who had actual notice from mortgagor that automobile was purchased through mortgagee and that he still owed money on account of purchase price was held put on inquiry as to respective rights of mortgagor and mortgagee before selling car to satisfy lien for repairs and storage, under Lien L. §§ 184, 201, 202.—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422.

74. Mo.—Barnard State Bank v. Lankford, 11 S.W.2d 1084, 228 Mo. App. 519.

a writ of attachment or execution in derogation of the mortgagee's rights constitutes a conversion.

The seizure and sale in derogation of the mortgagee's rights of mortgaged personal property in the hands of the mortgagor, on a writ of attachment or execution against him, amounts to a conversion,⁷⁵ but where the attachment does not affect the mortgagee's interest and is not in derogation of his rights there is no conversion.⁷⁶ So, where the mortgagee is rightfully in possession, a creditor of the mortgagor who levies on the mortgaged chattels is guilty of a conversion,⁷⁷ and a levying officer is guilty of a conversion if he levies on and sells the property without payment or tender of the mortgage

debt to the mortgagee as required by statute.⁷⁸ It is a conversion where the officer with notice of the mortgage assumes to sell the entire interest,⁷⁹ even though the purchaser at the sale knows of the mortgage.⁸⁰ The retention of the mortgaged chattels by an execution creditor who purchased at the execution sale with notice of the mortgagee's rights constitutes a conversion.⁸¹ Where the execution is valid when delivered, the judgment creditor is not liable for a wrongful sale by the officer,⁸² and, likewise, he is not responsible for mortgaged property which is stolen after being put in storage by the officer on his own volition.⁸³

H. ACTIONS BY MORTGAGOR

§ 218. Against Mortgagee

As will be shown infra §§ 219-226, on compliance with all conditions precedent, and subject to the general rules relating to parties, pleading, evidence, trial and judgment, the mortgagor in an action against a chattel mortgagee interfering with his right of possession or redemption can recover the property or damages for its conversion or detention.

75. Iowa.—Heessel v. Creston Nat. Bank, 218 N.W. 298, 205 Iowa 503. **Kan.**—Silver Lake State Bank v. George, 181 P. 574, 105 Kan. 129. **Mich.**—Kratzmer v. Detroit Lumber Co., 161 N.W. 817, 195 Mich. 570. 11 C.J. p 593 notes 78, 81, 82.

Refusal to deliver on demand

The lessor of land for one-half the crop and advances, who attached and took possession of the whole crop, and personally and through the sheriff refused, on demand, to deliver possession to the lessees' mortgagee, was guilty of conversion.—Moosios v. Rusconi, 174 P. 92, 37 Cal.App. 471.

Refusal to disclose purchaser

Judgment creditor of mortgagor, selling chattels at judicial sale and refusing to disclose names of purchasers, is liable in damages to mortgagee.—Covington v. Matlock, 121 So. 355, 10 La.App. 445.

Void execution sale

The purchaser of chattels under void execution sale and officer conducting sale, being wrongdoers, are not in a position to demand that the assignee of a mortgagee of property taken look to other property of mortgagor or to the mortgagor's personal responsibility.—Hopping v. Hicks, Tex.Civ.App., 190 S.W. 1119, error refused.

Absence of notice

Where mortgage was not in default and affidavit of mortgagee's interest in judgment debtor's automobile levied on by marshal while in

judgment debtor's possession was not given marshal as required by statute until after sale, when mortgagee decided to take possession under insecurity clause, sale was held valid as against claim of conversion by mortgagee against marshal and judgment creditor.—Huss v. Plumbers' Supply House, 281 N.Y.S. 468, 156 Misc. 140.

76. Or.—Hart v. Oregon Laundry Co., 178 P. 932, 97 Or. 324.

Tex.—Callihan v. Fort Worth Well Machinery & Supply Co., Civ.App., 88 S.W.2d 1057, error dismissed—Skaer v. First Nat. Bank, Civ.App., 293 S.W. 228—Baldwin Motor Co. v. De Ford, Civ.App., 282 S.W. 832. 11 C.J. p 593 note 79.

77. Mo.—Pollock v. Douglas, 56 Mo. App. 487.

11 C.J. p 593 note 86.

78. Cal.—Missouri State Life Ins. Co. v. Gilette, 12 P.2d 955, 215 Cal. 709—Bank of California v. McCoy, 72 P.2d 923, 23 Cal.App.2d 192—Winne v. Ford, 263 P. 545, 88 Cal. App. 308.

11 C.J. p 593 note 84.

Waiver

The failure of chattel mortgagees to call agreements extending time of payment of notes secured by mortgage to attention of sheriff levying upon property subject to mortgage did not waive any of mortgagees' rights, where extension agreement was fully executed between mortgagor and mortgagee prior to acquisition of any rights of execution credi-

§ 219. — Right of Action

For interference with his right of possession or redemption, the mortgagor can recover, in a proper case, the chattel or damages.

A mortgagor rightfully in possession has a right of action for damages against the mortgagee for wrongfully disturbing his possession⁸⁴ or he may

tor, so that execution creditor and sureties on his bond executed to protect sheriff in making levy were liable for value of sheep and for fees of mortgagees' attorneys.—Bank of California v. McCoy, 72 P.2d 923, 23 Cal.App.2d 192.

Payment to assignee of mortgagee

Assignee of indebtedness secured by mortgage subsequently purchasing mortgaged property is entitled to payment or tender of payment of mortgage from those levying execution on property.—Beatrice Creamer, Co. v. Golden, 263 P. 458, 129 Okl. 86.

79. Ala.—McConeghy v. McCaw, 81 Ala. 447.

Wis.—Frisbee v. Langworthy, 11 Wis. 375.

11 C.J. p 593 note 83.

80. Minn.—Johnson v. Gerber, 130 N.W. 995, 114 Minn. 174.

81. Mo.—Crawford v. Benoist, 70 S.W. 1098, 97 Mo.App. 219.

82. N.Y.—Huss v. Plumbers' Supply House, 281 N.Y.S. 468, 156 Misc. 140.

83. Tex.—Baldwin Motor Co. v. De Ford, Civ.App., 282 S.W. 832.

84. Kan.—Sansone v. Studebaker Corporation of America, 187 P. 673, 106 Kan. 279.

La.—Edlers v. Montgomery-Ward & Co., App., 172 So. 191.

Mont.—James v. Speer, 220 P. 535, 69 Mont. 100.

Neb.—Schreiner v. Shanahan, 181 N.W. 538, 105 Neb. 525.

recover possession of the property as by replevin,⁸⁵ or, as shown *infra* § 256, he may have an injunction to prevent the mortgagee from improperly interfering with the property in violation of the mortgagor's rights. After termination of the mortgagor's right to possession, however, he cannot ordinarily maintain trespass,⁸⁶ trover,⁸⁷ detinue,⁸⁸ or replevin⁸⁹ against the mortgagee, but is left to an action on the case⁹⁰ or to a bill in equity.⁹¹ The right of action is controlled by the conditions existing at the date of the alleged conversion.⁹²

Where possession is taken under a mortgage procured by fraud, the mortgagor may maintain replevin;⁹³ and where plaintiff contends that the property in suit was described in the mortgage without his authority, it is not necessary to sue in equity to reform the instrument or set it aside as void.⁹⁴

The authorities are in conflict as to whether the mortgagor may maintain replevin for property tak-

en into possession by the mortgagee under a mortgage based on an illegal consideration. The rule supported by the better reasoning apparently is that recovery will not be permitted,⁹⁵ although there is authority to the contrary.⁹⁶

It has been held that the mortgagor may waive the tort and in case of conversion sue the mortgagee in contract.⁹⁷

A statute relating to ascertainment of the amount of the mortgage debt, in an action by the mortgagee, does not apply to a suit by a mortgagor against the mortgagee to recover the property under a claim that the mortgage debt is paid.⁹⁸

§ 220. — Conditions Precedent

Tender of payment of the mortgage debt and demand may be, and ordinarily are, conditions precedent to mortgagor's action.

A tender or payment of the mortgage debt, is, as a general rule, essential to the right of the mortgagor to maintain, as against a mortgagee in possession

N.Y.—Hof v. Mager, 203 N.Y.S. 161, 208 App.Div. 144—Carter v. Phillips, 217 N.Y.S. 621, 127 Misc. 903. S.D.—Styke v. Sioux Falls Motor Co., 244 N.W. 387, 60 S.D. 358. Tex.—Raymer v. Houghton, Civ.App., 39 S.W.2d 941, error dismissed. 11 C.J. p 593 note 88.

"Action on the case," within statute, includes trover, case and assumpsit, and choice of actions depends on facts of case, under common-law principles.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Concurrent remedies

A statute authorizing an injunction for the purpose of transferring foreclosure proceedings to a court does not preclude an action at law to recover property wrongfully seized and sold under a chattel mortgage.—Black v. Howell, 10 N.W. 216, 56 Iowa 630.

Tender of payment

If the mortgagor tenders payment of the amount secured within the time provided therefor and the tender is refused, the mortgagor may maintain trover against the mortgagee.—Pierce v. Hasbrouck, 49 Ill. 23.

Time to sue

The mortgagor may sue within the period allowed by the statute of limitations in such case.—Schreiner v. Shanahan, 181 N.W. 536, 105 Neb. 525.

85. La.—Elders v. Montgomery-Ward & Co., App., 172 So. 191. Mont.—James v. Speer, 220 P. 535, 69 Mont. 100. N.Y.—Carter v. Phillips, 217 N.Y.S. 621, 127 Misc. 903. 11 C.J. p 593 note 89.

86. Ala.—Lineville Nat. Bank v. Weaver, 78 So. 461, 16 Ala.App. 431. 11 C.J. p 594 note 92.

87. Ala.—Lineville Nat. Bank v. Weaver, 78 So. 461, 16 Ala.App. 431.

Colo.—International Harvester Co. of America v. Lawrence Inv. Co., 37 P.2d 529, 95 Colo. 523.

Ind.—Blumberg v. Coleman, 129 N.E. 489, 75 Ind.App. 293—Sapirie v. Collins, 122 N.E. 679, 70 Ind.App. 529.

Mo.—Cook v. Smith, 204 S.W. 919, 200 Mo.App. 218.

Ohio.—Morris v. Commercial Credit Co., 9 N.E.2d 880, 55 Ohio App. 391.

11 C.J. p 594 note 93.

Second mortgagee entitled to possession

Although first chattel mortgage was voidable, mortgagor could not recover against first mortgagee for conversion of the property where at time of the conversion the first mortgage had not been declared void, and the property was turned over to the first mortgagee by a second mortgagee in possession thereof under a valid mortgage after condition broken and while a balance was due on the second mortgage, under belief that first mortgagee had prior lien, for, since such surrender was not waiver of the second mortgagee's lien, the second mortgagee was the only one entitled to possession at that time.—Cook v. Smith, 204 S.W. 919, 200 Mo.App. 218.

88. Ala.—Denning v. Davis, 57 Ala. 590—Lineville Nat. Bank v. Weaver, 78 So. 461, 16 Ala.App. 431.

S.C.—Rainwater v. Merchants' & Farmers' Bank of Cheraw, 93 S.E. 770, 108 S.C. 206.

89. Colo.—International Harvester Co. of America v. Lawrence Inv. Co., 37 P.2d 529, 95 Colo. 523.

S.C.—Rainwater v. Merchants' & Farmers' Bank of Cheraw, 93 S.E. 770, 108 S.C. 206.

Tex.—Raymer v. Houghton, Civ.App., 39 S.W.2d 941, error dismissed. 11 C.J. p 594 note 95.

90. Mont.—Potter v. Lohse, 77 P. 419, 31 Mont. 91.

N.H.—Adams v. Rice, 18 A. 652, 65 N.H. 186—Leach v. Kimball, 34 N.H. 568.

91. S.C.—Rainwater v. Merchants' & Farmers' Bank of Cheraw, 93 S.E. 770, 108 S.C. 206.

11 C.J. p 594 note 97.

92. Okl.—McDonald v. Schantz, 146 P. 36, 44 Okl. 648. 11 C.J. p 594 note 98.

93. S.C.—Knight v. Bennett, 121 S.E. 671, 128 S.C. 107.

11 C.J. p 594 note 1.

94. S.C.—Knight v. Bennett, *supra*.

95. Colo.—Horn v. Reitler, 21 P. 186, 12 Colo. 310.

Mass.—Dougherty v. Bonavia, 124 Mass. 210—King v. Green, 6 Allen 139.

11 C.J. p 594 note 2.

96. Kan.—McCartney v. Wilson, 17 Kan. 294.

97. Ala.—Torbert v. McFarland, 55 So. 311, 172 Ala. 117.

11 C.J. p 594 note 99.

98. Ala.—Daniel v. Walthall, 80 So. 37, 202 Ala. 215.

under the mortgage, trover,⁹⁹ detinue,¹ or replevin,² or to recover possession of the chattels in an equitable action after default;³ and in an action of replevin the tender must be made before the writ is issued, otherwise it will be disregarded.⁴ Not only must a tender be made, but it must be kept good to the date of the trial.⁵ However, where the mortgagee has placed it out of his power to return the mortgaged property, a tender of the mortgage debt is unnecessary as precedent to trover by the mortgagor,⁶ and a like rule applies where the suit is brought before the debt is due⁷ or where the mortgagee is in possession under a claim of absolute ownership and has sold more than enough of the goods to pay the mortgage debt.⁸ A mere claim of absolute ownership by the mortgagee is held sufficient by some authorities to excuse a tender before an action to recover possession of the property,⁹ but there is authority to the contrary.¹⁰

A valid tender as a condition to replevin may be coupled with a condition that the mortgagee execute and deliver such a satisfaction piece as the mortgagor has a right to demand.¹¹ Since on payment of the debt the mortgagor is ordinarily entitled to restoration of the possession of the mortgaged property, a tender of the amount due may likewise ordinarily be coupled with a demand for the restoration of the possession.¹²

Demand. Ordinarily a demand for the return of

the mortgaged chattels is a condition precedent to a suit for damages against a mortgagee who acquired possession rightfully. A demand is not, however, always necessary.¹³ Thus if the mortgagee justifies his seizure of the chattels under the provisions of the mortgage, a demand is not necessary before suing for damages for the seizure;¹⁴ and in any event a demand may be excused if it appears that it would be useless,¹⁵ as where defendant, by clear and unequivocal act and word, claims the property as his own and denies that plaintiff has any interest in it.¹⁶

§ 221. — Defenses

The mortgagee may interpose defenses which go to defeat the mortgagor's recovery.

It is a defense to an action by the mortgagor against the mortgagee for conversion that the mortgagor has consented to, or ratified, the acts of the mortgagee,¹⁷ or expressly waived the right of action,¹⁸ but merely retaining money, notes and papers given for the chattels and returned by the mortgagee at the time of the latter's conversion does not constitute a waiver.¹⁹ An offer by the mortgagee to return the property is not a defense where it has depreciated in value while in his possession.²⁰ The existence of subsequent liens on converted mortgaged property is a good defense pro tanto to the claim of the mortgagor.²¹ In an action by the mortgagor for conversion the mortgagee may set

99. Md.—Lucas v. Latour, 6 Harr. & J. 100.

1. Ala.—Rice v. Garnett, 84 So. 557, 17 Ala.App. 239, certiorari denied Ex parte Garnett, 85 So. 921, 204 Ala. 698.

2. Cal.—Brice v. Walker, 194 P. 721, 50 Cal.App. 49.

Mass.—Pokross v. Champagne, 121 N. E. 22, 231 Mass. 391.

11 C.J. p 594 note 5.

Although right to foreclose is waived by mortgagee, a mortgagor of a chattel or his donee with notice of the mortgage cannot recover possession of the chattel from him without offering to do equity by paying the mortgage debt.—Brice v. Walker, 194 P. 721, 50 Cal.App. 49.

3. N.Y.—DeLuca v. Archer Mfg. Co., 97 N.Y.S. 1026, 49 Misc. 645.

4. Mass.—Pokross v. Champagne, 121 N.E. 22, 231 Mass. 391.

5. Ala.—Rice v. Garnett, 84 So. 557, 17 Ala.App. 239, certiorari denied Ex parte Garnett, 85 So. 921, 204 Ala. 698.

11 C.J. p 594 note 5 [a].

6. Idaho.—Deichert v. Euerby, 27 P.2d 981, 54 Idaho 14.

Mich.—Brink v. Freoff, 6 N.W. 94, 40 Mich. 610, 44 Mich. 69.

7. Mich.—Danciewicz v. Kann, 200 N.W. 962, 229 Mich. 124.

8. Kan.—Burton v. Randall, 46 P. 326, 4 Kan.App. 593.

Mich.—Iler v. Baker, 46 N.W. 377, 82 Mich. 226.

11 C.J. p 595 note 8.

9. Neb.—Hippodrome Amusement Co. v. Redick, 191 N.W. 317, 109 Neb. 390.

11 C.J. p 595 note 9.

10. Mich.—Card v. Fowler, 79 N.W. 925, 120 Mich. 646.

11. N.Y.—Danches v. Pariser, 145 N.Y.S. 1066.

11 C.J. p 595 note 11.

12. Mich.—Brink v. Freoff, 40 Mich. 610.

13. Cal.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal. App. 46.

After tortious sale

No demand is necessary to enable mortgagor to sue mortgagee for conversion in tortiously selling the property after purchasing it from mortgagor's vendee, where conditions of mortgage, which entitled him to pos-

session, were not broken before sale by him.—Campbell v. Bryant, 129 A. 299, 93 Vt. 486.

14. N.Y.—Pugh v. Kraft, 126 N.Y.S. 162.

15. Cal.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal. App. 46.

Neb.—Hippodrome Amusement Co. v. Redick, 191 N.W. 317, 109 Neb. 390.

11 C.J. p 595 note 18.

16. Neb.—Hippodrome Amusement Co. v. Redick, supra.

17. Ill.—Merritt v. Ward, 113 Ill. App. 208.

N.J.—Mausert v. Mutual Distributing Co., 104 A. 203, 92 N.J.Law 190.

18. Tex.—Phoenix Furniture Co. v. McCracken, Civ.App., 3 S.W.2d 545.

19. Kan.—Sansone v. Studebaker Corporation of America, 187 P. 673, 106 Kan. 279.

20. Cal.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal. App. 46.

11 C.J. p 595 note 21.

21. U.S.—Kohn v. Dravis, Iowa, 94 F. 238, 36 C.C.A. 253.

off his debt,²² and interest to date of conversion;²³ and in some jurisdictions by authority of statute the mortgagee may show, in mitigation of damages, the amount of any lien to which plaintiff's rights were subject and which was held or paid by defendant or any person under whom he claims.²⁴ It has been held that the mortgage debt cannot be set up in defense to an action for the possession of the mortgaged property,²⁵ although a contrary rule is established by statute in some jurisdictions.²⁶ Where the mortgagor seeks to maintain replevin for the mortgaged goods on the ground that the mortgage was procured through fraud, fraud perpetrated by the mortgagor in another transaction will not constitute a defense;²⁷ and a chattel mortgagee, having unlawfully seized the mortgaged chattels before the statutory right so to do has accrued, cannot set off his lien against the value of their use to the time such right would have accrued.²⁸

§ 222. — Parties

The mortgagee may implead subsequent mortgagees; and after the mortgagor's death his administrator is a proper party.

The mortgagee, it has been held, may implead subsequent mortgagees.²⁹ The mortgagor's right of action passes to his personal representative on his death.³⁰

22. Cal.—Zarillo v. Le Mesnager, 196 P. 902, 51 Cal.App. 442.
Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Lords v. Lava Hot Springs State Bank, 256 P. 761, 762, 44 Idaho 316, citing *Corpus Juris*.
Mont.—James v. Speer, 220 P. 535, 69 Mont. 100—Kinsman v. Stanhope, 144 P. 1083, 50 Mont. 41, L.R.A.1916C 443.
11 C.J. p 595 note 23.

Cross complaint

In action for conversion where mortgagee filed cross complaint for judgment on the mortgage debt, judgment may be for mortgagee for amount of debt after offsetting damages because of conversion.—Zarillo v. Le Mesnager, 196 P. 902, 51 Cal. App. 442.

23. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427.
24. N.D.—Force v. Peterson Mach. Co., 116 N.W. 84, 17 N.D. 220.
25. N.D.—Steidl v. Aitken, 152 N.W. 276, 30 N.D. 281, L.R.A.1915E 192.
11 C.J. p 595 note 26.
26. Ark.—Geiser Mfg. Co. v. Davis, 162 S.W. 59, 110 Ark. 449.
11 C.J. p 595 note 25.
27. Iowa.—Sylvester v. Ammons, 101 N.W. 782, 126 Iowa 140.

28. U.S.—Peru Plow & Implement Co. v. Harker, S.D., 144 F. 673, 75 C.C.A. 475.
Vt.—Frappiea v. Johnson, 56 A. 100, 75 Vt. 397.
29. U.S.—Kohn v. Dravis, Iowa, 94 F. 288, 36 C.C.A. 253.
11 C.J. p 595 note 29.
30. Mich.—Haynes v. Hobbs, 98 N.W. 978, 136 Mich. 117.
11 C.J. p 596 note 31.
31. Iowa.—Sylvester v. Ammons, 101 N.W. 782, 126 Iowa 140.
Mo.—Stringer v. Geiser Mfg. Co., 162 S.W. 645, 177 Mo.App. 234.
N.Y.—Cody v. Springfield First Nat. Bank, 71 N.Y.S. 277, 63 App.Div. 199, 32 N.Y.Civ.Proc. 148.
11 C.J. p 596 note 32.

Complaint held sufficient

- (1) In action for conversion.
Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427.
Tex.—Draper v. Presley, Civ.App., 111 S.W.2d 1124, error dismissed.
(2) In trespass.—Shaw v. Personal Finance Co. of Champaign, 274 Ill.App. 93.
(3) As alleging mortgagee's unlawful taking of property before mortgagor's default.—Glassman v. Ficksman, 131 N.E. 316, 238 Mass. 580.
(4) As alleging facts from which allegation of place of conversion may

§ 223. — Pleading

The pleadings must sufficiently state the cause of action or defense; and general rules as to issues, proof, and variance prevail.

The mortgagor must allege all issuable facts necessary to warrant a recovery.³¹ A declaration in trover or a conversion of the property may be amended by adding a count claiming damages for the negligent acts described in the original declaration,³² or a complaint in replevin may be amended to show that the mortgage was fraudulent.³³ Where plaintiff, suing for possession of the goods taken under a mortgage fraudulently executed pursuant to a conspiracy between defendant mortgagee and plaintiff's joint adventurer, alleges a prior mortgage but does not claim thereunder, as mortgagee, he need not allege that defendant had notice of such prior mortgage when he took his own mortgage.³⁴

Defendant's pleadings must sufficiently state his defenses.³⁵ If he wishes to rely on matters in mitigation of damages, it has been held that they must be specially pleaded, because the defense in mitigation is in effect a plea in confession and avoidance.³⁶

Issues, proof, and variance. A mortgagor who seeks to recover chattels seized by a mortgagee on the ground that the mortgage was invalid need not tender in his complaint an issue with regard to the precise kind of invalidity he intends to set up.³⁷

be implied.—Draper v. Presley, supra.

- (5) As to damages.—Runnels Chevrolet Co. v. Clifton, Tex.Civ.App., 46 S.W.2d 426.

32. Mich.—Croze v. St. Mary's Canal Land Co., 117 N.W. 81, 153 Mich. 363.

33. Iowa.—Sylvester v. Ammons, 101 N.W. 782, 126 Iowa 140.

34. Colo.—Boyd v. Brown, 267 P. 200, 83 Colo. 547.

35. Cal.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal. App. 46.

Answer held insufficient

- (1) As to retention of cattle for reasonable time after seizure to render them marketable.—Peet v. People's Trust & Savings Bank, 204 P. 413, 56 Cal.App. 46.

- (2) As to tender of property to mortgagor.—Peet v. People's Trust & Savings Bank, supra.

36. N.D.—Steidl v. Aitken, 152 N.W. 276, 30 N.D. 281, L.R.A.1915E 192.

- Or.—Springer v. Jenkins, 84 P. 479, 47 Or. 502.

37. Mo.—Johnson v. Simmons, 61 Mo.App. 395.

- 11 C.J. p 596 note 36.

and should not mislead the jury.⁶⁹ It is not error, in a proper case, to instruct the jury that the facts show that the taking and conversion were wrongful, and that the only thing left for them to determine was the extent of plaintiff's damages, if any, and the amount, if anything, he should recover.⁷⁰

Verdict or findings in an action by the mortgagor against the mortgagee for conversion will not be disturbed unless manifestly unsupported by the evidence⁷¹ or not warranted by the instructions.⁷² A jury called on to answer specific questions cannot control the judgment by a general verdict which in effect contradicts the specific findings.⁷³ While replevin is merely a possessory action, where the rights of the parties change subsequently to the commencement of such an action, but prior to the date of the trial, the judgment should adjust the equities as they exist at the date of trial.⁷⁴ Where, pending disposal of a motion for new trial filed by the mortgagee in his replevin suit based on a chattel mortgage, the mortgagor began a second suit in replevin, the value of the property as assessed in the judgment in the second suit which went against mortgagor on appeal should not exceed the amount as assessed in the first suit.⁷⁵

Satisfaction of judgment. Where, prior to the recovery of a judgment by the mortgagor against one who had converted the mortgaged chattels, there had been a default in the condition of the mortgage, and the mortgagee had thus become the absolute owner, subject only to the right of redemp-

tion, and entitled to the immediate possession thereof, satisfaction of the judgment for the full value by the judgment debtor transfers to him the title of both mortgagor and mortgagee.⁷⁶

§ 226. — Damages and Accounting

The mortgagor is entitled to recover from the mortgagee the damages proximately resulting from the latter's wrongful act as measured in accordance with the usual rules, and, in a proper case, also exemplary damages.

The damages recoverable by the mortgagor against the mortgagee must be the natural and proximate cause of the alleged wrongful act.⁷⁷ He cannot recover exemplary or punitive damages in an action for conversion, unless he shows willful malice, or fraud, or gross negligence on the part of the mortgagee,⁷⁸ but such damages may be allowed where the mortgagee acts maliciously and oppressively,⁷⁹ and after condition broken the mortgagor may recover exemplary damages from the mortgagee for an alleged unlawful and wanton trespass committed by defendant in entering the mortgaged premises, and in taking away the goods.⁸⁰ A verdict will not be set aside as based on passion and prejudice merely because the jury, through a natural mistake, granted excessive damages to plaintiff where the judgment can be reduced to the extent thereof.⁸¹

Measure of damages. Where a mortgagee of chattels takes possession and converts before condition broken, the mortgagor's measure of damages is the value of the property at the time of the conversion⁸² not exceeding the value alleged in the com-

positive testimony that plaintiff had not executed it.—*Mims v. Bennett*, 158 S.E. 124, 160 S.C. 39, 78 A.L.R. 360.

(2) In action involving rights of successors to chattel mortgagor and mortgagee, instruction that action was for accounting of proceeds of sale of mortgaged property by defendant, and if no surplus remained, verdict must be for defendant, was properly refused.—*International Harvester Co. of America v. Lawrence Inv. Co.*, 37 P.2d 529, 95 Colo. 523.

69. Kan.—*Stewart v. Farmers' State Bank*, 202 P. 623, 110 Kan. 82.

70. Okl.—*Rogers v. Benford*, 201 P. 646, 83 Okl. 270.

71. Mich.—*Kramer v. Gustin*, 19 N. W. 1, 53 Mich. 291.

Minn.—*Latusek v. Davies*, 82 N.W. 587, 79 Minn. 279.
11 C.J. p 597 note 49.

72. Iowa.—*Sylvester v. Ammons*, 101 N.W. 782, 126 Iowa 140.

73. Tex.—*Farmers' State Bank v. Bell*, Civ.App., 176 S.W. 922.

74. N.D.—*Smythe v. Muri*, 158 N.W. 264.

Okl.—*McDonald v. Schantz*, 146 P. 36, 44 Okl. 648.—*Brook v. Bayless*, 52 P. 738, 6 Okl. 568.
11 C.J. p 597 note 53.

75. Mo.—*Smith v. Tucker*, App., 200 S.W. 707.

76. N.Y.—*Marsden v. Cornell*, 62 N. Y. 215.—*Hof v. Mager*, 154 N.Y.S. 60, 168 App.Div. 313.

77. Tex.—*Phoenix Furniture Co. v. McCracken*, Civ.App., 3 S.W.2d 545, 11 C.J. p 597 note 55.

Speculative profits

The mortgagor cannot recover speculative profits as damages for the detention of the chattel.—*Maycroft v. The Jennings Farms*, 176 N.W. 545, 209 Mich. 187.—11 C.J. p 597 note 55 [a].

78. S.C.—*Brown v. Gibbes Machinery Co.*, 125 S.E. 638, 130 S.C. 324.
Tex.—*Phoenix Furniture Co. v. McCracken*, Civ.App., 3 S.W.2d 545.
11 C.J. p 597 note 56.

79. Okl.—*Rogers v. Bedford*, 201 P. 646, 83 Okl. 270.

11 C.J. p 597 note 56.

Violation of extension agreement

Mont.—*Ramsbacher v. Hohman*, 261 P. 273, 80 Mont. 480.

80. Mo.—*Jones v. H. Martini Furnishing Co.*, 77 Mo.App. 474.

81. Mont.—*Ramsbacher v. Hohman*, 261 P. 273, 81 Mont. 480.

Overallowance of one hundred eight dollars and forty-eight cents in awarding actual damage against mortgagee for converting Ford car was held not to show passion and prejudice by jury.—*Ramsbacher v. Hohman*, supra.

Verdict held excessive

Where the mortgagor's testimony placed a maximum valuation of nine hundred eighteen dollars on the converted articles, a verdict for one thousand fifteen dollars was excessive and influenced by passion and prejudice.—*James v. Speer*, 220 P. 535, 69 Mont. 100.

82. Idaho.—*Peterson v. Hailey Nat. Bank*, 6 P.2d 145, 51 Idaho 427—

plaint,⁸³ plus such special damages as are actually caused by the taking,⁸⁴ if specially pleaded,⁸⁵ and in some jurisdictions, with interest from the date of the conversion⁸⁶ in the discretion of the jury;⁸⁷ but it has been held that the amount of the mortgage debt remaining unpaid⁸⁸ and interest to date

Advance-Rumely Thresher Co. v. Brady, 278 P. 224, 47 Idaho 726—Gunnell v. Largilliere Co., Bankers, 269 P. 412, 415, 46 Idaho 551, citing *Corpus Juris*.

Ky.—Cable Co. v. Greenfield, 244 S.W. 692, 196 Ky. 314.

La.—Ferrara v. Polito, App., 167 So. 120.

Mich.—Maycroft v. The Jennings Farms, 176 N.W. 545, 209 Mich. 187.

Minn.—Carlson v. Schoch, 170 N.W. 195, 141 Minn. 236.

Mo.—Allen v. Forschler, App., 189 S.W. 636.

Mont.—James v. Speer, 220 P. 535, 69 Mont. 100.

Neb.—Hippodrome Amusement Co. v. Redick, 191 N.W. 317, 109 Neb. 390.

Okl.—Oklahoma State Bank of Enid v. Buckner, 217 P. 189, 90 Okl. 109.

Or.—Laam v. Green, 211 P. 791, 109 Or. 311.

S.D.—Styke v. Sioux Falls Motor Co., 244 N.W. 387, 60 S.D. 358—Erickson v. Carlberg Co., 223 N.W. 195, 54 S.D. 296.

Tex.—Draper v. Presley, Civ.App., 111 S.W.2d 1124, error dismissed—Runnels Chevrolet Co. v. Clifton, Civ.App., 46 S.W.2d 426—O'Neal v. Allison, Civ.App., 292 S.W. 269—Cleveland State Bank v. Lilley, Civ.App., 260 S.W. 324.

11 C.J. p 597 note 58.

Application of part of goods to mortgage debt

Where there was no agreement by which defendant was to take part of plaintiff's goods in full settlement of a mortgage, measure of damages would be difference between value of all goods taken and the amount due defendant, but if there was such a settlement, and defendant took all the goods, the measure of damages would be value of goods which he had no right to take. — Allen v. Forschler, Mo.App., 189 S.W. 636.

Loss of use and expenses

Recovery of one hundred dollars for the loss of use of cattle converted, the loss of time and expenses incurred in attending court, and "other things." — Cleveland State Bank v. Lilley, Tex.Civ.App., 260 S.W. 324.

Market value

(1) Where chattels are unlawfully sold, the owner's measure of damages is market value of property, and not the price at which it was sold. — Barron-Fisher-Caudill Land Co. v. Rhoda, 191 S.W. 229, 126 Ark. 554.

(2) Price fixed on in an ineffectual sale is not necessarily the fair and reasonable basis to determine true value of property. — Montgomery

County Nat. Bank v. Wherry, 169 P. 1146, 102 Kan. 224.

(3) In fixing damages for conversion of automobiles, the standard of value is the market value at the place of conversion, and not the wholesale price plus freight.—McLeod Nash Motors v. Commercial Credit Trust, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296.

(4) An instruction that the market value is not the sole criterion of liability for conversion of mortgaged cows was erroneous.—Green v. Van Cott, 246 N.Y.S. 481, 230 App.Div. 633.

Sale price

Where mortgagee who converted automobile sold it for one hundred fifty dollars and a used automobile, sale price cannot be taken into consideration in determining damages in mortgagor's action for conversion, where sale price was under amount of mortgage and there was no fraud.—Colonial Finance Co. v. Bear, 189 N.E. 673, 46 Ohio App. 498.

83. Tex.—Draper v. Presley, Civ. App., 111 S.W.2d 1124, error dismissed.

84. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Gunnell v. Largilliere Co., 269 P. 412, 415, 46 Idaho 551, citing *Corpus Juris*.

11 C.J. p 598 note 59.

Sickness

Owners of household goods converted by mortgagee are entitled to recover damages resulting from wrongful taking of property, including damages for sickness directly resulting.—Quick v. Knight, 67 S.W.2d 729, 188 Ark. 777.

Taking of household furniture

Two hundred dollars each to husband and wife for humiliation, embarrassment, and inconvenience, including cost of room and board for themselves and child for two months, because of illegal removal and storage of their furniture by seller-mortgagee, without reasonable excuse was authorized.—Elders v. Montgomery-Ward & Co., La.App., 172 So. 191.

Expenses of redeeming

Where mortgagee was sued for damages for trespass in seizing automobile, recovery of expenses in redeeming car and unnecessary repair bill which the mortgagor was required to pay in redeeming, was held authorized.—Texas Auto Co. v. Clark, Tex.Civ.App., 12 S.W.2d 655.

85. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Gunnell v. Largilliere Co., 269 P.

412, 415, 46 Idaho 551, citing *Corpus Juris*.

11 C.J. p 598 note 60.

86. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Gunnell v. Largilliere Co., 269 P. 412, 415, 46 Idaho 551, citing *Corpus Juris*.

Ky.—Cable Co. v. Greenfield, 244 S.W. 692, 196 Ky. 314.

Minn.—McLeod Nash Motors v. Commercial Credit Trust, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296—Carlson v. Schoch, 170 N.W. 195, 141 Minn. 236.

Tex.—Cleveland State Bank v. Lilley, Civ.App., 260 S.W. 324.

11 C.J. p 598 note 61.

Interest on payments made

Mortgagor, suing seller-mortgagee for conversion of dairy herd, was entitled to interest on payments made on chattel mortgage notes from date of conversion, as such payments represent plaintiff's equitable interest in, or the value of, the property at the time it was converted.—Hitt v. Herndon, 117 So. 563, 166 La. 497.

87. Ky.—Cable Co. v. Greenfield, 244 S.W. 692, 196 Ky. 314.

88. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Advance-Rumely Thresher Co. v. Brady, 278 P. 224, 47 Idaho 726.

Ky.—Cable Co. v. Greenfield, 244 S.W. 692, 196 Ky. 314.

Mich.—Danciewicz v. Kann, 200 N.W. 962, 229 Mich. 124.

Minn.—Ingalls v. Enggren, 260 N.W. 302, 194 Minn. 332—McLeod Nash Motors v. Commercial Credit Trust, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296—Carlson v. Schoch, 170 N.W. 195, 141 Minn. 236.

Mont.—Ramsbacher v. Hohman, 261 P. 273, 80 Mont. 480—James v. Speer, 220 P. 535, 69 Mont. 100.

Neb.—Hippodrome Amusement Co. v. Redick, 191 N.W. 317, 109 Neb. 390. N.D.—Olstad v. Stockgrowers Credit Corporation, 266 N.W. 109, 66 N.D. 416.

Ohio.—Colonial Finance Co. v. Bear, 189 N.E. 673, 46 Ohio App. 498.

Okl.—Oklahoma State Bank of Enid v. Buckner, 217 P. 189, 90 Okl. 109. Or.—Laam v. Green, 211 P. 791, 109 Or. 311.

S.C.—Brown v. Gibbes Machinery Co., 125 S.E. 638, 130 S.C. 324.

S.D.—Erickson v. Carlberg Co., 223 N.W. 195, 54 S.D. 296.

Tex.—Draper v. Presley, Civ.App., 111 S.W.2d 1124, error dismissed—Runnels Chevrolet Co. v. Clifton, Civ.App., 46 S.W.2d 426—O'Neal v. Allison, Civ.App., 292 S.W. 269.

11 C.J. p 598 note 62.

"The holder of a chattel mortgage having refused a tender of the plain-

of conversion⁸⁹ must be deducted from this sum, and that when the amount of the lien exceeds the value of the property converted, plaintiff cannot recover.⁹⁰ So, where the mortgagee is an accommodation indorser of the mortgagor's note he is entitled to a credit for an amount subsequently paid by him in discharging the note.⁹¹ Where the mortgage is on goods sold by the mortgagee to the mortgagor, it is immaterial what the original price was or the amount of the payments plaintiff has made thereon.⁹² The mortgagor's measure of damages in an action for the conversion of goods delivered to defendant mortgagee under an agreement to sell them for plaintiff for a certain amount is the difference between such amount and the amount of plaintiff's debt to defendant.⁹³

The measure of damages for detention is the value of the use of the property up to the time when defendant became lawfully entitled to possession.⁹⁴ In some jurisdictions the jury may in their discre-

tion allow interest as damages,⁹⁵ but the fact that the value of its use cannot be ascertained does not justify the allowance of interest on the total value of the property.⁹⁶

Accounting for rents. Where a chattel mortgagee improperly takes possession of the property on replevin, the mortgagor may compel him to account for rents received.⁹⁷

§ 227. Against Third Persons

A mortgagor in lawful possession of the mortgaged chattels may protect that possession against third parties by appropriate legal remedies, as to which general rules relating to defenses, parties, pleading, evidence, trial, and damages apply.

The mortgagor in lawful possession, whether by the terms of the mortgage or otherwise, has the right to protect his possession against third parties by appropriate legal remedies, because he is regarded as the owner of the property mortgaged as against all persons except the mortgagee.⁹⁸ Hence,

tiff to pay its note and mortgage in full, and having sold the mortgaged property, thereby became liable to her for at least the difference between the value of the mortgaged property and its debt.—*Stewart v. Farmers' State Bank*, 202 P. 623, 110 Kan. 82.

Reason for rule

The amount of the mortgage debt is deducted in order to avoid circuity of action, two suits to adjust equities in a single transaction not being tolerated when adjustment can be made in one suit.—*Brink v. Freoff*, 6 N.W. 94, 44 Mich. 69, 40 Mich. 610.

In absence of claim for balance

In action for conversion of chattels released from mortgage, judgment for value thereof was proper, where converter made no claim by way of set-off for alleged balance of debt.—*Styke v. Sioux Falls Motor Co.*, 244 N.W. 387, 60 S.D. 358.

89. Idaho.—*Peterson v. Hailey Nat. Bank*, 6 P.2d 145, 51 Idaho 427.
Ky.—*Cable Co. v. Greenfield*, 244 S.W. 692, 196 Ky. 314.

90. Minn.—*Ingalls v. Enggren*, 260 N.W. 302, 194 Minn. 332.

Okl.—*Oklahoma State Bank of Enid v. Buckner*, 217 P. 189, 90 Okl. 109.

91. Mo.—*Miller v. Biggs*, App., 183 S.W. 718.

92. Ky.—*Cable Co. v. Greenfield*, 244 S.W. 692, 196 Ky. 314.

Tex.—*O'Neal v. Allison*, Civ.App., 292 S.W. 269.

93. S.C.—*Brown v. Gibbes Machinery Co.*, 125 S.E. 638, 130 S.C. 324.

94. Idaho.—*Gunnell v. Largilliere Co., Bankers*, 269 P. 412, 415, 46 Idaho 551, citing *Corpus Juris*.

Limits of recovery

Compensation to the mortgagor is not the limit of recovery, but the wrongdoer is not to be allowed to profit by his own wrong, and the mortgagor may recover, in addition to the property or its value, the value of the use of the property during the time of detention in case it exceeds interest; and it is immaterial that the injured mortgagor replaces the property by purchase, or that he in fact loses money in the use of the property so purchased, the value of the use being limited to the use for the purpose for which the property was used by the mortgagor and the mortgagee, at least in the absence of pleading by the mortgagor that he could and would have rented out the property for some other use.—*Montgomery v. Gallas*, Tex.Civ.App., 225 S.W. 557.

11 C.J. p 598 note 65.

Value exceeding debt

The rule that the mortgagor wrongfully deprived of his property by the mortgagee cannot recover possession of the mortgaged property from the mortgagee after conditions arise which would authorize the mortgagee to take possession, without paying the mortgage debt does not apply where the value of the use to which the mortgagee has put the mortgaged property exceeds the mortgage debt, and in such case the mortgagor may recover the mortgaged property and the excess of the value of such use over the amount of the mortgage debt.—*Montgomery v. Gallas*, supra.

"Value of use" as "rental value"

The term "value of the use" of property subject to chattel mortgage,

and withheld by the mortgagee from plaintiff mortgagor, when unaccompanied by allegations showing a special use for a particular purpose, means no more than "rental value"; and the measure of plaintiff's damages is the rental value of the mortgaged property for the time for which it was unlawfully withheld from plaintiff by defendant mortgagee.—*Montgomery v. Gallas*, supra.

95. Mo.—*Simpson v. Bantley*, 126 S.W. 999, 142 Mo.App. 490—*Feller v. McKillip*, 81 S.W. 641, 109 Mo.App. 61—*Bigler v. Leonori*, 77 S.W. 324, 103 Mo.App. 131.

96. Mo.—*Cummings v. Badger Lumber Co.*, 109 S.W. 68, 130 Mo.App. 557.

97. Mo.—*Baker v. Cunningham*, 62 S.W. 445, 162 Mo. 184, 85 Am.S.R. 490—*Cummings v. Badger Lumber Co.*, 109 S.W. 68, 130 Mo.App. 557.

98. Ala.—*Lowery v. Louisville & N. R. Co.*, 153 So. 467, 468, 228 Ala. 137, reversing 153 So. 465, 26 Ala. App. 70, quoting *Corpus Juris*—*First Nat. Bank v. Harden*, 82 So. 655, 17 Ala.App. 165, certiorari denied in re *First Nat. Bank of Alexander*, 82 So. 422, 203 Ala. 172—*Butler Cotton Oil Co. v. G. H. Campbell & Sons*, 78 So. 643, 16 Ala.App. 445.

Colo.—*Williams v. Stringfield*, 231 P. 653, 76 Colo. 343.

Mo.—*State ex rel. and to Use of Kibble v. First Nat. Bank*, App., 22 S.W.2d 185—*Bruce v. Crysler*, App., 217 S.W. 563.

N.C.—*Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 322, 190 N.C. 480, 49 A.L.R. 1452, quoting *Corpus Juris*.

the mortgagor may maintain an action where an officer makes a wrongful levy⁹⁹ or seizes exempt property on an execution,¹ or to recover for damage to the property caused by the negligence of a third person;² and it has been held that a mortgagor can recover in a suit brought in his own name on an account owing him which had been included in a mortgage.³ Even if the mortgagor is in default, yet if he still has possession, he has an interest sufficient to maintain an action against a third party wrongfully converting or destroying the property,⁴ especially where he has obtained the consent of the mortgagee, or even without his consent, after demand and his refusal, to bring it.⁵ After the mortgagor has parted with the possession of the property he can maintain an action on the case, or, in code states, an action in the nature of an action on the case, against one who takes the property from the hands of the mortgagee;⁶ but a mortgagor who was neither in possession of the mortgaged chattels nor entitled to their possession at the time of the conversion cannot maintain trover therefor.⁷ So, recovery for the full amount of the damages by the mortgagee under the principles discussed infra § 229 will bar recovery by the mortgagor.⁸ Although a mortgagor in possession may maintain trespass for an injury to his right of possession and

recover, by way of aggravation, for injury to the property itself, the right to such damages is only incidental to the right of action for an injury to the possession and is subordinate to the mortgagee's right to recover for damages to the property itself.⁹ A mortgagor who has given the mortgagee the right, on default in payment of any installment of the mortgage note, to sell the chattels, has no property right in them after default sufficient to sustain an interplea as against the mortgagee's attaching creditor.¹⁰

It constitutes a sufficient defense that plaintiff's cause of action has been extinguished subsequent to the commencement of his suit,¹¹ and to an action for conversion by the mortgagor against a purchaser of the goods, the mortgagee's parol license to sell personalty mortgaged by instrument under seal is a good defense.¹² Where the answer in an action for conversion asserted that defendant was the owner of the goods, he was entitled to show that subsequent to the wrongful taking of the property he purchased outright the mortgage on the goods, and was entitled to have the amount due on the mortgage credited to him and deducted from the value of the property wrongfully taken.¹³ An answer which does not present a defense is demurrable, however,¹⁴ as where in an action against the

S.C.—*Martin v. Seaboard Air Line Ry. Co.*, 93 S.E. 336, 108 S.C. 130. 11 C.J. p 599 note 69.

Registration of contract of sale retaining title to seller until payment of note given in payment of automobile did not affect right of buyer to maintain action for injury to it.—*Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Subsequent loss of possessory right Mortgagor could maintain an action for wrongful taking and conversion of an automobile as against defendant's taking it on execution against another, where at time of taking she had right of possession, although at time of demand and bringing of action mortgagee had right of possession.—*Williams v. Stringfield*, 231 P. 658, 76 Colo. 343.

Title in mortgagee

The fact that legal title to a horse was in the mortgagee did not affect right of mortgagor in possession to maintain action for its injury.—*Gover v. Central Vermont Ry. Co.*, 118 A. 874, 96 Vt. 208.

99. Colo.—*Williams v. Stringfield*, 231 P. 658, 76 Colo. 343. 11 C.J. p 599 note 71.

1. Iowa.—*Evans v. St. Paul Harvester Works*, 18 N.W. 881, 63 Iowa 204.

11 C.J. p 599 note 72.

2. Ala.—*Lowery v. Louisville & N. R. Co.*, 153 So. 467, 468, 228 Ala. 137, reversing 153 So. 465, 26 Ala. App. 70, quoting *Corpus Juris*.

La.—*Miller v. Hortman-Salmen Co.*, App., 145 So. 786, 789, citing *Corpus Juris*.

N.Y.—*Stewart Motor Trucks v. New York City*, 287 N.Y.S. 881, 158 Misc. 738.

Ohio.—*Commercial Credit Co. v. Standard Baking Co.*, 187 N.E. 251, 45 Ohio App. 403.

Or.—*Commercial Securities v. Mast*, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

S.C.—*Martin v. Seaboard Air Line Ry. Co.*, 93 S.E. 336, 108 S.C. 130. 11 C.J. p 599 note 73.

3. Mich.—*Swan v. Thurman*, 70 N. W. 1023, 112 Mich. 416. 11 C.J. p 599 note 74.

4. N.Y.—*Stewart Motor Trucks v. New York City*, 287 N.Y.S. 881, 158 Misc. 738.

Or.—*Commercial Securities v. Mast*, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

S.C.—*Martin v. Seaboard Air Line Ry. Co.*, 93 S.E. 336, 108 S.C. 130. 11 C.J. p 599 note 75.

Primary right in mortgagor

Ohio.—*Commercial Credit Co. v. Standard Baking Co.*, 187 N.E. 251, 45 Ohio App. 403.

5. S.C.—*Wilkes v. Southern R. Co.*, 67 S.E. 292, 85 S.C. 346, 137 Am. S.R. 890, 21 Ann.Cas. 79.

6. Ill.—*Frankenthal v. Mayer*, 54 Ill. App. 160.

Mont.—*Samuell v. Moore Mercantile Co.*, 204 P. 376, 63 Mont. 232.

7. Cal.—*Middleworth v. Sedgwick*, 10 Cal. 392.

11 C.J. p 599 note 78.

8. La.—*Miller v. Hortman-Salmen Co.*, App., 145 So. 786, 789, citing *Corpus Juris*.

N.C.—*Harris v. Seaboard Air Line Ry. Co.*, 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Or.—*Commercial Securities v. Mast*, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

9. Me.—*Donnell v. Deering Co.*, 97 A. 130.

10. Mo.—*Connorsville Buggy Co. v. Lowry*, 77 S.W. 771, 104 Mo.App. 186.

11. Colo.—*Hurt v. Hubbard*, 92 P. 908, 41 Colo. 505.

11 C.J. p 599 note 81.

12. Vt.—*Hunt v. Allen*, 50 A. 1103, 73 Vt. 322.

13. Mo.—*Bruce v. Chrysler*, App., 217 S.W. 563.

14. Ky.—*Commercial Credit Co. v. Cooper*, 55 S.W.2d 381, 246 Ky. 513.

mortgagee and its adjuster for conversion the latter pleaded that plaintiff was delinquent in his payments and that the pleader took the chattels with plaintiff's consent, but did not allege that he turned them over to the mortgagee and took no part in the conversion or its proceeds.¹⁵

Parties. It is not ordinarily necessary in an action by the mortgagor to join the mortgagee,¹⁶ but defendant may demand that the mortgagee be made a party where the mortgagee has been deprived of his security.¹⁷ Thus, in an action by the mortgagor against a tort-feasor for destruction of the mortgaged property, defendant may cause the mortgagee and other interested parties to be brought into court to protect him from a second action,¹⁸ and the mortgagee has a right to intervene in the action.¹⁹ Joinder of mortgagor and mortgagee as parties plaintiff in an action against a third party generally is treated *infra* § 240 a.

Evidence. In an action by the mortgagor for conversion, general rules of evidence apply.²⁰ Thus, in a possessory action by a chattel mortgagor

against a purchaser from the chattel mortgagee who set up no claim to the property except under foreclosure, it was held that the burden of proving the mortgagor's consent that the mortgage should stand as security for debts or claims not mentioned therein was on the purchaser.²¹

Trial. In accordance with the general rules applicable in the trial of civil actions generally, disputed questions of fact should be submitted to the jury for determination,²² and the court should properly instruct the jury as to the law of the case.²³ The suit should be dismissed as to parties not shown to have any connection with the tort.²⁴

Measure of damages. More than a nominal recovery may be obtained by the mortgagor,²⁵ for the measure of damages is the full face value of the goods which are taken from his possession²⁶ or destroyed.²⁷ The damages are the same whether the mortgagor or a stranger becomes the purchaser of the property at the sale under the wrongful levy.²⁸

15. Ky.—Commercial Credit Co. v. Cooper, *supra*.

16. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 468, 228 Ala. 137, reversing 153 So. 465, 26 Ala. App. 70, quoting *Corpus Juris*.

N.C.—Harris v. Seaboard Air Line R. Co., 130 S.E. 319, 322, 190 N.C. 480, 49 A.L.R. 1452, quoting *Corpus Juris*.

11 C.J. p 599 note 70.

17. Iowa.—Evans v. St. Paul Harvester Works, 18 N.W. 881, 63 Iowa 204.

11 C.J. p 610 note 56.

18. Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

S.C.—Martin v. Seaboard Air Line Ry. Co., 93 S.E. 336, 108 S.C. 130.

19. U.S.—Milton Mfg. Co. v. Chicago, B. & Q. R. Co., D.C.Iowa, 237 F. 118.

Minn.—Wohlwend v. J. I. Case Threshing Mach. Co., 44 N.W. 517, 42 Minn. 500.

20. Admissibility

In action by mortgagor and purchaser of mortgaged cattle for conversion thereof by lessee of grazing land, testimony as to application of proceeds of sales thereof by defendants and mortgagee on note and mortgage, and recourse to property of mortgagor's comaker for deficiency, is immaterial and incompetent, although evidence that notes secured by mortgage were paid before action was brought was admissible to prove plaintiffs' right to sue instead of mortgagee. Furthermore,

admission of testimony as to plaintiff's preparations for wintering and care of cattle is prejudicial error, in absence of claim for loss caused thereby; but the mortgagor's testimony as to intent in buying cattle and making arrangements with subsequent purchaser to care for them after resale is admissible as indicating good faith in transaction with such purchaser, which was challenged by defense. Testimony as to whether assignee of mortgage would have foreclosed, if defendants had not taken possession of cattle is inadmissible, however, in absence of allegations of special damages. Testimony as to whether mortgagees selling cattle on foreclosure had received returns from sales of cattle not accounted for by figures of account sales and sheriff's return is material.—Frost v. J. B. Long & Co., 228 P. 75, 71 Mont. 141.

21. Ala.—Hodges v. Kyle, 63 So. 761, 9 Ala.App. 449.

22. Mont.—Frost v. J. B. Long & Co., 228 P. 75, 71 Mont. 141.

S.C.—Clowney v. Rivers, 128 S.E. 759, 129 S.C. 58.

Identity of property

S.C.—Clowney v. Rivers, *supra*.

Number of cattle converted

Mont.—Frost v. J. B. Long & Co., 228 P. 75, 71 Mont. 141.

23. Mont.—Frost v. J. B. Long & Co., *supra*.

Damages

Mont.—Frost v. J. B. Long & Co., *supra*.

24. Adjuster

Where, under evidence, adjuster acted as seller's agent in repossessing automobile from buyer under chattel mortgage and had no connection with seller's subsequent sale of automobile, buyer's suit against seller and adjuster for conversion should have been dismissed as to adjuster.—*Id.* v. Presley, Tex.Civ. App., 111 S.W.2d 1124, error dismissed. 12

25. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 468, 228 Ala. 137 reversing 153 So. 465, 26 Ala. App. 70, quoting *Corpus Juris*.
11 C.J. p 599 note 84.

26. Ala.—Lowery v. Louisville & N. R. Co., *supra*.

Mo.—State ex rel. and to Use of Kible v. First Nat. Bank, App., 22 S. W.2d 185.

11 C.J. p 599 note 85.

Even after condition broken mortgagor is entitled to recover the full value of the property against one who is a stranger to the mortgage. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 468, 228 Ala. 137, reversing 153 So. 465, 26 Ala.App. 70, quoting *Corpus Juris*.
Minn.—Vandiver v. O'Gorman, 58 N. W. 831, 57 Minn. 64.

27. Ala.—Lowery v. Louisville & N. R. Co., 153 So. 467, 228 Ala. 137, reversing 153 So. 465, 26 Ala.App. 70.

28. Mass.—Leonard v. Hair, 133 Mass. 455.

I. ACTIONS BY MORTGAGEE

§ 228. In General

As shown *infra* §§ 229-245, on compliance with all conditions precedent and subject to general rules relating to parties, pleading, evidence, trial, and judgment, unless defendant can interpose some valid defense or counterclaim, a chattel mortgagee in an action against the mortgagor or some third person interfering with plaintiff's right of possession can recover the mortgaged property or damages for its conversion or detention.

§ 229. Right of Action

An action may be maintained by the mortgagee un-

der proper circumstances to protect his interest in the mortgaged chattels.

A mortgagee of personal property may maintain a possessory action against one who wrongfully takes the property from his possession,²⁹ and a mortgagee entitled to possession may maintain an action for its conversion,³⁰ or trespass for damages to his possession,³¹ or an action on the case,³² even before condition broken,³³ and notwithstanding the tort-feasor may also be subject to criminal prosecution for his acts respecting the mortgaged property.³⁴ A mortgagee may also enforce an immediate right to possession of the property conveyed by the mortgage in an action of replevin,³⁵ or

29. N.D.—Sandager v. El. Co., 48 N. W. 438, 2 N.D. 3.

11 C.J. p 599 note 87.

30. U.S.—Commercial Casualty Ins. Co. v. Allied Dairy Products Corporation, C.C.A.N.Y., 29 F.2d 489.

Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328—Johnson v. McFry, 68 So. 716, 14 Ala.App. 170.

Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 133 Ark. 173.

Ga.—Planters' Bank of Americus v. Albert Pick & Co., 143 S.E. 441, 38 Ga.App. 95.

Idaho.—Lawson v. Robertson, 7 P. 2d 946, 51 Idaho 551.

Ill.—American Banking Co. v. General Motors Acceptance Corporation, 248 Ill.App. 385.

La.—Plauche-Locke v. Securities Sales Co. of Louisiana, 125 So. 729, 169 La. 601.

Miss.—Love v. Mississippi Cottonseed Products Co., 165 So. 446, 174 Miss. 697.

Mont.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

N.Y.—Commercial Motors Mortg. Corporation v. Mack International Motor Truck Corporation, 209 N. Y.S. 661, 213 App.Div. 25—Stewart Motor Trucks v. New York City, 287 N.Y.S. 881, 158 Misc. 738.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

S.D.—First Nat. Bank v. Siman, 275 N.W. 347.

Tex.—Bowers v. Bryant-Link Co., Com.App., 15 S.W.2d 598, affirming Civ.App., 6 S.W.2d 788—Terry v. Spearman, Com.App., 259 S.W. 563, reversing, Civ.App., 246 S.W. 103—Wilson v. Wilson, Civ.App., 121 S.W.2d 1084—General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W.2d 1368—Universal Credit Co. v. Gasow-Howard Motor Co., Civ.App., 73 S.W.2d 909, error dismissed—Bridgeport Mach.

Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed—Carter v. Haynes, Civ.App., 269 S.W. 216, 220, quoting *Corpus Juris*.

Wash.—North Pacific Bank v. Pacific Mercantile Agency Collectors, 279 P. 103, 153 Wash. 37—Spokane Sec. Finance Co. v. Crowley Lumber Co., 274 P. 102, 150 Wash. 559, affirmed 279 P. 103, 152 Wash. 697.

Wis.—Ullman v. Austin, 176 N.W. 60, 171 Wis. 29.

11 C.J. p 600 note 88.

Persons liable

Any one who is instrumental in the disposition of the property in denial of the mortgagee's right, or who causes or induces such disposition of the property is liable to the mortgagee.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 827, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567.

Insecurity clause

Mortgagee is entitled to judgment in trover, although notes were not payable until after property had been converted, where mortgage gave him right to seize property whenever he deemed himself insecure.—Arnold v. Sutherlin, 114 So. 140, 216 Ala. 546.

Effect of statutes

(1) The common-law right of action for conversion of mortgaged property cannot be abridged except by an express statutory enactment.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

(2) Hence a statutory provision for but one action to recover debt or enforce right secured by mortgage is inapplicable to action for conversion of mortgaged property, such action not being on debt but to protect the value of the security given.

Cal.—Mills v. Brown, 269 P. 636, 205 Cal. 38.

Idaho.—Forbush v. San Diego Fruit & Produce Co., *supra*.

Notes in hands of third person

Action against lessor for conversion of bowling alleys conditionally

sold to lessee is maintainable in name of assignee of vendor, who held legal title as mortgagee, although vendor had been reinvested with title to purchase-money notes by his payment of them while held by transferee of original assignee or mortgagee.—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

31. Ill.—Callagan v. American Trust & Savings Bank, 196 Ill.App. 102. 11 C.J. p 601 note 89.

32. Ala.—Johnson v. McFry, 68 So. 716, 14 Ala.App. 170. 11 C.J. p 601 note 90.

33. Ala.—Johnson v. McFry, *supra*. 11 C.J. p 601 note 91.

34. La.—Plauche-Locke v. Securities Sales Co. of Louisiana, 125 So. 729, 169 La. 601.

35. U.S.—Commercial Casualty Ins. Co. v. Allied Dairy Products Corporation, C.C.A.N.Y., 29 F.2d 489—Cozart v. Barnes, S.C., 240 F. 935, 153 C.C.A. 621.

Cal.—Commercial & Savings Bank of Stockton v. Foster, 290 P. 583, 210 Cal. 76—Podrat v. Oberndorff, 278 P. 1035, 207 Cal. 457, 63 A.L.R. 1308—California Packing Corporation v. Stone, 222 P. 193, 64 Cal. App. 488.

Colo.—Brown v. Driverless Car Co., 280 P. 483, 86 Colo. 216—Walker v. Mathis, 242 P. 63, 78 Colo. 384.

Idaho.—Portland Cattle Loan Co. v. Biehl, 245 P. 88, 42 Idaho 39—Schleiff v. McDonald, 237 P. 1108, 41 Idaho 50—Blackfoot City Bank v. Clements, 226 P. 1079, 39 Idaho 194.

Ill.—Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation, 7 N.E.2d 623, 289 Ill.App. 576—Bird-Sykes Co. v. McNamara, 252 Ill. App. 262—American Banking Co. v. General Motors Acceptance Corporation, 248 Ill.App. 385.

Ind.—Crouch v. Fahl, 113 N.E. 1009, 63 Ind.App. 257.

Me.—Cate v. Merrill, 102 A. 235, 116 Me. 432.

detinue,³⁶ although he is not the absolute owner,³⁷ and before maturity of the debt,³⁸ nor is this right defeated by his sale of the property replevied prior to the determination of the suit.³⁹ A mortgagee

who has not possession or the lawful right there-to, however, can maintain neither replevin⁴⁰ nor trover,⁴¹ and, accordingly, as to property not covered by the mortgage, there is no right of action in

Mich.—Miller v. Siden, 242 N.W. 823, 259 Mich. 19—Peter Schuttler Co. v. Gunther, 192 N.W. 661, 222 Mich. 430.

Minn.—Swaney v. Hasara, 205 N.W. 274, 164 Minn. 416.

Mo.—Rankin v. Wyatt, 73 S.W.2d 764, 335 Mo. 628, 94 A.L.R. 941, transferred, App., 49 S.W.2d 243, overruling motion 48 S.W.2d 88—International Harvester Co. v. Threlkeld, 44 S.W.2d 182, 226 Mo. App. 600—Union House Furnishing Co. v. Mudd, App., 16 S.W.2d 671—Farmers' Sav. Bank v. American Trust Co., App., 196 S.W. 35.

Mont.—A. H. Averill Machinery Co. v. Freebury Bros., 193 P. 130, 59 Mont. 594.

N.M.—Farmers' Cotton Finance Corporation v. Green, 290 P. 739, 35 N.M. 84.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Ohio.—Keller v. Evans, 14 Ohio App. 265—Midland Acceptance Corp. v. Kuderer, 27 Ohio N.P., N.S. 416.

Okl.—Rozen v. Mannford State Bank of Mannford, 58 P.2d 119, 177 Okl. 171—First Nat. Bank v. Kreuzberg, 181 P. 717, 75 Okl. 97.

Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

Tenn.—Patton v. Beech, 2 Tenn.App. 437.

Tex.—Clow Gasteam Heating Co. v. Hixson, Civ.App., 67 S.W.2d 619, error dismissed.

Utah.—Morgan v. Layton, 208 P. 505, 60 Utah 230.

11 C.J. p 601 note 92—42 C.J. p 754 note 25, p 760 note 89.

Amount of debt

The right to possession depends on the existence of a debt and not its amount.—Moore v. Sanders, 103 S.E. 589, 114 S.C. 350.

To enforce mortgage

(1) Mortgagee may maintain replevin, not for purpose of obtaining and keeping possession of personalty, but only to obtain possession for purpose of selling under power in mortgage.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

(2) Mortgagee's action of replevin is concerned solely with the right of possession, and not with the proper method of subsequently disposing of the mortgaged property and accounting for the proceeds.—Clemmitt v. Miehle Printing Press & Mfg. Co., 110 A. 713, 136 Md. 385.

(3) Claim and delivery for possession by the mortgagee is a proceed-

ing not primarily to secure a judgment for the amount of the note secured, but to enforce provisions of the mortgage, which in such proceeding is paramount.—Elders v. Feutrel, 96 S.E. 541, 110 S.C. 307.

(4) The remedy by foreclosure given the holder of a bill of sale as security by Civ.Code 1910 § 3298 does not preclude an action by the creditor to recover the property.—Hill v. Marshall, 90 S.E. 175, 18 Ga. App. 652.

Estoppel and waiver

An action by mortgagee seeking possession of property to which claim was made by a third party by virtue of attachment proceedings which were ineffectual as to mortgagee because of sheriff's failure upon levy to take property into custody was not barred because mortgagee acted as attorney for such third-party claimant in the attachment proceedings.—Ruskin v. Cheney, Cal. Super., 70 P.8d 278.

In Louisiana the holder of a chattel mortgage has a right, in an appropriate proceeding, to pursue the property in the hands of third persons by hypothecary action or otherwise.—Black v. O. K. Radiator & Sheet Metal Works, App., 152 So. 782.

In Washington

(1) It seems that replevin is not a remedy available to a chattel mortgagee after default by the mortgagor.—Roberts v. Speck, 16 P.2d 463, 170 Wash. 324—Raymond Bros. Impact Pulverizer Co. v. Thomas, 294 P. 219, 159 Wash. 550—Spokane Sec. Finance Co. v. Crowley Lumber Co., 279 P. 103, 152 Wash. 697, affirming 274 P. 102, 150 Wash. 559—Roche Fruit & Produce Co. v. Lane, 255 P. 955, 143 Wash. 700—Roche Fruit & Produce Co. v. Vaught, 255 P. 953, 143 Wash. 601.

(2) "The case of Bancroft-Whitney Co. v. Gowan, 63 P. 1111, 24 Wash. 66 . . . held that, where a chattel mortgage gave the mortgagee the right in the case of default in payment to take possession of the goods, such possession could be enforced by an action of claim and delivery. . . . The cases of Nettleton v. Evans, 121 P. 54, 67 Wash. 227, and Roche Fruit & Produce Co. v. Vaught, 255 P. 953, 143 Wash. 601 . . . held that a mortgage of chattels, where the mortgage gave the right of possession, in the case of default did not have the right to maintain an action of replevin, but must proceed to foreclose

his security under the terms of the mortgage. . . . In neither of those cases is the Bancroft-Whitney Case cited, but was of necessity implicitly overruled. In order that the matter may now be set at rest, we say that the Bancroft-Whitney Case is overruled, and the doctrine of the cases of Nettleton v. Evans and Roche Fruit & Produce Co. v. Vaught is adhered to."—Spokane Sec. Finance Co. v. Crowley Lumber Co., supra.

(3) The rule that the mortgagee is not entitled to possession of the mortgaged property and cannot therefore recover it in a replevin action applies only to a mortgagee whose rights are secured by a conventional chattel mortgage, and not to a mortgage which contemplates the actual transfer of possession from the mortgagor to the mortgagee, and transfer of possession has actually been made to be held as security.—Burke v. Wilson, 181 P. 904, 107 Wash. 454.

36. Ala.—Holcombe v. Mountain River Dairy Farm, 168 So. 439, 232 Ala. 391—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 323—Mackey v. Hall Auto Co., 176 So. 318, 27 Ala.App. 557.
11 C.J. p 602 note 93.

Resort to equity unnecessary

If stipulated right to possession under chattel mortgage depends on extraneous facts, existence or non-existence thereof is triable at law in detinue without resorting to equity.—Manufacturers' Finance Acceptance Corporation v. Woods, 132 So. 611, 222 Ala. 239, reversing 132 So. 608, 24 Ala.App. 202.

37. Ala.—Elston v. Roop, 32 So. 129, 133 Ala. 331.
11 C.J. p 602 note 94.

38. Me.—Ferguson v. Thomas, 26 Me. 499.
11 C.J. p 602 note 95.

39. Okl.—First Nat. Bank v. Kreuzberg, 181 P. 717, 75 Okl. 97.

40. Wash.—Ward v. Warner, 71 P. 2d 677.
11 C.J. p 602 note 96.

41. Ala.—Fraser v. R. W. Allen & Co., 94 So. 782, 19 Ala.App. 55.
Ga.—Butler v. Scarboro, 187 S.E. 717, 54 Ga.App. 318.

Okl.—Hayes v. Frank Rowe, Inc., 75 P.2d 832, 181 Okl. 598.
Wash.—Lee v. Ryzek, 175 P. 297, 103 Wash. 622.
11 C.J. p 602 note 96.

replevin⁴² or detinue;⁴³ but where the property covered by the mortgage is delivered to the mortgagee to apply to the mortgage debt he has such title and right to possession as will support trover.⁴⁴ Although the mortgagee is not in possession or entitled to immediate possession he may bring an action in damages for an injury to his interest in the mortgaged property,⁴⁵ and although he is held to acquire no title to the mortgaged property until after foreclosure and sale, he nevertheless has such an interest as may be protected by an action at law.⁴⁶ Where the mortgagee is regarded as being the legal owner on condition broken, he may maintain an action for damages for injury to the mortgaged property after breach of the condition of the mortgage.⁴⁷

Title. The mortgagee, in order to maintain replevin, must rely on the strength of his own title,⁴⁸ without aid from the weakness or absence of title in defendant;⁴⁹ and he cannot succeed where he relies on an invalid mortgage.⁵⁰

A mere equitable title or interest is not sufficient to enable one to maintain trover or replevin, at least where the legal title and actual possession are in another.⁵¹ So it has been held that, in order to sustain an action of trover, plaintiff must have

title, as distinguished from a mere lien.⁵² Where, in accordance with the rule stated supra § 225, title to the property has passed to a judgment debtor by virtue of satisfaction of the judgment in an action of conversion by the mortgagor, the mortgagee cannot recover possession of the property but must look to the money paid to the mortgagor on the judgment for conversion,⁵³ even though default by the mortgagor occurs prior to the recovery of the judgment.⁵⁴ A mortgagee need not show a legal title to the property, however, in order to maintain an action on the case against a purchaser who bought the property with notice of the equitable lien thereon.⁵⁵ One who held two mortgages but could not recover under the second in time of execution because he did not own it at the time of the institution of the suit, may rely upon the first unless the second was intended to, and did, supersede the first.⁵⁶

After-acquired property. Where the rule, stated supra § 26, that possession must be taken in order to validate the mortgage of property subsequently to be acquired controls, it is held that a mortgagee of such property cannot, without previously having had the property in his possession, maintain replevin⁵⁷ or trover.⁵⁸ Although a mortgage on an un-

42. Wyo.—Tillotson v. Delfelder, 276 P. 935, 40 Wyo. 283, rehearing denied 277 P. 714, 40 Wyo. 283.

43. Ala.—Sansom v. Covington County Bank, 87 So. 406, 17 Ala.App. 556, certiorari denied Ex parte Sansom, 87 So. 408, 205 Ala. 54.

44. Ala.—Johnson v. McFry, 68 So. 718, 13 Ala.App. 619.

45. U.S.—Hummer v. R. C. Huffman Const. Co., C.C.A.Ill., 63 F.2d 372, 374, citing *Corpus Juris*—Smith v. Shellabarger, D.C.Colo., 291 F. 144, 147, citing *Corpus Juris*.

Ala.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130.

Fla.—Berlein v. Eddy, 104 So. 780, 89 Fla. 484—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 756, 81 Fla. 35, citing *Corpus Juris*.

Ga.—Blanchard v. Farmers' State Bank, 124 S.E. 695, 158 Ga. 780.

La.—Miller v. Hortman-Salmen Co., App., 145 So. 786, 789, citing *Corpus Juris*.

N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App.Div. 62.

S.D.—Cresbard Grain Co. v. Farnham, 244 N.W. 91, 92, 60 S.D. 179, citing *Corpus Juris*.

46. S.D.—Smith v. Donahoe, 83 N.W. 264, 13 S.D. 334.

47. S.C.—Wilkes v. Southern R. Co., 87 S.E. 292, 85 S.C. 346, 137 Am.S. R. 890, 21 Ann.Cas. 79—Wylie v. Ohio River, etc., R. Co., 26 S.E. 676, 48 S.C. 405.

48. Idaho.—Portland Cattle Loan Co. v. Biehl, 245 P. 88, 42 Idaho 39.

Iowa.—Conway v. Alexander, 205 N.W. 351, 200 Iowa 705.

N.Y.—Equitable Trust Co. of New York v. Majestic Hotel Co., 261 N.Y.S. 1, 237 App.Div. 166, affirmed 188 N.E. 31, 262 N.Y. 486.

11 C.J. p 603 note 14.

49. Iowa.—Conway v. Alexander, 205 N.W. 351, 200 Iowa 705.

50. Mass.—Chick v. Nute, 57 N.E. 219, 176 Mass. 57.

51. Ga.—Dewitt v. Bozeman, 87 S.E. 1100, 17 Ga.App. 666.

11 C.J. p 603 note 16.

52. Ala.—Richardson v. Sewell, 97 So. 678, 19 Ala.App. 399.

Conversion prior to maturity of mortgage will not support trover by the mortgagee, since to sustain the action plaintiff must have title as distinguished from mere lien.—Richardson v. Sewell, supra.

A mortgage which is a security only under the statute is not sufficient to sustain an action of trover.—Roddenberry v. Fouche, 102 S.E. 869, 25 Ga.App. 148.

53. N.Y.—Marsden v. Cornell, 62 N.Y. 215—Hof v. Mager, 154 N.Y.S. 60, 168 App.Div. 318.

54. N.Y.—Marsden v. Cornell, 62 N.Y. 215—Hof v. Mager, 154 N.Y.S. 60, 168 App.Div. 318.

11 C.J. p 602 note 1-3.

55. Ala.—Hurst v. Bell, 72 Ala. 336.

56. Ala.—Benton v. Danley, 134 So. 32, 24 Ala.App. 260.

57. Me.—Spinney v. Cook, 86 A. 517, 110 Me. 406.

Mo.—Scudder v. Bailey, 66 Mo.App. 40.

11 C.J. p 603 note 8.

Undivided share of crop

Where mortgage covered, in addition to mules, wagon, etc., cotton to be grown by mortgagor on third person's land under agreement entitling mortgagor to a share of the crop, the mortgagee, on mortgagor's default and transfer to mortgagee of the mortgaged goods other than the cotton, could not recover possession of specified amount of cotton in action against mortgagor and third person before the crop had been divided, his remedy being in equity.—Wilson v. Garrison, 110 S.E. 806, 118 S.C. 329.

58. N.Y.—Fleetham v. Reddick, 31 N.Y.S. 342, 82 Hun 890.

§ 232. — Action by Second Mortgagee

The second mortgagee can ordinarily maintain trover, replevin, or detinue against all persons except the prior mortgagee and those claiming under him.

As against all persons other than the prior mortgagee and those claiming in his right, a subsequent mortgagee is entitled to maintain trover,⁹⁰ replevin,⁹¹ or detinue.⁹² So a second mortgagee, in joint possession with the first mortgagee, may maintain an action against a third person for conversion;⁹³ and, as shown *infra* § 249, it is also held that a second mortgagee entitled to possession may maintain an action for conversion against the first mortgagee for the wrongful conversion of the property covered by the two mortgages.

To maintain trover, a second mortgagee must have either possession or a right to immediate possession.⁹⁴ The mortgagee under a second mortgage given after the mortgagor has been divested of legal title and right of possession, cannot maintain an action for possession but is limited to a suit in equity to redeem or for an accounting.⁹⁵

Where the mortgaged property is insufficient to satisfy the first mortgage, a second mortgagee sustains no damage entitling him to recover because of the conversion of the mortgaged property by a purchaser from the mortgagor.⁹⁶

§ 233. Conditions Precedent; Demand

a. Conditions precedent in general

b. Demand

a. Conditions Precedent in General

Plaintiff must comply with statutory or other conditions precedent.

Before the commencement, by the mortgagee, of an action to replevin mortgaged chattels, there must be a compliance with statutory conditions precedent,⁹⁷ such as a statute requiring the mortgagee to furnish the mortgagor a verified itemized statement of his account,⁹⁸ which, however, is satisfied by an account made in good faith and affording reasonable information.⁹⁹ In a suit to foreclose a chattel mortgage and collect a note, where plaintiffs alleged that third persons had converted the mortgaged chattels and the cause as to conversion was transferred to another court, a valid judgment against the mortgagor was not a condition precedent to liability of the third persons for the conversion.¹

b. Demand

Ordinarily a demand is not necessary where defendant's original taking was wrongful or a demand would be useless; but a demand is required where defendant was originally in rightful possession.

In an action by the mortgagee for conversion, a demand before suit is not necessary where there was an actual conversion² or where defendant did not come into possession lawfully.³ So in replevin by the mortgagee against a third person, no demand is necessary where the original taking is wrongful,⁴ or where defendant is guilty of actual conversion,⁵ or claims the right to retain possession.⁶ A demand is, however, necessary where defendant's possession is not wrongful.⁷

862—Williams v. Dobson, 1 S.E. 421, 26 S.C. 110.

90. Ala.—Baker v. Lauderdale, 69 So. 299.

11 C.J. p 605 note 33.

91. Ind.—Koehring v. Aultman, 34 N.E. 30, 35 N.E. 30, 7 Ind.App. 475. Iowa.—Sperry v. Ethridge, 30 N.W. 4, 70 Iowa 27.

11 C.J. p 605 note 38 [a].

92. Ala.—Gardner v. Morrison, 12 Ala. 547.

93. N.Y.—Columbia Bank v. American Surety Co., 82 N.Y.S. 1054, 84 App.Div. 487, affirmed 71 N.E. 1129, 178 N.Y. 628.

94. Me.—Clapp v. Glidden, 39 Me. 448.

11 C.J. p 605 note 42.

95. S.C.—Martin v. Jenkins, 27 S.E. 947, 51 S.C. 42.

96. Iowa.—Thompson v. Anderson, 53 N.W. 418, 86 Iowa 703.

97. Ark.—J. E. McCoy & Son v. Atkins, 267 S.W. 779, 167 Ark. 250.

Iowa.—McIver v. Davenport, 81 N.W. 585, 110 Iowa 740.

98. Ark.—J. E. McCoy & Son v. Atkins, 267 S.W. 779, 167 Ark. 250.

99. Ark.—J. E. McCoy & Son v. Atkins, *supra*.

Slight inaccuracies

Efficacy of account, which on its face constitutes sufficient compliance with the statute, is not affected by inaccuracies as showing credit by cash when it was by goods, or by one or more of items of daily credit being composed of a collection of credits for several articles.—J. E. McCoy & Son v. Atkins, *supra*.

1. Tex.—Fussell & Irvin v. M. Kangerga & Bro., Civ.App., 254 S.W. 159.

Reason for rule

As between defendants and mortgagees, on the allegations of the latter's petition, this was a suit for conversion, and not a suit to foreclose a mortgage lien. Inasmuch as it appeared that the mortgagees' debt against the mortgagor was not satisfied and exceeded the value of the property in controversy, they had a cause of action against defendants to which the mortgagor was not a

necessary party.—Fussell & Irvin v. M. Kangerga & Bro., *supra*.

2. Minn.—Hogan v. Atlantic El. Co., 69 N.W. 1, 66 Minn. 344.

11 C.J. p 606 note 63.

3. N.Y.—Keefer v. Greene, 16 N.Y. S. 498.

4. Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 133 Ark. 173.

Mo.—Central Missouri Trust Co. v. Wulfert, 199 S.W. 724, 198 Mo. App. 85.

11 C.J. p 606 note 65.

5. Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 133 Ark. 173.

11 C.J. p 606 note 66.

6. Iowa.—Beh v. Moore, 100 N.W. 502, 124 Iowa 564.

Mo.—Harding v. Kelso, 91 Mo.App. 607.

11 C.J. p 606 note 67.

7. N.J.—Resnick v. Jefferson Holding & Building Corporation, 137 A. 916, 14 N.J.Misc. 875.

11 C.J. p 606 note 68.

Although a mortgage stipulates that a mortgagee is entitled to possession after default, a demand for possession must be made on the mortgagor before replevin can be maintained against him,⁸ unless there has been an actual conversion,⁹ or unless the mortgagor denies the mortgagee's right to possession,¹⁰ or it is apparent that a demand would be unavailing.¹¹ In replevin by the mortgagee against the mortgagor, no demand and refusal need be shown, where defendant places his defense on the right of possession at the time of the commencement of the action.¹² When the mortgagee becomes entitled to possession because of the maturity of the mortgage debt, it has been held that a previous demand is not necessary to support detinue,¹³ and a voluntary promise, without consideration, to postpone the date for surrendering the property to the mortgagee does not render a new demand for delivery before the postponed date necessary.¹⁴ After the mortgagor has disposed of the mortgaged property and thereby put it beyond his power to comply with a demand, a demand is not a condition precedent to a mortgagee's action against him for conversion.¹⁵

Demand for payment. An action for the possession of the mortgaged chattels may be maintained by the mortgagee against the mortgagor after default without a demand for payment of the notes secured.¹⁶ A demand for payment of the debt is required, however, where it is necessary in order to establish a default.¹⁷ Where the mortgagor has

sold the property for his own benefit, a demand for payment of the debt is not a condition precedent to an action of trover.¹⁸

On whom demand may be made. If demand is necessary, it is sufficient to make it on the agent or the bailee in possession of the property.¹⁹

§ 234. — Demand in Action against Levying Officer

Demand on a levying officer is not necessary if plaintiff mortgagee has an immediate right to possession; otherwise it is.

In the absence of statute it is not necessary for a mortgagee, with an immediate right to possession, to make a demand on an officer levying an execution or attachment writ on the mortgaged property, before commencing an action of replevin to recover it²⁰ or trover for the value thereof.²¹ Where the mortgagee did not have an immediate right of possession, so that the taking was not wrongful as to him, a demand is necessary,²² but after demand replevin can be brought.²³

Where a default occurs in a condition of the mortgage after the chattel has been taken on execution against the mortgagor, the mortgagee may maintain replevin against the levying officer without first demanding the mortgage debt from the mortgagor or the officer.²⁴

§ 235. Time to Sue and Limitations

The mortgagee's action must be brought within the time limited by statute.

Lawful distress

Where landlord acquired possession of tenant's chattels through its bailiff by lawful distress, tenant's mortgagee could not maintain replevin where it was not made to appear that demand was made prior to institution of action.—*Resnick v. Jefferson Holding & Building Corporation*, 187 A. 916, 14 N.J.Misc. 875.

8. Mich.—*Tropical Paint & Oil Co. v. Hall*, 196 N.W. 354, 225 Mich. 293.

11 C.J. p 606 note 69.

Reasons for rule

"Plaintiff's right to take possession was optional. The defendant could not be in default for not delivering up what was not demanded. Until demand there would be no tortious or wrongful detention of the property, which is the basis of replevin. Demand, therefore, was here a necessary condition precedent."—*Tropical Paint & Oil Co. v. Hall*, 196 N.W. 354, 225 Mich. 293—11 C.J. p 606 note 69 [a].

9. N.M.—*Kitchen v. Schuster*, 89 P. 261, 14 N.M. 164.

10. N.C.—*Moore v. Hurtt*, 32 S.E. 317, 124 N.C. 27.

11 C.J. p 606 note 71.

11. Cal.—*Commercial & Savings Bank of Stockton v. Foster*, 290 P. 583, 210 Cal. 76.

Ohio.—*Zablotsky v. Frigidaire Sales Corporation*, 187 N.E. 192, 193, 45 Ohio App. 339, quoting *Corpus Juris*.

11 C.J. p 606 note 72.

12. Cal.—*Commercial & Savings Bank of Stockton v. Foster*, 290 P. 583, 210 Cal. 76.

Ohio.—*Zablotsky v. Frigidaire Sales Corporation*, 187 N.E. 192, 193, 45 Ohio App. 339, quoting *Corpus Juris*.

11 C.J. p 606 note 73.

13. Ala.—*International Harvester Co. of America v. Pittman*, 147 So. 144, 226 Ala. 355.

11 C.J. p 606 note 74.

14. Ala.—*International Harvester Co. of America v. Pittman*, 147 So. 144, 226 Ala. 355.

15. Vt.—*Hill v. Bedell*, 126 A. 493, 98 Vt. 82.

16. Ohio.—*Zablotsky v. Frigidaire*

Sales Corporation, 187 N.E. 192, 193, 45 Ohio App. 339, quoting *Corpus Juris*.

11 C.J. p 607 note 75.

17. N.C.—*Moore v. Ray*, 12 S.E. 1035, 108 N.C. 252.

11 C.J. p 607 note 77.

18. Conn.—*Ashmead v. Kellogg*, 23 Conn. 70.

19. N.D.—*Seymour v. Cargill El. Co.*, 71 N.W. 132, 6 N.D. 444.

11 C.J. p 607 note 79.

20. Colo.—*Rocky Mountain Seed Co. v. McArthur*, 272 P. 1117, 1119, 85 Colo. 1, citing *Corpus Juris*.

11 C.J. p 607 note 80.

21. Md.—*Burton v. Jennings*, 148 A. 424, 158 Md. 254.

11 C.J. p 607 note 81.

22. Ill.—*Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation*, 7 N.E.2d 623, 289 Ill.App. 576.

11 C.J. p 607 note 82.

23. U.S.—*Wood v. Weimar*, Mich., 104 U.S. 786, 26 L.Ed. 779.

24. Kan.—*Rankine v. Greer*, 16 P. 680, 38 Kan. 343, 5 Am.S.R. 751.

Actions for the possession of the mortgaged chattels must be brought within the time limited by the statutes in the various jurisdictions, even though the lien on the chattels created by the mortgage is not barred by the statute limiting the time for the recovery of the chattel.²⁵ Where a mortgagee's action is for a fraudulent removal of the property by a third person, the statute of limitations begins to run in defendant's favor from the time of removal, except where it is not apparent at the time that he intends to convert them, in which case the statute of limitations will not begin to run against the mortgagee's cause of action for a conversion of such chattels until the mortgagee, in the exercise of due diligence, discovers the fraud.²⁶ The mortgagee's right of action against a pledgee for conversion accrues at the time of the conversion.²⁷

§ 236. Defenses

As shown in the following three sections, in an action by a chattel mortgagee against the mortgagor or a third person, defendant may interpose any proper defense which tends to defeat plaintiff's recovery, including, in some jurisdictions, set-off and counterclaim.

§ 237. — By Mortgagor against Mortgagee

Defendant mortgagor may interpose any proper de-

fense which goes to defeat the mortgagee's right to recover, and, conversely, can interpose only such defenses.

The mortgagor will not be allowed to assert as against the mortgagee that the mortgage was made in fraud of creditors,²⁸ that he signed the mortgage without reading it,²⁹ or that the lien of the mortgage has been terminated by his own wrongful act;³⁰ neither can he rely on a partial failure of consideration,³¹ part payment of the debt,³² or a voluntary promise, without consideration, to postpone the date for surrendering the property to the mortgagee.³³ Moreover, the fact that the mortgagee prior to the determination of the case sold the replevined property cannot affect the issues in the case.³⁴ It has been held that defendant cannot assert that the property mortgaged did not belong to him,³⁵ but there is authority to the contrary.³⁶ Such defenses as payment of the entire debt,³⁷ failure of the mortgagee to furnish a verified statement of his account as required by statute,³⁸ title or right of possession in a third party,³⁹ invalidity of the mortgage,⁴⁰ fraud in procurement,⁴¹ duress,⁴² absence of consideration,⁴³ and breach of warranty⁴⁴ may be interposed. So, replevin being a possessory action, it is a defense that the property sued for was in possession of purchasers from defendant mortgagor.⁴⁵ Where permitted by statute, defendant in detinue on a chattel mortgage may plead any

25. Mo.—*Alwell v. Johnson*, 253 S. W. 161, 212 Mo.App. 211.
11 C.J. p 607 note 84.

26. Ga.—*Reid v. Matthews*, 29 S.E. 173, 102 Ga. 139, 66 Am.S.R. 164.

27. Mo.—*Houston Bank v. Kirkman*, 137 S.W. 38, 156 Mo.App. 309.

28. Mo.—*Sink v. Loflin*, 76 Mo.App. 463.

29. Colo.—*Howry v. Sigel-Campion Live Stock Commission Co.*, 249 P. 658, 80 Colo. 143.

30. Cal.—*Woodland Bank v. Duncan*, 49 P. 414, 117 Cal. 412.
11 C.J. p 607 note 90.

31. N.C.—*Batchelor v. Overton*, 74 S.E. 20, 153 N.C. 395.
11 C.J. p 607 note 91.

In Oklahoma

(1) The rule of the text was followed in an early case.—*Jones v. Bostick*, 129 P. 718, 35 Okl. 363.

(2) However it was subsequently held: "The plea of breach of warranty is the substantial equivalent of the plea of total or partial failure of consideration, and may be shown as a defense pro tanto in a replevin action between the original parties based upon a chattel mortgage given to secure the purchase price of the property covered by the mortgage.—

First Nat. Bank v. Woods, 46 P.2d 565, 172 Okl. 645.

32. Ala.—*Morrison v. Judge*, 14 Ala. 182.
11 C.J. p 607 note 92.

33. Ala.—*International Harvester Co. of America v. Pittman*, 147 So. 144, 226 Ala. 355.

In action of detinue

Ala.—*International Harvester Co. of America v. Pittman*, supra.

34. Okl.—*First Nat. Bank v. Kreuzberg*, 181 P. 717, 75 Okl. 97.

Wyo.—*Schlessinger v. Cook*, 62 P. 152, 9 Wyo. 256.

35. Mo.—*Layson v. Cooper*, 73 S.W. 472, 174 Mo. 211, 97 Am.S.R. 545.

36. Iowa.—*Conway v. Alexander*, 205 N.W. 351, 200 Iowa 705.

37. Mich.—*Tropical Paint & Oil Co. v. Hall*, 196 N.W. 354, 225 Mich. 293.

11 C.J. p 607 note 93.

38. Ark.—*Atkinson v. Burt*, 53 S.W. 404, 65 Ark. 316.

11 C.J. p 607 note 94.

39. Iowa.—*Conway v. Alexander*, 205 N.W. 351, 200 Iowa 705.

11 C.J. p 608 note 95.

40. Ala.—*West v. Teabo*, 79 So. 957, 14 Ala.App. 575.

11 C.J. p 608 note 96.

41. Ala.—*Hoobler v. International*

Harvester Co. of America, 64 So. 567, 185 Ala. 533.

11 C.J. p 608 note 97.

42. Neb.—*Iowa Sav. Bank v. Frink*, 92 N.W. 916, 1 Neb. (Unoff.) 14, 26.

43. Iowa.—*Ruiter v. Plate*, 41 N.W. 474, 77 Iowa 17.

Neb.—*Iowa Sav. Bank v. Frink*, 92 N.W. 916, 1 Neb. (Unoff.) 14, 26.

44. Okl.—*First Nat. Bank v. Woods*, 46 P.2d 565, 172 Okl. 645.

11 C.J. p 608 note 1.

In Alabama, under the code provision that a defendant in detinue by a mortgagee "may plead any matter of defense that he might have pleaded if the action had been on the debt," etc., a defendant, in detinue by a mortgagee in a mortgage to secure purchase-money notes given by defendant on buying personality, may set up breach of warranty in the sale or false representations made by the mortgagee which induced defendant to buy, for the purpose of defeating the action.—*McDaniel v. Sullivan*, 39 So. 355, 144 Ala. 583—*Hood v. Jenkins*, 75 So. 871, 16 Ala. App. 180, certiorari denied *Ex parte Hood*, 76 So. 741, 200 Ala. 543.

45. U.S.—*Stockyards Loan Co. v. Nichols*, Okl., 243 F. 511, 156 C.C. A. 209, 1 A.L.R. 511.

defense which might be made to the debt.⁴⁶ In some jurisdictions, either a legal or an equitable defense may be set up;⁴⁷ but a statute so providing does not create any new defenses or make that a defense which was not theretofore a defense either at law or in equity.⁴⁸

In replevin by a second mortgagee the mortgagor cannot defend because of a prior outstanding mortgage on the property where it is not shown that the owner of the prior mortgage has demanded possession so as to entitle him thereto.⁴⁹

§ 238. — By Third Person against Mortgagee

Defenses tending to defeat the cause of action may be interposed in an action by a chattel mortgagee against a third person.

Although a wrongdoer cannot set up this defense,⁵⁰ ordinarily, a third person may assert that the mortgage is void,⁵¹ for example, because of the absence of a consideration⁵² or because it is not recorded.⁵³ Further, he may show that the property has been released,⁵⁴ that the mortgagee has waived all claims under the mortgage,⁵⁵ that the possession of the mortgagor was fraudulent as to him,⁵⁶ or that the mortgage debt has been discharged,⁵⁷ as by proving an application of property in satisfaction;⁵⁸ but in order that payment of the mortgage debt shall constitute a defense to an action brought by a mortgagee against a third person for

the mortgaged chattels, it must be shown that payment was made before the suit was instituted.⁵⁹ A third person who without notice of a preëxisting mortgage made advances on the mortgaged chattel can defend the mortgagee's action for wrongful concealment and disposition on the ground of good faith.⁶⁰ It is, however, no defense that the mortgagor's assignee in bankruptcy might assert that the mortgage was invalid;⁶¹ nor that such part of the mortgaged property as could be found had been previously sold on foreclosure;⁶² nor that there was a parol understanding between the mortgagor and the mortgagee respecting the possession of mortgaged chattels;⁶³ nor that the property was subject to prior mortgages under which defendant was not claiming;⁶⁴ nor that the mortgagee has not obtained judgment against the mortgagor;⁶⁵ nor that the mortgagee took over part of the property mortgaged at the request of the mortgagor and disposed of it without foreclosure, where the property so taken was in part worthless and the value of the remainder was not shown;⁶⁶ nor that defendant in replevin made permanent repairs on the chattels.⁶⁷ In a mortgagee's action in detinue against mortgagors, an intervener, who was not privy to the mortgages, could not complain that one of the mortgages was not due.⁶⁸ Although the mortgagee may be obliged to recognize and protect it, a landlord's lien is no bar to a mortgagee's action of replevin.⁶⁹ Part payment of the mortgage debt will not de-

46. Ala.—Dean v. Brown, 78 So. 966.
201 Ala. 465—Hood v. Jenkins, 75 So. 871, 16 Ala.App. 180, certiorari denied Ex parte Hood, 76 So. 741, 200 Ala. 543.
11 C.J. p 608 note 2.

Rescission

Under such provision defense of rescission of contract of purchase, for price of which mortgage on which suit was founded was executed, was available to defendant.—Dean v. Brown, 78 So. 966, 201 Ala. 465.

47. S.C.—Greene v. Washington, 89 S.E. 649, 105 S.C. 137.
Wyo.—Schlessinger v. Cook, 62 P. 152, 9 Wyo. 256.
48. Wyo.—Schlessinger v. Cook, supra.
49. Mass.—Adams v. Wildes, 107 Mass. 123.
N.D.—James v. Wilson, 77 N.W. 603, 8 N.D. 186.
50. Mo.—K-M Supply Co. v. Moran, App., 53 S.W.2d 419.

Constable wrongfully seizing mortgaged personalty under attachment, issued on unverified affidavit, could not set up fact that mortgage was

unrecorded in replevin by mortgagee.—K-M Supply Co. v. Moran, supra.

51. Mass.—Shrieves v. Morris, 23 N. E. 838, 151 Mass. 310.
11 C.J. p 608 note 5.
52. Mass.—Clark v. Houghton, 12 Gray 38.
53. Cal.—Adlard v. Rodgers, 38 P. 889, 105 Cal. 327.
11 C.J. p 608 note 7.
54. Vt.—Hunt v. Allen, 50 A. 1103, 73 Vt. 322.
55. Wash. — Karanzias v. Chester, 265 P. 153, 147 Wash. 210.
56. Ill.—Reese v. Mitchell, 41 Ill. 365.
Neb.—Jones v. Loree, 56 N.W. 390, 37 Neb. 816.
57. Minn.—Stein v. Hastings, 47 N. W. 968, 45 Minn. 196.
11 C.J. p 608 note 10.
58. Mich.—Place v. Grant, 9 Mich. 42.
11 C.J. p 608 note 11.
59. Kan.—Rankine v. Greer, 16 P. 680, 38 Kan. 343, 5 Am.S.R. 751.
Mich.—Rosenfield v. Case, 49 N.W. 630, 87 Mich. 295.

Payment must be shown

- Tex.—Sanders v. Farrier, Civ.App., 271 S.W. 293.
60. Ga. — Blanchard v. Farmers' State Bank, 124 S.E. 695, 158 Ga. 780.
61. N.H.—Young v. Kimball, 59 N. H. 446.
62. S.D.—De Smet First Nat. Bank v. Northwestern El. Co., 57 N.W. 77, 4 S.D. 409.
63. Mich.—Harvey v. McAdams, 32 Mich. 472.
64. Tex.—Hunter v. Abernathy, Civ. App., 188 S.W. 269.
65. Kan.—Howard v. Hutchinson First Nat. Bank, 24 P. 983, 44 Kan. 549—Howard v. Burns, 24 P. 981, 44 Kan. 543.
66. Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.
67. Ohio.—Keller v. Evans, 14 Ohio App. 265.
68. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.
69. N.M.—Farmers' Cotton Finance Corporation v. Green, 290 P. 739, 35 N.M. 84.

feat an action of replevin by the mortgagee to recover possession of the property from a third person,⁷⁰ and irregularities in a foreclosure taking place after action is begun are not a defense, as against plaintiff entitled to possession at the commencement of the action.⁷¹ In an action against a third person for conversion, it has been held that it is no defense that the mortgagors have recovered the value of the mortgaged property in an independent action;⁷² but in claims based on the same tort, ordinarily, recovery for the full amount of the damage cannot be had by both mortgagor and mortgagee,⁷³ and recovery of the full amount by the mortgagor will bar an action by the mortgagee.⁷⁴ Defendant cannot urge his own wrong as a defense to plaintiff's claim, as by pleading failure of plaintiffs to take timely possession of the chattel after maturity of the debt, where defendant, with actual notice of the mortgage, took and held possession of the property under an inferior claim;⁷⁵ and a trespasser who has seized a portion of the mortgaged property cannot assert as a defense that the mortgagee thereafter has taken a decree of foreclosure against the remaining portion only.⁷⁶

In an action for conversion against an officer levying on the property and selling it, it is no defense that plaintiff took no legal steps to prevent the sale, nor is his failure to enter into a law suit with the purchaser at the sale, or to undertake to get possession of the property by force, a good defense; and the fact that the mortgagee could have replevied the property does not relieve the officer from liability.⁷⁷ A levying officer who sets up the consent of the mortgagee to the levy must show that the condition attached to the consent was complied with.⁷⁸

Outstanding title. A third person in trover⁷⁹ or replevin⁸⁰ may show that he holds under a title superior to that of the mortgagee. So, in detinue defendant may show a prior outstanding title in a stranger, although he does not connect himself with such title.⁸¹ Defendant destroying the mortgaged property long before the mortgagor's contract with the government expired cannot, as against the mortgagee, invoke the provisions of that contract whereby the property in question would become the property of the government if not removed within a certain time after expiration of the contract.⁸²

Other security. In an action for conversion it is no defense that there was property covered by the mortgage other than that which was converted by defendant to which plaintiff might resort;⁸³ nor that the mortgagor is solvent;⁸⁴ nor that the mortgagee possess other security.⁸⁵ So, where the property is taken on attachment it is no defense to replevin that it is sufficient to satisfy both the mortgage debt and the debt of the attaching creditor.⁸⁶ Under a statute providing that the mortgagee must resort to property of the mortgagor which the latter has not transferred since his mortgage was executed on the written demand of a subordinate claimant of other property in the mortgage, if he can do so without risk of loss, however, when the elements of the statute are present, it is available in defense of trover.⁸⁷

Validity of attachment claim. Where property which has been levied on in an action against a mortgagor is replevied from the officer by the mortgagee, it cannot be shown in defense to the replevin suit that the mortgage is in fraud of creditors without proof that the attachment debt in fact existed;⁸⁸ and, although the officer must act in reliance on val-

70. Mich.—Hyde v. Shank, 53 N.W. 787, 93 Mich. 535.
11 C.J. p 608 note 17.

71. Neb.—Smith v. Phelan, 59 N.W. 562, 40 Neb. 765.

72. N.C.—Grainger v. Lindsay, 31 S. E. 473, 123 N.C. 216.

Tex.—Scott v. Cox, 70 S.W. 802, 30 Tex.Civ.App. 190.
11 C.J. p 608 note 20.

73. Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

74. La.—Miller v. Hortman-Salmen Co., App., 145 So. 786, 789, citing *Corpus Juris*.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

75. Colo.—Rocky Mountain Seed Co. v. McArthur, 272 P. 1117, 85 Colo.

1—Littell v. Brayton Motor & Accessory Co., 201 P. 34, 70 Colo. 286.

76. Iowa.—Gillmore v. Kilpatrick-Koch Dry Goods Co., 70 N.W. 175, 101 Iowa 164.

77. Md.—Burton v. Jennings, 148 A. 424, 158 Md. 254.

78. U.S.—Norris v. McCanna, C.C. Mich., 29 F. 757.

79. Ala.—Holman v. Lock, 51 Ala. 287.

80. U.S.—Bradley v. Hargadine, etc., Dry-Goods Co., Ind.T., 96 F. 914, 37 C.C.A. 623.

N.Y.—Hale v. Sweet, 40 N.Y. 97.
11 C.J. p 608 note 23.

81. Ala.—Wilson v. Johnson, 44 So 539, 152 Ala. 614.

82. Mont.—Robison v. Dover Lumber Co., 191 P. 383, 58 Mont. 281.

83. Tex.—Liquid Carbonic Co. of

Texas v. Southwestern Drug Corporation, Civ.App., 73 S.W.2d 152, error dismissed—Clifton Mercantile Co. v. Haverbekken Bros., Civ. App., 17 S.W.2d 856.
11 C.J. p 609 note 25.

84. Mich.—Huellmantel v. Vinton, 70 N.W. 412, 112 Mich. 47—Worthington v. Hanna, 23 Mich. 530.

85. Mich.—Huellmantel v. Vinton, 70 N.W. 412, 112 Mich. 47.

86. Neb.—McDonald v. Bowman, 58 N.W. 704, 40 Neb. 269, 52 N.W. 828, 35 Neb. 93.

11 C.J. p 609 note 28.

87. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

88. Ill.—Badger v. Batavia Paper Mfg. Co., 70 Ill. 302.

Minn.—Braley v. Byrnes, 20 Minn. 435.

11 C.J. p 609 note 29.

id process,⁸⁹ it is not sufficient merely to prove the existence of the writ of attachment.⁹⁰ So, an attaching creditor of a chattel mortgagor stands in the shoes of the mortgagor, and is no more entitled to defeat a possessory action of the junior mortgagee than would be the mortgagor, were he defendant in such action.⁹¹ It may be shown, however, that the mortgagee acquired the mortgaged chattels with notice of the attaching creditor's rights.⁹²

§ 239. Set-Off and Counterclaim

Whether a set-off or counterclaim may be permitted against a chattel mortgagee suing for possession must be determined under applicable statutory provisions.

In some jurisdictions no set-off or counterclaim is permitted in actions of replevin for the possession of the mortgaged property.⁹³ In other jurisdictions, however, a set-off or counterclaim may be asserted in possessory actions;⁹⁴ but the subject matter must fall within the general rules applicable to the propriety of set-off or counterclaim.⁹⁵

§ 240. Parties

- a. Plaintiffs
- b. Defendants
- c. Intervention

a. Plaintiffs

One in possession or entitled thereto as mortgagee is a proper party to bring the action, or it may be brought jointly by joint owners or possessors; and under some circumstances the mortgagor and mortgagee may join as parties plaintiff.

Mortgagees taking possession of property mortgaged to several to secure several notes, are to be regarded as joint owners and must sue jointly in replevin⁹⁶ or trespass.⁹⁷ The same rule applies as to property taken from the possession of the common agent of several mortgagees holding under distinct mortgages.⁹⁸ So, several mortgagees in joint possession under distinct mortgages may sue jointly for conversion.⁹⁹ Likewise, the mortgagees under mortgages which, although distinct, are in effect a single conveyance, may sue jointly for conversion.¹ It has been held, however, that, where several creditors are secured by the same mortgage and possession has not been taken thereunder, one or more of them may maintain replevin against a third person to recover the property;² and one of several joint mortgagees may bring replevin against the mortgagor without joining the others as plaintiffs.³

The owners of separate mortgages on the same chattel ordinarily cannot join as plaintiffs in replevin.

89. Mich.—Cary v. Everett, 65 N.W. 566, 107 Mich. 654.

N.Y.—Halsey v. Christie, 21 Wend. 9. 11 C.J. p 609 note 30.

90. Wis.—James v. Van Duyn, 45 Wis. 512.

91. Mo.—West Union State Bank v. Keeney, 114 S.W. 553, 134 Mo.App. 74.

92. Mich.—Barmon v. Clippert, 25 N.W. 371, 58 Mich. 377.

93. Mich.—Tropical Paint & Oil Co. v. Hall, 196 N.W. 354, 225 Mich. 293.

11 C.J. p 609 note 34.

Set-off not extinguishing debt

Mortgagor has no right to claim or show set-off not extinguishing but merely reducing the amount owing.—Tropical Paint & Oil Co. v. Hall, 196 N.W. 354, 225 Mich. 293.

94. Or.—Corbin v. Preston, 218 P. 917, 109 Or. 230.

11 C.J. p 609 note 35.

In Arkansas, neither Kirby Dig. § 6869, authorizing defendants in replevin for recovery of personal property for purpose of foreclosure to set off payments made, nor Acts 1917 p 1441, authorizing counterclaims in actions for the recovery of money, authorizes a counterclaim in replevin suits to recover possession of personal property for purpose of foreclosing mortgages or deeds of trust, but

they only authorize a set-off against mortgage indebtedness by way of extinguishing or reducing it.—Jones v. Blythe, 210 S.W. 348, 138 Ark. 81.

In North Dakota, the right to counterclaim depends on statute, and it was held that where the alleged counterclaim is not in contract, does not arise out of the contract set forth in the complaint, and is not connected with the subject matter of the action, it will not lie. Thus, where plaintiff proved its right to possession of the property described in the complaint and directed the sheriff to take the property, defendant's counterclaim on the ground that the sheriff took property other than the property described and the taking of which caused them damage, cannot be maintained. It was intimated, however, that if the finding was that defendant was entitled to the return of the property, counterclaim might lie.—First Guaranty Bank v. Rex Theater Co., 195 N.W. 564, 50 N.D. 322.

Accounting for market value

Where replevying mortgagee sells the property without having it at the place of sale, as a result of which it was sold at great sacrifice, the right of the mortgagor to hold the mortgagee to an accounting for the market value of the property may be made available as a counterclaim in

the action for claim and delivery.—Nance v. King, 101 S.E. 212, 178 N.C. 574.

Claim for work and labor

Permitting set-off of claim for work and labor was proper as showing that defendant was not indebted to plaintiff at time action, tried on theory of replevin, was commenced.—Jones v. Parker, 273 P. 687, 39 Wyo. 423.

95. Colo.—Rhoads v. Gatlin, 29 P. 1019, 2 Colo.App. 96.

N.C.—Satterthwaite v. Ellis, 39 S.E. 726, 129 N.C. 67.

11 C.J. p 609 note 36.

96. Ill.—Durfee v. Grinnell, 69 Ill. 371.

97. Me.—Wheeler v. Nichols, 32 Me. 233.

98. Mich.—Densmore v. Mathews, 26 N.W. 146, 58 Mich. 616.

Mo.—Upham v. Allen, 73 Mo.App. 224.

11 C.J. p 609 note 40.

99. Neb.—Trompen v. Yates, 92 N. W. 647, 66 Neb. 525.

1. Mass.—Howard v. Chase, 104 Mass. 249.

11 C.J. p 609 note 42.

2. Neb.—Sloan v. Thomas Mfg. Co., 79 N.W. 728, 58 Neb. 713.

3. Mich.—Watson v. Mead, 57 N.W. 181, 93 Mich. 330.

in against a third person,⁴ although it has been held under code provisions in some jurisdictions that successive mortgagees may join in replevin mortgaged property where possession had not been had on any of the mortgages.⁵

An agent of the mortgagee who has taken possession with the consent of the mortgagor is entitled to sue in his own name in replevin against the mortgagor taking the property from his possession.⁶ One who takes a mortgage of chattels in his own name, but in fact for the benefit of another, may maintain replevin for such chattels in his own name, without joining such other person.⁷

Where the mortgage is in the form of a deed of trust, the trustee alone is authorized to sue to recover the property on breach of conditions imposed,⁸ or to recover the property from a third person.⁹

Since the interests of the mortgagor and the mortgagee are in conflict, it would seem on principle that they cannot join in replevin for the mortgaged property,¹⁰ although there is authority for allowing the mortgagee to join to assert his lien.¹¹ So, a mortgagee in possession hiring the chattels to another need not make the mortgagor a party to an action for the amount due.¹² However, the mortgagor and the mortgagee may join in an action for conversion¹³ or for damages to the mortgaged chattel,¹⁴ and in an action by the mortgagee against

a tort-feasor for destruction of the mortgaged property, defendant may cause the mortgagor and other interested parties to be brought into court to protect him from a second action.¹⁵

Joinder of the mortgagee in the mortgagor's action against a third person is treated *supra* § 227.

b. Defendants

Only the wrongdoer is a necessary party defendant to the mortgagee's action, although the mortgagor may be a proper party in an action against a third person for conversion.

Actions for the possession of mortgaged property must be brought against the party in possession,¹⁶ and it is, as a general rule, unnecessary to join other parties,¹⁷ although in an action against the mortgagor to recover possession, a prior mortgagee also claiming the property is a necessary defendant.¹⁸

The mortgagee may maintain trover against a third party converting the chattels, without making the mortgagor a party to the suit,¹⁹ although he may do so if he wishes;²⁰ and although it has been said that plaintiff should make the purchasers parties defendant if he does not show that the property has been taken beyond the jurisdiction of the court,²¹ it has been held not to be essential to join all of various purchasers of the property at an execution sale in a suit against the judgment creditor for conversion.²² So, where there was no community of wrongdoing, it was held improper to join as defendant the purchaser of a mortgaged chattel

4. Ohio.—Wehlen v. Macke, 9 Ohio Dec., Reprint, 565, 15 Cinc.L.Bul. 125.

5. Neb.—Earle v. Burch, 33 N.W. 254, 21 Neb. 702.

6. Mich.—Eldridge v. Sherman, 33 N.W. 255, 70 Mich. 266.

7. Wis.—Allen v. Kennedy, 5 N.W. 906, 49 Wis. 549.

8. Mo.—Scott v. Vogel-Boul Soda Water Co., 114 S.W. 44, 134 Mo. App. 302.

Substituted trustee

Liquidating agent of insolvent bank was its legal representative within power conferred in deed of trust giving bank authority to substitute trustee, and appointment of substituted trustee by writing addressed to chancery clerk of county, specifying substitution, was held sufficient to vest substituted trustee with power to maintain suit in replevin for property covered by deed of trust.—Stringer v. Price, 108 So. 431, 143 Miss. 189.

9. Ark.—Peeples v. Hayley, 116 S.W. 197, 89 Ark. 252.

11 C.J. p 610 note 50.

10. Ohio.—Lyons v. Geddes, 8 Ohio Dec., Reprint, 197, 6 Cinc.L.Bul. 247.

11. S.D.—Longerbeam v. Huston, 105 N.W. 743, 20 S.D. 254.

11 C.J. p 610 note 53.

12. Ark.—Terry v. Little, 18 S.W.2d 916, 179 Ark. 954.

13. Iowa.—Evans v. St. Paul Harvester Works, 18 N.W. 881, 63 Iowa 204.

14. Ala.—Southern R. Co. v. Chambliss, 65 So. 417, 10 Ala.App. 326, certiorari denied, 65 So. 1034, 187 Ala. 672.

11 C.J. p 610 note 55.

15. Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

Guarantor on note

Where guarantor on mortgage note pays installment thereon and is subrogated to mortgagee's rights, it should be made party to mortgagee's action against tort-feasor causing destruction of mortgaged car.—Commercial Securities v. Mast, *supra*.

16. U.S.—Stockyards Loan Co. v. Nichols, Okl., 243 F. 511, 156 C.A. 209, 1 A.L.R. 511.

11 C.J. p 610 note 57.

17. N.Y.—Hochman v. Hauptman, 78 N.Y.S. 659, 76 App.Div. 72.

11 C.J. p 610 note 58.

18. Ark.—Smith v. Moore, 4 S.W. 282, 49 Ark. 100.

19. La.—Plauche-Locke v. Securities Sales Co. of Louisiana, 125 So. 729, 169 La. 601.

11 C.J. p 610 note 59.

Transferred cause

Where, in suit to foreclose chattel mortgage and collect note, plaintiffs alleged that third parties had converted cotton covered by mortgage and on plea of privilege the cause as to conversion was transferred to county court of another county, the mortgagor was not a necessary party to the action for conversion, the amount of plaintiffs' debt remaining after the foreclosure exceeding the value of the converted property.—Fussell & Irvin v. M. Kangerga & Bro., Tex.Civ.App., 254 S.W. 159.

20. Tex.—Bowers v. Bryant-Link Co., Com.App., 15 S.W.2d 598, affirming, Civ.App., 6 S.W.2d 788.

11 C.J. p 610 note 60.

21. Tex.—Chapman v. Head, Civ. App., 284 S.W. 299.

22. N.Y.—Manning v. Monaghan, 23 N.Y.Super. 231, reversed on other grounds 23 N.Y. 585.

11 C.J. p 610 note 61.

from one who converted and refused to deliver it to the mortgagee.²³

c. Intervention

Any person having an adverse interest in the subject matter of the suit may, as a rule, intervene, although he is not required to do so.

Under the statutory rules applicable to civil actions generally, any person having an interest in the matter in litigation, or who has an interest adverse to both parties, may intervene,²⁴ but the intervener must accept the suit as he finds it, and is bound by the record of the case at the time of his intervention.²⁵ No duty to intervene, however, rests on a prior mortgagee when a subsequent one brings replevin for the mortgaged property, but he may institute a separate action under his own mortgage.²⁶

§ 241. Pleading

- a. Complaint, declaration, or petition
- b. Plea or answer
- c. Replication or reply
- d. Amended or supplemental pleadings
- e. Issues, proof, and variance

a. Complaint, Declaration, or Petition

Plaintiff must allege all facts necessary to state a cause of action, including ownership and possession, defendant's wrongful act, damages, and, under some circumstances, nonpayment or default, demand, value of the property, and recording of the mortgage.

The general rules applicable to the form of action adopted govern the mortgagee's pleadings in an action by him in replevin²⁷ or trover,²⁸ or for interference with, or destruction of, his lien.²⁹

Mortgage. While a copy of the mortgage may be filed with, and annexed to, the petition,³⁰ it will not, in the absence of statute, obviate the necessity of setting out in the complaint all the facts essential to the statement of a cause of action.³¹ Where, without referring to a mortgage filed with the complaint, a cause of action in replevin is stated, the complaint is not demurrable because of uncertainty in the mortgage.³²

Ownership and possession. In an action for the possession of the mortgaged chattels, plaintiff must allege ownership in himself,³³ possession in defendant,³⁴ and right of possession in plaintiff;³⁵ and it is not sufficient to allege merely that plaintiff is en-

23. S.D.—Northern Finance Corporation v. Midwest Commercial Credit Co., 239 N.W. 242, 59 S.D. 282.

24. Neb.—Harman v. Barhydt, 31 N.W. 488, 20 Neb. 625.

11 C.J. p 610 note 64.

25. Ala.—Faulk v. Dorsey, 166 So. 792, 232 Ala. 85.

11 C.J. p 611 note 65.

Regularity of writ

A second mortgagee intervening in a prior mortgagee's action in detinue against the mortgagor cannot question the regularity of the writ of seizure under which the chattels were held by the first mortgagee when the intervention was made, especially where the complaint and writ were not void on their face.—Faulk v. Dorsey, *supra*.

26. Ohio.—Smith v. Simper, 15 Ohio Cir.Ct. 375, 8 Ohio Cir.Dec. 308.

27. N.Y.—Crutts v. Daly, 145 N.Y. S. 850, 84 Misc. 192.

After judgment in replevin, all reasonable intendments should be indulged in favor of the petition.—Merrill v. Equitable Farm, etc., Impr. Co., 68 N.W. 365, 49 Neb. 198—11 C.J. p 611 note 71.

Notice of mortgage

In an action to recover personalty, taken under execution by defendant as constable, it is proper to allege that the execution creditor had knowledge of the mortgage, since notice to him is binding on the officer,

who is only an agent.—Starr v. Cox, 57 P. 247, 9 Kan.App. 882.

Pleadings held sufficient

Colo.—Howry v. Sigel-Campion Live Stock Commission Co., 249 P. 658, 80 Colo. 143.

Mo.—Cook v. Wheeler, App., 218 S.W. 929.

Tex.—Caraway v. Weathers, Civ. App., 258 S.W. 926.

Allegations held inconsistent with lien

Landlord's allegations of tenant's oral agreement to leave mules replevined on farm as security for debt was held inconsistent with claim that landlord's chattel mortgage still covered mules.—Forsee v. Zenner, Mo.App., 193 S.W. 975.

28. Tex.—Callihan v. Fort Worth Well Machinery & Supply Co., Civ. App., 88 S.W.2d 1057, error dismissed.

Pleadings held sufficient

Colo.—Obodov v. Foster, 68 P.2d 566, 100 Colo. 463.

Idaho.—Lawson v. Robertson, 7 P.2d 946, 51 Idaho 551.

N.D.—Markely v. First Guaranty Bank, 206 N.W. 416, 53 N.D. 421—Hellstrom v. First Guaranty Bank, 195 N.W. 512, 50 N.D. 292.

Tex.—Chapman v. Head, Civ.App., 5 S.W.2d 1001, error refused.

Setting out mortgage

A petition in a suit for conversion is not demurrable because it does not set out the mortgage in *hæc verba*.—Bridgeport Mach. Co. v.

Geers, Tex.Civ.App., 36 S.W.2d 1047, error dismissed.

29. Ala.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130. Ga.—Macon Nat. Bank v. Wood, 153 S.E. 779, 41 Ga.App. 550.

30. Ala.—Baker v. Hutchinson, 41 So. 809, 147 Ala. 636.

11 C.J. p 613 note 4.

31. Ark.—Chamblee v. Stokes, 33 Ark. 543.

11 C.J. p 613 note 5.

32. Ark.—Chamblee v. Stokes, 33 Ark. 543.

33. Colo.—Littell v. Brayton Motor & Accessory Co., 201 P. 34, 70 Colo. 286—Street v. Sederburg, 92 P. 29, 41 Colo. 128.

11 C.J. p 611 note 72.

Allegations held sufficient

Colo.—Littell v. Brayton Motor & Accessory Co., 201 P. 34, 70 Colo. 286.

Me.—Cate v. Merrill, 102 A. 235, 116 Me. 432.

34. Colo.—Littell v. Brayton Motor & Accessory Co., 201 P. 34, 70 Colo. 286.

Allegations held sufficient

Colo.—Littell v. Brayton Motor & Accessory Co., *supra*.

35. Colo.—Littell v. Brayton Motor & Accessory Co., *supra*.

Kan.—Cherryvale Inv. Co. v. Dillman, 11 P.2d 681, 135 Kan. 699.

Allegations held sufficient

Colo.—Littell v. Brayton Motor &

titled to possession.³⁶

In an action for conversion, plaintiff must allege that he was in possession³⁷ or, if he was not in possession, that he was entitled to the immediate possession,³⁸ and he must allege his special interest or ownership.³⁹

Although there is authority to the contrary,⁴⁰ in some jurisdictions it is sufficient for plaintiff to allege generally that he is the owner⁴¹ and is entitled to possession,⁴² and it is not necessary to notify defendant of the precise nature of plaintiff's title⁴³ or plead evidential facts which would, on the trial, establish his interest.⁴⁴ However, where general allegations of ownership and right of possession are accompanied by recitals alleging a special interest or ownership by virtue of a chattel mortgage, the sufficiency of the general allegations is governed by the special recitals,⁴⁵ and the pleading must set up facts showing the special interest or ownership⁴⁶ and also the facts entitling plaintiff to possession.⁴⁷ Except where such an allegation is made imperative by an application of the rules last stated,⁴⁸ it

is not necessary to allege that the mortgagor was owner of the property when the mortgage was executed.⁴⁹ Where the mortgagee is in possession under his mortgage, he may sue for a conversion of the mortgaged property without alleging the details of his mortgage lien,⁵⁰ or to recover possession when it is taken from him by a stranger, without alleging that any condition of the mortgage has been broken.⁵¹ So, in the absence of a demurrer, a complaint which fails to allege specifically that the mortgagee is entitled to possession is not fatally defective where the mortgage attached to the complaint shows on its face that the mortgagee is entitled to possession.⁵²

Taking and detention. While it is necessary for plaintiff in an action for conversion to allege that defendant's acts which deprived him of the property were wrongful,⁵³ it is not necessary specifically to allege that the taking was wrongful where that may be inferred from the language of the complaint,⁵⁴ but it seems that a proper pleading must allege the time and place of conversion.⁵⁵ An allegation that defendant "retains" possession is a

Accessory Co., 201 P. 34, 70 Colo. 286.

36. Colo.—Street v. Sederburg, 92 P. 29, 41 Colo. 128.
11 C.J. p 611 note 73.

37. N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App.Div. 62.
11 C.J. p 611 note 74.

38. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App. Div. 62.

N.D.—Markley v. First Guaranty Bank, 206 N.W. 416, 53 N.D. 421.
11 C.J. p 611 note 75.

Contra North Pacific Bank v. Pacific Mercantile Agency Collectors, 279 P. 103, 153 Wash. 37.

Allegations held sufficient

Wyo.—First Nat. Bank v. Sorenson, 217 P. 948, 30 Wyo. 136.

39. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.
11 C.J. p 611 note 76.

Petition held sufficient

Wyo.—First Nat. Bank of Newcastle v. Sorenson, 217 P. 948, 30 Wyo. 136.

40. Kan.—Kennett v. Peters, 37 P. 999, 54 Kan. 119, 45 Am.S.R. 274.

41. Mont.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

Tex.—Bridgeport Mach. Co. v. Geers,

Civ.App., 36 S.W.2d 1047, error dismissed.

11 C.J. p 611 note 77.

42. Tex.—Blount v. Payne, Civ.App., 187 S.W. 990.

43. Mont.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

11 C.J. p 611 note 79 [b], [c].

44. Ala.—Baker v. Hutchinson, 41 So. 809, 147 Ala. 636.

11 C.J. p 611 note 79 [a].

45. Colo.—Street v. Sederburg, 92 P. 29, 41 Colo. 128.

N.D.—Hellstrom v. First Guaranty Bank, 191 N.W. 963, 49 N.D. 531.

46. Colo.—Street v. Sederburg, 92 P. 29, 41 Colo. 128.

Neb.—Pennington County Bank v. Bauman, 116 N.W. 669, 81 Neb. 782—Paxton v. Learn, 75 N.W. 1096, 55 Neb. 459—Hill v. Campbell Commn. Co., 74 N.W. 388, 54 Neb. 59—Hudelson v. Tobias First Nat. Bank, 71 N.W. 304, 51 Neb. 557—Norcross v. Baldwin, 70 N.W. 511, 50 Neb. 885—Raymond v. Miller, 70 N.W. 22, 50 Neb. 506—Strahle v. Staton First Nat. Bank, 66 N.W. 415, 47 Neb. 319.

N.D.—Hellstrom v. First Guaranty Bank, 191 N.W. 963, 49 N.D. 531.

Ownership of notes

(1) In an action by a mortgagee out of possession against a third party for conversion of the mortgaged property, plaintiff must allege that at the time of the conversion he was the owner and holder of the notes secured.—Phelan v. Miller, 222 P. 416, 69 Mont. 289—11 C.J. p 611 note 79 [d].

(2) A complaint alleging that the mortgagor had executed and delivered the secured notes to plaintiff failed to state a cause of action.—Phelan v. Miller, supra.

47. N.D.—Markley v. First Guaranty Bank, 206 N.W. 416, 53 N.D. 421.

Wis.—Smith v. Coolbaugh, 19 Wis. 106.

11 C.J. p 611 note 80.

Pleading held insufficient

N.D.—Hellstrom v. First Guaranty Bank, 191 N.W. 963, 49 N.D. 531.

48. Colo.—Street v. Sederburg, 92 P. 29, 41 Colo. 128.

49. Mont.—Moore v. Crittenden, 204 P. 1035, 62 Mont. 309.

50. Neb. — Krug Brewing Co. v. Healey, 99 N.W. 489, 101 N.W. 329, 71 Neb. 662.

51. Neb. — Meyer v. Plattsmouth First Nat. Bank, 88 N.W. 867, 63 Neb. 679.

52. Wyo.—Reynolds v. Morton, 154 P. 325, 23 Wyo. 528.

53. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

54. Ark.—Barnett Bros. Mercantile Co. v. Jarrett, 202 S.W. 474, 133 Ark. 173.

Allegation of conversion

Mortgagee, alleging that mortgagor left the state and that defendant had taken and converted the mortgaged property to his own use, sufficiently alleged that the taking was wrongful.—Barnett Bros. Mercantile Co. v. Jarrett, supra.

55. Tex.—Callihan v. Fort Worth

sufficient allegation of detention.⁵⁶ In an action based on an attachment sale of the mortgaged property, the petition should allege that the property was not sold subject to the mortgage⁵⁷ and, if the purchasers of the property are not made parties defendant, it should further show that the property has been taken beyond the jurisdiction of the court.⁵⁸

Nonpayment or default. In trover⁵⁹ or replevin⁶⁰ it is, according to the general rule, unnecessary for the mortgagee to allege that the mortgage has not been satisfied, payment being a matter of defense.⁶¹ In some jurisdictions, however, it is held that it is essential to an action for conversion that the mortgagee allege that the mortgage debt is unpaid,⁶² and in actions of replevin, it is similarly held that allegations of defendant's default are necessary.⁶³ A default in the condition of the mortgage need not be alleged specifically when a default is clearly implied from the facts stated,⁶⁴ or where there is a copy of the mortgage attached to the petition, which shows on its face that the conditions therein have been broken.⁶⁵

Demand. Where the mortgagor is entitled to possession until demand, it has been held that a petition in replevin by the mortgagee against him or one holding under him should allege a demand or facts sufficient to authorize proof of a waiver;⁶⁶ but, on the other hand, the fact that the mortgagors were rightfully in possession has been held not to make allegation of a demand necessary, that being a matter of proof, and not pleading.⁶⁷ Plaintiff is not required to allege a demand for payment of the mortgage indebtedness in order to show his right

to possession, where he alleges that he was in possession by agreement with the mortgagor.⁶⁸ Where the mortgagee is entitled to possession on demand, a complaint in an action against a third person for damages is not demurrable for failure to allege specifically the time of demand.⁶⁹

Value of property. In an action for conversion of the mortgaged property it is in some jurisdictions necessary to aver its value⁷⁰ at the time and place of conversion,⁷¹ or the value of plaintiff's interest therein;⁷² but, in an action for conversion of part of the mortgaged property, it is not necessary to plead and prove the value of the entire property.⁷³ So, in an action by the mortgagee against the mortgagor, to recover possession of the property for the purpose of foreclosure, an averment of value is not necessary,⁷⁴ the petition in such case being sufficient if it sets up the facts of a breach of the conditions in the mortgage entitling plaintiff to possession.⁷⁵

Record. Where defendant did not have actual notice of the mortgage and possession was not taken by the mortgagee, it is necessary that a complaint for conversion allege that the mortgage was recorded as required by statute,⁷⁶ and the same is true in replevin.⁷⁷ Such an allegation may be supplied by reasonable intendment.⁷⁸ It is not necessary to allege that the mortgage was properly acknowledged if it is alleged that it was duly recorded in the proper office, as the latter allegation carries with it the implication that the mortgage had been duly prepared for record before it was recorded.⁷⁹

Good faith. A statute requiring that, where a mortgage is not accompanied by change of posses-

Well Machinery & Supply Co., Civ. App., 88 S.W.2d 1057, error dismissed.

56. Or.—First Nat. Bank of Sheridan v. Yocom, 189 P. 220, 98 Or. 438.

57. Tex.—Chapman v. Head, Civ. App., 284 S.W. 299.

58. Tex.—Chapman v. Head, supra.

59. Minn.—Strickland v. Minnesota Type-Fdy. Co., 79 N.W. 674, 77 Minn. 210.

60. Okl.—Swope v. Burnham, 52 P. 924, 6 Okl. 736.
11 C.J. p 612 note 88.

61. Colo.—Stevenson v. Lord, 25 P. 313, 15 Colo. 131.
11 C.J. p 612 note 89.

62. Mont.—Harrington v. Stromberg-Mullins Co., 74 P. 413, 29 Mont. 157.
11 C.J. p 612 note 90.

63. Kan.—Cherryvale Inv. Co. v. Dillman, 11 P.2d 681, 135 Kan. 699.

64. Neb.—Rodgers v. Graham, 55 N. W. 243, 36 Neb. 730.
11 C.J. p 612 note 91.

65. Okl.—Dabney v. Hathaway, 152 P. 77, 51 Okl. 658—Whiteacre v. Nichols, 87 P. 865, 17 Okl. 387.
11 C.J. p 612 note 92.

66. Wyo.—Boswell v. Laramie First Nat. Bank, 92 P. 624, 93 P. 661, 16 Wyo. 161.

67. Me.—Cate v. Merrill, 102 A. 235, 116 Me. 432.

68. Neb.—Taylor v. Harle-Haas Drug Co., 96 N.W. 182, 69 Neb. 546.

69. U.S.—O'Brien v. Miller, C.C. Conn., 117 F. 1000.
11 C.J. p 612 note 98.

70. Tex.—Callihan v. Fort Worth Well Machinery & Supply Co., Civ. App., 88 S.W.2d 1057, error dismissed.
11 C.J. p 612 note 84.

71. Tex.—Callihan v. Fort Worth

Well Machinery & Supply Co., supra.

72. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

73. Tex.—Liquid Carbonic Co. of Texas v. Southwestern Drug Corporation, Civ.App., 73 S.W.2d 152, error dismissed.

74. S.D.—Johnson v. Hillenbrand, 101 N.W. 33, 18 S.D. 446.
11 C.J. p 612 note 85.

75. S.D.—Johnson v. Hillenbrand, supra.

76. Ind.—Morris v. Ellis, 46 N.E. 41, 16 Ind.App. 679.
11 C.J. p 612 note 93.

77. Mont.—Cope v. Minnesota Type Fdy. Co., 49 P. 387, 20 Mont. 67.
11 C.J. p 612 note 94.

78. N.J.—Gregory v. Cable, 26 N.J. Eq. 178.
11 C.J. p 612 note 95.

79. Ind.—Syfers v. Bradley, 16 N.E. 805, 17 N.E. 619, 115 Ind. 345.

sion, it must appear that it was not executed for the purpose of hindering, delaying, or defrauding the creditors of the mortgagor does not require an allegation that the mortgage was not executed for such purpose as to an action begun at the time of its passage.⁸⁰ Under statutes providing that the question of fraudulent intent shall be one of fact in all cases, it is not necessary that the complaint by a mortgagee out of possession contain an averment that the mortgage was executed in good faith.⁸¹

Damages. In an action for conversion plaintiff mortgagee must allege that he was damaged.⁸²

Cross petition. In replevin by a second mortgagee against the mortgagor and holders of a prior mortgage in possession, where the mortgagor files a cross petition asserting payment of the first mortgage, and that he is the owner, subject only to the lien of plaintiff, he may set up against his codefendants a claim for unliquidated damages from transactions connected with their possession of the property.⁸³

b. Plea or Answer

The sufficiency of defendant's plea or answer is controlled by general rules of pleading, more particularly, those applicable to the specific form of action involved.

Defendant's pleadings in an action of replevin by a chattel mortgagee are subject to the rules applicable to that form of action generally.⁸⁴ A general denial sufficiently states a defense to the action in some jurisdictions⁸⁵ and it is held that defendant may avail himself thereunder of such special matters constituting a defense as fraud,⁸⁶ usury,⁸⁷ es-

toppel,⁸⁸ duress,⁸⁹ want of consideration,⁹⁰ or absence of right to possession.⁹¹ In other jurisdictions, however, it is necessary to plead such defenses as fraud,⁹² mistake,⁹³ or invalidity of the contract;⁹⁴ and defendant relying on a title or lien superior to that of the mortgagee must allege the facts on which such claim is based.⁹⁵ The same rule applies where defendant relies on a release of the mortgage⁹⁶ or a forfeiture of its lien,⁹⁷ or on the fact that he is a bona fide purchaser.⁹⁸ The defense in trover that the mortgagee enforcing the mortgage did not exercise good faith, being in the nature of release, should be specially pleaded.⁹⁹ Where plaintiff in replevin, claiming as mortgagee, in his complaint declares generally as an owner entitled to possession, defendant, under general denial, may prove payment of the debt secured by the mortgage,¹ but, where the pleadings disclose plaintiff's source of title as resting on a note and chattel mortgage, the defense of payment must be pleaded.² Where, in defense to an action for conversion of the mortgaged chattels by sale, defendant relies on an authorization to sell, he must allege it positively and not by way of recital.³ If defendant relies on fraud, he must allege the facts out of which the fraud is supposed to arise;⁴ yet it has been held that, under a plea of non est factum, defendant may show fraud in the procurement of his signature to the mortgage.⁵ In some jurisdictions, under statutes authorizing the jury to ascertain the amount due on the mortgage debt, it is not necessary for the mortgagor to set up a counterclaim in order to have the value of the mortgagee's interest determined.⁶

80. Minn.—Schneider v. Anderson, 79 N.W. 603, 77 Minn. 124.

81. Neb.—Ensign v. Roggencamp, 12 N.W. 811, 13 Neb. 30.

82. N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App.Div. 62.

83. Kan.—Commercial State Bank v. Baker, 161 P. 620, 99 Kan. 248.

84. R.I.—Hamilton v. Colt, 14 R.I. 209.

Matters not in issue

Where issue was limited to right of possession and damages for detention, defense of want of consideration for notes need not be pleaded in answer.—Massey-Harris Harvester Co. v. Quick, 87 S.W.2d 446, 229 Mo. App. 1136.

85. Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.
11 C.J. p 613 note 6.

86. Mich.—Eureka Iron, etc., Works v. Bresnahan, 27 N.W. 524, 60 Mich. 332.
11 C.J. p 613 note 7.

87. Mo.—Davis v. Tandy, 81 S.W. 457, 107 Mo.App. 437.

88. Mich.—Rogers v. Robinson, 62 N.W. 402, 104 Mich. 329.

89. Neb.—Iowa Sav. Bank v. Frink, 92 N.W. 916, 1 Neb., Unoff., 14.

90. Neb.—Iowa Sav. Bank v. Frink, supra.

91. Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.
11 C.J. p 613 note 12.

92. Cal.—Seaboard Dairy Credit Corporation v. Herman, 33 P.2d 1042, 139 Cal.App. 320.

93. Cal.—Seaboard Dairy Credit Corporation v. Herman, supra.

94. Cal.—Seaboard Dairy Credit Corporation v. Herman, supra.

95. Ala.—Baker v. Hutchinson, 41 So. 809, 147 Ala. 636.
Ky.—Thorn v. Henderson, 9 Ky.L. 619.
11 C.J. p 613 note 13.

96. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

11 C.J. p 613 note 14.

97. Ind.—Hemstreet v. Kutzner, 58 Ind. 319.

98. Ala.—Donahoo Horse, etc., Co. v. Durick, 69 So. 545, 193 Ala. 456.

99. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

1. Minn.—First Nat. Bank v. Halvorson, 223 N.W. 618, 176 Minn. 406.

2. Minn.—Trovatten v. Hanson, 213 N.W. 536, 171 Minn. 130.

3. Colo.—Ilfeld v. Ziegler, 91 P. 825, 40 Colo. 401.

4. Ala.—Hoobler v. International Harvester Co., 64 So. 567, 185 Ala. 533.

11 C.J. p 613 note 18.

5. Mo.—South Side Buick Auto Co. v. Bejach, App., 44 S.W.2d 870.

6. S.C.—Greene v. Washington, 89 S.E. 649, 105 S.C. 137.

11 C.J. p 613 note 19.

c. Replication or Reply

Plaintiff may reply to new matter pleaded in the answer.

In an action of detinue by a mortgagee against the mortgagor, in which the mortgagor defends on the ground that there was fraud in the procurement of the mortgage, plaintiff may reply that the mortgagor knew of its invalidity before the action was brought, but had failed to tender back the consideration.⁷ Plaintiff may substantiate allegations of general ownership by proof of special property by virtue of the mortgage, even though defendant had no opportunity to challenge the validity of the mortgage, if the reply alleged the execution of the mortgage.⁸

d. Amended or Supplemental Pleadings

The pleadings may be amended if a new cause of action or defense is not thereby set up.

In accordance with the general rule, the pleadings may be amended, if thereby a new cause of action or defense is not set up;⁹ and a mortgagee suing in detinue may be permitted to amend his complaint by adding a count on the note secured.¹⁰ The failure of the declaration or petition, in an action for conversion, to allege that plaintiff had possession, or the right to possession, at the time of the conversion may be remedied by amendment even after the cause is pending, on motion for new trial and in arrest of judgment.¹¹ The petition may be amended so as to change a general to a special allegation of ownership.¹²

Where replevin brought to recover mortgaged chattels was changed by amendment to an action to foreclose a lien thereon, such amendment operated to terminate the replevin action, and entitled de-

fendant to a restoration of the property taken under the writ, in the absence of an attachment issued against the property.¹³

e. Issues, Proof, and Variance

The pleadings and proofs must conform, but minor discrepancies will be disregarded; and evidence tending to support the pleadings is admissible thereunder.

As in other civil actions, the pleadings and proof must conform in an action by the mortgagee against third persons.¹⁴ If there is a substantial correspondence between the allegations and the proof, minor discrepancies will be disregarded.¹⁵ An intervening claimant in the mortgagee's detinue action cannot raise an issue of the mortgagee's right to possession as against the mortgagor, the issue being whether the mortgagee had the right to possession as against the intervening claimant when the claim suit was instituted.¹⁶

When defendant in detinue pleaded that the mortgage under which plaintiff claims was given to compromise a prosecution, evidence which tends to establish that fact is admissible.¹⁷ In replevin by a second mortgagee against the mortgagor and the holders of a prior mortgage in possession, plaintiff, without pleading payment or satisfaction of the prior mortgage, may offer proof of payment or satisfaction, or any fact defeating its priority;¹⁸ and the fact that he pleads that the first mortgage was fully paid will not prevent proof of satisfaction otherwise than by payment of money.¹⁹ A complaint pleading the value of live stock replevined by a mortgagor from third person claiming an agister's lien did not bar testimony as to a lesser value, nor require judgment in the pleaded sum for defendant.²⁰ Evidence that plaintiff waived his prior lien may be submitted to the jury, even though the waiv-

7. Ala.—Henderson v. Boyett, 28 So. 86, 126 Ala. 172.

8. Or.—Mayes v. Stephens, 63 P. 760, 64 P. 319, 33 Or. 512.

9. Or.—Nunn v. Bird, 59 P. 303, 36 Or. 515.

11 C.J. p 613 note 23.

10. Ala.—Singer v. National Bond & Investment Co., 118 So. 561, 218 Ala. 375.

11. Mo.—Golden v. Moore, 104 S.W. 481, 126 Mo.App. 518.

12. Neb.—Tackabery v. Gilmore, 78 N.W. 32, 57 Neb. 450.

13. N.Y.—Horowitz v. Decker, 88 N. Y.S. 217.

14. Okl.—First Nat. Bank v. City Nat. Bank of Wellington, Tex., 175 P. 253, 71 Okl. 52.

Tex.—Smith v. Stamford Gin Co., Civ.App., 74 S.W.2d 519, error dismissed.

11 C.J. p 613 note 27.

Variance held fatal

Ala.—First Nat. Bank v. Crawford, 149 So. 230, 25 Ala.App. 463, certiorari denied 149 So. 223, 227 Ala. 188.

Mont.—Torgerson v. Stocke, 230 P. 1096, 72 Mont. 7.

Ownership

Where, after condition broken, mortgagee's title is absolute at law, in replevin he may allege that property belongs to him, and thereunder evidence of title depending on a mortgage is admissible.—Cate v. Merrill, 102 A. 235, 116 Me. 432.

15. S.D.—Weiland v. Townsend, 238 N.W. 300, 59 S.D. 94.

Tex.—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed.

11 C.J. p 614 note 28.

Amount of indebtedness

Okl.—Chautauqua State Bank of

Chautauqua, Kan. v. Lewis, 226 P. 342, 99 Okl. 223.

Cure by amendment

In replevin to recover chattels mortgaged, a discrepancy between the allegations and the proof as to the amount of the note secured by the mortgage was a mere variance, which was cured by an amendment ordered under statutory authority.—Shantz v. Shriner, 150 S.W. 727, 167 Mo.App. 635.

16. Ala.—Faulk v. Dorsey, 166 So. 792, 232 Ala. 85.

17. Ala.—Weil v. Teabo, 70 So. 957, 14 Ala.App. 575.

11 C.J. p 614 note 29.

18. Kan.—Commercial State Bank v. Baker, 161 P. 620, 99 Kan. 248.

19. Kan.—Commercial State Bank v. Baker, supra.

20. Wyo.—Tillotson v. Delfelder, 276 P. 935, 40 Wyo. 283, rehearing denied 277 P. 714, 40 Wyo. 283.

er was not specially pleaded where there is no objection to the evidence on this ground.²¹ In an action for conversion, evidence that the chattels had been transported by truck is admissible under an allegation that they were "shipped;"²² and the mortgage is admissible in evidence, although not set out in *haec verba*, and although the petition alleged the mortgagee owned the converted property.²³ Evidence in mitigation of damages is admissible under the general issue.²⁴ Under a plea of set-off, in an action by the mortgagee to recover the balance due on the mortgage debt, the mortgagor may show the value of the mortgaged property.²⁵

§ 242. Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

21. Okl.—*Winter v. Harvell*, 52 P. 2d 717, 175 Okl. 315.

22. Tex.—*Bridgeport Mach. Co. v. Geers*, Civ.App., 36 S.W.2d 1047, error dismissed.

23. Tex.—*Bridgeport Mach. Co. v. Geers*, supra.

24. Ala.—*Kelley v. Cassels*, 147 So. 597, 226 Ala. 410.

25. Ala.—*Johnson v. Selden*, 37 So. 249, 140 Ala. 418, 103 Am.S.R. 49.

26. Ala.—*Mackey v. Hall Auto Co.*, 176 So. 318, 27 Ala.App. 557.

N.Y.—*Equitable Trust Co. of New York v. Majestic Hotel Co.*, 261 N.Y.S. 1, 237 App.Div. 166, affirmed 188 N.E. 31, 262 N.Y. 486.

N.C.—*Wheless v. Edwards*, 125 S.E. 4, 188 N.C. 457.

11 C.J. p 614 note 32.

After intervention

(1) Where junior mortgagee intervened as claimant in senior mortgagee's detinue action for cotton crop, mortgagees stood in same relation as original plaintiff and defendant to statutory action in detinue as regards burden of proof.—*Faulk v. Dorsey*, 166 So. 792, 232 Ala. 85.

(2) In attachment, interveners claiming the property under a mortgage must show that it was executed prior to the issuance of the attachment to secure a bona fide indebtedness, no part of which has been paid.—*Hutchison v. First Nat. Bank*, 246 S.W. 484, 156 Ark. 142.

Prima facie case

(1) Plaintiff makes prima facie case by showing execution of mortgage to plaintiff and that debt secured thereby was due and unpaid.—*K-M Supply Co. v. Moran*, Mo.App., 53 S.W.2d 419.

(2) Plaintiff need merely show its right to possession by proof that mortgagor owed plaintiff a debt, to

secure which he duly executed a mortgage stipulating that on default in payment of the debt plaintiff could take possession of the property, and that he did default in such payment.—*Motor Inv. Co. v. Breslauer*, 221 P. 700, 64 Cal.App. 230.

27. Tex.—*Knowles v. Gilmer State Bank*, Civ.App., 293 S.W. 625.

11 C.J. p 614 note 33.

Prima facie case

(1) Mortgagee suing alleged conditional seller of property covered by her mortgage for conversion of such property on proving that at time she first took mortgage and in all renewals of mortgage mortgagor was in possession of property and exercising rights of ownership over it established prima facie case.—*Kliks v. Courtemanche*, 43 P.2d 913, 150 Or. 332.

(2) Other illustrations see 11 C.J. p 614 note 33 [b].

28. Idaho.—*Forbush v. San Diego Fruit & Produce Co.*, 266 P. 659, 46 Idaho 231.

Mass.—*Hallfors v. Gove*, 114 N.E. 314, 225 Mass. 266.

Mo.—*John Deere Plow Co. v. Gooch*, 91 S.W.2d 149, 230 Mo.App. 150.

Mont.—*Swords v. Occident Elevator Co.*, 232 P. 189, 72 Mont. 189.

11 C.J. p 614 note 34.

Time of conversion

Plaintiff must show that conversion occurred after he had the right to take or seize the property.

Ala.—*Arnold v. Sutherland*, 114 So. 140, 216 Ala. 546.

Mont.—*First Nat. Bank v. Coit*, 257 P. 469, 79 Mont. 468.

29. Mont.—*A. H. Averill Machinery Co. v. Freebury Bros.*, 198 P. 130, 59 Mont. 594.

N.M.—*Bank of Commerce of Taiban v. Duckworth*, 204 P. 53, 27 N.M. 627.

a. Presumptions and Burden of Proof

As in other civil cases, the burden is on plaintiff to establish a prima facie case and on defendant to overcome it, or establish his affirmative defenses.

As in other civil actions, the burden rests on the mortgagee to establish the facts constituting his cause of action for the possession²⁶ or conversion²⁷ of the mortgaged property. Hence plaintiff must show title and right to possession in himself, in order to sustain trover,²⁸ replevin,²⁹ or detinue,³⁰ and in the last named action he must prove that defendant had possession.³¹ Where such facts are essential to the validity of the mortgage lien, plaintiff must show that the mortgage has been properly recorded,³² or that defendant had actual notice of its existence.³³ So when in issue, the burden is on the mortgagee to prove the execution of the mortgage,³⁴ its validity,³⁵ the indebtedness secured thereby,³⁶ default,³⁷ the interest of the mortgagor,³⁸ the val-

Tex.—*Landry v. Erkman*, Civ.App., 69 S.W.2d 206.

11 C.J. p 614 note 35.

In trial of right of property, it is against attaching creditor that mortgagee must establish his right to hold possession.—*Sanders v. Farrier*, Tex.Civ.App., 271 S.W. 293.

30. Ala.—*Faulk v. Dorsey*, 166 So. 792, 232 Ala. 85.—*First Nat. Bank v. Crawford*, 149 So. 228, 227 Ala. 188, denying certiorari 149 So. 230, 25 Ala. 463.—*Mackey v. Hall Auto Co.*, 176 So. 318, 27 Ala.App. 557.

Occurrence of event

Mortgagee, authorized to repossess automobile on specified events, has burden of proving occurrence thereof.—*Manufacturers' Finance Acceptance Corporation v. Woods*, 132 So. 611, 222 Ala. 239, reversing 132 So. 608, 24 Ala.App. 202.

31. Ala.—*Mackey v. Hall Auto Co.*, 176 So. 318, 27 Ala.App. 557.

32. U.S.—*Guras v. Porter*, D.C.Cal., 118 F. 668.

11 C.J. p 614 note 36.

33. Iowa.—*Martin v. Lesan*, 105 N.W. 996, 129 Iowa 573.

Constructive knowledge under foreign law

Ill.—*Snow v. Breene*, 248 Ill.App. 518.

34. Ala.—*Barksdale v. Bullington*, 69 So. 391, 194 Ala. 624.—*Mackey v. Hall Auto Co.*, 176 So. 318, 27 Ala.App. 557.

35. Kan.—*Pfeifer v. Basgall*, 211 P. 134, 112 Kan. 269.

36. Okl.—*Todd v. Webb*, 272 P. 380, 134 Okl. 107.

11 C.J. p 615 note 39.

37. N.Y.—*Wiggins v. Russel*, 236 N.Y.S. 657, 227 App.Div. 742.

38. Idaho.—*Forbush v. San Diego Fruit & Produce Co.*, 266 P. 659, 46 Idaho 231.

ue of the mortgagee's interest at the time of the alleged wrong;³⁹ and waiver of prior liens;⁴⁰ and it has been held that a mortgagee suing for conversion must show that he held under a valid mortgage, which, if he recovered, would inure to the benefit of the one charged with converting or, at least, give the one so charged the same right to the property that he had.⁴¹

When plaintiff has made a prima facie case, defendant relying thereon as a defense has the burden of showing that he is entitled to be subrogated to a landlord's lien for advances,⁴² and where he asserts a right superior to that of the mortgagee the burden is on him to prove it.⁴³ However, the mere fact that defendant has claimed ownership in his answer does not cast on him the primary burden of proving such claim by a preponderance of the evidence, since the claim amounts only to a general denial and not to the pleading of new matter.⁴⁴ It has been held necessary to show the validity of the mortgage before any question can be raised as to the soundness of an attachment claim.⁴⁵ Where a sheriff is sued by a junior chattel mortgagee for taking goods under a prior mortgage, the burden of

proving an intent of the owner and of the mortgagee to defraud creditors, in executing the subsequent mortgage, is on such defendant.⁴⁶

Production of note and mortgage. Where it appears in a mortgagee's action of replevin that the mortgage was given in security of a promissory note shown to be past due at the time of suit, and the grounds of recovery are denied by defendant, proof of plaintiff's right of recovery requires the production of the note in evidence, where it is shown that such note is in the possession of plaintiff.⁴⁷ So an alleged mortgagee suing an officer for levying on mortgaged property, must produce the note and mortgage in evidence or account for their absence and prove their contents;⁴⁸ and this principle has been recognized in an action on his bond against a mortgagee failing to prosecute his replevin suit.⁴⁹

Identity of property. Plaintiff has the burden of identifying the property in controversy with that described in the mortgage, both in replevin⁵⁰ and in trover;⁵¹ but where it is established that defendant in replevin wrongfully took the property

Crop mortgages

(1) A mortgagee claiming conversion of crops must show crops on which lien was claimed were sown or caused to be sown by mortgagor.—*Forbush v. San Diego Fruit & Produce Co.*, supra.

(2) So such mortgagee is required to show that, at time mortgage was executed, mortgagor had an interest in, or the right to cultivate, land on which the crop was grown.—*Kelley v. Cassels*, 147 So. 597, 226 Ala. 410.

(3) A similar rule was applied in an action on the case for preventing enforcement of equitable mortgage.—*Benson Hardware Co. v. Wilder Mercantile Co.*, 73 So. 4, 197 Ala. 703.

(4) It has been held in detinue, however, that the mortgagor had burden to show he had no interest in land on which crop was grown when mortgage was made in order to defeat mortgage.—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 333.

39. N.Y.—*Oest v. Ovberg*, 246 N. Y.S. 637, 231 App.Div. 866.

Value of property converted

In action to recover value of property allegedly converted, absence of testimony as to reasonable market value of property at time and place of conversion precludes recovery.—*Callihan v. Fort Worth Well Machinery & Supply Co.*, Tex.Civ. App., 88 S.W.2d 1057, error dismissed.

40. Mo.—*Zahner Mfg. Co. v. Har-*

nish, 24 S.W.2d 641, 224 Mo.App. 870.

Presumption

As bearing on question of whether warehouseman waived lien by "voluntarily" delivering goods to plaintiff without requiring the latter to identify them as the chattels called for by the writ of replevin, plaintiff in replevin is presumed to have known goods on which it had chattel mortgages, so that sheriff's receipt of more than it was entitled to and retention was equivalent to directing sheriff to take such property.—*Zahner Mfg. Co. v. Harnish*, supra.

41. Wash.—*Karanzias v. Chester*, 265 P. 158, 147 Wash. 210.

42. Ala.—*Gerson v. Norman*, 20 So. 453, 111 Ala. 433.

43. Kan.—*Hoxie State Bank of Hoxie v. Vaughn*, 21 P.2d 356, 137 Kan. 648.

Mont.—*A. H. Averill Machinery Co. v. Freebury Bros.*, 198 P. 130, 59 Mont. 594.

Or.—*Kliks v. Courtemanche*, 48 P.2d 913, 150 Or. 332.

Wyo.—*Reynolds v. Morton*, 154 P. 325, 23 Wyo. 528.

Lessor

Burden was on lessor, sued in replevin by mortgagee of lessee's office furniture, seized under void attachment in action for rent, to show that it took actual possession thereof under lease.—*K-M Supply Co. v. Moran*, Mo.App., 53 S.W.2d 419.

44. N.M.—*Bank of Commerce of*

Taiban v. Duckworth, 204 P. 58, 27 N.M. 627.

45. Ala.—*Thompkins v. Henderson*, 3 So. 774, 83 Ala. 391.

Colo.—*Hall v. Johnson*, 42 P. 660, 21 Colo. 414.

N.Y.—*Guilford v. Mills*, 11 N.Y.S. 261, 57 Hun 493.

11 C.J. p 615 note 42.

46. Colo.—*Morrison v. McCluer*, 148 P. 380, 27 Colo.App. 264.

47. Okl.—*Todd v. Webb*, 272 P. 380, 134 Okl. 107.

48. Mass.—*Gibbs v. Childs*, 9 N.E. 3, 143 Mass. 103.

11 C.J. p 615 note 44.

49. Ill.—*Snow v. Breene*, 248 Ill. App. 518.

50. Minn.—*First Nat. Bank v. Halvorson*, 223 N.W. 618, 176 Minn. 406.

11 C.J. p 615 note 45.

Burden on intervenor

Although chattel mortgages, under which intervenor claimed property delivered to it by sheriff in claim and delivery proceedings, were registered before registration of mortgages under which plaintiff claimed, burden was on intervenor to offer evidence from greater weight of which jury could find that property seized by sheriff was same as that conveyed in mortgages to intervenor.—*Cotter-Underwood Co. v. Wise*, 129 S.E. 591, 190 N.C. 861.

51. Mo.—*Dorroh v. Holland Bank*, App., 7 S.W.2d 374.

11 C.J. p 615 note 46.

from the possession of the mortgagee, the burden is on him to establish that the property taken was not covered by the mortgage,⁵² and a similar rule has been applied in an action for conversion.⁵³

Good faith. In some jurisdictions under the statutes relative to the effect of retention of possession by the mortgagor the burden of showing good faith in the mortgage is imposed on the mortgagee, where the mortgagor has been allowed to retain such possession,⁵⁴ but in the absence of statute it is not essential that the mortgagee establish that his mortgage was taken in good faith.⁵⁵ Where the mortgagee establishes his title and attacks as fraudulent a transaction whereby the intervener claimed title, the burden shifts to the intervener to show clearly and satisfactorily the good faith of the transaction.⁵⁶ The burden is on defendant mortgagor in detinue by the mortgagee who has possessed himself of the property under the mortgage to show the mortgagee did not act in good faith.⁵⁷

Payment. If defendant sets up payment of the mortgage the burden of proving this defense is on him.⁵⁸ Proof of the fact of payment casts back on the mortgagee the burden of proving that the right or claim to the property was continuing.⁵⁹

Bona fide purchaser. In an action by a mortgagee

against one claiming to be a bona fide purchaser, it has been held that the burden is on defendant to make satisfactory proof of purchase and payment,⁶⁰ whereupon the burden shifts, and plaintiff must show that defendant, before payment, had actual or constructive notice of the mortgage lien asserted, or facts sufficient to put him on inquiry, which, if followed up, would have shown the lien.⁶¹ Even though a purchaser of mortgaged property is not chargeable with notice of a recorded mortgage on account of defective description of the property, the burden is on him to show that his dealings with the mortgaged property were in good faith.⁶²

b. Admissibility

Any relevant and competent evidence material to the issues of the case is admissible in a mortgagee's action.

Under the rules applicable to civil actions generally evidence in an action by the chattel mortgagee must be competent and relevant to the issues.⁶³ Subject to this rule evidence is admissible to establish the execution of the mortgage,⁶⁴ the identity of the property,⁶⁵ the relations between parties,⁶⁶ the right to possession,⁶⁷ the purpose of the mortgagee in demanding possession,⁶⁸ the title of the mortgagor⁶⁹ or his possession,⁷⁰ the validity of the mort-

52. Kan.—Falk v. Decou, 61 P. 769, 8 Kan.App. 765.

53. Md.—Preston v. Leighton, 6 Md. 88.

11 C.J. p 615 note 48.

54. Minn.—Glasser v. O'Brien, 215 N.W. 517, 172 Minn. 355—Singer v. Farmers' State Bank of Goodridge, 201 N.W. 414, 161 Minn. 301.

11 C.J. p 615 note 50.

55. Mo.—National Brewery Co. v. Lindsay, 72 Mo.App. 591.

56. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

57. Ala.—R. P. Harris & Co. v. Thomas, 38 So. 51, 17 Ala.App. 634.

58. Okl.—Hardwick v. Atkinson, 58 P. 747, 8 Okl. 608.

11 C.J. p 616 note 53.

59. Tex.—Sanders v. Farrier, Civ. App., 271 S.W. 293.

60. Ala.—Donahoo Horse, etc., Co. v. Durick, 69 So. 545, 193 Ala. 456.

Purchase for value without notice

To avoid mortgage lien, purchaser of property must prove purchase for value and without actual notice.—Manbeck Motor Sales Co. v. Garside, 226 N.W. 9, 208 Iowa 656.

61. Ala.—Donahoo Horse, etc., Co. v. Durick, 69 So. 545, 193 Ala. 456.

Under statute making a chattel mortgage void against a purchaser

in good faith when not recorded, the burden of proving want of good faith in a purchaser is on the party asserting that the purchase was made with notice of his claim.—Commonwealth Finance Corporation v. Schutt, 116 A. 722, 97 N.J.Law 225.

62. Tex.—Maloney v. Greenwood, Civ.App., 186 S.W. 228.

63. U.S.—Stockyards Loan Co. v. Nichols, Okl., 260 F. 393, 171 C.C. A. 259.

64. Colo.—Miller v. Graf, 59 P. 416, 14 Colo.App. 167.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

Mass.—Veazie v. Somerby, 5 Allen 280.

Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431.

11 C.J. p 616 note 58.

Speculative matters inadmissible. Mont.—Robison v. Dover Lumber Co., 191 P. 333, 58 Mont. 231.

Defective notice

In replevin against a sheriff a notice of ownership, required by the code to render the sheriff liable, is inadmissible if defective.—McIver v. Davenport, 81 N.W. 585, 110 Iowa 740.

64. Ala.—Collier v. Pryor, 149 So. 816, 227 Ala. 299—Singer v. Na-

tional Bond & Investment Co., 118 So. 581, 218 Ala. 375.

65. U.S.—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696. 11 C.J. p 616 note 59.

66. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

Mich.—Stanton v. Estey Mfg. Co., 51 N.W. 101, 90 Mich. 12.

67. Colo.—Dorris v. San Luis Valley Finance Co., 7 P.2d 407, 90 Colo. 209.

Okl.—Kirkpatrick v. Oil Well Supply Co., 49 P.2d 712, 172 Okl. 248.

11 C.J. p 616 note 61.

68. Mich.—Wilson v. Montague, 24 N.W. 851, 57 Mich. 638.

69. Ala.—Shotts v. Cooper, 74 So. 353, 199 Ala. 284—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala. App. 130.

11 C.J. p 616 note 63.

Evidence held admissible

(1) In action of trover for crop.—Sewell v. Richardson, 104 So. 139, 20 Ala.App. 569.

(2) In detinue for crops.—Mackey v. Hall Auto Co., 176 So. 318, 27 Ala. App. 557.

70. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

gage generally,⁷¹ the residence of the mortgagor,⁷² the consideration for the mortgage,⁷³ the amount of the debt,⁷⁴ payment of the mortgage debt,⁷⁵ the property included in the mortgage,⁷⁶ the value of the property,⁷⁷ its disposition,⁷⁸ the intention in executing a subsequent note and mortgage,⁷⁹ the mortgagee's consent to sale,⁸⁰ fraud in the obtaining of the mortgage,⁸¹ intent to defraud creditors,⁸² notice of the mortgage,⁸³ title in a third person,⁸⁴ necessity of removal of the property,⁸⁵ or the amount of the damage.⁸⁶ The chattel mortgage statutes of another state are admissible when properly pleaded.⁸⁷ Where a mortgage asserted as against plaintiff's rights is invalid the title of the mortgagor in such mortgage is immaterial.⁸⁸ Parol evidence to

establish the relation of pledgor and pledgee is not admissible after the mortgage has been declared invalid.⁸⁹

The mortgage document. After the execution of a chattel mortgage is properly proved it is admissible in evidence,⁹⁰ and when the mortgage agreement is contained in more than one instrument all are admissible in evidence.⁹¹ The mortgage document is evidence of the amount due from the mortgagor to the mortgagee,⁹² of the mortgagor's interest,⁹³ and of the mortgagee's special ownership in the mortgaged property.⁹⁴ When the rights of third persons are concerned a void chattel mortgage is not admissible in evidence,⁹⁵ but as between the parties it may be offered in evidence.⁹⁶ Where

71. S.D.—Lyon v. Phillips, 108 N.W. 554, 20 S.D. 607.

Unsigned instrument

N.C.—Kearns v. Davis Bros., 120 S. E. 52, 186 N.C. 522.

72. N.C.—Industrial Discount Corporation v. Radecky, 170 S.E. 640, 205 N.C. 163.

73. Mich.—Heenan v. Forest City Paint, etc., Co., 101 N.W. 806, 138 Mich. 548.

N.Y.—Knapp v. Gregory, 20 N.Y.S. 21.

11 C.J. p 616 note 65.

74. Ala.—Holcombe v. Mountain River Dairy Farm, 168 So. 439, 232 Ala. 391.

11 C.J. p 616 note 66.

Reduction of debt

Ala.—Holcombe v. Mountain River Dairy Farm, *supra*.

75. S.C.—Fairley v. Haynes, 96 S.E. 694, 111 S.C. 132.

11 C.J. p 616 note 67.

76. S.C.—Fairley v. Haynes, 96 S.E. 694, 111 S.C. 132.

Prior mortgage

Evidence as to another mortgage of a prior date was held admissible to show what subsequent mortgage was made up from and included.—Fairley v. Haynes, *supra*.

77. Ala.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130. 11 C.J. p 616 note 68.

Evidence held inadmissible

S.C.—McNeal v. Herring, 152 S.E. 189, 155 S.C. 187.

78. Ala.—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 150.

Removal on defendant's order

Ala.—W. B. Smith & Sons v. Gay, *supra*.

79. Tex.—Cameron v. Carson, Civ. App., 249 S.W. 526.

80. Colo.—Zeigler v. Ilfeld, 122 P. 56, 52 Colo. 275, Ann.Cas.1913D 533.

81. Minn.—Glasser v. O'Brien, 215 N.W. 517, 172 Minn. 355.

11 C.J. p 616 note 70.

82. Wis.—Hoeffler v. Carew, 116 N. W. 241, 135 Wis. 605.

11 C.J. p 616 note 71.

83. U.S.—Stockyards Loan Co. v. Nichols, Okl., 243 F. 511, 156 C.C.A. 209.

Cal.—Bell v. Central Bank of Imperial Valley, 265 P. 551, 89 Cal. App. 551.

Mont.—First Nat. Bank v. Coit, 257 P. 469, 79 Mont. 468.

N.M.—Kitchen v. Schuster, 89 P. 261, 14 N.M. 164.

Tex.—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed.

Copies of mortgage and record

U.S.—Stockyards Loan Co. v. Nichols, Okl., 243 F. 511, 156 C.C.A. 209.

84. Ala.—Mackey v. Hall Auto Co., 176 So. 318, 27 Ala.App. 557.

Mont.—Reynolds v. Fitzpatrick, 72 P. 510, 28 Mont. 170.

Evidence held admissible

Ala.—Mackey v. Hall Auto Co., 176 So. 318, 27 Ala.App. 557—W. B. Smith & Sons v. Gay, 106 So. 214, 21 Ala.App. 130.

N.C.—Wheless v. Edwards, 125 S.E. 4, 188 N.C. 457.

85. Vt.—Smith v. Anderson, 41 A. 441, 70 Vt. 424.

86. N.Y.—Oest v. Ovberg, 246 N.Y.S. 637, 231 App.Div. 866.

Difference in value

As bearing on the amount of the damages for which he is liable, defendant who wrongfully removed mortgaged fixtures, but thereafter replaced them, could prove difference in value before and after taking.—Oest v. Ovberg, *supra*.

87. Kan.—Handley v. Harris, 29 P. 1145, 48 Kan. 606, 30 Am.S.R. 322, 17 L.R.A. 703.

88. Ala.—Johnson v. Wilson, 34 So. 392, 137 Ala. 468, 97 Am.S.R. 52.

89. Wash.—Marsh v. Wade, 20 P. 578, 1 Wash. 538.

90. Mo.—Central Missouri Trust Co. v. Wulfert, 199 S.W. 724, 198 Mo. App. 85.

Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

Tex.—Bridgeport Mach. Co. v. Geers, Civ.App., 36 S.W.2d 1047, error dismissed.

Knowledge of defendant

Mortgage on automobile sold by sheriff sued in trover is admissible, where sheriff knew of its existence.—Burton v. Jennings, 148 A. 424, 158 Md. 254.

91. Ala.—Wertheimer Bag Co. v. Hill, 71 So. 618, 14 Ala.App. 623.

11 C.J. p 616 note 75.

92. Ala.—Baker v. Hutchinson, 41 So. 809, 147 Ala. 636.

Ill.—Mantonya v. Martin Emerich Outfitting Co., 69 Ill.App. 62, affirmed 49 N.E. 721, 173 Ill. 92.

93. Mont.—Sweetman v. Ramsey, 56 P. 361, 22 Mont. 323.

94. Or.—Commercial Securities v. Mast, 28 P.2d 635, 145 Or. 394, 92 A.L.R. 194.

11 C.J. p 617 note 82.

Bill of sale

In action by holder of bill of sale as security, for possession of property, bill of sale was admissible.—Hill v. Marshall, 90 S.E. 175, 18 Ga. App. 652.

Trust receipts issued to plaintiff finance corporation by purchaser on delivery of bill of lading are admissible in detinue to show a legal title in plaintiff.—Industrial Finance Corporation v. Turner, 110 So. 904, 215 Ala. 460.

95. Ala.—Pinckard v. Cassels, 70 So. 153, 195 Ala. 353.

11 C.J. p 617 note 83.

96. Ill.—Davis v. Ransom, 26 Ill. 100.

property described in a chattel mortgage is admitted to have been at the time of the execution of the mortgage the property of another than the mortgagor and in the adverse possession of defendant, the mortgage is inadmissible in replevin by the mortgagee.⁹⁷

c. Weight and Sufficiency

The rules as to the weight and sufficiency of evidence applied in civil actions generally apply to actions by a mortgagee.

97. N.C.—Clark v. Hodge, 21 S.E. 562, 116 N.C. 761.

98. Iowa.—Conway v. Alexander, 205 N.W. 351, 200 Iowa 705.

Mo.—Dorroh v. Holland Bank, App., 7 S.W.2d 374.

11 C.J. p 617 note 86.

99. Evidence held sufficient

(1) To support plaintiff's judgment in replevin.

Ark.—Carroll v. Swicord, 9 S.W.2d 783, 177 Ark. 1193.

Mo.—Exchange Finance Co. v. Brown, 14 S.W.2d 683, 222 Mo.App. 1113.

Okl.—McCullough v. Simpson, 48 P. 2d 276, 173 Okl. 290.

(2) To sustain verdict for plaintiff in detinue.—Hood v. Jenkins, 75 So. 871, 16 Ala.App. 180, certiorari denied Ex parte Hood, 76 So. 741, 200 Ala. 543.

(3) To justify judgment for plaintiff in action for conversion.

Conn.—Terzano v. Clemente, 167 A. 825, 117 Conn. 267.

N.D.—Bovey-Shute Lumber Co. v. Dodge Elevator Co., 174 N.W. 88, 43 N.D. 150.

(4) To sustain finding that mortgagee took without knowledge of prior mortgage.—Habegger v. Skalla, 34 P.2d 113, 140 Kan. 166.

(5) To sustain a judgment for defendant for possession of property, or for its value.

Ill.—See E. C. Kadow & Co. v. Dobbins, 209 Ill.App. 269.

Okl.—Union State Bank v. Woodside, 178 P. 109, 74 Okl. 217.

Evidence held insufficient

(1) To sustain verdict and judgment for plaintiff in action for conversion.—Nebraska State Bank of Valparaiso v. Citizens' State Bank of Thedford, 240 N.W. 575, 122 Neb. 522.

(2) To make a prima facie case for plaintiff in replevin.—Baldwin Co. v. Keeley, 193 Ill.App. 237.

(3) To authorize verdict for defendant in replevin.

Iowa.—Wertheimer & Degen v. Shultice, 211 N.W. 568, 202 Iowa 1140.

Minn.—Schwartz v. Kleiber, 170 N.W. 210, 141 Minn. 332.

1. Evidence held sufficient

(1) To raise presumption of mortgagor's ownership.—Commercial Motors Mortg. Corporation v. Mack In-

ternational Motor Truck Corporation, 209 N.Y.S. 661, 213 App.Div. 25.

(2) To raise presumption of fraud.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

(3) To overcome presumption that new notes paid old note given for price of truck.—Gilligan v. New England Truck Co., 163 N.E. 651, 265 Mass. 51.

2. Evidence held sufficient

(1) To sustain finding that the property in question was covered by the mortgage.

Colo.—Howry v. Sigel-Campion Live Stock Commission Co., 249 P. 658, 80 Colo. 143.

Minn.—James v. Pettis, 158 N.W. 953, 134 Minn. 438.

(2) To sustain finding that crops were raised by, or under direction of, mortgagor.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

(3) To warrant finding that property was not covered by mortgage.—Hallfors v. Gove, 114 N.E. 314, 225 Mass. 266.

(4) To sustain finding that mortgage was not restricted to particular crop.—Bonneville Lumber Co. v. J. G. Peppard Seed Co., 271 P. 226, 72 Utah 463.

Evidence held insufficient

(1) To identify chattels as those mortgaged.—Muldowney v. McCoy Hotel Co., 269 N.W. 655, 223 Wis. 62.

(2) To show that particular property was covered by mortgage.

Ark.—I. Scholem & Co. v. Jefferies & Sons, 188 S.W. 800, 125 Ark. 597.

Iowa.—People's Nat. Bank of Waukon v. Russel, 194 N.W. 247, 196 Iowa 401.

(3) To establish that crops were not raised by mortgagor.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

3. Evidence held sufficient

(1) To warrant finding that mortgagor and former owner of land continued the owner thereof when mortgage was made and filed.—Bovey-Shute Lumber Co. v. Dodge Elevator Co., 174 N.W. 88, 43 N.D. 150.

(2) To warrant finding of implied contract to allow tenant to hold over

The mortgagee must establish his case by a preponderance of the evidence as in other civil cases;⁹⁸ and general rules have been applied in determining the sufficiency of the evidence to support a verdict or judgment,⁹⁹ to raise or overcome presumptions,¹ or with respect to such issues as the identity of the property,² the mortgagor's right or authority to execute the mortgage,³ the execution of the mortgage,⁴ plaintiff's title and right to possession,⁵ title in a

for another year, and so to give validity to crop mortgage.—Shotts v. Cooper, 74 So. 353, 199 Ala. 284.

(3) To show that arrangement with owner's son for mortgage was clandestine as respects the owner of the mortgaged property.—Conway v. Alexander, 205 N.W. 351, 200 Iowa 705.

Evidence held insufficient

(1) To establish that mortgagor owned property mortgaged.

Mich.—Colonial Theatrical Enterprises v. Cohen, 242 N.W. 770, 258 Mich. 407.

N.Y.—Commercial Motors Mortg. Corporation v. Mack International Motor Truck Corporation, 209 N.Y.S. 661, 213 App.Div. 25.

(2) To show mortgagor was authorized to execute mortgage.—South Denver Bank v. Guardian Trust Co., 278 P. 590, 86 Colo. 121.

(3) To show that mortgagor, at time mortgage was executed, possessed or owned land on which crop was grown.—Avondale Mills v. Abbott Bros., 103 So. 31, 214 Ala. 363.

4. Evidence held sufficient

(1) To prove execution.

Ala.—Gillespie v. Bartlett & Byers, 100 So. 858, 211 Ala. 560.

Cal.—Motor Inv. Co. v. Breslau, 221 P. 700, 64 Cal.App. 230—McDevitt v. Jones, 214 P. 661, 60 Cal. App. 773.

(2) To show acceptance by mortgagee.—Maxcy-Barton Organ Co. v. Glen Bldg. Corporation, 189 N.E. 326, 355 Ill. 223, 95 A.L.R. 321.

(3) To support conclusion that illiterate mortgagor took no part in subscribing name.—Hamilton v. Adams, 108 So. 1, 214 Ala. 440.

(4) To sustain finding that mortgage never became operative.—Farmers' & Merchants' State Bank of Correll v. Kohler, 198 N.W. 413, 159 Minn. 35.

5. Evidence held sufficient

(1) To establish plaintiff's special interest and right to possession.—Commercial Credit Trust v. Land, 251 Ill.App. 469.

(2) To show facts authorizing mortgagee to take possession.—Citizens' Bank v. Tyler, Mo.App., 226 S.W. 603.

(3) To show that plaintiff, after

third person,⁶ conversion,⁷ tender or payment of the debt and discharge of the mortgage lien,⁸ or other matters.⁹

- b. Instructions
- c. Verdict and findings

a. Questions of Law and Fact

Disputed questions of fact are for the jury in case of trial to a jury; questions of law are for the court.

Peremptory instructions should not be given if

§ 243. Trial

a. Questions of law and fact

default, took possession.—McDevitt v. Jones, 214 P. 661, 60 Cal.App. 773.

(4) To establish plaintiff's ownership and possession of mortgage notes.—Exchange Finance Co. v. Brown, 14 S.W.2d 683, 222 Mo.App. 1113.—St. Louis House Furnishing Co. v. Stoecker & Price Storage & Auction Co., App., 238 S.W. 841.

(5) To establish prior filing of mortgage.—Harrington v. Interstate Securities Co., Mo.App., 57 S.W.2d 438.

(6) To justify finding that plaintiff had a valid lien.—Bovey-Shute Lumber Co. v. Dodge Elevator Co., 174 N.W. 88, 43 N.D. 150.

(7) To show waiver of mortgage lien.—Producers Livestock Marketing Ass'n v. John Morrell & Co., 263 N.W. 242, 220 Iowa 948.

Evidence held insufficient

(1) To show title or possession in mortgagee.

Ga.—J. E. Dunson & Bros. Co. v. Unity Cotton Mills, 131 S.E. 186, 34 Ga.App. 768.

Mass.—Davis v. Smith-Springfield Body Corporation, 145 N.E. 434, 250 Mass. 278.

N.Y.—Equitable Trust Co. of New York v. Majestic Hotel Co., 261 N.Y.S. 1, 237 App.Div. 166, affirmed 188 N.E. 31, 262 N.Y. 486.

(2) To show that plaintiff took possession before defendants purchased property.—Barnard State Bank v. Lankford, 11 S.W.2d 1084, 223 Mo.App. 519.

(3) To show default in payment under chattel mortgage.—Wiggins v. Russel, 236 N.Y.S. 657, 227 App.Div. 742.

(4) To compel finding of consent, waiver, or estoppel to assert mortgage clause in lease.—Griffin v. Minnesota Sugar Co., 202 N.W. 445, 162 Minn. 240.

6. Evidence held sufficient

(1) To show ownership of third person.

Colo.—South Denver Bank v. Guardian Trust Co., 278 P. 590, 86 Colo. 121.

Iowa.—Conway v. Alexander, 205 N.W. 351, 200 Iowa 705.

Minn.—Utility Finance Co. v. Spangenberg, 259 N.W. 544, 193 Minn. 584.

S.D.—Smith v. Gasper, 230 N.W. 20, 56 S.D. 592.

(2) To support finding that land-

lord's lien was superior to mortgage.

Ga.—National Bank of Lumpkin v. Trotman, 148 S.E. 166, 39 Ga.App. 639.

N.D.—Hilsdorf v. First State Bank of Regan, 191 N.W. 478, 49 N.D. 274.

(3) To show a levy of execution before mortgage was recorded.—Hopping v. Hicks, Tex.Civ.App., 190 S.W. 1119, error refused.

(4) To show that defendant was subsequent good-faith purchaser without notice.—Griffin v. Minnesota Sugar Co., 202 N.W. 445, 162 Minn. 240.

Evidence held insufficient

(1) To establish separate ownership in defendants, or invalidate mortgagee's interest.—Central Missouri Trust Co. v. Wulfert, 199 S.W. 724, 198 Mo.App. 85.

(2) To show that alleged lien was paramount to mortgage lien.—Struble-Werneke Motor Co. v. Metropolitan Securities Corporation, 178 N.E. 460, 93 Ind.App. 416.

Consent to sell

Evidence of mortgagee's oral consent to a sale by mortgagor, relied on as a defense to action for conversion, must be clear, positive, and unequivocal.—Phelan v. Barnhart Bros. & Spindler, 181 P. 718, 75 Okl. 49.

7. Evidence held sufficient

(1) To show conversion.

Cal.—Winne v. Ford, 263 P. 545, 83 Cal.App. 308.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.—Averill Machinery Co. v. Vollmer-Clearwater Co., 166 P. 253, 30 Idaho 587.

Mo.—St. Louis House Furnishing Co. v. Stoecker & Price Storage & Auction Co., App., 238 S.W. 841.

(2) To justify finding that one mortgagor sanctioned conversion by other mortgagor.—Hill v. Bedell, 126 A. 493, 98 Vt. 82.

Evidence held insufficient

(1) To show conversion.

S.D.—First Nat. Bank v. Lasell, 217 N.W. 209, 52 S.D. 260.

Tex.—Knowles v. Gilmer State Bank, Civ.App., 298 S.W. 625.—Blair-Hughes Co. v. Coston, Civ.App., 274 S.W. 245.

(2) To show destruction of lien so as to support a count in case.—

Richardson v. Sewell, 97 So. 678, 19 Ala.App. 399.

8. Evidence held sufficient

(1) To show payment of mortgage debt and final discharge of lien.—Sanders v. Farrier, Tex.Civ.App., 271 S.W. 293.

11 C.J. p 617 note 86 [a].

(2) To show tender of amount due or waiver of tender.—Doering v. Schneider, 128 N.E. 936, 74 Ind.App. 294.

(3) To show nonpayment of mortgage.—Hamilton v. Diefenderfer, 131 P. 37, 133 P. 1081, 21 Wyo. 266.

(4) To support finding that a subsequent mortgage was given as additional security, and not in satisfaction of previous mortgages.—Earl v. Cheek, 260 S.W. 421, 163 Ark. 662.

Evidence held insufficient

(1) To prove nonexistence of mortgage or its discharge.—Bogestad v. Anderson, 173 N.W. 674, 143 Minn. 336.

(2) To show that a rebate was properly allowed as payment on the mortgage.—Davis v. Reid Lumber Co., 86 So. 379, 204 Ala. 517.

Evidence entitled to consideration

In action for conversion, evidence of return of chattels in satisfaction of mortgage should not be disregarded.—Delbon v. Krautwald, 169 N.Y.S. 610.

9. Evidence held sufficient

(1) To show acceptance of substituted security after learning of unauthorized shipment of mortgaged cattle to commission merchants sued for conversion.—Drovers' Cattle Loan & Investment Co. v. Rice, D.C. Iowa, 10 F.2d 510.

(2) To authorize a finding of value equal to the verdict.—Kratzmer v. Detroit Lumber Co., 161 N.W. 817, 195 Mich. 570.

(3) To show that mortgages were recorded.—Skies v. Riga, 297 S.W. 727, 221 Mo.App. 152.

(4) To authorize recovery of mortgaged cows under purchase-money mortgage, where, after deducting value of cows taken by third party having title superior to that of plaintiff, there remained considerable amount due plaintiff on purchase price.—Holcombe v. Mountain River Dairy Farm, 168 So. 439, 232 Ala. 391.

(5) To warrant finding that defendant became claimant's tenant

the evidence is conflicting;¹⁰ if the proof raises an issue of fact on a material question it should be submitted to the jury for determination.¹¹ If there is no material question of fact for submission to the jury on which there is any substantial controversy, the court may direct a verdict.¹²

Applying these rules, it is the province of the jury to determine questions of fact,¹³ such as performance of the conditions of the mortgage,¹⁴ consideration for an extension of the mortgage debt,¹⁵ whether the mortgage was given to defraud creditors or for a valuable consideration,¹⁶ whether mortgagee has such title or right of possession as entitles him to sue,¹⁷ whether officers in possession of the property exceeded their authority in refusing to surrender the property to the mortgagee,¹⁸ the

character of defendant's possession,¹⁹ the quantity of mortgaged property in defendant's possession,²⁰ whether an attachment creditor of the mortgagor was a creditor in fact,²¹ whether the debt secured by the mortgage has been paid,²² whether the mortgagee had waived his lien²³ or authorized the mortgagor to sell the property,²⁴ whether plaintiff had notice of defendant's claims,²⁵ whether defendant assented to the mortgage,²⁶ facts fixing the venue of the action,²⁷ whether the mortgagor of a crop had an interest in the land on which the crop was grown at the date of the mortgage,²⁸ and whether the mortgagors had title to the property at the time of the execution of the mortgage.²⁹

It is the province of the court, and not of the jury, to determine questions of law,³⁰ such as

after chattel mortgage lien was created.—*Gillespie v. Bartlett & Byers*, 100 So. 858, 211 Ala. 560.

10. Ala.—*Miller v. Bryant*, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570. 11 C.J. p 617 note 98.

11. Ala.—*Miller v. Bryant*, supra.
Mo.—*South Side Buick Auto Co. v. Bejach*, App., 44 S.W.2d 870—*Cindrick v. Scott*, 42 S.W.2d 957, 226 Mo.App. 153—*Bank of Willard v. Young*, App., 41 S.W.2d 195—*Æolian Co. of Missouri v. Annis*, App., 272 S.W. 1031.

Mont.—*Conrad Mercantile Co. v. Siler*, 241 P. 617, 75 Mont. 36.

N.Y.—*Ehle v. Nethaway*, 207 N.Y.S. 383, 211 App.Div. 627.

S.C.—*People's Bank v. Walker*, 128 S.E. 715, 132 S.C. 254.

S.D.—*Aalseth v. Simpson*, 231 N.W. 289, 57 S.D. 118.

Vt.—*Johnson v. Tuttle*, 187 A. 515, 106 A.L.R. 1291—*Symes v. Fletcher*, 115 A. 502, 95 Vt. 431.

11 C.J. p 617 note 99.

Wrongful detention

In replevin, it was not necessary to require the jury to find that defendant wrongfully detained the property, where it was required to find that defendant had defaulted in payment of the debt, and had moved the property from his premises, which under the mortgage entitled the holder of the mortgage to possession.—*Cook v. Wheeler*, Mo.App., 218 S.W. 929.

12. Kan.—*Jacquart v. Jennings*, 235 P. 101, 118 Kan. 224.

Mass.—*Gilgigan v. New England Truck Co.*, 163 N.E. 651, 265 Mass. 51.

Mo.—*National Bond & Investment Co. v. Miller*, App., 76 S.W.2d 703—*Union House Furnishing Co. v. McGrath*, App., 39 S.W.2d 445.

N.J.—*First Nat. Bank v. Eastern Motor Co.*, 162 A. 660, 109 N.J. Law 327.

S.C.—*McNeal v. Herring*, 152 S.E. 189, 155 S.C. 187—*Bagnal Rankin Motor Co. v. Nesmith-Flowers Co.*, 110 S.E. 150, 118 S.C. 297. 11 C.J. p 617 note 1.

Evidence held insufficient to raise jury question, in mortgagee's replevin action.—*Walter v. Pratt*, 245 N.W. 534, 260 Mich. 615.

13. Ala.—*Miller v. Bryant*, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

Kan.—*People's Nat. Bank of Kansas City v. Edmunds*, 237 P. 911, 119 Kan. 212.

Mo.—*Æolian Co. of Missouri v. Annis*, App., 272 S.W. 1031.

Okl.—*Gerlach Bank of Woodward v. Herd*, 159 P. 901, 60 Okl. 186.

S.C.—*People's Bank v. Walker*, 128 S.E. 715, 132 S.C. 254.

11 C.J. p 617 note 87.

Identity of property as question of fact generally see supra § 71.

14. Mich.—*Aultman, etc., Co. v. Dodson*, 62 N.W. 708, 104 Mich. 507.

15. N.M.—*West Texas Loan Co. v. Montgomery*, 200 P. 681, 27 N.M. 296.

16. U.S.—*George Adams, etc., Co. v. South Omaha Nat. Bank*, Neb., 123 F. 641, 60 C.C.A. 579.

N.Y.—*Bishop v. Cook*, 13 Barb. 326.

17. N.J.—*Manna v. Industrial Credit Corporation*, 162 A. 559, 10 N.J. Misc. 1098.

11 C.J. p 617 note 90.

Postponing date for surrender

Whether mortgagee agreed to postpone date when defaulting mortgagors should surrender property was for court sitting without jury.—*International Harvester Co. of America v. Pittman*, 147 So. 144, 228 Ala. 355.

18. Mich.—*Robertson v. Kennedy*, 116 N.W. 413, 152 Mich. 553.

19. Mo.—*J. W. Jenkins Music Co. v. Wilson*, App., 209 S.W. 987.

Neb.—*Godfrey v. Citizens' Nat. Bank*, 90 N.W. 239, 64 Neb. 477.

20. Mont.—*Conrad Mercantile Co. v. Siler*, 241 P. 617, 75 Mont. 36.

21. Minn.—*Glasser v. O'Brien*, 215 N.W. 517, 172 Minn. 355.

22. Ala.—*Hampton v. Tant*, 73 So. 325, 15 Ala.App. 463.

Mo.—*Æolian Co. of Missouri v. Annis*, App., 272 S.W. 1031—*Pool v. Wilkinson*, 257 S.W. 182, 216 Mo. App. 164.

Mont.—*Conrad Mercantile Co. v. Siler*, 241 P. 617, 75 Mont. 36.

S.C.—*People's Bank v. Walker*, 128 S.E. 715, 132 S.C. 254.

S.D.—*Aalseth v. Simpson*, 231 N.W. 289, 57 S.D. 118.

11 C.J. p 617 note 94.

23. Mo.—*Birmingham v. Carr*, 197 S.W. 711, 196 Mo.App. 411.

Termination of waiver

Whether waiver of lien terminated at a particular time was question for jury.—*Simonds v. Bishop*, Vt., 196 A. 754.

24. S.C.—*Cudd v. Rogers*, 98 S.E. 796, 111 S.C. 507.

25. Mo.—*Blake v. Keiser*, App., 267 S.W. 94.

26. Mo.—*Blake v. Keiser*, supra.

27. Tex.—*American Nat. Bank v. San Marcos First Nat. Bank*, 92 S.W. 439, 41 Tex.Civ.App. 392.

28. Ala.—*Littleton v. Abernathy*, 70 So. 282.

29. Ala.—*Miller v. Bryant*, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

N.Y.—*Commercial Motors Mortgage Corporation v. Mack International Motor Truck Corporation*, 209 N.Y.S. 661, 213 App.Div. 25.

Tex.—*Smith v. Stamford Gin Co.*, Civ.App., 74 S.W.2d 519, error dismissed.

30. Iowa.—*Wertheimer & Degen v. Parsons*, 229 N.W. 829, 209 Iowa 1241.

whether a retaking of the property by a party to the mortgage under color of right is malicious,³¹ or questions depending on a construction of the mortgage.³² Whether an action for conversion was prosecuted with "reasonable diligence" within a statute relating to the measure of damages is a question of law;³³ and on a question of title to personalty between certain mortgagees and a purchaser from the vendor of the mortgagees, the ownership of the property at the time of the execution of the mortgage is a question of law, dependent on findings of facts as to the possession of the property at the time of the mortgage.³⁴

b. Instructions

Correct instructions should be given on all matters put in issue by pleadings and proof.

The court should fairly submit to the jury instructions embodying a correct statement of the law applicable to the issues and facts,³⁵ and should inform the jury of the exact status of the case un-

der the pleadings and evidence,³⁶ but in accordance with well-settled rules of practice, the instructions must be strictly confined to the issues and proof.³⁷ An instruction leaving it to the jury to say what is a valid mortgage, without telling what constitutes such mortgage, is erroneous.³⁸ The fact that the court in referring to plaintiff in its instructions used the word "owner" is immaterial,³⁹ and a failure to charge in regard to a point not in issue is not a ground for a new trial.⁴⁰ Requested instructions which are misleading should be refused,⁴¹ and if given they afford ground for a new trial.⁴² So, instructions that ignore matters in issue should be refused.⁴³ In determining the validity of the instructions, they are to be construed as a whole.⁴⁴ There is no error in refusing a requested instruction which is fully covered by other proper instructions.⁴⁵

c. Verdict and Findings

The verdict and findings should be reasonably definite

Sufficiency of description as question of law generally see supra § 71.

31. Ohio. — White Co. v. Canton Transp. Co., 2 N.E.2d 501, 131 Ohio St. 190.

32. Ill.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403.

33. N.D.—Nathan v. Sax Motor Co., 256 N.W. 228, 64 N.D. 773.

Two or three weeks

Where the mortgagee sues within two or three weeks after he learns of the conversion, the action is, as a matter of law, prosecuted with reasonable diligence.—Nathan v. Sax Motor Co., supra.

34. Mo.—Bell v. Barnes, 87 Mo.App. 451.

35. Ala.—Neeley v. Reynolds, 72 So. 124.

11 C.J. p 617 note 3.

Instructions held proper

(1) Ownership of mortgaged property.—Conway v. Alexander, 205 N. W. 351, 200 Iowa 705.

(2) Plaintiff's right to possession at maturity of mortgage note.—Blake v. Keiser, Mo.App., 267 S.W. 94.

(3) Sale before execution of mortgage.—Warner v. Carter, 198 P. 960, 109 Kan. 285.

(4) Right of defendant sheriff to seize property belonging to mortgagor.—Hallfors v. Gove, 114 N.E. 314, 225 Mass. 266.

(5) Effect of payment of the mortgage debt.—Hampton v. Tant, 73 So. 825, 15 Ala.App. 463.

(6) Delivery and acceptance of goods for which mortgage given.—Massey-Harris Harvester Co. v.

Quick, 87 S.W.2d 446, 229 Mo.App. 1136.

(7) Share cropper's rights in crop before and after its division with landlord, and his right to have it applied to mortgage.—People's Bank v. Walker, 128 S.E. 715, 132 S.C. 254.

(8) Indebtedness of mortgagor to mortgagee.—Fairey v. Haynes, 96 S. E. 694, 111 S.C. 132.

(9) Sale of mortgaged chattel by sheriff.—Burton v. Jennings, 148 A. 424, 158 Md. 254.

36. Ala.—Miller v. Bryant, 151 So. 362, 25 Ala.App. 564, certiorari denied 151 So. 366, 227 Ala. 570.

Intervention

Charges that action against mortgagors was in effect action by mortgagee against intervener, and that plaintiff suggested that dealings between defendants and intervener, who belonged to same family, were to defeat recovery, were held proper under pleadings and evidence.—Miller v. Bryant, supra.

Burden of proof

In replevin, an instruction which declared that the burden was on plaintiff to prove that he had a bona fide mortgage on chattels claimed by him was correct.—Pfeifer v. Basgall, 211 P. 134, 112 Kan. 269.

37. Ohio. — White Co. v. Canton Transp. Co., 2 N.E.2d 501, 131 Ohio St. 190.

11 C.J. p 617 note 4.

Instructions erroneous under proof

Ala.—Campbell Motor Co. v. Stanfield, 108 So. 515, 214 Ala. 506—Monroe Stock & Exchange Co. v. Thames, 100 So. 348, 211 Ala. 320. Mass.—Hallfors v. Gove, 114 N.E. 314, 225 Mass. 266.

Ohio.—White Co. v. Canton Transp. Co., 2 N.E.2d 501, 131 Ohio St. 190. S.C.—Fairey v. Haynes, 96 S.E. 694, 111 S.C. 132.

38. Ill.—Cope v. Brentz, 190 Ill.App. 504.

39. Mo.—Hardy v. Graham, 63 Mo. App. 40.

40. Conn.—Potter v. Payne, 21 Conn. 361.

11 C.J. p 618 note 7.

Adverse possession

Refusal to instruct in replevin that it was essential that pledgee held "adversely" to owner was not error, where it was only necessary to submit question whether agreement for pledgee's possession was made and acted on.—Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.

41. N.M.—Bank of Commerce of Taiban v. Duckworth, 204 P. 53, 27 N. M. 627.

42. Colo.—Meador v. Cullison, 120 P. 145, 52 Colo. 172.

Mo.—Drumm-Flato Commn. Co. v. Gerlach Bank, 81 S.W. 503, 107 Mo. App. 426.

43. Ala.—Wilson v. Johnson, 44 So. 539, 152 Ala. 614.

Mo.—Layson v. Cooper, 73 S.W. 472, 174 Mo. 211, 97 Am.S.R. 545.

Mont.—Potter v. Lohse, 77 P. 419, 31 Mont. 91.

11 C.J. p 618 note 9.

44. Ala.—Peterman v. Henderson, 40 So. 756.

Ind.T.—Boyertown Nat. Bank v. Schufelt, 82 S.W. 927, 5 Ind.T. 27, affirmed 145 F. 509, 76 C.C.A. 187. Kan.—Warner v. Carter, 198 P. 960, 109 Kan. 285.

45. Kan.—Neal v. Cole, 223 S.W. 18, 144 Ark. 547.

and certain, conforming to the issues and proof and to the requirements of the particular form of action.

The verdict and findings must conform to the issues and proof,⁴⁶ and be reasonably definite and certain,⁴⁷ sufficiently identifying the property,⁴⁸ so that a judgment based on it can be enforced with reasonable certainty.⁴⁹ Where findings are required, there should be a finding on every material issue.⁵⁰

Where a third person is sued by a mortgagee for conversion, a verdict is sufficient when the jury find for the successful party generally,⁵¹ unless there are several mortgages given under different circumstances.⁵²

The verdict in replevin should be in the alternative for the recovery of the chattel or in case possession cannot be had, for a specified sum of money.⁵³ It must ordinarily determine the amount of the mortgagee's interest in, or claim on, the property,⁵⁴ but this principle, while applicable as between the mortgagee and the general owner has no application in an action by the mortgagee against a third person not the owner,⁵⁵ especially where there was no request for a finding as to the extent of the mortgagee's interest.⁵⁶ Where required by statute, the verdict must fix the value of the chattels at the time of trial or set forth the reason why the value

was not fixed.⁵⁷ Under statutes providing that defendant may show any payment which has been made on the mortgage and that judgment shall be rendered for the property or the amount due, the verdict should be such as to permit a judgment in accordance with the statute.⁵⁸ So, if the right of possession changes between the commencement of the action and the date of trial, the verdict and judgment should adjust the equities as they existed at the time of trial.⁵⁹ Where defendant prevails but does not ask for return of the property, a general verdict on his counterclaim for actual and punitive damages resulting to him from the unlawful taking has been held proper.⁶⁰

Under statutes so providing, in detinue by the mortgagee or his assignee against the mortgagor or one holding under him, defendant may on suggestion require the jury to ascertain the amount of the mortgage debt.⁶¹

§ 244. Judgment

The judgment should conform to the issues, proof, and findings, and, when required by the circumstances, should be in the alternative.

As in other civil actions the judgment in an action by the chattel mortgagee should conform to the issues, proof, and findings.⁶² A judgment in ex-

46. Ill.—See *Kennedy Furniture Co. v. Griffin*, 194 Ill.App. 530.

Mo.—*K-M Supply Co. v. Moran*, App., 53 S.W.2d 419.

Tex.—*Flagg v. Matthews*, Civ.App., 287 S.W. 299.

11 C.J. p 618 note 12.

Consistency of verdict and findings

A finding made by jury and returned in verdict that landlord received proceeds of tenant's crop on which plaintiff had mortgage is not inconsistent with an implied finding by the court that landlord was guilty of conversion.—*Hooser v. G. M. Carlton Bros. & Co.*, Tex.Civ.App., 288 S.W. 1095.

47. S.C.—*Bagnal Rankin Motor Co. v. Nesmith-Flowers Co.*, 110 S.E. 150, 118 S.C. 297.

11 C.J. p 618 note 18.

48. S.C.—*Bagnal Rankin Motor Co. v. Nesmith-Flowers Co.*, supra.

49. S.C.—*Bagnal-Rankin Motor Co. v. Nesmith-Flowers Co.*, supra.

Verdict held sufficient

S.C.—*Bagnal Rankin Motor Co. v. Nesmith-Flowers Co.*, supra.

50. Cal.—*Davis v. Monte*, 253 P. 352, 81 Cal.App. 164.

Fraud as material issue

In replevin, issue raised by pleadings as to whether mortgagee and seller of cattle made false representations with intent to deceive buyer

and mortgagor was material as respects findings.—*Davis v. Monte*, supra.

51. Wis.—*Blakeslee v. Rossman*, 44 Wis. 550.

52. Neb.—*Jones v. Loree*, 56 N.W. 390, 37 Neb. 816.

53. S.C.—*Bagnal Rankin Motor Co. v. Nesmith-Flowers Co.*, 110 S.E. 150, 118 S.C. 297.

54. Mo.—*Dixon v. Atkinson*, 86 Mo. App. 24.

Wis.—*Burke v. Birchard*, 1 N.W. 351, 47 Wis. 35.

11 C.J. p 618 note 16.

In South Carolina

In a claim and delivery action to recover possession of property covered by a chattel mortgage, the jury may be directed to find the property's real value and also plaintiff's interest therein, under the statute authorizing the answering of particular questions, and the fact that defendant mortgagor pleaded no counterclaim did not defeat his right to have the amount of the mortgagee's interest determined, especially as the statute authorizes the jury to find the amount due plaintiff. — *Greene v. Washington*, 89 S.E. 649, 105 S.C. 137.

55. Or.—*Farmers' Loan & Mortgage Co. v. Hansen*, 260 P. 999, 123 Or. 72.

56. Or.—*Farmers' Loan & Mortgage Co. v. Hansen*, supra.

57. N.Y.—*New York Yellow Cab Co. Sales Agency v. Courtlandt Garage & Realty Corporation*, 227 N.Y.S. 315, 223 App.Div. 44.

58. Ark.—*Wilson v. McCown*, 147 S. W. 451, 103 Ark. 422.

59. N.D.—*Smythe v. Muri*, 158 N.W. 264.

11 C.J. p 618 note 20.

60. S.C.—*Sandel v. Whisenhunt*, 167 S.E. 166, 168 S.C. 129.

61. Ala.—*Phillips v. Morris*, 53 So. 1001, 169 Ala. 460—*Beal v. McKee*, 43 So. 235, 150 Ala. 478—*Thompson v. Greene*, 4 So. 735, 85 Ala. 240.

11 C.J. p 618 note 17.

62. Ill.—See *Kissel Motor Co. v. Docauer*, 198 Ill.App. 43.

N.D.—*Thompson Realty Co. v. Mowbray*, 214 N.W. 908, 55 N.D. 732.

Parties

(1) Chattel mortgagor, made party defendant in replevin action, although in default, was party to action, and judgment could be entered against mortgagor.—*Wiggins v. Russell*, 236 N.Y.S. 657, 227 App.Div. 742.

(2) Judgment for second mortgagees against conditional seller of mortgaged furniture for surplus proceeds of latter's unlawful resale thereof, after satisfaction of first

cess of the ad damnum is erroneous.⁶³

In an action by the mortgagee against the mortgagor for conversion of the mortgaged goods, a judgment for plaintiff in the alternative should be for a return of the property or for the payment of the mortgage debt and interest.⁶⁴ A mortgagee's judgment against a third person for a tort causing the destruction of the mortgaged property stands in the place of the mortgage, and the mortgagor is entitled to any surplus over the amount necessary to discharge the mortgage debt.⁶⁵ Sums collected from a second mortgagee on a judgment against him and the mortgagor for conversion should be credited on the judgment against the mortgagor,⁶⁶ and the sums collected from the mortgagor should be credited on the judgment against the subsequent mortgagee.⁶⁷ The satisfaction of a judgment for the conversion of a mortgaged chattel, the condition of which had been breached prior to the recovery of such judgment, gives a judgment debtor the full title of both the mortgagor and the mortgagee.⁶⁸

In replevin the judgment should describe the chattels definitely enough to enable the sheriff to execute the writ,⁶⁹ but where the complaint contains a definite description, merely listing them in the judgment and referring to the complaint is sufficient.⁷⁰ Property not covered by the mortgage but replevied by the mortgagee should be ordered re-

turned to defendant.⁷¹ A judgment for plaintiff should be for the possession of the property or for its value not to exceed the amount of the mortgage debt with damages for detention;⁷² and if the judgment is for defendant it should, likewise, be in the alternative for the return of the property or its value if return cannot be had.⁷³ Where there are several defendants, the alternative money judgment is properly a joint one in favor of all defendants.⁷⁴ A statute providing that where the prevailing party is not in possession at the time of trial the judgment must always be in the alternative, for possession or value if possession cannot be had, does not apply, however, where the action was discontinued for want of jurisdiction.⁷⁵ Where there are several mortgages on the property in controversy, judgment for the aggregate indebtedness can be rendered, and the particular items need not be specified.⁷⁶ If at the time replevin is begun the mortgagee is not entitled to possession but becomes entitled pending the action, judgment should be against him for costs but without an order for the return of the property.⁷⁷ No sale of the property can be ordered in an action of replevin, for it is not a proceeding to foreclose.⁷⁸ Where the property was returned to defendant on execution of a delivery bond, judgment for plaintiff may be rendered against the sureties on the bond.⁷⁹ Where in replevin for goods sold by plaintiff to defendant and

mortgage was proper, although second mortgagees' cross complaint was against mortgagors only, where all parties were before court and all facts entitling second mortgagee to relief granted were fully pleaded.—*Walker v. Houston*, 12 P.2d 952, 215 Cal. 742, 87 A.L.R. 337.

Trial of right of property

Judgment, in trial of right of property, is erroneous that does not merely subordinate and make attachment lien subject to mortgagee claimant's possessory right if claimant, if still holding possession, be successful in proceeding.—*Sanders v. Farrier*, Tex.Civ.App., 271 S.W. 293.

63. Mo.—*Payne v. King*, 124 S.W. 1066, 141 Mo.App. 246.

64. Kan.—*Wolfley v. Rising*, 12 Kan. 535.

N.Y.—*Allen v. Judson*, 71 N.Y. 77.
N.C.—*Taylor v. Hodges*, 11 S.E. 156, 105 N.C. 344.

65. Kan.—*Woodrum v. Washington Nat. Bank*, 55 P. 333, 60 Kan. 44.
11 C.J. p 619 note 28.

66. Tex.—*Bailey v. Culver*, Civ.App., 175 S.W. 1083.

67. Tex.—*Bailey v. Culver*, supra.

68. N.Y.—*Marsden v. Cornell*, 62 N.

Y. 215—*Hof v. Mager*, 154 N.Y.S. 60, 168 App.Div. 318.

69. Or.—*First Nat. Bank of Sheridan v. Yocom*, 189 P. 220, 96 Or. 438.

70. Or.—*First Nat. Bank of Sheridan v. Yocom*, supra.

71. Ill.—*Talty v. Schoenholz*, 224 Ill. App. 158.

72. Okl.—*Todd v. Webb*, 272 P. 380, 134 Okl. 107.
11 C.J. p 618 note 23.

Unsecured debt

Where plaintiff brings replevin for mortgaged property, and includes in petition an item on open account not covered and secured by the mortgage, it is error to include such item in the alternative judgment.—*Simpson v. Butts*, 226 P. 332, 99 Okl. 168.

73. Wash.—*Roche Fruit & Produce Co. v. Lane*, 255 P. 955, 143 Wash. 700—*Roche Fruit & Produce Co. v. Vaught*, 255 P. 953, 143 Wash. 601.

In Illinois, under the controlling statute, if the property was held for payment of money and plaintiff fails in his action, judgment in alternative that plaintiff either pay the bill or return the property is proper.—*Nathan M. Stone Co. v. Ellerson*, 230 Ill.App. 593.

74. Wash.—*Roche Fruit & Produce Co. v. Lane*, 255 P. 955, 143 Wash. 700—*Roche Fruit & Produce Co. v. Vaught*, 255 P. 953, 143 Wash. 601.

75. Minn.—*Security State Bank of Ellendale v. Anderson*, 236 N.W. 617, 183 Minn. 322.

Custody of bankruptcy court

"In replevin by mortgagee to obtain possession of mortgaged chattels from the mortgagor, it appearing that the latter had been adjudged a bankrupt and that the mortgaged property was in the custody of the federal court, although a return of the property cannot be had, defendant was not entitled to a judgment for its value."—*Security State Bank of Ellendale v. Anderson*, 236 N.W. 617, 183 Minn. 322.

76. Mo.—*Peters v. Lowenstein*, 44 Mo.App. 406.

77. Ill.—*Chase Bros. Piano Co. v. Conners*, 182 Ill.App. 418.

78. Ark.—*Marks v. McGehee*, 35 Ark. 217.

N.C.—*Phillips v. Little*, 61 S.E. 49, 147 N.C. 282.
11 C.J. p 618 note 27.

79. Ark.—*Carroll v. Swicord*, 9 S.W. 2d 733, 177 Ark. 1193.

covered by a chattel mortgage, defendant prevails on his cross bill for rescission, the judgment should award the chattels to plaintiff on placing defendant in statu quo.⁸⁰ Defendant cannot complain that the judgment did not expressly determine the question of title to all the property replevied, where the property was returned to him on his giving the requisite bond, so that his possession and title cannot be questioned by plaintiff.⁸¹ In an action to replevin chattels for nonpayment of the buyer's note secured by mortgage on the chattels, in which the buyer filed a counterclaim, if plaintiff's note with interest exceeds the amount defendant may recover on his counterclaim, then plaintiff would be entitled to recover in replevin, and his special interest in the chattel may be determined, and judgment given accordingly, but if recovery on defendant's counterclaim should equal or exceed the amount of plaintiff's note, then defendant should have judgment for the difference, and plaintiff would fail in replevin.⁸² Judgment against a labor lien claimant and in favor of a mortgagee whose mortgage has ceased to be a valid lien should condition possession on payment of defendant's lien.⁸³ A final judgment for plaintiff in replevin is an adjudication that a default existed on the chattel mortgage when the suit was commenced,⁸⁴ and determines disputed questions of fact raised at the trial.⁸⁵

In a suit in detinue by the mortgagee against the mortgagor, where plaintiff took the property under a replevy bond and foreclosed it under power

of sale pending the detinue suit, it was proper for the judgment to show the balance of the mortgage debt ascertained by the verdict, representing the amount due after applying the proceeds of the foreclosure sale;⁸⁶ and where the mortgagee sues in detinue for possession of the chattel, and in another count sues on the note secured by the mortgage, and the jury return a verdict for plaintiff on both counts, a judgment is proper which provides that defendant's payment of the judgment on the note count, within the time fixed by law prior to the issuance of execution, should be in full satisfaction of the judgment rendered.⁸⁷

Costs may be taxed in plaintiff's favor although he proved title to only part of the property replevied, where defendant denied and contested his right to any of it.⁸⁸ Absence of a demand for possession, although not a defense to an action therefor, may be considered in awarding costs.⁸⁹

§ 245. Damages and Amount of Recovery

Except in so far as the mortgagee's recovery may be limited to his special interest in the property, his damages and the elements thereof are ascertained under rules of general application to the particular remedy invoked.

In trover by a mortgagee against the mortgagor or one holding under him for the conversion of the mortgaged property, the measure of damages is ordinarily held to be the amount of the mortgage debt and interest, not to exceed the value of the property.⁹⁰ In an action against a stranger or a

80. Mo.—Mack International Motor Truck Corporation v. Raining, App., 251 S.W. 107.

81. Wis.—Stradling v. Nelson, 202 N.W. 691, 186 Wis. 308.

82. Mo.—Caruthersville Plumbing & Auto Co. v. Lloyd, App., 240 S.W. 838.

83. Ill.—Bower v. Popp, 241 Ill.App. 568.

84. Colo. — French v. Commercial Credit Co., 64 P.2d 127, 99 Colo. 447.

85. Colo.—Rocky Mountain Seed Co. v. McArthur, 272 P. 1117, 85 Colo. 1.

Possession

Judgment in plaintiff's favor in replevin action by mortgagee, to recover automobile levied on by defendant, determined disputed question as to whether execution sale to third party was merely colorable, and whether defendant was in fact in possession of the car at the time of commencement of the action.—Rocky Mountain Seed Co. v. McArthur, *supra*.

86. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

87. Ala.—Singer v. National Bond & Investment Co., 118 So. 561, 218 Ala. 375.

88. N.C.—Phillips v. Little, 61 S.E. 49, 147 N.C. 282.

Wis.—Stradling v. Nelson, 202 N.W. 691, 186 Wis. 308.

In trial of right of property, proof of payment to claimant, chattel mortgagee, subsequent to time action began, may be cause in proper case for adjudging costs accruing before date of payment in favor of claimant.—Sanders v. Farrier, Tex. Civ.App., 271 S.W. 293.

89. Ala. — International Harvester Co. of America v. Pittman, 147 So. 144, 226 Ala. 355.

90. Ga. — Blanchard v. Farmers' State Bank, 124 S.E. 695, 158 Ga. 780.

Idaho.—Bodenhamer v. Pacific Fruit & Produce Co., 295 P. 243, 244, 50 Idaho 248, quoting *Corpus Juris*.

Ill.—National Bond & Inv. Co. v. Zakos, 230 Ill.App. 608.

La.—J. H. McMahon & Co. v. Winn Motor Co., 8 La.App. 775.

Miss.—Love v. Mississippi Cotton-

seed Products Co., 165 So. 446, 174 Miss. 697.

Mont.—Robison v. Dover Lumber Co., 191 P. 383, 58 Mont. 231.

Okl.—Black, Sivals & Bryson v. Loofburrow, 57 P.2d 836, 176 Okl. 506.

Tex.—Terry v. Spearman, Com.App., 259 S.W. 563, reversing, Civ.App., 246 S.W. 103—Universal Credit Co. v. Gasow-Howard Motor Co., Civ. App., 73 S.W.2d 909, error dismissed.

11 C.J. p 619 note 33.

"Highest market value"

"Where a person brings an action for the recovery of damages for the conversion of property on which he had a chattel mortgage, within two or three weeks after he learns of the conversion, such action is prosecuted with reasonable diligence, and plaintiff may elect to recover the 'highest market value of the property at any time between the conversion and the verdict without interest,' as provided by section 7168, subd. 2 of the Compiled Laws."—Nathan v. Sax Motor Co., 256 N.W. 228, 64 N.D. 773.

Manner of allowing credits on mortgage is immaterial where it

trespasser ab initio, however, the mortgagee may recover the full value of the property.⁹¹ As against a conditional seller of property mortgaged by the purchaser, the mortgagee can recover only the value of his special interest in the property;⁹² but where the conditional seller converted the property by reselling it after the mortgagee tendered the balance due him, plaintiff's damages are not limited to the difference between the proceeds of the resale and the balance due on the conditional sales contract, the measure of damages being the amount due under the mortgage including interest costs, and attorney's fees.⁹³

In some jurisdictions recovery of damages may include interest from the date of conversion,⁹⁴ the amount expended by plaintiff in following the property,⁹⁵ and attorney's fees where the mortgage provides that it shall cover the expenses of collection.⁹⁶ In a statute authorizing the mortgagee to recover the highest market value of the property at any time between the conversion and verdict "without interest," the quoted words refer to interest on the market value, and do not preclude recovery of interest on the mortgage.⁹⁷ A mortgagee who accepts the net proceeds of a sale of a portion of the mortgaged chattels, knowing they were sold in violation of the terms of the mortgage, is not in a subsequent action for conversion entitled to recover the gross proceeds without deduction of the expenses

usually incident to such transaction.⁹⁸ In an action against a warehouseman for conversion of chattels stored with the mortgagee's consent, the storage charges are deductible from the amount of plaintiff's recovery.⁹⁹ Amounts paid by defendant to satisfy claims against the property not constituting liens prior to the mortgage cannot be deducted from the mortgagee's recovery.¹ A landlord who intervenes claiming a superior lien on the crop can recover only an amount which will suffice completely to indemnify him from actual injury.²

Replevin. While in some jurisdictions a mortgagee's recovery is limited to his special interest in the property,³ ordinarily in replevin by the mortgagee, in case a return of the property cannot be had, the mortgagee is entitled to a judgment for the amount of his debt with interest and costs not in excess of the value of the property,⁴ together with, in some jurisdictions, where condition has been broken, interest on the value of the property from the time it was taken to the date of judgment.⁵ Likewise when conditions in a note secured by chattel mortgage making attorney's fee payable have been met, the fee is collectable in a replevin action for the mortgaged property,⁶ but there can be no recovery of attorney's fees in the absence of a provision therefor in the note or mortgage.⁷ The mortgagee, if successful, may recover damages for the detention of the property,⁸ the measure thereof

merely went to amount due on mortgage and could not have extinguished mortgage debt and thus prevent recovery, and the assignment of error went to the rendition of a judgment for plaintiff and not to the amount thereof or the improper allowance of credits.—*Arnold v. Sutherlin*, 114 So. 140, 216 Ala. 546.

91. Mass.—*Industrial Bankers of Massachusetts v. Reid, Murdoch & Co.*, 8 N.E.2d 19.

11 C.J. p 619 note 34.

Stipulated value

Where the mortgage covered other property, and the debt was much greater than the retail value of the property taken, the mortgagee was properly given judgment only for value stipulated in mortgage, regardless of the retail value thereof.—*Plauche-Locke Securities v. Securities Sales Co. of Louisiana*, 125 So. 729, 169 La. 601.

92. Cal.—*Pacific Finance Corporation v. Hendley*, 284 P. 736, 103 Cal. App. 335, hearing denied and modified on other grounds 285 P. 1048.

93. Cal.—*Walker v. Houston*, 12 P. 2d 952, 215 Cal. 742, 87 A.L.R. 937.

94. Mass.—*Barry v. Bennett*, 7 Metc. 354.

Tex.—*Farmers' State Bank v. Bell*,

Civ.App., 176 S.W. 922—*Barron v. San Angelo Nat. Bank*, Civ.App., 133 S.W. 142.

11 C.J. p 619 note 35.

95. Mont.—*Talmage-Sayer Co. of Joliet v. Smith*, 7 P.2d 536, 91 Mont. 289.

11 C.J. p 620 note 55.

96. Cal.—*Walker v. Houston*, 12 P. 2d 952, 215 Cal. 742, 87 A.L.R. 937.

11 C.J. p 619 note 35.

97. N.D.—*Nathan v. Sax Motor Co.*, 256 N.W. 228, 64 N.D. 773.

98. Tex.—*Campbell & Rosson Live Stock Commission Co. v. Border Nat. Bank of El Paso*, Com.App., 270 S.W. 539, reversing *Border Nat. Bank of El Paso v. Campbell & Rosson Live Stock Commission Co.*, Civ.App., 248 S.W. 780.

99. Idaho.—*Vollmer Clearwater Co. v. Union Warehouse & Supply Co.*, 248 P. 865, 43 Idaho 37.

1. Idaho.—*Vollmer Clearwater Co. v. Union Warehouse & Supply Co.*, supra.

2. N.D.—*Maxbass State Bank v. Hurley Farmers' El. Co.*, 156 N.W. 921, 33 N.D. 272.

3. S.C.—*Greene v. Washington*, 89 S.E. 649, 105 S.C. 137.

4. Ariz.—*Continental Securities Co. v. Yuma Nat. Bank*, 176 P. 572, 578, 20 Ariz. 13, citing *Corpus Juris*.

Okl.—*Todd v. Webb*, 272 P. 380, 134 Okl. 107.

11 C.J. p 619 note 38.

Amount due under mortgage

Measure of alternative recovery, in mortgagee's action of claim and delivery to recover cattle for foreclosure, is amount due under mortgage.—*Aalseth v. Simpson*, 231 N.W. 289, 57 S.D. 113.

5. Wis.—*Klinkert v. Fulton Storage, etc., Co.*, 89 N.W. 507, 113 Wis. 493.

6. Okl.—*First Nat. Bank of Stigler v. Howard*, 158 P. 927, 59 Okl. 237.

7. S.C.—*Fox v. Fox*, 92 S.E. 477, 107 S.C. 250.

8. Ill.—*Mason v. Fenn*, 13 Ill. 525.

Wis.—*Bates v. Wilbur*, 10 Wis. 415.

Nominal damages

In replevin for furniture claimed under a chattel mortgage, an allowance of fifty dollars damages for detention was excessive, where the testimony warranted only nominal damages.—*Pool v. Wilkinson*, 257 S.W. 182, 216 Mo.App. 164.

being the interest on the value of the property during the period of detention, where such value does not exceed the mortgage debt;⁹ and where it is shown that both the taking and the detention were unlawful, he is entitled to recover the damages to the goods directly caused by the taking and detention,¹⁰ although the value of the goods is in excess of the amount due under the mortgage.¹¹ In the absence of possession or right of possession, however, the mortgagee cannot recover damages for being deprived of possession;¹² and where he is entitled to possession merely for the purpose of foreclosure he cannot recover the value of the use of the property as special damages for its detention.¹³ Where the mortgagees have taken possession before their right accrues and the mortgagor recovers possession of the property by replevin and sells it, the mortgagees are entitled to a judgment in the replevin action for the amount of their debt less the damages for the detention of, and damages to, the property, notwithstanding their debt is not yet due.¹⁴

Where plaintiff wrongfully seized the mortgaged property in the replevin action, defendant is entitled to recover such actual damages as are right and proper under the circumstances.¹⁵ So, where plaintiff converted the property seized, defendant is entitled to have the value of the property assessed as of the date it was taken¹⁶ and to recover the value of his interest therein¹⁷ together with damages for the detention where plaintiff was not entitled to possession at the time of the seizure of the property.¹⁸ A judgment in favor of the mortgagor

for damages should be reduced by the amount due to the mortgagee on the mortgage,¹⁹ unless that would result in allowing the mortgagee to collect his claim before it matured.²⁰ The foregoing rules apply on waiver by the mortgagor of return of the property wrongfully taken.²¹ Although damage resulting from detention will be presumed on judgment for recovery of the chattels by defendant, in the absence of evidence of the amount thereof only nominal damages can be allowed.²² So although judgment is for defendant, it should be for nominal damages in case the value of the property does not exceed the mortgage lien.²³ In an action for possession by the mortgagee on the ground that condition has been broken, defendant cannot recover special damages for an alleged wrongful taking by plaintiff unless such special damages are alleged in his pleading.²⁴ So where the mortgagee prematurely takes possession of the property in a claim and delivery action, but before the trial the mortgagor defaults, the mortgagor is entitled only to damages for unlawful detention and the costs of action.²⁵

In trespass against an officer taking the mortgaged property on execution against the mortgagor, and holding it until he was paid the amount of the execution and his fees by the mortgagee, the measure of damages is the amount paid with interest together with reasonable compensation for the taking and detention.²⁶

In detinue recovery may be had for the use or hire of the mortgaged property during the time it is

9. Okl.—Chattanooga State Bank v. Citizens' State Bank, 134 P. 954, 39 Okl. 255.

10. Deterioration in value

The mortgagee of an automobile may recover from a purchaser from the mortgagor for the use of the car and the amount it has deteriorated, if its value has deteriorated below the amount due on the mortgage, with costs.—Rogers v. Booker, 113 S. E. 671, 184 N.C. 183.

11. Mass.—Allen v. Butman, 138 Mass. 586.

12. Tex.—Fritz Motor Co. v. Gabert, Civ.App., 41 S.W.2d 72, error dismissed.

13. Wyo.—McDaniel v. Hoblit, 245 P. 295, 34 Wyo. 509.

11 C.J. p 620 note 48.

14. Mo.—Cummings v. Badger Lumber Co., 109 S.W. 68, 130 Mo.App. 557.

15. Wyo.—Jones v. Parker, 273 P. 687, 39 Wyo. 423.

Award held proper

Tex.—Landry v. Erkman, Civ.App., 69 S.W.2d 206.

16. Mo.—Stockham v. Leach, 238 S. W. 853, 210 Mo.App. 407.

17. Mo.—Stockham v. Leach, 238 S. W. 853, 210 Mo.App. 407—McWherter v. Randall, 232 S.W. 1070, 207 Mo.App. 465.

18. Mo.—McWherter v. Randall, supra.

19. Mo.—Stockham v. Leach, 238 S. W. 853, 210 Mo.App. 407—McWherter v. Randall, 232 S.W. 1070, 207 Mo.App. 465.

11 C.J. p 619 note 42.

20. Neb.—Manker v. Sine, 53 N.W. 734, 35 Neb. 746.

21. Mich.—Theatre Equipment Acceptance Corporation v. Betman, 253 N.W. 201, 266 Mich. 22.

"Defendant, having waived return of the property, was entitled to recover the value thereof as of the time of the taking, less the amount of plaintiff's lien thereon at that time, and to have damages, if any, occasioned by the wrongful taking."—Theatre Equipment Acceptance

Corporation v. Betman, 242 N.W. 903, 904, 259 Mich. 245.

Theater equipment

Where defendant waived return of property after wrongful replevin of theater equipment, damages were properly confined to value of chattels taken, less amount of plaintiff's lien, plus interest on balance due defendant and expense of reinstalling property taken.—Theatre Equipment Acceptance Corporation v. Betman, 253 N.W. 201, 266 Mich. 22.

22. Cal.—Chowchilla Nat. Bank v. Nilmeier, 256 P. 298, 83 Cal.App. 18.

23. Ohio.—Coe v. Peacock, 14 Ohio St. 187.

11 C.J. p 620 note 44.

24. S.C.—Fuller v. McLeod, 74 S.E. 647, 91 S.C. 328.

25. Mo.—McWherter v. Randall, 232 S.W. 1070, 207 Mo.App. 465.

11 C.J. p 620 note 51.

26. N.H.—Carpenter v. Cummings, 40 N.H. 158.

detained,²⁷ but where the mortgagee voluntarily promised to postpone the date for surrendering the property, and no demand was made, no damages for detention prior to suit filed should be awarded.²⁸ Under some statutes defendant may, upon suggestion, require the amount of the mortgage debt to be ascertained, in which case the issues are broadened so as to include every item due on the mortgage,²⁹ which should be ascertained as of the date of the trial, not of date suit brought.³⁰ Where defendant pleads breach of warranty by plaintiff as to the soundness of the property the purchase price of which constitutes the consideration of the mortgage, the defense, if sustained, reduces the amount of the mortgage debt by the difference between the agreed price and the real value at the time of the sale.³¹ Damages from seizure under the writ pleaded by defendant in set-off and recoupment cannot be recovered if too remote.³²

Injury to chattels. The measure of damages in an action at law by the mortgagee to recover for injury to the mortgaged property is the value of such property, not what the mortgagor may owe the mortgagee on the mortgage debt in an accounting between them;³³ but in an action by a mortgagee not entitled to possession to recover damages for the impairment of his security, it has been held that the damages depend upon the extent to which the lien has been impaired, and are confined to the loss

suffered by the mortgagee for injury to his reversionary interest.³⁴ In an action for damages to property wrongfully removed but subsequently restored, the mortgagee can recover the difference in value before the wrong and afterward or the cost of repair, whichever is less.³⁵

Mitigation of damages. In mitigation of damages it can be shown that the mortgage was fraudulent as to creditors, although it covered exempt property only, and therefore could not be set aside,³⁶ or that plaintiff had received his debt out of the goods left in his possession;³⁷ but a return or a replacement of the goods after they have been converted,³⁸ or an application of the proceeds to pay off a lien which was prior to the mortgage,³⁹ cannot be shown in mitigation of damages. Actual payment on the debt will be considered in reduction of damages.⁴⁰

Exemplary damages. If the conversion was in reckless and wanton disregard of his rights, the mortgagee may recover exemplary damages,⁴¹ but not otherwise.⁴²

In an action by a junior mortgagee for conversion the rule stated in *Corpus Juris*, which has been cited with approval, is that he is entitled to recover the value of his interest in the mortgaged property, and the value of his interest is reduced by the amount due on the prior liens.⁴³

27. Va.—Hardaway v. Jones, 41 S.E. 957, 100 Va. 481.

28. Ala. — International Harvester Co. of America v. Pittman, 147 So. 144, 226 Ala. 355.

29. The purpose is to determine the amount still due to be paid the mortgagee for the release of the property or its value from the judgment in detinue.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

Attorney's fees

Where chattel mortgage note provides for attorney's fees under conditions existing at time of suit, fees become part of amount due, provable on suggestion.—Johnson v. Hill, 124 So. 394, 23 Ala.App. 286.

30. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

31. Ala.—Hood v. Jenkins, 75 So. 871, 16 Ala.App. 180, certiorari denied Ex parte Hood, 76 So. 741, 200 Ala. 543.

32. Ala.—Murphy v. Hays, 130 So. 202, 221 Ala. 566.

Closing of mill

In detinue for recovery of mort-

gaged live stock, damages from seizure under writ before defendant made bond for repossession because sawmill was closed down as consequence are not recoverable, since too remote.—Murphy v. Hays, supra.

33. S.C.—Wylie v. Ohio River, etc., R. Co., 26 S.E. 676, 48 S.C. 405.

Award held proper

La.—Miller v. Hortman-Salmen Co., App., 145 So. 786.

34. N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App.Div. 62, 11 C.J. p 620 note 54.

35. N.Y.—Oest v. Ovberg, 246 N.Y.S. 637, 231 App.Div. 866.

36. Wis.—Jewett v. Fink, 2 N.W. 1124, 47 Wis. 446.

37. Wis.—Ward v. Henry, 15 Wis. 239.

38. Mass.—Robinson v. Sprague, 125 Mass. 582.

Vt.—Smith v. Anderson, 41 A. 441, 70 Vt. 424.

11 C.J. p 620 note 58.

39. Ala.—Keith v. Ham, 7 So. 234, 89 Ala. 590.

40. Mich.—Huellmantel v. Vinton, 70 N.W. 412, 112 Mich. 47, 11 C.J. p 620 note 60.

41. Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431.

42. Tex.—Clifton Mercantile Co. v. Haverbekken Bros., Civ.App., 17 S. W.2d 856.

Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431.

43. Idaho.—Vollmer Clearwater Co. v. Union Warehouse & Supply Co., 243 P. 865, 866, 43 Idaho 37, citing *Corpus Juris*.

11 C.J. p 605 note 39, p 620 note 61.

Proceeds of unlawful sale

Lessors, to whom lessees executed second mortgage on furniture purchased by mortgagors under conditional sale contract, are entitled to surplus proceeds of seller's unlawful resale thereof after satisfaction of first mortgage.—Walker v. Houston, 12 P.2d 952, 215 Cal. 742, 87 A.L.R. 937.

J. ACTIONS BETWEEN MORTGAGEES

§ 246. In General

Actions between mortgagees for possession of, or damages for injury to, the mortgaged property, which are specifically treated in §§ 247-254 of this Title are, in so far as such rules are applicable, governed by the same principles as control in an action by the mortgagee against the mortgagor or a third person; so it may be useful, by way of analogy, to refer to §§ 228-245 where actions of the latter type are treated in this Title.

§ 247. Right of Action

As shown *infra* §§ 248-250, either a junior or senior mortgagee may, where the facts authorize such relief, maintain an action such as trover, replevin, or detinue against other mortgagees or compel them to account for moneys derived from possession of the mortgaged chattels.

§ 248. — By Senior Mortgagee

Where the facts authorize such relief, a mortgagee can maintain trover, replevin, detinue or an action on the case against a subsequent mortgagee interfering with his possessory rights or reversionary interest in the mortgaged chattel.

Although he may waive the tort and recover the proceeds in an action of assumpsit,⁴⁴ one holding a valid mortgage on personal property may maintain an action of trover for the conversion of the property against a subsequent encumbrancer,⁴⁵ provided the first mortgagee has become entitled to possession by default or other condition broken;⁴⁶ So a junior mortgagee who seizes and sells the mortgaged property may be sued by the holder of the first mortgage for a conversion of the property,⁴⁷ and no demand is necessary;⁴⁸ and the holder of the first mortgage cannot be compelled to pursue the property by foreclosure.⁴⁹ Plaintiff must recover upon the strength of his own title and must not only show that the

mortgage was executed, but that it was properly recorded.⁵⁰ In an action against subsequent mortgagees with notice of plaintiff's prior mortgage, defendants can claim no greater rights than the mortgagor could assert in an action against him, as where the mortgagor could claim failure of consideration for the first mortgage only to the extent of supplies promised but not furnished.⁵¹ In an action for a conversion which is not established, plaintiff cannot recover the excess of the proceeds of sale of the mortgaged chattels over the debt secured by defendant's mortgage as money had and received.⁵²

A first mortgagee entitled to possession may maintain replevin against a second mortgagee⁵³ or his assigns,⁵⁴ and his right so to proceed under the mortgage is not waived by the fact that instead of instituting foreclosure proceedings on the mortgage he had previously sought to get his money from a third person who had promised to purchase the mortgage.⁵⁵ A first mortgagee cannot recover the property from the second mortgagee in replevin without first tendering him the amount of expenditures made by him for the preservation of the mortgaged property with the consent of the first mortgagee.⁵⁶

By virtue of his interest as mortgagee, a first mortgagee may maintain an action on the case as against a junior mortgagee having actual notice of the first mortgage, who wrongfully impairs his security.⁵⁷

In detinue the superior equity of a mere equitable mortgage will not prevail as against a subsequent mortgagee.⁵⁸

§ 249. — By Junior Mortgagee

A junior mortgagee with a superior right of possession may in a proper case maintain trover or replevin against a senior mortgagee.

44. Md.—Leighton v. Preston, 9 Gill 201.

11 C.J. p 620 note 65.

45. Idaho.—Mahoney v. Citizens' Nat. Bank of Salmon, 271 P. 935, 47 Idaho 24.

Tex.—Citizens' Guaranty State Bank v. Johnson, Civ.App., 211 S.W. 271. 11 C.J. p 620 note 62.

46. Mo.—Chandler v. West, 37 Mo. App. 631.

Wis.—Klinkert v. Fulton Storage, etc., Co., 89 N.W. 507, 113 Wis. 493.

47. Cal.—United Bank & Trust Co. of California v. Powers, 265 P. 403, 89 Cal.App. 690.

Tex.—Parlin, etc., Co. v. Moore, 66 S.W. 798, 28 Tex.Civ.App. 243.

48. Cal.—United Bank & Trust Co. of California v. Powers, 265 P. 403, 89 Cal.App. 690.

49. Tex.—Parlin, etc., Co. v. Moore, 66 S.W. 798, 28 Tex.Civ.App. 243.

50. N.C.—Foy & Shemwell v. Hurley, 90 S.E. 582, 172 N.C. 575.

51. Tex.—Harris v. N. Parker & Son, Civ.App., 23 S.W.2d 745.

52. Ala.—Simpson v. Hinson, 7 So. 264, 88 Ala. 527.

11 C.J. p 621 note 66.

53. Mo.—McElvain v. Dorroh, App., 204 S.W. 824.

Wyo.—Finance Corporation of Wyoming v. Commercial Credit Co., 283 P. 1100, 41 Wyo. 198. 11 C.J. p 621 note 67.

54. Mass.—Roberts v. White, 15 N. E. 568, 146 Mass. 256.

55. Wyo.—Finance Corporation of Wyoming v. Commercial Credit Co., 283 P. 1100, 41 Wyo. 198.

56. Ark.—McKennon v. May, 39 Ark. 442.

57. Ga.—People's Bank of Richland v. Farmers' State Bank, 122 S.E. 636, 32 Ga.App. 42.

58. Ala.—Bradford v. Proctor, 96 So. 203, 209 Ala. 299.

A second mortgagee may maintain an action against the first mortgagee for the wrongful conversion of the property covered by both mortgages⁵⁹ after a tender of the payment of the senior mortgage,⁶⁰ and where he is entitled to possession he may bring replevin;⁶¹ but unless he shows a superior right to possession a second mortgagee cannot recover against the first mortgagee for a conversion,⁶² nor can he recover possession of the chattels.⁶³ Thus the second mortgagee cannot maintain replevin against a first mortgagee in possession unless the mortgage has been satisfied,⁶⁴ or unless the first mortgagee is exercising an unlawful or unauthorized control over the property;⁶⁵ nor may a subsequent mortgagee recover damages from a prior mortgagee unless it appears that the value of the property at the time of conversion exceeded the amount of the prior mortgagee's claim.⁶⁶ Where the first mortgage is regarded as conveying the legal title, it is held that a second mortgagee acquires a mere lien which will not support either trover⁶⁷ or detinue⁶⁸ against the first mortgagee and those holding under him. Furthermore, a second mortgagee, not being vested with legal title, cannot maintain an action predicated on such title against the first mortgagee, although the first mortgagee remains in possession after the satisfaction of his mortgage.⁶⁹ The holder of a second lien on property who claims damages through the act of a prior chattel mortgagee cannot recover if his lien is also secured by other property of sufficient value to pay it.⁷⁰

§ 250. — Accounting

A mortgagee may be compelled to account to other mortgagees for moneys derived from his possession of the mortgaged chattels.

The others may compel an accounting in equity if one of several mortgagees takes possession of the mortgaged property and derives a profit from its use,⁷¹ or fraudulently sells the property and refuses to apply the proceeds of the sale to the satisfaction of the mortgage liens;⁷² provided there is no adequate remedy at law;⁷³ and the substitution of a receiver for defendant senior mortgagee does not alter or diminish plaintiff's cause of action.⁷⁴

§ 251. Pleading

The rules of pleading applicable in civil actions of the same form generally, control actions between mortgagees.

In actions between mortgagees for conversion⁷⁵ or in replevin⁷⁶ plaintiff's pleadings must allege the facts constituting his cause of action. So, in replevin by a junior against a senior mortgagee whose mortgage is invalid against third persons, plaintiff must aver a compliance with the recording acts,⁷⁷ and if his petition shows that his debt has matured, he must positively aver a compliance with statutory requirements as to renewal of the mortgage.⁷⁸ When a first mortgagee sues a second mortgagee who has sold the property under his mortgage, the complaint must allege a right to possession⁷⁹ or a demand for possession,⁸⁰ but where the right to possession is alleged and the conversion has actually occurred it is held unnecessary to allege and prove a demand upon defendant and its refusal to deliver the chattels.⁸¹

59. Ala.—Brock v. Culpepper, 116 So. 126, 217 Ala. 289.

Tex.—Holmes v. Klein, Civ.App., 84 S.W.2d 521, error dismissed.

11 C.J. p 605 note 37, p 621 note 71.

60. Mich.—Schmittiel v. Moore, 79 N.W. 195, 120 Mich. 199.

S.D.—De Luce v. Root, 80 N.W. 181, 12 S.D. 141.

61. Wis.—Pierce v. Westby State Bank, 261 N.W. 752, 218 Wis. 648.

62. Mass.—Wing v. Bishop, 9 Gray 223.

N.C.—McBrayer v. Haynes, 44 S.E. 115, 132 N.C. 608.

11 C.J. p 621 note 72.

63. Mo.—Powell v. Tinsley, 119 S.W. 47, 137 Mo.App. 551.

64. Kan.—Smith-McCord Dry Goods Co. v. Burke, 66 P. 1036, 63 Kan. 740.

N.C.—McBrayer v. Haynes, 44 S.E. 115, 132 N.C. 608.

65. Kan.—Smith-McCord Dry Goods Co. v. Burke, 66 P. 1036, 63 Kan. 740.

66. Ark.—Bonner v. Stroud Bros. Gin, 289 S.W. 766, 172 Ark. 569.

11 C.J. p 621 note 74.

67. Ala.—Butler Cotton Oil Co. v. G. H. Campbell & Son, 78 So. 643, 16 Ala.App. 445.

11 C.J. p 605 note 48.

68. Ala.—Baker v. Patterson, 55 So. 135, 171 Ala. 88.

69. Ky.—Hume v. Breck, 4 Litt. 284.

11 C.J. p 605 note 45.

70. S.D.—Erickson v. Carlberg Co., 223 N.W. 195, 54 S.D. 296.

11 C.J. p 621 note 76.

71. Ark.—Franklin v. Meyer, 36 Ark. 96.

Ill.—Martin v. Sexton, 112 Ill.App. 199.

11 C.J. p 621 note 77.

72. Kan.—Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg, 16 P.2d 543, 136 Kan. 447.

73. Ill.—Martin v. Sexton, 112 Ill. App. 199.

74. Kan.—Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg, 16 P.2d 543, 136 Kan. 447.

75. Petition held sufficient

Tex.—Citizens' Guaranty State Bank v. Johnson, Civ.App., 211 S.W. 271.

76. Dak.—Madison Nat. Bank v. Farmer, 40 N.W. 345, 5 Dak. 282.

11 C.J. p 621 note 79.

77. Mont.—Cope v. Minnesota Type Fdy. Co., 49 P. 387, 20 Mont. 67.

78. Mont.—Cope v. Minnesota Type Fdy. Co., supra.

79. Wash.—Binnian v. Baker, 32 P. 1008, 6 Wash. 50.

Allegations held sufficient

Ala.—Long v. Pittman, 95 So. 18, 208 Ala. 621.

Or.—Eade v. First Nat. Bank, 242 P. 333, 117 Or. 47, 43 A.L.R. 374.

80. Wash.—Binnian v. Baker, 32 P. 1008, 6 Wash. 50.

81. Or.—Eade v. First Nat. Bank, 242 P. 333, 117 Or. 47, 43 A.L.R. 374.

Defendant who, in an action by the prior mortgagee, relies upon an equitable defense must allege all facts necessary to establish it.⁸² An answer alleging failure of plaintiff claiming under a crop mortgage to furnish the mortgagor with sufficient supplies to cultivate the crop does not show a total failure of consideration.⁸³ Although a statute provides that the lien of a crop mortgage shall attach only to crops next maturing after the execution thereof, in an action by a mortgagee of realty for conversion of a crop sold on foreclosure of a chattel mortgage thereon, the answer is not demurrable for failure to allege that the crop sold was the one next maturing after the execution of the mortgage, nor is the answer defective because not stating the mortgage was filed of record and the time and place thereof where plaintiff was accurately informed thereof by reference to an attached exhibit.⁸⁴

Issues, proof, and variance. In replevin by a second chattel mortgagee against one claiming under a prior mortgage the question of failure of consideration of the second mortgage as between plaintiff and the mortgagor is immaterial.⁸⁵ In replevin by the first mortgagee against the second mortgagee who has foreclosed his mortgage, the latter may avail himself of the defense that after-acquired goods were not covered by the first mortgage, under a general denial, and need not plead it affirmatively, but the prior mortgagee cannot assert an estoppel on the part of the junior mortgagee unless he pleads it.⁸⁶ A second mortgagee who relies on the release of the first mortgage to give him priority must plead such release.⁸⁷

§ 252. Evidence

General rules of civil actions as to the burden of

proof, and as to the admissibility, and weight and sufficiency of evidence apply.

In actions between mortgagees the burden of proof is on the party having the affirmative of the issue.⁸⁸ Thus, the burden is on plaintiff to establish all facts necessary to constitute a cause of action,⁸⁹ including his title,⁹⁰ and the fact that the chattels claimed are the identical ones described in his mortgage;⁹¹ and the burden is on the holder of a second lien who claims damages through the act of a prior chattel mortgagee, whereby the lien was lost, to prove that other property by which his lien is also secured is inadequate.⁹² When plaintiff discharges his preliminary burden and establishes a prima facie case, the burden shifts to the opposite party to establish his defense.⁹³ Thus, in detinue the burden is on him to prove the bona fides of his title.⁹⁴

Under the principles applicable to civil actions generally, the evidence in an action between mortgagees must be relevant and material,⁹⁵ but subject to this rule evidence is admissible to establish the identity of the chattels claimed,⁹⁶ ownership,⁹⁷ invalidity of defendant's mortgage,⁹⁸ defendant's effort to spoliage evidence of plaintiff's title,⁹⁹ or notice.¹ In an action between mortgagees, it was held error to exclude a mortgage containing a clause allowing the mortgagee to take possession at any time;² and in an action by the mortgagee of realty for conversion of grain sold by the sheriff on foreclosure of a chattel mortgage, notices of the sheriff's sale under the chattel mortgage and foreclosure and the sheriff's certificate of report of sale are properly admitted.³

Plaintiff must establish his case by a preponder-

82. Mass.—*Roberts v. White*, 15 N. E. 568, 146 Mass. 256.

11 C.J. p 620 note 63 [a].

83. Tex.—*Harris v. N. Parker & Son*, Civ.App., 23 S.W.2d 745.

84. Mont.—*National Life Ins. Co. of U. S. of America v. Baker*, 23 P.2d 1098, 94 Mont. 600.

85. Mo.—*Weber Impl. Co. v. Dunard*, 120 S.W. 608, 140 Mo. 476.

86. Mo.—*Kolkmeier v. J. S. Merrell Drug Co.*, 141 S.W. 1164, 162 Mo. App. 1.

87. Tex.—*Ross v. Strahorn-Hutton-Evans Commn. Co.*, 46 S.W. 398, 18 Tex.Civ.App. 698.

88. S.D.—*Hanover Nat. Bank v. Farmers' & Merchants' State Bank*, 227 N.W. 67, 55 S.D. 598.
11 C.J. p 621 note 87.

89. S.D.—*Hanover Nat. Bank v. Farmers' & Merchants' State Bank*, supra.

90. Tex.—*Livezey v. Putnam Supply Co.*, Civ.App., 30 S.W.2d 902, error refused.

91. S.D.—*Hanover Nat. Bank v. Farmers' & Merchants' State Bank*, 227 N.W. 67, 55 S.D. 598.

92. S.D.—*Erickson v. Carlberg Co.*, 223 N.W. 195, 54 S.D. 296.
11 C.J. p 621 note 75.

93. Ala.—*Danzy v. Dothan Guano Co.*, 121 So. 456, 28 Ala.App. 105.

94. Ala.—*Danzy v. Dothan Guano Co.*, supra.

95. Ga.—*People's Bank of Richland v. Farmers' State Bank*, 122 S.E. 636, 32 Ga.App. 42.

Value of property not involved

In action for diminution of security, evidence of value of property, other than that wrongfully disposed of by defendant, was inadmissible.—*People's Bank of Richland v. Farmers' State Bank*, supra.

96. U.S.—*First Nat. Bank & Trust Co. of Oklahoma City, Okl., v. Stock Yards Loan Co.*, C.C.A.Mo., 65 F.2d 226, certiorari denied 54 S. Ct. 65, 290 U.S. 648, 78 L.Ed. 562.

97. Colo.—*Thomas v. First Nat. Bank*, 51 P.2d 589, 97 Colo. 474.

98. Tex.—*Livezey v. Putnam Supply Co.*, Civ.App., 30 S.W.2d 902, error refused.

99. Ala.—*Dutton v. Gibson*, 148 So. 397, 226 Ala. 657.

1. Kan.—*Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg*, 16 P.2d 543, 136 Kan. 447.

2. N.Y.—*Independent Brewing Co. v. Durston*, 106 N.Y.S. 686, 55 Misc. 498.

3. Mont.—*National Life Ins. Co. of U. S. of America v. Baker*, 23 P. 2d 1098, 94 Mont. 600.

ance of the proof,⁴ and general rules as to weight and sufficiency of the evidence apply.⁵

§ 253. Trial and Judgment

In an action between mortgagees, general rules as to instructions, questions of law and fact, verdict, and judgment apply.

In accordance with the general rules applicable in the trial of a civil case generally, in actions between mortgagees for conversion the court should correctly instruct the jury as to the law applicable to the case, granting proper requested instructions where their submission is justified by the evidence.⁶ Where there is conflicting evidence, the court should submit to the jury questions of fact.⁷ Accordingly, in an action for conversion it is for the jury to determine questions relating to payment,⁸ priority of

the mortgages,⁹ or whether a mortgagee accepted a new mortgage thereby extinguishing a prior mortgage;¹⁰ and in an action for replevin, priority of the mortgages,¹¹ or what constitutes a reasonable time for calves to follow their mothers and remain covered by the mortgage lien,¹² are likewise jury questions. Questions relating to a contention that defendants were fraudulently endeavoring to absorb more property than was necessary to the payment of their prior claim may be determined in replevin.¹³ A verdict is properly directed in an action of replevin where the facts are undisputed or there is no substantial conflict in the evidence,¹⁴ but a verdict should not be directed for one mortgagee where there is ample evidence to support a verdict for the other either in a possessory action¹⁵ or in an action for damages;¹⁶ and it is error to di-

4. S.D.—Hanover Nat. Bank v. Farmers' & Merchants' State Bank, 227 N.W. 67, 55 S.D. 598.

Tex.—Otjen v. Mitchell, Civ.App., 27 S.W.2d 835.

11 C.J. p 621 note 88.

5. Evidence held sufficient

(1) To establish title in junior mortgagee, suing for mortgaged chattels.—Livezey v. Putnam Supply Co., Tex.Civ.App., 30 S.W.2d 902, error refused.

(2) To justify finding as to interest of defendant mortgagee in property.—Forgan v. Bridges, Mo.App., 281 S.W. 134.

(3) To establish notice and knowledge of junior mortgage.—Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg, 16 P. 2d 543, 136 Kan. 447.

(4) To show that subsequent mortgagees had no knowledge of first mortgage.—J. I. Case Threshing Mach. Co. v. Goldberg, 239 N.W. 745, 59 S.D. 289.

(5) To establish fraud in sale as against junior mortgagee.—Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg, supra.

(6) To show conversion by holder of subsequent mortgage.

Colo.—First Nat. Bank v. American State Bank of Brighton, 215 P. 473, 73 Colo. 254.

Tex.—American Trust & Savings Bank v. Whitaker, Civ.App., 2 S.W.2d 356, error dismissed.

(7) To show that converted property was covered by mortgage.

Colo.—First Nat. Bank v. American State Bank of Brighton, supra.

Mont.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289.

(8) To justify finding that chattels described in subsequent mortgage were not covered by earlier mortgage.—Farmers' & Merchants' State Bank of West Concord v.

Nummedahl, 207 N.W. 313, 166 Minn. 144.

(9) To establish that grantee under trust deed took possession with grantor's consent as "mortgagee in possession."—Nelson v. Bowen, 12 P. 2d 1033, 124 Cal.App. 662.

Evidence held insufficient

(1) To show unreasonable delay before commencing action.—Farmers' State Bank of Lindsborg v. Commercial State Bank of Lindsborg, 16 P. 2d 543, 136 Kan. 447.

(2) To warrant judgment for junior mortgagee.—Barnett v. Grizzell, 162 So. 407, 26 Ala.App. 472.

(3) To show loss of plaintiff's first lien through his fault.—United Bank & Trust Co. of California v. Powers, 265 P. 403, 89 Cal.App. 690.

(4) To prove plaintiff's title under mortgage.—Gannon v. Denton, Mo. App., 35 S.W.2d 960.

(5) To identify chattels in dispute as those covered by plaintiff's mortgage.

Kan.—Ragland v. Watkins Nat. Bank, 283 P. 632, 129 Kan. 426.

S.D.—Hanover Nat. Bank v. Farmers' & Merchants' State Bank, 227 N.W. 67, 55 S.D. 598.

(6) To show that defendant converted proceeds of sale of chattels. Mont.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289.

Tex.—Otjen v. Mitchell, Civ.App., 27 S.W.2d 835.

(7) To show conspiracy between defendant mortgagee and mortgagor. U.S.—First Nat. Bank & Trust Co. of Oklahoma City, Okl., v. Stock Yards Loan Co., C.C.A.Mo., 65 F.2d 226, certiorari denied 54 S.Ct. 65, 290 U.S. 648, 78 L.Ed. 562.

Mont.—Talmage-Sayer Co. of Joliet v. Smith, supra.

(8) To support finding that mortgagee appropriated mortgagor's property after putting him under

duress.—First Nat. Bank & Trust Co. of Oklahoma City, Okl., v. Stock Yards Loan Co., supra.

(9) To show that mortgagee sold property after suing on debt.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.

6. Ala.—Stewart Bros. v. Lindsey, 106 So. 41, 213 Ala. 659.

7. N.C.—Cotter-Underwood Co. v. Wise, 129 S.E. 591, 190 N.C. 861.

Tex.—Home Ins. Co. v. Klous, Civ. App., 58 S.W.2d 176, error refused.

8. Ala.—Long v. Pittman, 95 So. 18, 208 Ala. 621.

9. Ala.—Dutton v. Gibson, 131 So. 567, 222 Ala. 191.

Okl.—Blevins v. W. A. Graham Co., 182 P. 247, 72 Okl. 308.

Trial without jury

On issue of priority of chattel mortgage liens, whether plaintiff had actual or constructive notice of defendant's prior unrecorded mortgage was a question for the court trying the case without a jury.—Lone Star Finance Corporation v. Fulbright, Tex.Civ.App., 61 S.W.2d 562.

10. Ala.—Stewart Bros. v. Lindsey, 106 So. 41, 213 Ala. 659.

11. Mo.—Geiser Mfg. Co. v. Todd, App., 204 S.W. 287.

N.D.—Jacobson v. Forbragd, 171 N.W. 624, 42 N.D. 1.

12. Neb.—Leisy v. Kane, 259 N.W. 526, 128 Neb. 594.

13. Kan.—Moffatt v. Fouts, 160 P. 1137, 99 Kan. 118.

14. Colo.—Thomas v. First Nat. Bank, 51 P.2d 589, 97 Colo. 474.

15. Ala.—Kinney Bros. v. Johnson, 110 So. 561, 21 Ala.App. 609.

16. Miss.—Maris v. Levy, 72 So. 860, 112 Miss. 77.

Evidence held sufficient to go to the jury.—Miller v. White, Tex.Civ. App., 264 S.W. 176.

rect a verdict for defendant in an action by a second mortgagee against a first mortgagee for the conversion by the latter of property covered by both mortgages, where it appears that the value of the property converted exceeds the amount due on the first mortgage lien.¹⁷ Where the only issue in a mortgagee's replevin action against a subsequent mortgagee, was the right to possession and damages for detention, and the court directed a verdict for the transferee of defendant's mortgage, who intervened, the court should have directed a verdict for defendant.¹⁸

The sufficiency of the verdict and judgment is governed by the general rules applicable to the particular form of action resorted to.¹⁹ In an action in replevin by the senior mortgagee, plaintiff's judgment may be for the value of the chattel in lieu of delivery;²⁰ and the junior mortgagee who wrongfully detained property found to be of value sufficient to pay off both mortgages is not entitled to a money judgment against plaintiff for his lien, without first tendering to plaintiff the amount of the prior lien.²¹

§ 254. Damages and Amount of Recovery

The damages are measured by the successful party's interest in and the value of the mortgaged chattel.

In an action between mortgagees, plaintiff's recovery is limited to the amount of his interest in

the property or to the amount of his debt with interest not exceeding the value of the property,²² with attorney's fees when provided for in the mortgage or note secured thereby.²³ So, where the senior mortgagee without foreclosure sells the property at private sale and is sued by the junior mortgagee for conversion, if the value of the property sold is less than the amount secured by defendant's mortgage and the sale is not fraudulent, the junior mortgagee can recover no damages.²⁴ Where a mortgagee suing a prior mortgagee for conversion has other security he is, as shown *supra* § 249, entitled to recover at all only in the event that his remaining security is insufficient to pay the debt secured; and then his recovery is limited to so much of the excess in value of the property converted over the amount due on the prior mortgage as, with the remaining security, would be sufficient to pay the amount due him.²⁵

Under the statutes relating to replevin in some jurisdictions the first mortgagee may, when the property has been in the possession of the second mortgagee but is not in his possession at the time of suit, recover the value of the property.²⁶ Where the second mortgagee is in possession under his mortgage, the first mortgagee is not entitled to damages in replevin for the unlawful detention of the property unless a demand has been made before suit.²⁷ The damages to which the senior mortgagee

17. N.D.—Clendening v. Hawk, 79 N.W. 878, 8 N.D. 419.

18. U.S.—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965.

19. Mich.—Williams v. Bresnahan, 33 N.W. 739, 66 Mich. 634.

Mo.—Hubbell v. Allen, 3 S.W. 22, 90 Mo. 574—Williamson v. Gottschalk, 1 Mo.App. 425.

Conformity to proof

Awarding judgment to chattel mortgagee suing in replevin is not erroneous because there was no proof of value of goods contained in writ of replevin where mortgagee was at least entitled to nominal damages.—Bloch v. Egert, 172 A. 523, 12 N.J.Misc. 445.

20. Colo.—Wolf v. Larimer County Bank & Trust Co., 246 P. 285, 79 Colo. 376.

21. Mich.—Olin v. Lockwood, 60 N.W. 972, 102 Mich. 443.
11 C.J. p 621 note 90 [a].

22. Or.—Nichols v. Jackson County Bank, 298 P. 908, 136 Or. 302—Eade v. First Nat. Bank, 242 P. 833, 117 Or. 47, 43 A.L.R. 374.
11 C.J. p 622 note 92.

Full amount due

Where the value of the chattel was

in excess of the amount due under the first mortgage, the measure of damages as against a subsequent mortgagee who converted the mortgaged property, is the full amount due under the first mortgage, including interest and attorney fees.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.

As governed by mortgagor's interest

Under a mortgage covering all of the mortgagor's undivided interest in the chattel, the value of the mortgagor's interest at the time of the conversion by a subsequent mortgagee is the mortgagee's measure of damages.—Mahoney v. Citizens' Nat. Bank of Salmon, 271 P. 935, 47 Idaho 24.

Impairment of security

First mortgagee, in action on case as against junior mortgagee having actual notice of first mortgage, who wrongfully impairs security, may recover to extent that security has been diminished, damages within value of mortgaged property and not in excess of debt secured.—People's Bank of Richland v. Farmers' State Bank, 122 S.E. 636, 32 Ga.App. 42.

Liability of senior mortgagee

"Where two mortgages are of equal dignity covering the same property

in favor of different mortgagees, senior mortgagee is liable to junior mortgagee for conversion of property to extent of its market or intrinsic value at time of conversion."—Holmes v. Klein, Tex.Civ.App., 84 S.W.2d 521, error dismissed.

23. Cal.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.

Or.—Eade v. First Nat. Bank, 242 P. 833, 117 Or. 47, 43 A.L.R. 374.

Amount of attorney's fee

In action for conversion, plaintiff was entitled to what would have been reasonable attorney's fee for foreclosure of mortgage if property had not been converted and mortgage had been foreclosed.—Nichols v. Jackson County Bank, 298 P. 908, 136 Or. 302.

24. Neb.—Dempster Mill Mfg. Co. v. Wright, 95 N.W. 806, 1 Neb. Unoff., 666.

N.D.—Lovejoy v. Merchants' State Bank, 67 N.W. 956, 5 N.D. 623.

25. S.D.—Erickson v. Cariberg Co., 223 N.W. 195, 54 S.D. 296.

26. Neb.—Lininger v. Mills, 45 N.W. 463, 29 Neb. 297.

27. Iowa.—Nichols v. Sheldon Bank, 67 N.W. 582, 98 Iowa 603.

is entitled for detention is the legal interest on the value of the goods from the time of taking until the trial, and not the value of the use during such time.²⁸ In replevin by a subsequent mortgagee in good faith against a prior mortgagee who failed timely to file a renewal affidavit as required by law, defendant is not entitled to assert a prior claim on the chattel for warehousemen's charges he paid with the expectation of being reimbursed by the mortgagor.²⁹ In replevin by a first mortgagee against a second mortgagee who had replevined the mortgaged property from the mortgagor, all damages sustained by defendant because plaintiff took

back property covered by the mortgage can be determined, but defendant whose mortgage covered only one chattel cannot complain that plaintiff whose mortgage covered that chattel and another one took back the latter without selling it under the mortgage, nor can defendant question the sufficiency of the consideration allowed for the chattel taken back and credited upon the mortgage.³⁰

Recoupment in action by junior mortgagee. Where the junior mortgagee of chattels sues the senior mortgagee for a conversion thereof, the senior mortgagee may recoup the value of his special interest in the property.³¹

K. INJUNCTIONS

§ 255. In General

Injunction will not issue as of right where there are other adequate remedies.

An injunction will not issue as a matter of right where it is not necessary to protect the rights of the interested parties, and where other proceedings already accepted by the parties afford a complete remedy.³² Thus, while a judgment creditor of a chattel mortgagor with lien perfected on the mortgaged chattel may invoke the jurisdiction of equity to determine the validity of the chattel mortgage, where the judgment creditor has elected to sell the chattel in disregard of the mortgage and has bought it in, such equitable jurisdiction cannot be invoked to restrain the mortgagee's action of replevin without any showing that the law court will not be able to determine fully the rights of the parties.³³

§ 256. Suit by Mortgagor

In absence of other adequate remedy, improper interference with the mortgagor's rights may be enjoined.

The mortgagor may resort to equity to enjoin an improper interference on the part of the mortgagee with the property mortgaged in derogation of the

mortgagor's rights, wherever there is no adequate remedy at law.³⁴

§ 257. Suit by Mortgagee

A chattel mortgagee may in a proper case restrain the mortgagor, or purchasers from, or creditors of, the mortgagor, from interfering with his rights in the mortgaged chattel.

To prevent interference with or destruction of the property by the mortgagor, the mortgagee may maintain a bill in equity for an injunction and receiver, although the time for payment set out in the mortgage has not arrived,³⁵ and, where the mortgagee has legal title and the right of immediate possession, he may by injunction restrain the mortgagor from selling the chattels and placing them beyond the reach of the mortgagee or the control of the court.³⁶ The mortgagee has this remedy also against purchasers with notice and without consideration.³⁷ If the mortgagor is allowed to "conduct its ordinary business" in disposing of the mortgaged chattels, the mortgagee cannot enjoin a removal of the goods from the state.³⁸ The mortgagee of chattels may enjoin a sale of the mortgaged property by attaching creditors of the mortgagor if such sale endangers his rights.³⁹

28. Colo.—Austin v. Terry, 58 P. 810, 13 Colo.App. 141.
Wis.—Klinkert v. Fulton Storage, etc., Co., 89 N.W. 507, 113 Wis. 493.
11 C.J. p 622 note 96.

29. Wis.—Pierce v. Westby State Bank, 261 N.W. 752, 218 Wis. 648.

30. Mo.—McElvain v. Dorroh, App., 204 S.W. 824.

31. N.D.—Clendenen v. Hawk, 79 N.W. 878, 8 N.D. 419—Lovejoy v. Merchants' State Bank, 67 N.W. 956, 5 N.D. 623.

32. Ark.—Johnson v. Gillenwater, 87 S.W. 439, 75 Ark. 114.
11 C.J. p 622 note 99.

33. N.J.—Dey v. Moody, 108 A. 757, 91 N.J.Eq. 14.

34. Ill.—Hungate v. Reynolds, 72 Ill. 425.
11 C.J. p 622 note 1.

35. N.J.—Long Dock Co. v. Mallory, 12 N.J.Eq. 93, 99, reversed on other grounds 12 N.J.Eq. 431.
11 C.J. p 622 note 2.

36. N.J.—Chapman v. Hunt, 13 N.J. Eq. 370.

37. Cal.—Ukiah Bank v. Moore, 89 P. 1071, 106 Cal. 673.

38. N.J.—Anderson v. Anderson Food Co., 57 A. 489, 66 N.J.Eq. 209, affirmed 63 A. 1118, 67 N.J.Eq. 730.

39. Md.—Bruce v. Levering, 23 Md. 288.
11 C.J. p 623 note 6.

X. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR

§ 258. Right of Mortgagor to Remove

Frequently under the statutes and the usual terms of mortgages, the mortgagor is not permitted permanently to remove mortgaged chattels without the mortgagee's consent.

Ordinarily, under the statutes and usual terms of such mortgages, a chattel mortgagor is not permitted permanently to remove the mortgaged property beyond the limits of the state where the mortgage is made,⁴⁰ and, as shown *infra* § 279, it is frequently made a criminal offense for him to do so, although such removal is usually permissible if he gives ample security to protect the rights of the mortgagee,⁴¹ or if the mortgagee expressly or impliedly consents thereto.⁴² Of course, a prohibition in the mortgage against a removal of the property may be waived by the mortgagee's consent thereto,⁴³ although it may be that such consent must be supported by a sufficient consideration.⁴⁴ Where the mortgagee gives his consent to such removal, compliance with the terms thereof is essential, and an agreement that the mortgaged property may be removed to a particular state will not authorize its removal to a different one.⁴⁵ Even though there is an express provision in the mortgage prohibiting the removal of mortgaged property to another locality, where the

mortgage is on such property as a wagon or motor vehicle, in view of the nature of the property, a temporary removal of the property for ordinary purposes is permissible.⁴⁶

§ 259. Effect of Removal

A removal of the property from the situs of the mortgage will not affect the validity of the mortgage as between the parties, although the mortgagee's consent or acquiescence in a removal may render the mortgage subordinate to subsequent bona fide purchasers or encumbrancers.

A mere change in the locality of a mortgaged chattel will not displace or affect the lien as between the parties to the mortgage.⁴⁷ In the absence of a statute or stipulation to the contrary, an unauthorized removal at most only subjects the property to foreclosure,⁴⁸ and a removal does not render the mortgagor guilty of a conversion if there is no intent to place the property beyond the mortgagee's reach,⁴⁹ as where the removal is for the purpose of saving the property from injury.⁵⁰ On the other hand, it has been held that, as to subsequent bona fide⁵¹ purchasers or encumbrancers, if the mortgagee consents to a removal by the mortgagor, or ratifies an unauthorized removal,⁵² the mortgage lien is thereby waived or extinguished.⁵³

40. S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 838, 112 S.C. 243.

Reason for rule

"Not only does a removal of mortgaged property beyond the limits of the state impair the mortgagee's rights, but it is against the policy of the law. . . . Furthermore, if it should become necessary for the mortgagee to resort to the remedies provided by law for the enforcement of his rights, they would be impaired by reason of the necessity of resorting to another jurisdiction."—Hill v. Winnsboro Granite Corporation, *supra*.

41. S.C.—Hill v. Winnsboro Granite Corporation, *supra*.

42. S.C.—Hill v. Winnsboro Granite Corporation, *supra*.
11 C.J. p 623 note 7.

43. U.S.—Hardwick Bank & Trust Co. v. McFarland, C.C.A.Ga., 43 F. 2d 807, reversing, D.C., *In re Vining*, 37 F.2d 103.

Tex.—Burditt v. Motor Supply Co., Civ.App., 99 S.W.2d 679, error dismissed.

44. Mo.—Ramsey v. Maberry, 116 S. W. 1066, 135 Mo.App. 569.
11 C.J. p 623 note 8.

45. Ill.—Armitage-Herschell Co. v. Potter, 93 Ill.App. 602.

46. Colo.—Flora v. Julesburg Motor Co., 193 P. 545, 69 Colo. 238.

Ill.—Hayden v. Wabash Ry. Co., 269 Ill.App. 356, transferred 180 N.E. 795, 348 Ill. 126.

Okl.—First Nat. Bank v. Wesson, 235 P. 595, 109 Okl. 225.

47. U.S.—Hardwick Bank & Trust Co. v. McFarland, C.C.A.Ga., 43 F.2d 807, reversing, D.C., *In re Vining*, 37 F.2d 103.

Cal.—Ramsey v. California Packing Corporation, 201 P. 481, 51 Cal.App. 517.

Mo.—United Iron Works Co. v. Sleepy Hollow Mining & Development Co., 198 S.W. 443, 198 Mo. App. 562.

Tenn.—Hamblen Motor Co. v. Miller & Harle, 266 S.W. 99, 150 Tenn. 602.

11 C.J. p 623 notes 12, 13.

Termination of lien generally see *infra* § 326.

Removal in violation of penal statute and without the written consent of the mortgagee does not invalidate the mortgage.—Fife v. Ohio Inv. Co., 100 N.E. 392, 52 Ind.App. 108.

48. Mo.—United Iron Works Co. v. Sleepy Hollow Mining & Development Co., 198 S.W. 443, 198 Mo. App. 562.

49. Mass.—Metcalf v. McLaughlin, 122 Mass. 84.

50. Vt.—Smith v. Anderson, 41 A. 441, 70 Vt. 424.

51. Mo.—Adamson v. Fogelstrom, 300 S.W. 841, 221 Mo.App. 1243.
Necessity of recording as against purchasers and encumbrancers see *infra* §§ 142-143.

Mortgaged grain is prima facie free of encumbrance on its removal from the land, and a purchaser's knowledge, after its removal, that it was once mortgaged does not prevent his being a bona fide purchaser.—Brande v. A. L. Babcock Hardware Co., 83 P. 949, 35 Mont. 256, 119 Am.S.R. 858.

52. Cal.—I. S. Chapman & Co. v. Ulery, 59 P.2d 602, 15 Cal.App.2d 452—Haber v. J. G. Boswell Co., 20 P.2d 100, 130 Cal.App. 514.

Mo.—Adamson v. Fogelstrom, 300 S. W. 841, 221 Mo.App. 1243.

53. Tenn.—Hamblen Motor Co. v. Miller & Harle, 266 S.W. 99, 150 Tenn. 602—Great American Indemnity Co. v. Utility Contractors, App. 111 S.W.2d 901.

Validity of mortgage in state to which mortgaged property has been removed see *supra* § 15.

Attachment

Where mortgagee knew for approximately one year before attachment was levied that mortgaged property had been removed to Ten-

§ 260. Right of Mortgagor to Sell or Convey

In the absence of a statute or stipulation to the contrary, a mortgagor, acting in recognition of the mortgage, may sell his interest in the mortgaged chattels.

A mortgagor has the right, of course, to sell the mortgaged property with the mortgagee's consent.⁵⁴ In the absence of a statute or stipulation to the contrary, a mortgagor rightfully in possession may, before a default has occurred in the condition of the mortgage, sell,⁵⁵ give,⁵⁶ or mortgage⁵⁷ the encumbered property, but, as hereinafter considered in § 263, the purchaser with notice, actual or constructive, of the mortgage takes subject to its lien. The sale must be in recognition of, and not in antagonism to, the mortgage.⁵⁸

Even after a default or condition broken, a mortgagor may sell whatever interest he has in the property.⁵⁹ This vendible interest may be only an equity of redemption,⁶⁰ or it may be the legal title where, under the statute, title to mortgaged chattels does not pass until a foreclosure has been completed.⁶¹ A sale of the property by either party to the

mortgage with full consent of the other conveys the legal title to the purchaser.⁶²

Effect of penal statute. A statute which makes it criminal in a mortgagor to sell the property while the mortgage remains in force and unsatisfied without the written consent of the mortgagee, but which does not punish the purchaser, does not prevent title from passing to the purchaser subject to the mortgage lien when such a sale is made, if the purchaser does not know that the mortgage was unsatisfied or that the mortgagee had not given his consent to the sale.⁶³ A statute prohibiting the sale of mortgaged property without the mortgagee's consent does not prevent the mortgagor from contracting for a sale in the future, when such contract is made in recognition of the mortgage and provides for the payment or satisfaction thereof.⁶⁴

Assignability of right to sell. The right sometimes reserved to a mortgagor to retain possession of the mortgaged property and to dispose of it in the course of trade is not assignable.⁶⁵

nessee and knew that mortgagor was financially embarrassed, but took no steps to assert claims against property until after it had been impounded by attachment, chancellor properly decreed that attachment was superior to mortgage.—Great American Indemnity Co. v. Utility Contractors, *supra*.

54. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589. Idaho.—Peoples v. Whitworth, 238 P. 306, 41 Idaho 225.

Ky.—Penick v. White & Beauchamp, 94 S.W.2d 338, 264 Ky. 172.

Mo.—Gorin Sav. Bank v. Early, App., 260 S.W. 480.

N.C.—Southern Ry. Co. v. W. A. Simpkins Co., 100 S.E. 418, 178 N. C. 273.

Ohio.—Hostetler v. National Acceptance Co., 172 N.E. 851, 36 Ohio App. 141.

Consent of mortgagee to sale by mortgagor generally see *infra*, § 262.

55. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

Mo.—Adamson v. Fogelstrom, 300 S. W. 841, 221 Mo.App. 1243.

Mont.—Puckett v. Hopkins, 206 P. 422, 63 Mont. 137.

Tenn.—McClure v. State, 113 S.W.2d 63.

Tex.—Weeks v. First State Bank of De Kalb, Civ.App., 207 S.W. 973—G. M. Carleton Bros. & Co. v. Bowen, Civ.App., 193 S.W. 732. 11 C.J. p 623 note 18.

Liability for refusal to consent

As a mortgagor has a right to sell the mortgaged property without the mortgagee's consent, the latter is not

liable in damages for refusing permission to sell after once having given his consent.—Gamet v. Allender, 210 N.W. 49, 50 S.D. 307.

56. Ala.—Speakman v. Vest, 44 So. 1021, 152 Ala. 623.

57. Tex.—G. M. Carleton Bros. & Co. v. Bowen, Civ.App., 193 S.W. 732.

58. Me.—American Agr. Chemical Co. v. Small, 151 A. 555, 129 Me. 303.

N.Y.—Farnham v. Eichin, 246 N.Y.S. 133, 230 App.Div. 639.

Okl.—Wilson & Co. v. Russell, 290 P. 1106, 144 Okl. 284.

S.C.—Hill v. Winnsboro Granite Corporation, 99 S.E. 836, 112 S.C. 243. 11 C.J. p 624 note 21.

Liability of mortgagor for conversion see § 261 *infra*.

Sale or removal by mortgagor as authorizing mortgagee to take possession see *supra* § 180.

No implied authority

The mere fact that a mortgagor is permitted to retain possession of the property does not give him implied authority to sell it free from the lien.—Rogers v. Booker, N.C., 113 S. E. 671.

No right to appropriate proceeds

A mortgagor has no more right to sell the property and appropriate the proceeds of the sale than he has to dispose of any other property of mortgagee.—Mason v. Sault, 108 A. 267, 93 Vt. 412.

59. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

N.Y.—Nicclay v. Treasure, 115 N.Y. S. 1030.

N.D.—Sanford v. Duluth, etc., El. Co., 48 N.W. 434, 2 N.D. 6.

S.C.—Martin v. Jenkins, 27 S.E. 947, 51 S.C. 42.

60. N.Y.—Nicclay v. Treasure, 115 N.Y.S. 1030.

11 C.J. p 624 note 26.

Transfer in writing unnecessary

An equity of redemption may be transferred by a mortgagor without any writing.—Grice v. Haskins, 73 Ga. 700.

61. N.D.—Sanford v. Duluth, etc., El. Co., 48 N.W. 434, 2 N.D. 6.

62. S.C.—Martin v. Jenkins, 27 S.E. 947, 51 S.C. 42.

63. Cal.—Schwartzler v. Lemas, 53 P.2d 1039, 1043, 11 Cal.App.2d 442, quoting *Corpus Juris* with approval, but holding rule inapplicable.

Mont.—Puckett v. Hopkins, 206 P. 422, 63 Mont. 137.

11 C.J. p. 624, note 29.

Breach of condition

The violation of such a statute has, however, been construed as a breach of a condition of the mortgage permitting the mortgagee to take possession of and sell the property.—Kitchen v. Schuster, 89 P. 261, 14 N.M. 164.

64. Cal.—Schwartzler v. Lemas, 53 P.2d 1039, 11 Cal.App.2d 442.

Neb.—Morris v. Persing, 107 N.W. 218, 76 Neb. 80.

65. Mich.—Daggett, etc., Co. v. McClintock, 22 N.W. 105, 56 Mich. 51.

§ 261. Liabilities of Mortgagor on Transfer of Property

A mortgagor making or aiding in an absolute sale of mortgaged property without the mortgagee's consent is liable for conversion; but he is only liable as surety for the mortgage debt where, with the mortgagee's consent, he sells to a purchaser who assumes the debt.

A mortgagor in possession of mortgaged property is liable for conversion if he, or his agent, makes an absolute sale of the property without the mortgagee's consent and in derogation of his rights,⁶⁶ or if he aids in, or benefits by, such a sale.⁶⁷ However, the mortgagor is not liable for conversion if the mortgagee consents to the sale,⁶⁸ unless the consent is given on a condition which is violated.⁶⁹

A mortgagor is liable to a purchaser for the amount of the mortgage debt if the property is taken from the purchaser under foreclosure sale and the proceeds applied in payment of the debt.⁷⁰

Where purchaser assumes mortgage debt. After a sale of mortgaged property by a mortgagor to a purchaser who assumes the mortgage debt, as be-

tween the buyer and seller the mortgagor becomes liable on the debt as surety;⁷¹ and as between the mortgagor and mortgagee, the mortgagor becomes liable as a surety if the mortgagee consents to,⁷² or ratifies,⁷³ the transaction.

§ 262. Consent of Mortgagee to Sale

- a. In general
- b. Sufficiency of consent, ratification, and estoppel
- c. Consideration

a. In General

Where the mortgagee unconditionally consents to a sale of the property by the mortgagor, he waives his lien, and the purchaser takes title free therefrom, unless the parties intend that the property remain subject thereto.

A mortgagee, by consenting to a sale of the mortgaged property by the mortgagor, waives his lien thereon and the purchaser takes the title free therefrom,⁷⁴ whether or not he knew of the existence of

66. Ark.—*Mitchell v. Mason*, 44 S. W.2d 672, 184 Ark. 1000—*Sternberg v. Strong*, 250 S.W. 344, 158 Ark. 413.

Conn.—*Terzano v. Clemente*, 167 A. 825, 117 Conn. 267.

Me.—*American Agr. Chemical Co. v. Small*, 151 A. 555, 129 Me. 303.

Okl.—*Wilson & Co. v. Russell*, 290 P. 1106, 144 Okl. 284—*George W. Brown & Sons State Bank v. Polen*, 270 P. 9, 11, 132 Okl. 121, quoting *Corpus Juris*—*Bridges v. Union Cattle Loan Co.*, 229 P. 805, 104 Okl. 74.

Tex.—*Oats v. Dublin Nat. Bank*, 90 S.W.2d 824, 127 Tex. 2, reversing *Farmers' Nat. Bank v. Dublin Nat. Bank*, Civ.App., 55 S.W.2d 567—*Beaumont Rice Mills v. Dishman*, Civ.App., 72 S.W.2d 365, error refused.

Wyo.—*First Nat. Bank v. Sorenson*, 217 P. 943, 950, 30 Wyo. 136, citing *Corpus Juris*.

11 C.J. p 624 notes 22, 23.

Liability of parties other than mortgagor for conversion see *infra* § 264.

Effect of penal statute

A mortgagee's right to maintain trover against the mortgagor will not be precluded because of the fact that he has a remedy by a prosecution of the mortgagor.—*Drew v. Drew*, 33 A. 1063, 68 Vt. 70.

Joint action

Where the mortgagor converts the property by selling it, a joint action in trover may be brought against him and a purchaser who has constructive notice of the mortgage.—*Lefkovitz v. Lester*, 66 So. 894, 11 Ala.App. 504.

Other security immaterial

The fact that the mortgagee has other security sufficient to pay the debt does not relieve the mortgagor from liability.—*Beaumont Rice Mills v. Dishman*, Tex.Civ.App., 72 S.W.2d 365, error refused.

67. Vt.—*Hill v. Bedell*, 126 A. 493, 98 Vt. 32.

68. Cal.—*Reno v. A. L. Boyden Co.*, 2 P.2d 214, 115 Cal.App. 697.

Tex.—*Oats v. Dublin Nat. Bank*, 90 S.W.2d 824, 127 Tex. 2, reversing *Farmers' Nat. Bank v. Dublin Nat. Bank*, Civ.App., 55 S.W.2d 567.

Vt.—*Johnson v. Tuttle*, 187 A. 515, 106 A.L.R. 1291.

Assignee of mortgagee

Where a mortgagor sells with the consent of the mortgagee, and without notice that the mortgage has been assigned, neither he nor one who receives the proceeds of the sale from him is liable to the assignee of the mortgage for conversion.—*Farmer v. Graettinger Bank*, 107 N.W. 170, 130 Iowa 469.

69. Failure to turn over proceeds of a sale, on which act consent to sell was given, renders the mortgagor liable for conversion.—*Commercial Finance Corporation v. Commercial Credit Corporation*, 168 A. 257, 105 Vt. 453.

70. Tex.—*Sabine Motor Co. v. W. C. English Auto Co.*, Com.App., 291 S. W. 1038, reversing, Civ.App., 283 S.W. 224.

71. U.S.—*Clayton v. Fort Worth State Bank of Fort Worth, Tex.*, 4 F.2d 763, certiorari denied *Chapman v. Clayton*, 46 S.Ct. 13, 269 U. S. 555, 70 L.Ed. 403.

72. Mo.—*Massillion Engine & Thresher Co. v. Hayward*, App., 256 S.W. 536.

N.C.—*Hamilton v. Benton*, 104 S.E. 78, 180 N.C. 79.

Or.—*Weatherly v. Hochfeld*, 286 P. 588, 133 Or. 136.

Liability as principal continues unless the mortgagee's consent is shown.—*Reed v. Shaw*, Tex.Civ.App., 274 S.W. 274.

Consent to cancel mortgage

Where a mortgagee consents to cancel the mortgage on the purchaser's execution of a new one and in reliance on this agreement the mortgagor consents to the removal of the property, the mortgagee is estopped from holding the mortgagor liable for the debt on the purchaser's failure to execute the new mortgage.—*Antigo Bank v. Ryan*, 80 N.W. 440, 105 Wis. 37.

Discharge

The mortgagor will be discharged from all liability if the mortgagee does not refrain from any act which will impair the security.

Md.—*Prodis v. Constantinides*, 172 A. 286, 167 Md. 33, 93 A.L.R. 1200.

Mo.—*Massillion Engine & Thresher Co. v. Hayward*, App., 256 S.W. 536.

73. Md.—*Prodis v. Constantinides*, 172 A. 286, 167 Md. 33, 93 A.L.R. 1200.

74. U.S.—*U. S. v. Lankford*, D.C. Va., 3 F.2d 52—*Great Northern State Bank v. Ryan*, C.C.A.Minn., 292 F. 10—*Utah-Idaho Live Stock Loan Co. v. Blackfoot City Bank*, D.C.Idaho, 290 F. 583.

Ark.—*Williamson v. Lesser-Goldman*

the mortgage,⁷⁵ and notwithstanding his want of [knowledge when he makes the purchase that such

- Cotton Co., 277 S.W. 347, 186 Ark. 281.
- Cal.—*I. S. Chapman & Co. v. Ulery*, 59 P.2d 602, 15 Cal.App.2d 452—*Kuehn v. Don Carlos*, 41 P.2d 555, 5 Cal.App.2d 25—*Reno v. A. L. Boyden Co.*, 2 P.2d 214, 115 Cal. App. 697—*Valley Bank v. Hillside Packing Co.*, 267 P. 746, 91 Cal. App. 738—*Riddle v. Etling*, 258 P. 162, 84 Cal.App. 460.
- Colo.—*Arnold v. First Nat. Bank*, 39 P.2d 791, 96 Colo. 104, 97 A.L.R. 643—*Brown v. Driverless Car Co.*, 280 P. 488, 86 Colo. 216—*Colorado Motor Finance Co. v. Smith*, 210 P. 73, 72 Colo. 150—*Moore v. Jacobucci*, 197 P. 1015, 70 Colo. 171.
- Conn.—*General Credit Corporation v. Rohde*, 187 A. 676, 677, 122 Conn. 100, citing *Corpus Juris*.
- Ga.—*National City Bank of Rome v. Adams*, 117 S.E. 285, 30 Ga.App. 219.
- Idaho.—*Hoebel v. Raymond*, 266 P. 433, 46 Idaho 55—*Western Seed Marketing Co. v. Pfof*, 262 P. 514, 45 Idaho 340—*Bellevue State Bank v. Halley Nat. Bank*, 215 P. 126, 37 Idaho 121—*Adamson v. Moyes*, 184 P. 849, 32 Idaho 469.
- Ill.—*John Deere Plow Co. v. Hershberger*, 260 Ill.App. 227.
- Ind.—*Hilligoss v. Thorpe*, 141 N.E. 797, 80 Ind.App. 614.
- Iowa.—*Producers Livestock Marketing Ass'n v. John Morrell & Co.*, 263 N.W. 242, 244, 220 Iowa 948, quoting *Corpus Juris* at length—*Hall v. Getty*, 187 N.W. 86, 183 Iowa 436.
- Kan.—*Arkansas River Gas Co. v. Molk*, 285 P. 561, 130 Kan. 30—*Emerson Brantingham Implement Co. v. Faulkner*, 241 P. 431, 119 Kan. 807—*First State Bank of Stafford v. Independent Co-Op. Grain & Mercantile Co.*, 223 P. 1089, 115 Kan. 604.
- La.—*Security Credit Corporation v. Menefee Motor Co.*, 129 So. 174, 14 La.App. 1.
- Minn.—*Singer v. Farmers' State Bank of Goodridge*, 207 N.W. 631, 166 Minn. 327.
- Mo.—*United Film Ad Service v. Roach*, 297 S.W. 91, 222 Mo.App. 339—*Oklahoma Cattle Loan Co. v. Wright*, 268 S.W. 712, 219 Mo.App. 157—*Gorin Sav. Bank v. Early*, App., 260 S.W. 480.
- Mont.—*Fleming v. Consolidated Motor Sales Co.*, 240 P. 376, 74 Mont. 245—*Swords v. Occident Elevator Co.*, 232 P. 189, 72 Mont. 189.
- Neb.—*Warrick v. Rasmussen*, 199 N.W. 544, 112 Neb. 299—*Seymour v. Standard Live Stock Commission Co. of South Omaha*, 192 N.W. 398, 110 Neb. 185.
- N.C.—*Manufacturers' Finance Co. v. Amazon Cotton Mills Co.*, 121 S.E. 439, 443, 187 N.C. 233, quoting *Corpus Juris*.
- N.D.—*Calkins v. Stevens*, 193 N.W. 733, 49 N.D. 768.
- Okl.—*Universal Credit Co. v. Reilly*, 42 P.2d 516, 171 Okl. 236—*National Bond & Investment Co. v. Central Nat. Bank of Enid*, 285 P. 828, 142 Okl. 96—*Farmers' State Bank of Alva v. Kavanaugh & Shea*, 224 P. 525, 98 Okl. 119.
- S.C.—*Mauldin v. Milford*, 121 S.E. 547, 553, 127 S.C. 508, citing *Corpus Juris*—*Cudd v. Rogers*, 98 S.E. 796, 111 S.C. 507.
- S.D.—*First Citizens' Nat. Bank of Watertown v. Reilly*, 252 N.W. 40, 62 S.D. 192—*James River Bank of Frankfort v. Hansen*, 211 N.W. 976, 51 S.D. 13—*Jones v. Dennis*, 165 N.W. 1078, 39 S.D. 614—*Minneapolis Threshing Mach. Co. v. Calhoun*, 159 N.W. 127, 37 S.D. 542.
- Tex.—*Oats v. Dublin Nat. Bank*, 90 S.W.2d 824, 827, 127 Tex. 2, citing *Corpus Juris*, reversing *Farmers' Nat. Bank v. Dublin Nat. Bank*, Civ.App., 55 S.W.2d 567—*Hogg v. Magnolia Petroleum Co.*, Com. App., 267 S.W. 482, reversing *Magnolia Petroleum Co. v. Hogg*, Civ. App., 254 S.W. 580—*Zerr v. Howell*, Civ.App., 84 S.W.2d 867, error refused—*Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, error refused—*Harding v. San Saba Nat. Bank*, Civ.App., 13 S.W.2d 121, error dismissed—*Leonard v. Burton*, Civ. App., 11 S.W.2d 668—*Lumberman's Nat. Bank v. Bush & Witherspoon Co.*, Civ.App., 247 S.W. 295.
- Vt.—*Johnson v. Tuttle*, 187 A. 515, 106 A.L.R. 1291—*Commercial Finance Corporation v. Commercial Credit Corporation*, 168 A. 257, 105 Vt. 453—*Paska v. Saunders*, 153 A. 451, 103 Vt. 204—*Manley Bros. Co. v. Somers*, 138 A. 785, 100 Vt. 439—*Cloutier v. Devereaux*, 136 A. 28, 100 Vt. 187—*Rogers v. Whitney*, 99 A. 419, 91 Vt. 79.
- Wis.—*Caroline State Bank v. Andrews*, 235 N.W. 794, 204 Wis. 393—*Southern Wisconsin Acceptance Co. v. Paull*, 213 N.W. 317, 192 Wis. 548.
- 11 C.J. p 624 note 35—42 C.J. p 765 notes 61, 62.
- Agent of mortgagee may give consent for him and thereby waive the lien.**—*Producers Livestock Marketing Ass'n v. John Morrell & Co.*, 263 N.W. 242, 220 Iowa 948.
- Mortgagor as agent of mortgagee**
By giving his authority to a mortgagor to sell the mortgaged property, the mortgagee makes him his agent in the sale of the property and receipt of the money therefor.
Ala.—*Abbeville Live Stock Co. v. Walden*, 96 So. 237, 209 Ala. 315.
N.C.—*Southern Ry. Co. v. W. A. Simpkins Co.*, 100 S.E. 418, 178 N.C. 273.
- Mortgagor's contract of sale binds the mortgagee as principal if it is within the scope of the authority granted.**—*Warshauer Sheep & Wool Co. v. Rio Grande State Bank*, 247 P. 153, 79 Colo. 540.
- Burden of showing consent is on purchaser.**
Idaho.—*Western Seed Marketing Co. v. Pfof*, 262 P. 514, 45 Idaho 340.
Mass.—*Denno v. Standard Acceptance Corporation*, 178 N.E. 513, 277 Mass. 251.
- Deductions for pasturage**
That bank, holding note secured by mortgage on calves sold by mortgagor to defendant, did not understand that defendant's offer to purchase included not only deductions for pasturage bill due himself, but also that due another, was no justification for bank, in absence of fraud on defendant's part.—*First Nat. Bank v. Hoover*, Tex.Civ.App., 269 S.W. 262.
- Shipment for immediate sale**
Where a mortgagee has given his consent to the shipment of mortgaged sheep to another state for their immediate sale, he must act before, or at the time of, shipment, if he wishes to take the necessary steps to preserve his lien.—*Adamson v. Fogelstrom*, 300 S.W. 841, 221 Mo. App. 1243.
- Purchaser need not account to the mortgagee for the proceeds of the sale.**
Ala.—*Abbeville Live Stock Co. v. Walden*, 96 So. 237, 209 Ala. 315.
Conn.—*General Credit Corporation v. Rohde*, 187 A. 676, 122 Conn. 100.
Tex.—*Lumberman's Nat. Bank v. Bush & Witherspoon Co.*, Civ.App., 247 S.W. 295.
- As between mortgagee and mortgagor's representative, however, an agreement for the sale of mortgaged property is not a waiver.**—*State ex rel. Cantley v. Akin*, 22 S.W.2d 836, 224 Mo.App. 114.
75. U.S.—*First Nat. Bank & Trust Co. of Oklahoma City, Okl., v. Stock Yards Loan Co., C.C.A.Mo.*, 65 F.2d 226, certiorari denied 54 S.Ct. 65, 290 U.S. 648, 78 L.Ed. 562—*Farmers' Nat. Bank v. Missouri Livestock Commission Co.*, C.C.A.Mo., 53 F.2d 991.
Ark.—*Mitchell v. Mason*, 44 S.W.2d 672, 184 Ark. 1000—*Vaughan v. Hinkle*, 198 S.W. 705, 131 Ark. 197.
Idaho.—*Peoples v. Whitworth*, 238 P. 306, 41 Idaho 225.
Mo.—*Moffett Bros. & Andrews Commission Co. v. Kent*, 5 S.W.2d 395—*Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co.*, 295 S.W. 506, 221 Mo.App. 1096.

consent has been given.⁷⁶ Knowledge on the part of the mortgagee that a particular sale has taken place is unnecessary, if he gave the mortgagor general authority to sell.⁷⁷ Consent to a sale, however, does not constitute a waiver of the lien where the mortgagee positively refuses to release the mortgage,⁷⁸ or where the sale is subject to the mortgage which the purchaser assumes.⁷⁹

Conditional or qualified consent. The mortgagee's consent to a sale of the mortgaged property by

the mortgagor may be conditional;⁸⁰ and when such a consent is given, the condition must be performed in order to render the consent a waiver of the mortgage lien as between the parties, or as against a purchaser who was a party to the condition or had knowledge thereof,⁸¹ as where consent is given on condition that the proceeds of the sale be applied on the mortgage debt,⁸² or that the mortgage debt should first be paid.⁸³ On the other hand, nonperformance of a condition imposed on a mortgagor will not affect the rights of a purchaser⁸⁴ or third

Mont.—Luther v. Lee, 204 P. 365, 62 Mont. 174.

Nev.—Martin v. Duncan Automobile Co., 252 P. 322, 323, 50 Nev. 91, citing *Corpus Juris*, and declaring rule well settled.

11 C.J. p 625 note 36.

76. Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.

Mont.—Luther v. Lee, 204 P. 365, 62 Mont. 174.

Nev.—Martin v. Duncan Automobile Co., 252 P. 322, 50 Nev. 91.

11 C.J. p 625 note 37.

77. Mont.—Luther v. Lee, 204 P. 365, 62 Mont. 174.

Nev.—Martin v. Duncan Automobile Co., 252 P. 322, 50 Nev. 91.

11 C.J. p 625 note 39.

78. Tex.—Trabue v. Wade, Civ. App., 95 S.W. 616.

Delivery to mortgagor as bailee to sell and turn over proceeds to mortgagee does not waive right to proceeds.—First Nat. Bank v. First State Bank of Campbell, Tex. Civ. App., 252 S.W. 1089.

Refusal to release lien

Mortgagee consenting to proposed sale of property, but refusing to release lien thereby, negatives intention of waiver.—Home Ins. Co. v. Klous, Tex. Civ. App., 58 S.W.2d 176, error refused.

79. Colo.—Prather v. Auto Industrial Corporation, 45 P.2d 628, 96 Colo. 516.

Iowa.—Benson & Marxer v. Reger, 168 N.W. 881, 186 Iowa 19, modified on other grounds Benson & Marxer v. Same, 172 N.W. 166, 186 Iowa 19.

Okl.—Universal Credit Co. v. Reilly, 42 P.2d 516, 171 Okl. 286—National Bond & Investment Co. v. Central Nat. Bank of Enid, 285 P. 828, 142 Okl. 96.

S.D.—First Citizens' Nat. Bank of Watertown v. Reilly, 252 N.W. 40, 62 S.D. 192.

80. Tex.—Daggett v. Corn, Civ. App., 54 S.W.2d 1098, error refused.

81. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

Colo.—Arnold v. First Nat. Bank, 39 P.2d 791, 96 Colo. 104, 97 A.L.R.

643—Sowards v. Jones, 223 P. 747, 75 Colo. 25, citing *Corpus Juris*.

Conn.—General Credit Corporation v. Rohde, 187 A. 676, 122 Conn. 100.

Ga.—Wilkins v. Friedman, App., 139 S.E. 113, 114, citing *Corpus Juris*.

Idaho.—First Security Bank v. Zaring Farm & Livestock Co., 10 P.2d 303, 306, 51 Idaho 700, citing *Corpus Juris*—Western Seed Marketing Co. v. Pfost, 262 P. 514, 45 Idaho 340.

Iowa.—Farmers' Elevator Co. of Onawa v. Reddix, 170 N.W. 765, 185 Iowa 425.

Minn.—Silver v. McDonald, 215 N.W. 844, 172 Minn. 458.

Mo.—Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co., 295 S.W. 506, 508, 221 Mo. App. 1096, quoting *Corpus Juris*—Oklahoma Cattle Loan Co. v. Wright, 268 S.W. 712, 219 Mo. App. 157.

Okl.—Gibson Oil Co. v. Hayes Equipment Manufacturing Co., 21 P.2d 17, 20, 163 Okl. 134, quoting *Corpus Juris*.

Tex.—Daggett v. Corn, Civ. App., 54 S.W.2d 1098, error refused—First Nat. Bank v. Hoover, Civ. App., 244 S.W. 1044.

11 C.J. p 625 note 44.

Approval of purchaser held a condition precedent to mortgagee's consent to sale.—General Credit Corporation v. Rohde, 187 A. 676, 122 Conn. 100.

Compliance held unnecessary

The fixing of a stated time within which the property shall be removed does not make a condition on non-compliance with which the mortgagee's consent to a sale is revoked.—Gates v. Johnston Lumber Co., 52 N.E. 736, 172 Mass. 495.

82. Cal.—Reno v. A. L. Boyden Co., 2 P.2d 214, 115 Cal. App. 697.

Colo.—Arnold v. First Nat. Bank, 39 P.2d 791, 792, 96 Colo. 104, 97 A.L.R. 643, quoting *Corpus Juris*.

Idaho.—Hoebel v. Raymond, 266 P. 433, 46 Idaho 55.

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.

N.D.—Rohette State Bank v. Minnekahta Elevator Co., 195 N.W. 6, 50 N.D. 141.

Okl.—Farmers' State Bank of Alva v.

Kavanaugh & Shea, 224 P. 525, 98 Okl. 119.

S.D.—Nelson v. Badker, 163 N.W. 569, 39 S.D. 108.

Tex.—Home Ins. Co. v. Klous, Civ. App., 58 S.W.2d 176, 178, error refused, quoting *Corpus Juris*.

Vt.—Commercial Finance Corporation v. Commercial Credit Corporation, 168 A. 257, 105 Vt. 453.

11 C.J. p 625 note 45.

Collection by third person

Consent on condition that a third person shall collect and apply the proceeds of the sale to the mortgage debt does not operate to waive the lien, unless the mortgagee agrees to look to the proceeds of sale as his security.—Hart v. Farmers' Bank of Bates County, Mo. App., 28 S.W.2d 121 —Bruce v. Kays, 1 S.W.2d 214, 222 Mo. App. 77—Love v. Scott, 166 S.W. 859, 179 Mo. App. 351.

83. Idaho.—Western Seed Marketing Co. v. Pfost, 262 P. 514, 45 Idaho 340.

Tex.—Home Ins. Co. v. Klous, Civ. App., 58 S.W.2d 176, 178, quoting *Corpus Juris*—Eagle Drug Co. v. White, Civ. App., 182 S.W. 378.

84. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589. Ky.—Penick v. White & Beauchamp, 94 S.W.2d 338, 264 Ky. 172.

Mo.—Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co., 295 S.W. 506, 508, 221 Mo. App. 1096, quoting *Corpus Juris*—Oklahoma Cattle Loan Co. v. Wright, 268 S.W. 712, 219 Mo. App. 157.

Nev.—Martin v. Duncan Automobile Co., 252 P. 322, 50 Nev. 91.

Tex.—Daggett v. Corn, Civ. App., 54 S.W.2d 1098, error refused—Harding v. San Sala Nat. Bank, Civ. App., 13 S.W.2d 121, error dismissed.

Vt.—Commercial Finance Corporation v. Commercial Credit Corporation, 168 A. 257, 105 Vt. 453—Cloutier v. Devereaux, 136 A. 28, 100 Vt. 187.

Wis.—Southern Wisconsin Acceptance Co. v. Paull, 213 N.W. 317, 193 Wis. 548.

11 C.J. p 625 note 47.

Effect of recording

The fact that a mortgage, contain-

person⁸⁵ who does not participate therein, or have knowledge thereof, as an agreement to allow a mortgagor to sell and turn over the proceeds is a substitution of his personal obligation for the mortgage security.⁸⁶

Duty to give consent. In the absence of a binding contract, the mortgagee is not bound to consent to the sale of the mortgaged property by the mortgagor to a third person,⁸⁷ unless the goods are perishable.⁸⁸

Effect of sale on intermediate liens. In those jurisdictions in which the legal title to the mortgaged property remains in the mortgagor, a sale by the mortgagor with the consent of the first mortgagee, but without notice to intermediate lienholders, does not foreclose their liens, although made for full value, and the proceeds are applied to the payment of the debt secured by the first mortgage;⁸⁹ but the contrary has been held in those jurisdictions in which the effect of the mortgage is to vest title in the mortgagee.⁹⁰ An agreement that the mortgagor may sell a part of the property and, with the proceeds, purchase other property of like kind, to be

secured by the mortgage in lieu of that sold, is not void as to a junior mortgage, when the senior mortgagee has no actual knowledge of the existence of the junior mortgage,⁹¹ and a junior lienor cannot complain of a sale with such consent when it is made in good faith in open market.⁹² Of course, if the junior lienor is a party to the consent to sell the first mortgagee does not waive his lien as to him.⁹³

Revocation of authority. Authority to sell may be revoked at any time before a valid sale is made,⁹⁴ but not after the rights of a purchaser or encumbrancer have become fixed.⁹⁵

b. Sufficiency of Consent, Ratification, and Estoppel

Consent or authority given to the mortgagor to sell the property may be oral or in writing, and its sufficiency depends on the intention of the parties, unless the circumstances are such as to imply consent. A mortgagee may lose his lien by ratifying an unauthorized sale or by conduct estopping him from denying the mortgagor's authority to make the sale.

In the absence of a statute to the contrary,⁹⁶ the mortgagee's consent to a sale of the mortgaged

ing a provision against sale or removal of the mortgaged property without the mortgagee's written consent, is recorded does not indicate that prospective purchasers have notice of a conditional consent to sell.—*Oklahoma Cattle Loan Co. v. Wright*, 268 S.W. 712, 219 Mo.App. 157.

85. Mo.—*Adamson v. Fogelstrom*, 300 S.W. 841, 221 Mo.App. 1243—*Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co.*, 295 S.W. 506, 221 Mo.App. 1096.

Attaching creditor

Mo.—*Adamson v. Fogelstrom*, 300 S.W. 841, 221 Mo.App. 1243.

86. Cal.—*I. S. Chapman & Co. v. Ulery*, 59 P.2d 602, 15 Cal.App.2d 452—*Reno v. A. Boyden Co.*, 2 P.2d 214, 115 Cal.App. 697—*Ramsey v. California Packing Corporation*, 201 P. 481, 51 Cal.App. 517.

Colo.—*Moore v. Jacobucci*, 197 P. 1015, 70 Colo. 171.

Ga.—*National City Bank of Rome v. Adams*, 117 S.E. 235, 30 Ga.App. 219.

Mo.—*Moffett Bros. & Andrews Commission Co. v. Kent*, 5 S.W.2d 395.

Okl.—*Universal Credit Co. v. Reilly*, 42 P.2d 516, 171 Okl. 286—*National Bond & Investment Co. v. Central Nat. Bank of Enid*, 285 P. 828, 142 Okl. 96.

S.D.—*Minneapolis Threshing Mach. Co. v. Calhoun*, 159 N.W. 127, 37 S.D. 542.

Wis.—*Southern Wisconsin Acceptance Co. v. Paull*, 213 N.W. 317, 192 Wis. 548.

11 C.J. p 625 note 48.

Duty not condition

Where consent is given in reliance

on the mortgagor's promise to pay the debt, the promise constitutes a duty but it does not constitute a condition to the mortgagor's power to convey an unencumbered title.—*General Credit Corporation v. Rohde*, 187 A. 676, 122 Conn. 100.

87. Idaho.—*Colorado Nat. Bank of Denver v. Meadow Creek Live Stock Co.*, 211 P. 1076, 36 Idaho 509.

88. Ala.—*Gulfport Fertilizer Co. v. Jones*, 73 So. 145, 15 Ala.App. 230.

Implied contract that he shall buy the property is raised on the mortgagee's refusal to consent, but the mortgagor, to avail himself of this implied contract, must acquit himself of fault or negligence.—*Gulfport Fertilizer Co. v. Jones*, supra.

89. U.S.—*Platte Valley Cattle Co. v. Bosserman-Gates Live Stock, etc., Co., Neb.*, 202 F. 692, 121 C.C.A. 102, 45 L.R.A., N.S., 1137.

90. Neb.—*Faeth v. Leary*, 36 N.W. 513, 23 Neb. 267.

91. Kan.—*Farmers' State Bank v. Bank of Inman*, 254 P. 1038, 123 Kan. 238.

92. N.D.—*State v. Strong*, 201 N.W. 858, 860, 52 N.D. 197.

"The mortgagor and the first mortgagee may fairly and in good faith agree that the property be sold on the regular market without foreclosure and the proceeds applied on the indebtedness; and subsequent lienholders have no ground for complaint, in the absence of fraud, or misconduct amounting to legal fraud, which results in prejudice to their rights. If, in order to accomplish

such lawful purpose, it becomes necessary to remove the property, in good faith, from the county, failure to wait upon mortgagees or lienholders, subsequent to the first mortgage, in order to obtain their consent thereto, would not render the mortgagor guilty of a crime within the letter or the spirit of the statute. It is well known that a private sale of chattels, made in good faith and on the open market, is likely to bring more than a forced sale; that, in such circumstances, lienholders subsequent to the first mortgage cannot complain, when, notwithstanding the more advantageous sale, the proceeds are inadequate to extinguish the lien of the first mortgage, is as good sense as if it is sound law."—*State v. Strong*, supra.

93. Tex.—*Loya v. Bowen*, Civ.App. 215 S.W. 474.

94. Idaho.—*Saxton v. Breshears*, 121 P. 567, 21 Idaho 333.

Commencing foreclosure before a sale is consummated operates as a revocation of a mortgagee's consent to sell.—*Western Seed Marketing Co. v. Pfof*, 262 P. 514, 45 Idaho 340.

95. Mo.—*Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co.*, 289 S.W. 623, 316 Mo. 426.

One making advances to a mortgagor for the purpose of buying and reselling the mortgaged property acquires a special property therein, so as to preclude the mortgagee from withdrawing his implied consent to sell.—*Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co.*, supra.

96. Me.—*Rowe v. Green*, 100 A. 145, 116 Me. 94.

property may be given orally,⁹⁷ although the mortgage forbids sales without written consent,⁹⁸ and notwithstanding that a sale without such written consent, is, by statute, made an offense.⁹⁹

In the absence of circumstances implying consent, or working a ratification or estoppel, whether the mortgagee authorized the mortgagor to sell mort-

gaged property depends on the intention of the parties,¹ and the mortgagor may not go beyond the terms of a specific authorization.² If the authority to sell involves the exercise of discretion, it cannot be delegated by the mortgagor.³

A mortgagee's consent to a sale by the mortgagor of the property may be implied⁴ or inferred.⁵ The

97. Ark.—*Mitchell v. Mason*, 44 S. W.2d 672, 184 Ark. 1000—*Vaughan v. Hinkle*, 198 S.W. 705, 131 Ark. 197.

Cal.—*Woods Leasing Co. v. Funcheson*, 25 P.2d 47, 134 Cal.App. 111—*Reno v. A. L. Boyden Co.*, 2 P.2d 214, 115 Cal.App. 697.

Mo.—*Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co.*, 295 S.W. 506, 221 Mo.App. 1096—*Gorin Sav. Bank v. Early*, App., 260 S.W. 480.

Vt.—*Paska v. Saunders*, 153 A. 451, 103 Vt. 204—*Rogers v. Whitney*, 99 A. 419, 91 Vt. 79.

11 C.J. p 626 note 59.

98. Okl.—*Cudd v. Farmers' Exch. Bank of Lindsay*, 185 P. 521, 76 Okl. 317—*Phelan v. Barnhart Bros. & Spindler*, 181 P. 718, 75 Okl. 49. 11 C.J. p 626 note 60.

Reason for rule

The provision to the contrary is merely a statement of existing law of such a contract, and does not affect the doctrine of waiver ex post facto by word or act.—*Abbeville Live Stock Co. v. Walden*, 96 So. 237, 209 Ala. 315.

99. U.S.—*Globe Grain & M. Co. v. De Tweede N. & P. Hypotheekbank, C.C.A.Idaho*, 69 F.2d 418, 422, citing *Corpus Juris*.

Cal.—*Woods Leasing Co. v. Funcheson*, 25 P.2d 47, 134 Cal.App. 111—*Reno v. A. L. Boyden Co.*, 2 P.2d 214, 115 Cal.App. 697.

Mo.—*De Witt v. Syfon*, 211 S.W. 716, 202 Mo.App. 469.

Okl.—*Phelan v. Barnhart Bros. & Spindler*, 181 P. 718, 75 Okl. 49. 11 C.J. p 626 note 61.

1. Mo.—*Gorin Sav. Bank v. Early*, App., 260 S.W. 480.

Statements or acts held not authority to sell

(1) Statement that if purchaser intended to buy the cotton from mortgagor he would buy at his risk.—*Swift Gin Co. v. Robinson*, Tex. Civ.App., 77 S.W.2d 333, error dismissed.

(2) Consent to shipment or delivery.—*Hopkins v. Hemsley*, 22 P.2d 138, 53 Idaho 120.

2. Authorizations construed

(1) Authority to sell merchandise does not include power to sell fixtures.—*Harris v. Schnitzer*, 27 P.2d 1010, 146 Or. 391.

(2) Consent to sell to one person does not authorize a sale to another.—*Oats v. Dublin Nat. Bank*, 90 S.W. 2d 824, 127 Tex. 2, reversing *Farm-*

ers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567.

(3) Authority to sell at retail does not authorize a mortgagor to put the property into a partnership as his share of the capital.—*Barnard v. Eaton*, 2 Cush., Mass., 294.

(4) Authority to exchange property does not authorize a sale thereof.

Ala.—*Bright v. Mack*, Ala., 72 So. 433.

Ky.—*Cooper v. McKee*, 89 S.W. 203, 121 Ky. 287, 28 Ky.L. 270.

(5) Authority to sell raw material and apply the proceeds in a particular way, gives the mortgagor no right to convert the material into manufactured articles and to sell and dispose of them on the market.—*National Citizens' Bank v. McKinley*, 136 N.W. 579, 118 Minn. 162.

Consent to sell for cash

(1) If the mortgagee consents to a sale for cash only, the purchaser must show that he paid cash.—*Burks v. Hubbard*, 69 Ala. 379.

(2) An injunction will lie to prevent one who has mortgaged his stock of goods from selling otherwise than for cash.—*Logan v. Slade*, 10 So. 25, 28 Fla. 699.

Consent to sell part of property

(1) Does not imply consent to sell the whole of it.

Idaho.—*Knollin v. Jones*, 63 P. 638, 7 Idaho 466.

Mich.—*Riley v. Conner*, 44 N.W. 1040, 79 Mich. 497.

11 C.J. p 627 note 74.

(2) Does not prejudice the mortgagee's rights against the balance of the property. — *Ballinger Nat. Bank v. Bryan*, 34 S.W. 451, 12 Tex. Civ.App. 678.

(3) But if the release of part of the property interferes with adverse claims of which the mortgagee had knowledge at the time of such release, his rights against the balance of the property are prejudiced. Minn.—*Loveland v. Cooley*, 61 N.W. 133, 59 Minn. 269.

Miss.—*Dillon v. Bennett*, 22 Miss. 171.

Sale on credit

A consent to sell in the ordinary course of trade authorizes a sale on credit.—*Byam v. Johnson*, 61 N.W. 970, 93 Iowa 243.

3. Ala.—*Drum v. Harrison*, 3 So. 715, 83 Ala. 384.

4. Ariz.—*Babbitt Bros. Trading Co. v. Marley*, 238 P. 392, 28 Ariz. 589.

Mass.—*Denno v. Standard Acceptance Corporation*, 173 N.E. 513, 277 Mass. 251.

Mo.—*Moffett Bros. & Andrews Commission Co. v. Kent*, 5 S.W.2d 395. 11 C.J. p 627 note 77.

Circumstances held to imply consent

(1) A letter from a mortgagee indicating that the mortgagor should deduct a pasturage bill from the sale of mortgaged cattle. — *First Nat. Bank v. Hoover*, Tex.Civ.App., 289 S. W. 262.

(2) A mortgagee's indorsement of "O. K." on a bill of sale reciting that the property is sold free of encumbrance.—*Arkansas River Gas Co. v. Molk*, 285 P. 561, 130 Kan. 30.

(3) Consent that mortgaged cotton be placed on call.—*Knollenberg v. Farmers' Gin Co.*, Tex.Civ.App., 80 S. W.2d 1040.

(4) A mortgagee's knowledge of the execution of consignment contracts by the mortgagor's agent.—*Warshauer Sheep & Wool Co. v. Rio Grande State Bank*, 247 P. 183, 79 Colo. 540.

(5) A mortgagee's direction to the mortgagor to house and prepare for market an ungathered crop.—*Etheridge v. Hilliard*, 6 S.E. 571, 100 N.C. 250.

Circumstances held not to imply consent

(1) The fact that a mortgagee of wheat did not look after the wheat when it was threshed, or have anyone there to take it away, or send any team for it.—*Barnesville First Nat. Bank v. St. Anthony, etc.*, El. Co., 114 N.W. 265, 103 Minn. 82.

(2) A statement by the mortgagee after sale.—*McLeod Lumber Co. v. Neighbors*, 114 So. 176, 22 Ala.App. 204.

(3) That mortgagee of cattle notified mortgagor that he would discontinue advancements for running cattle, and that mortgagor must make other arrangements.—*Byers Bros. & Co. Live Stock Commission Corporation v. McKenzie*, 239 P. 525, 30 N.M. 487.

(4) Letter from mortgagee indicating that he hoped the mortgagor got a good price for the property, and requesting information as to when the mortgagor expected to sell.—*First Nat. Bank v. American State Bank of Brighton*, 215 P. 473, 73 Colo. 254.

5. Colo.—*Ziegler v. Ilfeld*, 122 P. 56, 52 Colo. 275, Ann.Cas.1913D 583.

implication may arise from a general course of dealing between the parties,⁶ from the terms of the mortgage itself,⁷ or from the fact that the mortgagee allows the mortgagor to assume the credit of ownership of the property.⁸ While consent of the mortgagee cannot be implied from equivocal conduct,⁹ it may be implied from the fact that he remains silent in the presence of an actual sale,¹⁰ or knowingly acquiesces in a sale.¹¹ A mortgagee's mere expectation that the mortgagor will sell the property and pay the proceeds to him and has been held to imply a consent,¹² although there is contrary authority.¹³

If a mortgage by its terms prohibits a sale without the mortgagee's written consent, there is authority that a further provision permitting the mortgagor to retain possession does not imply authority to sell;¹⁴ but it has been held that a provision prohibiting a sale may be waived by the mortgagee's conduct in knowingly permitting its violation.¹⁵

In case of mortgaged stock of goods. In the absence of a stipulation to the contrary, consent to sell mortgaged property consisting of a stock of goods is implied from the fact that the mortgagor is permitted by a provision in the mortgage to remain in possession of the property,¹⁶ or from the

6. U.S.—Farmers' Nat. Bank v. Missouri Livestock Commission Co., C.C.A.Mo., 53 F.2d 991.
11 C.J. p 627 note 78.

Permitting other sales

(1) Consent to a particular sale may be implied from the permission of previous sales over a considerable length of time.

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.
Tex.—Hodge v. Fly, Civ.App., 105 S.W.2d 778.

Wis.—Bernhagen v. Marathon Finance Corporation, 250 N.W. 410, 212 Wis. 495.

(2) Separate written consents to the sale of parts of mortgaged chattels indicates an intention not to give consent beyond each specific authorization.—Mitchell v. Mason, 44 S.W.2d 672, 184 Ark. 1000.

(3) Consent to sales under previous mortgages does not imply consent under a later mortgage containing a provision against sale except on written consent.—Imperial Valley Savings Bank v. Huff, 190 S.W. 116, 126 Ark. 281.

(4) Mere negative habitual conduct on previous occasions in making no objections to mortgagor's sales raises no inference of assent to a particular sale.—Hattermer v. Davis, 91 So. 321, 206 Ala. 613.

(5) Persons who have not previously dealt with the mortgagor have no right to rely on his previous course of selling mortgaged property.—Conway Compress Co. v. Adkisson, 69 S.W.2d 1079, 189 Ark. 20.

Facts held irrelevant

That chattel mortgagor applied proceeds of mortgaged property on mortgage debt, and that mortgagee never acquiesced in mortgagor's misappropriation of proceeds of mortgaged property.—Moffett Bros. & Andrews Commission Co. v. Kent, Mo., 5 S.W.2d 395.

7. U.S.—Allen v. Windham Cotton Mfg. Co., C.C.Conn., 87 F. 786.

Ala.—Money v. First Nat. Bank, 96 So. 230, 209 Ala. 298.

Covenant to account

(1) A covenant to account for the proceeds of mortgaged property may imply an authority to sell.—Abbott v. Goodwin, 20 Me. 408.

(2) This is particularly true where such a provision appears in a type-written clause in a mortgage on a printed form.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

8. Iowa.—Gardner v. Roach, 82 N.W. 897, 111 Iowa 413.

11 C.J. p 627 note 82.

9. Ala.—Hattermer v. Davis, 91 So. 321, 322, 206 Ala. 613, citing *Corpus Juris*.

11 C.J. p 627 note 79.

Mortgagee's knowledge of the mortgagor's contract of sale has no effect on his rights.—Beaumont Rice Mills v. Dishman, Tex.Civ.App., 72 S.W.2d 365, error refused.

10. Ill.—Brooks v. Record, 47 Ill. 30.
Ind.—Benedict v. Farlow, 27 N.E. 307, 1 Ind.App. 160.

11 C.J. p 627 note 81.

Silence when told of intended sale, however, does not imply a consent.—Smith v. Chitwood, 44 N.C. 445.

11. Tex. — Matthews v. Melasky, Tex.Civ.App., 240 S.W. 641.

Receipt of proceeds of sale

(1) A mortgagee's receipt of the proceeds of a sale of the mortgaged property without knowledge of their source does not constitute a waiver of the lien.—Nathan v. Sax Motor Co., 256 N.W. 223, 64 N.D. 773.

(2) A mortgagee's acceptance of the proceeds of a sale, with knowledge of their source, from a sales agency does not constitute a waiver.—Cole-McIntyre-Norfleet Co. v. Du Bard, 99 So. 474, 135 Miss. 20.

(3) A mere unaccepted tender of the proceeds does not constitute a waiver.—Holloway v. Arnold, 5 S.W. 277, 92 Mo. 293.

12. Miss.—Tonnar v. Washington & Issaquena Bank, 105 So. 750, 140 Miss. 875.

Mo.—Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co., 289 S.W. 623, 316 Mo. 426.

13. **Mortgagee does not waive his lien** by the mere fact that he expected the mortgagor to sell the property and use the money to pay the debt, even though he knew the latter was selling the property.—Weeks v. First State Bank of De Kalb, Tex. Civ.App., 207 S.W. 973.

14. Colo.—Estes v. Denver First Nat. Bank, 63 P. 788, 15 Colo.App. 526.

Mass.—Sleeper v. Chapman, 121 Mass. 404.

11 C.J. p 626 note 68.

15. Ark.—Coffman v. Citizens' Loan & Investment Co., 290 S.W. 961, 172 Ark. 889.

Va.—Boice v. Finance & Guaranty Corporation, 102 S.E. 591, 127 Va. 563, 10 A.L.R. 854.

16. U.S.—U. S. v. Lankford, D.C. Va., 3 F.2d 52.

Colo.—Colorado Motor Finance Co. v. Smith, 210 P. 73, 72 Colo. 150.

11 C.J. p 626 notes 64, 67.

Replenishment of, or additions to, stock

(1) A provision authorizing the mortgagor to continue the business and "replenish" the stock from time to time impliedly authorizes a sale.—Bynum v. Miller, 89 N.C. 393.

(2) A mortgagee's conduct in permitting the daily sale of a consumable stock of goods and the replenishment thereof raises a presumption of waiver.—Ogden v. Stewart, 29 Ill. 122.

(3) But a mortgage contemplating additions to the stock of goods on hand at the date of the mortgage has been held not to authorize the mortgagor to sell.—St. Louis Drug Co. v. Robinson, 81 Mo. 18.

Cut cord wood is not a stock of goods or property, the possession and use of which in the ordinary course of business means the daily sale thereof, and so such a provision in a mortgage thereon does not imply authority to sell.—Meyer v. Munro, 71 P. 969, 9 Idaho 46.

fact that the mortgagee accepted a mortgage on such property and permitted the mortgagor to remain in possession thereof with knowledge that it would be exposed and offered for sale by the mortgagor in the ordinary course of trade.¹⁷

Ratification or estoppel after sale. A mortgagee's lien may be extinguished by his ratification of an unauthorized sale.¹⁸ A subsequent assent to a sale,¹⁹ or the taking of a new mortgage on property received by the mortgagor in exchange for the original mortgaged property after acquiring knowledge of the exchange,²⁰ may constitute a ratification

of the mortgagor's sale; but a ratification will not necessarily be inferred from a mortgagee's equivocal acts or statements made after acquiring knowledge of a disposition of the property.²¹ A mortgagee is not bound on the theory of ratification of an unauthorized act of an agent, where the mortgagor, in selling the property, acts in his own right as owner.²²

A mortgagee may by his conduct be estopped from asserting his lien against a purchaser of the property from the mortgagor,²³ but the elements of an estoppel will not ordinarily be present if the

17. Ga.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

Mass.—Denno v. Standard Acceptance Corporation, 178 N.E. 513, 277 Mass. 251.

S.C.—Cudd v. Rogers, 98 S.E. 796, 111 S.C. 507.

Vt.—Rogers v. Whitney, 99 A. 419, 91 Vt. 79.

Rule applied to stock of automobiles
(1) Generally.

Ark.—Coffman v. Citizens' Loan & Investment Co., 290 S.W. 961, 172 Ark. 889.

Colo.—Brown v. Driverless Car Co., 280 P. 438, 88 Colo. 216—Colorado Motor Finance Co. v. Smith, 210 P. 73, 72 Colo. 150.

Ga.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

Kan.—Emerson Brantingham Implement Co. v. Faulkner, 241 P. 431, 119 Kan. 807.

Mont.—Luther v. Lee, 204 P. 365, 62 Mont. 174.

Va.—Boice v. Finance & Guaranty Corporation, 102 S.E. 591, 127 Va. 563, 10 A.L.R. 654.

(2) The fact that an automobile which was purchased from a dealer was not one on display in the dealer's wareroom is immaterial, where the mortgagee of the property put it within the power of the mortgagor dealer to mislead a third person.—Denno v. Standard Acceptance Corporation, 178 N.E. 513, 277 Mass. 251.

(3) The rule has been applied irrespective of the purchaser's notice of the mortgage.—Cudd v. Rogers, 98 S.E. 796, 111 S.C. 507.

(4) The rule is not rendered inoperative because such a mortgage is recorded, thereby giving a purchaser constructive notice of the mortgage. Ga.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

Mass.—Denno v. Standard Acceptance Corporation, 178 N.E. 513, 277 Mass. 251.

Ohio.—Hostettler v. National Acceptance Co., 172 N.E. 851, 36 Ohio App. 141.

42 C.J. p 764 notes 52, 53.

(5) In Louisiana, however, it has been held that the fact that mortgagee knew that an automobile was on, or immediately to be put on, sale, or expected to be paid from proceeds, did not estop him to assert mortgage as against purchasers.—Palmisano v. Louisiana Motors Co., 117 So. 446, 166 La. 416.

Time of giving permission

Whether permission is given contemporaneously with, or subsequent to, the mortgage is immaterial.

Ark.—Coffman v. Citizens' Loan & Investment Co., 290 S.W. 961, 172 Ark. 889.

Va.—Boice v. Finance & Guaranty Corporation, 102 S.E. 591, 127 Va. 563, 10 A.L.R. 654.

Statement in mortgage that mortgagor had no authority to sell free from the lien was held to mean only that mortgagor remained accountable, and not that he had no authority to sell.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

18. Cal.—Riddle v. Etling, 258 P. 162, 84 Cal.App. 460.

Iowa.—Sloan State Bank v. B. M. Stoddard & Son, 159 N.W. 636, 178 Iowa 104, L.R.A.1917A 1261.

Kan.—Emerson Brantingham Implement Co. v. Faulkner, 241 P. 431, 119 Kan. 807.

Tex.—Hanks v. First State Bank of Klondike, Civ.App., 265 S.W. 245.

Wyo.—Bell v. Kassahn, 270 P. 541, 39 Wyo. 152.

19. N.H.—Roberts v. Crawford, 54 N.H. 532.

20. N.Y.—Sheldon v. McFee, 140 N. Y.S. 818, 156 App.Div. 877, 11 C.J. p 628 note 90.

Additional security

It is not a ratification of a sale, however, to take new mortgages on other property of the mortgagor as further security for a collateral note to the original mortgage.—Palmisano v. Louisiana Motors Co., 117 So. 446, 166 La. 416.

21. Okl.—First Nat. Bank v. Harp, 291 P. 116, 144 Okl. 219.

11 C.J. p 627 note 89.

22. Colo.—Ilfeld v. Ziegler, 91 P. 825, 40 Colo. 401.

Okl.—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.

23. N.M.—Shepherd v. Van Doren, 60 P.2d 635, 40 N.M. 380.

Destroying purpose of recording act

A mortgagee will be estopped from asserting his lien if he performs some act which aids in destroying the intended purpose of a registration or recording act. Accordingly, where automobile sold under duly filed mortgage came into mortgagee's possession, and mortgagee discovered that engine number had been changed but redelivered automobile to mortgagor without restoring original number, the mortgagee was estopped to assert lien against subsequent good-faith purchaser.—Shepherd v. Van Doren, supra.

Estoppel of mortgagee

Mortgagee of chattels in leased café, who, on C, mortgagor and lessee, selling the business and chattels, signed a guaranty attached to the act of sale that the title to the property was unencumbered and free from any claims by C's creditors, was estopped to assert lien of the mortgage as against the lessors who, relying on the guaranty, accepted surrender of C's lease, with its superior lien, and gave to the purchasers a new lease under which lessors had an inferior lien.—Youree v. Limerick, 101 So. 864, 157 La. 39, 37 A.L.R. 394.

No estoppel

(1) A mortgagee's agreement to postpone his lien in favor of a subsequent mortgage does not estop him from suing a purchaser for conversion.—Swift Gin Co. v. Robinson, Tex.Civ.App., 77 S.W.2d 333, error dismissed.

(2) Where a mortgagor sold a mortgaged mule, the mortgagee, by filing a claim against the mortgagor's estate, was not estopped to proceed against the purchaser of the mule for a balance remaining.—Bank of Norris v. Pates & Allen Co., 94 S. E. 881, 108 S.C. 361.

mortgagee has no knowledge of the fact that there has been a sale.²⁴ If the mortgagor is not the mortgagee's agent for the sale, the mortgagee will not be estopped to assert his rights against a purchaser by any act of the mortgagor, unless the mortgagee has knowledge of the mortgagor's intention and the purchaser relies thereon in ignorance of the truth, and a mortgagee is not estopped to assert his rights against the purchaser where the latter has not paid the purchase money and so is not damaged.²⁵ Further, a mortgagee is not estopped to assert his rights against a purchaser who does not rely on the mortgagor's act in ignorance of his lack of authority,²⁶ and as against a purchaser with actual knowledge of the existence of a mortgage there can be no estoppel short of a binding contract.²⁷

Silence or acquiescence. While a ratification may not necessarily be inferred from a mortgagee's mere silence after learning that the mortgaged property has been disposed of,²⁸ if the mortgagee knowingly acquiesces in a sale and depends on the mortgagor for an accounting, he is estopped from asserting his lien.²⁹ A delay in asserting his claim may estop the mortgagee from denying the mortgagor's authority to sell,³⁰ and a prompt repudiation of the mortgagor's right to sell may be shown to disprove such acquiescence as might be construed

into a ratification of the sale³¹ or exchange³² of the mortgaged property. An assignee of notes secured by a recorded mortgage is not negligent in permitting the property to remain in the possession of one who, he knew, had purchased it from the mortgagor so as to prevent him from recovering for conversion.³³

Receipt or acceptance of proceeds of sale. A mortgagee's acceptance of all or part of the proceeds of a sale of the mortgaged property, with knowledge of their source, results in a ratification of the sale,³⁴ or operates to estop the mortgagee from claiming the property³⁵ or asserting his lien³⁶ against the purchaser. Also, the fact that the mortgagor, after receiving the proceeds, informs the mortgagee that he is using them in his business, and the mortgagee does not repudiate the mortgagor's act in so doing, is corroborative of the contention that the sale was authorized.³⁷ If, however, the mortgagee, without knowledge of a sale, receives a portion of the proceeds, his retention of the same after acquiring such knowledge is not a ratification of the sale;³⁸ and where the mortgagor, with the proceeds of an unauthorized sale, pays to the mortgagee, who has no knowledge as to the source of the money, a debt other than the one secured, failure to refund the money on learning the source from which it was derived is not

24. Mo.—Osborn v. Standard Sec. Co., 4 S.W.2d 503, 222 Mo.App. 1186.

25. Ark.—Conway Compress Co. v. Adkisson, 69 S.W.2d 1079, 1080, 189 Ark. 20, quoting *Corpus Juris*.
11 C.J. p 627 notes 84, 85.

26. Or.—Zorn v. Livesley, 75 P. 1057, 44 Or. 501.

Misleading third person

If a mortgagee knowingly puts the mortgagor in a position to mislead a third person and has reason to expect that such third person will be misled, his equities are inferior to those of the misled person.—Denno v. Standard Acceptance Corporation, 178 N.E. 513, 277 Mass. 251.

27. Cal.—Pacific Fruit Exchange v. F. E. Booth Co., 283 P. 944, 103 Cal. App. 54.

Ind.—Benedict v. Farlow, 27 N.E. 307, 1 Ind.App. 160.

28. Okl.—First Nat. Bank v. Harp, 291 P. 116, 144 Okl. 219.
11 C.J. p 627 note 88.

29. Tex.—Mathews v. Melasky, Civ. App., 240 S.W. 641.

30. Colo.—Sigel-Campion Live Stock Co. v. Holly, 101 P. 68, 44 Colo. 580.

11 C.J. p 628 note 92.

31. Ala.—Burks v. Hubbard, 69 Ala. 379.

N.Y.—Mack v. Phelan, 92 N.Y. 20.
N.C.—Harris v. Woodard, 1 S.E. 544.
96 N.C. 232.

32. Demand for return of exchanged property made by a mortgagee as soon as he learned of the exchange prevents a ratification.—Harris v. Woodard, *supra*.

33. Tex.—Nunn v. Padgett, Tex.Civ. App., 161 S.W. 921.

34. Ala.—Money v. First Nat. Bank, 96 So. 230, 209 Ala. 298.

Iowa.—Sloan State Bank v. B. M. Stoddard & Son, 159 N.W. 636, 178 Iowa 104, L.R.A.1917A 1261.

Kan.—Emerson-Brantingham Implement Co. v. Faulkner, 241 P. 431, 119 Kan. 307.

N.C.—Wilkins-Ricks Co. v. Welch, 102 S.E. 316, 179 N.C. 266.

Tex.—Knollenberg v. Farmers' Gin Co., Civ.App., 80 S.W.2d 1040—Hanks v. First State Bank of Klondike, Civ.App., 265 S.W. 245.

Wyo.—Bell v. Kassahn, 270 P. 541, 542, 39 Wyo. 152, citing *Corpus Juris*.

Recovery of price from buyer

By accepting part of the proceeds of a sale and thereby ratifying it, a mortgagee cannot recover the balance of the purchase price from the buyer.—Parker v. Harrell, 124 S.E. 575, 188 N.C. 337.

Satisfaction pro tanto

In a conversion action against a purchaser who intermingled mortgaged corn with his own, a subsequent receipt of proceeds by the mortgagee ought not to be construed as a ratification of the sale, but rather as a satisfaction of the claims pro tanto against the debtor and the purchaser who converted the corn.—Sloan State Bank v. B. M. Stoddard & Son, 159 N.W. 636, 178 Iowa 104, L.R.A.1917A 1261.

35. Neb.—Warrick v. Rasmussen, 199 N.W. 544, 112 Neb. 299—Seymour v. Standard Live Stock Commission Co. of South Omaha, 192 N.W. 393, 110 Neb. 135.

Wyo.—Bell v. Kassahn, 270 P. 541, 39 Wyo. 152.

11 C.J. p 628 note 95.

Use of proceeds for harvesting the unsold portion of a mortgaged crop estops the mortgagee.—Etheridge v. Hilliard, 6 S.E. 571, 100 N.C. 250.

36. Tex.—Hanks v. First State Bank of Klondike, Civ.App., 265 S.W. 245.

37. Ala.—Stevenson v. Whatley, 50 So. 41, 161 Ala. 250.

38. Colo.—First Nat. Bank v. American State Bank of Brighton, 215 P. 473, 73 Colo. 254.

Iowa.—Farmer v. Graettinger Bank, 107 N.W. 170, 130 Iowa 469.

a ratification of the sale.³⁹ The acceptance of the proceeds of a sale of a portion of the property covered by a duly recorded mortgage does not constitute an estoppel to deny the validity of a subsequent sale of the remainder of the mortgaged property.⁴⁰

c. Consideration

Consideration for a consent to sell mortgaged property is unnecessary unless the consent is in the form of a release.

At least where the purchaser had no actual knowledge of the mortgage, a purchaser from a mortgagor may take title to the property free of the mortgage lien without there being any consideration for the mortgagee's consent to sell, if such consent is based on an estoppel,⁴¹ or a waiver operating as an estoppel,⁴² rather than on the theory of a release.⁴³ An approval or confirmation of a sale made after the transaction and without consideration has been held ineffective to relieve the property of the mortgage⁴⁴ if it is a declaration in

the form of a release rather than an estoppel.⁴⁵

Where consideration is necessary, it has been held that a mortgagor's promise to the mortgagee that he will pay him from the proceeds of the sale of the property is sufficient consideration for his consent to sell, irrespective of whether or not the mortgagor actually fulfills his promise.⁴⁶

§ 263. Rights and Liabilities of Purchaser in General

In the absence of circumstances cutting off the rights of the mortgagee, a purchaser of mortgaged property from the mortgagee acquires only the rights of the mortgagor. In a proper case, a purchaser of mortgaged property may be liable for its value, the mortgage debt, or the value of the use of the property.

In the absence of special circumstances cutting off the rights of the mortgagee,⁴⁷ a purchaser of mortgaged property from the mortgagor acquires the rights of the mortgagor, but no greater rights,⁴⁸ and takes title subject to the lien of the mort-

39. Neb.—Gosnell v. Webster, 97 N. W. 1060, 70 Neb. 705.

Tex.—Swift Gin Co. v. Robinson, Civ.App., 77 S.W.2d 333, error dismissed.

Acceptance of proceeds as rent payment by a mortgagee who is also the landlord, does not imply a ratification of the mortgagor's unauthorized sale.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

40. Iowa.—Ashley v. Keenan, 137 N. W. 1041, 157 Iowa 1.

41. Ind.—Benedict v. Farlow, 27 N. E. 307, 1 Ind.App. 160.

42. Iowa.—Livingston v. Heck, 94 N.W. 1098, 122 Iowa 74.

43. Iowa.—Livingston v. Stevens, 94 N.W. 925, 122 Iowa 62.

44. Ark.—Riner Lumber Co. v. O'Dwyer, etc., Co., 130 S.W. 529, 96 Ark. 20.

45. N.H.—White v. Phelps, 12 N.H. 382.

46. Cal.—Reno v. A. L. Boyden Co., 2 P.2d 214, 115 Cal.App. 697.

47. Purchase from mortgagor in possession of mortgage

A purchaser of mortgaged property, relying on the presumption of payment arising from the mortgagor's possession of the mortgage and note secured, acquires a good title as against the mortgagee's claim that the mortgage was not in fact satisfied; and the vendee of such purchaser is also entitled to protection, although he may have had notice before paying the purchase price that the mortgage had not been satisfied.—Wilkinson v. Solomon, 3 So. 705, 83 Ala. 438.

Consent of mortgagee to sale see supra § 262.

48. Ala.—Allgood v. First Nat. Bank, 139 So. 100, 224 Ala. 169.

Colo.—Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 247 P. 183, 79 Colo. 540.

N.J.—Greenberg v. Hendrickson, 165 A. 860, 861, 11 N.J.Misc. 368, quoting *Corpus Juris*.

N.Y.—Norton v. Shields, 161 N.Y.S. 880, 174 App.Div. 804.
11 C.J. p 628 note 7.

Not indefeasible title

A purchase of mortgaged property does not of itself, and without reference to the title of the seller, give an indefeasible title thereto.—Wertheimer & Degen v. Shultice, 211 N. W. 568, 202 Iowa 1140.

Subject to mortgage

A purchaser of mortgaged property, sold "subject to the mortgage," takes no greater rights than the mortgagor had.

Ala.—Allgood v. First Nat. Bank, 139 So. 100, 224 Ala. 169.

Wash.—First Nat. Bank v. Northwest Motor Co., 183 P. 81, 108 Wash. 167.

Void sale

Mortgagee's rights under unrecorded mortgage are good against a purchaser from the mortgagor where the sale was made in disregard of a statute governing the sale and transfer of automobiles, which statute also provides that all sales which do not conform thereto are void.—Hammond Motor Co. v. Warren, Kan., 213 P. 810.

Primary liability

As between mortgagors and their assignee buying mortgaged property

for value, primary liability rests with mortgagors.—Sabine Motor Co. v. W. C. English Auto Co., Tex.Com. App., 291 S.W. 1088, reversing, Civ. App., 283 S.W. 224.

Statute determining rights of creditors

A statute providing that, if any person transact business in his own name, all property acquired or used in the business shall, as to creditors, be liable for his debts, cannot be extended to purchasers, and hence is not determinative of the rights of a purchaser of mortgaged property from a dealer.—Boice v. Finance & Guaranty Corporation, 102 S.E. 591, 127 Va. 563, 10 A.L.R. 654.

Rights of assignee under a deed of assignment are inferior to the rights of a mortgagee who takes possession of the mortgaged property prior to the filing of the deed.—Minnick v. Dettelbach, 17 Ohio Cir. Ct., N.S., 271.

Purchaser with notice

A purchaser with actual or constructive notice of the mortgage who buys the entire property from a mortgagor in rightful possession before default acquires only the interest of the mortgagor.—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.

Innocent purchaser defined

An "innocent purchaser" is one who pays or obligates himself to pay the full purchase price of mortgaged property to the vendor, with no notice of any claim or right to the property in another.—National Bank of Gallatin Valley v. Ingle, 164 P. 535, 53 Mont. 414.

gage,⁴⁹ except in so far as greater rights are conferred by reason of the failure of the mortgagee to take possession⁵⁰ or to record his mortgage, considered supra §§ 142-143. The fact that the mortgagee has other security sufficient to pay the debt does not give the purchaser any greater rights.⁵¹ The purchaser, however, has the legal title to the property and is entitled to possession until the right is cut off, either by judicial foreclosure or by sale in accordance with the terms of the mortgage.⁵² A mortgagee, bringing replevin for the property against attaching creditors, is not bound to protect the interests of an assignee of the mortgagor, although he has notice of the assignment.⁵³

Acceleration clause on disposal. A provision in a mortgage that if the property is disposed of the debt becomes immediately due and the mortgagee may enforce his lien, does not invalidate the sale of the mortgagor's interest to the purchaser, but gives immediate right of possession to the mortgagee and postpones the rights of the purchaser

until the former's lien is satisfied.⁵⁴

Consent to sale. In jurisdictions where the law forbids a sale of mortgaged chattels without the consent of the mortgagee, a purchaser participating in the wrongful act of the mortgagor is not a holder as of right.⁵⁵ The mortgagee's consent to a sale will not render him liable to the purchaser for breach of the mortgagor's contract of sale,⁵⁶ or prevent the mortgagee from setting up against the purchaser a title acquired under an assignment of a prior mortgage.⁵⁷ Where, however, such consent is given, the rights of the purchaser are not affected by the execution of a renewal mortgage.⁵⁸ It has been held that, where the mortgagor is authorized by the mortgagee to sell, he acts as agent for the latter and can bind him by his warranties,⁵⁹ but a contrary conclusion has been reached in a jurisdiction where a mortgage does not pass title to the mortgagee, but is merely a lien on the property.⁶⁰ If the mortgagee consents to a sale of a part of the property but without waiving his lien, the purchaser may require the mortgagee to first exhaust

49. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589. Cal.—Schwartzler v. Lemas, App., 73 P.2d 280, 282, quoting *Corpus Juris*. Ga.—National City Bank of Rome v. Adams, 117 S.E. 285, 30 Ga.App. 219.

Mass.—Denno v. Standard Acceptance Corporation, 178 N.E. 513, 277 Mass. 251.

Miss.—Cole-McIntyre-Norfleet Co. v. Du Bard, 99 So. 474, 135 Miss. 20. Mont.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289. N.Y.—Norton v. Shields, 161 N.Y.S. 880, 174 App.Div. 804.

N.C.—Whitehurst v. Nixon, 146 S.E. 599, 196 N.C. 823—Whitehurst v. Garrett, 144 S.E. 835, 196 N.C. 154. Okl.—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 870, 102 Okl. 83.

Tex.—Beaumont Rice Mills v. Dishman, Civ.App., 106 S.W.2d 1067—Beaumont Rice Mills v. Dishman, Civ.App., 72 S.W.2d 365, error refused.

11 C.J. p 623 note 19.

Liability for value of property

A person who purchases and disposes of property subject to a mortgage may be required to answer, by the mortgagee, for its value.—Morrison v. Montgomery, 163 P. 674, 101 Kan. 670.

50. Colo.—Moore v. Ellison, 261 P. 461, 82 Colo. 478.

Miss.—Simmons v. State, 135 So. 196, 160 Miss. 582.

Va.—O'Neil v. Cheatwood, 102 S.E. 596, 127 Va. 96.

Necessity of recording mortgage see supra §§ 142-143.

Necessity of transfer of possession and retention of possession with power of sale see supra §§ 139-207.

Mortgage covering particular automobile in the stock of an automobile dealer, and giving no permission to the dealer to sell the automobile, is not a mortgage on a shifting stock of goods, within the rule that a purchaser of goods subject to such mortgage acquires title free from the mortgage.—Hardin v. State Bank of Seattle, 205 P. 382, 119 Wash. 169.

Mortgagee is estopped to assert claim against bona fide purchaser, where retention of possession of stock in trade by mortgagor with power to sell is per se fraudulent.—Simmons v. State, 135 So. 196, 160 Miss. 582.

51. Tex.—Beaumont Rice Mills v. Dishman, Civ.App., 72 S.W.2d 365, error refused.

52. N.J.—Greenberg v. Hendrickson, 165 A. 860, 861, 11 N.J.Misc. 368, quoting *Corpus Juris*.

Tex.—Hughes v. Smith, 129 S.W. 1142, 61 Tex.Civ.App. 443.

Equity of redemption

Buyer of mortgaged chattels from mortgagor, or under execution against him, acquires only equity of redemption, that is, legal title subject to mortgage debt.—Liquid Carbonic Co. of Texas v. Logan, Tex. Civ.App., 79 S.W.2d 632.

Good title as against others

Under sale contract with purchase-money mortgage back, subsequent purchaser had good title as against every one but original buyer, it not appearing how seller to subsequent

purchaser obtained title from original buyer, in absence of default.—Edson & Co. v. Hudson Motor Car Co., 228 N.Y.S. 582, 132 Misc. 223.

Exercise of option to foreclose

A purchaser charged with notice of a recital in the mortgage authorizing the mortgagee to declare the note due and to foreclose when he felt unsafe cannot complain of an exercise of such option by the mortgagee.—Warren v. Osborne, Tex.Civ. App., 97 S.W. 851.

Subsequent sale by mortgagor

The rights acquired by a purchaser from a mortgagor cannot be affected by a subsequent sale by the mortgagor to the mortgagee.—Hughes v. Smith, 129 S.W. 1142, 61 Tex.Civ. App. 443.

53. Kan.—Martindale v. Evans, Kan. App., 53 P. 889.

54. Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

55. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

56. Iowa.—Burroughs v. Butler-Ryan Co., 96 N.W. 750, 121 Iowa 215.

57. Mass.—Clark v. Hale, 3 Gray 187.

58. U.S.—Pecos Valley Bank v. Evans-Snyder-Buel Co., Tex., 107 F. 654, 46 C.C.A. 534.

59. Minn.—National Citizens' Bank v. Ertz, 85 N.W. 821, 83 Minn. 12, 85 Am.S.R. 438, 53 L.R.A. 174.

60. Utah.—Blyth, etc., Co. v. Houtz, 66 P. 611, 24 Utah 62.

the lien on the unsold portion before having recourse to the property sold, and if that is sufficient to satisfy the debt, the purchaser becomes the absolute owner of the property free from the mortgage lien.⁶¹

Defective or invalid mortgage. If a mortgage is void because not properly executed,⁶² or because the mortgagor has had no title,⁶³ it may be attacked by a purchaser of the property from the mortgagor. On the other hand, a purchaser of mortgaged property who purchases subject to the mortgage,⁶⁴ or who, at the time of purchase, recognized the validity of the mortgage and took into consideration the indebtedness secured thereby in determining the purchase price,⁶⁵ may not deny the validity of the mortgage. Although it has been held that the invalidity of the mortgage because of fraud in its execution is available to the purchaser,⁶⁶ and that a ratification of the mortgage by the mortgagor after the purchaser had acquired his rights could not affect his rights,⁶⁷ it has also been held that any rights of a mortgagor because of having been induced by fraud to execute the mortgage do not pass to the purchaser,⁶⁸ and that where the instrument was fraudulently made and the mortgagor was in no position to attack it, a purchaser of the property from him is, likewise, in no position to take advantage of the fraud.⁶⁹ It has also been held that the purchaser at a sale of mortgaged property may assert the invalidity, as against creditors, of a senior mortgage, although the auctioneer in making the sale announced that it would be made subject to the senior mortgage.⁷⁰

Encumbrances subsequent to mortgage. A purchaser of property who buys subject to a mortgage and other encumbrances, is not subrogated to the rights of the mortgagee as against the subsequent encumbrancers by paying the mortgage, even though there is an express agreement to that effect.⁷¹

Mortgage covering after-acquired property. While a mortgage covering after-acquired property is valid, as against a subsequent purchaser from the mortgagor with notice, to bind property acquired by the mortgagor after the execution of the mortgage,⁷² it does not cover property subsequently acquired by the purchaser, although he purchases subject to the mortgage, unless he also assumes the covenants contained in the mortgage or the debt which it was given to secure,⁷³ or, although he does not directly assume the mortgage debt, unless the purchaser enters into a collateral agreement with the mortgagee which in effect amounts to such assumption.⁷⁴

Mortgage securing future advances. As a general rule, where a mortgage is given to secure future advances, advances made subsequent to a sale of the mortgaged property, the mortgagee having notice of the sale, will be postponed to the rights of the purchaser, but advances made after such sale, by virtue of the liability incurred prior to the sale, or notice thereof, are protected.⁷⁵

Liability of purchaser. In jurisdictions where the mortgagee has legal title to the property mortgaged a purchaser or assignee of chattels wrongfully sold or assigned by the mortgagor is liable to the mortgagee for their value.⁷⁶ A statute impos-

61. Tex.—Kessler v. Wray, Civ. App., 171 S.W. 534.

62. U.S.—Ridgely v. First Nat. Bank, C.C.Wyo., 75 F. 808.

63. Ala.—Karter v. Fields, 37 So. 204, 140 Ala. 352.

64. Wash.—First Nat. Bank v. Northwest Motor Co., 183 P. 81, 108 Wash. 167.

65. Ind.—Gaumer v. Register Pub. Co., 119 N.E. 728, 67 Ind.App. 658. N.J.—Dey v. Moody, 108 A. 757, 91 N.J.Eq. 14.

Wis.—Baierl v. Riesenecker, 230 N. W. 605, 201 Wis. 454, reversing 227 N.W. 9, 201 Wis. 454.

66. Conn.—Terzano v. Clemente, 167 A. 825, 117 Conn. 267.

67. Ala.—Hattermer v. Davis, 91 So. 321, 206 Ala. 613.

68. Mich.—Soule v. Harrington, 97 N.W. 357, 135 Mich. 155.

69. U.S.—Ridgely v. First Nat. Bank, C.C.Wyo., 75 F. 808.

Fraudulent as to creditors
A purchaser cannot take advantage

of a clause in the mortgage permitting the mortgagor to sell in the usual course of trade, as fraudulent against creditors.—Commercial Nat. Bank v. Davidson, 22 P. 517, 18 Or. 57.

70. Mo.—White v. Graves, 68 Mo. 218.

71. N.J.—Avon-by-the-Sea Land, etc., Co. v. McDowell, 62 A. 865, 71 N. J.Eq. 116.

To whom benefit of payment inures
Payment of prior encumbrance inures to the benefit of subsequent encumbrances.—Avon-by-the-Sea Land, etc., Co. v. McDowell, 62 A. 865, 71 N. J.Eq. 116.

72. Mont.—N Bar N Land & Livestock Co. v. Taylor, 22 P.2d 313, 94 Mont. 350.

N.D.—First Guaranty Bank v. Rex Theatre Co., 195 N.W. 564, 50 N.D. 322.

11 C.J. p 629 note 27.

73. N.Y.—Kribbs v. Alford, 24 N.E. 811, 120 N.Y. 519.

11 C.J. p 629 note 28.

74. N.J.—Stoll v. Sidson, 56 A. 710, 65 N.J.Eq. 552.

11 C.J. p 629 note 29.

75. Ill.—Preble v. Conger, 66 Ill. 370.

Ind.—Davis v. Carlisle, 82 S.W. 682, 5 Ind.T. 83.

76. Ala.—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., 75 So. 568, 200 Ala. 120—Bright v. Mack, 72 So. 433, 197 Ala. 214—McLeod Lumber Co. v. Neighbors, 114 So. 176, 22 Ala.App. 204.

Damages recoverable by mortgagee see infra § 275.

Liability of purchaser in conversion see infra § 264 b.

Swap or exchange provision

A provision in mortgage allowing mortgagors to swap or exchange mortgaged property, the property secured in exchange to stand in place of exchanged property, does not render mortgage void as to purchasers of the property not bona fide purchasers, so as to relieve them of liability for the value of the prop-

ing liability for the mortgage debt on a person purchasing property from a nonresident of the parish without first obtaining an affidavit from the seller that there is no mortgage on the property must be strictly construed and is inapplicable to a mortgage contracted in a foreign jurisdiction.⁷⁷ A purchaser failing to comply with such a statute cannot escape liability on the ground that the seller claimed to be a resident and that he so believed him to be,⁷⁸ and notwithstanding the fact that the mortgage had been executed under an assumed name.⁷⁹

The purchaser is not liable to the mortgagor for the purchase price of the chattels sold without the mortgagee's consent, when the property is returned after the sale,⁸⁰ or where the mortgage is subsequently foreclosed and the original purchaser buys it in at the foreclosure sale, although he will be liable for the use and hire of the chattels between the dates of the two sales,⁸¹ nor is he liable where the sale is made without the written consent of the mortgagee in violation of statute.⁸² A purchaser of mortgaged property who has not paid the mortgagor the purchase price may be required to pay it to the mortgagee in an action by the mortgagee against the purchaser and the mortgagor.⁸³

Where the mortgagor transfers the possession of the property to a third person, by sale or otherwise, that person, after demand made on him by the mortgagee entitled to possession, will thereafter be liable for the use and hire of the mortgaged property.⁸⁴

Other liabilities of purchasers of mortgaged property are discussed in sections immediately following.

§ 264. Liability for Conversion

- a. In general
- b. Purchaser

a. In General

Any person participating in an absolute sale of mortgaged property, or doing any act with respect thereto in defiance of the mortgagee's or rightful owner's rights, is liable for conversion.

Any person who participates in an absolute sale of mortgaged property to the exclusion of the mortgagee's rights,⁸⁵ or who is guilty of exercising an act, with respect to mortgaged property transferred by the mortgagor, which is in defiance of the mortgagee's rights,⁸⁶ is liable for conversion.

erty.—Bright v. Mack, 72 So. 433, 197 Ala. 214.

77. La.—Cullen Thompson Motor Co. v. Sullivan & Phillips, 126 So. 456, 12 La.App. 486.

78. La.—Southland Securities Co. v. Thieme, App., 142 So. 375, 376.

Necessity of alleging knowledge

The mortgagee need not allege that the buyer knew the seller was a nonresident.—Southland Securities Co. v. Thieme, supra.

79. La.—Southland Securities Co. v. Thieme, supra.

Reason

"It is no concern of a purchaser whether or not the making of the affidavit as required by the law will accomplish any good."—Southland Securities Co. v. Thieme, supra.

80. Mass.—Bryant v. Pollard, 10 Allen 81.

11 C.J. p 629 note 37.

81. S.C.—Alexander v. Maxwell, 9 S.C.Eq. 302.

82. N.H.—Bank v. Raymond, 57 N. H. 144—Gage v. Whittier, 17 N. H. 312.

83. Tex.—West Furniture Co. v. Cason, Civ.App., 218 S.W. 774.

84. Ala.—Chambers v. Mauldin, 4 Ala. 477.

85. Okl.—Wilson & Co. v. Russell, 290 P. 1106, 144 Okl. 284—Geo. W. Brown & Sons State Bank v. Polen, 270 P. 9, 132 Okl. 121.

Receipt of proceeds of unauthorized sale

(1) A third person's mere act of receiving the proceeds of an unauthorized sale of mortgaged property is not a conversion by him.—Iowa Farm Credits Co. v. People's Sav. Bank of Menlo, 192 N.W. 139, 196 Iowa 967.

(2) The party receiving such funds must have knowledge of their origin.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289.

(3) There is no liability for receiving such proceeds if the mortgagee waived its right thereto.—Evans-Snyder-Buel Co. v. Atchison County Bank, 76 Mo.App. 449.

(4) A junior mortgagee who aids and participates in an unauthorized sale with notice of the mortgage and receives and appropriates to his own use the proceeds thereof is liable in conversion.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567.

Person acquiring no interest in property

Where a conversion of a mortgaged chattel is caused by a purchase thereof, one who merely loaned the money to effect it, acquiring no interest therein, is not liable.—Argo v. Sylacauga Mercantile Co., 68 So. 534, 12 Ala.App. 442.

86. Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

Particular persons held liable

(1) A pledgee of mortgaged crops who resold them.—Equitable Loan Soc. v. Taylor Bros. Jewelry Co., Tex.Civ.App., 189 S.W. 516.

(2) A thresherman of mortgaged wheat, who sold it, and his purchaser.—Farmers' State Bank v. Peters, 22 P.2d 457, 137 Kan. 786.

(3) Elevator company paying money for mortgaged grain over to thresherman.—Great Falls Farm Machinery Co. v. Rocky Mountain Elevator Co., 22 P.2d 303, 94 Mont. 188.

(4) Vendor of land retaining a lien on half the crops as security for contract of sale, who terminates the contract and takes possession of the land and all of the crops, is liable for conversion to a mortgagee of that half of the crops which the vendor's lien did not cover.—Yakobian v. Johnson, 282 P. 522, 102 Cal.App. 10.

Unlawful removal

If one, having actual knowledge that another has a mortgage on personal property, willfully conveys the property beyond the limits of the state, and destroys the value of the mortgage, he is liable in damages to the mortgagee.—Franklin v. Howell, 133 S.E. 270, 35 Ga.App. 363.

Liability of mortgagor for conversion is considered in § 261 supra.

Agent. A person who acts as an agent of a mortgagor in wrongfully selling mortgaged property without the mortgagee's consent is liable for conversion to the same extent as the mortgagor for whom he acts, even though he may have no other notice of the mortgage than that given by record,⁸⁷ and irrespective of the fact that he acted innocently in making the sale.⁸⁸ To render an agent liable it is sufficient if he intermeddles with, or exercises any dominion over, the property, and it is not necessary that he have complete manual control thereof.⁸⁹

A servant of a purchaser who moves converted mortgaged property from the possession of the mortgagor to the purchaser in ignorance of the existence of the mortgage and of the terms of sale is not, it has been held, liable for conversion.⁹⁰

Bailee. The refusal of a bailee holding mortgaged property for the mortgagor to surrender it on a demand therefor by a mortgagee entitled to possession thereof may constitute a conversion by such bailee.⁹¹ However, a bailee receiving the property and returning it to the mortgagor before acquiring knowledge that the mortgagor's possession was wrongful is not a conversion by him.⁹²

Creditor. A creditor who instigates the mortgagor to sell mortgaged property and receives the proceeds,⁹³ or who, with notice of a crop mortgage, receives part of the crop in payment,⁹⁴ is liable to the mortgagee for conversion.

Mortgagee. Where under the recording act a bona fide purchaser for value and without notice obtains the property free from the mortgage lien, as already considered in § 142, he may sue the mortgagee for conversion for taking possession of the property and converting it, although no objection was made to the taking.⁹⁵

b. Purchaser

Where a sale of mortgaged property is absolute and unauthorized, the purchaser, if he had notice of the mortgagee's rights, is liable for conversion, and a demand and refusal is unnecessary; but, if he purchases without notice of the mortgagee's rights, or in recognition of the mortgage, unless he exercises dominion over the property inconsistent with the mortgagee's rights, he is not liable for conversion unless there is a demand for the property and a refusal.

One purchasing mortgaged property with notice of the mortgage and without the consent of the mortgagee is liable to the mortgagee for conversion, if the sale is an absolute one to the exclusion of, or if it is in derogation of, the rights of the mortgagee,⁹⁶ and the exercise of dominion by the

87. Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 827, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567, citing *Corpus Juris*.
11 C.J. p 632 notes 79, 80.

Sale by commission merchants outside state

(1) A commission merchant selling mortgaged property outside the state has been held liable for a conversion without any notice.—First Nat. Bank v. Siman, S.D., 275 N.W. 347.

(2) Other authority holds such a person liable on the theory of constructive notice given by the recording of the mortgage in the state where the property was originally located.—La Fayette County Bank v. Metcalf, 40 Mo.App. 494.

(3) Still other authority holds that actual notice of the mortgage is necessary in such a case.

Ill.—St. Paul Cattle Loan Co. v. Hansman, 215 Ill.App. 190.
Miss.—Hernandez v. Aaron, 16 So. 910, 73 Miss. 434.

88. S.D.—First Nat. Bank v. Siman, 275 N.W. 347.

89. Mo.—Arkansas City Bank v. Cassidy, 71 Mo.App. 186.

90. Me.—Burditt v. Hunt, 25 Me. 419, 43 Am.D. 289.

91. N.D.—Sand v. St. Anthony & Dakota Elevator Co., 191 N.W. 955, 49 N.D. 502.

92. Ala.—First Nat. Bank v. Harden, 82 So. 655, 17 Ala.App. 165, certiorari denied In re First Nat. Bank of Alexander, 82 So. 422, 203 Ala. 172.

93. Wyo.—Cone v. Iverson, 33 P. 31, 35 P. 933, 4 Wyo. 203.

94. Wash.—German-American State Bank v. Seattle Grain Co., 154 P. 443, 89 Wash. 376.

95. Ala.—Dixie v. Harrison, 50 So. 284, 163 Ala. 304.

96. Ala.—First Nat. Bank v. Burnett, 104 So. 17, 213 Ala. 89.

Ark.—Mitchell v. Mason, 44 S.W.2d 672, 184 Ark. 1000—Sternberg v. Strong, 250 S.W. 344, 158 Ark. 419—Imperial Valley Savings Bank v. Huff, 190 S.W. 116, 126 Ark. 281.

Idaho.—Bodenhamer v. Pacific Fruit & Produce Co., 295 P. 243, 50 Idaho 248—Smith v. Holmquist, 277 P. 574, 47 Idaho 611—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 322, 54 A.L.R. 1527.

Ill.—Lawton v. Ewing, 240 Ill.App. 607—Schillo v. White, 207 Ill.App. 390.

Kan.—Allis Chalmers Mfg. Co. v. Security Elevator Co., 38 P.2d 138, 140 Kan. 580.

Minn.—Purdie v. Lekve, 230 N.W. 266, 130 Minn. 81.

Mont.—Great Falls Farm Machinery Co. v. Rocky Mountain Elevator Co., 22 P.2d 303, 94 Mont. 188.

Okl.—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548—Wilson & Co. v. Russell, 290 P. 1106, 144 Okl. 284—Geo. W. Brown & Sons State Bank v. Polen, 270 P. 9, 132 Okl. 121—Wichita Mill & Elevator Co. v. Farmers' State Bank of Tipton, 226 P. 370, 102 Okl. 83.

Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567—First Nat. Bank v. Davis, Com. App., 5 S.W.2d 753.

11 C.J. p 630 notes 42, 44.

Necessity of notice, actual or constructive

(1) Notice of the mortgage, either actual or constructive, is usually necessary in order to hold the purchaser liable for conversion.—National Bond & Inv. Co. v. Moss, 263 Ill.App. 187.

(2) In some jurisdictions, it seems that actual notice is necessary in order to hold the purchaser in conversion.

Ga.—M. Wynne & Son v. Paulk, 129 S.E. 288, 34 Ga.App. 288.

purchaser of property covered by a mortgage inconsistent with, and in defiance of, the rights of the mortgagee therein, constitutes a conversion.⁹⁷ Thus, a purchaser is liable for conversion if he disposes of the property,⁹⁸ resells⁹⁹ or removes it,¹ seizes or retains possession thereof,² destroys or materially alters its condition,³ fraudulently secretes it,⁴ mixes it with his own property so that it cannot be identified,⁵ or otherwise persists in denying the mortgagee's rights.⁶ Of course, if a

purchaser's sale or removal of mortgaged chattels is prohibited by statute, he is liable for conversion.⁷

On the other hand, however, in view of the mortgagor's right to sell his interest in mortgaged property, as already discussed in § 260, a purchaser is not liable for conversion by his mere act of purchasing the property without doing anything inimical to the mortgagee's rights,⁸ particularly where the purchase was without notice of the mort-

Miss.—Hawkins v. Nash, 140 So. 522, 163 Miss. 500.

(3) On the other hand, it has also been held that actual notice is unnecessary to create liability of a purchaser for conversion.

U.S.—Farmers' Nat. Bank v. Missouri Livestock Commission Co., C. C.A.Mo., 53 F.2d 991.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

Okl.—Motor Exchange v. Commercial Inv. Co., 3 P.2d 178, 151 Okl. 176.

Successive purchasers

If mortgaged property is wrongfully sold to a purchaser who resells to another who in turn sells the property again, all the purchasers are liable for conversion.—Union State Bank of Wapato v. Warner, 248 P. 394, 140 Wash. 220.

Violative of mortgage provisions

The rule is particularly applicable where the sale is in violation of the provisions of the mortgage.

U.S.—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531.

N.J.—Greenberg v. Hendrickson, 165 A. 860, 11 N.J.Misc. 363.

Mortgagor as agent of purchaser

A purchaser with constructive notice of the mortgage cannot escape liability because of the fact that the mortgagor was acting as his agent in the sale and defrauded him, in the absence of collusion between such mortgagor and the mortgagee.—Little v. Southern Cotton Oil Co., 153 S.E. 462, 156 S.C. 480.

97. Ala.—Brock v. Culpepper, 116 So. 126, 217 Ala. 289.

Ark.—Sternberg v. Strong, 250 S.W. 344, 158 Ark. 419.

Mont.—U. S. Nat. Bank v. Great Western Sugar Co., 199 P. 245, 60 Mont. 342.

N.D.—Rolette State Bank v. Minnekota Elevator Co., 195 N.W. 6, 50 N.D. 141.

Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

S.D.—Bank of Brookings v. Aurora Grain Co., 186 N.W. 563, 45 S.D. 113, reversing, and adopting dissenting opinion in 181 N.W. 909, 43 S.D. 591.

Tex.—Moore-Hustead Co. v. Joseph

W. Moon Buggy Co., Civ.App., 221 S.W. 1032.

11 C.J. p 630 notes 46, 47.

Claiming as own

The purchase of mortgaged cattle by a third party and the claiming of them as his own, free from the mortgage, is a conversion thereof.—Barnett v. Wedgewood, 211 P. 601, 23 N.M. 312.

Payment of proceeds to mortgagor
In violation of a condition that they be paid to the mortgagee indicates such an absolute claim on, or dominion over, the property as will constitute conversion.—Rolette State Bank v. Minnekota Elevator Co., 195 N.W. 6, 50 N.D. 141.

Physical possession unnecessary

It is not essential to a conversion that the converter should take complete physical possession of the property, any intermeddling with, or dominion exercised over, the property of another being a conversion.—Argo v. Sylacauga Mercantile Co., 68 So. 534, 12 Ala.App. 442.

Appropriation to his own use of mortgaged property creates liability for conversion on the part of the purchaser, where the mortgagee, at the time, has a right of possession and the mortgage debt is unpaid.—U. S. Nat. Bank v. Great Western Sugar Co., 199 P. 245, 60 Mont. 342.

98. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.
Mo.—McCandless v. Moore, 50 Mo. 511.

S.D.—Bank of Brookings v. Aurora Grain Co., 186 N.W. 563, 45 S.D. 113, reversing 181 N.W. 909, 43 S.D. 591.

Wash.—Spokane Sec. Finance Co. v. Crowley Lumber Co., 274 P. 102, 150 Wash. 559, affirmed 279 P. 103, 152 Wash. 697.

99. Ala.—Butler & Gilchrist v. First Nat. Bank, 117 So. 490, 22 Ala.App. 504.

Ohio.—City Loan & Savings Co. v. Dickison, 19 Ohio N.P.N.S., 215.

Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

S.C.—Bank of Norris v. Pates & Allen Co., 94 S.E. 881, 108 S.C. 361.

Wash.—Union State Bank of Wapato

v. Warner, 248 P. 394, 140 Wash. 220.

11 C.J. p 631 note 65.

Failure to pay assumed mortgage debt

The failure of a purchaser to pay the mortgage debt after he has assumed it may render him liable for conversion when he resells the property.—Prescott v. Jordan, 57 Ala. 272.

1. Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.
Tex.—Sabine Motor Co. v. W. C. English Auto Co., Civ.App., 233 S.W. 224, reversed on other grounds, Com.App., 291 S.W. 1088—A. H. Karcher & Co. v. Davis, Civ.App., 278 S.W. 302.

Purchaser's good faith in removing the property is immaterial where he had constructive notice of the mortgage.—Ross v. Menefee, 25 N.E. 545, 125 Ind. 432.

2. Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

3. N.M.—Kitchen v. Schuster, 89 P. 261, 14 N.M. 164.

11 C.J. p 631 note 68.

4. Mass.—Boise v. Knox, 10 Metc. 40.

5. Ind.—Duke v. Strickland, 43 Ind. 494.

Tex.—Boydston v. Morris, 10 S.W. 331, 71 Tex. 697.

6. N.D.—Citizens' Nat. Bank v. Osborne-McMillan El. Co., 131 N.W. 266, 21 N.D. 335.

11 C.J. p 631 note 71.

7. Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74—Ralston Bank of Commerce v. Gas-kill, 145 P. 1131, 44 Okl. 728.

11 C.J. p 630 note 43, p 631 note 67.

8. Fla.—Berlein v. Eddy, 104 So. 780, 89 Fla. 484.

Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 46 Ohio App. 27.

11 C.J. p 631 note 63.

Giving bill of sale to his wife is not such an act by a purchaser as will be construed as so inimical to the mortgagee's rights as to constitute conversion, where the possession of the property does not change and no money consideration passes.—North Canton Bank v. Cocklin, supra.

gagee's rights.⁹ Of course, the purchaser is not liable for conversion if the sale was made with the mortgagee's consent,¹⁰ unless consent was given on an unperformed condition of which the purchaser had notice.¹¹ A purchaser is not liable to a mortgagee if the mortgage is void,¹² or if the proceeds of the sale are turned over to, and accepted by, the mortgagee.¹³

Demand and refusal. Although a purchaser of mortgaged chattels may be liable for conversion where he refuses to deliver the property to the mortgagee on proper demand therefor,¹⁴ it has been held that, where a mortgagor entitled to possession until default sells the property, the failure of the purchaser to deliver the same on demand is not a conversion, where he has resold it and it has passed out of his control.¹⁵ It is unnecessary for a mortgagee to make a demand on the purchaser in order to hold him liable for a conversion, if the purchaser has exercised an act of dominion over the property inconsistent with the rights of the mortgagee,¹⁶

or after the law day of the mortgage,¹⁷ or if a demand for the property would be unavailing.¹⁸ On the other hand, a purchaser is not liable for conversion without a demand and refusal, if the sale itself does not constitute a conversion, and the purchaser is lawfully in possession of the property, and does no act which is inimical to the rights of the mortgagee.¹⁹

Provision for taking possession in case of sale. A purchaser of mortgaged property, with notice, may be liable for conversion if the sale is in violation of a provision in the mortgage to the effect that the mortgagee may take possession of the property in the event of a sale without his consent,²⁰ whether the sale is an absolute one,²¹ or a sale subject to the mortgage with the exercise of dominion over the property by the purchaser.²² It has been held, however, that if the sale is before default and the mortgagee has not exercised his option, the purchaser is not liable in conversion if the purchase is subject to the mortgage,²³ but

9. Ohio.—North Canton Bank v. Cocklin, *supra*.

Tex.—Bradford v. Lembke, Civ.App., 118 S.W. 159.
11 C.J. p 631 note 64.

10. U.S.—Farmers' Nat. Bank v. Missouri Livestock Commission Co., C.C.A.Mo., 53 F.2d 991.

Ala.—Montgomery v. Tucker, 153 So. 183, 228 Ala. 182.

Idaho.—Adamson v. Moyes, 184 P. 849, 32 Idaho 469.

Miss.—Tonnar v. Washington & Isaquena Bank, 105 So. 750, 140 Miss. 875.

Mo.—Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co., 289 S.W. 623, 316 Mo. 426.

Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189—U. S. Nat. Bank v. Great Western Sugar Co., 199 P. 245, 60 Mont. 342.

Tex.—Hogg v. Magnolia Petroleum Co., Com.App., 267 S.W. 482, reversing Magnolia Petroleum Co. v. Hogg, Civ.App., 254 S.W. 580—Hydraulic Casing Pulling Co. v. Brown, Civ.App., 297 S.W. 770.

11. N.D.—Rolette State Bank v. Minnesota Elevator Co., 195 N.W. 6, 50 N.D. 151.

11 C.J. p 630 note 49.
Conditional or qualified consent to sale see *supra* § 262 a.

12. Ill.—W. W. Kimball Co. v. Polakow, 109 N.E. 313, 268 Ill. 344, affirming 190 Ill.App. 174.

Tex.—Doak v. Moore, 109 S.W. 405, 48 Tex.Civ.App. 594.

13. Tex.—Miller v. Santa Anna First State Bank, etc., Co., Civ. App., 184 S.W. 614.

Acceptance of proceeds as ratification see *supra* § 262 b.

Mortgagor's payment of debt other than the mortgage debt out of the proceeds of sale precludes a recovery for conversion, even though the mortgagee had no knowledge of the sale until after his receipt of the proceeds.—Helgeson v. Farmers' Co-op. Ass'n, Jackson, 199 N.W. 821, 160 Minn. 109.

14. Iowa.—Stanley v. Southwick, 94 N.W. 1120, 120 Iowa 480.

Me.—Dexter v. Curtis, 40 A. 549, 91 Me. 505, 64 Am.S.R. 266.

Minn.—Jorgensen v. Tait, 4 N.W. 44, 26 Minn. 327.

Bringing of action

Mortgagee's bringing of action for conversion of grain was a sufficient demand for return thereof, where defendant denied mortgagee's interest in grain.—First State Bank of Barton v. St. Anthony & Dakota Elevator Co., 250 N.W. 773, 64 N.D. 138.

15. Ill.—Dawes v. Rosenbaum, 53 N.E. 585, 179 Ill. 112, affirming 77 Ill. App. 295.

16. Mich.—Pinconning State Bank v. Henry, 241 N.W. 913, 258 Mich. 44. N.M.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312—Kitchen v. Schuster, 89 P. 261, 14 N.M. 164.

N.D.—Rolette State Bank v. Minnesota Elevator Co., 195 N.W. 6, 50 N.D. 141.

Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

11 C.J. p 630 note 45.

17. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

18. Colo.—Longmont Farmers' Mill-

ing & Elevator Co. v. Mulvaney, 205 P. 525, 71 Colo. 215.

N.D.—First State Bank of Barton v. St. Anthony & Dakota Elevator Co., 250 N.W. 773, 64 N.D. 138.

19. Mich.—Pinconning State Bank v. Henry, 241 N.W. 913, 258 Mich. 44. N.J.—Greenberg v. Hendrickson, 165 A. 860, 11 N.J.Misc. 368.

Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 46 Ohio App. 27.

11 C.J. p 630 note 48.

20. U.S.—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F. 2d 531.

S.D.—First Nat. Bank v. Siman, 275 N.W. 347.

Wash.—Spokane Sec. Finance Co. v. Crowley Lumber Co., 274 P. 102, 150 Wash. 559, affirmed 279 P. 103, 152 Wash. 697.

11 C.J. p 630 note 42.

Mortgagee's insolvency unnecessary

Where the mortgagee has a right to take possession of the property on a sale by the mortgagor without the former's consent, such right becomes absolute on breach of the condition, and it is not necessary, therefore, to show that the mortgagor was insolvent.—Conwell v. Jeger, 51 N.E. 733, 21 Ind.App. 110.

21. Ill.—Lawton v. Ewing, 240 Ill. App. 607.

22. Ill.—Schillo v. White, 207 Ill. App. 390.

Mo.—Lafayette County Bank v. Metcalf, 40 Mo.App. 494.

N.D.—Ellestad v. Northwestern El. Co., 69 N.W. 44, 6 N.D. 88.

Wyo.—Reynolds v. Morton, 154 P. 325, 23 Wyo. 528.

23. Mo.—Lafayette County Bank v.

he will be liable if the sale to him is an absolute one to the exclusion of the mortgagee's rights.²⁴

A *junior mortgagee*, if he has an actual financial interest in the property,²⁵ and did not consent to the sale, may recover in conversion from the purchaser of mortgaged property, if he purchased with knowledge of the mortgage and exercised dominion over the property inconsistent with the mortgagee's rights.²⁶ The application of the purchase money of mortgaged property toward payment of a prior lien will not relieve the purchaser from liability to the mortgagee for conversion, if the sale was made without authority from the holder of the prior lien.²⁷

Purchase from mortgagee in possession. In some jurisdictions it is held that a stipulation that the mortgagor shall retain possession of the property until breach of the condition precludes the mortgagee from suing in trover before default, and the purchaser cannot be held liable for conversion where he sells or disposes of the property purchased before such default,²⁸ although he may maintain a bill in equity to prevent a threatened

removal of the property, or a special action on the case for the injury to his lien.²⁹ Retention of possession after the law day, however, will render the purchaser guilty of conversion.³⁰ On the other hand, according to other authority, such an agreement for possession in the mortgage will not avail a purchaser in an action for conversion, regardless of when the sale took place, as such a stipulation is considered personal to the mortgagor.³¹

§ 265. Assumption of Debt by, and Personal Liability of, Purchaser

A purchaser of mortgaged property, who assumes the mortgage indebtedness as a part of the consideration for the conveyance to him, becomes personally liable for the mortgage indebtedness.

The purchaser of mortgaged chattels who assumes the mortgage indebtedness as a part of the consideration for the conveyance to him becomes personally liable for such indebtedness,³² particularly where the mortgagee, on the faith of the purchaser's assumption of the debt, releases the mortgagor from personal liability.³³ The purchaser's personal liability, however, depends entirely on his express

Metcalf, 29 Mo.App. 384, affirmed 40 Mo.App. 494.

"This [stipulation in mortgage authorizing mortgagee to take possession] is an option which he may or may not exercise. Authorities of high character, including those cited by counsel for defendants, hold that, until such option is exercised by the mortgagee, and he either so takes or demands the possession, the possession remains with the mortgagor until default made in the payment of the debt, and that a sale made by him before such default or assertion of right will not support trover against the vendee or agent making the sale."—National Bank of Commerce v. Morris, 21 S.W. 511, 513, 114 Mo. 255, 35 Am.S.R. 754, 19 L.R. A. 463.

24. Okl.—Ralston Bank of Commerce v. Gaskill, 145 P. 1131, 44 Okl. 738.

11 C.J. p 631 note 60.

25. Ala.—Chapman v. Metcalf, 51 So. 745, 165 Ala. 567.

Portion of property

If the sale involves only a portion of property subject to more than one lien and that portion has been set aside for the senior lienholder and is sold with his consent, the purchaser is not liable for conversion.—Chapman v. Metcalf, 51 So. 745, 165 Ala. 567—11 C.J. p 632 note 77.

26. Ky.—Ruby v. Cox & Grayot, 229 S.W. 127, 191 Ky. 162.

Minn.—Hector v. Royal Indemnity Co., 234 N.W. 643, 182 Minn. 413,

reargument denied 235 N.W. 675, 182 Minn. 413.

Okl.—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95.

27. Ala.—Belser v. Youngblood, 15 So. 863, 103 Ala. 545—Keith v. Ham, 7 So. 234, 89 Ala. 590.

28. N.Y.—Hathaway v. Brayman, 42 N.Y. 322, 1 Am.R. 524—Madill v. McDonald, 175 N.Y.S. 792, 187 App. Div. 761.

11 C.J. p 630 note 55, p 631 note 58.

29. Ala.—Heflin v. Slay, 78 Ala. 180.

30. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

31. S.C.—Bellune v. Wallace, 2 Rich. 80.

32. U.S.—Holt v. Albert Pick & Co., C.C.A.N.C., 25 F.2d 378, 380, citing *Corpus Juris*, certiorari denied Albert Pick & Co. v. Holt, 49 S.Ct. 9, 278 U.S. 602, 73 L.Ed. 530—Clayton v. Fort Worth State Bank of Fort Worth, Tex., C.C.A.Tex., 4 F.2d 763, certiorari denied Chapman v. Clayton, 46 S.Ct. 13, 269 U.S. 555, 70 L.Ed. 408.

N.C.—Hamilton v. Benton, 104 S.E. 78, 180 N.C. 79.

Or.—Weatherly v. Hochfeld, 286 P. 588, 133 Or. 136.

Tex.—Burkhart v. Brownfield, Civ. App., 33 S.W.2d 885.

Wash.—University State Bank v. Steeves, 147 P. 645, 85 Wash. 55, 2 A.L.R. 237.

11 C.J. p 632 note 89.

Liability of mortgagor where purchaser assumes mortgage debt see supra § 261.

Assumption of interest

Assumption, by grantee of business, of a mortgage on the property conveyed, is an agreement to assume and pay interest as well as principal, notwithstanding that the amount of the principal alone is recited in the assumption clause.—Castelbaum v. Wolfson, 104 A. 84, 92 N.J.Law 165.

No recovery from mortgagor

A purchaser assuming the mortgage debt cannot recover from the mortgagor on account of a part payment made on the mortgage, in the absence of fraud, mistake, or agreement to that effect.—Stuckman v. Roose, 46 N.E. 680, 147 Ind. 402.

Seller executing note as agent

Where the seller had so executed a note and mortgage as to bind himself personally, although he signed as agent, the fact that title to the mortgaged property was in another will not defeat the mortgagee's right to recover at law on the purchaser's promise to pay the mortgage debt.—Pope v. Porter, C.C.Iowa, 33 F. 7.

Not agent of mortgagee

A purchaser assuming the debt cannot, in replevin brought in his own name against an officer levying on the property in suit against the mortgagor, recover on the ground that he is the agent of the mortgagees.—McNorton v. Akers, 24 Iowa 369.

33. Cal.—Talcott v. Hurlbert, 76 P. 647, 143 Cal. 4.

11 C.J. p 633 note 98.

Assumption of debt by purchaser as

assumption of the mortgage debt, and the mere purchase of the property subject to a mortgage does not impose such liability on him.³⁴ The alleged promise by the purchaser to pay or assume the debt must be clear, satisfactory, and convincing.³⁵ A purchaser of mortgaged chattels who assumes payment of the notes secured thereby is entitled to credit for payments made, whether he became paymaster of the notes or not.³⁶

Consideration. A sufficient consideration for a purchaser's promise to assume the mortgage debt may be found in a mortgagee's promise to forbear foreclosure proceedings,³⁷ or in his act of consenting to the sale which results in his losing his mortgage lien.³⁸

Rescission or cancellation. An agreement between a buyer and seller of mortgaged property, whereby the buyer assumes the payment of the mortgage, may not be rescinded by their mutual consent.³⁹ However, it has been held that personal liability for the assumption of the mortgage does not attach to the purchaser in an executory contract of sale before title has passed, and in such a case the contract may be canceled and the purchaser

will be free of liability.⁴⁰

Right to attack mortgage. A purchaser of mortgaged property who assumes the mortgage debt is estopped from attacking the validity of the mortgage for any defect in its execution,⁴¹ or for failure to record.⁴²

§ 266. Right to Proceeds of Property

- a. Sale with mortgagee's consent
- b. Sale without mortgagee's consent
- c. Application of proceeds to debt

a. Sale with Mortgagee's Consent

- (1) In general
- (2) Conditional consent
- (3) Sale by mortgagor as agent

(1) In General

As a general rule the lien of a mortgage does not attach to the proceeds of a sale by the mortgagor where the mortgagee consented to the sale.

It is a general rule that the lien of a mortgage does not attach to the proceeds received from a transfer of mortgaged property by the mortgagor where the mortgagee consented to⁴³ or rati-

discharge of mortgage lien see *infra* § 346.

34. Mich.—Treuer v. Holtzman, 262 N.W. 369, 370, 272 Mich. 344, quoting *Corpus Juris*.

Tex.—Burkhart v. Brownfield, Civ. App., 33 S.W.2d 885—Nichols v. Lorenz, Civ.App., 237 S.W. 629, 632. 11 C.J. p 632 note 92.

No estoppel

Conduct of purchasers of mortgaged chattels in junking chattels because obsolete and in replacing junked chattels by modern equipment did not estop them from denying assumption of mortgage indebtedness.—Treuer v. Holtzman, 262 N.W. 369, 272 Mich. 344.

Subject to mortgage

(1) An assignee of a contract for the purchase of property is not liable for the indebtedness of the assignor for the purchase price, where the assignment was made subject to such indebtedness; but the property may, in such a case, be subjected to an existing lien.—Burkhart v. Brownfield, Tex.Civ.App., 33 S.W. 2d 885.

(2) Where the property is publicly sold with the express announcement that it is sold subject to a mortgage, the conditions of which are to be binding on the purchaser, one hearing the announcement and purchasing cannot be held personally liable for the mortgage debt.—Hamill v. Gillespie, 48 N.Y. 556.

35. Mich.—Treuer v. Holtzman, 262 N.W. 369, 272 Mich. 344.

Wash.—Bicknell v. Henry, 125 P. 156, 69 Wash. 408.

36. Tex.—McSpadden v. La Force, Civ.App., 39 S.W. 163.

37. Iowa.—Gibson v. McIntire, 81 N.W. 699, 110 Iowa 417.

38. Idaho.—First Nat. Bank v. Peterson, 279 P. 302, 407 Idaho 794.

39. Wis.—Bohnert v. Radke, 207 N.W. 284, 189 Wis. 203.

Reason for rule

A contract for the benefit of a third party is enforceable by such party from the date of its execution, and neither party to the contract may thereafter rescind or change it to the detriment of such third party.—Bohnert v. Radke, 207 N.W. 284, 189 Wis. 203.

Release by mortgagor

A purchaser cannot defeat the mortgagee's right to hold him responsible by procuring a release from his mortgagor.—Hartman v. Pistorius, 94 N.E. 131, 248 Ill. 568.

40. Ill.—Hartman v. Pistorius, 94 N.E. 131, 248 Ill. 568.

41. Conn.—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172. 11 C.J. p 633 note 4.

Defective description of the property in a mortgage, which renders the mortgage invalid as to attaching creditors and bona fide purchasers, is not such a defect as may be taken

advantage of by a purchaser who assumes the mortgage and takes possession of the property.—Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172.

Purchaser of stock of goods which has been exposed to sale cannot question the legality of the mortgage, even though such mortgage is fraudulent and void under the statute.—Denman v. James, Tex.Civ. App., 130 S.W. 1157—Beckville Continental State Bank v. Traubue, Tex. Civ.App., 150 S.W. 209.

Subsequent mortgagee, to whom the mortgagor has transferred the property, must perform his promise to pay, regardless of the validity of the prior mortgage.—Schneller v. Vincent, 229 P. 737, 131 Wash. 238, affirmed 237 P. 1119, 135 Wash. 698.

42. Ark.—Sunny South Lumber Co. v. A. J. Neimeyer Lumber Co., 38 S.W. 902, 63 Ark. 268.

Mich.—Dwight v. Scranton, etc., Lumber Co., 36 N.W. 152, 69 Mich. 127.

43. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10—Utah-Idaho Live Stock Loan Co. v. Blackfoot City Bank, D.C. Idaho, 290 F. 588.

Cal.—Valley Bank v. Hillside Packing Co., 267 P. 746, 91 Cal.App. 738—Riddle v. Etling, 258 P. 162, 84 Cal.App. 460.

Colo.—Moore v. Jacobucci, 197 P. 1015, 70 Colo. 171.

Idaho.—Bellevue State Bank v.

fixed⁴⁴ sale, except as between original parties to the loan,⁴⁵ or one standing in no better position than the mortgagor.⁴⁶ Of course, the mortgagee is not liable to other creditors of the mortgagor where the proceeds of the sale are applied in payment of the mortgage debt before anyone else acquired a lien thereon.⁴⁷ In some jurisdictions, however, it is held that where a mortgagor sells mortgaged property and receives the proceeds thereof, the proceeds stand in place of the thing sold, and the lien attaches to the proceeds as trust funds;⁴⁸ and it has been held that the lien of a mortgage on a growing crop follows the grain after severance, and the proceeds after a sale thereof.⁴⁹ Also, in some jurisdictions, the right to the proceeds of a sale of mortgaged property depends on whether the person claiming such funds had notice of the origin of the funds, and, if he had such knowledge, his equities are inferior to those of the mortgagee.⁵⁰

Where a mortgage is given on book accounts due the mortgagor, the mortgagee has no lien on the money collected thereon by a purchaser of the business, if it was mixed with other money and used in the regular course of business, but the mortgagee may claim from the assets of the purchaser moneys collected on such accounts as for money received for his use.⁵¹

(2) Conditional Consent

Generally a mortgagee is entitled to the proceeds of a sale of mortgaged property made upon the condition that the proceeds be paid to him, although he may not be entitled to them as against a third person receiving them from the mortgagor without notice of the mortgagee's rights.

A mortgagee is entitled to the proceeds of a sale of the mortgaged property by the mortgagor when the sale is made upon the condition, agreement, or understanding that the proceeds shall be paid to the mortgagee or his representative.⁵² This right of

Hailey Nat. Bank, 215 P. 126, 37 Idaho 121.

Iowa.—Scurry v. Quaker Oats Co., 203 N.W. 860, 201 Iowa 1171—First Nat. Bank v. Security Trust & Sav. Bank of Charles City, 181 N.W. 402, 191 Iowa 842.

Mo.—United Film Ad Service v. Roach, App., 297 S.W. 91, 11 C.J. p 633 note 9.

Property received in exchange for mortgaged property is not subject to the lien of the mortgage.—Fairweather v. Nelson, 79 N.W. 506, 76 Minn. 510.

Garnishment

The proceeds of a sale of mortgaged property, sold with the mortgagee's consent, is subject to garnishment by the mortgagor's creditors where such funds are in the hands of the mortgagor or purchaser.

Colo.—Moore v. Jacobucci, 197 P. 1015, 70 Colo. 171.

Okl.—Farmers' State Bank of Alva v. Kavanaugh & Shea, 224 P. 525, 98 Okl. 119.

Equitable mortgage

Cal.—Haber v. J. G. Boswell Co., 20 P.2d 100, 130 Cal.App. 514.

Question held immaterial under facts.—O'Connor v. Einfeldt, 205 N.W. 268, 164 Minn. 422.

Lien held not waived

Contention that there was a waiver of mortgage lien on proceeds of sale of mortgaged property on ground of mortgagee's consent to the sale by mortgagor could not be sustained where sale was made and proceeds were received, not by mortgagor corporation, but by another corporation under the same management.—Snodgrass v. Wallowa Milling & Grain Co., 227 P. 294, 111 Or. 402.

44. Cal.—Riddle v. Etling, 258 P. 162, 84 Cal.App. 460.

Okl.—Bank of Jefferson v. First Nat. Bank, 12 P.2d 540, 158 Okl. 37.

45. Cal.—Valley Bank v. Hillside Packing Co., 267 P. 746, 91 Cal. App. 738.

46. Iowa.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856—First Nat. Bank v. Riggle, 190 N.W. 143, 195 Iowa 189.

S.D.—Farmers' State Bank of Turton v. Van Houten, 219 N.W. 206, 52 S.D. 528.

Intermingling of proceeds

However, if the proceeds of a sale are intermingled with partnership funds so that they cannot be identified, the mortgagee can have no lien on such partnership funds in the hands of one holding them for the mortgagor.—Zerr v. Howell, Tex.Civ. App., 84 S.W.2d 867, error refused.

47. Ark.—Prins v. American Trust Co., 275 S.W. 914, 169 Ark. 455.

48. Miss.—Bolivar County v. Bank of Cleveland, 155 So. 176, 170 Miss. 555.

In equity

It has been held that the mortgagee may in equity insist that his lien adhere to the proceeds received by the vendee of the mortgagor.

Colo.—Clatworthy v. Ferguson, 210 P. 693, 694, 72 Colo. 259, citing **Corpus Juris**.

Ky.—Hillman v. Morton, 9 Ky.L. 198.

In Oklahoma

(1) By virtue of statute the mortgagor is deemed to be the trustee of funds received on the sale of mortgaged property, for the benefit of the mortgagee, when the sale was with the consent of the mortgagee.—Bank of Jefferson v. First Nat. Bank, 12 P.2d 540, 158 Okl. 37.

(2) A subsequent approval of the

sale does not bring the mortgagee within the statute where the sale was without his consent.—Bank of Jefferson v. First Nat. Bank, supra.

(3) The statute is inapplicable where the mortgagee consented to a sale and application of all but one-fourth of the proceeds to the mortgagor's use.—Midwest Production Co. v. Doerner, C.C.A.Okla., 70 F.2d 194.

49. Or.—Keel v. Levy, 24 P. 253, 19 Or. 450.

11 C.J. p 633 note 12.

50. Ala.—Wilson v. Cowart, 167 So. 602, 27 Ala.App. 110, certiorari denied 167 So. 604, 232 Ala. 170.

Instruction, "I charge you that money loses its identity when received in due course of trade by third person," was properly refused as misleading.—Wilson v. Cowart, supra.

Depository bank

A depository bank, notifying depositor of a credit to his checking account, and charging account with past-due note, was not a creditor charged with notice of recorded mortgage. The bank's actual knowledge of the mortgage would not preclude it from charging its unsecured note against depositor's credit from sale of mortgaged cattle, without proof that it knew the origin of the funds deposited. Under such circumstances, the mortgagee, permitting a sale of mortgaged cattle without notifying depository of proceeds, substitutes promise of mortgagor for his lien, and cannot look to depository for protection.—Security State Bank of Melrose, Minn. v. First Nat. Bank, 254 P. 417, 78 Mont. 389.

51. N.J.—Nugent v. John McNeill Shoe Co., 50 A. 638, 62 N.J.Eq. 583.

52. Iowa.—Hoyt v. Clemans, 149 N.

the mortgagee is superior to the claims of the mortgagor,⁵³ the mortgagor's creditors,⁵⁴ a purchaser,⁵⁵ or other persons whose claims were inferior to the mortgage lien prior to the sale.⁵⁶ If the agreement is for a public sale of mortgaged property with a third person to act as a clerk thereof and collect the proceeds for the mortgagee, the effect of the arrangement is to make the clerk a trustee of the

proceeds so collected,⁵⁷ or to operate as an assignment thereof,⁵⁸ for the benefit of the mortgagee, and they cannot be applied to any other purpose than the satisfaction of the mortgage debt.⁵⁹ As distinguished from such an arrangement, if the mortgagee gives his consent to sell in reliance only on the mortgagor's personal promise to collect and apply, or account for, the proceeds, there is au-

W. 442, 167 Iowa 330, L.R.A., N.S., 1915C 166.

Miss.—Cole-McIntyre-Norfleet Co. v. Du Bard, 99 So. 474, 135 Miss. 20.

Mo.—United Film Ad Service v. Roach, 297 S.W. 91, 222 Mo.App. 339—Martz v. Big Horn Glass Co., App., 269 S.W. 697.

S.D.—James River Bank of Frankfort v. Hansen, 211 N.W. 976, 978, 51 S.D. 13, quoting *Corpus Juris*—Nelson v. Badker, 163 N.W. 569, 39 S.D. 108.

11 C.J. p 633 note 20.

Equitable assignment of proceeds

A mortgagee's consent to sell on condition that the proceeds of the sale be paid to him amounts to an equitable assignment of such proceeds to the mortgagee.

Cal.—McIntyre v. Hauser, 63 P. 69, 131 Cal. 11.

Wis.—Middleton Lumber & Fuel Co. v. Kosanke, 256 N.W. 633, 216 Wis. 90.

53. Wis.—Carpenter v. Forbes, 247 N.W. 857, 211 Wis. 648.

Mortgagor as trustee

If a mortgagor receives the proceeds of a sale of the mortgaged property under an agreement that he is to pay them to the mortgagee, he holds such funds as trustee for the benefit of the mortgagee.—Scurry v. Quaker Oats Co., 208 N.W. 860, 201 Iowa 1171.

Retention for mortgagor's use

The mortgagee, however, has no right to such funds which he has permitted the mortgagor to retain for his own use.

U.S.—Midwest Production Co. v. Doerner, C.C.A.Okl., 70 F.2d 194.

Wis.—Caroline State Bank v. Andrews, 235 N.W. 794, 204 Wis. 393.

54. Cal.—McIntyre v. Hauser, 63 P. 69, 131 Cal. 11.

Colo.—J. I. Case Threshing Mach. Co. v. Rominger, 238 P. 63, 77 Colo. 595.

Idaho.—First Sec. Bank of Pocatello v. Zaring Farm & Livestock Co., 10 P.2d 303, 51 Idaho 700.

Iowa.—Scurry v. Quaker Oats Co., 208 N.W. 860, 201 Iowa 1171.

Kan.—Muse v. Lehman, 1 P. 804, 30 Kan. 514.

Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697.

Mont.—Dooley Implement Co. v. Citizens' State Bank of Dooley, 283 P. 423, 86 Mont. 339—First Nat.

Bank v. Citizens' State Bank of Dooley, 283 P. 420, 86 Mont. 331.

Okl.—Farmers' State Bank of Alva v. Kavanaugh & Shea, 224 P. 525, 98 Okl. 119.

Wis.—Middleton Lumber & Fuel Co. v. Kosanke, 256 N.W. 633, 216 Wis. 90—Carpenter v. Forbes, 247 N.W. 857, 211 Wis. 648.

Wyo.—Citizens' Nat. Bank of Cheyenne v. Puckett, 254 P. 128, 36 Wyo. 232.

Necessity for disclosure of agreement

A mortgagee's failure to disclose his agreement that the proceeds should be paid to him does not estop him from claiming the proceeds, if the mortgage is properly filed.—Wilson v. Geiss, 190 N.W. 61, 153 Minn. 211.

55. Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697.

S.D.—James River Bank v. Hansen, 211 N.W. 976, 51 S.D. 13.

Advancements by purchaser

A purchaser who has made advancements to the mortgagor is not entitled to credit the mortgagor's account by the amount of the sale price of mortgaged lumber purchased by it, except as to amounts the mortgagor was permitted to retain for his own use.—Caroline State Bank v. Andrews, 235 N.W. 794, 204 Wis. 393.

Notice

Actual notice of the agreement that the mortgagee was to have the proceeds is unnecessary, as constructive notice of the mortgage, together with knowledge that the mortgagee's employees were clerking a public sale of the property, is sufficient to put a purchaser on inquiry as to the mortgagee's rights.—James River Bank v. Hansen, 211 N.W. 976, 51 S.D. 13.

Recovery in assumpsit allowed

Mich.—Flood v. Butzbach, 72 N.W. 603, 114 Mich. 613, 63 Am.S.R. 501.

In the absence of fraud a purchaser claiming a set off against the mortgagor on the purchase price cannot complain of an arrangement between the mortgagee and mortgagor to sell the property at public sale.—James River Bank of Frankfort v. Hansen, 211 N.W. 976, 51 S.D. 13.

56. Mont.—Dooley Implement Co. v. Citizens' State Bank of Dooley, 283 P. 423, 86 Mont. 339—First Nat. Bank v. Citizens' State Bank of Dooley, 283 P. 420, 86 Mont. 331.

Sale to junior mortgagee

Where a mortgagor executes a mortgage to a trustee for the benefit of two creditors, one of which is to have a superior claim on the proceeds, and sells the property in the usual course of trade under an arrangement with the senior creditor whereby he may sell the property and assign the purchasers' accounts to him, the senior creditor may recover the purchase price of a sale to the junior creditor made under the same arrangement.—Grumme v. Firminich Mfg. Co., 81 N.W. 791, 110 Iowa 505.

57. Iowa.—Hoyt v. Clemans, 149 N.W. 442, 167 Iowa 330, L.R.A., N.S., 1915C 166.

Okl.—Farmers' State Bank of Alva v. Kavanaugh & Shea, 224 P. 525, 98 Okl. 119.

Wis.—Carpenter v. Forbes, 247 N.W. 857, 211 Wis. 648.

There is sufficient consideration for such an arrangement to pay the debt where the clerk receives a commission for his duties with respect to the sale.—Dooley Implement Co. v. Citizens' State Bank of Dooley, 283 P. 423, 86 Mont. 339—First Nat. Bank v. Citizens' State Bank of Dooley, 283 P. 420, 86 Mont. 331.

The clerk's authority is irrevocable by the mortgagor, and the latter can exert no control over the proceeds except as to any surplus.—Nelson v. Badker, 163 N.W. 569, 39 S.D. 108.

58. S.D.—James River Bank of Frankfort v. Hansen, 211 N.W. 976, 51 S.D. 13.

59. S.D.—Nelson v. Badker, 163 N.W. 569, 39 S.D. 108.

Validity and effect of agreement

An agreement between the mortgagor and the mortgagee that the property may be sold at a public sale by the mortgagor, and the proceeds paid to the clerk of the sale to be applied in discharge of the mortgage, is valid and binding and the mortgagee has a right to the proceeds of the sale as against other creditors of the mortgagor.—Barrett v. Martzahn, 173 N.W. 72, 186 Iowa 548.

thority that he is not entitled to a lien or claim thereon as against a person receiving them without notice of their character as proceeds of a sale of mortgaged property;⁶⁰ but the mortgagee is entitled to the proceeds as against the mortgagor⁶¹ or a person receiving them from him with notice,⁶² or a person not having lawful claim thereto under or through the mortgagor.⁶³

(3) Sale by Mortgagor as Agent

A mortgagee has a lien on the proceeds of a sale of mortgaged property, where he permits the mortgagor to sell as his agent or in his name.

A mortgagee's lien on the proceeds of a sale by the mortgagor is not waived when the latter acts as agent for the mortgagee in making the sale and delivery;⁶⁴ and so the mortgagee has a superior claim to the proceeds as against the mortgagor,⁶⁵ his assignee of the proceeds with notice of

the mortgagee's claims,⁶⁶ a garnishing judgment creditor,⁶⁷ or a purchaser.⁶⁸ The mere fact that the agent violates his instructions and sells the property as his own does not deprive the mortgagee of his right to the proceeds.⁶⁹ If a mortgagee permits a sale of the mortgaged property in his own name, the lien of the mortgage is transferred to the proceeds of the sale.⁷⁰

Where the mortgagee permitted the sale of, and aided the mortgagor in selling, part of the property sufficient to pay the mortgage debt, and in converting the proceeds to his own use, it was held that the mortgage was void as to a judgment creditor of the mortgagor, and the latter could subject to garnishment the proceeds of the remaining property in the hands of the mortgagee.⁷¹

b. Sale without Mortgagee's Consent

The lien of a mortgage does not attach to the pro-

60. Iowa.—Smith v. Crawford County State Bank, 61 N.W. 378, 68 N.W. 690, 99 Iowa 282.

Me.—Auburn First Nat. Bank v. Eastern Trust, etc., Co., 79 A. 4, 108 Me. 79—White Mountain Bank v. West, 46 Me. 15.

Or.—Snodgrass v. Wallowa Milling & Grain Co., 227 P. 294, 296, 111 Or. 402, citing *Corpus Juris*.

Particular persons entitled to proceeds

(1) Judgment creditor of mortgagor.—Smith v. Clark, 69 N.W. 1011, 100 Iowa 605.

(2) A bank in which funds are deposited to mortgagor's account.—Mason First Nat. Bank v. Bernard, Tex.Civ.App., 30 S.W. 580.

61. Me.—Auburn First Nat. Bank v. Eastern Trust, etc., Co., 79 A. 4, 108 Me. 79.

Neb.—Farmers' State Bank of Petersburg v. Anderson, 199 N.W. 728, 112 Neb. 413, 36 A.L.R. 1374.

Equity will transfer the lien of the mortgage to the proceeds, as between the parties.—State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.

62. Neb.—Farmers' State Bank of Petersburg v. Anderson, 199 N.W. 728, 112 Neb. 413, 36 A.L.R. 1374. 11 C.J. p 634 note 24.

Depository bank

A bank, in which a mortgagor has deposited the proceeds of a sale to his own credit, has no right to apply any of such funds in payment of the mortgagor's debt after receiving notice of such an agreement between the mortgagee and mortgagor, but is bound to pay them over to the mortgagee.—Auburn First Nat. Bank v. Eastern Trust, etc., Co., 79 A. 4, 108 Me. 79.

Proceeds in hands of subsequent purchaser

If the mortgagee consents to a

sale under an agreement of which the purchaser has notice that the proceeds of the sale are to be paid to him, and that when so paid he will release the mortgage, the mortgagee, while he cannot recover the property on failure of the purchaser to pay over the purchase price, is entitled to the proceeds of a second sale by the assignee in insolvency of the original purchaser, or by one taking a mortgage from such purchaser prior to the sale by the assignee and while the first mortgage is of record.—Monson v. Renaker, 60 S.W. 924, 22 Ky.L. 1405.

63. Neb.—Farmers' State Bank of Petersburg v. Anderson, 199 N.W. 728, 112 Neb. 413, 36 A.L.R. 1374.

64. Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697. Wis.—Middleton Lumber & Fuel Co. v. Kosanke, 256 N.W. 633, 216 Wis. 90.

What constitutes sale as agent

Where crop of beets subject to mortgage was sold to a sugar company, under an understanding that the usual custom of the company as to issuing checks payable to all parties interested should be followed, it was not a sale by mortgagor with the consent of the mortgagee, but was equivalent to a sale by mortgagor as agent of the mortgagee.—Clatworthy v. Ferguson, 210 P. 693, 72 Colo. 259.

Deposit in mortgagor's name

Where the proceeds of a sale of mortgaged property held by the mortgagor as the mortgagee's agent belong in equity to the mortgagee, his right is not affected by a deposit of the money to the mortgagor's credit in a bank.—Thex v. Shreve, 267 P. 92, 38 Wyo. 285.

65. Equitable lien on proceeds

As between the mortgagee and

mortgagor, the former has an equitable lien on the proceeds of a sale by the mortgagor as his agent.—Clatworthy v. Ferguson, 210 P. 693, 72 Colo. 259.

66. Colo.—Clatworthy v. Ferguson, *supra*.

67. Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697.

Wis.—Middleton Lumber & Fuel Co. v. Kosanke, 256 N.W. 633, 216 Wis. 90.

Wyo.—Thex v. Shreve, 267 P. 92, 38 Wyo. 285.

68. Ill.—Twaits v. Willy H. Lau Co., 176 Ill.App. 588.

Mo.—Martz v. Big Horn Glass Co., App., 269 S.W. 697.

11 C.J. p 634 note 27.

Husband mortgaging property to wife

Where personal property is mortgaged by a husband to his wife, and is thereafter sold by the mortgagor, the mortgagee may recover from the purchaser, either on the principle that her husband was acting as her agent and with her consent, or on the principle of a suit for money had and received.—Twaits v. Willy H. Lau Co., 176 Ill.App. 588.

69. Cal.—Crosby v. Fresno Fruit Growers' Co., 158 P. 1070, 30 Cal. App. 308.

70. Iowa.—Smith v. Crawford County State Bank, 61 N.W. 378, 68 N.W. 690, 99 Iowa 282.

Wis.—Caroline State Bank v. Andrews, 235 N.W. 794, 204 Wis. 393. 11 C.J. p 633 note 20.

71. Colo.—First Nat. Bank of Ft. Collins v. Daniels Mercantile Co., 172 P. 3, 64 Colo. 408—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1, 64 Colo. 388, L.R.A.1918E 636.

ceeds of an unauthorized sale of the mortgaged property, but the mortgagee may waive the tort and recover the proceeds of the sale from the mortgagor or a third person who had notice of the mortgage.

The lien of a mortgage is not transferred to the proceeds of an unauthorized sale of mortgaged property,⁷² at least as against a third person receiving them without notice of the mortgagee's rights,⁷³ although it has been held that, where mortgaged property is accepted by one who has notice of the mortgage, in part payment for other property, the substituted property is impressed with an equitable lien to the extent of the value of the property mortgaged,⁷⁴ and that, if the proceeds of an unauthorized sale are deposited in a bank pending determination as to priority of lien claimants, the bank is bound by the adjudication.⁷⁵

Where mortgaged property is sold without the mortgagee's consent, unless he has taken other in-

consistent action,⁷⁶ the mortgagee is not limited to his remedy of retaking the property but may waive the tort and recover the proceeds of the sale,⁷⁷ and such recovery has been permitted against a third person receiving the proceeds with knowledge of the source of the funds.⁷⁸ Such recovery may be had in an action for accounting,⁷⁹ or for money had and received.⁸⁰

c. Application of Proceeds to Debt

In the absence of a waiver or estoppel, ordinarily the proceeds of a sale of mortgaged chattels should be applied in payment of the mortgage debt if it is a first lien thereon.

As a general rule, money received by the mortgagee from the sale of the mortgaged property must be applied by the mortgagee in payment of the mortgage debt,⁸¹ even though the mortgagor has not directed this to be done,⁸² unless the mortgagor

72. Cal.—Riddle v. Etling, 253 P. 162, 84 Cal.App. 460.

Iowa.—Slimmer & Thomas v. Lawler, 218 N.W. 516, 205 Iowa 813. 11 C.J. p 635 note 36.

Reason for rule

The lien on the mortgaged property itself remains unaffected by an unauthorized sale.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289.

73. Cal.—Crosby v. Fresno Fruit Growers' Co., 158 P. 1070, 30 Cal. App. 308.

Iowa.—Kahler v. Hanson, 6 N.W. 57, 58 Iowa 698.

Payment of previous indebtedness

Where the proceeds of a sale by the mortgagor are paid over to a bank or other third person and are applied to the payment of a previous indebtedness, the mortgagee cannot follow such proceeds if the person to whom they are paid had no knowledge of the mortgage.—Oklahoma State Bank of Davis v. First Nat. Bank, 285 P. 117, 142 Okl. 50—11 C. J. p 635 note 39.

74. Ark.—American Soda Fountain Co. v. Futrell, 84 S.W. 505, 73 Ark. 464, 108 Am.S.R. 64.

75. Iowa.—Slimmer & Thomas v. Lawler, 218 N.W. 516, 205 Iowa 813.

76. U.S.—Minneapolis Nat. Bank of Minneapolis, Kan., v. Liberty Nat. Bank of Kansas City, C.C.A.Kan., 72 F.2d 434.

77. Ark.—Imperial Valley Savings Bank v. Huff, 190 S.W. 116, 126 Ark. 281.

Colo.—First Nat. Bank v. American State Bank of Brighton, 215 P. 473, 73 Colo. 254.

Mont.—Talmage-Sayer Co. of Joliet v. Smith, 7 P.2d 536, 91 Mont. 289. 11 C.J. p 634 note 32.

Fund deposited in lieu of bail

Where a mortgagor sold mortgaged property without permission and deposited the proceeds in habeas corpus proceedings in lieu of bail, and the mortgagees filed their claim therefor in the court having custody of the fund, this petition being filed before the mortgagor assigned his right, the mortgagees were entitled to it as against the assignee.—Imperial Valley Savings Bank v. Huff, 190 S.W. 116, 126 Ark. 281.

78. U.S.—Minneapolis Nat. Bank of Minneapolis, Kan., v. Liberty Nat. Bank of Kansas City, C.C.A.Kan., 72 F.2d 434—Smith v. Shellabarger, D.C.Colo., 291 F. 144.

Ky.—Ruby v. Cox & Grayot, 229 S. W. 127, 191 Ky. 162.

Mo.—Gorin Sav. Bank v. Early, App., 260 S.W. 480.

11 C.J. p 635 note 40.

Bank as trustee of proceeds

A bank, receiving proceeds of sale with knowledge that sale was made without consent of mortgagee, and that ownership of deposit is in mortgagee, is liable to mortgagee for the sum deposited and it holds such funds as trustee.—State v. Brown County Bank of Long Pine, 200 N.W. 866, 112 Neb. 642.

79. Iowa.—Fierce v. Fleming, 217 N.W. 806, 205 Iowa 1281.

80. Mo.—Gorin Sav. Bank v. Early, App., 260 S.W. 480.

11 C.J. p 634 notes 33, 34.

81. Nev.—Wheeler & Stoddard v. Portland Cattle Loan Co., 268 P. 46, 51 Nev. 53.

Equitable assignment

Where a chattel mortgagor sold the property, receiving a check payable to the mortgagee as his interest might appear, an agreement between

the mortgagor and mortgagee that the fund should be applied in discharge of the mortgage constituted an equitable assignment to the mortgagee, and the right to the fund passed to an assignee of the mortgagee as against an assignee of the mortgagor.—Slimmer v. State Bank of Halstad, 159 N.W. 795, 134 Minn. 349.

Indemnity mortgage

Where a chattel mortgage is given to indemnify the mortgagee against liability as surety for the mortgagor, in the absence of fraud, the mortgagee is entitled to hold the proceeds of the sale for his security, or until indemnified or relieved from liability.—Bean v. Parker, 96 A. 17, 89 Vt. 532.

Payment of real estate taxes

A mortgagee who held both a chattel and a real estate mortgage from the mortgagor cannot apply the proceeds of a sale of the mortgaged chattels in payment of real estate taxes and assessments without the mortgagor's consent, notwithstanding a provision in the real estate mortgage accelerating the due date thereof upon a failure to pay taxes.—Reichenbach v. City Trust & Savings Bank of Boone, 218 N.W. 903, 205 Iowa 1009.

82. Nev.—Wheeler & Stoddard v. Portland Cattle Loan Co., 268 P. 46, 51 Nev. 53.

An unsecured creditor of the mortgagor may not complain of an application of the proceeds in pursuance of an agreement with the mortgagor, even though he has advanced credit without notice of the mortgage.—Hammill Co. v. Van Loon, 72 N.W. 520, 103 Iowa 249.

Subsequent promise to surety

A mortgagor's promise to turn over the proceeds of a sale to his

consents to a different application thereof.⁸³

A mortgagee cannot complain of the application of the proceeds of a sale of mortgaged property in payment of prior liens, but he is entitled to the surplus, if any, after prior liens are discharged.⁸⁴ As against a second mortgagee, the law will apply the proceeds of a sale by the mortgagor with the first mortgagee's consent to the payment of the first mortgage;⁸⁵ in the event of a sale with the consent of a second mortgagee who receives the proceeds with knowledge of the prior mortgage, the proceeds will be held in trust by him for the benefit of the senior mortgagee.⁸⁶

The holder of a void mortgage has no lien on the proceeds of a sale of the mortgaged property and cannot complain of a judgment awarding the proceeds to another claimant, irrespective of the validity or invalidity of the latter's lien;⁸⁷ but it has been held that a mortgagee of a mortgage valid as between the parties but void as to creditors may retain the proceeds of a sale as against a judgment creditor who has failed to make a levy.⁸⁸

Sale by assignee, administrator, or receiver. A mortgagee has been held to be entitled to an equitable lien on the proceeds of property resulting from a sale by the mortgagor's assignee for the benefit of creditors,⁸⁹ an administrator of his estate,⁹⁰ or a receiver of the mortgaged property.⁹¹ If the mortgagee becomes a purchaser of the property at a receiver's sale, and pays the amount of his bid, he must assert his mortgage lien on the proceeds

of the sale before the receiver has distributed them to junior lienors and has received his discharge, regardless of whether or not the receiver knew of the mortgage.⁹²

Waiver. A mortgagee may waive his right to the proceeds of a sale of mortgaged chattels in favor of inferior liens, and on such waiver, if the mortgagee receives such proceeds, it holds them as trustee for those having superior rights.⁹³ A mortgagee waives or loses his right to the proceeds of a sale of the mortgaged property by his act of turning them over to the mortgagor after having had possession,⁹⁴ or by treating such proceeds as the property of the mortgagor,⁹⁵ as against a third person securing a right thereto. Further, a mortgage holder waives his equitable claim to the proceeds of a sale by commencing an action on the mortgage notes and garnishing the proceeds while his action to establish his equitable claim is still pending.⁹⁶

§ 267. Actions by Mortgagee against Mortgagor

Unauthorized removals or sales of mortgaged property may be restrained by injunction. Actions by a mortgagee against the mortgagor are governed by the usual rules.

An attempt by a mortgagor to remove the mortgaged goods from the state may be restrained by injunction,⁹⁷ even before a breach of a condition of the mortgage,⁹⁸ unless the mortgagor intended only to make a temporary removal in the ordinary

surety is not binding on a mortgagee to whom the mortgagor had previously transferred the mortgaged property as security for another debt.—*Francis v. Central Nat. Bank of Waco, Tex.Civ.App.*, 268 S.W. 761.

83. Nev.—*Wheeler & Stoddard v. Portland Cattle Loan Co.*, 268 P. 46, 51 Nev. 53.

Surplus above mortgage debt

A mortgagee may apply any surplus of proceeds over and above the amount of the mortgage debt to the payment of an open account, where the mortgage so provides.—*H. W. Williams & Co. v. Bell, Tex.Civ.App.*, 8 S.W.2d 745.

84. Ala.—*Head v. Knox*, 69 So. 257, 14 Ala.App. 221.

Priority between mortgage and other liens see *infra* §§ 297-306.

85. Kan.—*Madden v. Walker*, 51 P. 914, 7 Kan.App. 697.

86. Ill.—*Morrison v. Elzy*, 190 Ill. App. 374.

87. Ga.—*Dawson Nat. Bank v. Bank of Dawson*, 155 S.E. 791, 42 Ga. App. 300.

88. N.J.—*New York Nat. Shoe, etc., Bank v. August*, 33 A. 803, 54 N.J. Eq. 182, affirmed 39 A. 1114, 55 N. J.Eq. 590.

89. N.J.—*Doughten v. Gray*, 10 N.J. Eq. 323.

90. Ohio.—*Whiteley v. Weber*, 2 Ohio Cir.Ct. 336, 1 Ohio Cir.Dec. 517—*Linghler v. Kraft*, 3 Ohio N. P.N.S., 653, affirmed 86 N.E. 1004, 79 Ohio St. 225, 54 Wkly.L.Bul. 2.

91. Cal.—*Yakoobian v. Johnson*, 282 P. 522, 102 Cal.App. 10.

Proceeds applied for mortgagor's benefit

If the receiver applies the proceeds for the benefit of the mortgagor, the mortgagee may recover from him.—*Yakoobian v. Johnson*, *supra*.

92. Ga.—*Trautwein v. McKinnon*, 16 S.E. 85, 90 Ga. 301.

93. Tex.—*Home Ins. Co. v. Klous, Civ.App.*, 58 S.W.2d 176, error refused.

There is no duty on the part of the second mortgagee to look to the application of the proceeds by the

mortgagor.—*Home Ins. Co. v. Klous*, *supra*.

94. Mo.—*Evans-Snyder-Buel Co. v. Atchison County Bank*, 76 Mo.App. 449.

95. Kan.—*Turner v. Williams*, 221 P. 267, 114 Kan. 769.

Mortgagor's deposit in mortgagee bank

A mortgagee bank knowingly permitting its mortgagor depositor to deposit and check on the proceeds of a sale of the property thereby treats the fund as the latter's property and is precluded from claiming a superior right thereto as against a garnishing creditor; in such a case the bank could not necessarily be said to be a trustee of the funds.—*Turner v. Williams*, *supra*.

96. Mo.—*Young v. Princeton Bank*, 71 S.W. 713, 97 Mo.App. 576.

97. Ala.—*Walker v. Radford*, 67 Ala. 446.

11 C.J. p 623 note 14.

98. Ala.—*Heflin v. Slay*, 78 Ala. 180. Md.—*Parsons v. Hughes*, 12 Md. 1—*Claggett v. Salmon*, 5 Gill & J. 314.

use of the mortgaged property and to return the property before the maturity of the mortgage.⁹⁹ Likewise, a sale of the mortgaged property to the injury of the mortgagee may be restrained by injunction before¹ or after² a default in the mortgage.

As already stated in § 261, a mortgagee may maintain an action for conversion against a mortgagor who has sold the property without authority, and such actions are governed by the usual rules as to civil actions.³

§ 268. Actions by Mortgagee against Purchaser or Transferee

Actions by a mortgagee against the purchaser or transferee of mortgaged property are discussed in sections immediately following.

§ 269. — Right of Action

In a proper case the mortgagee may bring an action against the purchaser from the mortgagor to recover the property itself or its value.

In view of the rule discussed supra in § 264 b,

that a purchaser exercising dominion over the mortgaged property inconsistent with the rights of the mortgagor is guilty of conversion, where such facts exist, the mortgagee may bring an action for conversion against the purchaser to recover the value of the mortgaged property.⁴ Before bringing the action, the mortgagee must have a property interest in the chattel, general or special,⁵ and he must be entitled to possession of the property.⁶ Accordingly, the holder of a mortgage should not commence his action until after the "law day" of the mortgage,⁷ or until there has been a default giving him the right to possession of the property.⁸

In view of the rule that a mortgagee who unconditionally consents to a sale of the property waives his lien, considered supra in § 262 a, a mortgagee cannot maintain an action for conversion against the purchaser if he has authorized the sale,⁹ unless he consented on a condition which was unperformed.¹⁰

In a proper case the mortgagee may bring an action for damages for injury to, or destruction of, the mortgage lien,¹¹ which may be an action

N.J.—*Freeman v. Freeman*, 17 N.J. Eq. 44.

99. Ala.—*Walker v. Radford*, 67 Ala. 446.

1. Cal.—*Ukiah Bank v. Moore*, 39 P. 1071, 106 Cal. 673.
11 C.J. p 624 note 25.

2. Ind.—*McKinney v. Crawford*, 151 N.E. 136, 85 Ind.App. 299.

3. Time to sue

A statute declaring a mortgage to be void after it has been recorded a certain number of years does not bar an action brought after that time for the proceeds of a sale made, pursuant to an agreement, prior to the expiration of the period of limitation.—*State ex rel Cantley v. Akin*, 22 S.W.2d 836, 224 Mo.App. 114.

Parties

A bank in which the proceeds of a sale of mortgaged property is deposited pursuant to an agreement for the sale is not a necessary party in a mortgagee's action to recover such proceeds, particularly in the absence of any pleading of a nonjoinder of a party defendant.—*State ex rel Cantley v. Akin*, supra.

4. U.S.—*Denver Live Stock Commission Co. v. Lee*, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531.

Ala.—*Lefkovitz v. Lester*, 66 So. 894, 11 Ala.App. 504.
11 C.J. p 635 note 47.

Mortgages in possession, from whom the mortgagor has surreptitiously obtained the property and sold it, may sue the mortgagor, or his vendee, for conversion.—*McCandless v. Moore*, 50 Mo. 511.

5. Mont.—*Swords v. Occident Elevator Co.*, 232 P. 189, 72 Mont. 189.

Lumber cut from mortgaged timber
A mortgagee of timber has a sufficient title in the lumber cut therefrom to maintain trover.—*McLeod Lumber Co. v. Neighbors*, 114 So. 176, 22 Ala.App. 204.

6. Ala.—*Brock v. Culpepper*, 116 So. 126, 217 Ala. 289.

Mont.—*U. S. Nat. Bank v. Great Western Sugar Co.*, 199 P. 245, 60 Mont. 342.

Wash.—*Spokane Sec. Finance Co. v. Crowley Lumber Co.*, 274 P. 102, 150 Wash. 559, affirmed 279 P. 103, 152 Wash. 697.

7. Ala.—*Montgomery v. Tucker*, 153 So. 188, 228 Ala. 182.—*Brock v. Culpepper*, 116 So. 126, 217 Ala. 289.—*Albertville Trading Co. v. Critcher*, 112 So. 907, 216 Ala. 252.

8. Okl.—*Wichita Mill & Elevator Co. v. Farmers' State Bank of Tip-ton*, 226 P. 870, 102 Okl. 83.

Wash.—*Spokane Sec. Finance Co. v. Crowley Lumber Co.*, 274 P. 102, 150 Wash. 559, affirmed 279 P. 103, 152 Wash. 697.

Provision for taking possession

Where the mortgage authorizes the mortgagee to take possession if the mortgagor sells or attempts to sell the property, on an absolute sale of the property the mortgagee may bring action without waiting for the law day.—*Lowery v. Haley*, 68 So. 539, 12 Ala.App. 448.

9. Ala.—*Butler & Gilchrist v. First Nat. Bank*, 117 So. 490, 22 Ala.App. 504.

Ky.—*Penick v. White & Beauchamp*, 94 S.W.2d 338, 264 Ky. 172.

Mo.—*Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co.*, 289 S.W. 623, 316 Mo. 426.

Estoppel to assert lien

Ala.—*Citizens' Bank of Guntersville v. Pearson*, 116 So. 350, 217 Ala. 391.—*Butler & Gilchrist v. First Nat. Bank*, 117 So. 490, 22 Ala.App. 504.

10. Colo. — *Arnold v. First Nat. Bank*, 39 P.2d 791, 96 Colo. 104, 97 A.L.R. 643.

11. Ala.—*Albertville Trading Co. v. Critcher*, 112 So. 907, 216 Ala. 252.
11 C.J. p 635 note 48.

Damages to reversionary interest

Where the purchaser takes possession of mortgaged chattels, the mortgagee may at once maintain an action for damages to his reversionary interest, even though not entitled to possession.—*Reynolds v. Morton*, 154 P. 325, 23 Wyo. 528.

on the case¹² or an action of assumpsit.¹³ In some jurisdictions, however, in which the lien theory prevails, it is held that the mortgagee cannot maintain an action of assumpsit against the purchaser of the property where the mortgage contains only the usual conditions.¹⁴ The mortgagee in a proper case may also recover the proceeds of a sale of the property in an action for money had and received¹⁵ or assumpsit.¹⁶ Where the circumstances are such as to raise an implied promise on the part of the purchaser to pay the mortgagee the reasonable market value of the property, the mortgagee may recover it in a suit for account.¹⁷

Junior mortgagee. The holder of a mortgage junior to another lien may, if he has the right of immediate possession of the property as against anyone but the first mortgagee and those claiming under him, maintain trover against a purchaser of the property from the mortgagor;¹⁸ but, in a jurisdiction which regards the whole legal title and right of possession as passing to the first mortgagee, it has been held that a second mortgagee has no

such right of action.¹⁹ A junior mortgagee has no right to bring an action to recover the proceeds of a sale of the property by the mortgagor unless he shows that he has some interest therein.²⁰

Replevin. If a mortgagee has a right to the possession of the property, he may bring replevin to recover its possession from a purchaser or transferee of the mortgagor.²¹ He must recover on the strength of his own title²² or right of possession,²³ not on the purchaser's lack of right. A mortgagee who is entitled to possession need not make a demand for the property,²⁴ at least as against a purchaser with notice of the mortgagor's lack of authority to sell.²⁵ Of course, a mortgagee may not maintain replevin if he consented to the sale.²⁶

§ 270. — Defenses

Matters which negative plaintiff's cause of action are available as a defense.

As in other civil actions, matters available as a defense to an action for conversion,²⁷ or in replevin,²⁸ by a mortgagee against a purchaser or

12. Ala.—Brock v. Culpepper, 116 So. 126, 217 Ala. 289—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

Fla.—Berlein v. Eddy, 104 So. 780, 89 Fla. 484.

Destruction of lien

(1) Is an essential element to an action on the case.—Berlein v. Eddy, supra.

(2) To sustain a cause of action for the destruction of a mortgage lien, the evidence must reasonably show a sale, removal, or disposition of the mortgaged property which obstructs the enforcement thereof.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

13. Ala.—Albertville Trading Co. v. Critcher, supra.

14. Mich.—Warner v. Beebe, 11 N. W. 258, 47 Mich. 435.
11 C.J. p 634 note 35.

15. Ala.—Hattermer v. Davis, 91 So. 321, 206 Ala. 613.
11 C.J. p 634 note 33.

Proceeds of a resale

Ala.—Hattermer v. Davis, supra.

16. Cal.—Chittenden v. Pratt, 26 P. 626, 89 Cal. 178.

Sale by mortgagor as agent of the mortgagee to a purchaser with knowledge of the mortgage will entitle the mortgagee to recover the purchase price in assumpsit.—Bank v. Raymond, 57 N.H. 144.

17. Ala.—McLeod Lumber Co. v. Neighbors, 114 So. 176, 22 Ala. App. 204.

18. Okl.—Wichita Mill & Elevator Co. v. National Bank of Commerce

of Frederick, 227 P. 92, 102 Okl. 95.

Wash.—John Smith Co. v. Hardin, 233 P. 628, 133 Wash. 194, modified on other grounds 238 P. 647, 136 Wash. 694.

11 C.J. p 635 note 52.

19. Mass.—Ring v. Neale, 114 Mass. 111, 19 Am.R. 316.

20. S.D.—Swanson v. Brandon Sav. Bank, 240 N.W. 856, 59 S.D. 488.

21. S.C.—Bank of Norris v. Pates & Allen Co., 94 S.E. 881, 108 S.C. 361.

11 C.J. p 635 note 47.

Right to take possession on sale

The mortgagee's right to possession may be based on a stipulation in the mortgage giving him the right to take possession if any attempt should be made to dispose of the property. — German-American State Bank of Balfour v. Erickson, 170 N. W. 854, 41 N.D. 548.

The mere acceptance of delivery of mortgaged property by a purchaser does not entitle the mortgagee to bring an action in replevin.—Berlein v. Eddy, 104 So. 780, 89 Fla. 484.

22. Iowa.—Becker v. Dalby, 86 N.W. 314.

23. Mo.—Berry v. Adams, App. 71 S.W.2d 126.

Acceptance of new note and mortgage

Mortgagee of automobile, accepting in lieu of mortgage, and as payment of sum due thereon, another note and mortgage, could not thereafter replevy automobile, regardless of whether original mortgage re-

mained on file in recorder's office unreleased.—Berry v. Adams, supra.

24. Tex.—Moore-Hustead Co. v. Joseph W. Moon Buggy Co., Civ. App., 221 S.W. 1032.

25. Conn.—Pease v. Odenkirchen, 42 Conn. 415.

Me.—Partridge v. Swazey, 46 Me. 414.

26. Ind.T.—Rogers v. Nidiffer, 82 S. W. 673, 5 Ind.T. 55.

27. Matters constituting defense

(1) That the mortgage debt has been paid.—Argo v. Sylacauga Mercantile Co., 68 So. 534, 12 Ala.App. 442.

(2) That the mortgagee has executed an agreement to release the mortgage lien.—Catlett v. Stokes, 110 N.W. 84, 21 S.D. 108.

(3) The infancy of the mortgagor at the time he executed the mortgage.—Lake v. Lund, 99 N.W. 884, 92 Minn. 280.

(4) Estoppel of mortgagee.—Elliot v. Washington, 119 S.W. 42, 137 Mo.App. 526.

28. Matters held available as defense

(1) That the property claimed is different from that described in the mortgage.—Becker v. Dalby, Iowa, 86 N.W. 314.

(2) That defendant purchased the property without notice of plaintiff's rights.—York v. Murphy, 39 A. 992, 91 Me. 320.

(3) That the mortgagee converted the property and thereby destroyed the mortgage lien.—Wilson Motor Co.

transferee from the mortgagor are such facts as negative the cause of action as stated by the mortgagee.

On the other hand, matters which do not defeat the cause of action stated by the mortgagee cannot be set up by the purchaser in an action for conversion²⁹ or replevin.³⁰

§ 271. — Parties

In a mortgagee's action against a purchaser of mortgaged property, the mortgagor is a proper, but not a necessary, party defendant.

In a suit by the mortgagee against a purchaser of mortgaged property, for conversion, the mortgagor,³¹ and a successive purchaser,³² are proper parties defendant; but the mortgagor is not a necessary party, either in such an action³³ or in a claim and delivery action by a mortgagee against a warehouseman.³⁴ A warehouseman, with whom mortgaged grain is stored, is a proper party to an

action for conversion against a transferee of the negotiable warehouse receipt for the grain.³⁵

As a plaintiff in an action for conversion, a mortgagee who has pledged the mortgage and received a reassignment thereof from the pledgee prior to commencing the action is the real party in interest.³⁶

§ 272. — Pleading

- a. In general
- b. Issues, proof, and variance

a. In General

The plaintiff's petition, declaration, or complaint must state sufficient facts to constitute a cause of action. The defendant must plead affirmative defenses if he wishes to rely thereon.

In accordance with general rules, plaintiff, in his initial pleading in an action against a purchaser of mortgaged property, must allege facts which state a cause of action;³⁷ and a statement in compliance

v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17.

(4) That the lien of the mortgage has been released by the mortgagee.—Gaffney Live Stock Co. v. Bonner, 75 S.E. 369, 92 S.C. 122.

29. Matters held unavailable as defense

(1) An oral rescission of an acceleration clause in a mortgage which also provides that the rescission of any provision therein must be in writing.—Salabes v. Castelberg, 57 A. 20, 98 Md. 645, 64 L.R.A. 800.

(2) The mortgagee's act of taking part of the property, less in value than the mortgage debt, and crediting it thereon without a sale.—Rath v. Ponsor, 219 P. 285, 114 Kan. 370.

(3) The fact that a mortgagor in prior transactions sold mortgaged property without the mortgagee's consent and applied the proceeds in payment of the mortgage debt, particularly where defendant had no knowledge of such prior transactions.—Walters v. Slimmer, C.C.A. Ill., 272 F. 435, 438, citing *Corpus Juris*—11 C.J. p 636 notes 64, 65.

(4) The fact that a mortgagor directed the purchaser to take possession of the property, sell it, and apply the proceeds in payment of his debt to the purchaser.—Citizens' Nat. Bank of Ennis v. First Guaranty State Bank of Palmer, Tex.Civ.App., 275 S.W. 860.

(5) The purchaser's own wrongful act.—Bank of Brookings v. Aurora Grain Co., 186 N.W. 563, 45 S.D. 113, reversing 181 N.W. 909, 43 S.D. 591.

(6) That he is an innocent purchaser simply because the mortgagee has not taken proper precautions to

protect himself.—Endreson v. Larson, 112 N.W. 628, 101 Minn. 417, 118 Am.S.R. 631.

(7) A local custom not proved as a fact.—Fargo First Nat. Bank v. Minneapolis, etc., El. Co., 91 N.W. 436, 11 N.D. 280.

(8) A statute limiting the time within which the record of a mortgage shall constitute notice, where the act of conversion took place prior to the expiration thereof.—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483.

(9) The purchaser's willingness to have the mortgage foreclosed.—Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co., 129 S.W. 1161, 61 Tex. Civ.App. 49.

Action by junior mortgagee

(1) In a suit for conversion brought by a second mortgagee, a purchaser must connect himself with the prior mortgage in order successfully to plead it as a defense.—Butler Cotton Oil Co. v. G. H. Campbell & Son, 78 So. 643, 16 Ala.App. 445.

(2) He cannot, however, after the institution of the suit, set up a title acquired by foreclosure of the first mortgage.—Moore v. Prentiss Tool, etc., Co., 30 N.E. 736, 133 N.Y. 144, affirming 15 N.Y.S. 150, 59 N.Y.Super. 516.

30. Cal.—Hughes v. Maciel, 32 P.2d 688, 138 Cal.App. 509.

Ill.—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 143.

Delivery to mortgagor

It is not a defense that the mortgagor paid the mortgage and received delivery of the property after an action is brought, although before trial, title to the property not being

in litigation; and the buyer cannot recover on the replevy bond.—Derry Loan & Discount Co. v. Falconer, 152 A. 427, 84 N.H. 450.

31. Tex.—T. W. Marse & Co. v. Flockinger, Civ.App., 189 S.W. 1017, 11 C.J. p 636 note 67.

32. Ala.—Baker v. Lauderdale, 69 So. 299, 14 Ala.App. 224.

33. Tex.—T. W. Marse & Co. v. Flockinger, Civ.App., 189 S.W. 1017, 11 C.J. p 636 note 66.

34. S.C.—First Bank & Trust Co. v. Lancaster Cotton Mills, 126 S.E. 751, 131 S.C. 81.

35. Wash.—Arnold v. Peasley, 222 P. 472, 128 Wash. 176.

Motion to interplead warehouseman should be granted.—Arnold v. Peasley, 222 P. 472, 128 Wash. 176.

36. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 2 Cal.2d 576.

37. Mont.—W. L. Perkins & Co. v. Duluth Brewing & Malting Co., 194 P. 157, 58 Mont. 691.

Pleading held sufficient

(1) To state a cause of action. U.S.—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F. 2d 11, rehearing denied 20 F.2d 531. Ala.—Douglass v. N. S. Davenport Co., 110 So. 378, 215 Ala. 265.

Cal.—Hughes v. Maciel, 32 P.2d 688, 138 Cal.App. 509.

Ind.—Kirkpatrick Grain Co. v. Farmers-Merchants State Bank of Darlington, 200 N.E. 714, 101 Ind.App. 673.

Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

S.D.—Huset v. Clements, 233 N.W. 919, 57 S.D. 491.

with a code form may be sufficient.³⁸ If plaintiff's mortgage lien depends on some condition or act to be performed by the mortgagor, the performance thereof must be alleged.³⁹ A pleading is not bad because of a failure to allege that the mortgage sued on was registered or recorded,⁴⁰ or to allege a material fact which is shown by a copy of the mortgage attached to the pleading,⁴¹ or because it contains surplusage.⁴²

Although unnecessary in an action for money had and received,⁴³ in an action for conversion of mortgaged property, it is essential for plaintiff to allege that he has the ownership or legal title and right to possession of the property,⁴⁴ or that he has a special ownership or property therein.⁴⁵ Ownership of the indebtedness evidenced by the note and mortgage must be alleged in an action for conversion⁴⁶ and in replevin.⁴⁷ There should also be an allegation as to the place of conversion,⁴⁸ and a statement of the value of the property converted or the damage sustained.⁴⁹ However, there is authority holding that the value of the property and the amount of the mortgage debt need not be

alleged, as they are matters of proof, not pleading.⁵⁰ It is unnecessary to allege that the purchaser is guilty of fraud or bad faith,⁵¹ that all recourse against the mortgagor has been exhausted,⁵² or that the mortgagor is insolvent.⁵³ If the act of conversion took place after a default in the mortgage, a demand and refusal need not be alleged.⁵⁴

The declaration in an action on the case should have an allegation that plaintiff's security was injured.⁵⁵

Foreign mortgage. A mere general allegation that the execution of a mortgage in another state was in accordance with the laws of that state is sufficient, in the absence of a demurrer or motion for a more specific statement.⁵⁶

Defendant must plead an affirmative defense in order to rely on it,⁵⁷ and the facts relied on as a defense should be stated directly and positively and not hypothetically or by way of recital.⁵⁸

Amendment of pleadings. Plaintiff may, in a proper case, amend his pleadings to conform to the proofs.⁵⁹

Tex.—Korzekwa v. Schultz Mercantile Co., Civ.App., 7 S.W.2d 102.

(2) To sustain a bill for accounting. — Hartzog v. Andalusia Nat. Bank, 131 So. 433, 222 Ala. 170.

Pleading held insufficient

Mont.—Young v. Bray, 170 P. 1044, 54 Mont. 415.

Tex.—Newsom v. Beard, 45 Tex. 151 —Hydraulic Casing Pulling Co. v. Brown, Civ.App., 297 S.W. 770.

Undated mortgage

An averment in a petition as to when a crop mortgage was executed and as to what year's crop it was applicable is sufficient to support a cause of action on a crop mortgage which is undated, the averment being taken as true on a demurrer.—Colley v. H. L. Edwards & Co., Tex.Civ.App., 258 S.W. 191.

38. Ala.—J. P. Wolf Co. v. Johnson, 101 So. 655, 212 Ala. 39.

39. Tex.—Williams v. Patton, Civ. App., 55 S.W.2d 869.

40. Iowa.—Loranz & Co. v. Smith, 214 N.W. 525, 204 Iowa 35, 53 A. L.R. 662.

N.C.—Gallop v. Elizabeth City Milling Co., 100 S.E. 130, 178 N.C. 1.

To allege mortgage was "duly registered" is sufficient to show that it was registered in due time, should such an allegation be necessary.—Gallop v. Elizabeth City Milling Co., supra.

41. **Matters shown by attached mortgage**

(1) Plaintiff's right to possession of the mortgaged property.—Reyn-

olds v. Morton, 154 P. 325, 23 Wyo. 528.

(2) The mortgagor's ownership of the property.

U.S.—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531.

Kan.—Farmers', etc., Nat. Bank v. Gann, 148 P. 249, 95 Kan. 237.

42. Ala.—J. P. Wolf Co. v. Johnson, 101 So. 655, 212 Ala. 39.

43. Ala.—J. P. Wolf Co. v. Johnson, supra.

44. Ala.—J. P. Wolf Co. v. Johnson, supra.

Ownership in assignor

An allegation of ownership and right to possession in the assignor of plaintiff is sufficient.—First Nat. Bank of Galata v. Montana Emporium Co., 197 P. 994, 59 Mont. 584.

Where absolute ownership is not claimed in a petition, plaintiff must disclose the character and extent of her interest at the time of conversion.—Griffith v. Montana Wheat Growers' Ass'n, 244 P. 277, 75 Mont. 466.

45. U.S.—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531.

Okl.—Bridges v. Union Cattle Loan Co., 229 P. 805, 104 Okl. 74.

46. Colo.—Lowell Bros. & Talbott v. Wikstrom, 6 P.2d 463, 90 Colo. 99.

47. Mont.—W. L. Perkins & Co. v. Duluth Brewing & Malting Co., 194 P. 157, 58 Mont. 691.

48. Tex.—Hilker v. Agricultural Bond & Credit Corporation, Civ. App., 96 S.W.2d 544, error dismissed.

49. Mont.—Young v. Bray, 170 P. 1044, 54 Mont. 415.

Wyo.—Brokaw v. Bank of Deaver, 261 P. 905, 37 Wyo. 365.

50. Ala.—J. P. Wolf Co. v. Johnson, 101 So. 655, 212 Ala. 39.

51. Ohio.—City Loan & Savings Co. v. Dickison, 19 Ohio N.P.N.S., 215.

52. La.—Hurwitz-Mintz Furniture Co. v. Edward B. Fabacher Auction Exchange, App., 167 So. 162.

53. Ohio.—City Loan & Savings Co. v. Dickison, 19 Ohio N.P.N.S., 215.

54. Ohio.—Mercantile Discount & Security Co. v. Melick, 192 N.E. 804, 48 Ohio App. 211.

Allegation of demand held sufficient
S.D.—Catlett v. Stokes, 145 N.W. 554, 33 S.D. 278.

55. Fla.—Berlein v. Eddy, 104 So. 780, 39 Fla. 484.

56. Colo.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

57. Colo.—Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478.

Tex.—Douglas v. Citizens' State Bank of Wheeler, Civ.App., 52 S.W.2d 540, error dismissed.

58. Colo.—Ilfeld v. Ziegler, 91 P. 825, 40 Colo. 401.
11 C.J. p 636 note 70.

59. Ala.—Fields v. Karter, 25 So. 800, 121 Ala. 329.
11 C.J. p 636 note 72.

b. Issues, Proof, and Variance

In actions of this character, the parties are confined to the theory of the case made and the issues raised by their pleadings.

The parties, in an action by a mortgagee against a purchaser, are confined to the theory of the case made by their pleadings.⁶⁰ Proof may be made of any matter in issue,⁶¹ and all material issues in his pleading must be proved by plaintiff in order to warrant a recovery.⁶² A general denial puts in issue all the allegations in plaintiff's pleading that are necessary to constitute a cause of action, and under it defendant may introduce any competent evidence tending to negative those allegations.⁶³ The party having the affirmative of an issue should prove it as alleged,⁶⁴ but proof need not be made of admitted matters,⁶⁵ or matters not within the issues.⁶⁶ An immaterial variance between the pleadings and proof is not fatal.⁶⁷

§ 273. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

The burden of proof is on the party having the affirmative of the issue. The usual presumptions arising in civil actions arise in actions of this character.

In an action by a mortgagee against a purchaser from the mortgagor, the burden of proof is on the party who holds the affirmative of the issue.⁶⁸ Accordingly, the burden rests on plaintiff to make out his case,⁶⁹ and on defendant to prove affirmative matters of defense raised by him,⁷⁰ although on the making of a prima facie case the burden of going forward with the evidence may be shifted to the other party.⁷¹

While it has been held that a mortgagee suing

60. U.S.—Farmers' Nat. Bank v. Missouri Livestock Commission Co., C.C.A.Mo., 53 F.2d 991.
Ala.—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

Cal.—Hendricksen v. State Subsidiary, Limited, 45 P.2d 190, 3 Cal.2d 459.

Mo.—Stockyards Nat. Bank of South Omaha v. B. Harris Wool Co., 289 S.W. 623, 316 Mo. 426—Exchange Nat. Bank of Tulsa, Okl., v. Daley, App., 237 S.W. 846.

Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

Wyo.—Brokaw v. Bank of Deaver, 261 P. 905, 37 Wyo. 365.
11 C.J. p 636 note 71.

61. Mo.—Berry v. Adams, App., 71 S.W.2d 126.

Tex.—Harding v. San Saba Nat. Bank, Civ.App., 13 S.W.2d 121, error dismissed—Colley v. H. L. Edwards & Co., Civ.App., 258 S.W. 191.

Wash.—Arnold v. Peasley, 222 P. 472, 128 Wash. 176.

62. Ga.—Dunn Feed & Grocery Co. v. Georgia Rural Rehabilitation Corporation, App., 192 S.E. 840.

63. Ala.—Montgomery v. Tucker, 153 So. 138, 228 Ala. 182—Windham v. Wilson, 98 So. 15, 210 Ala. 330.
Mo.—Berry v. Adams, App., 71 S.W.2d 126.

Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

Okl.—Crowl v. Ross, 241 P. 1105, 113 Okl. 291.

Tex.—Ewing & Phillips Hardware Co. v. Cage-Sparks Hardware Co., Civ.App., 297 S.W. 568.

64. Cal.—Ramsey v. Powers, 241 P. 567, 74 Cal.App. 621.

Burden of proof generally see *infra* § 273 a.

65. Okl.—Harp v. First Nat. Bank, 37 P.2d 930, 169 Okl. 548.

66. Miss.—Reeves v. Hathcock, 75 So. 334, 114 Miss. 555.

67. Okl.—Peterman v. Rothschild, 229 P. 579, 103 Okl. 273.

68. Ala.—Johnson v. Coosa Mfg. Co., 81 So. 141, 16 Ala.App. 649.

Ark.—C. M. Ferguson & Son v. Lesser Cotton Co., 55 S.W.2d 79, 186 Ark. 660.

Mo.—Berry v. Adams, App., 71 S.W.2d 126.

N.Y.—Madill v. McDonald, 175 N.Y.S. 792, 187 App.Div. 761.

Ohio.—Franklin Bond & Investment Co. v. Long, 18 Ohio App. 235.

Tex.—Wright v. Texas Moline Plow Co., 90 S.W. 905, 40 Tex.Civ.App. 434.

11 C.J. p 636 note 76.

Burden of identification

Where extraneous proof is required, the burden is on one seeking to identify a mortgaged automobile as the one described to bring it within the terms of the description.—Smith v. Pettit, 117 S.E. 590, 124 S.C. 225.

69. Cal.—Ramsey v. California Packing Corporation, 201 P. 481, 51 Cal. App. 517.

Mo.—Berry v. Adams, App., 71 S.W.2d 126.

Plaintiff held to have burden of establishing

(1) Fact of conversion.—Madill v. McDonald, 175 N.Y.S. 792, 187 App. Div. 761.

(2) His right to possession.
Ala.—J. G. Smith & Sons v. Howell, 110 So. 57, 21 Ala.App. 549.

Colo.—Lowell Bros. & Talbott v. Wikstrom, 6 P.2d 463, 90 Colo. 99.

(3) That the property was covered by his mortgage.

Ala.—First Nat. Bank v. Ratley, 137 So. 26, 223 Ala. 455—Avondale Mills v. Abbott Bros., 108 So. 31, 214 Ala. 368—Polytinsky v. Brindley, 106 So. 394, 21 Ala.App. 185—Polytinsky v. Lindsey, 106 So. 70, 21 Ala.App. 128—First Nat. Bank v. Harden, 82 So. 655, 17 Ala.App. 165, certiorari denied *In re* First Nat. Bank of Alexander, 82 So. 422, 203 Ala. 172—Johnson v. Coosa Mfg. Co., 81 So. 141, 16 Ala.App. 649.

Ark.—Erwin v. Stackhouse, 300 S. W. 407, 175 Ark. 1169.

(4) That he was the owner of the mortgage.—Lowell Bros. & Talbott v. Wikstrom, 6 P.2d 463, 90 Colo. 99.

(5) Purchaser's knowledge that the removal of the crop from the premises was wrongful.—Ramsey v. California Packing Corporation, 201 P. 481, 51 Cal.App. 517.

70. Ala.—Houston Nat. Bank of Dothan v. J. T. Edmonson & Co., 75 So. 568, 200 Ala. 120.

Ill.—Lieberman Bed Spring Co. v. A. Brandwein & Co., 2 N.E.2d 385, 284 Ill.App. 642.

Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.

Ohio.—Franklin Bond & Inv. Co. v. Long, 18 Ohio App. 235.

S.C.—Gaffney Live Stock Co. v. Bonner, 75 S.E. 369, 92 S.C. 122.

Defendant held to have burden of establishing his title.—Farnham v. Eichin, 246 N.Y.S. 133, 230 App.Div. 639.

71. Ark.—C. M. Ferguson & Son v. Lesser Cotton Co., 55 S.W.2d 79, 186 Ark. 660.

for a wrongful conversion of the property has the burden of showing a purchase without his consent,⁷² there is authority holding that the burden is on defendant to prove that the purchase was with consent,⁷³ at least where the mortgage contains a provision prohibiting a sale without the mortgagee's consent,⁷⁴ or where defendant raises the issue of a consent as a defense.⁷⁵ It has been both held⁷⁶ and denied⁷⁷ that plaintiff has the burden of proving notice of his mortgage.

Presumptions. The usual presumptions are indulged in in actions of this character.⁷⁸

b. Admissibility

Competent evidence which is relevant and material to the issues is admissible.

72. Ind.—Conwell v. Jeger, 51 N.E. 733, 21 Ind.App. 110.

In Texas

(1) The burden of proof is on plaintiff to prove a sale without his consent and it is unnecessary for defendant to plead a waiver, as there is no conversion established unless the sale is wrongful and without plaintiff's consent.—Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567, 571, reversed on other grounds Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, quoting *Corpus Juris*—Ewing & Phillips Hardware Co. v. Cage-Sparks Hardware Co., Civ.App., 297 S.W. 568.

(2) But there is earlier authority that where a mortgagee has proved the existence of a lien, its registration, and a conversion of the property, the burden of proving the waiver of the lien was on the purchaser.—Weeks v. First State Bank of De Kalb, Civ.App., 207 S.W. 973.

73. Minn.—James v. Pettis, 159 N.W. 953, 134 Minn. 438.

There is no presumption that a sale is made with plaintiff's consent.—James v. Pettis, 159 N.W. 953, 134 Minn. 438.

74. Ohio.—Franklin Bond & Inv. Co. v. Long, 18 Ohio App. 235.

75. Colo.—Longmont Farmers' Milling & Elevator Co. v. Mulvaney, 205 P. 525, 71 Colo. 215.

Mortgagor's authority to sell as agent

A purchaser seeking to prove that his possession is rightful by showing that he purchased the property from the mortgagor who was acting as agent of mortgagee, has the burden of showing that mortgagor had such power and that it was strictly followed.

Ala.—Burks v. Hubbard, 69 Ala. 379. Colo.—Ilfeld v. Ziegler, 91 P. 825, 40 Colo. 401.

76. Ala.—Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 358.

Va.—O'Neil v. Cheatwood, 102 S.E. 596, 127 Va. 96.

77. Iowa.—Loranz & Co. v. Smith, 214 N.W. 525, 204 Iowa 35, 53 A.L.R. 662.

78. Sale or consumption

In the case of a mortgagor's unauthorized sale of mortgaged property purchased for sale on the market, a sale or consumption of the property by the purchaser will be presumed within a reasonable time. There is no such presumption of sale where cotton was sold by the mortgagor only two weeks before the law day of the mortgage.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252.

Presumptions arising from possession and ownership of negotiable instruments are not conclusive where there is evidence tending to overcome them.—Berry v. Adams, Mo. App., 71 S.W.2d 126.

Place of payment

On the issue as to place of payment of a mortgage, it has been held to be presumed that it is payable at the residence, office, or place of business of the mortgagee, where the residence of the mortgagor and mortgagee is in the same county.—Garner v. Arizona Egyptian Cotton Co., 197 P. 231, 22 Ariz. 318.

79. Ala.—Gay & Bruce v. W. B. Smith & Sons, 114 So. 468, 217 Ala. 33—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252—Gay & Bruce v. Citizens' Nat. Bank of Lineville, 110 So. 19, 215 Ala. 114—Hodges v. Collins, 106 So. 144, 213 Ala. 662—Wilson v. Windham, 104 So. 232, 213 Ala. 31—Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 358—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498—J. A. Lindsey & Co. v. Stenson, 79 So. 11, 201 Ala. 589—Sansom v. Covington County Bank, 87 So. 406, 17 Ala.App. 556, certiorari denied Ex parte Sansom, 87 So. 408, 205 Ala. 54.

In an action by a chattel mortgagee against a purchaser of the mortgaged property, competent evidence that is relevant or material to any of the matters in issue and not too remote therefrom is admissible,⁷⁹ but immaterial, irrelevant, or remote evidence must be excluded.⁸⁰

c. Weight and Sufficiency

Although indirect or circumstantial evidence may be sufficient to establish matters to be proved on issues such as fraud or a mortgagee's waiver of his lien, evidence on an issue such as a mortgagee's oral consent to sell must be clear and unequivocal.

While indirect or circumstantial evidence may be sufficient to prove such matters as fraud in a sale of mortgaged property,⁸¹ or to show the mortga-

Cal.—Hughes v. Maciel, 32 P.2d 683, 138 Cal.App. 509.

Kan.—Toronto State Bank v. Guy, 187 P. 865, 106 Kan. 244.

Mo.—Berry v. Adams, App., 71 S.W. 2d 126.

N.D.—Sax Motor Co. v. Belfield Farmers' Union Elevator Co., 245 N.W. 483, 62 N.D. 727.

Tex.—American Printing Co. v. Dailley, Civ.App., 90 S.W.2d 905—Daggett v. Corn, Civ.App., 54 S.W.2d 1098, error refused—Brooks Supply Co. v. Gallinger, Civ.App., 279 S.W. 524—Citizens' Nat. Bank of Ennis v. First Guaranty State Bank of Palmer, Civ.App., 275 S.W. 860, 11 C.J. p 636 note 78.

80. Ala.—Gay & Bruce v. Citizens' Nat. Bank of Lineville, 110 So. 19, 215 Ala. 114—Alexander v. Garland, 96 So. 138, 209 Ala. 267—Dothan Grocery Co. v. American Agricultural Chemical Co., 75 So. 334, 200 Ala. 22—Cole v. Gay & Bruce, 104 So. 774, 20 Ala.App. 643—Kilgore v. Jones, 73 So. 832, 15 Ala. App. 472.

Ark.—Newberger Cotton Co. v. Temple, 252 S.W. 23, 159 Ark. 524.

Colo.—Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478.

Ga.—Dunn Feed & Grocery Co. v. Georgia Rural Rehabilitation Corporation, App., 192 S.E. 840.

Idaho.—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.

Tex.—Swift Gin Co. v. Robinson, Civ. App., 77 S.W.2d 333, error dismissed—First Nat. Bank v. American Trust & Savings Bank of El Paso, Civ.App., 1 S.W.2d 437—Brooks Supply Co. v. Gallinger, Civ.App., 279 S.W. 524—Citizens' Nat. Bank of Ennis v. First Guaranty State Bank of Palmer, Civ. App., 275 S.W. 860.

11 C.J. p 636 note 79.

81. Cal.—Hughes v. Maciel, 32 P. 2d 683, 138 Cal.App. 509.

gee's waiver of his lien,⁸² it is necessary that evidence adduced to prove a matter such as a mortgagee's oral consent to a sale of the property shall be clear and unequivocal.⁸³ Particular cases have adjudged the sufficiency of evidence adduced to establish a conversion;⁸⁴ or the sufficiency of evidence to prove matters relating to such issues as a mort-

gagee's consent to,⁸⁵ or ratification of,⁸⁶ a sale by the mortgagor, estoppel,⁸⁷ waiver of the lien,⁸⁸ title to the mortgaged property,⁸⁹ payment of the mortgage debt,⁹⁰ purchaser's notice of the mortgagee's rights,⁹¹ whether the property in question was covered by the mortgage,⁹² purchaser's assumption of

82. Ark.—*Mitchell v. Mason*, 44 S.W. 2d 672, 184 Ark. 1000.

83. Okl.—*Harp v. First Nat. Bank*, 37 P.2d 930, 169 Okl. 548.

84. Evidence held sufficient to show a conversion.

Minn.—*Hector v. Royal Indemnity Co.*, 234 N.W. 643, 182 Minn. 413, reargument denied 235 N.W. 675, 182 Minn. 413.

N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P.2d 918, 41 N.M. 341.

Evidence held insufficient to show a conversion.—*St. Paul Cattle Loan Co. v. Hansman*, 215 Ill.App. 190.

85. Evidence held sufficient

(1) To show that the mortgagee consented to or authorized the sale. Minn.—*First & Farmers' State Bank v. Crosby*, 256 N.W. 315, 191 Minn. 566.

Miss.—*Hawkins v. Nash*, 140 So. 522, 163 Miss. 500.

N.D.—*Calkins v. Stevens*, 193 N.W. 733, 49 N.D. 768.

Tex.—*Medlin v. Hambright*, Civ.App., 225 S.W. 577.

(2) To support finding that mortgagee did not consent to sale.

Idaho.—*Hopkins v. Hemsley*, 22 P.2d 138, 53 Idaho 120.

Tex.—*Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, error refused.

(3) To support finding that sale was made by mortgagor for mortgagee's account.—*Gower v. Bertrand*, 186 P. 172, 44 Cal.App. 233.

Evidence held insufficient

(1) To show mortgagee's consent to sale.

Colo.—*Sowards v. Jones*, 223 P. 747, 75 Colo. 25.

Iowa.—*L. & L. F. Zeller v. Malottki*, 206 N.W. 101.

Kan.—*Beeler v. Lind*, 244 P. 1047, 120 Kan. 662, mandate modified 247 P. 117, 121 Kan. 368.

Okl.—*Harp v. First Nat. Bank*, 37 P.2d 930, 169 Okl. 548.—*National Bond & Investment Co. v. Central Nat. Bank of Enid*, 285 P. 828, 142 Okl. 96.

Tex.—*Oats v. Dublin Nat. Bank*, 90 S.W.2d 824, 127 Tex. 2, reversing *Farmers' Nat. Bank v. Dublin Nat. Bank*, Civ.App., 55 S.W.2d 567.—*Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, error refused.

(2) To show that mortgagor was required to notify mortgagee of in-

tended sale of mortgaged cattle.—*Van Sant v. Austin-Hamill-Hoover Live Stock Commission Co.*, 295 S.W. 506, 221 Mo.App. 1096.

86. Evidence held sufficient

(1) To show a ratification of sale by mortgagee.—*First & Farmers' State Bank v. Crosby*, 256 N.W. 315, 191 Minn. 566.

(2) To sustain finding that mortgagee did not ratify sale so as to waive mortgage lien.—*Hopkins v. Hemsley*, 22 P.2d 138, 53 Idaho 120.

Evidence held insufficient to show a ratification.

Kan.—*Beeler v. Lind*, 244 P. 1047, 120 Kan. 662, mandate modified 247 P. 117, 121 Kan. 368.

Tex.—*Daggett v. Corn*, Civ.App., 54 S.W.2d 1098, error refused.

Mere silence of a mortgagee respecting a sale does not show a ratification thereof.—*Harp v. First Nat. Bank*, 37 P.2d 930, 169 Okl. 548.

87. Evidence held sufficient to show estoppel.—*First & Farmers' State Bank v. Crosby*, 256 N.W. 315, 191 Minn. 566.

Evidence held insufficient to show an estoppel.—*L. & L. F. Zeller v. Malottki*, Iowa, 206 N.W. 101.

88. Evidence held sufficient to sustain a verdict negating a mortgagee's alleged waiver of his rights.

Idaho.—*Hopkins v. Hemsley*, 22 P. 2d 138, 53 Idaho 120.

N.D.—*Sax Motor Co. v. Belfield Farmers' Union Elevator Co.*, 245 N.W. 488, 62 N.D. 727.

Evidence held insufficient to warrant finding that mortgagee waived its lien.—*National Bond & Investment Co. v. Central Nat. Bank of Enid*, 285 P. 828, 142 Okl. 96.

Eventual sale

Mortgagee's knowledge that mortgagor will eventually have to sell mortgaged property to discharge debt does not necessarily show waiver of mortgage lien.—*Daggett v. Corn*, Tex.Civ.App., 54 S.W.2d 1098, error refused.

89. Evidence held sufficient

(1) To show title in mortgagor.—*Wertheimer & Degen v. Shultice*, 211 N.W. 568, 202 Iowa 1140.

(2) To establish title in an assignor of the mortgagee.—*First Nat. Bank of Galata v. Montana Emporium Co.*, 197 P. 994, 59 Mont. 584.

(3) To show that the mortgagor did not own the property at the time of the mortgage.—*State Bank of Downs v. Abbott*, 179 P. 326, 104 Kan. 344.

90. Evidence held sufficient

Ind.—*Kirkpatrick Grain Co. v. Farmers-Merchants State Bank of Darlington*, 200 N.E. 714, 101 Ind.App. 673.

Mo.—*Moffett Bros. & Andrews Commission Co. v. Kent*, 5 S.W.2d 395 —*Berry v. Adams*, App., 71 S.W.2d 126.

Prima facie evidence of debt

A note and mortgage duly executed, acknowledged, and recorded, so as to make the same self-proving, is prima facie evidence of the existence of the debt when produced by the creditor, and, in an action to recover the property from a third person, that the debt thereby secured is unpaid.—*Wilson v. Windham*, 90 So. 791, 206 Ala. 427.

Presumptive evidence

Evidence that mortgage had not been released was presumptive evidence only that mortgage note and mortgage were still subsisting obligations.—*Berry v. Adams*, Mo.App., 71 S.W.2d 126.

91. Evidence held sufficient

(1) To show purchaser's knowledge.

Mo.—*Kissick v. Kissick*, 279 S.W. 764, 221 Mo.App. 420.

S.C.—*J. I. Case Threshing Mach. Co. v. Rogers*, 114 S.E. 22, 118 S.C. 497.

(2) To support a finding of defendant's lack of actual knowledge of mortgage. — *J. I. Case Threshing Mach. Co. v. Goldberg*, 239 N.W. 745, 59 S.D. 289.

92. Evidence held sufficient to show that the property in question was covered by the mortgage.

Cal.—*Pacific Nat. Agr. Credit Corporation v. Wilbur*, 42 P.2d 314, 2 Cal.2d 576.

Idaho.—*Twin Falls Bank & Trust Co. v. Weinberg*, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.

Kan.—*Toronto State Bank v. Guy*, 187 P. 865, 106 Kan. 244.

Mont. — *Exchange State Bank of Glendive v. Occident Elevator Co.*, 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

mortgage debt,⁹³ value of the mortgaged property,⁹⁴ and as to other issues.⁹⁵

§ 274. — Trial and Judgment

The court should determine questions of law; ques-

tions of fact should be submitted to the jury under proper instructions. The verdict and judgment must conform to the pleadings and evidence.

Questions of fact, where the evidence is conflicting, should be submitted to the jury;⁹⁶ but if the

93. Evidence held sufficient to show that a transferee of property had not assumed the mortgage.—*Bank of Morrillton v. Oliver*, 259 S.W. 406, 163 Ark. 662.

Evidence held insufficient

(1) To sustain a finding that purchaser did not agree to pay the mortgage debt.—*Clayton v. Fort Worth State Bank of Fort Worth, Tex.*, C.C.A.Tex., 4 F.2d 763, certiorari denied *Chapman v. Clayton*, 46 S.Ct. 18, 269 U.S. 555, 70 L.Ed. 408.

(2) To establish that purchaser had assumed the mortgage.—*Lords v. Lava Hot Springs State Bank*, 256 P. 761, 44 Idaho 316.

94. Evidence held sufficient to sustain finding as to valuation.

Kan.—*State Bank of Downs v. Abbott*, 179 P. 326, 104 Kan. 344.
N.M.—*Security State Bank v. Clovis Mill & Elevator Co.*, 68 P.2d 918, 41 N.M. 341.

Evidence held sufficiently definite as to the amount and value of property taken.—*Reeves v. Hathcock*, 75 So. 384, 114 Miss. 555.

95. Evidence held sufficient

(1) To show that payee of renewal note was not holder in due course of mortgage alleged to secure payment.—*Merchants' Nat. Bank v. Carolina Broom Co.*, 125 S.E. 12, 188 N.C. 508.

(2) To establish mortgagor's indebtedness to mortgagee in amount equal to judgment against defendant for concealing mortgaged property.—*Covington v. Matlock*, 121 So. 355, 10 La.App. 445.

(3) To establish that purchasers consented to continuance of mortgagee's lien.—*First Citizens' Nat. Bank of Watertown v. Reilly*, 252 N.W. 40, 62 S.D. 192.

(4) To show that mortgagee knew money received from mortgagor represented purchase price.—*Bell v. Kassahn*, 270 P. 541, 39 Wyo. 152.

(5) To show a legal delivery of mortgaged cattle in the spring.—*Penick v. White & Beauchamp*, 94 S.W. 2d 338, 264 Ky. 172.

(6) To show conversion subsequent to filing of mortgage.—*Ake v. General Grain Co.*, Okl., 72 P.2d 735.

Evidence held to support finding

(1) For plaintiff.—*Crowell Bros. v. Johnson*, 220 P. 328, 93 Okl. 158.

(2) For defendant.—*Slocum v. Delia Grain Co.*, 266 P. 739, 126 Kan. 58.

(3) That defendant purchased mortgaged property from mortgagor.—*Shaw v. King*, Mo.App., 227 S.W. 850.

(4) That, when defendant purchased mortgaged calves from mortgagor, the latter was indebted to another for pasturage thereon, and that mortgagee consented that pasturage bill should be deducted by defendant from sale price of the calves.—*First Nat. Bank v. Hoover*, Tex.Civ.App., 269 S.W. 262.

(5) That mortgagor was in good faith in conveying land producing mortgaged grain.—*State Bank of Stephen, by Veigel, v. Farmers' Grain Co. of Stephen*, 219 N.W. 871, 174 Minn. 531.

(6) That defendant received mortgaged property.—*Hanson v. Luther*, 156 So. 771, 229 Ala. 256.

Evidence held insufficient

(1) To sustain finding that mortgagee intended to release mortgagor's personal obligation.—*Fast Motor Co. v. Morgan*, 52 P.2d 25, 175 Okl. 269.

(2) To sustain plaintiff's claim that defendant participated in and aided the sale of mortgaged cattle by the mortgagor.—*Iowa Farm Credits Co. v. People's Sav. Bank of Menlo*, 192 N.W. 139, 196 Iowa 967.

(3) To show that defendant converting a mortgaged drilling rig received more than one thousand five hundred feet of drill pipe.—*Brooks Supply Co. v. First State Bank of Electra, Tex.Civ.App.*, 293 S.W. 631.

(4) To show a tender of the mortgaged property by defendant.—*Brown v. Rankin*, 93 S.E. 327, 108 S.C. 105.

(5) To show a conversion after the law day of the mortgage.—*J. G. Smith & Sons v. Howell*, 110 So. 57, 21 Ala.App. 549.

96. Ark.—*Newberger Cotton Co. v. Temple*, 252 S.W. 23, 159 Ark. 524.
Mont.—*U. S. Nat. Bank v. Great Western Sugar Co.*, 199 P. 245, 60 Mont. 342.

Okl.—*Diamond v. Enid Milling Co.*, 299 P. 440, 149 Okl. 61—*State v. Wilson*, 242 P. 1039, 116 Okl. 16—*Crowell Bros. v. Johnson*, 220 P. 328, 93 Okl. 158.

S.D.—*J. I. Case Plow Works Co. v. Farmers' Co-op. Union Elevator Co.*, 219 N.W. 888, 53 S.D. 9.

Tex.—*Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App.*, 55 S.W.2d 567, 570, reversed on other grounds *Oats v. Dublin Nat. Bank*, 90 S.W. 2d 824, 127 Tex. 2.

11 C.J. p 637 note 80.

Ultimate fact an inference

"We understand the rule to be that, when the ultimate fact in is-

sue is one to be determined as an inference or implication from other facts in evidence, it is only when but one reasonable inference can be drawn from the undisputed facts that the court is warranted in holding the inferred fact to be conclusively shown as a matter of law."—*Farmers' Nat. Bank v. Dublin Nat. Bank*, supra.

Questions held for jury

(1) Fact of conversion.

Ala.—*Wilson v. Cowart, App.*, 167 So. 602, certiorari denied 167 So. 604, 232 Ala. 170.

Mont.—*First Nat. Bank of Galata v. Montana Emporium Co.*, 197 P. 994, 59 Mont. 584.

(2) Destruction of mortgage lien.—*Brock v. Culpepper*, 116 So. 126, 217 Ala. 289.

(3) Mortgagee's consent to sale.
Ala.—*Wilson v. Windham*, 104 So. 232, 213 Ala. 31.

Ark.—*Boddy v. Thompson*, 14 S.W. 2d 240, 179 Ark. 71—*Newberger Cotton Co. v. Temple*, 252 S.W. 23, 159 Ark. 524.

Mont.—*U. S. Nat. Bank v. Great Western Sugar Co.*, 199 P. 245, 60 Mont. 342.

Okl.—*Diamond v. Enid Milling Co.*, 299 P. 440, 149 Okl. 61.
11 C.J. p 625 note 42.

(4) Mortgagee's ratification, waiver, or estoppel.
N.C.—*Goodrum v. Farmers Gin Co.*, 191 S.E. 25.

Tex.—*First Nat. Bank v. Hoover, Civ.App.*, 244 S.W. 1044—*Martin Co. v. Nicholson, Civ.App.*, 149 S.W. 280.

(5) Satisfaction of mortgage.
Mo.—*Berry v. Adams, App.*, 71 S.W. 2d 126.

Tex.—*American Printing Co. v. Dai-ley, Civ.App.*, 90 S.W.2d 905.

(6) Purchaser's good faith.
Ala.—*Wilson v. Cowart*, 167 So. 602, certiorari denied, Sup., 167 So. 604, 232 Ala. 170.

S.D.—*Nelson v. Robinson*, 205 N.W. 40, 48 S.D. 436.

(7) Other questions.

Ala.—*Gay & Bruce v. Citizens' Nat. Bank of Lineville*, 110 So. 19, 215 Ala. 114—*Ingram v. Watson*, 100 So. 557, 211 Ala. 410.

Okl.—*Crowell Bros. v. Johnson*, 220 P. 328, 93 Okl. 158.

S.D.—*J. I. Case Plow Works Co. v. Farmers' Co-op. Union Elevator Co.*, 219 N.W. 888, 53 S.D. 9.

Tex.—*Edmondson v. Coffman, Civ. App.*, 97 S.W.2d 779, error dismissed.

evidence relating to a certain issue is undisputed,⁹⁷ or insufficient to establish the matter to be proved,⁹⁸ the issue may be withdrawn from the jury, and a verdict directed by the court.

The instructions must not, of course, be confused or misleading,⁹⁹ they should fairly and clearly state the issues,¹ and should not assume the existence of disputed facts.²

The verdict or findings³ and judgment⁴ must conform to the pleadings and evidence adduced at the trial, and the judgment should give the proper relief to the parties.⁵

§ 275. — Damages

The damages recoverable by a mortgagee in an ac-

tion for the value of mortgaged property is generally the value of the property or the amount of the balance due on the mortgage, whichever is the lesser amount, including interest on the debt; but there should be deducted from the amount allowable sums applied in payment of the debt or a superior lien. Damages for a wrongful detention, or for depreciation may be recovered in an action for possession.

In an action to recover damages or the value of mortgaged property from a purchaser thereof, as where the purchaser is guilty of a conversion of the property, the amount recoverable is generally either the value of the property up to the amount due under the mortgage, or the balance due to the extent of the value of the property, according to which is the lesser sum.⁶ The value of the property has been measured by its market value⁷ at the time of its conversion,⁸ or the time of sale,⁹ and, in case

97. Mo.—Exchange Nat. Bank of Tulsa, Okl., v. Daley, App., 237 S. W. 846.

Mont.—Security State Bank of Melrose, Minn., v. First Nat. Bank, 254 P. 417, 78 Mont. 389.

11 C.J. p 637 note 81.

98. U.S.—Evans v. First Nat. Bank & Trust Co. of Oklahoma City, C. C.A.Tex., 49 F.2d 125.

Iowa.—L. & L. F. Zeller v. Malottki, 206 N.W. 101.

Kan.—Patrick v. Pettit Grain Co., 297 P. 673, 132 Kan. 764.

Mich.—Miller v. Bick, 216 N.W. 402, 240 Mich. 608.

Mont.—Security State Bank of Melrose, Minn. v. First Nat. Bank, 254 P. 417, 78 Mont. 389.

99. Ala.—J. A. Lindsey & Co. v. Stenson, 79 So. 11, 201 Ala. 589.

Kan.—Beeler v. Lind, 235 P. 113, 118 Kan. 276.

11 C.J. p 637 note 83.

Instructions held not misleading

Idaho.—Bodenhamer v. Pacific Fruit & Produce Co., 295 P. 243, 50 Idaho 248.

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.

1. Kan.—Beeler v. Lind, 235 P. 113, 118 Kan. 276.

Instructions held proper or erroneously refused.

Ala.—Gay & Bruce v. W. B. Smith & Sons, 114 So. 468, 217 Ala. 33—

Gay & Bruce v. W. B. Smith & Sons, 100 So. 633, 211 Ala. 358—J. G. Smith & Sons v. Howell, 110 So. 57, 21 Ala.App. 549—Polytinsky v. Brindley, 106 So. 394, 21 Ala.App. 185.

Kan.—State Bank of Downs v. Abbott, 179 P. 326, 104 Kan. 344.

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395—Berry v. Adams, App., 71 S.W. 2d 126.

Vt.—Wells v. Blodgett, 104 A. 146, 92 Vt. 330.

11 C.J. p 637 note 83 [b].

Instruction held supported by evidence

Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.

Instructions held erroneous or properly refused.

Ala.—Douglass v. N. S. Davenport Co., 110 So. 378, 215 Ala. 265—Dothan Grocery Co. v. American Agricultural Chemical Co., 75 So. 334, 200 Ala. 22.

Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.

Okl.—First Nat. Bank v. Harp, 291 P. 116, 144 Okl. 219.

11 C.J. p 637 note 83 [a].

2. Ala.—Hickey v. McDonald, 48 So. 1031, 160 Ala. 300.

3. N.D. — German-American-State Bank of Balfour v. Erickson, 170 N.W. 854, 41 N.D. 548.

4. Ala.—J. E. Butler & Co. v. A. G. Henry & Co., 79 So. 630, 202 Ala. 155.

Kan.—Farmers' State Bank v. Peters, 22 P.2d 457, 137 Kan. 786.

N.Y.—Sani-Forcelain Enamel Products v. Bender Store Fixture Co., 295 N.Y.S. 411, 251 App.Div. 726.

Tex.—Brooks Supply Co. v. First State Bank of Electra, Civ.App., 292 S.W. 631—A B C Stores v. Houston Showcase & Mfg. Co., Civ. App., 284 S.W. 332—Smith v. Wall, Civ.App., 230 S.W. 759.

5. N.C.—Rogers v. Booker, 113 S.E. 671.

6. Ala.—First Nat. Bank v. Ratley, 137 So. 26, 223 Ala. 455—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

Cal.—Bell v. Central Bank of Imperial Valley, 265 P. 551, 89 Cal. App. 551.

Ga.—Franklin v. Howell, 133 S.E. 270, 35 Ga.App. 368.

Idaho.—Adams v. Caldwell Milling & Elevator Co., 197 P. 723, 33 Idaho 677.

Ill.—Levinsohn v. Miller, 251 Ill.App. 497—Schillo v. White, 207 Ill.App. 390.

La.—Covington v. Matlock, 121 So. 355, 10 La.App. 445.

Okl.—Hillery v. Waurika Nat. Bank, 226 P. 1051, 100 Okl. 34.

11 C.J. p 637 notes 86–88.

Value of property as including parts thereof

A judgment for the value of a part of converted property is erroneous, where recovery for that part was included in the value of the property as a whole.—Brooks Supply Co. v. First State Bank of Electra, Tex. Civ.App., 292 S.W. 631.

Successive purchasers

Where the chattels are sold to various purchasers, each one is liable to the mortgagee for the full value of the property purchased by him up to the point when the mortgage debt is satisfied, but equity will enforce contribution between them.—Hughes v. Graves, 1 Litt., Ky., 317.

Remittitur for excess

If a judgment is in excess of the value of the property converted, a remittitur of such excess is proper.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

7. Tex.—Douglas v. Citizens' State Bank of Wheeler, Civ.App., 52 S.W. 2d 540, error dismissed.

Damages held authorized by evidence

Ky.—Ruby v. Cox & Grayot, 229 S. W. 127, 191 Ky. 162.

Tex.—Brooks Supply Co. v. First State Bank of Electra, Civ.App., 292 S.W. 631.

8. Ala.—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

Ohio.—City Loan & Savings Co. v. Dickison, 19 Ohio N.P., N.S., 215.

9. Iowa.—Schwanz v. Farmers' Co-op. Co. of Lorimor, 214 N.W. 491, 204 Iowa 1273, 55 A.L.R. 644.

of a fluctuation in value, the highest value between the time of conversion and trial has been allowed in the discretion of the jury.¹⁰ The interest due on the mortgage¹¹ from the time of a purchaser's resale of the property,¹² or from the maturity of the debt,¹³ may be included in the damages. Recovery for reasonable expenditures incurred by the mortgagee in pursuing the property has also been allowed.¹⁴ However, the amount recoverable by a mortgagee is limited to the amount of his interest in the mortgage instrument.¹⁵ There should be deducted from the damages allowed the value of any property,¹⁶ or the amount of any sums,¹⁷ received by the mortgagee for application on the debt; but the expense of picking or threshing a mortgaged crop may not be deducted if the lien for the labor is inferior to the mortgage lien.¹⁸

In an action to recover possession of mortgaged property, the mortgagee may include damages for a wrongful detention of the property;¹⁹ also, an amount for any depreciation²⁰ or deterioration²¹ of the property.

Attorney's fees. While a purchaser may be liable for attorney's fees stipulated for in the notes secured by the mortgage in an action on the notes,²² an allowance therefor where the suit is not on the note has been held to be improper.²³

Nominal damages. If the mortgagee has sustained no actual damages, only nominal damages will

be awarded.²⁴

Exemplary damages. In an action against a purchaser for the possession of the mortgaged chattel, or for the value thereof, plaintiff is not entitled to exemplary damages.²⁵

Damages recoverable by holder of junior mortgage. The holder of a second mortgage is entitled to recover only the value of his interest in the mortgaged property,²⁶ and the value of such interest is necessarily reduced if the security is inadequate to respond to both liens to the extent of the deficiency;²⁷ if the first mortgage is less than the value of the property, the second mortgagee may recover the value less the amount of the first mortgage.²⁸ As in the case of an action by a first mortgagee, a purchaser is entitled to credit for any sums received by the second mortgagee in payment of his debt, and, on the other hand, the second mortgagee is entitled to add interest to the amount due him.²⁹

§ 276. Actions by Purchaser or Transferee

A purchaser of mortgaged chattels in suing third persons for their conversion cannot recover for the loss suffered by the mortgagee, but is limited in his recovery to the loss he has actually suffered.

A purchaser of goods mortgaged in excess of their value to a mortgagee who at the time of their conversion by a third person had filed suit for foreclosure is, in an action against such third person for conversion, limited in his recovery to the value of

10. Ala.—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

11. Ala.—First Nat. Bank v. Ratley, 137 So. 26, 223 Ala. 455—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

Cal.—Deposit Guaranty State Bank v. Hessel Motor Car Co., 265 P. 954, 90 Cal.App. 428.

12. Mass. — Barry v. Bennett, 7 Metc. 354.

13. Ala.—Maddox v. Dunklin, 50 So. 277, 163 Ala. 278.

14. Cal. — Deposit Guaranty State Bank v. Hessel Motor Car Co., 265 P. 954, 90 Cal.App. 428.

15. Miss.—Ellis-Jones Drug Co. v. Coker, 125 So. 826, 156 Miss. 775, suggestion of error overruled and setting aside judgment refused 127 So. 283, 156 Miss. 775.

16. Ala.—First Nat. Bank v. Ratley, 137 So. 26, 223 Ala. 455.

In replevin action, where there is a prayer to recover the balance due on the mortgage debt, the value of property replevined should be deducted from the amount of a judgment for the balance due.—Boddy v.

Thompson, 14 S.W.2d 240, 179 Ark. 71.

17. Ala.—Albertville Trading Co. v. Critcher, 112 So. 907, 216 Ala. 252—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

S.C.—Carroll & Byers Co. v. Gaffney Mfg. Co., 146 S.E. 604, 149 S.C. 192.

18. Kan.—Bird City State Bank v. Goodland Equity Exch., 216 P. 278, 113 Kan. 696.

In Texas

(1) It has been held that the lien of a registered mortgage takes precedence over a lien of a person who picks cotton, and consequently the text rule applied. — Westbrook v. Clinton Grocery Co., Civ.App., 9 S.W.2d 1044.

(2) On the other hand, it has been held that trial court properly allowed defendants' claim for items for cotton picking and rent.—T. W. Marse & Co. v. Flockinger, Civ.App., 189 S.W. 1017.

19. Ark.—Boddy v. Thompson, 14 S.W.2d 240, 179 Ark. 71.

20. Kan.—Davidson & Case Lumber Co. v. Anderson, 187 P. 872, 106 Kan. 213.

21. N.C.—Rogers v. Booker, 113 S.E. 671, 184 N.C. 183.

22. Ala.—Maddox v. Dunklin, 50 So. 277, 163 Ala. 278.

Miss.—Tubberville v. Simpson, 47 So. 784, 94 Miss. 154.
11 C.J. p 637 note 92.

23. **Allowance for attorney fees held improper**

(1) In an action for conversion.—Metzler v. Foster Holding Co., 54 P. 2d 447, 5 Cal.2d 278.

(2) In a claim and delivery action to recover mortgaged property.—Carroll & Byers Co. v. Gaffney Mfg. Co., 146 S.E. 604, 149 S.C. 192.

24. Ala.—Teat v. Chapman, 56 So. 267, 1 Ala.App. 491.
11 C.J. p 637 note 93.

25. Iowa.—McDonald v. Norton, 34 N.W. 458, 72 Iowa 652.

26. N.D.—Citizens' Nat. Bank v. Osborne-McMillan El. Co., 131 N.W. 266, 21 N.D. 335.

27. N.D.—Citizens' Nat. Bank v. Osborne-McMillan El. Co., supra.

28. N.D.—Citizens' Nat. Bank v. Osborne-McMillan El. Co., supra.
S.D.—Carroll & Byers Co. v. Gaffney Mfg. Co., 146 S.E. 604, 149 S.C. 192.

29. S.C.—Carroll & Byers Co. v. Gaffney Mfg. Co., supra.

the use and possession of the property during the time he was wrongfully deprived of it, and it is error to refuse to hear proof as to the existence of the mortgage lien and the rights of all the parties.³⁰ A purchaser assuming the debt cannot, in replevin brought in his own name against an officer levying on the property in a suit by creditors against the mortgagor, recover on the ground that he is the agent of the mortgagees.³¹

§ 277. — Against Mortgagee

A purchaser of mortgaged chattels may recover for their conversion by the mortgagee, subject to any right the mortgagee may have to offset the amount of the mortgage debt. In such actions the general rules governing actions generally will apply as to the pleadings, evidence and trial thereof, and the damages to be awarded.

A purchaser of mortgaged chattels may recover from a mortgagee for his conversion thereof,³² but the mortgagee can offset the amount due under the mortgage, if uncollected,³³ which amount the purchaser may recover over against the mortgagor from whom he purchased, after having made said mortgagor a party to the suit.³⁴ Also, on the foreclosure by a senior mortgagee of mortgaged chattels in the possession of a purchaser thereof, the purchaser is entitled to recover in a cross action against a junior mortgagee the purchase price he paid to such junior mortgagee with the mortgagor's consent.³⁵ It is not necessary that the purchaser, or the assignee of the mortgagor, in order to main-

tain an action for conversion of the mortgaged chattels by the mortgagee, prove demand and refusal, if there was otherwise a conversion,³⁶ or tender to the mortgagee the amount of the mortgage indebtedness;³⁷ nor, where he has taken legal title and his title and right to possession have never been divested, is he required to tender the amount of the mortgage debt as a condition to the assertion of his title against the mortgagee;³⁸ but, where the purchaser was not in possession at the time the property was taken by the legal representative of the mortgagee, he cannot recover possession without paying or tendering payment of the secured debt.³⁹

In actions by the purchaser against the mortgagee to recover possession of the property or for damages for a wrongful taking thereof, the rules governing civil actions generally will apply as to pleading,⁴⁰ evidence,⁴¹ and instructions to the jury.⁴² No presumption exists that a mortgagor owns the property covered by his mortgage, as between a party to the mortgage and a stranger,⁴³ but under the presumption that all persons are presumed innocent of crime and that the law has been obeyed it will, in a claim and delivery action by a remote assignee of the mortgagor to recover mortgaged chattels withheld by the mortgagee, be presumed, in the absence of all evidence on the subject, that the mortgagor in making the original transfer complied with a statute requiring him to notify the mortgagee of the intended sale, and making a sale without such notice larceny.⁴⁴

30. Tex.—Terry v. Spearman, Com. App., 259 S.W. 563, reversing, Civ. App., 246 S.W. 103.

Reason for limited recovery

There is no equity of redemption in plaintiff's favor.—Terry v. Spearman, supra.

31. Iowa.—McNorton v. Akers, 24 Iowa 369.

32. Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S. W. 1088, reversing, Civ.App., 283 S.W. 224.

Failure to resist conversion

That the purchaser did not resist or object to the taking of the property by the mortgagee is not a defense.—Dixie v. Harrison, 50 So. 284, 163 Ala. 304.

33. Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S. W. 1088, reversing, Civ.App., 283 S.W. 224.

34. Tex.—Sabine Motor Co. v. W. C. English Auto Co., supra.

35. Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2, reversing Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567.

36. Ala.—Dixie v. Harrison, 50 So. 284, 163 Ala. 304.

Colo.—McLagan v. Granato, 252 P. 348, 80 Colo. 412.

37. Ga.—Hudson v. Gunn, 92 S.E. 546, 20 Ga.App. 95.

Or.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S. W. 1088, reversing, Civ.App., 283 S.W. 224.

38. Tex.—Hughes v. Smith, 129 S. W. 1142, 61 Tex.Civ.App. 443.

11 C.J. p 638 note 98.

39. Tex.—Kelly v. Wimbish, Civ. App., 65 S.W. 386.

40. Ala.—Stickney v. Dunaway, 53 So. 770, 169 Ala. 464.

11 C.J. p 638 note 1.

Essential allegations

In action for conversion of mortgaged chattels by mortgagee, allegation of tender of the mortgage debt is not essential to the cause of action.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

41. Evidence held sufficient

(1) To support judgment for buyer against mortgagee for conversion

of car purchased from dealer entrusted with possession.—McLagan v. Granato, 252 P. 348, 80 Colo. 412.

(2) To establish prima facie, that subsequent assignee and purchaser made demand for possession of property on original lessee claiming property under mortgage executed by first assignee.—Hartford v. Faw, 7 P. 2d 4, 166 Wash. 335.

Admissibility

(1) In buyer's action for conversion of car by mortgagee, exclusion of evidence whether plaintiff had been sued on notes given for car held not error.—McLagan v. Granato, 252 P. 348, 80 Colo. 412.

(2) For earlier cases involving admissibility of the evidence see 11 C. J. p 638 note 2.

42. Colo.—McLagan v. Granato, supra.

11 C.J. p 638 note 3.

43. Neb.—First Nat. Bank of Bridgeport v. First Nat. Bank of Hartington, 196 N.W. 691, 111 Neb. 441—Booknau v. Clark, 79 N.W. 159, 58 Neb. 610.

44. Cal.—Miller v. Salomon, 281 P. 39, 100 Cal.App. 756.

Matters of law should not be submitted to the jury,⁴⁵ but questions of fact, such as the identity of the property purchased with that covered by the mortgage, are for the jury to determine.⁴⁶

A purchaser of mortgaged chattels may recover from a mortgagee who converted them the value of the chattels at the time of their conversion,⁴⁷ together with damages for the unlawful detention from the date of the alleged conversion.⁴⁸

§ 278. — Against Mortgagor

A purchaser may bring an action against the mortgagor for inducing the sale by the fraudulent statement that the property was free from encumbrance. If he assumes the mortgage he cannot recover for payments made on the mortgage, nor acquire rights prior to those of the mortgagee by attachment in an action against the mortgagor.

The purchaser may, it seems, bring an action on the case for fraud against the mortgagor on the ground that the sale was induced by the mortgagor's fraudulent statement that the property was free from encumbrance.⁴⁹ However, a purchaser who assumes payment of the mortgage debt cannot recover from the mortgagor on account of a part payment made on the mortgage in the absence of fraud, mistake, or agreement to that effect;⁵⁰ nor can he, in an action against his seller, the mortgagor, acquire rights prior to those of the mortgagee by attaching the goods.⁵¹

§ 279. Criminal Responsibility

- a. In general
- b. Character and validity of mortgage
- c. Intent

- d. Unlawful disposition of property
- e. Want of consent

a. In General

Subject to variations, it is generally by statute made a crime for a mortgagor to remove or dispose of mortgaged property without the mortgagee's consent and to his detriment.

By statute, in many jurisdictions, it is a crime to sell, remove, conceal, or otherwise dispose of mortgaged property without the mortgagee's consent,⁵² and the character of the offense as a felony or misdemeanor depends on the terms of the statute under which prosecution is brought,⁵³ or on the value of the property.⁵⁴ Such statutes are intended to protect the interests of the mortgagee by guarding against any disposal of the property without his consent,⁵⁵ and to protect the person to whom the mortgaged property has been sold,⁵⁶ and they may be broad enough to protect an assignee of the mortgage from the fraud of the mortgagee.⁵⁷

Statutes of this character, being highly penal, are to be strictly construed, such construction being dependent on the meaning conveyed by the words used and by the context considered in connection with the law existing when the statute was passed.⁵⁸ A strict literal construction will not, however, be given the statute if such construction would cause the statute to be of doubtful validity.⁵⁹

Absence of notice to purchaser. Under some statutes the failure of the mortgagor to notify the purchaser that the property sold is mortgaged is made an element of the offense.⁶⁰ Where the statute makes intent to defraud an element of the offense, the fact that the mortgage is recorded will

45. Waiver of lien

Whether bank released its lien by indorsing "O. K." on the mortgagor's bill of sale containing guaranty that mortgagor had the right to transfer the chattel free of all encumbrances is a question of law for the determination of the court, not a question of fact for submission to the jury.—Arkansas River Gas Co. v. Molk, 285 P. 561, 130 Kan. 30.

46. Ala.—Dunaway v. Stickney, 69 So. 232, 13 Ala.App. 645.

47. Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S.W. 1088, reversing, Civ.App., 283 S.W. 224.

Actual, not market, value

Assignee of original owner of furniture, purchased by latter for his personal use and remaining in his home until sold by mortgagee, is not limited to recovery of market value thereof at the time and place of con-

version, but is entitled to recover the actual value of the property to him, excluding any fanciful or sentimental value he might place upon it.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

48. Tex.—Hughes v. Smith, 129 S. W. 1142, 61 Tex.Civ.App. 443. 11 C.J. p 638 note 5.

49. Vt.—Colson v. Bean, 58 A. 795, 77 Vt. 40.

50. Ind.—Stuckman v. Rose, 46 N.E. 680, 147 Ind. 402.

51. Conn. — Hartford-Connecticut Trust Co. v. Puritan Laundry of Hartford, 111 A. 149, 95 Conn. 172.

52. Larceny

Sale of property covered by crop mortgage without knowledge and consent of mortgagee constitutes "larceny" or "theft."—People v. Allanjan, 299 P. 813, 114 Cal.App. 260.

53. N.Y.—Norton v. Shields, 161 N. Y.S. 380, 174 App.Div. 804.

Felony, under Oklahoma laws.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

54. Mich.—People v. Schultz, 48 N. W. 293, 85 Mich. 114.

55. Neb.—State v. Butcher, 177 N. W. 184, 104 Neb. 380.

56. Idaho.—State v. Barber, 96 P. 116, 15 Idaho 96. 11 C.J. p 638 note 9.

57. Ala.—Foster v. State, 7 So. 185, 88 Ala. 182.

58. Tenn.—McClure v. State, 113 S. W.2d 63.

59. Okl.—Watson v. State, 149 P. 926, 11 Okl.Cr. 542.

60. Minn.—State v. Bates, 194 N.W. 107, 156 Minn. 104.

Mo.—State v. Prince, 297 S.W. 34, 317 Mo. 840.

11 C.J. p 641 note 76.

not defeat prosecution for the sale of the mortgaged property,⁶¹ nor, under such statute, will the fact that accused informed the purchaser that the property was mortgaged, although it may serve to negative a fraudulent intent.⁶²

Demand on mortgagor. Where the statute does not so require, a demand need not be made on the mortgagor for the debt or mortgaged property, nor need there be a refusal of payment of the indebtedness on his part, as a condition precedent to the commission of the offense.⁶³

Failure to recite prior mortgage. As the purpose of a statute making it an offense for a mortgagor to execute a second mortgage on chattels, while they are subject to an existing mortgage by him without setting forth the existence of the previous mortgage in the subsequent mortgage, is for the protection of the public, the fact that the parties agreed that it was not necessary to make such a recitation in the subsequent mortgage does not relieve such omission of its criminality.⁶⁴

Knowledge of mortgage lien. In those jurisdictions where the statute is broad enough to make it an offense for any person to do the acts prohibited, a knowledge of the existence of the mortgage lien is a necessary element of the offense.⁶⁵

Loss sustained by holder of mortgage. Some

statutes require that loss must be sustained by the holder of the mortgage in order to constitute an offense.⁶⁶ Under others such fact is not made an element of the offense.⁶⁷

Possession of property. Possession of the property prior to the time of disposition has been held to be an essential element of the crime.⁶⁸

b. Character and Validity of Mortgage-

The existence of a valid mortgage is essential to the commission of the offense.

It is essential to these offenses that there be a valid and subsisting mortgage,⁶⁹ although equitable mortgages and liens, as well as legal, may be held to be covered by the statute.⁷⁰ There must be a debt secured,⁷¹ and the property must be such as can be mortgaged.⁷² It has been held that the description of the property in the mortgage must be sufficient to identify it;⁷³ but it has also been held that the question as it arises in a criminal prosecution has no relation to the question of the sufficiency of description where the rights of third persons are involved, and that the fact that the description is defective is immaterial, where there could be no doubt but that the mortgagor disposed of property covered by the mortgage.⁷⁴ In the absence of statutory requirement it is not necessary that the mortgage be recorded,⁷⁵ but under some statutes the mortgage

61. Tex.—Thornton v. State, 31 S.W. 372, 34 Tex.Cr. 469.

62. Tex.—Briggs v. State, Cr., 44 S.W. 491.

63. Ark.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339—Stewart v. State, 214 S.W. 48, 139 Ark. 403.

64. Vt.—State v. Lowe, 109 A. 910, 94 Vt. 200.

65. Ala.—Jones v. State, 21 So. 229, 113 Ala. 95.

S.C.—State v. Reeder, 15 S.E. 544, 36 S.C. 497.

66. Ga.—Farmer v. State, App., 89 S.E. 382—Wright v. State, 71 S.E. 500, 9 Ga.App. 442—Denney v. State, 58 S.E. 318, 2 Ga.App. 146. 11 C.J. p 641 note 73.

67. Idaho.—State v. Barber, 96 P. 116, 15 Idaho 98.

68. Ala.—Swint v. State, 57 So. 394, 3 Ala.App. 93.

69. Ky.—Wyrick v. Commonwealth, 54 S.W.2d 629, 246 Ky. 127. 11 C.J. p 638 note 12.

A title note, evidencing conditional sale of personal property and reserving title thereto until full payment of purchase price, is not a "chattel mortgage," within the statute.—State v. Webb, 184 P. 715, 105 Kan. 407.

Junior mortgage

A statute providing that any person who shall sell or dispose of "any" personal property on which any mortgage exists shall be guilty of the offense applies to a junior mortgage as well as to a senior mortgage.—State v. Buice, 105 S.E. 408, 115 S.C. 280.

Mortgages held within protection of statute

Ala.—Spicer v. State, 133 So. 58, 24 Ala.App. 162, certiorari denied 133 So. 59, 222 Ala. 515.

Mo.—State v. Griffin, 228 S.W. 800.

In Illinois it is only when the property in question is mortgaged pursuant to the provisions of the Chattel Mortgage Act that its sale without the consent in writing of the mortgagee is made a misdemeanor.—People v. McGinnis, 220 Ill.App. 29.

70. Ala.—Varnum v. State, 78 Ala. 28—Courtney v. State, 65 So. 433, 10 Ala.App. 141.

Ark.—Beard v. State, 43 Ark. 284.

Absolute bill of sale, intended only as security for debt, may be treated as an equitable mortgage covered by the statute.—Farmer v. State, 89 S.E. 382, 18 Ga.App. 307.

71. Okl.—Hall v. State, 217 P. 229, 24 Okl.Cr. 197.

11 C.J. p 638 note 14.

Collateral contract of assurance

Where a mortgage is given as a collateral contract to assure the performance of a prior original obligation, and where the original obligation by mutual consent or otherwise is ended, the collateral obligation also ceases, and thereafter will not support a prosecution for disposing of mortgaged property.—Hall v. State, 217 P. 229, 24 Okl.Cr. 197.

72. Ga.—Hall v. State, 59 S.E. 26, 2 Ga.App. 739.

11 C.J. p 638 note 15.

Property subject to mortgage see supra §§ 21–36.

Crop mortgage

(1) A mortgage on unplanted crops is invalid, and the mortgagor cannot be convicted of selling mortgaged crops.—Nelson v. State, 238 N.W. 110, 121 Neb. 658.

(2) Other examples of crop mortgages see 11 C.J. p 638 note 15 [a], [b].

73. Ga.—Hampton v. State, 52 S.E. 19, 124 Ga. 3—Wyatt v. State, 81 S.E. 802, 15 Ga.App. 817.

Sufficiency of description see supra §§ 57–71.

74. Colo.—Lowdermilk v. People, 202 P. 118, 70 Colo. 459.

75. Ark.—Hampton v. State, 54 S.W. 746, 67 Ark. 266.

must be properly recorded,⁷⁶ although filing for recording has been held to be sufficient.⁷⁷

A mortgage executed and filed in another state from where the mortgagee resides and where the sale takes place is within the intent of a statute of the latter state punishing the sale or disposition of mortgaged property without the mortgagee's consent.⁷⁸

c. Intent

Where made such by statute, intent is an essential element of the offense.

Where the statute so provides, intent is an essential element of the offense.⁷⁹ An intent to defraud is made by some statutes an essential element of criminality in the case of sale, removal, or other disposition of mortgaged personal property.⁸⁰ Under other statutes it is not an element of the offense.⁸¹ The statutes in some jurisdictions make an intent to defraud an element of the offense where the act prohibited consists in the removal of the mortgaged property,⁸² but do not make such intent an element of the offense when the act prohibited

consists of the sale, transfer, or further encumbrance of the mortgaged property.⁸³ So, under a statute making it an offense to "sell or dispose of mortgaged property," etc., where the act charged is "a disposition of mortgaged property by taking it beyond the limits of the State," it was held proper to inquire into the motive or intent of said act,⁸⁴ even though on a prosecution for the sale of mortgaged property, under such statute, an intent to defraud, or to defeat the lien, is not a necessary element, and will be presumed.⁸⁵

d. Unlawful Disposition of Property

An unlawful disposition of the mortgaged property within the terms of the statute is an essential element of the offense.

An unlawful disposition of mortgaged property within the terms of the statute denouncing the offense is, of course, an essential element of the offense.⁸⁶ Where the statute applies merely to a "sale" of mortgaged property, a transfer by exchange for other property, where money does not pass, is not included;⁸⁷ but a statute making it an offense "to sell or convey" covers a transfer by

76. Ky.—Wyrick v. Commonwealth, 54 S.W.2d 629, 246 Ky. 127.

77. Ark.—Cooper v. State, 37 Ark. 412.

78. S.D.—In re Renshaw, 99 N.W. 83, 18 S.D. 32, 112 Am.S.R. 778.

79. Mo.—State v. Klick, App., 282 S.W. 161.

Mistake

(1) Where a person sells or disposes of mortgaged property under the mistaken belief that he had the right so to do, he will not be criminally liable.

Mass.—Com. v. Cutler, 26 N.E. 855, 153 Mass. 252.

Tex.—Stewart v. State, 131 S.W. 329, 60 Tex.Cr. 92.

(2) This is true even though he intended to appropriate the proceeds to his own use.

Ark.—Lawhorn v. State, 158 S.W. 113, 108 Ark. 474.

Tex.—Stewart v. State, supra.

"Wilfully"

Under a statute making it an offense for one wilfully to destroy, remove, conceal, etc., mortgaged chattels, it was held that the word "wilfully" simply means "intentionally," that is, not by a mistake.—State v. Bronkol, 67 N.W. 680, 5 N.D. 507.

80. Ga.—Farmer v. State, 89 S.E. 382, 18 Ga.App. 307.

Kan.—State v. Wilfong, 220 P. 250, 114 Kan. 639.

La.—Melson v. Calhoun, 120 So. 115, 10 La.App. 492.

Mo.—De Witt v. Syfon, 211 S.W. 716, 202 Mo.App. 469.

N.J.—State v. Moldenhauer, 136 A. 412, 103 N.J.Law 238.

N.Y.—People v. Primon, 250 N.Y.S. 543, 232 App.Div. 541.

Ohio.—State v. Redd, 171 N.E. 20, 122 Ohio St. 162.

11 C.J. p 640 note 55.

Intent to deprive mortgagee of claim is an essential element of the crime of removing mortgaged property with intent of depriving the mortgagee of his claim thereto or interest therein.—A. H. Averill Machinery Co. v. Taylor, 223 P. 918, 70 Mont. 70.

81. Minn.—State v. Bates, 194 N.W. 107, 156 Minn. 104.

11 C.J. p 640 note 56.

Doing of inhibited act constitutes the crime.—Fiehn v. State, 245 N.W. 6, 124 Neb. 16.—State v. Butcher, 177 N.W. 184, 104 Neb. 380.

82. Cal.—People v. Iden, 142 P. 117, 24 Cal.App. 627.—People v. Wolfrom, 115 P. 1088, 15 Cal.App. 732.

83. Cal.—People v. Phillips, 157 P. 1003, 30 Cal.App. 31.—People v. Iden, 142 P. 117, 24 Cal.App. 627.—People v. Wolfrom, 115 P. 1088, 15 Cal.App. 732.

11 C.J. p 640 note 58.

84. S.C.—State v. Rice, 20 S.E. 986, 43 S.C. 200.

11 C.J. p 640 note 59.

85. S.C.—State v. Reeder, 15 S.E. 544, 36 S.C. 497.

11 C.J. p 641 note 60.

86. **Death of mortgaged mules** would not, of course, be a disposition of mortgaged property within the statute.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339.

Failure to disclose whereabouts

A failure, after default, to disclose the whereabouts of mortgaged property constitutes a "secreting" of it.—People, on Complaint of Perman Bros., v. Francia, 253 N.Y.S. 857, 142 Misc. 143.

To whom made

A statute making it a felony for mortgagor of personal property to sell or dispose of it to any "person or body corporate," without consent of mortgagee, applies to sale or transfer of mortgaged chattels to partnership.—State v. Stapel, 170 N.W. 665, 103 Neb. 135.

Unauthorized manner of sale

The fact that the mortgage permits the mortgagor to sell the mortgaged property in a certain way will not defeat a prosecution for the sale of the property in a manner not authorized by the mortgage.—State v. Boyer, 68 S.E. 573, 86 S.C. 260—11 C.J. p 639 note 21.

When debt not due

A sale before the debt is due is not an offense under a statute prohibiting the sale of mortgaged property without the consent of the mortgagee, and without immediately discharging the encumbrance.—State v. Sullivan, 32 So. 55, 80 Miss. 596—11 C.J. p 639 note 35.

87. Miss.—State v. Austin, 23 So. 34.

exchange,⁸⁸ the execution of a subsequent mortgage on the property,⁸⁹ or the consignment thereof to a third person over a railroad,⁹⁰ since the word "convey" has the significance of "transfer," and means the passing of title and dominion from one person to another.⁹¹ The words "otherwise dispose of" mortgaged property or like words have generally been given a broad meaning for the protection of the mortgagee, and have been held to include concealment,⁹² and to mean to "sell, alienate, or to put away,"⁹³ but, where necessary to sustain the validity of the statute denouncing the offense, the words have been limited to a disposition in the nature of a sale.⁹⁴ Under a statute making it an offense for one to sell or dispose of mortgaged personal property, without the written consent of the holder of the mortgage or lien, etc., it has been held that the removal thereof to another state is such a disposition of the property as falls within the provisions of the statute,⁹⁵ although, under such a statute, it has been held that it is not necessary that the goods be taken beyond the limits of the state to constitute an unlawful disposition thereof.⁹⁶

Amount and application of proceeds. Where the statute does not make an intent to defraud an element of the offense, it is not, unless made so by the statute, a defense that the property was sold for less than enough, or only enough to pay prior claims;⁹⁷ but such fact does constitute a defense where the statute makes an intent to defraud an element of the offense.⁹⁸

Concealment. Some statutes also make it an offense to conceal mortgaged property;⁹⁹ and this has been held to include an intentional handling and shifting of the property in such a manner as to mis-

lead or confuse the mortgagee in his efforts to find it.¹

Effect of sale of part of property. Where the statute provides that the act of accused must be done with the intent to "hinder, delay or defraud the right of the mortgagee," a sale of a part of the mortgaged property will constitute an offense thereunder, if such intent is established, no matter how small a part of the property is sold.²

Effect of acquiring superior lien. Under a statute applying to all persons who deal with mortgaged property, a mortgagee who assigns the mortgage and subsequently acquires a superior lien thereon is not criminally liable for removing said property if he acquired said lien after assigning the mortgage, or if he acquired said lien before the assignment thereof, unless he made such representations at the time of the assignment as would estop him from asserting such prior lien.³

Removal of the property is made criminal under some statutes,⁴ but is not a violation of a statute which makes it an offense for one to "sell or dispose of any personal property, on which any mortgage or other lien exists," etc.,⁵ unless the removal had the effect of defeating the lien.⁶ Under a statute making it an offense for one to remove property subject to an encumbrance or lien, from the county in which it may be, without immediately discharging such encumbrance or lien, it has been held that such removal must be completed by act of the party charged, or he must cause such removal to be done directly, and not remotely as a mere consequence of a sale to one in the county, who subsequently removes the property.⁷

Under a statute which makes it an offense for

88. Ala.—Johnson v. State, 69 Ala. 593.

89. Ala.—Fort v. State, 55 So. 434, 1 Ala.App. 195.

90. Ala.—Lippman v. State, 16 So. 130, 104 Ala. 61.

91. Ala.—Fort v. State, 55 So. 434, 1 Ala.App. 195.

11 C.J. p 639 note 27.

92. Ark.—McClaskey v. State, 270 S. W. 498, 168 Ark. 339.

93. Iowa.—State v. Julien, 48 Iowa 445.

94. Ga.—Conley v. State, 11 S.E. 659, 85 Ga. 348.

Eating of mortgaged sow was not within statute.—Stenson v. State, 159 S.E. 777, 43 Ga.App. 582.

95. S.C.—State v. Haynes, 55 S.E. 118, 74 S.C. 450.

With purpose of selling

Shipping mortgaged property out

of the state with the purpose of selling it there amounts to disposing of it within the meaning of the statute.—State v. Gorman, 216 P. 290, 113 Kan. 740, citing *Corpus Juris*.

96. S.C.—State v. Boyer, 68 S.E. 573, 86 S.C. 260.

97. Fla.—Hooks v. State, 50 So. 536, 58 Fla. 57.

98. N.D.—State v. Strong, 201 N.W. 858, 52 N.D. 197.

Okl.—Neal v. State, 168 P. 247, 14 Okl.Cr. 121.

Tex.—Graves v. State, 72 S.W.2d 917, 126 Tex.Cr. 461.

11 C.J. p 639 notes 33, 34.

Payment of indebtedness as defense see *infra* § 280.

99. Iowa.—State v. Julien, 48 Iowa 445.

1. Kan.—State v. Taylor, 133 P. 861,

90 Kan. 438—State v. Miller, 87 P. 723, 74 Kan. 667.

2. N.C.—State v. Manning, 12 S.E. 248, 107 N.C. 910.

3. Ala.—Foster v. State, 7 So. 185, 88 Ala. 182.

4. Cal.—People v. Stanich, 271 P. 920, 94 Cal.App. 738.

11 C.J. p 639 note 40.

Temporary removal, in accordance with the usual and customary use of the property, is not within the statute.—Tredway v. Birks, 242 N.W. 590, 59 S.D. 649.

5. S.C.—Whaley v. Lawton, 35 S.E. 558, 57 S.C. 256.

11 C.J. p 640 note 41.

6. S.C.—State v. Knight, 109 S.E. 803, 118 S.C. 99.

11 C.J. p 640 note 42.

7. Miss.—Polk v. State, 4 So. 540, 65 Miss. 433.

one to "remove, permit, or cause to be removed, said mortgaged property, or any part thereof, out of the county with intent to deprive the owner of said mortgage of his security," it has been held that a removal of a portion of said mortgaged goods is equivalent to a removal of the whole and is a violation of the statute, even though the debt is partially paid, and the property remaining has been improved by repairs;⁸ and the fact that the mortgagor is solvent, or that the property remaining is sufficient to satisfy the debt, will not defeat the prosecution.⁹

e. Want of Consent

The absence of the mortgagee's consent to the disposition of the property is ordinarily made a necessary element of the offense.

The statutes ordinarily make the absence of the consent of the holder of the mortgage lien a necessary element.¹⁰ As a general rule, consent may be proved by parol even though it contradicts the terms of the mortgage.¹¹ Under some statutes, however, consent must be in writing and oral consent constitutes no defense,¹² although under a statute providing that such writing should be the only competent evidence to prove the consent, it has been held that the statute should be liberally construed, so as to effect the purpose intended by the legislature.¹³

Effect of consent. In the absence of a provision in the statute to the contrary,¹⁴ where the mortgagee or his agent gives permission to the mort-

gagor to make a sale, it will defeat prosecution,¹⁵ even though the mortgagor has an intention of misappropriating the proceeds,¹⁶ or fails to pay the proceeds of the sale to the mortgagee in accordance with the condition on which consent is given.¹⁷

Property subject to two mortgages. Where the property is subject to two mortgages, under some statutes the consent of the inferior mortgagee is unnecessary to a sale and liquidation of the preferred mortgage debt;¹⁸ and where an intent to defeat the holder of the lien is a necessary element of the offense, it was held that the consent of a prior mortgagee, while not conclusive, tended to show that there was no intention to defeat the second mortgagee in the collection of his debt.¹⁹ Where, however, the statute makes it an offense for one willfully to sell, etc., mortgaged property, without the consent of the one holding the mortgage, and where an intent to defraud is not an element of the offense, it is no defense to a prosecution under such statute that the first mortgagee gave his consent to the sale of property subject to two mortgages.²⁰

§ 280. — Defenses

Matters which negative an essential element of the offense are available as a defense.

In addition to the formal defenses available in criminal prosecutions generally, matters which negative an essential element of the offense are available as a defense.²¹ Accordingly, payment of the

8. Neb.—Wilson v. State, 62 N.W. 209, 43 Neb. 745.

9. Neb.—Wilson v. State, supra.

10. Ga.—Farmer v. State, 89 S.E. 382, 18 Ga.App. 307.

Ohio.—State v. Redd, 171 N.E. 20, 122 Ohio St. 162.

11 C.J. p 641 note 62.

11. Okl.—Thompson v. State, 201 P. 1004, 20 Okl.Cr. 211.

11 C.J. p 641 notes 63, 64.

12. Kan.—State v. Burton, 165 P. 847, 101 Kan. 62.

S.D.—State v. Shomaker, 187 N.W. 630, 45 S.D. 352.

11 C.J. p 641 note 65.

13. Okl.—Watson v. State, 149 P. 926, 11 Okl.Cr. 542.

14. Failure to inform purchaser

Under a statute punishing a mortgagor who sells mortgaged personal property without consent of the mortgagee, or without informing the purchaser that it is mortgaged, the mortgagor of an automobile is guilty of a violation of a statute if he fails to inform the purchaser of the mortgage, even though the mortgages

consented to the sale.—State v. Bates, 194 N.W. 107, 156 Minn. 104.

15. Ga.—Wallace v. State, 192 S.E. 81, 55 Ga.App. 872.

Iowa.—State v. Gibson, 202 N.W. 108, 199 Iowa 377.

Tex.—Daniels v. State, 272 S.W. 143, 100 Tex.Cr. 493.

11 C.J. p 641 notes 67, 68.

Subsequent consent that the mortgagor might keep possession of the property does not defeat a prosecution for a prior unlawful removal of the property.—Nall v. State, Tex.Cr., 109 S.W.2d 492.

16. Iowa.—Walker v. Camp, 27 N.W. 800, 69 Iowa 741.

17. Tex.—Daniels v. State, 272 S.W. 143, 100 Tex.Cr. 493.

11 C.J. p 641 note 70.

18. Okl.—Neal v. State, 163 P. 247, 14 Okl.Cr. 121.

Removal

Where, to sell property subject to mortgage according to agreement between mortgagor and first mortgagee, it is necessary to remove it in good faith from county, failure to obtain consent of junior mortgagees

or lienholders does not make mortgagor guilty of the offense.—State v. Strong, 201 N.W. 858, 52 N.D. 197.

19. Ark.—Osborne v. State, 160 S.W. 215, 109 Ark. 440.

Informal foreclosure

Where there is a first and a second chattel mortgage, of record, covering the same property, and where the assignee of the first mortgage, by agreement with the mortgagor, authorizes and directs the sale of the mortgaged property at private sale, neither the assignee nor the mortgagor, acting for the assignee, will be punishable for the illegal disposition of mortgaged property, where it appears that there was no intention by either to defraud the holder of the second mortgage, and where the second mortgage in fact suffered no harm by such informal foreclosure.—Thompson v. State, 201 P. 1004, 20 Okl.Cr. 211.

20. N.D.—State v. Bronkol, 67 N.W. 680, 5 N.D. 507.

21. **Recital in bill of sale** that property was subject to mortgage constitutes no defense to a prosecution for selling mortgaged property with-

debt, or that the full value of the mortgaged chattel has been turned over to the mortgagee in payment, in whole or in part, of the mortgage debt, has been held to constitute a good defense to a prosecution of this character,²² although it has also been held that such payment must have been made prior to the sale which is the basis of the prosecution.²³ The mortgagor may also show, by way of defense, that he was induced by fraud to give up the mortgaged goods.²⁴ An offer to the mortgagee of other property, in satisfaction for that sold or removed, will not protect the mortgagor from conviction;²⁵ and it follows that the mere ownership of such property by the mortgagor is equally unavailable by way of defense,²⁶ unless the substitution was made prior to the sale complained of.²⁷ Further it is no defense that the accused acted on, and in accordance with, the advice of counsel,²⁸ that defendant and his family were destitute,²⁹ that the mortgagee failed to advance mortgagor as much as agreed,³⁰ that their physician advised him to move or the family would die,³¹ nor that defendant sold the property for the purpose of getting to a place to earn money to pay the debt that he owed the mortgagee.³² The fact that no fraud was intended or resulted to the mortgagee by the removal of the goods is, in some jurisdictions, a matter of defense.³³

The fact that the mortgage was executed prior to the enactment of the statute is no defense where

the property was sold subsequent to the passage of such statute.³⁴

Limitations. The time within which prosecution must be commenced is governed entirely by statute.³⁵

§ 281. — Persons Liable

The provisions of the statute under which prosecution is brought govern as to what persons may be guilty of the offense. Ordinarily such statutes are directed against the unlawful acts of the mortgagor.

While the statutes are primarily directed against the unlawful acts of the mortgagor,³⁶ in some jurisdictions they are broad enough to cover the unlawful acts of any person with a knowledge of the existence of the mortgage lien.³⁷ In other jurisdictions, the statutes also apply to one who purchases the mortgaged property with a knowledge of the lien,³⁸ or to one who aids or abets the mortgagor or other persons in the unlawful acts.³⁹ It has, however, been held that the acts of an agent, without the knowledge or connivance of the principal, will not make the latter criminally liable;⁴⁰ nor will the acts of one cotenant without the knowledge or connivance of the other impose liability on him.⁴¹ Where the body of the mortgage describes the property as belonging to a certain person, and given to secure his debt, it will not support the conviction of a different person merely because he joined in signing the mortgage.⁴²

out the mortgagee's consent.—*State v. Burton*, 165 P. 847, 101 Kan. 62.

22. Neb.—*Fiehn v. State*, 245 N.W. 6, 124 Neb. 16.—*State v. Butcher*, 177 N.W. 184, 104 Neb. 380.

11 C.J. p 641 note 81.

Application of proceeds in payment of prior lien see *supra* § 279 d.

Insufficient tender no defense

Neb.—*Fiehn v. State*, 245 N.W. 6, 124 Neb. 16.

23. Ala.—*Medley v. State*, 140 So. 184, 25 Ala.App. 35.

Mich.—*Bowen v. Borland*, 241 N.W. 201, 257 Mich. 306.

11 C.J. p 641 note 82.

In *Tennessee*, however, by virtue of statute, if the mortgagor pays the debt, to secure which the mortgage was executed, before he is arraigned for trial, he cannot be held for the offense.—*McClure v. State*, Tenn., 113 S.W.2d 63.

24. Mo.—*State v. Munsen*, 72 Mo. App. 543.

11 C.J. p 641 note 83.

25. Ark.—*Cooper v. State*, 37 Ark. 412.

26. Ga.—*Coleman v. Allen*, 5 S.E. 204, 79 Ga. 637, 11 Am.S.R. 449.

27. Ala.—*Fountain v. State*, 13 So. 492, 98 Ala. 40.

28. S.C.—*State v. Reeder*, 15 S.E. 544, 36 S.C. 497.

29. Tex.—*Briggs v. State*, Cr., 44 S. W. 491.

No funds to gather crops

That mortgagor, selling part of a mortgaged crop, had nothing to eat, nor anything on which to gather the crops, is no defense.—*Folmar v. State*, 97 So. 768, 19 Ala.App. 435.

30. Ala.—*Folmar v. State*, *supra*.

31. Tex.—*Briggs v. State*, Cr., 44 S.W. 491.

32. Tex.—*Briggs v. State*, *supra*.

33. Okl.—*Watson v. State*, 149 P. 926, 11 Okl.Cr. 542.

34. Ga.—*Conley v. State*, 11 S.E. 659, 85 Ga. 348.

35. Ark.—*Brown v. State*, 143 S.W. 91, 101 Ark. 599.

36. N.C.—*State v. Woods*, 10 S.E. 555, 104 N.C. 898.

Transferee

Where mortgaged property is transferred to one not a party to the mortgage, with full notice of the mortgage and with the knowledge

and assent of the mortgagee, the transferee may deal with the property in all respects without regard to the statute. The reason for this is that personal property, covered by a mortgage, is the subject of daily transfer and has become so much a part of the usual routine of sales commerce that the courts will not attempt to add burdens not already placed thereon by the legislature.—*Miller v. Salomon*, 281 P. 89, 100 Cal. App. 756.

37. Ala.—*May v. State*, 22 So. 611, 115 Ala. 14.

S.C.—*State v. Reeder*, 15 S.E. 544, 36 S.C. 497.

11 C.J. p 642 note 94.

38. N.C.—*State v. Woods*, 10 S.E. 555, 104 N.C. 898.

39. Ga.—*Sirmans v. State*, 172 S.E. 93, 48 Ga.App. 159.

11 C.J. p 642 note 96.

40. Ala.—*Foster v. State*, 7 So. 185, 88 Ala. 182.

41. Ala.—*Courtney v. State*, 65 So. 433, 10 Ala.App. 141.

42. Miss.—*Monasco v. State*, 62 So. 427, 105 Miss. 551.

§ 282. — Venue

Venue is usually laid in the place where the criminal act took place.

Venue is ordinarily laid in the jurisdiction where the criminal act took place.⁴³ Accordingly, in the absence of statutes the place of sale or other disposition of the property has been held to determine the venue irrespective of where the mortgage was executed or where the property was brought from.⁴⁴ Likewise, where the disposal of mortgaged chattels was the shipping of them out of the state for the purpose of sale, it is punishable in the county from which shipment was made, notwithstanding the state line was crossed from another county.⁴⁵ However, it has been held that if the property is taken to another county with the intention of disposing of it there, and is sold in the latter county, the offense may be prosecuted in either jurisdiction.⁴⁶

§ 283. — Preliminary Proceedings in Prosecution

In prosecutions of this character before a magistrate, it is sufficient to designate the offense, either in the complaint or warrant, by name only, or by words from which it may be inferred.

It has been held to be sufficient, in a prosecution of this character before a magistrate, to designate the offense, either in the complaint or warrant, by name only, or by words from which it may be inferred. Consequently, a warrant charging the offense of "buying mortgaged property" can be reasonably interpreted as charging a violation of a

statute the caption of which is: "Removing, Selling or Buying Property to Which Others Have Claim."⁴⁷

§ 284. — Indictment or Information

- a. In general
- b. Particular allegations

a. In General

The indictment must be definite and certain and must sufficiently set forth an offense under the statute on which it is based.

The indictment must be definite and certain and must sufficiently set forth an offense under the statute on which it is based,⁴⁸ and averments of mere legal conclusions are insufficient.⁴⁹ As a general rule, it is sufficient to describe the offense in the words of the statute, or by words clearly of the same legal import,⁵⁰ or equivalent to, or substantially the same as, the language of the statute.⁵¹ The indictment must be sufficient, however, to notify accused of what he is charged with having done;⁵² and, where the statute is very broad in its terms, it is proper to require the indictment to aver such other facts and circumstances as will bring the matter within the statute.⁵³ An indictment is sufficient if it is in the form prescribed by the statute.⁵⁴

b. Particular Allegations

The indictment should allege every particular matter which the law requires to be proved.

As a general rule, the indictment should allege every matter which the law requires to be proved,⁵⁵

43. Violation of tobacco pool
Ky.—Malone v. Commonwealth, 133 S.W. 235, 141 Ky. 570—Collins v. Commonwealth, 133 S.W. 233, 141 Ky. 564.

44. S.C.—State v. McCoy, 82 S.E. 280, 98 S.C. 133.
11 C.J. p 646 note 91.

45. Kan.—State v. Gorman, 216 P. 290, 113 Kan. 740.

Removal of property

Under a statute providing that prosecutions for offenses committed wholly or partly without and made punishable within the state may be carried on in any county in which the offender is found, a prosecution for removing mortgaged property from the state can be maintained in the county from which the property was removed, and to which defendant is returned on being arrested in another county.—Williams v. State, 11 S.W. 114, 27 Tex.App. 253.

46. S.C.—State v. Perry, 70 S.E. 304, 87 S.C. 535.

47. Ala.—Nolen v. Jones, 76 So. 935, 200 Ala. 577.

48. Ga.—Moore v. State, 110 S.E. 55, 27 Ga.App. 781.
11 C.J. p 642 note 2.

49. Ill.—Keyes v. Peo., 100 Ill.App. 163, affirmed 64 N.E. 730, 197 Ill. 638.

50. Mo.—State v. Ferris, 16 S.W.2d 96, 322 Mo. 1.
11 C.J. p 642 notes 4, 5.

It is necessary that the offense be charged in the terms of the statute or by words of similar import.—Sturgis v. State, 240 P. 750, 32 Okl. Cr. 252.

51. Minn.—State v. Williams, 21 N.W. 746, 32 Minn. 537.
11 C.J. p 642 note 6.

52. S.C.—State v. Perry, 70 S.E. 304, 87 S.C. 535.
11 C.J. p 642 note 7.

53. N.C.—State v. Pickens, 79 N.C. 652, 654.
11 C.J. p 642 note 8.

54. Ala.—Tallent v. State, 38 So.

841, 142 Ala. 47—Atwell v. State, 63 Ala. 61.

S.C.—State v. Perry, 70 S.E. 304, 87 S.C. 535.

55. Iowa.—State v. Gibson, 202 N.W. 108, 199 Iowa 377.

Okl.—Sturgis v. State, 240 P. 750, 32 Okl. Cr. 252.

Tenn.—State v. Ellison, 274 S.W. 536, 152 Tenn. 181.

11 C.J. p 642 note 10.

Designation of class

Since a statute providing that "any mortgagor of personal property, or his legal representative," etc., provides that the doing of a certain act by a person of a certain class shall be a crime, the information must allege that accused is of the class designated.—Little v. State, 32 P.2d 94, 55 Okl. Cr. 420.

Indictments held sufficient

Fla.—Traylor v. State, 160 So. 194, 118 Fla. 764.

Neb.—State v. Butcher, 177 N.W. 184, 104 Neb. 380.

Tex.—Hardin v. State, 227 S.W. 676, 88 Tex. Cr. 495.

and the want of these requirements cannot be aided by intendments,⁵⁶ nor supplied by the findings of the jury.⁵⁷

Absence of consent. In some jurisdictions, where the statute makes absence of the written consent of the holder of the mortgage an element of the offense, it is necessary that the indictment contain an allegation that the sale or removal of the property was effected without such written consent of the owner of the mortgage debt.⁵⁸ However, in other jurisdictions, where such written consent is also made an element of the offense, it has been held sufficient if the indictment fully negatives the idea that any sort of permission or consent was given.⁵⁹

Concealment. An information or indictment charging concealment of the mortgaged property is sufficient if it is sufficiently clear, definite, and explicit to enable a person of common understanding to know what is intended,⁶⁰ and it is not objectionable because it does not state the specific means employed in the concealment.⁶¹

Description of mortgage. As a general rule, it is not necessary to set out the mortgage in hæc verba,⁶² although it is the better practice so to do.⁶³ However, since the existence of the mortgage as a valid and subsisting lien within the protection of the statute at the time when the offense was committed must be alleged,⁶⁴ the indictment must state the existence of the mortgage debt.⁶⁵ The

fact that the title to a mortgage is erroneously alleged to be in the administrators of the mortgagee and not in his heirs will not render the indictment defective.⁶⁶

It is not necessary to allege that the mortgage is in writing,⁶⁷ nor that the mortgagor had a mortgageable interest in the property at the time the mortgage was executed.⁶⁸ Further, it is not necessary for the indictment to aver that the mortgage was recorded or filed for record,⁶⁹ unless the statute applies only to such liens as are recorded,⁷⁰ nor to aver that the mortgage was duly acknowledged,⁷¹ nor that the original mortgagees are still the holders of the lien.⁷²

Where the mortgage is in the form of a deed of trust and discloses the character of trusteeship, it is not necessary for the indictment to allege that the trustee holds the debt,⁷³ nor that he is trustee for the holder thereof.⁷⁴

Under the statute of jeofails, a failure to state in the indictment that the mortgagee is a corporation, when such is the case, is not fatal.⁷⁵

Description of property, ownership and value. It may be sufficient if the indictment describes the property so that it may be identified,⁷⁶ and shows it to be such as falls within the offense created by the statute.⁷⁷ If the property is incorrectly described in the mortgage, the indictment, after describing the

56. Kan.—State v. Ferron, 253 P. 402, 122 Kan. 845.

Minn.—State v. Isaacson, 193 N.W. 694, 155 Minn. 377.
11 C.J. p 642 note 11.

57. Iowa.—State v. Gustafson, 50 Iowa 194.

58. Kan.—State v. Miller, 87 P. 723, 74 Kan. 667.

Neb.—State v. Hughes, 56 N.W. 982, 38 Neb. 366.

59. Ind.—State v. Pepin, 53 N.E. 842, 22 Ind.App. 373.

Mo.—State v. Munsen, 72 Mo.App. 543.

60. Wash.—State v. Schultz, 261 P. 385, 145 Wash. 644.

61. Kan.—State v. Taylor, 133 P. 861, 90 Kan. 438.

62. Tex.—Depew v. State, 32 S.W.2d 457, 116 Tex.Cr. 82.

11 C.J. p 642 note 16.

Matter of inducement

The gist of the offense of fraudulently disposing of mortgaged property is the fraudulent sale of the property, and any pleading of the mortgage is by way of inducement.—Hardin v. State, 227 S.W. 676, 88 Tex.Cr. 495.

63. Tex.—McElroy v. State, 150 S.W. 797, 67 Tex.Cr. 603.

64. Ill.—People v. McGinnis, 220 Ill. App. 29.

Kan.—State v. Ferron, 253 P. 402, 122 Kan. 845.

Tenn.—State v. Ellison, 274 S.W. 536, 152 Tenn. 181.
11 C.J. p 643 note 18.

Allegation held sufficient

An allegation, in an indictment for fraudulently disposing of mortgaged property, that the mortgage was a valid, subsisting, and unsatisfied mortgage, sufficiently alleged that the same was for a consideration, and given to secure a debt.—Hardin v. State, 227 S.W. 676, 88 Tex.Cr. 495.

65. Minn.—State v. Isaacson, 193 N.W. 694, 155 Minn. 377.

11 C.J. p 643 note 19.

Transfer of note

Where the indictment alleged that the mortgage had been transferred, it was fatally defective if it failed to allege that the note which the mortgage was given to secure had also been transferred to the transferee of the mortgage.—Connally v. State, 234 S.W. 886, 90 Tex.Cr. 284.

66. Tex.—State v. Maxey, 41 Tex. 524.

67. Neb.—Wilson v. State, 62 N.W. 209, 43 Neb. 745.

68. Minn.—State v. Williams, 21 N.W. 746, 32 Minn. 537.

69. Ark.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339.
11 C.J. p 643 note 23.

70. Ark.—State v. Harberson, 48 Ark. 378.

71. Ark.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339.
11 C.J. p 643 note 25.

72. Miss.—McCallum v. State, 30 So. 47, 78 Miss. 502.

73. Tex.—Stewart v. State, 131 S.W. 329, 60 Tex.Cr. 92.

74. Tex.—Stewart v. State, supra.

75. Mo.—State v. Carson, 18 S.W. 2d 457, 323 Mo. 46.

76. Tex.—Rice v. State, 293 S.W. 826, 106 Tex.Cr. 547.
11 C.J. p 643 note 29.

77. Tex.—Mooney v. State, 7 S.W. 587, 25 Tex.App. 31.
11 C.J. p 643 note 30.

property as contained in the mortgage, should further allege that such description was incorrect, stating wherein it was incorrect, and also allege the true description of the property.⁷⁸ However, it has been held that a sufficient description in an indictment will not support a conviction based on a mortgage in which the description is defective and insufficient.⁷⁹

Where the crime charged is denominated "larceny" by the statute, ownership must be alleged.⁸⁰

In those jurisdictions where the statute fixes a different degree of punishment, depending on the value of the property, it is necessary that the indictment contain such an allegation.⁸¹ Where, however, the degree of punishment does not depend on the value of the property sold or removed, it is not necessary that the indictment contain such an allegation.⁸²

Intent to defraud. Where the statute makes an intent to defraud an element of the offense, it is necessary that the indictment contain an allegation charging the accused with such an intent.⁸³ In those jurisdictions where the statute does not make the intent to defraud an affirmative element of the crime, it is not necessary that the indictment contain an allegation of such intent.⁸⁴ Under a statute which makes it an offense for one to do the prohibited acts with "the intent to defraud the mortgagee,"⁸⁵ or with the intent to defraud the "mortgagee or assignee of the mortgage,"⁸⁶ it is necessary to allege that the person defrauded comes within the terms of the statute, but under a statute making it an offense to do the prohibited acts with "an intent to hinder, delay or defraud such

mortgagee, trustee or beneficiary, his heirs or assigns," an information charging that the purchaser of the property was defrauded has been held sufficient.⁸⁷

Name of purchaser. When the offense charged consists of the sale of the mortgaged property, in some jurisdictions it is necessary to state in the indictment the name of the purchaser thereof,⁸⁸ while in others no such averment is necessary.⁸⁹

Place of commission. Ordinarily, it is necessary to allege the place where the offense was committed,⁹⁰ although in some jurisdictions the statutes provide that, where the place of the crime is not charged in the indictment, it shall be considered as charging commission within the local jurisdiction of the court.⁹¹

Removal. Where the offense of removal of mortgaged property is defined by statute as a removal "beyond the limits of the county," it is necessary that the removal be charged to have been beyond the limits of the county.⁹²

§ 285. — Issues, Proof, and Variance

The evidence must conform to the allegations of the indictment, the state must prove the essential elements of the offense charged, and a material variance between an essential allegation and the proof offered to sustain it is fatal.

In a prosecution for the sale, removal, or other disposition of mortgaged chattels, the evidence must conform to the allegations of the indictment.⁹³

It is necessary for the state to prove the elements of the offense charged,⁹⁴ and in the absence of such evidence it is error to refuse a peremptory instruction in favor of defendant.⁹⁵ However, where ac-

78. Tex.—*Coleman v. State*, 2 S.W. 859, 21 Tex.App. 520.

79. Ga.—*Wyatt v. State*, 81 S.E. 802, 16 Ga.App. 817.

80. Iowa.—*State v. Gibson*, 202 N.W. 108, 199 Iowa 377.

81. Ill.—*People v. McGinnis*, 220 Ill. App. 29.
11 C.J. p 643 note 33.

Statement of value held sufficient
Mo.—*State v. Ferris*, 16 S.W.2d 96, 322 Mo. 1.

82. Neb.—*Wilson v. State*, 62 N.W. 209, 43 Neb. 745.
11 C.J. p 643 note 34.

83. Kan.—*State v. Miller*, 87 P. 723, 74 Kan. 667.
Tex.—*Satchell v. State*, 1 Tex.App. 438.

84. Neb.—*State v. Hurds*, 27 N.W. 139, 19 Neb. 316, 322.
11 C.J. p 644 note 40.

85. Minn.—*State v. Ruhnke*, 7 N.W. 264, 27 Minn. 309.

86. Mich.—*Peo. v. Schultz*, 48 N.W. 293, 85 Mich. 114.

87. Mo.—*State v. Munsen*, 72 Mo. App. 543.

88. Neb.—*State v. Hughes*, 56 N.W. 982, 38 Neb. 366.
11 C.J. p 643 note 35.

89. Ark.—*McClaskey v. State*, 270 S.W. 498, 168 Ark. 339.
11 C.J. p 643 note 36.

90. Miss.—*McCallum v. State*, 30 So. 47, 78 Miss. 502.
N.C.—*State v. Burns*, 80 N.C. 277—*State v. Pickens*, 79 N.C. 652.

91. Ark.—*Hampton v. State*, 54 S.W. 746, 67 Ark. 266.

92. Okl.—*Sturgis v. State*, 240 P. 750, 32 Okl.Cr. 252.

93. Tex.—*Williams v. State*, 39 S.W.2d 79, 118 Tex.Cr. 336.
11 C.J. p 644 note 50.

94. Ala.—*Isbell v. State*, 176 So. 615, 27 Ala.App. 563—*Wiley v. State*, 75 So. 641, 16 Ala.App. 93.

Ga.—*Wallace v. State*, 192 S.E. 81, 55 Ga.App. 872.

Ill.—*People v. McGinnis*, 220 Ill.App. 29.
11 C.J. p 644 note 51.

The state must prove

(1) Ownership of the mortgage.—*State v. Gibson*, 202 N.W. 108, 199 Iowa 377.

(2) That purchaser was unknown, where the indictment so charges.—*Thurman v. State*, 43 S.W.2d 604, 119 Tex.Cr. 377.

(3) Failure to inform purchaser of mortgage, where such is an element of the offense under the statute.—*State v. Prince*, 297 S.W. 34, 317 Mo. 840.

(4) That the property sold is that covered by the mortgage.—*Monasco v. State*, 62 So. 427, 105 Miss. 551.

Written mortgage

In a prosecution for the fraudulent sale of property upon which a written mortgage has been executed, the mortgage must be in evidence.—*Kolb v. State*, 245 S.W. 909, second case, 93 Tex.Cr. 101.

95. Ala.—*Ex parte Shoults*, 94 So. 777, 208 Ala. 598, granting certiorari *Shoults v. State*, 94 So. 776, 19 Ala.App. 19.

11 C.J. p 644 note 52.

cused is charged with disposing of property covered by two chattel mortgages, it is sufficient if the evidence shows the unlawful disposition of the property under one of them.⁹⁶ Matters which the statute does not make an ingredient of the offense,⁹⁷ or surplusage in the indictment,⁹⁸ need not be proved.

To constitute a variance, the inconsistency between the indictment and the proof offered to sustain it must relate to a material allegation.⁹⁹

§ 286. — Evidence

The rules as to evidence in criminal cases apply in prosecutions of this character.

As already pointed out in § 285, the state must prove the essential elements of the offense charged, and the state must negative the legal presumption

of innocence.¹ Where the statute makes intent to defraud an element of the offense, such intent must be proved by the prosecution, beyond a reasonable doubt, the same as any other allegation,² particularly where the offense is the removal of mortgaged property with intent to defraud the mortgagor;³ but, where the statute does not require a specific intent, fraudulent intent may be presumed as a necessary consequence of doing that which the statute prohibits.⁴ Where the absence of the mortgagee's consent is made an element of the offense, it has been held unnecessary for the prosecution, in the first instance, to prove that the sale took place without it.⁵

Admissibility. Evidence to be admissible must be relevant and material.⁶ However, when it becomes necessary to prove motive, intent, or knowledge on

96. S.C.—State v. Boyer, 68 S.E. 573, 86 S.C. 260.

97. **Intent**, where not an ingredient of the offense, need not be proved.—State v. Bates, 194 N.W. 107, 156 Minn. 104.

98. Ga.—Moore v. State, 110 S.E. 55, 27 Ga.App. 781.

99. Ala.—Little v. State, 144 So. 462, 25 Ala.App. 273.

Ill.—People v. McGinnis, 220 Ill.App. 29, 11 C.J. p 644 note 54.

Slight variations between the descriptions of the mortgaged property in the mortgage and the indictment are not fatal.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339.

There was no variance

(1) For an indictment for fraudulently disposing of mortgaged property to name less property than is named in the mortgage.—Hardin v. State, 227 S.W. 676, 88 Tex.Cr. 495—11 C.J. p 644 note 54 [b] (6).

(2) Other examples see 11 C.J. p 644 note 54 [b].

Variance held fatal

(1) Indictment alleging bill of sale to property wrongfully sold was executed by defendant and another, and proof showing execution by other alone.—Holmes v. State, 147 S.E. 776, 39 Ga.App. 556.

(2) Where indictment was for moving mortgaged property from county, and conditional sale contract was introduced in evidence.—Williams v. State, 39 S.W.2d 79, 118 Tex. Cr. 386.

1. N.J.—State v. Moldenhauer, 136 A. 412, 103 N.J.Law 238.

2. Tacit authority to sell

Where a prosecution for illegal sale of personal property under mortgage is instituted in aid of adjustment of a civil liability, and the evidence shows that the mortgagor

had tacit authority from the mortgagee to sell the property, but no written authority as stipulated in the mortgage, an actual intent to defraud must be shown to sustain a conviction, as distinguished from constructive fraud.—Mays v. State, 242 P. 580, 33 Okl.Cr. 185.

3. N.J.—State v. Moldenhauer, 136 A. 412, 103 N.J.Law 238, 11 C.J. p 645 note 56.

4. S.C.—State v. Haynes, 55 S.E. 118, 74 S.C. 450, 11 C.J. p 645 note 55.

Refusal to disclose whereabouts

(1) Intent to defraud may be inferred from refusal to disclose whereabouts of mortgaged ring, after default in payments thereon.—People, on Complaint of Perman Bros., v. Francia, 253 N.Y.S. 857, 142 Misc. 143.

(2) Under a statute which prohibits certain acts, and further provides that on the failure of an officer, after a diligent search, to find the property, or on the failure of the mortgagor to produce it on the demand of the mortgagee, it should be prima facie evidence as to the disposition and intent, in the absence of evidence on the part of the accused, to explain or justify the acts proved by the prosecution, he will be presumed to have intended the necessary consequences of his own act, and the burden is on him to explain or justify the acts proved by the prosecution.—State v. Holmes, 26 S.E. 692, 120 N.C. 573.

(3) However, on a prosecution under such statute, where there was evidence tending to show that the sale or removal by the mortgagor would not have the effect of "hindering, delaying or defrauding the rights of the mortgagee," no inference of a fraudulent intent would be made from the fact that the re-

moval or sale was willfully and knowingly done.—State v. Manning, 12 S.E. 248, 107 N.C. 910.

Sale of mortgaged property without payment of the mortgage debt raises a presumption of intent to defraud.—Bowen v. Borland, 241 N.W. 201, 257 Mich. 306.

5. S.C.—State v. Williams, 14 S.E. 319, 35 S.C. 344.

Affirmative defense of mortgagee's consent to the sale must be proved by accused.—Folmar v. State, 97 So. 768, 19 Ala.App. 435.

6. Ala.—Little v. State, 144 So. 462, 25 Ala.App. 273—Folmar v. State, 97 So. 768, 19 Ala.App. 435, 11 C.J. p 645 note 63.

Evidence held admissible

(1) In general. Ark.—McClaskey v. State, 270 S.W. 498, 168 Ark. 339.

Kan.—State v. Gorman, 216 P. 290, 113 Kan. 740.

(2) As to the possession of the property as tending to prove an element of the offense.—Swint v. State, 57 So. 394, 3 Ala.App. 93.

(3) To show that accused had parted with the possession of the mortgaged property.—Holcomb v. State, 94 So. 917, 19 Ala.App. 24, certiorari denied Ex parte Holcomb, 94 So. 921, 208 Ala. 698—11 C.J. p 645 note 78.

(4) Evidence of the means, other than the brand mark, by which the mortgagee identified the cattle.—People v. Iden, 142 P. 117, 24 Cal. App. 627.

(5) Since the progeny of mortgaged animals born after the making of the mortgage become subject to the lien created by the mortgage, evidence as to the birth thereof.—Swint v. State, supra.

Evidence held inadmissible

(1) A writ of attachment which

the part of accused,⁷ or to impeach accused,⁸ greater latitude is allowed in the admission of testimony and it is competent for the prosecution to prove such acts, conduct, or declaration of accused as tend to establish such motive, intent, or knowledge,⁹ or to impeach accused, provided the court limits it to the particular purpose for which it was introduced.¹⁰ The note which the mortgage was given to secure is admissible as it relates to the indebtedness of accused.¹¹ A mortgage is admissible in evidence if its execution is properly proved;¹² but where the statute requires the mortgage to be executed in a certain manner a mortgage which does not comply with the statute is inadmissible.¹³ Secondary evidence as to the mortgage is not admissible in the absence of the proper foundation.¹⁴

Evidence which tends to show an absence of fraud on the part of accused is admissible in his behalf.¹⁵ Accordingly, evidence that the sale was made in order to pay the debt of a prior lien, the subsequent mortgagee refusing the balance of the

proceeds,¹⁶ or that the proceeds of the sale were entirely consumed in discharging the prior lien,¹⁷ is admissible as tending to show an absence of fraud. Under a statute requiring the written consent of the mortgagee to removal or sale of the property, it has been held that evidence as to a verbal consent or acquiescence is not admissible in defense,¹⁸ although it has also been held that such evidence is admissible in mitigation of punishment,¹⁹ or in determining whether there was a fraudulent intent on the part of the mortgagor.²⁰ Where, however, the property is sold without the consent of one holding a superior lien, evidence that the proceeds were applied to the payment of a subsequent mortgage, known to be an inferior lien, is not admissible to show the absence of fraudulent intent.²¹

Weight and sufficiency. In prosecutions of this character, the state has the burden of proving the offense charged in the indictment by evidence sufficient to satisfy the jury of accused's guilt beyond a reasonable doubt and to a moral certainty.²²

fails to describe the property mentioned in the indictment.—*Shuman v. State*, 56 So. 694, 62 Fla. 84.

(2) Evidence as to the disposition of the mortgaged property by another, in the absence of evidence showing such authority from accused.—*Owens v. State*, 79 S.W. 575, 46 Tex.Cr. 14.

Evidence held irrelevant or immaterial

(1) Evidence as to whether the mules were able to do certain work or were stiff, on the question of identity.—*Shoults v. State*, 94 So. 776, 19 Ala. App. 19, certiorari granted *Ex parte Shoults*, 94 So. 777, 208 Ala. 598.

(2) Evidence of any claim alleged mortgagee had to property other than mortgage.—*Wiley v. State*, 75 So. 641, 16 Ala.App. 93.

(3) Evidence that one accused of selling part of a mortgaged crop turned over the balance to mortgagees, and paid the proceeds on advances made for the gathering of the crop, in the absence of any claim that the entire debt was discharged.—*Folmar v. State*, 97 So. 768, 19 Ala. App. 435.

7. Tex.—*Martin v. State*, 13 S.W. 151, 28 Tex.App. 364.

8. Tex.—*Cowart v. State*, 158 S.W. 809, 71 Tex.Cr. 116.

9. Ark.—*McClaskey v. State*, 270 S.W. 498, 168 Ark. 339.

Kan.—*State v. Gorman*, 216 P. 290, 113 Kan. 740.
11 C.J. p 645 note 66.

Intent

(1) The intent of the mortgagor may be gathered from all the at-

tendant facts and circumstances.—*Galbreath v. Wilson*, 10 Ky.L. 638.

(2) In order to prove a fraudulent intent previous disposition of other property included in the mortgage may be shown, although such proof may show that accused has committed a crime distinct from that for which he is being tried.—*Martin v. State*, 13 S.W. 151, 28 Tex.App. 364—11 C.J. p 645 note 70.

(3) Testimony as to other debts of accused is admissible as bearing upon the fraudulent intent.—*Owens v. State*, 79 S.W. 575, 46 Tex.Cr. 14.

10. Tex.—*Cowart v. State*, 158 S.W. 809, 71 Tex.Cr. 116.

11. Ala.—*Folmar v. State*, 97 So. 768, 19 Ala.App. 435.

12. Ala.—*Livingston v. State*, 97 So. 166, 19 Ala.App. 316.

11 C.J. p 645 note 73.

13. Ala.—*Houston v. State*, 21 So. 813, 114 Ala. 15.

14. Ala.—*Foster v. State*, 7 So. 185, 88 Ala. 182.

Tex.—*Harris v. State*, Cr., 67 S.W. 327.

Certified copy held admissible

Tex.—*Lee v. State*, 277 S.W. 151, 102 Tex.Cr. 2.

15. Tex.—*Graves v. State*, 72 S.W.2d 917, 126 Tex.Cr. 461.

11 C.J. p 646 note 82.

Consent

(1) Where the mortgagor sells the property with consent of the first mortgagee who holds a debt greatly in excess of the value of the property, while not conclusive as to the effect upon the subsequent mortga-

gee, yet such evidence is admissible and tends to show the absence of an intent to defraud.—*Osborne v. State*, 160 S.W. 215, 109 Ark. 440.

(2) Accused is entitled to introduce in rebuttal evidence that tends to show the mortgagee's consent to the sale, as that affects his credibility.—*Cowart v. State*, 158 S.W. 809, 71 Tex.Cr. 116.

16. Ala.—*Conner v. State*, 12 So. 413, 97 Ala. 83.

17. N.C.—*State v. Ellington*, 4 S.E. 534, 98 N.C. 749.

18. Fla.—*Ellis v. State*, 76 So. 698, 74 Fla. 215.

19. S.D.—*State v. Shomaker*, 187 N.W. 630, 45 S.D. 352.
11 C.J. p 646 note 86.

20. Kan.—*State v. Burton*, 165 P. 847, 101 Kan. 62.

Mo.—*DeWitt v. Syfon*, 211 S.W. 716, 202 Mo.App. 469.

21. Ala.—*Courtney v. State*, 65 So. 433, 10 Ala.App. 141.

22. Ala.—*Little v. State*, 144 So. 462, 25 Ala.App. 273.
11 C.J. p 646 note 90.

Evidence held sufficient

(1) To sustain a conviction.

Ark.—*Stewart v. State*, 214 S.W. 48, 139 Ark. 403.

Ga.—*Sirmans v. State*, 172 S.E. 93, 48 Ga.App. 159—*Hardin v. State*, 150 S.E. 453, 40 Ga.App. 529.

Kan.—*State v. Wilfong*, 220 P. 250, 114 Kan. 639—*State v. Burton*, 165 P. 847, 101 Kan. 62.

Mo.—*State v. Ferris*, 16 S.W.2d 96, 322 Mo. 1—*State v. Griffin*, 228 S.W. 800.

§ 287. — Trial and Review

The rules as to trial in criminal cases generally apply.

The trials of prosecutions for the wrongful sale or other disposition of mortgaged property are governed by the usual rules of trials in criminal cases.

Questions of law and fact. In prosecutions of this character, questions of fact are to be tried by the jury.²³ Where the evidence is not undisputed, whether the property sold was subject to the mortgage,²⁴ whether the mortgagee consented to the sale,²⁵ the mortgagor's ownership of the property at the time he executed the mortgage,²⁶ and the mortgagor's intent in making the sale²⁷ have been held to be questions for the jury.

Where the evidence fails to establish the necessary elements of the offense, accused is entitled to an instruction directing the jury to find a verdict of not guilty.²⁸

Instructions. The instructions of the court to the jury must correctly state the law,²⁹ and clearly present the issues raised by the evidence.³⁰ They must also be free from argumentativeness and must not give undue prominence to the testimony of a single witness.³¹ An erroneous refusal to give an instruction is not remedied by an instruction which does not present the issue as made by the facts;³² but an error, if any, in overruling a motion to require the state to elect, whether it would rely for conviction on a concealment, or on a sale of the mortgaged property, is cured by an instruction that a conviction can be had only on one of the acts charged.³³

Verdict. The verdict must conform to the charge in the indictment or information,³⁴ although a general verdict of guilty may be sufficient.³⁵ It should also be responsive to the evidence offered in the case,³⁶ and to the issues presented by the instruc-

Neb.—Fiehn v. State, 245 N.W. 6, 124 Neb. 16.

Okl.—Dobbins v. State, 268 P. 1116, 40 Okl.Cr. 334.

Tex.—Castle v. State, 251 S.W. 808, 94 Tex.Cr. 364.

11 C.J. p 646 note 90 [a].

(2) To show ownership of mortgage.—State v. Gibson, 202 N.W. 108, 199 Iowa 377.

Evidence held insufficient to sustain a conviction.

Ala.—Wiley v. State, 75 So. 641, 16 Ala.App. 93.

Ga.—Tatom v. State, 109 S.E. 917, 27 Ga.App. 779.

N.Y.—People v. Primon, 250 N.Y.S. 543, 232 App.Div. 541.

Okl.—Weitz v. State, 215 P. 962, 24 Okl.Cr. 56.

Tex.—Shelden v. State, 45 S.W.2d 968, 119 Tex.Cr. 376—Wise v. State, 44 S.W.2d 693, 119 Tex.Cr. 379.

11 C.J. p 646 note 90 [b].

Circumstantial evidence

In a prosecution for the sale of mortgaged property with intent to defraud mortgagee, the fraudulent intent may be shown by circumstantial evidence, where the circumstances naturally, logically, and clearly tend to and justify an inference of such intent.—State v. Wilfong, 220 P. 250, 114 Kan. 689.

Name of purchaser

If the name of the purchaser was known, such fact will rebut the presumption that it was unknown, and will not support an allegation that it was unknown.—Thurman v. State, 43 S.W.2d 604, 119 Tex.Cr. 377.

23. Ky.—Wyrick v. Commonwealth, 54 S.W.2d 629, 246 Ky. 127.

24. Ala.—McCullough v. State, 74 So. 755, 15 Ala.App. 661.

25. Iowa.—State v. Gibson, 202 N.W. 108, 199 Iowa 377.

26. Tex.—Hardin v. State, 227 S.W. 676, 38 Tex.Cr. 495.

27. Ala.—Livingston v. State, 97 So. 166, 19 Ala.App. 316.

Tex.—Graves v. State, 72 S.W.2d 917, 126 Tex.Cr. 461.

11 C.J. p 646 notes 93, 98.

Fraudulent intent

(1) Fraudulent intent is an inferential fact to be drawn by the jury.—Foster v. State, 7 So. 185, 88 Ala. 182.

(2) It must be gathered from all of the attendant facts and circumstances.—Galbreath v. Wilson, 10 Ky.L. 638.

(3) A proof of the sale or removal of the mortgaged property with a knowledge of the lien will authorize a jury to infer a fraudulent intent, unless there are attending circumstances to repel the inference.—Foster v. State, supra.

11 C.J. p 646 note 97.

28. Ala.—Isbell v. State, 176 So. 615, 27 Ala.App. 563.

11 C.J. p 646 note 99.

Refusal of affirmative charge held proper under the evidence.

Ala.—Holcomb v. State, 94 So. 917, 19 Ala.App. 24, certiorari denied.

Ex parte Holcomb, 94 So. 921, 208 Ala. 698—McCullough v. State, 74 So. 755, 15 Ala.App. 661.

Kan.—State v. Perkins, 210 P. 1091, 112 Kan. 455.

29. Ga.—Hardin v. State, 150 S.E. 453, 40 Ga.App. 529.

Mo.—State v. Ferris, 16 S.W.2d 96, 322 Mo. 1—State v. Griffin, 228 S.W. 800.

Wash.—State v. Schultz, 261 P. 385, 145 Wash. 644.

11 C.J. p 646 note 2.

Instructions held erroneous or properly refused

(1) Instruction ignoring part of indictment and proof.—State v. Bates, 194 N.W. 107, 156 Minn. 104.

(2) Instruction improperly stating the law as to validity of mortgage.—State v. Gorman, 216 P. 290, 113 Kan. 740.

(3) An instruction improperly placing on accused the burden of showing the mortgagee's consent.—State v. Griffin, Mo., 228 S.W. 800.

30. Ark.—McClaskey v. State, 270 S.W. 498, 168 Ark. 839.

Mo.—State v. Griffin, 228 S.W. 800.

Tex.—Daniels v. State, 272 S.W. 143, 100 Tex.Cr. 493.

11 C.J. p 646 note 1.

Instructions held sufficient

Iowa.—State v. Gibson, 202 N.W. 108, 199 Iowa 377.

31. Ala.—Fountain v. State, 13 So. 492, 98 Ala. 40—Wilson v. State, 71 So. 971, 14 Ala.App. 87.

11 C.J. p 646 note 3.

32. Tex.—Sweat v. State, Cr., 59 S.W. 265.

33. Kan.—State v. Taylor, 133 P. 861, 90 Kan. 438.

34. Cal.—People v. Wolfrom, 115 P. 1088, 15 Cal.App. 732.

Kan.—State v. Braden, 96 P. 340, 78 Kan. 576.

35. Mo.—State v. Miller, 164 S.W. 482, 255 Mo. 223.

36. Mo.—State v. Miller, supra.

Verdict in conjunctive

Under a statute making it an offense to sell or dispose of mortgaged chattels with intent to defraud, a verdict finding accused guilty of selling and disposing of the property may be upheld where the evidence shows a disposal of the property,

tions of the court.³⁷ The verdict must also be definite and certain,³⁸ and furnish the facts necessary to enable the court to pronounce sentence, since verdicts cannot be supplied with material and important findings omitted by the jury, unless by a reasonable degree of inference and interpretation the verdict may be rendered certain beyond a reasonable doubt.³⁹

§ 288. — Sentence and Punishment

Punishment for offenses of this character is a matter of statutory regulation.

The maximum punishment for offenses of this character is usually prescribed by statute,⁴⁰ and the sentence imposed should not be excessive.⁴¹

XI. LIEN AND PRIORITIES

§ 289. In General

Mortgages are ordinarily valid between the parties irrespective of defects which would invalidate them as to third persons. A mortgage is not a lien within the meaning of certain statutes designating the holder of the lien as lienor, factor, or consignee. A person who gains a prescriptive title by adverse possession has rights superior to the lien of a mortgage by the prior owner.

The question of whether a mortgage transfers the legal title or operates merely to create a lien is considered *supra* § 1. As a general rule a mortgage is valid between the immediate parties, irrespective of defects, errors, or circumstances which would invalidate it as against one who has acquired a title through a bona fide purchase from the owner, without notice of a weakness in the title, or through a similarly bona fide encumbrance created by such owner.⁴² Mortgages are not "liens upon merchandise or the proceeds thereof" within the meaning of a statute providing that "liens upon merchandise or the proceeds thereof created by agreement for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, shall not be void or presumed to be void or fraudulent . . . provided" particular notices are posted "stating the name of the lienor, and designating said lienor as 'lienor, factor or consignee,'" since they are not liens at all, are not created by agreement, and are not given to secure the pay-

ment of commissions or other charges, and a mortgagee could in no true sense be designated as "lienor, factor or consignee" in a sign to be posted.⁴³

Adverse possession. A person who obtains the property otherwise than through or under the mortgagor, and who holds it in adverse possession for the statutory period, thereby gains a prescriptive title superior to the lien of the mortgage.⁴⁴

§ 290. Commencement of Lien

- a. In general
- b. Crop liens

a. In General

The lien of a mortgage does not attach until the debt is created, and, where covering after-acquired or nonexistent property, not until such property is acquired by the mortgagor or comes into existence.

Since a mortgage is but an incident to a debt, no lien arises until the debt is created.⁴⁵ Thus a mortgage covering future advances will attach only from the date of the advances and not from the date of the mortgage,⁴⁶ and a conditional lien does not become operative where the contingent balance of indebtedness, for the security of which the lien is given, never comes into existence, according to the plain and unambiguous stipulations set forth in the instrument creating the lien.⁴⁷ Also a mortgage given to secure a debt substantially in excess

whether or not it would have warranted a conviction if the charge had been merely of selling.—*State v. Gorman*, 216 P. 290, 113 Kan. 740.

37. Mo.—*State v. Miller*, 164 S.W. 482, 255 Mo. 223.

38. Cal.—*People v. Wolfrom*, 115 P. 1088, 15 Cal.App. 732.

Kan.—*Smith v. Braden*, 96 P. 840, 78 Kan. 576.

Felony or misdemeanor

Where the statute makes the offense a felony where the chattel is valued at more than fifty dollars, and a misdemeanor if its value is less than fifty dollars, the verdict should indicate whether accused was found guilty of a felony or a misde-

meanor so that the jurisdiction of the appeal may be determined thereby.—*State v. Griffin*, Mo., 228 S.W. 800.

39. Kan.—*State v. Braden*, 96 P. 840, 78 Kan. 576.
11 C.J. p 847 note 12.

40. N.Y.—*People v. Taylor*, 287 N.Y. S. 667, 159 Misc. 377.

41. Neb.—*Fiehn v. State*, 245 N.W. 6, 124 Neb. 15.

42. Colo.—*Thomas v. First Nat. Bank*, 51 P.2d 589, 97 Colo. 474.
Ind.—*Gaumer v. Register Pub. Co.*, 119 N.E. 728, 730, 67 Ind.App. 668, citing *Corpus Juris*.

43. N.Y.—*Utica Trust & Deposit Co. v. Decker*, 155 N.E. 665, 244 N.Y.

340, reversing 215 N.Y.S. 669, 217 App.Div. 137.

44. Ga.—*Towler v. Carithers*, 61 S. E. 1132, 4 Ga.App. 517.

45. Tex.—*Harris v. N. Parker & Son*, Civ.App., 23 S.W.2d 745.

46. N.Y.—*Brown v. Guthrie*, 18 N.E. 254, 110 N.Y. 435.

Or.—*Nicklin v. Batts Spring Co.*, 5 P. 51, 11 Or. 406, 50 Am.R. 477.

Pa.—*McClure v. Roman*, 52 Pa. 458.

47. Ga.—*Dingfelder v. Georgia Peach Growers Exchange*, 192 S.E. 188, 184 Ga. 569.

Subsequent crop if present crop insufficient

Where bill of sale to peach crop, made to secure advances by broker,

of the amount a prior mortgage was given to secure will not be considered a renewal mortgage the lien of which attaches as of the date of the first mortgage.⁴⁸

Under a statute requiring that a mortgage be "forthwith filed" to be valid against creditors, if it is so filed the inception of the lien is from its execution and not from the date of its registration.⁴⁹

After-acquired or nonexistent property. Although in some jurisdictions a mortgage of personal property to be acquired does not attach to that property, at law or in equity, as it comes into the hands of the mortgagor,⁵⁰ as a general rule the lien of a mortgage covering after-acquired property or property not yet in existence attaches as soon as, but not before, the property is acquired by the mortgagor or comes into existence.⁵¹ As between the

parties, a lien on rents and profits arises at the date of execution of the mortgage providing therefor.⁵²

b. Crop Liens

The lien of a mortgage covering crops in existence attaches when the mortgage is executed; but, where it covers crops to be grown after the execution of the mortgage, the lien attaches when the crop comes into existence which ordinarily is when it is planted or sown.

The lien of a mortgage given on crops in existence attaches when the mortgage is given.⁵³ While a mortgage upon crops to be grown after the execution of the mortgage is generally held to be valid, as appears supra § 32, and, although it is held in some jurisdictions, in accordance with the express provisions of statutes in force therein, that mortgages on crops to be planted have the same force and effect to bind such crops and their products as other mortgages to bind property already in being, provided only the crops are planted within

provided that net proceeds of sale should be applied in payment of advances and, if insufficient, that broker would have title to following year's crop as security for such unpaid balance, and net proceeds exceeded amount of advances, there was no indebtedness for security of which lien on following year's crop could arise.—*Dingfelder v. Georgia Peach Growers Exchange*, supra.

38. U.S.—*Murphy Hotels Corporation v. Central Nat. Bank Savings & Trust Co.*, C.C.A.Ohio, 18 F.2d 719, certiorari denied *Central Nat. Bank Savings & Trust Co. v. Murphy Hotels Corporation*, 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412.

39. Tex.—*Collins v. McFarland*, Civ. App., 60 S.W.2d 334, error refused.

40. Mass.—*Massachusetts Gasoline & Oil Co. v. Go-Gas Co.*, 156 N.E. 871, 259 Mass. 585—*West Springfield Trust Co. v. Hinckley*, 154 N.E. 580—*Davis v. Smith-Springfield Body Corporation*, 145 N.E. 434, 250 Mass. 278.

Possession by mortgagee

Where the rights of third persons have not intervened, the taking of possession by the mortgagee of after-acquired property in the assertion of a right previously given confers a title which relates back to the date of the mortgage.—*Petition of Post*, C.C.A.Mass., 17 F.2d 555, reversing, D.C., *In re Robert Jenkins Corporation*, 11 F.2d 979, certiorari denied *evy v. Post*, 43 S.Ct. 20, 275 U.S. 27, 72 L.Ed. 407.

1. U.S.—*Martin v. Arctic Ice Machine Co.*, C.C.A.Tex., 29 F.2d 155—*In re Alabama Braid Corporation*, D.C.Ala., 13 F.Supp. 336—*In re Los Angeles Mfg. Co.*, D.C.Cal., 7 F.Supp. 567—*W. Hayward Export Co. v. Lee*, Fla., 193 F. 647, 113 C.C.A.

515, affirming, D.C., *In re McDavid Lumber Co.*, 190 F. 97.

Cal.—*Bank of California v. McCoy*, App., 72 P.2d 923.

Dak.—*Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co.*, 43 N.W. 806, 6 Dak. 357.

Iowa.—*Lowden Sav. Bank v. Zeller*, 194 N.W. 966, 196 Iowa 1205.

La.—*Soady Bldg. Co. v. Collins*, 137 So. 631, 18 La.App. 164.

N.Y.—*Burton v. Klein*, 239 N.Y.S. 103, 135 Misc. 571.

N.D.—*Hellstrom v. First Guaranty Bank*, 209 N.W. 379, 54 N.D. 322—*First Guaranty Bank v. Rex Theatre Co.*, 195 N.W. 564, 50 N.D. 322—*Bidgood v. Monarch Elevator Co.*, 84 N.W. 561, 9 N.D. 627, 81 Am.S.R. 604.

Okl.—*Union Nat. Bank v. Leidecker Tool Co.*, 178 P. 690, 72 Okl. 121—*Mitchell v. Guaranty State Bank of Okmulgee*, 172 P. 47, 63 Okl. 110. S.C.—*Clowney v. Rivers*, 123 S.E. 759, 129 S.C. 58—*Creech v. Long*, 51 S.E. 614, 72 S.C. 25—*Perkins v. Loan, etc.*, Bank, 20 S.E. 759, 43 S.C. 39—*Akers v. Rowan*, 12 S.E. 165, 33 S.C. 451, 10 L.R.A. 705—*Parker & Co. v. Jacobs*, 14 S.C. 112, 37 Am.R. 724.

S.D.—*Iverson v. Soo Elevator Co.*, 119 N.W. 1006, 22 S.D. 638.

Tex.—*Zeigler v. Citizens' Bank of Venus*, Civ.App., 79 S.W.2d 662, 664, citing *Corpus Juris*, error refused.

Condition precedent

Mortgagor's acquisition of title is condition precedent to property's becoming subject to mortgage under clause covering after-acquired property.—*Hodes v. Mooney*, 152 A. 205, 8 N.J.Misc. 851, 9 N.J.Misc. 48.

Considered a lien, not a conveyance

This rule "is what is termed the equity rule, and is generally followed

where the mortgages are held to be mere liens, and not transfers of title".—*Alberts v. Alberts*, 221 N.W. 80, 81, 53 S.D. 463.

Lien equitable before possession by mortgagee

A mortgage covering after-acquired property is effectual to charge the property as soon as it is acquired by the mortgagor, and before possession is obtained by the mortgagee, with an equitable lien.—*Perkins v. Loan, etc.*, Bank, 20 S.E. 759, 43 S.C. 39.

Realty converted into personality by severance

(1) Where a mortgage provided that mortgages should have a lien on all the wood cut on the land and that mortgagor should from time to time execute such mortgages as should be necessary to protect the same, and it was held that, although the agreement could not take effect until the wood should be cut and severed from the realty, it attached instantly and could be enforced against mortgagor and all persons claiming under him with notice.—*Wood v. Lester*, 29 Barb.N.Y., 145.

(2) A mortgage on ores to be mined does not attach until the ore is actually mined.—*Galloway v. Blue Springs Min. Co.*, Tenn.Ch.App., 37 S.W. 1016.

52. Iowa.—*Soehren v. Hein*, 243 N.W. 330, 214 Iowa 1060.

53. Mont.—*N Bar N Land & Livestock Co. v. Taylor*, 22 P.2d 313, 94 Mont. 350.

When crop exists

A crop of hay is in existence so that the lien of a mortgage will attach thereto where the roots are in the ground, even though nothing is growing at the time.—*N Bar N Land & Livestock Co. v. Taylor*, supra.

twelve months after the execution of the mortgage, or the mortgage is executed on or after a certain date in the year the crop is to be grown,⁵⁴ in general a mortgage on such crops does not give a present lien when the mortgage is executed, but the lien attaches only when the crop comes into existence and not before.⁵⁵ Also the lien of a mortgage on so much of the mortgagor's growing crop of a specified year as he puts into designated sheds attaches as soon as it is placed in the sheds, without further act on the part of the mortgagee.⁵⁶

Where, under the terms of the lease, title and possession of the crops are reserved in the lessor until after a division of the crops and settlement between the lessor and lessee, a mortgage by the lessee upon the crops to be grown on the land leased attaches to the equitable interest of the tenant when the crop comes into existence;⁵⁷ and the instant when settlement is had and a division of the crops made, the tenant's equitable interest becomes a legal interest to which the lien of the mortgage attaches, regardless of who is then in actual possession of the crop, and even though the crop has been delivered to an elevator for general

storage and the tenant can only require a return of like kind, quality, and amount.⁵⁸ A mortgage by a landlord of his share of the crop which he is to receive as rent under a lease whereby the legal title to the crops and the right to their exclusive possession are in the tenant until a separation and delivery of the rent share, attaches a lien to the landlord's share as soon as it is ascertained and set apart, if not before.⁵⁹

Time crop comes into existence. For the purpose of attaching the lien of a mortgage, a crop comes into existence when sown or planted⁶⁰ or, in some states, as soon as the crop is above the ground, and possibly at the time of the germination of the seed;⁶¹ but in no instance does the lien attach prior to the actual planting or sowing, the preparation of the land for sowing or planting being insufficient therefor.⁶²

Relation back of lessee's subsequently acquired leasehold interest. Where a mortgage on crops to be thereafter grown is executed prior to the time the mortgagor leases the land on which the crop is to be grown, the lien of the mortgage attaches only from the time of the execution of the lease.⁶³

54. Ala.—Keyser v. Maas, 21 So. 346, 111 Ala. 390.

Ark.—Snerly v. Stacey, 298 S.W. 213, 174 Ark. 978.

Formerly the lien of a mortgage on crops to be grown in the future did not attach to the crop until it came into esse.—Snerly v. Stacey, supra.

55. U.S.—Sims v. Jamison, C.C.A. Or., 67 F.2d 409.

Cal.—First Nat. Bank of Oakdale v. Brashear, 253 P. 143, 145, 200 Cal. 389, citing *Corpus Juris*.

Idaho.—Albrethsen v. Clements, 279 P. 1097, 48 Idaho 80.

Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908, 911, quoting *Corpus Juris*—Fawcett Inv. Co. v. Rullestad, 253 N.W. 131, 218 Iowa 654, 94 A.L.R. 800—Louis v. Hansen, 219 N.W. 523, 205 Iowa 1216.

Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580.

Minn.—Massey-Harris Harvester Co. v. Moorhead Farmers' Elevator Co., 222 N.W. 571, 176 Minn. 90—State Bank of Stephen v. Farmers' Grain Co., 219 N.W. 871, 872, 174 Minn. 531, citing *Corpus Juris*.

N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N.D. 355, L.R.A.1917E 298.

Tex.—Zeigler v. Citizens' Bank of Venus, Civ.App., 79 S.W.2d 662, 664, citing *Corpus Juris*—Waters v. B. F. Ellington & Co., Civ.App., 289 S. W. 417.

Wash.—Third Nat. Bank v. Kniffen,

255 P. 378, 143 Wash. 434—First Nat. Bank v. Womach, 223 P. 586, 128 Wash. 492.

11 C.J. p 647 note 13.

Mortgage is effective as between the mortgagor and mortgagee from the execution and delivery of the mortgage.—Thompson Yards v. Richardson, 199 N.W. 863, 51 N.D. 241.

Lien exists in present

The lien of a mortgage on unplanted crop exists in present.—Thompson Yards v. Richardson, 199 N.W. 863, 51 N.D. 241.

Lien attaches automatically

Mortgage on unplanted crop will attach automatically as lien thereon on coming into existence by the agency of mortgagor.—Thompson Yards v. Richardson, 199 N.W. 863, 51 N.D. 241.

Failure to raise crops

(1) A mortgage on crops to be thereafter grown is subject to be defeated if the mortgagor fails to bring the crops into existence.—First Nat. Bank v. Coit, 257 P. 469, 79 Mont. 468.

(2) If no crop is sown there is nothing to which the mortgage can attach.—Third Nat. Bank v. Kniffen, 255 P. 378, 143 Wash. 434.

56. Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580.

57. N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N. D. 355, L.R.A.1917E, 298, overruling Herrmann v. Minnesota Elevator Co., 145 N.W. 821, 27 N.D.

235, and Bidgood v. Monarch Elevator Co., 84 N.W. 561, 9 N.D. 627, 81 Am.S.R. 604.

58. S.D.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S.D. 479.

Acceptance of storage tickets

Landlord, by accepting storage tickets for his share of grain and selling grain, without expressing dissatisfaction, acquiesced in tenant's division of crops, so that mortgage given on tenant's share attached.—First State Bank of New Salem v. Farmers' Co-op. Elevator Co., 231 N. W. 859, 59 N.D. 699.

59. Iowa.—Riddle v. Dow, 66 N.W. 1066, 98 Iowa 7, 32 L.R.A. 811. Minn.—Potts v. Newell, 22 Minn. 561.

60. Idaho.—Lords v. Lava Hot Springs State Bank, 256 P. 761, 44 Idaho 316.

Mont.—Moccasin State Bank v. Waldron, 264 P. 940, 81 Mont. 579.

Wash.—First Nat. Bank v. Womach, 223 P. 586, 128 Wash. 492.

61. N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N.D. 355, L.R.A.1917E 298.

62. Cal.—First Nat. Bank of Oakdale v. Brashear, 253 P. 143, 200 Cal. 389.

63. N.D.—Fargo Loan Agency v. Larson, 207 N.W. 1003, 53 N.D. 621.

Relation back of lease interest

Title, right, and interest acquired by mortgagor by lease subsequent to

§ 291. Scope and Extent of Lien

- a. In general
- b. Crop mortgages

a. In General

The lien of a mortgage attaches only to the property described therein and only to the mortgagor's interest, and is enforceable only to the extent of the debt secured. The lien attaches to the property in its entirety where another knowingly changes its form or adds to its value, but it creates no interest in or lien on the land on which the chattels are located.

The lien of a mortgage in respect of its amount is enforceable only for the debt secured by the particular mortgage.⁶⁴ As to the property covered, in the absence of express agreement, the lien is limited to the property described in the mortgage,⁶⁵ and to the extent of the mortgagor's interest therein.⁶⁶ Where the mortgagee elects to follow the specific article upon which his lien exists and to have it subjected to the satisfaction of his claim, his security attaches to the article in its entirety, and he will not be compelled to release any portion of it because another has knowingly changed its form or added to its value.⁶⁷ A mortgage of chattels creates no interest in, or lien on, the land on which they are located.⁶⁸

After-acquired property. A mortgage intended to apply to after-acquired property, whether such

property is acquired by purchase or is manufactured or produced, attaches only to such interest therein as the mortgagor acquires.⁶⁹ Property acquired by the mortgagor, after the execution of a mortgage covering after acquired property, will, as appears supra § 118, be subject to the mortgage, if within the description of the covenant, however alien it may be in quality or function to the property presently subjected to the lien; but to spread the lien of the mortgage to property acquired by purchasers of the mortgaged property or successors of the mortgagor, there must be an independent ground of duty, which may have its origin in a statute or in a covenant of assumption or in the principles of estoppel or accession, or in some other kindred equity.⁷⁰

b. Crop Mortgages

A crop mortgage creates no lien on the land on which the crop is grown, but covers only the mortgagor's interest in the crop, so that, where the mortgage covers crops to be grown in the future, if, when the crop is grown, the mortgagor has no interest therein no lien attaches because of the mortgage.

A crop mortgage does not affect in any degree the title to the land upon which the crops covered by said crop mortgage are being grown.⁷¹ In accordance with the general rule that the lien of a mortgage attaches only to the mortgagor's interest

mortgage on crops to be raised on leased ground inured to the mortgagee as security for the debt owing it by the mortgagor and related back to the time of the execution of the mortgage.—*Fargo Loan Agency v. Larson*, 207 N.W. 1003, 53 N.D. 621.

64. Mich.—*Guarantee Bond & Mortgage Co. v. Hilding*, 224 N.W. 643, 246 Mich. 334.

65. U.S.—*Security Trust Co. v. Bank of Bernice, La.*, 239 F. 665, 152 C.C.A. 499.
11 C.J. p 647 note 15.

Property purchased to complete breached contract

A purchase-money mortgage extends to that portion of the property ordered which the buyer purchased from another and paid for with money received from the seller's surety in settlement of the seller's breach from inability to deliver certain parts of the property ordered, so as to take precedence over a subsequent mortgage covering the same property.—*Martin v. Arctic Ice Machine Co.*, C.C.A.Tex., 29 F.2d 155.

Necessity and sufficiency of description see supra §§ 56-71.
Property included by description see supra §§ 116-129.

66. N.Y.—*Diana Paper Co. v. Wheel-*

er-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

N.D.—*Hellstrom v. First Guaranty Bank*, 209 N.W. 379, 54 N.D. 322.

Okl.—*Union Nat. Bank v. Leidecker Tool Co.*, 178 P. 690, 72 Okl. 121—*Mitchell v. Guaranty State Bank of Okmulgee*, 172 P. 47, 68 Okl. 110.

Tex.—*Zeigler v. Citizens' Bank of Venus*, Civ.App., 79 S.W.2d 662, error refused.

11 C.J. p 549 note 82.

Possession without ownership

A mortgage is not affected by a previous mortgage, given by one who did not own the property, but had possession of it, where her mortgagee did not rely on such possession or advance money upon the faith of it.—*Loud v. Hanson*, 184 P. 544, 53 Mont. 445.

67. Tex.—*American Nat. Bank v. Clarksville First Nat. Bank*, 114 S.W. 176, 52 Tex.Civ.App. 519.

68. Iowa.—*McMaster v. Emerson*, 80 N.W. 389, 109 Iowa 284.

Minn.—*Christianson v. Nelson*, 78 N.W. 875, 79 N.W. 647, 76 Minn. 36—*Simmons v. Anderson*, 47 N.W. 52, 44 Minn. 487.

69. Minn.—*Schnirring v. Stubbe*, 225 N.W. 389, 177 Minn. 441.

Wash.—*Community State Bank v. Martin*, 258 P. 498, 144 Wash. 483.
11 C.J. p 647 note 28.

Special fund for carrying out war contract

A special fund consisting of money borrowed by a manufacturer to carry on a special war munitions manufacturing contract and all money to be received from the munitions contract, created and set aside for specific uses by the contract of the manufacturer and the indorsers on his notes for the loans, was held not within the after-acquired property clause of prior mortgage, it being insufficient to pay all the debts on account of the loans and the munitions contract, so that there was no surplus in it for the mortgagor or its receiver.—*Irwin's Bank v. Fletcher Savings & Trust Co.*, 145 N.E. 869, 195 Ind. 669, modified on other grounds 146 N.E. 909, 195 Ind. 669.

70. U.S.—*Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co.*, 170 N.E. 887, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App. Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 51 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.

71. Cal.—*Congdon v. G. M. H. Wagner & Sons*, 278 P. 863, 207 Cal. 373.

Mont.—*Moccasin State Bank v. Waldron*, 264 P. 940, 81 Mont. 579.

in the property described, stated supra § 291 a, a mortgage of crops by one tenant in common of the crop,⁷² or by one joint owner of the land on which the crop is grown,⁷³ covers only his interest in the crop; and, when the mortgagor retains an interest in the crop as rental, as where he is to receive a share of the crop raised, such interest only will be covered by his mortgage.⁷⁴ So a mortgage on crops

to be thereafter grown does not give the mortgagee a lien or charge on the land, but attaches only to the interest which the mortgagor has, or may acquire, in the crops when they come into being.⁷⁵ Thus the lien of a mortgage does not attach to crops sown by others than the mortgagor, except in so far as the mortgagor has or retains an interest in them,⁷⁶ so that, if for any reason the

72. Ala.—Keyser v. Maas, 21 So. 346, 111 Ala. 390.

Kan.—Dodson v. Covey, 105 P. 519, 81 Kan. 320.

73. Tex.—American Trust & Savings Bank v. Whitaker, Civ.App., 2 S.W.2d 356, error dismissed.

74. Cal.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

11 C.J. p 505 note 83.

Separate mortgages by tenant and landlord

Mortgage by landowner on entire crop attaches only to the interest of the landowner in the proceeds of the crop, and a subsequent mortgage by the tenant on the crop attaches to the tenant's interest in the crop free of any interest by the mortgagee of the landowner.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

Effect of cropsharing agreement on prior mortgage

Where a mortgagor gave a mortgage on crops to be sown in the future, and then contracted with D to raise them, D to have two thirds of the crops for his labor, although title was to remain in the mortgagor until division, it was held that the mortgage did not attach to D's share.—Christianson v. Nelson, 78 N.W. 875, 79 N.W. 647, 76 Minn. 36.

75. U.S.—Sims v. Jamison, C.C.A. Or., 67 F.2d 409.

Ala.—Keyser v. Maas, 21 So. 346, 111 Ala. 390.

Cal.—Acme Inv. Corporation v. Thompson, 14 P.2d 87, 216 Cal. 335—Shintaffer v. Bank of Italy Nat. Trust & Savings Ass'n, 13 P. 2d 668, 216 Cal. 243—Congdon v. G. M. H. Wagner & Sons, 278 P. 863, 207 Cal. 373—First Nat. Bank of Oakdale v. Brashear, 253 P. 143, 200 Cal. 389—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

Fla.—E. C. Fitz & Co. v. Eldridge, 176 So. 539—Summerlin v. Orange Shores, 122 So. 508, 97 Fla. 996.

Idaho.—Devereaux Mortg. Co. v. Walker, 268 P. 37, 46 Idaho 431.

Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908—Louis v. Hansen, 219 N.W. 523, 205 Iowa 1216.

Minn.—Purdie v. Levke, 230 N.W. 266, 180 Minn. 81—Massey-Harris Harvester Co. v. Moorhead Farmers' Elevator Co., 222 N.W. 571, 176 Minn. 90—State Bank of Ste-

phen, by Veigel, v. Farmers' Grain Co. of Stephen, 219 N.W. 871, 174 Minn. 531—Christianson v. Nelson, 78 N.W. 875, 79 N.W. 647, 76 Minn. 36.

N.D.—Fargo Loan Agency v. Larson, 207 N.W. 1003, 53 N.D. 621—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N.D. 355, L.R.A. 1917E 298.

Or.—U. S. Nat. Bank of La Grande v. Wright, 283 P. 1, 131 Or. 518.

S.D.—Harms v. Miller, 230 N.W. 766, 57 S.D. 85.

Wash.—Community State Bank v. Martin, 258 P. 493, 144 Wash. 493—Third Nat. Bank v. Kniffen, 255 P. 378, 143 Wash. 434—Hinkhouse v. Wacker, 191 P. 881, 112 Wash. 253, affirmed 195 P. 218, 112 Wash. 253.

11 C.J. p 444 note 74, p 647 notes 17, 18.

Statute altering time lien attaches immaterial

Statute providing that mortgages on crops to be planted shall have the same force and effect to bind such crops and their products as other mortgages now have to bind property already in being, requiring only that the crops shall be planted within twelve months after the execution of the mortgage, does not change the law with reference to the subject matter of the mortgage so far as enlargement of the power of the mortgagor to create a lien on the property in excess of his interest therein is concerned.—Snerly v. Stacey, 298 S. W. 213, 174 Ark. 978.

Tenant's interest not covered by landlord's mortgage

(1) Mortgages given by owner of land on crops to be raised thereon the following year, whether made before or after his contracts with tenants to cultivate it for such year and pay him as rent one-fourth of crops produced, attach only to his one-fourth interest.—Reynolds v. Polk, 109 So. 698, 144 Miss. 223.

(2) One who was not the owner of land having made a lease to a tenant on the basis of an equal division of the wheat crop between the lessor and the lessee, the holder of a mortgage on one third of the growing crop given by lessor is not prima facie entitled to any of the lessee's half, in the absence of a showing as

to the relations between the owner of the land and the lessor, since the mortgagee's interest is carved out of the mortgagor's, and he can assert no greater right against the mortgagor's tenant than the mortgagor could have done.—Hoxie State Bank v. Brewer, 224 P. 896, 115 Kan. 756.

Mortgagee of tenant's crop as against landlord

Where tenant under crop-sharing agreement with landlord abandoned the lease and the landlord harvested the crop, a mortgagee of the crop of the tenant is entitled to no greater share of the crop, as against the landlord, than the tenant would have received had he harvested it himself.—Labbitt v. Bunston, 277 P. 805, 84 Mont. 579.

Tenant's interest acquired by landlord

Crop mortgage, given by landlord excepting tenant's share, held prior lien on all crops, where tenant subsequently became mere employee, taking second crop mortgage for past services.—Monroe v. Hall, Tex.Civ. App., 290 S.W. 289.

Interest mortgagor held to possess

(1) Where tenant agrees to pay the landlord as rent a specified share of the crops raised, the tenant is not vested with full title to the growing crop, but each party has at all times an ownership in the growing crops proportionate to the share he will ultimately receive.—Devereaux Mortg. Co. v. Walker, 268 P. 37, 46 Idaho 431.

(2) Where son owning two-thirds interest in farm farmed the entire farm, but without any agreement for the raising of the crop having been entered into, a mortgage given by the son on the crop to be raised thereafter was a lien on only a two-thirds interest in the crop and not an eight-ninths interest, even though it was customary for landlords and tenants to divide crops two-thirds to the tenant and one-third to the landlord.—Farmers' State Bank of Reardan v. Chick, 255 P. 915, 143 Wash. 614.

76. Idaho.—Albrethsen v. Clements, 279 P. 1097, 43 Idaho 80—Lords v. Lava Hot Springs State Bank, 256 P. 761, 44 Idaho 316—Collins v. Brown, 114 P. 671, 19 Idaho 360.

mortgagor fails to plant or raise a crop on the land designated in the mortgage, a crop grown thereon is not covered by the mortgage.⁷⁷ For example, the lien of a mortgage by a tenant on crops to be thereafter grown does not attach to crops sown or planted after the tenant has surrendered the premises by either forfeiting, abandoning, assigning, or selling his lease.⁷⁸ Also the lien of a mortgage on future crops to be grown on land owned by the mortgagor does not attach to crops planted or sown after the mortgagor has conveyed the land,⁷⁹ or leased it, retaining no interest in the crop to be grown,⁸⁰ as where he leases the land for cash,⁸¹ except however, it has been held under statutes recognizing as effective in the present crop mortgages on existing crops and upon crops next maturing, that an owner of land who has executed a valid chattel mortgage upon the next maturing crop cannot defeat the same by a subsequent arrangement whereby a lessee with notice is to raise the crop, paying a cash rental.⁸² However, where the mortgagor, the owner of the land, severs the rents from the reversion by including

in the crop mortgage all rents accruing during the year, thus effecting a transfer to the mortgagee of the rent claims or rent obligations of the tenants on the land for that year, a purchase by, or conveyance of the mortgagor to, another of the land, subsequent to the execution and recordation of the mortgage, will not defeat the rights of the mortgagee, as transferee of the rents, in a proper proceeding.⁸³

Crops raised by subtenant. Where a lessee of land for cash rent gives a mortgage on the crops to be planted and grown on the land as security for the rent, one who subsequently becomes a subtenant with knowledge of the mortgage is bound by the terms of such mortgage, and crops grown by him, as well as by the original tenant, are covered by the mortgage;⁸⁴ but crops grown on the land by a subtenant are not bound by a mortgage covering crops to be grown on the land, which was given by the original tenant as security for advances made to enable him to make a crop,⁸⁵ especially where the subtenant subleases the land prior to

77. Iowa.—Fawcett Inv. Co. v. Rulstad, 253 N.W. 131, 218 Iowa 654, 94 A.L.R. 800.—Louis v. Hansen, 219 N.W. 523, 205 Iowa 1216.
Tex.—Zeigler v. Citizens' Bank of Venus, Civ.App., 79 S.W.2d 662, error refused.

Foreclosure of real estate mortgage

A chattel mortgage by the owner of land on crops to be grown thereafter confers no lien where a receiver took possession of the land under a real estate mortgage foreclosure proceeding before the crops were planted and in legal effect farmed it for that season.

Ark.—O'Connell v. St. Louis Joint-Stock Land Bank, 281 S.W. 385, 170 Ark. 778.

Iowa.—Louis v. Hansen, 219 N.W. 523, 205 Iowa 1216.

78. Cal.—First Nat. Bank of Oakdale v. Brashear, 253 P. 143, 200 Cal. 389.

Idaho.—Green v. Consolidated Wagon & Machine Co., 164 P. 1016, 30 Idaho 359.

Wash.—Third Nat. Bank v. Kniffen, 255 P. 378, 143 Wash. 434.

79. Ala.—First Nat. Bank v. Crawford, 149 So. 228, 227 Ala. 188, denying certiorari 149 So. 230, 25 Ala. App. 463.

Ark.—Snerly v. Stacey, 298 S.W. 213, 174 Ark. 978.

Iowa.—Equitable Life Assur. Soc. of U. S. v. Hastings, 273 N.W. 908.

Or.—U. S. Nat. Bank of La Grande v. Wright, 283 P. 1, 131 Or. 518.

Effect of owner taking crop mortgage from purchaser

Where owner of land mortgaged

crop to be thereafter grown and then conveyed the land to another, taking a crop mortgage on future crops from the vendee as security for the purchase price, he did not thereby sow, or cause to be sown, the crop of the next year, and the lien he acquired was not an interest in the future crop, but a lien upon it which did not subject the crop itself to the lien of the mortgage given by the vendor.—Lords v. Lava Hot Springs State Bank, 256 P. 761, 44 Idaho 316.

Purchaser abandoning sale contract

Mortgage on crops to be grown, executed by purchaser thereafter abandoning sale contract was not lien as against share of crop produced by another as tenant.—First Nat. Bank v. Milwaukee Grain Elevator Co., 287 P. 678, 156 Wash. 551.

80. Iowa.—McMaster v. Emerson, 80 N.W. 389, 109 Iowa 284.

Minn.—Simmons v. Anderson, 47 N.W. 52, 44 Minn. 487.

81. Minn.—Purdie v. Lekve, 230 N.W. 266, 180 Minn. 81.

Mortgagor's lien on crops for rent immaterial

A mortgage on all his right, title, and interest in crops that mortgagor "agrees to cultivate and produce during this year" on certain land did not give mortgagee a lien on crops raised on such land by mortgagor's tenants, who paid their rent in money, and not by sharing their crops, notwithstanding Crawford & M.Dig. §§ 6889, 6890, giving the mortgagor a lien on the crops for rent and supplies furnished by him to the ten-

ants.—Belcher v. Winter, 233 S.W. 803, 150 Ark. 33.

82. N.D.—State Bank of Bremen v. St. Anthony & Dakota Elevator Co., 209 N.W. 351, 54 N.D. 264.

Crop raised through agency of mortgagor

A tenant taking possession of land with notice of a valid outstanding crop mortgage, executed by the landlord, and raising a crop according to the stipulations of the lease, brings the crop into existence through the agency of the mortgagor, and the mortgage attaches, notwithstanding stipulations for a cash rental.—State Bank of Bremen v. St. Anthony & Dakota Elevator Co., supra.

Cash rental payable to assignee

Where landowner executes crop mortgage covering half interest in crop next maturing and subsequently leases land to one with notice, who is to pay cash rental equivalent to value of half of crop to third party as assignee of lessor and mortgagor, lien of mortgage was not defeated.—State Bank of Bremen v. St. Anthony & Dakota Elevator Co., 209 N.W. 351, 54 N.D. 264.

83. Ala.—First Nat. Bank v. Crawford, 149 So. 228, 227 Ala. 188, denying certiorari 149 So. 230, 25 Ala.App. 463.

84. Okl.—Eckles v. Ray, 75 P. 286, 13 Okl. 541.

S.D.—Schlecht v. Hinrich, 210 N.W. 192, 50 S.D. 360.

85. Ark.—Watkins v. Wells, 290 S.W. 593, 172 Ark. 696.

Tex.—Sewell v. Pierce, Civ.App., 244 S.W. 1034, reversed on other grounds 245 S.W. 745.

the execution of the mortgage by the original tenant.⁸⁶

Indebtedness covered. A mortgage incorporated in a contract of sale of real estate which secures payments due in any given year by giving a lien on the purchaser's interest in all grain grown on the land during that year secures the whole amount of the purchase price where that amount is due and payable by reason of a default in payments to be made, and not merely the amount which would be due that year if a default had not been made.⁸⁷

§ 292. Priorities in General

Unless waived, the lien of a mortgage, if first in point of time, is given preference.

As hereinafter considered in § 297, the lien of a mortgage, where the statutory conditions with respect to execution, delivery, filing, or recording are complied with, is, if first in time, usually also held to be first in right, and, conversely, is held inferior to other valid liens prior in time. Priority of lien may be waived,⁸⁸ or, where secured by fraud, may be denied the party.⁸⁹ The priority of a mortgage is not affected by the statement of the mortgagor, without authority from the mortgagee, that the property is free from lien.⁹⁰

The question as to the identity of the property described in different mortgages does not present an issue as to priority.⁹¹

§ 293. Priority between Debts or Obligations Secured by Same Mortgage

There is a diversity of opinion as to whether a mortgage securing several items of indebtedness secures them all equally or whether they are entitled to priority in the proceeds of the security according to the order in which they mature or are listed in the mortgage.

In some jurisdictions a mortgage securing several items of indebtedness, in the absence of any special provision or agreement to the contrary, secures them all equally, so that no one has priority of lien over the other but all are entitled to share pro rata in the proceeds of the security;⁹² and the order in which the items of indebtedness are listed in the body of the mortgage,⁹³ or the priority of their maturity dates,⁹⁴ is insufficient to indicate any intended priority of lien for one over the others.

In other jurisdictions, if there is no special provision or agreement to the contrary, several notes secured by a mortgage have priority of lien and are entitled to payment from the proceeds of the mortgaged property in the order in which they become due and payable, the note first maturing having preference;⁹⁵ and where two distinct kinds of liability are secured, the proceeds must be applied primarily to the payment of the liability first mentioned in the mortgage.⁹⁶ The mortgage debtor cannot, after the execution of the mortgage, control the application of the proceeds of sale.⁹⁷

86. N.C.—*Norfleet v. Baker*, 42 S.E. 544, 131 N.C. 99.

87. N.D.—*Bentler v. Brynjolfson*, 165 N.W. 553, 38 N.D. 401.

88. Okl.—*Kirkpatrick v. Oil Well Supply Co.*, 49 P.2d 712, 172 Okl. 248.

11 C.J. p 647 note 22.

Acquiescence of agent

That mortgagee's agent acquiesced in completed removal of mortgaged cattle to agister's ranch did not raise issue of waiver of, or estoppel to assert, priority of mortgage lien over agister's lien.—*Lock v. Reed*, Tex.Civ.App., 58 S.W.2d 892.

Permission to sell not waiver

First crop mortgagee, expressly agreeing that hail insurer's mortgage should be prior, could not insist that insurer waived lien by permitting mortgagor to sell part of crop to pay insurer's note and harvesting expenses.—*Home Ins. Co. v. Klous*, Tex.Civ.App., 58 S.W.2d 176, error refused.

Replevin

The owner of a senior mortgage does not waive the priority of his lien by taking a judgment in replevin for money and issuing execution

thereon.—*Baker v. Coffman*, 24 Ohio N.P.N.S., 259.

89. Or.—*Snell, etc., Co. v. Baker City Nat. Bank*, 45 P. 733, 29 Or. 250.

Wash.—*Puget Sound Realty Associates v. Catlett*, 145 P. 617, 33 Wash. 495.

11 C.J. p 647 note 23.

90. Wash.—*Puget Sound Realty Associates v. Catlett*, supra.

91. Ga.—*Our Bank v. Corry*, 89 S.E. 365, 145 Ga. 335.

92. N.J.—*Abrams v. Brown*, 195 A. 810, 122 N.J.Eq. 563.

Grouping of indebtedness

Where mortgage secured three notes which were grouped together at outset of mortgage in one total amount, and no preference in payment out of security was indicated, inference arose that no preference was intended.—*Carr v. Stencel*, 270 N.W. 261, 278 Mich. 182.

Controlling equity not shown

Where a party acting at the same time as president and manager of a bank and trustee for minors obtained a mortgage as security for the unsecured and equally meritorious claims of the bank and the minors, no equity arose which gave the claim

of the minors preference over the claim of the bank to the security, but each was entitled to a ratable distribution of the proceeds therefrom.—*Carr v. Stencel*, supra.

Priority of lien shown

Where proceeds of resale of stock of drugs were required by chattel trust to be applied first on note and then on expenses of sale, purchaser individually charged with expenses of sale had no lien on drugs superior to that of transferee of purchase-money note.—*Rhodes v. Freeman*, 14 F.2d 247, 56 App.D.C. 355.

Assignment of part of claim secured as transferring pro tanto interest in mortgage security see *infra* § 315.

93. Mich.—*Carr v. Stencel*, 270 N.W. 261, 278 Mich. 182.

94. Mich.—*Carr v. Stencel*, 270 N.W. 261, 278 Mich. 182.
N.J.—*Abrams v. Brown*, 195 A. 810, 122 N.J.Eq. 563.

95. U.S.—*McDonnell v. Burns*, Mo., 83 F. 866, 28 C.C.A. 174.
11 C.J. p 649 note 48.

96. Me.—*Low v. Allen*, 41 Me. 248.

97. Iowa.—*Wyland v. Griffith*, 64 N.W. 673, 96 Iowa 24.

§ 294. Priority between Mortgages

Subject to the effect of registration statutes and the effect of taking possession of the property mortgaged, mortgages generally have priority according to the order in which they attach as liens to the property mortgaged, unless intervening equities interfere.

Although, in the absence of the effect of registration statutes, the right of priority as between a senior and junior mortgagee is subject peculiarly to the rules of equity jurisprudence,⁹⁸ and a subsequent mortgagee may gain priority by virtue of an estoppel,⁹⁹ in general, successive chattel mortgages on the same property,¹ including duly recorded general mortgages covering after-acquired personal property,² have priority and the holders thereof

are entitled to priority of payment out of the proceeds of the property according to the order in which they attached as liens thereon.

Ordinarily the lien of a mortgagee who has notice, either actual or constructive, of the rights of another to a prior chattel mortgage,³ as where the second mortgagee has actual knowledge that the first mortgage covers after-acquired property,⁴ will be subordinated to the rights of that other; and where the second mortgagee accepts his mortgage with knowledge or notice of a prior mortgage he is precluded from asserting priority of his claim,⁵ except, in some jurisdictions, as against a prior unrecorded mortgage or mortgage recorded

98. Tex.—Springfield Third Nat. Bank v. National Bank of Commerce, Civ.App., 139 S.W. 665. Actions to determine priorities see *infra* § 310 a.

99. Wash.—Eltopia Finance Co. v. Colley, 219 P. 24, 126 Wash. 554. 11 C.J. p 649 note 52.

Settlement on basis of nonexistent provision

Where the first and second crop mortgages, in settling accounts at the end of the crop season, treated the first mortgage as providing for future advances, neither the second mortgagee, nor its successors could thereafter set up the fact that the mortgage did not so provide.—Eltopia Finance Co. v. Colley, *supra*.

Antedating insufficient to establish estoppel

That mortgage executed, filed and delivered in October and the acknowledgment were antedated to June does not estop mortgagee to assert their validity, as against subsequent mortgage executed in December to secure debt incurred during period between date of former mortgage and date of its filing.—Tenney Co. v. Thomas, 237 N.W. 710, 61 N.D. 202.

Estoppel not shown

Sureties held not estopped to deny discharge of trust deeds securing them against loss by indorsing notes for money borrowed to pay judgment on bond.—Fleming v. Branham, 139 S.E. 267, 148 Va. 510.

1. U.S.—Martin v. Arctic Ice Machine Co., C.C.A.Tex., 29 F.2d 155. Ga.—Lord v. Sledge & Norfleet, 152 S.E. 121, 41 Ga.App. 13.

Ill.—Payne v. Brownlee, 196 Ill.App. 108.

Mont.—Loud v. Hanson, 164 P. 544, 53 Mont. 445.

N.D.—State v. Strong, 201 N.W. 858, 52 N.D. 197.—Citizens' State Bank of Selfridge v. Winmill, 182 N.W. 457, 48 N.D. 44.

Tex.—Church v. Western Finance Corporation, Civ.App., 22 S.W.2d 1074.

Prior recorded mortgage

A mortgage taken subsequent to a prior properly recorded or filed mortgage on the same property is inferior thereto.—Foglesong v. Farmers' State Bank of Brentford, 223 N.W. 49, 54 S.D. 288.

Mortgagee's joinder in note to subsequent mortgagee

Although prior mortgagee of crop joined mortgagor in execution of note to subsequent mortgagee, the title of the subsequent mortgagee was subordinate to that of the prior mortgagee, prior mortgagee not having either signed the subsequent mortgage or waived rights under prior mortgage.—Home Supply Co. v. Almon, 81 So. 179, 17 Ala.App. 3.

Extent of second mortgagee's rights

Rights of first lienholder under mortgage are paramount, and second mortgagee is only entitled to the equity remaining after first mortgage debt is paid, his written consent to a sale and disbursement of the funds in liquidation of the first mortgage debt not being required.—Neal v. State, 168 P. 247, 14 Okl.Cr. 121.

Exposure to sale of property

Where automobile was not part of stock of goods when mortgage was executed, subsequent acts of mortgagor in exposing it to sale cannot destroy mortgage under statute declaring void mortgages on a stock of goods exposed to sale in the regular course of business, and such mortgage would be superior to mortgage given while car was exposed for sale.—Laredo Nat. Bank v. Steinhart, Tex.Civ.App., 15 S.W.2d 130.

Livestock and increase

Prior mortgagee of live stock and increase is entitled to possession as against subsequent mortgagee of live stock and increase, in the absence of evidence that mortgagor purchased additional livestock, after execution of prior mortgage, since livestock mortgaged to subsequent mortgagee was either original stock covered by prior mortgage or "increase" there-

of.—John Deere Plow Co. v. Gooch, 91 S.W.2d 149, 230 Mo.App. 150.

Rents

Assignee of rents embraced in mortgage which was recorded April 4, 1932, held entitled to priority of right as against subsequent assignee of rents whose mortgage was dated Jan. 6, 1933.—Bank of Florida v. Williams, 163 So. 321, 230 Ala. 676.—Bank of Florida v. Williams, 163 So. 905, 26 Ala.App. 619.

2. Fla.—Hyman v. City Trust Co., 128 So. 611, 99 Fla. 1202.

Mortgage held superior

Second mortgage is subsequent to first mortgage where the second mortgagee took with knowledge of the first mortgage and there was no provision in the first mortgage which attempted to make it a floating charge on shifting property.—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

Realty mortgage with after-acquired personalty clause

When mortgagor executes realty mortgage containing after-acquired personal property clause, subsequent chattel mortgage purporting to cover in whole or part same personalty is subordinate to lien of prior realty mortgage with after-acquired personal property clause.—Herold v. Cohrone Boat Co., 292 N.Y.S. 81, 249 App.Div. 318.

3. Neb.—First Nat. Bank v. Young, 247 N.W. 586, 124 Neb. 598.

Mortgagee as bona fide purchaser see *infra* §§ 307-309.

4. N.Y.—Diana Paper Co. v. Wheeler-Green Electric Co., 240 N.Y.S. 108, 228 App.Div. 577.

5. Tenn.—Hamblen Motor Co. v. Miller & Harle, 266 S.W. 99, 150 Tenn. 602.

Inquiry into claim required

Notice that mortgagors claimed certain notes were secured by advance clause in prior mortgage was sufficient to put mortgagees on inquiry.—Union Bank & Trust Co. v. Wieck, 29 P.2d 384, 96 Mont. 132.

subsequent to the time limited by statute therefor, unless the second mortgage is merely of the mortgagor's right to redeem from the prior mortgage and not of the property itself.⁶

Under the registration statutes in force in various jurisdictions a mortgage, if recorded, or if possession is taken thereunder, precedes a prior unrecorded mortgage,⁷ irrespective of whether or not the second mortgagee had notice.⁸ Also, under statutes providing that a mortgage shall be absolutely void as against subsequent mortgagees in good faith unless filed or recorded or accompanied by a change of possession, an unfiled chattel mortgage is postponed to the lien of a subsequent mortgage taken in good faith, although the latter mortgage is not filed or recorded,⁹ although the first mortgage is filed before the second is filed.¹⁰ A verbal mortgage, not coupled with possession by the mortgagee, will not take precedence over a subsequent written mortgage taken without notice of the secret lien of the verbal mortgage.¹¹ Under a statute declaring a mortgage void unless acknowledged, a subsequent mortgage, although securing an antecedent debt, is superior in right to a prior unacknowledged mortgage,¹² especially where such written mortgage is recorded.¹³ A second mortgagee cannot complain

that the mortgagor permitted the first mortgagee to resort to the property for payment, even if it entirely exhausted the security,¹⁴ and the purchaser from the first mortgagee in such case takes good title as against the second mortgagee.¹⁵

The lien of a mortgage which conveys a legal title is prior to the lien of a prior mortgage which conveys only an equitable title,¹⁶ where the legal mortgagee, when he took his mortgage, had no knowledge of the equitable mortgage.¹⁷ Under a statute providing that a mortgage shall be void as to third persons, unless the property be delivered to the mortgagee or the mortgage provide that it remain with the mortgagor and is accompanied with an affidavit of good faith, a mortgage of a stock of goods providing that the mortgagor may continue to sell them in the usual course of trade is inferior to a subsequent mortgage on the same goods.¹⁸

Consideration. A mortgage without consideration must yield to one given on good consideration.¹⁹ A subsequent mortgage taken in consideration of an antecedent debt is inferior to a prior mortgage regardless of whether or not the first mortgage was recorded.²⁰ A recorded mortgage

Reasonable inquiry shown

Mortgagee, put on inquiry by notice that mortgagors claimed certain notes were secured by advance clause in prior mortgage, held to have made reasonable inquiry by examining mortgages, ascertaining that they contained no advance clause, and giving prior mortgagee opportunity to read their mortgage.—*Union Bank & Trust Co. v. Wieck*, 29 P.2d 384, 96 Mont. 132.

Mortgage by agent holding title

Where an owner of personalty executes a bill of sale to another who executes a mortgage thereon and delivers the proceeds to the owner, the possession of the property remaining with the owner and the bill of sale not being recorded, the buyer acting merely as the agent of the owner in the obtaining of the loan, such mortgage is superior to a subsequent mortgage by the owner to a mortgagee having actual knowledge of the prior mortgage.—*Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket, R.I.*, 172 P. 924, 70 Okl. 1.

6. Mass.—*Connecticut Valley Union Co. v. Pielock*, 183 N.E. 526, 281 Mass. 287.

7. Mo.—*Ingersoll Co. v. Belt*, App., 71 S.W.2d 118—*Humphreys Sav. Bank v. Carpenter*, 250 S.W. 618, 213 Mo.App. 390.

Or.—*Carnes v. Manning*, 248 P. 137, 118 Or. 665.

R.I.—*Royal Plan v. Reliable Auto Finance Corporation*, 195 A. 510.

Unrecorded trust receipt

Mortgagee claiming under recorded mortgage of automobiles from dealer, without notice of prior unrecorded trust receipts executed by dealer to plaintiff, had superior claim to that of plaintiff.—*Forgan v. Bridges*, Mo.App., 281 S.W. 134.

8. U.S.—*In re Baumgartner*, C.C.A. Wis., 55 F.2d 1041.

9. Kan.—*Dixon v. Tyree*, 139 P. 1026, 92 Kan. 137.

11 C.J. p 649 note 55.

10. Iowa.—*Iowa State Bank of Ft. Madison v. Bradfield*, 215 N.W. 602, 204 Iowa 488.

11 C.J. p 649 note 56.

11. Neb.—*Mueller v. Parcel*, 99 N. W. 684, 71 Neb. 795.

12. Wash.—*Smith v. Allen*, 138 P. 683, 78 Wash. 135.

13. Ga.—*Wilkins v. Friedman*, 139 S.E. 113, 37 Ga.App. 141.

14. Minn.—*Carity Motors v. Eichten*, 249 N.W. 190, 189 Minn. 310.

11 C.J. p 649 note 59.

15. Ga.—*Read Phosphate Co. v. Brooks*, 89 S.E. 528, 18 Ga.App. 356.

11 C.J. p 649 note 60.

16. Ala.—*Houston Nat. Bank of Dothan v. J. T. Edmonson & Co.*, 75 So. 568, 200 Ala. 120.

Title conveyed by mortgage see supra § 175.

Attempted conversion of equitable into legal mortgage

Where a mortgagor gave a mortgage on his crop to a mortgagee prior to January 1st of the year in which the crop was grown and subsequent to that date gave another mortgage on the same crop to another mortgagee, his giving of another mortgage to the first mortgagee after the execution of the second mortgage does not convert the first mortgagee's prior equitable mortgage into a prior legal mortgage so as to give the first mortgagee priority of lien over the second mortgagee.—*Houston Nat. Bank of Dothan v. J. T. Edmonson & Co.*, supra.

17. Mo.—*Page v. Riggins*, App., 20 S.W.2d 164.

18. Mo.—*Leopold v. Silverman*, 16 P. 580, 7 Mont. 266.

19. Colo.—*Machette v. Wanless*, 2 Colo. 169.

Mortgage voluntarily executed

Mortgage voluntarily executed and recorded by mortgagor without knowledge of mortgagee, and accepted by him thereafter, the mortgagor acting to avoid obligation to another creditor, does not have precedence over unrecorded equitable mortgage lien.—*Hagist v. Vogt*, Tex.Civ.App., 280 S.W. 350, reversing 276 S.W. 959.

20. U.S.—*Singletary v. General Motors Acceptance Corporation*, C.C. A.Ga., 73 F.2d 453.

given to secure future advances within a stated amount is superior, to the extent of the advances made within the amount stated, to a second mortgage on the same property executed and recorded prior to the time the future advances were made,²¹ especially, if at the time of making the additional advance the first mortgagee had no notice of the rights of the second mortgagee,²² but the lien of a senior mortgage which makes no provision for subsequent advances,²³ or under which the advances are optional,²⁴ does not give priority of security for advances made by the senior mortgagee subsequent to the execution of the junior mortgage.

Effect of taking possession. Where neither mortgage is recorded, the mortgagee first securing possession has priority;²⁵ and, in jurisdictions where mortgages must be recorded or filed in the county of the mortgagor's residence in order to constitute a lien, a second mortgagee in possession of the property mortgaged is entitled to prevail over a first mortgagee where both mortgages were recorded in a county other than that of the mortgagor's residence.²⁶ The lien of a second mortgage displaces the lien of a first mortgage where the second mortgagee takes possession of the chattels on the failure of the first mortgagee to take possession thereof,²⁷ or to extend his mortgage as required by statute,²⁸ within the statutory period after

maturity of the debt secured by the first mortgage. Under a statute providing that a mortgage shall be void as against creditors, subsequent purchasers, and encumbrancers in good faith, unless filed or recorded, where a prior mortgage has not been recorded at the time a second mortgage is given, but possession is taken under the prior mortgage before the second mortgage is recorded, the first mortgage has priority.²⁹ It has been held that, where the mortgage is void as to other creditors because not filed, the mortgagee, if he takes possession of the mortgaged property with the consent of the debtor, may hold the property as pledgee.³⁰

Purchase-money mortgages. Where on the sale of personalty title passes to the purchaser prior to the execution of a mortgage to the seller as security for payment of the purchase price, a prior mortgage executed by the purchaser covering such property, as a prior mortgage covering after-acquired property, is superior to the chattel mortgage of the seller;³¹ but if no title passes to the purchaser until after, or except upon, the execution of a mortgage by the purchaser to the seller as security for payment of the purchase price, the lien of such purchase-money mortgage is superior to the lien of any mortgage covering such property executed by the purchaser prior thereto,³² except that a mortgage on future chattels may prevail against an un-

21. Minn.—Carity Motors v. Eich-
ten, 249 N.W. 190, 189 Minn. 310.
Tex.—Cason, Monk & Co. v. Baker,
Civ.App., 62 S.W.2d 592—Cattle
Raisers' Loan Co. v. First Nat.
Bank, Civ.App., 54 S.W.2d 857, er-
ror dismissed.

Actual notice immaterial

Actual notice by the first mortgagee of the existence of the subsequent mortgage does not divest the first mortgage of its superiority of lien for advances made thereafter, even though the mortgage did not require the mortgagee to make such advances but left him the option to do so or not.—Cattle Raisers' Loan Co. v. First Nat. Bank, *supra*.

22. Ala.—Farmers' Union Warehouse Co. v. Barnett Bros., 137 So. 176, 223 Ala. 435.

23. Wash.—Palmer v. Cochrane Brokerage Co., 217 P. 1007, 126 Wash. 169.

Expenses of sale

A senior mortgagee who sells the mortgaged article on delivery by the mortgagor is entitled to deduct from the proceeds the cost of handling and selling.—Palmer v. Cochrane Brokerage Co., *supra*.

24. Tex.—G. M. Carleton Bros. & Co. v. Bowen, Civ.App., 193 S.W. 732.

25. Mass.—Keepers v. Fleitmann, 100 N.E. 333, 213 Mass. 210.

26. Ark.—Jones v. Ross, 14 S.W.2d 239, 179 Ark. 116.

27. Colo.—Conrad v. National Bank of Wray, 242 P. 676, 78 Colo. 485.

Constructive possession

Constructive possession equivalent to actual possession is obtained by the second mortgagee duly recording and extending his mortgage.—Farmers' State Bank of Brighton v. Anglo American Mill Co., 231 P. 156, 76 Colo. 309.

28. U.S.—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965.

29. Okl.—Garrison v. Carpet Co., 97 P. 978, 21 Okl. 643, 129 Am.S.R. 799.

11 C.J. p 649 note 61.

30. N.Y.—Blumenthal v. Lynch, 11 N.Y.S. 382, 25 Abb.N.Cas. 85.

31. Fla.—Central Farmers' Trust Co. v. McCampbell Furniture Stores, 174 So. 748, 127 Fla. 721, 128 Fla. 60—Hyman v. City Trust Co., 128 So. 611, 99 Fla. 1202.

Ill.—American Banking Co. v. General Motors Acceptance Corporation, 248 Ill.App. 385.

Utah.—Wasatch Livestock Loan Co. v. Lewis & Sharp, 35 P.2d 835, 84 Utah 347.

Wash.—John Hancock Mut. Life Ins. Co. v. Lewis Realty & Investment Corporation, 23 P.2d 572, 173 Wash. 444.

32. Fla.—McCampbell Furniture Stores v. Central Farmers' Trust Co., 158 So. 283, 117 Fla. 351.

N.D.—Fleckten v. Ward County Farmers' Press, 213 N.W. 498, 55 N.D. 399.

Tex.—Hamilton Nat. Bank v. Harris, Civ.App., 260 S.W. 318.

Wash.—John Hancock Mut. Life Ins. Co. v. Lewis Realty & Investment Corporation, 23 P.2d 572, 173 Wash. 444.

Delivery prior to sale immaterial

Purchase-money mortgage, executed at sale of threshing machine previously delivered to buyer, is superior to prior mortgage given by buyer.—Schnirring v. Stubbe, 225 N.W. 389, 177 Minn. 441.

Failure to retain lien in bill of sale immaterial

Where defendants, having a half interest in a laundry property, gave a mortgage covering all the property to a bank, and on the day the mortgage was recorded purchased from plaintiff the other undivided half interest, plaintiff not retaining a lien in the bill of sale, but taking a mortgage to secure the purchase price which he filed forthwith, the trans-

recorded purchase-money mortgage.³³ A purchase-money mortgage executed on the sale of personalty is inferior to the lien of a prior purchase money mortgage executed by the seller on his purchase of the property.³⁴

The lien of a mortgage, given to secure the payment of a part of the purchase price of chattels thereafter annexed to realty, will be protected as against a prior mortgage on the realty so far as it does not diminish the security which the real estate mortgagee would have had if there had been no annexation.³⁵

Priority between crop mortgages. In general the lien of the first of two crop mortgages is the prior lien³⁶ especially if the first mortgage is recorded.³⁷ So it has been held that a recorded mortgage on an unplanted crop is superior to a subsequent mortgage on the crop after it was planted;³⁸ but in some jurisdictions a recorded mortgage on an unplanted crop is inferior to a subsequent mortgage executed after the crop was planted where the second mortgagee had no other notice of the first mortgage except the record thereof, although, if

the second mortgagee had actual knowledge of the first mortgage when he took his mortgage, it is inferior to such first mortgage.³⁹ However, a mortgage on crops executed before the mortgagor leased the land is inferior to a mortgage on such crops executed with the lease as security for the rent,⁴⁰ or to seed grain notes executed to obtain seed for the crop;⁴¹ but it is superior to a mortgage executed with the lease securing unpaid rent for a former year.⁴² A crop mortgage covering the crops of a future year or years for an indebtedness created in the year the mortgage was given, since it is only an equitable mortgage good between the parties, is inferior to a subsequent crop mortgage to secure advances to enable the production of the crop covered by the latter mortgage;⁴³ but a prior equitable mortgage is superior to the lien of a subsequent legal mortgage taken by a party who has notice of the rights of the equitable mortgagee.⁴⁴ A mortgage covering the mortgagor's interest in "the summer fallow to be prepared by the mortgagor" does not cover the crop grown on the land fallowed as against a subsequent mortgagee of such crop.⁴⁵ A chattel mortgage covering that portion

fer by bill of sale and the taking of the mortgage were so related in point of time as to be one transaction so that the bank's lien was inferior to the plaintiff's lien.—*Central Texas Exch. Nat. Bank v. Sparkman*, Tex.Civ.App., 228 S.W. 297.

Mortgage executed between order and shipment of goods

A mortgage on goods given by the buyer after he had ordered them and before their shipment is inferior to a subsequent mortgage given by the buyer at the time the goods were shipped to secure the purchase price where the order provided that the buyer should give security before taking title to the property.—*Klimes v. Jones*, 7 Tenn.App. 583.

Mortgage transferred from old to purchased article

Mortgage taken on new truck in lieu of mortgage on old truck, by mortgagee knowing of trade-in transaction, and to enable owner to trade in old truck, would be inferior to seller's mortgage on new truck for purchase price.—*Harrington v. Interstate Securities Co.*, Mo.App., 57 S.W.2d 438.

33. S.C.—*Perkins v. Loan, etc., Bank*, 20 S.E. 759, 43 S.C. 39.

34. Vt.—*Campbell v. Bryant*, 129 A. 299, 98 Vt. 486.

35. N.J.—*Kramer v. Yocum*, 144 A. 188, 104 N.J.Eq. 79.

Postponement of real estate mortgage immaterial

The postponement of the real estate mortgage given prior to the

execution of the chattel mortgage to the lien of a real estate mortgage given subsequent to the execution of the chattel mortgage will neither increase nor decrease the rights of the real estate mortgagee as against the chattel mortgagee.—*Kramer v. Yocum*, supra.

36. Colo.—*Wolf v. Larimer County Bank & Trust Co.*, 246 P. 285, 79 Colo. 376.

Collateral character of debt immaterial

Mortgage, including grain not covered by previous mortgage, held superior to subsequently executed mortgages, whether note secured by new mortgage was principal obligation or collateral to notes secured by original mortgage.—*Wolf v. Larimer County Bank & Trust Co.*, supra.

Selection of portion of crop covered

Where one secures a first lien on portion of crop and later another secures lien on the remainder, the first mortgagee has prior right to select portion of crop to be applied to satisfaction of his mortgage.—*Dallas Joint Stock Land Bank v. Henry & Younce*, Tex.Civ.App., 78 S.W.2d 725.

Mortgage by holdover tenant

Prior crop mortgage given by holdover tenant in possession held superior to crop mortgage given after making formal lease.—*Abbeville State Bank v. Wiley Fertilizer Co.*, 140 So. 431, 224 Ala. 421.

Cancellation of lease and execution of new one to mortgagor

Where a lessor permits lessee to

remain in possession and cultivate the premises after an agreement to cancel the existing lease, and the lessee gives a crop mortgage to a third person on crops to be grown on such premise, of which mortgage lessor has notice, and lessor thereafter leases the premises to the mortgagor under a new lease, taking a second chattel mortgage on the crops for rent, the lien of the first mortgage is prior, and lessor is estopped to question its validity.—*Bank of Roberts v. Olaveson*, 221 P. 563, 38 Idaho 234—*Bank of Roberts v. Olaveson*, 221 P. 560, 38 Idaho 223.

37. Ala.—*Metcalf v. Clemmons-Powers & Co.*, 76 So. 9, 200 Ala. 243.

38. Ariz.—*First Nat. Bank v. Yuma Nat. Bank*, 245 P. 277, 30 Ariz. 188.

39. Colo.—*J. I. Case Threshing Mach. Co. v. Glass & Bryant Mercantile Co.*, 223 P. 35, 74 Colo. 535.

40. Minn.—*Massey-Harris Harvester Co. v. Moorhead Farmers' Elevator Co.*, 222 N.W. 571, 176 Minn. 90.

41. Minn.—*Massey-Harris Harvester Co. v. Moorhead Farmers' Elevator Co.*, supra.

42. Minn.—*Massey-Harris Harvester Co. v. Moorhead Farmers' Elevator Co.*, supra.

43. Miss.—*Coffey v. Land*, 167 So. 49—*Butler Mercantile Co. v. Cruise*, 166 So. 325, 175 Miss. 200.

44. Neb.—*Kelly v. Kannarr*, 225 N. W. 230, 118 Neb. 472.

45. Wash.—*Farmers' & Merchants' Bank of Walla Walla v. Small*, 229 P. 531, 131 Wash. 197.

of a crop due a joint owner as rental given by a purchaser of the joint owner's interest in the realty as security for the purchase price is superior to a prior mortgage on the entire crop given by another joint owner and third person who farmed the land.⁴⁶

Priority between crop and real estate mortgages.

In general, the rights of a crop mortgagee as against a mortgagee of the land on which the crop is grown under a prior mortgage are no greater than those of his mortgagor,⁴⁷ and a crop mortgage is subject to a prior mortgage on the land on which the crop is grown.⁴⁸ However, since as appears in the C.J.S. title Mortgages § 313, also 41 C.J. p 625 notes 91-95, the right of the holder of a mortgage on real estate, pledging the rents and income as security, does not arise until action has been commenced to enforce collection of the debt, the lien of a mortgage on crops raised on the land is generally superior to the lien of a real estate mortgage on the land where the real estate mort-

gage has not been foreclosed or an attempt made to do so;⁴⁹ and a chattel mortgage, whether on present or future crops, which attaches as a lien on the crops before a real estate mortgagee obtains possession of the realty under a prior real estate mortgage which also covers the rents, issues, and profits is a superior lien on the crops to the lien of such real estate mortgage.⁵⁰ In jurisdictions where a real estate mortgage gives a lien on, and not title to, the mortgaged premises, for a consideration of which see the C.J.S. title Mortgages § 1, also 41 C.J. p 273 note 1-p 281 note 22 $\frac{2}{3}$, a crop mortgage which attaches while the mortgagor is in possession is superior to a prior real estate mortgage or deed of trust covering the rents, issues, and profits to the extent of the crops growing and maturing upon the mortgaged premises up to the time of the expiration of the period of redemption from sale under order of foreclosure of the real estate mortgage.⁵¹ Also, in some jurisdictions, a chattel mortgagee of crops has a superior

46. Tex.—American Trust & Savings Bank v. Whitaker, Civ.App., 2 S.W.2d 356, error dismissed.

47. Ala.—Buchmann v. Callahan, 131 So. 799, 222 Ala. 240.

48. Ala.—Whitaker v. Lohm, 149 So. 717, 25 Ala.App. 516.

49. Iowa.—Hanson v. Sheffer, 219 N.W. 529, 205 Iowa 1191—First Nat. Bank v. Security Trust & Sav. Bank of Charles City, 181 N.W. 402, 191 Iowa 842.

50. Mont.—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 80 Mont. 593.

Action to obtain possession insufficient

Mortgagee, suing tenant for possession, gained, at most, constructive possession, insufficient to create lien on mortgagor's share of crop as against crop mortgagee.—Morton v. Union Cent. Life Ins. Co., *supra*.

51. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Bank of Amador County, 28 P.2d 86, 135 Cal.App. 714—First Nat. Bank v. Garner, 266 P. 849, 91 Cal.App. 176.

Fla.—E. C. Fitz & Co. v. Eldridge, 176 So. 539.

Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 139 N.E. 654, 46 Ohio App. 548.

"Up until the time the mortgagee has chosen to exercise his right to perfect his lien on the rents, issues, and profits, any intervening lien acquired upon them must take precedence and be held superior."—Southern Trust Co. v. First City Bank &

Trust Co. of Hopkinsville, 82 S.W. 2d 205, 208, 259 Ky. 151.

Mortgagor not in possession

However, crops grown by a lessee of the mortgagor after foreclosure of the real estate mortgage and during the period of redemption are not subject to a crop mortgage executed by the mortgagor subsequent to the institution of the action for foreclosure of the real estate mortgage but prior to the foreclosure sale.—Shintaffer v. Bank of Italy Nat. Trust & Savings Ass'n, 13 P.2d 663, 216 Cal. 243.

Default of prior debt immaterial

Trust deed on land which gave holder right to possession, rents, issues, and profits, and appointment of receiver in case of default, constituted only passive lien upon growing beet crop, and where lien had not been ripened into active lien by receivership, mortgage on crop given by owners in possession held superior to lien of trust deed regardless of mortgagee's knowledge when he accepted mortgage of defaulted state of paper which trust deed secured.—Tolland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

Realty mortgage not in terms covering produce

Real estate mortgage not in terms covering fruit crops was not lien thereon, and subsequent crop mortgage gave prior right to proceeds of fruit, notwithstanding receivership in proceedings to foreclose real estate mortgage where the fruit was severed before foreclosure sale.—Haines City Citrus Growers' Ass'n v. Petteway, 145 So. 183, 107 Fla. 344.

Crop well advanced at time of foreclosure

Mortgage given by landowner on orange crop for current year and on succeeding crops until debt should be paid held to give mortgagee lien on succeeding year's crop superior to lien of earlier purchase-money mortgage given on land containing orange grove, where both mortgages were executed subsequently to enactment of crop lien statute, and where crop was well advanced and default in purchase-money note had not occurred at time of giving crop lien.—Hughes v. Summit Realty Co., 162 So. 343, 120 Fla. 136.

Notice of realty mortgage immaterial

Chattel mortgagee had claim to crops superior to real estate mortgagee, where chattel mortgagee acquired title before real estate mortgagee ever acquired constructive possession, irrespective of whether chattel mortgagee had notice of clause in real estate mortgage giving equitable chattel lien on after-acquired property.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 139 N.E. 654, 46 Ohio App. 548.

Marshaling assets

As respects priority between holder of trust deed on land and chattel mortgagee of beet crop and other personality of same obligor over right to proceeds from sale of beet crop where deficiency judgments had resulted from sales of both land and personality under foreclosures, chattel mortgagee in resorting to beet crop only after sale of other security and application of proceeds had showed necessity therefor properly marshaled assets.—Tolland Co.

right, as against a real estate mortgage of the land on which the crops were grown, to crops severed from the soil prior to a sale of the land under foreclosure of the real estate mortgage, although subsequent to the appointment of a receiver in the foreclosure suit.⁵² On the other hand, the rights of a real estate mortgagee or of those holding under or through him after possession, or the right to possession, of the realty has been obtained under foreclosure proceedings are superior to those of a subsequent mortgagee of the crops grown on the land in crops grown thereafter;⁵³ and, in some jurisdictions, of crops growing on the land and unsevered at the time the mortgagee, or those holding under him, obtain possession or the right to possession of the premises.⁵⁴ In jurisdictions where a real estate mortgagee has title to the land mortgaged and not merely a lien thereon, for a consideration of which see the C.J.S. title Mortgages §§ 1, 194-197, also 41 C.J. p 273 note 1-p 281 note 22½, p 486 note 87-p 489 note 30, a real estate mortgagee who foreclosed his mortgage, obtained possession of the land and gathered the crops thereon, the mortgagor having failed to avail himself of his statutory right to retain possession of the realty in order to gather and remove the crops thereon by executing a bond to compensate the real estate mortgagee for such use and occupation, is not lia-

ble in an action in trover by a mortgagee of the crops for their conversion, since the real estate mortgagee is entitled to possession of the land and to a lien on the crops as security for his right to compensation for the use and occupation of the realty after foreclosure;⁵⁵ and the rights of a purchaser of land at a mortgage foreclosure sale to a crop thereafter grown thereon is superior to the rights of a mortgagee of the crop executed by a lessee of the mortgagor of the real estate mortgage.⁵⁶

Renewal mortgages. Since, as appears *infra* § 339, the giving of a new note and mortgage in renewal of, or in substitution for, the one originally given does not discharge the lien of the original mortgage, but the lien of the renewal mortgage attaches as of the date of the original mortgage, the acceptance by a prior mortgagee of a renewal note and mortgage in satisfaction of the original note and mortgage does not affect the right of his mortgage to priority over a mortgage executed subsequent to the original mortgage but prior to the renewal one, even though the renewal was made without the consent of the holder of the later mortgage.⁵⁷

Payment of prior lien. When a debt secured by a first mortgage is paid the lien of the mort-

v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

52. Okl.—Hill v. First Nat. Bank, 1 P.2d 364, 150 Okl. 220.

53. Ark.—Wilkening v. Layne-Arkansas Co., 17 S.W.2d 879, 179 Ark. 667.

Fla.—E. C. Fitz & Co. v. Eldridge, 176 So. 539—Summerlin v. Orange Shores, 122 So. 508, 97 Fla. 996.

Iowa.—Finken v. Schram, 236 N.W. 408, 212 Iowa 406—Phelps v. Taggart, 219 N.W. 528, 207 Iowa 164—Louis v. Hansen, 219 N.W. 523, 205 Iowa 1216.

Notice of suit asking receiver

Chattel mortgage not taken until after the real estate mortgagee had made application for a receiver in a suit brought to enforce the lien of his real estate mortgage, of which suit the chattel mortgagee had notice, is inferior thereto.—G. B. Brasfield & Son v. Northwestern Mut. Life Ins. Co., 25 S.W.2d 72, 233 Ky. 94.

Crop mortgage securing cost of construction on land

Party who constructs improvements on land and releases title to such improvements, taking a chattel mortgage on future crops as security for the cost thereof, is not entitled to a lien on crops grown on the land after foreclosure of a prior real estate mortgage.—Wilkening v. Layne-

Arkansas Co., 17 S.W.2d 879, 179 Ark. 667.

Fruit crop mortgages

(1) Chattel mortgage will not take priority over earlier real estate mortgage as to fruit not yet begun in maternal flower.—E. C. Fitz & Co. v. Eldridge, 176 So. 539—Summerlin v. Orange Shores, 122 So. 508, 97 Fla. 996.

(2) Purported fruit mortgage executed after default in real estate mortgage which was being foreclosed before fruit had started into being by bloom was not effective to create a lien superior to a mortgage on the real estate.—E. C. Fitz & Co. v. Eldridge, *supra*.

(3) Real estate mortgage executed before enactment of statute permitting giving of chattel mortgages upon fruit crops to be grown upon lands held prior as to growing fruit to chattel mortgage upon fruit crops growing or to be grown on land covered by real estate mortgage.—L. Maxcy, Inc., v. James, 158 So. 164, 117 Fla. 641.

Government crop production loan

The United States government, making crop production loans secured by mortgages on crops grown on mortgaged lands without procuring waiver of land rents from receiver of such lands, had no lien on

crops prior to that of mortgagee purchasing lands at foreclosure sale.—U. S. v. Western & Southern Life Ins. Co., Ark., 114 S.W.2d 36.

54. Ill.—Rankin-Whithan State Bank v. Mulcahey, 176 N.E. 366, 344 Ill. 99.

Mo.—Canton Trust Co. v. Durrett, 9 S.W.2d 925, 320 Mo. 1208—Farmers' Bank of Hickory v. Bradley, 288 S.W. 774, affirming, App., 271 S.W. 857, disapproving Farmers' Bank of Mt. Vernon v. Parker, 245 S.W. 586, 215 Mo.App. 96.

Execution of mortgage as severing crop

As between a mortgagee of the crop and the holder of the real estate mortgage on the land the mortgage of the growing crop does not work a severance of the crops from the real estate.

Ill.—John Hancock Mut. Life Ins. Co. v. Watson, 200 Ill.App. 315.

Mo.—Farmers' Bank of Hickory v. Bradley, App., 271 S.W. 857, affirmed 288 S.W. 774, 315 Mo. 811.

55. Ala.—Buchmann v. Callahan, 181 So. 799, 222 Ala. 240.

56. Ala.—Whitaker v. Lohm, 149 So. 717, 25 Ala.App. 516.

57. U.S.—In re Ballard, D.C.Tex., 279 F. 574.

Tex.—First State Bank of Saltillo v.

gage ceases to exist by reason of the payment, and the priority of such lien, which is but an incident thereto, ceases to exist, and from that moment a second mortgage on the same property becomes eo instanti a prior lien and the holder of the second mortgage is entitled to possession of the mortgaged property according to the terms of his mortgage.⁵⁸

Ownership of chattel. A mortgage on personal property by one having title thereto is superior to a mortgage given thereon by another, irrespective of which is prior in time.⁵⁹

§ 295. — Priority of Record

As between recorded mortgages priority of record usually determines priority of lien in the absence of notice of the first mortgage or an agreement as to priority or some intervening event which releases the lien of the

first mortgage, such as the removal of the property to another state or county, or the failure of the first mortgagee properly to renew his mortgage.

Priority of record usually determines priority of lien between recorded mortgages,⁶⁰ irrespective of the order of execution,⁶¹ in the absence of knowledge or notice of the first mortgage,⁶² or, as shown *infra* § 296, an agreement postponing the mortgage first filed. However, priority of record will not give priority of lien as between mortgages executed contemporaneously without any agreement between the parties that one shall take precedence over the other;⁶³ and, as between mortgages registered simultaneously, unless agreed or intended otherwise, priority will be given the mortgage first executed and delivered.⁶⁴ A recorded mortgage by the seller of goods is superior to a prior recorded

Ennis Title Co., Civ.App., 200 S.W. 1122.

58. Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591.

Prior lien restored

Where indebtedness secured by second mortgage was paid, the prior lien accorded second mortgage by reason of first mortgagee's failure to record statement required under statute or properly to extend his mortgage was extinguished and, as between the first and second mortgagees, the first mortgage was restored to its former position of priority.—Stokes v. Kirk, *supra*.

Balance of proceeds

Holder of inferior mortgage is entitled to recover of the holder of the superior mortgage the value of any mortgaged property received by the latter in excess of that called for by his mortgage.—Miller v. White, Tex. Civ.App., 264 S.W. 176.

59. Utah.—Wasatch Livestock Loan Co. v. Lewis & Sharp, 35 P.2d 835, 84 Utah 347.

Mortgage by coadventurers of title holders

Chattel mortgage innocently taken by third party from partnership having title and power to mortgage sheep purchased with money advanced by coadventurers under joint adventure agreement is superior to mortgages given by coadventurers to banks, although one of such mortgages antedated the mortgage held by third party.—Wasatch Livestock Loan Co. v. Lewis & Sharp, *supra*.

Fraudulent representation

Fraudulent representation to bank that title to property owned by partnership operating under joint adventure agreement was to vest in coadventurers advancing the purchase money, on the strength of which representation the bank loaned money to the coadventurer and took his mortgage on the property, did not

render such mortgage superior to a subsequent mortgage thereon by the partnership taken by an innocent third party in reliance on the true status of the parties.—Wasatch Livestock Loan Co. v. Lewis & Sharp, *supra*.

60. Ark.—Rainey v. Rainey, 26 S.W. 2d 101, 181 Ark. 406—First Nat. Bank v. Lewis, 257 S.W. 730, 162 Ark. 54.

Ill.—Veach v. Stegmeyer, 233 Ill. App. 559.

La.—Bank of Winnfield v. Olla State Bank, 124 So. 621, 11 La.App. 640 —Whitney-Central Nat. Bank v. Cuneo, 7 La.App. 197.

Mich.—Kirby v. Carey, 200 N.W. 965, 229 Mich. 129.

Mo.—McElvain v. Dorroh, App., 204 S.W. 824.

N.C.—McHan v. Dorsey, 92 S.E. 598, 173 N.C. 694.

Wash.—Goddard v. Morgan, 74 P.2d 894.

11 C.J. p 650 note 64.

Fruit crop mortgages

(1) Recorded fruit crop mortgages do not take precedence over prior existing recorded mortgages covering land and fruit crops without consent of prior mortgagees.—Plant City Agr. Credit Co. v. Pool, 139 So. 595, 103 Fla. 806.

(2) Bill of sale of peach crop, since of prior date and recordation, held superior to mortgage on crop.—A. J. Evans Marketing Agency v. Federated Growers' Credit Corporation, 165 S.E. 114, 175 Ga. 294.

Where mortgagee acts in good faith

Where defendants took chattel mortgage in good faith, plaintiff's mortgage lien must depend for priority on mortgage itself and priority of execution and filing.—Alberts v. Alberts, 221 N.W. 30, 53 S.D. 463.

Location of property

Chattel mortgage first recorded in county in which mortgaged property was permanently located is prior in

right to earlier mortgage subsequently recorded in county to which property was later removed, even though the earlier mortgage had been filed first in a county in which the property was never located.—Continental Supply Co. v. Badgett, 242 P. 209, 114 Okl. 1.

Disposition of proceeds of sale

Purchasers of mortgaged cotton at the market price who paid mortgagor the proceeds of his interest in the cotton which the mortgagor paid to the first mortgagee are entitled to an affirmative charge in their favor in an action for conversion of the cotton by the second mortgagees.—Pinckard v. Burnett Cotton Co., 105 So. 702, 21 Ala.App. 90, certiorari denied Ex parte Pinckard, 105 So. 703, 213 Ala. 520.

Prior filing number

A prior filing number on a mortgage indicates that it was filed before mortgages bearing subsequent numbers, and that it enjoys prior ranking privileges under statute.—Motor Finance Co. v. Universal Motors, La.App., 163 So. 721.

Indexing

Trust deed, recorded and indexed in same book before, but indexed in general chattel mortgage book after, chattel mortgage on same personality was inferior in lien.—Pruitt v. Parker, 161 S.E. 212, 201 N.C. 696.

61. Ark.—Irvin v. Bank of Alma, 254 S.W. 538, 161 Ark. 666.

Tex.—Miller v. White, Civ.App., 264 S.W. 176.

11 C.J. p 650 note 65.

62. Ky.—Holt v. Farmers' Loose Leaf Tobacco Warehouse Co., 256 S.W. 6, 201 Ky. 184.

N.J.—Bloch v. Egert, 172 A. 523, 12 N.J.Misc. 445.

11 C.J. p 650 note 66.

63. Minn.—Sheldon v. Brown, 75 N. W. 709, 72 Minn. 496.

64. N.C.—McHan v. Dorsey, 92 S. E. 598, 173 N.C. 694.

mortgage by the purchaser of such goods where the purchaser left the goods in the possession of the seller and did not record his bill of sale.⁶⁵

Improper renewal. The lien of a mortgage, junior in point of recording, is superior to the lien of a mortgage, senior in point of recording, where the senior mortgage was not properly extended and the statutory requirements of a requisite affidavit as to good faith and amount due not strictly complied with.⁶⁶

Removal of property. In jurisdictions where the lien of a properly executed and recorded mortgage is not lost by removal of the property into another state, considered *supra* § 15, the lien of a mortgage executed and recorded in one state is superior to the lien of a subsequent mortgage executed and recorded in another state to which the property had been removed,⁶⁷ except where such removal was with the consent of the mortgagee,⁶⁸ or he had knowledge of it and failed to assert his rights

within a reasonable time.⁶⁹

Registration of mistaken release. A second mortgagee is charged with constructive notice of a prior properly registered mortgage and holds subject thereto, notwithstanding a mistaken release and fraudulent registration thereof, where he had no actual knowledge of the mortgage or release and was not therefore misled.⁷⁰

§ 296. — Agreement or Understanding as to Priority

Ordinarily an agreement that a mortgage shall be made subject to another one postpones it thereto regardless of priority of record or the effect otherwise given to taking possession of the property, and estops the mortgagee from questioning the validity of the prior encumbrance.

An express agreement between the parties to a mortgage that it shall be postponed to other liens or encumbrances is valid and operative,⁷¹ as where the mortgage contains a recital that it is made subject to another,⁷² is valid and operative and will

Intention shown by parol

Priority intended as between contemporaneously filed mortgages may be shown by parol.—*Manor v. Sheehan*, 15 N.W. 687, 30 Minn. 419.

65. Wash.—*Champagne v. Birnot*, 254 P. 829, 143 Wash. 187.

66. Colo.—*Stokes v. Kirk*, 47 P.2d 686, 97 Colo. 96.

67. Iowa.—*First Nat. Bank v. Ripley*, 215 N.W. 647, 204 Iowa 590.

68. Mo.—*Geiser Mfg. Co. v. Todd*, App., 204 S.W. 287.

Tenn.—*Hamblen Motor Co. v. Miller & Harle*, 266 S.W. 99, 150 Tenn. 602.

69. Tenn.—*Hamblen Motor Co. v. Miller & Harle*, *supra*.

70. Tex.—*Ross v. Strahorn-Hutton-Evans Commn. Co.*, 46 S.W. 398, 18 Tex.Civ.App. 698.

71. Iowa.—*Tollerton, etc., Co. v. Anderson*, 78 N.W. 822, 108 Iowa 217.

11 C.J. p 650 note 71.

Implied agreement

Agreement which will defeat purpose of mortgage transaction should not be inferred or implied against mortgagee without cogent evidence.—*First Nat. Bank v. Witherspoon Livestock Commission Co.*, Mo.App., 90 S.W.2d 453.

Oral agreement

Oral agreement of grower's creditor for modification of contract relative to disposition of proceeds, under which the grower received additional advances from the crop mortgage is valid.—*Schumann v. California Cotton Credit Corporation*, 286 P. 1068, 105 Cal.App. 136.

Contract of pledge on future crop

Where owner of land executed contract of pledge on crop to be thereafter grown as security for advances of cash and supplies, and it was understood at the time, and so stipulated in the contract, that the lien of the bank was to be on only two fifths of the crop, three fifths having already been dedicated to water rent and land notes, the lien of the bank is limited to two fifths only of the crop, even though the contract dedicating a portion of the crop to the land notes did not create a lien on the crop as no money was advanced thereon.—*People's Bank & Trust Co. v. Racca*, 1 La.App. 222.

Postponement not shown by agreement

Agreement that purchaser of real estate should execute chattel mortgages on crops for improvements made in lieu of first payment contemplated purchaser should not default in payments to vendor and did not postpone the real estate mortgage to the chattel mortgage.—*Wilkening v. Layne-Arkansas Co.*, 17 S.W.2d 879, 179 Ark. 667.

72. Colo.—*Sharp v. Hollister*, 174 P. 301, 65 Colo. 110.

N.C.—*Avery County Bank v. Smith*, 120 S.E. 215, 186 N.C. 635.

11 C.J. p 650 note 73.

Misdescription

A mortgage, "subject to a prior mortgage" to secure payment of a sum "due A.," held to give priority to an earlier mortgage to "A. & Son," where it was the parties' intention that the second mortgage was subject to the mortgage to A & Son.—

Avery County Bank v. Smith, 120 S. E. 215, 186 N.C. 635.

Sufficiency of recital

Words "second mortgage" above caption of chattel mortgage is insufficient recognition by mortgagee that another's mortgage was paramount.—*Brittain v. Collum*, 45 S.W.2d 501, 184 Ark. 1193.

Earlier cases as to sufficiency of recital see 11 C.J. p 650 note 73 [a].

Pro rata division

(1) Where second mortgage on five hundred fifty acres of wheat states that it is subject to first mortgage on two hundred acres given to secure note for seven hundred dollars, which mortgage was not recorded, the first mortgagee is entitled to four elevenths of proceeds of wheat on five hundred fifty acres rather than seven hundred dollars, in absence of evidence showing what two hundred acres were under first mortgage and amount of wheat produced thereon.—*Ingersoll Co. v. Belt*, Mo. App., 71 S.W.2d 118.

(2) Where first mortgagee subordinated its lien on entire crop to bank's lien on one fourth of crop only, apportionment of proceeds of sale of crop between the two mortgagees in proportion that lien held by each bore to entire crop was proper.—*Dallas Joint Stock Land Bank v. Henry & Younce*, Tex.Civ.App., 78 S. W.2d 725.

Optional advances

A mortgagee secured by a crop mortgage for future advances, having made optional advances beyond amount specified, is entitled to lien to amount at which his mortgage was listed in subsequent mortgage.

postpone it thereto, if supported by a consideration,⁷³ without regard to questions affecting priority of record,⁷⁴ or the effect of obtaining possession of the property mortgaged.⁷⁵ However, a mere reference to the existence of a prior encumbrance does not recognize its validity as a superior lien except as it may comply with the requirements of the registration laws;⁷⁶ and in some jurisdictions, under statutes providing that unrecorded mortgages and mortgages not recorded within a designated time from the date of their execution are invalid against a person other than the parties thereto, a second mortgage which purports to convey the property described is superior to a prior unrecorded mortgage or mortgage recorded subsequently to the time designated by statute, even though by its terms it is made subject to the earlier mortgage; but if the second mortgage is merely of the mortgagor's right, title, and interest, that is, of his right to redeem under the first mortgage, a statement therein that it is subject to a first mortgage will cause the first mortgage to retain its precedence even though it is not recorded or was recorded subsequently to the time limited by statute therefor.⁷⁷

Ordinarily a mortgagee whose mortgage is made expressly subject to a prior mortgage is estopped to deny the validity thereof,⁷⁸ as by asserting that the encumbrance to which it is subject was defectively executed,⁷⁹ or insufficiently described the property,⁸⁰ or was fraudulent.⁸¹

The parties cannot, however, by their agreement alter the character of property as realty or personality so as to affect the rights of third persons;⁸² nor can the second mortgagee and the mortgagor by agreement between themselves alter or change the contract stated in the first mortgage unless the first mortgagee becomes a party thereto or estops himself by his conduct;⁸³ but the junior mortgagee may question the amount due under the senior mortgage.⁸⁴ The rule that a second mortgagee who takes expressly subject to a prior mortgage cannot assert the invalidity thereof does not apply as between the parties.⁸⁵ Where a sale of mortgaged property is made expressly subject to the mortgage, the purchaser is postponed thereto in spite of defects which would invalidate the instrument.⁸⁶ Although a subsequent mortgage recites that it is subject to a former mortgage, the second

—G. M. Carleton Bros. & Co. v. Bowen, Tex.Civ.App., 193 S.W. 732.

73. Tex.—Home Ins. Co. v. Klous, Civ.App., 53 S.W.2d 176, error refused.

11 C.J. p 650 note 72.

Consideration shown

First crop mortgagee's waiver consenting that hail insurer's mortgage should be prior, made in consideration for loss payable clause in favor of first mortgagee, was supported by consideration, and estopped first mortgagee from insisting upon priority.—Home Ins. Co. v. Klous, Tex.Civ.App., 53 S.W.2d 176, error refused.

Antecedent debt

Landowner's subsequent agreement with crop mortgagee, financing tenant on mortgage subject to claim for rent, that mortgagee might pay lienable labor claims, and deduct from crop, covered only payments made after date of agreement and was without consideration as to payments made prior thereto.—Howell v. Kahn, 245 P. 86, 42 Idaho 277.

74. Ark.—Rose v. Million, 228 S.W. 376, 147 Ark. 530.

Mo.—Geiser Mfg. Co. v. Todd, App., 204 S.W. 287.

11 C.J. p 650 note 74.

Violation of agreement as to filing

A second mortgagee who violated his agreement not to file his mortgage until a prior mortgage was filed by placing his mortgage on file as soon as practicable is not a mortga-

gee or lienholder in good faith and does not obtain superiority of lien thereby.—Home Nat. Bank of Cleburne v. Herd, Tex.Civ.App., 250 S.W. 250.

Misstatement of prior mortgage's recording

Recorded mortgage, containing recital that it is second to previously recorded mortgage, is not superior lien to former mortgage, even though former was not recorded.—Haney v. Holt, 16 S.W.2d 463, 179 Ark. 403.

Contemporaneous mortgages

Where parties to contemporaneous mortgages agree one should be prior lien and should be first filed, that mortgage is entitled to priority, although by mistake other is first filed.—Hill v. Bender, 6 P.2d 1081, 1084, 138 Or. 400, citing *Corpus Juris*. 11 C.J. p 650 note 71 [a].

75. Wis.—Wisconsin Valley Trust Co. v. Hotel Wausau Co., 251 N.W. 213, 214 Wis. 73.

76. N.C.—Avery County Bank v. Smith, 120 S.E. 215, 186 N.C. 635.

Encumbrances of record

A recital in a mortgage of record that it is subject to encumbrances of record will not render it subject to a prior mortgage improperly recorded.—Pruitt v. Parker, 161 S.E. 212, 201 N.C. 696.

77. Mass.—Connecticut Valley Onion Co. v. Pielock, 183 N.E. 526, 281 Mass. 287.

78. Colo.—Sharp v. Hollister, 174 P. 301, 65 Colo. 110.

Or.—Nichols v. Jackson County Bank, 298 P. 908, 136 Or. 302.

11 C.J. p 651 note 75.

79. Mo.—Young v. Evans-Snyder-Buell Commn. Co., 59 S.W. 113, 158 Mo. 395.

11 C.J. p 651 note 76.

80. Iowa.—Corning First Nat. Bank v. Reid, 98 N.W. 107, 122 Iowa 280. Neb.—Wood River Bank v. Kelley, 46 N.W. 86, 29 Neb. 590.

Okl.—Hardwick v. Atkinson, 58 P. 747, 8 Okl. 608.

Different descriptions

That description in first mortgage issued by concrete company on its plant was not same as that in second mortgage expressly made subject to first held not to affect priority of first.—Hunt v. Longyear, 125 N.E. 583, 72 Ind.App. 109.

81. Ind.—Muncie Nat. Bank v. Brown, 14 N.E. 358, 112 Ind. 474.

11 C.J. p 651 note 78.

82. N.Y.—Matter of Munson, 128 N.Y.S. 1106, 70 Misc. 461.

83. N.Y.—Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512.

84. Ill.—Henneberry v. Binns, 125 Ill.App. 499.

85. Mass.—Housatonic Bank v. Martin, 1 Metc. 294.

86. Mich.—Dwight v. Scranton, etc., Lumber Co., 36 N.W. 752, 69 Mich. 127.

11 C.J. p 651 note 82.

mortgagee is not bound by a verbal agreement extending the lien of the first mortgage to after-acquired property where he has no notice of such agreement.⁸⁷

While an agreement postponing a mortgage lien will be construed liberally to effectuate the intention of the parties,⁸⁸ it will not be extended beyond its plain terms,⁸⁹ and, unless all of its essential conditions are performed as required by its express terms, the parties will be remitted to their original rights.⁹⁰

§ 297. Priority between Mortgage and Other Liens

The lien of a valid mortgage, if first in time, is usually granted priority.

In the absence of the mortgagee's consent to, or estoppel to deny, the creation of a superior lien or right,⁹¹ the lien of a mortgage, where the statutory conditions with respect to execution, delivery, filing, or recording have been met, is, if first in time, usually also held to be first in right,⁹² unless a preference is granted by statute to the subsequent

87. Mo.—Kolkmeier v. J. S. Merrell Drug Co., 141 S.W. 1164, 162 Mo. App. 1.

88. Iowa.—Wood v. Duval, 69 N.W. 1061, 100 Iowa 724.

89. Cal.—Irvine v. California Cotton Credit Corporation, App., 64 P.2d 782.

11 C.J. p 651 note 84.

90. N.Y.—McLeod v. Miner, 56 N.Y. S. 714, 38 App.Div. 115.

91. Mich.—Marquette First Nat. Bank v. Weed, 50 N.W. 864, 89 Mich. 357.

92. U.S.—Coggin v. Hartford Accident & Indemnity Co., D.C.N.C., 9 F.Supp. 785, reversed on other grounds, C.C.A., Hartford Accident & Indemnity Co. v. Coggin, 78 F. 2d 471, certiorari denied Coggin v. Hartford Accident & Indemnity Co., 56 S.Ct. 141, 296 U.S. 620, 80 L.Ed. 472, rehearing denied 56 S. Ct. 169, 296 U.S. 663, 80 L.Ed. 440.

Ala.—R. P. Harris Motor Co. v. Bailey, 121 So. 33, 219 Ala. 8, 63 A.L.R. 1453—Campbell Motor Co. v. Stanfield, 108 So. 515, 214 Ala. 506.

Cal.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167.

Ill.—Atlas Securities Co. v. Ramsay, 262 Ill.App. 559—Central Trust Co. of Illinois v. Sheridan Beach Hotel Bldg. Corporation, 259 Ill.App. 404.

Ind.—Gaumer v. Register Pub. Co., 119 N.E. 728, 730, 67 Ind.App. 658, citing *Corpus Juris*.

Kan.—Faeth Co. v. Bressie, 264 P. 1077, 1078, citing *Corpus Juris*—Davidson & Case Lumber Co. v. Anderson, 187 P. 872, 106 Kan. 213.

La.—Liquid Carbonic Corporation v. Leger, App., 169 So. 170—Bernhardt v. Sandel, 4 La.App. 648.

Mass.—West Springfield Trust Co. v. Hinckley, 154 N.E. 580, 258 Mass. 157.

Minn.—Healy, Owen-Hartzell Co. v. Montevideo Farmers' & Merchants' Elevator Co., 206 N.W. 646, 165 Minn. 330, 44 A.L.R. 1238.

Mo.—United Iron Works Co. v. Sleepy Hollow Mining & Development Co., 198 S.W. 443, 198 Mo. App. 562.

Neb.—Weigand v. Hyde, 192 N.W. 198, 109 Neb. 678.

N.J.—Kramer v. Yocum, 144 A. 183, 104 N.J.Eq. 79—Bainbridge v. Warburton, 129 A. 474, 98 N.J.Eq. 81.

N.C.—Cowan v. Dale, 128 S.E. 155, 189 N.C. 684.

N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N.D. 355, L.R.A.1917E 298.

Ohio.—Kittinger Witt Co. v. Brookins, 172 N.E. 297, 35 Ohio App. 266.

Tex.—Scott v. Bonner, Civ.App., 21 S.W.2d 54.

Va.—Electric Transmission Co. of Virginia v. Pennington Gap Bank, 119 S.E. 99, 137 Va. 94.

Wash.—Kirby v. First Nat. Bank, 229 P. 305, 131 Wash. 204—Arnold v. Peasley, 222 P. 472, 128 Wash. 176.

Wis.—Hibbard v. Cribb, 49 N.W. 823, 80 Wis. 393, 15 L.R.A. 768.

11 C.J. p 647 note 20—42 C.J. p 763 note 49.

Corpus Juris is cited in Kaufman Oil Mill v. Republic Nat. Bank & Trust Co., Tex.Civ.App., 43 S.W.2d 269, 270.

Priority between agistor's lien and chattel mortgage lien see Animals § 21.

Priority between thresherman's lien and chattel mortgage lien see Agriculture § 56.

Priority of carrier's lien for charges over chattel mortgage lien see Carriers § 329.

Mortgage given priority

(1) Over a subsequent assignment.—Bainbridge v. Warburton, 129 A. 474, 98 N.J.Eq. 81.

(2) Over factor's lien.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 323.

(3) Over photostatic copies of record of mortgaged abstract plant, so that holders of such copies could not sell them to satisfy an alleged possessory lien.—Phegley & Cavender v. Swender Blue Print Co., 289 P. 500, 133 Or. 146.

(4) Over a subsequent mortgage, at least where the subsequent mortgagee had notice of plaintiff's rights, notwithstanding that plaintiff possessed an equitable mortgage arising from promise to give mortgage.—Weigand v. Hyde, 192 N.W. 198, 109 Neb. 678.

Garnishment

(1) A mortgage has priority over a subsequent garnishment of the mortgaged property or the proceeds thereof.

Colo.—Etchison v. Strain, 262 P. 919, 83 Colo. 73.

Iowa.—Scurry v. Quaker Oats Co., 208 N.W. 860, 201 Iowa 1171.

N.D.—Ruble v. Nyseth, 239 N.W. 625, 61 N.D. 623.

S.D.—Minneapolis Threshing Mach. Co. v. Calhoun, 159 N.W. 127, 37 S.D. 542.

Tex.—West v. U. S. Fidelity & Guaranty Co., Civ.App., 298 S.W. 652.

28 C.J. p 256 note 66.

(2) If mortgagee shows either legal or equitable right to funds in hands of garnishee, the latter is protected against liability to garnishing creditor of mortgagor.—Scurry v. Quaker Oats Co., supra.

Judgment

(1) The rights of a mortgagee have priority over those of a subsequent judgment creditor, the mortgage having been duly recorded.—Williamson v. Johnson, 195 P. 562, 99 Or. 336.

(2) A valid mortgage given before delivery to secure the purchase price of a chattel is superior to the lien of a prior judgment against the mortgagor.—Papas v. Snow, 252 Ill. App. 120.

(3) Where, under the statute, a mortgage with a maturity date exceeding three years is valid during the three years, if the mortgagor or trustee took possession of the property on default within three years, the mortgage had priority over a judgment given subsequent to the recording of the mortgage.—Central Trust Co. of Illinois v. Sheridan Beach Hotel Bldg. Corporation, 259 Ill.App. 404.

Widow's lien

(1) Where the circumstances are such as to bring the case within the statute, a widow's lien, created by statute, will have priority over a mortgage.

Ga.—Gresham v. Loganville Banking Co., 122 S.E. 806, 32 Ga.App. 177.

lien,⁹³ and, conversely, is held inferior to other valid liens prior in time.⁹⁴ Indeed, in the absence of a statute to the contrary, a mortgagor has no power to impose a special lien on the mortgaged chattels which will take precedence over the mortgage⁹⁵ without the authority of the mortgagee, express or implied;⁹⁶ but the consent of the mortgagee to the creation of the lien may be implied.⁹⁷

Even though the mortgagor is in possession, he is not the mortgagee's agent; and the mortgagor does not, in the absence of some authorization by the mortgagee, sustain to the mortgagee any relation which authorizes him to contract any liability on his behalf or to contract a lien that shall have priority over his mortgage.⁹⁸ Mere knowledge on

the part of the mortgagee that the property is being used under circumstances tending to create a lien is not sufficient to imply a grant of authority on his part.⁹⁹ A mortgage is also prior to an alleged statutory lien which has not been perfected in accordance with the statutory requirements.¹

After-acquired property. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands, as already considered in § 291, and hence the mortgagee will take it subject to all prior or superior liens;² but the mortgagee will have a lien superior to subsequent liens.³ Hence, a mortgage of property thereafter to be acquired will not have priority over the rights

Tex.—Cleveland State Bank v. Lilley, Civ.App., 260 S.W. 324.
24 C.J. p 249 notes 22-26.

(2) The lien of a mortgage given before the mortgagor's marriage, however, has been held to be superior to the statutory widow's lien.—Hedeman v. Newnom, 211 S.W. 968, 109 Tex. 472, reversing Newnom v. Hedeman, Civ.App., 184 S.W. 298.

(3) Under such circumstances, "the estate of the husband" as used in the statute refers only to the equity of redemption.—Hedeman v. Newnom, supra.

Priority of surviving spouse's allowance generally see the C.J.S. title Executors and Administrators § 338, also 24 C.J. p 247 note 3-p 249 note 37.

93. Minn.—Moorhead Lumber Co. v. Remington Packing Co., 206 N.W. 653, 165 Minn. 411.

Punitive damages held proper, in action by statutory lienholder against mortgagee for removing car from jurisdiction.—Waldrop v. M. & J. Finance Corporation, 183 S.E. 460, 178 S.C. 527.

94. Ga.—Brooks v. Folds, 126 S.E. 554, 33 Ga.App. 409.

Iowa.—Malvern Nat. Bank v. Halliday, 192 N.W. 843, 195 Iowa 734.

Kan.—Kansas Wheat Growers' Ass'n v. Floyd, 227 P. 336, 116 Kan. 522.

La.—Home Finance Service v. Linam, App., 174 So. 389.

Mont.—National Bank of Gallatin Valley v. Ingle, 164 P. 535, 53 Mont. 414.

N.J.—Efficient Collection & Adjustment Co. v. McDonough, 174 A. 487, 12 N.J.Misc. 724.

N.D.—Michigan City Bank v. First State Bank of Manvel, 201 N.W. 176, 51 N.D. 757.

R.I.—Rhode Island Hospital Trust Co. v. Devonshire Financial Service Corporation, 167 A. 134, 53 R. I. 443.

11 C.J. p 647 note 21.

Lien of partner as against mortgage of other partner

Where the partnership contract provided that one partner should loan money to the other partner for the conduct of the firm business, and have a prior lien on the firm property for such loan, he thereby became a creditor of the firm, entitled to priority over a mortgagee of the undivided interest of the other partner.—Malvern Nat. Bank v. Halliday, 192 N.W. 843, 195 Iowa 734.

Perfection of lien

Where a statute gives a lienholder a certain time within which to perfect his lien by recording, his lien when so recorded is superior to that of a mortgage taken in good faith before the lien was recorded.—Oil Well Supply Co. v. Farmers' Nat. Bank of Chickasha, 239 P. 585, 112 Okl. 17.

Pledge

A pledgee who has taken actual possession is entitled to priority over a subsequent mortgage of the same goods.

Ill.—Cooper v. Ray, 47 Ill. 53.

Ind.—Deeter v. Sellers, 102 Ind. 458.

Kan.—Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.

Ky.—Sanders v. Davis, 13 B.Mon. 432.

11 C.J. p 647 note 24.

95. Ky.—South v. Tuesdale, 26 S.W. 2d 519, 233 Ky. 682.

Tex.—Overland Automobile Co. of Dallas v. Findley, Civ.App., 234 S.W. 106.

11 C.J. p 651 note 87.

Subsequent conditional sale

Where dealer sold automobile covered by floor plan mortgage, under conditional sale contract, title retained by dealer remained subject to mortgage.—National Bond & Investment Co. v. Union Inv. Co., 244 N.W. 483, 260 Mich. 307.

96. Mo.—Union House Furnishing Co. v. Mudd, App., 16 S.W.2d 671.

Mont.—First Nat. Bank v. Hergert, 22 P.2d 169, 94 Mont. 197.

Tex.—Fritz Motor Co. v. Gabert, Civ. App., 41 S.W.2d 72, error dismissed, 11 C.J. p 651 note 88.

Waiver of priority generally see supra § 292.

Lien created by contract

A valid recorded mortgage creates a lien prior to any subsequent lien created by contract of any kind to which the mortgagee is not a party or to which he does not give consent, actual or implied.—Hawkes v. First Nat. Bank, 224 P. 224, 75 Colo. 47.

97. Tex.—Fritz Motor Co. v. Gabert, Civ.App., 41 S.W.2d 72, error dismissed.

11 C.J. p 652 note 90.

98. Tex.—Overland Automobile Co. of Dallas v. Findley, Civ.App., 234 S.W. 106.

99. Mo.—First Nat. Bank v. Witherpoon Livestock Commission Co., App., 90 S.W.2d 453.

Wis.—Adler v. Godfrey, 140 N.W. 1115, 153 Wis. 186.

11 C.J. p 652 note 91.

1. U.S.—Elk Creek Lumber Co. v. Hamby, C.C.A.N.C., 84 F.2d 144.

Okl.—Jarecki Mfg. Co. v. Fleming, 252 P. 17, 123 Okl. 147.

Notice of lien

Although employed by sheriff to take care of live stock seized in claim and delivery action by mortgagee, mortgagor who served no statutory notice acquired no lien thereon superior to the mortgage which was prior and recorded.—Peyton v. Nielsen, 244 N.W. 384, 60 S.D. 351.

2. U.S.—Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation, C.C.A.N.J., 293 F. 706.

Mich.—Grinnell Bros. v. Moy, 203 N.W. 167, 230 Mich. 26.

Or.—Union Nat. Bank v. Leidecker Tool Co., 178 P. 690, 72 Okl. 121.

Tex.—H. O. Wooten Grocer Co. v. Wade Meat Co., Civ.App., 37 S.W. 2d 1090.

11 C.J. p 647 note 28.

3. Ga.—Downing Co. v. Jones, 176 S.E. 904, 50 Ga.App. 9.

of a vendor retaining title under a valid conditional sale of such property, since the mortgagor acquires no title thereto.⁴ In equity, the lien of a mortgage on after-acquired property attaches as soon as the property is acquired by the mortgagor, and is superior to the lien of a judgment creditor with a levy on the same property under a judgment against the mortgagor.⁵ A judgment lien attaches to a growing crop only from the time it has an actual existence, while a mortgage on a crop to be made takes effect from the date of the mortgage, thereby taking precedence over the lien of the prior judgment.⁶

Execution. The lien of a valid mortgage has priority over the lien of an execution which subsequently attaches,⁷ but a mortgage lien is subject and subordinate to an existing execution lien.⁸

Garage keeper's lien. In the absence of a statute to the contrary, a garage keeper does not have a lien on a motor vehicle for storage, services, and supplies which is superior to a prior mortgage

thereon.⁹ The mere fact that the mortgagee knew that the mortgagor was keeping the machine in the garage does not imply his consent to the creation of a superior lien.¹⁰ On the other hand, where such a lien is granted by statute, a garage keeper has a lien for storage, services, and supplies furnished the mortgagor which is superior to a prior mortgage,¹¹ notwithstanding that the automobile is taken and returned daily to the garage.¹² Such a statutory lien, once acquired, is, of course, superior to a subsequent chattel mortgage.¹³

Mortgage securing future advances. Where the mortgagee under a mortgage providing for future advances possesses an option as to the making of such advances, his lien for advances made after notice of a subsequent mortgage which has been given on the property will be postponed to that of a junior encumbrance,¹⁴ and the same rule has been applied to a sale by the mortgagor.¹⁵ Future advances, however, will be protected even though made after a sale by the mortgagor,¹⁶ or after a sale under execution against him,¹⁷ when made by

Miss.—Tabb v. People's Bank & Trust Co., 133 So. 137, 160 Miss. 22.

4. Ariz.—Babbitt & Cowden v. Live Stock Co. v. Hooker, 236 P. 722, 28 Ariz. 263.

N.J.—Hodes v. Mooney, 152 A. 205, 8 N.J.Misc. 851, 9 N.J.Misc. 48.

11 C.J. p 647 note 29.
Priority of chattel mortgage over seller's lien generally see infra § 305.

5. N.J.—Stoll v. Sibson, 56 A. 710, 65 N.J.Eq. 552.

6. Miss.—Candler v. Cromwell, 57 So. 554, 101 Miss. 161—Cooper v. Turnage, 52 Miss. 431—Cayce v. Stovall, 50 Miss. 396.

7. Ala.—Choctaw Bank v. Dearmon, 134 So. 648, 223 Ala. 144.

Cal.—Bank of California v. McCoy, App., 72 P.2d 923.

Colo.—Robinson v. Wright, 9 P.2d 618, 619, 90 Colo. 417.

Ill.—Demetropoulos v. Horan, 5 N.E. 2d 262, 287 Ill.App. 626—State Bank of Warrensburg v. Keck, 229 Ill.App. 230.

Iowa.—Pierre v. Pierre, 232 N.W. 633, 210 Iowa 1304.

La.—Automobile Sec. Corporation v. Randazza, 135 So. 45, 17 La.App. 489, recalled on application for rehearing 135 So. 674, 17 La.App. 489.

Mo.—American Asphalt Roof Corporation v. Marler, App., 56 S.W.2d 844—Sikes v. Riga, 297 S.W. 727, 221 Mo.App. 152.

N.Y.—Martin v. Miller, 245 N.Y.S. 37, 230 App.Div. 401.

S.D.—First Citizens' Nat. Bank of Watertown v. Reilly, 252 N.W. 40, 62 S.D. 192.

Wash.—Tope v. Brattain, 21 P.2d 241, 172 Wash. 556.

23 C.J. p 507 note 58.

Execution sale

The purchaser at an execution sale of a leasehold interest, including an interest in the growing crop, did not acquire any interest therein superior to the rights of a prior mortgagee, where mortgage was recorded.—First Nat. Bank v. Womach, 223 P. 586, 128 Wash. 492.

8. Ill.—Payne v. Brownlee, 196 Ill. App. 108.

23 C.J. p 506 note 52.

9. Ala.—R. P. Harris Motor Co. v. Bailey, 121 So. 33, 219 Ala. 8, 63 A.L.R. 1453—Campbell Motor Co. v. Stanfield, 108 So. 515, 214 Ala. 506.

Mich.—Sloat v. Mid-West Finance Corporation, 189 N.W. 52, 219 Mich. 577.

Ohio.—National Bond & Inv. Co. v. American Auto Hotel Co., 24 Ohio N.P., N.S., 585.

Tex.—Commercial Credit Co. v. Brown, Civ.App., 281 S.W. 1101, reformed in other respects, Com. App., 284 S.W. 911.

Wash.—Ellison v. Scheffsky, 250 P. 452, 141 Wash. 14—Rothweiler v. Winton Motorcar Co., 153 P. 737, 92 Wash. 215.

Priority of storage liens over mortgages generally see infra § 306.

10. Wis.—Adler v. Godfrey, 140 N. W. 1115, 153 Wis. 186.

11. Mo.—Bostic v. Workman, 31 S. W.2d 218, 224 Mo.App. 645.

N.J.—Cattell v. Rehner, 119 A. 374, 94 N.J.Eq. 292.

N.Y.—Courtlandt Garage & Realty Corporation v. New York Yellow Cab Co. Sales Agency, 215 N.Y.S. 789, 217 App.Div. 4—Maccar Trucks v. Gorenstein, 248 N.Y.S. 231, 139 Misc. 681—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422—Bardasch v. Kalisch, 193 N.Y.S. 719, 118 Misc. 119—Willys-Overland v. Prudman Automobile Co., 196 N.Y.S. 487.

38 C.J. p 81 note 48.

Assigned lien is prior to lien of chattel mortgage.—Cattell v. Rehner, 119 A. 374, 94 N.J.Eq. 292.

Purchase-money mortgage is inferior to garageman's statutory lien for storage and supplies.—Wolfman Co. v. Eisenberg, 190 N.Y.S. 259, 116 Misc. 43.

12. N.Y.—Sterling Motor Truck Co. of New York v. Pincus, 182 N.E. 241, 260 N.Y. 43, modifying Sterling Motor Truck Co. of New York v. Lavan, 250 N.Y.S. 953, 233 App. Div. 819.

13. N.J.—Efficient Collection & Adjustment Co. v. McDonough, 174 A. 487, 12 N.J.Misc. 724.

14. U.S.—Davis v. Carlisle, Ind.T., 142 F. 106, 73 C.C.A. 330, reversing 82 S.W. 682, 5 Ind.T. 83.

Minn.—Anderson v. Liston, 72 N.W. 52, 69 Minn. 82.

Tex.—Omaha Bank v. Pope, Civ.App., 103 S.W. 692.

15. Ill.—Preble v. Conger, 66 Ill. 370.

16. Ill.—Preble v. Conger, supra.

17. Tex.—Law Sprinkle Mercantile Co. v. Hause, Civ.App., 184 S.W. 737.

virtue of a liability incurred prior to the sale or notice thereof. Such advances have, likewise, been protected where at the time of the sale under execution the other property was sufficient to have discharged the debt.¹⁸ A judgment subsequent to a security given to secure future advances has priority over all advances made subsequently to the existence of such judgment.¹⁹

Purchase-money mortgages. A mortgage for the purchase price of an article executed to the seller by the buyer simultaneously with the acquisition of title is ordinarily accorded priority over claims which would outrank an ordinary mortgage,²⁰ but in some jurisdictions the lien of a purchase-money mortgage depends, as in the case of other mortgages, on priority of record or change of possession.²¹ Although there is authority to the contrary,²² a purchase-money mortgage executed simultaneously with the acquisition of title is superior to an antecedent mortgage covering after-acquired property.²³

§ 298. — Priority of Record

In the absence of a statutory preference, priority of record gives a chattel mortgage precedence over other claims or liens.

Not only does priority of record determine priority of lien as between successive mortgages, as already considered in § 295, but priority of record also gives a mortgage precedence over other claims or liens that are not granted a special preference by virtue of statute.²⁴

§ 299. — Livery-Stable Keeper's Lien

In the absence of a legislative intent to the contrary, a prior valid recorded mortgage has priority over a liveryman's lien.

In the absence of a statute to the contrary, the lien of a prior valid recorded mortgage will according to the weight of authority take precedence over the subsequently acquired lien of a livery-stable keeper on animals placed in his charge, unless such animals were delivered to the livery-stable keeper to be kept and cared for by him with the consent of the mortgagee, express or implied,²⁵ but there

18. Tex.—Law Sprinkle Mercantile Co. v. Hause, *supra*.

19. N.J.—Griffin v. New Jersey Oil Co., 11 N.J.Eq. 49.

20. Ala.—Blackman v. Engram, 107 So. 741, 214 Ala. 262.

Colo.—Robinson v. Wright, 9 P.2d 618, 619, 90 Colo. 417, citing *Corpus Juris*.

11 C.J. p 648 note 32.

Antecedent judgment

(1) Such a mortgage is superior to an antecedent judgment.

Ala.—*Ex parte Scharnagel*, 136 So. 834, 223 Ala. 4, granting certiorari *Scharnagel v. Quinn*, 136 So. 833, 24 Ala.App. 320, certiorari denied 136 So. 835, 223 Ala. 487.

Ga.—Ritchie & Wells v. Irvin, 139 S. E. 910, 37 Ga.App. 230.

11 C.J. p 648 note 33.

(2) Lien of judgment against vendee giving mortgage to secure part only of purchase money, however, attaches to interest of mortgagor. Accordingly, property returned to vendor in satisfaction of purchase price was subject to levy, where purchase price, and credit given was not fair market value of property.—*Ritchie & Wells v. Irvin*, *supra*.

Antecedent mortgage

A purchase-money mortgage outranks a previously executed mortgage covering the same property. Conn.—*Walker v. Vaughn*, 33 Conn. 577.

Tex.—*Tips v. Gay*, Civ.App., 146 S. W. 306.

11 C.J. p 648 note 36.

Claimant held not entitled to priority as a purchase-money mortgagee.—*Shooters Island Shipyard Co. v.*

Standard Shipbuilding Corporation, C.C.A.N.J., 293 F. 706.

Execution

Lien of mortgages given to secure purchase money, was superior to lien of execution issued against mortgagor and placed in hands of sheriff before date of mortgages.—*Robinson v. Wright*, 9 P.2d 618, 90 Colo. 417.

Proceeds

Where the mortgaged property is sold on foreclosure of a senior mortgage, a mortgage given to secure a part of the purchase price takes precedence over a lien of junior mortgages.—*Stuckman v. Roose*, 46 N.E. 680, 147 Ind. 402—11 C.J. p 648 note 40.

Renewals held purchase-money mortgages

Utah.—*Gray v. Kappos*, 61 P.2d 613.

What constitutes purchase-money mortgage

(1) A purchase-money mortgage is a mortgage which is given on the property sold to secure the balance of the purchase price remaining unpaid. Whether the mortgage is given directly to the seller or to a third person who advances the money, the legal effect is the same.—*Gray v. Kappos*, Utah, 61 P.2d 613.

(2) Where the seller agrees that the buyer shall borrow a portion of the purchase price and execute a mortgage on the property therefor, he cannot insist that a mortgage given to secure the remainder of the purchase money shall be a prior lien.—*Face v. J. M. Radford Grocery Co.*, Tex.Civ.App., 152 S.W. 1130.

21. Ark.—*Thornton v. Findlay*, 134

S.W. 627, 97 Ark. 432, 33 L.R.A., N.S., 491.

11 C.J. p 648 note 37.

22. N.J.—*Dunn v. Hastings*, 34 A. 256, 54 N.J.Eq. 503.

11 C.J. p 648 note 38.

23. Mich.—*Hammel v. Hancock First Nat. Bank*, 38 N.W. 397, 129 Mich. 176, 95 Am.S.R. 431.

11 C.J. p 648 note 39.

24. U.S.—*Free-Crayton Hardwood Co. v. Richardson-Warren Co.*, D.C. La., 18 F.2d 617.

Ill.—*Nathan M. Stone Co. v. Ellerson*, 230 Ill.App. 593, 596, citing *Corpus Juris*.

La.—*Maroun v. Marrs*, 178 So. 723.

N.C.—*Jordan v. Wetmur*, 162 S.E. 610, 302 N.C. 279.

S.C.—*Garris v. Commercial Credit Co.*, 147 S.E. 601, 149 S.C. 498.

11 C.J. p 652 note 94.

Effect of delay in recording mortgage see *supra* § 157.

Dates from time of filing

In contest between duly recorded bill of sale to secure debt and lien of subsequently recorded general execution, record of bill dates from time of filing in superior clerk's office.—*Merchants' & Mechanics' Bank v. Beard*, 134 S.E. 107, 162 Ga. 446, answers to certified questions conformed to 134 S.E. 479, 35 Ga.App. 692.

Recording of mortgage insufficient to impart constructive notice does not grant priority to mortgage.—*Life Ins. Co. of Virginia v. Page*, Miss., 172 So. 873.

25. Mo.—*First Nat. Bank v. Wither- spoon Livestock Commission Co.*,

is authority to the contrary.²⁶

The lien of the liveryman will be superior to that of the mortgagee under a prior mortgage when the mortgagee consents to the mortgagor's leaving the animal in charge of the liveryman, or, being notified that it has been so left, permits it to remain, expressly recognizing the right to a lien thereon.²⁷

The consent of the mortgagee may be implied from the circumstances of the case, but the mere fact that the mortgagee leaves the mortgaged property in the possession of the mortgagor is not of itself proof of such consent.²⁸ Also the mere fact that the mortgagee does not object to the animals being kept by the livery-stable keeper does not constitute waiver or consent on his part.²⁹

Of course, where a statute so provides, the lien of a livery-stable keeper is superior to that of a mortgagee,³⁰ provided there has been a compliance with the statutory requirements, such as to giving notice.³¹ This superiority of lien may under the statute extend to wagons and other appurtenances.³² To entitle such lien to priority, however, it must arise from a compliance with the terms of the statute and not from agreement between the parties.³³

The priority of an agistor's lien over a mortgage is considered in the title Animals § 21 g.

Lien attaching before execution of mortgage.

The lien of a liveryman which had its inception prior to the giving of the chattel mortgage, which is taken with knowledge of the situation of the animals, is superior to that of such mortgage.³⁴ The lien of the livery-stable keeper, however, will be invalidated when he voluntarily permits the animals to leave his possession,³⁵ and in such case will be postponed to the rights of third persons without notice of the lien.³⁶ Where, however, the possession of the animal is tortiously obtained from the stable keeper by the owner or by anyone else, the lien of the stable keeper is not thereby destroyed,³⁷ even as against third persons having no notice of his lien.³⁸

§ 300. — Artisan's or Repair Man's Lien

In the absence of a statute to the contrary, or the express or implied consent of the mortgagee, the lien of a prior recorded mortgage on a motor vehicle is superior to that of a repair man's.

Ordinarily, as already considered in the title Bailments § 35 h, the mortgagor has no right to impose a lien for repairs on the mortgaged property superior to the mortgage, unless the facts indicate an implied consent on the part of the mortgagee that the mortgagor may incur expenses for repairing the property.

Motor vehicles. A lien for repairs imposed by a mortgagor in possession of a motor vehicle is in

App., 90 S.W.2d 453, 461, quoting *Corpus Juris*.
 N.Y.—Johanns v. Ficke, 121 N.E. 358, 224 N.Y. 513, modifying 155 N.Y.S. 1115, 171 App.Div. 897.
 Tex.—Oak Cliff State Bank & Trust Co. v. Travis, Civ.App., 219 S.W. 286.
 Wash.—Levitch v. Link, 164 P. 233, 95 Wash. 639.
 11 C.J. p 652 note 95.
 26. Kan.—Willard v. Whinfield, 43 P. 314, 2 Kan.App. 53.
 11 C.J. p 653 note 97.
 27. Me.—Bowden v. Dugan, 39 A. 467, 91 Me. 141.
 11 C.J. p 653 note 98.
 28. Mo.—First Nat. Bank v. Witherpoon Livestock Commission Co., App., 90 S.W.2d 453—Birmingham v. Carr, 197 S.W. 711, 196 Mo.App. 411.
 11 C.J. p 653 notes 2, 3.
 29. Mo.—First Nat. Bank v. Witherpoon Livestock Commission Co., App., 90 S.W.2d 453.
 30. N.Y.—Johanns v. Ficke, 121 N.E. 358, 224 N.Y. 513, modifying 155 N.Y.S. 1115, 171 App.Div. 897.
Training of race horse
 Defendant, contracting to develop

and train race horse, has no lien on sulky and harness as against trustee under prior deed of trust to such property. He does, however, under Code 1907 § 4808, have a lien on horse, with right of retention for charges.—Finney v. Dryden, 103 So. 13, 214 Ala. 370.
 31. N.Y.—Bissell v. Pearce, 28 N.Y. 252—Corning v. Ashley, 4 N.Y.S. 255, 51 Hun 483, affirmed 24 N.E. 1100, 121 N.Y. 700.
 11 C.J. p 654 note 12.
 32. N.Y.—Peter Barrett Mfg. Co. v. Van Ronk, 105 N.E. 811, 212 N.Y. 90, affirming 133 N.Y.S. 691, 149 App.Div. 194.
 11 C.J. p 654 note 13.
 33. Kan.—Central Nat. Bank v. Brecheisen, 70 P. 895, 65 Kan. 807.
 34. Ala.—Snellgrove v. Evans, 40 So. 567, 145 Ala. 600.
 Colo.—Tabor v. Salisbury, 33 P. 190, 3 Colo.App. 335.
 Neb.—Becker v. Brown, 91 N.W. 173, 65 Neb. 264.
 35. Neb.—Marseilles Mfg. Co. v. Morgan, 10 N.W. 462, 12 Neb. 66.
 11 C.J. p 653 note 6.
 36. Mo.—State v. Shevlin, 23 Mo. App. 598.

Neb.—Marseilles Mfg. Co. v. Morgan, 10 N.W. 462, 12 Neb. 66.
 11 C.J. p 653 note 7.
Accepting bill of sale
 Where the lienor waives his lien for services and accepts a bill of sale of the property, after the execution of a mortgage, his rights are postponed to those of the mortgagee.—Murray v. Guse, 38 P. 753, 10 Wash. 25—11 C.J. p 654 note 9.
Usual use by mortgagor
 A livery-stable keeper allowing the property to be used in the usual way by the mortgagor will lose his lien against a mortgagee without notice or knowledge.
 Mo.—Drummond v. Griffin, 95 A. 506, 114 Me. 120, L.R.A.1916B 748.
 Neb.—Marseilles Mfg. Co. v. Morgan, 10 N.W. 462, 12 Neb. 66.
 11 C.J. p 654 note 8.
 37. Mo.—Heaps v. Jones, 23 Mo. App. 617, 621, overruling McCreery v. Muench, 7 Mo.App. 589—State v. Shevlin, 23 Mo.App. 598, overruling McCreery v. Muench, supra.
 11 C.J. p 654 note 10.
 38. Mo.—Heaps v. Jones, 23 Mo. App. 617, overruling McCreery v. Muench, 7 Mo.App. 589—State v. Shevlin, 23 Mo.App. 598, overruling McCreery v. Muench, supra.

some jurisdictions regarded as inferior to that of the mortgagee,³⁹ in the absence of the mortgagee's consent to the creation of a superior lien.⁴⁰ The mortgagee's consent to repairs is not implied from the mere fact of the mortgagor's possession⁴¹ or an agreement that the mortgagor should keep the machine in repair.⁴² In other jurisdictions the mortgagee of the vehicle by allowing the mortgagor to have possession of it for use is regarded as having impliedly consented to a bailment of the vehicle for reasonable repairs which enhance its value,

and the lien of a repair man for such repairs is held superior to the claim of the mortgagee, notwithstanding an additional agreement between the mortgagor and mortgagee that the mortgagee shall pay for repairs, or even an agreement that no liens shall be incurred, since the law creates the lien and not the consent of the parties.⁴³

Of course, where a statute gives the repair man of a motor vehicle a lien superior to a prior mortgage, preference will be given the repair man's lien⁴⁴ even though he had knowledge of the prior

39. Ala.—Jordan v. J. E. Rotten & Co., 126 So. 893, 23 Ala.App. 465.

Ill.—Ehrlich v. Chapple, 143 N.E. 61, 311 Ill. 467, 32 A.L.R. 989, reversing 228 Ill.App. 293.

Ohio.—Metropolitan Securities Co. v. Orlow, 140 N.E. 306, 107 Ohio St. 533, 32 A.L.R. 992.

Okl.—Greer v. Bird, 220 P. 579, 93 Okl. 246—Cook v. Oklahoma Auto Supply Co., 162 P. 731, 62 Okl. 202.

Or.—Ford v. Bates, 47 P.2d 951, 150 Or. 672.

R.I.—Arnold v. Chandler Motors of Rhode Island, 123 A. 85, 45 R.I. 469—Providence Buick Co. v. Pitts, 120 A. 583, 45 R.I. 145.

S.C.—R. H. Nesbitt Auto Co. v. Whitlock, 101 S.E. 822, 113 S.C. 519.

S.D.—Cope v. Jorgenson, 221 N.W. 263, 53 S.D. 544.

Tenn.—Owen v. George Cole Motor Co., 292 S.W. 1, 155 Tenn. 250.

Wash.—Rothweiler v. Winton Motor-car Co., 158 P. 737, 92 Wash. 215. 42 C.J. p 823 note 71.

Priority of:

Garage keeper's lien see supra § 297.

Repair man's lien over that of conditional seller see the C.J.S. title Motor Vehicles § 754, also 42 C.J. p 823 note 70—p 825 note 96.

Mechanic's lien

(1) The text rule applies to mechanics' liens on motor vehicles. Ala.—Campbell Motor Co. v. Stanfield, 108 So. 515, 214 Ala. 506.

Ind.—Grusin v. Stutz Motor Car Co. of America, 187 N.E. 382, 206 Ind. 296.

Ky.—C. I. T. Corporation v. Studebaker Sales of Kentucky, 65 S.W.2d 84, 251 Ky. 349.

42 C.J. p 824 note 84.

(2) This is particularly true as to purchase-money mortgages.—Denison v. Shuler, 11 N.W. 402, 47 Mich. 598, 41 Am.R. 734.

Right of possession

A provision in a mortgage giving the mortgagee the right of immediate possession on attachment or claim of the mortgaged property by any other person before payment has been held to preclude a subsequent repairman's claim for a lien.—

Hawkes v. Telluride First Nat. Bank, 224 P. 224, 75 Colo. 47.

In Texas

(1) The rule as stated in the text has been followed.—Commercial Credit Co. v. Brown, Com.App., 284 S.W. 911, reforming, Civ.App., 281 S.W. 1101—Fritz Motor Co. v. Gabert, Civ.App., 41 S.W.2d 72, error dismissed—General Motors Acceptance Corporation v. Merritt, Civ.App., 16 S.W.2d 296—Vilbig v. Faison, Civ. App., 296 S.W. 669—Dallas County State Bank v. Crismon, Civ.App., 231 S.W. 857—Holt v. Schwarz, Civ.App., 225 S.W. 856.

(2) On the other hand, it has also been held that where a mortgagee permits the mortgagor to remain in possession of the machine, the repairman has a superior lien.—City Nat. Bank of Wichita Falls v. Laughlin, Civ.App., 210 S.W. 617.

40. Okl.—Kirkpatrick v. Oil Well Supply Co., 49 P.2d 712, 172 Okl. 248.

Consent to removal

That the mortgaged structure could be moved and rebuilt at another point did not give mechanic's lien claimant priority.—United Iron Works Co. v. Sleepy Hollow Mining & Development Co., 198 S.W. 443, 198 Mo.App. 562.

41. La.—Federal Mortgage & Finance Co. v. Bohne, 146 So. 173.

42 C.J. p 823 note 72.

42. Ill.—Ehrlich v. Chapple, 143 N.E. 61, 311 Ill. 467, 32 A.L.R. 989, reversing 228 Ill.App. 293.

Ind.—Grusin v. Stutz Motor Car Co. of America, 187 N.E. 382, 206 Ind. 296.

Mass.—Guaranty Security Corporation v. Brophy, 137 N.E. 751, 243 Mass. 597.

N.C.—Twin City Motor Co. v. Rouzer Motor Co., 148 S.E. 461, 197 N.C. 371.

Ohio.—Metropolitan Securities Co. v. Orlow, 140 N.E. 306, 107 Ohio St. 533, 32 A.L.R. 992—Ohio Finance Co. v. Middleton, 14 Ohio App. 43. 42 C.J. p 823 note 74.

43. Ind.—Grusin v. Stutz Motor Car Co. of America, 187 N.E. 382, 206 Ind. 296.

44. Cal.—Mortgage Securities Co. of California v. Pfaffmann, 169 P. 1033, 177 Cal. 109, L.R.A.1918D 118. Kan.—Hockaday Auto Supply Co. v. Huff, 245 P. 1013, 121 Kan. 113—Willys Overland Co. v. Evans, 180 P. 235, 104 Kan. 632.

N.Y.—Courtlandt Garage & Realty Corporation v. New York Yellow Cab Co. Sales Agency, 215 N.Y.S. 789, 217 App.Div. 4—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422.

N.C.—Reich v. Triplett, 155 S.E. 573, 199 N.C. 678—Twin City Motor Co. v. Rouzer Motor Co., 148 S.E. 461, 197 N.C. 371—Johnson v. Yates, 110 S.E. 603, 183 N.C. 24.

Wis.—Jesse A. Smith Auto Co. v. Kaestner, 159 N.W. 738, 164 Wis. 205.

42 C.J. p 824 note 81.

Not classed with conditional sellers

Purchase-money mortgagee of automobile is not in same class with conditional seller, under statute relating to repairmen's liens.—Commercial Credit Co. v. Hayes-Lamb Motor Co., 298 S.W. 217, 174 Ark. 945.

Validity of statutes

(1) "Statutes giving liens for services in repairing personal property and purporting to make such liens superior to all others have been construed to create liens superior to previous chattel mortgages, even though the lien claimant had knowledge of the prior mortgage. Such statutes have been held to be constitutional, provided the prior chattel mortgage was taken subsequently to the passage of the statute, and the mortgagor has been allowed to keep possession of the mortgaged chattel. The reason is that, in taking such a mortgage, the mortgagee does so with the knowledge of the lien given by the statute, and by leaving the property, such as an automobile, in the hands of the mortgagor, impliedly consents that he shall make a contract for repairs which are necessary to preserve the property and which enhance its value."—Commercial Credit Co. v. Hayes-Lamb Motor Co., 298 S.W. 217, 174 Ark. 945.

(2) Statute held valid.—Clark v. Davis, 254 P. 399, 123 Kan. 99.

mortgage.⁴⁵ Such a statute has been held not to authorize a lien for articles sold which are attached to the automobile, although a small charge is made for attaching them.⁴⁶

Where the repair man has a superior lien, either by virtue of the mortgagee's consent or by virtue of statute, the lien will be enforceable unless it is expressly or impliedly waived; the waiver must be intentional and it cannot be implied from the terms and conditions of the mortgage of which the garage keeper has no actual knowledge.⁴⁷ Ordinarily a repair man will lose his preference if he relinquishes his possession of the motor vehicle,⁴⁸ but he will not lose his priority where he was induced to part with his possession by false and fraudulent representations of the mortgagee.⁴⁹

45. Ark.—Commercial Credit Co. v. Hayes-Lamb Motor Co., 298 S.W. 217, 174 Ark. 945.

46. Kan.—Clark v. Davis, 254 P. 399, 123 Kan. 99.

47. Ind.—Grusin v. Stutz Motor Car Co. of America, 187 N.E. 382, 206 Ind. 296.

48. N.C.—Twin City Motor Co. v. Rouzer Motor Co., 148 S.E. 461, 197 N.C. 371.

Wash.—Ellison v. Scheffsky, 250 P. 452, 141 Wash. 14.

49. N.C.—Reich v. Triplett, 155 S. E. 753, 199 N.C. 678.

50. No estoppel arises from the fact that a prior mortgagee later received a warehouseman's receipts to mortgagor for his deliveries of mortgaged wheat, and saw thereon warehouseman's notations that advances for the grain had been made.—First Nat. Bank v. White-Dulany Co., 209 P. 861, 121 Wash. 386.

51. Minn.—Ash Creek State Bank v. Zwart, 196 N.W. 935, 158 Minn. 100. Tex.—Barton v. Lary, Civ.App., 283 S.W. 920.

Equal equities

Where the equities on future crops are equal, but where the right of a chattel mortgagee came into existence at the time of making the mortgage while that of a second mortgage on the premises came into existence thereafter at the time he filed a petition for foreclosure of his mortgage, the lien of the chattel mortgagee was given preference.—Equitable Life Ins. Co. v. Read, 246 N.W. 779, 215 Iowa 700.

Executory contract of sale

Where a person had sold a growing crop but no record or delivery was made and later executed a mortgage thereon for value, the original contract was merely an executory contract of sale, and did not pass title; and the owner, being in posses-

sion, conveyed to the mortgagee a title superior to the original purchaser. Also where a purchaser claimed title under the Pooling Act of 1907 he having furnished money and materials for the growing of the crop, his title was not prior to an innocent mortgagee without notice.—Dysart v. Hamilton, 11 Tenn.App. 43.

Instructions

Where subsequent claimant had notice of the prior crop mortgage, submitting the issue as to his knowledge thereof to the jury was error.—Hairslip v. Brannum, 73 So. 464, 198 Ala. 214.

Possession as bailee of the lessor's portion of the crop does not give the lessee a lien for advances under the lease superior to the lessor's crop mortgagee, at least where title to crops remained in lessor until division thereof.—Bailey v. John W. Sward, Inc., 193 P. 952, 184 Cal. 395.

52. Minn.—First Nat. Bank v. Saterren, 188 N.W. 62, 152 Minn. 101. Mo.—Pearson v. Lafferty, 193 S.W. 40, 197 Mo.App. 123.

S.D.—Winans v. Light, 217 N.W. 635, 52 S.D. 359.

Cropping contracts

(1) The lessor is not liable in conversion for selling the tenant's share of crop, as against the tenant's mortgagee, where necessary to reimburse himself in accordance with the lease for certain contingent claims that he was compelled to pay for the tenant.—First Nat. Bank v. Saterren, 188 N.W. 62, 152 Minn. 101.

(2) The mortgagee of a growing crop planted by a tenant under a contract which entitles the landlord to a portion of the crop succeeds only to the interest of the mortgagor, and where the mortgage is made by the tenant, and the mortgagee converts the whole crop to his own use, he is liable for the share of the

§ 301. — Crop Lien

- a. In general
- b. Statutory liens

a. In General

A crop lien complying with statutory requirements and otherwise valid may be given preference over a later mortgage.

In the absence of a statute to the contrary or circumstances constituting a waiver or estoppel,⁵⁰ the lien of a crop mortgage prior in point of time will be given priority over a lien subsequently acquired,⁵¹ and an agreement giving a lien on crops, if prior in point of time to a chattel mortgage, will be given preference.⁵² Such an agreement, however, to be effectual must usually be properly recorded,⁵³ unless the mortgagee has actual notice thereof,⁵⁴ or there must be a delivery of the crop.⁵⁵

landlord on a proper demand for its delivery.

Cal.—Tuohy v. Linder, 78 P. 233, 144 Cal. 790—Sunol v. Molloy, 63 Cal. 369.

Del.—State v. Vandever, 2 Del. 397. Iowa.—Atkins v. Womeldorf, 4 N.W. 905, 53 Iowa 150.

53. Cal.—Merriman v. Martin, 298 P. 95, 113 Cal.App. 167—First Nat. Bank v. Andreas, 267 P. 937, 92 Cal.App. 62.

Wash.—Arnold v. Peasley, 222 P. 472, 123 Wash. 176.

11 C.J. p 654 note 17.

Mortgage executed by landowner

Recordation of crop mortgage executed by landowner alone did not give constructive notice of claim against cropper's share of proceeds to subsequent mortgagee of cropper's interest in proceeds of crop.—Merriman v. Martin, 298 P. 95, 113 Cal. App. 167.

Provision of lease giving landlord lien on crops for unpaid rent is in nature of chattel mortgage, and, lease not being recorded, his rights as against holder of subsequently executed recorded crop mortgage are same as if he depended on unrecorded mortgage.—Joeckel v. Gust, 268 S.W. 838, 217 Mo.App. 495.

Verbal promise

Crop mortgagees' right was superior to landlord's right under mortgagor's verbal promise of cropper's share in payment of debt.—Bohl v. Spratt, 211 N.W. 451, 50 S.D. 596.

54. Iowa.—Reese v. Lamp, 193 N.W. 536, 195 Iowa 1221.

Neb.—Weigand v. Hyde, 192 N.W. 198, 109 Neb. 678.

Or.—La Grande Nat. Bank v. Oliver, 165 P. 682, 84 Or. 532.

55. Ark.—Person v. Wright, 35 Ark. 169.

Ky.—Rives v. Christie, 46 S.W. 204, 20 Ky.L. 526, 104 Ky. 82.

Although a valid recorded crop mortgage cannot be rendered inferior by any subsequent agreement between the landlord and tenant to which the mortgagee is not a party,⁵⁶ where a crop mortgage is executed prior to the time of the making of the lease the lien of the mortgage is inferior to that of the landlord's reserved in the lease.⁵⁷

Where there is a conflict of interest between lien claimants on a crop, reference must be made to a general statute providing for the order of resort for payment of prior liens, at least if there is no statute applicable particularly providing for priority of chattel mortgages on crops.⁵⁸

For advances or supplies. The priority of a lien for supplies over a mortgage may be acquired by express agreement between the parties.⁵⁹

Tenant abandoning crop. A landlord renting on

shares does not have, in the absence of statute or a reservation of a lien, a claim superior to mortgagees of the tenant abandoning the crop;⁶⁰ but the landlord does have such an interest in the whole crop that he may protect himself by caring for it and repay himself for such expense out of the tenant's share.⁶¹

b. Statutory Liens

Where a statute so provides, a crop lien may be superior to a crop mortgage, if there has been a compliance with statutory requirements with regard thereto.

Some statutes regarding statutory liens on crops for supplies advanced to enable the production thereof provide that such a lien shall take precedence over a prior⁶² or subsequent⁶³ valid mortgage, or an older judgment,⁶⁴ if the lien for advances is properly perfected as required by law.⁶⁵

N.D.—Grand Forks Second Nat. Bank v. Swan, 50 N.W. 357, 2 N.D. 225.

11 C.J. p 654 note 18.

56. Cal.—Wixom v. Davis, 246 P. 1041, 198 Cal. 641.

57. Wash.—Community State Bank v. Martin, 258 P. 498, 144 Wash. 483.

58. Okl.—Anderson v. Marietta Nat. Bank, 220 P. 883, 93 Okl. 241.

59. Cal.—Lencioni v. Fidelity Trust & Savings Bank of Fresno, 273 P. 103, 95 Cal.App. 490, rehearing denied 274 P. 75, 95 Cal.App. 490—Lencioni v. Fidelity Trust & Savings Bank of Fresno, 231 P. 366, 69 Cal.App. 325.

Mo.—Pearson v. Lafferty, 193 S.W. 40, 197 Mo.App. 123.

N.D.—State Bank of Bowman v. Nelson, 186 N.W. 766, 48 N.D. 702.

11 C.J. p 655 note 25.

Reservation of title to crop

Where lessor of farm land reserves title of tenant's share of crop until settlement between them, and right to deduct indebtedness owing from lessee to him, he may deduct from tenant's share all such indebtedness for advances or loans made in good faith during term of lease, without being guilty of conversion as against holder of a mortgage on crop executed by tenant and of which lessor had no knowledge until after loans and advances had been made, and settlement and division had between lessor and lessee.—First Nat. Bank v. Gutru, 204 N.W. 887, 52 N.D. 918.

60. Colo.—Meador v. Cullison, 120 P. 145, 52 Colo. 172.

61. Or.—Abernethy v. Uhlman, 93 P. 936, 97 P. 540, 52 Or. 359.

Necessity to conserve crop

Holder of mortgage on land con-

taining citrus groves, on showing necessity for receiver to conserve crop, had right to fruit superior to that of creditor given option by mortgagor to apply future crop to his indebtedness.—Summerlin v. Orange Shores, 122 So. 508, 97 Fla. 996.

62. Ala.—Lauderdale v. Flippo & Son, 75 So. 323, 200 Ala. 11.

Ark.—Baker v. Betzner Mercantile Co., 13 S.W.2d 608, 178 Ark. 1199—Wilson v. Citizens' Bank of Osceola, 232 S.W. 689, 170 Ark. 1194—Lunsford v. Skelton, 275 S.W. 901, 169 Ark. 547.

N.M.—Farmers' Cotton Finance Corporation v. Cotton Finance & Trading Corporation, 18 P.2d 1027, 37 N.M. 101.

Tex.—Taack v. Underwood, Civ.App., 266 S.W. 618—Ross v. Schultz, Civ.App., 198 S.W. 672—Frith v. Wright, Civ.App., 173 S.W. 453.

11 C.J. p 654 note 20—36 C.J. p 509 notes 59, 61, 62.

Citrus fruit crop

A crop lien and mortgage on a citrus fruit crop, given by the owners of the land on which the citrus fruit crop was growing and to be produced, for advances of money to aid in the production of the crop, not purporting to have been made by a person engaged in the business of producing citrus fruits, or to aid in the business of producing fruits, but made to secure a note, executed by the lienor to represent amounts advanced by the lender to the crop owner to aid in producing the mortgaged crop, properly falls under Act 1925 c 10279, Comp.Gen.L. §§ 5741, 5742, respecting mortgages on crops, and not under Comp.Gen.L. § 5373, Rev.Gen.St. § 3515, giving a lien prior to other encumbrances, the two statutes being inconsistent with

each other and being intended to have an entirely different field of operation.—Plant City Agr. Credit Co. v. Pool, 139 So. 595, 103 Fla. 306.

Irrigating lien

Where a statute so provides, the lien of an irrigating company furnishing water to the mortgagor is superior to a mortgage on the crops.—Texas Bank & Trust Co. of Beaumont v. Smith, 192 S.W. 533, 108 Tex. 265, 2 A.L.R. 771—Texas Bank & Trust Co. of Beaumont v. Smith, Tex.Civ.App., 195 S.W. 617.

Purchaser of land from landlord, who had furnished tenants supplies, who paid tenants' accounts as part of consideration, was entitled to statutory lien.—Oberste Bros. v. Crabtree, 299 S.W. 6, 175 Ark. 107.

63. N.M.—Farmers' Cotton Finance Corporation v. Cotton Finance & Trading Corporation, 18 P.2d 1027, 37 N.M.101.

Tex.—First Nat. Bank v. Pointer, Civ.App., 51 S.W.2d 781—Gorman Co. v. Jones, Civ.App., 245 S.W. 448.

64. Ga.—Hix v. Williams, 155 S.E. 355, 42 Ga.App. 143.

11 C.J. p 655 note 21.

Peach crop was not "crop" within meaning of statutes.—A. J. Evans Marketing Agency v. Federated Growers' Credit Corporation, 165 S.E. 114, 175 Ga. 294.

65. S.C.—Cantey v. McClary-Broadway Co., 73 S.E. 614, 95 S.C. 29.

Recording unnecessary, for privilege of one furnishing supplies for the making of a crop, and where it existed when a mortgage was given it was not affected by the mortgage.—Purity Feed Mills Co. v. Moore, 93 So. 196, 152 La. 393.

Such statutes will not be given a retroactive effect,⁶⁶ nor will the lien for supplies be extended beyond the terms of the statute creating it.⁶⁷ The fact that the crop is delivered to the mortgagee does not affect the priority of the lien for advances.⁶⁸ However, unless the advances are actually made the mortgage on the crop will have priority.⁶⁹ It has been held that a mortgagee of crops is not liable for supplies furnished the mortgagor to enable him to raise the crop, in the absence of any express agreement to pay therefor, although the crops are sold to pay the mortgage.⁷⁰ Where the statute provides that the landlord's lien for supplies furnished shall not operate against persons holding a mortgage for supplies of which the landlord had notice, it has been held that the landlord's lien for advances even after such notice was superior to the mortgage lien when it appeared that the advances

were made for the common good of those interested.⁷¹

The lien of the mortgagee for supplies furnished a tenant cannot be defeated by any subsequent arrangement between the landlord and the tenant.⁷²

If there has been a compliance with statutory requirements,⁷³ a lien arising on a crop by virtue of a seed grain note has priority over a lien on the same crop acquired by means of a previously executed and filed chattel mortgage.⁷⁴

For rent. A landlord's statutory lien on crops accrues as soon as they come into existence, and hence has priority over any mortgage of the crops made by the tenant,⁷⁵ unless the mortgage on the crop was in existence at the time the land was acquired by the landlord,⁷⁶ or unless the landlord has lost his lien by a removal of the crop from the

66. Ga.—Hix v. Williams, 155 S.E. 355, 42 Ga.App. 143.

11 C.J. p 655 note 23.

67. Ga.—Fountain v. Fountain, 66 S.E. 1020, 7 Ga.App. 361.

Crops of following year

Landlord making advances to tenant for supplies on one year had no lien on mortgaged crop raised following year, as against mortgage against crops raised that year.—Wright v. First Guaranty State Bank of Bellevue, Tex.Civ.App., 281 S.W. 270.

68. Ala.—Atkinson v. James, 10 So. 846, 96 Ala. 214.

69. N.C.—Knight v. Rountree, 6 S.E. 762, 99 N.C. 389.

70. Cal.—Gosliner v. Grangers' Bank, 56 P. 1029, 124 Cal. 225.

71. Miss.—Strauss v. Baley, 58 Miss. 131.

72. Miss.—Brown v. Matthews, 40 So. 66.

73. Minn.—Opatril v. Cook, 194 N.W. 103, 156 Minn. 57.

74. Minn.—Enderson v. Larson, 112 N.W. 628, 101 Minn. 417, 118 Am. S.R. 631—McMahan v. Lundin, 58 N.W. 827, 57 Minn. 84.
11 C.J. p 655 note 29.

75. Ala.—Bellingrath v. Samuel, 122 So. 27, 219 Ala. 263—First Nat. Bank v. Meeks, 94 So. 527, 208 Ala. 534—McDonald v. Stephens, 85 So. 746, 204 Ala. 359—Hughes & Tidwell Supply Co. v. Carr, 83 So. 472, 203 Ala. 469—A. Burkart & Co. v. Bell, 137 So. 322, 24 Ala.App. 516.
Ga.—Finn v. Reese, 137 S.E. 574, 36 Ga.App. 591.

Iowa.—Farber v. Andrew, 225 N.W. 850, 208 Iowa 964—Dilenbeck v. Security Sav. Bank, 169 N.W. 675, 186 Iowa 308, modified on other grounds 172 N.W. 486, 186 Iowa 308.

Kan.—Shell v. Guthrie, 284 P. 420, 129 Kan. 632—Snodgrass v. Carlson, 230 P. 83, 117 Kan. 80, rehearing denied 232 P. 241, 117 Kan. 353.
Ky.—First Nat. Bank v. Pierce, 250 S.W. 497, 199 Ky. 53.

N.C.—Never Fail Land Co. v. Cole, 149 S.E. 585, 197 N.C. 452—Montague v. Thorpe, 144 S.E. 691, 196 N.C. 163.

Okl.—First Nat. Bank v. Melton & Holmes, 9 P.2d 703, 156 Okl. 63—Chickasaw Nat. Bank of Purcell v. Martin, 254 P. 59, 124 Okl. 52.

Tex.—Guaranty Bond State Bank of Timpson v. Redding, Civ.App., 24 S.W.2d 457—Koontz v. Savely, Civ. App., 233 S.W. 540, dismissed for want of jurisdiction—McKelvy v. Gugenheim, Civ.App., 208 S.W. 757.
11 C.J. p 655 note 30—36 C.J. p 507 note 36.

Crop reserved as rent

Equitable lien of chattel mortgage on crops subordinate to that of landlord's has no application to part of crop reserved as rent and delivered to landlord.—White v. Kinney, 101 So. 426, 211 Ala. 624.

Mortgage before term

A mortgage on crops to be grown does not attach until the crop is planted and, therefore, a tenant cannot deprive the landlord of the lien expressly created by statute on crops to be grown or the increase to come into existence after the tenant has taken possession by a mortgage given just before the beginning of the term.—Dilenbeck v. Security Sav. Bank, 169 N.W. 675, 172 N.W. 486, 186 Iowa 308.

Notice

(1) Notice that a landlord's lien exists on the growing crop which is being subjected to a mortgage may be constructive as well as actual, and a knowledge of facts which would put a mortgagee on inquiry

as to the mortgagor's tenancy will be as binding on the mortgagee as if he were fully apprised of all the facts which would affect the validity and priority of the landlord's lien.—Bowland v. McDowell, 297 P. 691, 132 Kan. 820—Shell v. Guthrie, 284 P. 420, 120 Kan. 632.

(2) The mere fact that it is crop mortgage charges mortgagee with notice that it is subject to any existing landlord's lien.—Metropolitan Life Ins. Co. v. Reconstruction Finance Corporation, 162 So. 379, 230 Ala. 580.

Priority of execution immaterial

Okl.—Chickasaw Nat. Bank of Purcell v. Martin, 254 P. 59, 124 Okl. 52.

Rent of grass lands

Landlord's lien on crops for rent of grass land and buildings was superior to lien of chattel mortgage on crops.—Shell v. Guthrie, 284 P. 420, 129 Kan. 632.

Subtenant

The text rule applies as to a subtenant's mortgage.—Lunsford v. Skelton, 275 S.W. 901, 169 Ark. 547.

76. Ala.—Gillespie v. Bartlett & Byers, 100 So. 558, 211 Ala. 560—Lamar v. Johnson, 81 So. 140, 16 Ala.App. 648—Gatlin v. King, 118 So. 678, 22 Ala.App. 627.

S.C.—Cassidy v. Hutto, 93 S.E. 191, 107 S.C. 489.

11 C.J. p 655 note 31.

However, it has been held that the landlord's lien was superior to the lien of a mortgage even though the mortgage was executed before the land was acquired by the landlord.—G. M. Carlton Bros. & Co. v. Hoppe, Tex.Civ.App., 204 S.W. 248, error dismissed—Ivy v. Pugh, Tex.Civ.App., 161 S.W. 939.

Default in land mortgage

Where a chattel mortgagee knows at the time of taking a crop mort-

1,77 or where he has waived or lost,⁷⁸ or has expressly agreed to postpone,⁷⁹ his lien. The reason of landlord and tenant, however, is essential to the establishment of this statutory preferred lien.⁸⁰

After the rent has been paid from the proceeds of the crop, the balance will go to a mortgagee of the crop before it can be applied on an open account due the landlord from the tenant.⁸¹

That the mortgagor was in default on his mortgage on the land, where after foreclosure the mortgagor attorned to the land mortgagee who was the purchaser, the mortgage was inferior to the purchaser's lien for rent.—*First Nat. Bank v. Federal Land Bank of New Orleans*, 143 So. 567, 225 Ala. 387.

Purchaser at mortgage sale

(1) Under Remington Comp.St. § 1, the lien of a purchaser at a mortgage foreclosure sale for taxes is superior to that of a mortgagee during the year of redemption is superior to that of a mortgagee, the crop mortgagee being charged with notice of this statutory lien where the chattel mortgage is executed after the real estate mortgage.—*Davin v. Dowling*, 123 P. 123, 146 Wash. 137.—*Farmers' State Bank of Reardan v. Chick*, 255 P. 915, 143 Wash. 614.—*Mount v. Oklahoma State Bank*, 236 P. 82, 134 Wash. 479.

(2) Purchaser, however, had no claim for taxes paid after foreclosure sale, or for interest on judgment, during redemption period as against a mortgagee claiming under a deed of trust in farm property who did not redeem.—*Pease v. Stephens*, 173 Wash. 12.

Cal.—*Marshall v. Linz*, 47 P. 597, 115 Cal. 622.

Alabama

(1) The priority of a landlord's lien is not displaced by the mere removal of the crops from the rented premises. The priority of his lien exists until the crop has passed into the hands of a bona fide purchaser, and the mortgagee is not affected as such.—*Metropolitan Life Ins. Co. v. Reconstruction Finance Corporation*, 162 So. 379, 230 Ala. 530.—*Bellingrath v. Samuel*, 122 So. 27, 2 Ala. 263.

(2) This rule is also applicable to the proceeds of the crop.—*Metropolitan Life Ins. Co. v. Reconstruction Finance Corporation*, supra.

(3) As against landlord's lien, however, a warehouse company was entitled to protection as to advances security of cotton in warehouse, where company had no actual notice of landlord's lien. Under such circumstances, a description in the mortgage including cotton grown

"on my farm, or any other places cultivated by me, or in which I have an interest" is not notice that the cotton was raised on rented land.—*Bellingrath v. Samuel*, supra.

(4) On the other hand, it has been held that a mortgagee of an unplanted crop of cotton on leased premises had the legal title to a bale of cotton harvested from such crop and sold by the tenant and removed from the premises as against the landlord who never had possession, either actual or constructive, of the bale of cotton.—*Mutual Warehouse Co. v. Hamilton*, 55 So. 116, 171 Ala. 82.

Tex.—*Farmers' Cotton Finance Corporation v. Collins*, Civ.App., 9 S.W.2d 1054.

11 C.J. p 655 note 33.

Preservation of lien

(1) Under a statute providing that the lien of the landlord shall not continue for more than one hundred and twenty days after the expiration of the term, where within that time the tenant delivers the crop to the landlord or his agent as security for the landlord's claim, his lien is preserved and is superior to a chattel mortgage on the crop.—*Barlow v. Fuller*, 163 S.W. 742, 157 Ky. 532.—*Marquess v. Ladd*, 100 S.W. 305, 30 Ky.L. 1143.

(2) Accordingly, where both the landlord and tenant are under a legal duty to deliver the crop to a cooperative association, the signing of a statement by them within the statutory period authorizing the association to pay the landlord's claim from the proceeds of the crop preserves the landlord's lien and as so preserved is superior to a chattel mortgage on the crop.—*Dark Tobacco Growers' Co-Op. Ass'n v. Haddox*, 283 S.W. 81, 214 Ky. 300.

Ark.—*Beattie v. Hughes*, 101 S. W. 170, 82 Ark. 199.

11 C.J. p 656 note 34.

Ala.—*Herzfeld v. Hayne*, 76 So. 973, 200 Ala. 615.

Tenancy at will

Where a mortgagor's default in a purchase-price installment made him the mortgagee's tenant at will, and such tenancy was converted by agreement into one for a fixed term, the landlord's lien for rentals on the crops was superior to the lien of a

When a mortgage on the crop of a certain year is executed by the owner of the land, and the land is afterward conveyed by the mortgagor, and a lease of it is taken by him, the mortgage has priority over the landlord's lien.⁸²

For labor. By statute in some jurisdictions a person expending labor in the production of a crop is given a lien superior to all other claims,⁸³ but, in the absence of controlling statutes or provisions

crop mortgage executed after the agreement creating a tenancy for a fixed term.—*Hughes & Tidwell Supply Co. v. Carr*, 83 So. 472, 203 Ala. 469.

Unrecorded bond for title

A crop mortgage is not prior to a landlord's lien, although landlord claims under an unrecorded bond for title.—*In re Mixon*, 96 S.E. 403, 110 S.C. 270.

Ga.—*Cofer v. Benson*, 19 S.E. 56, 92 Ga. 793.

Ala.—*Daniel v. M. C. Clayton & Co.*, 149 So. 355, 25 Ala.App. 487. 11 C.J. p 656 note 37.

Right of mortgagor to sell or convey see supra § 260.

Holder of bill of sale, executed under statute, to secure advances for making of crops was entitled to recover crops in trover action, notwithstanding defendant had security deed to land on which crops were grown before execution of bill of sale, received warranty deed from maker of bill of sale after making and recording thereof, distrained for rent for year crops were to be grown, and became purchaser of crops at sale under levy of distress warrant, and notwithstanding holder of bill of sale interposed no claim and made no objection to sale.—*Piedmont Agricultural Credit Corporation v. Northeastern Banking Co.*, 181 S.E. 84, 51 Ga.App. 571.

Ark.—*Carraway v. Phipps*, 86 S. W.2d 12, 191 Ark. 326.

N.D.—*First Nat. Bank v. Weiss*, 209 N.W. 780, 54 N.D. 371.

Wash.—*Musgrave v. Atkinson*, 203 P. 973, 118 Wash. 323.

11 C.J. p 656 note 38.

Agricultural liens in general see Agriculture §§ 44-52.

Priority of labor liens over chattel mortgages generally see infra § 303.

Grain in elevators

Farm laborer's lien on filing attaches to grain seized in foreclosure proceedings under mortgage on growing crops or crops thereafter to be grown, and placed in storage in elevators.—*First Nat. Bank v. Weiss*, 209 N.W. 780, 54 N.D. 371.

Notice that a laborer is employed in the production of the crop, at the time of execution of a crop mort-

in the mortgagor's lease to the contrary,⁸⁴ a laborer's lien is inferior to a prior valid mortgage.⁸⁵ To acquire the lien given by such statute it is necessary for the laborer to comply with its provisions.⁸⁶ It has also been held that the priority of a crop mortgage may be affected by the fact that the crops were rendered valuable by the labor and money expended by a receiver of the mortgagor.⁸⁷

§ 302. — Innkeeper's Lien

An innkeeper's statutory lien is superior to a mortgage on a guest's chattels which are brought to his premises.

An innkeeper's statutory lien on a chattel brought to his premises by a guest is superior to that of a mortgagee of the chattel, even though the mortgage

was due when the chattel was brought to the hotel,⁸⁸ and this lien is not waived by failure to assert it on refusing to deliver the goods to a chattel mortgagee demanding possession under his mortgage.⁸⁹ An innkeeper will not be deprived of this statutory lien even though he had actual notice of the mortgage, as long as the guest was legally in possession of the goods and was the owner thereof.⁹⁰

§ 303. — Laborer's Lien

In the absence of a statute to the contrary or a waiver by the mortgagee, a laborer's lien is not superior to a prior valid mortgage.

In the absence of statute a laborer's lien is not entitled to superiority over a prior valid mortgage,⁹¹ particularly where the statute so provides,⁹² un-

gage, is usually under the statutes, notice of the laborer's lien, thereby rendering it superior to the crop mortgage.

Ala.—Gray v. Burdette, 86 So. 95, 17 Ala.App. 432, certiorari denied Ex parte Gray, 86 So. 96, 204 Ala. 358. Tex.—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71.

Priority statute construed

Where a statute providing for a laborer's lien upon a crop provides that liens "shall be paid and settled according to the priority of the notice of the lien filed with the justice or clerk," such a provision applies only to liens required to be filed with a justice or the clerk and, since a mortgage is not required to be so filed, the statute has no application in determining the priority of a laborer's lien over a mortgage.—White v. Riddle, 152 S.E. 501, 198 N.C. 511.

Relation back

A laborer's lien properly filed and the right resulting therefrom asserted in apt time relate back to the beginning of the work, and the rights of a mortgagee cannot prevail against such a lien, even though some of the crop has been appropriated to the mortgage before notice of lien was filed.—White v. Riddle, 152 S.E. 501, 198 N.C. 511.

In Texas

(1) It has been held that the lien of employee of mortgagor for labor in production of cotton crop took priority over a mortgage, where wages were payable on sale of first bale.—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71.

(2) On the other hand, it has been held that the statutory lien, if any, of parties picking cotton, was inferior to prior registered mortgage lien thereon.—Westbrook v. Clinton Grocery Co., Civ.App., 9 S.W.2d 1044.

84. Threshing costs

Where a lease provided that the lessee would deliver to the lessor one

half the threshed grain and would pay for threshing the entire crop, no interest of the lessee's crop mortgage could legally attach until after the threshing and division of the crop was completed, and this did not occur until after the lien for threshing and expenses incidental thereto had attached.—Lee v. Seals, 256 S.W. 830, 215 Mo.App. 582.

85. Ala.—Smith v. Haley, 98 So. 19, 210 Ala. 339.

Cal.—Wilson v. Donaldson, 53 P. 404, 121 Cal. 8, 66 Am.S.R. 17, 43 L.R.A. 524, overruled on the ground that the statute gave the laborer a superior lien, Mortgage Securities Co. v. Pfaffmann, 169 P. 1033, 177 Cal. 109, L.R.A.1918D 118.

Notice of mortgage

Rights of son in a crop raised on his father's land were subordinate to a mortgage given on the crop by the father, if the son had notice of the mortgage at the time of contract.—Hairslip v. Brannum, 73 So. 464, 193 Ala. 214.

86. Tex.—Eads v. Honeycutt, Civ. App., 185 S.W. 1030, 11 C.J. p 656 note 40.

87. Utah.—Columbia Trust Co. v. Farmers' & Merchants' Bank, 22 P. 2d 164, 82 Utah 117.

88. N.Y.—Matthews v. Victor Hotel Co., 132 N.Y.S. 375, 74 Misc. 426, affirmed 135 N.Y.S. 1127, 150 App. Div. 928.

89. N.Y.—Corbett v. Cushing, 15 Daly 170.

90. N.Y.—Weil Bros. v. Stern, 240 N.Y.S. 639, 136 Misc. 265.

91. Cal.—Wilson v. Donaldson, 53 P. 404, 121 Cal. 8, 66 Am.S.R. 17, 43 L.R.A. 524, overruled on the grounds that the statute granted the laborer a superior lien, Mortgage Securities Co. v. Pfaffmann, 169 P. 1033, 177 Cal. 109, L.R.A. 1918D 118.

La.—White Co. v. Hammond Stage Lines, 158 So. 353, 180 La. 962.

Okl.—Cook v. Oklahoma Auto Supply Co., 162 P. 731, 62 Okl. 202.

Tex.—Ferrell-Michael Abstract & Title Co. v. McCormac, Com.App., 215 S.W. 559, affirming, Civ.App., 184 S.W. 1081—Vilbig v. Faison, Civ.App., 296 S.W. 669.

Wash.—Beecher v. Thompson, 207 P. 1056, 120 Wash. 520, 29 A.L.R. 699. Priority of artisan's or repair man's lien see supra § 300.

Particular mortgages held superior

(1) A security deed.—Bennett v. Green, 119 S.E. 620, 156 Ga. 572.

(2) Purchase-money mortgage.—Indiana Truck Corporation of Kentucky v. Hurry Up Broadway Co., 1 S.W.2d 990, 222 Ky. 521.

Particular liens held inferior

(1) For shredding and bailing shocked corn.—Kelley v. Howell, 67 S.W.2d 694, 252 Ky. 558.

(2) For sawing lumber into timber.—South v. Truesdale, 26 S.W.2d 519, 233 Ky. 682.

(3) For drilling oil wells.—Wagner Supply Co. v. Bateman, 18 S.W.2d 1052, 118 Tex. 498, reversing in part and affirming in part, Civ.App., 260 S.W. 672.

(4) For work done in mine.—Estep v. Blue Ribbon Coal Co., 9 S.W.2d 331, 177 Ark. 83.

(5) For turpentine woods rider.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.

(6) Lien of printer on printing press and engine, notwithstanding the statute provides for a "first lien."—American Type Founders' Co. v. Nichols, 214 S.W. 301, 110 Tex. 4.

Public policy cannot be used as a basis for preferring laborers' liens over prior mortgages.—Benson v. Wood Motor Parts Corporation, 174 S.E. 895, 115 W.Va. 200.

92. Ark.—Burrow v. Fowler, 56 S. W. 1061, 68 Ark. 178.

less the mortgagee waives his right to priority in favor of the laborer's lien.⁹³ However, a mortgage executed after the liens of laborers have attached to the chattels is inferior thereto,⁹⁴ unless, under some statutes, the mortgage or security deed was taken bona fide by the grantee and without notice of such liens;⁹⁵ and under some statutes, a mortgage executed and recorded after the chattels have been furnished to, and used by, the employer is inferior to laborers' liens.⁹⁶ An unrecorded mortgage has also been held to be inferior to a laborer's lien for services rendered prior to the recording of the mortgage.⁹⁷

On the other hand, where so given by statute, laborers' liens, or certain classes thereof, are superior to the lien of a chattel mortgage,⁹⁸ when the specifications and conditions of the statute have

been met,⁹⁹ particularly where it is prior in point of time and where the mortgagee took with notice thereof.¹

Under a statute providing that, where the property of the employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within a certain time prior to such appointment shall be paid first out of the trust fund, the claim of a laborer is inferior to that of a mortgagee, after condition broken, since the title to the property thereupon becomes vested in the mortgagee.²

Persons protected. As a general rule, the statutes protecting wage claims are confined to those who perform manual services,³ and this has been held to include those which require some skill in their performance.⁴

93. Idaho.—Rourke v. Bergevin, 44 P. 645, 4 Idaho 742.
11 C.J. p 656 note 45.

Person employed by mortgagee to guard oil well tools lying idle on lease with owner's authority and acquiescence has lien prior to mortgagee's.—Colonial Supply Co. v. Smith, 272 P. 879, 134 Okl. 40.

Provision in lease

In an action by a second mortgagee against a first mortgagee for conversion of wheat, where the first mortgage provided that it was given to secure not only the original loan but also all amounts advanced for the maintenance or transportation of the property, the first mortgagee was justified in paying labor costs, whether the liens were filed or not.—Shoemaker v. White-Dulaney Co., 230 P. 162, 131 Wash. 347, affirmed 232 P. 695, 131 Wash. 347, 132 Wash. 699.

94. U.S.—Security Trust Co. v. Bank of Bernice, La., 239 F. 665, 152 C. C.A. 499.

95. Ga.—Bennett v. Green, 119 S.E. 620, 156 Ga. 572.

96. Okl.—Arkansas Fuel Oil Co. v. McDowell, 249 P. 717, 119 Okl. 77.

97. Ark.—Ruddell v. Reves, 225 S. W. 316, 146 Ark. 259.
Okl.—Oklahoma Tool & Supply Co. v. Smith, 246 P. 1090, 118 Okl. 228.
11 C.J. p 656 note 46.

98. Ark.—Carraway v. Phipps, 86 S. W.2d 12, 191 Ark. 326.—First Nat. Bank v. Scranton Coal Co., 12 S. W.2d 6, 178 Ark. 643.

Cal.—Mortgage Securities Co. v. Pfaffmann, 169 P. 1033, 177 Cal. 109, L.R.A.1918D 118, overruling Wilson v. Donaldson, 53 P. 404, 121 Cal. 8, 66 Am.S.R. 17, 43 L.R.A. 524.

Ga.—Decatur County Bank v. Broome, 142 S.E. 565, 37 Ga.App. 821.

N.C.—White v. Riddle, 152 S.E. 501, 198 N.C. 511.

Wash.—Mahon v. Nelson, 268 P. 144, 148 Wash. 110.

11 C.J. p 656 note 48.

Statutory labor lien on crop as prior to mortgage see supra § 301.

Purchase-money mortgages

The superiority of such a statutory lien is not affected by the fact that it is given to secure the purchase money for such mortgaged property.—Aronoff v. Woodard, 171 S.E. 404, 47 Ga.App. 725—11 C.J. p 656 note 49.

Protective steps

One taking a mortgage on a drilling outfit is bound to know the kind of use to which it is to be put and the probability of the employment of laborers entitled to a superior lien, and hence should take steps necessary to protect himself against such liens.—Smith v. Luster, 2 S.W.2d 1104, 176 Ark. 263.

99. Iowa.—Heessel v. Creston Nat. Bank, 218 N.W. 298, 205 Iowa 508.

Property "seized"

Under a statute providing that when the property of any person shall be seized on by any process of any court for the purpose of paying or securing the payment of the debts of such person, the debts owing to employees for labor shall be a preferred debt, where an employee sold his employer's automobile on execution for unpaid wages, his claim is not entitled to preference over a mortgage thereon, as the statute contemplates that the creditor and the laborer shall be different persons.—Heessel v. Creston Nat. Bank, 218 N.W. 298, 205 Iowa 508.

Time not expended in labor

Although a laborer's subcontract with a contractor, who has engaged to drill an oil and gas well, provides for pay for straight time, the labor-

er may not have a lien on the leasehold for time not expended on the well, unless the owner is at fault.—Moyer v. Hezlep, 257 P. 229, 123 Kan. 735.

1. Fla.—Exchange Nat. Bank of Tampa v. Kennedy, 147 So. 572, 109 Fla. 386.

Abstract plant

One taking chattel mortgage on abstract plant takes mortgage with notice that plant is at all times in course of construction and that those employed in such construction acquire lien for services on plant.—Exchange Nat. Bank of Tampa v. Kennedy, 147 So. 572, 109 Fla. 386.

Necessity for filing

Where the mortgagee has constructive notice of the lien of the laborer, filing of notice of lien by the laborer is unnecessary to maintain the superiority of his lien.—Exchange Nat. Bank of Tampa v. Kennedy, 147 So. 572, 109 Fla. 386.

2. Ohio.—St. Mary's Mach. Co. v. National Supply Co., 67 N.E. 1055, 68 Ohio St. 535, 96 Am.S.R. 677, 64 L.R.A. 845.

3. Ill.—Heckman v. Tammen, 56 N. E. 361, 184 Ill. 144, affirming 84 Ill.App. 537.

Liens held superior

(1) For threshing and hauling rice.—Klier Singh Doot v. Skirving Warehouse Co., 259 P. 81, 202 Cal. 75.

(2) Log haulers' lien.—Greely v. Bank of Stevenson, 13 P.2d 493, 169 Wash. 181.

(3) Oil driller's lien.
Ark.—Smith v. Luster, 2 S.W.2d 1104, 176 Ark. 263.

La.—Boudreaux v. Moon Oil Co., App. 158 So. 672, followed in 158 So. 676.

4. Ill.—Heckman v. Tammen, 56 N. E. 361, 184 Ill. 144, affirming 84 Ill. App. 537.

11 C.J. p 656 note 53.

§ 304. — Landlord's Lien

In the absence of a statute or reservation in the lease to the contrary, a mortgage on the tenant's property is superior to a landlord's lien for rent. Where the landlord is given a superior lien by statute, his lien usually is preferred where the mortgage was executed and recorded after the chattels have been placed on the premises, but is inferior to a mortgage thereon before they are placed on the premises.

In the absence of a statute conferring a lien for

rent or the reservation of such a lien in the lease,⁵ a mortgage on the tenant's property is superior to the landlord's rights for unpaid rent,⁶ and the right to distrain for rent is subordinate to an existing mortgage,⁷ unless the mortgage lien has been waived or lost.⁸

A landlord's statutory lien for rent⁹ or advanc-

5. Notice

The mere fact that at the time of execution of the mortgage the mortgagee had notice that the relationship of landlord and tenant existed, does not charge the mortgagee with notice and knowledge of a lien created in favor of the landlord by the terms of the lease.—*Abraham v. American Nat. Bank*, 17 P.2d 480, 161 Okl. 87.

6. Tex.—*Huebsch Mfg. Co. v. Coleman, Civ.App.*, 113 S.W.2d 639.

Exempt property

(1) Where, under the statute, the landlord's lien does not extend to exempt property, a mortgage on such property is superior to the landlord's lien for unpaid rent.—*Huebsch Mfg. Co. v. Coleman, Tex.Civ.App.*, 113 S.W.2d 639—*Racugno v. Hanovia Chemical & Manufacturing Co., Tex. Civ.App.*, 110 S.W.2d 249—*McNabb v. Terminal Bldg. Corporation of Dallas, Tex.Civ.App.*, 93 S.W.2d 189, error refused—*American Law Book Co. v. Dykes, Tex.Civ.App.*, 278 S.W. 247.

(2) No subsequent act of the tenant in failing to claim the exemption will vitalize a lien that did not actually exist, so as to defeat the priority of a mortgage given at a time when the property was free of lien.—*Huebsch Mfg. Co. v. Coleman, supra*—*McNabb v. Terminal Bldg. Corporation of Dallas, supra*.

(3) Whether particular property is exempt may be a matter of fact to be determined in the light of the attending circumstances. — *Huebsch Mfg. Co. v. Coleman, supra*.

Rights of landlord purchasing property

Landlord purchasing tenant's mortgaged soda fountain fixtures on execution under judgment foreclosing landlord's lien could not acquire title thereto by limitation independent of lien as against mortgagee without giving mortgagee notice of adverse claim, since title acquired under execution sale was only that of mortgagor.—*Liquid Carbonic Co. of Texas v. Logan, Tex.Civ.App.*, 79 S.W.2d 632.

Securing surrender of lease

Where plaintiff had, by virtue of mortgage, right as against defendant's tenant to enter and gather crop after expiration of year, defendant, who had knowledge of mortgage,

could not defeat such right by securing from tenant surrender of lease, and claim the crop as payment of rent.—*Owings v. Shaw*, 92 S.E. 474, 107 S.C. 258.

7. N.J.—*Bodell v. Real Securities Inv. Co.*, 99 A. 337, 89 N.J.Law 707, affirming 95 A. 758, 88 N.J. Law 155.

11 C.J. p 656 note 54.

8. Ill.—*Albert Pick & Co. v. Spoor*, 212 Ill.App. 612.

9. U.S.—*Kaye v. MacMillan, C.C.A. Ky.*, 60 F.2d 7.

Ala.—*Allgood v. First Nat. Bank*, 139 So. 100, 224 Ala. 169—*Gay & Bruce v. W. B. Smith & Sons*, 114 So. 468, 217 Ala. 33—*Hodges v. Westmoreland*, 96 So. 573, 209 Ala. 498.

D.C.—*Spilman v. Geiger*, 58 F.2d 890, 61 App.Div. 164.

Fla.—*Pillans & Smith Co. v. Lowe*, 157 So. 649, 117 Fla. 249.

Iowa.—*Corydon State Bank v. Scott*, 252 N.W. 536, 217 Iowa 1227—*Kubiak v. Commercial Nat. Bank of Waterloo*, 230 N.W. 559—*Farmers' Grain & Mercantile Co. v. Benson*, 193 N.W. 14, 195 Iowa 695.

Ky.—*First Nat. Bank v. Trimble*, 17 S.W.2d 228, 229 Ky. 280.

Tex.—*Nuckles v. J. M. Radford Grocery Co., Civ.App.*, 72 S.W.2d 652—*Southwestern Drug Corporation v. Johnson, Civ.App.*, 53 S.W.2d 809, error refused—*Phil H. Pierce Co. v. Rude, Civ.App.*, 291 S.W. 974.

W.Va.—*Mazo v. Burke*, 133 S.E. 378, 101 W.Va. 700.

11 C.J. p 657 note 55—36 C.J. p 507 note 35.

Antedating lease

The priority of a mortgage lien is not affected by the antedating of the lease by collusion between the landlord and the tenant.—*Grey v. Hudson*, 5 Iowa 554.

Existence of chattels at time of lease

The mere fact that, at the time the lease contract was entered into, none of the property in controversy was in existence and in place on the premises, does not make the landlord's lien inferior to a mortgage thereon.—*Bank of Oakman v. Union Coal Co., C.C.A. Ala.*, 15 F.2d 360.

For taxes

Where the lessee is to pay all taxes on the leased property, the lessor's lien on improvements placed on the premises by the lessee for taxes

which he has been compelled to pay is superior, under some statutes, to the lien of a mortgagee thereof.—*Commercial Trust Co. v. L. Wertheim Coal & Coke Co.*, 102 A. 448, 88 N.J.Eq. 143.

Increase in stock

(1) A landlord's lien for rent on the increase in stock is superior to a mortgage on the stock.—*Corydon State Bank v. Scott*, 252 N.W. 536, 217 Iowa 1227—*Wunder v. Schram*, 251 N.W. 762, 217 Iowa 920—*Mau v. Rice Bros.*, 249 N.W. 206, 216 Iowa 864.

(2) That deed to grantee and lease back to grantor were not recorded did not make lien of landlord for rent on increase of live stock coming into existence after execution of lease subject to earlier recorded mortgage on such increase, since statutory provisions for recording apply only to interests in land.—*Corydon State Bank v. Scott, supra*.

No conversion

One acting as landlord's agent in foreclosing lien could not be guilty of conversion of property.—*Nuckles v. J. M. Radford Grocery Co., Tex. Civ.App.*, 72 S.W.2d 652.

Relation back to default

Where a contract of letting arises by virtue of a stipulation in an executory contract of sale that, on default, the relation of landlord and tenant shall arise and relate back to a prior date, the landlord's lien is superior to that of a mortgagee, notwithstanding the default was subsequent to the execution of the mortgage.—*British, etc., Mortg. Co. v. Cody*, 33 So. 832, 135 Ala. 622.

In Louisiana

(1) A lessor's lien is superior in rank to a mortgage if the lessor's lien exists before the mortgage is recorded, but is inferior in rank to the mortgage if the lessor's lien arises after the mortgage is recorded.

U. S.—*Fee-Crayton Hardwood Co. v. Richardson-Warren Co., D.C.La.*, 18 F.2d 617.

La.—*Union Bldg. Corporation v. Burmeister*, 173 So. 752, 186 La. 1027—*White Co. v. Hammond Stage Lines*, 158 So. 353, 180 La. 962—*Youree v. Limerick*, 101 So. 864, 157 La. 39, 37 A.L.R. 394—*Maroun v. Marrs, App.*, 178 So. 723—*Spretnich v. Somerfield, App.*, 166

es¹⁰ on chattels of his tenant on the premises has priority over the lien of a mortgagee on such chattels given after they are placed on the premises, but will ordinarily be postponed to a prior mort-

gage on the property, or to a mortgage executed prior to the lease,¹¹ if the mortgage is executed and recorded as required by the statute.¹²

Under some statutes, the rights of the mortgagee

So. 630—Soady Bldg. Co. v. Collins, 137 So. 631, 18 La.App. 164—Hardie v. Wright, 125 So. 312, 12 La.App. 52—Murov v. Meyer, 2 La.App. 756.

(2) Where there has been a novation of a prior mortgage after the lessor's lien came into existence, the lessor's lien is superior.—White Co. v. Hammond Stage Lines, 158 So. 353, 180 La. 962.

(3) Of course, a mortgage on the chattels which was recorded before they were placed on the premises is superior to the lessor's privilege.—Vickers v. Hughes, App. 160 So. 154—Peats v. Alphonse Brenner Co., App. 149 So. 365.

(4) A mortgage containing an insufficient description of the property does not prime the lessor's lien.—Hodge v. Collens & Chapman, App. 154 So. 357.

In South Carolina

(1) The landlord has no lien on the personal property of his tenant, other than on the crops raised on the demised premises, for rent due by his tenant. While the landlord has no lien on such personal property, the statutes have preserved to him, in a modified form, his common-law right to distrain on such property. The law, as now declared to be settled, is that, after distraint or its equivalent, the holder of a mortgage on chattels will have a superior claim to that of the landlord only when the mortgage was executed before the rental contract was entered into or before the chattels were brought on the rented premises, and recorded before the debt of the landlord was contracted.—Francis H. Leggett & Co. v. Orangeburg Piggly Wiggly Co., 180 S.E. 483, 176 S.C. 449—Mather-James Co., Inc. v. Wilson, 174 S.E. 265, 172 S.C. 387.

(2) If the mortgage is recorded before any proceeding in distress is taken, although executed before the chattels were placed on the premises, the lien of the mortgage ranks only from the date of record as against subsequent creditors, and the lien of the landlord is prior to the mortgage to the extent of the debt for rent due him prior to the record of the mortgage.—Francis H. Leggett & Co. v. Orangeburg Piggly Wiggly Co., supra—General Motors Acceptance Corporation v. Anderson, 174 S.E. 268, 172 S.C. 395—Mather-James Co. v. Wilson, supra—U. S. Hoffman Machinery Corporation v. Harris, 166 S.E. 613, 167 S.C. 443.

(3) Accordingly, if a rental contract is for a certain amount, the entire amount must be considered as

due at the beginning of the contract, although payments might be made on a monthly basis, and if the chattels were brought onto the property before the mortgage was recorded, the landlord's lien has priority.—Francis H. Leggett & Co. v. Orangeburg Piggly Wiggly Co., supra.

(4) On the other hand, if the rental contract is by the month, the recorded mortgage ranks ahead of the monthly rent which is not due at the time of recording the mortgage.—Mather-James Co. v. Wilson, supra.

(5) It has also been held that where a tenant's mortgaged chattels were put on the premises before the mortgage was executed, the landlord's claim for rent had preference over the mortgagee's claim.—Ex parte Stackley, 159 S.E. 622, 161 S.C. 278—Dana v. Peurifoy, 140 S.E. 247, 142 S.C. 46—Morgan Silver Plate Co. v. Bobo Undertaking Co., 92 S.E. 720, 107 S.C. 280.

(6) If the lien of the mortgage was active at the time the chattel was distrained for rent, it was entitled to priority over the rent claim.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

10. Ala.—Colvin v. Payne, 118 So. 578, 218 Ala. 341—Walls v. Skelton, 110 So. 813, 215 Ala. 357.

Notice

Mortgagee of property purchased by tenant with advances from landlord is charged with knowledge of landlord's lien, where tenancy is known.—Colvin v. Payne, 118 So. 578, 218 Ala. 341.

11. Ala.—Matheson v. Farmers' Bank & Trust Co., 116 So. 906, 217 Ala. 606, denying certiorari 116 So. 906, 22 Ala.App. 314—Payne v. Boutwell, 164 So. 753, 26 Ala.App. 573, certiorari denied 164 So. 755, 231 Ala. 311.

Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 45 Ariz. 1.

Iowa.—Guthrie v. Winters, 163 N.W. 203, 181 Iowa 1324.

Ky.—First Nat. Bank v. Trimble, 17 S.W.2d 223, 229 Ky. 280—Montgomery Coal Corporation v. Allais, 3 S.W.2d 180, 223 Ky. 107.

N.C.—Warrington v. Hardison, 116 S.E. 166, 185 N.C. 76.

Tex.—Sherman v. Texas Hotel Supply Co., Civ.App., 66 S.W.2d 1094, error dismissed—Collins v. McFarland, Civ.App., 60 S.W.2d 334, error refused—Trail v. Maphis & Day, Civ.App., 25 S.W.2d 627—Cave

v. Talley Co., Civ.App., 298 S.W. 912—B. M. Burgher & Co. v. Barry, Civ.App., 211 S.W. 457—Oakes v. Freeman, Civ.App., 204 S.W. 360, 11 C.J. p 657 note 56—36 C.J. p 508 note 40.

Purchase-money mortgage

(1) The giving of a purchase-money mortgage by a tenant as part of the transaction of purchase by him constitutes a lien in favor of the holder thereof on such property superior to the lien of the landlord for rent.

Ala.—Gay v. Radney, 142 So. 828, 225 Ala. 331—Blackman v. Engram, 107 So. 741, 214 Ala. 262.

Iowa.—Farmers' Grain & Mercantile Co. v. Benson, 193 N.W. 14, 195 Iowa 695—Miller v. Swartzlender & Holman, 182 N.W. 651, 192 Iowa 153.

Tex.—Street Realty Co. v. Lackey, Civ.App., 11 S.W.2d 824.

Utah.—Gray v. Kappos, 61 P.2d 613, 11 C.J. p 648 note 34, p 657 note 62 [a]—36 C.J. p 508 notes 50, 51.

(2) This is particularly true where the lease expressly provides that the landlord's lien shall be inferior to any lien for purchase money.—Graham Hotel Co. v. Garrett, Tex.Civ. App., 33 S.W.2d 522, error dismissed.

Renewal of note

When the note, for which a mortgage of the tenant's goods has been given as security before such goods are brought on the rented premises, is subsequently destroyed and a new note given in place thereof to a new trustee, such new note is not a renewal of the old, and, when duly recorded, will postpone the lien to the date of its making, and thus let in the landlord's lien.—Hechtman v. Sharp, 10 D.C. 90.

12. Ky.—Smith v. Jackson, 22 S.W. 2d 420, 232 Ky. 76—Montgomery Coal Corporation v. Allais, 3 S.W. 2d 180, 223 Ky. 107.

Miss.—Life Ins. Co. of Virginia v. Page, 172 So. 873.

Tex.—Collins v. McFarland, Civ.App., 60 S.W.2d 334, error refused.

11 C.J. p 657 note 57—36 C.J. p 508 notes 41, 53.

Necessity of recording mortgage as against purchasers and encumbrancers see supra §§ 142, 143.

Lien creditor

Under a statute which provides that every mortgage of personal property, where the mortgagor is allowed to retain possession, is void as to the lien creditors of the mortgagor, with or without notice, unless the mortgage is recorded, as required by law, a landlord is held to be such

are postponed to the lien of the landlord where the mortgagor moves the mortgaged property on the leased premises.¹³ The landlord's lien does not depend on the contract with the tenant, but on the statute, and, in the absence of a statute to the contrary, the fact that the rent contract is not recorded will not affect his lien,¹⁴ although to preserve his lien as against a mortgage there must be a compliance with any statutory requirements as to the recording of statements of rents due and unpaid.¹⁵

Under some statutes, the landlord's lien relates to the time of actual seizure under a distress warrant¹⁶ or attachment,¹⁷ and a mortgage previously recorded is superior, although a mortgage recorded subsequent thereto is inferior, notwithstanding that

it was executed before the seizure.¹⁸ The landlord's lien, however, is superior to a mortgage given prior to the levy of attachment when the consideration for the mortgage is an antecedent debt.¹⁹

Reserving a lien for rent on chattels located on leased premises will give the landlord a prior claim thereon, unless at the time the property is brought on the premises it is subject to a valid mortgage,²⁰ or unless the mortgage was executed and recorded prior to the beginning of the tenancy;²¹ but such a reservation in favor of the landlord is in effect a mortgage and must be recorded to be effectual against a subsequent mortgage in ordinary form,²² unless the subsequent mortgagee has notice of the reservation in the unrecorded lease.²³ It has been

a lien creditor, and not a mere lienholder, and the landlord's lien is, therefore, superior to such an unrecorded mortgage.—*Berkey, etc., Furniture Co. v. Sherman Hotel Co.*, 16 S.W. 807, 81 Tex. 135.—*Liquid Carbonic Acid Mfg. Co. v. Lewis*, 75 S.W. 47, 32 Tex.Civ.App. 481.

Mistake in mortgage recorded

Where, by mistake, the mortgage is recorded as for a smaller sum than it actually is, the mortgagee is entitled to a superior lien only as to the amount as recorded.—*Nagel v. Ferriman*, 294 S.W. 184, 219 Ky. 635.

13. Del.—*State v. Frick*, 65 A. 781, 22 Del. 26.

11 C.J. p 657 note 58—36 C.J. p 508 notes 46, 47.

14. Ala.—*Metropolitan Life Ins. Co. v. Reconstruction Finance Corporation*, 162 So. 379, 230 Ala. 580.

11 C.J. p 657 notes 59, 60.

15. Tex.—*Walker-Smith Co. v. Winstead, Civ.App.*, 99 S.W.2d 1051—*West Development Co. v. Crown Bottling Co., Civ.App.*, 90 S.W.2d 887, error dismissed.—*McKesson-Crowdus Drug Co. v. Newman, Civ.App.*, 86 S.W.2d 881.

Knowledge insufficient

That officers of bank which took a mortgage from tenant knew that rents were unpaid at time did not entitle landlord to priority of lien for unpaid rents, where landlord failed to file sworn statement with county clerk.—*West Development Co. v. Crown Bottling Co., Tex.Civ.App.*, 90 S.W.2d 887, error dismissed.

Rental due immaterial

The mere fact that the rent was in arrears at the time of execution of the mortgage is immaterial if the rent claim was not filed until more than six months after the rent became due.—*Walker-Smith Co. v. Winstead, Tex.Civ.App.*, 99 S.W.2d 1051.

16. N.J.—*Bodell v. Real Securities Inv. Co.*, 99 A. 337, 89 N.J.Law 707, affirming 95 A. 758, 88 N.J.Law 155.

11 C.J. p 657 note 61—36 C.J. p 507 note 37.

17. Miss.—*Marye v. Dyché*, 42 Miss. 347.

18. N.J.—*Mans v. Brody*, 168 A. 263, 111 N.J.Law 194, affirmed 171 A. 787, 112 N.J.Law 504.

Corrective mortgage

Where original mortgage was void as against mortgagor's creditors because of defective affidavit, corrective mortgage executed after mortgagor's landlord had extended credit by allowing six months' rent to accrue was void as to landlord who levied on chattels by distress warrant.—*Resnick v. Jefferson Holding & Building Corporation*, 187 A. 916, 14 N.J.Misc. 875.

Unrecorded sale

A landlord's general lien for rent, arising on the issuance and levy of a distress warrant, is superior to a tenant's unrecorded bill of sale of personalty to secure a debt, although the bill of sale was executed and delivered prior to the date of the levy of the distress warrant on the property covered by the bill of sale.—*Butler v. La Grange Grocery Co.*, 116 S.E. 213, 29 Ga.App. 612.

19. U.S.—*Hattiesburg Bank v. Carter, Miss.*, 232 F. 127, 146 C.C.A. 319.

20. Iowa.—*Miller v. Swartzlander & Holman*, 182 N.W. 651, 192 Iowa 153.—*Barrett v. Martzahn*, 173 N.W. 72, 186 Iowa 548.

11 C.J. p 657 note 62.

Deposit security

Where the tenant made a deposit with the landlord under the original lease as security for payment of rent, and it was provided that any assignment of the tenant's right should be subject to the lien of the landlord, landlord's claim for rents accruing up to the time of acceptance of tenant's surrender constituted a lien on the deposit superior to the lien of a subsequent mortgage

thereon.—*Von Schleinitz v. North Hotel Co.*, 23 S.W.2d 64, 323 Mo. 1110.

Return of mules

Where landlord rented farm with mules under lease requiring tenant to return personal property or equivalent in kind, and five mules died or were disposed of and tenant placed six new mules on farm, but it was not shown he did so as agent or on behalf of landlord or to replace the five mules, landlord had no title to five of the six new mules and could not maintain action for proceeds of sale under mortgage.—*Forehand v. Edenton Farmers' Co.*, 175 S.E. 183, 206 N.C. 827.

Validity of lease, joinder of wife

Under a statute requiring a wife to join in an encumbrance of exempt personal property, a lease giving the landlord a lien on such property, which is not signed by the wife, is not superior to a subsequent valid mortgage covering such chattels.—*Brownlee v. Masterson*, 247 N.W. 481, 215 Iowa 993.

21. Iowa.—*Wunder v. Schram*, 251 N.W. 762, 217 Iowa 920.

22. Cal.—*Stewart v. Leasure*, 55 P. 2d 917, 919, 12 Cal.App.2d 652, quoting *Corpus Juris*.

Iowa.—*Brownlee v. Masterson*, 247 N.W. 481, 215 Iowa 993.—*Brenton v. Bream*, 210 N.W. 756, 202 Iowa 575.

Okl.—*Abraham v. American Nat. Bank*, 17 P.2d 480, 161 Okl. 87.

Wash.—*M. H. B. Co. v. Desmond*, 275 P. 733, 151 Wash. 344.

11 C.J. p 658 note 63.

Exempt property

Lease, in effect a chattel mortgage, giving lien on exempt property, must be recorded to be valid against subsequent mortgagee without notice, claiming under recorded chattel mortgage.—*Brenton v. Bream*, 210 N.W. 756, 202 Iowa 575.

23. Iowa.—*Brenton v. Bream, supra*. 11 C.J. p 658 note 64.

held that the landlord under such a lease is not a subsequent encumbrancer for value, so the fact that the recording of the prior mortgage was defective and insufficient to give the landlord constructive notice is immaterial.²⁴

Of course, in order to be entitled to a preferred landlord's lien, the relationship of landlord and tenant must exist between claimant and the mortgagor;²⁵ and the claim for rent, if the lien is claimed under a statute, must be for unpaid rent within the time limited, if any, by the statute.²⁶

When no rent due. Under a statute providing that a landlord's lien shall attach only by reason of rent due or such as is accruing, the lien of a mortgage is superior to that of the landlord for his rent, if at the time the mortgage is executed the rent has been paid in full;²⁷ and, where the superiority of the landlord's lien only covers rents accruing before actual or constructive notice of the mortgage, the mere fact that the lien attaches for the full term as between the landlord and tenant cannot subordinate the title of the mortgagee who put his mortgage to record when no unpaid rent was due.²⁸ Where,

however, the statutory lien of a landlord for rent attaches at the beginning of the tenancy, or where the chattels are brought on the premises, a landlord's lien on chattels on the premises is superior to a mortgage thereon, even though at the time of its execution all accrued rents had been paid.²⁹ Also, where it is provided in the lease that the lien shall attach for rent to become due during the term of the lease, the lien is not defeated by a mortgage on the tenant's property, although at the time of its execution all accrued rents have been paid;³⁰ but where, after the expiration of the lease the tenancy has become one at will, on the expiration of the period at which the tenancy at will might have been terminated immediately succeeding the execution of a mortgage, and on the payment of rent for that period, the mortgage attains priority.³¹

Effect of renewal of tenancy. A valid mortgage lien created during one term of a lease is superior to a landlord's lien, existing during a second term of lease to the same tenant, that had not begun or been contracted for when the mortgage was executed;³² but the execution of a new lease covering the

Knowledge of tenancy

Mortgagee was held not to have willfully abstained from making inquiry as to unrecorded lease giving lien on exempt property, nor to be charged with notice thereof, although it knew mortgagors were tenants.—Brenton v. Bream, *supra*.

24. Iowa.—Miller v. Swartzlander, 182 N.W. 651, 192 Iowa 153—Bartlett v. Martzahn, 173 N.W. 72, 186 Iowa 548.

25. Assignor of a lease is not entitled to a landlord's lien on the chattels of the assignee superior to a mortgage thereon.—Davis v. First Nat. Bank, Tex.Civ.App., 258 S.W. 241.

26. Mo.—Joeckel v. Gust, 268 S.W. 888, 217 Mo.App. 495.

N.M.—Dees v. Dismuke, 240 P. 198, 30 N.M. 528.

Tex.—McKeever v. Brooks-Davis Chevrolet Co., Civ.App., 74 S.W.2d 311, error dismissed—H. O. Wooten Grocer Co. v. Wade Meat Co., Civ. App., 37 S.W.2d 1090—Radford v. Bacon Securities Co., Civ.App., 18 S.W.2d 848—Mecham v. O'Keefe, Civ.App., 198 S.W. 1000.

Current contract year

A statute giving the landlord a lien for unpaid rent and providing that the rent to become due shall not continue or be enforced for a longer period than the current contract year, embraces a period of twelve months reckoning from the beginning of the lease or rental contract, whether it be in the first or any other year of the lease or rental con-

tract.—Gray v. McFaddin, Tex.Civ. App., 8 S.W.2d 293, error dismissed.

Former year's rent

Where the statute does not give the lessor for a term of years a lien on crops of one year to secure the payment of rent for another year, the lien of purchaser of tenant's note and recorded mortgage on interest in crop, before maturity, for value and in due course, is superior to landlord's lien under unrecorded lease for unpaid rent.—Joeckel v. Gust, 268 S.W. 888, 217 Mo.App. 495.

27. Tex.—Brackenridge v. Millan, 16 S.W. 555, 81 Tex. 17—Hempstead Real Estate, etc., Assoc. v. Cochran, 60 Tex. 620—Rogers v. Grigg, Civ.App., 29 S.W. 654.

11 C.J. p 658 note 65.

28. Ala.—Gay v. Radney, 142 So. 828, 225 Ala. 331.

29. D.C.—Spilman v. Geiger, 58 F.2d 890, 61 App.D.C. 164.

La.—Youree v. Limerick, 101 So. 864, 157 La. 39, 37 A.L.R. 394.

30. Iowa.—Nickle v. Mann & Clute, 232 N.W. 722, 211 Iowa 906.

11 C.J. p 658 note 66.

31. Iowa.—Nickle v. Mann & Clute, *supra*—German State Bank v. Heron, 82 N.W. 430, 111 Iowa 25—Thorpe v. Fowler, 11 N.W. 3, 57 Iowa 541.

32. U.S.—People's Trust Co. v. Oates, C.C.A.W.Va., 68 F.2d 353.

Ala.—Payne v. Boutwell, 164 So. 755, 231 Ala. 311, denying certiorari 164 So. 753, 26 Ala.App. 573.

N.M.—Dees v. Dismuke, 240 P. 198,

200, 30 N.M. 528, quoting *Corpus Juris*.

11 C.J. p 658 note 67.

In Louisiana

(1) A mortgage recorded before the expiration of the first lease primes a new lease made subsequently.—Hardie v. Wright, 125 So. 312, 12 La.App. 52—Williams v. Federal Machine Shop, 8 La.App. 281—Bernhardt v. Sandel, 4 La.App. 648—Bernhardt v. Sandel, 3 La.App. 139.

(2) Where a tenant's holding over after the expiration of his lease constitutes a reconduction, the landlord's lien for rent after the expiration of the conventional lease primes a mortgage executed prior to the expiration of the term.—McKesson Parker Blake Corporation v. Eaves & Reddit, App., 149 So. 294—Comegys v. Shreveport Kandy Kitchen, 110 So. 104, 162 La. 103, 52 A.L.R. 931, reversing 3 La.App. 692.

(3) It has been held, however, that a reconduction constitutes a new contract for each month and that a chattel mortgage enjoys priority over a tacit reconduction made subsequent thereto.—Remedial Loan Soc. v. Solis & Trepagnier, 1 La.App. 164.

(4) It has also been held that reduction in rent of lease having no fixed time for its duration, and which had continued from month to month by reconduction, was not modification of existing lease, but constituted new lease; hence lessee's mortgage on property on premises which was recorded prior to rent reduction had

unexpired term of the old lease will not postpone the landlord's lien to a mortgage on the goods on the premises, although it was executed before the change in the lease.³³ It has also been held, where the leases to the tenant had been renewed annually for a period of years, each including the same terms and conditions and each providing that any unpaid rental should be carried over and become obligations of the following years, that the leases should be deemed to be a continuing tenancy and that the lien covered the unpaid rentals of the tenancy and was superior to a subsequent mortgage.³⁴

§ 305. — Seller's Lien or Interest

In the absence of a statute to the contrary, a seller's lien is superior to the lien of the buyer's mortgagee.

A lien for the purchase price in favor of a seller in possession is prior to that of a chattel mortgage executed by the buyer.³⁵ Where, however, chattels in the actual possession of the mortgagor under a valid contract of sale are mortgaged, the rights of the mortgagee are superior to those of the original vendor or those claiming through him.³⁶ When a mortgage covers after-acquired property, the rights of the mortgagee as to property subsequently purchased by the mortgagor are superior to the claim of the seller for the purchase money, even though

the seller has reduced his claim to judgment and levied execution on the property sold him;³⁷ but a seller receiving a worthless check in payment has been held to be entitled to recover the chattels in preference to one holding a preëxisting mortgage on the buyer's goods owned and to be acquired, and taking possession thereof with knowledge of the seller's equity.³⁸ A statute declaring that property shall not be exempt from execution or attachment for the purchase price does not give the seller a lien,³⁹ and, notwithstanding such a statute, where possession of the property is delivered to the buyer who executes a mortgage thereon, the seller's rights are inferior to those of the mortgagee,⁴⁰ even though the mortgagee knows that the purchase price is unpaid.⁴¹

Where personal property is sold, but possession is retained by the seller, it has been held that a mortgagee from the seller without notice of the sale will be protected against the claim of the buyer.⁴²

Conditional sales. While there is authority to the contrary,⁴³ the general rule is, where unaffected by statute, that the lien of the seller under a conditional sale contract reserving title in the seller until performance of the condition is superior to that of a subsequent mortgagee of the buyer in possession;⁴⁴ but an absolute sale cannot be modified by

priority over lessor's future rent claims.—*Weaks Supply Co. v. Werdin, App.*, 147 So. 838.

33. Iowa.—*Rollins v. Proctor*, 9 N. W. 235, 56 Iowa 326.

34. Kan.—*Bowland v. McDowell*, 297 P. 691, 132 Kan. 820.

35. Cal.—*Seaboard Dairy Credit Corporation v. Herman*, 33 P.2d 1042, 139 Cal.App. 320.
11 C.J. p 658 note 70.

36. Mo.—*Brown v. Deal, App.*, 256 S.W. 114—*Cass County Bank v. Hulen, App.*, 195 S.W. 74.
Or.—*Kliks v. Courtemanche*, 43 P. 2d 913, 150 Or. 332.
11 C.J. p 658 note 71.

General creditor

If two creditors have a claim against a common debtor, one for the purchase price of personal property and the other as a general creditor, the general creditor, even though he knows that the purchase price has not been paid, if he obtains a first lien by mortgage, will prevail over the creditor for the purchase price.—*R. Williams & Co. v. Farm & Home Savings & Loan Ass'n*, 272 S.W. 1006, 217 Mo.App. 554.

Mortgagee one of buyers

One of the buyers, privy to the giving of title note as security for part of the price, could not, by subsequent mortgage, acquire a superior

lien on the property.—*Doyle v. Ben-trup*, 207 P. 859, 111 Kan. 442.

In Louisiana

(1) In the absence of a law requiring that a vendor's privilege on movable property be recorded in order to be effective against a mortgage, a seller of movable property, which is not paid for, has a preference on the price of his property, over other creditors of the purchaser, including mortgagees, if the property still remains in the possession of the purchaser.—*Continental Bank & Trust Co. v. Succession of McCann*, 92 So. 55, 151 La. 555—*Weiss v. Hudson Const. Co.*, 91 So. 525, 151 La. 1—*Eddy v. Weathers*, 134 So. 259, 16 La.App. 634.

(2) As the law does not require a vendor's privilege on movable property to be recorded, the vendor's failure to record it does not estop him as against the taking of a mortgage on the faith of the records without making any other effort to ascertain if the property was free from privileges.—*Weiss v. Hudson Const. Co.*, supra.

(3) A seller on open account, however, has no vendor's lien superior to that of a subsequent mortgagee.—*Eddy v. Weathers*, supra.

37. N.J.—*Page v. Kendig, Ch.*, 7 A. 878.

38. Iowa.—*Gray Bros. v. Otto*, 160 N.W. 293, 178 Iowa 854.

39. Mo.—*Kane v. Manley*, 63 Mo. App. 43—*Taylor v. Smith*, 47 Mo. App. 141—*Corning v. Rinehart Medicine Co.*, 46 Mo.App. 16.
11 C.J. p 658 note 74.

40. Mo.—*Kane v. Manley*, 63 Mo. App. 43—*Taylor v. Smith*, 47 Mo. App. 141—*Corning v. Rinehart Medicine Co.*, 46 Mo.App. 16.

41. Mo.—*Kane v. Manley*, 63 Mo. App. 43—*Finke v. Pike*, 50 Mo. App. 564.

42. Cal.—*Jasper v. Presley*, 152 P. 941, 28 Cal.App. 405.

Iowa.—*Hesser v. Willson*, 36 Iowa 152.
11 C.J. p 658 note 77.

Retention of possession or apparent title as evidence of fraud see the C.J.S. title *Fraudulent Conveyances* § 187 et seq., also 27 C.J. p 574 note 24 et seq.

43. Md.—*Lincoln v. Quynn*, 11 A. 848, 68 Md. 299, 6 Am.S.R. 446.
11 C.J. p 658 note 78.

44. Ark.—*Meyer v. Equitable Credit Co.*, 297 S.W. 846, 174 Ark. 575.
Cal.—*Oakland Bank of Savings v. California Pressed Brick Co.*, 191 P. 524, 183 Cal. 295—*Peronnet v. Ralph*, 296 P. 329, 112 Cal.App. 97—*Pacific Finance Corporation v. Hendley*, 284 P. 736, 103 Cal.App.

a subsequent agreement, so as to convert it into a conditional sale as against the rights of an intervening mortgagee.⁴⁵ Also, the lien of a conditional seller is superior where there has been a compliance with the recording statutes prior to the execution of the mortgage,⁴⁶ where the mortgagee has notice of the conditional sale,⁴⁷ or where the seller has retaken possession of the property during the time limited by statute for the superiority of his lien.⁴⁸ On the other hand, where the conditional sales contract was not properly recorded as required by law, the lien of a mortgagee of the buyer

in possession as an encumbrancer for value is superior to that of the conditional seller,⁴⁹ even though the mortgage has not been properly recorded.⁵⁰ It has been held, however, that where neither seller nor mortgagee has complied with a statute requiring registration of the respective instruments under which they claim, they are left where they would have stood, regardless of the registry statute, and the first in time will prevail.⁵¹ A prior lien under an unrecorded contract of sale will prevail over a subsequent mortgage which does not clearly include the property on which the lien rests.⁵² Al-

335, hearing denied and opinion modified on other grounds 285 P. 1048.

Wash.—Western Electric Co. v. Norway Pacific Construction & Drydock Co., 213 P. 686, 124 Wash. 49. 11 C.J. p 658 note 79.

Assignee of note given for purchase price of goods may have priority over a subsequent mortgage, although seller retains title to the property until the purchase money is paid.—Townsend v. Southern Product Co., 56 S.E. 436, 127 Ga. 342, 119 Am. S.R. 340.

Mortgagee not buyer

Mortgagee is not "buyer at executed sale" within statute providing when buyer acquires better title than seller has.—Pacific Finance Corporation v. Hendley, 285 P. 1048, denying rehearing and modifying 284 P. 736, 103 Cal.App. 335.

45. U.S.—Van Winkle v. Crowell, Ala., 13 S.Ct. 18, 146 U.S. 42, 36 L.Ed. 880.

46. Del.—In re Baker, 162 A. 356, 5 W.W.Harr. 198.

Contract construed

Where conditional sale stated that forty per cent of amount earned by purchaser with such property on certain work to be done for seller would be applied on purchase price, a mortgagee in mortgage executed by purchaser could not claim that forty per cent of amount earned automatically reduced amount due seller, where forty per cent has not actually been applied.—Kammeier v. Chauvet, 171 N.W. 165, 186 Iowa 958.

Description in recorded conditional sale held sufficient to give mortgagee notice, where mortgagor had no other such chattels on his premises.—Wayne Oil Tank & Pump Co. v. Equitable Refining Co., 275 S.W. 934, 220 Mo.App. 507.

47. Ky.—Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co., 45 S.W.2d 470, 241 Ky. 779.

N.Y.—American Soda Fountain Co. v. Najarian, 195 N.Y.S. 555, 119 Misc. 219.

Directors of corporation taking

mortgage on certain cars recently purchased by corporation were not entitled to protection against seller as innocent purchasers, where contract for purchase, executed by one of directors, contained title retention provision.—Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co., 45 S.W.2d 470, 241 Ky. 779.

Knowledge held insufficient to render mortgage lien inferior to unrecorded conditional seller's lien.—Bratnobar Co. v. Mauk Seattle Lumber Co., 24 P.2d 89, 173 Wash. 689.

48. Recording unnecessary

Under Code 1907 § 3394, as amended by Acts 1911 p 115, requiring a contract retaining title to property sold until the purchase price is paid to be recorded within three months after the sale in order to be valid against innocent purchasers, a seller can retake possession of his property under his reserved title from a subsequent innocent mortgagee before the expiration of the three months after the sale, and need not then record his contract.—Motor Sales Co. v. McNeill, 89 So. 89, 18 Ala.App. 132, certiorari denied Ex parte McNeill, 89 So. 923, 206 Ala. 700.

49. U.S.—In re James, Inc., D.C.N.Y., 30 F.2d 551, reversed on other grounds, C.C.A., 30 F.2d 555—John Van Range Co. v. Meade, C.C.A.Ky., 27 F.2d 206—In re Tonawanda Brewing Corporation, D.C.N.Y., 13 F.Supp. 345.

Ala.—Harris v. Leeth Nat. Bank, 105 So. 434, 21 Ala.App. 83.

Minn.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85.

N.Y.—Seger & Gross Co. v. MacLaire, 165 N.Y.S. 423.

N.C.—Commercial Inv. Trust v. Albemarle Motor Co., 137 S.E. 874, 193 N.C. 663.

Tenn.—Maryville Furniture Co. v. Rowen, 1 Tenn.App. 184.

Va.—Mack International Motor Truck Corporation v. Jones & Combs, 149 S.E. 544, 153 Va. 183.

Wash.—Bratnobar Co. v. Mauk Seattle Lumber Co., 24 P.2d 89, 173 Wash. 689—Lee Tire & Rubber Co. v. Gay, 4 P.2d 503, 164 Wash. 569—Ritzville Trading Co. v. Harrington State Bank, 297 P. 190, 161

Wash. 464—Edgar v. Hartman & Nathan, 284 P. 76, 155 Wash. 256. Wis.—Farmers & Merchants State Bank of Wisconsin Dells v. Schulenberg, 276 N.W. 333.

Validity of unrecorded conditional sale as against subsequent mortgagees see the C.J.S. title Sales § 580, also 55 C.J. p 1254 note 34—p 1255 note 50.

Assignee

Where the mortgagee of a buyer received a valid lien because the conditional sale was not recorded, the mortgage is valid in the hands of the mortgagee's assignee, even though the assignee had knowledge of the existence of the conditional sale contract, since the assignee succeeded to the rights of the mortgagee as to whom the mortgage was superior to the conditional sale.—Hoeller v. Moog, 198 P. 867, 60 Mont. 74.

Contract held conditional sale, subject to a prior recorded mortgage.—Commercial Inv. Trust v. Albemarle Motor Co., 137 S.E. 874, 193 N.C. 663.

"Purchaser" within recording act for conditional sales includes mortgagee.—Farmers & Merchants State Bank of Wisconsin Dells v. Schulenberg, Wis., 276 N.W. 333.

Reservation in one not seller

Purported reservation of title in one who was not a vendor, and hence was not within the protection of the recording statute, was inferior to subsequent deed of trust acquired by one without notice of such reservation.—People's Bank of Southampton v. Merchants' & Farmers' Bank, 147 S.E. 220, 152 Va. 520.

50. Mont.—Herd v. Freeman, 273 P. 1047, 84 Mont. 32.

Mortgage admissible

Irregularly recorded mortgage was admissible in claim and delivery action by seller under unrecorded conditional sale contract.—Herd v. Freeman, supra.

51. Ga.—Cottrell v. Merchants', etc., Bank, 15 S.E. 944, 89 Ga. 508. 11 C.J. p 659 note 81.

52. Ky.—Hoe v. Bullock, 1 Ky.L. 313.

though a mortgagee's rights are generally inferior as to property subsequently acquired by the mortgagor on a conditional sales contract,⁵³ even though the contract is not recorded,⁵⁴ the rule is limited to those cases wherein the mortgagee is neither an encumbrancer for value, nor possessed of equity, as against the conditional vendor with respect to such property.⁵⁵

§ 306. — Storage Liens

In the absence of a statute to the contrary or consent of the mortgagee thereto, a lien for storage is inferior to a valid chattel mortgage.

In the absence of statute, storage charges will not constitute a lien superior to the rights of the mort-

gagee,⁵⁶ but otherwise if the mortgagee consents to the storage of the property.⁵⁷ By statute, however, a mortgagor may be empowered to impose a lien for storage on the mortgaged property superior to that of a prior mortgage.⁵⁸

§ 307. Mortgagee as Bona Fide Purchaser

In the absence of a statute to the contrary, a mortgagee in good faith for a consideration of one in possession occupies the position of a bona fide purchaser.

Ordinarily, a mortgagee taking in good faith a mortgage from a mortgagor occupies the position, in the absence of a statute to the contrary, of a bona fide purchaser, and takes the property free from undisclosed equities of others.⁵⁹ According-

53. Ark.—Whittington v. Hooks, 242 S.W. 817, 154 Ark. 423.

54. Del.—Pisculli v. Bellanca Aircraft Corporation, 149 A. 418, 17 Del.Ch. 73, reversed on other grounds 150 A. 81, 17 Del.Ch. 151, affirmed Bellanca Aircraft Corporation v. Pisculli, 156 A. 503, 18 Del.Ch. 427.

Minn.—Goodrich Silvertown Stores of B. F. Goodrich Co. v. A. & A. Credit System, 274 N.W. 172.

N.J.—Mississippi Valley Trust Co. v. Cosmopolitan Club, 162 A. 396, 111 N.J.Eq. 277.

Wash.—J. Bornstein & Sons v. Allen, 220 P. 801, 127 Wash. 314.

Mortgage void

Where buyer of truck and trailer had given his creditor a mortgage thereon prior to acquiring the property from seller when he executed a conditional sales contract and chattel mortgage, creditor's mortgage was not superior to seller's mortgage, notwithstanding creditor's mortgage was recorded first, since buyer at time of execution of creditor's mortgage had no interest in property and hence mortgage was void.—Valley Chevrolet Co. v. O. S. Stapley Co., Ariz., 72 P.2d 945.

55. N.J.—Mississippi Valley Trust Co. v. Cosmopolitan Club, 162 A. 396, 111 N.J.Eq. 277.

Not subsequent creditor

Where, on June 19, 1920, hotel company executed a mortgage for a loan which covered after-acquired property, notwithstanding that an order was placed for dishes and silverware on May 6, but the sale contemplated was not consummated, and a subsequent arrangement was made for conditional sale consummated on June 30, mortgagees were not creditors subsequent to date of the conditional sale contract.—J. Bornstein & Sons v. Allen, 220 P. 801, 127 Wash. 314.

Subsequent consideration

Where consideration for mortgage is to be advanced from time to time

as building operations progress and furniture and furnishings are installed, time of making advances under, and not time of recording of, mortgage constitutes controlling test as to whether mortgagee is "subsequent encumbrancer." — Mississippi Valley Trust Co. v. Cosmopolitan Club, 162 A. 396, 111 N.J.Eq. 277.

56. D.C.—Smith's Transfer & Storage Co. v. Reliable Stores Corporation, 58 F.2d 511, 61 App.D.C. 106.

Ill.—See Werner Bros. Exp. & Storage Co. v. Donovan, 206 Ill.App. 11.

La.—Burglass v. Wright, 159 So. 176. N.D.—Aas v. St. Anthony & Dakota Elevator Co., 249 N.W. 917, 63 N. D. 771.

Ohio.—Bankers Commercial Security Co. v. Coffman, 22 Ohio N.P., N.S., 193.

Tex.—Bewley Mills v. First Nat. Bank, Civ.App., 110 S.W.2d 201, error dismissed—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed—Holloway v. Merchants' Transfer Co., Civ.App., 294 S.W. 989.

Wash.—First Nat. Bank v. White-Dulany Co., 209 P. 861, 121 Wash. 386.

11 C.J. p 659 note 84.

Priority of garage keeper's lien over mortgage see supra § 297.

Length of time immaterial

Where mortgagee of grain is not bound by mortgagor's contract of storage, length of time warehouseman held grain is immaterial, and mortgagee is not liable for storage charges.—Aas v. St. Anthony & Dakota Elevator Co., 249 N.W. 917, 63 N.D. 771.

Past indebtedness

Lien of warehouseman based on past dealings with grower was not prior.—Bewley Mills v. First Nat. Bank, Tex.Civ.App., 110 S.W.2d 201, error dismissed.

Property stored by police

Where the police of a city stored certain chattels found on the side-

walk, a mortgagee's lien on such goods is superior to the lien of the warehouseman, at least where the warehouseman by the exercise of ordinary diligence could have learned the ownership thereof.—Holloway v. Merchants' Transfer Co., Tex.Civ. App., 294 S.W. 989.

57. Idaho.—Vollmer Clearwater Co. v. Union Warehouse & Supply Co., 248 P. 865, 43 Idaho 37.

Mo.—Zahner Mfg. Co. v. Harnish, 51 S.W.2d 145, 146, 227 Mo.App. 287 citing *Corpus Juris*—Zahner Mfg. Co. v. Harnish, 24 S.W.2d 641, 643, 224 Mo.App. 870, citing *Corpus Juris*.

Wash.—Pacific Storage Warehouse & Distributing Co. v. Bjorklund, 62 P. 2d 39.

11 C.J. p 659 note 85.

Second mortgage, expressly made subject to a first mortgage containing permission for storage, is inferior to a warehouseman's lien.—Vollmer Clearwater Co. v. Union Warehouse & Supply Co., 248 P. 865, 43 Idaho 37.

Possession after default

Where a mortgagee of grain allows the mortgagor to remain in possession after default, the mortgagor is not the agent of the mortgagee for the purpose of storing the grain with the warehouseman.—Aas v. St. Anthony & Dakota Elevator Co., 249 N. W. 917, 63 N.D. 771.

58. N.Y.—Courtlandt Garage & Realty Corporation v. New York Yellow Cab Co. Sales Agency, 215 N. Y.S. 789, 217 App.Div. 4—National Surety Co. v. Gotham Garage Co., 216 N.Y.S. 290, 127 Misc. 422—Willys-Overland v. Prudman Automobile Co., 196 N.Y.S. 487. 11 C.J. p 659 note 86.

59. Tenn.—Dysart v. Hamilton et al., 11 Tenn.App. 43.

Mortgagee as bona fide purchaser:

As against prior mortgage not filed or recorded see supra § 142.

As against unrecorded conditional sale contract see the C.J.S. title

ly, it is well established that, where a sale of personal property is induced by fraud, and the fraudulent purchaser mortgages the property to one who takes without notice of the fraud, and for a present consideration, the mortgagee occupies the position of a bona fide purchaser, and will be protected against the claim of the defrauded seller to the extent of the mortgage debt.⁶⁰ The same rule has also been applied where the mortgagor obtained the property by false pretenses amounting to a felony, if the owner voluntarily parted with the possession and intended to part with the title.⁶¹ Where, however, title to the property did not pass to the mortgagor, the mortgagee does not occupy the position of a bona fide purchaser and will not be protected against the claim of the rightful owner,⁶² at least where the owner has not clothed the mortgagor with the indicia of ownership to the extent of estopping him as against a mortgagee of the one in possession.⁶³

§ 308. — Notice

A mortgagee does not occupy the position of a bona

fide purchaser where, at the time of taking the mortgage, he had actual or constructive notice of the equities of others in the mortgaged property.

A mortgagee is not entitled to protection as a bona fide purchaser where he participates in the fraud by which the mortgagor obtains the mortgaged property,⁶⁴ or where, at the time of taking the mortgage, he had knowledge or notice of the fraud,⁶⁵ or of equities existing in favor of a third person.⁶⁶ Also, he is not entitled to protection as a bona fide purchaser where, at the time of taking the mortgage, he has notice that the mortgagor has transferred title to another, notwithstanding that the transfer might be deemed fraudulent because of the transferor's retention of possession,⁶⁷ or where he has notice that the mortgagor lacks title or right to the chattels mortgaged.⁶⁸ Actual notice is not necessary, and if the mortgagee has knowledge of such facts as would cause an ordinarily careful and prudent man to make inquiries which would lead to knowledge of the mortgagor's fraud, he is not a purchaser in good faith.⁶⁹ While the fact of notice may be inferred from circumstances, as well as

Sales § 580, also 55 C.J. p 1254 note 34—p 1255 note 50.

Mortgagee of purchaser in transfer to defraud creditors see the C.J.S. title *Fraudulent Conveyances* §§ 297-303, also 27 C.J. p 696 note 24—p 701 note 93.

Mortgagee of fraudulent seller

Where a sale is deemed fraudulent because of retention of possession by the seller, a mortgagee in good faith has a lien on the property superior to the claim of the fraudulent buyer.—*Wightman v. King*, 250 P. 772, 31 Ariz. 89.

60. Mass.—*Entin v. Evans*, 126 N.E. 284, 235 Mass. 43.

Miss.—*Mayer v. Thompson*, 91 So. 275, 128 Miss. 561.

11 C.J. p 659 note 88—42 C.J. p 751 note 45.

61. Ind.—*Patterson v. Indiana Investment & Securities Co.*, 131 N.E. 19, 75 Ind.App. 489.

11 C.J. p 659 note 89.

62. Mo.—*Windle v. Citizens' Nat. Bank*, App., 216 S.W. 1023.

Tex.—*Gose v. Brooks*, Civ.App., 229 S.W. 979, error refused.

Mortgagee of imposter

(1) A person who takes a mortgage in good faith from an imposter does not acquire rights superior to the seller.

Mo.—*Windle v. Citizens' Nat. Bank*, App., 216 S.W. 1023.

Tex.—*Gose v. Brooks*, Civ.App., 229 S.W. 979, error refused.

(2) He is, however, entitled to be reimbursed by the owner, on the latter's reclaiming the chattels, for

their feed and care while in his possession.—*Gose v. Brooks*, supra.

63. N.M.—*Skarda v. First Mortg. Loan Co. of Clovis*, 214 P. 761, 28 N.M. 536.

Estoppel by negligence in clothing another with apparent title or ownership see the C.J.S. title *Estoppel* § 106, also 21 C.J. p 1176 note 7.

Unreceipted invoices for motor trucks, not proved to have been delivered or issued at all by manufacturer, and referring to certain contracts not produced at trial, were not evidence of sale or of title, and plaintiff was not entitled to rely thereon in making mortgage loan.—*Commercial Motors Mortg. Corporation v. Mack International Motor Truck Corporation*, 209 N.Y.S. 661, 213 App.Div. 25.

64. Kan.—*Wafer v. Harvey County Bank*, 26 P. 1032, 46 Kan. 597.

Okl.—*Browning v. DeFord*, 60 P. 534, 8 Okl. 239, affirmed 20 S.Ct. 876, 178 U.S. 196, 44 L.Ed. 1033.

Effect and sufficiency of actual notice under recording acts on rights of purchasers and mortgagees see supra § 146.

65. Okl.—*Browning v. De Ford*, 60 P. 534, 8 Okl. 239, affirmed 20 S.Ct. 876, 178 U.S. 196, 44 L.Ed. 1033.

11 C.J. p 660 note 92.

66. Idaho.—*Smeed v. Stockmen's Loan Co.*, 284 P. 559, 43 Idaho 643.

Neb.—*First Nat. Bank v. Young*, 247 N.W. 586, 124 Neb. 598.

Wash.—*Othello State Bank v. J. I. Case Threshing Machine Co.*, 194 P. 563, 564, citing *Corpus Juris*.

Wyo.—*Finance Corporation of*

Wyoming v. Commercial Credit Co., 283 P. 1100, 41 Wyo. 198.

11 C.J. p 660 note 93.

Landlord's rights

(1) Where a lease provides that the lessees shall, on demand, execute a mortgage on the crops to secure the payment of the rent, but lessee fails to do so, and executes to a third person a first mortgage on the same crops, the mortgagee, if he had notice of the provisions of the lease, and of the landlord's rights thereunder, is not a mortgagee in good faith, and in an action by the lessor for specific performance of the terms of the lease, the mortgagee's rights will be subordinated to those of the lessor.—*Weigand v. Hyde*, 192 N.W. 198, 109 Neb. 678.

(2) Where, however, the lease was not recorded and the mortgagee had no actual knowledge thereof, he was a mortgagee in good faith with rights superior to those of the lessor.—*State Bank of Gering v. Grover*, 198 N.W. 765, 110 Neb. 421.

67. Ind.—*Craig Brokerage Co. v. Joseph A. Goddard Co.*, 175 N.E. 19, 92 Ind.App. 234.

Va.—*Henry's Ex'x v. Payne*, 100 S.E. 845, 126 Va. 1.

68. Wash.—*Hinkhouse v. Wacker*, 191 P. 881, 112 Wash. 253, affirmed 195 P. 218, 112 Wash. 253.

69. Kan.—*Salisbury v. Barton*, 66 P. 618, 63 Kan. 552.

11 C.J. p 660 note 94.

Burden

In a seller's action of replevin of goods claimed by a mortgagee of the purchaser, where it is alleged that

shown by direct evidence, it has, nevertheless, been held that the proof must be such as to affect the conscience of the mortgagee, and must be so strong and clear as to fix on him the imputation of mala fides.⁷⁰ If the mortgagee took his mortgage without notice of the fraud by which the mortgagor obtained the property, a subsequent knowledge of the fraud will not deprive him of his rights as an innocent purchaser.⁷¹

Remedy pursued as affecting question of notice. Where the seller of personal property has the right to rescind the sale for fraud, and acts promptly in the exercise of such right, he need not, as against one who subsequently took a mortgage from the purchaser to secure an antecedent debt, show that such mortgagee had notice or knowledge of the fraud;⁷² but where the seller, having the right to rescind, elects not to do so, but sues in attachment for the value of the property, he thereby affirms the sale, and must show that the mortgagee had knowledge of the mortgagor's fraud in procuring the property.⁷³ If, however, such knowledge or notice on the part of the mortgagee is shown, the invalidi-

ty of the mortgage, as against the defrauded seller, will not be affected by the fact that, instead of seeking to rescind and recover the identical property, he affirms the sale by electing to sue for the value,⁷⁴ although the contrary has been held.⁷⁵

§ 309. — Preëxisting Debt as Consideration

In the absence of statute it is generally held that a mortgage given for a preëxisting debt is not on such a consideration as to place the mortgagee in the position of a bona fide purchaser for value.

Although, as already considered in § 42, a mortgage executed to secure a preëxisting debt is valid as between the parties and their privies, and, as a general rule, is not fraudulent as to creditors, as considered in the C.J.S. title *Fraudulent Conveyances* § 155, also 27 C.J. p 534 note 44, it, although there is authority to the contrary,⁷⁶ is not, according to the weight of authority, on such a consideration as to put the mortgagee in the position of a bona fide purchaser for value,⁷⁷ so as to entitle him to prevail over a defrauded seller seeking to rescind the sale for fraud,⁷⁸ or as against equities existing

the mortgagor was a fraudulent purchaser, the burden is imposed on the mortgagee of establishing his own good faith.—*Salisbury v. Barton*, supra—11 C.J. p 615 note 52. Burden of proof generally see *infra* § 310 b.

Recorded conditional sale

Purchaser from conditional vendee was entitled to auto as against company taking mortgage from person who wrongfully filled in his own name on bill of sale left with him by conditional vendee for purchaser, since original conditional sale contract remained unsatisfied and of record when the mortgage was taken.—*Grays Harbor Finance Co. v. Sutcliffe*, 5 P.2d 1002, 165 Wash. 536.

70. Ala.—*Alabama Mach., etc., Co. v. Camden Bank*, 55 So. 433, 1 Ala. App. 461.

Iowa.—*Hesser v. Wilson*, 36 Iowa 152.

Va.—*Arbuckle v. Gates*, 30 S.E. 496, 95 Va. 802.

11 C.J. p 660 note 95.

Agreement to purchase mortgage

Finance company which agreed with dealer in advance to buy automobile purchase-money note and mortgage and took immediate assignment thereof was not required to make investigation as to consideration and was not chargeable with notice of lack of consideration.—*National Bond & Investment Co. v. Miller, Mo.App.*, 76 S.W.2d 703.

71. Ill.—*Kranert v. Simon*, 65 Ill. 344.

Neb.—*Henry v. Vliet*, 49 N.W. 1107, 33 Neb. 130, 29 Am.S.R. 478, 19 L.R.A. 590.

72. Colo.—*Nicholls v. McShane*, 64 P. 375, 16 Colo.App. 165—*Reid v. Bird*, 61 P. 353, 15 Colo.App. 116. Ind.—*Curme v. Rauh*, 100 Ind. 247.

11 C.J. p 660 note 97.

73. U.S.—*Browning v. De Ford*, Okl., 20 S.Ct. 876, 173 U.S. 196, 44 L.Ed. 1033.

Colo.—*Nicholls v. McShane*, 64 P. 375, 16 Colo.App. 165, 170.

11 C.J. p 660 note 98.

74. U.S.—*Browning v. De Ford*, Okl., 20 S.Ct. 876, 173 U.S. 196, 44 L.Ed. 1033.

Colo.—*Nicholls v. McShane*, 64 P. 375, 16 Colo.App. 165.

11 C.J. p 660 note 99.

75. Mo.—*Stokes v. Burns*, 33 S.W. 460, 132 Mo. 214.

11 C.J. p 660 note 1.

76. Cal.—*Smitton v. McCullough*, 189 P. 686, 182 Cal. 530.

11 C.J. p 661 note 5.

Preëxisting indebtedness:

As against prior mortgage not filed or recorded see *supra* § 143.

As against unrecorded conditional sale contracts see the C.J.S. title *Sales* § 581, also 55 C.J. p 1249 note 77—p 1250 note 79.

In Nebraska

(1) It has been held that a mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preëxisting or not, without

actual or constructive notice of prior equities against the mortgaged property.—*State Bank of Gering v. Grover*, 193 N.W. 765, 110 Neb. 421—*Rogers v. Trumble*, 125 N.W. 600, 86 Neb. 316—*State Bank of Lushton v. Kelly Co.*, 63 N.W. 481, 49 Neb. 242.

(2) It has also been held, however, that a mortgagee of a mortgage given to secure a preëxisting indebtedness does not occupy the position of an innocent purchaser so as to cut off the rights of a defrauded seller.

—*Charles P. Kellogg Co. v. Horkey*, 86 N.W. 497, 61 Neb. 751—*Phenix Iron Works Co. v. McEvony*, 66 N.W. 290, 47 Neb. 228, 53 Am.S.R. 527—*Henry v. Vliet*, 54 N.W. 122, 36 Neb. 133, 19 L.R.A. 590, 49 N.W. 1107, 33 Neb. 130, 29 Am.S.R. 478—*Tootle v. Chadron First Nat. Bank*, 52 N.W. 396, 34 Neb. 863.

(3) In attempting to reconcile these holdings, it has been pointed out that the mortgage merely created a lien on the mortgagor's interest in the property, subject to be defeated by the seller's rescinding the sale. Accordingly, where the seller rescinded because of fraud, the title of the mortgagor failed, and there was nothing to which the mortgage could attach.—*State Bank of Lushton v. Kelly Co.*, *supra*.

77. Idaho.—*Livestock Credit Corporation v. Corbett*, 22 P.2d 874, 53 Idaho 190.

78. Ga.—*Mashburn v. Dannenberg*, 44 S.E. 97, 117 Ga. 567.

11 C.J. p 661 note 6.

favor of third persons,⁷⁹ such as the claim of seller for the purchase price.⁸⁰ Under the Uniform Sales Act, however, making an antecedent value where goods or documents of titles are taken as security therefor, a mortgage based on an antecedent debt constitutes the mortgagee an encumbrancer for value.⁸¹ On the other hand, if, besides securing a preëxisting debt, the mortgage is based on some new or additional consideration,⁸² such as an extension of the time of payment,⁸³ or the surrender of other securities,⁸⁴ the mortgagee will be protected. A preëxisting debt, within the meaning of the rule, is one contracted before the fraudulent sale; and a debt created after the sale, though not secured by mortgage until some time after the debt was created, is not a preëxisting debt.⁸⁵

§ 310. Actions to Determine Priorities

- a. In general
- b. Evidence

a. In General

Actions to determine priorities as to mortgaged chattels are proper subjects of equity jurisdiction, and in such actions general rules as to proceedings in equity apply.

Actions to determine priorities between mortgages, or between a mortgage and other claims, are proper subjects of equity jurisdiction.⁸⁶ Actions involving a determination of priorities are governed by usual rules as to parties,⁸⁷ pleadings,⁸⁸ issues,⁸⁹ trial,⁹⁰ including questions of law and fact.⁹¹ Fur-

Ga.—*Matthews v. Kennedy*, 38 S. E. 854, 113 Ga. 378. C.J. p 661 note 7.

Mo.—*Napa Valley Wine Co. v. Rinehart*, 42 Mo.App. 171.

Idaho.—*Millick v. Stevens*, 257 P. 30, 44 Idaho 347.

Additional sales not recorded

A mortgagee in a mortgage to secure a preëxisting debt is a mortgagee in good faith, within the meaning of a statute declaring contracts conditional sale void as against subsequent purchasers and mortgagees in good faith unless recorded.—*Howles Loom Works v. Vacher*, 31 306, 57 N.J.Law 490, 33 L.R.A. 1.

Mortgagee of fraudulent seller

Mortgagee of personal property under mortgage securing antecedent debt had superior lien to prior purchaser of fraudulent seller.—*Millick v. Stevens*, 257 P. 30, 44 Idaho 347. In *Missouri*, in view of Rev.St. 9 § 812, making an antecedent or preëxisting debt constitute value, a mortgagee of personalty under a mortgage securing such a debt is a purchaser for value within § 1622, providing that personal property shall in no case be exempt from execution under a judgment for the purchase price "except in the hands of an innocent purchaser for value."—*Brown v. Deal*, App., 256 S.W. 114.

Mass.—*Entin v. Evans*, 126 N.E. 84, 235 Mass. 43. C.J. p 661 note 9.

N.D.—*Horton v. Wright, Barrett & Stillwell Co.*, 162 N.W. 939, 36 N.D. 622.

C.J. p 661 note 10.

Mo.—*J. I. Case Plow Works v. Boss*, 74 Mo.App. 437.

—*Woodburn v. Chamberlin*, 17 Ark. 446.

Ga.—*Mashburn v. Dannenberg*, 4 S.E. 97, 117 Ga. 567.

Mich.—*Hees v. Carr*, 74 N.W. 181, 115 Mich. 654.

11 C.J. p 661 note 12.

86. Mo.—*First Nat. Bank v. Johnson*, 297 S.W. 724, 221 Mo.App. 31.

Mont.—*Union Bank & Trust Co. v. Wieck*, 29 P.2d 384, 386, 96 Mont. 132, citing *Corpus Juris*—*First Nat. Bank of Hardin v. Hergert*, 22 P.2d 169, 171, citing *Corpus Juris*. Tex.—*Massachusetts Mut. Life Ins. Co. v. Stockyards Nat. Bank*, Civ. App., 50 S.W.2d 425, error dismissed.

11 C.J. p 661 note 14.

87. Colo.—*Tolland Co. v. First State Bank of Keenesburg*, 35 P.2d 867, 95 Colo. 321.

Ky.—*Safety Motor Coach Co. v. Maddin's Adm'x*, 99 S.W.2d 183, 266 Ky. 459.

11 C.J. p 661 note 15.

88. La.—*Motor Finance Co. v. Universal Motors*, App., 168 So. 721.

Mont.—*Morton v. Union Cent. Life Ins. Co.*, 261 P. 278, 80 Mont. 593.

Tex.—*Sherman v. Texas Hotel Supply Co.*, Civ.App., 66 S.W.2d 1094, error dismissed.

11 C.J. p 661 note 16.

Allegations held sufficient

Allegations of answer that prior mortgagee had surrendered his notes and mortgages to mortgagor, received settlement, and took a new note for balance due, but later, hearing mortgagor was insolvent, persuaded mortgagor to return the notes without consideration, were sufficient to support plea of payment.—*Motor Finance Co. v. Universal Motors*, La. App., 168 So. 721.

Demurrer to intervention held properly sustained and intervention properly dismissed.—*Plant City Agr. Credit Co. v. Pool*, 139 So. 595, 103 Fla. 806.

Litigation of priority

Chattel mortgagee, notwithstanding

final foreclosure judgment, was properly, under the existing liberal system of pleading, required to litigate priority of lienholder subsequently intervening by petition invalid as intervention or review.—*Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas*, Tex.Civ. App., 30 S.W.2d 364.

89. N.J.—*Bankers' Trust Co. v. Maxson*, 134 A. 875, 100 N.J.Eq. 1. Tex.—*Massachusetts Mut. Life Ins. Co. v. Stockyards Nat. Bank*, Civ. App., 50 S.W.2d 425, error dismissed.

11 C.J. p 662 note 18.

Allegation of priority

Allegation that lessor's lien was prior to lien of plaintiff's mortgage raised issue of priority and authorized introduction of evidence establishing that lessor entered into new lease, by reducing rent, subsequent to date mortgage was recorded.—*Weeks Supply Co. v. Werdin*, La.App., 154 So. 378.

Matters held not in issue

Wash.—*Kirby v. First Nat. Bank*, 239 P. 556, 136 Wash. 214, setting aside departmental opinion 229 P. 305, 131 Wash. 204.

90. Ill.—*National Cash Register Co. v. Clyde W. Riley Advertising System*, 160 N.E. 545, 329 Ill. 403.

Questions of fact in general

(1) On conflicting evidence, the question of superiority of lien is for the jury.—*Blackmon v. Engram*, 116 So. 307, 22 Ala.App. 396.

(2) On conflicting evidence, whether mortgagee gave permission for the creation of a prior lien is a question of fact for jury.—*Robinson-Hoover Cattle Loan Co. v. Sifferman*, Mo. App., 37 S.W.2d 974—*Yahlem Motor Co. v. McCord*, Mo.App., 299 S.W. 49.

(3) Determination of value of tenant's furniture, on conflicting evidence, in landlord's suit for destruction of lien by holder of mortgage on

ther, the relief prayed for is also governed by the usual rules.⁹²

b. Evidence

General rules apply as to the burden of proof, the admissibility, and the weight and sufficiency, of the evidence.

Burden of proof and presumptions. Ordinarily, in an action or proceeding involving the priority of liens on mortgaged chattels, plaintiff has the burden of proving that he has a lien⁹³ superior to the rights of others,⁹⁴ and claimants asserting a prior

lien to the property have the burden of proving their right thereto.⁹⁵ The burden of proving notice seems to rest on the attacking party,⁹⁶ but where a subsequent encumbrancer attempts to enforce his lien, it is necessary to show that he took without knowledge of the prior encumbrance.⁹⁷ Under some statutes, one claiming priority as a bona fide purchaser, as against a defectively executed or recorded mortgage, has the burden of proving such fact,⁹⁸ but where under the recording statute an unrecorded mortgage is void as to bona fide purchasers, the mortgagee of an unrecorded or

furniture was for jury.—Gay v. Radney, 142 So. 828, 225 Ala. 331.

Questions of notice held for jury
Ala.—Harris v. Leeth Nat. Bank, 105 So. 434, 21 Ala.App. 83.

Mo.—Crocker State Bank v. White, App., 226 S.W. 972.

N.D.—Horton v. Wright, Barrett & Stillwell Co., 162 N.W. 939, 36 N.D. 622.

Tex.—Lindig v. Johnson City State Bank, Com.App., 41 S.W.2d 222, reversing Johnson City State Bank v. Lindig, Civ.App., 26 S.W.2d 658.

Unrecorded conditional sale

Whether seller of unrecorded conditional sale repossessed chattel in compliance with statute, so as to gain superiority over mortgage thereon was held to be a question for the jury.—McNeill v. Motor Sales Co., 94 So. 365, 208 Ala. 310.

92. S.C.—Pearce-Young-Angel Co. v. Murrah, 174 S.E. 21, 172 S.C. 348.
Utah.—Hansen v. Daniels, 272 P. 941, 73 Utah 142.

11 C.J. p 662 note 19.

Apportionment of labor lien

The amount of a mill laborer's lien against lumber covered by a mortgage may be determined between the mortgagee and the mortgagor's receiver by apportioning to that lumber the usual cost of labor in that mill for producing an equal quantity.—Security Trust Co. v. Bank of Bernice, La., 239 F. 665, 152 C.C.A. 499.

Ascertainment of true equities

Where buyer of truck and trailer had executed mortgage thereon and such mortgage was recorded, and buyer acquired property, giving seller a conditional sales contract and mortgage, then the court would go back of the date of the respective instruments and their recording and ascertain the true equities, since mortgage to creditor would be merely equitable.—Valley Chevrolet Co. v. O. S. Stapley Co., Ariz., 72 P.2d 945.

Recognition of lien

Holder of note and mortgage on automobile was entitled to recognition of lien and privilege on automobile as against mortgagor, notwith-

standing holder was guilty of laches in enforcement of mortgage, where mortgagor failed to defend suit on note.—Black v. O. K. Radiator & Sheet Metal Works, La.App., 152 So. 782.

93. La.—Kelly, Weber & Co. v. Metcalf, 177 So. 444.

N.Y.—Armondi v. Gifford, 297 N.Y.S. 286, 251 App.Div. 918.

11 C.J. p 662 note 20.

Consideration

As respects priorities, mortgagee need not prove specific consideration for chattel mortgage securing negotiable note.—Lone Star Finance Corporation v. Fulbright, Tex.Civ.App., 61 S.W.2d 562.

Execution

Mortgagee was required to show mortgages were executed by debtor personally.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403.

94. Iowa.—Meredith v. Beadle, 233 N.W. 512, 211 Iowa 390.

Mich.—Cappon, etc., Leather Co. v. Preston Nat. Bank, 72 N.W. 180, 114 Mich. 263.

Wash.—John Hancock Mut. Life Ins. Co. v. Lewis Realty & Investment Corporation, 23 P.2d 572, 173 Wash. 444.

Compliance with statutes

That mortgage may be established as prior lien as against judgment creditors, holder must prove technical compliance with statute.—National Cash Register Co. v. Clyde W. Riley Advertising System, 160 N.E. 545, 329 Ill. 403.

Mortgage creditor of tenant, who became such creditor before tenant assumed actual relation of tenant, is exception to general rule as to landlord's right of distress, and he must prove exception, declared by Civ.Code 1912 § 3516.—Morgan Silver Plate Co. v. Bobo Undertaking Co., 92 S.E. 720, 107 S.C. 280.

95. La.—Weaks Supply Co. v. Werdin, App., 154 So. 378.

N.C.—Rogers v. Ray, 155 S.E. 253, 199 N.C. 577.

Matters required to be proved

(1) Lack of consideration for

mortgage, notwithstanding that it is a negative allegation.—First Nat. Bank v. Todd, Tex.Com.App., 231 S.W. 322, reversing, Civ.App., 212 S.W. 219.

(2) Cancellation of mortgage.—Bensen & Marxer v. Reger, 168 N.W. 881, 186 Iowa 19, modified on other grounds Benson & Marxer v. Reger, 172 N.W. 168, 186 Iowa 19.

(3) That mortgage was not properly on file when claimant purchased property.—Shackelford v. Clements, Tex.Civ.App., 300 S.W. 98.

(4) That lessor's privilege primed mortgage.—Weaks Supply Co. v. Werdin, La.App., 154 So. 378.—Remington-Rand, Inc., v. Profits Island Gravel Co., La.App., 150 So. 76, reinstating opinion 144 So. 636.—Weaks Supply Co. v. Werdin, La.App., 147 So. 338.—Kidd, for Use and Benefit of Kidd, v. Terrel, La.App., 145 So. 23.

Removal from state

Mortgagee, contesting seller's rights to automobile under conditional sales agreement, has burden of proving seller, or his assignee, consented to removal to neighboring state.—Meyer v. Equitable Credit Co., 297 S.W. 846, 174 Ark. 575.

96. La.—Wessell v. Kite, App., 142 So. 363.—Dainello v. McCoy, 131 So. 608, 14 La.App. 358.

Mont.—Union Bank & Trust Co. v. Wieck, 29 P.2d 384, 337, 96 Mont. 132, citing *Corpus Juris*.

Wash.—Bratnaber Co. v. Mauk Seatle Lumber Co., 24 P.2d 89, 173 Wash. 689.—Clark v. Kilian, 199 P. 721, 116 Wash. 532.

11 C.J. p 662 note 21.

97. U.S.—In re Ballard, D.C.Tex., 279 F. 574.

Kan.—Latenser v. Schied, 268 P. 855, 126 Kan. 490.

Tex.—East Texas Motor Co. v. Baughman, Civ.App., 248 S.W. 802.

11 C.J. p 662 note 22.

98. S.D.—Nelson v. Robinson, 205 N.W. 40, 48 S.D. 436.

Tex.—Lindig v. Johnson City State Bank, 41 S.W.2d 222, reversing Johnson City State Bank v. Lindig, Civ.App., 26 S.W.2d 658.

11 C.J. p 662 note 23.

mely recorded mortgage, to secure priority over subsequent purchaser, must prove that the purchaser had actual knowledge of his mortgage at time of purchase.⁹⁹

Also, one claiming an agreement or waiver by which his lien is given preference has the burden of proof;¹ and the courts will not indulge in a pretension that an agreement existed between the mortgagee and the mortgagor that the mortgage should give way to another lien, but such an agreement must be shown by clear and cogent evi-

dence.² Where the removal of a crop from the land constitutes a prima facie extinguishment of the lien of a mortgage thereon, the burden is on the mortgagee to rebut the presumption by showing that the removal was tortious.³

Admissibility. General rules govern the admissibility of evidence.⁴

Weight and sufficiency. In the notes are cases in which the evidence was held sufficient⁵ or insufficient⁶ to prove or show the existence of particular matters in issue. It is not necessary to estab-

Wash.—Lowman v. Guile, 228 P. 5, 130 Wash. 606—Clark v. Lian, 199 P. 721, 116 Wash. 532. Ark.—Wilson v. Citizens' Bank Osceola, 232 S.W. 689, 170 Ark. 94.

—Federal Mortgage & Finance Co. Bohne, App., 146 So. 173.

—Vilbig v. Faison, Civ.App., 296 W. 669.

J. p 662 note 24.

Ill.—Ehrlich v. Chapple, 143 N.E. 311 Ill. 467, 32 A.L.R. 989, reversing 228 Ill.App. 293.

Cal.—Valley Bank v. Hillside Packing Co., 267 P. 746, 91 Cal.App. 18.

Cal.—First Nat. Bank v. Garner, 16 P. 849, 91 Cal.App. 176.

—Daniello v. McCoy, 131 So. 608, 1 La.App. 358—McManeman v. Malone & Raynor, 1 La.App. 464.

n.—Kilmes v. Jones, 7 Tenn.App. 13.

—Southwestern Drug Corporation v. First Nat. Bank, Civ.App., 1 S.W.2d 424, error refused.

sh.—Muehler v. Kellogg-Preston Logging Co., 276 P. 558, 151 Wash. 14.

J. p 662 note 17.

Evidence held admissible

(1) Conversations with mortgagee dealings with owners.—Gould v. 251 P. 167, 43 Idaho 93.

(2) Conversations to show mortgagee's knowledge of lien.—Black v. Engram, 116 So. 307, 22 Ala. 396.

(3) Testimony of mortgagor that had been his custom to enter into leasing contracts with others without objection from mortgagee, to show likelihood that mortgagee consented to feeding.—First Nat. Bank Witherspoon Livestock Commission Co., 90 S.W.2d 453, 230 Mo.App.

Evidence of indebtedness

(1) Giving mortgage priority over lien was not erroneous for lack of formal proof that indebtedness was owing.—Moyer v. Hez- 257 P. 229, 123 Kan. 735.

Evidence held sufficient

(1) To show implied consent to creation of superior lien.

Tex.—American Surety Co. of New York v. Bay City Cattle Co., Civ. App., 263 S.W. 247.

Wash.—Pacific Storage Warehouse & Distributing Co. v. Bjorklund, 62 P.2d 39, 188 Wash. 269.

(2) To show that mortgagee was an innocent purchaser.

Minn.—Miller Motor Co. v. Jaax, 257 N.W. 653, 193 Minn. 85.

Utah.—Hansen v. Daniels, 272 P. 941, 73 Utah 142.

Wash.—First Nat. Bank v. Hart, 241 P. 675, 137 Wash. 110.

Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 592, 44 Wyo. 307.

(3) To show that mortgagee was not an innocent purchaser without notice of prior lien.—Brown v. Deal, Mo.App., 256 S.W. 114.

(4) To show claimant's actual knowledge of unrecorded mortgage.—Slimmer & Thomas v. Lawler, 218 N.W. 516, 205 Iowa 813.

(5) To show delivery of trust deed on rent crops.—Red River Nat. Bank v. Summers, Tex.Civ.App., 30 S.W.2d 726.

(6) To show validity of mortgage. Mont.—N Bar N Land & Livestock Co. v. Taylor, 22 P.2d 313, 94 Mont. 350.

Tex.—General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W.2d 1368.

(7) To show that mortgage was properly recorded.—First Nat. Bank v. Hutto, 121 So. 325, 10 La.App. 448.

(8) To identify farm named in mortgage as one on which mortgaged crop was raised.—Power Mfg. Co. v. Arkansas Rice Growers' Co-op. Ass'n, 281 S.W. 379, 170 Ark. 771.

(9) To establish release of landlord's lien.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 45 Ariz. 1.

(10) To show mortgagor's lack of title.—Dunn v. Guaranty Inv. Co., 42 P.2d 434, 181 Wash. 245.

(11) To show superiority of a lien over the mortgage lien.

Iowa.—Iowa State Bank of Ft. Madison v. Bradfield, 215 N.W. 602, 204 Iowa 488.

N.D.—State Bank of Bowman v. Nelson, 186 N.W. 766, 48 N.D. 702.

(12) To sustain a finding that machinery covered by conditional sales contract was in possession of purchaser prior to date of contract and at time mortgage was given thereon.—Ritzville Trading Co. v. Harrington State Bank, 297 P. 190, 161 Wash. 464.

Knowledge of lease

Evidence that mortgagees took the description from a lease containing a provision giving lessor a lien on the crops shows that they had actual knowledge thereof.—Reese v. Lamp, 193 N.W. 536, 195 Iowa 1221.

Evidence held insufficient

(1) To establish priority of lessor's lien over that of mortgagee.—Kidd, for Use and Benefit of Kidd v. Terrel, La.App., 145 So. 28.

(2) To show mortgagee's agreement to see that number of cotton bales on which landlord waived lien was delivered to it by tenant.—Farmer's Cotton Finance Corporation v. Collins, Tex.Civ.App., 9 S.W.2d 1054.

(3) To show that sale price of chattels was below value, or that expense of sale was too great.—Toland Co. v. First State Bank of Keenesburg, 35 P.2d 867, 95 Colo. 321.

(4) Where mortgage was mailed to county clerk, to show that he received it in his office for filing.—Carter Guaranty Co. v. Cumberland & Manchester R. Co., 292 S.W. 812, 219 Ky. 207.

(5) To justify judgment for landlord against holder of chattel mortgage.—International Harvester Co. of America v. Helme, Ind.App., 8 N.E.2d 423.

(6) To sustain finding that bank took chattel mortgage with actual notice of contents of unrecorded lease containing chattel mortgage clause, covering same subject matter.—Steelsmith v. Johannsen, 201 N.W. 917, 191 Minn. 529.

Evidence held not to show waiver

(1) Of landlord's lien.—National Bank of Lumpkin v. Miller, 147 S.E. 592, 39 Ga.App. 502.

lish a verbal mortgage by clear, strong, and convincing proof, but a preponderance of the testimony is sufficient, as in other civil cases.⁷ The mere fact that the mortgage note is not in the possession of

the mortgagee at the time of the trial of an action to establish the mortgage lien will not defeat the lien of the mortgage.⁸

XII. ASSIGNMENT OF MORTGAGE OR DEBT

§ 311. Right to Assign

A mortgagee may assign his interests under a mortgage at any time before the right of redemption is barred.

A mortgagee may dispose of his interests under the mortgage by assignment⁹ at least at any time before the right of redemption is barred.¹⁰ Of course, an assignment ordinarily transfers no interest where at the time of the assignment the mortgagee has no assignable interest.¹¹ Moreover, an assignment of the mortgage security after payment or satisfaction of the mortgage debt is a nullity.¹² However, it has been held that, although a mortgage may for some reason be void as between the original parties, an assignment thereof confers on the assignee a nominal legal title to the property.¹³ The fact that an assignment before maturity is made a criminal offense by statute has been held not to affect the title of an innocent assignee for value of a mortgage so assigned.¹⁴

A mortgage may be transferred merely as collateral security,¹⁵ in which case the mortgagee may subsequently assign his remaining interest under the mortgage to another.¹⁶

Where the mortgagee disposes of the mortgage for an amount in excess of that due him under the mortgage from the mortgagor, he is under no duty to account to the latter for such excess.¹⁷

§ 312. Requisites and Validity in General

In the absence of a statute prescribing the mode of assignment, no particular form is necessary for an assignment of a mortgage, although in order to pass legal title to the property, in jurisdictions where a mortgage passes title, the assignment must be so executed as to be sufficient to convey the property itself.

In the absence of statutory provision prescribing the mode of assignment, no particular form is necessary, generally speaking, to effect a valid assignment of a mortgage.¹⁸ However, for purposes of passing legal title to the mortgaged property to the assignee, an assignment of the mortgage must be in such form and so executed as to be sufficient to convey the legal title to the property itself,¹⁹ statutes governing transfers of personalty being applicable to assignments of mortgages as regards the transfer of legal title to the mortgaged property.²⁰

An intention to vest the mortgagee's interest in the assignee is, of course, necessary to the validity of an assignment.²¹ Thus a transaction is not an

(2) Of mortgage lien.

La.—Federal Mortgage & Finance Co. v. Bohne, App., 146 So. 173.

N.D.—Union Central Life Ins. Co. v. First Nat. Bank, 216 N.W. 201, 56 N.D. 103—Weiser v. Ridgeway, 215 N.W. 870, 56 N.D. 21.

Wyo.—Washakie Livestock Loan Co. v. Meigh, 62 P.2d 523, 50 Wyo. 480, 107 A.L.R. 1063.

7. N.C.—Odom v. Clark, 60 S.E. 513, 146 N.C. 544, criticizing Shelburne v. Letsinger, 52 Ala. 96.

8. Iowa.—Peppers v. Harris, 124 N.W. 625, 145 Iowa 635.

9. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328. Colo.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

Ill.—Greenspahn v. Ehrlich, 277 Ill. App. 322—Pendleton v. Petchaft, 210 Ill.App. 313.

Ind.—Gaumer v. Register Pub. Co., 119 N.E. 728, 67 Ind.App. 658.

Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420.

N.C.—Johnson v. Bray, 93 S.E. 728, 174 N.C. 176.

11 C.J. p 662 note 27.

10. S.C.—Moody v. Ellerbe, 4 S.C. 21.

11. Suretyship mortgage

An assignment by a surety on a bond of a mortgage securing him against loss on such bond will not transfer any interest to the assignee if the assignment is prior to a breach of the condition of the bond.—Comley v. Dazian, 21 N.E. 135, 114 N.Y. 161.

12. Idaho.—Porter v. Title Guaranty, etc., Co., 106 P. 299, 17 Idaho 364, 27 L.R.A., N.S., 111.

10 C.J. p 662 note 29.

13. N.Y.—Fellows v. Van Hyring, 23 How.Pr. 230.

14. Mass.—Draper v. Saxton, 118 Mass. 427.

15. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

Ark.—Johnson v. Barrett, 7 S.W.2d 773, 177 Ark. 779.

11 C.J. p 663 note 30.

16. N.Y.—Haskins v. Kelly, 24 N.Y. Super. 160, 1 Abb.Pr., N.S., 63.

17. Ill.—Pendleton v. Petchaft, 210 Ill.App. 313.

18. Ala.—Roy v. Greil, 77 So. 64, 16 Ala.App. 226.

Minn.—Farmers' & Merchants' State Bank of West Concord v. Nummedahl, 207 N.W. 313, 166 Minn. 144.

Mo.—Yahlem Finance Corporation v. Elsbury, App., 18 S.W.2d 544.

N.M.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312.

11 C.J. p 663 note 35.

19. Ala.—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383.

20. Ala.—Sims v. United Auto Supply Co., supra.

21. Idaho.—Porter v. Title Guaranty, etc., Co., 106 P. 299, 17 Idaho 364, 27 L.R.A., N.S., 111.

Ill.—Kreider v. Fanning, 74 Ill.App. 230.

N.Y.—Sparandera v. Staten Island Garage, 193 N.Y.S. 392, 117 Misc. 780.

Okl.—Booth v. First State Bank of Maramec, 229 P. 412, 103 Okl. 44.

assignment unless the assent to the transfer of the mortgagee's interest be mutual²² and voluntary.²³

An assignment may be effected without a writing of any kind,²⁴ and it may be effected by an assignment of the debt and an actual manual transfer of the mortgage.²⁵ A mortgage may be legally assigned by an indorsement thereon,²⁶ which may be a blank indorsement.²⁷ Further, a mortgage may be legally assigned by a separate writing,²⁸ and such a writing accompanied by delivery of the note and mortgage is at least sufficient to convey equitable title, in a jurisdiction in which a mortgagee acquires title.²⁹ The fact that the assignee's name is not set forth in the writing is immaterial if the transaction was otherwise sufficient to constitute an assignment, since the assignee has implied authority to write in his name.³⁰

In the absence of a statute requiring assignments to be proved or registered, the signature of a mortgagee, assigning the mortgage by assignment thereon, may be proved as if written on a separate piece of paper.³¹

A seal is not essential to the validity of an assignment of a chattel mortgage.³²

Acknowledgment is necessary only to entitle the assignment to record.³³

Consideration. While a sufficient consideration

is necessary to a valid assignment of a mortgage,³⁴ yet the absence of a consideration, or of a sufficient consideration, is in general no concern of the mortgagor, and will not avail him or a junior mortgagee,³⁵ nor will it affect the rights of the assignee against creditors of the mortgagor.³⁶

§ 313. Filing or Recording Assignment

In the absence of a statute to the contrary, it is generally held that the recordation of the assignment is not necessary in order to protect the rights of the assignee.

It is the rule in most jurisdictions that the filing or recording of an assignment of a mortgage is not necessary, in the absence of a statute requiring it in express terms or by necessary implication, in order to protect the rights of the assignee,³⁷ even as against subsequent purchasers without notice;³⁸ and statutory requirements relative to the filing of mortgages have been held not to apply to assignments of such instruments.³⁹ Under some statutes, however, an assignment of a mortgage is entitled to record,⁴⁰ and in some jurisdictions, even though the statute does not expressly provide for the recordation of an assignment of a mortgage, it is held that an unrecorded assignment will be avoided in favor of subsequent purchasers and existing creditors without notice.⁴¹ In other jurisdictions, where the statutes provide for the recordation of

A surrender of a mortgage as a discharged instrument on the payment of the debt does not constitute an assignment of the mortgage, even though a request for a transfer thereof was made at the time of its payment.—Cain v. Key, 70 So. 845, 195 Ala. 105.

Division of foreclosure proceeds

An agreement between creditors that one of them who holds a mortgage from the debtor shall divide the proceeds of foreclosure sale among the creditors does not operate as an assignment of the mortgage.—Tabor Mfg. Co. v. Lovell, 37 Pa.Super. 592.

22. Idaho.—Porter v. Title Guaranty, etc., Co., 106 P. 299, 17 Idaho 364, 27 L.R.A., N.S., 111.

23. Ill.—Kreider v. Fanning, 74 Ill. App. 230.
11 C.J. p 663 note 37.

24. Mo.—Green v. Powell, App., 46 S.W.2d 915.
N.M.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312.
11 C.J. p 663 note 42.

Transfer of corporate business

A corporation succeeding to the business of another corporation may become the owner of a mortgage held by the former corporation without a written assignment.

Mo.—Yahlem Finance Corporation v. Elsbury, App., 18 S.W.2d 544.
Vt.—Zabarsky v. Employers' Fire Ins. Co., 123 A. 520, 97 Vt. 377.

25. Or.—Clarinda Trust & Savings Bank v. Doty, 163 P. 418, 83 Or. 214.

26. Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.
11 C.J. p 663 note 44.

27. Ala.—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383.

28. Mich.—Aultman v. Sloan, 73 N.W. 123, 115 Mich. 151.

29. Ala.—Roy v. Greil, 77 So. 64, 16 Ala.App. 226.

30. Minn.—Farmers' & Merchants' State Bank of West Concord v. Nummeasahl, 207 N.W. 313, 166 Minn. 144.

31. N.C.—Hodges v. Wilkinson, 15 S.E. 941, 111 N.C. 56, 17 L.R.A. 545.

32. Ark.—Gilchrist v. Patterson, 18 Ark. 575.
N.C.—Hodges v. Wilkinson, 15 S.E. 941, 111 N.C. 56, 17 L.R.A. 545.

33. Ind.—Tulley v. Citizens' State Bank, 47 N.E. 850, 18 Ind.App. 240.

34. Idaho.—Porter v. Title Guaranty, etc., Co., 106 P. 299, 17 Idaho 364, 27 L.R.A., N.S., 111.
11 C.J. p 663 note 39.

35. Wyo.—Hamilton v. Diefenderfer, 131 P. 37, 133 P. 1081, 21 Wyo. 286.

36. Ill.—Beach v. Derby, 19 Ill. 617.
N.J.—Rue v. Scott, Ch., 21 A. 1048.

37. Okl.—Thompson v. State, 201 P. 1004, 1005, 20 Okl.Cr. 211, citing *Corpus Juris*.

S.D.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S.D. 479.

11 C.J. p 664 note 50.

38. N.M.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312.
11 C.J. p 664 note 56.

39. Mass.—Bigelow v. Smith, 2 Allen 264.

40. Ala.—Garrison v. Hamlin, 109 So. 106, 215 Ala. 39.

Filing of satisfaction

A statute providing for the filing of a satisfaction of a mortgage has been held to authorize, but not to require, recordation of an assignment.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312.

41. Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 83, 45 Ariz. 1, recognizing the rule as stated in 11 C.J. p 664 note 50, but holding that the Arizona statute by necessary implication required recordation.

Colo.—Federal Acceptance Corpora-

an assignment of a mortgage, an unrecorded assignment is invalid as against subsequent purchasers without notice,⁴² although only as against such persons.⁴³ Where a statute expressly so provides, an unrecorded assignment will not pass legal title even as between the parties.⁴⁴

Record as notice. Where a statute so provides, the record of the assignment is notice to all persons concerned.⁴⁵ However, where the record is defective in some substantial particular, it does not operate as constructive notice of the assignment.⁴⁶

tion v. Dillman, 262 P. 85, 82 Colo. 598.

11 C.J. p 664 note 52.

Subsequent assignee of the mortgage for value is a subsequent purchaser within the text rule.—*Illinois Cent. Trust Co. v. Stepanek*, 115 N.W. 891, 138 Iowa 131, 128 Am.S.R. 175, 15 L.R.A.N.S., 1025—11 C.J. p 664 note 53.

In New York

(1) An unrecorded assignment has been held to be void as against innocent purchasers for value, under a statute providing for the recordation of mortgages or conveyances intended to operate as an assignment of goods and chattels. Thus, a purchaser of mortgaged property on the mortgagor's default has been held to acquire good title to the property as against an assignee of one of a duplicate set of mortgages and notes, where the purchaser had no notice of the assignment and the assignor had executed a satisfaction of the other set and delivered it to the purchaser of the property. Also, an unrecorded assignment has been said to be void as against a subsequent purchaser of the mortgage.—*Fahlbusch v. Consumers Discount Corporation*, 288 N.Y.S. 511, 159 Misc. 568.

(2) However, recordation of an assignment was held to be unnecessary where the statute provided merely for the recording of the mortgage itself.—*Haskins v. Kelly*, 24 N.Y. Super. 160, 1 Abb.Pr., N.S., 63.

(3) In the case of a transfer of the mortgage merely by way of collateral security for the payment of a debt, recordation has been held unnecessary on the ground that the statute extends only to mortgages of goods and chattels, not to mortgages of choses in action.—*Haskins v. Kelly*, *supra*.

42. Wash.—*Gottstein v. Harrington*, 65 P. 753, 25 Wash. 508.

43. Ind.—*Tulley v. Citizens' State Bank*, 47 N.E. 850, 18 Ind.App. 240.

44. Md.—*Lester v. Hardesty*, 29 Md. 50.

11 C.J. p 664 note 55.

45. N.J.—*Mayer v. McLaughlin*, 84 A. 1054, 80 N.J.Eq. 342.

14 C.J.S.—61

46. Want of proper acknowledgment

The record of an assignment not properly acknowledged, and hence, not entitled to record, does not operate as constructive notice.—*Longley v. Sperry*, 66 A. 1062, 72 N.J.Eq. 537.

Statement of amount assigned

The record of a partial assignment which is indefinite as to the amount assigned does not constitute constructive notice to a subsequent purchaser from the mortgagee.—*French v. Haskins*, 9 Gray, Mass., 195—11 C. J. p 664 note 60.

Filing mortgage

(1) The mere original filing of the mortgage itself is not sufficient to protect the assignee where the mortgage contains no recital of the assignment.—*Fahlbusch v. Consumers Discount Corporation*, 288 N.Y.S. 511, 159 Misc. 568.

(2) An assignment written on the face of a mortgage is no part of the mortgage record.—*Commercial Credit Trust v. Land*, 251 Ill.App. 469.

47. Ark.—*Biscoe v. Royston*, 18 Ark. 508.

Iowa.—*Waller v. Staples*, 77 N.W. 570, 107 Iowa 738.

Kan.—*Ross v. Aber*, 67 P. 457, 64 Kan. 885.

11 C.J. p 664 note 61.

48. Ala.—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 383.

Ariz.—*Stock Growers' Finance Corporation v. Hildreth*, 249 P. 71, 30 Ariz. 505.

Colo.—*Lowell Bros. & Talbott v. Wikstrom*, 6 P.2d 463, 90 Colo. 99.—*Federal Acceptance Corporation v. Dillman*, 262 P. 85, 82 Colo. 598.

Conn.—*Waterbury Trust Co. v. Weisman*, 108 A. 550, 94 Conn. 210.

Fla.—*Voges v. Ward*, 123 So. 785, 98 Fla. 304.

Ill.—*Commercial Credit Trust v. Land*, 251 Ill.App. 469.

Iowa.—*State v. Gibson*, 202 N.W. 108, 199 Iowa 377.

Kan.—*Interstate Nat. Bank of Kansas City, Mo., v. Koster*, 292 P. 805, 131 Kan. 461.—*Lower v. Short-*

hill, 176 P. 107, 103 Kan. 534, re-

§ 314. Transfer of Secured Claim Alone

Generally the transfer of a note or debt secured by a mortgage operates in equity as a transfer of the security as well.

Unless the mortgagee has previously parted with his interest under the mortgage,⁴⁷ a transfer of the mortgage notes or of the mortgage debt will operate as an equitable assignment of the security as well, in the absence of an express agreement or statute to the contrary.⁴⁸ The rule has been held to apply with equal force although the assignment

hearing denied 176 P. 647, 103 Kan. 904.

Ky.—*Securities Inv. Co. of St. Louis v. Harrod Bros.*, 7 S.W.2d 492, 225 Ky. 12.

N.M.—*Barnett v. Wedgewood*, 211 P. 601, 28 N.M. 312.

N.Y.—*Ziepkke v. Cusimano*, 226 N.Y. S. 254, 222 App.Div. 827.

S.D.—*Emerson-Brantingham Implement Co. v. Ainslie*, 161 N.W. 1001, 38 S.D. 472.

Wis.—*Muldowney v. McCoy Hotel Co.*, 269 N.W. 655, 657, 223 Wis. 62, citing *Corpus Juris*.

5 C.J. p 951 note 18—11 C.J. p 664 note 62.

Reason for rule

(1) A chattel mortgage is a mere incident of the debt which it secures, and an assignment of such indebtedness carries with it an interest in the mortgage.—*Beatrice Creamery Co. v. Golden*, 263 P. 458, 129 Okl. 86.

(2) Other statements see 11 C.J. p 664 note 62 [a].

An assignee of a mortgage taken in satisfaction of a judgment based on a prior second mortgage note succeeds to no rights under such second mortgage.—*Gould & Co. v. Mt. Baker Savings & Loan Ass'n*, 53 P.2d 841, 185 Wash. 253.

Mortgage on after-acquired property

The transfer of a note secured by a mortgage on crops to be sown and harvested has been held to carry with it the mortgage on the crop.—*Purdie v. Lekve*, 230 N.W. 266, 180 Minn. 81.

In Louisiana

(1) The transfer of a note or debt carries with it every accessory thereto.—*Riley v. Washington*, App., 161 So. 896.

(2) Thus a transfer of the debt carries with it a chattel mortgage securing such debt.—*Gresham v. Graves*, 3 La.App. 153.

(3) So also it carries with it a vendor's lien of the mortgagee, entitling the transferee of the debt to pursue the property wherever the vendor could follow it.—*Riley v. Washington*, *supra*.

not made until after maturity of the claim,⁴⁹ or until after the mortgagee has made a demand on the mortgagor for possession of the property.⁵⁰ Whatever interest will pass by a general or full indorsement may, it seems, pass by a qualified indorsement of the mortgage note.⁵¹ The fact that the mortgage is never delivered to the mortgagee has been held not to prevent the security from following the debt.⁵² So also statutory requirements as to the form of assignments of choses in action have been held to be inapplicable to a transfer of security effected by a transfer of the debt, since such a transfer is effected, not by an act of the parties, but by the operation of a doctrine of equity.⁵³ However, while a transfer of the security will be effected as between the immediate parties and subsequent purchasers with notice, it has been held that it will not be effective as against subsequent purchasers without notice.⁵⁴ Moreover, although an assignment of the debt ordinarily carries with it the lien of the mortgage, it is generally held that it does not convey to the assignee legal title to the mortgaged property.⁵⁵ On the contrary, unless the mortgage itself is assigned, or the legal title is in some other manner conveyed, it is generally held that the legal title remains in the mortgagee as trustee for the holder of the debt thus secured.⁵⁶ However, there is authority holding, under a statute vesting legal title in the mortgaged chattels in the mortgagee, that a transfer of a secured note does convey to the transferee the legal title to the mortgaged chattels.⁵⁷

If the transferor of the debt expressly assumes absolute liability thereon, he may, by an express agreement with the transferee, retain the interest in the mortgage in himself.⁵⁸

Under a statute providing that a mortgage becomes absolutely void on a transfer of the secured debt where the note fails to state on its face that it is secured by the mortgage, where the mortgage

has become void under such statute, subsequent conduct of the parties will be ineffective to revive it.⁵⁹

§ 315. — Part of Claim

A transfer of a portion of a mortgage debt carries with it, in the absence of an agreement to the contrary, a pro tanto equitable interest in the security.

Not only will the transfer of an entire secured debt operate as an equitable assignment of the security, as discussed in the preceding section, but a transfer of one of several notes or of a distinct part of the indebtedness secured by a mortgage will carry with it a pro tanto equitable interest in the mortgage security, in the absence of any stipulation or agreement to the contrary.⁶⁰ However, such a transfer will not carry with it a right to the possession of the mortgaged property by the assignee to the exclusion of the mortgagee.⁶¹ Where the terms of the assignment are silent as to priority, the assignee's debt will ordinarily be given preference as a claim on the property over that retained by the mortgagee, but by stipulating therefor, the assignee may be postponed to the mortgagee.⁶² The assignee, by claiming under the mortgage, is estopped to impeach the mortgagee's debt.⁶³

Where notes or distinct portions of a debt secured by a mortgage are assigned to several different persons, each assignee is entitled to a pro rata share in the proceeds of the security, in the absence of an agreement to other effect, irrespective of the order of the assignments or of the date of maturity of the notes or the portions of the debt.⁶⁴ On the other hand, the mortgagee may give priority to a particular assignee, and such priority need not be explicitly given, but may be inferred from the circumstances surrounding the transfer.⁶⁵

Where priority has been accorded to the holder of one of several notes or a portion of the debt, such person must, nevertheless, act fairly and in good faith toward the holders of other notes or portions of the debt secured by the mortgage.⁶⁶ If

⁴⁹ N.Y.—*Langdon v. Buel*, 9 Wend. 80.

⁵⁰ U.S.—*Buckingham v. Dake*, Kan., 112 F. 258, 50 C.C.A. 492.

⁵¹ Fla.—*Stewart v. Preston*, 1 Fla. 11, 44 Am.D. 621.

⁵² Wis.—*Gilmore v. Roberts*, 48 N. W. 522, 79 Wis. 450.
C.J. p 665 note 66.

Writing

Thus a statutory requirement that assignments of choses in action be in writing is inapplicable where the assignment is effected, not by an act of the parties, but by the operation of the equitable doctrine that an assignment of the debt operates as a transfer of the security.—*Barnett v. Edgewood*, 211 P. 601, 28 N.M. 312.

⁵⁴ Colo.—*Federal Acceptance Corporation v. Dillman*, 262 P. 85, 32 Colo. 598.

⁵⁵ Ala.—*Sims v. United Auto Supply Co.*, 129 So. 53, 221 Ala. 383.

⁵⁶ Tenn.—*Richmond Type, etc., Fdy. v. Carter*, 182 S.W. 240, 133 Tenn. 489.
11 C.J. p 665 note 67.

⁵⁷ U.S.—*Buckingham v. Dake*, Kan., 112 F. 258, 50 C.C.A. 492.

⁵⁸ Kan.—*Geo. R. Barse Live Stock Commn. Co. v. Ketcham*, 48 P. 29, 57 Kan. 771.
11 C.J. p 664 note 62 [b].

⁵⁹ Ill.—*Chance v. Hudson*, 233 Ill. App. 542.

⁶⁰ N.J.—*Abrams v. Brown*, 195 A. 510, 122 N.J.Eq. 563.

Okl.—*Beatrice Creamery Co. v. Golden*, 263 P. 458, 129 Okl. 86.
11 C.J. p 665 note 69.

⁶¹ N.C.—*Kelly Handle Co. v. Crawford Plumbing, etc., Co.*, 88 S.E. 514, 171 N.C. 495.

⁶² Ala.—*Penney v. Miller*, 33 So. 668, 134 Ala. 593.

⁶³ Ala.—*Penney v. Miller*, *supra*.

⁶⁴ N.J.—*Abrams v. Brown*, 195 A. 510, 122 N.J.Eq. 563.

⁶⁵ N.J.—*Abrams v. Brown*, *supra*.
R.I.—*Goldberger v. Flink*, 158 A. 877, 52 R.I. 168.

66. Failure to foreclose

An assignee of the note first due cannot be divested of his priority by

the person having priority also has legal title to the entire mortgage, he holds the mortgage, although primarily for his own benefit, secondarily for the benefit of persons holding other notes or portions of the debt secured by the mortgage.⁶⁷ If the possession or the right to possession of the property is in such person, he must use care to prevent the destruction and spoliation of the property.⁶⁸ However, it has been held that he is not a trustee save as to collections in excess of his debt.⁶⁹

§ 316. Transfer of Mortgage Alone

A transfer of a mortgage without an assignment of the debt secured thereby passes no right to the assignee.

Unless an assignment of a mortgage is accompanied by an assignment of the debt secured thereby no right passes to the assignee,⁷⁰ but where the debt secured is evidenced by no instrument other than the mortgage, an assignment of the mortgage has been held to be an assignment of the debt as well.⁷¹ It has been held, however, that an assignment of the mortgage note is not essential if it was the intention of the parties to transfer the debt.⁷²

A transfer of a mortgage and a part of the secured claim as collateral security does not result in a loss of the mortgagee's interest under the mortgage for the portion of the claim not transferred.⁷³

Inasmuch as a mortgage presupposes the existence of a debt, as shown supra in § 37, the transfer

of a purported mortgage not securing a debt passes no interest to the transferee.⁷⁴

§ 317. Assignment to Mortgagor or Owner of Property

An intention to assign is necessary in order to pass the mortgagee's interest to the owner of the mortgaged property. A transfer of the mortgage to one of several mortgagors for a consideration flowing from a stranger operates as an assignment of the mortgage to such mortgagor.

As in the case of all assignments, an intention to assign is necessary in order that a transaction constitute an assignment of the mortgagee's interest to the owner of the mortgaged chattels.⁷⁵ Accordingly, at least in so far as the rights of junior lienholders are concerned, the mere fact that the owner of the mortgaged chattels pays the mortgage debt, or causes it to be paid, will not result in an assignment of the mortgage to him.⁷⁶ So also it has been held that, where the owner of property has taken the property with notice of a reservation of an interest therein by the vendor, he cannot keep alive a mortgage executed by the vendor on such interest by purchasing the note secured by the mortgage.⁷⁷

However, a transfer of a mortgage to the mortgagor will ordinarily operate, as shown infra § 344, as a merger of interests and an extinguishment of the mortgage; but a transfer of the mortgage to one of several mortgagors for a valuable consideration flowing from a stranger has been held to op-

failure to commence his action to foreclose before maturity of the second note.—*Lyman v. Smith*, 21 Wis. 674.

If assignee having priority sells the mortgaged property he must either give other persons having an interest under the mortgage notice of the sale, or, failing to give such notice, obtain a fair price for the property sold, and if he fails to perform his duty in this regard, will be liable to such persons for the fair value of the property.—*Abrams v. Brown*, 195 A. 810, 122 N.J.Eq. 563.

67. N.J.—*Abrams v. Brown*, supra.

68. Ala.—*Penney v. Miller*, 33 So. 668, 134 Ala. 593.

11 C.J. p 665 note 72.

69. Ala.—*Penney v. Miller*, supra.

70. Ill.—*Elvin v. Wuchetich*, 157 N.E. 243, 326 Ill. 285.

Ind.—*Business Men's Finance Ass'n v. Rolsin*, 161 N.E. 646, 88 Ind.App. 109.

Mo.—*Page v. Riggins*, App., 20 S.W. 2d 164.

Tex.—*Connally v. State*, 234 S.W. 886, 90 Tex.Cr. 284.

11 C.J. p 666 note 74.

Indorsement of mortgage notes by the assignor of the mortgage is nec-

essary in order to transfer any rights under the mortgage to the assignee thereof, and legal title to note secured by the mortgage must be transferred to the assignee of the latter in order that he be entitled to maintain an action of replevin.—*Elvin v. Wuchetich*, 157 N.E. 243, 326 Ill. 285.

Signed copy of note

The mere fact that a signed copy of the note is embodied in the mortgage does not transfer any interest to the assignee of the mortgage.—*Business Men's Finance Ass'n v. Rolsin*, 161 N.E. 646, 88 Ind.App. 109.

71. Mass.—*Jones v. Huggefard*, 3 Metc. 515.

N.C.—*White v. Winslow*, 79 S.E. 261, 163 N.C. 40, 42.

Tenant in common

Where the debt secured is evidenced by no instrument other than the mortgage, an assignee of a part of the mortgage becomes a tenant in common of the mortgaged property.—*Earl v. Stumpf*, 13 N.W. 701, 56 Wis. 50.

72. N.Y.—*Campbell v. Birch*, 60 N.Y. 214.

11 C.J. p 666 note 76.

73. Future advances

Where a mortgage by its own terms secured a note and any advances thereafter to be made in addition to the sum mentioned in the note, the mortgage was security for advances made by the mortgagee even after he had transferred the note and mortgage to another as collateral security.—*Johnson v. Barrett*, 7 S.W.2d 773, 177 Ark. 779.

74. Uncompleted loan

Assignee of mortgage acquired no rights thereunder, where loan secured by mortgage was never consummated.—*Page v. Riggins*, Mo.App., 20 S.W.2d 164.

75. Okl.—*Booth v. First State Bank of Maramec*, 229 P. 412, 103 Okl. 44.

76. Payment of first mortgage, which was thereupon canceled of record, by the purchaser of the mortgaged chattels has been held not to constitute an equitable assignment of the mortgage to the purchaser so as to defeat the lien of a second mortgage.—*Booth v. First State Bank of Maramec*, supra.

77. Tex.—*Bowyer v. Beardon*, 291 S.W. 219, 116 Tex. 337.

ate as an assignment of the mortgagee's interest in the mortgagor.⁷⁸

318. Evidence as to Assignment

In the absence of evidence to the contrary, an assignment of the mortgage by the mortgagee will not be presumed.

In the absence of proof to the contrary, it is presumed that the rights secured by a mortgagee under a chattel mortgage are still in him,⁷⁹ and the mere fact that payments on the mortgage debt were made by a third person does not establish an assignment by such person.⁸⁰ In various cases, however, the evidence has been held to be sufficient to show a transfer of the mortgage.⁸¹

319. Rights Acquired by Assignee in General

The assignee of a mortgage and the secured debt generally acquires all the rights and powers possessed by the mortgagee, including the latter's interest in, and right of possession of, the mortgaged property; but he does not ordinarily acquire any greater rights than the mortgagee had, or rights personal to the mortgagee.

An assignment of a mortgage and the debt which it secures will generally invest the assignee with all the rights and powers which were possessed by the mortgagee,⁸² which are not personal to him,⁸³ and the assignee stands in the same position as to the mortgagor,⁸⁴ or a donee from the mortgagor,⁸⁵ as did the mortgagee, and the same rights and obligations exist between them. The assignment prima facie transfers the mortgagee's interest in the mortgaged property,⁸⁶ and this is true although the transfer is only as collateral security.⁸⁷ Moreover, a right of estoppel existing in connection with the mortgage in favor of the mortgagee has been held to pass to the assignee by an assignment of the mortgage.⁸⁸ The mere fact that the assignee claims another lien on the same property does not prevent his acquiring the mortgagee's interest in the property.⁸⁹

The assignee, however, cannot in general claim any greater rights or take any better title than the mortgagee⁹⁰ or an intermediate assignor⁹¹ had. Thus he cannot hold the mortgaged property as se-

78. Ga.—Nolley v. Elliott, 178 S.E. 309, 50 Ga.App. 382.

79. N.Y.—Sparandera v. Staten Island Garage, 193 N.Y.S. 392, 117 Misc. 780.

80. N.Y.—Sparandera v. Staten Island Garage, supra.

81. Ala.—Slone v. Gramling, 96 So. 143, 209 Ala. 265.

Idaho.—Allis-Chalmers Mfg. Co. v. Harris, 59 P.2d 345, 56 Idaho 769.
Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.

82. Ala.—Garrison v. Hamlin, 109 So. 106, 215 Ala. 39—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

Colo.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

Ill.—Greenspahn v. Ehrlich, 277 Ill. App. 322.

Ind.—Gaumer v. Register Pub. Co., 119 N.E. 728, 67 Ind.App. 658.

Mich.—Jassy v. Marciniak, 244 N.W. 432, 260 Mich. 153.

Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420—Bruce v. Chrysler, App., 217 S.W. 563.

N.C.—Johnson v. Bray, 93 S.E. 728, 174 N.C. 176.

1 C.J. p 666 note 77.

83. A separate guaranty has been held not to pass to the assignee of notes secured by a mortgage.—Chrisoffel v. Lee, 153 Ill.App. 395.

Waiver by landlord of the priority of his lien over a mortgage given by his tenant to secure advances for repairs has been held to be personal to the mortgagee and not to inure

to the benefit of an assignee of the mortgagee's interest, in the absence of an agreement to other effect.—Neely v. Phillips, 66 S.W. 349, 70 Ark. 90.

84. Mo.—Bruce v. Chrysler, App., 217 S.W. 563.

N.C.—Johnson v. Bray, 93 S.E. 728, 174 N.C. 176.

11 C.J. p 666 note 78.

Unrecorded mortgage has been held not to be invalid as between the assignee and the mortgagor despite a statutory provision that a mortgage not recorded within a particular time shall be invalid as against persons other than parties thereto, on the ground that the mortgage is not invalid under such statute as against the mortgagee, and that the assignee succeeds to the latter's rights.—Gaumer v. Register Pub. Co., 119 N.E. 728, 67 Ind.App. 658.

85. Ala.—Speakman v. Vest, 44 So. 1021, 152 Ala. 623.

86. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.
11 C.J. p 666 note 80.

After-acquired property

If the mortgagee is entitled under the mortgage to after-acquired property, such right passes to the assignee.

Me.—Williamson v. Nealey, 17 A. 404, 81 Me. 447.

Mass.—Adams v. Young, 86 N.E. 942, 200 Mass. 588.

87. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

88. **Estoppel of prior mortgagee** to assert his claim against subsequent mortgagees may be asserted by a bona fide assignee of the latter.—Powell v. Tinsley, 119 S.W. 47, 137 Mo.App. 551.

89. **Attachment lien**

One who sued a husband and wrongfully attached the property of the wife had a perfect right to protect his claim by purchasing a mortgage on the attached property, and acquired by such assignment the mortgagee's rights against the wife, no question of subrogation being involved.—Bruce v. Chrysler, Mo.App., 217 S.W. 563.

90. Ark.—Tankersley v. Gibbs, 46 S.W.2d 802, 185 Ark. 201.

N.Y.—Kommel v. Herb-Gner Const. Co., 176 N.E. 413, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App. Div. 96—New York Title & Mortgage Co. v. Grossman Properties, 253 N.Y.S. 533, 142 Misc. 274, affirmed 257 N.Y.S. 1031, 236 App. Div. 665, two cases, and 257 N.Y.S. 1032, 236 App.Div. 665, three cases, motion denied 257 N.Y.S. 1032, 236 App.Div. 666, affirmed County Trust Co. v. Grossman Properties, 257 N.Y.S. 1033, 236 App.Div. 665.
S.C.—Motor Dealers' Credit Corporation v. Heise, 164 S.E. 900, 166 S.C. 389.

Tex.—National Finance Co. v. Fregia, Civ.App., 78 S.W.2d 1081.
11 C.J. p 666 note 81.

91. N.Y.—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568.

Equitable title

If the assignor has only an equita-

curity for a debt not intended by the original parties to the mortgage to be secured thereby,⁹² or for a debt which, although contemplated, never came into existence.⁹³

After an assignment, the rights acquired by the assignee will not, generally speaking, be prejudiced by acts of the mortgagee not authorized or ratified by the assignee.⁹⁴

Right of assignee to possession. The assignee of a mortgage and the note secured thereby is ordinarily entitled to the possession of the mortgaged chattels as soon as the original mortgagee would have been entitled to their possession,⁹⁵ and can exercise in his own behalf the rights conferred on the mortgagee by an insecurity clause in the mortgage.⁹⁶ However, if the right of seizure has been waived by the mortgagee, it is not available to a subsequent assignee.⁹⁷ Moreover, it has been held that an assignee is not entitled to the possession of mortgaged property which the mortgagee permitted to remain in the hands of a levying officer at the time of assigning the mortgage.⁹⁸ If the mortgagee assigns only a part of his interest, neither the assignee nor the mortgagee is entitled to the exclusive possession of the mortgaged property,⁹⁹ and if the mortgagee is in possession in such circumstances the assignee

cannot maintain an action against him for possession.¹

Possession must be acquired by the assignee in a legal manner, and, although the assignee may be entitled in particular circumstances to possession, he cannot retain possession acquired in an illegal manner.²

Rights of mortgagee after assignment. The assignment of the mortgage before maturity by delivery and indorsement of the mortgage and note as collateral security for a loan not yet due vests in the assignee only the equitable title,³ and the mortgagee does not lose his interest in the mortgage.⁴ Accordingly he is entitled to any surplus realized from a sale of the property by the assignee;⁵ or, if the transfer is a mere pledge, may himself enforce his lien by a sale of the mortgaged property, subject to the interest of the pledgee.⁶

Reimbursement on paying prior lien. Where the assignee pays off a prior lien he is entitled to be reimbursed, even though the mortgage is held to be invalid as to creditors for want of proper registration.⁷

§ 320. Implied Warranties

An assignor of a mortgage, even though the assignment is without recourse, impliedly warrants that the mortgage is genuine and what it purports to be.

ble title to mortgaged property, the assignee will acquire only an equitable title thereto.—*Albertville Trading Co. v. Brooks*, 113 So. 473, 22 Ala. App. 147.

92. Mortgagor's debt to assignee

(1) The assignee cannot hold the mortgaged property as security for a debt of the mortgagor to the assignee where such debt was not within the contemplation of the original parties at the time of the execution of the mortgage and no provision was made therein for the securing of such debt.—*Tankersley v. Gibbs*, 46 S.W.2d 802, 185 Ark. 201.

(2) The fact that a mortgage purports to be security for any present or future indebtedness of the mortgagor to the mortgagee does not make it security for a debt of the mortgagor to an assignee of the mortgagee's interests under the mortgage.—*National Finance Co. v. Fregia*, Tex.Civ.App., 78 S.W.2d 1081.

93. Future advances not made

An assignee of a mortgage given to secure future advances which are never made acquires no rights thereunder.—*Judge v. Vogel*, 38 Mich. 569—*Judge v. Vogel*, 38 Mich. 568.

94. S.C. — *Farmers' & Merchants' Nat. Bank of Lake City v. Bank of Hemingway*, 101 S.E. 746, 113 S.C. 140.

Seizure and failure to sell property

A seizure of the mortgaged property by the mortgagee and his failure to sell it within a reasonable time will not prejudice the assignee's interests unless the assignee authorized or ratified the seizure.—*General Motors Acceptance Corporation v. Holland*, Mo.App., 30 S.W.2d 1087.

95. Ala.—*Baker, Lyons & Co. v. American Agricultural Chemical Co.*, 77 So. 866, 201 Ala. 328.
N.C.—*Johnson v. Bray*, 93 S.E. 723, 174 N.C. 176.
11 C.J. p 666 note 85.

Collection by mortgagee

Where the assignee redelivers the notes and mortgages to the mortgagee for collection as his agent, the mortgagee's possession of mortgaged property received in discharge of the debt is the possession of the assignee.—*Baker, Lyons & Co. v. American Agricultural Chemical Co.*, 77 So. 866, 201 Ala. 328.

96. Ill.—*Beach v. Derby*, 19 Ill. 617.
Mo.—*Merchants' Nat. Bank v. Abernathy*, 32 Mo.App. 211.
N.Y.—*Rich v. Milk*, 20 Barb. 616.

97. Ala.—*Fields v. Copeland*, 26 So. 491, 121 Ala. 644.
Ill. — *Anderson v. South Chicago Brewing Co.*, 50 N.E. 655, 173 Ill. 213, reversing 67 Ill.App. 300.
11 C.J. p 667 note 87.

98. Kan.—*McDonald v. Richolson*, 45 P. 95, 3 Kan.App. 235.

99. N.C.—*Kelly Handle Co. v. Crawford Plumbing, etc., Co.*, 88 S.E. 514, 171 N.C. 495.

1. N.C.—*Kelly Handle Co. v. Crawford Plumbing, etc., Co.*, 88 S.E. 514, 171 N.C. 495.

2. Ill.—*Greenspahn v. Ehrlich*, 277 Ill.App. 322.

Set-off of mortgage

The purchaser of chattels cannot take possession thereof without the seller's consent, retain them, and refuse to pay the price on the ground that he is the assignee of a mortgage given on the property, the validity of which is disputed by the seller, but must return the property on demand, and proceed according to law to foreclose his mortgage.—*Devlin v. Kosel*, 22 N.Y.S. 361, 3 Misc. 40, affirmed 37 N.E. 824, 142 N.Y. 676.

3. Ala.—*Lowery v. Haley*, 68 So. 539, 12 Ala.App. 448.
Miss.—*Blacketer v. Cartee*, 161 So. 697, 698, 172 Miss. 389, quoting *Corpus Juris*.

4. Ark.—*Johnson v. Barrett*, 7 S.W. 2d 773, 177 Ark. 779.

5. N.Y.—*Schmidt v. Weeks*, 127 N.Y. S. 39, 142 App.Div. 83.

6. N.Y.—*Haskins v. Kelly*, 24 N.Y. Super. 160, 1 Abb.Pr.N.S., 63.

7. Tex.—*Randolph v. Brown*, 53 S. W. 825, 21 Tex.Civ.App. 617.

In the absence of an express agreement to the contrary, the rule that the transfer, without recourse, of a note warrants by implication that the note transferred is genuine and not forged or fictitious,⁸ and that it is what it purports to be,⁹ has been held to apply to the assignment of a mortgage. However, an assignment of all the mortgagee's interest in the mortgage and everything therein contained has been held to exclude any implied warranty of the mortgagee's title to the mortgaged property.¹⁰ Moreover, it has been held that the assignor is not liable to the assignee for the amount of an undisclosed claim discharged by the assignee after the assignment, in the absence of an express assumption of liability therefor by the assignor.¹¹

§ 321. Payment or Discharge of Mortgage

a. In general

b. Payment to, and release by, mortgagee after assignment

a. In General

In the absence of an agreement or understanding to the contrary, one buying a mortgage for less than its face value is entitled to recover the whole amount due.

In the absence of an agreement or understanding to other effect,¹² it has been held that one buying a mortgage for less than its face value is entitled to recover the whole amount due.¹³ On the other hand, where an assignment is taken with the intention of holding the mortgage only for the amount of the consideration given, the mortgage may be discharged by paying to the assignee the consider-

ation which he gave, with interest.¹⁴ If a mortgage was transferred merely as collateral security, payment of the amount of the debt to secure which the mortgage was transferred will discharge the transferee's lien on the mortgage.¹⁵

Whether a transaction involving a payment to the creditor by a third person constitutes an assignment of the debt and mortgage to such person or a discharge of the debt and mortgage is determined largely by the intention of the parties.¹⁶

Application of proceeds. Where the mortgaged property has been received by the mortgagee to apply the proceeds on the debt, one who obtains possession of the property with notice of the agreement and takes an assignment of the debt and mortgage must apply the proceeds to discharge the debt secured by that mortgage, and the fact that such person holds a junior mortgage on the property will not entitle him to apply the proceeds on some other debt before discharging the debt secured by the senior mortgage.¹⁷

Right to assignment on payment. A third person having an interest in the mortgaged property is ordinarily entitled to an assignment of the mortgage upon tendering the amount due thereon to the mortgagee.¹⁸ Accordingly, a judgment creditor who levies on mortgaged chattels is entitled to an assignment of the mortgage on tendering a sufficient amount to the mortgagee,¹⁹ except where part of the chattels covered by the mortgage is exempt from execution.²⁰

8. Iowa.—Waller v. Staples, 77 N.W. 570, 107 Iowa 738.

N.Y.—Corwin v. Wesley, 34 N.Y.Super. 109.

11 C.J. p 667 note 98.

9. S.C.—Bouknight v. Mitchell, 129 S.E. 134, 132 S.C. 40.

Purported first lien

The assignee of a mortgage purporting to be a first lien, although it was in fact only a junior lien, has been held entitled to reimbursement equal to the diminution in the value of the security because of undisclosed prior liens, although the assignment was without recourse, unless the property remaining at the time of the assignment was as great in value as the balance due on the mortgage.—Bouknight v. Mitchell, supra.

10. Mass.—Jones v. Huggefard, 3 Metc. 515.

11. R.I.—Allen v. Perrino, 181 A. 407, 55 R.I. 353, 101 A.L.R. 620.

12. Where assignee takes with notice of an agreement between the original parties that the mortgage

will be discharged on payment of a sum less than its face value, and he pays only such sum for the indorsement, he cannot recover the full face value of the mortgage.—Ganong v. Green, 38 N.W. 661, 71 Mich. 1.

13. N.J.—Rue v. Scott, Ch., 21 A. 1048.

Assignment to mortgagor or owner of mortgaged property as discharge of mortgage see *infra* § 344.

14. Mich.—Stewart v. Brown, 12 N.W. 499, 48 Mich. 383.
11 C.J. p 667 note 3.

15. Mich.—Place v. Grant, 9 Mich. 42.

N.Y.—Haskins v. Kelly, 24 N.Y.Super. 160, 1 Abb.Pr., N.S., 63.

16. Transfer of mortgage to a third person paying the amount of the indebtedness to the creditor has been held to evidence an intention to assign, and, therefore, to constitute an assignment of, the mortgagee's interest, not a payment of the indebtedness.—Persinger Garage Co. v. Caminsky, 176 N.W. 794, 188 Iowa 901.

Satisfaction from proceeds

The act of a third person in taking possession of the mortgaged property and satisfying the mortgage indebtedness with the proceeds thereof has been held not to constitute an assignment, but a payment, of the mortgage.—Haynes v. Gwin, 209 S.W. 67, 137 Ark. 387.

17. Tex.—Keasler v. Wray, Civ.App., 171 S.W. 534.

18. Mass.—Cochrane v. Rich, 6 N.E. 781, 142 Mass. 15.

Mich.—Shutes v. Woodard, 23 N.W. 775, 57 Mich. 213.

A subsequent mortgagee is entitled to have a prior mortgage assigned to him on payment of the amount due on it.—Cochrane v. Rich, 6 N.E. 781, 142 Mass. 15.

19. Mich.—Shutes v. Woodard, 23 N.W. 775, 57 Mich. 213.

20. Mich.—Williams Bros. Co. v. Hamner, 94 N.W. 176, 132 Mich. 635.

N.Y.—Bernheimer, etc., Brewing Co. v. H. Koehler Co., 86 N.Y.S. 716, 42 Misc. 377.

b. Payment to, and Release by, Mortgagee after Assignment

After the assignment of a negotiable note secured by a mortgage, payment to the mortgagee, unless authorized or ratified by the assignee, will not bind the assignee. After an assignment, a release of the mortgage by the mortgagee will, generally speaking, be ineffective.

After the assignment of a negotiable note secured by a mortgage, the mortgagee has no right to receive payment of the debt, the assignee alone being entitled thereto, and payment to the mortgagee will not ordinarily discharge the debt and mortgage in the hands of the assignee,²¹ unless the assignee has authorized²² or ratified²³ such payment. Moreover, this has been held to be the law even when the one paying the debt does so without notice of the assignment.²⁴ If the mortgage secures a nonnegotiable debt, however, a payment of the debt to the mortgagee after the assignment, and in ignorance of such assignment, will discharge the mortgage.²⁵

Discharge or release by mortgagee after assignment. A mortgagee cannot, generally speaking, release the mortgage after making an assignment thereof.²⁶ A release by him in such case has been held to be void;²⁷ and it is generally held that the mortgagee cannot prejudice the rights of the as-

signee as against even subsequent bona fide purchasers and mortgagees by releasing or entering satisfaction of the mortgage.²⁸ A fortiori, after an assignment of the mortgage, the mortgagee cannot prejudice the interest acquired by the assignee by statements that the mortgage has been satisfied.²⁹ In order to set up a release after an assignment as a defense, no rights of third parties having intervened, the mortgagor must first pay off the mortgage debt.³⁰

§ 322. Equities and Defenses between Original Parties

In most jurisdictions a bona fide assignee of a negotiable mortgage note for value before maturity is generally held to take the mortgaged property free from equities and defenses between the original parties. An assignee not a bona fide purchaser, or an assignee of a nonnegotiable debt, takes subject to all such equities or defenses.

Although a mortgage is not negotiable in the sense of the commercial law,³¹ the rule as laid down in most jurisdictions is that a bona fide assignee of a negotiable mortgage note, before maturity, and for value, will take the mortgaged property free from equities and defenses existing between the original parties to the mortgage,³² at

21. N.Y.—Baxter v. Gilbert, 12 Abb. Pr. 97.

22. U.S. — Swift v. Washington Bank, Kan., 114 F. 643, 52 C.C.A. 339.

Mo.—City Nat. Bank v. Goodloe-McClelland Commn. Co., 93 Mo.App. 123.

Okl. — Smith v. Cadiz First Nat. Bank, 104 P. 1080, 23 Okl. 411, 29 L.R.A., N.S., 576.

Authority held not established

Kan.—Interstate Nat. Bank of Kansas City, Mo. v. Koster, 292 P. 805, 131 Kan. 461.

Okl.—R-F Finance Corporation v. Summers, 32 P.2d 312, 168 Okl. 179—Federal Intermediate Credit Bank of Wichita v. Shane, 299 P. 435, 148 Okl. 250.

Tex.—Guaranty Securities Co. v. Brown, Civ.App., 254 S.W. 240, reversed on other grounds Brown v. Guaranty Securities Co., Com.App., 265 S.W. 547.

11 C.J. p 667 note 5 [a].

23. Acceptance of proceeds

Payment to the mortgagee did not discharge the liability of the maker of the note to the assignee where the assignee had not received the proceeds of such payment.—R-F Finance Corporation v. Summers, 32 P. 2d 312, 168 Okl. 179—Federal Intermediate Credit Bank of Wichita v. Shane, 299 P. 435, 148 Okl. 250.

24. Kan.—Interstate Nat. Bank of

Kansas City, Mo. v. Koster, 292 P. 805, 131 Kan. 461.

11 C.J. p 668 note 6.

Assignment of debt as carrying security

The maker of a note is bound to know that a transfer of a note secured by a chattel mortgage transfers the security without a formal assignment.—Interstate Nat. Bank of Kansas City, Mo. v. Koster, supra.

25. U.S.—Cudahy Packing Co. v. State Nat. Bank, Mo., 134 F. 538, 67 C.C.A. 662.

26. Cal.—Snyder v. Miller, 157 P. 22, 29 Cal.App. 566.

Negotiable Instruments Law § 119 subd 4 does not permit the original payee or mortgagee to discharge by his act the obligation after he has transferred his interests therein to an innocent indorsee for value in due course before maturity.—Farmers' & Merchants' Nat. Bank of Lake City v. Bank of Hemingway, 101 S.E. 746, 113 S.C. 140.

27. Cal.—Snyder v. Miller, 157 P. 22, 29 Cal.App. 566.

28. Or.—Bamberger v. Geiser, 33 P. 609, 24 Or. 203.

11 C.J. p 668 note 11.

29. Ga.—Rogers v. Lawrence, 3 S.E. 559, 79 Ga. 185.

30. Ill.—Jennings v. Hunt, 6 Ill.App. 523.

31. Vendor's privilege

A privilege in favor of a vendor of

movable and immovable property for the purchase money has been held not to be negotiable in the sense of the commercial law.—Bowers v. Riegal, 96 So. 680, 153 La. 851.

32. Ala. — Royal Tire Service v. Shades Valley Boys' Club, 168 So. 139, 232 Ala. 357—Singer v. National Bond & Investment Co., 118 So. 561, 218 Ala. 375.

Ariz.—Stock Growers' Finance Corporation v. Hildreth, 249 P. 71, 75, 30 Ariz. 505, quoting **Corpus Juris**. Mo.—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154.

Tex.—Thomason v. Flippen-Prather Realty Co., Civ.App., 98 S.W.2d 799 —First Nat. Bank of Tulsa, Okl. v. Hoover, Civ.App., 269 S.W. 262, 265, citing **Corpus Juris**.

11 C.J. p 668 note 21.

Defenses to action to foreclose mortgage see supra § 400.

Particular defenses held not maintainable

(1) Admission of the mortgagee that the mortgagor corporation executed the mortgage to secure the debt of an individual.—Von Schleinitz v. North Hotel Co., 23 S.W.2d 64, 323 Mo. 1110.

(2) Breach of warranty.—General Contract Purchase Corporation v. Dillman, 137 So. 654, 18 La.App. 286.

(3) Voluntary drunkenness of maker.—Singer v. National Bond & Investment Co., 118 So. 561, 218 Ala. 375.

least where the equities are secret or latent;³³ and it would seem that this rule obtains although the assignee takes the secured note as collateral security.³⁴ Moreover, if the assignor is a bona fide holder, the assignee will take free from equities or defenses not affecting the assignor, even though the assignee takes after maturity and with knowledge of such defenses or equities.³⁵ On the other hand, in a few jurisdictions, it is held that the rights of a bona fide transferee are governed by principles applicable to nonnegotiable instruments, and that, so far as the mortgaged property is concerned, such a transferee takes subject to equities and defenses existing between the original parties.³⁶

An assignee who does not stand in the position of a bona fide purchaser will, of course, take subject to all equities and defenses between the original parties,³⁷ as where he takes with notice of such equities or defenses,³⁸ where the note secured by the mortgage has not been properly transferred,³⁹ or where the note is overdue at the time it is assigned.⁴⁰ Moreover, where the debt secured by the

mortgage is nonnegotiable, the assignee takes subject to all equities between the original parties.⁴¹

Payment of the debt to the mortgagee after an assignment as a defense against the assignee is discussed supra § 321.

Assignment pendente lite. After the institution of a foreclosure suit an assignee takes a mortgage subject to all the equities and infirmities which can attach to it by reason of the final decree in such suit, but he is not bound by a collateral proceeding unless he has notice of it and is given an opportunity to be heard.⁴²

Estoppel to assert defense. Where a gratuitous mortgage is given for the purpose of being sold, it has been held that the mortgagor will be estopped to assert against the assignee of the mortgage that it was not given to secure a real debt.⁴³

§ 323. Equities in Favor of Third Persons

A bona fide assignee of a mortgage is generally held to take it free from equities of third persons of which he had no notice.

(4) Want of authority to affix name as subscribing witness.—*Singer v. National Bond & Investment Co.*, supra.

(5) Want of consideration. Ala.—*Royal Tire Service v. Shades Valley Boys' Club*, 168 So. 139, 232 Ala. 357. Ohio.—*Dennis v. Potter*, 183 N.E. 188, 43 Ohio App. 330.

Duty to insure property

The obligation of the mortgagor to insure the mortgaged property in favor of the holder of the note secured by the mortgage does not require the holder to insure as a security for the maker and indorsers of the note.—*Southern Securities Co. v. Landau*, 8 La.App. 483.

33. Ariz.—*Stock Growers' Finance Corporation v. Hildreth*, 249 P. 71, 75, 30 Ariz. 505, quoting *Corpus Juris*. La.—*Durel v. Buchanan*, 86 So. 189, 147 La. 804. Mich.—*Saginaw Financing Corporation v. Detroit Lubricator Co.*, 240 N.W. 44, 45, 256 Mich. 441, citing *Corpus Juris*. 11 C.J. p 668 note 22.

Assignee held not to have notice that the mortgagee did not execute an affidavit of good faith as recited therein. — *Stock Growers' Finance Corporation v. Hildreth*, 249 P. 71, 30 Ariz. 505.

Assignee held indorsee for value without notice, and not the payee or mortgagee, in law or in fact, where it loaned money through local banks and loan companies only. — *Stock Growers' Finance Corporation v. Hildreth*, supra.

Conformity to statute

Where the right of a holder for value in good faith to take a mortgage free from any equities between the original parties is created by statute, the act by which the mortgage purports to be given must reasonably and clearly conform to the law under which it is given.—*Durel v. Buchanan*, 86 So. 189, 147 La. 804.

34. Mo.—*Merchants' Nat. Bank v. Abernathy*, 32 Mo.App. 211.

35. **Failure of consideration** has been held not to be a defense as against an assignee taking from a holder in due course of the note, even though the assignee took after maturity and had notice of the mortgagor's defense as against the mortgagee.—*Royal Tire Service v. Shades Valley Boys' Club*, 168 So. 139, 232 Ala. 357.

36. N.Y. — *Kommel v. Herb-Gner Const. Co.*, 176 N.E. 413, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App.Div. 96.—*Fahlbusch v. Consumers Discount Corporation*, 238 N.Y.S. 511, 159 Misc. 568. 11 C.J. p 669 note 30.

Existence of mortgage essential

"The general rule that an assignee of a mortgage takes subject to the equities existing against the assignor . . . [is] postulated upon the prior existence of a mortgage . . . then having legal vigor."—*Kommel v. Herb-Gner Const. Co.*, 176 N.E. 413, 415, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App.Div. 96.

37. Minn.—*Hargreaves v. Reese*, 69 N.W. 223, 66 Minn. 434. Mo.—*Scheidel Western X-Ray Co. v. Bacon*, App., 201 S.W. 916.

Okl.—*Hummell v. Brown*, 221 P. 738, 93 Okl. 256. 11 C.J. p 669 note 25.

Purchaser of mortgagee's business and assets has been held to take a note and mortgage assigned in connection with the purchase subject to any defense of the mortgagor against the mortgagee arising out of the transaction in which the note and mortgage were given.—*West v. Prater*, 67 P.2d 273, 57 Idaho 533.

38. N.Y.—*Colonial Discount Co. v. Rumens*, 292 N.Y.S. 121, 161 Misc. 846, affirmed 291 N.Y.S. 676, 249 App.Div. 736. 11 C.J. p 669 note 26.

39. **Want of indorsement** of the note as required by a statute.—*Hummell v. Brown*, 221 P. 738, 93 Okl. 256.

40. Iowa.—*Gibson v. McIntire*, 81 N. W. 699, 110 Iowa 417. Kan.—*Dewey v. Bobbitt*, 100 P. 77, 79 Kan. 505.

Unexercised option to accelerate the maturity of a mortgage and note does not render the instrument mature, and assignee thereof occupies position of holder in due course.—*Dennis v. Rotter*, 183 N.E. 188, 43 Ohio App. 330.

41. Okl.—*Mannsville First State Bank v. Howell*, 137 P. 657, 41 Okl. 216. 11 C.J. p 668 note 24.

42. N.Y.—*Zeiter v. Bowman*, 6 Barb. 133.

43. Ill.—See *Baker v. Benjamin*, 195 Ill.App. 17. Mich.—*Judge v. Vogel*, 38 Mich. 569.

It is a general rule that the bona fide assignee of a mortgage takes it free from latent or secret equities in favor of third persons of which he had no notice or knowledge.⁴⁴ Thus, it has been held that a bona fide assignee without notice will take the mortgage free from the claims of creditors of the mortgagor who had previously levied on the mortgaged property,⁴⁵ or of creditors claiming a prior lien or mortgage thereon.⁴⁶ Likewise, it has been held that such an assignee will take free from claims of creditors asserting that the mortgage was fraudulent as to them,⁴⁷ but the contrary has been held where the creditors have taken sufficient steps to

set aside the mortgage.⁴⁸ So also, a mortgage given to indemnify a surety has been held to pass by assignment free from claims of the principal creditor of which the assignee had no notice.⁴⁹

On the other hand, where the assignee does not stand in the position of a bona fide holder, he takes the mortgage subject to the equities of third persons.⁵⁰ Where the mortgage is not an operative legal instrument at the time the mortgaged property is purchased by a third person, one subsequently taking an assignment of the mortgage for value and without notice acquires no rights as against the purchaser.⁵¹

44. *Ariz.*—Stock Growers' Finance Corporation v. Hildreth, 249 P. 71, 75, 30 *Ariz.* 505, quoting *Corpus Juris* at length.

Mich.—Saginaw Financing Corporation v. Detroit Lubricator Co., 240 N.W. 44, 256 *Mich.* 441, 11 C.J. p 669 note 31.

Transferor's knowledge not imputed

A bona fide purchaser of negotiable notes secured by a mortgage is not charged with notice of the equities of third persons on the ground that the transferor has knowledge of such equities.

Okl.—Ambrister v. Dalton, 168 P. 231, 66 *Okl.* 153.

Wash.—Myers-Shepley Co. v. Milwaukee Grain Elevator Co., 214 P. 1051, 124 *Wash.* 533.

Rule as to original parties held inapplicable

The rule that a bona fide assignee of a chattel mortgage takes it subject to all the equities and defenses between the original parties has been held not to apply to latent equities of third persons.—*Myers-Shepley Co. v. Milwaukee Grain Elevator Co.*, supra—11 C.J. p 670 note 41.

In New York

(1) It has generally been held that an assignee will take subject to such equities of third persons as would have prevailed against the assignor.—*Kommel v. Herb-Gner Const. Co.*, 176 N.E. 413, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App.Div. 96.—*Fahlbusch v. Consumers Discount Corporation*, 288 N.Y.S. 511, 159 *Misc.* 568—11 C.J. p 669 note 31 [b] (1), (2).

(2) Thus the assignee will take subject to secret and latent equities of which the assignor had notice.—*Kommel v. Herb-Gner Const. Co.*, 239 N.Y.S. 148, 228 App.Div. 96, reversed on other grounds 176 N.E. 413, 256 N.Y. 333.—*New York Title & Mortgage Co. v. Grossman Properties*, 253 N.Y.S. 533, 142 *Misc.* 274, affirmed 257 N.Y.S. 1031, 236 App.Div. 665, two cases, and 257 N.Y.S. 1032, 236 App.Div. 665, three cases, motion denied 257 N.Y.S. 1032, 236 App.Div.

666, affirmed County Trust Co. v. Grossman Properties, 257 N.Y.S. 1033, 236 App.Div. 665.

(3) However, under a statute providing that a purchaser of chattels will take free of a conditional sales contract of which he has no notice, it has been held that an assignee will take free of such a contract if he has no notice thereof and stands in the position of a purchaser of the property.—*Kommel v. Herb-Gner Const. Co.*, 176 N.E. 413, 256 N.Y. 333, reversing 239 N.Y.S. 148, 228 App.Div. 96.

(4) In an early case, it was held that a bona fide assignee of a note and mortgage for value before maturity takes the mortgage, as he takes the note, free from equities to which it was subject in the hands of the mortgagee.—*Gould v. Marsh*, 1 Hun 566, 4 *Thomps. & C.* 128, 11 C.J. p 669 note 31 [b] (3).

45. *Mich.*—Henry v. Ferguson, 21 N.W. 381, 55 *Mich.* 399.

46. *Wash.*—Myers-Shepley Co. v. Milwaukee Grain Elevator Co., 214 P. 1051, 124 *Wash.* 533, 11 C.J. p 670 note 35.

Vendor's lien

N.H.—McNally v. Bailey, 18 A. 745, 65 N.H. 208.

47. *Mass.*—Sleeper v. Chapman, 121 *Mass.* 404.

Mo.—Merchants' Nat. Bank v. Abernathy, 32 *Mo.App.* 211.

48. Possession and injunction

Where an assignee in insolvency has taken possession of property mortgaged in fraud of creditors, and has filed a bill in equity to prevent a transfer of the mortgage by the mortgagee, he may hold the property as against one to whom the mortgage and the secured note were subsequently assigned for a good consideration and without notice.—*Bigelow v. Smith*, 2 *Allen, Mass.* 264.

49. *Ala.*—Tison v. People's Sav., etc., Assoc., 57 *Ala.* 323.

50. *Okl.*—Ambrister v. Dalton, 168 P. 231, 66 *Okl.* 153.

Wash.—Palmer v. Cochrane Brokerage Co., 217 P. 1007, 126 *Wash.* 169.

An assignee with notice of equities or claims of third persons will acquire no better right than his assignor, whether he has actual notice of such equities or claims, or constructive notice arising from the record of the mortgage.—*Ambrister v. Dalton*, 168 P. 231, 66 *Okl.* 153—11 C.J. p 670 notes 47, 48.

Assignee after maturity

(1) If the assignment is not until after maturity, the assignee takes subject to equities of third persons.—*Palmer v. Cochrane Brokerage Co.*, 217 P. 1007, 126 *Wash.* 169—11 C.J. p 670 note 38.

(2) The rule that the assignee of a mortgage securing paper that is overdue takes subject to equities between the original parties, however, has been held not to apply to latent equities of third persons.—*Gibson v. McIntire*, 81 N.W. 699, 110 *Iowa* 417.

Mortgage note nonnegotiable

Where the mortgage note assigned is nonnegotiable the assignee takes subject to the same defenses in favor of a third person as such person would have against the mortgagee.—*City Nat. Bank v. Gunter*, 72 P. 842, 67 *Kan.* 227—11 C.J. p 670 note 42.

Procuring extension of time

Where, prior to the assignment, the assignee procured for the mortgagor from the mortgagee an extension of the time of payment, the assignee on taking the assignment was bound by the extension if the mortgagee was bound thereby.—*Shank v. Blackburn*, 200 P. 762, 53 *Cal.App.* 620.

Want of indorsement

If the debt is in the form of a negotiable note, and the assignee takes no indorsement thereof, he takes only an equitable interest, which is subject to existing equities of third persons.—*Nelson v. Ferris*, 30 *Mich.* 497.

51. **Mortgage not accepted by mortgagee at the time the mortgaged property was purchased.**—*First Nat. Bank v. McCreary*, 132 P. 718, 134 P. 1180, 66 *Or.* 484, 489.

Unrecorded mortgage. An assignee of an unrecorded mortgage has been held to take subject to the rights of judgment creditors who have reduced the property to possession.⁵²

Right as against mortgagee. Although a purchaser of a portion of the mortgaged property from a mortgagee could have prevented a sale by the latter's assignee, and failed so to do, he may nevertheless recover damages from the mortgagee for transferring the mortgage in violation of a guaranty.⁵³

After an assignment, the rights acquired by the assignee will not be affected by a sale or mortgage of the property to a person having notice of the mortgage lien,⁵⁴ unless the assignee authorized the transaction,⁵⁵ or is otherwise estopped to assert his rights.⁵⁶

§ 324. Actions by Assignees

- a. Right of action and defenses
- b. Parties
- c. Pleading, evidence, trial, and damages

a. Right of Action and Defenses

After a mortgage has been assigned, the assignee, not the mortgagee, is ordinarily entitled to maintain actions based on the mortgage, such as an action for conversion or possession of the mortgaged property or for destruction of the mortgage lien. In case of fraud in the assignment, the assignee may rescind the assignment.

After a mortgagee has assigned the mortgage, he

cannot maintain an action for conversion of the property,⁵⁷ or sue in his own right to recover possession thereof.⁵⁸ The right of action for conversion,⁵⁹ for trespass against one wrongfully taking the property,⁶⁰ or for possession of the property⁶¹ is thereafter in the assignee, unless the assignee assents to the mortgagee bringing the suit,⁶² or unless, at the time the mortgage note is transferred, the mortgage is retained by the mortgagee under an agreement that the assignee of the note shall have nothing to do with it.⁶³ However, where a part of the debt secured by a mortgage is assigned as collateral security for an indebtedness of the mortgagee to the assignee and the assignee appropriates sufficient of the mortgaged property before the mortgage becomes due to satisfy his debt, his title is extinguished and he cannot maintain trover against one who levies on a part of the mortgaged property by virtue of executions against the mortgagor.⁶⁴

The assignee need not maintain an action on the debt before resorting to the mortgage.⁶⁵ He may, it seems, bring an action in tort, or for money had and received, against one who converts the mortgaged property.⁶⁶ Although there is authority to the contrary,⁶⁷ it is generally held that, in order to give the assignee a right of action for conversion of the mortgaged property, the conversion must have taken place after the assignment, since the assignment will not transfer such a right of action;⁶⁸ nor will the assignment of a mortgage and the note

52. Kan.—McDonald v. Richolson, 45 P. 95, 3 Kan.App. 235.

53. S.C.—Lain v. Simon, 19 S.C. 270.

54. Mich.—Saginaw Financing Corporation v. Detroit Lubricator Co., 240 N.W. 44, 256 Mich. 441.

S.C.—Farmers' & Merchants' Nat. Bank of Lake City v. Bank of Hemingway, 101 S.E. 746, 113 S.C. 140.

11 C.J. p 670 note 35.

55. U.S.—State Nat. Bank v. Cudahy Packing Co., C.C.Mo., 126 F. 543, affirmed 134 F. 538, 67 C.C.A. 662.

56. Knowledge of transaction

The fact that transferee of mortgage authorizing mortgagee to collect as its trustee knew cotton received from mortgagors would be placed with factors for storage or sale has been held not to estop it from asserting its rights.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

57. Ala.—Gilbreath v. Copeland, 77 So. 58, 16 Ala.App. 220.

Mass.—Horne v. Briggs, 98 Mass. 510.

Miss.—Love v. Mississippi Cotton-

seed Products Co., 165 So. 446, 174 Misc. 697.

Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420.

58. Ill.—Robinson v. Huschle, 233 Ill.App. 519.

11 C.J. p 670 note 50.

59. Ala.—Baker, Lyons & Co. v. American Agricultural Chemical Co., 77 So. 866, 201 Ala. 328.

S.C.—Farmers' & Merchants' Nat. Bank of Lake City v. Bank of Hemingway, 101 S.E. 746, 113 S.C. 140.

11 C.J. p 670 note 51.

60. Wis.—Cotton v. Watkins, 6 Wis. 629.

Where, however, the indorsement on the mortgage does not purport to transfer the mortgage, it does not invest plaintiff with such title as to authorize him to maintain an action of trespass for the wrongful taking.—Cleckler v. Childress, 80 So. 136, 16 Ala.App. 562.

61. N.C.—Johnson v. Bray, 93 S.E. 728, 174 N.C. 176.

11 C.J. p 670 note 53.

Suit in equity for specific delivery
An assignee may maintain a bill

in equity against a purchaser from the mortgagor for specific delivery of the mortgaged chattels.—Bryan v. Robert, 2 Rich.Eq., S.C., 11.

62. Mich.—Eddy v. McCall, 43 N.W. 911, 77 Mich. 242.

11 C.J. p 671 note 54.

63. Kan.—Ketcham v. Geo. R. Barse Live Stock Commn. Co., 48 P. 29, 57 Kan. 771.

64. Mich.—Place v. Grant, 9 Mich. 42.

65. Ariz.—Spann v. Meidinger, 295 P. 321, 37 Ariz. 480.

66. Ala.—Gadsden First Nat. Bank v. Sproull, 16 So. 879, 105 Ala. 275.

67. Colo.—Zinn v. Denver Live Stock Commission Co., 187 P. 1033, 68 Colo. 274.

Mo.—Kissick v. Kissick, 279 S.W. 764, 221 Mo.App. 420.

68. Cal.—Millner v. Lankershim Packing Co., 56 P.2d 1295, 13 Cal. App.2d 315.

S.C.—Robinson v. Saxon Mills, 117 S.E. 424, 427, 124 S.C. 415, quoting *Corpus Juris*.

11 C.J. p 671 note 60.

Statute not affecting rule

A statute in California referring

secured thereby transfer to the assignee a right of action which the mortgagee may have had against the sheriff for the return of the property.⁶⁹

Where a statute declares that a mortgagee is not entitled to possession unless the mortgage so provides, or unless he takes possession at the time the mortgage is executed, an assignee of the mortgage cannot maintain replevin against a purchaser of the property from the mortgagor, where the mortgagee left such property in the mortgagor's possession, but can only bring an action to foreclose the mortgage.⁷⁰

Where the property has been put beyond the reach of the mortgagee, the assignee may maintain an action on the case for the destruction of the lien of the mortgage,⁷¹ but a mere conversion of the property will not support such an action.⁷² An assignee has been held to have no right of action of debt against a purchaser of the mortgaged property, although the purchaser has assumed the mortgage debt.⁷³ Where the transferee of a part of the mortgage debt acquires a second mortgage on the same property, he may, in the same bill, compel an accounting by the first mortgagee, and enforce his entire claim, including his rights under the second mortgage.⁷⁴

Where the mortgagee has knowingly misrepresented a material fact, in order to induce the assignee to purchase the mortgage, the assignee may rescind the transaction upon promptly offering restoration after discovering the fraud.⁷⁵

Defenses. Defendant may set up any defense he may have to an action by an assignee of a mort-

gage.⁷⁶ The fact that the assignment was not made until after the maturity of the note transferred and after a demand for the property had been made by the mortgagee is not a defense to an action of replevin;⁷⁷ nor is the fact that the assignee permitted the mortgagee to reduce the note to judgment a defense where the assignee had purchased all of the mortgagee's assets and owned them at the time of the trial.⁷⁸ The mortgagor cannot defend by setting up a prior mortgage on the same property, as that implies a breach of his warranty to the mortgagee,⁷⁹ and a subsequent agreement whereby the assignee waived particular terms of the mortgage will not prevent him from replevying the property in accordance with the original terms of the mortgage where the mortgagor failed to comply with the agreement.⁸⁰ The fact that the assignee sold the mortgaged property pending the action,⁸¹ or that he reassigned the secured note after crediting the proceeds of a sale of the mortgaged property,⁸² will not bar an action of replevin by him.

b. Parties

An assignee of a mortgage is generally held to have the right to bring an action in his own name for the recovery of damages for injury to, or for the possession of, the mortgaged property. The mortgagor is a necessary party to actions adversely affecting his interests.

After a mortgagor has forfeited his right to possession of the mortgaged chattels, an assignee of the mortgage has a general right to maintain in his own name an action of trover to recover damages for a wrongful conversion of the property;⁸³ and under similar circumstances he may maintain in his own name an action of detinue,⁸⁴ replevin,⁸⁵ or claim

to rights which inure to benefit of a transferee of a mortgage does not contemplate that assignee of a mortgage thereby succeeds to right of action for tortious acts committed by way of conversion against mortgaged property prior to time assignee acquired interest by way of lien in mortgaged property.—*Millner v. Lankershim Packing Co.*, 56 P.2d 1295, 13 Cal.App.2d 315.

69. Kan.—*McDonald v. Richolson*, 45 P. 95, 3 Kan.App. 235.

70. Ind.—*Drimmie v. Hendrickson*, 99 N.E. 436, 51 Ind.App. 198.

71. Ala.—*Lowery v. Haley*, 68 So. 539, 12 Ala.App. 448.
11 C.J. p 672 note 81.

72. Ala.—*Lowery v. Haley*, supra.
S.D.—*Wheaton Nat. Bank v. Elkins*, 159 N.W. 60, 37 S.D. 479.

73. Md.—*Gable v. Scarlett*, 56 Md. 169.

74. Ala.—*Penney v. Miller*, 33 So. 668, 134 Ala. 593.

11 C.J. p 671 note 63.

75. Ga.—*Nipper v. Griffin Mercan-*

tile Co., 120 S.E. 439, 21 Ga.App. 211.

Enforcement of prior encumbrance need not be shown in order to entitle the assignee to rescind for the fraud of the mortgagee in representing that no prior encumbrance existed.—*Nipper v. Griffin Mercantile Co.*, supra.

Mortgagee's payment of prior encumbrance subsequent to the rescission will not allow him to escape the consequences of his fraud.—*Nipper v. Griffin Mercantile Co.*, supra.

76. Mo.—*Scheidel Western X-Ray v. Bacon*, App., 201 S.W. 916.

An inadvertent misstatement of the amount of his interest by the assignee to a person preparing to dispose of the mortgaged property did not estop the assignee from maintaining an action of conversion against such person.—*Farmers' & Merchants' Nat. Bank of Lake City v. Bank of Hemingway*, 101 S.E. 746, 113 S.C. 140.

Mere delay in enforcing rights did not estop assignee.—*Farmers' &*

Merchants' Nat. Bank of Lake City v. Bank of Hemingway, supra.

77. U.S.—*Buckingham v. Dake*, Kan., 112 F. 258, 50 C.C.A. 492.

78. Mo.—*Yahlem Finance Corporation v. Elsbury*, App., 18 S.W.2d 544.

79. Mo.—*Gottschalk v. Klinger*, 33 Mo.App. 410.

80. Ohio.—*White Co. v. Canton Transp. Co.*, 2 N.E.2d 501, 131 Ohio St. 190.

81. Mo.—*Yahlem Finance Corporation v. Elsbury*, App., 18 S.W.2d 544.

82. Cal.—*Woodland Bank v. Duncan*, 49 P. 414, 117 Cal. 412.

83. N.M.—*Barnett v. Wedgewood*, 211 P. 601, 28 N.M. 312.

S.C.—*Montgomery v. Kerr*, 1 Hill 291.

84. Ala.—*Gafford v. Lofton*, 10 So. 505, 94 Ala. 333—*Russell v. Walker*, 73 Ala. 315—*Stevens v. Romano*, 65 So. 713, 10 Ala.App. 601.

85. Ill.—*Blake-Silkwood Motor Co. v. Spires*, 245 Ill.App. 148.

11 C.J. p 671 note 70.

and delivery,⁸⁶ even before maturity of the debt,⁸⁷ or he may sue in his own name in trespass to recover for an injury to the property caused by a third person.⁸⁸ In some jurisdictions, however, where the assignee acquires merely an equitable title to the mortgaged property, or where the assignment is insufficient to convey legal title, he cannot maintain, in his own name, an action at law for the conversion thereof,⁸⁹ nor sue in his own name to recover possession,⁹⁰ but he may maintain an action on the case in his own name,⁹¹ or he may bring trover⁹² or an action of detinue or replevin⁹³ in the name of the mortgagee. However, in other jurisdictions it is held that the equitable title of an assignee is sufficient to maintain an action in his own name against a stranger who takes possession of the mortgaged property,⁹⁴ or to maintain replevin for the recovery of possession,⁹⁵ even though the note was indorsed merely for collection.⁹⁶

Joinder and intervention. The mortgagor is a necessary party to an action in which his rights are adjudicated.⁹⁷ Replevin to recover possession of mortgaged chattels may be brought by the assignee of the mortgage and the secured note without joining the assignor,⁹⁸ although the mortgage debt is charged on the assignor's books as an account, which is not assignable,⁹⁹ but the assignor has been held to be a proper party.¹ The assignee of one partner's interest belonging to a firm may properly join with a remaining partner in an action for the

conversion of the mortgaged property.²

An assignee holding under an equitable assignment of a part of the notes secured by a chattel mortgage may intervene in an action by the mortgagee to protect that interest.³

c. Pleading, Evidence, Trial, and Damages

The usual rules of pleading, evidence, trial, and damages in civil actions generally apply.

The general rules governing pleading in civil actions are applicable to actions by assignees of mortgages.⁴ Thus, where the assignee cannot anticipate that defendant will attempt to impeach the mortgage or the assignment, he is not required to plead facts operating as an estoppel;⁵ and, in replevin by the assignee of a junior mortgagee against a senior mortgagee, plaintiff may show in rebuttal that defendant is estopped to claim under his mortgage, although plaintiff failed to plead the estoppel.⁶

Although generally the assignee must prove the assignment of the mortgage by the mortgagee to him,⁷ it has been held that, where the assignee of a chattel mortgage alleges ownership of the mortgage and such allegation is not denied, he need not prove an assignment of the mortgage to him.⁸

Where there is a defense available to the mortgagor if the assignee is not a bona fide holder of the instrument, and where there is evidence reasonably tending to support the defense, the burden is on plaintiff assignee to show that he is such a holder;⁹

Real party in interest

Under a statute providing that every action shall be prosecuted by the real party in interest, the assignee may maintain an action of replevin in his own name if he is the real party in interest.

Mo.—Green v. Powell, App., 46 S.W. 2d 915.

Wis.—Muldowney v. McCoy Hotel Co., 269 N.W. 655, 223 Wis. 62. 11 C.J. p 671 note 70 [a].

86. N.C.—Johnson v. Bray, 93 S.E. 728, 174 N.C. 176.

87. N.C.—Satterthwaite v. Ellis, 39 S.E. 726, 129 N.C. 67.

88. N.Y.—Langdon v. Buel, 9 Wend. 80.

N.C.—Hodges v. Wilkinson, 15 S.E. 941, 111 N.C. 56, 17 L.R.A. 545.

89. Ala.—Albertville Trading Co. v. Brooks, 113 So. 473, 22 Ala.App. 147.

11 C.J. p 671 note 73.

90. Ala.—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383. 11 C.J. p 671 note 74.

Assignment without written indorsement of mortgage.—Sims v. United Auto Supply Co., supra—Kinney v. Foust, 95 So. 911, 19 Ala.App.

183—Sanders v. Rogers, 77 So. 69, 16 Ala.App. 231.

91. Ala.—Lowery v. Haley, 68 So. 539, 12 Ala.App. 448.

92. Ala.—Lowery v. Haley, supra. Mass.—Crain v. Paine, 4 Cush. 483. 11 C.J. p 672 note 76.

93. Ala.—Graham v. Newman, 21 Ala. 497.

Me.—Ramsdell v. Tewksbury, 73 Me. 197.

Tenn.—Richmond Type, etc., Fdy. v. Carter, 182 S.W. 240, 133 Tenn. 489.

94. N.M.—Barnett v. Wedgewood, 211 P. 601, 28 N.M. 312.

N.Y.—Langdon v. Buel, 9 Wend. 80.

95. Wis.—Muldowney v. McCoy Hotel Co., 269 N.W. 655, 223 Wis. 62. 11 C.J. p 672 note 79.

96. Mo.—Willison v. Smith, 52 Mo. App. 133.

97. S.C.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

98. U.S.—Buckingham v. Dake, Kan., 112 F. 258, 50 C.C.A. 492.

99. Ark.—Wilson v. McCown, 147 S.W. 451, 103 Ark. 422.

1. Kan.—Commercial Credit Co. v. Brown, 53 P.2d 865, 143 Kan. 65.

Tex.—People's State Bank of Ranger v. National Bank of Commerce of Houston, Civ.App., 267 S.W. 992.

2. Ala.—Keith v. Ham, 7 So. 234, 89 Ala. 590.

3. Neb.—Harman v. Barhydt, 31 N.W. 488, 20 Neb. 625.

4. Defendant's pleadings held sufficient to charge assignee's breach of duty.—Terrell v. General Motors Acceptance Corporation, Tex.Civ. App., 59 S.W.2d 442, error refused.

5. Mo.—Mexico First Nat. Bank v. Ragsdale, 59 S.W. 987, 158 Mo. 668, 81 Am.S.R. 332.

11 C.J. p 672 note 88.

6. Mo.—Powell v. Tinsley, 119 S.W. 47, 137 Mo.App. 551.

7. Ala.—Columbus Grocery Co. v. Prince, 73 So. 333, 197 Ala. 624.

Tex.—Howerton Finance Corporation v. Farmers' & Merchants' Nat. Bank of Abilene, Civ.App., 38 S.W. 2d 839.

8. Ark.—Perry County Bank v. Rankin, 84 S.W. 725, 86 S.W. 279, 73 Ark. 589.

9. Okl.—Hummell v. Brown, 221 P. 738, 93 Okl. 256.

but, where it is uncontradicted that the assignee paid full value for the note and mortgage before its maturity, the burden is on the mortgagor to prove notice of the defense before the assignee took the instrument.¹⁰

The usual rules of evidence apply to the admissibility¹¹ and weight and sufficiency¹² of evidence in actions of this character.

Where the evidence is conflicting, issues of fact should be submitted to the jury¹³ under proper instructions,¹⁴ but issues as to which there is no conflict in the evidence, or which have not been proved, should not be submitted to the jury.¹⁵

Damages. In an action by the assignee against the mortgagee for conversion, the measure of damages is the market value of the goods at the time and place of conversion, with interest on the amount of recovery, in the discretion of the court.¹⁶ In estimating the damages in trover by the assignee against an attaching officer for conversion of a part of the mortgaged chattels, the amount at which the assignee bid in the remaining part at foreclosure sale, rather than a larger amount for which he afterward sold the same, should be deducted from the mortgage debt.¹⁷ If the assignee asserts his right to possession before the mortgage debt matures, the mortgagor should not be allowed the value of the use of the property from the time of seizure to the

time of judgment in the assignee's favor.¹⁸ A pledge of the property by the mortgagee prior to the assignment is admissible on the question of damages.¹⁹

§ 325. Actions against Assignees

The usual rules applicable to civil actions apply in actions against assignees.

When the assignee of a mortgage takes possession of the mortgaged property after condition broken, in accordance with the terms of the mortgage, the legal title to the property is in him, and the mortgagor cannot bring trover to recover the value thereof.²⁰ On the other hand, the mortgagor can recover possession of the property by an action of replevin where the assignee acquired possession by an act of trespass, and the mortgagor demanded the return of the property, before the assignment of the mortgage.²¹

Defenses. Where the equitable assignee of a mortgage obtains possession of the mortgaged property from the holder of the legal title, he may set up as a defense the outstanding superior title, with which he thus connects himself, to defeat detinue brought by the mortgagor for recovery of the property,²² and in an action of replevin by a claimant of mortgaged property the assignee of the mortgage is entitled to the same protection as the mortgagee.²³ In an action against the assignee by the

10. Colo.—Abley v. Davies, 270 P. 880, 84 Colo. 398.

11. Evidence held admissible

(1) Minutes of a meeting of directors of a corporation, to show a sale of a mortgage by the corporation to the president thereof.—Clem v. Wise, 31 So. 986, 133 Ala. 403.

(2) A lease on which the mortgagor's title to the mortgaged property was based, as bearing on the issue of the mortgage lien after a settlement under the lease and the effect of a levy under execution against the mortgagor.—National Bank of Wheaton, Minn., v. Elkins, 159 N.W. 60, 37 S.D. 479.

12. Ark.—Sherman v. McIlroy Banking Co., 24 S.W.2d 958, 181 Ark. 124.

Evidence held sufficient

(1) To support finding for defendant.

Minn.—People's Finance Corporation v. Houck, 217 N.W. 505, 173 Minn. 443.

N.D.—First Nat. Bank v. Dickinson Roller Milling Co., 199 N.W. 940, 51 N.D. 310.

(2) To support finding that assignee had agreed to look to a purchaser of the property for payment

of debt.—Shrum v. Meredith, 82 S.W. 2d 426, 259 Ky. 366.

(3) To support finding that purchase of debt and mortgage was induced by material misrepresentations.—Mossler v. Capital City Auto Co., La.App., 150 So. 429.

(4) To support verdict for the mortgagee's assignee against the mortgagor's assignees.—Slimmer v. State Bank of Halstad, 159 N.W. 795, 134 Minn. 349.

(5) To warrant a finding that assignee did not take assignment in good faith for valuable consideration without notice.—Coconut Grove Exchange Bank v. Fleming Novelty Works, 144 So. 337, 107 Fla. 1.

Evidence held insufficient to show that plaintiff paid value for note and mortgage. — Industrial Acceptance Corporation v. Corey, Tex.Com.App., 29 S.W.2d 978, affirming, Civ.App., 19 S.W.2d 365.

13. Mo.—Yahlem Finance Corporation v. Elsbury, App., 18 S.W.2d 544.

Okl.—Hummell v. Brown, 221 P. 738, 93 Okl. 256.

Tex.—Terrell v. General Motors Acceptance Corporation, Civ.App., 59 S.W.2d 442, error refused.

14. Minn.—Slimmer v. State Bank

of Halstad, 159 N.W. 795, 134 Minn. 349.

15. U.S.—Vogt v. State Bank of Wisconsin of Madison, C.C.A.Wis., 81 F.2d 700.

Kan. — Commercial Credit Co. v. Brown, 53 P.2d 865, 143 Kan. 65. Me.—Larrabee v. Lovely, 196 A. 87. Okl.—R-F Finance Corporation v. Summers, 32 P.2d 312, 168 Okl. 173. R.I.—Allen v. Perrino, 181 A. 407, 55 R.I. 353, 101 A.L.R. 620.

16. U.S.—State Nat. Bank v. Cudahy Packing Co., C.C.Mo., 126 F. 543, affirmed 134 F. 538, 67 C.C.A. 662.

17. Mich.—Hull v. Bernatz, 64 N.W. 473, 106 Mich. 551.

18. N.C.—Satterthwaite v. Ellis, 39 S.E. 726, 129 N.C. 67.

19. N.Y.—Haskins v. Kelly, 24 N.Y. Super. 160, 1 Abb.Pr., N.S., 63.

20. Colo.—Hurt v. Hubbard, 92 P. 908, 41 Colo. 505.

21. Ill.—Greenspahn v. Ehrlich, 277 Ill.App. 322.

22. Ala.—Dumas v. People's Bank, 40 So. 964, 146 Ala. 226.

23. Mich.—Mayer v. Soulier, 12 N. W. 632, 43 Mich. 411.

N.C.—Hodges v. Wilkinson, 15 S.E. 941, 111 N.C. 56, 17 L.R.A. 545.

assignor on a note given as consideration for the assignment, the defense of failure of consideration can be predicated on the assignor's misrepresentations that there were no prior mortgages without a showing of fraud on the part of the assignor.²⁴

Evidence. In an action against an assignee for conversion, evidence for defendant that the mortgagee disclosed information regarding the disappearance of the mortgaged property was held admissible.²⁵ The usual rules as to the weight and sufficiency of evidence apply.²⁶

Trial. In trover by the mortgagor against the assignee, plaintiff may, where the evidence is otherwise material and competent, show anything to make out his case which is covered by the opening

of his counsel.²⁷

Damages. In an action by the mortgagor against the assignee of the mortgage for conversion of the mortgaged property, the mortgagor must account to the assignee for the amount of the indebtedness due on the date of the assignment.²⁸ Similarly, where the mortgagee bids in the property at foreclosure sale, credits the amount realized on the mortgage debt, and then sells the property and assigns the remaining portion of the debt, if the foreclosure sale is for any reason invalid, the mortgagor in an action against the assignee to recover the value of the property is entitled to recover only the excess, if any, in the value of the property over the mortgage debt.²⁹

XIII. DISCHARGE OR RELEASE OF MORTGAGE OR DEBT AND TERMINATION OF LIEN

§ 326. Termination of Lien in General

Ordinarily a mortgage lien continues, as between the parties, until discharged or released.

In the absence of statutes to the contrary, the lien of a mortgage continues as between the parties until it is discharged or released.³⁰ Under some statutes, in the absence of a proper extension of the mortgage, the lien thereof, as to third persons, ceases to exist within a prescribed number of days from the maturity of the indebtedness secured.³¹

A married woman mortgagee, who joins her husband in a conveyance of the chattels and real property, for the purpose of relinquishing her dower, an

interest having passed to him, does not thereby extinguish the chattel mortgage.³²

Extinguishment of lien where mortgagee wrongfully takes possession for purpose of foreclosure see *infra* § 395.

§ 327. Waiver of, and Estoppel to Claim, Lien

A mortgagee may waive his lien or be estopped to enforce it.

A mortgagee may waive his mortgage lien, or be estopped to enforce it, by conduct inconsistent with its existence.³³ Such waiver or estoppel need not,

24. S.C.—Bouknight v. Mitchell, 129 S.E. 134, 132 S.C. 40.

25. Minn.—Rahn v. First Nat. Bank, 240 N.W. 529, 185 Minn. 246.

26. Ill.—Hall v. Pittenger, 6 N.E.2d 134, 365 Ill. 135.

27. Mich.—Canning v. Harlan, 15 N.W. 492, 50 Mich. 320.
11 C.J. p 672 note 99.

28. Mo.—Bruce v. Chrysler, App., 217 S.W. 563.

Cross claim by mortgagor

An assignee's lien will survive the determination of a replevin suit brought by the assignee, and a judgment in the mortgagor's failure for the value of the property which ignores the assignee's lien is unjust.—Theatre Equipment Acceptance Corporation v. Betman, 242 N.W. 903, 259 Mich. 245.

29. Minn.—Berg v. Olson, 93 N.W. 309, 88 Minn. 392.

30. Tex.—Waters v. B. F. Ellington & Co., Civ.App., 289 S.W. 417.
11 C.J. p 673 note 3.

Equal to right of redemption

Lien of mortgage continues as long as mortgagor's right to redeem.

—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 320, 146 S.C. 257.

31. U.S.—Hirschfeld v. Nogle, D.C. Ill., 5 F.Supp. 234.

Colo.—First Nat. Bank v. O'Connell, 236 P. 1002, 77 Colo. 275.

Maturity of note

Life of mortgage does not extend beyond maturity of note it was given to secure.—Livestock Credit Corporation v. Corbett, 22 P.2d 874, 53 Idaho 190.

32. N.Y.—Hof v. Mager, 154 N.Y.S. 60, 168 App.Div. 318.

33. Cal.—Kuehn v. Don Carlos, 41 P.2d 535, 536, 5 Cal.App.2d 25, citing *Corpus Juris*.

Idaho.—Western Seed Marketing Co. v. Pfost, 262 P. 514, 45 Idaho 340—Smith v. Washburn-Wilson Seed Co., 232 P. 574, 576, 40 Idaho 191, quoting *Corpus Juris*.

La.—Palmisano v. Louisiana Motors Co., 117 So. 446, 166 La. 416.

Mo.—Stockyards Nat. Bank v. B. Harris Wool Co., 289 S.W. 623, 632, 316 Mo. 426, quoting *Corpus Juris*.

Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

N.Y.—Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512.

S.D.—State v. Shomaker, 187 N.W. 630, 631, 45 S.D. 352, quoting *Corpus Juris*.

Tex.—Daggett v. Corn, Civ.App., 54 S.W.2d 1098, error refused—Matthews v. Melasky, Civ.App., 240 S.W. 641—Medlin v. Hambricht, Civ.App., 225 S.W. 577.

Wash.—Wells Chevrolet Co. v. Pacific Fire Ins. Co., 296 P. 177, 182, 161 Wash. 1, quoting *Corpus Juris*.
11 C.J. p 674 note 18.

Acceptance of prior mortgage as collateral

Where a cotton planter had agreed to give his employee the cotton on a four-acre tract, to be selected by the employee at picking time from the planter's three tracts, and the employee had mortgaged his cotton to the planter for supplies describing it as four acres of cotton on the land of the planter, and the planter thereafter transferred the employee's mortgage to plaintiff, who already held a mortgage on the cotton on a forty-acre tract, executed after the

of course, be shown by written evidence,³⁴ nor be supported by consideration,³⁵ and may be established by circumstances surrounding the transaction or by evidence of a general course of dealing between the parties.³⁶ However, the acts relied on as a waiver or estoppel must have been done with knowledge,³⁷ and in order for mere silence of the mortgagee to work an estoppel, he must have both a specific opportunity and an apparent duty to speak.³⁸ Also, an estoppel can arise only where the one relying thereon has changed his position to his mate-

rial detriment because of the conduct of the mortgagee,³⁹ and the one claiming the benefit thereof must have relied on material acts or representations and must have had no knowledge of, or convenient means of knowing, the true facts.⁴⁰ Furthermore, there is no implication in law or fact that the mortgagee has waived his security as to the remainder of the property, because he waived his lien as to a portion thereof.⁴¹

In determining whether there was or was not a waiver, the intention of the parties, although not

employee's mortgage, plaintiff, by accepting from the employee payment of the mortgage so transferred as collateral security from the proceeds of cotton on four acres selected by the employee out of the tract, covered by the planter's subsequent mortgage, ratified the selection of the tract by the employee, and cannot object to the employee's claim for the balance of the proceeds from such cotton on the ground that the description in the employee's mortgage was insufficient to take that cotton out from plaintiff's mortgage.—*Davis v. Bartig Mercantile Co., Mo. App.*, 236 S.W. 423.

Breach of agreement between mortgagee landlord and mortgagor tenants

Breach of agreement between mortgagee landlord and mortgagor tenants regarding storage of cotton covered by mortgage and rent and supply liens in favor of landlord, with knowledge of landlord, did not constitute a waiver by landlord of rights under mortgage so as to vest title to cotton in tenants or authorize tenants to convey to purchasers in good faith for value by sale of cotton and delivery of negotiable warehouse receipts.—*Schmitt v. Federal Compress & Warehouse Co.*, 153 So. 815, 169 Miss. 589.

Failure to enforce lien

A mortgagee cannot be required to enforce his lien, in the absence of a provision therefor in the mortgage, at a time appointed by another, on pain of forfeiture of his lien.—*Brown v. Rankin*, 93 S.E. 327, 108 S.C. 105.

Representations by mortgagee as attorney

Mortgagee, who as attorney advised the mortgagor as to the disposition of mortgaged property, waived right to rely on recorded mortgage.—*Duncan v. Kimbrel*, 176 N.E. 25, 93 Ind.App. 454.

34. S.D.—*State v. Shomaker*, 187 N.W. 630, 631, 45 S.D. 352, quoting *Corpus Juris*.

Wash.—*Wells Chevrolet Co. v. Pacific Fire Ins. Co.*, 296 P. 177, 182, 161 Wash. 1, quoting *Corpus Juris*. 11 C.J. p 674 note 19.

35. Wash.—*Wells Chevrolet Co. v. Pacific Fire Ins. Co.*, supra. 11 C.J. p 674 note 20.

Mutual promises by the holders of conflicting claims will constitute a sufficient consideration for an agreement to waive or release the lien.—*Holden v. Gilfeather*, 63 A. 144, 78 Vt. 405.

36. Wash.—*Wells Chevrolet Co. v. Pacific Fire Ins. Co.*, 296 P. 177, 182, 161 Wash. 1, quoting *Corpus Juris*. 11 C.J. p 674 note 22.

37. Wash.—*Wells Chevrolet Co. v. Pacific Fire Ins. Co.*, supra. 11 C.J. p 674 note 21.

38. Idaho.—*Seat v. Quarles*, 169 P. 1167, 31 Idaho 212.

39. Cal.—*California Bank v. Leahy*, 18 P.2d 709, 129 Cal.App. 243. Colo.—*Thomas v. First Nat. Bank*, 51 P.2d 589, 97 Colo. 474.

Under contract for sale of timber

(1) A vendor of a tract of timber land having in effect a chattel mortgage on the timber under his contract for sale, was not estopped to assert his lien on the lumber, cut by the purchaser of the land and timber, because of his agent's agreement that the purchaser might use proceeds of cross-ties cut by him to enable him to proceed with operations or of the agent's knowledge that purchaser was having such work done by claimants of laborers' liens, in absence of showing that agent did anything to lead claimants to suppose that vendor would waive its contract rights.—*Elk Creek Lumber Co. v. Hamby*, C.C.A.N.C., 84 F.2d 144.

(2) Also, in such a situation, the vendor's cancellation of the contract on the purchaser's default, as authorized by the contract, did not preclude vendor from asserting lien, given by contract, on lumber cut by purchaser for balance due thereunder as against claimants of laborers' liens for manufacturing lumber.—*Elk Creek Lumber Co. v. Hamby*, supra.

40. Ill. — *Atlas Securities Co. v. Ramsay*, 262 Ill.App. 559.

Va.—*Fleming v. Branham*, 139 S.E. 267, 148 Va. 510.

Failure to register transfer of title to aeroplane

A mortgagee under purchase-money mortgage on biplane was not estopped from asserting lien as against subsequent lienor who furnished materials and storage to mortgagor, by mortgagee's failure to register with commerce department transfer of title as required by air commerce regulations, as an examination of the mortgage records in the county recorder's office would have disclosed that the plane was mortgaged.—*Atlas Securities Co. v. Ramsay*, 262 Ill. App. 559.

Representations based on receipt issued by grantee under trust deed

Purchaser of mule having notice of trust deed was entitled to rely on representations of grantor based on receipt issued by grantee that indebtedness had been paid, and the grantee and trustee are estopped to assert any right to the mule.—*Beasley v. Steen*, 134 So. 531, 160 Miss. 259.

Letter of mortgagee to bank

Where holders of a mortgage on live stock on request of the owner wrote a bank that they were willing to carry the owner's indebtedness over another year if the bank would take up his indebtedness to a cattle loan company, and the bank satisfied such indebtedness, taking a second mortgage on the cattle from the owner, it was held, that the holders of the first mortgage were not estopped against the bank from claiming their mortgage as a lien on the cattle, as the letter in no manner requested the bank to take up the owner's indebtedness to the cattle loan company, or contained anything having the least tendency to estop the holders of the first mortgage.—*Slimmer v. Meade County Bank of Sturgis*, 161 N.W. 325, 38 S.D. 311, rehearing denied *Slimmer & Thomas v. Meade County Bank of Sturgis*, 162 N.W. 536, 39 S.D. 8.

41. Idaho.—*Seat v. Quarles*, 169 P. 1167, 31 Idaho 212.

controlling, is important,⁴² and the mortgagee may testify as to his intention.⁴³

§ 328. Payment of Debt

A mortgage and the interest transferred thereby are extinguished by a proper payment of the debt secured.

A mortgage, being but an incident of the debt which it is given to secure, the title or interest transferred by the mortgage is extinguished when the debt has been wholly paid,⁴⁴ and the title or interest transferred reverts in the mortgagor without a redelivery or resale of the property or a cancellation of the mortgage.⁴⁵ Thereafter, the mortgage necessarily ceases to be a lien on the property,⁴⁶ and the mortgagee's right to possession terminates;⁴⁷ but he need do no more than return so much of the property as remains after the debt is paid.⁴⁸

On a voluntary payment of the debt secured by a first mortgage, a second mortgage on the same

property becomes eo instante a prior lien, and the holder of the second mortgage is entitled to recover possession of the mortgaged property according to the terms of his mortgage,⁴⁹ and where the first mortgagee becomes the purchaser of the mortgaged property for an amount larger than his debt, the second mortgagee is entitled to the surplus after satisfying his debt.⁵⁰

Place of payment. Where no place of payment is specified in a chattel mortgage, it is the duty of the mortgagor to seek the mortgagee and make payment to him in person.⁵¹ In case the mortgage debt is evidenced by a promissory note which is silent as to the place of payment, in accordance with the general rules laid down in the title Bills and Notes § 441, it is presumed that the debt is payable where the payor of the note resides or has his place of business.⁵² If, on the other hand, the note by its terms specifies a place of payment, it is payable there,⁵³ and it has been held that a note, secured

42. N.D.—Nathan v. Sax Motor Co., 256 N.W. 228, 64 N.D. 773.

Wash.—Wells Chevrolet Co. v. Pacific Fire Ins. Co., 296 P. 177, 161 Wash. 1.

11 C.J. p 674 note 23.

43. Wash.—Wells Chevrolet Co. v. Pacific Fire Ins. Co., supra.

11 C.J. p 674 note 24.

44. Ala.—Bank of Mobile v. Lewis, 80 So. 179, 16 Ala.App. 605.

Colo.—Stokes v. Kirk, 75 P.2d 1041, 1042, 101 Colo. 591, citing *Corpus Juris*.

Tex.—Sanders v. Farrier, Civ.App., 271 S.W. 293.

11 C.J. p 674 note 26.

Mortgagee's interest extinguished

Mortgagee of cotton to be grown on certain farm, whose claim had been satisfied, had no interest in two of the three bales grown thereon and shipped by mortgagor to commission merchant who remitted proceeds to mortgagor. — Hunter v. Abernathy, Tex.Civ.App., 188 S.W. 269.

Trust receipt rendered functus officio

Where automobile dealer borrowed money to pay draft covering shipment of cars, gave lender a trust receipt, and, on being unable to pay loan when due, negotiated new loan from finance company, giving note and bill of sale on cars, and after return of trust receipt gave it also to finance company, it was held that the trust receipt was rendered functus officio, and its return and delivery to finance company did not constitute effective assignment thereof, placing finance company in position of original lender.—Keystone Finance Corporation v. Krueger, C.C.A. N.J., 17 F.2d 904.

Recovery on mortgage notes barred

(1) Payee's transferee was not entitled to recover on mortgage notes where jury found that maker and his surety had repaid full amount borrowed, together with more than enough to cover interest at highest rate allowed by law. — Brand v. Smithdeal, Tex.Civ.App., 95 S.W.2d 1017.

(2) Full payment of amount advanced to make crop from proceeds of sale of crop left mortgage note, pledged as collateral security for crop lien note without consideration in lender's hands as in effect paid and extinguished, so as to bar recovery thereon by him.—Polito v. Ferraro, La.App., 155 So. 477.

Second mortgage

The lien of a second mortgage continues, unless waived, until the debt which it secures is paid, or until the first mortgage is foreclosed according to law.—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95.

45. Mo.—Third Nat. Bank v. Yorkshire Ins. Co., 267 S.W. 445, 448, 218 Mo.App. 660, citing *Corpus Juris*.

N.C.—Harris v. Seaboard Air Line Ry. Co., 130 S.E. 319, 190 N.C. 480, 49 A.L.R. 1452.

Tex.—Sanders v. Farrier, Civ.App., 271 S.W. 293.

11 C.J. p 674 note 28.

Property conveyed to surety as security

On principal's payment of suretyship debt, title to property conveyed surety as security immediately vests in principal.—Bank of Trion v. Parker, 160 S.E. 128, 43 Ga.App. 686.

46. Iowa.—Persinger Garage Co. v.

Caminsky, 176 N.W. 794, 188 Iowa 901.

Mo.—Third Nat. Bank v. Yorkshire Ins. Co., 267 S.W. 445, 218 Mo.App. 660.

47. Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591.

Tex.—Sanders v. Farrier, Civ.App., 271 S.W. 293.

11 C.J. p 674 note 27.

48. U.S.—Flat-Marks Realty Corporation v. Silver's Lunch Stores, C. C.A.N.Y., 74 F.2d 210, affirming, D. C., In re Silver's Lunch Stores, 4 F.Supp. 702, and certiorari denied Flat-Marks Realty Corporation v. Silver Lunch Stores, 55 S.Ct. 640, 294 U.S. 731, 79 L.Ed. 1260.

49. Colo.—Stokes v. Kirk, 75 P.2d 1041, 101 Colo. 591.

Mo.—Noll v. Harrison County Bank, 11 S.W.2d 1076, 222 Mo.App. 1162.

11 C.J. p 674 note 30.

50. Ala.—Head v. Knox, 69 So. 257, 14 Ala.App. 221.

51. N.Y.—Wazen v. Duggan, 186 N. Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

52. Ariz.—Federal Reserve Bank of Dallas v. Live Stock & Agricultural Loan Co. of New Mexico, 250 P. 770, 31 Ariz. 116.

53. Note payable at place of business of trust company

In a mortgage conditioned to pay a sum in installments, "secured by . . . notes . . . payable on the fifteenth day of each and every month," the quoted phrase operated to fix the time and manner of payment, and, the notes being payable at a named trust company, mortgagor was not in default, where on the maturity of a note she had on deposit with the trust company an amount

by a chattel mortgage, which is dated, made, and delivered in a particular place, is payable there.⁵⁴

Renewal or extension of mortgage after payment. Where the mortgage debt has been paid in full, a verbal agreement that it shall stand as security for a further indebtedness and for future advances to be made to the mortgagor is void under a statute which forbids the creation, renewal, or extension of chattel mortgages otherwise than by writing.⁵⁵

§ 329. — Who May Pay and Rights of Person Paying

A person other than the debtor may pay the mortgage debt. Such a payment extinguishes the mortgage as far as he is concerned, unless equity otherwise requires, or he intended otherwise.

Payment of the debt secured by a mortgage may be made by a person other than the debtor and without his knowledge.⁵⁶ Thus, a creditor seeking to subject to his debt the property of his debtor on which there exists a mortgage may pay to the mortgagee the amount of the mortgage debt, and such payment discharges the mortgage lien.⁵⁷ However, it has been held that, while strictly speaking the legal effect is to discharge the mortgage lien, yet equity will preserve the lien so far as to prevent injustice to the creditor in case the proceeding against the debtor fails by reason of some defect.⁵⁸

Where one who has become the owner of the equity of redemption pays off the debt the mortgage is extinguished,⁵⁹ and a purchaser in good faith of property subject to two mortgages will be protected in equity, where he makes payment to the persons entitled thereto;⁶⁰ but a voluntary payment by a third person will not operate to discharge the mortgage unless that is manifestly his intention or such

a result is clearly to his interest.⁶¹ Thus, a purchaser of mortgaged property at execution sale subject to the mortgage may either pay off the mortgage and thus protect his purchase, or purchase the mortgage and take an assignment thereof; if he pays off the mortgage it will be extinguished, but if he takes the mortgage by purchase and assignment, it continues as an operative instrument in his hands.⁶² However, if payment is made with the mortgagor's money by one who purchased the property at sheriff's sale to aid the debtor in defrauding his creditors, the mortgage is extinguished.⁶³ Also, a purchaser of mortgaged chattels, who pays the amount of the note secured thereby to the payee named therein, does so at his own risk where he does not require either the exhibition of the note or the furnishing of a release.⁶⁴

Taking up mortgage notes for the makers has been held not to discharge the mortgage securing the notes where it was the intention of the parties that it should continue in force,⁶⁵ but where the money was supplied to the assignee in part by the mortgagor, the mortgage is pro tanto discharged.⁶⁶ The payment of insurance money to the mortgagee on a policy which has been taken out by him without the knowledge of the mortgagor will not extinguish the mortgage, but if the insurance has been effected at the request or by the authority of the mortgagor, or at his expense, or under circumstances that would make him chargeable with the premium, he will, it seems, be entitled to its benefits by applying the money paid in extinguishment of his debt pro tanto.⁶⁷

Whether the transaction amounts to a payment or a purchase depends on the circumstances in evidence.⁶⁸

exceeding the note, and had instructed the trust company to pay the note on presentation. — *Wazen v. Duggan*, 186 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

54. *Ariz.*—*Albert Steinfeld & Co. v. Southern Arizona Bank & Trust Co.*, 236 P. 713, 28 *Ariz.* 242.

55. *Idaho.*—*Willows v. Rosenstien*, 48 P. 1067, 5 *Idaho* 305.

56. *Idaho.*—*Willows v. Rosenstien*, 48 P. 1067, 5 *Idaho* 305.

11 C.J. p 675 note 33.

57. *U.S.*—*Downs v. Kissam*, *Miss.*, 10 *How.* 102, 13 *L.Ed.* 346.

11 C.J. p 675 note 34.

58. *Okl.*—*Moore v. Calvert*, 58 P. 627, 8 *Okl.* 358.

59. *Kan.*—*Clouston v. Gray*, 28 P. 983, 48 *Kan.* 31.

N.Y.—*Doolittle v. Naylor*, 15 *N.Y. Super.* 206.

60. *Wash.*—*Shoemaker v. White-Du-*

laney Co., 230 P. 162, 131 *Wash.* 347, affirmed 232 P. 695, 131 *Wash.* 347, 132 *Wash.* 699.

61. *Md.*—*Walker v. Stone*, 20 *Md.* 195.

11 C.J. p 675 note 37.

Payment by assignee of mortgage

Where, at the time a common-law trust was facing financial difficulties, the wife of one of the trustees advanced money, part of which was used by her husband in obtaining an assignment of an outstanding note of the trust, secured by a mortgage, foreclosure of which was being threatened, which note and mortgage he intended to hold as security for his wife, it was held in an action by a receiver of the trust to set aside a subsequent foreclosure of the mortgage, that a payment thereof could not be predicated on the theory that the money advanced by the trustee's wife had been loaned to the

association and paid to the holder of the mortgage, where no obligation on account of any such loan had ever been made to the wife by the company.—*Jesseph v. Carroll*, 219 P. 429, 126 *Wash.* 661.

62. *N.Y.*—*Brown v. Rich*, 40 *Barb.* 28.

63. *N.Y.*—*Thompson v. Van Vechten*, 27 *N.Y.* 568.

11 C.J. p 675 note 39.

64. *Okl.*—*R-F Finance Corporation v. Summers*, 32 P.2d 312, 168 *Okl.* 179.

65. *Tex.*—*Dilley v. Freedman*, 60 *S. W.* 448, 25 *Tex.Civ.App.* 39.

66. *Ala.*—*McLemore v. Pinkston*, 31 *Ala.* 266, 68 *Am.D.* 167.

67. *Ill.*—*Honore v. Lamar F. Ins. Co.*, 51 *Ill.* 409.

68. *Tex.*—*Powers v. McKnight*, *Civ. App.*, 73 *S.W.* 549.

§ 330. — Time for Payment

The time for payment may be extended by agreement and the acceptance of full payment after default is a waiver of forfeiture.

Payment of the debt in full after default, if accepted by the mortgagee, is a waiver of forfeiture, and extinguishes all his right and interest in the property,⁶⁹ but acceptance of a partial payment after forfeiture will not be construed as a waiver of the forfeiture.⁷⁰

Extension of time. An agreement to extend the time for the payment of the mortgage debt is valid and enforceable if supported by legally sufficient consideration,⁷¹ and such an agreement has the effect of suspending the right to enforce payment during the period of extension.⁷² A part payment of interest made and accepted after default has been considered as a waiver and an extension of the time of payment of the indebtedness.⁷³

Although the mortgage is under seal, the time for payment may be extended by parol.⁷⁴

An assignee may extend the time for payment.⁷⁵

Debt payable in installments. While there is no consideration to support an agreement by the mortgagee to extend the time for payment of an installment, yet by accepting the payment the mortgagee waives his right to a forfeiture.⁷⁶ Where the debt is secured by several notes and the mortgagee has the right to accelerate the maturity of all the notes on default of payment of one of them, the right to have acceleration because of default in payment of one of the notes is waived by acceptance of subse-

quent payments, and cannot arise again until there is a subsequent default.⁷⁷ However, where a mortgage provides that on default in payment of any installment the whole debt should mature, etc., the mortgagee does not waive his right to foreclose without first demanding the property by accepting payments in amounts and at times other than those mentioned in the mortgage.⁷⁸

Payment of an installment on the required date is excused if it is prevented by the acts of the mortgagee alone or in combination with third persons.⁷⁹

§ 331. — What Constitutes Payment

In the absence of statute, what constitutes payment depends on the intention of the parties as gathered from the entire transaction.

What constitutes payment of a mortgage depends on the intention of the parties as gathered from the entire transaction.⁸⁰ So, if the parties agree on the amount due, payment of this amount satisfies the mortgage;⁸¹ but the payment and discharge of a collateral agreement does not so operate,⁸² and while a default by which the title becomes absolute in the mortgagee gives him control of the property for the purpose of applying it to his debt, this does not of itself operate as a payment of the mortgage debt.⁸³

The acceptance by the mortgagee of any part of the fine imposed on the mortgagor for a wrongful sale of the property, under some statutes, extinguishes the whole debt, both principal and interest.⁸⁴

Vt.—Denno v. Nash, 14 A. 459, 60 Vt. 334.

11 C.J. p 675 note 43.

69. Me.—Perow Co. v. Lewiston Security Co., 92 A. 516, 112 Me. 443. 11 C.J. p 675 note 45.

70. S.C.—Wallingford v. Aiken, 22 S.E. 372, 44 S.C. 396. 11 C.J. p 676 note 46.

71. Fla.—Mitchell v. Harper, 86 So. 246, 80 Fla. 338.

Or.—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 265.

11 C.J. p 676 note 47.

Adjustment of mortgagor's damage claim constitutes sufficient consideration for extension of time of payment.—Burditt v. Motor Supply Co., Tex.Civ.App., 99 S.W.2d 679, error dismissed.

72. Fla.—Mitchell v. Harper, 86 So. 246, 80 Fla. 338.

11 C.J. p 676 note 50.

73. Colo.—Thomas v. Beirne, 30 P. 2d 863, 94 Colo. 429.

74. Ala.—Deshazo v. Lewis, 5 Stew. & P. 91, 24 Am.D. 769.

Me.—Flanders v. Barstow, 18 Me. 357.

75. Mo.—McGraw v. O'Neil, 101 S. W. 132, 123 Mo.App. 691.

76. N.Y.—Fischman v. Levin, 144 N. Y.S. 674, 83 Misc. 107.

77. Mich.—Theatre Equipment Acceptance Corporation v. Betman, 242 N.W. 903, 259 Mich. 245.

78. N.Y.—Kraus v. Black, 107 N.Y. S. 609, 56 Misc. 641.

79. Wyo.—Wettlin v. Jones, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 236 P. 247, 32 Wyo. 446.

80. Okl.—Nicholson v. Bynum, 162 P. 740, 62 Okl. 167.

Mortgage in same transaction with real estate mortgage

Where chattel mortgage for two thousand dollars and realty bond and mortgage for seven thousand five hundred dollars were given in single transaction as security for purchase price of realty and personalty, chattel mortgage reciting that it was "collateral" to realty mortgage and

should be discharged when principal on realty mortgage was reduced by two thousand dollars, and realty mortgage was foreclosed with deficiency judgment of three thousand five hundred seventy-six dollars, that value of property as determined under statute was three thousand four hundred twenty-four dollars greater than amount of prior liens was held not to discharge chattel mortgage as would cash payment to that extent, since chattel mortgage was "collateral security" and parties intended that it should be discharged only if realty remained as security for balance.—Lenner v. Corso, 295 N.Y.S. 827, 162 Misc. 500.

81. Mich.—Levine v. Lachman, 215 N.W. 320, 240 Mich. 384.

82. Mass.—Haley v. Manufacturers' F., etc., Ins. Co., 120 Mass. 292. 11 C.J. p 676 note 56.

83. Ga.—Tucker v. Toomer, 86 Ga. 138.

84. Ga.—Conley v. Maher, 20 S.E. 647, 93 Ga. 781.

Part payment. In order that payment may discharge the mortgage it must be a payment of the whole debt; a part payment will not release the lien except by agreement of the parties,⁸⁵ but where the mortgagee surrenders the mortgage note on payment of a portion of the amount due, and allows the note to be marked "paid," he will be estopped to claim that a balance is still due as against a bona fide purchaser of the property.⁸⁶

Payment with property. Whether the delivery of property to the mortgagee constitutes a payment of the mortgage debt, depends on the intention of the parties.⁸⁷ If the mortgagee agrees to accept property in satisfaction of the mortgage debt, the tender and acceptance of such property, pursuant to the agreement, will be equivalent to payment.⁸⁸ However, the mere acceptance by a mortgagee of property other than that mortgaged, and the crediting of the same at an agreed price on the mortgage, does not show an agreement to release the mortgaged property;⁸⁹ and it has been held that such property does not constitute an extinguishing credit merely, because the mortgagee has a prior lien thereon, where its value exceeds the amount due on the mortgage.⁹⁰ Also, it has been held that an agreement to accept payment of mortgage notes in personal property at a particular price does not destroy the legal effect of the mortgage as security for the note.⁹¹

Whether a deed to property is given in satisfaction of the mortgage or merely as collateral security therefor, depends, of course, on the intention of the parties; however, until the contrary is shown the presumption is that the indebtedness is not satisfied by a conveyance where the creditor retains the

evidence of indebtedness.⁹²

The failure to deliver property promptly, pursuant to an agreement that it shall be accepted as payment, may be waived by the mortgagee.⁹³

Payment with services. A mortgage debt may also, by agreement between the parties, be paid by the performance of services.⁹⁴ Where the agreement is that the services of the mortgagor shall be applied on the mortgage debt, the law will make the application as the services are performed, and the mortgage will be discharged and the title to the property revested in the mortgagor whether the application is in fact made by the holder of the mortgage or not.⁹⁵ However, where the mortgagor, performing services under such an agreement was allowed to draw almost all of the amount due for the work, in cash, it was held that the mortgage was not discharged.⁹⁶

Counterclaims against mortgagee. The fact that a mortgagee is indebted to the mortgagor in an amount equal to the mortgage indebtedness does not of itself discharge a mortgage,⁹⁷ and a bequest by the mortgagee to the mortgagor will not extinguish the mortgage debt pro tanto unless there is something in the terms of the bequest showing such an intention;⁹⁸ but an agreement to apply a claim in favor of the mortgagor in payment of the mortgage will operate to discharge it, although such claim is filed in set-off in another action between the parties.⁹⁹ The mortgagor may, likewise, direct that an unquestioned indebtedness due to him by the holder of the mortgage shall be applied toward the payment of the same, and such direction on the part of the mortgagor is equivalent to payment.¹

85. S.C.—*Sellers v. Campbell*, 87 S. E. 999, 103 S.C. 207.
11 C.J. p 676 note 58.

After default

Lien of seller of chattels created by mortgage back for security was not lost because not enforced immediately on default, and because payments of part of the debt were subsequently accepted.—*Clemmitt v. Miehle Printing Press & Mfg. Co.*, 110 A. 713, 136 Md. 385.

86. Tex.—*Finks v. Buck*, Civ.App., 27 S.W. 1094.

87. Okl.—*Nicholson v. Bynum*, 162 P. 740, 62 Okl. 167.

88. Ark.—*Priest v. Hodges*, 118 S.W. 253, 90 Ark. 131.

- N.D.—*Merchants' State Bank v. Kershien*, 144 N.W. 1080, 26 N.D. 603.

Mortgagor's rights not affected by release

Acceptance of mortgage release reciting that note was erroneously in-

cluded in affidavit stating indebtedness secured by mortgage, and that note had not been paid, did not estop mortgagor from thereafter asserting right to discharge note in merchandise instead of money.—*Palestine Drug Co. v. Boggs*, 29 P.2d 56, 167 Okl. 260.

89. Ala.—*Brannen v. Harris*, 39 So. 721.

90. Ala.—*Barnett v. Grizzell*, 162 So. 407, 26 Ala.App. 472.

91. Ala.—*Lehman v. Marshall*, 47 Ala. 362.

92. Ill.—*Messick v. Darnall*, 281 Ill. App. 375.

93. Tex.—*Consolidated Oil Co. of Texas v. Schaffner*, Civ.App., 286 S.W. 258, affirmed *Schaffner v. Consolidated Oil Co. of Texas*, Com. App., 293 S.W. 159.

By subsequent delivery and acceptance

Where delivery of tools on default in payment of notes would discharge

notes, failure to deliver promptly on maturity of notes could be waived by subsequent delivery and acceptance according to contract.—*Consolidated Oil Co. of Texas v. Schaffner*, supra.

94. Ala.—*Fields v. Copeland*, 26 So. 491, 121 Ala. 644.

- Mich.—*McRae v. Davenport*, 17 N.W. 213, 51 Mich. 633.

95. Ala.—*McCullars v. Harkness*, 21 So. 472, 113 Ala. 250.

96. Mich.—*McRae v. Davenport*, 17 N.W. 213, 51 Mich. 633.

97. Ala.—*McCullars v. Harkness*, 21 So. 472, 113 Ala. 250.

- Ark.—*Hudson v. Snipes*, 40 Ark. 75. Cal.—*Woodland Bank v. Duncan*, 49 P. 414, 117 Cal. 412.

98. Wis.—*Harrington v. Brittan*, 23 Wis. 541.

99. Ala.—*McCullars v. Harkness*, 21 So. 472, 113 Ala. 250.

- 11 C.J. p 677 note 62.

1. Ga.—*McCook v. Laughlin*, 71 S. E. 917, 9 Ga.App. 550.

§ 332. — Receipts for, and Indorsement of Payments

A receipt for payment is necessary, where required by statute. It is not necessary to indorse payments on the mortgage, in the absence of statute.

Under statutes in some jurisdictions, a mortgage on household goods shall be void, unless the holder of the mortgage gives a receipt for any payments made. Such a statute has been declared constitutional;² and it has been held that it cannot be waived by agreement between the mortgagor and the mortgagee,³ and that failure to execute such receipts is a complete defense to an action by the mortgagee to recover possession of the mortgaged property.⁴ The statute is designed to protect householders and their families, to some extent, against the consequences of improvident agreements through which they may be stripped of those articles which are necessary to their comfort,⁵ and its provisions are directed primarily to those who loan money and take mortgages on household goods, and not to the owner of goods who sells them and takes a mortgage to secure the purchase price.⁶ Accordingly it has been held that the statute does not apply to a mortgage given to secure the purchase price of furniture used by a single man for a rooming house.⁷

Where the grantee in a trust deed covering chattels issues a receipt reciting that the indebtedness was paid, he is estopped to assert a right to the property as against a purchaser relying in good faith on representations based on the receipt.⁸

Indorsement of payments. It has been held not to be necessary to indorse payments on the mortgage, or the copy thereof filed with the township clerk, in order to render the mortgage valid as to creditors;

but that it is sufficient to file, at the end of the year an affidavit of the amount paid.⁹

§ 333. — Application of Payments

Agreements of the parties or directions of the mortgagor as to the application of payments or of income profits, or proceeds of the mortgaged property, must be observed. If neither party makes an appropriation the law will do so, justly and equitably.

If the parties agree as to the manner of applying payments, such agreement must be observed, unless some controlling equity has intervened.¹ Where the mortgagor gives directions as to the application of his payments, such direction must be followed,¹¹ but if he does not give such direction the mortgagee may make the appropriation.¹ Where neither party makes a specific appropriation, the law will apply the payment according to the equity and justice of the case,¹³ the general rule being that payments will be applied by the court to unsecured rather than to secured, indebtedness.¹ However, it has been held in some jurisdiction that, where the mortgagor owes the mortgagee on an open account, in addition to the mortgage debt and payments are made by the mortgagor, without any application being made by either party, the law will apply the payments to the mortgage debt;¹ and where, on making a partial payment, the mortgagee gives the mortgagor a receipt stating that the payment is made on an open account, the receipt is not conclusive that the payment was directed to be made on the account and not on the mortgage debt but is subject to explanation.¹⁶

A payment by a mortgagor may not be applied to release from the mortgage lien a part of the property which has been sold, where the purchaser has not paid for the property, and has given it away to defraud his creditors.¹⁷ Also, deposits received by

2. Ind.—Zumpfe v. Gentry, 54 N.E. 805, 153 Ind. 219 — Drimmie v. Hendrickson, 99 N.E. 436, 51 Ind. App. 198.

3. Ind.—Zumpfe v. Gentry, 54 N.E. 805, 153 Ind. 219.

4. Ind.—Drimmie v. Hendrickson, 99 N.E. 436, 51 Ind. App. 198.

5. Ind.—Zumpfe v. Gentry, 54 N.E. 805, 153 Ind. 219.

6. Ind.—Lynch v. Boyer, 105 N.E. 786, 56 Ind. App. 514.

7. Ind.—Lynch v. Boyer, *supra*.

8. Miss.—Beasley v. Steen, 134 So. 581, 160 Miss. 259.

9. Mich.—Anderson v. Cook, 59 N.W. 423, 100 Mich. 621.

10. Wash.—Simpson v. Combes, 182 P. 566, 107 Wash. 575.

11 C.J. p 677 note 72.

Agreement in mortgage

Where mortgage provided that

payments should be applied toward discharging mortgage indebtedness, the mortgagees have burden of proving an oral agreement that payments should be otherwise applied.—Simpson v. Combes, 182 P. 566, 107 Wash. 575.

11. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236.

11 C.J. p 677 note 73.

12. Ark.—Bell v. Radcliff, 32 Ark. 645.

11 C.J. p 677 note 74.

13. Tex.—Marshall v. G. A. Stowers Furniture Co., Civ. App., 167 S.W. 230.

11 C.J. p 677 note 75.

Proceeds from sale of crops on mortgagee's foreclosed farm

Where a contract purchaser of a farm mortgaged some of his personal property as security for the contract

which was later foreclosed for the full amount due thereon, and crops grown thereon were sold and the proceeds paid to the vendor mortgagee, it was held that such proceeds should be applied on the amount due on the land contract, or if there is no indebtedness of this character the proceeds should be used to reduce the amount due on the mortgage.—Pinconning State Bank v. Henry, 241 N.W. 913, 258 Mich. 44.

14. U.S.—Schuelenburg v. Martin, 1 C. Kan., 2 F. 747, 1 McCrary 348. N.C.—Vick v. Smith, 83 N.C. 80.

15. Md.—Laeber v. Langhor, 45 Md. 477.

11 C.J. p 677 note 77.

16. Ala.—Lynn v. Bean, 37 So. 51, 141 Ala. 236.

17. Md.—Dorsey v. Gassaway, Harr. & J. 402, 3 Am.D. 557.

the mortgagee from the mortgagor, although exceeding the amount of the mortgage debt, will not constitute a payment, where the mortgagor does not direct that any of the deposits be applied to the payment of the debt, and the mortgagee does not make any such application, the depositor checking against such deposits during the continuance of the mortgage debt.¹⁸ Monthly payments, made in consideration of an extension of the time for payment from month to month, will be applied on the mortgage indebtedness, and will not be treated as interest or as compensation for extensions.¹⁹

Where there are several mortgages, and it does not appear how the mortgagor's payments have been credited, they will be applied to the payment of the first mortgage.²⁰

Income, profits, or proceeds of mortgaged property. A mortgagee in possession must devote rents and profits derived from the mortgaged property to the discharge of the mortgage debt, unless the mortgagor assents to a different appropriation.²¹ Likewise, the proceeds arising from a sale of the property must be applied to the extinguishment of the mortgage debt, without any direction to that effect from the mortgagor and in the absence of an agreement to the contrary.²² If the property is sold by consent of the parties, and the money is paid to the mortgagee, it has been held that he has an absolute right to apply it to the mortgage debt, and it is beyond the power of the mortgagor to direct its appropriation to the payment of another debt owing to the mortgagee.²³ When the mortgagor consents to the sale of the property, on consideration of the application of the proceeds to its debt, it is entitled to enforce such agreement,²⁴ and the mortgagor

may authorize the appropriation of the proceeds of part of the mortgaged property to unsecured debts, when no rights of third persons have intervened.²⁵ The mortgagee, on the other hand, is not required to collect the proceeds of a sale of the property by the mortgagor, in the absence of an express agreement to that effect.²⁶

Where two or more notes, secured by a single mortgage, fall due on the same day, and the mortgage fund is not sufficient to pay the entire amount of the notes, the notes should be paid pro rata out of the fund, unless some agreement or paramount equity would require a different mode of payment.²⁷

If the mortgagor and the holder of a first mortgage have agreed on the manner of appropriating the proceeds of the property, the holder of a second mortgage cannot compel a different appropriation,²⁸ and a second mortgagee who has consented to a different application of the proceeds of sale cannot afterward insist that they be applied to the first mortgage.²⁹ Also, where a mortgage as to the portion of the indebtedness secured creates a lien subordinate to a second mortgage, and as to the remaining portion creates a prior lien, the holder of such mortgage is, as to the second mortgagee, bound to apply the proceeds of the same coming into his hands to the discharge of the portion of the indebtedness as to which the prior lien exists.³⁰

Where the mortgagee sells the property to pay the mortgage, he cannot deny the mortgagor's title thereto.³¹

§ 334. Performance of Particular Conditions

A mortgage, conditioned on the performance of a particular condition, is discharged by a proper performance thereof.

18. Wyo.—McCord v. Albany County Nat. Bank, 48 P. 1058, 7 Wyo. 9.

19. Mich.—Bateman v. Blake, 45 N. W. 831, 81 Mich. 227.

20. Idaho.—Porter v. Title Guaranty, etc., Co., 106 P. 299, 17 Idaho 364, 27 L.R.A., N.S., 111.

Tex.—Marshall v. G. A. Stowers Furniture Co., Civ.App., 167 S.W. 230.

21. Ark.—Caldwell v. Hall, 1 S.W. 62, 49 Ark. 508, 4 Am.S.R. 62, 4 Am.S.R. 64.

11 C.J. p 678 note 83.

22. Ala.—Monroe Stock & Exchange Co. v. Thames, 100 So. 348, 211 Ala. 320—Leath v. Hancock, 98 So. 274, 210 Ala. 374.

S.C.—People's Bank v. Walker, 128 S.E. 715, 132 S.C. 254.

11 C.J. p 678 note 84.

On order of commission firm

Where mortgagor shipped mort-

gaged cattle to commission firm, and where the commission firm placed net proceeds in bank with instructions to credit the amount "By direction of: H. [indorser of mortgage notes], a/c J. [mortgagor]. Deposited by S. [commission firm]. To the following bank: S. [owner of mortgage notes]"—and where advice card from bank in which the proceeds were so deposited to bank owning notes stated: "We credit your account \$4,316.60 [amount of proceeds]. By direction of: H. [indorser of mortgage notes], a/c J. [mortgagor]"—the bank owning note was required to credit proceeds to mortgagor's account toward payment of mortgage note, and not to the account of the indorser of the notes, to be drawn out and used by it as it saw proper.—Stockyards Nat. Bank v. Wilkinson, Tex.Civ.App., 230 S.W. 1040, error refused.

23. Wis.—Masten v. Cummings, 24 Wis. 623.

24. Cal.—California Winemakers' Corp. v. Sciaroni, 72 P. 990, 139 Cal. 277.

25. Ark.—Hughes v. Johnson, 38 Ark. 235.

26. Tex.—Sherrill v. First State Bank of Rocksprings, Civ.App., 293 S.W. 317, reversing 289 S.W. 123.

27. Kan.—Aultman-Taylor Co. v. McGeorge, 2 P. 778, 31 Kan. 329.

28. Tex.—First Nat. Bank v. Gerard, Civ.App., 40 S.W.2d 849.

29. Wash.—Presby v. Melgard, 94 P. 641, 48 Wash. 689.

30. U.S.—Davis v. Carlisle, 142 F. 106, 73 C.C.A. 330, reversing 82 S.W. 682, 5 Ind.T. 83.

31. S.C.—People's Bank v. Walker, 128 S.E. 715, 132 S.C. 254.

Where a mortgage is conditioned to be satisfied on the performance of some particular condition, due performance of the condition discharges the mortgage.³² Thus, where a mortgage is given to secure the delivery of articles of merchandise at a certain time, and not to secure the payment of money, if the articles are not delivered at the stipulated time, but are afterward delivered and accepted, the lien created by the mortgage is thereby discharged.³³ However, the performance, to be effective, must be in accordance with the intention of the parties as expressed in the instrument.³⁴ Accordingly, a mortgage conditioned on the mortgagor's appearance at the next term of court, and given to protect sureties on a recognizance bond, is not discharged by his appearance, if the case is continued and the mortgage is properly kept alive by renewals.³⁵

Under some statutes, after breach of a condition in the mortgage, the mortgagor and his grantee have a legal right of redemption for a specified period of time, so that compliance with the condition after the breach thereof but within the time specified, immediately terminates the vital existence of the mortgage and takes the title to the property from the mortgagee *instantly*.³⁶

Termination of lease containing mortgage clause. Where a lessor elects to terminate the lease, in accordance with its provisions, for breach of covenant, such election does not discharge the lien of a mortgage contained in the lease, and given as security for the performance of the covenants on the part of the lessee.³⁷ A conditional settlement for the rent and discharge of a mortgage clause in a lease is not effective where the prescribed conditions have not been performed.³⁸ However, where a mortgage is

given to secure the performance of obligations assumed under a lease, it will be discharged if the terms of the lease are fulfilled at the expiration of the term thereof, or if, during the term, the lessor with the consent of the lessee, cancels the lease and assumes possession of the demised premises.³⁹

§ 335. Indemnity Mortgages

An indemnity mortgage is discharged by the mortgagor's payment of the primary obligation; but surety's payment thereof does not have this effect, unless the parties so intend.

Where a mortgage is given to indemnify the mortgagee against a debt for which he is secondarily liable, payment, by the mortgagor, of the debt or obligation thus secured will discharge the mortgage lien,⁴⁰ but payment by the surety will not have a like effect,⁴¹ unless such was the intention of the parties.⁴² However, where a surety pays the debt for which he is surety and takes a new mortgage on the same property to secure to him the repayment of the money so paid, the first mortgage is discharged.⁴³ Also, if the sureties assign the mortgage to the creditor for his security and he gives them a discharge of their liability as sureties, the mortgage is discharged.⁴⁴

Where a mortgage is given to indemnify the mortgagee for his indorsement of notes executed by the mortgagor, and such notes are paid out of the proceeds of new notes made by the mortgagor and indorsed by the mortgagees for that purpose, the mortgage is not discharged by payment of the original notes, but continues in force as a security for the mortgagees for the amount of the new notes, and in such a case it is proper to show that the payment of the original notes with the proceeds of

32. Okl.—Arkansas Fuel Oil Co. v. McDowell, 249 P. 717, 119 Okl. 77. 11 C.J. p 678 note 91, p 679 note 5.

Drilling well to specified depth

Where a mortgage on drilling equipment is conditioned on the drilling of an oil well to a prescribed depth, the mortgage is fully satisfied by the act of drilling to the agreed depth.—Arkansas Fuel Oil Co. v. McDowell, *supra*.

33. Me.—Butler v. Tufts, 13 Me. 302.

34. N.Y.—Macy v. Kotta, 299 N.Y. S. 478, 252 App.Div. 435.

Reduction of principal of realty mortgage

Where a chattel mortgage given as additional security provided for payment of six thousand dollars in yearly installments, to be applied on realty mortgage, which contained insurance clause, and that, when principal of realty mortgage had been

reduced to fifteen thousand five hundred dollars, chattel mortgage should be discharged, reduction of realty mortgage to fifteen thousand five hundred dollars by application thereon of fire insurance money did not operate to discharge chattel mortgage.—Macy v. Kotta, *supra*.

35. Mich.—Crawford v. Vinton, 62 N.W. 988, 102 Mich. 83.

36. Me.—James B. Drake & Sons v. Nickerson, 121 A. 86, 123 Me. 11.

37. Minn.—Ludlum v. Rothschild, 43 N.W. 137, 41 Minn. 218.

38. Minn.—Gage v. G. W. Van Dusen & Co., 194 N.W. 769, 156 Minn. 332.

39. Cal.—Miller v. Salomon, 281 P. 89, 100 Cal.App. 756.

40. Minn.—Harrington v. Samples, 30 N.W. 671, 36 Minn. 200. 11 C.J. p 678 note 95.

41. N.C.—Knight v. Rountree, 6 S.E. 762, 99 N.C. 389.

11 C.J. p 678 note 96.

Payment partially with funds furnished by sureties

Trust deeds securing sureties against loss on a forthcoming bond and requiring the trustee to sell the property on request if they were required to pay off the bond or a part thereof, were not discharged by the principal's payment of the amount thereof, where part of the amount paid was actually furnished by the principal by the sureties.—Fleming v. Branham, 139 S.E. 267, 1 Va. 510.

42. Iowa.—Packard v. Kingman, Iowa 219.

Mass.—Bryant v. Pollard, 10 All 81.—Davis v. Maynard, 9 Mass. 242.

43. Me.—Paul v. Hayford, 22 Me. 234.

44. Me.—Sumner v. Bachelder, Me. 35.

the new notes was not designed to extinguish the mortgage.⁴⁵

§ 336. Tender

- a. In general
- b. Form and sufficiency in general
- c. Time of making
- d. By whom and to whom made.
- e. Keeping tender good

a. In General

The lien of the mortgage may be discharged by a proper tender of payment.

Although the debt secured by a mortgage continues in existence until paid, notwithstanding a tender of such debt and refusal thereof by the mortgagee or person authorized to recover the same,⁴⁶ the mortgage lien will be discharged by a proper tender of payment.⁴⁷ Tender ipso facto puts an end to the interest of the mortgagee, and restores the sole right of possession to the mortgagor,⁴⁸ and a mortgagee who refuses to restore the property on proper tender is liable for conversion.⁴⁹

Destruction after tender. The loss falls on the mortgagee who has refused to return the mortgaged chattels after a tender of the amount due, in case the chattels are destroyed.⁵⁰

b. Form and Sufficiency in General

The tender must be in good faith, unconditional, in

compliance with the mortgage, and for the proper amount.

In order that a tender may operate to discharge the mortgage lien, it must clearly appear that it was fairly made and deliberately and intentionally refused;⁵¹ that it was made unconditionally,⁵² in compliance with the conditions of the mortgage,⁵³ and in good faith, with ability on the part of the person making it to comply therewith.⁵⁴ An offer in writing to pay the amount due has been held to be a sufficient tender.⁵⁵ The source from which the tendered money comes is immaterial so long as the mortgagee could have obtained payment by accepting the tender.⁵⁶ However, tender of the notes of a third person in satisfaction of the mortgage debt does not constitute a satisfaction of the mortgage, although the mortgagee had agreed to accept them previous to the making of the tender.⁵⁷ Likewise, a mortgagor's proposal to turn over to the mortgagee the unindorsed check of a purchaser of the mortgaged property does not constitute a tender of the amount of money named in the check.⁵⁸

A levy on the property by the mortgagee has been held to be a recognition of the validity of a prior tender by the mortgagor of the amount due on the mortgage debt.⁵⁹

Amount. The full and exact amount due according to the terms of the mortgage must be tendered,⁶⁰ including, if the mortgage so provides, the cost

45. Conn.—Pond v. Clarke, 14 Conn. 334.

N.Y.—Chapman v. Jenkins, 31 Barb. 164.

11 C.J. p 679 note 1.

46. Wash.—Thomas v. Seattle Brewing, etc., Co., 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N.S., 1164, 15 Ann.Cas. 494.

11 C.J. p 679 note 4.

47. Idaho.—Schleiff v. McDonald, 264 P. 866, 867, 45 Idaho 620, citing *Corpus Juris*.

Mich.—Avery v. Midwest Commercial Credit Co., 236 N.W. 798, 254 Mich. 324.

Tex.—Meyer & Kiser v. French, Com. App., 288 S.W. 405, reversing French v. Meyer & Kiser, Civ.App., 277 S.W. 1114—Texas Auto Co. v. Clark, Civ.App., 12 S.W.2d 655—Florence v. Warren, Civ.App., 293 S.W. 226.

11 C.J. p 679 note 5.

48. Cal.—Moscovitz v. Le Francois, 8 P.2d 1049, 1051, citing *Corpus Juris*.

Me.—Williams v. Dunn, 115 A. 276, 126 Me. 506.

49. Mass.—Bacon v. Hooker, 54 N.E. 253, 173 Mass. 554.

11 C.J. p 679 note 6.

50. Ala.—Goodman v. Pledger, 14 Ala. 114.

51. Mich.—Schmittiel v. Moore, 79 N.W. 195, 120 Mich. 199.

Wash.—Thomas v. Seattle Brewing, etc., Co., 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N.S., 1164, 15 Ann.Cas. 494.

52. S.C.—McNeal v. Herring, 152 S.E. 189, 155 S.C. 187.

11 C.J. p 679 note 12.

Tender not effective

Where mortgagor had delivered property, in violation of mortgage, to broker, who had acted as agent for mortgagee and assignee of mortgage, tender of payment of amount due on condition that property be returned was not effective tender, in absence of right of mortgagor to impose such a condition.—Kruger v. Vernon, 238 P. 1062, 73 Cal.App. 476.

53. Minn.—Coffin v. Reynolds, 21 Minn. 456.

11 C.J. p 679 note 13.

54. Cal.—Horan v. Harrington, 62 P. 400, 130 Cal. 142.

Mich.—Potts v. Plaisted, 30 Mich. 149.

11 C.J. p 679 note 14.

55. Or.—Bartell v. Lope, 6 Or. 326.

56. Mich.—Eslow v. Mitchell, 26 Mich. 500.

57. Miss.—Coleman v. Low, 18 So. 227.

58. Kan.—Morrison v. Montgomery, 168 P. 674, 101 Kan. 670.

59. Mich.—Daugherty v. Byles, 1 N.W. 919, 41 Mich. 61.

60. Wis.—Friedman v. Wisconsin Acceptance Corporation, 210 N.W. 831, 192 Wis. 58, 53 A.L.R. 758.

11 C.J. p 679 note 19.

Tender insufficient

A tender of the amount due on a particular note is insufficient where the mortgage also secures the amount due on a note previously executed.—Martin v. Covington, Tex. Civ.App., 21 S.W.2d 363, error dismissed.

Tender sufficient

Tender of the amount due on two mortgages was held to be sufficient to discharge the liens of both of them.—Union Bank & Trust Co. v. Wleck, 29 P.2d 384, 96 Mont. 132.

Amount due on unsecured debt

Mortgagee cannot make acceptance of payment by subsequent purchaser of mortgaged crop conditional on payment of mortgagor's unsecured

of insurance,⁶¹ and interest,⁶² although if the debt secured bears usurious interest, a tender of the principal, without interest, will be good.⁶³ If the mortgage has been assigned to a third person who holds the same for the amount that he has paid with interest, a tender of that amount will extinguish the mortgage lien and give the mortgagor right of possession.⁶⁴

Where the tender is made after proceedings have been commenced to enforce the mortgage, it must include reasonable and necessary costs and expenses,⁶⁵ including an attorney's fee, if that is stipulated for in the mortgage.⁶⁶ So, costs and expenses must be included in a tender made after the holder of the mortgage has taken possession of the property under an insecurity clause,⁶⁷ and in case the mortgagee seizes the property under such a clause before the debt is due, a tender of the principal with interest to date, and accrued costs, will discharge the mortgage lien, and interest need not be paid to the date of maturity.⁶⁸

It has been held that, where a tender is made, the holder of the mortgage must have a reasonable opportunity to look over the mortgage and accompanying papers to calculate and ascertain the amount due; and if such papers are not present he must be allowed a reasonable time to get them and make the calculation; he cannot be bound at the hazard of losing his entire debt to carry at all times in his head the precise amount due on any particular day.⁶⁹

Waiver or prevention of tender. A mortgagee may waive a legal tender of the amount due,⁷⁰ as where he prevents an actual and formal tender by refusal to accept it, and by asserting that a larger amount is due.⁷¹ So, a mortgagee cannot insist that a tender should have been made where his agent

by false statements misled the mortgagor into failing to make a tender,⁷² and the mortgagee may waive a legal tender of the amount due him by rendering an incorrect account, coupled with the statement that unless it is paid he will accept nothing; but if he honestly believes the account he renders is correct, and insists on payment of it in that belief, and if that belief, although erroneous, is based on reasonable grounds the refusal of a tender of the amount actually due will not discharge the mortgage lien.⁷³ Under some statutes the person to whom a tender is made must at the time specify any objection he may have to the money, instrument, or property, or he is deemed to have waived it.⁷⁴

Tender by second mortgagee. Where a first mortgagee has replevied property from a second mortgagee after the latter's refusal to deliver on demand, the second mortgagee must add the costs incurred in the replevin suit to the amount he must tender to release the lien of the first mortgage;⁷⁵ but the second mortgagee need only tender the prescribed statutory costs, even though the mortgage contains a stipulation entitling the mortgagee to more extensive costs.⁷⁶

c. Time of Making

In the absence of statute, an effective tender may be made on the day the mortgage is due, or, if the mortgagee has obtained or is seeking to obtain possession, it may be made before maturity; but an effective tender cannot be made after default, unless the mortgagor is in possession of the property.

A mortgage is discharged by a tender of the amount secured thereby on the day the mortgage is due,⁷⁷ and a mortgagee who refuses to accept such a tender is liable in trover for not restoring the goods, as is shown above in §§ 219, 220. If the time of payment is extended on a valid consideration, a tender made within the time as extended is

debt also.—*Barton v. Lary*, Tex.Civ. App., 283 S.W. 920.

61. Wis.—*Friedman v. Wisconsin Acceptance Corporation*, 210 N.W. 831, 192 Wis. 58, 53 A.L.R. 758.

62. S.C.—*National Cash Register Co. v. Johnson*, 125 S.E. 292, 130 S.C. 296.
11 C.J. p 680 note 20.

63. Ala.—*Shiver v. Johnston*, 62 Ala. 37.
Md.—*Lucas v. Latour*, 6 Harr. & J. 100.

64. Mich.—*Stewart v. Brown*, 12 N. W. 499, 48 Mich. 383.

65. S.C.—*National Cash Register Co. v. Johnson*, 125 S.E. 292, 130 S.C. 296.
11 C.J. p 680 note 24.

66. Minn.—*Reisan v. Mott*, 43 N.W. 691, 42 Minn. 49, 18 Am.S.R. 489.
11 C.J. p 680 note 26.

67. Mich.—*Shattuck v. Cole*, 52 N. W. 69, 91 Mich. 580.

Tender insufficient

A tender before the debt was due after the mortgagee had seized the property to prevent its removal from the state, was held to be insufficient where it did not include the expenses of seizing the property.—*Hill v. Winnsboro Granite Corporation*, 99 S.E. 836, 112 S.C. 243.

68. Mich.—*Shattuck v. Cole*, 52 N. W. 69, 91 Mich. 580.

69. Mich.—*Potts v. Plaisted*, 30 Mich. 149.

70. S.C.—*Lee v. Hill*, 75 S.E. 273, 92 S.C. 114.

71. Mass.—*Schayer v. Commonwealth Loan Co.*, 39 N.E. 1110, 163 Mass. 322.
11 C.J. p 680 note 29.

72. Mich.—*Avery v. Midwest Commercial Credit Co.*, 236 N.W. 798, 254 Mich. 324.

73. S.C.—*Lee v. Hill*, 75 S.E. 273, 92 S.C. 114.

74. Cal.—*Prentice v. Zumwalt*, 13 P. 2d 379, 124 Cal.App. 646.

75. Minn.—*Benson Bank v. Hove*, 47 N.W. 449, 45 Minn. 40.
11 C.J. p 680 note 31.

76. S.D.—*De Luce v. Root*, 80 N.W. 181, 12 S.D. 141.

77. Wash.—*Thomas v. Seattle Brewing, etc., Co.*, 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N. S., 1164, 15 Ann.Cas. 494.
11 C.J. p 680 note 33.

sufficient.⁷⁸ A tender made before the mortgage is due, and when the mortgagee is about to take possession of the property,⁷⁹ or has already taken possession thereof,⁸⁰ in accordance with a stipulation in the mortgage, will discharge the mortgage lien and reinvest the mortgagor with title to the property.

After default. In the absence of statutory provisions to the contrary,⁸¹ the general rule is that a mere tender of the debt after breach of the condition does not operate as a discharge of the mortgage, so as to divest the legal title of a mortgagee in possession of the property, and if the mortgagee does not accept the tender the mortgagor's only remedy is an equitable action to redeem,⁸² the only effect of the tender at that time being to stop the running of interest and to protect from costs so long as it is kept good.⁸³ So, the right of the mortgagee to maintain a replevin action for possession of the property for foreclosure purposes is not affected by a tender made after the service of the replevin writ.⁸⁴ However, where the mortgagor is in possession,⁸⁵ and no demand for possession has been made by the mortgagee,⁸⁶ a tender of the amount due will discharge the mortgage lien, although made after default in the condition of the mortgage. In some jurisdictions where mortgages have been converted into mere liens, a tender of the debt after default, but before foreclosure and sale, has been held to have the same effect as a tender on the law day at common law, and releases the lien of the mortgage.⁸⁷

d. By Whom and to Whom Made

Tender may be made by a purchaser of the property, an agent of the mortgagor, or a junior mortgagee. It

may be made to a joint mortgagee, an assignee of the mortgage, an agent of the mortgagee, or to constable serving a writ.

A tender may be made by one who has purchased the property from the mortgagor, and, if it meets the requirements of a valid tender,⁸⁸ and the rights of the person making the tender are made known to the mortgagee,⁸⁹ the mortgage lien will be discharged. Likewise, an unconditional tender by a purchaser at an execution sale of the mortgagor's title and interest of the entire debt secured by the mortgage, the debt being due and the tender being kept good, divests the lien of the mortgage and entitles the purchaser to the possession of the property.⁹⁰ Also, a duly authorized agent of the mortgagor may make a tender,⁹¹ but the mortgagee must in such case have a reasonable opportunity to ascertain the agent's authority.⁹² While tender may be made by a junior mortgagee,⁹³ a tender by him, if accompanied by a demand for an assignment of the mortgage, does not extinguish the mortgage lien.⁹⁴

Tender may be made to one of several joint mortgagees,⁹⁵ or to an assignee of the mortgage.⁹⁶ Tender may also be made to an agent of the mortgagee if he is authorized to receive payment of the mortgage debt,⁹⁷ and a subagent who is instructed to take possession of the property has authority to accept a tender of the amount due.⁹⁸ In a proceeding instituted in justice's court, a tender to the constable serving the writ is sufficient.⁹⁹

e. Keeping Tender Good

A tender need not be renewed and may be kept good by paying the money into court.

78. Ill.—Pierce v. Hasbrouck, 49 Ill. 23.

Mich.—Baxter v. Spencer, 33 Mich. 325.

79. Mo.—Johnson v. Simmons, 61 Mo.App. 395.

Wis.—Rice v. Kahn, 35 N.W. 465, 70 Wis. 323.

80. Mich.—Shattuck v. Cole, 52 N. W. 69, 91 Mich. 580.

Wis.—Rice v. Kahn, 35 N.W. 465, 70 Wis. 323—Harder v. Hosp, 34 N. W. 145, 69 Wis. 288.

81. Mass.—Weeks v. Baker, 24 N.E. 905, 152 Mass. 20.

S.C.—Lowery v. Gregory, 38 S.E. 257, 60 S.C. 149.

82. Neb.—Tompkins v. Batie, 7 N. W. 747, 11 Neb. 147, 38 Am.R. 361.

Wis.—Smith v. Phillips, 2 N.W. 285, 47 Wis. 202.

11 C.J. p 681 notes 40, 41.

83. U.S.—Mitchell v. Roberts, C.C. Ark., 17 F. 776, 5 McCrary 425.

84. Okl.—Secrest v. Wood, 224 P. 349, 98 Okl. 60.

85. Neb.—Knox v. Williams, 39 N. W. 786, 24 Neb. 630, 8 Am.S.R. 220.

11 C.J. p 681 note 43.

86. Ala.—Maxwell v. Moore, 10 So. 444, 95 Ala. 166, 36 Am.S.R. 190.

11 C.J. p 681 note 44.

87. Wash.—Thomas v. Seattle Brewing, etc., Co., 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N. S., 1164, 15 Ann.Cas. 1194.

11 C.J. p 681 note 45.

88. Iowa.—Sheeler v. Porter Hardware Co., 142 N.W. 1019, 162 Iowa 6.

11 C.J. p 681 note 48.

89. Wash.—Thomas v. Seattle Brewing, etc., Co., 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N.S., 1164, 15 Ann.Cas. 494.

90. Neb.—Gould v. Armagost, 65 N. W. 1064, 46 Neb. 897.

91. Mass.—Schayer v. Common-

wealth Loan Co., 39 N.E. 1110, 163 Mass. 322.

92. Mich.—Eslow v. Mitchell, 26 Mich. 500.

93. S.D.—De Luce v. Root, 80 N.W. 181, 12 S.D. 141.

11 C.J. p 681 note 51.

94. Mich.—Schmittziel v. Moore, 79 N.W. 195, 120 Mich. 199.

11 C.J. p 681 note 52.

95. Minn.—Flanigan v. Seelye, 55 N. W. 115, 53 Minn. 23.

96. Mo.—Hase v. Schotte, 84 S.W. 1014, 109 Mo.App. 458.

11 C.J. p 681 note 57.

97. Mass.—Bacon v. Hooker, 54 N.E. 253, 173 Mass. 554.

Tex.—Texas Auto Co. v. Clark, Civ. App., 12 S.W.2d 655.

98. Mich.—Wienskawski v. Wisner, 72 N.W. 177, 114 Mich. 271.

99. Mo.—Owens v. Kellum Coffee, etc., Co., 144 S.W. 1113, 162 Mo. App. 667.

Where a tender has once been made and refused, it is unnecessary, as a rule, to renew it, and especially is this true where there is no indication that the refusal has been withdrawn or that a tender would be accepted; a payment into court is all that is required in order to keep the tender good.¹ In fact, while there is authority to the contrary,² according to same authorities it is not even necessary to bring the money into court, in order to keep the tender good, where it was made before a breach in the condition.³ However, if the tender is not made until after the maturity of the mortgage debt, the general rule, at least in most of the jurisdictions in which the mortgage vests title to the property in the mortgagee, is that the tender must be kept good by bringing the money into court.⁴ On the other hand, in those jurisdictions in which a mortgage does not vest title in the mortgagee, but only creates a lien in his favor, it is held that, when a mortgagor makes an unconditional tender, even after default, the lien of the mortgage is discharged whether the tender is kept good and the money paid into court or not;⁵ and this rule also obtains in some jurisdictions in which the legal title to mortgaged chattels is regarded as vesting in the mortgagee.⁶

It has been held that, where a mortgagee refuses to accept certain property from the debtor in full satisfaction of the indebtedness on the mortgagor's tender, in accordance with his agreement, the debt is not thereby satisfied and the lien discharged, if the mortgagor does not make a further and continuous tender of the property.⁷

Where the effect of a tender is the extinguishment of the mortgagee's rights, it is not essential

that the tender be kept good.⁸ Where, however, it is necessary for the tender to be kept good, this may be done by retaining the money which has been offered to the mortgagee, subject to his order, for the avowed purpose of paying off the mortgage debt and paying it into court at the trial.⁹ It has been indicated that a payment into court, in order to keep the tender good, must be unconditional.¹⁰

Under a statute authorizing the mortgagor to bring replevin if the property is not restored forthwith on payment or tender, it has been held that the money due on the mortgage need not be brought into court.¹¹

§ 337. — Right of Mortgagor to Possession of Mortgage and Note on Tender of Payment

The mortgagor is entitled to possession of the mortgage and note on a valid tender of payment.

The mortgagor has a right, on tender of the amount due, to demand a surrender of the mortgage and the note secured thereby.¹²

§ 338. Change in Form of Debt or Terms of Payment

Generally, a mortgage is not terminated by a change in the form of the debt or terms of payment.

Since a mortgage is regarded as security for the debt and not merely the instrument evidencing the debt, while the original debt remains, the mortgage is not defeated by a change in the form of the debt or in the evidence thereof, but continues as security for the debt in its new form.¹³ Accordingly, a change from a simple contract debt to a personal

1. Ind.—Doering v. Schneider, 128 N.E. 936, 74 Ind.App. 294.

2. Ala.—Hamaker v. Bynum, 34 So. 405, 137 Ala. 391.—Frank v. Pickens, 69 Ala. 369.

3. Neb.—Tompkins v. Batie, 7 N.W. 747, 11 Neb. 147, 38 Am.R. 361. 11 C.J. p 682 note 63.

4. Okl.—Smith-Wogan Hardware, etc., Co. v. Bice, 125 P. 456, 34 Okl. 294, 296, Ann.Cas.1914C 274. 11 C.J. p 682 note 64.

5. Wash.—Thomas v. Seattle Brewing, etc., Co., 94 P. 116, 48 Wash. 560, 125 Am.S.R. 945, 15 L.R.A., N.S., 1164, 15 Ann.Cas. 494.

6. Minn.—Moore v. Norman, 45 N.W. 857, 43 Minn. 428, 433, 19 Am.S.R. 247, 9 L.R.A. 55.

7. Ga.—Messenger Pub. Co. v. Overstreet, 137 S.E. 125, 36 Ga. App. 458.

8. Me.—James B. Drake & Son v. Nickerson, 121 A. 86, 88, 123 Me. 11, citing *Corpus Juris*.

9. Wis.—Rice v. Kahn, 35 N.W. 465, 70 Wis. 323.

10. S.C.—McNeal v. Herring, 152 S.E. 189, 155 S.C. 187.

11. Mass.—Weeks v. Baker, 24 N.E. 905, 152 Mass. 20, explaining Roberts v. White, 15 N.E. 568, 146 Mass. 256.

12. S.C.—Spears v. Fields, 52 S.E. 44, 72 S.C. 395. 11 C.J. p 682 note 70.

13. Idaho.—Gunnell v. Largilliere Co., Bankers, 269 P. 412, 414, 46 Idaho 551, quoting *Corpus Juris*. Minn.—Farmers' & Merchants' State Bank of West Concord v. Nummedahl, 207 N.W. 313, 166 Minn. 144. 11 C.J. p 682 note 72.

Acceptance and transfer of notes

Where goods were sold under a conditional contract, declared by statute to be a mortgage, seller did not waive his lien by taking notes in evidence of the goods sold, nor did

he impair his right to a lien by a transfer of notes, given in evidence of the goods sold, to a bank as collateral, and thereafter reacquiring the same, since the transfer of the notes in both cases carried with it such rights in the mortgage as the owner of the notes had.—Moore-Hustead Co. v. Joseph W. Moon Buggy Co., Tex.Civ.App., 221 S.W. 1032.

Acceptance of recognizance in lieu of note

The surrender of a mortgage note and the acceptance of a recognizance in lieu thereof does not discharge the mortgage.—Thurber v. Jewett, 3 Mich. 295.

In assignment of lease for which mortgage is security

Lessee's assignment of lease subject to consent of lessors, on which assignment lessors indorsed their consent on condition of assignee's agreement to pay rental called for by lease as modified, to be bound by terms and conditions thereof, that

judgment against the mortgagor will not have that effect, so long as the judgment remains unsatisfied,¹⁴ unless the circumstances are such as to show an intention of the parties to substitute the judgment for the mortgage security.¹⁵ A fortiori the mere commencement of suit on the mortgage note will not operate to discharge it,¹⁶ and as against one who has converted part of the property the lien of the mortgage is not lost by seeking judgment on the debt and obtaining a foreclosure resulting in a deficiency judgment against the mortgagor.¹⁷

An extension of time of payment on the note secured,¹⁸ or the release of a surety thereon,¹⁹ does not amount to a waiver or termination of the mort-

gage lien.

A junior mortgagee does not acquire any vested right in the contract between the mortgagor and a prior mortgagee so as to preclude them from making changes therein.²⁰

§ 339. — Giving New or Renewal Note

A mortgage is not terminated by the giving of a new or renewal note, unless the parties so intend.

The giving of a new note in renewal of, or in substitution for, that originally given as evidence of the mortgage debt does not of itself discharge the mortgage,²¹ even though the renewal note is for a slightly increased amount,²² and it is immaterial

term of lease should be extended for certain period, that rental should be reduced in specified sum, that assignee should carry elevator insurance, and that assignee, as purchaser of personality in premises, should take them subject to mortgage securing lease was not in legal effect a new lease such as to extinguish old lease and discharge chattel mortgage securing it.—Gordon v. Pfeiffer, 274 P. 578, 96 Cal.App. 607.

Surety's note and mortgage not superseded

Where A signs a note as surety for B, payable to C, and gives a mortgage to secure the note on which he is surety, and B also gives a mortgage to secure the note, and before the maturity of the note A and B enter into a written contract with C that B is to sell all his cattle to D at a given price, payment for the same to be applied on the note, and A agrees that, if the money received is insufficient, he will give his individual note due in six months and secured by mortgage, and B's cattle are sold and the money so applied, and there remains a deficiency on A's refusal to carry out the subsequent contract, it was held that such contract did not supersede and cancel the original note and mortgage, and that C had a right to foreclose.—Dunn v. Hite, 195 P. 1078, 27 N.M. 53.

14. U.S.—American Trust Co. v. W. S. Doig, Inc., C.C.A.Va., 28 F.2d 898.

Ala.—Logan v. Smith Bros. & Co., 63 So. 766, 9 Ala.App. 459, certiorari denied Ex parte Logan, 64 So. 570, 185 Ala. 525.

Ill.—Beckman v. Alberts, 178 N.E. 387, 346 Ill. 74.

11 C.J. p 683 note 80.

15. N.Y.—Butler v. Miller, 1 Den. 407.

16. Or.—Weatherly v. Hochfeld, 286 P. 538, 133 Or. 136.

11 C.J. p 683 note 82.

Contra statement explained

(1) It has been said that "when

one brings an action at law upon the note, he is deemed to have waived the mortgage."—Hawkins v. Fuller, 240 P. 549, 550, 116 Or. 433.

(2) In a case which followed the rule advanced in the text, the court in considering the above language said: "The conclusion reached in that case was undoubtedly sound, but such statement cannot be followed as a hard and fast rule, for to do so would be in direct violation of Or. L. § 429. Certainly the mere commencement of such an action does not constitute a waiver of security.—Weatherly v. Hochfeld, 286 P. 538, 133 Or. 136.

17. Wash.—German-American State Bank v. Seattle Grain Co., 154 P. 443, 89 Wash. 376.

18. Tex.—Mayers v. McNeese, Civ. App., 71 S.W. 68.

Extension of lien

An agreement extending lien of mortgage is valid and binding as to all parties.—Bank of California v. McCoy, Cal.App., 72 P.2d 923.

19. Tex.—Mayers v. McNeese, Civ. App., 71 S.W. 68.

20. Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 85, 45 Ariz. 1, quoting Corpus Juris.

11 C.J. p 683 note 86.

21. U.S.—Hodiamont Bank v. Livingston, C.C.A.Mo., 35 F.2d 18.

Idaho.—Gunnell v. Largilliere Co., Bankers, 269 P. 412, 46 Idaho 551.

Ind.—Kirkpatrick Grain Co. v. Farmers-Merchants State Bank of Darlington, 200 N.E. 714, 101 Ind.App. 673.

Iowa.—Johnson v. Turnholt, 203 N. W. 715, 199 Iowa 1331—Persinger Garage Co. v. Caminsky, 176 N.W. 794, 188 Iowa 901.

Kan.—Silver Lake State Bank v. George, 181 P. 574, 105 Kan. 129.

Mich.—Stram v. Jackson, 226 N.W. 888, 248 Mich. 171.

Minn.—Munson v. Bensel, 211 N.W. 838, 169 Minn. 434.

Okl.—Drum Standish Commission Co.

v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—First State Bank of Blanchard v. Armstrong, 248 P. 1107, 119 Okl. 98—State v. Lonewolf, 163 P. 532, 63 Okl. 166.

S.D.—Guaranty State Bank, Claremont, v. Russell, 225 N.W. 53, 55 S.D. 91—Hyde County State Bank v. State Bank of Seneca, 198 N.W. 558, 559, 47 S.D. 316, quoting Corpus Juris.

Tenn.—Hamblen Motor Co. v. Miller & Harle, 266 S.W. 99, 150 Tenn. 602.

Tex.—Davenport v. San Antonio Machine & Supply Co., Civ.App., 59 S.W.2d 207, error refused—First State Bank of Saltillo v. Ennis Title Co., Civ.App., 200 S.W. 1122.

Wash.—Tahoma Finance Co. v. Shannon, 244 P. 271, 138 Wash. 90.

11 C.J. p 682 note 73.

Replevin action not barred

A note executed for a balance due on a previous debt or demand is not an extinguishment of a mortgage given to secure the demand, and will not bar replevin for possession of the property described in mortgage after maturity of note.—State v. Lonewolf, 163 P. 532, 63 Okl. 166.

Lien of indemnity mortgage not extinguished

Where maker of note executed a mortgage to protect one who signed the note as surety, and a bank assigned the note to a third person and the surety assigned the mortgage to the same person, and defendant gave such check for the amount of the note and the mortgage was assigned to him, and the surety destroyed the note and the maker of the old note executed the new note to defendant without the surety joining, the lien of the mortgage was not extinguished.—Persinger Garage Co. v. Caminsky, 176 N.W. 794, 188 Iowa 901.

22. Iowa.—Liscomb State Sav. Bank v. Akers, 197 N.W. 890, 197 Iowa 706.

11 C.J. p 683 note 74.

that there is no express agreement of the parties that the mortgage shall continue as security.²³ However, if the parties agree or intend that the new note shall discharge the mortgage lien, it will be given that effect,²⁴ and a subsequent creditor of the mortgagor may obtain a cancellation of the original note and mortgage.²⁵ The burden is on the mortgagor to show such agreement or intention,²⁶ and the intention of the parties is a question for the jury.²⁷

When a new note is given in settlement of a balance due on mutual running accounts, of which a debt secured by a prior mortgage forms only a part, it is a satisfaction, and not a renewal, of the mortgage.²⁸

23. U.S.—Hodiamont Bank v. Livingston, C.C.A.Mo., 35 F.2d 18.

24. La.—Bloomenstiel v. Tridico, App., 156 So. 790.

Okl.—Ambrister v. Dalton, 168 P. 231, 66 Okl. 158.

11 C.J. p 683 note 75.

25. La.—Bloomenstiel v. Tridico, App., 156 So. 790.

After endeavor to purchase

Endeavor on part of holder of note secured by mortgage on maker's automobile to buy from another a note secured by mortgage on same automobile was no recognition that such other note had not been extinguished, and hence holder was entitled to have such note canceled on ground that it was extinguished, where noteholder was not aware that other noteholder had taken over automobile from finance company and resold automobile to maker who executed new note for unpaid balance.—Bloomenstiel v. Tridico, La.App., 156 So. 790.

26. N.C.—Dawson v. Thigpen, 49 S. E. 959, 137 N.C. 462.

11 C.J. p 683 note 76.

27. Mich.—Cadwell v. Pray, 2 N.W. 52, 41 Mich. 307.

Mo.—Caldwell v. Sisson, 131 S.W. 140, 150 Mo.App. 547.

28. Minn.—Christofferson v. Howe, 58 N.W. 830, 57 Minn. 67.

29. Cal.—Pacific Nat. Agricultural Credit Corporation v. Wilbur, 42 P.2d 314, 320, quoting *Corpus Juris*.

11 C.J. p 683 note 88.

30. Ala.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340.

Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 45 Ariz. 1.

Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 320, 2 Cal.2d 576, quoting *Corpus Juris*—Schwartzler v. Lemas, App., 73 P.2d 280—Bank of California v. McCoy, App., 72 P.2d 923.

Ind.—Kirkpatrick Grain Co. v. Farm-

ers-Merchants State Bank of Darlington, 200 N.E. 714, 101 Ind.App. 673.

Kan.—Rath v. Ponsor, 219 P. 285, 286, 114 Kan. 370, citing *Corpus Juris*. Minn.—Carity Motors v. Eichten, 249 N.W. 190, 189 Minn. 310.

N.C.—Bank of Duplin, Rose Hill Branch, v. Hall, 166 S.E. 526, 203 N.C. 570.

Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400.

Tex.—Davenport v. San Antonio Machine & Supply Co., Civ.App., 59 S.W.2d 207, error refused—Cameron v. Carson, Civ.App., 249 S.W. 526, 527, citing *Corpus Juris*.

Va.—Fleming v. Branham, 139 S.E. 267, 148 Va. 510.

Wyo.—Megown v. Fuller, 266 P. 124, 38 Wyo. 211, rehearing denied 268 P. 189, 38 Wyo. 211.

11 C.J. p 683 note 89.

Renewal of mortgage and note

Where mortgage indebtedness is extended by giving of renewal note and mortgage and surrender of original note, the debt and lien are substance of transaction, notes and mortgages being in themselves merely evidence of agreement between parties. Accordingly, under a statute prescribing how lien of chattel mortgage may be discharged, execution and delivery of renewal note and mortgage on same property accompanied by return to mortgagor of original note and duplicate of original mortgage marked paid does not discharge lien of original mortgage which had not been otherwise satisfied or released of record in compliance with statute.—Walker v. Farmers' Bank of Kendrick, 238 P. 968, 41 Idaho 279.

Renewal of bill of sale and note

Holder of original bill of sale given to secure specified debt and future advances did not relinquish lien as to indebtedness subsequently created by taking renewal note and new bill

§ 340. Giving New or Additional Security

A mortgage is not ordinarily terminated by the giving of new or additional security, unless the parties so intend.

The validity of a chattel mortgage is not affected by the fact that the mortgagee holds independent collateral security,²⁹ and the taking of new or additional security to secure the same debt and covering the same property as a prior chattel mortgage does not, of itself, and in the absence of an agreement or understanding to that effect, operate to release or discharge the prior mortgage,³⁰ or to destroy the priority obtained by virtue of the original mortgage.³¹ The same rule has been held to apply where the second mortgage is for an increased amount,³² or where it secures an additional claim,³³

of sale.—Albany Loan & Finance Co. v. Tift, 160 S.E. 661, 43 Ga.App. 789.

Mortgage securing accommodation indorsers not released

Where accommodation indorsers protected by chattel mortgage gave individual notes and took delivery of accommodation notes, there was no relinquishment of mortgage security.—Patrisco v. Nolan's Point Amusement Co., 159 A. 620, 10 N.J. Misc. 397.

Rights of purchaser not impaired

A second chattel mortgage executed to renew note secured by first mortgage did not create new obligation, but merely perpetuated existing lien, and so did not impair rights of purchaser who took title to one-half interest in property subject to lien of first mortgage, notwithstanding that mortgagee had knowledge of purchase when second mortgage was executed.—Schwartzler v. Lemas, Cal.App., 73 P.2d 280.

31. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 320, 2 Cal.2d 576, quoting *Corpus Juris*.

11 C.J. p 684 note 90.

32. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, supra.

11 C.J. p 684 note 91.

Depends on intention of parties

Whether the giving of a second chattel mortgage for an increased amount was accompanied by such a settlement of the previously existing indebtedness as to constitute payment thereof, and discharge the first, was held to be a question of fact, to be determined in the light of all the circumstances surrounding the transactions and showing the intention of the parties.—In re Drag, D. C.Mich., 254 F. 474.

33. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 320, 2 Cal.2d 576, quoting *Corpus Juris*.

Kan.—Rath v. Ponsor, 219 P. 285;

or reduces the interest rate,³⁴ or covers additional property³⁵ or property owned by another person;³⁶ and property which is omitted from the new mortgage is not released from a prior mortgage given to secure the same debt, in the absence of an understanding that it shall have that effect.³⁷ However, a mortgage has been held to be discharged by the giving of a new mortgage on the same property where there was a change in the person of the mortgagor without the consent of the original mortgagor,³⁸ or a change in the person of the mortgagee.³⁹ So, also, the giving of a new note and mortgage will operate as a discharge of the old security where such is the agreement or understanding of the parties,⁴⁰ and the same rule applies where the new security is a real estate mortgage,⁴¹ or a pledge of a part of the mortgaged property,⁴² instead of a chattel mortgage. However, where an instrument constituting a pledge of personal property is given in lieu of the chattel mortgage, it will not, in the absence of the delivery of the articles pledged, release the chattel mortgage where the statute provides that no pledge is valid without delivery of the property to the pledgee.⁴³

In some jurisdictions it has been held that a second mortgage for the same debt does not extinguish the first mortgage in the absence of an express release, or at least a release implied from the terms

of the mortgage, such as a covenant not to sue.⁴⁴

Whether or not a new mortgage is taken with intent to discharge the old one is a question of fact for the jury,⁴⁵ the burden of proof being on the party asserting that such was the agreement or intent;⁴⁶ and it has been held that the giving of a new note and mortgage and the surrendering of the old makes a prima facie case.⁴⁷ The presumption is that the original note and mortgage are discharged when they have been surrendered and released and replaced by a new note and mortgage on the same property.⁴⁸ The mortgagor may testify as to his intention in giving the new mortgage and note.⁴⁹

§ 341. Resort to, or Release of, Other Security or Remedy

A mortgage is ordinarily terminated where the mortgagee realizes the amount due thereon by resorting to other security.

Where a mortgagee realizes on collateral security and applies to his own use a sufficient amount of the sum thus received to pay the mortgage, the mortgage is discharged.⁵⁰ Where an entire debt is secured by a mortgage on real estate and a part of it by a chattel mortgage, the chattel mortgage is discharged when the decree of foreclosure of the real estate mortgage becomes absolute;⁵¹ but a purchase by the mortgagee at a sale on foreclosure of

286, 114 Kan. 370, citing **Corpus Juris**.

11 C.J. p 684 note 92.

34. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, 42 P.2d 314, 320, 2 Cal.2d 576, quoting **Corpus Juris**.

35. Cal.—Pacific Nat. Agr. Credit Corporation v. Wilbur, *supra*.

Kan.—Rath v. Ponsor, 219 P. 285, 286, 114 Kan. 370, citing **Corpus Juris**.

11 C.J. p 684 note 93.

Additional cattle covered

Where bank took a mortgage on twenty-one head of cattle, and more than five months later took a new mortgage on sixty head under circumstances indicating it was a renewal, it was held that, in the absence of evidence tending to show bank intended to release its lien on the twenty-one cattle, the jury could infer that the bank did not so intend, but intended to include them in the sixty head.—Kibble v. Ragland, Mo.App., 263 S.W. 507.

36. Miss.—Dean v. Boyd, 38 So. 297, 86 Miss. 204.

37. Tex.—Cameron v. Carson, Civ. App., 249 S.W. 526, 527, quoting **Corpus Juris**.

11 C.J. p 684 note 95.

38. Kan.—Woodman v. Hunter, 36 P. 713, 53 Kan. 393.

39. Colo.—Herr v. Denver Milling, etc., Co., 22 P. 770, 13 Colo. 406, 6 L.R.A. 641.

40. Ariz.—Buerger Bros. Supply Co. v. El Rey Furniture Co., 40 P.2d 81, 45 Ariz. 1.
11 C.J. p 684 note 98.

Discharge of former mortgage intended

A mortgage was held under the evidence to have been entered into as a new and independent transaction with the intent to extinguish a previous mortgage.—Holmes v. Ellis, 225 P. 538, 99 Okl. 27.

Note and mortgage extinguished

Where mortgagee sold mortgagor's automobile and note to another who resold automobile to mortgagor who executed new note and mortgage for balance due on first note plus carrying charges, the first note and mortgage were held to have been extinguished.—Bloomenstiel v. Tridico, La.App., 156 So. 790.

41. Neb.—First Nat. Bank v. Guenther, 252 N.W. 395, 125 Neb. 807.
11 C.J. p 684 note 99.

42. Ga.—Farkas v. Albany Third Nat. Bank, 66 S.E. 926, 133 Ga. 755, 26 L.R.A., N.S., 496.
11 C.J. p 684 note 1.

43. Cal.—Irwin v. McDowell, 34 P. 708, 4 Cal.Unrep.Cas. 329.

44. Ga.—Carlton Supply Co. v. Battle, 83 S.E. 225, 142 Ga. 605, L.R.A. 1916A 926.

11 C.J. p 685 note 3.

45. Okl.—Ambrister v. Dalton, 168 P. 231, 66 Okl. 153.
11 C.J. p 685 note 4.

46. Tex.—Cameron v. Carson, Civ. App., 249 S.W. 526, 527, quoting **Corpus Juris**.
11 C.J. p 685 note 5.

47. Mass.—Tracy v. Lincoln, 14 N.E. 122, 145 Mass. 357.
Mich.—Brown v. Dunckel, 8 N.W. 537, 46 Mich. 29.
11 C.J. p 685 note 6.

48. Okl.—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400—Ambrister v. Dalton, 168 P. 231, 66 Okl. 153.

49. Tex.—Mayers v. McNeese, Civ. App., 71 S.W. 68.

50. Ala.—Nelson v. Holcomb, 65 So. 773, 187 Ala. 119.
Ind.—Farmsley v. Anderson Fdy., etc., Works, 90 Ind. 120.
11 C.J. p 685 note 9.

51. Vt.—Calkins v. Clement, 54 Vt. 635.

a real estate mortgage will not discharge a chattel mortgage given to secure the same debt.⁵²

Where the senior mortgagee having a mortgage for the same debt on the mortgagor's homestead releases the mortgage on the homestead, such act does not render him liable to a junior mortgagee because other property must be exhausted before a resort could be had to the homestead,⁵³ and the same doctrine has been applied to a mortgage by a partnership covering both firm and individual property.⁵⁴

§ 342. Transfer or Other Disposition of Mortgaged Property

- a. In general
- b. Transfer to mortgagee
- c. Seizure or conversion by mortgagee in general
- d. Seizure under attachment
- e. Seizure under execution

a. In General

While a mortgagee may not lose his lien by turning over legal possession of the property to the mortgagor's administrator, he may lose his lien by transferring title to the mortgagor, and under some statutes his lien on a crop is lost where he consents to or negligently permits its removal.

A mortgagee does not lose his lien because, after having legally obtained possession of the mortgaged chattels, he turns them over to an administrator of

the mortgagor solely for the purpose of saving delay and expense in reducing the property to cash.⁵⁵ However, where a mortgagee having title to the mortgaged chattels transfers title thereto to the mortgagor giving him written evidence of unqualified ownership, he is estopped from thereafter asserting as against a good faith purchaser from the mortgagor that there was no intention to release the property.⁵⁶ Likewise, as is shown above in § 262, a mortgagee ordinarily waives the mortgage lien by consenting to a sale of the property by the mortgagor.

Removal of crops. In the absence of a statute to the contrary, the lien of a crop mortgage does not terminate on the harvesting of the crop, unless the parties in their contract provide otherwise.⁵⁷ Under the statutes in some jurisdictions, the lien of a mortgage on a growing crop is lost by a removal of the crop from the land after severance, with the consent of the mortgagee,⁵⁸ or through his failure to exercise reasonable diligence.⁵⁹ However, under such a statute, it has been held that the lien of the mortgage is not lost when the removal is tortious,⁶⁰ whether removed by the mortgagor⁶¹ or by a third person,⁶² or where the crop is removed by the mortgagee for his better security;⁶³ or where the mortgagor removes it at the request of, and as agent of, the mortgagee with instructions to have the same stored in the latter's name, even though the one receiving the crop under such circumstances

52. Iowa.—Wilhelmi v. Leonard, 13 Iowa 330.

53. Iowa.—Tollerton, etc., Co. v. Anderson, 78 N.W. 822, 108 Iowa 217.

54. Ga.—Keese v. Coleman, 72 Ga. 658.

55. S.D. — Guaranty State Bank, Claremont, v. Russell, 225 N.W. 53, 55 S.D. 92.

56. Minn. — Walker v. Fitzgerald, 196 N.W. 269, 157 Minn. 319, affirmed 197 N.W. 259, 157 Minn. 319.

57. Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

Mont.—Moccasin State Bank v. Waldron, 264 P. 940, 81 Mont. 579.

Neb.—Eigbrett v. State, 196 N.W. 700, 111 Neb. 388.

Arrangement to store grain as mortgagee's was held to evidence taking possession rather than forfeiture or waiver of mortgagee's rights.—Silver v. McDonald, 215 N.W. 844, 172 Minn. 458.

Tortious removal

Lien of crop mortgage continues, although mortgaged crops have been tortiously removed and disposed of.

—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

58. Cal.—I. S. Chapman & Co. v. Ulery, 59 P.2d 602, 15 Cal.App.2d 452—Haber v. J. G. Boswell Co., 20 P.2d 100, 130 Cal.App. 514—Bell v. Central Bank of Imperial Valley, 265 P. 551, 89 Cal.App. 551—Campodonico v. Santa Maria Bean & Grain Co., 260 P. 330, 86 Cal.App. 339—Ramsey v. California Packing Corporation, 201 P. 481, 51 Cal.App. 517.

11 C.J. p 673 note 6.

History of legislation in California as to crop mortgages, considered.—Valley Bank v. Hillside Packing Co., 267 P. 746, 91 Cal.App. 738.

59. Cal.—Valley Bank v. Hillside Packing Co., supra.

60. Cal.—Pacific Fruit Exchange v. F. E. Booth Co., 283 P. 944, 103 Cal.App. 54—Valley Bank v. Hillside Packing Co., 267 P. 746, 91 Cal.App. 738—Campodonico v. Santa Maria Bean & Grain Co., 260 P. 330, 86 Cal.App. 339.

Removal not tortious

A removal is not tortious as to a mortgagee, where the removal is by virtue of the sale of the crop by the

landlord of the mortgagor, pursuant to a provision of the lease, which was also made a part of the crop mortgaged.—Gates v. Tom Quong, 95 P. 662, 3 Cal.App. 443.

61. Cal.—California Packing Corporation v. Stone, 222 P. 193, 64 Cal. App. 488.

11 C.J. p 673 note 7.

Tortious storing of grain

Mortgagee of growing crop of oats did not lose lien thereon by removal of oats from land, where mortgagor agreed to convey threshed grain to named warehouse, and store it there in mortgagee's name, and instead tortiously stored it in his own name, took warehouse receipts, and absconded, and warehouse, having notice of existence of mortgagee's lien, took the crop subject to it.—Campodonico v. Santa Maria Bean & Grain Co., 260 P. 330, 86 Cal.App. 339.

62. Cal.—Pacific Fruit Exchange v. F. E. Booth Co., 283 P. 944, 103 Cal.App. 54.

11 C.J. p 673 note 8.

63. Cal.—Missouri State Life Ins. Co. v. Gillette, 12 P.2d 955, 215 Cal. 709.

11 C.J. p 673 note 9.

erroneously stored it in the name of the mortgagor.⁶⁴ Further, such a statute being for the protection of those who stand in the position of bona fide purchasers, a consignee who makes advances on the crop while still on the land where grown does so with notice, and is not entitled to superiority over the claim of the mortgagee.⁶⁵

Where a creditor of a lessee, who, without knowledge of the lessor, had a mortgage on the lessee's crop, induced the lessee without false representations to remove his grain to the creditor's farm to be threshed and afterward attached it, he was not estopped to deny the continuance of the mortgagor's lien after its removal from the land on which it was grown.⁶⁶

b. Transfer to Mortgagee

A valid transfer of the mortgaged property to the mortgagee may operate to extinguish the mortgage debt when the parties so intend.

A purchase by, and a transfer of the mortgaged property to, the mortgagee absolutely, operates to extinguish the mortgage debt when that is the intention of the parties,⁶⁷ at least where the mortgagor has a legal right to transfer the property in this manner;⁶⁸ but the transaction must be established as fully as any other transfer of property in payment of a debt,⁶⁹ and the burden is on the mortgagee to show that the sale was voluntarily made and that the consideration was fair.⁷⁰ An agreement by a mortgagor to deliver the mortgaged property, or a specified portion thereof, in full payment of the mortgage debt imports a sufficient consideration to support the mortgagee's promise to deliver up the mortgage and evidences of indebtedness.⁷¹

A mortgagee does not lose his lien by receiving

the mortgaged property under an agreement to sell it with the privilege of retaining the amount of the mortgage from the price, the transaction constituting a purchase of the equity of redemption in contravention of the insolvency law;⁷² nor is his lien lost in such a situation where the mortgagor breaches the contract and renders lawful performance by the mortgagee impossible.⁷³ Also, where a mortgagor executed a bill of sale of the property to the mortgagee, falsely representing that the property was free from all liens except the mortgage, the bill of sale was held not to operate as a satisfaction of the mortgage.⁷⁴

Agreement for return of property to mortgagee.

Where property is sold under an agreement that if it does not comply with the warranty it may be returned without payment, and it is returned as defective, a mortgage given to secure payment of the purchase price is discharged;⁷⁵ and a return of the property because unsatisfactory, and the substitution of other property therefor, in accordance with an agreement between the parties, will not satisfy the mortgage and the note which it was given to secure.⁷⁶

c. Seizure or Conversion by Mortgagee in General

A mortgagee waives his lien by a conversion of the property, or, as to third persons, by his failure promptly to enforce his lien after default. The debt is satisfied to the extent of the value of the property either by his conversion thereof, or his seizure of it after default.

A conversion of the mortgaged property to his own use by the holder of the mortgage satisfies the mortgage debt to the extent of the value of the property,⁷⁷ constitutes a waiver of the mortgage lien,⁷⁸

64. Cal. — Campodonico v. Oregon Impr. Co., 25 P. 763, 87 Cal. 566.
11 C.J. p 673 note 10.

65. Cal.—Crosby v. Fresno Fruit Growers' Co., 158 P. 1070, 30 Cal. App. 308.

66. Cal.—Horgan v. Zanetta, 40 P. 22, 107 Cal. 27.

67. Tex.—Sussdorf v. Lee, Civ.App., 2 S.W.2d 344, citing *Corpus Juris*, error dismissed.
11 C.J. p 685 note 17.

As against accommodation maker

Acceptance of mortgaged automobile in full satisfaction of mortgage debt precludes recovery against accommodation maker of mortgage note.—Lewis v. Chain Inv. Co., Tex. Civ.App., 68 S.W.2d 517.

Lien not discharged

Where a lumber mill operator mortgaged his lumber then on hand as well as all lumber to be manufactured for a two-year period to a corporation doing a wholesale lumber business, it was held that the mortgage lien was not discharged by

the execution of a bill of sale for certain of the mortgaged lumber by the mortgagor to the mortgagee, where the sale was made to enable the mortgagor to discontinue the sawmill business and pay off his obligations to certain employees and creditors.—American Lumber & Export Co. v. Love, 34 So. 559, 17 Ala. App. 251.

68. Tex.—Starr Piano Co. v. Jimmerson, Civ.App., 279 S.W. 302.

69. Kan.—Jones v. Franks, 6 P. 789, 33 Kan. 497.

Wis.—Blakeslee v. Rossman, 43 Wis. 116.

70. Kan.—Jones v. Franks, 6 P. 789, 33 Kan. 497.

71. Okl.—Edmisson v. Drumm-Flato Commn. Co., 73 P. 958, 13 Okl. 440.

72. Vt.—Enright v. Amsden, 40 A. 37, 70 Vt. 183.

73. Tex.—Overland Sales Co. v. Pierce, Civ.App., 225 S.W. 284.

74. Ill.—Hamilton v. Seeger, 75 Ill. App. 599.

75. S.C.—Wilkins v. Curry, 72 S.E. 1019, 90 S.C. 128.

Mortgage rendered functus officio

When piano is sold under an installment contract secured by a mortgage, and the piano is taken back because defective, and a new one substituted, the mortgage is rendered functus officio.—J. W. Jenkins Music Co. v. Wilson, Mo.App., 209 S. W. 987.

76. Ark.—Jones v. Wolfert, 97 S.W. 452, 80 Ark. 474, 117 Am.S.R. 101.
11 C.J. p 686 note 24.

77. Ark.—Haynes v. Gwin, 209 S. W. 67, 137 Ark. 387.

Ind.—Shortal v. Standerford, 157 N. E. 109, 87 Ind.App. 167.

S.C.—Rentz v. Crosby, 94 S.E. 1053, 108 S.C. 431.

Tex.—Williams v. Walker, Civ.App., 290 S.W. 299, 301, citing *Corpus Juris*.
11 C.J. p 686 note 26.

78. Cal.—Zarillo v. Le Mesnager, 196 P. 902, 51 Cal.App. 442.

and effects an extinguishment thereof.⁷⁹ Thus, where the mortgagee after condition broken takes possession of a part of the property and retaining the same assigns the mortgage to a third person, he is guilty of a conversion of such property, and the value thereof should be applied in payment of the mortgage.⁸⁰ So also a sale after default in violation of statutory requirements is a conversion of the property which will operate to extinguish the lien of the mortgage,⁸¹ and the mortgagor will be credited with payment up to the value of the property, the debt being extinguished only to this extent.⁸² However, the mortgagee is not considered to have exercised such control over the property as to defeat his lien because of an act of his agent against his express directions,⁸³ or because he takes possession under a claim of ownership,⁸⁴ or because he, as landlord holding a mortgage on the household furniture of his tenant as security for rent, takes possession of the furniture on its abandonment by the tenant and cares for it,⁸⁵ or because he uses the property temporarily with the assent of the mortgagor.⁸⁶

While the mortgagee's seizure of the property after default does not ipso facto extinguish the mortgage,⁸⁷ yet if he retains possession after such

seizure instead of foreclosing, the mortgage debt is satisfied to the extent of the value of the property so taken,⁸⁸ uncertainty as to the value thereof being resolved against him,⁸⁹ except where the mortgagor has consented to such conduct on the part of the mortgagee,⁹⁰ or where the mortgagee's failure to sell is due to the fact that his right to the property is disputed by a third person and has not been determined,⁹¹ or where it is apparent that possession is taken merely to protect the security.⁹² However, a mortgage is not avoided or discharged by the failure of the mortgagee to foreclose immediately on default,⁹³ or on default in the payment of one of several installments of the mortgage debt.⁹⁴

Where the mortgage gives the mortgagor only a qualified right to possession of the mortgaged property, laches of the mortgagee in failing to take prompt possession of the mortgaged property upon default in the payment of the debt secured, when it becomes due, will defeat the lien, as against third persons,⁹⁵ unless such persons have notice of the mortgage.⁹⁶ However, if the instrument is violated before maturity of the debt the mortgagee is not bound to take possession and may waive the breach without endangering his lien,⁹⁷ and as between the parties the lien is not lost by failure of the mort-

79. Cal.—Metheny v. Davis, 290 P. 91, 107 Cal.App. 137—Blodgett v. Rheinschild, 206 P. 674, 56 Cal. App. 728.

Okl.—Wilson Motor Co. v. Dunn, 264 P. 194, 129 Okl. 211, 57 A.L.R. 17. 11 C.J. p 674 note 16.

Rule applies to assignee of mortgage

Rule as to extinction of lien by conversion is the same as to both mortgagee and mortgage assignee.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S. C. 257.

80. Mich.—Brong v. Brown, 3 N.W. 291, 42 Mich. 119.

81. Cal.—Metheny v. Davis, 290 P. 91, 107 Cal.App. 137.

Okl.—Parks v. Thompson & Wilkerson, 264 P. 607, 129 Okl. 256. 11 C.J. p 686 note 35.

82. N.Y.—Harrison v. Hall, 145 N.E. 737, 239 N.Y. 51, reversing 202 N. Y.S. 626, 207 App.Div. 511.

83. Vt.—Green v. Laclair, 99 A. 244, 91 Vt. 23.

84. Mich.—Card v. Fowler, 79 N.W. 925, 120 Mich. 646. 11 C.J. p 687 note 36.

85. N.Y.—Lathers v. Hunt, 13 N.Y. S. 813, 16 Daly 349, 10 N.Y.S. 529, 16 Daly 135, 9 N.Y.S. 494.

86. Md.—Albert v. Lindau, 46 Md. 334.

87. Tex.—Williams v. Walker, Civ.

App., 290 S.W. 299, 301, citing **Corpus Juris**. 11 C.J. p 686 note 27.

Repossession of automobile by seller

Seller's repossession of automobile on which he holds a mortgage, with purchaser's consent, for nonpayment, was held not to constitute acceptance thereof in settlement of debt, releasing purchaser from purchase notes and contract sued on.—Bernstein-Lanford, Inc., v. Tieuel, La.App., 144 So. 195.

In South Carolina

(1) It is held that if the mortgagee converts all the property mortgaged, and the value exceeds the debt, he must account to the mortgagor for the excess, but, if there is an actual deficiency, he can demand nothing more of the mortgagor.—Fowler v. Goldsmith, 126 S.E. 431, 131 S.C. 119—Rentz v. Crosby, 94 S. E. 1053, 1055, 108 S.C. 431, citing **Corpus Juris**.

(2) The debt is satisfied, however, by mortgagee's possession of mortgaged chattel only where appropriated to his own use.—General Motors Acceptance Corporation v. Hanahan, 143 S.E. 820, 146 S.C. 257.

(3) If the mortgage includes several subjects, and the mortgagee converts one of them only, such act does not of itself discharge the debt.—Rentz v. Crosby, supra.

88. Ala.—Manchuria S. S. Co. v.

Harry G. G. Donald & Co., 77 So. 12, 200 Ala. 638.

N.Y.—Harrison v. Hall, 145 N.E. 737, 239 N.Y. 51, reversing 202 N.Y.S. 626, 207 App.Div. 511—Altman v. Krumholtz, 172 N.Y.S. 126.

11 C.J. p 686 note 28.

89. Wash.—Palmer v. Cochran Brokerage Co., 217 P. 1007, 126 Wash. 169.

90. S.C.—Working Men's Bldg., etc., Assoc. v. Epstein, 53 S.E. 952, 73 S.C. 575.

91. N.Y.—Malone Third Nat. Bank v. Shields, 8 N.Y.S. 298, 55 Hun 274.

92. N.Y.—Beadleston v. Morton, 37 N.Y.S. 663, 16 Misc. 72.

93. S.D.—Pitts Agricultural Works v. Baker, 77 N.W. 586, 11 S.D. 342. 11 C.J. p 686 note 32.

94. Ill.—Woodward v. Donovan, 167 Ill.App. 503.

95. Ill.—Bower v. Popp, 241 Ill.App. 568—St. Louis Iron, etc., Works v. Kimball, 53 Ill.App. 636.

96. Ill.—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 148.

97. Ill.—Southern Illinois Nat. Bank of East St. Louis v. Thaxton, 224 Ill.App. 554.

On violation of provision as to transfer of mortgage

Even if a provision in a mortgage prohibits a transfer or sale by the mortgagor without the written con-

gagee to enforce it at once upon default.⁹⁸ Under some statutes, while the status of the lien is not effected as between the parties,⁹⁹ the lien of the mortgage is lost as against third persons if the mortgagee does not take possession of the property or obtain a renewal of the mortgage within a prescribed period after the debt matures,¹ unless such third persons have notice of the mortgage.²

Where the mortgagee waives his lien by a conversion, as far as his rights against one claiming the right to possession of the property in a replevin action are concerned, it is immaterial whether the conversion took place before or after the commencement of the action.³

While a second mortgagee may insist that the first mortgage be foreclosed in the manner provided by statute, an irregular sale in good faith for the purpose of raising funds to discharge a mortgage debt does not constitute a waiver of a mortgagee's rights as against the second mortgagee of the same property; the remedy of the second mortgagee in such case is an action in replevin or trover with the right to recover the property subject to, or the value thereof, over and above, the obligation secured by the first mortgage.⁴

d. Seizure under Attachment

The decisions are in disagreement as to whether an attachment of the mortgaged property by the mortgagee constitutes a waiver of his lien. The mortgagee does not waive his lien by failing to object to an attachment of the mortgaged property by other creditors.

The decisions are not uniform as to the effect of an attachment levied on the mortgaged property by the mortgagee.⁵ In some jurisdictions where a mortgage is regarded as transferring the legal title to the mortgagee, the fact that the mortgagee attaches the property covered by the mortgage has

been held to constitute a waiver of the mortgage lien,⁶ even though the property is attached in an action on a debt other than the one secured by the mortgage.⁷ However, as between mortgagees it would seem that a first mortgagee does not waive his lien by attaching the property.⁸

On the other hand, where the mortgage merely constitutes a lien on the property an attachment levied thereon by the mortgagee does not constitute a waiver of the mortgage lien,⁹ especially where the attachment suit does not go to judgment.¹⁰

In addition to the authorities making this distinction it should be noted that in some jurisdictions the remedy by attachment is regarded as consistent with and may be pursued without waiver of the mortgage lien, without regard to whether title or a mere security is given by the mortgage;¹¹ and in some jurisdictions where, although the legal title is regarded as passing to the mortgagee, the mortgagor has an equity of redemption which is subject to execution, the mortgagee may attach such equity of redemption without waiving his mortgage lien.¹² In some jurisdictions where the lien theory prevails, the rule that an attachment by the mortgagee does not have the effect of waiving the mortgage lien is based on a statute giving the mortgagor an equity of redemption which may be levied on.¹³

Duty of mortgagee to assert claim against attachment. Under a statute permitting levy on the interest of the mortgagor in case certain conditions are complied with, the mortgagee is not required to take any steps for the sole purpose of shielding the debtor's property.¹⁴ A mortgagee who learns of the levy of an attachment on the mortgaged property is under no obligation to notify the attaching creditor and get him to stop further proceedings

sent of the mortgagee and authorizes the mortgagee to take possession in the event of a breach of this provision, the mortgagee does not lose his lien as to third persons because he fails to take possession upon such a default.—Blake-Silkwood Motor Co. v. Spires, 245 Ill.App. 148.

98. Md.—Clemmitt v. Miehle Printing Press & Mfg. Co., 110 A. 713, 136 Md. 385.

99. Ill.—Beckman v. Alberts, 178 N. E. 367, 346 Ill. 74.

1. Ill.—Bower v. Popp, 241 Ill.App. 568.

2. U.S.—Wenstrand v. Albert Pick & Co., C.C.A.Ill., 38 F.2d 25, certiorari denied 50 S.Ct. 466, 281 U. S. 768, 74 L.Ed. 1175.

3. Okl.—Wilson Motor Co. v. Dunn,

264 P. 194, 129 Okl. 211, 57 A.L.R. 17.

4. Minn.—Berkner v. D'Evelyn, 137 N.W. 1097, 119 Minn. 246.

5. *Variance of authorities considered and explained*
Or.—Weatherly v. Hochfeld, 236 P. 588, 133 Or. 136.

6. Ala.—Hill v. Hooper, 110 So. 323, 21 Ala.App. 584.

Me.—M. Steinert & Sons Co. v. Reed, 108 A. 334, 118 Me. 403.
11 C.J. p 687 note 41.

7. N.H.—Haynes v. Sanborn, 45 N. H. 429.

8. Mass.—Wing v. Bishop, 9 Gray 223.
11 C.J. p 687 note 43.

9. Tex.—Walden v. Locke, Civ.App., 49 S.W.2d 832.

11 C.J. p 687 note 45.

10. Iowa.—Stein v. McAuley, 125 N. W. 336, 147 Iowa 630, 140 Am.S.R. 332, 27 L.R.A.,N.S., 692.

N.D.—Madson v. Rutten, 113 N.W. 872, 16 N.D. 281, 13 L.R.A.,N.S., 554.

11. Kan.—Kansas City Live Stock Commn. Co. v. Hamlin Bank, 101 P. 617, 79 Kan. 761, 24 L.R.A.,N.S., 490, 17 Ann.Cas. 956.
11 C.J. p 688 note 47.

12. Ala.—Ex p. Logan, 64 So. 570, 185 Ala. 525, 51 L.R.A.,N.S., 1068, Ann.Cas.1916C 405, denying certiorari 63 So. 766, 9 Ala.App. 459.
11 C.J. p 688 note 48.

13. Iowa.—Stein v. McAuley, 125 N. W. 336, 147 Iowa 630, 140 Am.S.R. 332, 27 L.R.A.,N.S., 692.

14. Iowa.—Collins v. Gregg, 80 N.W. 562, 109 Iowa 506.

in the attachment suit,¹⁵ and his failure to object to the taking of the property by the sheriff does not constitute a waiver of his right to possession under the mortgage lien.¹⁶ Consent to a levy on part of the mortgaged property will not prevent a mortgagee from enforcing his claims against the remaining part.¹⁷

e. Seizure under Execution

A mortgagee does not ordinarily waive his lien by levying an execution against the mortgaged property.

The levy on the mortgaged property of execution on a judgment obtained in an action on the mortgage debt by the holder of the mortgage does not have the effect of waiving the mortgage lien, where the levy is released before a sale of the property is made,¹⁸ or where it is not shown that the property has been sold under the execution, or that the debt has been satisfied in whole or in part.¹⁹ Further, in a jurisdiction where the lien theory prevails, it has been held that a mortgagee who obtains a judgment for the mortgage debt, levies execution on the chattels, and sells all of them except such property as is exempt from execution, does not thereby release his lien and claim under the mortgage to the exempt property.²⁰ Likewise, the owner of a senior mortgage does not waive the priority of his lien by recovering a judgment on the note which it secures and causing an execution to be levied on the mortgaged property.²¹ So a mortgagee does not waive his lien where, in a replevin action, an erroneous judgment is entered in his favor for its value, in-

stead of a judgment in the alternative for possession, etc., and he thereafter levies execution on the mortgaged property and becomes the purchaser thereof at such sale.²²

§ 343. Merger

Whether a mortgage is terminated by merger depends upon the intention of the parties and the equities of the case.

Whether a mortgage has merged depends ordinarily upon the intention of the parties and the equities of the case,²³ and, where it is for the best interests of the mortgagee not to merge legal and equitable titles, he may refrain from so doing.²⁴ Accordingly, the assignment of the interests of both mortgagor and mortgagee to the same person does not operate to discharge the mortgage on the doctrine of merger, unless the parties so intend it,²⁵ and there is no merger where the purchaser of both the mortgage and the mortgaged property exhibits a clear intent to keep the mortgage alive.²⁶ Likewise, in equity the mortgage is not merged when the mortgagee acquires legal title, where this would be against his interest.²⁷ A fortiori after the mortgagee has parted with his interest, an assignment of the equity of redemption to him does not extinguish the mortgage.²⁸ The intention that the mortgage lien shall be extinguished will not be presumed where the interest of the purchaser of the mortgage and the mortgaged property requires that the mortgage shall remain in force,²⁹ and a transfer of the property to the holder of the mortgage, expressly

15. Mass.—*Canada v. Southwick*, 16 Pick. 556.

Mo.—*Wurmser v. Frederick*, 62 Mo. App. 634.

16. Wyo.—*Carroll v. Anderson*, 218 P. 1038, 30 Wyo. 217.

17. Mo.—*Woolner v. Levy*, 48 Mo. App. 489.

18. N.J.—*Conway v. Wilson*, 11 A. 734, 44 N.J.Eq. 457, 458.

Wis.—*J. I. Case Threshing Mach. Co. v. Johnson*, 139 N.W. 445, 152 Wis. 8, 10.

11 C.J. p 688 note 53.

19. Ala.—*Logan v. Smith Bros. & Co.*, 63 So. 766, 9 Ala.App. 459, certiorari denied, Sup., Ex parte Logan, 64 So. 570, 185 Ala. 525.

20. Ill.—*Barchard v. Kohn*, 41 N.E. 902, 157 Ill. 579, 29 L.R.A. 303, reversing 54 Ill.App. 629.

11 C.J. p 688 note 54.

21. Ohio.—*Green v. Bass*, 35 Ohio Cir.Ct. 31, affirmed 94 N.E. 742, 83 Ohio St. 378, Ann.Cas.1912A 828, 11 C.J. p 689 note 55.

22. Wis.—*Hoeffler Mfg. Co. v. Machajewski*, 157 N.W. 702, 163 Wis. 184.

23. Mont.—*Dilts v. Brooks*, 213 P. 600, 66 Mont. 346.

N.Y.—*Burton v. Klein*, 239 N.Y.S. 103, 135 Misc. 571.

Or.—*Phegley & Cavender v. Swender Blue Print Co.*, 289 P. 500, 133 Or. 146.

Wash.—*Beecher v. Thompson*, 207 P. 1056, 1057, 120 Wash. 520, 29 A.L.R. 699, quoting *Corpus Juris*.

Intent controls

The element of intent is of large importance in determining whether there has been a merger.—*Hector v. Royal Indemnity Co.*, 234 N.W. 643, 132 Minn. 413, reargument denied 235 N.W. 675, 132 Minn. 413.

24. Or.—*Smith v. Allen*, 24 P.2d 1043, 144 Or. 261—*Phegley & Cavender v. Swender Blue Print Co.*, 289 P. 500, 133 Or. 146.

25. Wash.—*Beecher v. Thompson*, 207 P. 1056, 120 Wash. 520, 29 A.L.R. 699.

11 C.J. p 689 note 57.

26. Mo.—*Thesen v. Parker*, App., 274 S.W. 853.

27. Tex.—*People's Nat. Bank of Nocona v. Jones*, Civ.App., 34 S.W. 2d 346.

No merger

(1) Where a chattel mortgage was given as collateral security for a real estate bond and mortgage, the mortgagee's acceptance of a quitclaim deed to the premises covered by the real estate mortgage from mortgagors in bankruptcy sale did not extinguish mortgagors' obligation under chattel mortgage through merger.—*Burton v. Klein*, 239 N.Y.S. 103, 135 Misc. 571.

(2) Interest created by mortgage taken by assignee of creditors' claims was not merged in interest transferred by subsequent assignment to mortgagee as assignee for benefit of creditors, as against creditor exempt from participation in proceeds of assignment.—*Smith v. Allen*, 24 P. 2d 1043, 144 Or. 261.

28. Wash.—*Beecher v. Thompson*, 207 P. 1056, 1057, 120 Wash. 520, 29 A.L.R. 699, quoting *Corpus Juris*.

11 C.J. p 689 note 58.

29. Wash.—*Beecher v. Thompson*, supra, quoting *Corpus Juris*, 11 C.J. p 689 note 59.

subject to the mortgage debt, evidences an intention that no merger shall be effected.³⁰

On the other hand, subject to the foregoing rules, where the mortgagee acquires title to the mortgaged property the mortgage will be merged in the title,³¹ and the lien of the mortgage will be extinguished where the mortgage is purchased by one who has previously bought the mortgaged property and has agreed to assume or to discharge the encumbrances existing thereon.³² Likewise, where a junior mortgagee purchases the property at sale on execution against the mortgagor and pays off a prior mortgage, his own mortgage and debt will thereby be extinguished;³³ and where a mortgagor and a mortgagee transferred their respective interests to a corporation, taking stock in the corporation in payment therefor, it was held that the rights that the corporation acquired as the equitable assignee of the mortgage, if any, were merged in its title to the property acquired from the mortgagor.³⁴ So also a mortgage may be merged in an agreement of sale of the mortgaged property.³⁵

Where an owner of land leased the same to the owner of a mill situated thereon, and the landowner subsequently purchased the mill and lease, the purchase did not operate to extinguish the lien of an extinguishing chattel mortgage on the mill, nor to prevent its enforcement by one to whom the mortgage had been assigned after such purchase.³⁶

Where the holder of a second mortgage acquires the first, the legal title remaining in a third person, it is questionable whether the doctrine of merger is at all applicable; if it is, the rule that the intention of the parties and the equities of the case govern should be even more stringently applied than in the ordinary case where legal and equitable title have passed into the same hands.³⁷

§ 344. — Assignment of Mortgage to Mortgagor

An assignment of the mortgage to the mortgagor may release the lien of the mortgage.

30. Wash.—Beecher v. Thompson, supra, quoting *Corpus Juris*.
11 C.J. p 689 note 60.

31. Mont.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.

Wash.—Northwest Hay Ass'n v. Slayton, 242 P. 354, 137 Wash. 248.

By repossession

Mortgagee's rights under mortgage were merged in his repossession of mortgaged sheep.—Hansen v. Daniels, 272 P. 941, 73 Utah 142.

32. U.S.—Kilpatrick v. Haley, Colo., 66 F. 133, 13 C.C.A. 480.

33. Ill.—Merritt v. Niles, 25 Ill. 282. 11 C.J. p 689 note 65.

34. Mont.—Hamilton v. Smith, 92 P. 32, 36 Mont. 1, 122 Am.S.R. 330.

35. Or.—Boyd v. Coleman, 294 P. 604, 135 Or. 60.

36. Iowa.—Denham v. Sankey, 38 Iowa 269.

37. Ariz.—Hathaway v. Neal, 251 P. 173, 31 Ariz. 155.

38. N.Y.—Phoenix Mills v. Miller, 4 N.Y.St. 787.

39. Miss.—Coombs v. Wilson, 107 So. 874, 142 Miss. 502.

Rights of parties not affected

The fact that a mortgage, standing uncanceled on the records, was surrendered to the mortgagor when his note, only one of the debts secured, was paid, does not affect the rights of the parties; it not appearing that a subsequent purchaser of the mort-

An assignment of the mortgage to the mortgagor operates as a release of the mortgage lien.³⁸ However, a surrender of the mortgage to the mortgagor through an oversight does not have this effect,³⁹ and it has been held that where a mortgage executed by a partnership was purchased by the executor of one of the partners, such purchase did not constitute a payment of the mortgage.⁴⁰

§ 345. Breach of Collateral Agreement by Mortgagee

The breach of a collateral agreement by the mortgagee does not operate to release the mortgage lien.

A breach by the mortgagee of a contract independent of that evidenced by the mortgage does not operate to release the lien of the mortgage or to nullify its effect.⁴¹

§ 346. Assumption of Debt by Purchaser of Property

Assumption of the debt by a purchaser of the mortgaged property does not of itself discharge the lien of the mortgage.

The assumption of the mortgage debt by one who purchased the chattels from the mortgagor will not discharge the mortgage lien in the absence of an agreement or understanding that it shall be released.⁴²

§ 347. Release in General

In the absence of statute, a mortgage may be released expressly or impliedly without any particular formalities by the holder thereof or a receiver appointed thereunder; but the release must be supported by consideration.

Many of the rules governing the release of real estate mortgages, considered in the title Mortgages, are applicable to releases of chattel mortgages.⁴³ If the intent of parties in a particular agreement is to put an end to the lien, it will be effective although no formal release is executed.⁴⁴ Accordingly, a

gaged property knew of the surrender, which was an oversight and without consideration.—Coombs v. Wilson, supra.

40. N.Y.—Loewenstein v. Loewenstein, 99 N.Y.S. 730, 114 App.Div. 65.

41. Cal.—Woodland Bank v. Duncan, 49 P. 414, 117 Cal. 412.

11 C.J. p 690 note 68.

42. Cal.—Talcott v. Hurlbert, 76 P. 647, 143 Cal. 4.

11 C.J. p 690 note 69.

43. Fla.—Snow v. Nowlin, 169 So. 598, 125 Fla. 166.

44. Conn.—Windsor Trust Co. v. Champigny, 136 A. 556, 105 Conn. 615.

parol agreement for a release is sufficient, and no formal discharge need be executed⁴⁵ or recorded,⁴⁶ although the mortgage is under seal,⁴⁷ and the debt unpaid,⁴⁸ in the absence of statutes, such as those considered below in §§ 349, 350, requiring formalities of this character. Also, a mortgagee who has agreed to release the lien and extinguish the debt will not be permitted to take advantage of his failure to put the release in writing, in accordance with his agreement.⁴⁹

On the other hand, as between the mortgagor and mortgagee, there is no discharge of the mortgage where their actual intention, as manifested by their conduct, is to enforce the lien rather than to cancel it.⁵⁰ Likewise, a mortgage is not released by the release of another mortgage executed as a part of an independent transaction,⁵¹ and an apparent release which by mistake purports to release a mortgage does not have this effect where it would be inequitable and no new rights have been acquired

on the strength thereof.⁵² Similarly, the fact that a mortgage is withdrawn by mistake from the register of deeds office does not constitute a satisfaction, in the absence of countervailing equities in the party who would gain by the satisfaction.⁵³

Also, to be valid a release must be supported by a consideration,⁵⁴ and it will not be conclusively presumed that there was a consideration for a cancellation under seal, where the cancellation need not be under seal.⁵⁵

Furthermore, if the release is conditional, it is not effective unless and until the conditions are performed.⁵⁶

Although there is authority to the contrary,⁵⁷ it has been held that a mortgage may be canceled by an implied agreement between the parties.⁵⁸ So, the mortgage lien may in effect be released by the mortgagee by the execution of a bond to the purchasers of the property, conditioned to secure them perfect title.⁵⁹

45. Ark.—*Ribelin v. Loyd*, 230 S.W. 556, 148 Ark. 487.
11 C.J. p 690 note 78.

46. Mass.—*Frost v. George*, 63 N.E. 388, 181 Mass. 271.
11 C.J. p 690 note 79.

47. Ala.—*Acker v. Bender*, 33 Ala. 230.

48. Ala.—*Wallis v. Long*, 16 Ala. 738.

Ark.—*Horton v. Thompson*, 187 S.W. 627.

49. Tex.—*Caffarelli Bros. v. Price-Davis Drug Co.*, Civ.App., 19 S.W. 2d 386, error dismissed.

50. Ark.—*Rose v. Million*, 228 S.W. 376, 147 Ark. 530.

51. Tex.—*Weston v. General Motors Acceptance Corporation*, Civ.App., 250 S.W. 744.

52. Or.—*Hoy v. Biladeau*, 223 P. 241, 110 Or. 591.

53. Minn.—*Carity Motors v. Eichten*, 249 N.W. 190, 189 Minn. 310.

54. Ga.—*Wilder Bros. v. Montgomery*, 179 S.E. 861, 51 Ga.App. 231.
Iowa.—*Bensen & Marxer v. Reger*, 168 N.W. 881, 186 Iowa 19, modified on other grounds *Benson & Marxer v. Reger*, 172 N.W. 166, 186 Iowa 19.

11 C.J. p 690 note 82.

Sufficient consideration

(1) Transfer of automobile to authorized agent of finance company holding note of buyer secured by mortgage on automobile was sufficient consideration for release of balance due on note and mortgage.—*Manufacturers' Finance Acceptance Corporation v. Autrey*, 153 So. 181, 228 Ala. 149.

(2) An agreement under which the

owner of the personal property was entitled to have the mortgage thereon released, in view of the evidence, was held to be supported by a sufficient consideration and was not merely an agreement to do that which the mortgagor was obligated to do.—*Downey v. Gifford*, 218 N.W. 488, 206 Iowa 848.

(3) Where the owner of cattle covered by a mortgage sold part of the cattle, accepting a part payment of one hundred fifty dollars, and the purchaser before delivery resold them to a third person, and it appeared that neither the original purchaser nor his vendee knew of the existence of the mortgage at the time of the sale but that on obtaining knowledge thereof they agreed with the mortgagee's agent that the proceeds on sale in a certain market should be paid to the mortgagee, who was thereupon to release the mortgage, the agreement for release was held to have been supported by a sufficient consideration. In this connection, it was held that the payment of the one hundred fifty dollars constituted at least a part of the consideration for the agreement, since, if the original purchasers had refused to carry it out in the event that the mortgagee should have insisted on its rights, it could have required the return of the payment, and the agreement deprived them of such right, and also because by the agreement the mortgagee, which was the real vendor, relinquished all its rights to such payment.—*Lee v. Clay, Robinson & Co. of Texas*, Tex.Com. App., 219 S.W. 1090, reversing *Lee v. Clay, Robinson & Co.*, Civ.App., 185 S.W. 1061.

(4) Where seller sold property under title retention contract, apparently constituting mortgage, a return of the chattels to a seller was a sufficient consideration for a release from further liability, by the seller.—*Barber-Greene Co. v. Proksch*, 232 N.W. 232, 251 Mich. 329.

55. Ga.—*Sims v. Scheussler*, 64 S. E. 99, 5 Ga.App. 850.

56. Ga.—*Wilkins v. Friedman*, 139 S.E. 113, 37 Ga.App. 141.

Conditions to be performed by purchaser or mortgagor

If the mortgagee agrees to release the property to a purchaser from the mortgagor on conditions to be performed by the purchaser, or by the mortgagor, of which the purchaser has knowledge, the release does not become effective, nor is the property discharged from the lien of the mortgage, unless and until performance is made of the conditions of the release.—*Wilkins v. Friedman*, supra.

Under tripartite agreement

Where mortgagor and mortgagee enter into tripartite agreement with third party, whereby among other terms the mortgagor was to sell and the mortgagee to release the mortgage to such third party, and this agreement could not be carried out and was abandoned, it was held that the goods were not released from the mortgage.—*Citizens' Nat. Bank of Cheyenne v. Puckett*, 254 P. 128, 36 Wyo. 232.

57. Tex.—*Stewart v. State*, 181 S. W. 329, 60 Tex.Cr. 92.
11 C.J. p 690 note 81.

58. Miss.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

59. Mich.—*Newcomb v. Montague*, 171 N.W. 433, 205 Mich. 80.

Where printed and typewritten clauses in a satisfaction of a mortgage are irreconcilable one with the other, the typewritten clause will prevail.⁶⁰

A provision in an agreement for the release of a mortgage requiring the owner of the mortgaged property to pay a specified sum, is effective where the parties have acted under it.⁶¹

Who may release. It is obvious that the holder of a deed of trust on personalty has the right to release the same,⁶² and a joint mortgage may be released by one of the mortgagees without the other's knowledge in order to permit a new mortgage consolidating prior mortgages to retain their priority.⁶³ Also, a surety has authority to release a mortgage executed to indemnify him from liability as indorser of certain notes, which release would be binding on bona fide purchasers of the notes who have made no claim to the property before the execution of such release;⁶⁴ and where one who has executed an accommodation note and taken a mortgage as security releases the mortgage, it is not necessary that the holder of the note should consent to the release.⁶⁵ Furthermore, a receiver appointed under a mortgage has authority to enter into an arrangement whereby a claim of the mortgagor for services shall be satisfied by a release of a portion of the property covered by the mortgage.⁶⁶

§ 348. Partial Release

A partial release is effective if supported by a sufficient consideration.

A partial release of the mortgaged property will be effective if it is supported by a sufficient consideration.⁶⁷

§ 349. Entry of Satisfaction

Where statutes so provide, a satisfaction or release of the mortgage must be entered of record in the manner prescribed.

Where there has been a payment or an accord and satisfaction of the entire debt secured by the mortgage, the debtor is entitled to have the fact of payment or satisfaction entered on the margin of the record of the mortgage.⁶⁸ In many jurisdictions the statutes require that the release or satisfaction of a mortgage shall be entered of record in order to make such release effective, whether the debt is paid in full or canceled by accord and satisfaction,⁶⁹ and, as is shown below in § 350, such statutes may impose a penalty on a mortgagee who neglects or refuses to make such entry. However, statutes of this character do not prevent the mortgagee from waiving the lien of his mortgage even though it remains unreleased of record.⁷⁰

A prior mortgage that has been paid but not canceled of record is of no effect as against creditors of the mortgagor and subsequent purchasers and mortgagees.⁷¹

Where there is no statutory provision for recording, such a recording does not affect the rights of the parties.⁷²

Authority to make entry. A court may cause the proper release to be made on the record when the debt secured by the mortgage is paid.⁷³

Entries of satisfaction in the record by an unauthorized person cannot be introduced in evidence to

60. Wash.—Creditors' Ass'n v. Fry, 37 P.2d 688, 179 Wash. 339.

61. Ark.—Krone v. Maestri, 43 S.W.2d 732, 184 Ark. 389.

62. Ark.—McIntosh Min. Co. v. Red Cloud Zinc Co., 182 S.W. 506, 122 Ark. 45.

63. Kan.—Washington Nat. Bank v. Rooney, 150 P. 555, 96 Kan. 133.

64. Conn.—Thrall v. Spencer, 16 Conn. 139.

65. Wis.—Junek v. Buzzelli, 134 N.W. 1124, 148 Wis. 610.
11 C.J. p 690 note 73.

66. N.J.—Ayers v. Hawk, Ch., 11 A. 744.

67. Ark.—Ribelin v. Loyd, 230 S.W. 556, 148 Ark. 487.

Pro tanto release clause

Provision in mortgage that, if mortgagor defaulted and mortgagee repossessed chattel, mortgagor should have interest in chattel equal to fifty per cent of money he had paid, meant that mortgagor's interest in chattel would not be subject

to foreclosure, and amounted to binding pro tanto release clause.—Snow v. Nowlin, 169 So. 598, 125 Fla. 166.

Release absolute

Receipt given mortgagor by mortgagee reading, "Received from D. [mortgagor], in the land deal with J., ninety-five dollars, which I hereby release three (3) Poland China male pigs on which I have a lien, for his use for meat hogs only," was held absolutely to release the three pigs from the mortgage, and not to make such release conditional on mortgagor's use of the pigs for meat.—Ribelin v. Loyd, 230 S.W. 556, 148 Ark. 487.

Sufficient consideration

(1) Where chattel mortgagor gave mortgagee a real estate mortgage on land to secure the initial payment on it, and thereafter sold the land for more than he had agreed to pay for it, mortgagee's release of a portion of the goods covered by the chattel mortgage, in consideration of the profit made by mortgagor in the pur-

chase and sale of land, was based on a sufficient consideration.—Ribelin v. Loyd, supra.

(2) Mortgagor's giving bill of sale of part of mortgaged chattels is sufficient consideration for mortgagee's release of rest of property.—Central States Inv. Co. v. Boettcher, 230 N.W. 120, 180 Minn. 6.

68. Ala.—Scales v. Rosenbush Furniture Co., 101 So. 743, 212 Ala. 19.

69. Ala.—Hamilton v. Harry L. Hussmann Refrigerator & Supply Co., 108 So. 43, 214 Ala. 376.
11 C.J. p 691 note 86.

70. Mo.—Rogers v. Davis, App., 184 S.W. 151, 155.

71. N.J.—Longley v. Sperry, 66 A. 1062, 72 N.J.Eq. 537.

72. U.S.—In re Jeandros Dye & Print Works, D.C.Mass., 22 F. Supp. 26.

73. Ky.—Securities Inv. Co. of St. Louis v. Harrod Bros., 7 S.W.2d 492, 225 Ky. 12.

prove the satisfaction of the mortgage.⁷⁴

Signature to entry. Where the statute provides that a mortgage may be discharged by an entry on the book kept by the township or city clerk, signed by the mortgagee or his personal representative, or assignee, acknowledging the satisfaction of the mortgage in the presence of such clerk, a discharge entered by the clerk which does not appear to be signed by the mortgagee or his personal representative or assignee will not defeat the mortgage lien.⁷⁵

§ 350. Penalties for Failure to Release or Enter Satisfaction

- a. Right of action and defenses
- b. Pleading
- c. Evidence
- d. Trial
- e. Damages or amount recoverable

a. Right of Action and Defenses

Under statutory authorization a mortgagor may recover damages or a penalty from the mortgagee for improperly failing or refusing to enter a satisfaction.

In some jurisdictions a mortgagor is authorized by statute to recover damages or a penalty for failure or refusal to enter satisfaction or record, where the mortgage has been paid or otherwise discharged; and such statute has been held constitutional,⁷⁶ and, being penal, should be strictly construed.⁷⁷ Some statutes of this character are not applicable to a mortgage which has been validly foreclosed, whether by judicial decree or under a power of

sale.⁷⁸ Also, a statute providing a penalty for the failure to release a recorded mortgage does not apply to a chattel mortgage which is by law merely required to be filed,⁷⁹ or which has never been recorded as required by statute.⁸⁰

The right to a penalty of this character is not a mere personal right of the mortgagor,⁸¹ but is a right running with the property.⁸² Thus, the right of action arises only in favor of the owner of the mortgaged property at the time the cause of action accrues,⁸³ and against the mortgagee or his assignee of record.⁸⁴

In order to render the mortgagee or his assignee liable for failure to enter satisfaction, a proper request for such entry must be made,⁸⁵ accompanied by tender of the register's fee therefor if the statute so requires.⁸⁶ No particular form of words is necessary to constitute a sufficient demand or request; all that is necessary is that the words used in the request are such as shall reasonably inform the mortgagee, or his assignee, that entry of satisfaction is desired.⁸⁷ The general agent of a firm, even where he is outside the state,⁸⁸ is authorized to receive the written request for entry of satisfaction so as to render the firm liable for failure to make such entry.⁸⁹

The fact that the mortgagee is obligated to pay an indebtedness of the mortgagor not covered by the mortgage is no excuse for refusing to release the mortgage when satisfied,⁹⁰ and he cannot assign the

74. Ala.—Wilson v. Johnson, 44 So. 539, 152 Ala. 614.

11 C.J. p 691 note 90.

75. Mich.—Aultman v. Sloan, 73 N. W. 123, 115 Mich. 151.

76. Or.—Ebbert v. First Nat. Bank, 279 P. 534, 131 Or. 57.

11 C.J. p 691 note 93.

77. Ala.—International Harvester Co. v. Simpson, 133 So. 4, 222 Ala. 493—General Motors Acceptance Corporation v. Crumpton, 124 So. 870, 220 Ala. 297, 65 A.L.R. 1313—Scales v. Rosenbush Furniture Co., 101 So. 743, 212 Ala. 19.

11 C.J. p 691 note 94.

78. Ala.—J. I. Case Threshing Mach. Co. v. McGuire, 77 So. 729, 201 Ala. 203.

79. Okl.—Farmers' State Bank of Glencoe v. Harris, 160 P. 317, 61 Okl. 62.

11 C.J. p 691 note 3.

80. Ark.—Simpson v. First Nat. Bank, 292 S.W. 138, 173 Ark. 284.

Mortgage not recorded in proper judicial district

Mortgagee was not liable for penalties for failure to satisfy mortgages not recorded in proper judi-

cial district of county in accordance with statutory requirements.—Simpson v. First Nat. Bank, supra.

81. Kan.—Thomas v. Reynolds, 29 Kan. 304.

82. Kan.—Thomas v. Reynolds, supra.

83. Kan.—Coffman v. Hillard, 24 P. 1098, 44 Kan. 538.

11 C.J. p 691 note 97.

84. Kan.—Parkhurst v. Clyde First Nat. Bank, 35 P. 1116, 53 Kan. 136—Thomas v. Reynolds, 29 Kan. 304.

11 C.J. p 691 note 98.

85. Neb.—Clearwater Bank v. Kurkowski, 63 N.W. 133, 45 Neb. 1.

11 C.J. p 691 note 1.

86. Mo.—Dodson v. Clark, 38 Mo. App. 150.

87. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236.

11 C.J. p 691 note 4.

Sufficient notice

(1) A notice directing the satisfaction on the record of all recorded mortgages given by the mortgagor to the mortgagee, which have been paid, is sufficiently definite.—International Harvester Co. v. Simpson, 133 So. 4, 222 Ala. 493.

(2) Notice given by buyer of two trucks to seller, in connection with final payment on second truck, to "satisfy all records and mortgage" was sufficient, in buyer's action for penalty, as notice to satisfy record of purchase-money mortgage on first truck, where mortgage on first truck had been recorded and paid and mortgage on second truck was never recorded.—International Harvester Co. v. Fulmer, 166 So. 771, 232 Ala. 112.

Insufficient notice

(1) A notice "to take my note off the record" is not sufficient.—International Harvester Co. v. Simpson, 133 So. 4, 222 Ala. 498.

(2) Where two mortgages have been given by the mortgagor, a notice which refers to one mortgage only and fails to describe or refer to any certain mortgage is not sufficient to fasten the penalty on the mortgagee.—International Harvester Co. v. Simpson, supra.

88. Ala.—J. I. Case Threshing Mach. Co. v. McGuire, 77 So. 729, 201 Ala. 203.

89. Ala.—Long v. Jennings, 33 So. 857, 137 Ala. 190.

90. Miss.—Coon v. Robinson Mer-

mortgage after it has been paid, so as to avoid the duty to enter satisfaction;⁹¹ neither can he shift the burden to the mortgagor by requesting him to procure the doing of the act, and he has no right to presume from the mere silence of the mortgagor that he has gratuitously accepted and undertaken to execute the request so made of him.⁹² However, the relationship between the parties may be such that the silence of the mortgagor after he has been requested to file the release and give advice as to additional requirements will estop him from recovering the statutory penalty.⁹³

An entry of satisfaction after the expiration of the statutory period therefor,⁹⁴ or after the action to recover a penalty is commenced,⁹⁵ will not defeat the action; and it is no defense that the mortgagee, on receiving a request from the mortgagor to satisfy the mortgage, directed the judge of probate by letter to enter satisfaction.⁹⁶ Also, mortgagees who expressly place their refusal to enter satisfaction on other grounds cannot defeat an action against them for the statutory penalty on the ground that the mortgagor did not tender a satisfaction piece already prepared for execution, or tender the fees of the register for entering satisfaction.⁹⁷ However, it has been held that the refusal of the mortgagee to satisfy the mortgage must be intentional and willful in order to render him liable for the penalty, and the mortgagee is not liable when the right of the person demanding satisfaction is in doubt, and the refusal to enter satisfaction is made in good faith and in the honest belief that the mortgage is not entitled to be discharged;⁹⁸ nor can a mortgagee be mulcted in damages for failure or refusal to release a mortgage, where he in good faith disputes the validity of another claim not connected with the obligation to secure which the mortgage is given which it is sought to compel him to accept as a part payment of the amount due.⁹⁹ Also, a tender of the amount due, although the money be brought into court with the suit to recover a penalty, is not such

a satisfaction of the mortgage as will render the mortgagee liable for failure or refusal to satisfy.¹

Statute not applicable to conditional sale notes. It has been held that a statute providing that conditional sale notes, when deposited with the register of deeds, shall be subject to the law applicable to the filing of chattel mortgages does not render such notes when filed subject to the law providing penalties for failure to satisfy chattel mortgages.²

b. Pleading

General rules govern the pleadings in actions of this character.

A complaint in an action for a penalty is sufficient where it identifies the mortgage by date, alleges payment thereof, stating the amount if the payment is a partial one, and avers a written request to the mortgagee to satisfy the mortgage, and his failure so to do within the time required by law.³ Such a complaint must allege full payment or satisfaction of the mortgage debt,⁴ and is subject to demurrer where it alleges an antedated payment.⁵ A petition is sufficient, although it fails to allege the amount of the mortgage debt, where it is otherwise sufficiently identified.⁶ The declaration may properly join in one count a claim for the penalty and for all damages occasioned by the mortgagee's neglect,⁷ and several counts for separate penalties for such neglect in regard to different mortgages may be joined.⁸

In an action of the character under discussion, a plea which proceeds on the theory of fraud and estoppel is not necessarily subject to demurrer,⁹ but, where the complaint does not allege the exact date when the mortgage was paid, but merely shows that it had been paid when the request to enter satisfaction was made, a plea averring that at the time plaintiff made the request defendant did not own the mortgage but had transferred it to a third person is demurrable, because not alleging a transfer

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| cantile Co., 70 So. 884, 110 Miss. 700. | Mo.—Dodson v. Clark, 38 Mo.App. 150. | 141 Ala. 236—Hoffman v. Knight, 28 So. 593, 127 Ala. 149. |
| 91. Ala.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380. | 96. Ala.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380. | 4. Ala.—Scales v. Rosenbush Furniture Co., 101 So. 743, 212 Ala. 19. |
| 92. Ala.—J. I. Case Threshing Mach. Co. v. McGuire, 77 So. 729, 201 Ala. 203. | 97. Kan.—Thomas v. Reynolds, 29 Kan. 304. | 5. Ala.—Stephens v. International Harvester Co., 80 So. 686, 16 Ala. App. 612. |
| 93. Ala.—Hamilton v. Harry L. Hussmann Refrigerator & Supply Co., 108 So. 43, 214 Ala. 376. | 98. Kan.—Parkhurst v. Clyde First Nat. Bank, 35 P. 1116, 53 Kan. 136. 11 C.J. p 692 note 10. | 6. Ala.—Denton v. Foster, 70 So. 152, 195 Ala. 53. |
| 94. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236. | 99. Neb.—Caves v. Bartek, 123 N. W. 1031, 85 Neb. 511. | 7. Vt.—Giffen v. Barr, 15 A. 190, 60 Vt. 599. |
| Neb.—Clearwater Bank v. Kurkonski, 63 N.W. 133, 45 Neb. 1. | 1. Ala.—Hamaker v. Bynum, 34 So. 405, 137 Ala. 391. | 8. Ala.—Hoffman v. Knight, 28 So. 593, 127 Ala. 149. |
| 95. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236. | 2. Kan.—Curd v. Bown, 43 P. 846, 3 Kan.App. 553. | 9. Ala.—Hamilton v. Harry L. Hussmann Refrigerator & Supply Co., 108 So. 43, 214 Ala. 376. |
| | 3. Ala.—Lynn v. Bean, 37 So. 515, | |

of the mortgage by defendant prior to its payment.¹⁰

Issues, proof, and variance. Where the issue is raised by the pleadings, plaintiff may introduce evidence as to either payment of the debt or accord and satisfaction.¹¹ A slight variance between the date of the mortgage note as alleged in the complaint and that stated in the mortgage will not render the mortgage inadmissible in evidence.¹²

c. Evidence

General rules apply to the evidence in actions of this character.

In an action for a penalty for failure to release a mortgage, the burden of proof rests on plaintiff as to all issues raised by the complaint, and replications to the pleas, including full payment or satisfaction of the mortgage debt.¹³ However, if the mortgagee, in an action against him for failure to enter a partial payment, sets up by special plea that at the time the request was made the mortgage had been fully satisfied, the burden is on him to prove such allegation, and, if he fails to discharge that burden, plaintiff is entitled to recover.¹⁴

The general rules as to the competency and relevancy of evidence are applicable to actions for these statutory penalties. It has been held that the mortgagee cannot introduce his own ex parte statements on the issue as to whether the mortgage had been satisfied.¹⁵ Evidence of usury in the mortgage note is admissible as bearing on the question of whether the amount legally due had been paid before defendant was called on to discharge the mortgage,¹⁶ and the original mortgage on which partial payments were made is admissible;¹⁷ also, plaintiff may introduce in evidence the written request served on defendant,¹⁸ and testimony by a person employed by the mortgagee as a bookkeeper that, after receiving notice to enter satisfaction, he wrote to the

judge of probate was admissible in the mortgagor's behalf, where the mortgagor afterward testified that the mortgagee admitted to him that he had received the notice, and had requested the bookkeeper to write the judge to satisfy the mortgage on the record.¹⁹

General rules governing the sufficiency of evidence are also applicable.²⁰

d. Trial

General rules apply to the trial of actions of this character.

It is the province of the jury to determine questions of fact, and, if there is evidence supporting a plea that the parties had entered into an agreement whereby plaintiff released his claim for damages, it is error to withdraw the question of such agreement from the jury;²¹ but the construction of the statute giving a right of action for failure to enter satisfaction is one of law for the court, and should not be submitted to the jury.²² Instructions applicable to the evidence and otherwise correct should be given on request,²³ but it is proper to refuse instructions which are argumentative or which emphasize a particular phase of the evidence.²⁴

e. Damages or Amount Recoverable

Under proper pleading and proof, actual damages, or the penalty prescribed by statute, may be recovered from the mortgagee for failure to release or enter satisfaction of the mortgage.

Where an action is brought by the mortgagor for the penalty presented by statute for failure to enter satisfaction of a mortgage, no actual damages need be proved,²⁵ but the fixing of a definite sum as a penalty does not prevent recovery of such damages as were the natural result of the mortgagee's omission to enter satisfaction of the mortgage.²⁶ Such damages, however, must be proved,²⁷ and a judg-

10. Ala.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380.

11. Ala.—Hamilton v. Harry L. Hussmann Refrigerator & Supply Co., 108 So. 43, 214 Ala. 376.

12. Ala.—Long v. Jennings, 33 So. 857, 137 Ala. 190.

11 C.J. p 692 note 21.

13. Ala.—Scales v. Rosenbush Furniture Co., 101 So. 743, 212 Ala. 19. 11 C.J. p 692 note 22.

14. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236.

15. Ala.—Lynn v. Bean, *supra*.

16. Vt.—Giffen v. Barr, 15 A. 190, 60 Vt. 599.

17. Ala.—Long v. Jennings, 33 So. 857, 137 Ala. 190.

18. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236.

19. Ala.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380.

20. Evidence insufficient

(1) To support defendant's cross petition for damages for failure to release mortgage and for attorney's fee.—First State Bank of Webb City v. Brooks, 260 P. 502, 127 Okl. 220.

(2) To show that mortgagee's failure to satisfy mortgages of record caused loss of sale of realty.—Ebbert v. First Nat. Bank, 279 P. 534, 131 Or. 57.

21. Ala.—Hoffman v. Knight, 28 So. 593, 127 Ala. 149.

22. Ala.—Dothan Guano Co. v. Ward, 31 So. 748, 132 Ala. 380.

23. Ala.—Dothan Guano Co. v. Ward, *supra*.

24. Ala.—Lynn v. Bean, 37 So. 515, 141 Ala. 236.

11 C.J. p 693 note 33.

25. Ala.—Hoffman v. Knight, 28 So. 593, 127 Ala. 149.

Neb.—Clearwater Bank v. Kurkonski, 63 N.W. 133, 45 Neb. 1.

26. Neb.—Clearwater Bank v. Kurkonski, *supra*—Deering v. Miller, 50 N.W. 1056, 33 Neb. 654.

27. Or.—Ebbert v. First Nat. Bank, 279 P. 534, 131 Or. 57.

For rejection of application for loan

Where recovery from the mortgagee is sought on the basis of damages resulting from the refusal of a land bank to grant a loan because of unreleased mortgages on record, plaintiff must show that the mortgagee's neglect to release the mortgages of record caused the re-

ment for damages for failure to satisfy a mortgage within the statutory time cannot stand where predicated upon the mistaken premise that the notes securing the mortgage were paid.²⁸

If the action is framed under a clause in a statute allowing recovery of actual damages, plaintiff will be limited to such sum as will fully compensate him for his injury, and it cannot be increased by awarding punitive or exemplary damages;²⁹ and it has been held that exemplary damages beyond the amount of the penalty are not recoverable in a suit for the penalty.³⁰

In case there is no proof of actual damage and liability for punitive or penal damages is barred by the statute of limitations, plaintiff is entitled only to nominal damages.³¹

Pleading damages. Under an allegation of "other damages," a mortgagor cannot recover for his time and expense in going to a third person, falsely stated by the mortgagee to have the mortgage in his possession, to ascertain whether it had been discharged, as such damages are recoverable, if at all, only on a special allegation.³²

§ 351. Effect of Release or Satisfaction

Although generally a mortgage is not enforceable after it has been released or satisfied, the effect of a release or satisfaction entered depends on the character of the rights claimed thereunder, and the release or satisfaction may not be conclusive evidence of payment or discharge.

The effect of a release of a mortgage depends to some extent on the character of the right that is claimed under it.³³ Thus a subsequent purchaser of the property who has relied on a release of record is protected by it as against a subsequent assignee of the mortgagee's interest,³⁴ but a release intended merely to facilitate a renewal of the mortgage will not protect a person who, without the knowledge of the mortgagee, takes the property while it is subject to the mortgage, and then claims

that the mortgagee lost his lien by the release.³⁵ On the satisfaction of a first mortgage, a second mortgage on the same property becomes a first lien.³⁶

The facts that a mortgagee executed a written agreement to discharge a mortgage and that a marginal note to this effect was made by the recording officer are sufficient to warrant a finding that there has been a bona fide discharge;³⁷ but the execution and filing of a release are not conclusive evidence that the mortgage has been paid or discharged,³⁸ and it may be shown by parol that the release was entered without authority,³⁹ or by mistake;⁴⁰ and a direct proceeding to impeach the entry of satisfaction is not required as between the mortgagor and the mortgagee.⁴¹ Recitals in releases to the effect that they are made because of the payment of the debt are no more conclusive than the recital of payment in a receipt or the recital of consideration in a deed, and at most they are only admissions of payment that do not preclude plaintiff from showing that the debt was not in fact paid.⁴²

The mortgagee cannot enforce his lien against the mortgagor where, for a full and fair consideration, he has agreed to release the mortgagor and look to another for payment of the indebtedness.⁴³ Likewise, a mortgagee who has received other property under an agreement to release the mortgaged property in consideration thereof will be estopped to retain the property so received, and also to assert the mortgage lien against the property agreed to be released;⁴⁴ and, where a purchaser of mortgaged property informs the mortgagee of his purchase, giving a description of the property purchased, and the mortgagee, after ascertaining from what he deems a reliable source the extent of his interest in such property, releases it from the mortgage and receives the consideration agreed to be paid for such portion, he will be estopped to assert a further lien.⁴⁵

jection of the application, and that in the absence of the mortgagee's wrongful act there was a reasonable likelihood that the loan would have been made.—*Ebbert v. First Nat. Bank*, *supra*.

28. Mont.—*Advance-Rumely Thresher Co. v. Hess*, 279 P. 236, 85 Mont. 293.

29. Neb.—*Clearwater Bank v. Kurkonski*, 63 N.W. 133, 45 Neb. 1.

30. Vt.—*Giffen v. Barr*, 15 A. 190, 60 Vt. 599.

31. Or.—*Ebbert v. First Nat. Bank*, 279 P. 534, 131 Or. 57.

32. Vt.—*Giffen v. Barr*, 15 A. 190, 60 Vt. 599.

33. Wyo.—*Megown v. Fuller*, 266 P. 124, 38 Wyo. 211, rehearing denied 263 P. 189, 38 Wyo. 211.

34. Wash.—*Gottstein v. Harrington*, 65 P. 753, 25 Wash. 508.

35. Wyo.—*Megown v. Fuller*, 266 P. 124, 38 Wyo. 211, rehearing denied 263 P. 189, 38 Wyo. 211.

36. Okl.—*Ambrister v. Dalton*, 168 P. 231, 66 Okl. 158.

37. Mass.—*Stowell v. Goodale*, 6 Cush. 452.

38. Neb.—*Waggoner v. Creighton First Nat. Bank*, 61 N.W. 112, 43 Neb. 84.

11 C.J. p 693 note 41.

39. Mo.—*Brown v. Koffler*, 113 S.W. 711, 133 Mo.App. 494.

40. Mass.—*Frost v. George*, 63 N.E. 888, 181 Mass. 271.
11 C.J. p 693 note 43.

41. Mo.—*Brown v. Koffler*, 113 S.W. 711, 133 Mo.App. 494.

42. Wyo.—*Megown v. Fuller*, 266 P. 124, 38 Wyo. 211, rehearing denied 263 P. 189, 38 Wyo. 211.

43. Tex.—*Caffarelli Bros. v. Price-Davis Drug Co.*, Civ.App., 19 S.W. 2d 386, error dismissed.

44. Ala.—*Brannen v. Harris*, 39 So. 721—*Bloch v. Edwards*, 22 So. 600, 116 Ala. 90.

45. Kan.—*Drumm-Flato Commn. Co. v. Barnard*, 72 P. 257, 66 Kan. 568.

When two persons have separate mortgage liens on personal property, the fact that one of them releases his lien does not destroy the lien of the other.⁴⁶ Also, where a third person has assumed the mortgage indebtedness, a release of the mortgagor from personal liability does not discharge the debt or release the mortgage.⁴⁷

The mortgagee is not liable to an attaching creditor who has become subrogated to his rights in the mortgage for illegally canceling it, unless it is shown that he was damaged thereby.⁴⁸

Release obtained by fraud. Fraudulent misrepresentations on the part of the mortgagor in obtaining the release will justify its cancellation.⁴⁹ However, misrepresentation in regard to the value of property from which a mortgage has been released does not afford a ground for canceling the release, since the statements of value were mere opinions on which the mortgagee was not justified in relying.⁵⁰

Satisfaction entered by mistake. Where a mortgage is satisfied by mistake,⁵¹ or without the knowledge of any intervening change in the title,⁵² as against a person who has acquired no intermediate right on the faith of the satisfaction courts of equity will restore the lien of such mortgage;⁵³ also, if entry of satisfaction on the margin of the record is made by mistake, the mortgagee may revoke it at any time before it is known to the mortgagor, and may show, in an action brought against him for taking the goods under his mortgage, that the mortgage debt was never paid, that the entry of satisfaction was made by mistake, and that he canceled it before the mortgagor learned of its existence;⁵⁴ and such cancellation will also be effectual as against the assignee of the mortgaged property who had no knowledge of the mistaken entry.⁵⁵ On the other hand, where a third person relies on the release, the mortgagee is estopped to dispute its validity, although it was in fact executed without con-

sideration.⁵⁶

The fact that a register of deeds inadvertently causes a purported satisfaction of a first mortgage to be filed does not give priority to a second mortgagee whose position has not been changed thereby.⁵⁷ Likewise, the balance due on a mortgage note may be recovered, although by mistake a marginal entry has been made on the record of the mortgage to the effect that it has been fully paid, satisfied, and discharged.⁵⁸

Partial release. Where, before the execution of a second renewal mortgage on the same property, the parties agree by parol that the mortgagor may dispose of a part of the property free from mortgage liens, and he does so, the rights acquired by third persons to such released property are unaffected by the renewal mortgage;⁵⁹ and, where the mortgaged property exceeds the amount of the debt, the mortgagee cannot release a portion of the property for the mortgagor's benefit and assert his lien thereon against a subsequent attaching creditor.⁶⁰ Where a mortgage constitutes a second lien on the property mortgaged, it cannot be displaced by the act of the first lienor in releasing his lien as to a portion of the property covered;⁶¹ and, where a prior mortgagee, for the purpose of depriving a junior mortgagee of his security, fraudulently releases that portion of the property on which the prior mortgage is the exclusive lien, he will not be permitted to satisfy his mortgage out of the property covered by the junior mortgage.⁶²

§ 352. Revival of Mortgage after Payment or Cancellation

A mortgage cannot be revived after it has been paid and surrendered to the mortgagor.

A mortgage cannot be revived after the mortgage note has been paid and the mortgage surrendered to the mortgagor by the redelivery of the instrument to the mortgagee on the occasion of his making a new loan.⁶³ Where an original mortgage, contain-

46. Kan.—Gosselin v. Concordia Milling Co., 241 P. 118, 119 Kan. 834.

47. Or.—Weatherly v. Hochfeld, 286 P. 538, 133 Or. 136.

48. Mont.—Degenhart v. Cartier, 192 P. 259, 58 Mont. 245.

49. N.Y.—Lynch v. Tibbits, 24 Barb. 51—Lambert v. Leland, 32 N.Y. Super. 218.
11 C.J. p 694 note 53.

50. Iowa.—Hoffman v. Wilhelmi, 27 N.W. 433, 68 Iowa 510.

51. Tex.—Ross v. Strahorn-Hutton-Evans Commission Co., 46 S.W. 398, 18 Tex.Civ.App. 698.

52. Kan.—Cornwell v. Moss, 147 P. 824, 95 Kan. 229.

53. Mo.—Christy v. Scott, 31 Mo. App. 331.
11 C.J. p 693 note 49.

54. Mass.—Frost v. George, 63 N.E. 888, 181 Mass. 271.
11 C.J. p 693 note 45.

55. Mass.—Frost v. George, supra.
11 C.J. p 693 note 46.

56. N.Y.—Kennedy v. Strobel, 28 N.Y.S. 452, 77 Hun 96.

57. S.D.—Hyde County State Bank v. State Bank of Seneca, 198 N.W. 558, 47 S.D. 316.

58. Cal.—Edwards v. Modoc County Bank, 27 P.2d 800, 135 Cal.App. 556.

59. U.S.—Pecos Valley Bank v. Evans-Snyder-Buel Co., Tex., 107 F. 654, 46 C.C.A. 534.

60. Tex.—Andrews v. Dun, 39 S.W. 209, 15 Tex.Civ.App. 124.

61. N.C.—White v. Winslow, 79 S.E. 261, 163 N.C. 40.
11 C.J. p 694 note 58.

62. Neb.—Jordan v. Hamilton County Bank, 9 N.W. 654, 11 Neb. 499.

63. Mass.—Douglass v. Stetson, 34 N.E. 542, 159 Mass. 428, 38 Am.S.R. 442.

ing a defect only in its proof for record, is destroyed and a new mortgage is executed and accepted by the mortgagee without objection subsequent to a sale of the property by the mortgagor, and a remortgage thereof by the purchaser, the original mortgage cannot be resuscitated and enforced as a prior lien as against such purchaser and its mortgagee, without proof that the sale and remortgage by the purchaser were voluntary or were taken with notice of the existence of the original mortgage.⁶⁴

§ 353. Evidence of Payment or Release

Proof of payment or release is governed by the general rules pertaining to presumptions, burden of proof, admissibility, and sufficiency of evidence.

Presumptions and burden of proof. Where the mortgage is in the possession of the mortgagee uncanceled, it is presumed to be unpaid.⁶⁵ The production of the mortgage note by the mortgagee at the trial of an action of replevin brought by him is prima facie evidence that the note has not been paid.⁶⁶ On the other hand, payment may be presumed from a considerable lapse of time after the maturity of the debt.⁶⁷ Also, possession of the

mortgage and the mortgage note, by the mortgagor, after maturity, is prima facie evidence that the mortgage has been paid, although no entry of satisfaction was made on the record.⁶⁸ Where a mortgagee, who has exercised his right to take possession of the property on the maturity of the indebtedness subsequently delivers it to the mortgagor, this furnishes prima facie evidence that the mortgage is satisfied,⁶⁹ but any presumption of payment arising from possession of the property may be overcome by evidence that the mortgagor acquired possession without the mortgagee's knowledge or consent.⁷⁰

The burden of proving payment or discharge of the mortgage is on the party asserting it.⁷¹ So, in an action to foreclose an uncanceled mortgage, the burden is on defendant to prove payment, where he asserts it as a defense.⁷² Also, where the mortgagor claims that payment was effected by a transfer to the mortgage holder of something other than money, the burden rests on him to show that this was accepted as payment,⁷³ in accordance with the rules considered in the C.J.S. title Payment § 96, also 48 C.J. p 684 note 65.

64. N.J.—Tingley v. International Dynelectron Co., 70 A. 919, 74 N.J. Eq. 538, affirmed 75 A. 1102, 76 N. J. Eq. 337.

65. N.Y.—Beattie v. Meeker, 149 N. Y.S. 453, affirmed 149 N.Y.S. 1070, 164 App.Div. 964.

S.C.—Ex parte Citizens' Bank of Fairfax, 119 S.E. 903, 126 S.C. 291 —Gowdy v. Gowdy, 65 S.E. 385, 83 S.C. 349.

Unauthorized surrender of instrument

The fact that a bond and mortgage, found among the papers of the mortgagee after his death, were surrendered to the mortgagor by a person who, although thereafter appointed administrator, had at the time of the surrender no authority to represent the estate, does not weaken the presumption, raised by the mortgagee's possession of the papers, that they are still valid and unpaid.—Fitzmahony v. Caulfield, 49 N.Y.S. 196, 25 App.Div. 119.

66. Neb.—Heagney v. J. I. Case Threshing Mach. Co., 99 N.W. 260, 4 Neb. (Unoff.) 753, 96 N.W. 175, 4 Neb. (Unoff.) 745.

67. Ill.—W. W. Kimball Co. v. Piper, 111 Ill.App. 82, 11 C.J. p 695 note 75.

68. Ala.—Wilkinson v. Solomon, 3 So. 705, 83 Ala. 438.

69. Miss.—Carpenter v. Bridges, 32 Miss. 265.

70. Or.—Zorn v. Livesley, 75 P. 1057, 44 Or. 501.

71. Minn.—Bogestad v. Anderson, 173 N.W. 674, 143 Minn. 336.

S.C.—Gowdy v. Gowdy, 65 S.E. 385, 83 S.C. 349.

11 C.J. p 694 note 70.

On second mortgage

Where second mortgagee contended that first had been satisfied and that he was entitled to priority in application of proceeds of sale of the mortgaged chattels, it was held that he had the burden of proof.—Nicholson v. Bynum, 162 P. 740, 62 Okl. 167.

In detinue for mortgaged property, where defendant pleaded payment, the burden of proof was on him to establish such plea. — Howell v. Smith, 91 So. 496, 206 Ala. 646.

In replevin against mortgaged property where the defense was that the mortgage was paid, the burden was held to be on defendant mortgagor to prove payment by preponderance of evidence. — Mitchell v. Hammett, 60 S.W.2d 559, 187 Ark. 1163.

In action to recover credit due mortgagor

To recover amount held by finance company under contract, in legal effect a mortgage, providing that amount withheld would be paid to dealer when contracts covering automobiles were paid in full, automobile dealer would be required to allege and prove that amount claimed had actually accrued under contract and that demand had been made therefor. — Lindsey v. Commercial

Discount Co., 55 P.2d 896, 12 Cal.App. 2d 345.

72. Cal.—Bank of Italy Nat. Bank & Savings Ass'n v. Bettencourt, 7 P. 2d 174, 214 Cal. 571—Gordon v. Pfeiffer, 274 P. 578, 96 Cal.App. 607.

N.Y.—Walsh v. Gray, 212 N.Y.S. 230, 214 App.Div. 296.

Plaintiff not bound to prove nonpayment

In suit to obtain adjudication that written instruments constituted mortgage and for foreclosure thereof, where instruments sued on created obligation for payment of money, within Civ.Pract.Act § 242, it was error to hold that plaintiffs were bound to prove nonpayment to establish cause of action.—Walsh v. Gray, supra.

73. Okl.—Riley Motor Co. v. Wilkins, 65 P.2d 481, 179 Okl. 236.

In suit on note secured by chattel mortgage, mortgagor who claims to have discharged debt by delivering mortgaged property to mortgagee has burden of proving that mortgagee accepted property in satisfaction of debt.—Riley Motor Co. v. Wilkins, supra.

In suit to enforce mortgage

Purchaser, in seller's suit to enforce mortgage had burden of proving that seller repossessed automobile without purchaser's consent and accepted it in settlement of purchaser's debt sued on.—Bernstein-Lanford, Inc., v. Tieuel, La.App., 144 So. 195.

Admissibility of evidence. Evidence which bears on payment of the mortgage is relevant and admissible, if otherwise competent,⁷⁴ in accordance with the principles considered in the C.J.S. title Payment § 112, also 48 C.J. p 717 note 93.

Payment of the mortgage debt may be proved by a bill of sale of cattle to the mortgagee, the proceeds of which cattle were to be credited on the mortgage, and by the fact that the mortgagee has subsequently sold cattle.⁷⁵

In an action by the assignee of a mortgagor against the mortgagee for conversion, where the issue is whether there was a default in payment, evidence that the assignee agreed to pay to prevent removal of the property, if the mortgagee would give him time to draw the money from the bank, is admissible only as a part of the *res gestæ*, and

it is error to permit the assignee to follow it up by other evidence showing the amount of his bank account;⁷⁶ and on an issue as to whether, prior to the execution of a renewal mortgage, the parties agreed by parol to release a portion of the property from the lien of the first mortgage, the renewal mortgage and a pencil memorandum of the alleged parol agreement are admissible, the inferences deducible from the difference in the language of the two mortgages, and whether any memorandum was ever written, and, if written, what it contained, being questions for the jury.⁷⁷

Sufficiency of evidence. General rules governing weight and sufficiency control in determining whether the evidence is sufficient to show that the mortgage debt has or has not been paid or released,⁷⁸ or to support a judgment,⁷⁹ finding,⁸⁰ or ver-

74. Tex.—*Brand v. Smithdeal*, Civ. App., 95 S.W.2d 1017.

Testimony as to receipt of rents

In bank's action on notes executed by farm tenant as maker and landlord as surety, which notes were secured by a mortgage on maker's crops, wherein maker testified that all crops were sold and proceeds delivered to bank for purpose of calculating amount of rent due, testimony of surety as to amount of rent received by him during years involved was admissible as circumstance to show amount of payments received by bank on notes.—*Brand v. Smithdeal*, supra.

75. Tex.—*Watts v. Dubois*, Civ.App., 66 S.W. 698.

76. N.Y.—*Fischman v. Levin*, 144 N. Y.S. 674, 83 Misc. 107.

77. U.S. — *Pecos Valley Bank v. Evans-Snyder-Buel Co.*, Tex., 107 F. 654, 46 C.C.A. 534.

78. Evidence sufficient

(1) To establish that seller repossessed automobile with purchaser's consent and did not accept it in settlement of debt, so as to release purchaser from contract and purchase notes sued on.—*Bernstein-Lanford, Inc. v. Tieuel*, La.App., 144 So. 195.

(2) To show that chattels were surrendered and accepted in full satisfaction of debt by mortgagees who, therefore, could not recover deficiency from mortgagor after holding mortgage sale.—*Harris v. Rivard*, 248 N.W. 573, 263 Mich. 134.

(3) To show that note secured by mortgage had been paid and discharged prior to the bringing of a foreclosure action thereon.—*Underwood State Bank v. Weber*, 193 N.W. 602, 49 N.D. 814.

(4) To show that the mortgage debt was paid.—*Kidd v. Talbot*, La. App., 147 So. 825.

(5) To show a satisfaction of the mortgage debt.—*Hamilton v. Harry L. Hussmann Refrigerator & Supply Co.*, 108 So. 43, 214 Ala. 376.

(6) To show that marketing association agreed to pay mortgage against hay crop as part of consideration of sale of crop to it.—*Northwest Hay Ass'n v. Slayton*, 242 P. 354, 137 Wash. 248.

(7) To show that mortgagor gave mortgage on live stock on farm, and that owner of farm never released mortgage on property.—*Kerby v. Feild*, 38 S.W.2d 308, 183 Ark. 714.

Evidence insufficient

(1) To show conclusively acceptance of debtor's note as payment of antecedent debt, in action to recover mortgaged personal property.—*Farmers' & Merchants' State Bank of West Concord v. Nummedahl*, 207 N. W. 313, 166 Minn. 144.

(2) To show completed contract for discharge of another chattel mortgage for which priority was claimed.—*Hill v. Bender*, 6 P.2d 1081, 138 Or. 400.

(3) Where the giving of the mortgage is admitted, a statement by mortgagor that mortgagee had no mortgage or no claim on mortgaged property is not sufficient to prove discharge of mortgage.—*Bogestad v. Anderson*, 173 N.W. 674, 143 Minn. 336.

79. Evidence insufficient

(1) To justify judgment for mortgagor in detinue action on ground that mortgage under which property sued for was claimed had been satisfied by seizure of certain of mortgagor's property sold by mortgagee for much less than amount of mortgage debt.—*Williams v. Love*, 166 So. 681, 232 Ala. 31.

(2) To support judgment awarding automobile dealer recovery on con-

tract with finance company, in legal effect a mortgage, whereunder finance company was to pay dealer amount withheld by company when contracts covering automobiles were paid in full.—*Lindsey v. Commercial Discount Co.*, 55 P.2d 896, 12 Cal.App.2d 345.

80. Evidence sufficient

(1) To sustain finding that mortgages had not been paid in full.—*Baker v. Betzner Mercantile Co.*, 13 S.W.2d 608, 178 Ark. 1199.

(2) To warrant finding that mortgage on corn and cotton crop had been paid.—*Blankenship v. Modglin*, 6 S.W.2d 531, 177 Ark. 388.

(3) To require finding that mules were not unconditionally delivered by owner in payment of his son's mortgage.—*Anderson v. Martin Motor Co.*, Tex.Civ.App., 32 S.W.2d 676.

(4) A judgment to the effect that a mortgage was paid by a check mailed by the mortgagor but not cashed by the mortgagee because of the failure of the drawee bank, was held to be based on an implied finding that the payee knew of the precarious condition of the drawee bank when it deposited the check in a local bank; the evidence was held to be sufficient to support this implied finding.—*Blackwelder v. Fergus Motor Co.*, 260 P. 734, 80 Mont. 374.

Evidence insufficient

(1) To support finding that mortgage note was paid, so as to make mortgagee's seizure of chattels a conversion.—*Woods Leasing Co. v. Funcheon*, 25 P.2d 47, 134 Cal.App. 111.

(2) To support finding of agreement whereby mortgagee was to accept all property and possession of premises in complete settlement of mortgage debt, in action on agreement whereby mortgagee was to take over designated property and credit

dict⁸¹ to the effect that there has or has not been such payment or release. Payment must be proved by a preponderance of the evidence.⁸² The mere acceptance by a mortgagee of property other than that mortgaged, and the crediting of the same, at an

agreed price, on the mortgage, do not show an agreement to release the mortgaged property.⁸³ Payment of a large amount over the mortgage debt will, however, authorize a finding that the mortgage has been paid.⁸⁴

XIV. FORECLOSURE

A. IN GENERAL

§ 354. Necessity of Foreclosure

The foreclosure of a chattel mortgage is ordinarily necessary in order to cut off and transfer the mortgagor's interest in the mortgaged property; however, it is unnecessary if the mortgagor, after a default, delivers the property to the mortgagee in satisfaction of the mortgage debt.

At common law, on the breach of a condition of a chattel mortgage, an absolute title to the mortgaged chattels vested in the mortgagee without a foreclosure, as shown *infra* § 432. Under the modern rule, however, courts of equity interfere to give the mortgagor a right of redemption, as will be discussed in § 432, particularly since in many jurisdictions a chattel mortgage creates merely a lien on the property, as already discussed in § 1. Accordingly, a foreclosure, either in accordance with the terms of the mortgage,⁸⁵ or in the manner prescribed by law,⁸⁶ is ordinarily necessary today, the

function of a foreclosure being officially to declare a forfeiture of the mortgagor's interest and to transfer it to another.⁸⁷ However, foreclosure is unnecessary where the mortgagor, after default, delivers the property to the mortgagee in satisfaction of the mortgage debt.⁸⁸

§ 355. Right to Foreclose

Unless the circumstances are such that the right to foreclose is granted or denied by statute, the circumstances under which a right to foreclose a chattel mortgage arises depend on the intention of the parties to the mortgage.

Except in particular circumstances in which a right to foreclose may be created⁸⁹ or denied⁹⁰ by a statute, or be denied because of equitable considerations,⁹¹ the circumstances under which a right to foreclose arises depend on the intention of the parties as expressed in the mortgage,⁹² although to

defendant on the mortgage debt for the fair value thereof.—*Horst v. Staley*, 54 P.2d 876, 101 Mont. 543.

(3) To support finding that note secured by mortgage had been paid, in an action on the note.—*First Nat. Bank v. Morris*, Tex.Civ.App., 94 S. W.2d 867.

81. Evidence sufficient

(1) To sustain verdict finding balance remained yet unpaid, in action to foreclose mortgage on crop and personalty.—*Callaway v. Dozier*, 166 S.E. 254, 45 Ga.App. 865.

(2) Evidence of payment of balance alleged to be due on note for piano was held to be sufficient to support verdict for defendant in replevin.—*Æolian Co. of Missouri v. Annis*, Mo.App., 272 S.W. 1031.

Evidence insufficient to go to jury on question as to whether mortgagee agreed to take back mortgaged machinery in payment of mortgage notes.—*Crawford v. Souders*, Mo. App., 37 S.W.2d 495.

82. S.D.—*Townsend v. Weisenburger*, 142 N.W. 253, 32 S.D. 148.

83. Ala.—*Brannen v. Harris*, 39 So. 721.
11 C.J. p 695 note 81.

84. Mo.—*Vette v. Johnson*, 43 Mo. App. 300.
11 C.J. p 695 note 82.

85. Or.—*Templeton v. Lloyd*, 109 P. 1119, 115 P. 1068, 59 Or. 52.

86. Mich.—*Robinson v. Solomon*, 193 N.W. 209, 222 Mich. 618.
N.Y.—*Holliday v. McGraw*, 199 N.Y. S. 661, 106 Misc. 661.
11 C.J. p 695 note 89.

87. Wash.—*Larson v. Anderson*, 166 P. 774, 97 Wash. 484.

88. Okl.—*Hixon v. Hubbell*, 44 P. 222, 4 Okl. 224.
Waiver, loss, or abandonment of right of redemption see *infra* § 434.

89. Ga.—*Nichols v. Ward*, 108 S.E. 832, 27 Ga.App. 501.
Wash.—*Lee v. Walmsley*, 240 P. 906, 136 Wash. 573—*J. I. Case Threshing Machine Co. v. Shroll*, 170 P. 564, 100 Wash. 212.

90. La.—*Motors Securities Co. v. Tullos*, App., 178 So. 634.

Estoppel to assail validity

A mortgagor cannot be estopped to assail the validity of a foreclosure made in violation of a statute prohibiting a foreclosure, since what is positively forbidden cannot be accomplished by indirection.—*Aultman, etc., Co. v. Meade*, 89 S.W. 137, 121 Ky. 241, 28 Ky.L. 208, 123 Am.S.R. 193.

91. N.J.—*Dichter v. Nagle*, Ch., 113 A. 519.

92. Ala.—*Gernert v. Limbach*, 50 So. 903, 163 Ala. 413.
Ariz.—*Glaspie v. Williams*, 51 P.2d 254, 46 Ariz. 381.
Iowa.—*Koster v. Seney*, 69 N.W. 868, 100 Iowa 558.
La.—*Hopkins v. Southall*, App., 150 So. 871.

Mass.—*Wooldridge v. Wolf*, 149 N.E. 685, 254 Mass. 128—*Lawlor v. Dowd*, 130 N.E. 103, 237 Mass. 569.
Miss.—*Quarles v. Hucherson*, 104 So. 148, 139 Miss. 356.

Mo.—*Stockham v. Leach*, 238 S.W. 853, 210 Mo.App. 407—*Citizens' Bank v. Tyler*, App., 226 S.W. 603.
Mont.—*Advance-Rumely Thresher Co. v. Kruger*, 16 P.2d 1102, 93 Mont. 66, 85 A.L.R. 1053—*Bice v. Daffern*, 293 P. 433, 88 Mont. 479.
N.Y.—*Wazen v. Duggan*, 186 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

N.D.—*Thompson Realty Co. v. Mowbray*, 214 N.W. 908, 55 N.D. 732—*Taughner v. Northern Pac. R. Co.*, 129 N.W. 747, 21 N.D. 111.

Or.—*Swan v. Jones*, 173 P. 249, 88 Or. 708.

Wash.—*Woodruff v. Stahl*, 217 P. 1013, 126 Wash. 184.

W.Va.—*Southern Billiard Supply Co. v. Lopinsky*, 116 S.E. 253, 93 W. Va. 214.

determine the intention of the parties in this respect it is permissible to construe the mortgage in connection with other instruments executed at the same time.⁹³ Particular circumstances in which the right to foreclose may exist are discussed infra §§ 356, 357, and 360.

The right to foreclose is not affected by the fact that the mortgagor, with the mortgagee's knowledge, has relinquished control of the property to a third person for a definite period,⁹⁴ or that the mortgagee's interest in the property is only a partial one;⁹⁵ nor is it affected by the fact that the mortgagee is indebted to the mortgagor, if such indebtedness has no connection with, or is insufficient entirely to wipe out, the mortgage debt.⁹⁶ So also, the right to foreclose is unaffected by controversies between the mortgagor and third persons concerning matters as to which the mortgagee is a stranger.⁹⁷ However, where the mortgagee has been summoned as a trustee in attachment, the mortgage cannot thereafter be foreclosed,⁹⁸ although an invalid attachment does not prevent foreclosure.⁹⁹

A mortgage may properly be foreclosed after the death of the mortgagor, and the mortgagee need not file his claim against the estate in probate.¹

Where the mortgagee has seized the property for his own use, rather than for the protection of his security, the mortgage debt is satisfied, as shown supra § 342, to the extent of the value of the property, and the mortgagee cannot maintain an action to foreclose the lien on such property, but if he has seized only a part of the property he may foreclose the mortgage on the property remaining in the possession of the mortgagor.²

On conversion. It has been held that where the mortgaged property has been converted by a third person, the holder of the mortgage may proceed to foreclose the mortgage on the property in the hands of such person.³

Counterclaim. Where a counterclaim is set up by the mortgagor to an action by the mortgagee to recover the mortgage debt and to foreclose the mortgage, the mortgage may be foreclosed for the amount of the debt, subject to a set-off for the amount of any claim established by the mortgagor.⁴ Also, where a chattel mortgage is given to secure future advances totaling a specified sum, but only a portion of such amount is advanced, the mortgagee may nevertheless foreclose the mortgage for the amount due, subject to a set-off for any damages which the mortgagor may have suffered by reason of the mortgagee's failure to advance the whole sum.⁵

§ 356. — Maturity of Debt

In the absence of a statute to the contrary, a mortgage conditioned on the payment of a debt on a day certain cannot be foreclosed before that date.

In the absence of circumstances giving rise to a statutory right to foreclosure where the condition of the mortgage is the payment of a debt on a day certain, a right to foreclose does not exist prior thereto.⁶ On the other hand, where no time for payment of the debt is specified,⁷ or where the debt is past due at the time the mortgage is executed,⁸ the mortgage may be foreclosed immediately on delivery. However, it has generally been held that there must be a demand and refusal to pay,⁹ even

93. Iowa.—Koster v. Seney, 69 N.W. 868, 100 Iowa 558.

Mo.—Stockham v. Leach, 238 S.W. 853, 210 Mo.App. 407.

Mont.—Bice v. Daffern, 293 P. 433, 88 Mont. 479.

N.Y.—Wazen v. Duggan, 186 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

Foreclosure as terminating contract

An attempt by the mortgagee to foreclose the mortgage in violation of the terms of an agreement entered into in connection with the mortgage at the time of the execution of the latter has been held to entitle the mortgagor to treat the agreement as at an end.—Wooldridge v. Wolf, 149 N.E. 685, 254 Mass. 128.

Renewal as waiver by mortgagor

As respects right to foreclose, an objection that the mortgagee did not properly apply a check given to him on his promise to give an extension of time is waived by the mortgagor's subsequent signing of an extension or renewal note.—Davenport v. San

Antonio Machine & Supply Co., Tex. Civ.App., 59 S.W.2d 207, error reversed.

94. N.Y. — Judson v. Easton, 1 Thoms. & Co. 598, affirmed 58 N.Y. 664.

11 C.J. p 695 note 91 [a] (2).

95. N.Y.—Reuscher v. Klein, 35 N.Y. Super. 446.

96. S.D.—Aalseth v. Simpson, 231 N.W. 289, 57 S.D. 118.

97. Ark.—Robinson, etc., Contracting Co. v. Harrison, 133 S.W. 197, 90 Ark. 643.

98. Mass.—Hobart v. Jouvett, 6 Cush. 105.

99. Cal.—Souza v. Lucas, App., 100 P. 115.

1. Iowa.—Cocke v. Montgomery, 39 N.W. 386, 75 Iowa 259.

Mont.—Emerson-Brantingham Implement Co. v. Anderson, 194 P. 160, 58 Mont. 617.

2. N.Y.—Altman v. Krumholtz, 172 N.Y.S. 126.

3. Tex.—Wilson v. Wilson, Civ.App., 21 S.W.2d 1084.

4. Tex.—West Texas Utilities Co. v. Nunnally, Civ.App., 10 S.W.2d 391.

5. Miss.—Watts v. Bonner, 6 So. 187, 66 Miss. 629—Coleman v. Galbreath, 53 Miss. 303.

Or.—Abernethy v. Uhlman, 93 P. 936, 97 P. 540, 52 Or. 359.

6. Mont.—James v. Speer, 220 P. 535, 69 Mont. 100.

7. Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106. 11 C.J. p 697 note 9.

8. Iowa.—Johnston v. Robuck, 73 N.W. 1062, 104 Iowa 523.

11 C.J. p 697 note 8.

9. U.S.—Brown v. Grand Rapids Parlor Furniture Co., Mich., 58 F. 286, 7 C.C.A. 225, 22 L.R.A. 817.

11 C.J. p 697 note 10.

Preserving lien against third parties

Where a mortgage note has no due date, the mortgagee, to preserve his lien against another encumbran-

where the mortgage contains an express agreement to pay at maturity.¹⁰

Renewal. Although by the terms of the mortgage the mortgagor may renew the debt and mortgage at maturity if he pays the interest, a mere payment of the interest when due will not constitute a renewal of the mortgage so as to prevent foreclosure.¹¹

§ 357. — Default in Payment or Performance of Condition

The right to foreclose a chattel mortgage arises usually on a default in payment or the performance of any other condition in the mortgage.

The right to foreclose a chattel mortgage usually

arises on a default in the payment of the mortgage debt,¹² or the performance of any other condition named in the mortgage,¹³ and a default occurs immediately on the mortgagor's failure to perform his obligation strictly according to the tenor of the mortgage.¹⁴ Conversely, in the absence of an express agreement by the mortgagor, or a provision of a statute, to other effect, no right to foreclose exists ordinarily prior to, or in the absence of, a default.¹⁵ A mortgagor is not in default, so as to authorize a foreclosure, where it is possible that his obligation will be,¹⁶ or that it is being,¹⁷ or that it has been,¹⁸ performed in accordance with the terms of the mortgage. Where the mortgage is conditioned on the payment of a note, the mortgage and

cer, must make demand for payment within a reasonable time, or take possession within the time specified by statute.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.

10. U.S.—Brown v. Grand Rapids Parlor Furniture Co., Mich., 58 F. 288, 7 C.C.A. 225, 22 L.R.A. 817.

11. Kan.—Weldgrube v. Kerns, 207 P. 654, 111 Kan. 428.

12. Ill.—Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation, 7 N.E.2d 623, 289 Ill.App. 576.

Iowa.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856.

Kan.—Cherryvale Inv. Co. v. Dillman, 11 P.2d 681, 683, 135 Kan. 699, citing *Corpus Juris*,

La. — Bernstein-Lanford, Inc., v. Tieuel, App., 144 So. 195.

Me.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Mich.—Theatre Equipment Acceptance Corporation v. Betman, 242 N. W. 903, 259 Mich. 245.

N.Y.—Wazen v. Duggan, 186 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

N.D.—Advance-Rumely Thresher Co. v. Johnson, 243 N.W. 919, 62 N.D. 553—Thompson Realty Co. v. Mowbray, 214 N.W. 908, 55 N.D. 732.

Or.—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 265—Kummer v. Lauman, 7 P.2d 556, 138 Or. 514—Swan v. Jones, 173 P. 249, 88 Or. 706.

S.C.—People's Bank v. Walker, 128 S. E. 715, 132 S.C. 254.

S.D.—Aalseth v. Simpson, 231 N.W. 289, 57 S.D. 118.

Tex.—Terry v. Spearman, Com.App., 259 S.W. 563, reversing, Civ.App., 246 S.W. 103.

11 C.J. p 695 note 91.

13. Me.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Miss.—Quarles v. Hucherson, 104 So. 148, 139 Miss. 356.

11 C.J. p 695 note 91.

14. Mass.—Lawlor v. Dowd, 130 N. E. 103, 237 Mass. 569.

N.D.—Bangs, Berry & Carson v. Nichols, 131 N.W. 87, 47 N.D. 123. 11 C.J. p 696 note 92.

Sale or disposition of property

(1) A sale of the mortgaged property by the mortgagor without the mortgagee's consent has been held to constitute a breach of the mortgage, authorizing foreclosure at once, although only a part of the property was sold.—Bangs, Berry & Carson v. Nichols, supra.

(2) However, according to other authority, a sale or other disposition of the property by the mortgagor in violation of the terms of the mortgage does not authorize an executory process before maturity, in the absence of an express provision in the mortgage to the contrary.—Hopkins v. Southall, La.App., 150 So. 871.

(3) Option to foreclose on sale or disposition see *infra* § 360 a.

Failure to insure

The failure of a mortgagor to exercise due diligence in procuring insurance for the property as required by the terms of the mortgage has been held to constitute a default. Thus the mortgagor was in default where, although he had applied therefor on the date the mortgage was executed, the insurance was not issued until more than two months afterward.—Lawlor v. Dowd, 130 N. E. 103, 237 Mass. 569.

15. Ariz.—Glaspie v. Williams, 51 P. 2d 254, 46 Ariz. 381.

La.—Hopkins v. Southall, App., 150 So. 871.

Mo.—Stockham v. Leach, 238 S.W. 853, 210 Mo.App. 407.

Mont. — Advance-Rumely Thresher Co. v. Kruger, 16 P.2d 1102, 93 Mont. 66, 85 A.L.R. 1053.

N.Y.—Wazen v. Duggan, 186 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

Or.—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

Wash.—Simpson v. Combes, 182 P. 566, 107 Wash. 575.

11 C.J. p 696 notes 93, 94.

16. Mortgagor's option

Where by the terms of the mortgage, payment may be made in accordance with either of two plans, the mortgagee cannot foreclose merely on a failure to make payment in accordance with one plan, where payment in accordance with the other plan is still possible.—Glaspie v. Williams, 51 P.2d 254, 46 Ariz. 381.

17. Mo.—Stockham v. Leach, 238 S. W. 853, 210 Mo.App. 407.

Performance of services

Where the mortgagor's obligation is to render services specified in a contract entered into in connection with the mortgage, the mortgagor is not in default, so as to authorize foreclosure, so long as the contract is being performed, even though a note payable by the performance of such services is due.—Stockham v. Leach, supra.

Action held premature

Where, irrespective of whether a warehouse receipt sought to be foreclosed as a chattel mortgage was delivered to secure the repayment of money, a part of the money was to be paid by the defendant from certain contracts with a third person, and such payments were then being made, an action as to such part was prematurely brought. — Stultz v. Gamble, 180 N.Y.S. 424.

18. N.Y.—Wazen v. Duggan, 186 N. Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

Wrongful application of payment

Where mortgagors had paid enough to discharge the mortgage, but the mortgagees, contrary to the mortgage terms, applied such payments on another debt, a foreclosure sale for default of payment was void as to mortgagors' trustee in bankruptcy.—Simpson v. Combes, 182 P. 566, 107 Wash. 575.

note must be read together in determining whether there has been a breach of the condition,¹⁹ and payment of the note in accordance with the terms thereof constitutes a performance of the condition of the mortgage.²⁰

Even where there has been a breach of a condition of the mortgage, it has been held that the mortgage cannot be foreclosed where to permit a foreclosure would be inequitable.²¹

In the absence of other existing liens on the mortgaged property, a mortgagor may surrender it to the mortgagee and authorize its sale and the application of the proceeds to the mortgage debt, although no default has occurred in the terms of the mortgage,²² and a foreclosure before default cannot be impeached by inferior lienholders if the value of the mortgaged goods is less than the debt secured by the mortgage to plaintiff.²³ Moreover, even an unauthorized foreclosure before a default,²⁴ or the time specified for foreclosure in the mortgage,²⁵ if not objected to by the mortgagor, is valid as against the mortgagor's general creditors.

Redelivery of possession. If a default occurs while the mortgagee holds temporary possession, he need not go through the form of delivery back to the mortgagor before asserting his right.²⁶

§ 358. — Persons Entitled to Foreclose

The mortgagee or persons having acquired sufficient

interest therein or acting as representative of the mortgagee may foreclose the mortgage.

Where a mortgage is given to several persons jointly to secure separate debts, either mortgagee may enforce his own claim by foreclosure,²⁷ or the mortgage may be foreclosed by the mortgagees jointly.²⁸ On the other hand, it has been held that a mortgage given to several persons to secure a single debt cannot be foreclosed by one of them,²⁹ but there is authority to the contrary.³⁰

Parties to assignment. An assignee of the mortgage may foreclose it,³¹ as may an assignee of a part of the mortgage debt,³² unless by its terms the mortgage confers a right of foreclosure on the mortgagee only.³³ If the mortgage itself is assigned, the assignee acquires the legal title and may enforce the mortgage in his own name;³⁴ but even where the assignment is only an equitable one, the assignee has a right to use the name of the holder of the legal title to enforce the mortgage at law.³⁵ Where, although the mortgage and the note had been assigned, they were in the mortgagee's possession at the time of the foreclosure, and the mortgagor recognized the mortgagee as the owner, a foreclosure by the mortgagee was held to be proper.³⁶

Parties to suretyship agreement. A surety to whom a mortgage has been given as indemnity cannot foreclose it, in the absence of an express provision therein to the contrary, until he has paid the debt or some part thereof;³⁷ nor can he foreclose after having been discharged as a surety.³⁸ The

19. Mont.—Bice v. Daffern, 293 P. 433, 88 Mont. 479.

20. Deposit as payment

Where a note is payable at a particular time and at a particular trust company, and the mortgage securing the note is by its terms conditioned on the payment of such note, the mortgagor is not in default, so as to authorize a foreclosure, where on maturity he has on deposit with the trust company a sum exceeding the note, with instructions to pay the note upon presentment, and the mortgagee fails to make presentment at such place.—Wazen v. Duggan, 188 N.Y.S. 394, affirmed 188 N.Y.S. 956, 197 App.Div. 922.

21. Execution of second mortgage

The execution of a second mortgage by the mortgagor, especially where such mortgage has been canceled of record, will not entitle the holder of the first mortgage to foreclose the latter, despite an agreement therein by the mortgagee not to create another mortgage or lien on the property, since the second mortgage can in no way affect the lien of the first, and to permit such a foreclosure would be inequitable.—Dichter v. Nagle, N.J.Ch., 113 A. 519.

22. N.D.—Taughner v. Northern Pac. R. Co., 129 N.W. 747, 21 N.D. 111.

23. N.D.—Taughner v. Northern Pac. R. Co., supra—Lovejoy v. Merchants' State Bank, 67 N.W. 956, 5 N.D. 623.

24. Mont.—Noyes v. Ross, 59 P. 367, 23 Mont. 425, 75 Am.S.R. 543, 47 L.R.A. 400.

25. U.S.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co., C.C.Mass., 110 F. 491.

26. Mo.—Thompson v. White Sewing Mach. Co., 166 S.W. 895, 179 Mo.App. 276.
11 C.J. p 696 note 3.

27. Mich.—Lyon v. Ballentine, 29 N. W. 837, 63 Mich. 97, 6 Am.S.R. 284 —Walker v. White, 27 N.W. 554, 60 Mich. 427.

Neb.—Sloan v. Thomas Mfg. Co., 79 N.W. 728, 58 Neb. 713.

28. Mich.—Lyon v. Ballentine, 29 N. W. 837, 63 Mich. 97, 6 Am.S.R. 284. N.D.—Baird v. Wallum, 212 N.W. 215, 54 N.D. 925.

29. Mo.—Hutchins Hanks Coal Co. v. Walnut Land, etc., Co., 124 S.W. 1098, 141 Mo.App. 251.

N.J.—Chapman v. Hunt, 14 N.J.Eq. 149.

30. Tex.—Simpson v. Shaw, Civ. App., 33 S.W.2d 809, error refused.

31. Ark.—Erdman v. Erdman, 159 S. W. 201, 109 Ark. 151.

11 C.J. p 698 note 35.

32. Ala.—Penney v. Miller, 38 So. 668, 134 Ala. 593.

Tex.—Avery v. Popper, 48 S.W. 572, 49 S.W. 219, 50 S.W. 122, 92 Tex. 337, 71 Am.S.R. 849, dismissing appeal 21 S.Ct. 94, 179 U.S. 305, 45 L.Ed. 203.

11 C.J. p 699 note 36.

33. Tex.—Colburn v. Coburn, Civ. App., 211 S.W. 248.

34. Mich.—Hyma v. Three Rivers Nat. Bank, 44 N.W. 427, 79 Mich. 167.

11 C.J. p 699 note 38.

35. Ala.—Dumas v. People's Bank, 40 So. 964, 146 Ala. 226—Graham v. Newman, 21 Ala. 497.

36. Iowa.—Cain v. Vogt, 116 N.W. 786, 138 Iowa 631, 128 Am.S.R. 216.

37. Mo.—Walker v. Sutton, App., 195 S.W. 51.

38. N.Y. — Newsam v. Finch, 25 Barb. 175.

creditor may enforce such a mortgage in equity,³⁹ and where one agreeing to pay a debt owing to a third person takes a chattel mortgage as security, the mortgage may be enforced in equity by the person whose debt it is agreed shall be paid.⁴⁰

A trustee named in a chattel mortgage as the mortgagee is a proper person to foreclose the mortgage;⁴¹ but he cannot foreclose in order to be paid his claim for services rendered in administering the trust where he never performed services as such trustee under the mortgage.⁴² Where the trustee is a mere nominal one, he is a mere agent of the creditor, and the latter may maintain a suit to foreclose in his own name,⁴³ but if there has been an agreement, express or implied, that the trustee shall have entire discretionary powers as to the manner of handling the trust, and he has refused to foreclose, the creditor is not entitled so to do.⁴⁴ Under a statute to that effect, where a trustee named in a deed of trust cannot act because of unforeseen circumstances, the deed may be enforced by a substitute trustee appointed by the court.⁴⁵

Personal representative. On the death of the mortgagee, an action to foreclose should be brought by his personal representatives, not by the heir.⁴⁶

A junior mortgagee may bring an action of foreclosure against the mortgagor, and may make prior mortgagees parties thereto,⁴⁷ or, if the mortgaged property is in the possession of a senior mortgagee, may maintain an action of foreclosure against the senior mortgagee.⁴⁸ However, a junior mortgagee must establish as against a senior mortgagee,⁴⁹ at least if the latter is rightfully in possession of the property,⁵⁰ that the junior mortgagee has a substantial, and not merely a nominal, interest in the property. Thus, if the value of the mortgaged prop-

erty is such that the proceeds of a sale thereof would not exceed the amount due under the prior mortgage, a junior mortgagee cannot foreclose until he has procured a discharge of the prior mortgage by paying the prior mortgagee the amount due the latter under his mortgage.⁵¹ On the other hand, if the proceeds of a sale of the property would be sufficient to satisfy the senior mortgage and leave a surplus, a junior mortgagee may foreclose his mortgage and apply the surplus on his own debt.⁵² Also, it has been held that a junior encumbrancer may exercise his legal right to foreclose without liability to other encumbrancers in case he subjects only the interest of the mortgagor.⁵³

The assignee of a junior chattel mortgage may seize and sell the property for the debt represented thereby, subject to the interest of the senior mortgage, and free from interference by anyone not having a prior claim.⁵⁴

Bill to compel foreclosure. A subsequent mortgagee of a part of the property embraced in a prior mortgage may, after exhausting all his other securities without satisfaction, file a bill in equity against the prior mortgagee for the purpose of subjecting such property by compelling the latter to foreclose, and to resort first to the other property embraced in his mortgage.⁵⁵

§ 359. — Waiver of Default or Right to Foreclose

A waiver of default or of a right to foreclose may be effected by an express agreement or by any other unequivocal act by the mortgagee to that end, or by his acquiescence in the breach.

A waiver of default or of a right to foreclose a chattel mortgage may be effected by an express agreement,⁵⁶ or by any other unequivocal act⁵⁷

39. Ala.—Troy v. Smith, 33 Ala. 469.
Ind.—Plaut v. Storey, 30 N.E. 886,
131 Ind. 46.

Tex.—Ferrell-Michael Abstract, etc.,
Co. v. McCormac, Civ.App., 184 S.
W. 1081.

40. Vt.—Greene v. McDonald, 40 A.
1035, 70 Vt. 372.

41. U.S.—In re Pilot Radio & Tube
Corporation, D.C.Mass., 5 F.Supp.
453, affirmed, C.C.A., 72 F.2d 316,
certiorari denied Eckhardt v. Ball,
55 S.Ct. 98, 293 U.S. 584, 79 L.Ed.
680.

42. Wash.—Northwest Textile Ass'n
v. Weinstein, 19 P.2d 108, 171
Wash. 687.

43. U.S.—H. B. Claffin Co. v. Fur-
tick, C.C.S.C., 119 F. 429.
11 C.J. p 699 note 42.

44. Cal.—Sierra Paper Co. v. Grep-
pin, 138 P. 608, 45 Cal.App. 630.

**Finding trustee had such discretion
held justified**

Cal.—Sierra Paper Co. v. Greppin,
supra.

45. Mo.—Thompson v. Foerstel, 10
Mo.App. 290.

46. Va.—Harrison v. Harrison, 1
Call 419, 5 Va. 419.

11 C.J. p 699 note 43.

47. Minn.—Tiedt v. Boyce, 142 N.W.
195, 122 Minn. 283.

48. S.C.—Edwards v. Dargan, 8 S.E.
858, 30 S.C. 177.

49. Or.—Harcombe v. Rubenstein, 74
P.2d 982, 158 Or. 78.

50. Minn.—Tiedt v. Boyce, 142 N.W.
195, 122 Minn. 283.

51. Or.—Harcombe v. Rubenstein, 74
P.2d 982, 158 Or. 78.

52. Minn.—Tiedt v. Boyce, 142 N.W.
196, 122 Minn. 283.
S.C.—Edwards v. Dargan, 8 S.E. 858,
30 S.C. 177.

53. N.Y.—Hale v. Omaha Nat. Bank,
64 N.Y. 550.

54. N.Y.—Schwab Mfg. Co. v. Alzen-
man, 94 N.Y.S. 729, 106 App.Div.
478.

11 C.J. p 699 note 48.

55. Ark.—Hannah v. Carrington, 18
Ark. 85.

56. Mont.—Fleming v. Consolidated
Motor Sales Co., 240 P. 376, 74
Mont. 245.

Tex.—Burditt v. Motor Supply Co.,
Civ.App., 99 S.W.2d 879, error dis-
missed.

11 C.J. p 698 notes 17, 21 [a], [b].

Verbal agreement by the mortga-
gee after a default not to accelerate
maturity and foreclose the mortgage
did not prevent him from accelerat-
ing maturity and foreclosing on a
subsequent default where the origi-
nal mortgage and a new mortgage
executed in consideration of the ver-
bal agreement both contained an ac-
celeration clause.—Glaser v. Hender-
son, Tex.Civ.App., 2 S.W.2d 987.

57. Mass.—Phelps v. Hendrick, 105
Mass. 106.

to that end by the mortgagee, or it may be effected by his acquiescence in the breach.⁵⁸ An express agreement in writing is not necessary therefor.⁵⁹ Accordingly, the right to foreclose may be lost by an extension of the indebtedness,⁶⁰ by a sale of the mortgaged chattels with the mortgagee's permission and the application of the proceeds on the mortgaged debt,⁶¹ by a destruction of the chattels,⁶² or by a wrongful conversion thereof by plaintiff.⁶³

On the other hand, the right to foreclose is not lost by an agreement on the part of the mortgagee to postpone foreclosure proceedings,⁶⁴ by an abandonment of foreclosure proceedings prior to a final adjudication,⁶⁵ by an agreement to accept payment of the mortgage debt in a particular manner,⁶⁶ by an execution to the mortgagor of an escrow deed to the mortgaged property for the purpose of a levy and sale,⁶⁷ by an acceptance of rent for the use of the property by a lessee thereof,⁶⁸ by secretly taking a new mortgage in place of a prior unrecorded mortgage,⁶⁹ by waiving the right to enforce a pledge securing the same debt,⁷⁰ or by a purchase by the mortgagee of part of the chattels included in the mortgage.⁷¹ An agreement by one of two joint mortgagees not to foreclose after a default in

the payment of an installment does not bind his comortgagee and prevent the latter from foreclosing on such a default.⁷²

Even after the mortgagee has elected to declare a forfeiture, he may waive his election; but it has been held that an election to declare the whole debt due on a default in the payment of interest is not waived by his subsequent acceptance of the interest.⁷³

§ 360. Option to Foreclose

- a. Before default
- b. On partial default

a. Before Default

Where the mortgage itself or a statute so provides, the mortgagee may have an option to foreclose before a default has taken place.

An option to foreclose a chattel mortgage before a default may be conferred by a provision in the mortgage or a statute giving the mortgagee a right to foreclose at such time as he chooses,⁷⁴ or, in the absence of a statute to the contrary,⁷⁵ by a provision in the mortgage authorizing him to foreclose at any time he feels insecure.⁷⁶ However, it is

S.D.—Hesnard v. Larive, 184 N.W. 972, 45 S.D. 19.
Acceptance of payment after default as waiver of forfeiture see supra § 330.

Demand for payment

(1) A right to foreclose may be waived by a demand for payment after the mortgage is overdue.
Me.—Greene v. Dingley, 24 Me. 131.
N.Y.—Van Loan v. Willis, 13 Daly 281.

(2) Such a demand, however, does not reinvest the mortgagor with title to the property.

S.C.—Hale v. Utsey, 22 S.E. 371, 44 S.C. 393.

Failure to make timely claim -

A right to foreclose on a default in the performance of a condition named in the mortgage is waived where, although the mortgagee himself performed the condition, he failed to make a timely claim for reimbursement therefor, and instead of reimbursing himself from payments made by the mortgagor applied such payments on a debt not yet due.—Hesnard v. Larive, 184 N.W. 972, 45 S.D. 19.

58. S.D.—Hesnard v. Larive, supra. 11 C.J. p 698 note 18.

59. Tex.—Burditt v. Motor Supply Co., Civ.App., 99 S.W.2d 679, error dismissed. 11 C.J. p 698 note 20.

60. Ill.—Orcutt v. Williams, 63 Ill. App. 407.

N.Y.—Repelow v. Walsh, 90 N.Y.S. 651, 98 App.Div. 320. 11 C.J. p 698 note 26.

61. Mont.—Fleming v. Consolidated Motor Sales Co., 240 P. 376, 74 Mont. 245. 11 C.J. p 698 note 27.

62. Mich.—Michigan Sugar Co. v. Moffett, 149 N.W. 1025, 183 Mich. 589. 11 C.J. p 698 note 24.

63. N.D.—Strehlow v. McLeod, 117 N.W. 525, 17 N.D. 457, 17 Ann.Cas. 423.

64. Ill.—Fox v. Kitton, 19 Ill. 519.
Mo.—Byrne v. Carson, 70 Mo.App. 126. 11 C.J. p 698 note 28.

65. Ga.—Hart v. Hatcher, 71 Ga. 717.

Vt.—Desany v. Thorp, 39 A. 309, 70 Vt. 31. 11 C.J. p 698 note 30.

66. Mass.—Avery v. Bushnell, 123 Mass. 349. 11 C.J. p 698 note 29.

67. Ga.—Finn v. Reese, 137 S.E. 574, 36 Ga.App. 591.

68. Mass.—Southbridge Theatre Operating Co. v. Rosenberg, 171 N. E. 226, 271 Mass. 213.

69. Iowa.—Letts v. McMaster, 49 N. W. 1035, 83 Iowa 449.

70. Cal.—Bowman v. Sears, 213 P. 489, 63 Cal.App. 235.

71. Iowa.—Connolly v. Dillrance, 50 Iowa 92.

72. N.Y.—Hanrahan v. Roche, 22 Alb.L.J. 134.

73. Or.—Swan v. Jones, 173 P. 249, 88 Or. 706.

74. Iowa.—Robinson v. Gray, 57 N. W. 614, 90 Iowa 699, 23 L.R.A. 780. 11 C.J. p 696 note 95.

75. La.—Motors Securities Co. v. Tullos, App., 178 So. 634.

76. Colo.—Ramstetter v. MacGinnis, 68 P.2d 454, 100 Colo. 494.

Ill.—Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation, 7 N.E.2d 623, 239 Ill.App. 576.

Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136.

Or.—Harcombe v. Rubenstein, 74 P. 2d 982, 158 Or. 78.

S.D.—Grieme v. Robkes, 188 N.W. 745, 45 S.D. 480.

Wash.—Woodruff v. Stahl, 217 P. 1013, 126 Wash. 184—Skookum

Lumber Co. v. Sacajawea Lumber & Shingle Co., 181 P. 914, 107

Wash. 356, affirmed 187 P. 410, 107

Wash. 356—J. I. Case Threshing

Machine Co. v. Shroll, 170 P. 564,

100 Wash. 212. 11 C.J. p 696 note 96.

Interest

Where the mortgagee feels insecure, he is entitled to have debt matured, and to foreclose the mortgage without any deduction of interest from face of note, notwithstanding that note did not draw interest until after due.—Lee v. Walmsley, 240 P. 906, 136 Wash. 573.

generally held that an option to foreclose whenever the mortgagee feels insecure cannot be exercised arbitrarily, but only in good faith and when he has reasonable grounds to believe himself insecure;⁷⁷ although it is sufficient in some jurisdictions if the mortgagee in fact believes himself insecure, without regard to the grounds for such belief.⁷⁸ Likewise, under a clause in the mortgage or a statute so providing, the mortgagee may foreclose the mortgage, although no default in payment has occurred, if the mortgagor destroys, removes, or disposes of the property, or attempts to do so,⁷⁹ or where the property has unreasonably depreciated in value.⁸⁰ Also, where the mortgage so provides, the mortgagee may declare a default if the property be used for unlawful purposes, but no default may be declared under such a provision in the absence of some actual evidence of illegal use.⁸¹

On the other hand, the mortgagee cannot be compelled to exercise the option, since it is for his benefit.⁸² The right to foreclose a mortgage before a default in payment is separate and distinct from, and not dependent on the exercise of, the right to

take possession of the property.⁸³

Where an option to foreclose before default is exercised in a proper manner, neither the mortgagee, if the proceeds did not exceed his debt, nor the purchaser of the mortgaged property is liable to a subsequent mortgagee for any sum.⁸⁴

What rights in respect of foreclosure before default are conferred by the mortgage is a question of law for the court, and it is error to submit it to the jury.⁸⁵

b. On Partial Default

A mortgage securing a debt payable in installments may ordinarily be foreclosed, at the mortgagee's option, on a default in the payment of one installment, or at the maturity of the whole debt.

Where the mortgage debt is payable in installments, a failure to pay an installment when due constitutes a breach of the condition of the mortgage,⁸⁶ unless the language of the instrument expresses a contrary intention,⁸⁷ but it is optional with the mortgagee whether he will foreclose then or wait until the maturity of the other installments.⁸⁸ The right to foreclose on a default in

77. Ariz.—*Glaspie v. Williams*, 51 P.2d 254, 46 Ariz. 381.

Colo.—*Ramstetter v. MacGinnis*, 68 P.2d 454, 100 Colo. 494—*Thomas v. Beirne*, 30 P.2d 863, 94 Colo. 429.

Wash.—*Woodruff v. Stahl*, 217 P. 1013, 126 Wash. 184.

Wyo.—*Wettlin v. Jones*, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 236 P. 247, 32 Wyo. 446.

Reasonable grounds held to exist
S.D.—*Grieme v. Robkes*, 188 N.W. 745, 45 S.D. 480.

Wash.—*J. I. Case Threshing Machine Co. v. Shroll*, 170 P. 564, 100 Wash. 212.

Reasonable grounds held lacking
Wash.—*Woodruff v. Stahl*, 217 P. 1013, 126 Wash. 184—*Skookum Lumber Co. v. Sacajawea Lumber & Shingle Co.*, 181 P. 914, 107 Wash. 356, affirmed 187 P. 410, 107 Wash. 356.

78. Kan.—*Weldgrube v. Kerns*, 207 P. 654, 111 Kan. 428.

Ohio.—*Crocker v. Associate Inv. Co.*, 10 N.E.2d 153, 56 Ohio App. 136.

79. Miss.—*Quarles v. Hucherson*, 104 So. 148, 139 Miss. 356.

Mont.—*Bice v. Daffern*, 293 P. 433, 88 Mont. 479.

Ohio.—*Crocker v. Associate Inv. Co.*, 10 N.E.2d 153, 56 Ohio App. 136.

Wash.—*J. I. Case Threshing Machine Co. v. Shroll*, 170 P. 564, 100 Wash. 212.

11 C.J. p 696 note 97.

Intention to remove or dispose of the property at or about the time of commencing the foreclosure is suf-

ficient to entitle the mortgagee to foreclose under such a provision, an actual attempt to remove or dispose of the property on the very day the foreclosure is brought being unnecessary.—*Nichols v. Ward*, 108 S. E. 832, 27 Ga.App. 501.

80. Provision as to minimum amount

The mere fact that the mortgagor disposed of a part of the property will not entitle the mortgagee to foreclose, under a provision authorizing foreclosure in case of an unreasonable depreciation, where the mortgage provides that the property shall not be allowed to fall below a specified amount, and the remainder of the property did not fall below such amount.—*Citizens' Bank v. Tyler*, Mo.App., 226 S.W. 603.

81. La.—*Motors Securities Co. v. Tullos*, App., 178 So. 634.

82. Ill.—*Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation*, 7 N.E.2d 623, 289 Ill.App. 576.

Iowa.—*J. I. Case Threshing Machine Co. v. Van Vors*, 180 N.W. 656, 190 Iowa 543.

Mich.—*Theatre Equipment Acceptance Corporation v. Betman*, 242 N. W. 903, 259 Mich. 245.

11 C.J. p 696 note 98.

83. Mont.—*Bice v. Daffern*, 293 P. 433, 88 Mont. 479.

Right to take possession see supra §§ 178-182.

84. Or.—*Harcombe v. Rubenstein*, 74 P.2d 982, 158 Or. 78.

85. Iowa.—*Richardson v. Coffman*, 54 N.W. 356, 87 Iowa 121.

86. Ala.—*Gernert v. Limbach*, 50 So. 903, 163 Ala. 413.

Ill.—*Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation*, 7 N.E.2d 623, 289 Ill.App. 576.

La.—*Bernstein-Lanford, Inc. v. Tieuel*, App., 144 So. 195.

Mich.—*Theatre Equipment Acceptance Corporation v. Betman*, 242 N. W. 903, 259 Mich. 245.

Or.—*Reid v. Wentworth & Irwin*, 63 P.2d 210, 155 Or. 265.

11 C.J. p 697 note 14.

Not penalty or forfeiture

An acceleration clause in a mortgage is not objectionable as providing for a penalty or forfeiture.—*Reid v. Wentworth & Irwin*, 63 P.2d 210, 155 Or. 265.

87. N.Y.—*Earle v. Gorham Mfg. Co.*, 37 N.Y.S. 1037, 2 App.Div. 460—*Corrigan v. Sammis*, 120 N.Y.S. 69, 65 Misc. 473.

11 C.J. p 697 note 13.

88. Ill.—*Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation*, 7 N.E.2d 623, 289 Ill.App. 576.

Iowa.—*J. I. Case Threshing Mach. Co. v. Van Vors*, 180 N.W. 656, 657, 190 Iowa 543, citing *Corpus Juris*.

Mich.—*Theatre Equipment Acceptance Corporation v. Betman*, 242 N. W. 903, 259 Mich. 245.

11 C.J. p 697 note 15.

Even without provision in the mortgage to such effect, the mortgagee has an option to wait until the maturity of all the installments

the payment of a later installment is not affected by the fact that a different mortgage securing the same debt was foreclosed on a default in the payment of an earlier installment.⁸⁹ However, if the holder of the mortgage induces the mortgagor to omit payment of an installment, he cannot foreclose the mortgage without first making a demand and affording the mortgagor a reasonable opportunity to pay such installment.⁹⁰

According to some authority, a mortgage may be foreclosed for the whole amount of the debt on a default in the payment of an installment, irrespective of whether the mortgage so provides.⁹¹ Under other authority, this can be done where the mortgage so provides,⁹² or the mortgagor has in some other manner agreed,⁹³ but not otherwise.⁹⁴ Likewise, where the mortgage so provides, the mortgagee may, at his option, foreclose the mortgage for the whole amount of the debt on a default in the payment of interest.⁹⁵

A failure to declare an acceleration and to foreclose on the mortgagor's first default does not preclude an acceleration and foreclosure on a subsequent default by the mortgagor.⁹⁶ No demand for payment is necessary to entitle the mortgagee to accelerate maturity and foreclose the mortgage for the entire amount of the debt on a default by the mortgagor.⁹⁷

According to some authority, an acceleration clause in a chattel mortgage is applicable only to the enforcement of the mortgage,⁹⁸ and, as shown in the title Bills and Notes § 251 b, will not accelerate the maturity of the note for the purpose of a personal action thereon.

§ 361. Delay or Failure to Foreclose

Under a statute to that effect, the lien of a chattel

mortgage will become void as against third parties if not foreclosed within a specified time after maturity; the foreclosure must, of course, be in a manner recognized by law.

Where a statute so provides, the lien of a chattel mortgage will become void as against third parties if not foreclosed within a specified time after maturity.⁹⁹ However, a foreclosure is timely, although not completed within such period, if it would have been completed during such time but for a restraining order and an assumption of exclusive jurisdiction over the chattels by a court in a proceeding by another party, and if it is completed after a relinquishment of such jurisdiction, the mortgagee's rights being the same on the date the court relinquished, as on the day it assumed, exclusive jurisdiction over the chattels.¹

The foreclosure must, of course, be in a manner recognized by law;² a mere taking of possession,³ or a statement and an indorsement on the mortgage by a constable to whom the mortgage was intrusted for foreclosure, that he had foreclosed it,⁴ will not preserve the lien as against third persons.

§ 362. Methods of Foreclosure

- a. In general
- b. Under statutes

a. In General

A mortgage may be foreclosed by judicial proceedings, or, if such procedure is authorized, by a sale without judicial proceedings or by a transfer of possession intended as a foreclosure. Where more than one method exists, the mortgagee may elect which he will pursue.

A mortgage may ordinarily be foreclosed by a judicial proceeding for that purpose, as will be hereinafter discussed in § 398. Equity is not deprived of its jurisdiction over such a proceeding by the fact that the parties have stipulated for a foreclo-

before foreclosing the mortgage.—J. I. Case Threshing Mach. Co. v. Van Voss, 180 N.W. 656, 190 Iowa 543.

89. N.D.—Thompson Realty Co. v. Mowbray, 214 N.W. 908, 55 N.D. 732.

90. Or.—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

91. Mont.—Clark v. Baker, 9 P. 911, 6 Mont. 153.
11 C.J. p 697 note 16.

92. Ill.—Consolidated Hair Goods Co. v. Adams Clark Bldg. Corporation, 7 N.E.2d 623, 289 Ill.App. 576.
La.—Bernstein-Lanford, Inc., v. Tieuel, App., 144 So. 195.

Mich.—Theatre Equipment Acceptance Corporation v. Betman, 242 N.W. 903, 259 Mich. 245.

Or.—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 265.
11 C.J. p 697 notes 12, 16.

93. Mich.—Hogan v. Hudson, 67 N.W. 1081, 110 Mich. 54.

94. N.Y.—Carter v. Phillips, 217 N.Y.S. 621, 127 Misc. 908.

11 C.J. p 697 notes 13 [b] (2), 16 [b].
95. Or.—Swan v. Jones, 173 P. 249, 88 Or. 706.

W.Va.—Southern Billiard Supply Co. v. Lopinsky, 116 S.E. 253, 93 W.Va. 214.

96. Mich.—Theatre Equipment Acceptance Corporation v. Betman, 242 N.W. 903, 259 Mich. 245.

97. Or.—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 265.

98. Ariz.—Hawkins v. Leake, 22 P.2d 833, 42 Ariz. 121.

Mo.—McMillan v. Grayston, 83 Mo. App. 425.

W.Va.—Southern Billiard Supply Co. v. Lopinsky, 116 S.E. 253, 93 W.Va. 214.

99. Colo.—Metropolitan State Bank v. Wright, 209 P. 804, 72 Colo. 106.
Ill.—McKesson-Fuller-Morrisson Co.

v. Chapell Ice Cream Co., 2 N.E.2d 561, 285 Ill.App. 472.

Delay or failure to foreclose as conversion see supra § 215.

Delay or failure to take possession as against third persons see supra § 194.

1. Ill.—McKesson-Fuller-Morrisson Co. v. Chapell Ice Cream Co., 2 N.E.2d 561, 285 Ill.App. 472.

Mortgagor's bankruptcy proceeding
Ill.—McKesson-Fuller-Morrisson Co. v. Chapell Ice Cream Co., supra.

2. Ill.—Williams v. Head, 219 Ill. App. 5.

Okl.—Security State Bank of Mooreland v. First Nat. Bank, 213 P. 874, 89 Okl. 179, 180.

3. Okl.—Security State Bank of Mooreland v. First Nat. Bank, supra.

4. Ill.—Williams v. Head, 219 Ill. App. 5.

sure by some other method,⁵ such as a sale without judicial proceedings⁶ in a manner authorized by statute.⁷ However, in the absence of a statute to the contrary, a judicial proceeding is not ordinarily required,⁸ especially where the mortgage itself provides a method of foreclosure.⁹ Where a foreclosure is sought in a judicial proceeding, the court will not direct a delivery of the property to the mortgagee, but will direct a sale thereof, a discharge of the debt out of the proceeds, and the payment of any surplus to the mortgagor.¹⁰

As shown *infra* § 366, a foreclosure may be effected by a sale without a judicial proceeding, provided, in some jurisdictions, a power of sale is expressly conferred in the mortgage. Further, a mere taking of possession of the property by the mortgagee with the consent of the mortgagor has been held, where the parties so intended, to constitute a foreclosure.¹¹ An execution creditor, although also the holder of a chattel mortgage, however, cannot enforce the lien of his chattel mortgage by his execution.¹²

Election. Where different modes of foreclosure exist, the mortgagee may ordinarily elect which one he will pursue,¹³ as, for example, whether he will sell without judicial proceedings or will resort to a judicial foreclosure,¹⁴ at least if the former method is inadequate or less adequate.¹⁵ The remedies by action to foreclose and by sale without judicial proceedings are inconsistent and cannot both be pursued.¹⁶ A void foreclosure is not an election of remedies precluding a subsequent enforcement of the mortgage.¹⁷

b. Under Statutes

A foreclosure may, and in some jurisdictions must, be effected in the manner prescribed by statute.

A foreclosure may, of course, be effected in a manner provided by statute,¹⁸ and this is true although the parties have stipulated in the mortgage for foreclosure by some other method.¹⁹ Moreover, under some statutes the methods of foreclosure provided are held exclusive.²⁰ However, in other jurisdictions, the statutory method is not ex-

5. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

Tex.—Young v. Harvison, Civ.App., 283 S.W. 687.

6. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

Tex.—Young v. Harvison, Civ.App., 283 S.W. 687.

11 C.J. p 699 note 57.

7. Neb.—Meeker v. Waldron, 87 N. W. 539, 62 Neb. 689.

11 C.J. p 699 note 59.

8. S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

11 C.J. p 695 note 84.

Injunction proceedings

Although in an action by a holder of a junior mortgage to enjoin a foreclosure of a senior mortgage, the senior mortgagee may ask by a cross petition for a foreclosure by the court, he is not obliged to foreclose in court rather than by a sale out of court.—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 196 Iowa 1205.

9. W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W.Va. 490.

10. N.Y.—Finkenberg v. Levinson, 182 N.Y.S. 18, 192 App.Div. 1.

11. Wyo.—Finance Corporation of Wyoming v. Commercial Credit Co., 283 P. 1100, 41 Wyo. 198.

12. Ark.—Summers v. Heard, 50 S. W. 78, 51 S.W. 1057, 66 Ark. 550.

13. Ark.—Moore v. Price, 70 S.W. 2d 563, 189 Ark. 117.

Mont.—Bice v. Daffern, 293 P. 433, 88 Mont. 479.

S.C.—Stokes v. Liverpool & London

& Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Tex.—Kelly v. R-F Finance Corporation, Civ.App., 60 S.W.2d 1067—Young v. Harvison, Civ.App., 283 S.W. 687.

11 C.J. p 699 note 53.

14. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

Ind.—Broadhead v. McKay, 46 Ind. 595.

Mont.—Bice v. Daffern, 293 P. 433, 88 Mont. 479.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Tex.—Kelly v. R-F Finance Corporation, Civ.App., 60 S.W.2d 1067—Young v. Harvison, Civ.App., 283 S.W. 687.

11 C.J. p 699 notes 54–56.

15. Kan.—Tri-State Auto Supply Co. v. Cochran, 250 P. 283, 284, 121 Kan. 825, citing *Corpus Juris*.

11 C.J. p 704 note 32.

16. Tex.—Sabine Motor Co. v. W. C. English Auto Co., Com.App., 291 S.W. 1088, reversing, Civ.App., 283 S.W. 224—Kelly v. R-F Finance Corporation, Civ.App., 60 S.W.2d 1067.

17. Cal.—J. I. Case Threshing Mach. Co. v. Copren Bros., 187 P. 772, 45 Cal.App. 159.

Okl.—Central Sav. Bank & Trust Co. v. Liberty Nat. Bank of Kansas City, Mo., 239 P. 660, 112 Okl. 35.

18. Iowa.—Hamlin v. Parsons, 33 Iowa 207.

Utah.—Morgan v. Layton, 208 P. 505, 60 Utah 280—Utah Ass'n of Credit

Men v. Jones, 164 P. 1029, 49 Utah 519.

11 C.J. p 699 note 60.

Compliance with other statute immaterial

If a foreclosure has been properly conducted, it is immaterial that the mortgagee attempted, but failed, to comply also with the provisions of a statute relating to the retaking of property sold under a conditional sales contract.—Lauer v. Matushek & Son Piano Co., 172 N.Y.S. 439.

In Oklahoma, a chattel mortgagee may foreclose his mortgage either by Comp.St.1921 §§ 8186–8210, or by § 7646.—Mitchell v. White, 233 P. 746, 106 Okl. 218.

19. Ga.—Willis v. Jefferson, 75 Ga. 743.

Okl.—Pettee v. John Deere Plow Co., 68 P. 735, 11 Okl. 467.

20. Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*.

11 C.J. p 700 note 66.

In Utah, under a statute providing that there is but one action for the enforcement of any right secured by mortgage on real estate, or personal property, the remedy by action to foreclose a chattel mortgage is exclusive, unless the mortgage contains a power of sale, in which event a foreclosure by advertisement and sale is authorized.—Morgan v. Layton, 208 P. 505, 60 Utah 280.

clusive,²¹ but may be waived by the mortgagor;²² and the mortgagee may proceed under a power of sale contained in the mortgage,²³ or a bill in equity may be maintained,²⁴ especially where the legal remedy is inadequate.²⁵ A statute forbidding the foreclosure of a mortgage has been held not to preclude an enforcement of the lien by a proper sale of the property.²⁶ Where a statute so provides, a foreclosure of the mortgage in a manner other than that provided by the statute will preclude the recovery of a judgment for any deficiency, as shown *infra* § 390, even though the mortgagor has waived the statutory method.

Mortgages of specified types of articles. Where a statute so provides, mortgages covering types of articles specified by the statute, such as household goods, wearing apparel, or mechanic's tools, must be enforced by an action for that purpose.²⁷ Such a statute is constitutional.²⁸ Moreover, it will be construed liberally,²⁹ and should be applied to the necessary household goods of a widower without any family as well as to those of a married man.³⁰ However, such a statute does not apply to the sale of furniture on the installment plan by regular dealers.³¹ It has also been held that such a statute does not apply where property of the kind con-

templated by the statute included in the mortgage is insignificant in amount as compared with the value of other property included therein.³²

§ 363. Existence of or Resort to Other Remedies

Unless restrained by statute a mortgagee may bring an action for the conversion of the mortgaged chattels, or to recover their possession, or to enforce his lien; but he can have but one satisfaction for his debt.

In the absence of a statute to the contrary, the holder of a chattel mortgage may, on the mortgagor's default, sue at law to recover the mortgaged chattel,³³ or for its conversion,³⁴ or he may sue in equity for the foreclosure of the lien which he has by virtue of the mortgage.³⁵ Also, as shown *infra* § 440, a mortgagee has, in circumstances varying in different jurisdictions, an action at law on the mortgage debt. Where several remedies exist, the mortgagor cannot complain of the mortgagee's choice among them.³⁶

In some jurisdictions, an action for conversion or to recover possession of the mortgaged property and an action to foreclose are cumulative remedies,³⁷ while in other jurisdictions they are, or apparently are, only alternative remedies,³⁸ or, at least,

21. Me.—Consolidated Rendering Co. v. Stewart, 168 A. 100, 132 Me. 139, 88 A.L.R. 908.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris* at length. 11 C.J. p 700 note 61.

22. Okl.—J. I. Case Threshing Mach. Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*. 11 C.J. p 700 note 62.

23. Me.—Consolidated Rendering Co. v. Stewart, 168 A. 100, 132 Me. 139, 88 A.L.R. 908.

Okl.—J. I. Case Threshing Machine Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*. 11 C.J. p 700 note 63.

24. Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075. 11 C.J. p 700 note 64.

25. U.S.—Stillwell-Bierce, etc., Co. v. Williamson Oil, etc., Co., C.C.S. C., 80 F. 68. 11 C.J. p 700 note 65.

26. Ky.—Montenegro-Riehm Music Co. v. Beuris, 169 S.W. 986, 160 Ky. 557, L.R.A.1916C 557.

27. Ill.—Pease v. L. Fish Furniture Co., 52 N.E. 932, 176 Ill. 220. 11 C.J. p 700 note 67.

28. Ohio.—Mahoney v. Kinney, 7 Ohio S. & C.P. 405, 5 Ohio N.P. 336.

29. Ohio.—Economy Bldg., etc., Co. v. Newman, 28 Ohio Cir.Ct. 103, affirmed 81 N.E. 1185, 76 Ohio St. 579.

30. Ohio.—Economy Bldg., etc., Co. v. Newman, *supra*.

31. Ill.—Bernstein v. Zolotkoff, 70 Ill.App. 369.

32. U.S.—In re Chadwick, D.C. Ohio, 140 F. 674, reversed on other grounds 148 F. 975, 78 C.C.A. 597, 18 L.R.A., N.S., 1233, appeal dismissed 28 S.Ct. 760, 209 U.S. 542, 52 L.Ed. 918.

33. Ark.—Ford Hardwood Lumber Co. v. Bryant, 13 S.W.2d 1, 178 Ark. 807—Strode v. Holland, 233 S.W. 1073, 150 Ark. 122. Okl.—Mitchell v. White, 233 P. 746, 106 Okl. 218.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Tex.—Terry v. Spearman, Com.App., 259 S.W. 563, reversing, Civ.App., 246 S.W. 103. 11 C.J. p 700 note 74.

34. Ark.—Strode v. Holland, 233 S.W. 1073, 150 Ark. 122. 11 C.J. p 700 notes 73, 75.

Actions by mortgagee for conversion generally see *supra* §§ 228-245.

35. Ark.—Strode v. Holland, 233 S.W. 1073, 150 Ark. 122. 11 C.J. p 700 note 75.

36. Ala.—Davis v. Elba Bank & Trust Co., 106 So. 595, 214 Ala. 100. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

Iowa.—Silver v. Wickfield Farms, 227 N.W. 97, 209 Iowa 856.

37. *Detinue held cumulative*, not an exclusive, remedy.—Davis v. Elba Bank & Trust Co., 106 So. 595, 214 Ala. 100.

Judgment in unlawful detainer

The fact that the mortgagee has obtained a judgment in an action of unlawful detainer does not preclude the enforcement of the mortgage in so far as it secures the payment of the claim incorporated in the judgment.—Stich v. Gordon, 14 P.2d 835, 126 Cal.App. 434.

38. Ark.—Moore v. Price, 70 S.W. 2d 563, 189 Ark. 117—Strode v. Holland, 233 S.W. 1073, 150 Ark. 122.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Tex.—Terry v. Spearman, 259 S.W. 563, reversing judgment, Civ.App., 246 S.W. 103.

must be joined.³⁹ Where an action may be maintained on the mortgage debt, such an action and a proceeding against the property are generally regarded as concurrent remedies,⁴⁰ although it has been held that they are only alternatives,⁴¹ and that they cannot be pursued simultaneously.⁴² In any case, the creditor can have, of course, but one satisfaction for his debt.⁴³ Where the debt has been reduced to judgment, the mortgagee may, at his election, levy an execution on the property or proceed under the mortgage; but a levy followed by a prompt release of the property without a sale is not an election of remedies precluding proceedings under the mortgage.⁴⁴

The fact that the mortgagee received other security in addition to the mortgage at the time of the execution of the latter, and that he has not pursued his remedy against such other security, will not preclude a foreclosure of the mortgage as a matter of law.⁴⁵ Also, a foreclosure of a mortgage has been held not precluded by the fact that a trust deed securing bonds given as additional security for the mortgage debt has been foreclosed.⁴⁶ The fact that the mortgagee has taken possession of the mortgaged property for the purpose of managing the mortgagor's business and applying the proceeds on the mortgage debt does not, if the mortgagor consented to the taking and the mortgagee has acted honestly and diligently, affect his right to foreclose.⁴⁷

Action by mortgagor. A buyer's action for a breach of a sales contract cannot be pleaded in abatement of an action by the seller on a pur-

chase-money note and to foreclose a chattel mortgage securing it.⁴⁸

§ 364. — Statutory Provisions

Under statutes to that effect, it is variously held that there can be but one action to enforce an obligation secured by a chattel mortgage; that an action under a mortgage is suspended pending an action on the debt; that successive actions may be maintained on both; or that an inability to foreclose does not preclude a resort to other remedies.

Where a statute so provides, there can be but one action for the recovery of any debt or the enforcement of any right secured by a mortgage on personal property.⁴⁹ Under such a statute an action on the debt precludes an action to foreclose the mortgage,⁵⁰ but the mere commencement of an action on the debt, subsequently dismissed without the court having acted thereon, has been held not to be an election precluding a foreclosure of the mortgage.⁵¹ Such a statute, however, has been construed to be applicable only to actions directly affecting the rights of the mortgagor under the mortgage,⁵² or to actions which are necessary to the recovery of the debt and a foreclosure of the lien, and not to any collateral contract in the mortgage which does not affect the interests of the parties in the mortgaged property.⁵³ Accordingly the statute does not prevent a mortgagee from maintaining an action of replevin where the mortgage by its terms authorizes him to take possession after a default;⁵⁴ and this has been held to be so, although a foreclosure of the mortgage is pending,⁵⁵ but there is authority to the contrary.⁵⁶ Also, the statute has been held not to preclude an action for conversion against one not the mortgagor;⁵⁷ nor does

39. Okl.—*Mitchell v. White*, 233 P. 746, 106 Okl. 218.

40. Minn.—*First Nat. Bank v. Flynn*, 250 N.W. 806, 190 Minn. 102, 92 A. L.R. 1272.

N.Y.—*Baronberg v. Humphreys*, 1 N.Y.S.2d 415, 166 Misc. 100.

Tex.—*Ranger Mercantile Co. v. Terrett*, Civ.App., 106 S.W. 1145, 11 C.J. p 701 note 76.

In Louisiana a mortgagee may proceed either by an ordinary action for the debt, or by an executory process, and may even convert his executory process into an ordinary action for a personal judgment.—*J. D. Cathey, Inc. v. Henriques*, 107 So. 493, 160 La. 692—*Morris Plan Bank v. Glockner*, App., 161 So. 792.

41. Ark.—*Moore v. Price*, 70 S.W. 2d 563, 189 Ark. 117.

42. Proceedings must be suspended in an action in a court of equity to foreclose the mortgage pending active procedure in an action at law on the debt, or vice versa.—*Franklin v. Hersch*, 3 Tenn.Ch. 467.

43. Ala.—*Logan v. Smith*, 63 So. 766, 9 Ala.App. 459, certiorari denied 64 So. 570, 185 Ala. 525, 51 L.R.A., N.S., 1068, Ann.Cas.1916C 405.

44. Minn.—*First Nat. Bank v. Flynn*, 250 N.W. 806, 190 Minn. 102, 92 A. L.R. 1272.

45. N.Y.—*Baronberg v. Humphreys*, 1 N.Y.S.2d 415, 166 Misc. 100.

46. Iowa.—*Silver v. Wickfield Farms*, 227 N.W. 97, 209 Iowa 856.

47. Tex.—*Witherspoon v. Terry*, Com.App., 267 S.W. 973, affirming *Terry v. Witherspoon*, Civ.App., 255 S.W. 471.

48. Tex.—*Blume v. J. I. Case Threshing Mach. Co.*, Civ.App., 225 S.W. 831, error refused.

49. Cal.—*Bank of America Nat. Trust & Savings Ass'n v. Pendergrass*, 48 P.2d 659, 4 Cal.2d 253.

Idaho.—*Jeppesen v. Rexburg State Bank*, 62 P.2d 1369, 57 Idaho 94—*Portland Cattle Loan Co. v. Biehl*, 245 P. 88, 42 Idaho 39—*Cedarholm*

v. Loofborrow, 9 P. 641, 2 Idaho, Hasb., 191.

Mont.—*Barth v. Ely*, 278 P. 1002, 85 Mont. 310.

50. Cal.—*Brice v. Walker*, 194 P. 721, 50 Cal.App. 49.

11 C.J. p 701 note 79.
Right to maintain action on the debt under such a statute see *infra* § 440.

51. Cal.—*Brice v. Walker*, *supra*.

52. Idaho.—*Forbush v. San Diego Fruit & Produce Co.*, 266 P. 659, 46 Idaho 231.

53. Cal.—*Harper v. Gordon*, 61 P. 84, 128 Cal. 489—*Ely v. Williams*, 92 P. 393, 6 Cal.App. 455.

54. Cal.—*Harper v. Gordon*, 61 P. 84, 128 Cal. 489.

55. Cal.—*Ely v. Williams*, 92 P. 393, 5 Cal.App. 455.

56. Idaho.—*Cedarholm v. Loofborrow*, 9 P. 641, 2 Idaho, Hasb., 191.

57. Idaho.—*Forbush v. San Diego Fruit & Produce Co.*, 266 P. 659, 46 Idaho 231.

the fact that an action for possession has been maintained against such a person preclude a subsequent action for foreclosure.⁵⁸ However, where the mortgagee fails to foreclose against all of the mortgaged property, he is precluded from subsequently maintaining an action for the possession of the remainder.⁵⁹

Under a statute to that effect, the right to maintain an action under the mortgage is suspended during the pendency of an action on the debt until judgment is rendered in the plaintiff's favor and an execution is returned unsatisfied.⁶⁰ A statute requiring that if separate actions on the debt and to foreclose the mortgage are maintained simultaneously in the same county, plaintiff must elect which he will pursue, has been held not to prevent the bringing of successive actions on the debt and mortgage.⁶¹ The fact that a mortgage cannot be foreclosed because of noncompliance with a statute requiring a mortgagee to furnish a verified statement of account has been held not to prevent a resort to other remedies to enforce payment.⁶²

§ 365. Injunction against Foreclosure

- a. Right to remedy
- b. Persons entitled to injunction

Reason for decision

"An action in conversion against a third party has no connection whatever with the mortgage security, as such, and certainly has nothing to do with the mortgage debt."—*Forbush v. San Diego Fruit & Produce Co.*, *supra*.

58. Action against assignee of lease

The statute does not prevent a lessor who has maintained an action of unlawful detainer against the assignee of a lease from thereafter foreclosing a chattel mortgage executed by the original lessee to secure the rent, since the liability of the latter is separate and distinct from the liability of the assignee.—*Schehr v. Berkey*, 135 P. 41, 166 Cal. 157.

59. Idaho.—*Portland Cattle Loan Co. v. Biehl*, 245 P. 88, 42 Idaho 39.

60. Or.—*Winter v. Heyden*, 37 P.2d 871, 149 Or. 20.

61. Iowa.—*Hamilton v. Henderson*, 230 N.W. 347, 211 Iowa 29.

62. Ark.—*Ford Hardware Lumber Co. v. Bryant*, 13 S.W.2d 1, 178 Ark. 807.

63. Ala.—*Sanders v. King*, 95 So. 19, 208 Ala. 638.

Mont.—*Blackwelder v. Fergus Motor Co.*, 260 P. 734, 80 Mont. 374—

Claussen v. Chapin, 221 P. 1073, 69 Mont. 205.

N.Y.—*Kaufman v. Schwartz*, 160 N.Y. S. 1056, 174 App.Div. 239—*Carter v. Phillips*, 217 N.Y.S. 621, 127 Misc. 903—*Beebe v. Prime*, 166 N.Y.S. 56, 99 Misc. 668.

Okl.—*Pearson v. Glen Lumber Co.*, 160 P. 48, 55 Okl. 280.

Utah.—*Watts v. Greenwood*, 162 P. 72, 49 Utah 118.

Wash.—*State v. Superior Court for King County*, 222 P. 203, 128 Wash. 100—*State v. Superior Court of Washington for King County*, 199 P. 977, 116 Wash. 535.

Executory process to enforce a chattel mortgage may be enjoined where plaintiff is not entitled to such process.—*Durel v. Buchanan*, 86 So. 189, 147 La. 804.

64. Mont.—*Blackwelder v. Fergus Motor Co.*, 260 P. 734, 80 Mont. 374—*Claussen v. Chapin*, 221 P. 1073, 69 Mont. 205.

N.Y.—*Kaufman v. Schwartz*, 160 N.Y. S. 1056, 174 App.Div. 239—*Beebe v. Prime*, 166 N.Y.S. 56, 99 Misc. 668. 11 C.J. p 701 note 86.

65. Okl.—*Beane v. Rucker*, 168 P. 1167, 66 Okl. 299. 11 C.J. p 701 note 85.

66. Idaho.—*Beeler v. C. C. Mercantile Co.*, 70 P. 943, 8 Idaho 644, 60 L.R.A. 283, 1 Ann.Cas. 310.

- c. Awarding other relief
- d. Actions

a. Right to Remedy

Where sufficient grounds for equitable intervention are shown, the foreclosure of a chattel mortgage may be enjoined.

Where sufficient grounds for equitable interference are shown, particularly where under such circumstances the issuance of the writ is authorized by statute, the foreclosure of a mortgage may be enjoined.⁶³ Thus the absence of an adequate remedy at law may warrant the issuance of an injunction against a foreclosure.⁶⁴ On the other hand, in the absence of a statute to other effect, a foreclosure will not be enjoined where it is not shown that there is no adequate remedy at law for any injury occasioned by it if wrongful.⁶⁵ Subject to these general rules, an injunction will lie to prevent a sale under a void mortgage;⁶⁶ a sale under a mortgage securing a debt which is not yet due,⁶⁷ or which has been paid,⁶⁸ or which is unlawful;⁶⁹ a sale of property on which the mortgage is not a lien;⁷⁰ or a foreclosure in violation of a collateral agreement.⁷¹ Also, it has been held sufficient to justify equitable interference that there was a controversy as to the amount due on the mortgage debt,⁷² or regarding the property covered by the

La.—*Durel v. Buchanan*, 86 So. 189, 147 La. 804.

N.Y.—*Kaufman v. Schwartz*, 160 N.Y. S. 1056, 174 App.Div. 239—*Beebe v. Prime*, 166 N.Y.S. 56, 99 Misc. 668.

Grounds of invalidity

(1) Insufficient description of the property.—*Durel v. Buchanan*, 86 So. 189, 147 La. 804.

(2) Want of reffiling.—*Beebe v. Prime*, 166 N.Y.S. 56, 99 Misc. 668.

67. **Under Louisiana statute** so providing, an executory process may be enjoined when the debt is not yet due and plaintiff is not relegated to an action for damages, even though no irreparable injury is threatened.—*Heard v. Motors Securities Co.*, La. App., 177 So. 126.

68. Colo.—*French v. Commercial Credit Co.*, 64 P.2d 127, 99 Colo. 447.

Tex.—*Southwest Nat. Bank of Dallas v. Cates*, Civ.App., 262 S.W. 569.

69. Miss.—*Peebles v. Yates*, 40 So. 996, 88 Miss. 289.

70. Idaho.—*Green v. Consolidated Wagon & Machine Co.*, 164 P. 1016, 30 Idaho 359.

11 C.J. p 702 note 88.

71. Wis.—*Parsons v. Hunkins*, 58 N.W. 264, 87 Wis. 115.

11 C.J. p 702 note 90.

72. Idaho.—*Wakefield v. Griffiths*, 261 P. 665, 45 Idaho 51.

mortgage,⁷³ or that there was fraud on the part of the mortgagee;⁷⁴ but an injunction has been refused when asked for merely on the ground that the mortgagee was threatening foreclosure⁷⁵ or had advertised the mortgaged property for sale.⁷⁶ Further, there may be an injunction to prevent a power of sale from being exercised in an inequitable manner,⁷⁷ or so as to be perverted from its legitimate purpose, as where the power is sought to be used for the purpose of oppressing the debtor or to enable the creditor to acquire the property himself.⁷⁸

Injunction pendente lite. The prosecution of an action to declare a forfeiture or to foreclose the mortgage may be restrained pending the determination of an action to have the mortgage declared void.⁷⁹ Also, the exercise of a power of sale without judicial proceedings may be restrained pending the determination of an action to have the mortgage declared void,⁸⁰ or to have it adjudged that the mortgage has been paid,⁸¹ or to determine the amount due⁸² or the property covered by the mortgage,⁸³ or pending an action for the return of the property and damages for its wrongful detention.⁸⁴ However, an injunction which would in effect determine the issue to be decided at a trial on the merits will not be granted unless the right thereto is clear.⁸⁵ The fact that, at the conclusion of a trial on the merits, an injunction pendente lite is dissolved does not amount to a finding that the person obtaining the injunction was not entitled thereto at the time that it was granted and that it was im-

properly issued.⁸⁶

Transferring proceedings to court. Under a statute to that effect, a foreclosure by notice and sale may be enjoined where necessary,⁸⁷ or where it appears that the mortgagor has a valid counterclaim or a defense against the debt,⁸⁸ in order that the proceedings may be transferred to court, and the right to foreclose, as well as the amount claimed to be due, be contested in a judicial proceeding. However, such a statute will not prevent the mortgagor from adopting some other remedy for the contesting of a foreclosure.⁸⁹

Action to establish right. Under a statute to that effect, a third person claiming a right to property about to be sold under a chattel mortgage is not bound to enjoin the sale in order to protect his right, but may maintain an action to establish the right, and if he succeeds in establishing it a sale pending the action will be a nullity.⁹⁰

b. Persons Entitled to Injunction

Any person having a right, interest, or claim sufficiently connected with the mortgaged property is entitled to enjoin a foreclosure of the mortgage, but the mere fact that he may incur injury is not enough.

Any person having a right, interest, or claim which is sufficiently connected with the mortgaged property is entitled to an injunction against a foreclosure of the mortgage;⁹¹ but the mere fact that a person's right, interest, or claim may be prejudiced by a foreclosure will not entitle him to maintain an action for an injunction in the absence of a

Mont.—Nett v. Stockgrowers' Finance Corporation, 274 P. 497, 84 Mont. 116.—Blackwelder v. Fergus Motor Co., 260 P. 734, 80 Mont. 374. 11 C.J. p 702 note 91.

73. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51. Tex.—Ripple v. McCoury, Civ.App., 29 S.W.2d 436.

Utah.—Baker v. Hatch, 257 P. 673, 70 Utah 1.

11 C.J. p 702 note 92.

74. Ala.—Sanders v. King, 95 So. 19, 208 Ala. 638. 11 C.J. p 702 note 93.

75. D.C.—Sullivan v. Bailey, 21 App.D.C. 100. 11 C.J. p 702 note 94.

76. Me.—York, etc., R. Co. v. Myers, 41 Me. 109.

77. R.I.—Frieze v. Chapin, 2 R.I. 429. 11 C.J. p 703 note 11.

78. Ala.—Henderson Law Co. v. Wilson, 49 So. 845, 161 Ala. 504.

79. Ala.—Sanders v. King, 95 So. 19, 208 Ala. 638.

80. Mont.—Blackwelder v. Fergus Motor Co., 260 P. 734, 738, 80 Mont. 374, citing *Corpus Juris*—Claussen v. Chapin, 221 P. 1073, 69 Mont. 205. 11 C.J. p 702 note 96.

81. Mont.—Blackwelder v. Fergus Motor Co., 260 P. 734, 738, 80 Mont. 374, citing *Corpus Juris*.

Tex.—Southwest Nat. Bank of Dallas v. Cates, Civ.App., 262 S.W. 569.

11 C.J. p 702 note 97.

82. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51. 11 C.J. p 702 note 98.

83. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51.

84. N.Y.—Carter v. Phillips, 217 N. Y.S. 621, 127 Misc. 903.

85. N.Y.—Carter v. Phillips, supra.

86. Idaho.—Wakefield v. Griffiths, 261 P. 665, 45 Idaho 51.

87. Wash.—State v. Superior Court for King County, 222 P. 203, 128 Wash. 100.—State v. Superior Court of Washington for King County, 199 P. 977, 116 Wash. 535.

11 C.J. p 702 note 3.

Injunction held necessary

Where the mortgagor was resisting a foreclosure out of court by disputing the amount claimed, and the mortgagee was resisting the former's application for an injunction and insisting that the sheriff not be disturbed in the summary proceedings and sale, an injunction was necessary, within the meaning of the statute stated in the text, in order effectively to transfer the proceedings to the court.—State v. Superior Court of Washington for King County, 199 P. 977, 116 Wash. 535.

88. Okl.—Pearson v. Glen Lumber Co., 160 P. 48, 55 Okl. 280. Utah.—Watts v. Greenwood, 162 P. 72, 49 Utah 118.

89. Iowa.—Black v. Howell, 10 N.W. 216, 56 Iowa 630.

90. La.—Exchange Nat. Bank v. Palace Car Co., 1 La.App. 307.

91. N.Y.—Beebe v. Prime, 166 N.Y. S. 56, 99 Misc. 668.

Tex.—Ripple v. McCoury, Civ.App., 29 S.W.2d 436.

Utah.—Baker v. Hatch, 257 P. 673, 70 Utah 1.

sufficient connection between such right, interest, or claim and the property.⁹²

Owner of property. A stranger to the mortgage claiming title to the property may enjoin a foreclosure.⁹³

A mortgagor who has not paid the debt secured by a second mortgage has an interest in the property entitling him to enjoin an action by the first mortgagee, to which the second mortgagee was not made a party, to foreclose the first mortgage; this is so, even where the second mortgagee has legal title, if the mortgagor is entitled to possession, and to have the property sold and the proceeds applied in payment of the debt secured by the second mortgage.⁹⁴

Creditors of mortgagor. A bill to enjoin the foreclosure of a chattel mortgage may be maintained by a creditor whose claim has been adjudicated,⁹⁵ or who has acquired a lien on the property.⁹⁶ Thus a bill to enjoin the foreclosure of a mortgage may be maintained by an attachment⁹⁷ or judgment⁹⁸ creditor of the mortgagor, or by an administrator of the mortgagor in possession of the chattels and representing creditors whose claims have been admitted.⁹⁹ On the other hand, such a bill ordinarily cannot be maintained by a general creditor who has not connected himself with the property either by a lien or by securing an adjudication of his claim.¹

Mortgagees. A junior mortgagee, even if his debt is not yet due, may enjoin a senior mortgagee or his representatives from selling the mortgaged property for less than its value.² A second mortgagee may have the foreclosure of a prior mortgage

enjoined on the ground that it is fraudulent, even before the second mortgage has matured.³ Also, a senior mortgagee, it has been held, may enjoin a sale by a junior mortgagee.⁴ However, it has been held, under a statute giving a person claiming ownership of property about to be sold by a sheriff a right to enjoin the sale, that a mortgagee cannot enjoin a sale of the property under another mortgage.⁵

Purchaser. A purchaser of the mortgaged goods at an execution sale against the mortgagor cannot enjoin foreclosure of a mortgage given prior to the sale.⁶

A landlord is not entitled to enjoin the foreclosure of a chattel mortgage executed by his tenant to a third person in the absence of a showing that the tenant is insolvent or that the landlord has a lien which it is necessary to protect by an injunction.⁷

c. Awarding Other Relief

In an action to enjoin the foreclosure of a chattel mortgage, a court of equity may ordinarily grant whatever relief equity may require.

In an action to restrain a mortgagee in the exercise of his ordinary right of foreclosure, a court of equity will ordinarily see that justice is done by granting whatever relief equity may require.⁸ Accordingly, the court may make the injunction conditional on the mortgagor's executing a new mortgage,⁹ or paying over to the mortgagee such balance of the debt as may still remain due.¹⁰ Where the amount due is disputed, it has been held that the mortgagor must have paid or tendered what he considered due under the mortgage before he may enjoin a foreclosure.¹¹ However, a mortgagor will not be required to pay into court the amount due on

92. Idaho.—Neustadter v. Doust, 92 P. 978, 13 Idaho 617.

La.—Day v. Goff, 2 La.App. 75.

Okl.—Beane v. Rucker, 168 P. 1167, 66 Okl. 299.

93. Tex.—Ripple v. McCoury, Civ. App., 29 S.W.2d 436.

Trial of right of property

Third person claiming title to chattel about to be sold under foreclosure judgment had remedy by injunction or by proceeding of trial of right of property under claimant's oath and bond.—Ripple v. McCoury, supra.

94. Utah.—Baker v. Hatch, 257 P. 673, 70 Utah 1.

95. N.Y.—Beebe v. Prime, 166 N.Y. S. 56, 99 Misc. 668.

96. Wash.T.—El. C. Meacham Arms Co. v. Swartz, 7 P. 859, 2 Wash.T. 412.

97. Wash.T.—El. C. Meacham Arms Co. v. Swartz, supra.

98. Ohio.—McCrea v. Darnell, 3 Ohio Dec. (Reprint) 348, L. & Bank.Bul. 348.

99. N.Y.—Beebe v. Prime, 166 N.Y.S. 56, 99 Misc. 668.

1. Idaho.—Neustadter v. Doust, 92 P. 978, 13 Idaho 617.
11 C.J. p 702 note 6.

2. Ind.—Ades v. Levi, 37 N.E. 388, 137 Ind. 506.

N.Y. — Bernheimer, etc., Pilsener Brewing Co. v. Koehler Co., 86 N. Y.S. 716, 42 Misc. 377.
11 C.J. p 702 note 7.

3. Ind.—McCormick v. Hartley, 6 N. E. 357, 107 Ind. 248.

4. Tex.—Citizens' State Bank v. Galveston First Nat. Bank, 120 S. W. 1141, 56 Tex.Civ.App. 515.
11 C.J. p 702 note 10.

5. La.—Day v. Goff, 2 La.App. 75.

6. U.S.—Baird v. Warwick Mach. Co., C.C.N.Y., 40 F. 386, affirmed

10 S.Ct. 513, 134 U.S. 178, 33 L. Ed. 872.

11 C.J. p 703 note 13.

7. Okl.—Beane v. Rucker, 168 P. 1167, 66 Okl. 299.

8. Mass.—E. Kronman, Inc., v. Bunn Bros., 155 N.E. 426, 258 Mass. 562.
Mich.—Graff v. Epstein, 213 N.W. 190, 238 Mich. 227.

Mont.—Nett v. Stockgrowers' Finance Corporation, 274 P. 497, 84 Mont. 116.

N.J.—Grinlee v. Rockhill, Ch., 13 A. 609.

Utah.—Watts v. Greenwood, 162 P. 72, 49 Utah 118.

9. N.J.—Grinlee v. Rockhill, Ch., 13 A. 609.

11 C.J. p 703 note 14.

10. Mich.—Costigan v. Howard, 58 N.W. 1116, 100 Mich. 335.

N.J.—Lambert v. Miller, 38 N.J.Eq. 117.

11. Mont.—Nett v. Stockgrowers'

the mortgage where it would be inequitable to make such a requirement a condition to obtaining relief.¹² The imposing of a condition that further security be given will not justify an injunction against the exercise of the rights conferred by an insecurity clause in a mortgage.¹³

Under a statute authorizing an injunction against a foreclosure by a sale out of court if it appears that the mortgagor has a valid counterclaim or a defense against the debt, it is held that an injunction will issue as a matter of right, not of discretion,¹⁴ and, accordingly, that the court cannot impose any condition on the granting thereof.¹⁵ Under such a statute, the mortgagor cannot be required to tender the amount due or to offer to pay any amount found to be due,¹⁶ or to give an injunction bond,¹⁷ before being entitled to present his counterclaim or defense in court.

Adjudication of entire controversy. Its aid having been invoked, a court of equity may proceed to give complete relief and dispose of the whole matter between the parties.¹⁸ Accordingly, the court may retain jurisdiction for the purpose of determining title to the property,¹⁹ to assess any damages incurred by plaintiff as a result of the foreclosure.²⁰ Where an injunction bill challenges the amount due on a debt and mortgage, and defendant answers, the court may proceed to take an accounting, decree payment, foreclose the mortgage, and determine any deficiency;²¹ this on the ground that such a bill is an offer by plaintiff to do equity by paying any balance that the court may find to be due,²² and that

an answer to such a bill is, in effect, a bill for an accounting or to foreclose.²³ Where it appears that the property may decline in value, or that the cost of caring for it may be great, pending the proceedings, plaintiff may be called upon to consent to a sale of the property forthwith, or, if he refuses, may be required to execute an indemnity bond to hold defendant harmless from such causes.²⁴

Injunction bond. Under a statute so providing, a party seeking to enjoin the foreclosure of a chattel mortgage must file a bond conditioned on the payment of damages which the party enjoined may sustain because of the injunction.²⁵ Under a statute providing for an injunction against a foreclosure without legal proceedings in order to permit a contest of the right to foreclose in a judicial proceeding, however, it has been held that a bond is unnecessary.²⁶

The extent of liability on an injunction bond is controlled primarily by a fair construction of the terms thereof.²⁷ Thus a bond conditioned on the payment of any decree and damages awarded defendant against plaintiff has been held to render the sureties liable for a deficiency determined by the court after foreclosing the mortgage.²⁸

d. Actions

Rules applicable in injunction proceedings generally ordinarily apply to proceedings for injunctions of this character.

In an action to enjoin foreclosure, all parties actually interested in the mortgage or the transaction complained of must be joined as defendants.²⁹

Finance Corporation, 274 P. 497, 84 Mont. 116.

Attorney's fees

Mortgagor cannot enjoin sale of mortgaged chattels to pay attorney's fees, where he neither paid nor tendered any amount as a reasonable fee.—*Nett v. Stockgrowers' Finance Corporation*, supra.

12. Miss.—*Peeples v. Yates*, 40 So. 996, 88 Miss. 289.

11 C.J. p 703 note 20.

13. Wis.—*Cline v. Libby*, 49 N.W. 832, 46 Wis. 123, 32 Am.R. 700.

14. Okl.—*Pearson v. Glen Lumber Co.*, 160 P. 48, 55 Okl. 280.

15. Utah.—*Watts v. Greenwood*, 162 P. 72, 49 Utah 118.

16. Okl.—*Pearson v. Glen Lumber Co.*, 160 P. 48, 55 Okl. 280.

17. Utah.—*Watts v. Greenwood*, 162 P. 72, 49 Utah 118.

18. Mich.—*Graff v. Epstein*, 213 N. W. 190, 238 Mich. 227.

Mont.—*Nett v. Stockgrowers' Finance Corporation*, 274 P. 497, 84 Mont. 116.

Utah.—*Watts v. Greenwood*, 162 P. 72, 49 Utah 118.

19. Mass.—*E. Kronman, Inc., v. Bunn Bros.*, 155 N.E. 426, 258 Mass. 562.

20. Mass.—*E. Kronman, Inc., v. Bunn Bros.*, supra.

Plaintiff held entitled to damages
Mass.—*E. Kronman, Inc., v. Bunn Bros.*, supra.

21. Mich.—*Graff v. Epstein*, 213 N. W. 190, 238 Mich. 227.

Reasonableness of attorney's fee

Where an injunction bill challenges the reasonableness of an attorney's fee demanded, and defendant answers, the court may proceed to determine what is a reasonable fee, decree payment thereof, and, in case of nonpayment, foreclose the mortgage.—*Nett v. Stockgrowers' Finance Corporation*, 274 P. 497, 84 Mont. 116.

22. Mich.—*Graff v. Epstein*, 213 N. W. 190, 238 Mich. 227.

Mont.—*Nett v. Stockgrowers' Finance Corporation*, 274 P. 497, 84 Mont. 116.

23. Mont.—*Nett v. Stockgrowers' Finance Corporation*, supra.

24. Utah.—*Watts v. Greenwood*, 162 P. 72, 49 Utah 118.

25. Idaho.—*Wakefield v. Griffiths*, 261 P. 665, 45 Idaho 51.

26. Wash.—*State v. Superior Court for King County*, 222 P. 203, 128 Wash. 100.

27. Mass.—*Haczela v. Krupa*, 106 N. E. 1004, 219 Mass. 261.

11 C.J. p 703 note 22.

28. Mich.—*Graff v. Epstein*, 213 N. W. 190, 238 Mich. 227.

Payment of indebtedness

Where, although the action for an injunction is brought by only one of two mortgagor partners, the condition of the injunction bond is the payment of the indebtedness by plaintiff, he and his sureties are jointly and severally liable for the indebtedness.—*Graff v. Epstein*, 213 N.W. 190, 238 Mich. 227.

29. Mich.—*Costigan v. Howard*, 58 N.W. 1116, 100 Mich. 335.

The petition or complaint must show a sufficient connection between plaintiff's right, interest, or claim and the property involved;³⁰ it must disclose the want of a right on the part of defendant to foreclose,³¹ and the need of plaintiff for the equitable relief sought.³² If relief other than a restraining of the foreclosure is sought, the nature of such relief must be sufficiently stated.³³ The complaint must be properly verified.³⁴

Matters which are questions for trial need not be proved on motion for injunction pendente lite.³⁵ In order to authorize the issuance of an injunction against the foreclosure of a chattel mortgage, the evidence must establish with sufficient legal certain-

ty the existence of the facts constituting the cause of action.³⁶

Where a mortgage is foreclosed without judicial proceedings pending an action to restrain a foreclosure, a motion by defendant for a final decree should not be sustained, but the court should retain the bill for an assessment of damages.³⁷

On the dissolution of an injunction restraining foreclosure, no personal judgment against the mortgagor, it has been held, can be entered on the injunction bond for the value of the mortgaged property which the mortgagee had been prevented from seizing.³⁸

B. FORECLOSURE BY SALE WITHOUT JUDICIAL PROCEEDINGS

§ 366. Authority to Sell

- a. In general
- b. Persons authorized to sell

a. In General

After a forfeiture, the holder of a chattel mortgage

may ordinarily sell the property without a judicial proceeding, at least where the parties have so agreed.

After a forfeiture, the holder of a chattel mortgage may ordinarily sell the property in satisfaction of his debt without a judicial proceeding,³⁹ at least where the parties have so agreed.⁴⁰ Thus it

Miss.—Peoples v. Yates, 40 So. 996, 88 Miss. 289.
11 C.J. p 703 note 25.

30. Okl.—Beane v. Rucker, 168 P. 1167, 66 Okl. 299.

Plaintiff's title to the property must be disclosed by the petition.—Kidd v. Beavers, 74 P. 819, 33 Wash. 635—11 C.J. p 703 note 23.

31. N.Y.—Carter v. Phillips, 217 N. Y.S. 621, 127 Misc. 903.

Failure of consideration

Defense of failure of consideration, not alleged in bill to enjoin foreclosure of chattel mortgage, is unavailing, since party can recover only according to allegations in bill.—Gillfillan's Adm'r v. Bixby, 139 A. 250, 100 Vt. 468.

Waiver by the mortgagee of his right to foreclose is not available to plaintiff unless alleged in the complaint.—Nett v. Stockgrowers' Finance Corporation, 274 P. 497, 84 Mont. 116.

Payment

A petition alleging a delivery of the property by the mortgagor to the mortgagee and the latter's acceptance thereof has been held to allege, not an accord and satisfaction, but a payment, sufficient to state a cause of action for an injunction against a sale of the property.—Southwest Nat. Bank of Dallas v. Cates, Tex.Civ.App., 262 S.W. 569.

32. Okl.—Beane v. Rucker, 168 P. 1167, 66 Okl. 299.
11 C.J. p 703 note 24.

33. N.Y.—Carter v. Phillips, 217 N. Y.S. 621, 127 Misc. 903.

Prayer for damages held sufficient

Prayer "for further relief as . . . may seem meet" was sufficient to entitle plaintiff to damages for sale after filing of bill.—E. Kronman, Inc. v. Bunn Bros., 155 N.E. 426, 258 Mass. 562.

34. Ill.—Palmer Grill, Inc. v. Nory, 268 Ill.App. 292.

35. N.Y.—Carter v. Phillips, 217 N. Y.S. 621, 127 Misc. 903.

36. La.—Prudhomme v. Federal Land Bank of New Orleans, 134 So. 372, 172 La. 399.

Evidence held sufficient

(1) To support a finding that payments were to be applied on debts other than the mortgage debt and that it was still due and unpaid.—Mills v. Coron, R.I., 172 A. 617.

(2) To sustain finding that mortgagor owned the property when the mortgage was executed.—Nelson v. Sjogren, 30 P.2d 653, 176 Wash. 600.

(3) To sustain finding that plaintiff did not assume debt secured by mortgage executed by tenant to defendant company.—Green v. Consolidated Wagon & Machine Co., 164 P. 1016, 30 Idaho 359.

Evidence held insufficient

(1) To establish an agreement to extend time of payment.—Prudhomme v. Federal Land Bank of New Orleans, 134 So. 372, 172 La. 399.

(2) To show that mortgagee was acting in bad faith in disposing of the property.—Ruston Motors v. Jackson, 125 So. 490, 12 La.App. 269.

Prima facie case is sufficient, in absence of rebutting evidence.—

Kaufman v. Schwartz, 160 N.Y.S. 1053, 174 App.Div. 239.

37. Mass.—E. Kronman, Inc. v. Bunn Bros., 155 N.E. 426, 258 Mass. 562.

38. Ark.—Lawson v. Barton, 7 S.W. 387, 50 Ark. 346.

39. Iowa.—Lowden Sav. Bank v. Zeller, 194 N.W. 966, 196 Iowa 1205. N.Y.—Holliday v. McGraw, 176 N.Y. S. 666, 106 Misc. 661.

Okl.—Riley Motor Co. v. Wilkins, 65 P.2d 481, 179 Okl. 236.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

11 C.J. p 695 note 85.

40. Iowa.—Barrett v. Martzahn, 173 N.W. 72, 186 Iowa 548.

La.—Horton v. Kavanaugh-Hinton Motor Co., 131 So. 497, 15 La.App. 226.

Me.—Consolidated Rendering Co. v. Stewart, 168 A. 100, 132 Me. 139, 88 A.L.R. 908.

Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

Okl.—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77—J. I. Case Threshing Machine Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997. Wash.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.

"The power to foreclose through sales, other than under court order, is purely contractual."—Campbell v.

is generally held that the mortgage may be foreclosed by a sale of the property under a power of sale contained in the mortgage without resort to a court for a decree of foreclosure,⁴¹ unless, as already considered in § 362 b, the statutory method of foreclosure is exclusive. In some jurisdictions the power to sell is restricted to those cases in which it is expressly conferred in the mortgage;⁴² but in other jurisdictions it is not so restricted⁴³ and it is sufficient that the parties have agreed to the sale⁴⁴ orally⁴⁵ or by a separate writing.⁴⁶

A power to sell contained in a mortgage may be a naked power or a power coupled with an interest,⁴⁷ and does not terminate with the expiration of the period of time for which the mortgage was given.⁴⁸ It is irrevocable by the mortgagor,⁴⁹ and neither he nor an equitable owner whom he represents may defeat the right of the mortgagees to foreclose by a sale under such power.⁵⁰ The power has been held not to continue after the death of the mortgagor,⁵¹ although the contrary has been held as regards a right to sell based on a statute.⁵²

Property in custodia legis. According to some

authority, the interest of the mortgagor may be sold under the mortgage although the property is in custodia legis,⁵³ but there is authority to the contrary.⁵⁴

b. Persons Authorized to Sell

The terms of a mortgage or a statute specifying who shall be entitled to sell must ordinarily be followed. A sale by one of several mortgagees under a mortgage not securing separate debts is invalid, but the contrary is held where the debts are separate.

Where the mortgage specifies by whom the power of sale shall be executed, it can be executed only by such person,⁵⁵ especially where the power is a naked one not coupled with an interest.⁵⁶ Such person cannot lawfully delegate his authority,⁵⁷ unless the mortgage so provides, expressly or by plain implication.⁵⁸ Where a power of sale is conferred on a trustee in a deed of trust, the power may be executed only by the trustee, unless he is unable or refuses to execute it.⁵⁹ Likewise it is held that the terms of a statute specifying the person who shall be entitled to foreclose by a sale without judicial proceedings must be followed.⁶⁰ However,

Eastern Seed & Grain Co., Tex.Civ. App., 109 S.W.2d 997, 998.

41. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

Me.—Gallagher v. Aroostook Federation of Farmers, 197 A. 554—Consolidated Rendering Co. v. Stewart, 168 A. 100, 101, 132 Me. 139, 88 A. L.R. 908, citing *Corpus Juris* with full approval.

Mont.—Nett v. Stockgrowers' Finance Corporation, 274 P. 497, 84 Mont. 116.

Okl.—J. I. Case Threshing Machine Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Or.—Ashley & Rumelin v. Lance, 171 P. 561, 88 Or. 109.

Tex.—Latimer v. Hebert, Civ.App., 25 S.W.2d 929—Young v. Harvison, Civ.App., 288 S.W. 687.

Utah.—Morgan v. Layton, 208 P. 505, 60 Utah 280.

W.Va.—Modern Show Case & Fixture Co. v. Todd, 138 S.E. 116, 103 W. Va. 490.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.
11 C.J. p 704 notes 27, 29.

Summary process

Under a mortgage importing a confession of judgment, the mortgagee may proceed by summary process against the property, or take possession thereof, sell the same, and apply the proceeds on the debt.—Horton v. Kavanaugh-Hinton Motor Co., 131 So. 497, 15 La.App. 226.

42. Conn.—Kirkbride v. Bartz, 74 A. 883, 82 Conn. 615.
11 C.J. p 695 note 87.

43. Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

11 C.J. p 695 note 86.

44. Okl.—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77.

Mortgagor's voluntary delivery of the property to the mortgagee on default constitutes implied consent that the property be sold and the proceeds applied on the debt.—Horton v. Kavanaugh-Hinton Motor Co., 131 So. 497, 15 La.App. 226.

45. Miss.—O'Reilly v. Hendricks, 10 Miss. 388.

46. Me.—Consolidated Rendering Co. v. Stewart, 168 A. 100, 132 Me. 139, 88 A.L.R. 908.

47. Ala.—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86.
Mass.—Harvey v. Smith, 61 N.E. 217, 179 Mass. 592.

48. Tex.—Parlin, etc., Co. v. Hanson, 53 S.W. 62, 21 Tex.Civ.App. 401—Sanger v. Harris, Civ.App., 42 S.W. 645.
11 C.J. p 704 note 45.

49. Ala.—Gilliland v. Martin, 42 So. 7, 149 Ala. 672—Street v. Sinclair, 71 Ala. 110.

50. Mass.—Harvey v. Smith, 61 N.E. 217, 179 Mass. 592.
11 C.J. p 704 note 44.

51. Pa.—Kater v. Steinruck, 40 Pa. 501.

52. Iowa.—Cocke v. Montgomery, 39 N.W. 386, 75 Iowa 259.

53. Mich.—Cavanaugh v. Sanderson, 115 N.W. 955, 152 Mich. 11.

Tex.—Brant v. Lane, 118 S.W. 229, 139 S.W. 768, 54 Tex.Civ.App. 425.
11 C.J. p 704 note 52.

54. Okl.—Scott v. Standridge, 245 P. 591, 117 Okl. 111—Mid-Continent Motor Securities Co. of Tulsa v. Art Harris Transfer & Storage Co. of Muskogee, 223 P. 130, 97 Okl. 139—Salisbury v. First Nat. Bank, 221 P. 444, 99 Okl. 138.
11 C.J. p 704 note 53.

55. Tex.—Lewis v. Valley Finance Corporation, Civ.App., 17 S.W.2d 138, error refused.

56. Ala.—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86.

57. Ala.—Barksdale v. Strickland & Hazard, supra.

58. Tex.—Lewis v. Valley Finance Corporation, Civ.App., 17 S.W.2d 138, error refused.

Sale by assignee

Provision that mortgage should bind both parties' assigns implied that mortgagee's assignee succeeded to mortgagee's right to seize and sell mortgaged chattels.—Lewis v. Valley Finance Corporation, supra.

59. Ala.—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86.

60. Idaho.—Peterson v. Halley Nat. Bank, 6 P.2d 145, 51 Idaho 427.

Sale by sheriff

(1) Where a statute provides that the foreclosure shall be conducted by the sheriff, it cannot validly be conducted by a constable.—Jacobson v. Aberdeen Packing Co., 66 P. 419, 26 Wash. 175—Pickle v. Smalley, 58 P. 581, 21 Wash. 473.

it has been held that a power of sale contained in the mortgage may be executed by the person named in the mortgage without calling upon a person designated by the statute.⁶¹

Joint mortgagees. Where a mortgage to several mortgagees is not given to secure a separate indebtedness of each, a sale by one of them is invalid, unless the mortgagor has ratified the act.⁶² On the other hand, where joint mortgagees hold the property as security for debts due them respectively in the proportions that their respective demands bear to each other, it is generally held that one of the mortgagees may sell the property to the extent of his interest in it;⁶³ but there is other authority holding that he cannot dispose of the property, but only of his interest therein.⁶⁴ A mortgage securing separate debts may be foreclosed by the mortgagees jointly.⁶⁵

§ 367. Procedure Generally

A foreclosure by a sale without judicial proceedings under a statute or a power of sale in the mortgage must be conducted in accordance with the provisions of the

statute or of the mortgage, and with due regard generally for the interests of other persons in the property.

Where the right to sell is based on statute, the provisions of the statute as to sale must be followed.⁶⁶ In the absence of a statute to the contrary, a power of sale contained in the mortgage must, generally speaking, be strictly pursued,⁶⁷ and the rights and duties of the holder of the mortgage in executing the power are limited by the terms of the instrument.⁶⁸ Slight irregularities in the foreclosure, however, will not necessarily invalidate it, especially if the rights of no person are thereby prejudiced,⁶⁹ and it is sufficient that the foreclosure be fairly conducted.⁷⁰ Moreover, the consent of the mortgagor may obviate the effect of irregularities,⁷¹ and if the mortgagor insists on a foreclosure as stipulated in the mortgage, he must himself comply with the conditions of the mortgage.⁷²

A person exercising his right to sell must have due regard for the interests of the mortgagor, or other persons, in the property.⁷³ He is not entitled to act as the owner of the property,⁷⁴ and, where he is the mortgagee, he is regarded as being an agent or trustee of the mortgagor,⁷⁵ and his con-

(2) Under a statute providing for foreclosure by the sheriff when the property cannot be peaceably taken, the foreclosure can be conducted by the sheriff only when peaceable possession is refused, or all the mortgagors are out of the county.—*Peterson v. Hailey Nat. Bank*, 6 P.2d 145, 51 Idaho 427.

61. *Mont.—Kinsman v. Stanhope*, 144 P. 1083, 50 Mont. 41, L.R.A. 1916C 443.

Statute naming sheriff

Where the mortgage provides for a sale by the mortgagee, the sale may be made by such person despite a statute providing for calling upon the sheriff to execute the power.—*Kinsman v. Stanhope*, 144 P. 1083, 50 Mont. 41, L.R.A. 1916C 443.

62. *Mo.—Hutchins Hanks Coal Co. v. Walnut Land, etc., Co.*, 124 S. W. 1098, 141 Mo.App. 251.

63. *Neb.—Sloan v. Thomas Mfg. Co.*, 79 N.W. 723, 58 Neb. 713. 11 C.J. p 704 note 38.

64. *N.Y.—Tyler v. Taylor*, 8 Barb. 585.

65. *Mich.—Lyon v. Ballentine*, 29 N.W. 837, 63 Mich. 97, 6 Am.S.R. 284.

66. *Idaho.—Peterson v. Hailey Nat. Bank*, 6 P.2d 145, 51 Idaho 427.—*McDougall v. Kasiska*, 282 P. 943, 48 Idaho 424, certiorari denied *Kasiska v. McDougall*, 50 S.Ct. 347, 281 U.S. 740, 74 L.Ed. 1154.

Minn.—State Bank of Loretto v. Loose, 269 N.W. 399, 400, 198 Minn. 222, quoting *Corpus Juris*.

Mont.—Trudell v. Hingham State Bank of Hingham, 205 P. 667, 62 Mont. 557.

N.D.—Hedrick v. Stockgrowers' Credit Corporation, 250 N.W. 539, 542, citing *Corpus Juris*.

Okl.—Parks v. Thompson & Wilkerson, 264 P. 607, 129 Okl. 256.

Wash.—Inland Finance Co. v. J. B. Ingersoll Co., 213 P. 679, 124 Wash. 72.

11 C.J. p 705 note 54.

67. *Ala.—C. Scheussler & Sons v. Heard*, 81 So. 590, 202 Ala. 648.

Me.—Consolidated Rendering Co. v. Stewart, 168 A. 100, 132 Me. 139, 88 A.L.R. 908.

Mo.—Fulkerson v. New Gazette Co., 297 S.W. 115, 222 Mo.App. 230.—*Huber Mfg. Co. v. Ellis*, 201 S.W. 931, 199 Mo.App. 96.

Tex.—Fireman's Fund Ins. Co. v. Wilson, Com.App., 284 S.W. 920, reversing *Wilson v. Fireman's Fund Ins. Co.*, Civ.App., 274 S.W. 176.

11 C.J. p 705 note 56.

68. *Ark.—Barton v. Bowlin*, 163 S. W. 502, 111 Ark. 123.

Tex.—Adami v. Bowers, Civ.App., 21 S.W.2d 590, error dismissed.

69. *Neb.—Tackaberry v. Gilmore*, 78 N.W. 32, 57 Neb. 450.

70. *Mich.—Manwaring v. Jenison*, 27 N.W. 899, 61 Mich. 117.

71. *Ala.—Campbell v. Woodstock Iron Co.*, 3 So. 369, 83 Ala. 351.

Iowa.—Geiser Mfg. Co. v. Krogman, 82 N.W. 938, 111 Iowa 503.

Okl.—Harrill v. Weer, 109 P. 539, 26 Okl. 313.

11 C.J. p 705 note 54 [d] (2).

72. *Or.—Jacobs v. McCalley*, 8 Or. 124.

73. *D.C.—Van Mourick v. Bowie*, 69 F.2d 834, 63 App.D.C. 96.

Ga.—Goldin v. Federal Intermediate Credit Bank, 179 S.E. 291, 50 Ga. App. 790.

Ky.—Hawkins Furniture Co. v. Morris, 137 S.W. 527, 143 Ky. 738.

Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

Manner and conduct of sale see *infra* § 373.

Subsequent mortgagee

A first mortgagee owes a second mortgagee same obligation of good faith and reasonable care in exercising a power of sale as first mortgagee owes to mortgagor. The fact that first mortgagee is not contractually bound to give second mortgagee notice of sale does not free him from this obligation. Bad faith and lack of reasonable care may be found without showing that first mortgagee promised to give second mortgagee notice of foreclosure sale.—*Castro v. Linchitz*, Mass., 8 N.E.2d 744.

74. *Tex.—Adami v. Bowers*, Civ. App., 21 S.W.2d 590, error dismissed.

75. *Cal.—J. I. Case Threshing Mach. Co. v. Copren Bros.*, 162 P. 647, 32 Cal.App. 194.

Ga.—Goldin v. Federal Intermediate Credit Bank, 179 S.E. 291, 50 Ga. App. 790.

duct and fairness in making the sale is always open to investigation by any person having a sufficient interest in the property.⁷⁶

§ 368. Preliminary Proceedings

The terms of a statute prescribing preliminary proceedings, such as furnishing the mortgagor a statement of account or appraising the property, must ordinarily be followed.

Where a statute specifies proceedings to be had preliminary to the sale, its terms must ordinarily be followed.⁷⁷ Thus, where a statute so provides, a statement of account must be furnished the mortgagor,⁷⁸ or the property must be appraised,⁷⁹ before the sale.

The affidavit of foreclosure, where required by statute, should set forth facts showing a right to foreclosure, including a showing that the debt on which the right is founded is due and mature.⁸⁰ A substitution of the trustee in a deed of trust need not be recorded unless required by a statute or by the deed.⁸¹

Time of sale. A right to sell cannot be validly exercised before the expiration of a time specified by the mortgage or a statute,⁸² unless the mortgagor consents to a sale before such time.⁸³

§ 369. — Demand

A demand on the mortgagor to perform the condition of his mortgage is a condition precedent to a valid sale where there can be no default until demand. A demand for peaceable possession of the property is necessary, under a statute so providing, before the sale may be made by the sheriff.

A demand on the mortgagor to perform the condition of his mortgage is a condition precedent to a valid sale where there can be no default until demand,⁸⁴ as where the mortgage note is payable on demand;⁸⁵ but even in such case a notice of intention to foreclose has been held equivalent to a demand of payment and to entitle the mortgagee to possession of the mortgaged property,⁸⁶ especially where the mortgagor has rendered an actual demand impossible.⁸⁷ Demand is not necessary if the mortgage waives it,⁸⁸ as where he has authorized a sale on default without notice⁸⁹ or at such time as the mortgagee deems himself insecure.⁹⁰ A demand is also unnecessary where it is obvious that it would be futile.⁹¹

Under some statutes, there must be a demand from the mortgagor for peaceable possession of the property before the foreclosure may be conducted by the sheriff;⁹² and although the statute is to protect the mortgagor from the expenses of such a sale, the mortgagee's noncompliance therewith is not cured by his paying the expenses.⁹³

§ 370. — Notice

- a. Necessity
- b. Sufficiency
- c. Effect of defects

a. Necessity

Unless waived, notice of a foreclosure by sale should be given, particularly where a statute or a stipulation in the mortgage provides therefor.

Notice of a foreclosure by sale should be given where a statute⁹⁴ or a stipulation in the mortgage

Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.
11 C.J. p 705 note 55.

76. Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.
Mass.—Castro v. Linchitz, 8 N.E.2d 744.

N.Y.—Morrisania Laundry Service v. Strauss, 242 N.Y.S. 579, 137 Misc. 488.

77. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427—Advance Rumley Thresher Co. v. Ayres, 277 P. 20, 47 Idaho 514.

78. Ark.—J. E. McCoy & Son v. Atkins, 267 S.W. 779, 167 Ark. 250.
11 C.J. p 705 note 54 [c].

Statement of account is sufficient, although it contains inaccuracies, if it is made in good faith and reasonably informs the mortgagor of the state of his account.—J. E. McCoy & Son v. Atkins, 267 S.W. 779, 167 Ark. 250.

79. Ind.T.—Webb v. Hunt, 53 S.W. 437, 2 Ind.T. 612.

Okl.—Harrill v. Weer, 109 P. 539, 26 Okl. 313.

11 C.J. p 705 note 54 [a].

80. Idaho.—Gunnell v. Largilliere Co., Bankers, 269 P. 412, 46 Idaho 551.

81. Miss.—Quarles v. Hucherson, 104 So. 143, 139 Miss. 356.

82. Mo.—Fulkerson v. New Gazette Co., 297 S.W. 115, 222 Mo.App. 230.

83. Wis.—Stevens v. Breen, 44 N.W. 645, 75 Wis. 595.

84. Mass.—Goodrich v. Willard, 2 Gray 203.

N.J.—Mausert v. Mutual Distributing Co., 104 A. 203, 92 N.J.Law 190.

85. Ill.—Slingo v. Steele-Wedeles Co., 82 Ill.App. 139.

11 C.J. p 705 note 62.

86. Hawaii.—Silva v. Lopez, 5 Hawaii 262.

Mass.—Goodrich v. Willard, 2 Gray 203.

11 C.J. p 705 note 63.

87. N.J.—Mausert v. Mutual Distributing Co., 104 A. 203, 92 N.J. Law 190.

88. Cal.—Maddox v. Wyman, 28 P. 338, 92 Cal. 674.

Ga.—Willis v. Jefferson, 75 Ga. 743.

89. N.Y.—Budweiser Brewing Co. v. Capparelli, 38 N.Y.S. 972, 16 Misc. 502.

90. N.Y.—Huggans v. Fryer, 1 Lans. 276.

91. *Demand is unnecessary* where the mortgagor is insolvent, has gone out of business, and is not represented by anyone at his former place of business.—P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co., Mo. App., 207 S.W. 266.

92. Idaho.—Advance Rumley Thresher Co. v. Ayres, 277 P. 20, 47 Idaho 514.

93. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427.

94. Idaho.—Advance Rumley Thresher Co. v. Ayres, 277 P. 20, 47 Idaho 514.

Minn.—State Bank of Loretto v. Loose, 269 N.W. 399, 198 Minn. 222—Jankowitz v. Kaplan, 165 N.W. 275, 138 Minn. 452.

itself⁹⁵ provides therefor, and, although there is authority to the contrary,⁹⁶ it would seem that such notice is a requisite even in the absence of a statutory or contractual requirement.⁹⁷ Under some statutes, the notice is in the nature of process and is the authority to the officer to take possession of the mortgaged property.⁹⁸ On the other hand, in the absence of a statute to the contrary, the mortgage itself may dispense with the necessity of notice,⁹⁹ as where it provides that the mortgagee may sell at a private sale.¹ Also, where the statutory method of foreclosure is not exclusive, the mortgagor may waive statutory requirements as to notice,² as well as stipulations in the mortgage requiring notice.³ Likewise, under the rule that notice is necessary, although not stipulated for in the mortgage or required by statute, notice may be waived.⁴

Postponement or adjournment of sale. In the absence of a statute the mortgagee may in the exercise of a reasonable discretion adjourn the sale under the power from time to time without a new no-

tice to the mortgagor.⁵ However, under a statute expressly so providing a foreclosure sale may be postponed from time to time by inserting a notice of such postponement as soon as practicable in the newspaper in which the original advertisement of the sale was published.⁶

Subordinate lienholders. Unless a mortgage is regarded as vesting legal title in the mortgagee,⁷ a sale by a mortgagor of chattels, in whom is the legal title, with the consent of the first mortgagee, without notice to subordinate lienholders does not foreclose their liens, although the sale is made for the full value of the property,⁸ and the proceeds are applied to the payment of the debt secured by the first lien.⁹

b. Sufficiency

Although immaterial variations are not fatal, the notice of sale must substantially comply with statutory requirements or the provisions in the mortgage.

The notice of sale must substantially conform to the requirement of the statute¹⁰ or the provisions of the mortgage,¹¹ although variations have been

Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed.
11 C.J. p 705 note 67.

Notice to receiver of the mortgagor is unnecessary.—Inland Finance Co. v. J. B. Ingersoll Co., 213 P. 679, 124 Wash. 72.

Notice to wife

Right of wife, who joined with husband in executing chattel mortgage and mortgage note, to have written notice of sale and of mortgagee's intention to take property, vests in wife individually and in her own right, independent of similar rights or privileges vested in husband, nor can a trustee appointed to administer husband's estate in bankruptcy deprive her, without her knowledge or consent, of right to have such notice, since, without wife's consent, or notice to her, husband could not deprive wife of such rights.—Banking Commission of Wisconsin v. Ray, 253 N.W. 556, 214 Wis. 433.

95. Ala.—Moville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648—Speakman v. Vest, 51 So. 980, 166 Ala. 235.
D.C.—Van Mourick v. Bowie, 69 F. 2d 834, 63 App.D.C. 96.
Mo.—Huber Mfg. Co. v. Ellis, 201 S. W. 931, 199 Mo.App. 96.

96. N.Y.—Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512.
Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997.

97. Ky.—Montenegro-Riehm Music

Co. v. Beuris, 169 S.W. 886, 160 Ky. 557, L.R.A.1916C 557.

11 C.J. p 706 note 69.

98. Idaho.—Blumauer-Frank Drug Co. v. Bransetter, 43 P. 575, 4 Idaho 557, 95 Am.S.R. 151.

Wash.—Allen v. Morris, 151 P. 827, 87 Wash. 268—Mack v. Doak, 96 P. 325, 50 Wash. 119.

11 C.J. p 706 note 70.

99. Ohio.—Crocker v. Associate Inv. Co., 10 N.E. 2d 153, 56 Ohio App. 136—Clark v. Studebaker Corporation of America, 171 N.E. 602, 35 Ohio App. 54.

Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused—Fidelity Union Fire Ins. Co. v. Ballew-Satterfield Co., Civ.App., 10 S.W.2d 163—Block Motor Co. v. Melia, Civ.App., 247 S.W. 666, 668, quoting *Corpus Juris*.

11 C.J. p 706 note 75.

1. Tex.—Block Motor Co. v. Melia, Civ.App., 247 S.W. 666, 668, quoting *Corpus Juris*.

11 C.J. p 706 note 76.

2. Wis.—Welcome v. Mitchell, 51 N. W. 1080, 81 Wis. 566, 29 Am.S.R. 913.

11 C.J. p 706 note 72.

3. Okl.—Harrill v. Weer, 109 P. 539, 26 Okl. 313.

S.C.—Darnall v. Darlington, 5 S.E. 620, 28 S.C. 255.

Tex.—Bourke v. Vanderlip, 22 Tex. 221.

11 C.J. p 706 note 73.

4. Nev.—Bryant v. Carson River Lumbering Co., 3 Nev. 313, 93 Am. D. 403.

5. Mass.—Freed v. Rosenthal, 121 N.E. 72, 231 Mass. 357.

11 C.J. p 706 note 80.

6. Neb.—Coad v. Home Cattle Co., 49 N.W. 757, 32 Neb. 766, 29 Am. S.R. 465.

11 C.J. p 706 note 79.

7. Neb.—Faeth v. Leary, 36 N.W. 513, 23 Neb. 267.

8. Okl.—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 102 Okl. 95.

9. U.S.—Platte Valley Cattle Co. v. Bosserman-Gates Live Stock, etc., Co., Neb., 202 F. 692, 121 C.C.A. 102, 45 L.R.A.N.S., 1137.

11 C.J. p 706 note 77.

10. Idaho.—Advance Rumley Thresher Co. v. Ayres, 277 P. 20, 47 Idaho 514.

Minn.—State Bank of Loretto v. Loose, 269 N.W. 399, 198 Minn. 222—Jankowitz v. Kaplan, 165 N. W. 275, 138 Minn. 452.

Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused.

11 C.J. p 706 note 81.

11. Ala.—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648.

D.C.—Van Mourick v. Bowie, 69 F.2d 834, 63 App.D.C. 96.

Mo.—Huber Mfg. Co. v. Ellis, 201 S. W. 931, 199 Mo.App. 96.

11 C.J. p 706 note 82.

held harmless where not as to material matters,¹² particularly where the mortgagor has actual knowledge of the sale.¹³ Further, the insufficiency of the notice may be waived.¹⁴ Where the mortgage authorized a sale either with or without notice, the fact that the mortgagee elected to sell at a public sale has been held not to impose upon him a duty of giving notice in a specific manner required by statutes relating to sales under execution.¹⁵

Contents. Where a statute so requires, the notice must state the nature of the default;¹⁶ but in the absence of such a statute a notice of foreclosure proceedings commenced by virtue of an insecurity clause in the mortgage before the debt is due need not allege that the mortgagee deems himself insecure and declares the whole debt due, since the seizure of the property on notice of sale is a sufficient declaration of such intention.¹⁷ Under a statute so providing, the notice must state the amount claimed to be due,¹⁸ and contain a description of the mortgage.¹⁹ Further, the notice must sufficiently describe,²⁰ and state the location of,²¹ the prop-

erty to be sold. If the sale embraces the whole of the mortgaged property, the description thereof in the notice is sufficient if it conforms substantially to that contained in the mortgage.²²

Signature. In the absence of statutory provision to the contrary, the notice of sale may be signed by the mortgagee or his agent.²³ Where there has been an equitable assignment of the mortgage, the notice may be signed in the name of the holder of the legal title in case he does not object.²⁴

Time of notice. Where no particular time is specified, the notice must be given a reasonable time in advance of the sale,²⁵ the question of reasonableness depending on the circumstances of each case.²⁶ On the other hand, where a time is specified, the notice must be given for the time specified before the sale,²⁷ unless the mortgagor waives the requirement by consenting to a lesser notice.²⁸

Manner of service. Where a statute so provides, personal service of the notice of the mortgagee's intended sale is required to be made upon the mortgagor,²⁹ or the owner of the property,³⁰ if he can

12. Ill.—Waite v. Dennison, 51 Ill. 319.

Mich.—Manwaring v. Jenison, 27 N. W. 899, 61 Mich. 117.

13. Ill.—Marvel v. McKinzey, 105 Ill.App. 164.

Iowa.—O. S. Kelley Co. v. Chinn, 75 N.W. 315.

14. Wash.—Mack v. Doak, 96 P. 825, 50 Wash. 119.

15. Tex.—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused.

16. Okl.—Fitch v. Green, 134 P. 34, 39 Okl. 18.

11 C.J. p 707 note 87.

Notice as evidence of default

Statute making report of sale prima facie evidence of facts stated does not make recitals in notice of sale, such as a recital of default, prima facie evidence of facts stated in notice.—Advance-Rumely Thresher Co. v. Kruger, 16 P.2d 1102, 93 Mont. 66, 85 A.L.R. 1053.

17. Wash.—Allen v. Morris, 151 P. 827, 87 Wash. 268—Woodward v. Lutsch, 124 P. 393, 69 Wash. 59.

18. Okl.—Fitch v. Green, 134 P. 34, 39 Okl. 18.

Wash.—Allen v. Morris, 151 P. 827, 87 Wash. 268.

19. Wash.—Allen v. Morris, supra.

11 C.J. p 707 note 90.

20. Ala.—De Merville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204.

Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 166 Minn. 383.

Tex.—Smith v. Tex, etc., R. Co., Civ.

App., 105 S.W. 528, modified on other grounds 108 S.W. 819, 101 Tex. 405.

21. Tex.—Davenport v. San Antonio Machine & Supply Co., Civ.App., 59 S.W.2d 207, error dismissed.

Description held sufficient

Failure of notice of sale to give correct section number of land on which mortgaged property was located did not render the notice insufficient if place was otherwise sufficiently described.—Davenport v. San Antonio Machine & Supply Co., supra.

22. Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 166 Minn. 383.

11 C.J. p 707 note 92.

23. Minn.—Powell v. Gagnon, 53 N. W. 1148, 52 Minn. 232.

11 C.J. p 707 note 93.

24. Minn.—Carpenter v. Artisans' Sav. Bank, 47 N.W. 150, 44 Minn. 521.

11 C.J. p 707 note 94.

25. Cal.—Wilson v. Brannan, 27 Cal. 258.

26. Cal.—Bendel v. Crystal Ice Co., 22 P. 1112, 82 Cal. 199.

11 C.J. p 707 note 98.

27. Ala.—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648.

Mo.—Huber Mfg. Co. v. Ellis, 201 S. W. 931, 199 Mo.App. 96.

Notice before filing of mortgage

Sale under chattel mortgage in county other than that where the mortgage was on file, as authorized by the mortgage, was not invalid because notice of sale was published

before filing certified copy of the mortgage in the county where the sale was conducted.—Foglesong v. Farmers' State Bank of Brentford, 223 N.W. 49, 54 S.D. 288.

Notice held sufficient

Under the terms of a mortgage providing for notice by publication a specified time before the sale, it has been held sufficient that the first publication was prior to that time.—Freed v. Rosenthal, 121 N.E. 72, 231 Mass. 357.

28. Okl.—Ardmore First State Bank v. Dougherty, 120 P. 656, 31 Okl. 179, Ann.Cas.1913D 411.

29. Minn.—Powell v. Gagnon, 53 N. W. 1148, 52 Minn. 232.

Wis.—Banking Commission of Wisconsin v. Ray, 253 N.W. 556, 214 Wis. 433.

In Idaho, if the mortgagor cannot be found within the county, the mortgagee is not required to make demand for peaceable possession of the mortgaged property before placing his affidavit in the hands of the sheriff for service. Service must be had on all the mortgagors found within the county, and the absence of one of them from the county will not excuse failure to serve the others.—Advance Rumley Thresher Co. v. Ayres, 277 P. 20, 47 Idaho 514.

30. Wash.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

Sheriff's return unnecessary

A statute requiring the sheriff to make personal service of the notice on the owner if he can be found does not require or authorize him to make a return that he is unable to find the

be found. Also, where a statute so provides, personal service must be made upon the person in actual possession of the property,³¹ but some statutes do not require service upon such person where he is not the mortgagor and has voluntarily surrendered possession of the property.³² The effort to obtain personal service must be reasonable and bona fide.³³ However, unless otherwise provided by statute, it is not necessary that the notice be served on the mortgagor before the sheriff takes possession.³⁴

Under some statutes and mortgages an advertisement of the sale is sufficient.³⁵ If the mortgage or statutes prescribe a certain place for giving notice,³⁶ as by posting the notice in some conspicuous place,³⁷ the notice must be given accordingly. However, the validity of a sale will not be affected by the fact that prior to the time of sale, some of the notices posted as required by statute, were destroyed, without the knowledge of the one making the sale, by causes beyond his control.³⁸

Amendment of notice. It has been held that, although the first notice delivered to the sheriff was insufficient, a second notice which is sufficient in form, and under which the sale was made, may be treated as an amendment, and will be sufficient.³⁹

nonresident owner to make personal service on him.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

Statute held constitutional
Wash.—Strandberg v. Stringer, supra.

31. Minn.—Jankowitz v. Kaplan, 165 N.W. 275, 138 Minn. 452.

Sale by mortgagor immaterial
The mortgagor can object to failure to serve copy of notice of sale upon person in actual possession, although the mortgagor had sold property before the proceeding.—Jankowitz v. Kaplan, supra.

32. Idaho.—First Nat. Bank v. Poling, 248 P. 19, 42 Idaho 636.

33. Minn.—Powell v. Gagnon, 53 N.W. 1148, 52 Minn. 232.
11 C.J. p 707 note 5.

34. Wash.—Allen v. Morris, 151 P. 827, 87 Wash. 268.

35. Iowa.—O. S. Kelley Co. v. Chinn, 75 N.W. 315.

Wash.—Inland Finance Co. v. J. B. Ingersoll Co., 213 P. 679, 124 Wash. 72.

Publication in newspaper
S.D.—Felker v. Grant, 72 N.W. 81, 10 S.D. 141.
11 C.J. p 707 note 2.

36. Mo.—Huber Mfg. Co. v. Ellis, 201 S.W. 931, 199 Mo.App. 96.
Okl.—Fitch v. Green, 134 P. 34, 39 Okl. 18.

Posting in county seat held insufficient

The requirements of a statute pro-

viding for posting notices of sale in the town, district, or county to which the subject matter relates are not complied with where the notices were not posted in the town where the property was located, but only at the county seat.—State Bank of Loretto v. Loose, 269 N.W. 399, 198 Minn. 222.

Requirement held not waived

A stipulation that sale be held in another county, but not mentioning the place where notices should be posted, did not waive the requirement that notices be posted where specified by mortgage.—Huber Mfg. Co. v. Ellis, 201 S.W. 931, 199 Mo.App. 96.

37. Ill.—See W. H. Collins Ice Cream Co. v. Talmage, 210 Ill.App. 374.

Tex.—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused.
11 C.J. p 707 note 3.

Place held "public"

Where road traveled by public ran by side of building housing mortgaged machinery and on which notice of sale was posted, place was sufficiently "public" to meet statutory requirements.—Kent v. National Supply Co. of Texas, Tex.Civ.App., 36 S.W.2d 811, error refused.

38. Okl.—Moorehead v. Daniels, 153 P. 623, 57 Okl. 298.

39. Wash.—Allen v. Morris, 151 P. 827, 87 Wash. 268, 272.
11 C.J. p 707 note 7.

c. Effect of Defects

According to some authorities, a defect in the notice will invalidate the sale, although by other authorities the sale will be valid, especially if it brings the full value and the proceeds are applied properly, and the mortgagor will be remitted to an action for damages.

In some jurisdictions, it is held that the sale is void if the mortgagee fails to give notice as provided for in the mortgage⁴⁰ or as required by statute;⁴¹ or the mortgagor may have relief in equity.⁴² Furthermore, under a statute to that effect, a sale without conformity to the requirements of the statute as to notice will extinguish the mortgage and the mortgage debt.⁴³ On the other hand, according to some authorities, defects in notice will not be regarded as a ground for declaring the foreclosure sale void if the property brings the full value and the proceeds are properly applied.⁴⁴ Similarly, there is authority holding that a sale under a power in the mortgage will pass title to the purchaser, although notices of sale are not posted as prescribed by the mortgage,⁴⁵ and the only remedy which the mortgagor has in such a case is an action of law against the mortgagee for damages.⁴⁶ The amount of damages recoverable for a sale without a sufficient notice is the value of the mortgaged property less the amount of the mortgage lien thereon.⁴⁷

40. Mo.—Huber Mfg. Co. v. Ellis, 201 S.W. 931, 199 Mo.App. 96.
Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed.
11 C.J. p 708 note 13.

41. **Posting of notice**
Minn.—State Bank of Loretto v. Loose, 269 N.W. 399, 198 Minn. 222.
Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed.

Person notified
Minn.—Jankowitz v. Kaplan, 165 N.W. 275, 138 Minn. 452.

42. Hawaii.—Silva v. Lopez, 5 Hawaii 262.

43. Wis. — Emerson-Brantingham Impl. Co. v. Paul, 158 N.W. 326, 163 Wis. 589—Bekkelal v. Johnson, 107 N.W. 5, 127 Wis. 624.

Waiver

Where first mortgagee received possession of the property and sold it to a third person at a private sale and without giving the statutory notice, the lien of the first mortgage was waived.—Beaty v. First Nat. Bank, 242 P. 246, 116 Okl. 223.

44. Ala.—Speakman v. Vest, 51 So. 980, 166 Ala. 235.

45. Iowa.—Campbell v. Wheeler, 29 N.W. 613, 69 Iowa 588—Whitaker v. Sigler, 44 Iowa 419.

46. Iowa.—Campbell v. Wheeler, 29 N.W. 613, 69 Iowa 588.

47. Ky.—Hawkins Furniture Co. v. Morris, 137 S.W. 527, 143 Ky. 738.
Neb.—Callen v. Rose, 66 N.W. 639, 47 Neb. 638.

§ 371. Transfer of Proceedings to Court

Under a statute to that effect, proceedings to foreclose by notice and sale may be transferred to a court upon a demand by any sufficiently interested person, for the purpose of contesting the foreclosure in a judicial proceeding. Thereafter the foreclosure will proceed as if originally brought in the court.

Under a statute to that effect, proceedings to foreclose by notice and sale may⁴⁸ or must⁴⁹ be transferred to a court upon a proper demand therefor by any person having a sufficient interest in the subject matter, in order to permit a contest of the right to foreclose, or of the amount due, in a judicial proceeding. One seeking transfer of summary foreclosure proceedings must show an interest in the property entitling him to resist foreclosure and also negative the mortgagee's right to foreclose,⁵⁰ and any matter which would be a bona fide defense to a foreclosure in the courts is a sufficient interest to require a removal to the courts on a demand by the person asserting such a defense.⁵¹ Where, under the statute, the transfer is not mandatory, a transfer cannot be required if some other remedy is open for testing the validity and legality of the mortgage or of making a defense thereto.⁵² A statute providing for a sale without judicial proceedings does not deprive a person claiming an interest in the property of an opportunity to defend against the mortgagee's claim where the statute provides also for a removal of the proceedings to a court on

the former's demand.⁵³

After the proceedings have been transferred, the right to foreclose by notice and sale ceases, and the foreclosure must be by a proceeding in court.⁵⁴ The proceedings then stand, as regards the merits, just as if the foreclosure had originally been brought in the court by the holder of the mortgage,⁵⁵ the person on whose demand the proceedings were transferred becoming, not plaintiff, but defendant,⁵⁶ and remaining such throughout the proceeding.⁵⁷

§ 372. Taking Possession, Custody, and Protection of Property

- a. Right to possession
- b. Necessity and sufficiency of possession; custody

a. Right to Possession

The mortgagee may maintain an action for possession for the purpose of sale, or, after the sale, of delivering the same to the purchaser. A mortgagor failing to exercise his statutory right of injunction cannot object to a wrongful taking; nor can a subsequent attaching creditor object to certain irregularities if the mortgagee has possession and the mortgagor is not objecting.

The holder of a chattel mortgage may maintain an action to recover the possession of the mortgaged property for the purpose of a foreclosure by a sale without judicial proceedings,⁵⁸ the presumption be-

Okl.—Harrill v. Weer, 109 P. 539, 26 Okl. 318.

11 C.J. p 708 note 15.

48. Iowa.—McDonald v. Johnston, 256 N.W. 676, 218 Iowa 1352.

49. Wash.—Christensen v. Plymouth Collateral Co., 38 P.2d 233, 179 Wash. 457.—State v. Superior Court of Washington in and for King County, 238 P. 614, 135 Wash. 664.—State v. Superior Court for Kings County, 222 P. 203, 128 Wash. 100.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

"When one seeking transfer of a summary foreclosure proceeding to the . . . court has so properly pleaded his right in that behalf, the transfer of the summary proceeding to the . . . court becomes a matter of right in him."—Elder v. Massachusetts Mortg. Co., 293 P. 711, 712, 159 Wash. 450, 85 A.L.R. 638.

50. Wash.—Elder v. Massachusetts Mortg. Co., supra.

51. Wash.—Christensen v. Plymouth Collateral Co., 38 P.2d 233, 179 Wash. 457.—State v. Superior Court of Washington in and for King County, 238 P. 614, 135 Wash. 664.

Attachment creditor, the priority of whose lien is disputed by the mortgagee, has an interest in the

subject matter entitling him to a removal of the proceedings to a court.—State v. Superior Court of Washington in and for King County, 238 P. 614, 135 Wash. 664.

52. Iowa.—McDonald v. Johnston, 256 N.W. 676, 218 Iowa 1352.

Defense to replevin

Where mortgagee commenced replevin, and mortgagor's answer set up want of consideration and fraud in procurement of mortgage, mortgagor was not entitled to have case transferred to equity for equitable foreclosure, since defenses pleaded were available to defendant in replevin and plaintiff was entitled to jury trial.—McDonald v. Johnston, supra.

53. Wash.—Strandberg v. Stringer, 216 P. 25, 125 Wash. 358.

54. Wash.—Christensen v. Plymouth Collateral Co., 38 P.2d 233, 179 Wash. 457.—Clark v. Kraft, 13 P. 2d 7, 169 Wash. 49.—State v. Superior Court for King County, 222 P. 203, 128 Wash. 100.

11 C.J. p 702 note 3.

55. Wash.—Christensen v. Plymouth Collateral Co., 38 P.2d 233, 179 Wash. 457.—Elder v. Massachusetts Mortg. Co., 293 P. 711, 159 Wash. 450, 85 A.L.R. 638.

Motion for voluntary nonsuit

Under a statute providing that an action shall not be dismissed on plaintiff's motion if defendant has pleaded a set-off or counterclaim, a motion by the mortgagee for a voluntary nonsuit will be denied where the person on whose demand the proceedings were transferred pleads a set-off or counterclaim.—Christensen v. Plymouth Collateral Co., 38 P.2d 233, 179 Wash. 457.

56. Wash.—Christensen v. Plymouth Collateral Co., supra—Elder v. Massachusetts Mortg. Co., 293 P. 711, 159 Wash. 450, 85 A.L.R. 638.

57. Wash.—Elder v. Massachusetts Mortg. Co., supra.

58. Okl.—Mitchell v. White, 233 P. 746, 106 Okl. 218.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Actions by mortgagee for possession generally see supra §§ 238-245.

Taking possession after default in general see supra §§ 183-185.

Conditional sales statute does not control the right of a mortgagee to take possession under a chattel mortgage.—Sheeley v. Holmes Music Co., 179 N.Y.S. 202, 189 App.Div. 756.

ing, if he fails to ask also for a foreclosure, that he intends to foreclose by a sale without judicial proceedings.⁵⁹ If a sale is had without previously taking possession, the mortgagee may maintain an action thereafter for possession in order to deliver possession to the purchaser.⁶⁰ Where it was agreed at the time of granting an extension of the debt that the mortgagee could declare the debt due at any time he felt insecure because of any act of the mortgagor, the mortgagee was entitled to take possession of the property for the purpose of sale upon any act of the mortgagor after the agreement causing the mortgagee to feel insecure.⁶¹ The fact that possession was also taken of chattels other than those covered by the mortgage has been held not to invalidate the proceeding where the taking was in good faith, the chattels wrongfully taken were promptly returned, and the owner incurred no injury.⁶² Moreover, even if the mortgagee is not entitled to foreclose, the mortgagor cannot complain that he was ousted from possession of the mortgaged property if he failed to take advantage of his statutory right to restrain the foreclosure proceedings.⁶³ Also it has been held that if the mortgagee has obtained possession and is foreclosing without the mortgagor's objection, a subsequent attaching creditor cannot avail himself of such irregularities as an insufficient affidavit or a failure properly to record the mortgage.⁶⁴

Duty to sell. A mortgagee taking possession of the property takes it at its worth and may be compelled to sell it.⁶⁵

b. Necessity and Sufficiency of Possession; Custody

In some jurisdictions the mortgagee must have possession of the chattels in order to foreclose the mortgage by a sale, but there is authority to other effect. The possession required is only relative, and the sheriff may transfer custody to the mortgagor.

In some jurisdictions it is regarded as necessary for the full execution of the power of sale contained in the mortgage that the mortgaged property should be in the possession of the mortgagee⁶⁶ so that he may fully effectuate the purposes of the sale by delivering possession to the purchaser.⁶⁷ However, there is authority holding that the mortgagee may sell without taking possession where an express power so to do is given him by the mortgage,⁶⁸ and that failure to take possession is an irregularity which renders the sale voidable but not void.⁶⁹ It has also been held that neither possession⁷⁰ nor a demand therefor⁷¹ is essential to the validity of the sale, without regard to a provision in the mortgage to that effect, even though the property is held adversely by another.⁷²

Where possession is required, it is, nevertheless, only a relative matter depending on the character and situation of the property possessed or claimed to be possessed,⁷³ and need be only such as is reasonably practicable.⁷⁴ A sheriff taking possession may place or leave the property in the hands of the mortgagor to be kept by him for the sheriff until the sale,⁷⁵ and such possession will be that of the sheriff, not of the mortgagor.⁷⁶ In such case the mortgagor will be entitled to a keeper's fee, even if the fee is made large because of his contesting the

59. Okl.—*Mitchell v. White*, 233 P. 746, 106 Okl. 218.

60. Okl.—*Continental Gin Co. v. Pannell*, 160 P. 598, 61 Okl. 102.

61. Tex.—*Glaser v. Henderson*, Civ. App., 2 S.W.2d 987.

62. Tex.—*Lewis v. Valley Finance Corporation*, Civ.App., 17 S.W.2d 138, error refused.

63. Wash.—*Allen v. Morris*, 151 P. 827, 87 Wash. 268.

64. Idaho.—*Largilliere Co. v. McConkie*, 210 P. 207, 36 Idaho 229.

65. N.Y.—*Goodman v. Schulman*, 258 N.Y.S. 681, 144 Misc. 512.

66. Wash.—*Gould & Co. v. Mt. Baker Savings & Loan Ass'n*, 53 P.2d 841, 185 Wash. 253.

67. Ark.—*Hannah v. Carrington*, 18 Ark. 85.

Cal.—*Ely v. Williams*, 92 P. 393, 6 Cal.App. 455.

Ga.—*Fulghum v. J. P. Williams Co.*, 40 S.E. 695, 114 Ga. 643, 88 Am.S.R. 48, 1 L.R.A., N.S., 1055.

68. Tex.—*Ames Iron Works v. Chinn*, 38 S.W. 247, 15 Tex.Civ.App. 83.

Power to remove not fraudulent

An express power in the mortgage to remove the goods for the purpose of sale in case of default is not fraudulent.—*Armstrong v. Cook*, 54 N.W. 873, 95 Mich. 257.

69. U.S.—*Coulson v. Panhandle Nat. Bank, Tex.*, 54 F. 855, 4 C.C.A. 616.

70. Mass.—*Loza v. Osmola*, 181 N. E. 125, 279 Mass. 220.

Okl.—*Continental Gin Co. v. Pannell*, 160 P. 598, 61 Okl. 102.

71. Mass.—*Loza v. Osmola*, 181 N. E. 125, 279 Mass. 220.

72. Okl.—*Continental Gin Co. v. Pannell*, 160 P. 598, 61 Okl. 102.

73. Mining apparatus

In the case of such property, it has been held sufficient that the sale took place where the property was situated and was visible to bidders, and that the mortgagee could have taken

possession before the sale, irrespective of whether he actually did so.—*P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co.*, Mo.App., 207 S.W. 266.

74. Wash.—*Gould & Co. v. Mt. Baker Savings & Loan Ass'n*, 53 P. 2d 841, 185 Wash. 253.

75. Idaho.—*South Side Live Stock Loan Co. v. Iverson*, 263 P. 481, 45 Idaho 499.

Herd of live stock

In the case of a herd of dairy cattle requiring guarding, tending, feeding, and milking daily, it was sufficient that a notice of foreclosure was posted on the farm of the mortgagor, who agreed to act as the sheriff's custodian in holding and caring for the cattle pending the sale.—*Gould & Co. v. Mt. Baker Savings & Loan Ass'n*, 53 P.2d 841, 185 Wash. 253.

76. Idaho.—*South Side Live Stock Loan Co. v. Iverson*, 263 P. 481, 45 Idaho 499.

foreclosure; and the sheriff will be primarily liable for such fee.⁷⁷

§ 373. Manner and Conduct of Sale

Generally speaking, the sale must be conducted in the manner provided by the statute or by the mortgage, and with such diligence and fairness as will obtain the best or an adequate price for the property.

Where the manner of conducting the sale is prescribed by a statute, its terms must be followed,⁷⁸ unless the parties have agreed that the sale shall be conducted in some other manner,⁷⁹ and provided the agreement is not violative of public policy or in fraud of the rights of third persons.⁸⁰ Indeed, in the absence of a statute to the contrary, the terms

of a mortgage specifying the manner in which the sale shall be conducted must ordinarily be followed.⁸¹

The mortgagee, in conducting the sale, is regarded as an agent or trustee of the mortgagor,⁸² and must conduct it in such a manner as to obtain the best, a reasonable, or an adequate price for the property.⁸³ To that end, the person conducting the sale must exercise reasonable care and diligence in disposing of the goods,⁸⁴ and conduct the sale fairly and justly.⁸⁵ Persons desiring to purchase must be given a reasonable opportunity to offer bids,⁸⁶ open, fair, and free competition among bidders must not be discouraged,⁸⁷ and the property must be sold

77. Idaho.—South Side Live Stock Loan Co. v. Iverson, *supra*.

Doctrine of accession inapplicable

The doctrine of accession whereby labor and new material added to the property by the mortgagor belongs to the mortgagee has no application to the right of a mortgagor to a keeper's fee.—South Side Live Stock Loan Co. v. Iverson, *supra*.

78. Idaho.—McDougall v. Kasiska, 282 P. 934, 48 Idaho 424, certiorari denied Kasiska v. McDougall, 50 S.Ct. 347, 281 U.S. 740, 74 L.Ed. 1154.

Ill.—Illinois Refining Co. v. Welch, 173 N.E. 345, 341 Ill. 292.

Mass.—Loza v. Osmola, 181 N.E. 125, 279 Mass. 220.

Mont.—Trudell v. Hingham State Bank of Hingham, 205 P. 667, 62 Mont. 557.

79. Cal.—Sherlock v. Alturas State Bank, 238 P. 816, 73 Cal.App. 391.

80. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 232 F. 10.

Sale under confessed judgment, pursuant to an agreement between the mortgagor and the mortgagee, and at a fair price, is valid, even as against one claiming a subsequent lien, although not in compliance with the provisions of the statute.—Utah Ass'n of Credit Men v. Jones, 164 P. 1029, 49 Utah 519.

81. Ala.—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648.

Ill.—Illinois Refining Co. v. Welch, 173 N.E. 345, 341 Ill. 292.

Mass.—Loza v. Osmola, 181 N.E. 125, 279 Mass. 220.

Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

Mont.—Trudell v. Hingham State Bank of Hingham, 205 P. 667, 62 Mont. 557.

Tex.—Fireman's Fund Ins. Co. v. Wilson, Com.App., 284 S.W. 920, reversing Wilson v. Fireman's Fund Ins. Co., Civ.App., 274 S.W. 176.

82. Ga.—Goldin v. Federal Interme-

diate Credit Bank, 179 S.E. 291, 50 Ga.App. 790.

Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 13, 166 Minn. 383, citing *Corpus Juris*.

Mo.—Waltner v. Smith, App., 274 S.W. 526—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.

11 C.J. p. 708 note 18 [b].

83. U.S.—Johnson v. People's State Bank of Beaverton, D.C.Mich., 22 F.2d 211, 213, citing *Corpus Juris*.

Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.

Mass.—Castro v. Linchitz, 8 N.E.2d 744.

Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 13, 166 Minn. 383, citing *Corpus Juris*.

Mo.—Universal Credit Co. v. Uhr, App., 101 S.W.2d 501—Waltner v. Smith, App., 274 S.W. 526—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

N.Y.—Fells v. Globe Candle Co., 300 N.Y.S. 659, 253 App.Div. 729—Fleischmann v. Clausen, 225 N.Y.S. 288, 222 App.Div. 7—Harrison v. Hall, 202 N.Y.S. 626, 207 App. Div. 511, affirmed 145 N.E. 737, 239 N.Y. 51.

N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.

Ohio.—Crocker v. Associated Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136—Clark v. Studebaker Corporation of America, 171 N.E. 602, 35 Ohio App. 54.

Okl.—J. I. Case Threshing Machine Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Or.—Harcombe v. Rubenstein, 74 P. 2d 982.

Wis.—Schwemer v. Citizen's Loan & Investment Co., 272 N.W. 673, 676, quoting *Corpus Juris*.

11 C.J. p. 708 note 19.

Manner and conduct as to procedure generally see *supra* § 367.

84. U.S.—Johnson v. People's State Bank of Beaverton, D.C.Mich., 22 F.2d 211, 213, citing *Corpus Juris*.

Colo.—J. H. Hincke Printing Co. v. Bailey, 263 P. 719, 83 Colo. 242.

Mass.—Castro v. Linchitz, 8 N.E.2d 744.

Mo.—Universal Credit Co. v. Uhr, Mo.App., 101 S.W.2d 501—Waltner v. Smith, App., 274 S.W. 526.

N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.

Wis.—Schwemer v. Citizen's Loan & Investment Co., 272 N.W. 673, 676, quoting *Corpus Juris*.

11 C.J. p. 708 note 18.

85. U.S.—Johnson v. People's State Bank of Beaverton, D.C.Mich., 22 F.2d 211, 213, citing *Corpus Juris*.

Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.

Mass.—Castro v. Linchitz, 8 N.E.2d 744—Loza v. Osmola, 181 N.E. 125, 279 Mass. 220.

Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 13, 166 Minn. 383, citing *Corpus Juris*.

N.Y.—Fells v. Globe Candle Co., 300 N.Y.S. 659, 253 App.Div. 729—Fleischmann v. Clausen, 225 N.Y.S. 288, 222 App.Div. 7—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661.

Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136—Clark v. Studebaker Corporation of America, 171 N.E. 602, 35 Ohio App. 54.

Okl.—J. I. Case Threshing Machine Co. v. Rennie, 177 P. 548, 71 Okl. 309.

Or.—Harcombe v. Rubenstein, 74 P. 2d 982.

Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997.

Wis.—Schwemer v. Citizen's Loan & Investment Co., 272 N.W. 673, 676, quoting *Corpus Juris*.

11 C.J. p. 708 notes 17, 19.

86. Neb.—Langdon v. Wintersteen, 78 N.W. 501, 53 Neb. 278.

87. N.Y.—Bradley v. Kingsley, 43 N.Y. 534—Harrison v. Hall, 202 N.Y.S. 626, 207 App.Div. 511, affirmed 145 N.E. 737, 239 N.Y. 51.

Conditions must not be imposed on

to the highest bidder;⁸⁸ otherwise, the mortgagee may be held liable to the mortgagor for any sacrifice resulting from a failure so to do.⁸⁹ However the law does not ordinarily require more than that the person conducting the sale comply with the terms of the mortgage, including any statutory requirements expressly or impliedly embodied therein, and act in good faith.⁹⁰ He is not required to see that bidders are present.⁹¹ Whether the sale shall be adjourned is a matter within the sound discretion of the person conducting it.⁹²

If the mortgage covers property that is partly subject to other liens or claims, the part that is not subject should be first sold.⁹³ A foreclosure of separate mortgages in a single summary proceeding is invalid where the mortgagor or attaching creditors cannot ascertain the amount claimed to be due under any particular mortgage.⁹⁴

A foreclosure sale is none the less such because of the fact that, by agreement between the mortgagor and the mortgagee, it is attempted to conceal the forced character of the sale;⁹⁵ nor is it of any consequence that the sale was to satisfy a debt larg-

er than that actually due, where such fact was not brought to the mortgagee's attention prior to the sale.⁹⁶

§ 374. — Place

A sale may be conducted at any accessible place on or near the premises where the property is situated, unless a place of sale is designated by the mortgage or by a statute, in which case the terms thereof must ordinarily be followed.

If there is a general power of sale, with no restriction as to the place where the sale shall be held, the sale may be held at any accessible place on or near the premises on which the mortgaged property is situated.⁹⁷ It is not necessary that the sale be held at the place of seizure.⁹⁸ On the other hand, if a place of sale is specified in the mortgage, and statutory requirements in regard thereto are complied with, a sale is properly conducted in that place.⁹⁹ Indeed, in the absence of a statute to the contrary, a sale conducted at a place other than that stipulated for in the mortgage is invalid,¹ unless the mortgagor consents to such sale.²

Where a place of sale is designated by a statute, its terms must be complied with by the mortgagee.³

the sale discouraging open, fair, and free competition among bidders.—*Harrison v. Hall*, 202 N.Y.S. 626, 207 App.Div. 511, affirmed 145 N.E. 737, 239 N.Y.S. 51.

Acts by mortgagor

The mortgagor must refrain from doing or saying anything calculated to deter others from bidding or to depress the price of the property.—*Henderson-Snyder Co. v. Polk*, 82 S. E. 904, 149 N.C. 104.

88. Ala.—*C. Scheussler & Sons v. Heard*, 81 So. 590, 202 Ala. 648.

89. Neb.—*Langdon v. Wintersteen*, 78 N.W. 501, 58 Neb. 278.

90. Mass.—*Loza v. Osmola*, 181 N.E. 125, 279 Mass. 220.

Rules of auction sales do not apply literally to sales by chattel mortgagees where mortgagee has title after default, although out of possession, and object of mortgagees' sale is to cut off equity of redemption.—*In re Packard Press*, C.C.A.N. Y., 3 F.2d 232.

Title retention statute held inapplicable to recorded mortgages or what is generally termed a chattel trust.—*Tacker v. Mitchell*, 3 Tenn. App. 495.

91. Tex.—*Davenport v. San Antonio Machine & Supply Co.*, Civ.App., 59 S.W.2d 207, error refused.

92. **Postponement for hour** has been held not to constitute improper conduct by the auctioneer.—*Antoine v. Commonwealth Trust Co.*, 165 N.E. 12, 266 Mass. 202.

Refusal to adjourn the sale after a bid by a stockholder of the mortgagor corporation has been held not to be improper.—*Antoine v. Commonwealth Trust Co.*, supra.

93. Tex.—*Baughn v. Allen*, Tex.Civ. App., 73 S.W. 1063.

94. Idaho.—*McDougall v. Kasiska*, 282 P. 943, 48 Idaho 424, certiorari denied *Kasiska v. McDougall*, 50 S. Ct. 347, 281 U.S. 740, 74 L.Ed. 1154.

95. Ind.—*Seiberling v. Porter*, 74 N. E. 516, 165 Ind. 7.

96. Tex.—*Davenport v. San Antonio Machine & Supply Co.*, Civ.App., 59 S.W.2d 207, error refused.

97. N.C.—*Wormell v. Nason*, 83 N.C. 32.

98. Mich.—*Croze v. St. Mary's Canal Mineral Land Co.*, 107 N.W. 92, 313, 143 Mich. 514, 114 Am.S.R. 677.

99. Neb.—*Buffalo County Nat. Bank v. Sharpe*, 58 N.W. 734, 40 Neb. 123.

1. Ill.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292.

W.Va.—*Charleston Milling & Produce Co. v. Craighead*, 179 S.E. 69, 116 W.Va. 194.

Particular place specified

(1) Place where the property was situated.

Tex.—*Fireman's Fund Ins. Co. v. Wilson*, Com.App., 284 S.W. 920, reversing *Wilson v. Fireman's Fund Ins. Co.*, Civ.App., 274 S.W. 176.

W.Va.—*Charleston Milling & Produce*

Co. v. Craighead, 179 S.E. 69, 116 W.Va. 194.

(2) At any convenient place in the county where the chattels are located.—*National Bank of Commerce of Forum v. Jackson*, 170 P. 474, 69 Okl. 93.

(3) In front of the courthouse door.—*C. Scheussler & Sons v. Heard*, 81 So. 590, 202 Ala. 648.

2. Iowa.—*Tootle v. Taylor*, 21 N.W. 115, 64 Iowa 629.

11 C.J. p 709 note 27.

A subsequent agreement changing the place of sale specified in the mortgage will not be added to by indentment.—*Huber Mfg. Co. v. Ellis*, 201 S.W. 931, 199 Mo.App. 96.

3. Ill.—*Illinois Refining Co. v. Welch*, 173 N.E. 345, 341 Ill. 292.

Particular place

(1) Where the property was situated when mortgaged.—*Illinois Refining Co. v. Welch*, supra.

(2) County where the mortgagor resides. Where all of several mortgagors reside in the same county, the provision requires that the sale shall be made in the county where all reside.—*Illinois Refining Co. v. Welch*, supra.

Property used in interstate commerce after execution of mortgage is not by that fact removed from operation of statute specifying the place of sale.—*Illinois Refining Co. v. Welch*, supra.

Place held legally designated by the board of county commissioners.

In some jurisdictions, statutes specifying the place of giving notice are held to determine the place of sale.⁴ However, according to some authority, a statute providing the place of sale is for the benefit of the mortgagor, and the parties may waive or change the statutory place.⁵ A provision in the mortgage that the mortgaged property may be sold in a county other than that in which the mortgagor resides has been held not to waive a statutory requirement that the mortgage be filed in the county where the sale is to take place.⁶

If the circumstances require, it has been held that the sale may be or must be held at more than one place, even though the mortgage and an applicable statute contemplate but one place of sale.⁷

§ 375. — Presence of Property

The property ordinarily must be in plain view of the bidders at the time of the sale, unless it is impossible or impracticable to produce it, or the mortgagor has waived its presence.

In order better to realize the full value of the property sold, it is ordinarily held, under⁸ or apart from⁹ a statute so providing, that the property must be in plain view of the bidders at the time of the sale. However, it has been held that production of the property is not essential if impossible

or impracticable.¹⁰ Moreover, the mortgagor may waive this condition,¹¹ it being for his benefit,¹² and will be held to have done so in case he refuses to produce the property on demand.¹³

§ 376. — Necessity for Public Sale

Although extremely desirable that the exercise of a power of sale without judicial proceedings be by public auction, unless prohibited by statute a private sale of mortgaged property is generally valid where it is authorized by the mortgagor.

If not absolutely necessary it is extremely desirable that the sale under the power should be by public auction, since the mortgagee by selling at private sale, although he does not lose his rights under the mortgage,¹⁴ will be held to strict account,¹⁵ and, as shown *infra* § 381, may be charged with the best price reasonably obtainable, or with the value of the property. Also, a purchaser at a private sale may be liable to other encumbrancers if he purchases with notice that the rights of such encumbrancers are being disregarded.¹⁶ Of course, where the mortgage so stipulates, the sale must be a public one,¹⁷ unless the mortgagor subsequently waives the requirement.¹⁸ On the other hand, unless such agreement is violative of statute or public policy,¹⁹ or is fraudulent as to third persons,²⁰ where authorized by the mortgagor, the property may be sold

—Felker v. Grant, 72 N.W. 81, 10 S. D. 141—11 C.J. p 709 note 24 [a] (2).

4. S.C.—Fretwell v. Carter, 59 S.E. 639, 78 S.C. 531.

11 C.J. p 709 notes 24 [a] (1), 25.

5. S.C.—Fretwell v. Carter, *supra*.
11 C.J. p 709 note 28.

6. Neb.—Buffalo County Nat. Bank v. Sharpe, 58 N.W. 734, 40 Neb. 123.
—Loeb v. Milner, 32 N.W. 205, 21 Neb. 392.

7. Mont.—Trudell v. Hingham State Bank of Hingham, 205 P. 667, 62 Mont. 557.

Single sale at undesignated place

A sale of all of the property at a place other than that designated is fatally irregular where part of the property was at both places and the notice of sale had been given at both places.—Trudell v. Hingham State Bank of Hingham, *supra*.

8. Neb.—Lexington Bank v. Wirges, 72 N.W. 1049, 52 Neb. 649.

9. Ala.—De Merville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204—Dewberry v. Bank of Standing Rock, 150 So. 463, 227 Ala. 484—Chenault v. Milan, 87 So. 537, 205 Ala. 310—Bowdoin v. Bedsole, 75 So. 167, 199 Ala. 648.

Cal.—Helmick v. Holaday, 289 P. 224, 106 Cal.App. 380.

N.M.—Jenkins v. Reeves, 57 P.2d

1203, 1204, 40 N.M. 231, quoting **Corpus Juris**.

N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.

W.Va.—Charleston Milling & Produce Co. v. Craighead, 179 S.E. 69, 116 W.Va. 194.

11 C.J. p 709 note 33.

10. Ala.—Bowdoin v. Bedsole, 75 So. 167, 199 Ala. 648.

Ungathered crop

Where the mortgagee reduced to possession before foreclosure sale some of the mortgaged property, the sale would not be vitiated as to the remainder of the property because of its nonproduction, where part of it, consisting of an ungathered crop, could not be reduced to possession at the time.—Bowdoin v. Bedsole, *supra*.

11. Ala.—Bowdoin v. Bedsole, *supra*.
Cal.—Marsh v. Lapp, 180 P. 533, 180 Cal. 231.

Neb.—Lexington Bank v. Wirges, 72 N.W. 1049, 52 Neb. 649.

N.M.—Jenkins v. Reeves, 57 P.2d 1203, 1204, 40 N.M. 231, quoting **Corpus Juris**.

12. N.M.—Jenkins v. Reeves, 57 P.2d 1203, 40 N.M. 231.

13. Ala.—Bowdoin v. Bedsole, 75 So. 167, 199 Ala. 648—Foster v. Goree, 5 Ala. 424.

Cal.—Marsh v. Lapp, 180 P. 533, 180 Cal. 231.

N.M.—Jenkins v. Reeves, 57 P.2d 1203, 1204, 40 N.M. 231, quoting **Corpus Juris**.

14. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661.
11 C.J. p 709 note 37.

15. Tenn.—Tacker v. Mitchell, 3 Tenn.App. 495.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 276, 42 Wyo. 380, 73 A.L.R. 851, citing **Corpus Juris**.

16. Okl.—Vale v. Stubblefield, 135 P. 933, 39 Okl. 462.
11 C.J. p 709 note 39.

17. Ala.—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648.
D.C.—Van Mourick v. Bowie, 69 F. 2d 834, 63 App.D.C. 96.
11 C.J. p 710 note 43.

18. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.
11 C.J. p 709 note 38 [c].

19. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

Okl.—McRoberts v. Citizens Nat. Bank of Muskogee, 69 P.2d 56, 180 Okl. 237—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77.

20. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

at private sale,²¹ particularly where such a stipulation appears in the mortgage,²² and, if only a private sale is provided for in the mortgage, a public sale will not be a valid foreclosure.²³ Indeed, a provision or agreement for a private sale has been held to be valid, even though a statute provides for foreclosure by public sale,²⁴ in which case the mortgagee may elect the method which he will pursue.²⁵

A private sale by the mortgagor with the consent of the mortgagee and an agreement to apply the proceeds on the mortgage debt, made in good faith and for full value, has been held equivalent to a foreclosure of the mortgage.²⁶

§ 377. — Sale in Bulk or Parcels

Unless the mortgage prescribes how the chattels shall be sold, the chattels may be sold separately, in lots, or all together, as may best suit the buyers' convenience and insure the largest returns.

In the absence of a provision in the mortgage prescribing the manner in which the chattels shall be sold, the mortgagee in selling is required only to

act in entire good faith, and is not bound by any fixed rule as to sale in bulk or in parcels,²⁷ but must sell the articles separately, in lots, or all together, as may best suit the convenience of buyers and insure the largest returns.²⁸ A sale in bulk is not oppressive or unfair if the value of the property depends largely on its being dealt with as a whole and such a sale will be as advantageous to the mortgagor as a sale of the parts separately.²⁹ A sale of the mortgaged chattels in bulk with other chattels for a lump sum is improper,³⁰ unless the sale be with the consent of the mortgagor and be advantageous and without a wrongful motive.³¹ Where the mortgage expressly so provides, the mortgagee may be required to sell in bulk³² or in parcels.³³ Where the mortgage contemplates a sale of so much of the property only as may be necessary to discharge the debt, the property must be offered in such lots or parcels as will suit the convenience of bidders and comport with the character of the property to be sold, and it is not proper to sell the property in gross.³⁴ Where the mortgagor authorizes the mortgagee to sell at public auction

21. Kan.—Reynolds v. Thomas, 28 Kan. 810.

Consideration held sufficient

Agreement between parties to chattel mortgage to sell property at private sale would be valid even if consideration was that mortgagee would accept less sum than that secured.—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77.

Subsequent agreement

The sale may be a private one where the mortgagor has so agreed subsequent to the execution of the mortgage.

U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

Kan.—Reynolds v. Thomas, 28 Kan. 810.

Okl.—McRoberts v. Citizens Nat. Bank of Muskogee, 69 P.2d 56, 180 Okl. 237.—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77.

22. N.Y.—Sheeley v. Holmes Music Co., 179 N.Y.S. 202, 189 App.Div. 756.

Ohio.—Crocker v. Associate Inv. Co., 10 N.E.2d 153, 56 Ohio App. 136.—Clark v. Studebaker Corporation of America, 171 N.E. 602, 35 Ohio App. 54.

Or.—Ashley & Rumelin v. Lance, 171 P. 561, 88 Or. 109.

Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997.—English v. Southwest Broadcasting Co., Civ.App., 81 S.W.2d 296.—Fidelity Union Fire Ins. Co. v. Ballew-Satterfield Co., Civ.App., 10 S.W.2d 163.—Block Motor Co. v. Melia, Civ.App., 247 S.W. 666.

Wyo.—McInerney & Conway Finance

Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*.

11 C.J. p 709 note 40.

Waiver

Where the power in the mortgage authorizes either a public or private sale, the fact that the mortgagee elects to sell at public auction does not constitute a waiver of such authority.—Kent v. National Supply Co. of Texas, Tex.Civ.App., 36 S.W.2d 811, error refused.

23. Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075.

24. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

Okl.—Harbour-Longmire Co. v. Reid, 254 P. 29, 124 Okl. 77.

Vt.—Campbell v. Bryant, 129 A. 299, 98 Vt. 486.

Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*.

11 C.J. p 710 note 41.

After default in payment of the debt secured by the mortgage the parties may contract for a private sale, notwithstanding the statute provides for a public sale.—McRoberts v. Citizens Nat. Bank of Muskogee, 69 P.2d 56, 180 Okl. 237.

25. Wyo.—McInerney & Conway Finance Corporation v. Smith, 295 P. 273, 275, 42 Wyo. 380, 73 A.L.R. 851, quoting *Corpus Juris*.

11 C.J. p 710 note 42.

26. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

27. Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 166 Minn. 383.

11 C.J. p 710 notes 44, 45.

Matter within auctioneer's discretion Mass.—Antoine v. Commonwealth Trust Co., 105 N.E. 12, 266 Mass. 202.

28. Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.

11 C.J. p 710 note 46.

Rule applied to assignee of mortgage.—Johnson v. Selden, 37 So. 249, 140 Ala. 418, 103 Am.S.R. 49.

Sale in bulk held improper

Ala.—Chenault v. Milan, 87 So. 537, 205 Ala. 310.

Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.

29. Minn.—Watson v. Koochiching Realty Co., 208 N.W. 11, 166 Minn. 383.

Estoppel of junior mortgagee

A junior mortgagee is estopped to complain that two articles covered by the mortgage were sold at once, where he was present and made no objection, but actually bid on them.—Dickerson v. Cleland, 112 S.E. 920, 120 S.C. 221.

30. Ill.—Orcutt v. Williams, 63 Ill. App. 407.

31. U.S.—Great Northern State Bank v. Ryan, C.C.A.Minn., 292 F. 10.

32. Tex.—Parlin, etc., Co. v. Hanson, 53 S.W. 62, 21 Tex.Civ.App. 401.

33. Wash.—Richter v. Buchanan, 82 P. 782, 48 Wash. 32.

34. Ark.—Hannah v. Carrington, 18 Ark. 85.

or private sale and either in bulk or by single article and with or without notice, it has been held that the mortgagee may sell at retail in the ordinary course of trade.³⁵

§ 378. — Person Conducting Sale

Generally speaking, a provision in the mortgage or a statute specifying by whom the sale shall be made must be complied with, and such person must be personally present and supervise the sale.

Generally, where the mortgage³⁶ or statute³⁷ specifies by whom the sale shall be made, its terms must be followed. The person designated cannot lawfully delegate his power,³⁸ unless the mortgagor agrees thereto³⁹ expressly or by clear implication,⁴⁰ but must be personally present and supervise the sale. Where it is not made a part of the sheriff's legal duties to foreclose mortgages he, in conducting a mortgage sale, acts as the private agent of the mortgagee.⁴¹ Where a statute provides that the method provided in the mortgage for foreclosure shall be exclusive, a sheriff cannot claim that he took possession and sold in his official character where the mortgage provides that the mortgagee shall take possession and make disposition of the mortgaged property.⁴² If the sale is conducted by the mortgagor as the mortgagee's agent, the mortgagee is bound by any representations and warranties made by such agent.⁴³ It is improper for the auctioneer to act as agent for the buyer.⁴⁴

§ 379. — Terms of Sale

Although there is authority to the contrary, unless otherwise authorized by the mortgagor the sale should be for cash.

In the absence of a provision in the mortgage specifying the terms of sale, the sale, according to some authority, must be for cash,⁴⁵ although according to other authority, the sale may properly be on credit,⁴⁶ within the discretion of the auctioneer.⁴⁷ Where the mortgage itself so provides, it is the mortgagee's duty to sell for cash,⁴⁸ or on such terms as he deems advantageous and proper.⁴⁹ However, it is held that even if it is the mortgagee's duty to sell for cash, a sale for credit is not void,⁵⁰ at least if it has been ratified by the mortgagor and his creditors,⁵¹ and the only penalty for a breach of the duty is to hold the mortgagee responsible for the damages caused thereby.⁵²

A power of sale is ordinarily held to confer no right to barter or exchange the property for property other than money,⁵³ except, perhaps, where the goods bartered for are taken in at a cash valuation and credited on the debt.⁵⁴ Where the sale is for cash, the purchaser cannot offset debts which he holds against the mortgagor,⁵⁵ but the person conducting the sale may accept in part payment a claim for keeper's fees arising after the seizure of the property and pending sale.⁵⁶ Where the mortgagee is permitted to purchase, he is entitled to the

35. Iowa.—Tollerton, etc., Co. v. Anderson, 78 N.W. 822, 108 Iowa 217 —Johnston v. Robuck, 73 N.W. 1062, 104 Iowa 523.
11 C.J. p 710 note 50.

36. Ala.—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86.
Tex.—Lewis v. Valley Finance Corporation, Civ.App., 17 S.W.2d 138, error refused.
11 C.J. p 710 note 54.

Sale by mortgagee's attorney held void, in absence of mortgagee, under mortgage conferring power of sale on the mortgagee and not providing for delegation of such power.—Fireman's Fund Ins. Co. v. Wilson, Tex. Com.App., 284 S.W. 920, reversing Wilson v. Fireman's Fund Ins. Co., Civ.App., 274 S.W. 176.

37. Idaho.—Peterson v. Hailey Nat. Bank, 6 P.2d 145, 51 Idaho 427.
Minn.—Oswald v. O'Brien, 51 N.W. 220, 48 Minn. 333.

38. Ala.—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86.

39. Tex.—Fireman's Fund Ins. Co. v. Wilson, Com.App., 284 S.W. 920, reversing Wilson v. Fireman's Fund Ins. Co., Civ.App., 274 S.W. 176.

40. Tex.—Lewis v. Valley Finance

Corporation, Civ.App., 17 S.W.2d 138, error refused.

41. N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 54 N.D. 322.
11 C.J. p 710 note 56.

42. Or.—Pittock v. Jordan, 13 P. 510, 19 Or. 7.

43. Minn.—National Citizens' Bank v. Ertz, 85 N.W. 821, 83 Minn. 12, 85 Am.S.R. 438, 53 L.R.A. 174.

44. Mich.—Smitton v. Seibert, 99 N.W. 381, 136 Mich. 410.

45. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc.R. 661.
11 C.J. p 710 note 62.

46. Mass.—Lipsohn v. Goldstein, 98 N.E. 703, 212 Mass. 144, 40 L.R.A., N.S., 627.

47. Mass.—Antoine v. Commonwealth Trust Co., 165 N.E. 12, 266 Mass. 202.

48. Ala.—C. Scheussler & Sons v. Heard, 81 So. 590, 202 Ala. 648.
Tex.—Rouss v. Ratliff, Civ.App., 75 S.W. 862.

49. D.C.—Van Mourick v. Bowie, 69 F.2d 834, 63 App.D.C. 96.

50. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc.R. 661.

51. Tex.—Rouss v. Ratliff, Civ.App., 75 S.W. 862.

52. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661.
11 C.J. p 710 note 63.

Waiver by mortgagee

The requirement of the mortgage that the sale be for cash, being for the mortgagee's benefit, may be waived by him, but a sale on credit will be at his risk.—Williams v. Hatch, 38 Ala. 338.

53. Iowa.—Edwards v. Cottrell, 43 Iowa 194.
N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661.

54. Iowa.—Tollerton, etc., Co. v. Anderson, 78 N.W. 822, 108 Iowa 217.

55. Cal.—Williams v. Corker, 77 P. 1004, 144 Cal. 468.
Wis.—Halpin v. Stone, 47 N.W. 177, 78 Wis. 183.

56. Idaho.—South Side Live Stock Loan Co. v. Iverson, 263 P. 481, 45 Idaho 499.

Sheriff is under no duty, however, to collect such fees.—South Side Live Stock Loan Co. v. Iverson, supra.

bill of sale without payment of any money to the officer making the sale, if the amount of his bid is less than the amount due him.⁵⁷

The terms of sale must not be such as will tend unnecessarily to discourage bidding,⁵⁸ but the fact that the terms are cash on the day of the sale has been held not to be so prejudicial to the mortgagor as to invalidate the sale as a matter of law.⁵⁹

§ 380. — Amount to Be Sold

The mortgagee is bound to sell only so much of the property as is necessary to satisfy his claim if he can do so without prejudice to himself or the mortgagor. Having sold that amount, his right of possession and title to the remainder is terminated.

Where the mortgagee may, without prejudice or great inconvenience to himself, satisfy his claim by a sale of a part of the mortgaged property, and the interests of the mortgagor require it, he is bound so to sell.⁶⁰ However, it is of no consequence that he sells slightly more than the amount of the indebtedness, provided the surplus is returned to the mortgagor.⁶¹ Moreover, the fact that more than enough is sold to discharge the mortgage debt will not render the sale void.⁶² On the other hand, the mere fact that a sale of part would protect the mortgagee's interest will not render oppressive or unfair a sale of the whole if the value of the property depends largely on its being dealt with as a whole and a sale of the whole will be as advantageous to the mortgagor as a sale of part.⁶³

When sufficient of the property has been sold to pay the whole debt and the expenses of the sale, the mortgagee's right of possession is terminated⁶⁴ and his title extinguished;⁶⁵ but where the proceeds of a partial sale are insufficient to pay the mortgage debt and expenses, the lien on the remaining property is not discharged.⁶⁶ There is an implied agreement that the balance unsold be restored to the mortgagor,⁶⁷ and if the mortgagee proceeds to sell the residue notwithstanding enough have been sold to pay the debt and costs, it is a conversion of the chattels for which he is liable to the mortgagor.⁶⁸ However, although the mortgagee must surrender such surplus on demand, he is under no duty or obligation to return it to the mortgagor's premises.⁶⁹

§ 381. — Price

Mere inadequacy of the price will not invalidate the sale, but the mortgagee is liable for the deficiency if he fails to exercise reasonable diligence to sell for the best price obtainable.

The mere inadequacy of the price for which the property was sold will not invalidate the sale⁷⁰ for fraud,⁷¹ although it is a circumstance to be considered in determining whether the mortgagee acted in good faith and with reasonable care.⁷² In determining what was an adequate price, the condition of the goods and all the circumstances of the sale should be taken into consideration.⁷³ An agreement between bidders as to the price will not invalidate the sale unless it tends to stifle bidding and

57. Wash.—*Filion v. Stewart*, 101 P. 370, 52 Wash. 632.

58. Sale on condition

A sale unattended by either the mortgagor or the mortgagee is invalid where the property is sold on the condition that the mortgagee shall have it should he be willing to pay more than that offered by the highest bidder.—*Harrison v. Hall*, 202 N.Y.S. 626, 207 App.Div. 511, affirmed 145 N.E. 737, 239 N.Y. 51.

59. Md.—*Sunderland v. McAbee*, 121 A. 844, 143 Md. 81.

60. Minn.—*Stromburg v. Lindberg*, 25 Minn. 513.

61. Mich.—*Croze v. St. Mary's Canal Mineral Land Co.*, 117 N.W. 81, 153 Mich. 363.

62. Mo.—*Keating v. Hannenkamp*, 13 S.W. 89, 100 Mo. 161.

63. Minn.—*Watson v. Koochiching Realty Co.*, 208 N.W. 11, 166 Minn. 383.

64. Iowa.—*Bellamy v. Doud*, 11 Iowa 285.

Okla.—*Vale v. Stubblefield*, 135 P. 933, 934.

11 C.J. p 710 note 66.

65. Mo.—*Moore v. Ryan*, 31 Mo.App. 474.

N.Y.—*Charter v. Stevens*, 3 Den. 33, 45 Am.D. 444.

66. Mass.—*Hopkins v. McCrillis*, 32 N.E. 1026, 158 Mass. 97.

Mich.—*Rose v. Page*, 46 N.W. 227, 82 Mich. 105.

S.D.—*De Smet First Nat. Bank v. Northwestern El. Co.*, 57 N.W. 77, 4 S.D. 409.

67. U.S.—*Kohn v. Dravis*, Iowa, 94 F. 288, 36 C.C.A. 253.

68. Neb.—*Skow v. Locke*, 101 N.W. 340, 72 Neb. 631.
11 C.J. p 711 note 70.

69. Iowa.—*Campbell v. Wheeler*, 29 N.W. 613, 69 Iowa 538.

70. Colo.—*J. H. Hincke Printing Co. v. Bailey*, 263 P. 719, 83 Colo. 242.
—*Colorado Nat. Bank of Denver v. Navins*, 257 P. 357, 82 Colo. 130.

Mass.—*Castro v. Linchitz*, 8 N.E.2d 744—*Antoine v. Commonwealth Trust Co.*, 165 N.E. 12, 266 Mass. 202.

Tex.—*Davenport v. San Antonio Machine & Supply Co.*, Civ.App., 59 S. W.2d 207, error refused.

Value exceeding debt

The mere fact that value of property covered by chattel mortgage was greater than mortgage debt is insufficient to impeach a sale for the amount of the debt, where it was fairly conducted.—*Credit Service Co. v. Furney*, 271 P. 738, 128 Or. 21.

71. Minn.—*Watson v. Koochiching Realty Co.*, 208 N.W. 11, 13, 166 Minn. 383, citing *Corpus Juris*.
11 C.J. p 711 note 75.

72. Mass.—*Castro v. Linchitz*, 8 N.E.2d 744—*Antoine v. Commonwealth Trust Co.*, 165 N.E. 12, 266 Mass. 202.

Ohio.—*Clark v. Studebaker Corporation of America*, 171 N.E. 602, 35 Ohio App. 54.

Finding of fraud held justified where property worth two thousand five hundred dollars was sold en masse by the mortgagee to himself for five hundred six dollars although bidders offered to buy parts of the property.—*Henderson v. Fisher*, 176 P. 63, 38 Cal.App. 270.

73. Neb.—*Raymond v. Miller*, 52 N.W. 573, 34 Neb. 576.

R.I.—*Babcock v. Wells*, 54 A. 596, 25 R.I. 23, 105 Am.S.R. 848.

to prevent competition.⁷⁴

Where the foreclosure sale is properly conducted the mortgagor is entitled to credit only for the amount realized by the sale and not for the value of the property sold;⁷⁵ but the mortgagee is liable for the deficiency if he failed to exercise reasonable diligence to secure the best price obtainable,⁷⁶ at least where the sale was a private one.⁷⁷ Indeed, it has been held that a mortgagee by selling at a private sale will render himself liable to the mortgagor for any damages which the latter may have suffered by reason of his failure to sell publicly, to the extent of the difference between the price realized and the actual value of the property above the mortgage debt.⁷⁸

Although the property advances in value after the sale, the mortgagee is not bound to account for more than the sum realized at the sale in the absence of fraud,⁷⁹ but the mortgagor is entitled to the benefit of profits made by a resale of the prop-

erty a short time after it had been purchased by the mortgagee at the foreclosure sale.⁸⁰

§ 382. — Persons Who May Purchase

Although in some jurisdictions a mortgagee, unless the mortgagor consents thereto, is prohibited from purchasing at his own sale, in other jurisdictions he may do so if the sale is fairly made. The mortgagor may purchase.

In some jurisdictions, in the absence of statutory permission, the mortgagee is prohibited from purchasing at his own sale, either directly or through the medium of an agent, and in case of such a purchase the mortgagee must account for the actual value of the property mortgaged.⁸¹ In other jurisdictions, however, although such a sale will be set aside more readily,⁸² such a sale is not void, but only voidable,⁸³ and under, or apart from, a statute to that effect, will not be set aside if fairly made, even though the mortgagor did not expressly assent to the mortgagee's purchasing the property.⁸⁴ In any event, it would seem that the mortgagor

74. N.Y.—Gross v. Jancsok, 10 N. Y.S. 541, 16 Daly 346.
11 C.J. p 711 note 79.

75. Colo.—Colorado Nat. Bank of Denver v. Navins, 257 P. 357, 82 Colo. 130.

D.C.—Van Mourick v. Bowie, 69 F. 2d 834, 63 App.D.C. 96.

Ill.—Kuhnen-Siegrist Hardware Co. v. Papista, 267 Ill.App. 531.

Okl.—Waggoner v. Koon, 168 P. 217, 67 Okl. 25.

Or.—Liquidators v. Benedict, 56 P.2d 1090, 153 Or. 492.

S.D.—Morris v. Hubbard, 86 N.W. 25, 14 S.D. 525.

Tex.—Sherrod v. City Nat. Bank of Wichita Falls, Civ.App., 294 S.W. 295, 297, citing *Corpus Juris*—Consolidated Oil Co. of Texas v. Schaffner, Civ.App., 286 S.W. 253, affirmed Schaffner v. Consolidated Oil Co. of Texas, Com.App., 293 S.W. 159.
11 C.J. p 708 note 19 [b], p 716 note 66.

76. Mo.—Universal Credit Co. v. Uhri, App., 101 S.W.2d 501.

Liability for breach of contract

A mortgagee selling a chattel under a power in the mortgage, but at too low a price, is liable for a breach of an express or implied contract to make a fair sale of the property.—*McInerney & Conway Finance Corporation v. Smith*, 295 P. 273, 42 Wyo. 380, 73 A.L.R. 851.

77. Mo.—Waltner v. Smith, App., 274 S.W. 526—*Nichols & Shepard Co. v. Stokes*, App., 196 S.W. 1075.
11 C.J. p 708 note 18 [b].

78. Ala.—Marsh v. Elba Bank & Trust Co., 130 So. 323, 221 Ala. 683—*Marsh v. Elba Bank & Trust Co.*, 93 So. 604, 207 Ala. 553.

Tex.—Adami v. Bowers, Civ.App., 21 S.W.2d 590, error dismissed.
11 C.J. p 709 note 38.

Private sale not expressly authorized

A chattel mortgagee disposing of the property at a private sale is entitled to be credited with the proceeds, if, in the absence of an express provision for a private sale, the sale was for the value of the property.—*Holliday v. McGraw*, 176 N.Y.S. 661, 106 Misc.R. 661.

79. Va.—Moore v. Aylett, 1 Hen. & M. 29, 11 Va. 29.

80. Ala.—Cunningham v. Rogers, 14 Ala. 147.

81. Cal.—Helmick v. Holaday, 289 P. 224, 106 Cal.App. 380—*Henderson v. Fisher*, 176 P. 63, 38 Cal. App. 270.

Colo.—*Thompson v. Hartman*, 209 P. 635, 636, quoting *Corpus Juris*.
11 C.J. p 711 notes 80, 81.

Analogy to purchase by sheriff

Under statutes to that effect, the position of a chattel mortgagee purchasing at his own sale is analogous to that of a sheriff purchasing at an execution sale conducted by him, in which case the sale is voidable, if not void.—*Henderson v. Fisher*, 176 P. 63, 38 Cal.App. 270.

Equity of redemption is not extinguished by such a sale and purchase.

Cal.—*Henderson v. Fisher*, 176 P. 63, 38 Cal.App. 270.

Mo.—*P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co.*, App., 207 S.W. 266.

82. N.J.—*Rosenblatt v. Premier Dyeing Co.*, 139 A. 389, 101 N.J. Eq. 569.

83. Ga.—*Blakely Mule Co. v. Lewis*, 108 S.E. 804, 27 Ga.App. 400.

84. N.J.—*Alchin v. Supreme Milk & Cream Co.*, 169 A. 837, 12 N.J.Misc. 94.

Okl.—*Norris v. Hare*, 259 P. 532, 126 Okl. 214.

Tex.—*Davenport v. San Antonio Machine & Supply Co.*, Civ.App., 59 S.W.2d 207, error refused.
11 C.J. p 711 note 82.

Agent

The fact that the person conducting the sale arranged to have another bid on the property has been held not to invalidate the sale.—*Davenport v. San Antonio Machine & Supply Co.*, supra.

Purchase by corporation

(1) The mortgagee's corporation or a corporation in which he has a director's vote may purchase at a sale by the mortgagee only if the circumstances show fair dealing and good faith on the part of the mortgagee.—*Graves v. Negy*, 219 P. 286, 114 Kan. 373.

(2) However, it has been held that the fact that the person conducting the sale was a stockholder in the mortgagee corporation will not invalidate a sale at which the latter was the purchaser.—*Davenport v. San Antonio Machine & Supply Co.*, Tex.Civ.App., 59 S.W.2d 207, error refused.

Sales statute held inapplicable

A statute requiring the seller at an auction sale to reserve the right to bid is inapplicable to sales under chattel mortgages.—*Alchin v. Supreme Milk & Cream Co.*, 169 A. 837, 12 N.J.Misc. 94.

may consent to a purchase by the mortgagee.⁸⁵ The mortgagee cannot question the regularity of a sale at which he is a purchaser,⁸⁶ nor can a creditor of the mortgagor where the mortgagor acquiesces in the sale.⁸⁷ A second valid sale may be made notwithstanding the invalidity of a previous sale at which the mortgagee bid in the property for himself.⁸⁸

In some jurisdictions which recognize that the sale is only voidable, a mortgagor contesting the validity of a sale must affirmatively prove the defect claimed to render it voidable.⁸⁹ However, the more generally accepted rule is that the burden is on the mortgagee to show that the sale was regularly and fairly conducted in every particular, and that an adequate price was paid for the goods sold;⁹⁰ and if he cannot sustain this burden, the sale will be set aside at the election of the mortgagor.⁹¹

The mortgagor may purchase at a foreclosure sale,⁹² and so may his wife.⁹³

Necessity of prompt objection. The mortgagor must act with reasonable promptness in objecting to the sale.⁹⁴

§ 383. — Report of Sale

Where a statute so provides, the mortgagee must deliver a report of the sale to the mortgagor within a specified time thereafter, or file an affidavit giving the particulars of the sale.

Where a statute so provides, the mortgagee must deliver to the mortgagor a report of the sale within a specified time thereafter,⁹⁵ containing such information as the name of the purchaser⁹⁶ and the expenses of the sale,⁹⁷ and properly signed.⁹⁸ How-

ever, the mortgagor may waive the requirement of the statute;⁹⁹ but the fact that the mortgagor surrendered possession, where he had no knowledge of the sale,¹ or that he made no inquiry,² or was not injured by his lack of knowledge,³ will not excuse a failure to give a proper report; nor will a failure to make a report be excused on the ground that the mortgagor's whereabouts could not be ascertained, where his post office address was known.⁴ The statute has been held inapplicable where the sale was unauthorized, and the burden of proving a sale under a power contained in the mortgage is on the mortgagor.⁵ However, such a sale will be assumed where the mortgagee admits that the steps taken by him to acquire possession were under and pursuant to his rights under the mortgage.⁶

Under other statutes so providing, the mortgagee must file an affidavit within a specified time after the sale giving particulars thereof,⁷ containing a detailed statement of the expenses of the sale, and a copy of the notice of sale.⁸

An officer may, under leave of court, amend his return of sale under the mortgage where no rights of third persons have intervened.⁹ The person conducting the sale is the agent of the mortgagee or the owner of the mortgage, and the proper person to make the report of the sale.¹⁰ Where a statute so provides, the report is prima facie evidence of the facts therein stated.¹¹

§ 384. Operation and Effect

A sale authorized by the mortgage or the parties has the same effect as a foreclosure in court; it is absolute, and not subject to collateral attack; and it extinguishes the mortgage if the proceeds equal the debt.

85. Ala.—Chenault v. Milan, 87 So. 537, 205 Ala. 310.

Cal.—Henderson v. Fisher, 176 P. 63, 38 Cal.App. 270.

Mo.—P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co., App., 207 S.W. 266.

11 C.J. p 712 note 83.

Purchase by mortgagee's agent is valid where the mortgage by its terms authorized a purchase by the mortgagee.—Clark v. Studebaker Corporation of America, 171 N.E. 602, 35 Ohio App. 54.

86. Ala.—Williams v. Hatch, 38 Ala. 338.

Ill.—Massey v. Hardin, 81 Ill. 330.

87. Mich.—Brown v. Mynard, 65 N.W. 293, 107 Mich. 401.

88. Minn.—Cushing v. Seymour, 15 N.W. 249, 30 Minn. 301.

89. Iowa.—Geiser Mfg. Co. v. Krogman, 82 N.W. 938, 111 Iowa 503.

Tex.—Kent v. National Supply Co.

of Texas, Civ.App., 36 S.W.2d 811, error refused.

90. Okl.—Norris v. Hare, 259 P. 532, 126 Okl. 214.

11 C.J. p 712 note 89.

91. Okl.—Fitch v. Green, 134 P. 34, 39 Okl. 18.

11 C.J. p 712 note 90.

92. N.Y.—Bame v. Drew, 4 Den. 287.

93. Minn.—Houston v. Nord, 40 N.W. 568, 39 Minn. 490.

94. Kan.—Graves v. Negy, 219 P. 286, 114 Kan. 373.

11 C.J. p 712 note 87.

95. Ill.—Pendleton v. Petchaft, 210 Ill.App. 313.

11 C.J. p 712 note 93.

96. Ill.—Aoskad v. Packard Motor Car Co., 195 Ill.App. 251—Watson v. Makaroff, 167 Ill.App. 428.

97. Ill.—Watson v. Makaroff, supra.

98. Ill.—Watson v. Makaroff, supra.

99. Ill.—McMahel v. Smith, 277 Ill. App. 29.

1. Ill.—McMahel v. Smith, supra.

2. Ill.—Aoskad v. Packard Motor Car Co., 195 Ill.App. 251.

3. Ill.—Aoskad v. Packard Motor Car Co., supra.

4. Ill.—Pendleton v. Petchaft, 210 Ill.App. 313.

5. Ill.—McMahel v. Smith, 277 Ill. App. 29.

6. Ill.—McMahel v. Smith, supra.

7. Wis.—Patrick v. Deschamp, 129 N.W. 1096, 145 Wis. 224.

11 C.J. p 712 note 94.

8. Wis.—Emerson-Brantingham Imp. Co. v. Paul, 158 N.W. 326, 163 Wis. 589.

9. Vt.—Desany v. Thorp, 39 A. 309, 70 Vt. 31.

10. N.D.—Hellstrom v. First Guaranty Bank, 209 N.W. 379, 54 N.D. 322.

11. N.D.—Hellstrom v. First Guaranty Bank, supra.

A sale of mortgaged property under a power in the mortgage¹² or with the consent of the interested parties¹³ has the same effect as a foreclosure by an action in court, and, so far as the rights of third persons are concerned, stands on the same footing.¹⁴ Such a sale is ordinarily absolute,¹⁵ and, as hereinafter discussed in § 435, extinguishes the mortgagor's equity of redemption. It generally has the same effect as *res judicata* as a foreclosure by an action in court,¹⁶ and is not subject to collateral attack.¹⁷ Thus it has been held to set at rest, and not to be subject to collateral attack because of, objections going to the sufficiency of the description of the property in the mortgage,¹⁸ the recording of the mortgage,¹⁹ the fact that the mortgage debt was not the debt of the mortgagor corporation,²⁰ the right of the mortgagee to apply payments by the mortgagor, before foreclosure, to debts other than that secured by the mortgage,²¹ and the amount due.²² However, a sale of property not included in the mortgage is subject to collateral attack.²³

Where the foreclosure is under a power of sale, the mortgage becomes an executed contract,²⁴ and if the proceeds equal or exceed the amount of the

debt and the expenses of the sale, the mortgage is extinguished.²⁵ A sale of a part of the property has been held not to extinguish the mortgage lien on the portion unsold unless the amount realized at the sale is more than the debt;²⁶ but it has been held that the purchase of a portion of the mortgaged property by the mortgagee will extinguish the mortgage to the extent of the proportion in value that the portion purchased by the mortgagee bears to the entire property mortgaged.²⁷ Where the proceeds of sale are turned over to the mortgagor's trustee in bankruptcy, the debt is not discharged *pro tanto*.²⁸ If the proceeds do not exceed the amount of the debt, the sale will extinguish the lien of an inferior mortgage,²⁹ and the inferior mortgagee cannot recover the amount of his mortgage from the holder of the prior mortgage.³⁰

§ 385. Title and Rights of Purchaser

Generally speaking, a purchaser at a lawful foreclosure sale acquires the interests which the mortgagor had in the property when executing the mortgage, and the mortgagee's rights. Ordinarily his title depends on the validity of proceedings before and including the sale, not on what should be done thereafter.

Generally speaking, a purchaser at a lawful foreclosure sale acquires all the interests which the

12. Mont.—*Nett v. Stockgrowers' Finance Corporation*, 274 P. 497, 84 Mont. 116.

Wash.—*Yeatman v. Patrician*, 257 P. 622, 144 Wash. 241—*Payne v. White Swan Auto Co.*, 219 P. 32, 126 Wash. 550.

13. Okl.—*Harbour-Longmire Co. v. Reid*, 254 P. 29, 124 Okl. 77.

Sale by mortgagor with the consent of the interested parties and under an agreement to apply the proceeds on the mortgage debt, in good faith and for full value, amounts in equity to a foreclosure of the mortgage.—*Great Northern State Bank v. Ryan*, C.C.A. Minn., 292 F. 10.

14. Ga.—*Fulghum v. J. P. Williams Co.*, 40 S.E. 695, 114 Ga. 643, 88 Am.S.R. 48, 1 L.R.A.N.S., 1055.

15. Ariz.—*Central Finance Corporation v. Norton-Morgan Commercial Co.*, 205 P. 810, 23 Ariz. 517.

16. Wash.—*Yeatman v. Patrician*, 257 P. 622, 144 Wash. 241—*Payne v. White Swan Auto Co.*, 219 P. 32, 126 Wash. 550.

17. Wash.—*Yeatman v. Patrician*, 257 P. 622, 144 Wash. 241—*International Harvester Co. of America v. First Nat. Bank*, 245 P. 14, 138 Wash. 582—*Payne v. White Swan Auto Co.*, 219 P. 32, 126 Wash. 550.

Attachment after sale did not create a lien or right entitling the attaching creditor to assail the validity of the mortgage.—*F. D. Cummer & Son Co. v. R. M. Hudson Co.*, 127 S.E. 171, 141 Va. 271.

Objection by subsequent mortgagee

Where a statutory notice of sale under a first mortgage was properly given and the property was sold without an objection or an attempt by a subsequent mortgagee to remove the proceedings to court, and in a subsequent action by such mortgagee to foreclose his own mortgage he was permitted to contest the validity of the sale to the same extent as if the proceedings had been removed, such mortgagee could not object on appeal that he was not notified of the sale.—*Inland Finance Co. v. J. B. Ingersoll Co.*, 213 P. 679, 124 Wash. 72.

18. Mich.—*Austin v. French*, 36 Mich. 199.

19. Va.—*F. D. Cummer & Son Co. v. R. M. Hudson Co.*, 127 S.E. 171, 141 Va. 271.

20. Wash.—*Payne v. White Swan Auto Co.*, 219 P. 32, 126 Wash. 550.

21. Minn.—*Richards v. Spicer*, 23 Minn. 212.

22. Wash.—*International Harvester Co. of America v. First Nat. Bank*, 245 P. 14, 138 Wash. 582.

23. La.—*Willis v. Thomason*, 1 La. App. 313.

Necessity of recovering judgment

A sale of chattels which, although included in the mortgage, were never owned by the mortgagor does not operate as a payment of the notes, and it is immaterial that the owner of the chattels has not recovered

judgment against the payee for conversion at the time the latter brings an action on the notes.—*Handy v. Tracy*, 23 N.E. 226, 150 Mass. 524.

24. Ala.—*Hardison v. Plummer*, 44 So. 591, 152 Ala. 619, 11 C.J. p 712 note 97.

Sale of part of property

A mortgage will not be recognized and rendered executory where the mortgagee voluntarily sold part of the mortgaged property at private sale.—*Brewer v. Foshee*, 179 So. 87, 189 La. 220, modifying 178 So. 778.

25. Mich.—*Long v. Moore*, 22 N.W. 97, 56 Mich. 23, 11 C.J. p 712 note 98.

26. S.D.—*De Smet First Nat. Bank v. Northwestern El. Co.*, 57 N.W. 77, 4 S.D. 409.

27. S.C.—*Green v. Scruggs*, 53 S.E. 612, 73 S.C. 403.

28. Mo.—*Priddy v. Miners', etc., Bank*, 111 S.W. 865, 132 Mo.App. 279.

29. Tex.—*Latimer v. Hebert*, Civ. App., 25 S.W.2d 929.

Private sale under an agreement between the mortgagor and a first mortgagee will conclude and bar a subsequent mortgagee if such sale is made for full value and the proceeds are applied on the first mortgage.—*Harbour-Longmire Co. v. Reid*, 254 P. 29, 124 Okl. 77.

30. N.Y.—*Goodman v. Schulman*, 258 N.Y.S. 681, 144 Misc. 512.

mortgagor had in the property³¹ at the time the mortgage was executed,³² and all the rights of the mortgagee.³³ He acquires title to the mortgaged property itself, and becomes the owner thereof.³⁴ Also he ordinarily acquires the right to take and retain possession,³⁵ and may sue for a conversion,³⁶ of the property; and he succeeds to the mortgagee's right, if any, to priority over other liens and claims.³⁷ Notice to the purchaser that his vendor

is a mortgagee does not affect the title acquired by him.³⁸

However, the rule of caveat emptor ordinarily applies,³⁹ and the purchaser acquires no better title than the mortgagee himself had.⁴⁰ No warranty of title is implied,⁴¹ and the purchaser is put on inquiry as to prior encumbrances.⁴² As between the purchaser and a claimant to the property other than the mortgagee, the purchaser is put on inquiry as to

31. Wash.—Payne v. White Swan Auto Co., 219 P. 32, 126 Wash. 550.

32. Idaho.—Gandiago v. Finch, 270 P. 621, 46 Idaho 657.

Mortgagee purchaser

(1) Where it is proper for the mortgagee to become a purchaser, he acquires all the interest in the property which the mortgagor had when the mortgage was executed.—Gandiago v. Finch, 270 P. 621, 46 Idaho 657.

(2) In the absence of prior claims of third persons, he becomes the absolute owner of the property, and may retain any profits he is subsequently able to make therefrom.—Steiner v. Schrank, 149 N.E. 542, 253 Mass. 551.

33. Mich.—Sirrine v. Briggs, 31 Mich. 443.

N.J.—Schneider v. Schmidt, Ch., 70 A. 688.

Tex.—Oxsheer v. Tandy, 32 S.W. 372, 11 Tex.Civ.App. 142.

34. Mass.—Steiner v. Schrank, 149 N.E. 542, 253 Mass. 551.

N.J.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368.

Tex.—Fidelity Union Fire Ins. Co. v. Ballew-Satterfield Co., Civ.App., 10 S.W.2d 163.

11 C.J. p 713 note 8.

Purchaser of mortgagor's undivided interest

The purchaser at a foreclosure sale of a mortgagee's undivided interest will become the owner thereof as a tenant in common with the owner of the remaining unsold portion of the property discharged of the mortgagor's equity of redemption.—Wilson v. Brannan, 27 Cal. 258.

Purchase held bona fide

In a replevin action against a sheriff for the return of property purchased at a foreclosure sale, evidence warranted the direction of verdict for plaintiff on the ground that he was a bona fide purchaser at such sale.—Henning v. Stanfield, 186 N.W. 364, 107 Neb. 551.

35. Okl.—Continental Gin Co. v. Pannell, 160 P. 598, 61 Okl. 102. 11 C.J. p 713 note 10.

Possession as against mortgagor

(1) The purchaser may take and retain possession, as against the mortgagor, at least, until the mort-

gage debt is paid or tendered.—Sirrine v. Briggs, 31 Mich. 443.

(2) Redemption after foreclosure see *infra* § 435.

36. Tex.—Oxsheer v. Tandy, 32 S.W. 372, 11 Tex.Civ.App. 142.

37. Ala.—Rust v. Electric Lighting Co., 27 So. 263, 124 Ala. 202. 11 C.J. p 713 note 15.

38. Nev.—Bryant v. Carson River Lumbering Co., 3 Nev. 313, 93 Am. D. 403.

39. Miss.—Rayborn v. Mize, 118 So. 623, 151 Miss. 558.

11 C.J. p 713 note 12.

40. Miss.—Rayborn v. Mize, *supra*. N.J.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368—Manchester v. Long Island Finance Corporation, 168 A. 35, 11 N.J.Misc. 718—Hodes v. Mooney, 152 A. 205, 8 N.J.Misc. 351, 9 N.J.Misc. 48. 11 C.J. p 713 note 11.

Material alteration

Where a chattel mortgage has been so materially altered as to be void, the purchaser at a foreclosure sale cannot maintain any action on the altered mortgage.—Bowser v. Cole, 11 S.W. 1131, 74 Tex. 222.

Property not included in mortgage

(1) A purchaser at such a sale acquires no title to property not covered by the mortgage.—Willis v. Thomason, 1 La.App. 313—11 C.J. p 713 note 11 [a].

(2) Where the mortgage was not intended to cover property acquired by the mortgagor after the execution of the mortgage, a purchaser of such property at a foreclosure sale under the mortgage acquires no title thereto.

Idaho.—Stoddard v. Ploeger, 247 P. 791, 42 Idaho 688.

Mass.—J. P. Manning Co. v. Kempainen, 173 N.E. 532, 273 Mass. 298.

(3) Such a purchaser acquires no right even as against a creditor claiming under a mortgage not recorded until after the sale under which the purchaser claims, despite a statute providing that an unrecorded mortgage is void as against the mortgagor's creditors and subsequent purchasers of the property in good faith.—Stoddard v. Ploeger, *supra*.

(4) Such purchaser is chargeable with value of after acquired goods which he purchased at foreclosure sale.—J. P. Manning Co. v. Kempainen, *supra*.

Joinder of purchaser in action

Sale will not be set aside or resale of goods ordered, on ground that mortgage is void as to mortgagor's creditors, in suit to which the purchaser, who is the holder of legal title, is not party.—Arnesto Paint Co. v. Brush, 175 A. 902, 117 N.J.Eq. 368.

Sale under second mortgage

(1) The purchaser at a sale under a second mortgage simply steps into the place of the mortgagor and holds his title subject to the prior mortgage.—Finkel v. Lepkin, 41 A. 718, 62 N.J.Law 530.

(2) He is not, however, precluded from denying the validity of an older mortgage simply because the sale was made subject to such older mortgage.—White v. Graves, 68 Mo. 218.

Unrecorded mortgage

(1) A purchaser at a sale under an unrecorded mortgage is in no better position than the mortgagee would have been as against creditors of the mortgagor.—Davis v. Dugy, 3 Tex.A. Civ.Cas. § 334.

(2) Where a mortgage is void because of failure to record, the mortgagee acquires no greater rights by purchasing the property under an attempted foreclosure.

Ill.—See Lasley v. Cermak, 209 Ill. App. 431.

N.Y.—Russell v. St. Mart, 73 N.E. 31, 180 N.Y. 356, reversing 82 N.Y.S. 71, 83 App.Div. 543.

41. Kan.—Phillips v. Soper, 239 P. 968, 969, 119 Kan. 389, citing *Corpus Juris*.

Minn.—Bogestad v. Anderson, 173 N.W. 674, 143 Minn. 336.

11 C.J. p 713 note 13.

42. Tex.—Ames Iron Works v. Chinn, 38 S.W. 247, 15 Tex.Civ.App. 88.

Delinquent taxes

Property purchased at a foreclosure sale with knowledge of an assessment prior to the sale is taken subject to unpaid taxes.—Johnson City v. Press, Inc., Tenn., 100 S.W.2d 657.

whether the mortgage is a live instrument,⁴³ but there is a warranty or representation by the mortgagee that he has a subsisting mortgage.⁴⁴

As regards the effect of the foreclosure proceedings upon the purchaser's title, such title ordinarily depends on the validity of the proceedings prior to, and including, the sale, not on what should be done thereafter by the person making the sale.⁴⁵ Thus a failure on the part of the person conducting the sale to execute a bill of sale to the purchaser,⁴⁶ or to transmit a return of the proceedings,⁴⁷ has been held not to invalidate the title acquired by the purchaser. In the absence of a statute so requiring, a recording of the bill of sale is not necessary,⁴⁸ and the validity of such a bill is not affected by the fact that the bill was acknowledged before the mortgagee's attorney.⁴⁹ Leaving the chattels on the land at the request of the owner of the latter has been held not to affect the purchaser's title.⁵⁰

Proof. In an action against a third person to enforce his title, the purchaser must produce evidence that he has purchased property covered by a valid and existing mortgage.⁵¹ A purchaser maintaining an action to recover the consideration paid, on the ground that the mortgage had been discharged before the foreclosure, has the burden of proving such discharge.⁵²

§ 386. Proceeds of Sale

A mortgagee foreclosing by a sale without judicial

proceedings is strictly accountable for the proceeds, including any surplus after satisfying the mortgage debt.

A mortgagee foreclosing his chattel mortgage by a sale without judicial proceedings is strictly accountable for the proceeds of the sale.⁵³ If a surplus remains after satisfying the mortgage debt, he holds such surplus as a trustee for one entitled thereto,⁵⁴ and must account therefor.⁵⁵ An action will lie to compel him to render an account,⁵⁶ or an action in trover, or assumpsit, or some other form may be maintained for a surplus.⁵⁷

The mortgagee is liable for interest on any surplus unreasonably detained by him, but not for profits from the property unless received before the sale.⁵⁸

§ 387. — Rights in and Application in General

After payment of expenses, the proceeds must ordinarily be credited on the mortgage debt and any surplus paid to the mortgagor. As among several debts secured, the mortgagee may ordinarily elect which he will credit; in case part of the debt is otherwise secured, the other part may be credited. Nonexempt property must be sold first.

Although the proceeds of a sale under a chattel mortgage are in no sense to be regarded as a voluntary payment, the application of which the debtor has authority to direct,⁵⁹ after payment of the expenses the net proceeds must ordinarily be credited to the mortgagor as a payment on account of the mortgage debt;⁶⁰ and the mortgagor is, as against

43. Miss.—Rayborn v. Mize, 118 So. 623, 151 Miss. 558.

44. Minn.—Bogestad v. Anderson, 173 N.W. 674, 143 Minn. 336.

45. Idaho.—Gandiago v. Finch, 270 P. 621, 46 Idaho 657.

46. Idaho.—Gandiago v. Finch, supra.

Tex.—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused—Fidelity Union Fire Ins. Co. v. Ballew-Satterfield Co., Civ.App., 10 S.W.2d 163.

47. Idaho.—Gandiago v. Finch, 270 P. 621, 46 Idaho 657.

48. Statute as to marks and brands
A statute requiring the recording of a bill of sale of live stock sold by marks and brands applies only where the marks and brands also are sold, not where only the live stock is sold and there is no intention to sell the marks and brands.—Jenkins v. Reeves, 57 P.2d 1203, 40 N.M. 231.

49. Tex.—Campbell v. Eastern Seed & Grain Co., Civ.App., 109 S.W.2d 997.

50. Tex.—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused.

51. N.Y.—Razey v. Whittick, 27 N. Y.S. 55, 75 Hun 306.

52. Minn.—Bogestad v. Anderson, 173 N.W. 674, 143 Minn. 336.

53. Ariz.—Navajo-Apache Bank & Trust Co. v. Desmond, 170 P. 798, 19 Ariz. 335.

Okl.—Waggoner v. Koon, 168 P. 217, 67 Okl. 25.

Wash.—Sheehan v. Levy, 23 P. 802, 1 Wash. 149.

54. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517—Navajo-Apache Bank & Trust Co. v. Desmond, 170 P. 798, 19 Ariz. 335.

Colo.—Johnson v. National Sugar Mfg. Co., 297 P. 995, 88 Colo. 404.

N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.

Vt.—Darling v. Burlington Drug Co., 142 A. 75, 101 Vt. 155.

55. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Colo.—J. H. Hincke Printing Co. v. Bailey, 263 P. 719, 83 Colo. 242.

N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.

56. Ariz.—Central Finance Corpora-

tion v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517—Navajo-Apache Bank & Trust Co. v. Desmond, 170 P. 798, 19 Ariz. 335. 11 C.J. p 715 note 45.

Action as ratification of sale

An action for an accounting of the surplus operates as a ratification of the sale and renders immaterial any questions as to the validity of the sale.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

57. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., supra.

58. Va.—Moore v. Aylett, 1 Hen. & M. 29, 11 Va. 29.

59. Iowa.—Citizens' Sav. Bank v. Wood, 111 N.W. 929, 134 Iowa 232. 11 C.J. p 713 note 21.

60. N.C.—Planters' Store Co. v. Bullock, 104 S.E. 65, 180 N.C. 656. Or.—Liquidators v. Benedict, 56 P.2d 1090, 153 Or. 492—Ashley & Rummelin v. Lance, 171 P. 561, 88 Or. 109. 11 C.J. p 714 note 22. Dictum Riddle v. Etlings, 258 P. 162, 84 Cal.App. 460.

the mortgagee, entitled to all sums realized in excess of such debt and expenses.⁶¹ However, until the mortgage debt and all reasonable expenses of foreclosure have been fully satisfied and there is a surplus remaining, he has no rights in any part of the property seized for sale or in its proceeds.⁶² Pending an action for the property by a third person, the mortgagee is not required to apply the proceeds of sale to the mortgage debt.⁶³

Generally speaking, a mortgagee is not entitled to apply the proceeds on a debt not secured by the mortgage,⁶⁴ unless the mortgagor consents to such an application.⁶⁵ In some jurisdictions, the debtor's consent to such an application cannot be presumed,⁶⁶ but there is authority holding that a surplus remaining after applying the proceeds to the mortgage debt may be applied to an unsecured indebtedness of the mortgagor in the absence of an agreement to the contrary.⁶⁷ If the proceeds of sale have been applied to the payment of the mortgage debt, such application cannot be changed without mutual consent.⁶⁸ However, if there are prior liens or encumbrances, the proceeds should be applied first to such liens or encumbrances, as shown *infra* § 389, and then to the mortgage debt,⁶⁹ to the extent of the mortgage lien,⁷⁰ without any or-

der of court, if the property is not in custodia legis or sold under order of court.⁷¹

Several debts secured. Where there are several debts secured and the proceeds are not sufficient to pay all of them, the mortgagee may elect as to which debts he will apply the property.⁷² Accordingly, if the mortgage is given to secure the payment of various notes, but does not specify what claims shall be paid first, nor the order of their payment, the mortgagee can apply the proceeds of the mortgaged property, in its discretion, to any of the claims which the mortgage was given to secure.⁷³ Where the mortgage stipulates that the entire debt shall become due on default in payment of any of the notes secured, and there is no direction by the debtor, the mortgagee may apply the sum realized on a sale of the property on nonpayment of the first maturing note as a credit on any of the notes.⁷⁴ Where a trust deed requires the trustee to appropriate the proceeds of sale to payment of the notes secured, it has been held that he should, where the notes are payable to different persons and the proceeds of sale are insufficient to pay them in full, apply such proceeds pro rata in part payment.⁷⁵

The mortgagee has no right to apply the proceeds of sale in payment of part of the mortgage debt

61. Ariz.—Navajo-Apache Bank & Trust Co. v. Desmont, 170 P. 798, 19 Ariz. 335.

N.J.—Mount v. Matthews, 133 A. 299, 99 N.J.Eq. 839.

N.Y.—Goodman v. Schulman, 258 N. Y.S. 881, 144 Misc. 512.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

Wis.—Schwemer v. Citizen's Loan & Investment Co., 272 N.W. 673, 225 Wis. 46.

11 C.J. p 714 note 23.

Mortgagor's conversion of unsold property is no defense in an action by the mortgagor to recover a surplus remaining after a sale of the other property by the mortgagee.—Bryson v. Watson, 160 So. 532, 230 Ala. 221.

Refusal of affirmative charge requested by the mortgagor in an action for money had and received by the mortgagee at a foreclosure sale was erroneous where the evidence was undisputed that the mortgagor was entitled to recover in some amount.—Bryson v. Watson, 160 So. 532, 230 Ala. 221.

Stipulation not fraudulent

An additional clause in a power of sale that the mortgagee shall hold the surplus proceeds subject to the mortgagor's order does not render the transaction fraudulent.—Coulter v. Lumpkin, 14 S.E. 614, 88 Ga. 277.

62. Mass.—Steiner v. Schrank, 149 N.E. 542, 253 Mass. 551.

S.C.—Stokes v. Liverpool & London & Globe Ins. Co., 126 S.E. 649, 130 S.C. 521.

11 C.J. p 714 note 24.

Under mortgagee's plea of general issue in an action by the mortgagor in assumpsit for money had and received by the mortgagee at a foreclosure sale, the mortgagee could show the amount of the mortgage debt and interest and the costs of foreclosure.—Bryson v. Watson, 160 So. 532, 230 Ala. 221.

Judgment on injunction bond

In action by mortgagor for money had and received mortgagee may set off amount of judgment recovered by mortgagee against mortgagor in suit on injunction bond for damages in dissolving injunction against prosecution by mortgagee of suit in detinue to obtain possession of property.—Bryson v. Watson, 160 So. 532, 230 Ala. 221.

63. N.Y.—Tonawanda German-American Bank v. P. W. Scribner Lumber Co., 30 N.Y.S. 740, 81 Hun 140.

64. **Debt secured by other mortgage**

As between a debt of a husband secured by his mortgage and a subsequent debt secured by note and mortgage of him and his wife, a payment from proceeds of the property covered by the first mortgage is to be applied on the first debt.—

Planters' Store Co. v. Bullock, 104 S.E. 65, 180 N.C. 656.

65. Cal.—Riddle v. Etling, 258 P. 162, 84 Cal.App. 460.

Colo.—Glass & Bryant Mercantile Co. v. Farmers' State Bank of Ft. Morgan, 265 P. 682, 83 Colo. 193. 11 C.J. p 714 note 29.

66. Ala.—Taylor v. Cockrell, 80 Ala. 236.

Tex.—Rush v. Amarillo First Nat. Bank, Civ.App., 160 S.W. 319, rehearing denied 160 S.W. 609.

67. Ohio.—Calder v. Bliss Auto Sales Co., 18 Ohio App. 242.

68. Ala.—Nelson v. Holcomb, 65 So. 773, 187 Ala. 119.

69. Okl.—Sallisaw First Nat. Bank v. Ballard, 139 P. 293, 41 Okl. 553. 11 C.J. p 714 note 26.

70. Ill.—Keelin v. Postlewait Co., 102 N.E. 205, 259 Ill. 130.

71. Ill.—Boynton v. Spafford, 44 N. E. 379, 162 Ill. 113, 53 Am.S.R. 274.

72. Me.—Livermore Falls Trust, etc., Co. v. Richmond Mfg. Co., 79 A. 844, 108 Me. 206. 11 C.J. p 715 note 35.

73. Wis.—Northern Nat. Bank v. Lewis, 47 N.W. 834, 78 Wis. 475.

74. Mo.—Avery Mfg. Co. v. Leathers, 109 S.W. 851, 130 Mo.App. 202. 11 C.J. p 715 note 37.

75. Ark.—Cook v. Collins, 122 S.W. 654, 92 Ark. 291.

not yet matured.⁷⁶

Other security for part of debt. If the proceeds are insufficient to satisfy the entire debt, and the mortgagee has security other than the mortgage for part of the debt, he may apply the proceeds to the satisfaction of the debt secured only by the mortgage,⁷⁷ and in case there is other security for a portion of the notes secured by the mortgage, the mortgagee may apply the proceeds of sale first to the notes otherwise unsecured.⁷⁸

Exempt and nonexempt property. Where the mortgage covers exempt and nonexempt property, the mortgagor is entitled to have the nonexempt property first sold and applied to the payment of the debt,⁷⁹ and a mortgagee who has misapplied funds derived from the nonexempt property to other debts cannot resort to the proceeds of the exempt property.⁸⁰ However, a mortgagee holding also a lien on property not covered by the mortgage and exempt except for the lien is not bound to apply the proceeds of the sale of the mortgaged property to the discharge of the lien against the exempt property.⁸¹

§ 388. — Marshaling Assets

A senior mortgagee with notice of a junior mortgage on part of the property must first exhaust the part not covered by both mortgages, or, if necessary to avoid discrimination, apportion his satisfaction among the proceeds of the respective parts, unless he will thereby be prejudiced or suffer risks or burdens not assumed.

As a general rule, the holder of a mortgage on property on part of which there is a junior mortgage of which he has actual notice is required to protect the junior mortgagee by first exhausting that portion of the property not covered by both mortgages.⁸² Where necessary in order to avoid discrimination between several junior claimants, each claiming the proceeds of only a part of the property, the satisfaction of the prior lien or mortgage may be required to be apportioned among the proceeds of the respective pieces of property.⁸³

However, these principles are not to be applied in such a manner as to prejudice the senior lienholder,⁸⁴ or to impose risks or burdens on him which he has not assumed.⁸⁵ The rule has also been held inapplicable when the additional property covered by the senior mortgage is ordinarily exempt from the claims of the mortgagor's creditors.⁸⁶ Where a portion of the property covered by the mortgage has been transferred by the mortgagor, the transferee,⁸⁷ or a subordinate claimant of other property in the mortgage,⁸⁸ may compel the mortgagee to resort first to that which is retained by the mortgagor, where so to do will not require him to incur a risk of loss, or delay or inconvenience him in enforcing his claim. However, the mortgagee is not required to use diligence in locating property other than that claimed by the subordinate claimant.⁸⁹ Where mortgaged property is subsequently mortgaged to different persons, in separate parcels, and the first mortgagee sells both parcels at different times, the proceeds of neither sale being alone sufficient to discharge his mortgage debt, but the proceeds of both being more than sufficient, the mortgagee who holds a second mortgage on the second parcel of property sold cannot insist that the entire proceeds of the parcel first sold be applied to the senior encumbrance, before resorting to the proceeds of the sale of the property covered by his mortgage.⁹⁰ Where a surety on a mortgage joined purely for the accommodation of the principal, the principal cannot complain of the application of the proceeds of the property of the surety covered by the mortgage to a prior unrecorded mortgage executed by the surety on such property.⁹¹

§ 389. — Rights of Third Persons

The proceeds of a foreclosure of a chattel mortgage without judicial proceedings should be applied first to the payment of prior liens or encumbrances, then to junior liens, and, after the claims of lienholders have been satisfied, general creditors of the mortgagor may reach the surplus.

Where there are prior liens or encumbrances,

76. Neb.—Loeb v. Milner, 32 N.W. 205, 21 Neb. 392.

77. Iowa.—Tolerton, etc., Co. v. Roberts, 88 N.W. 966, 115 Iowa 474. 11 C.J. p 715 note 33.

78. Iowa.—Citizens' Bank v. Whinery, 81 N.W. 694, 110 Iowa 390—Hanson v. Manley, 33 N.W. 357, 72 Iowa 48—J. I. Case Threshing Mach. Co. v. Matthews, 174 S.W. 198, 188 Mo.App. 429. 11 C.J. p 715 note 34.

79. Tex.—Baughn v. Allen, Civ.App., 73 S.W. 1063.

80. Miss.—Walton v. Hollis, 16 So. 260.

81. Iowa.—Citizens' Sav. Bank v. Wood, 111 N.W. 929, 134 Iowa 232.

82. Kan.—St. Marys First Nat. Bank v. Taylor, 76 P. 425, 69 Kan. 28. 11 C.J. p 715 note 48.

83. La.—White Co. v. Hammond Stage Lines, 158 So. 353, 180 La. 962.

84. La.—White Co. v. Hammond Stage Lines, supra.

85. Kan.—Burnham v. Emporia Citizens' Bank, 40 P. 912, 55 Kan. 545.

86. Kan.—Youngberg v. Walsh, 83 P. 972, 72 Kan. 220.

Tex.—Baughn v. Allen, Civ.App., 68 S.W. 207.

11 C.J. p 715 note 49.

87. Mass.—Black v. Robinson, 61 Mass. 54.

Miss.—Keaton v. Miller, 38 Miss. 630.

88. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.

89. Ala.—Kelley v. Cassels, supra.

90. Kan.—Consolidated Barb Wire Co. v. Guthrie Nat. Bank, 51 P. 233 6 Kan.App. 775.

91. Ala.—Stevens v. Romano, 65 So. 713, 10 Ala.App. 601.

the proceeds of a foreclosure without judicial proceedings should be applied first to the discharge of such liens or encumbrances.⁹² After prior liens or encumbrances have been satisfied, junior lienholders are entitled to have any surplus proceeds applied on their claims.⁹³ The proceeds must not be applied on a debt not secured by the mortgage,⁹⁴ or turned over to unsecured creditors,⁹⁵ to the detriment of junior lienholders. Where a claim is subsequent to the chattel mortgage claim but is entitled to a statutory priority over a claim which is prior to the mortgage, it should be satisfied from the portion of the proceeds applicable to the claim prior to the mortgage, but should not be given priority to the mortgage lien by indirection.⁹⁶ The general creditors of the mortgagor,⁹⁷ creditors who have garnished the mortgagee,⁹⁸ judgment creditors whose judgments are subsequent to the mortgage,⁹⁹ an assignee of the mortgagor,¹ a receiver of the property of the mortgagor,² and a purchaser of the mortgaged property from the mortgagor,³ have

been held to have a right in equity to any interest which the mortgagor may have in the mortgaged property or its proceeds after the mortgage debt is satisfied; but a creditor without any lien cannot complain of the manner in which the proceeds are applied in payment of other claims against the mortgagor.⁴ Creditors holding executions against the mortgagor are entitled, in some jurisdictions, to the surplus realized from a sale of the mortgaged property after the mortgage debt is satisfied,⁵ but a contrary rule prevails in other jurisdictions.⁶ An unsecured creditor attaching mortgaged property in a suit has been held not to acquire thereby any right to surplus proceeds after the mortgage debt is satisfied,⁷ but there is authority to the contrary.⁸ The surety of a mortgagor has an interest entitling him to object to the manner in which the proceeds are applied;⁹ and where a chattel mortgage is given to indemnify the mortgagee against liability as surety for the mortgagor, the mortgagee is entitled, in the absence of fraud, to hold the proceeds of a

92. Ga.—Mathews v. Fields, 77 S.E. 11, 12 Ga.App. 225.

Iowa.—Snyder v. Carson, 130 N.W. 143—Dowie v. Christen, 88 N.W. 830, 115 Iowa 364—Doane v. Garretson, 24 Iowa 351.

11 C.J. p 714 notes 25, 26.

93. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Colo.—Johnson v. National Sugar Mfg. Co., 297 P. 995, 997, 88 Colo. 404, quoting *Corpus Juris*.

N.J.—Mount v. Mathews, 133 A. 299, 99 N.J.Eq. 839.

Tex.—Adami v. Bowers, Civ.App., 21 S.W.2d 590, error dismissed.

11 C.J. p 715 note 31, p 716 note 57 [a].

Burden of proof as to surplus

As against the holder of a second chattel mortgage, the holder of a first mortgage who has collected money due the mortgagor to an amount in excess of the first mortgage has the burden of proving that the first mortgage has not been paid.—Ribelin v. Holder, 191 S.W. 224, 126 Ark. 558.

Payment to mortgagor's bankruptcy trustee

Senior mortgagee refusing junior mortgagee's demand for payment of surplus remaining after discharge of senior mortgage, and paying over all excess money to mortgagor's trustee in bankruptcy, was liable to junior mortgagee for money received.—Johnson v. National Sugar Mfg. Co., 297 P. 995, 88 Colo. 404.

94. Ariz.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Application under power to select

Even if a chattel mortgagee had

the right under the provisions of his mortgage to select in lieu of property described in the mortgage other property owned by the mortgagor on which he also had a chattel mortgage and on which there was a second mortgage in favor of another, he lost his right of selection by failing to exercise it before selling the property under the two mortgages respectively, and he cannot exercise it by transferring the excess received in one sale to make up the deficiency in the other sale.—Central Finance Corporation v. Norton-Morgan Commercial Co., 205 P. 810, 23 Ariz. 517.

Mortgagor's surety may object if the mortgagee applies the proceeds on a debt not secured by the mortgage.—Keel v. Levy, 24 P. 253, 19 Or. 450.

95. Tex.—Adami v. Bowers, Civ. App., 21 S.W.2d 590, error dismissed.

96. Iowa.—Snyder v. Carson, 130 N.W. 143.

11 C.J. p 715 note 32.

97. Neb.—Rockford Watch Co. v. Manifold, 55 N.W. 236, 36 Neb. 801. 11 C.J. p 716 note 54.

98. Ill.—Glass v. Doane, 15 Ill.App. 66.

N.H.—Boardman v. Cushing, 12 N.H. 105.

11 C.J. p 716 note 55.

99. N.J.—Mount v. Mathews, 133 A. 299, 99 N.J.Eq. 839.

11 C.J. p 716 note 56.

1. Minn.—Brown v. Crookston Agricultural Assoc., 26 N.W. 907, 34 Minn. 545.

11 C.J. p 716 note 57.

2. N.Y.—Davenport v. McChesney, 86 N.Y. 242—Merry v. Wilcox, 36 N.Y.S. 1050, 92 Hun 210.

Allowance for expenses

A receiver who has been ordered to deliver the mortgaged goods to mortgagee for sale under the mortgage is not entitled to expenses out of the proceeds of the sale.—*Ex parte Citizens' Bank of Fairfax*, 119 S.E. 903, 126 S.C. 291.

3. S.C.—Lee v. Buck, 13 S.C. 178.

11 C.J. p 716 note 59.

4. Colo.—Glass & Bryant Mercantile Co. v. Farmers' State Bank of Ft. Morgan, 265 P. 682, 83 Colo. 193.

Iowa.—S. Hammill Co. v. Van Loon, 72 N.W. 520, 103 Iowa 249.

5. Ill.—McConnell v. People, 84 Ill. 583.

Ky.—McCann v. Letcher, 8 B.Mon. 320.

Right as against mortgagee under void mortgage

Chattel mortgagee who, claiming under void lien, prevented sale under execution of another, could not contend that execution lien had expired when the execution creditor sold property.—Beckman v. Alberts, 178 N.E. 367, 346 Ill. 74.

6. S.C.—Robins v. Ruff, 20 S.C.L. 406.

7. Mo.—Fahy v. Gordon, 34 S.W. 881, 133 Mo. 414.

8. Iowa.—Torbert v. Hayden, 11 Iowa 435.

Ohio.—Carty v. Fenstermaker, 14 Ohio St. 457.

9. Or.—Keel v. Levy, 24 P. 253, 19 Or. 450.

sale for his security, or until indemnified or relieved from liability.¹⁰ Where a trust created on surplus proceeds by the mortgagor for the benefit of a third person fails, the mortgagor becomes entitled to such proceeds.¹¹

§ 390. Deficiency and Personal Liability

If the proceeds of the foreclosure sale are insufficient to pay the mortgage debt, the mortgagee is ordinarily entitled to recover the deficiency from the mortgagor, unless the mortgagee accepted the property in satisfaction of the debt, or unless the foreclosure and sale was irregular or wrongful. In the action the general rules of procedure apply.

If the proceeds of a proper foreclosure sale are insufficient to pay the mortgage debt, the mortgagor is personally liable for any deficiency,¹² unless the mortgagee accepted the property from the mortgagor in satisfaction of the debt.¹³ However, a failure to foreclose and sell in strict compliance with the manner prescribed by statute prevents the maintenance of an action to collect a deficiency,¹⁴ especially where the statute so provides;¹⁵ and this has been held to be so even where the mortgagor has waived the statutory method.¹⁶ So, the failure

of the mortgagee to sell the property for the best price obtainable,¹⁷ or a foreclosure made maliciously and in bad faith and for motives not contemplated or provided for in the mortgage,¹⁸ prevents the recovery of a deficiency judgment by the mortgagee; and, in a suit for a deficiency, proof that the foreclosure and sale were invalid and that the mortgagee purchased the mortgaged property at such sale and thereafter sold a part thereof for more than the mortgage debt establishes a wrongful conversion of the property by the mortgagee and entitles the mortgagor to credit therefor.¹⁹

An action for the amount of a deficiency is not precluded by a statute allowing but one action to recover a secured debt, since after a sale of the property the debt is no longer a secured debt.²⁰

Such a deficiency cannot be recovered except by an action against the mortgagor.²¹ The mortgagee must allege and prove a sale of the mortgaged property,²² and is limited to a recovery based on the pleadings.²³ The mortgagee has the burden of proving such a breach of the mortgage as will justify the sale;²⁴ but the burden of proving matters

10. Vt.—*Bean v. Parker*, 96 A. 17, 89 Vt. 532.

11. Idaho.—*McCutcheon v. Thomas*, 273 P. 950, 47 Idaho 188.

12. Cal.—*J. I. Case Threshing Machine Co. v. Copren Bros.*, 162 P. 647, 32 Cal.App. 194.

N.Y.—*Goodman v. Schulman*, 253 N. Y.S. 681, 144 Misc. 512.

Or.—*Ashley & Rumelin v. Lance*, 171 P. 561, 88 Or. 109.

11 C.J. p 716 note 65.

13. Okl.—*Riley Motor Co. v. Wilkins*, 65 P.2d 481, 179 Okl. 236.

Property taken at worth

In general a mortgagee who obtains possession of the mortgaged chattels on default of the mortgagor takes at their worth.—*Goodman v. Schulman*, 253 N.Y.S. 681, 144 Misc. 512.

14. Idaho.—*Peterson v. Hailey Nat. Bank*, 6 P.2d 145, 51 Idaho 427—*Standlee v. Hawley*, 4 P.2d 340, 51 Idaho 129—*Boomer v. Isley*, 290 P. 405, 49 Idaho 666—*Advance-Rumley Thresher Co. v. Brady*, 278 P. 224, 47 Idaho 726—*Advance Rumley Thresher Co. v. Ayres*, 277 P. 20, 47 Idaho 514—*Garrett v. Soucie*, 267 P. 1078, 46 Idaho 289—*First Nat. Bank v. Poling*, 248 P. 19, 42 Idaho 636.

Wash.—*Mitchell v. O'Neil*, 47 P. 235, 16 Wash. 108.

Compliance held sufficient

Mortgagee obtaining possession of mortgaged property from person in possession, and giving notice as required by statute, and filing return

in accordance with statute, complied with statute relative to summary foreclosure, enabling him to maintain action for deficiency.—*First Nat. Bank v. Poling*, 248 P. 19, 42 Idaho 636.

Sufficient compliance shown

Idaho.—*Binder v. Blair*, 233 P. 613, 48 Idaho 580.

15. La.—*Home Finance Service v. Walmsley, App.*, 176 So. 415.

16. La.—*Home Finance Service v. Walmsley*, supra.

Failure to appraise

Under a statute so providing, a deficiency judgment cannot be recovered where the property has been sold without an appraisal, even though an appraisal was waived by the mortgagor. The statute is applicable to private sales without an appraisal.—*Home Finance Service v. Walmsley*, La.App., 176 So. 415.

17. Mo.—*Universal Credit Co. v. Uhri, App.*, 101 S.W.2d 501.

18. N.Y.—*Hyer v. Sutton*, 12 N.Y.S. 378, 59 Hun. 40.

19. Minn.—*Jankowitz v. Kaplan*, 165 N.W. 275, 138 Minn. 452.

Value of property

In such case it is not necessary to prove value of property.—*Jankowitz v. Kaplan*, supra.

20. Cal.—*J. I. Case Threshing Mach. Co. v. Copren Bros.*, 162 P. 647, 32 Cal.App. 194.

21. Idaho.—*South Side Live Stock Loan Co. v. Iverson*, 263 P. 481, 45 Idaho 499.

22. Cal.—*J. I. Case Threshing Machine Co. v. Copren Bros.*, 162 P. 647, 32 Cal.App. 194.

Private sale

In an action to recover balance on secured notes after foreclosure and sale, where plaintiff did not sell at public sale pursuant to notice, burden was on it to prove a sale at other time.—*J. I. Case Threshing Mach. Co. v. Copren Bros.*, supra.

Jury question

Withdrawal from jury of issue whether plaintiff sold property at public sale is error.—*J. I. Case Threshing Mach. Co. v. Copren Bros.*, supra.

23. Colo.—*Aultman-Taylor Machinery Co. v. Forrest*, 168 P. 1119, 69 Colo. 53.

Private sale

Plaintiff cannot recover on a private sale not pleaded, where he pleaded a public sale.—*Aultman-Taylor Machinery Co. v. Forrest*, supra.

Essential allegations

The allegation of a complaint for the balance of the debt that the property mortgaged was sold is sufficient, and demand for payment and notice of sale are not essential, and need not be pleaded.—*Union Bank & Trust Co. v. Himmelbauer*, 181 P. 332, 56 Mont. 82.

24. Mont.—*Advance-Rumley Thresher Co. v. Kruger*, 16 P.2d 1102, 93 Mont. 66, 85 A.L.R. 1053.

Report of sale insufficient

That report of mortgage foreclosure sale contains copy of notice of

in defense, such as fraud in the foreclosure and sale of the mortgaged property by the mortgagee,²⁵ or the value of the chattels possessed by the mortgagee,²⁶ is on the mortgagee.

In an action for a deficiency arising on the sale of the mortgaged property, findings of the jury based on competent evidence will not be disturbed on appeal.²⁷

§ 391. Fees and Costs

The right of the mortgagee to retain from the proceeds of sale the expenses and fees incurred is considered *infra* §§ 430-431.

§ 392. Wrongful or Irregular Seizure or Sale

The rights and liabilities arising from the wrongful or irregular seizure or sale of the mortgaged property are treated *infra* §§ 393-397.

sale which recites mortgagor's default does not relieve party relying on sale of necessity of proving default justifying sale.—*Advance-Rumely Thresher Co. v. Kruger*, *supra*.

25. Colo.—*Ramstetter v. MacGinnis*, 68 P.2d 454, 100 Colo. 494.

26. N.Y.—*Harrison v. Hall*, 145 N.E. 737, 239 N.Y. 51, reversing 202 N.Y.S. 626, 207 App.Div. 511.

Admissions as to value

A judgment dismissing action was error, where answer contained admissions fixing value of chattels as lower than debt.—*Harrison v. Hall*, *supra*.

27. Colo.—*Aultman-Taylor Machinery Co. v. Forrest*, 168 P. 1119, 69 Colo. 53.

28. N.C.—*Nance v. King*, 101 S.E. 212, 178 N.C. 574.

Okl.—*Salisbury v. First Nat. Bank*, 221 P. 444, 99 Okl. 138.—*National Bank of Commerce of Porum v. Jackson*, 170 P. 474, 69 Okl. 93, 11 C.J. p 717 note 68.

Presence of property at place of sale
N.C.—*Nance v. King*, 101 S.E. 212, 178 N.C. 574.

Sale prior to termination of replevin suit

Where mortgagee instituting replevin action to foreclose mortgage obtains possession of property by filing replevin bond, sale thereof at foreclosure sale prior to determination of issues entitles defendant to damages by way of cross petition in same action, or by set-off against mortgage debt to extent of reasonable market value of property, if it is less than debt and not merely for the amount for which the property

was sold.—*Tingley v. Smith*, 72 P.2d 729, 181 Okl. 84.—*Scott v. Standridge*, 245 P. 591, 117 Okl. 111.—*Mid-Continent Motor Securities Co. of Tulsa v. Art Harris Transfer & Storage Co. of Muskogee*, 223 P. 130, 97 Okl. 139.—*Salisbury v. First Nat. Bank*, 221 P. 444, 99 Okl. 138.

Liability for conversion see *supra* § 215.

29. Ky.—*Hawkins Furniture Co. v. Morris*, 137 S.W. 527, 143 Ky. 738, 11 C.J. p 717 note 72.

30. Ohio.—*Clark v. Studebaker Corporation of America*, 171 N.E. 602, 35 Ohio App. 54, 11 C.J. p 717 note 69.

Wrongful foreclosure essential

Actions for wrongful foreclosure of chattel mortgage, and conspiracy to defraud, cannot be maintained, in absence of illegality or wrongful acts in foreclosure proceedings.—*Antoine v. Commonwealth Trust Co.*, 165 N.E. 12, 266 Mass. 202.

Bad faith

Mortgagee, who in collusion with another with intent to defraud mortgagor takes possession and sells property under clause in mortgage authorizing him to do so whenever he feels himself insecure, does not act in good faith.—*Wetlin v. Jones*, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 236 P. 247, 32 Wyo. 446.

Conspiracy to cause default

If default or conditions that caused mortgagee to feel insecure were brought about by him in collusion or conspiracy with third person, foreclosure following default was unlawful act.—*Wetlin v. Jones*, *supra*.

Court process required

Chattel mortgagee who had sold

§ 393. — Rights of Mortgagor in General; Damages

A mortgagee is liable to the mortgagor for the wrongful seizure and sale of the mortgaged property, unless the latter assents to the sale or waives his rights therein, the mortgagor generally being entitled to the full value of the property less the amount of the mortgage debt. In an action therefor the general rules of procedure apply.

A mortgagee²⁸ or assignee of the mortgagee²⁹ who takes possession of and sells the mortgaged property in such a manner as to constitute an invalid foreclosure of the mortgage is accountable for its market value at the instance and election of the mortgagor or those claiming under him, and is liable in damages for any injury caused by a wrongful seizure and sale,³⁰ as well as for liquidated damages expressly authorized by statute in addition to actual damages for the failure to comply with specific statutory requirements,³¹ unless, as appears *infra* § 397, the latter consents to the sale or waives irregularities therein; but a mortgagor who at the time

summarily, instead of by court process, cotton covered by chattel mortgage was properly charged with loss resulting from temporarily depressed market.—*Stedham v. Swift & Co.*, C.C.A.Ga., 79 F.2d 648.

Payment

Payee of mortgage note, pledged to him as collateral security for note secured by lien on crop, from proceeds of sale of which payee's advances to make crop were repaid, should not have sued out execution on mortgage and note secured thereby, in absence of proof that note was repledged to him as security for subsequent advances or indebtedness.—*Polito v. Ferraro*, La.App., 155 So. 477.

31. Wis.—*Banking Commission of Wisconsin v. Ray*, 253 N.W. 556, 214 Wis. 433.

Person entitled

Mortgagor's wife, who signed as mortgagor with him, being a person personally liable for the indebtedness, is entitled to statutory liquidated damages for failure of the mortgagee to give her notice of the sale of his intention to take the property and for failure to file an affidavit giving the details of the sale.—*Banking Commission of Wisconsin v. Ray*, *supra*.

Knowledge of sale

The fact that the mortgagor obtained knowledge of the terms, conditions and name of the purchaser of the mortgaged chattels after the sale will not constitute a defense to an action for the statutory penalty for failure of the mortgagee to give the mortgagor such information within a specified time after the sale.—*McMahel v. Smith*, 253 Ill.App. 53.

owned no part of the mortgaged property cannot complain of a wrongful foreclosure.³² However, it has been held that in those jurisdictions in which the mortgagee is regarded as having an absolute legal title after default and possession taken, and in which the procedure at law and in equity is distinct, the mortgagor's only remedy for a wrongful foreclosure sale is by a bill in equity for redemption with an accounting for the reasonable value of the property if it is injured or destroyed or is for any reason unavailable for redemption.³³ So, where the mortgagee is rightfully in possession, he cannot, while the mortgage remains unredeemed, be charged as for a conversion by reason of any irregularity in the subsequent proceeding for sale.³⁴ Where the provisions of the statute or mortgage as to sale are not substantially complied with and have not been waived, the mortgagor is entitled to have the value of the property applied to the mortgage debt and, if the value exceeds the debt, to recover the difference from the mortgagee;³⁵ the purchaser becomes subrogated to all the rights of the mortgagee, and is to be regarded and treated as an equitable assignee of the security to secure him for the purchase money paid by him and applied on the payment of the mortgagor's debt.³⁶ Where the mortgagee bids in the property at the sale, the mortgagor and the mortgagee stand in the same position as before the sale in case the sale is invalid.³⁷ If the mortgagor elects to regard the foreclosure as invalid he cannot recover the value of

the property without accounting for the amount owing on the mortgage.³⁸ Where the mortgagee after bidding in the property credits the amount realized on the mortgage debt and then sells the property and assigns the remaining portion of the debt to the purchaser, the purchaser cannot be regarded as a stranger to the mortgage, and in an action by the mortgagor against him to recover the value of the property the mortgagor is entitled to recover only the excess, if any, in the value of the property over the indebtedness.³⁹ So, where there is an invalid foreclosure and the property is bid in by an assignee of the mortgage, he is entitled to be credited with the amount paid by him in trover by a purchaser of the mortgaged property from the mortgagor.⁴⁰

The damages should be determined as in an action for conversion,⁴¹ considered generally supra § 226, the measure of damages being the excess of the actual value of the property at the time of sale over the mortgage debt,⁴² and the reasonable market rental value of the property during the period it was wrongfully held before its sale.⁴³ However, a mortgagee who obtains possession of the mortgaged property under an order of delivery in a replevin suit and sells it is liable, on the determination of the issues in the replevin suit against him, for the value of the property at the time of the service of the order of delivery with interest from that date and not for damages for detention of the property.⁴⁴ The market value of the property sold

32. Iowa.—J. I. Case Threshing Mach. Co. v. Van Vora, 180 N.W. 656, 657, 190 Iowa 543, citing *Corpus Juris*.

11 C.J. p 717 note 71.

33. Ala.—Harmon v. Dothan Nat. Bank, 64 So. 621, 186 Ala. 360.

34. Mass.—Murray v. Erskine, 109 Mass. 597.

35. Cal.—Helmick v. Holaday, 289 P. 224, 106 Cal.App. 380.

Tex.—Wilson v. Fireman's Fund Ins. Co., Civ.App., 274 S.W. 176, 179, quoting *Corpus Juris* at length.

W.Va.—Charleston Milling & Produce Co. v. Craighead, 179 S.E. 69, 70, 116 W.Va. 194, citing *Corpus Juris*.

11 C.J. p 717 note 73.

Debt not extinguished

If mortgagee sells unfairly or irregularly, the consequence is, not that the debt becomes extinguished, but that the mortgagor may be credited with payment up to the value of the property.—Harrison v. Hall, 145 N.E. 737, 239 N.Y. 51, reversing 202 N.Y.S. 626, 207 App.Div. 511.—Goodman v. Schulman, 258 N.Y.S. 681, 144 Misc. 512.

Irrespective of limitations

In suit on notes secured by chattel mortgage which mortgagee attempted to foreclose by public instead of private sale, as provided, bidding off property for itself, mortgagors were entitled to have value of property applied in payment of notes as of date when property was taken, irrespective of lapse of time which would bar a claim for an excess.—Nichols & Shepard Co. v. Stokes, Mo.App., 198 S.W. 1075.

36. Ga.—Dutcher v. Hobby, 12 S.E. 356, 86 Ga. 198, 22 Am.S.R. 444, 10 L.R.A. 472.

Okl.—Harrell v. Weer, 109 P. 539, 26 Okl. 313.

11 C.J. p 718 note 77.

37. Okl.—Nichols & Shepard Co. v. Dunnington, 247 P. 353, 118 Okl. 231.

11 C.J. p 718 note 78.

38. Minn.—Berg v. Olson, 93 N.W. 309, 88 Minn. 392.

39. Minn.—Berg v. Olson, supra.

40. Ga.—Rogers v. Lawrence, 3 S.E. 559, 79 Ga. 185.

41. Mass.—Castro v. Linchitz, 8 N. E.2d 744.

42. Okl.—National Bank of Commerce of Forum v. Jackson, 170 P. 474, 69 Okl. 93.

Tex.—Trehan v. Dunnigan, Civ.App., 297 S.W. 1102.

Action by second mortgagee

In an action by a second mortgagee for wrongful foreclosure and sale by the first mortgagee, the second mortgagee is entitled to recover the difference between the market value of the mortgaged property on the day of the foreclosure sale and the amount of the first mortgagee's lien thereon.—Castro v. Linchitz, Mass., 8 N.E.2d 744.

43. Tex.—Trehan v. Dunnigan, Civ. App., 297 S.W. 1102.

Improper items

The value of the property by the hour or day or the amount the mortgagor could earn per day by using it in his occupation is not a proper measure of damages for its detention.—Trehan v. Dunnigan, supra.

44. Ark.—Neal v. Cole, 223 S.W. 18, 144 Ark. 547.

is to be determined as of the time and place of the sale,⁴⁵ but should not include its value for use in place on the premises where the purchaser does not have the right to use it thereon.⁴⁶

Motive. If, in the foreclosure proceedings, the mortgagee acts wholly within his legal rights, his motive in foreclosing the mortgage is unimportant.⁴⁷

Private sale. Since, as appears supra § 373, the mortgagee in selling the mortgaged property must sell it fairly and for an adequate price, a mortgagee who sells at private sale is responsible and accountable for at least the fair and reasonable value of the property, regardless of the price actually received by him,⁴⁸ so that if the property is wrongfully sold at private sale the measure of damages is the difference between the price realized and the actual value of the property, or the excess of the value of the property above the mortgage debt.⁴⁹

Election of remedies. If the mortgagee takes possession of, and claims title to, the property in pursuance of a sale collusively or improperly made to himself, the mortgagor can elect to treat the sale as valid and hold the mortgagee to account for the excess produced over the mortgage debt, or he can disregard the sale and proceed for the value of the property over and above the debt and interest.⁵⁰ Where the sale is to a third person he may treat the sale as invalid and sue the mortgagee for an accounting and for the value of the property in excess of the mortgage debt, recovering in no event the value of the property without accounting for the amount due on the mortgage debt, or he may sue the purchaser to redeem the property by tendering to him a sum sufficient to pay his claim against the property.⁵¹

Procedure. In an action for wrongful foreclosure of the mortgage the general rules of pleading⁵² and evidence⁵³ apply. Similarly in action for

45. Mass.—Castro v. Linchitz, 8 N. E.2d 744.

46. Mass.—Castro v. Linchitz, supra.

47. Mass.—Antoine v. Commonwealth Trust Co., 165 N.E. 12, 266 Mass. 202.

48. Ala.—Zadek v. Burnett, 57 So. 447, 176 Ala. 80.

49. Mich.—Botsford v. Murphy, 11 N.W. 375, 376, 47 Mich. 537. 11 C.J. p 717 note 74.

50. Ind.—Lee v. Fox, 14 N.E. 889, 113 Ind. 98.

N.Y.—Davenport v. McChesney, 86 N.Y. 242.

51. Okl.—Harrill v. Weer, 109 P. 539, 26 Okl. 313.

52. Petition held sufficient

(1) Petition failing to allege compliance with all statutory requirements as to notice before and after sale.—McMahel v. Smith, 258 Ill.App. 53.

(2) Petition, although unsuccessfully attacking foreclosure proceeding, entitled petitioner to come into equity, enjoin proceeding at law, and set up his defenses therein, where petition showed that defendant's acts prevented petitioner from pursuing his remedy at law by affidavit of illegality, although defendant removed obstacle to filing of illegality after petition was filed, since equity, having acquired jurisdiction, will retain it, and failure to retain jurisdiction would throw cost of suit, which defendant compelled petitioner to file, on petitioner.—Simpson v. Jones, 136 S.E. 558, 132 Ga. 544.

Petition held insufficient

(1) To state cause of action for trespass by reason of removal of

mortgaged property from petitioner's premises, where foreclosure proceedings were not void for any reason assigned.—Simpson v. Jones, supra.

(2) To state cause of action for damages for malfeasance, misfeasance, and nonfeasance in conducting auction sale.—Van Mourick v. Bowie, 69 F.2d 834, 63 App.D.C. 96.

(3) In action for statutory penalty special plea which shows that the property was not taken to foreclose the mortgage is subject to demurrer on the ground that the plea amounts to the general issue.—McMahel v. Smith, 258 Ill.App. 53.

Tender of payment

In action for wrongful seizing plaintiff's business, including property used therein and appropriating it to defendant's use after inducing plaintiff to omit installments on note secured by chattel mortgage on truck, plaintiff was not bound to tender omitted installments in complaint.—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

Waiver

In a proceeding for a statutory penalty arising from the failure to comply with the statutory requirements as to notice before and after sale, a plea purporting to set up a waiver of those requirements should confess the cause of action alleged and then allege matters avoiding the effect thereof.—McMahel v. Smith, 258 Ill.App. 53.

Issues

Pleadings did not raise issue that foreclosure of chattel mortgages was premature.—Stotts v. Carney, 242 P. 675, 78 Colo. 472.

Proof

As against general issue, plaintiff

must prove foreclosure in action for statutory penalty.—McMahel v. Smith, 258 Ill.App. 53.

53. Burden of proof

(1) Burden of proving defendant mortgagee's bad faith in seizing and selling the property was held to be on plaintiffs.—In re Nuccio's Will, 195 N.Y.S. 593, 202 App.Div. 108—11 C.J. p 717 note 69 [f].

(2) Burden of proving that notice of foreclosure sale was not given was held to be on plaintiff.—Bailey v. Diamond T. Motor Car Co., 255 Ill.App. 447.

(3) Burden is on mortgagee to prove that private sale, made contrary to statute and without the consent of the mortgagor, was openly and fairly conducted and that the price paid was not so inadequate as to raise a presumption of bad faith.—Tacker v. Mitchell, 3 Tenn.App. 495.

Evidence held admissible

Evidence tending to show that defendant made no charge for taking, keeping, or selling truck, offered as tending to show that the notice of sale was sufficient.—Bailey v. Diamond T. Motor Car Co., 255 Ill.App. 447.

Evidence held inadmissible or properly excluded

(1) Where mortgagee relied on waste as justifying foreclosure on stock of merchandise and fixtures, evidence that store was closed for about eleven days, in absence of evidence that any of the mortgaged property deteriorated, although part of it was perishable.—Rosenthal v. Newman, 141 N.E. 118, 246 Mass. 389.

(2) Evidence that plaintiffs worked hard and tried to do the best they

wrongful foreclosure, the general rules of trial apply.⁵⁴

§ 394. — Title of Purchaser

Subject to express statutory provisions and the effect of notice of irregularity or fraud to the purchaser, a purchaser of mortgaged property sold under a power of sale in the mortgage ordinarily obtains good title even though there was an irregularity in the execution of the power of sale.

A sale under a power contained in a chattel mortgage ordinarily is not invalidated as against a purchaser for value by an irregularity in the execution of the power of sale.⁵⁵ However, where a statute provides that a sale not in conformity with its provisions shall pass no title, it must be given effect in accordance with its terms.⁵⁶ Similarly, one who purchases at a private sale, with notice that a public sale is required by the terms of the mortgage, takes no title as against the mortgagor and those claiming under him;⁵⁷ and where a mortgage sale is conducted in such a manner as to be in fraud

of creditors, the purchaser, if he participates in such fraud, takes no title.⁵⁸ Where a tenant in common mortgages his interest in personalty, a purchaser of the whole property, with notice of the rights of the mortgagor's cotenants who retain possession, is liable for conversion.⁵⁹

§ 395. — Extinguishment of Lien

Although there is some authority to the contrary, in general a valid mortgage is not extinguished by an irregular sale.

In some jurisdictions, particularly where a statute so provides,⁶⁰ where the mortgagee takes possession of the property for the purpose of foreclosing and sells the property without a substantial compliance with the statute,⁶¹ or the terms of the mortgage,⁶² his lien is extinguished; but the more generally accepted rule is that a valid mortgage is not extinguished by an irregular sale, and that the purchaser succeeds to the rights of the mortgagee.⁶³ So, where the mortgagee took possession under the

could in caring for the property, on issue under insecurity clause.—*In re Nuccio's Will*, 195 N.Y.S. 593, 202 App.Div. 108.

(3) That foreclosing mortgage of restaurant equipment put mortgagor out of business, on question of bad faith or of special damage.—*Loza v. Osmola*, 181 N.E. 125, 279 Mass. 220.

Evidence held sufficient

(1) To warrant finding of conspiracy between mortgagee and third person to foreclose mortgage on laundry equipment, and to deprive mortgagors, absent from state, of their interest therein.—*Wettlin v. Jones*, 234 P. 515, 32 Wyo. 446, rehearing denied 236 P. 246, 236 P. 247, 32 Wyo. 446.

(2) Evidence held sufficient for submission to jury on question of whether mortgaged automobile on which there was default in payment under mortgage was fairly sold.—*Clark v. Studebaker Corporation of America*, 171 N.E. 602, 35 Ohio App. 54.

(3) Evidence that horse and wagon were wrongfully taken from owner when needed to make crop and sold under execution on mortgage and note secured thereby established damages.—*Polito v. Ferraro*, La.App., 155 So. 477.

Evidence held insufficient

(1) To support finding that defendant had no occasion to deem security unsafe.—*In re Nuccio's Will*, 195 N.Y.S. 593, 202 App.Div. 108.

(2) To show fraud or deceit in foreclosure of chattel mortgage which provided that mortgagee could sell mortgaged sheep at any time he felt himself unsafe and insecure.

—*Ramstetter v. MacGinnis*, 68 P.2d 454, 100 Colo. 494.

(3) To show conspiracy to commit wrongful act.—*Antoine v. Commonwealth Trust Co.*, 165 N.E. 12, 266 Mass. 202.

(4) Small number of bidders, possibly inadequate sum from sale, and failure to give notice by publication, where option to give written notice existed, is insufficient to show bad faith in foreclosing chattel mortgage.—*Loza v. Osmola*, 181 N.E. 125, 279 Mass. 220.

(5) Certificate filed after foreclosure sale by purchaser of property, in connection with the formation of a new corporation which stated the value of the property purchased to be an amount more than twice the sale price, is insufficient to show bad faith or negligence in foreclosing mortgage.—*Antoine v. Commonwealth Trust Co.*, supra.

54. Instructions

(1) Refusal to instruct to find for defendants if plaintiff did not tender omitted installments before foreclosure, after receiving defendants' attorney's letter that he was instructed to foreclose, is not error where defendant induced plaintiff to omit payments on mortgage.—*Kaller v. Spady*, 24 P.2d 351, 144 Or. 206.

(2) Instructions held erroneous.—*See Howard v. Hartman Furniture & Carpet Co.*, 208 Ill.App. 562.

55. Mass.—*Wasserman v. McDonnell*, 76 N.E. 959, 190 Mass. 326.
Tex.—*Lee C. Moore & Co. v. Jarecki Mfg. Co.*, Civ.App., 82 S.W.2d 1002, error refused.

56. S.D.—*Edmonds v. Riley*, 90 N. W. 139, 15 S.D. 470.
11 C.J. p 718 note 85.

57. Dak.—*Everett v. Buchanan*, 6 N. W. 439, 8 N.W. 31, 2 Dak. 249.

Second mortgagee

Where first chattel mortgagee takes property without mortgagor's objection and sells without foreclosing mortgage in legal manner, purchaser takes subject to second mortgage recorded prior to sale, and, after default, second chattel mortgagee may sue purchaser at sale by first chattel mortgagee not complying with statutes, for possession to foreclose mortgage.—*Parks v. Thompson & Wilkerson*, 264 P. 607, 129 Okl. 256.

58. Kan.—*Collingsworth v. Bell*, 43 P. 252, 56 Kan. 338.

59. N.Y.—*Van Doren v. Balty*, 11 Hun 239.

60. In Wisconsin, by virtue of statute, if the property is sold without proper notice to the mortgagor, or without filing an affidavit giving details of sale, the debt is deemed paid and the mortgage canceled.—*Banking Commission of Wisconsin v. Ray*, 253 N.W. 556, 214 Wis. 433.

61. Cal.—*Metheny v. Davis*, 290 P. 91, 107 Cal.App. 137.
11 C.J. p 707 note 9, p 718 note 89.

62. Cal.—*Metheny v. Davis*, supra.

63. Mont.—*A. H. Averill Machinery Co. v. Freebury Bros.*, 198 P. 130, 131, 59 Mont. 594, citing *Corpus Juris*.

Tenn.—*Tacker v. Mitchell*, 3 Tenn. App. 495.
11 C.J. p 718 note 90.

terms of his mortgage at the time of its execution, he does not lose his right to possession through the invalidity of a foreclosure sale at which he became the purchaser.⁶⁴ Further, a void foreclosure does not affect the title acquired by the mortgagee on breach of condition by the mortgagor.⁶⁵ However, the proceeds of a fraudulent sale for an inadequate price by a prior mortgagee will be treated as a voluntary payment in satisfaction of the prior mortgagee's lien, which leaves the lien of the subsequent mortgagee unimpaired.⁶⁶

§ 396. — Setting Aside Sale

Although a sale properly made under a mortgage will not be set aside, if it is prematurely made or is characterized by fraud or oppression it may be set aside. On a resale the purchaser at the first sale is entitled to bid and to apply on the purchase price the amount paid by him on the first sale.

A sale under a mortgage will not be set aside in equity, where the terms of the power of sale are pursued and no fraud or oppression is shown; but a sale which is prematurely made, or which is characterized by fraud or oppression,⁶⁷ may be set aside. If a sale was under a trust deed, it can be set aside only by a direct proceeding in a court of equity.⁶⁸ Where a sale on foreclosure is set aside and a resale ordered, the purchaser at the invalid sale should be permitted to bid at the resale, and to apply on the purchase price as much of the sum paid by him on the first purchase as remained after deducting what he received from sales of the property while in his hands.⁶⁹

§ 397. — Waiver of Irregularities

A mortgagor or those holding under him, including

a subsequent mortgagee, may waive irregularities in the foreclosure and sale of the mortgaged property.

If the mortgagor knowingly consents to, participates in, or ratifies a wrongful sale of the mortgaged property,⁷⁰ as where he purchases from the mortgagee a part of the chattels, which the latter had bought at the sale, or accepts from the mortgagee a voluntary payment of the difference between the amount of the debt and what the mortgagee realized from the chattels purchased at the sale,⁷¹ all irregularities are waived and the sale is equivalent to a foreclosure in proper form. However, it has been held that it is not a waiver that the mortgagor is present at the sale without objecting,⁷² or assents to a credit of the amount realized at the sale,⁷³ or accepts the surplus proceeds of the sale from the mortgagee,⁷⁴ or that he made no objection to the removal of the property and pointed out its location.⁷⁵ The purchaser may also be precluded by his conduct from attacking the validity of the sale,⁷⁶ and as between the junior and the senior mortgagee, the former may be estopped to object to the invalidity of the sale.⁷⁷ The mere fact that the mortgagor requested additional time after the sale in which to make redemption does not constitute a ratification of an illegal sale.⁷⁸ A second chattel mortgagee who through agents participates in the sale under the first mortgage is estopped to dispute the title acquired at the sale, even though the holder of the first mortgage is the purchaser.⁷⁹ It is not necessary that a mortgagor challenging the validity of the foreclosure bring his action for relief prior to the sale.⁸⁰

64. Mont.—James v. Speer, 220 P. 535, 69 Mont. 100.
Utah.—Park v. Parsons, 37 P. 570, 10 Utah 330.

Mortgagee has right to replevy property from stranger.—A. H. Averill Machinery Co. v. Freebury Bros., 198 P. 130, 59 Mont. 594.

65. Or.—Jennings v. Weinberger, 146 P. 1087, 75 Or. 556.

66. N.Y.—Fells v. Globe Candle Co., 300 N.Y.S. 659, 253 App.Div. 729.

67. Ala.—Henderson Law Co. v. Wilson, 49 So. 845, 161 Ala. 504.

In absence of evidence in record, court cannot say that setting aside sale was improper for not requiring mortgagor to pay amount due.—Kapalos v. Ganes, 242 Ill.App. 302.

68. Mo.—Haeussler v. Missouri Glass Co., 52 Mo. 452.

69. Mich.—Smitton v. Seibert, 99 N. W. 381, 136 Mich. 410.

70. Mo.—Berry v. Cobb, 20 S.W.2d 296, 223 Mo.App. 934.

- N.J.—Mausert v. Mutual Distributing Co., 104 A. 203, 92 N.J.Law 190.
11 C.J. p 717 note 70, p 718 note 1.

Intervention under statute is sufficient to reclaim property from illegal chattel mortgage sale.—Exchange Nat. Bank v. Palace Car Co., 1 La.App. 307.

Mode of assent to sale

- (1) Assent may be express.—Nance v. King, 101 S.E. 212, 178 N. C. 574.

- (2) Assent may be implied.—Reed v. Byrnes, 169 So. 576, 185 La. 569.

Statutory penalty

Where mortgagor consented to the sale of mortgaged property under chattel mortgage, mortgagor could not recover penalty on the mortgage notes being held void, under St.1915 § 2316c, the taking not being hostile to mortgagors.—Jones v. Brandt, 181 N.W. 813, 173 Wis. 539.

71. N.J.—Mausert v. Mutual Dis-

- tributing Co., 104 A. 203, 92 N.J. Law 190.

72. Mich.—Canning v. Harlan, 15 N. W. 492, 50 Mich. 320.

73. N.Y.—Mumford v. Crouch, 40 N. Y.S. 878, 8 App.Div. 529, affirmed 49 N.E. 1100, 154 N.Y. 737.

74. Mass.—Bennett v. Bailey, 22 N. E. 916, 150 Mass. 257.

- 11 C.J. p 719 note 5.

75. Wis.—American Hardware Co. v. Moore, 187 N.W. 996, 177 Wis. 190.

76. Neb.—Undeland v. Stanfield, 73 N.W. 459, 53 Neb. 120.

- 11 C.J. p 719 note 6.

77. Iowa.—Tollerton, etc., Co. v. Anderson, 73 N.W. 822, 108 Iowa 217.

- 11 C.J. p 719 note 7.

78. Minn.—State Bank of Loretto v. Loose, 269 N.W. 399, 198 Minn. 222.

79. Mo.—Weber Impl. Co. v. Dunard, 120 S.W. 608, 140 Mo.App. 476.

80. Idaho.—Gropp v. Huyette, 208 P. 848, 35 Idaho 683.

C. ACTIONS TO FORECLOSE

§ 398. In General

Generally, actions to foreclose mortgages are cognizable in equity.

A mortgage may be foreclosed by action, even though it does not contain a power of sale.⁸¹

While the form of procedure is sometimes regulated by statutes,⁸² under which an ordinary foreclosure proceeding is sometimes made an action at law,⁸³ proceedings to foreclose a mortgage are properly cognizable in equity,⁸⁴ a question belonging thereto being presented,⁸⁵ as where there are successive encumbrances;⁸⁶ and the court may transfer such cause from the law to the equity side of the docket of its own motion.⁸⁷ The fact that a remedy at law exists, unless such remedy is adequate, will not debar equitable relief of this nature,⁸⁸ but, where the legal remedy of foreclosure is adequate, a mortgage cannot be foreclosed in equity.⁸⁹ A defendant cannot, by demanding legal damages, divest the court of equitable jurisdiction to foreclose.⁹⁰

Although it has been held that, if a mortgage fails to express the intention of the parties, it should be reformed in some tribunal having jurisdiction to grant such relief before attempting to foreclose it,⁹¹ a mortgage may be foreclosed by a suit in equity without a separate suit first being brought to reform the mortgage so as to correct a mistake in the description of the indebtedness secured, the reformation being granted as part of the relief in the foreclosure suit if the pleadings justify it,⁹² and, where a note secured by the mortgage is not paid or discharged, although returned to the maker by mistake, the holder may foreclose according to the terms of the mortgage without preliminary action in equity.⁹³ However, a verbal agreement to execute a mortgage cannot be enforced by a suit seeking specific performance and foreclosure.⁹⁴

Nature of proceeding. A foreclosure suit in its usual form is partly an action in rem, for the seizure and sale of the property, and partly an action

81. Tex.—Bailey v. Culver, Civ.App., 175 S.W. 1083.

82. Ky.—Cartwright v. C. I. T. Corporation, 70 S.W.2d 338, 253 Ky. 690.

11 C.J. p 719 note 10.

Mortgagor obtaining possession by order of delivery

Where mortgagor obtained possession of automobile by order of delivery before mortgagee repossessing it had reasonable time to dispose of it, court should have adjudged entire case and procedure prescribed for enforcement of liens and application of proceeds of judicial sale was applicable.—Cartwright v. C. I. T. Corporation, supra.

Revival by short order proceeding

Where a mortgage foreclosure proceeding is void ab initio, it cannot be revived by a short order proceeding for a sale of the property as provided by statute.—Bacon v. Hanesley, 97 S.E. 101, 22 Ga.App. 704.

83. Mo.—Nichols & Shepard Co. v. Stokes, App., 196 S.W. 1075. 11 C.J. p 720 note 17.

84. Ala.—Hanson v. Luther, 156 So. 771, 229 Ala. 256—J. E. Butler & Co. v. A. G. Henry & Co., 79 So. 630, 202 Ala. 155—Tucker v. Pilcher, 75 So. 171, 199 Ala. 609. Ark.—McKinney v. New Rocky Grocery Co., 3 S.W.2d 295, 176 Ark. 463.

Mo.—S. F. Bowser & Co. v. Hartnett, 273 S.W. 420, 217 Mo.App. 147—Schloss v. Dattilo, 198 S.W. 1137, 197 Mo.App. 656—Nichols & Shepard Co. v. Stokes, App., 196 S.W.

1075—Commerce Trust Co. v. White, 158 S.W. 457, 172 Mo.App. 537.

S.C.—Judson Mills v. Norris, 164 S. E. 919, 166 S.C. 422.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

11 C.J. p 719 note 11.

Alternative aspects

A bill may have equity to foreclose a mortgage on land and personally, even though treated as a chattel mortgage because of ambiguity in the description of the realty, although it seeks a reformation of such description.—Reeves v. Thompson, 142 So. 663, 225 Ala. 204, citing Corpus Juris.

Not special proceeding

A mortgage foreclosure suit is an equitable action and not a special proceeding.—Schmaling v. Johnston, 13 P.2d 1111, 54 Nev. 293, affirmed 27 P.2d 1059, 55 Nev. 164.

Inherently a matter of equity jurisdiction

In the absence of any controlling statute the foreclosure of a mortgage is inherently a matter of equity jurisdiction.—McCormick v. Hartley, 6 N.E. 357, 107 Ind. 248.

Issue of law

An action to foreclose a mortgage is a suit in equity and cannot be transformed into an action at law by merely raising an issue of law as a defense.—Gresens v. Martin, 145 N. W. 823, 27 N.D. 231.

85. Mo.—Schloss v. Dattilo, 198 S. W. 1137, 197 Mo.App. 656.

86. Mo.—S. F. Bowser & Co. v. Hartnett, 273 S.W. 420, 217 Mo. App. 147.

11 C.J. p 719 note 12.

87. Ky.—Jones v. Jones, 112 S.W. 650, 33 Ky.L. 1036.

88. Ala.—Ingram v. Roberts, Euther & Co., 140 So. 369, 224 Ala. 314.

Kan.—Tri-State Auto Supply Co. v. Cochran, 250 P. 283, 121 Kan. 825. 11 C.J. p 719 note 14.

89. Ala.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340.

Me.—Gallagher v. Aroostook Federation of Farmers, 197 A. 554. 11 C.J. p 720 note 15.

Property in hands of defendant

Where creditor is secured by mortgage which passes legal title to him, he has adequate remedy at law, and, unless he can show that trust property or some part thereof is in hands of defendant, so that processes of court may reach property itself, or some part thereof, and foreclose thereon, courts of equity will not intervene.—Leeth Nat. Bank v. Elrod, 172 So. 104, 233 Ala. 340.

90. Mont.—Clark v. Baker, 9 P. 911, 6 Mont. 153.

91. N.Y.—Weisl v. James, 120 N.Y. S. 47.

92. Wash.—First Nat. Bank v. Oppenheimer, 212 P. 164, 123 Wash. 290.

93. Mo.—Goodin Mercantile Co. v. Organ, App., 186 S.W. 589.

94. Ind.—Baddeley v. Patterson, 78 Ind. 157.

in personam, for the ascertainment of the debt of the mortgage debtor, and obtaining a personal judgment against him,⁹⁵ and, where no personal judgment is sought, a suit to foreclose a mortgage is essentially a proceeding in rem.⁹⁶ However, a suit on a note and for foreclosure of a mortgage securing it has been held not a proceeding in rem, the foreclosure of the lien being merely incidental to the principal obligation.⁹⁷

§ 399. Conditions Precedent

It is sometimes a condition precedent to an action to foreclose a mortgage that the mortgagee make a demand for the amount due, file a notice of the intended foreclosure, file or deliver a verified statement of the account, or that a certain percentage of the mortgagee bondholders request a foreclosure.

A statute requiring a demand, where it relates only to summary foreclosure by notice and sale, is not applicable to foreclosure by action;⁹⁸ and after a breach of the conditions of the mortgage, whereby the right to an action to foreclose the same accrues, no demand is necessary as a preliminary to the suit;⁹⁹ but, where it is sought to foreclose a chattel mortgage, given to secure the payment of a note due on demand, the note and mortgage are to be considered and construed together, and a previous demand for payment is necessary.¹

In some jurisdictions a notice of the intended foreclosure must be recorded in a prescribed place and within a certain time, in order to foreclose a mortgage by action.² The notice need not be indexed, however,³ nor is it necessary to record the notice, if the mortgage is valid without being recorded.⁴

A mortgagee need not remove the property from the building in which it is installed, thus destroying its value in a substantial part in order merely to foreclose the mortgage.⁵ The jurisdiction of the court to render judgment is not conditioned on

plaintiff's taking possession of the property under a warrant of seizure, notwithstanding such seizure is authorized by statute.⁶

Where a mortgagee procured an execution sale of chattels under a personal judgment on notes secured by a mortgage, he must refund the sale price with interest to the purchaser as a condition precedent to foreclosure of a mortgage on such chattels.⁷

Ascertainment or statement of amount due. A statute requiring the mortgagee to make and deliver to the mortgagor a verified statement of his account, showing each item, etc., has been held not applicable where the debt secured is a note on which no payment has been made;⁸ nor is it applicable where the chattel mortgage is additional security to a note secured by a mortgage on land, where the land is foreclosed leaving a deficiency,⁹ and such a requirement may be waived.¹⁰

It is not a condition precedent to an action to foreclose a mortgage, given to secure the performance of a contract, that the damages for breach of the contract should be ascertained, the foreclosure necessarily involving a determination as to the amount for which it should be awarded.¹¹

Request by bondholders. A provision that a foreclosure shall not be had until a certain portion of the mortgagee bondholders so request does not render the mortgage void.¹²

§ 400. Defenses

Generally, anything tending to defeat the mortgagee's right to foreclose may be set up as a defense to an action to foreclose, and in proper cases the mortgagor may interpose a set-off or counterclaim.

In the absence of an estoppel,¹³ anything tending to defeat the mortgagee's right to foreclose may be shown in defense to an action to foreclose.¹⁴ For example, it may be shown that the mortgagee is estopped to foreclose,¹⁵ that the mortgage debt

95. Ala.—Hall v. Milligan, 128 So. 438, 221 Ala. 233, 69 A.L.R. 618.

96. Ala.—Hall v. Milligan, supra.

97. Ariz.—Sargent v. Sarival Storage Co., 236 P. 468, 28 Ariz. 152.

98. Idaho.—Colorado Nat. Bank of Denver v. Meadow Creek Live Stock Co., 211 P. 1076, 36 Idaho 509.

99. Ga.—Willis v. Jefferson, 75 Ga. 743.

11 C.J. p 720 note 26.

1. Ill.—Slingo v. Steele-Wedeles Co., 82 Ill.App. 139.

2. Mass.—Reade v. Woburn Nat. Bank, 97 N.E. 773, 211 Mass. 320.

11 C.J. p 720 note 28.

3. Mass.—Burtis v. Bradford, 122 Mass. 129.

4. Mass.—Frost v. George, 63 N.E. 888, 181 Mass. 271—Taber v. Hamlin, 97 Mass. 489, 93 Am.D. 113.

5. Wash.—Pollock v. Ives Theatres, 24 P.2d 396, 174 Wash. 65.

6. N.D.—Workman v. Salzer Lumber Co., 199 N.W. 769, 51 N.D. 280.

7. Ohio.—Hauelsen v. Szalay, 169 N. E. 602, 33 Ohio App. 350.

8. Ark.—Ford Hardwood Lumber Co. v. Bryant, 13 S.W.2d 1, 178 Ark. 807—Perry County Bank v. Rankin, 84 S.W. 725, 73 Ark. 589.

9. Ark.—Van Pelt v. Russell, 203 S.W. 267, 134 Ark. 236.

10. Ark.—Haffke v. Hempstead County Bank & Trust Co., 263 S.W. 395, 165 Ark. 158.

11. Wash.—Hopkins v. Crane, 97 P. 772, 50 Wash. 636.

12. Mo.—Hasbrouck v. Rich, 88 S. W. 131, 113 Mo.App. 389.

13. Tex.—Peyton v. Sturgis, Civ. App., 202 S.W. 205.
Wash.—Lee v. Swanson, 69 P.2d 824, 190 Wash. 580.

14. Tex.—Wilson v. Wilson, Civ. App., 21 S.W.2d 1084.
11 C.J. p 721 note 43.

Laches in foreclosing held no defense.—Vilbig v. Faison, Tex.Civ. App., 296 S.W. 669.

15. Tex.—Wilson v. Wilson, Civ. App., 21 S.W.2d 1084.
11 C.J. p 721 note 44.

Estoppel not shown

(1) Where a mortgagee agreed, "in

has been discharged,¹⁶ or that the mortgage is invalid for nondelivery or for lack of acceptance by the mortgagee,¹⁷ for want or failure of consideration,¹⁸ or for fraud.¹⁹

It is no defense that the mortgagee has violated collateral promises to the mortgagor,²⁰ or that the goods covered by the mortgage did not correspond with the samples shown defendant,²¹ or that the chattel mortgage erroneously set up the giving of two instead of a single note to secure the debt;²² and a mortgagee of crops has been held not barred from foreclosing his mortgage by the mortgagor's want of title to the land and title outstanding in a third person not a party to the suit.²³

A settlement of the controversy by the mortgagor and the mortgagee will not bind other nonconsenting parties to the foreclosure suit.²⁴ Personal defenses can be interposed only by those whom they concern.²⁵ Also, the junior mortgagee cannot make defenses to the foreclosure of the senior mortgage, unless the matters set up in some way concern his rights.²⁶ In a proceeding by an assignee to foreclose the mortgage, all defenses which might have been urged against the mortgagee may be set up against his assignee.²⁷

Set-off and counterclaim. In the absence of statutory provisions to the contrary, the mortgagor may generally offset against his indebtedness whatever damages he has sustained which have arisen out

of the transaction involved.²⁸ While, in some jurisdictions, sometimes by virtue of statutory provisions, a claim for conversion has been held not a proper counterclaim in an action to foreclose a chattel mortgage,²⁹ in other jurisdictions the contrary rule prevails.³⁰ However, an injury to the credit of the mortgagor by the mortgagee's act, without right, in causing the property to be transferred to the mortgagee has been held not to constitute a basis for the recovery of damages by way of counterclaim; nor can the mortgagor counterclaim for speculative damages because of such act.³¹ A counterclaim for damages resulting from the commencement of the action, by taking over the property in the course of the suit, and by threats of suit, has been held improper as not existing at the commencement of the action.³²

§ 401. Jurisdiction and Venue

Generally an action to foreclose a mortgage may be brought in any court having equitable powers which has jurisdiction over the person of the mortgagor, provided the court has cognizance of such proceedings; and the statutes as to the venue of the action must be complied with.

A mortgage may be foreclosed by an action in a court of record;³³ and an equitable action to foreclose a mortgage may be brought in any court with equity powers which has jurisdiction over the person of the mortgagor without regard to the locus of the mortgaged property,³⁴ even though it is in a

consideration of this agreement, and what hereafter follows, to withdraw foreclosure proceedings," etc., followed by a covenant on part of mortgagor to use beer of mortgagee in a certain city, he was not estopped from subsequently proceeding with the foreclosure, where mortgagor failed to use mortgagee's beer as agreed.—*Mission Brewing Co. v. Rickert*, 179 P. 720, 39 Cal.App. 668.

(2) Holder of mortgage is not estopped from seeking foreclosure against defendants converting mortgaged live stock by having recovered against another for foreclosure of same property.—*Wilson v. Wilson*, Tex.Civ.App., 21 S.W.2d 1084.

16. Alaska.—*Harry Gong & Co. v. Mt. Baker Packing Co.*, 7 Alaska 1. 11 C.J. p 721 note 45.

Prior taking and sale

Plaintiff's act of taking possession and proceeding to sell mortgaged chattel without reasonable cause is ground of defense to foreclosure under insecurity clause.—*Harry Gong & Co. v. Mt. Baker Packing Co.*, supra.

17. Tex.—*Whitaker v. Sanders*, Civ. App., 52 S.W. 638.

18. Ga.—*Smith v. Walker*, 18 S.E. 830, 93 Ga. 253.

11 C.J. p 721 note 47.

19. Or.—*Smith v. Aplanalp*, 267 P. 1070, 126 Or. 213.

11 C.J. p 721 note 48.

20. Ark.—*Robards v. Cooper*, 16 Ark. 238.

11 C.J. p 721 note 49.

21. N.Y.—*Wallace v. Leoni*, 104 N.Y.S. 392.

11 C.J. p 721 note 50.

22. Tex.—*Bailey v. Culver*, Civ. App., 175 S.W. 1083.

23. Ga.—*Chatham Chemical Co. v. Vidalia Chemical Co.*, 136 S.E. 62, 163 Ga. 276.

24. N.Y.—*Shepard, etc., Lumber Co. v. Hurd*, 66 N.Y.S. 766, 55 App.Div. 627, 8 N.Y. Ann. Cas. 264.

25. U.S.—*New York Cent. Trust Co. v. Worcester Cycle Mfg. Co.*, C.C. Mass., 110 F. 491.

11 C.J. p 721 note 53.

26. Cal.—*Schehr v. Berkey*, 135 P. 41, 166 Cal. 157.

11 C.J. p 721 note 54.

27. Ill.—*Christoffel v. Lee*, 153 Ill. App. 395.

Equities and defenses between orig-

inal parties generally see supra § 322.

28. Idaho.—*West v. Prater*, 67 P.2d 273, 57 Idaho 583.

Breach of warranty

In replevin action to foreclose mortgage on chattels purchased by defendant, defendant under general denial may prove damages from breach of warranty as offset to show that plaintiff's debt to him was equal to his debt to plaintiff.—*Securities Inv. Corporation v. Krejci*, 271 N.W. 287, 132 Neb. 146.

29. Wash.—*First Nat. Bank v. Fowler*, 102 P. 1038, 54 Wash. 65.

30. Tex.—*West Texas Utilities Co. v. Nunnally*, Civ.App., 10 S.W.2d 391.

31. Ariz.—*Crosby v. Murray*, 210 P. 1046, 24 Ariz. 446.

32. Mont.—*Griffiths v. Thrasher*, 26 P.2d 995, 95 Mont. 210.

33. N.Y.—*Marcus v. Sherr*, 230 N.Y.S. 425, 132 Misc. 734.

34. Ala.—*Hall v. Milligan*, 128 So. 438, 221 Ala. 233, 69 A.L.R. 618.

Utah.—*Emerson-Brantingham Implement Co. v. Giles*, 174 P. 181, 53 Utah 539.

11 C.J. p 721 note 56.

state other than that where the mortgage was executed.³⁵ The action must of course be brought in courts having cognizance of such proceedings, and in courts of inferior jurisdiction the power must have been specially conferred.³⁶ Under some statutes jurisdiction depends on the value of the property in controversy.³⁷

Venue. The requirements of the statutes as to the venue of the action must be complied with,³⁸ and the pleadings must contain sufficient averments of venue.³⁹ In some jurisdictions it is provided by statute that such action must be brought in the county where the mortgage is filed,⁴⁰ or where the notes are payable,⁴¹ or where the property is situated;⁴² but, even though the statute authorizes the suit in the county where the property is situated, this does not necessarily confine the foreclosure proceeding to such venue.⁴³ The action may be brought in the county where defendant may be summoned⁴⁴ and in a court of equity, notwithstanding the statute provides for a foreclosure by an action at law in the county where the mortgage was filed.⁴⁵

§ 402. Limitations and Laches

The right to foreclose a chattel mortgage may be barred after the lapse of the period within which an action may be brought for the possession of the property or to collect the mortgage debt.

While it has been held that the mortgagee need not foreclose within a certain time after taking possession of the mortgaged chattel on condition broken,⁴⁶ on analogy to the statute of limitations, it has been held that the right to foreclose is barred after the lapse of the period within which an action at law may be brought for the possession of the property⁴⁷ or to collect the mortgage debt.⁴⁸ Conversely, the mortgagee is not barred by his laches in bringing a suit to foreclose, until his right to enforce payment of the debt has expired at law.⁴⁹ Where no time of payment is designated, the indebtedness is payable within a reasonable time and the mortgage must be foreclosed within a reasonable time.⁵⁰

The statutory period does not begin to run until the time of forfeiture,⁵¹ and not even after the forfeiture, as long as the possession of the mortgagor is permissive and not adverse to the rights of the mortgagee.⁵² However, it has also been held that delay for a shorter time tends to raise a presumption that the mortgage debt is satisfied.⁵³ Where the mortgage is payable by installments, the statute does not commence to run until the last installment falls due.⁵⁴ Where the maker of a note gives a chattel mortgage to indemnify a surety and subsequently transfers the property to a corporation organized to take over his business, the statute of limitations does not run in favor of the corporation, by

Property temporarily in another state

The passing of title to personal property to a mortgagee for breach of condition of the mortgage, confirmed by decree of a court of competent jurisdiction, was no less effective with respect to a locomotive engine which constituted a part of the property because at the time of such passing of title the engine, which was in use in the interstate business of the mortgagor, chanced to be temporarily in another state than that of its permanent situs and where it was owned, and it was not thereafter subject to attachment in the foreign state by creditors of the mortgagor.—*North Carolina Land, etc., Co. v. Boyer, Tenn.*, 191 F. 552, 112 C.C.A. 162, 39 L.R.A., N.S., 627.

35. Fla.—*Carter v. Bennett*, 6 Fla. 214.
11 C.J. p 721 note 57.

36. Mo.—*O'Fallon v. Elliott*, 1 Mo. 364.
11 C.J. p 721 note 58.

37. N.Y.—*Marcus v. Sherr*, 230 N.Y. S. 425, 132 Misc. 734.
11 C.J. p 721 note 59.

38. Ga.—*Brown v. Greer*, 13 Ga. 285 —*Guerard v. Polhill, R. M. Charlt.* 237.

39. Tex.—*McDaniel v. Staples*, Civ. App., 113 S.W. 596.

40. Or.—*Commercial Nat. Bank v. Davidson*, 22 P. 517, 18 Or. 57.

41. Tex.—*Mathews v. Denison*, 1 Tex.A.Civ.Cas. § 1256.
11 C.J. p 722 note 63.

42. Tex.—*Barcus v. J. I. Case Threshing Mach. Co.*, Civ.App., 197 S.W. 478, dismissed for want of jurisdiction.

Part of property removed

Under Comp.St. § 6379, providing that the mortgage may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated, an action to foreclose a mortgage as to property partly converted, and removed to a different county, is properly brought in the county where the remaining property is situated.—*Berg v. Carey*, 232 P. 904, 40 Idaho 278.

43. Tex.—*McDaniel v. Staples*, Civ. App., 113 S.W. 596.

44. Okl.—*Widick v. Phillips Petroleum Co.*, 49 P.2d 132, 173 Okl. 325, 104 A.L.R. 228.

45. Or.—*Commercial Nat. Bank v. Davidson*, 22 P. 517, 18 Or. 57—*Jacobs v. McCalley*, 8 Or. 124.

46. S.C.—*General Motors Acceptance Corporation v. Hanahan*, 143 S.E. 820, 146 S.C. 257.

47. Ark.—*Ewell v. Tidwell*, 20 Ark. 136.
11 C.J. p 720 note 34.

48. Wyo.—*Finance Corporation of Wyoming v. Commercial Credit Co.*, 283 P. 1100, 41 Wyo. 198.
11 C.J. p 720 note 35.

49. Ala.—*Boyd v. Beck*, 29 Ala. 703.
Ill.—*Magerstadt v. Harder*, 95 Ill. App. 303, reversed on other grounds 65 N.E. 225, 199 Ill. 271.

Ky.—*Hillman v. Morton*, 9 Ky.L. 198.

50. Colo.—*Anglo-American Mill Co. v. First Nat. Bank*, 230 P. 118, 76 Colo. 57.

51. Ala.—*Byrd v. McDaniel*, 33 Ala. 18.
N.C.—*Joyner v. Vincent*, 20 N.C. 535.

52. U.S.—*Smith v. Woolfolk, Ark.*, 5 S.Ct. 1177, 115 U.S. 143, 29 L.Ed. 357.
11 C.J. p 720 note 33.

53. Mich.—*Harkness v. Toulmin*, 25 Mich. 80.
11 C.J. p 720 note 39.

54. U.S.—*Louisiana Union Bank v. Stafford, Tex.*, 12 How. 327, 13 L. Ed. 1008.

reason of its holding the property, as against the right of the payee to enforce the mortgage,⁵⁵ since the mere possession and use of the property by the corporation in such case is not inconsistent with the terms and legal effect of the mortgage.⁵⁶

Limitation as to credits. The lapse of time may preclude defendant from setting up a claim for alleged credits.⁵⁷

§ 403. Parties

Generally, all persons interested in the mortgaged property are proper parties to a foreclosure action; and such persons may intervene provided they come within the rules, if any, relating thereto laid down by statute.

In a proceeding in equity to foreclose a chattel mortgage all persons interested in the property should be made parties⁵⁸ and are proper parties.⁵⁹ The original beneficiary in a trust deed is not a proper party where he has parted with his interest in the deed.⁶⁰

The discussion as to what persons are entitled to foreclose a chattel mortgage will be found *supra* § 355.

Defendants. The general rule in regard to parties defendant is that all persons against whom the

mortgagee seeks judgment are necessary parties to an action to foreclose,⁶¹ and every person who claims a part of the property in his own right and holds possession thereof is properly joined as defendant.⁶² The mortgagor, if he retains an interest in the property, is a necessary party defendant;⁶³ but the mortgagor is not a necessary party where he has parted with his entire interest in the property,⁶⁴ unless it is intended to enforce personal liability on the debt against the mortgagor⁶⁵ or his assignee.⁶⁶ If husband and wife executed the mortgage, the wife is a necessary party;⁶⁷ and plaintiff may join as defendants those liable on different notes secured by the same chattel mortgage, even though the mortgage is not executed by all of the defendants.⁶⁸

While purchasers of the mortgagor's equity in the chattels mortgaged are not only always proper parties,⁶⁹ but usually necessary parties as well,⁷⁰ it has also been held that such a purchaser is not a necessary party;⁷¹ and it has been held that the mortgagee has no duty to make one renting the chattels with knowledge of the pending foreclosure a party to the action.⁷²

Subsequent encumbrancers are proper but not

55. Tex.—Ferrell-Michael Abstract, etc., Co. v. McCormac, Civ.App., 184 S.W. 1081, affirmed, Com.App., 215 S.W. 559.

56. Tex.—Ferrell-Michael Abstract, etc., Co. v. McCormac, *supra*.

57. Or.—Gabel v. Armstrong, 171 P. 190, 88 Or. 84.

58. Idaho.—Bank of Roberts v. Olaveson, 221 P. 563, 38 Idaho 234 —Bank of Roberts v. Olaveson, 221 P. 560, 38 Idaho 223.

N.Y.—Finkenberg v. Levinson, 182 N. Y.S. 18, 192 App.Div. 1.

11 C.J. p 722 note 67.

Mortgagee selling some of secured notes

Where chattel mortgagee sells some of the notes and assigns entire legal interest in mortgage to purchaser, mortgagee would be a "necessary party" in suit to foreclose mortgage.—Abrams v. Brown, 195 A. 810, 122 N.J.Eq. 563.

Mortgage of membership in association

Since a membership in the Western Associated Press can, under its by-laws, only be sold to publishers of newspapers, and a transfer of such membership would not entitle the transferee to the privileges of a member, unless voluntarily accorded him by the association, a bill will not be entertained to foreclose a mortgage on a certificate of membership in such association unless the

association is made a party defendant.—Metropolitan Nat. Bank v. St. Louis Dispatch Co., Mo., 13 S.Ct. 944, 149 U.S. 436, 37 L.Ed. 799, affirming, C.C., 36 F. 722.

59. Idaho.—Bank of Roberts v. Olaveson, 221 P. 563, 38 Idaho 234 —Bank of Roberts v. Olaveson, 221 P. 560, 38 Idaho 223.

11 C.J. p 722 note 68.

60. Ark.—Howell v. Walker, 164 S. W. 746, 111 Ark. 362.

61. Ala.—Blake v. Anniston City Nat. Bank, 73 So. 114, 197 Ala. 611.

Tex.—Northwest Engineering Co. v. Chadwick Machinery Co., Civ.App., 93 S.W.2d 1223, error dismissed.

11 C.J. p 722 note 71.

62. Idaho.—Bank of Roberts v. Olaveson, 221 P. 563, 38 Idaho 234 —Bank of Roberts v. Olaveson, 221 P. 560, 38 Idaho 223, quoting *Corpus Juris*.

N.D.—First Nat. Bank v. Kling, 257 N.W. 631, 65 N.D. 264.

Tex.—Carey v. Sheets, Civ.App., 109 S.W.2d 732.

11 C.J. p 722 note 72.

Corpus Juris is cited by analogy as to the proper parties to an action to foreclose a threshing lien in Golly v. Kiner, 197 N.W. 883, 884, 50 N.D. 800.

63. Idaho.—Bank of Roberts v. Olaveson, 221 P. 563, 38 Idaho 234 —Bank of Roberts v. Olaveson, 221 P. 560, 38 Idaho 223.

Tex.—Holmes v. Klein, Civ.App., 59 S.W.2d 171, error dismissed.

11 C.J. p 722 note 73.

64. Fla.—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35.

Tex.—Smith v. Wall, Civ.App., 230 S. W. 759—Smith v. Coburn, Civ. App., 222 S.W. 344.

Wash.—Lee v. Swanson, 69 P.2d 824, 190 Wash. 580.

11 C.J. p 722 note 74.

65. Ala.—Tucker v. Pilcher, 75 So. 171, 199 Ala. 609.

Wash.—Lee v. Swanson, 69 P.2d 824, 190 Wash. 580.

11 C.J. p 722 note 75.

66. Ala.—Hamilton v. Clancy, 72 So. 15, 196 Ala. 194.

67. Fla.—Daniels v. Henderson, 5 Fla. 452.

68. Tex.—Coleman Nat. Bank v. Cathey, Civ.App., 185 S.W. 661.

69. Mich.—Javas v. Sackos, 220 N. W. 769, 243 Mich. 495.

11 C.J. p 722 note 77.

70. Wash.—Bollen v. Wilson Creek Union Grain, etc., Co., 156 P. 404, 90 Wash. 400.

11 C.J. p 722 note 78.

71. Mich.—Javas v. Sackos, 220 N. W. 769, 243 Mich. 495.

72. Tex.—Poole v. Frank, Civ.App., 11 S.W.2d 611.

necessary parties;⁷³ and the same distinction has been made in regard to creditors of the mortgagor and public officers who have seized the mortgaged property on execution,⁷⁴ and persons who have wrongfully converted the mortgaged property to their own use.⁷⁵ Also, a prior lienholder,⁷⁶ or a prior encumbrancer who has authorized the mortgagor to execute a subsequent mortgage,⁷⁷ is not a necessary party.

It is both unnecessary and improper to join as parties defendant persons who have no interest in the mortgaged property and who cannot be affected by a decree in the proceeding.⁷⁸ It has also been held that guarantors of the debt are not proper parties to the action.⁷⁹ So, where the mortgage notes have been transferred by an indorsement imposing liability on the payee only after all security has been exhausted, the payee is not a proper defendant in proceedings to foreclose the mortgage.⁸⁰

Legatees of a mortgagor who dies pending an ac-

tion to foreclose are not necessary parties.⁸¹

Intervention. Where the right to intervene is regulated by statute, third persons must be within the meaning thereof in order to be entitled to intervene;⁸² and one renting the mortgaged chattels from the mortgagor with knowledge of the foreclosure suit has a duty to intervene and set up whatever right he may have acquired.⁸³ Claimants of the mortgaged property, whether claiming as owners⁸⁴ or as attaching,⁸⁵ judgment,⁸⁶ or other lien,⁸⁷ creditors, may intervene in an action to foreclose; but general creditors cannot do so,⁸⁸ unless in a case where it is alleged that the foreclosure is collusive.⁸⁹ A junior encumbrancer may also be made a party to a foreclosure suit on his own application,⁹⁰ under proper circumstances,⁹¹ but after final decree an order requiring plaintiff to add new parties is irregular.⁹²

The intervenor is not entitled to litigate any question pending between the other parties,⁹³ and

73. Fla.—McCoy v. Boley, 21 Fla. 803.

11 C.J. p 723 note 79.

74. Or.—Williamson v. Johnson, 195 P. 562, 99 Or. 336.

11 C.J. p 723 note 80.

Sheriff was properly made a party defendant to a suit to foreclose a chattel mortgage, plaintiff seeking to restrain him from selling the mortgaged property on execution under a judgment in favor of another creditor, as against the objection that the remedy by way of replevin was adequate, and that Or.L. § 10184, provides for foreclosure of a chattel mortgage by an action at law.—Williamson v. Johnson, 195 P. 562, 99 Or. 336.

75. Wash.—German-American State Bank v. Seattle Grain Co., 154 P. 443, 89 Wash. 376.

11 C.J. p 723 note 81.

76. Tex.—Smith v. First Nat. Bank, Civ.App., 114 S.W.2d 317.

77. Ky.—Foulks v. Ritter, 6 Ky.Op. 233.

78. Ala.—J. E. Butler & Co. v. A. G. Henry & Co., 79 So. 630, 202 Ala. 155.

Tex.—Moore v. B. & M. Chevrolet Co., Civ.App., 72 S.W.2d 945.

11 C.J. p 723 note 82.

79. Wis.—Borden v. Gilbert, 13 Wis. 670.

80. N.D.—Smith v. Show, 112 N.W. 1062, 16 N.D. 306.

81. Ark.—Johnson v. Meyer, 16 S.W. 123, 54 Ark. 442.

82. Ky.—Vanmeter v. Fidelity Trust & Safety-Vault Co., 53 S.W. 10, 107 Ky. 108, 21 Ky.L. 744.

Claim of right or interest in property or proceeds

Under Civ.Code Pract. § 29, provid-

ing that in an action to recover real or personal property, or to enforce a lien thereon, "any person claiming a right to or interest in the property or its proceeds" may intervene, one who seeks to set aside a deed to land cannot intervene in an action brought by the grantee to enforce a chattel mortgage executed to secure the rent accruing on a lease of the land executed by him, although the prayer of the intervening petition be that the rent be adjudged to the intervenor.—Vanmeter v. Fidelity Trust & Safety-Vault Co., supra.

83. Tex.—Poole v. Frank, Civ.App., 11 S.W.2d 611.

84. Neb.—McConniff v. Van Dusen, 77 N.W. 348, 57 Neb. 49.

Okl.—Boatman's Bank v. Rogers, 57 P.2d 860, 177 Okl. 85.

11 C.J. p 723 note 88.

Where property sold by officer

One claiming to be owner of property seized by sheriff under writ of replevin in action to foreclose chattel mortgage may, by permission of court, while action is pending, file petition in intervention, and thereby invoke jurisdiction of court to determine interest of intervenor in property seized, notwithstanding it has been sold by plaintiffs.—Boatman's Bank v. Rogers, supra.

85. Wash.—Dungeness Logging Co. v. Oregon, etc., R. Co., 118 P. 825, 65 Wash. 631—Ephraim v. Kelleher, 29 P. 985, 4 Wash. 243, 18 L.R.A. 604.

86. Ga.—Standard Oil Co. v. R. D. Cole Mfg. Co., 33 S.E. 825, 108 Ga. 227.

11 C.J. p 723 note 90.

87. Tex.—Polk v. King, 43 S.W. 601, 19 Tex.Civ.App. 666.

11 C.J. p 723 note 91.

88. U.S.—Queenan v. Wiker, D.C. Okl., 21 F.Supp. 943.

Wash.—Hindman v. Great Western Coal Development & Mining Co., 92 P. 139, 47 Wash. 382.

11 C.J. p 723 note 92.

Rights as of date suit filed

The rights of general creditors seeking to intervene in a suit to foreclose a chattel mortgage on hotel equipment, and of an assignee of the mortgage and of the lessors of the hotel under a lease providing for a lien for rent, must be determined as of the date the suit was filed.—Queenan v. Wiker, D.C.Okl., 21 F. Supp. 943.

89. N.H.—Commonwealth Trust Co. v. Salem Light, etc., Co., 89 A. 452, 77 N.H. 146.

90. Iowa.—Parrott v. Hughes, 10 Iowa 459.

91. Tex.—Watkins v. Rockwall Citizens Nat. Bank, 115 S.W. 304, 53 Tex.Civ.App. 437.

Interest in rights and remedies involved

If applicant is interested merely in the thing in litigation, that is, the mortgaged property, and not in the particular rights, wrongs, or remedies involved, then he has no right to make himself a party; or if it does not appear that he will or may be affected prejudicially he has no right to make himself a party.—Watkins v. Rockwall Citizens Nat. Bank, supra.

92. Ky.—Jouitt v. Gaither, 6 T.B. Mon. 251.

93. Tex.—Beaumont Rice Mills v. Dishman, Civ.App., 72 S.W.2d 365, error refused.

may not question the validity of plaintiff's claim against defendant, nor file any answer thereto which denies or tends to deny its validity, but is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff.⁹⁴

The rights of a third person after decree of foreclosure has been granted the mortgagee are treated *infra* § 413.

§ 404. Process and Appearance

Personal service or service by publication, in accordance with statutes relating thereto, is sufficient in an action to foreclose a mortgage.

Where, by statute it is required that personal service of notice of the intention of the parties to institute a suit be made on the mortgagor, it is sufficient to hand the mortgagor a copy of the notice.⁹⁵ Where the suit is essentially one, in rem, as shown *supra* § 398, service by publication, when allowed by statute, is sufficient.⁹⁶ A citation and the officers' returns are not rendered defective by inclosing in parentheses a direction to deliver a certified copy of the petition to the named defendants.⁹⁷ Where the statute does not so require, notice of the proceedings need not be given the mortgagor at the time of issuing execution.⁹⁸

94. N.C.—Hill v. Patillo, 122 S.E. 306, 187 N.C. 531.

95. Fla.—Wynn v. Ely, 8 Fla. 232.

96. Ala.—Hall v. Milligan, 128 So. 438, 221 Ala. 233, 69 A.L.R. 618.

97. Tex.—Zihlman v. Yates, Civ. App., 91 S.W.2d 1167.

98. Ga.—Golden v. J. M. Easterling & Sons, 139 S.E. 102, 37 Ga.App. 172.

99. Cal.—Shank v. Blackburn, 200 P. 762, 53 Cal.App. 620.
11 C.J. p 723 note 99.

The complaint must contain the title of the action, the county and the court, the names of parties, a statement of facts constituting the cause of action, and a demand for the relief claimed.—Murphy v. Russell, 67 P. 421, 8 Idaho 133.

Renewal affidavit

In foreclosure of mortgage affidavit of renewal was not a necessary portion of the complaint, insufficiency of the affidavit being entirely a matter of defense.—Foorman v. Weber, 196 P. 147, 59 Mont. 594.

Complaint or petition held sufficient

(1) In general.
Cal.—Shank v. Blackburn, 200 P. 762, 53 Cal.App. 620.

Tex.—Howerton Finance Corporation v. Farmers' & Merchants' Nat. Bank of Abilene, Civ.App., 38 S.W. 2d 839—Edmondson v. Bishop, Civ. App., 32 S.W.2d 670.

(2) A complaint, alleging that de-

fendant for a valuable consideration executed and delivered to plaintiff the note and mortgage described, and that the sum of seven hundred dollars and interest is still unpaid thereon, sufficiently stated that plaintiff was the owner and holder of the note and mortgage at the commencement of the suit, and that indebtedness was due thereon.—Williamson v. Johnson, 195 P. 562, 99 Or. 336.

(3) Bill of surety on replevin bond to declare his security mortgage a valid lien, to foreclose it, and to redeem from former mortgage, merely stating that, being misinformed as to the legal effect of execution of supersedeas bond in the replevy suit, the surety entered satisfaction of the mortgage of record, although nothing had been paid thereon, did not show a cancellation, surrender, and satisfaction of the mortgage debt.—Searcy v. Shows, 85 So. 444, 204 Ala. 218.

Complaint or petition held insufficient

Ala.—People's Bank of Mobile v. Lenoir, 85 So. 487, 204 Ala. 236.
Ga.—Kern & Loeb v. Herring, 89 S. E. 829, 145 Ga. 776.

1. Cal.—Stringer v. Davis, 30 Cal. 318.
Ky.—Cooper v. McKee, 89 S.W. 203, 121 Ky. 287, 28 Ky.L. 270.
11 C.J. p 723 note 1.

2. N.J.—Gregory v. Cable, 26 N.J. Eq. 178.

§ 405. Pleading

- a. Bill or complaint
- b. Plea, answer, or cross complaint
- c. Amended and supplemental pleadings; bill of particulars
- d. Issues, proof, and variance

a. Bill or Complaint

The bill or complaint must allege every fact necessary to entitle plaintiff to relief, including the ownership of the debt, breach of the condition of the mortgage, and a description of the property, and must contain a prayer for relief.

In accordance with general rules, the bill or complaint must allege every fact necessary to entitle plaintiff to relief,⁹⁹ by direct averment,¹ although the fair and reasonable intendment of pleading will be allowed,² especially where objection is not made at the proper time.³ The mortgage should be copied in the petition or its effect should be set up,⁴ and it should be alleged that the mortgage debt is due and unpaid,⁵ and that there has been a default in the performance of the condition of the mortgage,⁶ unless foreclosure is sought under an insecurity clause.⁷ It is not necessary for plaintiff to anticipate the defenses of defendant.⁸

N.C.—J. F. White Co. v. Carroll, 59 S.E. 678, 146 N.C. 230.

11 C.J. p 724 note 2.

3. Minn.—Seibert v. Minneapolis, etc., R. Co., 59 N.W. 822, 58 Minn. 39.

11 C.J. p 724 note 3.

4. Ky.—Day, etc., Lumber Co. v. Stadler, 69 S.W. 712, 139 Ky. 587, 24 Ky.L. 640.

11 C.J. p 724 note 4.

5. Ga.—Kern & Loeb v. Herring, 89 S.E. 829, 145 Ga. 776.

11 C.J. p 724 note 5.

Payment held negatived

Tex.—Caraway v. Weathers, Civ. App., 258 S.W. 926.

Curing defect

Ind.—Baldwin v. Boyce, 51 N.E. 334, 152 Ind. 46.

6. Kan.—Cherryvale Inv. Co. v. Dillman, 11 P.2d 681, 135 Kan. 699.

11 C.J. p 724 note 6.

7. Alaska.—Harry' Gong & Co. v. Mt. Baker Packing Co., 7 Alaska 1.

Grounds of belief

Where, under an insecurity clause, the mortgagee seeks to foreclose before the maturity of the mortgage, it has been held not necessary that he set forth in his complaint the grounds of his belief that he is insecure.—Harry Gong & Co. v. Mt. Baker Packing Co., 7 Alaska 1.

8. Tex.—Blount v. Payne, Civ.App., 187 S.W. 990.

Record and notice. Compliance with recording acts must be averred where essential to the validity of the mortgage,⁹ for example, it must be shown that the mortgage was recorded in the proper county,¹⁰ and, where the mortgage is not recorded as required by statute, foreclosure cannot be maintained against the purchaser of the property unless facts showing that he had actual or constructive notice of the mortgage are alleged.¹¹ As between the parties, however, it is not necessary to allege that the mortgage was registered.¹²

Description of property. A bill for the foreclosure of a mortgage should show of what the property consists,¹³ and the mortgagor's title, or claim of title, to it,¹⁴ but the pleadings need not state the value of the property.¹⁵ While it has been stated that the bill should show that the property is within the jurisdiction of the court,¹⁶ in some states an equitable action to foreclose may be brought in any court having jurisdiction of the parties without regard to the locus of the mortgaged property, as shown *supra* § 401.

Right to sue. The bill must show that complainant is the owner of the debt secured,¹⁷ and, where complainant sues as assignee of the mortgage, he must set up the facts establishing his right to sue as such,¹⁸ including the manner in which he acquired title.¹⁹

Where a third person is joined as a person claiming an interest in the mortgaged property, his interest should plainly be shown by an appropriate averment.²⁰ So, where third persons are made parties

to an action to foreclose, for the purpose of charging them with the value of the property, sufficient facts must be alleged to show the ground of their liability.²¹

Prayer for relief. The bill or complaint must contain a proper prayer for relief,²² although it has been held that the prayer need not necessarily contain the word "foreclosure."²³

A petition in intervention, setting forth a claim and asking to have the lien declared superior to plaintiff's, has been held to state a cause of action where the mortgage set up by plaintiff was void on its face as to intervenor.²⁴

b. Plea, Answer, or Cross Complaint

The plea or answer must state what defenses are to be relied on, and, where special damages are claimed by defendant, they must be pleaded in order to be recovered.

Where a bill to foreclose a mortgage sets out facts on which defendant's claim as owner is based, the issue may be determined on the general demurrer, and in such case defendant need not file an answer.²⁵ Ordinarily, however, the plea, answer, or cross complaint must state clearly and precisely which allegations of the petition or complaint it admits as true,²⁶ which ones are denied,²⁷ and what defenses are to be relied on,²⁸ for it is a well settled principle of law that no defense is available unless properly set up by pleadings;²⁹ and, where defendant claims special damages, they must be pleaded in order to be recovered.³⁰ Where absence of notice is relied on by purchasers, they must

9. Ind.—Baldwin v. Boyce, 51 N.E. 334, 152 Ind. 46.

11 C.J. p 724 note 8.

10. Ind.—Stengel v. Boyce, 42 N.E. 905, 143 Ind. 642.

11 C.J. p 724 note 9.

11. Wash.—Smith v. Ellis, 21 P. 385, 3 Wash.T. 328.

12. Tex.—Blount v. Payne, Civ.App., 187 S.W. 990.

13. Cal.—Boob v. Hall, 40 P. 117, 107 Cal. 160.

11 C.J. p 724 note 12.

14. Cal.—Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380.

11 C.J. p 724 note 13.

Alleging execution of mortgage sufficient

Cal.—Rummelsburg v. McDonald, *supra*.

15. Cal.—Maddox v. Wyman, 28 P. 838, 92 Cal. 674.

Tex.—Bullard v. Stewart, 102 S.W. 174, 46 Tex.Civ.App. 49.

16. N.J.—Chapman v. Hunt, 14 N.J. Eq. 149.

11 C.J. p 724 note 14.

17. Fla.—Key West Bank v. Navarro, 22 Fla. 474.

18. Ala.—Emanuel v. Hunt, 2 Ala. 190.

N.J.—Chapman v. Hunt, 14 N.J.Eq. 149.

11 C.J. p 724 note 18.

19. N.Y.—Griffin v. Armsted, 143 N.Y.S. 770, affirmed 147 N.Y.S. 1114, 162 App.Div. 936.

20. Tex.—Shackelford v. Clements, Civ.App., 300 S.W. 98.

11 C.J. p 724 note 19.

21. Ind.—Huff v. Clark, 71 N.E. 910, 33 Ind.App. 606.

11 C.J. p 724 note 20.

22. Tex.—Shackelford v. Clements, Civ.App., 300 S.W. 98.

11 C.J. p 724 note 21.

Prayer held sufficient

Fla.—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35.

Tex.—Shackelford v. Clements, Civ. App., 300 S.W. 98.

23. Wyo.—Graham v. Blinn, 30 P. 446, 3 Wyo. 746.

24. Okl.—Guarantee State Bank v. Moore, 163 P. 272, 63 Okl. 133.

25. Ill.—W. W. Kimball Co. v. Polakow, 109 N.E. 313, 268 Ill. 344, affirming 190 Ill.App. 174.

26. S.D.—Iowa, etc., Bank v. Price, 70 N.W. 336, 9 S.D. 582.

27. N.Y.—McCrea v. Hopper, 55 N.Y.S. 136, 35 App.Div. 572, affirmed 59 N.E. 1125, 165 N.Y. 633.

28. Ark.—Leavitt v. Marathon Oil Co., 57 S.W.2d 814, 186 Ark. 1077.

Tex.—Lewis v. Chain Inv. Co., Civ. App., 68 S.W.2d 517.

11 C.J. p 725 note 25.

29. Iowa.—Wetmore v. Wooster, 237 N.W. 430, 212 Iowa 1365.

Wash.—Lee v. Swanson, 69 P.2d 824, 190 Wash. 580.

11 C.J. p 725 note 26.

Offer to rescind

Iowa.—Rudolph Wurlitzer Co. v. Rhea, 126 N.W. 345, 147 Iowa 332.

30. Tex.—West Texas Utilities Co. v. Nunnally, Civ.App., 10 S.W.2d 391.

expressly deny notice;³¹ and the mortgagor cannot be credited with payments which he claims to have made on the mortgage debt unless such payments are properly pleaded.³² However, a defendant claiming an interest in property not covered by the mortgage is not obliged to allege or prove his ownership or to anticipate the entry of a decree ordering the sale of his property.³³

Where fraud, misrepresentation, or duress is relied on, the facts constituting the same must be pleaded;³⁴ and, while the pleading is to be most strongly construed against the pleader, the language is to be interpreted fairly and in accordance with the intent of the pleader if that intent is to be gathered from a reasonable construction of the language used.³⁵

A set-off must, under the rules of equity practice, be pleaded by way of a cross bill;³⁶ and a set-off or counterclaim must be pleaded fully and distinctly and all the facts must be alleged which go to make up the particular cause of action relied on as a counterclaim.³⁷ Defendant is entitled to set up by way of cross complaint that the mortgagee obtained possession of the mortgaged property in an action of replevin, that judgment was rendered against him, but that the property was not returned but was converted by the mortgagee and was largely in excess of the amount due on the note secured;³⁸ and a cross petition to establish the priority of a junior mortgage may be filed in an action to foreclose a senior mortgage.³⁹

Disclaimer. In a suit to foreclose a mortgage, a disclaimer is an admission on the record of plaintiff's right, and a denial of the assertion of title on the part of defendant;⁴⁰ and, where defendant admits the execution of a note and mortgage, plaintiff is prima facie entitled to recover and to have the mortgage foreclosed.⁴¹

c. Amended and Supplemental Pleadings; Bill of Particulars

Amendments or supplemental pleadings which set up a new cause of action are not allowable.

Amended or supplemental pleadings that set up a new cause of action are not allowable.⁴² If the original petition or complaint is amended after defendant has answered, and he reserves the right, prior to the taking of evidence, to answer the amended pleading, he is not bound to adhere to the defenses alleged in the original answer, but may set up any defense otherwise available.⁴³ A supplemental petition which is a complete answer to the material allegations of the plea or answer is not subject to general demurrer.⁴⁴

Bill of particulars. In a proper case, defendant may be entitled to a bill of particulars.⁴⁵

d. Issues, Proof, and Variance

Issues should be framed for all material questions in controversy, and evidence not predicated on allegations in the pleadings will be excluded; but immaterial variances will be disregarded.

At the trial of an action to foreclose, issues should be framed for the determination of all material

31. U.S.—Fowler v. Merrill, Ark., 11 How. 375, 13 L.Ed. 736, affirming, C. C., 17 F.Cas.No.9,469, Hempst. 563. 11 C.J. p 725 note 28.

32. Ala.—Tatum v. Yahn, 29 So. 201, 130 Ala. 575.
Mo.—Dunham v. Stevens, 60 S.W. 1064, 160 Mo. 95.

33. Wash.—Olson v. Lida, 230 P. 643, 131 Wash. 528, reversing Olson v. Fireoed, 225 P. 643, 129 Wash. 635.

34. Tex.—Bejil v. Blumberg, Civ. App., 215 S.W. 471. 11 C.J. p 725 note 29.

Rescission

In a suit by the seller of an automobile to foreclose a mortgage given for the price, an answer setting up as a separate defense misrepresentations as to the condition of the automobile was demurrable, where it failed to allege a rescission, whether the answer be regarded as one seeking recoupment for deceit or breach of warranty.—P. & M. Motor Car Co. v. Paris, 185 N.Y.S. 835.

35. Or.—Gabel v. Armstrong, 171 P. 190, 88 Or. 84.

36. Ala.—Tatum v. Yahn, 29 So. 201, 130 Ala. 575.

37. Or.—Gabel v. Armstrong, 171 P. 190, 88 Or. 84.

38. Ind.—Hartman v. Ringgenberg, 21 N.E. 464, 119 Ind. 72.

39. Iowa.—Hartney v. Jordan, 69 N. W. 1037, 100 Iowa 646.

40. Tex.—Nuckles v. J. M. Radford Grocery Co., Civ.App., 72 S.W.2d 652.

Denial held disclaimer

Where complaint described mortgage and mortgaged property described therein as located in certain apartment house, and alleged that mortgagors abandoned apartment house and turned it over to co-defendant, who claimed some interest therein, codefendant's denial is at most a disclaimer of any interest in mortgaged property.—Olson v. Lida, 230 P. 643, 131 Wash. 528, reversing Olson v. Fireoed, 225 P. 643, 129 Wash. 635.

41. Tex.—Brownfield State Bank v. Hudson, Civ.App., 73 S.W.2d 140, error refused.

42. Mont.—Bice v. Daffern, 293 P. 433, 88 Mont. 479. 11 C.J. p 725 note 36.

Supplemental complaint held not to change cause of action

Where original complaint stated cause of action to foreclose mortgage, supplemental complaint alleging note secured was due did not change cause of action, but merely entitled mortgagee to additional relief of deficiency judgment.—Bice v. Daffern, supra.

43. Or.—Ayre v. Hixson, 98 P. 515, 53 Or. 19, 133 Am.S.R. 819, Ann. Cas.1913E 659.

44. Tex.—Board v. Emerson-Brantingham Implement Co., Civ.App., 203 S.W. 421, error refused.

45. Alaska.—Harry Gong & Co. v. Mt. Baker Packing Co., 7 Alaska 1.

Bill granted

Where complaint on foreclosure contained cause of action for moneys advanced, defendant was entitled to bill of particulars setting forth the dates and items comprehending the sum sued for, for which suit was brought.—Harry Gong & Co. v. Mt. Baker Packing Co., supra.

questions in controversy,⁴⁶ such as the validity of the mortgage,⁴⁷ and the rights of other encumbrancers to priority,⁴⁸ and the allegations put in issue must be supported by proof in order to authorize a recovery.⁴⁹ Matters not put in issue by the pleadings will not be considered,⁵⁰ and evidence not predicated on allegations in the pleadings will be excluded.⁵¹ Conversely, proof in support of the pleadings is admissible;⁵² and, where defendant alleges a lien on the property for labor and materials furnished for repairs without specifying the nature of the lien, he may prove that it is a pledgee's lien.⁵³

An immaterial variance between the mortgage described and the one proved at the trial will be disregarded,⁵⁴ and a slight variance in the description of the mortgaged property between the pleading and proof will be disregarded if the property is otherwise described so as to be identified.⁵⁵ Although the complaint was based primarily on a note, recovery on a mortgage, a copy of which was at-

tached to the complaint as an exhibit, has been held not a fatal variance.⁵⁶

§ 406. Evidence

The mortgagee has the burden of establishing the facts entitling him to foreclosure by a preponderance of relevant and competent evidence, and a similar burden is on the defendant to establish affirmative defenses.

The burden is on the mortgagee to establish the facts entitling him to the relief sought,⁵⁷ but proof of immaterial facts or allegations is not necessary.⁵⁸ Conversely, the burden is on defendant to establish matters of affirmative defense.⁵⁹ Where a third party intervenes, the burden is on him to show his right and title to the property.⁶⁰ It has been held that there is a presumption that all property within the description in the mortgage and which is in possession of the mortgagor on the appointment of a receiver belonged to the mortgagor on the execution and delivery of the mortgage.⁶¹

Any relevant competent evidence is admissible, although indirect and circumstantial, if not too remote from the fact in issue.⁶² The mortgage in-

46. Cal.—Maddox v. Wyman, 28 P. 838, 92 Cal. 674.

General denial

In suit to foreclose mortgage, the issue as to whether all furniture that defendant had bought within a certain period was specified in mortgage when it was signed by her, or whether mortgage was then blank, was triable under the general denial.—Holzwasser & Co. v. Gotman, 169 N.Y.S. 505.

47. Ala.—Mobile Branch Bank v. Taylor, 10 Ala. 67.

48. Tex.—Blythe v. Crump, 66 S.W. 885, 28 Tex.Civ.App. 327.

49. Wash.—Pollock v. Ives Theatres, 24 P.2d 396, 174 Wash. 65.

50. Mo.—Dunham v. Stevens, 60 S.W. 1064, 160 Mo. 95.
11 C.J. p 725 note 42.

51. Tex.—Bejil v. Blumberg, Civ. App., 215 S.W. 471.
11 C.J. p 725 note 43.

52. Kan.—First Nat. Bank v. Staab, 171 P. 3, 102 Kan. 369.

53. Ark.—Umsted Auto Co. v. Henderson Auto Co., 207 S.W. 437, 137 Ark. 40.

54. Tex.—Lipscomb v. James Leffel & Co., Civ.App., 44 S.W.2d 1008.
11 C.J. p 725 note 44.

55. Tex.—Harding v. Jesse Dennett, Inc., Civ.App., 17 S.W.2d 862, error refused.

56. Or.—Schwary v. Schwary, 7 P. 2d 986, 138 Or. 690.

57. Mont.—Security State Bank of Havre v. Mariette, 223 P. 114, 69 Mont. 536.

N.Y.—New York Title & Mortgage

Co. v. Grossman Properties, 253 N.Y.S. 533, 142 Misc. 274, affirmed 257 N.Y.S. 1031 (two cases), 236 App.Div. 665 and 257 N.Y.S. 1032, (three cases) 236 App.Div. 665. Motion denied 257 N.Y.S. 1032, 236 App.Div. 666. Affirmed County Trust Co. v. Grossman Properties, 257 N.Y.S. 1033, 236 App.Div. 665. N.D.—Security State Bank v. Krach, 161 N.W. 568, 36 N.D. 115.

Tex.—Witherspoon v. Terry, Com. App., 267 S.W. 973, affirming Terry v. Witherspoon, Civ.App., 255 S.W. 471—H. O. Wooten Grocer Co. v. Wade Meat Co., Civ.App., 37 S.W. 2d 1090—Industrial Acceptance Corporation v. Corey, Civ.App., 19 S.W.2d 365, affirmed, Com.App., 29 S.W.2d 978—Burrows v. Nacogdoches Nat. Farm Loan Ass'n, Civ. App., 7 S.W.2d 172, error dismissed.
11 C.J. p 725 note 45.

After-acquired property

Mortgagee has burden of showing that after-acquired property was covered by mortgage.—H. O. Wooten Grocer Co. v. Wade Meat Co., Tex. Civ.App., 37 S.W.2d 1090.

Mortgagor's title

(1) Holder of chattel mortgage was not required to prove mortgagor's title, as against purchaser from mortgagor.—Scott v. Bonner, Tex. Civ.App., 21 S.W.2d 54.

(2) Mortgagee, however, has burden to establish rights superior to those of an alleged owner of the property.—Industrial Acceptance Corporation v. Corey, Tex.Civ.App., 19 S.W.2d 365, affirmed, Com.App., 29 S.W.2d 978.

Debt

Plaintiffs had burden to establish

debt.—Caffarelli Bros. v. Price-Davis Drug Co., Tex.Civ.App., 19 S.W.2d 386, error dismissed.

Right superior to third person

Mortgagee, had burden to establish superior right as against third person in possession, asserting claim.—Rhea Mortg. Co. v. Lemmerman, Tex. Com.App., 10 S.W.2d 690, affirming, Civ.App., 294 S.W. 959.

58. Or.—Kummer v. Lauman, 7 P. 2d 556, 138 Or. 514.

59. Cal.—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360 —Rummelsburg v. McDonald, 226 P. 412, 66 Cal.App. 380.

Iowa.—Bartlett v. Bolte, 188 N.W. 814, 193 Iowa 1063.

Mont.—Union Bank & Trust Co. v. Wieck, 29 P.2d 384, 96 Mont. 132.

Or.—Zographos v. Vichas, 46 P.2d 577, 151 Or. 31.

Wash.—Lee v. Swanson, 69 P.2d 824, 190 Wash. 580.
11 C.J. p 726 note 46.

60. Iowa.—Chariton & Lucas County Nat. Bank v. Taylor, 232 N.W. 487, 210 Iowa 1153.

La.—Williams v. Hayes, 140 So. 293, 19 La.App. 326.

N.C.—Jordan v. Wetmur, 162 S.E. 610, 202 N.C. 279.

Tex.—Martin v. Covington, Civ.App., 21 S.W.2d 363, error dismissed.

61. U.S.—The Fort Orange, D.C.N. Y., 5 F.Supp. 833.

Presumption is partly overcome by evidence that certain property was acquired by mortgagor subsequent to making and delivery of mortgage.—The Fort Orange, supra.

62. Ga.—Lane v. American Agr.

strument or a certified copy thereof is admissible in evidence,⁶³ without proof of its execution, where no issue is made by the pleadings as to its validity,⁶⁴ but if a plea of non est factum is filed, the execution of the mortgage must be proved before a certified copy can be admitted in evidence.⁶⁵ However,

incompetent and irrelevant evidence is not admissible.⁶⁶

In accordance with general rules in civil actions, a preponderance of the evidence is necessary and sufficient to establish the facts in dispute.⁶⁷

Chemical Co., 161 S.E. 646, 44 Ga. App. 432.

Nev.—Schmaling v. Johnston, 13 P. 2d 1111, 54 Nev. 293, affirmed 27 P.2d 1059, 55 Nev. 164.

N.D.—Minneapolis Threshing Mach. Co. v. Huncovsky, 202 N.W. 280, 52 N.D. 112.

11 C.J. p 726 note 47.

Prior renewed mortgages

Fla.—Calhoun v. Russ, 89 So. 134, 81 Fla. 773.

Fraud and conspiracy

La.—Durel v. Buchanan, 86 So. 189, 147 La. 804.

63. Ark.—Thompson v. Grace, 120 S.W. 397, 91 Ark. 52, 134 Am.S.R. 52.

Tex.—Grounds v. Ingram, 12 S.W. 1118, 75 Tex. 509.

11 C.J. p 726 note 48.

64. Tex.—Powell v. Nicholson, Civ. App., 283 S.W. 623.

11 C.J. p 726 note 49.

65. Tex.—Morris v. Moon, Civ.App., 120 S.W. 1063.

66. Tex.—Moore v. Ferrier, Civ.App., 39 S.W.2d 120.

67. Or.—Zographos v. Vichas, 46 P. 2d 577, 151 Or. 31.

Prima facie case

(1) By introducing note and chattel mortgage, plaintiff made out prima facie case.—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360.

(2) Junior mortgagee, introducing note and mortgage, made prima facie case against debtor and senior mortgagee in possession.—Howerton Finance Corporation v. Farmers' & Merchants' Nat. Bank of Abilene, Tex.Civ.App., 38 S.W.2d 839.

(3) Written sales contract, complete on face, signed by defendant, is prima facie evidence of entire agreement.—Patterson v. Yellow Cab Mfg. Co., Tex.Civ.App., 298 S.W. 918.

Ownership

Execution and delivery of mortgage does not prove mortgagor's title as against stranger.—Rhea Mortg. Co. v. Lemmerman, Tex.Com.App., 10 S.W.2d 690, affirming, Civ.App., 294 S.W. 959.

Amount due

(1) The giving of a note and chattel mortgage to secure a store account covering a period of a year is not conclusive that the amount stated in the notes and mortgage is correct, and is not an acknowledgment of the amount of the indebtedness; and, where the answer denied that

the amount stated in the note is the amount of the indebtedness of the mortgagor, he has the right to show that the amount stated in the mortgage is not correct.—Calhoun v. Russ, 89 So. 134, 81 Fla. 773.

(2) An agreement as to the amount due on the mortgage made between the mortgagor and the mortgagee, after action brought, is not conclusive evidence as to the amount really due as against other parties to the action.—Shepard, etc., Lumber Co. v. Franklin Trust Co., 66 N.Y.S. 766, 55 App.Div. 627, 8 N.Y. Ann.Cas. 264.

Evidence held sufficient

(1) To authorize finding mortgagee intended its lien to be inferior to lien of trust deed.—Southwestern Public Service Co. v. Smith, Tex.Civ.App., 48 S.W.2d 456.

(2) To require finding of priority of another chattel mortgage by agreement.—Hill v. Bender, 6 P.2d 1081, 138 Or. 400.

(3) To show absence of fraud.—Lewis v. Brown, 224 S.W. 986, 145 Ark. 492.

(4) To show conversion.—State Bank of Bowman v. Nelson, 186 N.W. 766, 48 N.D. 702.

(5) To show landlord's waiver of his lien.—Jaco v. W. A. Nash & Co., Tex.Civ.App., 286 S.W. 235.

(6) To show purchaser's or creditor's want of knowledge of the mortgage.

Cal.—Treat v. Burns, 13 P.2d 724, 216 Cal. 216—Kramer v. Reynolds, 269 P. 573, 93 Cal.App. 224.

Iowa.—Commercial Sav. Bank v. Brooklyn Lumber & Grain Co., 160 N.W. 817, 178 Iowa 1206.

(7) To support judgment of foreclosure.

Mich.—La France-Republic Sales Corporation v. Norton, 276 N.W. 490, 282 Mich. 389.

N.D.—Bangs, Berry & Carson v. Nichols, 181 N.W. 87, 47 N.D. 123.

Okl.—Jones v. Stedman Co., 65 P.2d 1007, 179 Okl. 291—Blackford v. Casey, 62 P.2d 1023, 178 Okl. 268.

Tex.—Edmondson v. Bishop, Civ. App., 32 S.W.2d 670.

(8) To support verdict or findings for defendant.

Ark.—Chronister Bros. & Co. v. Oswalt, 299 S.W. 9, 175 Ark. 337.

N.D.—First Nat. Bank v. Riden, 194 N.W. 336, 49 N.D. 1020.

(9) To sustain deficiency judgment.—Bailey v. Frank, 280 S.W. 663, 170 Ark. 610.

(10) To establish other and miscellaneous matters.

Ala.—J. E. Butler & Co. v. A. G. Henry & Co., 79 So. 630, 202 Ala. 155.

Ariz.—Perkins v. First Nat. Bank, 56 P.2d 639, 47 Ariz. 376, certiorari denied Perkins v. Honorable Supreme Court of State of Arizona, 57 S.Ct. 20, 299 U.S. 540, 81 L.Ed. 397.

Ark.—Brummitt v. Wilmans, 70 S.W. 2d 841, 189 Ark. 1171—Webb v. Alma Cash Store, 254 S.W. 670, 160 Ark. 290—Walker v. Meyer, 213 S.W. 758, 139 Ark. 605—Lilly v. Verser, 203 S.W. 31, 133 Ark. 547.

Cal.—Riddle v. Etling, 258 P. 162, 84 Cal.App. 460—Pine v. Higgins, 256 P. 582, 83 Cal.App. 276—Bowman v. Sears, 218 P. 489, 63 Cal.App. 235.

Colo.—Thimmig v. Segel, 3 P.2d 303, 89 Colo. 385.

Ga.—Stanfield v. Darby, 165 S.E. 864, 45 Ga.App. 636—Golden v. J. M. Easterling & Sons, 139 S.E. 102, 37 Ga.App. 172.

Iowa.—Avery Co. v. Olesen, 198 N. W. 31, 197 Iowa 643—Doyle v. Lytle Inv. Co., 184 N.W. 721.

Ky.—Perkins v. National Bond & Investment Co., 5 S.W.2d 475, 224 Ky. 65.

Minn.—Holland v. Nichols, 162 N.W. 468, 136 Minn. 354.

Mont.—Union Bank & Trust Co. v. Wieck, 29 P.2d 384, 96 Mont. 132.

Nev.—Wheeler & Stoddard v. Portland Cattle Loan Co., 268 P. 46, 51 Nev. 53.

Or.—Schwary v. Schwary, 7 P.2d 986, 138 Or. 690.

Tex.—Rhea Mortg. Co. v. Lemmerman, Com.App., 10 S.W.2d 690, affirming, Civ.App., 294 S.W. 959.

Terrell v. Davis, Civ.App., 90 S.W. 2d 872—Merchants' & Manufacturers' Securities Co. v. Wright, Civ. App., 59 S.W.2d 1097, error refused.

Carter v. First Nat. Bank, Civ. App., 45 S.W.2d 1111—Farmers' Nat. Bank of Hillsboro v. White, Civ.App., 25 S.W.2d 944, error dismissed.

Industrial Acceptance Corporation v. Corey, Civ.App., 19 S.W. 2d 365, affirmed, Com.App., 29 S.W. 2d 978—Glass v. Frank, Civ.App., 18 S.W.2d 709—Florence v. Warren, Civ.App., 293 S.W. 226—Hurt v. Hommel, Civ.App., 240 S.W. 632.

Wash.—Brotherhood State Bank of Spokane v. Chapman, 259 P. 391, 145 Wash. 214, 56 A.L.R. 447.

Evidence held insufficient
(1) To authorize deficiency judgment.—Lee v. Pasco Theater Co., 160 P. 435, 93 Wash. 204.

§ 407. Attachment or Sequestration

In many jurisdictions statutes provide that on compliance therewith the mortgagee may have a writ for the attachment, sequestration, or seizure of the property in aid of his foreclosure of a chattel mortgage thereon; but if wrongfully issued the mortgagee may be liable in damages. The court may order a sale prior to judgment in a proper case.

On foreclosure in equity, the court may take into its custody the mortgaged property in order to preserve the status quo for the benefit of all the parties, and it may do this through the agency of its marshal or other officer,⁶⁸ or through the agency of a receiver, as shown *infra* § 409.

Sequestration. In some jurisdictions, a writ of sequestration may properly issue in suits for the foreclosure of chattel mortgages, verbal or written;⁶⁹ and, while an affidavit for sequestration must be filed as part of the record in a suit to foreclose a chattel mortgage before the issuance of the writ,⁷⁰

the affidavit for sequestration is not an essential element of plaintiff's cause of action for debt and foreclosure of the chattel mortgage.⁷¹ Where the mortgagor and mortgagee conspired to secure fraudulently the release of property from an officer who had seized it in an action against the mortgagor, the mortgagee's subsequent sequestration of the property in a subsequent action on a chattel mortgage in another county has been held illegal.⁷²

Attachment. In other jurisdictions provision is made for an attachment in aid of foreclosure, compliance with such provision being essential to the issuance of the writ;⁷³ and, where more than one person has an interest in the personal property, the levy under attachment is unlawful except as to the interests of the mortgagors.⁷⁴ Under the statute, writs of attachment in aid of foreclosure of a chattel mortgage may be subject to a motion to dissolve as other writs of attachment.⁷⁵ However, the dis-

(2) To show conversion.
Ark.—Starling v. Hamner, 50 S.W. 2d 612, 185 Ark. 930.
Cal.—Kruger v. Vernon, 238 P. 1062, 73 Cal.App. 476.

(3) To show fraud.—Burns v. Treadway & Webb, 191 S.W. 868, 174 Ky. 123.

(4) To show mortgagee's lack of good faith.—Burlington State Bank v. Marlin Nat. Bank, Tex.Civ.App., 207 S.W. 954.

(5) To show payment.
Ark.—Walker v. Meyer, 213 S.W. 758, 139 Ark. 805.
Ill.—Messick v. Darnall, 281 Ill.App. 375.

(6) To support finding in favor of intervener.—Hagen v. Dwyer, 162 N. W. 699, 36 N.D. 346.

(7) To support judgment for defendant.—John Smith Co. v. Hardin, 218 P. 2, 126 Wash. 425.

(8) To show that mortgagee waived or was estopped to assert lien.—Hardin v. State Bank of Seattle, 205 P. 382, 119 Wash. 169.

(9) To establish other and miscellaneous matters.

Ark.—Moye & Davis v. Watkins, 284 S.W. 749, 171 Ark. 501.

Cal.—Shank v. Blackburn, 200 P. 762, 53 Cal.App. 620.

La.—Williams v. Hayes, 140 So. 293, 19 La.App. 326.

N.Y.—New York Title & Mortgage Co. v. Grossman Properties, 253 N. Y.S. 533, 142 Misc. 274, affirmed 257 N.Y.S. 1031 (two cases), 257 N.Y.S. 1032 and 236 App.Div. 665 (three cases), 236 App.Div. 665. Motion denied 257 N.Y.S. 1032, 236 App. Div. 666. Affirmed County Trust Co. v. Grossman Properties, 257 N. Y.S. 1033, 236 App.Div. 665—Hanson v. Kassmayer, 91 N.Y.S. 755.

N.D.—Sando v. Burke, 193 N.W. 252, 49 N.D. 751.

Or.—Hubbs v. Warehouse Service Corporation, 42 P.2d 180, 149 Or. 559.

Tex.—Rhea Mortg. Co. v. Lemmerman, Com.App., 10 S.W.2d 690, affirming, Civ.App., 294 S.W. 959—Terry v. Witherspoon, Civ.App., 255 S.W. 471, judgment affirmed Witherspoon v. Terry, Com.App., 267 S.W. 973—Emerson-Brantingham Implement Co. v. Prewitt Mercantile Co., Civ.App., 264 S.W. 1015—Blockson v. Guaranty State Bank & Trust Co., Civ.App., 241 S.W. 315, reversed on other grounds, Com. App., 251 S.W. 1025.

Utah.—Phillips v. Buckley, 243 P. 796, 66 Utah 501.

68. U.S.—H. B. Clafin Co. v. Furtick, C.C.S.C., 119 F. 429.

Corpus Juris is quoted with approval as to the procedure in foreclosing a statutory lien given to one furnishing parts for a motor vehicle.—Mathieu v. Roberts, 247 P. 1066, 1069, 31 N.M. 469.

69. Tex.—Whitis v. Hinckley, Civ. App., 19 S.W.2d 328.

Copy of mortgage

A person who seeks to have mortgaged property seized in the hands of a third possessor must produce a copy, in due form, of the act of mortgage and a judgment against the principal debtor.—Poydras v. Hiriart, 6 Mart.N.S., La., 403.

70. Tex.—Dubois v. Walters, Civ. App., 239 S.W. 751.

Items of indebtedness

The affidavit, stating the total amount sued for, need not state the different items of indebtedness claimed to be due, at least where such items are stated in the complaint or

petition.—Dawson v. State Bank, Tex.Civ.App., 175 S.W. 438.

Name of defendant or possessor of property

The affidavit for sequestration in foreclosure proceedings need not name defendants nor allege the name of the person in possession of the property.—Whitaker v. Sanders, Tex. Civ.App., 52 S.W. 638.

71. Tex.—D. V. Brooks Co. v. Vera, Civ.App., 58 S.W.2d 1061, affirmed Vera v. D. V. Brooks Co., 94 S.W. 2d 132, 127 Tex. 306.

72. La.—King v. Littlepage, App., 153 So. 585.

73. Fla.—Georgia Fertilizer Co. v. Privett, 145 So. 840, 107 Fla. 596. 11 C.J. p 726 note 55.

Belief in allegations of affidavit

An affidavit in attachment is insufficient as a basis upon which to issue the writ where it does not state that affiant "does believe" the allegations of the affidavit, but only states that "he has reason to believe."—Georgia Fertilizer Co. v. Privett, *supra*.

74. Iowa.—People's Sav. Bank v. McCarthy, 217 N.W. 453, 206 Iowa 28.

75. Fla.—Carter v. Lisle, 174 So. 22, 127 Fla. 788—Georgia Fertilizer Co. v. Privett, 145 So. 840, 107 Fla. 596.

Not retroactive

A statute providing that a writ of attachment in aid of foreclosure of a chattel mortgage is subject to a motion to dissolve as other writs of attachment has been held not retroactive.—Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 105 So. 823, 90 Fla. 282.

Earlier statute

(1) Rev.Gen.St.1920 § 3405 pro-

missal of a bill to foreclose a chattel mortgage, alleging the maturity of the indebtedness secured by the mortgage and default in payment, on the dissolution of an attachment is erroneous, no other reason appearing for the order of dismissal.⁷⁶

A statute authorizing the officer levying a warrant of attachment to demand indemnity from the attaching mortgagee where the property is claimed by another person than defendant, has no application where the property is not in the possession of defendant in the warrant of attachment, but is taken from the possession of claimant.⁷⁷

Warrant of seizure. In still other jurisdictions provision is made for the issuance of a warrant of seizure in aid of foreclosure where the mortgagee is out of possession, and, when complainant complies therewith and sustains his claim by an affidavit, the court should issue the writ on the giving of a bond by complainant in accordance with the statute.⁷⁸ A mortgagor's locking of a door and refusing access to, or inspection of, the property by the mortgagee has been held to constitute secreting of property within the meaning of the statute authorizing a warrant of seizure without notice.⁷⁹ A warrant of seizure is improperly issued on the ground that the property had not been stored in a certain building where it appears that such building did not exist.⁸⁰

Damages. A mortgagee cannot deal with property seized under a writ of sequestration in a foreclosure suit as owner, and if he sells it privately before it could have been sold under judicial process he is guilty of conversion,⁸¹ although, under some circumstances, such a sale has been considered as intended to be made of final effect by the decree

of the court of foreclosure and sale under the mortgage stipulation,⁸² and where the mortgagee has the express right to take the property into his possession after the maturity of the debt he is not liable for wrongful sequestration although a writ issued which was later quashed, unless the property was negligently handled by the mortgagee and damage resulted therefrom.⁸³ However, a mortgagee must exercise good faith in prosecuting an action to foreclose his lien after taking possession of the property under a writ of sequestration, notwithstanding a repossession clause in the mortgage, and a mortgagee, having taken possession of property under a writ of sequestration and dismissed the case without returning the property, cannot avail himself of a provision in the mortgage for repossession as a defense to the mortgagor's action for damages, and the mortgagor may recover the difference between the amount due the mortgagee and the value of the property.⁸⁴ Reasonable attorney's fees may be recovered by the mortgagor as part of the damages, although the mortgagee was partly successful, where it was necessary to defend the entire cause of action in order to secure the release of the property so seized under the warrant.⁸⁵

An agreement by the mortgagor to waive any right of action by reason of the taking of possession of the property has been held to waive only a right of action for taking possession upon some breach of contract by the mortgagor, and does not preclude an action for damages from sequestration at a time when the mortgagor had performed every legal obligation the contract imposed upon him.⁸⁶

That a mechanic's lienholder recovered possession of property under a claimant's bond after it had

vides merely a statutory chancery attachment writ in aid of foreclosure and is under the control of the chancery court foreclosing the mortgage.—*Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, 105 So. 823, 90 Fla. 282—*Alford v. Leonard*, 102 So. 885, 88 Fla. 532.

(2) Proceedings for the discharge of attachments in aid of foreclosure must be taken under the rules of chancery practice.—*Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, supra—*Alford v. Leonard*, supra.

(3) Under such statute a writ of attachment in aid of foreclosure of a chattel mortgage was not subject to a motion to dissolve as other writs of attachment.—*Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, supra—*Alford v. Leonard*, supra—*Skinner v. Moore*, 98 So. 331, 86 Fla. 365.

76. Fla.—*Skinner v. Moore*, supra.

77. N.D.—*Ravely v. Isensee*, 221 N. W. 38, 57 N.D. 286.

78. Ala.—*Davis v. Elba Bank & Trust Co.*, 106 So. 595, 214 Ala. 100, 11 C.J. p. 726 note 56.

Allegation writ not sued out for vexation

Where the statute does not so require, it is not necessary that the bill allege, sustained by the affidavit, that the writ is not sued out for the purpose of vexing or harassing defendant.—*Davis v. Elba Bank & Trust Co.*, 106 So. 595, 214 Ala. 100.

Vacation of order or warrant

Where the mortgagee does not resort to his remedies at law and his right to possession under the mortgage, but submits his cause to the jurisdiction of equity and procures an order of seizure without a showing of the statutory requisites, the vacation of the order of seizure is within the proper exercise of the dis-

cretion of the court.—*Avery v. Roland*, 292 N.Y.S. 592, 249 App.Div. 902.

79. N.Y.—*Lomin Corporation v. Kohlhepp*, 271 N.Y.S. 709, 151 Misc. 545.

80. N.Y.—*Bellom v. Schindler*, 224 N.Y.S. 429, 130 Misc. 503.

81. Tex.—*American Mortg. Corporation v. Wyman*, Civ.App., 41 S.W. 2d 270.

82. Tex.—*Texas Cotton Co-op. Ass'n v. Felton*, Civ.App., 52 S.W.2d 1105, error dismissed.

83. Tex.—*Smith v. First Nat. Bank*, Civ.App., 114 S.W.2d 317.

84. Tex.—*Wakefield v. Queisser*, Civ. App., 293 S.W. 896.

85. N.D.—*Krach v. Security State Bank of New England*, N. D., 175 N.W. 573, 43 N.D. 441.

86. Tex.—*Sheppard v. Rash*, Civ. App., 60 S.W.2d 499.

been sequestered has been held not a basis for a claim of damages by a chattel mortgagee.⁸⁷

Penalty of bond. In an action on a bond given to secure a warrant of seizure, damages may be recovered against the principal therein in excess of the penalty named, only to the extent of legal interest on the penal sum from the date of the breach thereof.⁸⁸

Order of sale. The court cannot order a sale in advance of the regular foreclosure sale on the ground that there is danger of the property suffering a depreciation in value,⁸⁹ unless the property is of a perishable nature.⁹⁰

§ 408. Redelivery of Property to Mortgagor on Security

Provision is generally made by statute for redelivery of the property to the mortgagor after seizure in aid of foreclosure of a chattel mortgage, and the liability of sureties on a forthcoming or redelivery bond is dependent on the terms of the bond and the statutes.

Where property is taken under a writ of attachment or sequestration, etc., in aid of foreclosure of a chattel mortgage thereon, provision is generally made by statute for the redelivery of the property to the mortgagor on the giving of a bond or other security.⁹¹ On compliance with some statutes, no order of the court is necessary for the restoration of the property;⁹² and on redelivery of the property to the mortgagor the latter holds the property

in express recognition of the mortgagee's rights and as trustee for him.⁹³

Obligation and liability of surety. The obligation of sureties on a bond to replevy property after seizure in a mortgage foreclosure suit extends only to see that the property is properly taken care of and is forthcoming to abide the decision of the court.⁹⁴ Although in some jurisdictions the statutes do not specifically authorize an entry of judgment against the sureties on a forthcoming bond,⁹⁵ where the mortgagee is successful he is entitled to a judgment against the sureties and principal on the replevy bond for the value of the property as fixed by the officer taking and approving said bond, subject to the right of defendants to satisfy the judgment by complying with the provisions of the statute by surrendering the property,⁹⁶ and refusal of judgment against the sureties on the mortgagor's replevin bond where the mortgagee recovered judgment has been held erroneous.⁹⁷ While the allegation in an affidavit for sequestration as to the value of the property sought to be sequestered serves as a predicate for the amount of the applicant's bond, it does not fix the value as a predicate for the judgment against the obligors on the replevin bond where the property is replevied,⁹⁸ and the value of the property at the date of the trial, plus any recoverable damages to it since its replevy, is the full measure of the sureties' liability on the replevy bond,⁹⁹ and a judgment against the sureties on the

87. Tex.—Fritz Motor Co. v. Gabert, Civ.App., 41 S.W.2d 72, error dismissed.

88. N.D.—Krach v. Security State Bank of New England, N. D., 175 N.W. 573, 43 N.D. 441.

89. Ky.—Tipton v. Harris, 87 S.W. 1074, 27 Ky.L. 1175, 82 S.W. 585, 26 Ky.L. 909.

11 C.J. p 726 note 57.

90. Ky.—Hill v. Cohen, 55 S.W. 1, 21 Ky. L. 1356.

N.J.—Howell v. Frances, Ch., 9 A. 379.

91. **General statute not applicable**
(1) Rev.Gen.St.1920 § 3418 is the only one relating to the return of property to defendants in attachment which is applicable to chancery proceedings.—Alford v. Leonard, 102 So. 885, 88 Fla. 532.

(2) The general statute constituting part of the statutory proceedings in attachments relates only to attachments at law and is not applicable where the property was taken in aid of foreclosure in chancery.—Alford v. Leonard, supra.

92. Fla.—Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 105 So. 823, 90 Fla. 282—Alford v. Leonard, 102 So. 885, 88 Fla. 532.

93. Ala.—Humes v. Scott, 30 So. 788, 130 Ala. 281.

94. Tex.—Laseter v. Hyde, Civ.App., 65 S.W.2d 388.

Delivery to mortgagee's agent as shown by recitation in default judgment in foreclosure discharges sureties on replevy and sequestration bond except for damages.—Laseter v. Hyde, supra.

95. Fla.—Alford v. Leonard, 102 So. 885, 88 Fla. 532.

96. Tex.—American Finance Co. of Galveston v. Randolph, Civ.App., 56 S.W.2d 908.

Specifically authorizing satisfaction by redelivery

(1) In some cases it has been held that the judgment may, but need not, specifically authorize satisfaction thereof by the sureties on the replevy bond by delivering the property to the proper officer within a certain time.—Continental Gin Co. v. Thorndale Mercantile Co., Tex.Com.App., 254 S.W. 939—Irwin v. Auto Finance Co., Civ.App., 40 S.W.2d 871, reversed on other grounds Rogers v. Irwin, Com.App., 60 S.W.2d 192.

(2) In other cases it has been held that the judgment is erroneous if it does not provide for their discharge

upon delivery of the property.—Laseter v. Hyde, Tex.Civ.App., 65 S.W.2d 388—Ingram v. Brown, Tex.Civ.App., 173 S.W. 524.

97. Tex.—West Texas Utilities Co. v. Nunnally, Civ.App., 10 S.W.2d 391.

98. Tex.—Rogers v. Irwin, Com. App., 60 S.W.2d 192, reversing Irwin v. Auto Finance Co., Civ.App., 40 S.W.2d 871.

99. Tex.—Rogers v. Irwin, Com. App., 60 S.W.2d 192, reversing Irwin v. Auto Finance Co., Civ.App., 40 S.W.2d 871—Laseter v. Hyde, Civ.App., 65 S.W.2d 388.

Evidence held to sustain finding as to value

In foreclosure of mortgage lien on automobile sold three months previously for one thousand two hundred ninety-five dollars, for which mortgagor executed replevy bond of two thousand two hundred dollars, evidence held to sustain finding that car was worth five hundred dollars when bond was executed.—Cottle v. Jefferson Securities Co., Tex.Civ. App., 272 S.W. 819.

Valuing articles separately

(1) Where more than one sequestered article is replevied, the court

replevy bond, predicated on the value of the property at the time of the replevy, has been held erroneous.¹ Where the sequestered property replevied was valued by the court at more than the amount of the judgment against the principal in the replevy bond, a judgment against the replevy bond sureties for the amount found against the principal is proper;² but the sureties may render themselves liable to a decree for the amount of the debt where they bind themselves to abide the decree by paying the amount adjudged to be due.³ Under some statutes, where the mortgagor has replevied the property after seizure on a writ of sequestration, he can only be required to place it in the hands of the proper officer for sale to satisfy the judgment and cannot be required to deliver the property to plaintiff; and a judgment which, as a prerequisite to discharge of the sureties, directs the replevied property to be delivered to the officer of one county for delivery to plaintiff and in another paragraph directs delivery of the property to an officer of another county for sale to satisfy the judgment has been held erroneous.⁴

§ 409. Injunction and Receiver

Where proper grounds therefor are shown, equity will, in the absence of an adequate remedy at law, ap-

point a receiver to take charge of property pending the foreclosure of a chattel mortgage, or will issue an injunction to preserve such property.

A chancery court in which a foreclosure suit is properly brought has jurisdiction to appoint a receiver to take charge of the mortgaged property as incident to jurisdiction in the foreclosure suit;⁵ but a mortgage or deed of trust which has never been executed cannot be the basis for the appointment of a receiver.⁶ Generally, a receiver will not be appointed pending a suit to foreclose, where the mortgagee has an adequate remedy at law,⁷ or where it is not apparent that the rights of any person in interest are in jeopardy, because the appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency;⁸ but where the appointment of a receiver is provided for by statute, it has been held no objection that the mortgagee has other legal or equitable remedies, such objection being held valid only where the appointment is based on equitable usages.⁹ The appointment of a receiver is not error where the mortgage provides for the appointment of a receiver on a breach of the conditions thereof;¹⁰ and equitable grounds for relief may be shown which will justify the appointment, although the mortgage does not provide therefor,¹¹ even though the statute allows a

rendering judgment against the replevy bond sureties must find the value of each article separately.—*Rogers v. Irwin*, Tex.Com.App., 60 S.W.2d 192, reversing *Irwin v. Auto Finance Co.*, Civ.App., 40 S.W.2d 871.

(2) A judgment foreclosing a mortgage on an automobile and equipment replevied after sequestration has been held not erroneous as against the replevy bond sureties because not finding the value of the equipment separately, in the absence of a showing that the equipment was not attached to the automobile.—*Rogers v. Irwin*, supra.

(3) Replevy bond surety bringing error proceedings alone could not complain that the judgment foreclosing the mortgage on a sequestered automobile and all equipment was erroneous as to him because not separately finding the value of the equipment, where the affidavit for sequestration and the replevy bond referred to the automobile alone.—*Rogers v. Irwin*, supra.

1. Tex.—*Laseter v. Hyde*, Civ.App., 65 S.W.2d 388.

2. Tex.—*Rogers v. Irwin*, Com.App., 60 S.W.2d 192, reversing *Irwin v. Auto Finance Co.*, Civ.App., 40 S.W.2d 871.

3. Fla.—*Tilghman v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, 105 So. 823, 90 Fla. 282—*Alford v. Leonard*, 102 So. 885, 88 Fla. 532.

4. Tex.—*Riggle v. Automobile Finance Co.*, Civ.App., 276 S.W. 439.

General statute not applicable

Statutes providing that, where defendant replevies the property sequestered, judgment may be rendered against his sureties for the value of the property, or requiring the property to be delivered to plaintiff, have been held not to apply where the property is sequestered on foreclosure of a mortgage in view of a provision that, if plaintiff recovers judgment for foreclosure, the property is to be sold to satisfy the judgment.

Tex.—*Riggle v. Automobile Finance Co.*, supra.

5. Ark.—*Beeson v. Chambers*, 90 S.W.2d 770.

6. Miss.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

Future advances not made

A deed of trust to cover advances to a tenant, where the owner immediately refuses to make the advances, cannot be used as a basis for appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces and offers possession, such acts being in effect a rescission of the deed.—*Burton v. Pepper*, supra.

7. Miss.—*Burton v. Pepper*, supra.

Tex.—*Davenport v. Wood Motor Co.*, Civ.App., 107 S.W.2d 1093.
11 C.J. p 726 note 60.

Third persons taking property

The mere fact that parties have, without right, taken possession of a part of the mortgaged property, and that others are threatening to take more of it from its rightful owner does not warrant the appointment of a receiver, as the mortgagee may resort to his action at law against these parties.—*Gilbert v. Block*, 51 Ill.App. 516.

8. Mich.—*White v. Fulton*, 244 N.W. 498, 260 Mich. 346, quoting *Corpus Juris*.

9. Tex.—*Lipow v. Pacific Finance Corporation*, Civ.App., 34 S.W.2d 658.

10. Or.—*Hubbs v. Warehouse Service Corporation*, 42 P.2d 180, 149 Or. 559.

For prior mortgagee

Court should have appointed receiver for holder of earliest of two mortgages covering crops subsequently grown on mortgaged premises, where both mortgages provided for such appointment.—*Equitable Life Ins. Co. v. Read*, 246 N.W. 779, 215 Iowa 700.

11. Iowa.—*Farmers' Trust & Savings Bank of Laurens v. Miller*, 214 N.W. 546, 203 Iowa 1380.

mortgage to be foreclosed in an action at law.¹² Among these grounds are the inadequacy of property to secure the debt,¹³ the insolvency of the mortgagor¹⁴ and danger that the property will be lost or materially injured,¹⁵ or that the property is subsequently put into the hands of a third party, who is insolvent and wasting it, to the destruction of the lien sought to be foreclosed,¹⁶ and if the mortgage gives the mortgagor power to sell and he fails to exercise it within a reasonable time, the court may appoint a receiver to sell it, especially if the mortgaged property is perishable and liable to deteriorate.¹⁷ Ordinarily, a receiver will not be appointed where it appears *prima facie* that the mortgagor is solvent,¹⁸ although there may be circumstances under which a showing of insolvency is not necessary,¹⁹ and in a proper case a receiver may

be appointed even though the mortgagee's right to foreclose has not accrued.²⁰

However, the condition of the property after institution of the suit cannot change the legal rights of the parties as they existed at the time the suit was instituted;²¹ and it is improper for the court to appoint a receiver for property not embraced in the mortgage,²² or to appoint a receiver to take possession of a chattel where it has been sold to a purchaser, without actual notice of the mortgage, by the mortgagor with the implied consent of the mortgagee,²³ or to appoint a receiver to take the property and to use it pending litigation where the mortgagor has a right to a speedy foreclosure and sale,²⁴ but a receiver may be appointed to take possession of property purchased with the proceeds of the sale

Nev.—*Martin v. Duncan Automobile Co.*, 252 P. 322, 50 Nev. 91.
11 C.J. p 727 note 62.

Receiver will be appointed only when it is shown that the property is in danger of being lost, removed, or materially injured, or for any other reason when, in the discretion of the court, it may be necessary to secure ample justice to the parties.—*Gahagan v. Wisner*, 247 P. 965, 139 Wash. 664.

Clear showing necessary

To justify a receiver in a foreclosure suit against a tenant, there should be a clear showing of inadequacy of the security, insolvency, and that the tenant had either removed or abandoned the premises or was misappropriating the property, or doing something to destroy the value of the security, and it is not enough to show that he is short of feed and supplies after surviving a winter.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

Appointment not justified

Wash.—*Gahagan v. Wisner*, 247 P. 965, 139 Wash. 664.

12. Mo.—*Commerce Trust Co. v. White*, 154 S.W. 864, 169 Mo.App. 5.

Neb.—*Monnich v. Schwartz*, 96 N.W. 636, 4 Neb., Unoff., 811.

13. Mo.—*Tuttle v. Blow*, 75 S.W. 617, 176 Mo. 158, 98 Am.S.R. 488.

14. Ala.—*Lambert v. Anderson*, 149 So. 98, 227 Ala. 222.

Fla.—*J. G. White Engineering Corporation v. People's State Bank of Lakeland*, 87 So. 753, 81 Fla. 35.

Ga.—*Ross v. Fletcher*, 96 S.E. 1, 148 Ga. 147.

11 C.J. p 727 note 65.

Advances not made by landlord

A deed of trust to cover advances from a landlord to a tenant, which the landlord then refuses to make, although the deed recited that it

is to be a supplementary renewal for prior debts, cannot be used as a basis for appointment of a receiver, even if the tenant is insolvent, in the absence of intent of a tenant to misappropriate the funds or abandon the property.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

15. Ala.—*Lambert v. Anderson*, 149 So. 98, 227 Ala. 222.

Fla.—*J. G. White Engineering Corporation v. People's State Bank of Lakeland*, 87 So. 753, 81 Fla. 35.

Ga.—*Ross v. Fletcher*, 96 S.E. 1, 148 Ga. 147.

Iowa.—*Equitable Life Ins. Co. v. McNamara*, 262 N.W. 466, supplementing opinion and denying rehearing *Equitable Life Ins. Co. of Iowa v. McNamara*, 259 N.W. 231.

Okl.—*McDonald v. Bohling*, 228 P. 783, 102 Okl. 243.

Tex.—*Kiel v. Miller*, Civ.App., 234 S.W. 550.

11 C.J. p 727 note 66.

Must be clearly shown

Mortgagee must clearly show that the property is being materially wasted or unnecessarily injured in value, or was in fact fraudulently procured from him.—*Kiel v. Miller*, *supra*.

Mortgagor renting automobile

A mortgagee of an automobile which has been rented by the mortgagor to another and is being so used by him as to cause a deterioration in value which renders the security inadequate is entitled to have a receiver appointed to collect the rents earned by the car, where the mortgagor is insolvent.—*J. G. White Engineering Corp. v. People's State Bank*, 87 So. 753, 81 Fla. 35.

16. Mo.—*Commerce Trust Co. v. White*, 154 S.W. 864, 169 Mo.App. 5.

Mortgagor's insolvency immaterial

Plaintiff's right to a receiver in

such case is not affected by the solvency or insolvency of the debtor.—*Commerce Trust Co. v. White*, *supra*.

17. Ky.—*Hill v. Cohen*, 55 S.W. 1 21 Ky.L. 1356.

Miss.—*Alexander v. Houston*, 31 So. 211.

18. U.S.—*Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, C.C.S.C., 80 F. 68.

11 C.J. p 727 note 68.

19. Ind.—*Mannos v. Bishop-Babcock Becker Co.*, 104 N.E. 579, 181 Ind. 343.

Tex.—*Crow v. Red River County Bank*, 52 Tex. 362.

20. Tex.—*Lipow v. Pacific Finance Corporation*, Civ.App., 34 S.W.2d 658.

11 C.J. p 727 note 70.

21. Miss.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

22. Ga.—*Ross v. Fletcher*, 96 S.E. 1 148 Ga. 147.

11 C.J. p 727 note 71.

23. Nev.—*Martin v. Duncan Automobile Co.*, 252 P. 322, 50 Nev. 91.

24. Miss.—*Burton v. Pepper*, 76 So. 762, 116 Miss. 139.

To operate plantation

A deed of trust on stock machinery and crops for a year finished has been held not a basis for appointment of a receiver to farm the property for the current year, and to use the tenant's property for the benefit of the landlord; and where a landlord had a receiver appointed in the spring, before planting time who took possession of a farm, and there was no order authorizing the receiver to spend any money or incur debts, and farmed the land with the tenant's implements and stock it was held that the tenant was not chargeable with rent.—*Burton v. Pepper*, *supra*.

of part of the mortgaged property along with the balance of such property.²⁵

One holding a subsequent mortgage cannot object to the appointment of a receiver on the application of the prior mortgagee, where the claim secured by such prior mortgage is larger than the value of the property.²⁶

Property in possession of mortgagee. A receiver may be appointed to take charge of property in the possession of a mortgagee, where a creditor having the right to redeem tenders payment, which is refused and the property is retained,²⁷ but where the mortgagee is in possession of the property, and there is no dispute as to the amount due or as to the property, a receiver should not be appointed.²⁸

Pending injunction. The court may place the mortgaged chattels in the hands of a receiver pending the trial of a suit to enjoin the foreclosure of the mortgage.²⁹

Procedure for appointment. The facts on which the application is based must be sufficiently alleged in the bill or petition,³⁰ and if a sufficient showing is made, a rule may be issued against the mortgagor to show cause why the appointment should not be

made.³¹ Ordinarily, a notice and hearing are necessary,³² but under exceptional circumstances, or where the parties are all before the court, notice may be dispensed with,³³ in which case, defendant may appeal, or move to vacate the appointment, or appear on the day set and show cause why the receivership should not be continued.³⁴ The improper appointment of a receiver may be waived or ratified by the mortgagor.³⁵

Effect of appointment. The appointment of a receiver does not in any manner affect the priority of claims,³⁶ although it does have the same effect, as against a subsequent lienor, as if possession were taken by the mortgagee.³⁷ A receiver's possession in an action to foreclose cannot be interfered with by creditors of the mortgagor;³⁸ he holds for the benefit of the person to whom the court ultimately decides that the property belongs.³⁹

It is the duty of the mortgagor to deliver the property adjudged to be covered by the mortgage to the receiver, unless subsequent to the judgment he has acquired some right thereto,⁴⁰ but the persons refusing possession to the receiver cannot be held in contempt therefor where the receiver has demanded more than he was entitled to receive.⁴¹

25. Ga.—Ross v. Fletcher, 96 S.E. 1, 148 Ga. 147.

26. Ala.—Whaley v. Bright, 66 So. 644, 189 Ala. 134.

27. N.J.—Schultz v. Jerrard, 3 A. 265.

28. Iowa.—Maish v. Bird, 13 N.W. 298, 59 Iowa 307.

N.J.—Schultz v. Jerrard, 3 A. 265.

N.Y.—Bayaud v. Fellows, 28 Barb. 451.

Where mortgagee in possession was garnished and had brought suit to foreclose, it was held that he was entitled to the appointment of a receiver.—Maish v. Bird, 13 N.W. 298, 59 Iowa 307.

Suit by creditor or subsequent encumbrancer

Where a mortgagee of property is in possession thereof, a suit for the appointment of a receiver and an adjustment of claims against the mortgagor cannot be maintained by a creditor or subsequent encumbrancer. —McConnell v. Denham, 34 N.W. 298, 72 Iowa 494.

29. Tex.—Citizens' State Bank v. Galveston First Nat. Bank, 120 S.W. 1141, 56 Tex.Civ.App. 515.

30. Tex.—Underwood v. Clark, Civ. App., 103 S.W.2d 199, 11 C.J. p 727-note 76.

Petitions held sufficient

Fla.—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35. Ind.—Stair v. Meissel, 192 N.E. 453, 207 Ind. 280.

Tex.—Lipow v. Pacific Finance Corporation, Civ.App., 34 S.W.2d 658.

Petition held insufficient

Tex.—Underwood v. Clark, Civ.App., 103 S.W.2d 199.

31. U.S.—H. B. Clafin Co. v. Furtick, C.C.S.C., 119 F. 429.

32. Ala.—Meyer v. Thomas, 30 So. 89, 131 Ala. 111.

Miss.—Burton v. Pepper, 76 So. 762, 116 Miss. 139.

Tex.—Amason v. Harrigan, Civ.App., 288 S.W. 566.

33. Tex.—Underwood v. Clark, Civ. App., 103 S.W.2d 199, 11 C.J. p 728 note 78.

General rule is that a receiver should not be appointed without notice to the parties adversely interested unless it should be made to appear that plaintiff in the suit would suffer some material injury by the delay necessary to give notice.—Underwood v. Clark, supra.

Appointment by court

On cross bill to foreclose alleging mortgagors' insolvency and attempt to dispose of mortgaged property, which was insufficient to pay mortgage indebtedness, judge properly appointed receiver without notice, statute requiring notice only when application for receiver is made to register. —Lambert v. Anderson, 149 So. 98, 227 Ala. 222.

Temporary receiver

Where, in an action to foreclose a chattel mortgage, a sufficient emer-

gency is made to appear, a temporary receiver may be appointed without notice. —Haggard v. Sanglin, 71 F. 711, 31 Wash. 165.

34. Tex.—Lipow v. Pacific Finance Corporation, Civ.App., 34 S.W.2d 658.

On general demurrer to motion to vacate a receivership on the ground that the mortgage debt is fully paid, it is error to refuse to vacate the receivership, such ground presenting an absolute defense, if true.—De Wees v. American Household Finance Co. of Texas, Tex.Civ.App., 113 S.W.2d 275.

35. Kan.—Guy v. Doak, 27 P. 968, 47 Kan. 236, 366, 11 C.J. p 728 note 79.

36. Ind.—Lorch v. Aultman, 75 Ind. 162, 11 C.J. p 728 note 80.

37. Ill.—Central Trust Co. of Illinois v. Sheridan Beach Hotel Bldg. Corporation, 259 Ill.App. 404.

38. U.S.—Farmers' L. & T. Co. v. Toledo, etc., R. Co., C.C.Mich., 43 F. 223, reversed on other grounds 54 F. 759, 4 C.C.A. 561.

39. U.S.—New York Cent. Trust Co. v. Worcester Cycle Mfg. Co., Conn., 93 F. 712, 35 C.C.A. 547.

40. Cal.—Crouse v. Los Angeles County Super. Ct., 153 P. 723, 28 Cal.App. 625.

41. Wash.—American Laundry Machinery Co. v. Eastlake Laundry Co., 29 P.2d 696, 176 Wash. 410.

Bond to prevent appointment. By giving bond with sufficient sureties to produce the mortgaged property, a mortgagor can prevent the appointment of a receiver.⁴²

Discharge of receiver. Where a receiver appointed in a foreclosure proceeding sells mortgaged chattels pursuant to the court's order, on the subsequent trial of the foreclosure action it is error to discharge the receiver and to set aside his acts.⁴³

An injunction will not lie to preserve the property, or to have other property substituted, pending foreclosure if the parties have an adequate remedy at law;⁴⁴ nor will an injunction issue to protect the possession of the property pending foreclosure where a statutory remedy by sequestration is more direct.⁴⁵ However, equity will prevent, by injunction, a mortgagor from impairing the value of, or destroying, the mortgaged property;⁴⁶ and the discretion of the trial court has been held not abused in the granting of a temporary restraining order against further disposal of the mortgaged property where it was shown that defendants were disposing of such property and were about to dispose of more,⁴⁷ but it is error to issue an injunction restraining disposition of property not subject to the mortgage.⁴⁸

The granting or refusal of an injunction to prevent the disposition of the property pending fore-

closure cannot in any way affect the finding and decree on the merits, where otherwise regular.⁴⁹

§ 410. Trial or Hearing

Defendants in a foreclosure suit are entitled to hearing and questions of fact should be submitted to the jury under proper instructions where a jury trial is had and the verdict or findings, which will be given a reasonable construction, must be sufficient to support the judgment.

While, in every case defendants in foreclosure must be given an opportunity to be heard,⁵⁰ the denial of a compulsory order of reference is not error where there is no issue requiring the examination of a long account.⁵¹

Questions of law and fact. Where a jury trial is had and the evidence is conflicting,⁵² question of fact should be submitted to the jury.⁵³ However, where the proceeding to foreclose is regarded as purely equitable in its character, the court may determine issues of both law and fact,⁵⁴ and although issues of fact may be submitted to a jury,⁵⁵ the verdict thereon is regarded as merely advisory in some jurisdictions.⁵⁶

Direction of verdict. The court should not direct a verdict where the evidence presents a jury question or makes out a case for the jury,⁵⁷ but, where no question of fact is presented, a direction of verdict is proper.⁵⁸

42. Tenn.—Williams v. Noland, 2 Tenn.Ch. 151.

11 C.J. p 728 note 85.

43. Okl.—J. I. Case Threshing Mach. Co. v. Barney, 154 P. 674.

44. Ala.—People's Bank of Mobile v. Lenoir, 85 So. 487, 204 Ala. 236. 11 C.J. p 728 note 87.

45. Tex.—Hull v. Quest, 2 Tex.Unrep.Cas. 564.

46. Fla.—Vanderpool Properties v. Hess & Slager, 130 So. 457, 100 Fla. 933.

47. S.D.—Grieme v. Robkes, 188 N.W. 745, 45 S.D. 480.

48. Ga.—Ross v. Fletcher, 96 S.E. 1, 148 Ga. 147.

49. Colo.—Bennett v. Reef, 27 P. 252, 16 Colo. 431.

50. Ala.—Meyer v. Thomas, 30 So. 89, 131 Ala. 111.

51. S.C.—Norwood Nat. Bank v. Banks, 139 S.E. 202, 141 S.C. 10.

52. Nev.—Wheeler & Stoddard v. Portland Cattle Loan Co., 268 P. 46, 51 Nev. 53.

53. Tex.—Weathered v. Meek, Civ.App., 258 S.W. 516.

Wyo.—P. J. Black Lumber Co. v. Turk, 62 P.2d 519, 50 Wyo. 361, rehearing denied 63 P.2d 805, 50 Wyo. 361.

Particular questions of fact

(1) Whether seller misrepresented hotel property sold defendant.—Palmer v. Moyers, Mo.App., 298 S.W. 101.

(2) Whether plaintiffs took truck back in satisfaction of the debt, or under an agreement to sell it and apply proceeds in satisfaction of unpaid purchase money, or under their mortgage securing payment of notes.—Weathered v. Meek, Tex.Civ.App., 258 S.W. 516.

(3) Whether plaintiffs turned truck over to vendor in settlement of the amount due, or to be sold for the benefit of both parties.—Weathered v. Meek, supra.

(4) Whether when loan was made mortgagor gave mortgagee's agent check with understanding that part thereof would be applied to payment of first installments on mortgage.—Carter v. State Finance Co., Tex.Civ.App., 81 S.W.2d 1046.

(5) Whether mortgagor ratified mortgagee's application to principal of money paid with instructions to apply it on interest so as to permit foreclosure for nonpayment of interest.—Thomas v. Beirne, 30 P.2d 863, 94 Colo. 429.

(6) Whether plaintiff had reason-

able grounds for determining that his security was unsafe.—Thomas v. Beirne, supra.

(7) Whether cattle were those mortgaged.—Schmaling v. Johnston, 27 P.2d 1059, 55 Nev. 164, affirming 13 P.2d 1111, 54 Nev. 293.

Evidence held sufficient to go to jury. Ark.—Kirby v. Wooten, 201 S.W. 1132 Ark. 44.

Tex.—Burditt v. Motor Supply Co. Civ.App., 99 S.W.2d 679, error dismissed.

Right to trial by jury see the C.J. title Juries § 29, also 35 C.J. p 16 notes 99-9.

54. Ind.—Brown v. Russell, 4 N.J. 428, 105 Ind. 46.

55. Cal.—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 36 11 C.J. p 728 note 92.

56. Cal.—Simon Newman Co. v. Woods, supra. 11 C.J. p 728 note 93.

57. Ga.—Nichols v. Ward, 108 S.J. 832, 27 Ga.App. 501.

Tex.—South Texas Lloyds v. Kilgor Civ.App., 295 S.W. 959—Terry Witherspoon, Civ.App., 239 S.V. 300.

58. Ga.—Fowler v. Federal Intermediate Credit Bank of Columbia 164 S.E. 102, 45 Ga.App. 149.

Instructions. Where questions of fact are submitted to the jury, they should be accompanied by proper instructions from the court;⁵⁹ and in submitting an issue to the jury, where the status of the parties has changed during the suit, such change in the status must not be overlooked.⁶⁰ However, it is improper to instruct the jury on issues not raised by the pleadings.⁶¹ Where an action is brought to recover on the mortgage debt and also for a foreclosure, the jury should be required, if they find for plaintiffs, to find the amount due them, including interest and attorney's fees.⁶²

Verdict, findings, and conclusions. The findings of the court must be sufficient to justify the judgment,⁶³ and must not be inconsistent,⁶⁴ but findings as to matter alleged which is not sufficient to constitute a defense need not be made.⁶⁵ In an action to foreclose more than one chattel mortgage, when a disposal of, or an injury to, the property or its deterioration is relied on as ground of foreclosure before the note secured is due, separate findings should be made as to the security of each mortgage, and the court must find the amount due on the debt secured by each mortgage separately.⁶⁶

Construction of findings. The findings will be

given a natural and reasonable construction.⁶⁷ A special finding limits and controls a general finding; and in such case it is the duty of the court to reject the conclusion of such general finding.⁶⁸

§ 411. Judgment or Decree

- a. Scope and extent of relief
- b. Requisites and validity of decree

a. Scope and Extent of Relief

Where equity acquires jurisdiction of a foreclosure proceeding, it will retain it for the purpose of affording complete relief; foreclosure will not be granted where it would be futile, and the mortgagee is not entitled to recover more than the amount of his indebtedness.

Courts of equity have control of mortgaged personal property and have the power to make all needful orders to secure the rights of all parties claiming an interest therein,⁶⁹ and, where a court of equity has acquired jurisdiction of a proceeding to foreclose, it will retain such jurisdiction for the purpose of affording complete relief as between the parties,⁷⁰ and the general equity power of ascertaining and adjusting the rights of all parties before the court will be exercised.⁷¹ Claims of third persons, made parties, to the property in suit may be

Tex.—Southwestern Drug Corporation v. First Nat. Bank, Civ.App., 45 S.W.2d 424, error refused.

59. Ga.—Taliaferro v. J. S. Cowart & Son, 171 S.E. 406, 47 Ga.App. 730.

Instructions held proper

(1) In proceeding to foreclose crop mortgage covering any additional farm supplies furnished mortgagor, charge that mortgagee could apply payments, made without direction as to application, first to satisfaction of amount due for additional supplies, crediting mortgage note with balance.—*Taliaferro v. J. S. Cowart & Son, supra.*

(2) In action to foreclose mortgage securing notes covering purchase price of grain separator, instruction on theory of one order and one contract for machinery.—*Advance-Rumely Thresher Co. v. Johnson, 243 N.W. 919, 62 N.D. 553.*

(3) An instruction that fraudulent intent may be established by circumstances.—*Palmer v. Moyers, Mo.App., 298 S.W. 101.*

Failure to instruct

In replevin action to foreclose chattel mortgage, where defense was that plaintiff was indebted to defendant, failure to instruct that amount so due must equal that due on mortgage note to defeat plaintiff's cause of action was error.—*Securities Inv. Corporation v. Krejci, Neb., 271 N.W. 287.*

60. Tex.—Williams v. Smith, Civ. App., 98 S.W. 916.

61. Okl.—Boatman's Bank v. Rogers, 57 P.2d 860, 177 Okl. 85.

62. Tex.—Freiberg v. Brunswick-Balke-Collender Co., 16 S.W. 784, 4 Tex.A.Civ.Cas. § 142.

63. Cal.—Bank of Parris v. Sandor, App., 75 P.2d 87.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

11 C.J. p 728 note 1.

Value of property

A finding as to the value of the property is not essential.—*Burt v. Forrest, 254 P. 296, 81 Cal.App. 579.*

64. U.S.—Union Stockyards Bank of Wichita, Kan., v. Hamilton, Ky., 246 F. 580, 158 C.C.A. 550.

65. Idaho.—Hare v. Young, 146 P. 104, 26 Idaho 682.

66. N.D.—Nome First Nat. Bank v. Mahoney, 135 N.W. 771, 23 N.D. 177.

67. Tex.—Florence v. Warren, Civ. App., 293 S.W. 226.

11 C.J. p 728 note 5.

Conclusion involving finding

A court's conclusion that the mortgagor made legal tender of payment has been held to involve a finding that several days' delay in communicating acceptance thereof was unreasonable.—*Florence v. Warren, supra.*

68. Tex.—Lee v. Robinson, Civ.App., 185 S.W. 1061.

69. Ark.—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117.

11 C.J. p 729 note 15.

Rights of mortgagor

Where the mortgagor obtained possession of the property which had been repossessed by the mortgagee, the possession of the property should be adjudged to the mortgagee with appropriate protection of the mortgagor's rights therein, where the mortgagee's lien is upheld.—*Cartwright v. C. I. T. Corporation, 70 S.W.2d 388, 253 Ky. 690.*

Reimbursement of transferee subject to mortgage

Transferee of chattels subject to conditional sales contract and subsequent mortgage was not entitled on foreclosure of mortgage to reimbursement for payments made on contract.—*Pacific States Savings & Loan Co. v. Strobeck, 33 P.2d 1063, 139 Cal.App. 427.*

70. Cal.—Lawrence v. Oakes, 3 P.2d 334, 335, 117 Cal.App. 32, citing Corpus Juris.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

Wash.—Mackall-Paine Veneer Co. v. Vancouver Plywood Co., 32 P.2d 530, 177 Wash. 503.

11 C.J. p 729 note 8.

71. La.—Twin City Motor Co. v. Pettit, App., 177 So. 814.

11 C.J. p 729 note 9.

adjusted by a court in foreclosure proceedings;⁷² and, if claimant has only an equitable lien, the question of his priority is purely of equitable cognizance.⁷³ It follows that in such actions liens equitably entitled to priority over the mortgage may be enforced,⁷⁴ although some cases hold that one of the recognized limitations on equitable jurisdiction in such actions is that there can be no litigation of title paramount or hostile to the mortgage.⁷⁵

A mortgagee may be entitled to either a judgment of foreclosure or for conversion as warranted by the evidence,⁷⁶ but an alternative judgment for plaintiff in an action to foreclose, awarding a specified amount of money in the event that a delivery of the mortgaged property could not be had, should not award an amount in excess of the amount of the indebtedness unpaid,⁷⁷ and it is error to render a judgment for the value of the property against a third person as having converted it and also to direct foreclosure of the mortgage lien on the same property where none of it is lost, destroyed, or beyond the jurisdiction of the court.⁷⁸ Also, a judgment decreeing that, if possession of the chattels could not be given, the mortgagee should be entitled to a judgment for the full amount of the mortgage with interest is unauthorized as against another lienor or the levying officer in the absence of any evidence as to the value of the chattels at the time of the conversion by them;⁷⁹ but a judgment against the mortgagor for the principal, interest, and attorney's fees with foreclosure of the mortgage lien and awarding, on replevy bond after

sequestration, the value of the replevied property has been held not defective as amounting to a double recovery.⁸⁰ However, it has been held that a mortgagee, having only a lien on the property, cannot recover damages for the wrongful conversion of the property in a chancery proceeding to foreclose the mortgage.⁸¹ In an action to foreclose several mortgages, a judgment foreclosing the last mortgage only is proper where the prior mortgages were ineffectual because of an insufficient description of the property.⁸²

While judgment should not be rendered until all preliminary issues that may affect the extent of the mortgagor's liability have been disposed of,⁸³ in an action to foreclose a mortgage for an indebtedness, the mortgagee is entitled to a judgment for the full amount due⁸⁴ and is not limited to the property covered by the mortgage sought to be foreclosed,⁸⁵ but the failure of the mortgagor to avail himself of the privilege of ascertaining the amount of the mortgage debt will not serve to award to the mortgagee more than his full debt with interest,⁸⁶ and a mortgagee by acquiring possession by detinue is in no position to obtain advantage merely by reason of the form of action, and is not entitled to recovery for the detention of the property in addition to the amount of the debt.⁸⁷ Conversely, the sum decreed as due must not exceed the amount due at the time of the decree,⁸⁸ including, of course, interest and legal expenses,⁸⁹ although such a judgment has been held not void in the absence of prejudice.⁹⁰ The computation of a judgment by award-

72. N.Y.—Seger & Gross Co. v. Maclaure, 165 N.Y.S. 423.
11 C.J. p 729 note 10.

Holder of conditional bill of sale

Where the mortgage covers more chattels than a conditional bill of sale, over which it took priority, the judgment of foreclosure should direct a sale of all the chattels in order to protect the holder of the bill of sale.—Seger & Gross Co. v. Maclaure, 165 N.Y.S. 423.

Claim and delivery

A mortgagee has the right to have a foreclosure judgment entered where the property is in custodia legis, although a claim and delivery proceeding by other persons was pending, where such persons were made parties to the foreclosure and no request for a delay was made.—Pacific Southwest Trust & Savings Bank v. Tuleedo, 241 P. 574, 74 Cal.App. 629.

73. Ky.—Woodward v. Newcomb, 12 Ky.L. 140.

74. Iowa.—Hartney v. Jordan, 69 N. W. 1037, 100 Iowa 646.

Wash.—Moody v. Noyes, 45 P. 732, 15 Wash. 128.

11 C.J. p 729 note 12.

75. N.Y.—Lembeck, etc., Eagle Brewing Co. v. Sexton, 77 N.E. 38, 184 N.Y. 185.

11 C.J. p 729 note 13.

76. Tex.—Hydraulic Casing Pulling Co. v. Brown, Civ.App., 297 S.W. 770.

77. Cal.—Shank v. Blackburn, 200 P. 762, 53 Cal.App. 620.

78. Tex.—Hydraulic Casing Pulling Co. v. Brown, Civ.App., 297 S.W. 770—A B C Stores v. Houston Showcase & Mfg. Co., Civ.App., 284 S.W. 332—Henderson v. Glezen, Civ.App., 240 S.W. 666.

79. N.Y.—Anderson v. A. H. Sickinger, Inc., 256 N.Y.S. 228, 235 App. Div. 735.

80. Tex.—Zihlman v. Yates, Civ. App., 91 S.W.2d 1167.

81. Fla.—J. G. White Engineering Corporation v. People's State Bank of Lakeland, 87 So. 753, 81 Fla. 35.

82. Tex.—Farmers' State Bank of Donna v. Valley Motors Co., Civ. App., 246 S.W. 712.

83. Ky.—Woodward v. Newcomb, 12 Ky.L. 140.

84. Ark.—Henry v. Irby, 282 S.E. 3, 170 Ark. 928.

Interest

Judgment awarding six per cent interest on mortgage on crop was improper, where note secured bore ten per cent.—Henry v. Irby, 282 S. W. 3, 170 Ark. 928.

85. Or.—Hubbs v. Warehouse Service Corporation, 42 P.2d 180, 149 Or. 559.

86. Ala.—Bradley v. Bentley, 167 So. 294, 232 Ala. 114.

87. Ala.—Bradley v. Bentley, supra.

88. N.Y.—Beers v. Waterbury, 21 N. Y.Super. 396.

11 C.J. p 730 note 26.

89. Iowa.—Stickney v. Stickney, 42 N.W. 518, 77 Iowa 699.

Ky.—Pennington v. Pyle, 3 Dana 529.
Tex.—Freiberg v. Brunswick-Balke-Collender Co., 16 S.W. 784, 4 Tex.A. Civ.Cas. § 142.

90. La.—Thompson v. King Motors, 140 So. 257, 19 La.App. 298.

ing the difference between the amount of plaintiff's verdict and defendant's verdict on a counterclaim has been held not improper.⁹¹

Under an agreement which is insufficient to constitute a mortgage lien, while plaintiff may recover the amount due, he is not entitled to a judgment giving him a mortgage lien on the property;⁹² and under statutory provisions in some jurisdictions, unless exceptional complications are present, strict foreclosure of a mortgage can be granted only in cases where the legal title is in the party seeking foreclosure.⁹³ Under a statute authorizing a judgment permitting the officer to levy on other property of the mortgagor in case of inability to find the mortgaged property, such a judgment has been held proper, although the mortgagee has taken possession of the mortgaged property, the mortgagor being able to protect himself by proper resort to a court of equity if the mortgagee should secrete the property and thereby prevent the officer holding the writ of execution from finding it.⁹⁴ Although the property is in the hands of a receiver pendente lite, the court appointing the receiver may order the proper officer to sell the property under a special execution on rendering a judgment of foreclosure.⁹⁵

The owner of property not included in the mortgage is entitled to recover his interest in such property where it was destroyed while in possession of the mortgagee under sequestration;⁹⁶ and an allowance to the mortgagor for property unaccounted for by the receiver, which property was taken along with mortgaged property, has been held authorized against the mortgagee where he purchased all the mortgaged property,⁹⁷ but the interveners in

a foreclosure action cannot recover for more property than was seized.⁹⁸ Where foreclosure is decreed against property not covered by the mortgage, the owner of such property has a right to have a proper decree of foreclosure entered notwithstanding he may have a right of action against the sheriff for taking such property.⁹⁹

Foreclosure futile. A foreclosure sale will not be decreed where it would be a futile and idle act,¹ as where the property mortgaged has ceased to exist.²

Statute authorizing summary judgment strictly construed. The meaning of a clause in a statute authorizing decrees for the sale of mortgaged property on an assent declared in the mortgage, since it provides a remedy of a summary nature, cannot be enlarged beyond the limits set by the words when read in connection with their context and the subject matter of the legislation.³

Personal or deficiency judgments are treated infra § 419.

b. Requisites and Validity of Decree

- (1) In general
- (2) Parties
- (3) Effect

(1) In General

The judgment or decree must be in conformity with the issues, proof, and findings and should not be ambiguous, and it should specify the amount of the lien and designate the property affected with reasonable certainty.

The judgment or decree must be in conformity to the issues, proof, and findings,⁴ and the decree

91. Mo.—Palmer v. Moyers, App., 298 S.W. 101.

92. Ga.—Bray v. McKenzie, 147 S.E. 406, 39 Ga.App. 397.

93. Or.—Corbin v. Preston, 218 P. 917, 109 Or. 230.

94. Tex.—Betty v. Tuer, Civ.App., 292 S.W. 271.

95. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

96. Tex.—Farmers' Nat. Bank of Hillsboro v. White, Civ.App., 25 S.W.2d 944, error dismissed.

97. Ark.—Temple v. Hamilton, 26 S.W.2d 591, 181 Ark. 1147.

98. N.D.—Northwestern Nat. Bank of Minneapolis, Minn., v. Howlett, 255 N.W. 574, 64 N.D. 664.

99. Wash.—Olson v. Lida, 230 P. 643, 131 Wash. 528, reversing Olson v. Fireoved, 225 P. 643, 129 Wash. 635.

1. S.D.—Valley Springs Holding Corporation v. Carlson, 227 N.W. 841, 56 S.D. 163.

2. Tex.—First Nat. Bank v. Morris, Civ.App., 94 S.W.2d 867.

3. Md.—Miller v. Hirschmann, 183 A. 259, 170 Md. 145.

Goods and chattels personal

(1) Term "goods" in statute authorizing decrees for sale of mortgaged chattels real or goods and chattels personal is not so comprehensive as "chattels," "goods" designating inanimate objects, while chattels embrace both animate and inanimate property.—Miller v. Hirschmann, 183 A. 259, 170 Md. 145.

(2) "Chattels personal" are movable things, which may be carried about by or with owner, such as domestic animals, jewels, furniture, etc., and are within statute authorizing Baltimore city circuit courts to decree sales of such chattels with

mortgagors' assent, if situated in such city.—Miller v. Hirschmann, supra.

(3) General legacy of share in estate of personalty, contingent on legatee surviving life tenant, is not "chattel personal" within statute authorizing decrees for sale of such chattels in Baltimore with mortgagors' assent.—Miller v. Hirschmann, supra.

4. Ariz.—Crosby v. Murray, 210 P. 1046, 24 Ariz. 446.
Cal.—Bank of Perris v. Sandor, App., 75 P.2d 87.

Iowa.—Farmers' Sav. Bank of Williamsburg v. Cash, 200 N.W. 603, 199 Iowa 597.

N.D.—State Bank of Bowman v. Nelson, 186 N.W. 766, 48 N.D. 702.
S.D.—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

Tex.—Ross v. Dozier, Civ.App., 32 S.W.2d 911—Automobile Finance

should not be ambiguous⁵ in stating the order of the court directing foreclosure, and the mode in which such order is to be carried out.⁶ It should also describe the property affected with reasonable certainty,⁷ and specify the amount of the lien,⁸ but a judgment has been held not fatally defective as to the mortgagor because of a failure to state the value of each article covered by the mortgage.⁹ While a decree containing mistakes in material matters is improper,¹⁰ errors on immaterial points are not fatal to the validity of the decree,¹¹ and, where the court had jurisdiction of the parties and of the subject matter with which the cause of action dealt, the fact that it made an erroneous ruling will not necessarily render the judgment void.¹² In a foreclosure under a statute the judgment must in all particulars comply with the requirements of the statute.¹³ The judgment or decree may be entered

on a written stipulation or agreement of the parties.¹⁴

Judgment by default. If defendant fails to answer the suit, his default admits the execution of the mortgage, and the court may render judgment by default or decree pro confesso for the amount of the mortgage debt and for a sale of the mortgaged property.¹⁵ However, where the affidavit of an intervener is sufficient to set forth his claim, it is improper to enter a default judgment for plaintiff because the intervener filed no answer.¹⁶

Final decree. A decree approving a master's report of sale of the mortgaged property and the expenses therein is a final decree.¹⁷

(2) Parties

Foreclosure will not be decreed against one not in possession of the property and it cannot be decreed where the mortgagor is not a party.

Co. v. Bryan, Civ.App., 3 S.W.2d 835.

11 C.J. p 729 note 16.

Prayer for relief

In chattel mortgage foreclosure proceeding, under a counterclaim for conversion, it was held that the relief relating to conversion was not restricted to the prayer of relief in the answer.—State Bank of Bowman v. Nelson, 186 N.W. 766, 48 N.D. 702.

Property not covered by mortgage

A judgment decreeing foreclosure of property not covered by the mortgage is erroneous.—Olson v. Lida, 230 P. 643, 131 Wash. 528, reversing Olson v. Fireoed, 225 P. 643, 129 Wash. 635.

Increase of property

Where plaintiff enumerated property described in mortgage, and also stated increase of property was covered thereby, trial court did not err in including increase of property in decree of foreclosure.—Burns v. Corn Exch. Nat. Bank of Omaha, Neb., 240 P. 683, 33 Wyo. 474.

Crops grown to date of judgment

Where mortgage created lien on all crops growing or to be grown until debt was paid, judgment ordering sale of all crops grown to date of entry of judgment was proper.—Lawrence v. Oakes, 3 P.2d 334, 117 Cal.App. 32.

Appointment of receiver and commissioner

The appointment of a receiver and commissioner to gather the property and make sale thereof has been held not error as outside the issues, the word "receiver" adding nothing to the legal effect of the order which, in fact, appointed a commissioner.—Ramsey v. Furlott, 57 P.2d 1007, 14 Cal.App.2d 145.

5. Tex.—Ross v. Dozier, Civ.App., 32 S.W.2d 911.

11 C.J. p 729 note 17.

6. N.C.—Chas. Hackley Piano Co. v. Kennedy, 67 S.E. 488, 152 N.C. 196. 11 C.J. p 730 note 18.

7. Tex.—Edwards v. Osman, 19 S.W. 868, 84 Tex. 656—Jaco v. W. A. Nash & Co., Civ.App., 236 S.W. 235. 11 C.J. p 730 note 19.

Description sufficient

(1) Judgment authorizing sale and correctly reciting serial number of mortgaged automobile is sufficient to identify it, notwithstanding recital of wrong motor number.—Thompson v. King Motors, 140 So. 257, 19 La. App. 298.

(2) A judgment foreclosing a mortgage covering "office furniture," reciting that foreclosure was granted against office furniture including chairs and tables was not erroneous as limiting, under rule of ejusdem generis, foreclosure to articles of like nature with chairs and tables to exclusion of articles other than cabinet makers' wares, in absence of indication of intention to limit or qualify descriptive language of mortgage by specific reference in judgment, since articles of furniture other than cabinet makers' wares were included within term "office furniture."—Stevenson v. Record Pub. Co., Tex.Civ.App., 107 S.W.2d 462, error dismissed.

Judgment not void

Judgment foreclosing mortgage on "50 cows, 7 bulls and 47 calves, all located in Baylor County, Texas," as described in petition by mortgagee who introduced evidence of legal description of cattle, was not void because not sufficiently identifying cattle.—Busby v. First Nat. Bank, Tex. Civ.App., 68 S.W.2d 328, error dismissed.

8. Tex.—Kelly v. R-F Finance Corporation, Civ.App., 60 S.W.2d 1067. 11 C.J. p 730 note 20.

Judgment held too indefinite

Judgment in foreclosure suit requiring reference to mortgage to interpret recital with respect to surrendered into court by mortgagee assignee is too indefinite.—Kelly R-F Finance Corporation, Tex.Civ.App., 60 S.W.2d 1067.

9. Tex.—Zihlman v. Yates, Civ.App. 91 S.W.2d 1167.

10. Ariz.—Crosby v. Murray, 210 1046, 24 Ariz. 446.

11 C.J. p 730 note 21.

11. N.J.—Hunt v. Ludwig, 118 839, 94 N.J.Eq. 158, affirming 1 A. 699, 93 N.J.Eq. 314.

11 C.J. p 730 note 22.

Dismissing bill and ordering sale

Where, in a suit to foreclose chattel mortgage, a receiver appointed in behalf of complainant sold the chattels, and the mortgage was a judgment invalid, it was error to dismiss the bill, and in the same decree order a disposal of the proceeds of sale, since the decree thus rendered depended on the validity of the foreclosure proceedings, but such inadvertence may be corrected.—Hunt v. Ludwig, 118 A. 839, 94 N.J.Eq. 158, affirming 116 A. 699, 93 N.J.Eq. 314.

12. Ariz.—Hawkins v. Leake, 22 2d 833, 42 Ariz. 121.

13. N.D.—Nome First Nat. Bank v. Mahoney, 135 N.W. 771, 23 N.D. 177.

14. Iowa.—Mains v. Des Moines Nat. Bank, 85 N.W. 758, 113 Iowa 395.

15. Tex.—Ricks v. Pinson, 21 Tex. 507.

16. N.C.—Hill v. Patillo, 122 S. 306, 187 N.C. 531.

17. Fla.—Alford v. Leonard, 102 S. 885, 88 Fla. 532.

The fact that there can be no personal judgment in a proceeding to foreclose, because of the absence of the necessary parties will not prevent a decree for foreclosure where the proper parties for that purpose are before the court.¹⁸ Foreclosure will not be decreed against one not in possession of the mortgaged chattels,¹⁹ and foreclosure cannot be decreed where the mortgagor is not a party.²⁰ In case of the mortgagor's death pending foreclosure the action must be revived against his legal representatives; otherwise no valid foreclosure can be decreed.²¹ A purchaser of personal property, pending a bill to foreclose a chattel mortgage thereon, is bound by the decree that may be made against the person from whom he derives title.²²

Joint mortgagees. Under a decree foreclosing a mortgage executed to two mortgagees to secure distinct debts, without indicating whether they take as joint tenants or tenants in common, the mortgagees are entitled to the property as joint tenants in proportion to their debts as they then exist, although one debt may have been reduced more than the other.²³

(3) Effect

A mortgage becomes merged in a judgment of foreclosure, and the judgment is conclusive as to defenses which should have been set up in the action.

A judgment for the foreclosure of a mortgage affirms the validity of the mortgage and plaintiff's right to satisfaction out of the specific property covered by it,²⁴ and is a binding adjudication that plaintiff in such action has a better title to the property than a defendant therein who was claiming under another mortgage.²⁵ The mortgagee does not get legal title to the property under a judgment of foreclosure, but only a lien on the property,²⁶ and the mortgage becomes merged in the judgment.²⁷

and has no further vitality as long as the judgment stands.²⁸ The assignor of a mortgage is bound by a finding that the assignee was the owner of the mortgage in a foreclosure suit to which the assignor was a party,²⁹ and a final decree of foreclosure is conclusive as to defenses which should have been set up in the action,³⁰ and a general judgment for plaintiff, although irregular in form, disposes of all parties and issues,³¹ but a judgment of foreclosure has been held not conclusive as to any incidental or collateral questions not actually put in issue and adjudicated.³² In the absence of fraud or collusion, when a junior mortgagee forecloses his mortgage and obtains possession of the property from one who is the successor in interest of, and stands in privity with, the senior mortgagee and obtains a valid judgment against such person decreeing the junior mortgagee to be the owner of the property and such judgment is unappealed from, the rights of the senior mortgagee will be precluded by such judgment.³³

Where an attempt to foreclose a mortgage is void, the parties to the mortgage are left in the same position as that occupied by them before the foreclosure was attempted.³⁴

§ 412. Sale

While sales on foreclosure are sometimes made through the agency of a special execution, equity will not order them to be so made when it would defeat the ends of justice; mandatory provisions of statutes in reference to such sales must be complied with.

The practice in some jurisdictions is to sell under a foreclosure decree through the agency of a special execution,³⁵ but courts of equity, in ordering a sale of property on foreclosure of a chattel mortgage, will not follow the manner of sales on execution, where so to do would defeat the ends of justice.³⁶ A decree of foreclosure does not authorize

18. Wash.—Weir v. Rathbun, 40 P. 625, 12 Wash. 84.

19. Or.—Flanagan Bank v. Graham, 71 P. 137, 790, 42 Or. 403.
11 C.J. p 730 note 28.

Joint possession

It is error to render judgment against one who is merely in joint possession of the property with the mortgagor, without other title or right thereto.—McLain v. McCollum, Tex.Civ.App., 72 S.W. 1027.

20. S.D.—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

21. Ind.—Binkley v. Forkner, 15 N. E. 343.

22. Ill.—McCauley v. Rogers, 104 Ill. 578, affirming 10 Ill.App. 559.

23. R.I.—Clarke v. Robinson, 13 A. 124, 16 R.I. 180.

24. Ala.—Boswell v. Carlisle, 70 Ala. 244.

25. Iowa.—Allen v. First Nat. Bank, 180 N.W. 675, 191 Iowa 492.

26. Tex.—Taylor v. Tillotson, Civ. App., 272 S.W. 323.

27. Tex.—Taylor v. Tillotson, supra. 11 C.J. p 730 note 33.

28. Wash.—Spokane Merchants' Assoc. v. Coleville First Nat. Bank, 150 P. 434, 86 Wash. 367.

29. Ark.—Starling v. Hamner, 50 S. W.2d 612, 185 Ark. 930.

30. N.J.—Bankers' Trust Co. v. Maxson, 134 A. 875, 100 N.J.Eq. 1.

31. Tex.—Medino v. Sheppard, Civ. App., 273 S.W. 885.

Amount due

In a mortgagee's action for money realized from a sale of part of the

security, he is bound by the prior judgment in foreclosure adjudicating the total amount due.—Halladay v. McGraw, 132 N.E. 123, 231 N.Y. 382, modifying 179 N.Y.S. 924, 190 App. Div. 929.

32. Iowa.—Vogel v. Wadsworth, 48 Iowa 23.

34 C.J. p 966 note 44.

33. Okl.—Security State Bank of Mooreland v. First Nat. Bank, 213 P. 874, 89 Okl. 179, 180.

34. Idaho.—Blackfoot City Bank v. Clements, 226 P. 1079, 39 Idaho 194.

35. N.D.—Workman v. Salzer Lumber Co., 199 N.W. 769, 51 N.D. 280. 11 C.J. p 730 note 35.

36. N.D.—Workman v. Salzer Lumber Co., supra. 11 C.J. p 730 note 36.

the seizure and sale of property not described therein;³⁷ but a decree ordering a sale of the property in an adjoining county, although unauthorized by the terms of the contract, is not subject to collateral attack.³⁸

The person in possession of the property may, by an order of attachment, be forced to deliver it to the commissioner appointed to conduct the sale.³⁹ Mere delay in executing the order to sell does not forfeit the mortgagee's right to enforce.⁴⁰ While the chancellor, to adjust the rights between the parties, should order a sale of the property, an execution defendant has no right to complain of the failure of the court to order a sale, if he has received credit on the mortgage debt for the full value of the property,⁴¹ and in the absence of an express agreement or statute requiring a sale of property subject to a chattel mortgage on default, the mortgagee is only obliged to sell in case he desires to hold the mortgagor for any deficiency.⁴²

Advertisement and notice. While the various acts required by statute to be performed by the officer in connection with the sale, such as the advertisement thereof and the return, have been regarded in at least one jurisdiction as directory merely, and not essential to give him the power to sell,⁴³ in other jurisdictions substantial compliance with statutory provisions regarding notice of the sale is necessary,⁴⁴ and the description of the property to be sold at the foreclosure sale must be given with reasonable certainty in the advertisement and notice of sale.⁴⁵ There is a legal presumption that the officer obeyed the directions given by the decree as to the publication of notice of the proposed sale.⁴⁶ A statute prescribing the procedure to subject prop-

erty covered by a chattel mortgage to the mortgage debt without the consent of the mortgagor and providing that a notice of sale must be given the owner of the equity of redemption and that for a violation thereof the debt secured by the mortgage shall be deemed fully satisfied and the mortgage canceled has been held invalid.⁴⁷

Appraisal. Where an appraisal is required by statute, before sale, the fact that the mortgagor waived such requirement does not preclude the mortgagee from moving to set aside the sale for failure to have an appraisal.⁴⁸

§ 413. — Claims of Third Persons

After judgment in a foreclosure action, third persons claiming an interest in the property may generally restrain the sale of the property or secure proper relief by appropriate action.

Where execution has issued on a judgment in foreclosure, claimant in rightful possession of the mortgaged property may retain it through statutory provisions for the trial of right to property.⁴⁹

In the absence of statutory provisions, a third person owning property seized in a chattel mortgage foreclosure action may claim ownership orally or in writing, such claim need not state the value of the property, and if stated, claimant is not bound, the value of the property being a question for the jury.⁵⁰

A third person claiming an interest in property, where such claim is denied, has the burden of proving his right thereto⁵¹ by a preponderance of the evidence;⁵² and he cannot claim the proceeds of the sale by priority and at the same time attack the act of mortgage under which the sale was made.⁵³

37. Tex.—Lawrence v. Story, etc., Plano Co., Civ.App., 183 S.W. 1187. 11 C.J. p 781 note 41.

38. Iowa.—King v. Nelson, 94 N.W. 1095, 120 Iowa 606.

39. Ky.—Cooper v. McKee, 89 S.W. 203, 121 Ky. 287, 28 Ky.L. 270. 11 C.J. p 781 note 37.

40. N.D.—Workman v. Salzer Lumber Co., 199 N.W. 769, 51 N.D. 280. 11 C.J. p 781 note 38.

41. Ky.—Hubbard v. Ratcliffe, 13 Ky.L. 640.

42. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661.

43. Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

44. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

Return insufficient to show notice Sheriff's return of fore-

closure sale creating inference that notices of sale of realty only were posted, and that sale of personalty was overlooked, was insufficient to show notice.—Kunselman v. Kaser, supra.

45. U.S.—Sampson v. Camperdown Cotton Mills, C.C.S.C., 64 F. 939.

N.Y.—General Electric Co. v. Wightman, 39 N.Y.S. 420, 3 App.Div. 118.

46. U.S.—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965.

47. Wis.—Stierle v. Rohmeyer, 260 N.W. 647, 218 Wis. 149.

48. Iowa.—Minneapolis Threshing Mach. Co. v. Beck, 64 N.W. 637, 95 Iowa 725.

49. Tex.—Jones v. Lawrence, Civ. App., 151 S.W. 584—Yandell v. Appling, Civ.App., 140 S.W. 518—Craig v. Martin-Bennett Co., Civ. App., 102 S.W. 1172.

50. N.D.—Morton v. Stensby, 232 N.W. 6, 59 N.D. 784.

Attachment statute not applicable

A statute relating to the claims of third parties in an attachment suit is not applicable where property is taken under a warrant of seizure in an action to foreclose a mortgage and was disposed of under a special execution issued on the judgment of foreclosure in such action.—Morton v. Stensby, supra.

51. Ala.—Bixler v. Zeidman, 119 So. 211, 218 Ala. 498.

Evidence held sufficient

Evidence sustained verdict for damages for conversion for third party claimant against sheriffs who seized and sold property in mortgage foreclosure action.—Morton v. Stensby, 232 N.W. 6, 59 N.D. 784.

53. La.—Federal Mortgage & Finance Co. v. Bohne, App., 146 So. 173—Eddy v. Weathers, 134 So. 259, 16 La.App. 634.

After final judgment, the denial of a petition of intervention by parties who had not established their claim, is within the discretion of the court.⁵⁴

Although a judgment in foreclosure directs that the claim of a third person be fully paid from the proceeds of sale, such third person cannot insist on a sale under the judgment after the mortgage indebtedness has been paid and the mortgage discharged.⁵⁵ A person paying a note secured by a chattel mortgage, which also partly secured other indebtedness, has been held entitled on intervention in foreclosure proceedings to require the payee of the note to exhaust the additional security first before satisfying his claim out of the property covered by the mortgage.⁵⁶

Intervention prior to judgment in a foreclosure action is treated *supra* § 403.

§ 414. — Manner and Conduct of Sale

Substantial compliance with existing statutory provisions is necessary to render a foreclosure sale valid, but the sale will not be set aside for mere irregularities.

Where statutes are in force regarding the manner and conduct of a foreclosure sale, substantial compliance therewith is generally sufficient.⁵⁷ The sale is a judicial one, and in the absence of a statute directing an execution to be issued therefor the court may order any person to make the sale and may prescribe the manner of the sale.⁵⁸ The officer making the sale acts as an officer of the court,⁵⁹ and may make a valid sale under the order issued in pursuance of a foreclosure decree, even though the mortgaged property is not present, or under his control, at the time and place of sale.⁶⁰ The prop-

erty should be sold in the manner calculated to bring the best price,⁶¹ and the court may direct the officer to offer it for sale both separately and together, in order to determine this;⁶² but where there are several mortgages on separate parcels of personal property securing different debts, the total mortgaged property cannot be sold in one lot to pay the balance due on all the debts.⁶³

The failure to sell all of the mortgaged property will not invalidate the sale where part of the property could not be located.⁶⁴ Omissions and irregularities of the sheriff at a sale held by him are not chargeable to the buyer, but are questions between the sheriff and the parties to the judgment.⁶⁵

Attacking sale. A foreclosure sale will not be set aside in an action therefor on the ground of collusion and fraud, where there is no claim of new evidence or matters not known at the time of the foreclosure proceedings;⁶⁶ and the fact that personalty in a receiver's control was sold while it was in the physical possession of tenants has been held not to warrant setting aside the sale on the ground that the property could not be delivered to the purchaser.⁶⁷ One desiring a sale of mortgaged property in separate units should present a timely application therefor,⁶⁸ and before a foreclosure sale of a number of pieces of property sold in parcels or all as one may be set aside, it must be shown that it would have brought a higher price if sold piece by piece.⁶⁹ Alleged conduct of an attorney representing the mortgagee at the sale is not ground for setting aside the sale where such conduct was not improper;⁷⁰ and the adequacy of the price at the sale being within the discretion of the trial court,

54. Wyo.—Anderson v. Star-Bair Oil Co., 243 P. 394, 34 Wyo. 332.

55. N.Y.—Washington Trust Co. v. Morse Iron Works, etc., Co., 79 N. E. 1022, 187 N.Y. 307, reversing 100 N.Y.S. 254, 114 App.Div. 886.

56. Tex.—Askey v. Stroud, Civ.App., 240 S.W. 339.

57. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

Within view of property

Foreclosure sale of furniture on premises where any purchaser had privilege of viewing it in apartments is sufficient compliance with statute requiring that sale must be within view of purchasers.—Kunselman v. Kaser, *supra*.

Sale for cash invalid

Under St.Annot., 1899, § 3376, requiring foreclosure sales made by order of court to be on three months' credit, a sale for cash was held invalid.—Stone v. Thacker, 62 S.W. 70, 3 Ind.T. 737.

Extent of waiver of statute

Provision in bill of sale to secure debt waiving notice of application for speedy sale of perishable property or property liable to deteriorate from keeping was held not waiver of notice of application for speedy sale of mule, and hence speedy sale of mule without such notice was void.—Jackson v. Parks, 174 S.E. 203, 49 Ga.App. 29.

58. Ind.—Leader Pub. Co. v. Grant Trust, etc., Co., 108 N.E. 121, 182 Ind. 651.

11 C.J. p 731 note 46.

59. Kan.—Wildin v. Duckworth, 112 P. 606, 83 Kan. 698.

60. Colo.—Conway v. Headquist, 34 P.2d 69, 95 Colo. 187.

11 C.J. p 731 note 48.

61. Ariz.—Kunselman v. Kaser, 17 P. 2d 327, 41 Ariz. 219.

11 C.J. p 731 note 52.

62. W.Va.—Hurxthal v. Hurxthal, 32 S.E. 237, 45 W.Va. 584.

63. La.—T. Hofman-Olsen v. North-

ern Lumber Mfg. Co., 107 So. 593, 160 La. 339.

64. Vt.—Firestone Tire & Rubber Co. v. Hart, 158 A. 90, 104 Vt. 100.

65. Ga.—Parr, etc., Furniture Co. v. Barnett, 85 S.E. 823, 16 Ga.App. 550.

66. Wash.—Jesseph v. Carroll, 219 P. 429, 126 Wash. 661.

67. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

68. Fla.—Hyman v. City Trust Co., 128 So. 611, 99 Fla. 1202.

69. Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

Fla.—Hyman v. City Trust Co., 128 So. 611, 99 Fla. 1202.

Sale held valid

Ariz.—Kunselman v. Kaser, 17 P.2d 327, 41 Ariz. 219.

70. Wash.—Jesseph v. Carroll, 219 P. 429, 126 Wash. 661.

Stating priority and amount of other liens

Where an attorney representing

such question will be reviewed only for the purpose of determining whether there has been an abuse of discretion.⁷¹

A mortgagor's creditor has been held not entitled to take advantage of mere irregularities in the foreclosure sale;⁷² and a foreclosure sale is not subject to collateral attack for mere irregularities.⁷³

§ 415. — Persons Who May Purchase

A mortgagee may purchase the property at a foreclosure sale.

The holder of a mortgage may purchase at the sale, under a decree of foreclosure,⁷⁴ and cannot be disturbed in his purchase by the trustee in bankruptcy of the mortgagor, on account of irregularities in the sale.⁷⁵

§ 416. — Report of Sale

Ordinarily, the officer must make a return or report after he has sold the property and the sale must be confirmed by the court where so required by statute or decree of the court.

Generally, after the officer has sold the property in accordance with the decree of the court, he must make a return or report.⁷⁶ However, the fact that the officer's return failed to disclose how much the

personalty and the realty were sold for respectively has been held harmless, as such error could be corrected by an amended return.⁷⁷

Confirmation of sale. While a foreclosure sale may be effective without confirmation by the court where confirmation is not required either by statute or order of court,⁷⁸ generally, after the officer has made a return or report to the court, his action must then be confirmed,⁷⁹ and the court may order a confirmation which will relate back to the time of sale.⁸⁰ While, ordinarily, the inadequacy of price is not ground for withholding an order of confirmation of the sale, a sale at a price that is inequitable will not be confirmed.⁸¹

§ 417. — Effect of Sale

A judgment of foreclosure and sale of the property completely extinguishes the mortgage, and the mortgagor has neither legal nor equitable title to the property, but only a personal privilege to redeem.

A judgment of foreclosure and sale of the mortgaged property to the mortgagee completely extinguishes the mortgage,⁸² and satisfies the mortgage debt to the extent of the net proceeds obtained;⁸³ and by force of statutory provision, it has been held to discharge the debt entirely when the person liable therefor was not made a party to the proceedings.⁸⁴

the mortgagee at a foreclosure sale, when questioned, told contemplated purchasers the amount of liens against the property, stating that he represented the lien claimants and that in his opinion the liens were valid and superior to the mortgage lien, and where he further allowed additional time for the investigation of such matters before starting the sale, his conduct was not such as to discourage the bidding.—*Jesseph v. Carroll*, 219 P. 429, 126 Wash. 661.

71. Wash.—*Jesseph v. Carroll*, supra.

Inadequacy not shown

Where personal property, subject to liens aggregating three thousand six hundred dollars was sold at a foreclosure sale for two thousand six hundred seventy dollars, although shown to have been originally purchased, together with a body of timber land, for thirty thousand dollars, and although about one half of the timber land had been sold for ten thousand dollars, such an inadequacy of price was not shown as would warrant setting aside the foreclosure sale.—*Jesseph v. Carroll*, supra.

72. Ill.—*Matson v. City Market Co.*, 262 Ill.App. 200.

73. Wash.—*Dare v. Hall*, 250 P. 106, 141 Wash. 389.

11 C.J. p 731 note 49.

74. Mo.—*Weber Impl. Co. v. Dunard*, 164 S.W. 685, 140 Mo.App. 476. 11 C.J. p 731 note 54.

75. Mich.—*Lyle v. Palmer*, 3 N.W. 921, 42 Mich. 314.

76. Ariz.—*Kunselman v. Kaser*, 17 P.2d 327, 41 Ariz. 219. 11 C.J. p 731 note 57.

Provision as to return of writ directory

Where judgment forecloses equity of redemption in specific property and provides for issuance of special execution directing sheriff to sell property, the judgment is enforceable under Comp.L.1913 § 7714, by writ reciting the material parts of the judgment, and in such case the provision in the execution for its return within sixty days, and in the statute, Comp.L.1913 § 7719, requiring executions to be returned within sixty days, is directory.—*Workman v. Salzer Lumber Co.*, 199 N.W. 769, 51 N.D. 280.

Statute invalid

A statute prescribing the procedure to subject property covered by a chattel mortgage to the mortgage debt without the consent of the mortgagor, and providing for the filing of an affidavit reporting the sale and that for a violation thereof the debt secured by the mortgage shall be deemed fully satisfied and the mortgage canceled, has been held invalid.—*Stierle v. Rohmeyer*, 260 N.W. 647, 218 Wis. 149.

77. Ariz.—*Kunselman v. Kaser*, 17 P.2d 327, 41 Ariz. 219.

78. U.S.—*Radetsky v. Gramm-Bernstein Motor Truck Co.*, C.C.A.Colo., 4 F.2d 965.

79. Ky.—*Schneider v. Greenbaum*, 46 S.W. 2, 20 Ky.L. 207. 11 C.J. p 731 note 58.

80. Mich.—*Ruggles v. Centerville First Nat. Bank*, 5 N.W. 257, 43 Mich. 192.

81. U.S.—*Hanan v. Threadgill*, D.C. Fla., 296 F. 569—*Blackburn v. Selma R. Co.*, C.C.Tenn., 3 F. 689.

Price inequitable

A sale of a boat and land under mortgages will not be confirmed, where bids were one thousand nine hundred dollars in November, as against eleven thousand seven hundred fifty dollars in former sale in May, not reported by master, and it appeared that complaining party had interest by reason of guaranty and as obligor in supersedeas bond, and was prevented from attending the November sale.—*Hanan v. Threadgill*, D.C.Fla., 296 F. 569.

82. Tex.—*Ligon v. Jackson*, Civ. App., 238 S.W. 1024.

83. Ga.—*Earnest v. Nappier*, 19 Ga. 537.

11 C.J. p 731 note 60.

84. Conn.—*Ansonia Nat. Bank's Appeal*, 18 A. 1030, 20 A. 394, 51 Conn. 257.

Where the property was sold under foreclosure of a second mortgage to the mortgagee who was also the holder of the first mortgage thereon, it was held that the lien of the first mortgage became merged in the higher title, and ceased to exist.⁸⁵

After a foreclosure sale of mortgaged property, the mortgagor has neither legal nor equitable title thereto, but is left with a mere personal privilege to redeem, and the title vests in the purchaser subject to the statutory privilege to redeem,⁸⁶ and until the sale has been set aside or declared void, the purchaser remains bound for the purchase price.⁸⁷

A lessee cannot sustain a claim to the property after a sale thereof under foreclosure proceedings to which the lessor was a party;⁸⁸ and the person conducting a sale under a judgment of foreclosure is protected against all adverse claimants of the property.⁸⁹ On a collateral attack, the price ob-

tained at such sale has been held conclusively to fix the value of the property in the absence of fraud.⁹⁰

§ 418. — Title and Rights of Purchaser

The title of the purchaser under a foreclosure sale is dependent on the validity and priority of the mortgage and the regularity of the foreclosure proceedings, and he is ordinarily entitled only to property covered by the mortgage and the bill of sale thereunder.

The title of the purchaser, under a judicial foreclosure of a chattel mortgage, depends on the validity of the mortgage foreclosed,⁹¹ its priority of lien,⁹² and the regularity and legality of the foreclosure proceedings.⁹³ A purchase by a chattel mortgagee at his own sale has been held not void, but only voidable at the mortgagor's election.⁹⁴ While it has been held that the burden is not on the purchaser to show that the sale was lawful,⁹⁵

85. Cal.—Good v. Brown, 196 P. 299, 51 Cal.App. 199.

86. Wis.—Whalen v. Finn, 240 N.W. 188, 207 Wis. 254.

87. Ky.—Schneider v. Greenbaum, 46 S.W. 2, 20 Ky.L. 307.

88. U.S.—In re Kolb Carton Co., C. C.A.Conn., 9 F.2d 706, mandate amended 11 F.2d 1011.

89. Conn.—Carter v. Clark, 28 Conn. 512.

11 C.J. p 732 note 63.

90. Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

11 C.J. p 732 note 62.

91. Md.—Miller v. Hirschmann, 183 A. 259, 170 Md. 145.

11 C.J. p 732 note 65.

Property or rights not subject to mortgage

As remainderman's interest in contingent general legacy of money was not the subject of a mortgage, purchaser at sale of such interest under consent foreclosure decree did not acquire absolute title thereto.—Miller v. Hirschmann, *supra*.

92. Ga.—Hanesley v. Council, 92 S. E. 530, 147 Ga. 27.

11 C.J. p 732 note 66.

Purchase at sale under first mortgage

Where sale of property under chattel mortgage did not bring sufficient sum to discharge first lien, purchaser at such sale acquired property discharged from subordinate lien.—Lindsey v. Monroe, Tex.Civ. App., 95 S.W.2d 1324.

Purchase at sale under second mortgage

The purchaser of property at a foreclosure sale under a second mortgage may pay the debt due to

the first mortgagee and retain the property.—Cason, Monk & Co. v. Baker, Tex.Civ.App., 62 S.W.2d 592.

93. Ga.—Kirkland v. Gaskins, Paulk & Co., 92 S.E. 965, 20 Ga.App. 235. Va.—McClure Grocery Co. v. Watson, 139 S.E. 288, 148 Va. 601.

11 C.J. p 732 note 67.

Delivery of property

Where purchaser at sale under deed of trust was already in possession at time of sale as lessee of grantor, a formal delivery was unnecessary.—F. D. Cummer & Son Co. v. R. M. Hudson Co., 127 S.E. 171, 141 Va. 271.

Payment of purchase money

(1) Where sale of property under deed of trust was regarded as completed by both trustee and purchaser, fact that payment of price for property sold was temporarily deferred did not affect sale, where it was by agreement between trustee and purchaser.—F. D. Cummer & Son Co. v. R. M. Hudson Co., *supra*.

(2) The owner of a mortgage who bid in the property at a foreclosure sale for cash, for more than the amount due on the mortgage, and who made no payment on his purchase, was held to acquire no title to the property.—Weber Impl. Co. v. Dunard, 164 S.W. 685, 181 Mo.App. 658.

Notice that sale was fraudulent

Defendants may show that an alleged sale under a deed of trust was a mere sham and a fraud on the rights of creditors and that such facts were known to the purchaser at the sale.—McClure Grocery Co. v. Watson, 139 S.E. 288, 148 Va. 601.

Void sale to mortgagee

Where buyer of mule conveyed mule to seller in bill of sale to secure purchase price, purchase of

mule by seller at void foreclosure sale for less than debt secured was not rescission of sale to buyer; hence buyer was entitled to have mule restored, and seller was entitled to payment of purchase money due or to resale of mule in proper manner.—Jackson v. Parks, 174 S.E. 203, 45 Ga.App. 29.

Purchaser bound to know of statute

Purchaser of mortgaged property must know as matter of law that he could not obtain good title from sheriff except under statutory procedure.—Porter v. Burtis, 221 N.W. 741, 197 Wis. 227.

Statute relating to void sale

On a void judicial sale under a mortgage foreclosure, the rights of the mortgagors and the purchasers are not affected by a statute providing that the purchaser succeeds to all of the interests of the mortgagee where the purchaser was the mortgagee in the mortgage foreclosed.—Kirkland v. Gaskins, Paulk & Co., 92 S.E. 965, 20 Ga.App. 235.

Estoppel to deny legality of sale

Where plaintiff, holding title to automobiles as security for loan without reconveying them to defendant in fieri facias, instructed sheriff to levy thereon and referred him to attorney of plaintiff in fieri facias for instruction and property was advertised and sold in usual manner, plaintiff in fieri facias was estopped from denying legality of sale and purchaser receives good title as against plaintiff in fieri facias, notwithstanding there was no reconveyance of title.—Washington Loan & Banking Co. v. Butler, 126 S.E. 289, 159 Ga. 520.

94. Ill.—Matson v. City Market Co., 262 Ill.App. 200.

95. Kan.—Eppler v. Roberts, 139 P. 384, 91 Kan. 676.

where the purchaser was notified before purchase that the sale was illegal, he must show that the sale was valid.⁹⁶ Where the mortgage or deed of trust is apparently valid on its face and the sale apparently regular, it is not necessary for the purchaser to show the amount secured by the mortgage or deed, the value of the property unsold, or the validity of the mortgage or deed, but the burden in such a case is on the attaching creditor, seeking to obtain a lien, to show that his rights were superior to those acquired by the purchaser.⁹⁷

Ordinarily, the purchaser is not entitled to property not covered by the mortgage or bill of sale thereunder;⁹⁸ but appurtenances that are permanent and necessary to the enjoyment of the chattel as originally mortgaged will pass to the purchaser on foreclosure.⁹⁹ The alteration of a chattel mortgage after execution and delivery does not divest the title acquired by a purchaser under the paper as made.¹ The purchaser at the foreclosure sale may maintain an action to recover the property,² and a person buying from the purchaser under a foreclosure sale is entitled to the property on proving ownership thereof.³

A bona fide purchaser at a foreclosure or trustee's sale is not responsible for subsequent unauthorized acts of ownership by the former owner or any other person.⁴

§ 419. Deficiency and Personal Liability

On foreclosure of a chattel mortgage acknowledging an existing debt or containing a promise to pay any deficiency, a personal judgment may be rendered in favor of the mortgagee provided he has not lost his right thereto by waiver or estoppel.

In a proceeding to foreclose, a personal judgment for the amount of the mortgage debt may be entered in a proper case against the original mortgagor,⁵ or, in some jurisdictions, against a grantee who has assumed payment of the mortgage debt,⁶ and against subsequent purchasers of the property who have disposed of or converted it to their own use.⁷ Thus, if there is a promise in the mortgage to pay any deficiency arising on foreclosure,⁸ or if the mortgage expressly acknowledges an existing debt,⁹ then the personal liability of the mortgagor is implied from the execution of the mortgage and a recovery for the deficiency is authorized, without proof of the delivery of a note evidencing the indebtedness;¹⁰ but if there is no separate obligation, no covenant or agreement in the mortgage to pay the sum secured, and no recital or declaration of indebtedness from the mortgagor to the mortgagee, the relief awarded in a foreclosure suit must be confined to a sale of the mortgaged premises.¹¹ This rule also applies to the liability of purchasers of property encumbered by the mortgage,¹² unless the purchaser assumed payment of the mortgage debt.¹³

96. Mo.—Walker v. Sutton, App., 195 S.W. 51.

97. Va.—F. D. Cummer & Son Co. v. R. M. Hudson Co., 127 S.E. 171, 141 Va. 271.

98. Wash.—Wintler Abstract & Loan Co. v. Sears, 184 P. 309, 108 Wash. 461, 7 A.L.R. 152.

Copies of mortgaged abstract books

Where a mortgagee of abstract books on foreclosure purchased the same, and the decree of foreclosure, which gave particular description of the property ordered sold, specified only the books themselves, it was held that the mortgagee's grantee could not recover photographic reproductions of the mortgaged abstract books and records, even though the mortgagor might have been enjoined from making such photographic reproductions.—Wintler Abstract & Loan Co. v. Sears, supra.

99. Mich.—Presque Isle Sash, etc., Co. v. Reichel, 146 N.W. 231, 179 Mich. 466.

11 C.J. p 732 note 69.

1. N.Y.—Stearns v. Oberle, 94 N.Y. S. 37, 47 Misc. 349.

2. Ala.—Richards v. Montgomery, 160 So. 706, 230 Ala. 307.

Stock certificate not actually deposited

If note providing that maker had deposited as collateral for payment of note certificate of stock was executed and delivered, purchaser at mortgage foreclosure sale could maintain detinue against maker for certificate not actually so deposited.—Richards v. Montgomery, supra.

3. Wash.—Dare v. Hall, 250 P. 106, 141 Wash. 389.

Statute relating to title passing under sheriff's bill of sale

Where the property is bought in by the mortgagee through his agent at a foreclosure sale and such agent, after the death of the mortgagee, sold it to another to whom the sheriff executed a bill of sale, it was held that a statute providing that the bill of sale given by an officer shall be effectual to carry the whole title and interest purchased did not establish the title of such person as against the mortgagee.—Larson v. Anderson, 166 P. 774, 97 Wash. 484.

Evidence held to show ownership

Wash.—Dare v. Hall, 250 P. 106, 141 Wash. 389.

4. Va.—McClure Grocery Co. v. Watson, 139 S.E. 283, 148 Va. 601.

5. Ky.—Hoskins v. Black, 226 S.W. 384, 190 Ky. 98.

11 C.J. p 732 note 71.

6. Ariz.—Kastner v. Fashion Livery Co., 85 P. 120, 10 Ariz. 23—Johns v. Wilson, 53 P. 583, 6 Ariz. 125, affirmed 21 S.Ct. 445, 180 U.S. 440, 45 L.Ed. 613.

7. Ala.—Comer v. Lehman, 6 So. 264, 87 Ala. 362.

11 C.J. p 732 note 73.

8. Ky.—Hoskins v. Black, 226 S.W. 384, 190 Ky. 98.

11 C.J. p 733 note 89.

9. Or.—Schwary v. Schwary, 7 P.2d 986, 138 Or. 690.

11 C.J. p 733 note 90.

10. Or.—Schwary v. Schwary, supra.

11. Cal.—Morgan v. Callahan, 279 P. 487, 99 Cal.App. 756.

Ky.—Hoskins v. Black, 226 S.W. 384, 190 Ky. 98.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

11 C.J. p 733 note 91.

12. Wash.—Robert Morton Organ Co. v. Armour, 38 P.2d 257, 179 Wash. 392.

11 C.J. p 733 note 92.

13. Wash.—Robert Morton Organ Co. v. Armour, supra.

11 C.J. p 733 note 93.

Also, no personal judgment can be given against a party defendant merely because he has asserted some claim against the property;¹⁴ and where third persons claim the property and have taken it under attachment or execution, a money judgment against them for the amount of the unpaid mortgage cannot be rendered in the absence of a showing of the value of the property.¹⁵ Where the property is in the possession of defendant claiming under two mortgages, one senior and one junior to that held by complainant, there can be no personal judgment in the absence of any showing that such defendant was personally indebted to complainant, either by contract or in any other way.¹⁶

The right of a mortgagee to a deficiency judgment may be waived by an oral agreement supported by a sufficient consideration;¹⁷ and may be lost by estoppel.¹⁸ If the mortgagee desires to hold the mortgagor for any deficiency, he must sell the property within a reasonable time or he will be deemed to have elected to retain the property in satisfaction of the whole indebtedness,¹⁹ or at least will be chargeable with the value thereof at the time of taking possession;²⁰ but if a foreclosure sale is had, the mortgagee may collect the balance

due although he was the purchaser at such sale.²¹ So, if the mortgagee converts the property to his own use, and its value is less than the mortgage debt, he forfeits or waives all claims against the mortgagor for any deficiency.²²

As a deficiency judgment is an adjudication that prior to its entry the mortgage security has been wholly exhausted,²³ so long as any part of the property remains unsold there can ordinarily be no deficiency judgment.²⁴ A court of equity may, however, decree a personal judgment against the mortgagor without foreclosure, if it is impossible for plaintiff to reach the property subject to his lien;²⁵ and a deficiency judgment entered, without notice, after the lapse of the statutory period since the foreclosure judgment became final, on affidavits that the mortgaged chattels were valueless has been held not void for want of jurisdiction.²⁶

A personal judgment cannot be rendered against a mortgagor who was not personally served;²⁷ and to sustain a personal judgment, the bill must contain appropriate allegations²⁸ and a proper prayer for relief.²⁹ The mortgagor has the burden of establishing his defense to a claim or suit for a deficiency judgment.³⁰

14. S.D.—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

Tex.—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835. 11 C.J. p 733 note 74.

15. N.Y.—Anderson v. A. H. Sickinger, Inc., 256 N.Y.S. 228, 235 App. Div. 735.

11 C.J. p 733 note 75.

16. S.C.—Edwards v. Dargan, 8 S.E. 858, 30 S.C. 177.

17. Cal.—Gerson v. Kelsey, 40 P.2d 543, 4 Cal.App.2d 158, rehearing denied 43 P.2d 266, 4 Cal.App.2d 158.

Benefit to promisor or detriment to promisee

Any benefit conferred on promisor to which he is not lawfully entitled, or any prejudice suffered by promisee, is sufficient consideration to support agreement between parties to mortgage to waive deficiency judgment, and law does not weigh quantum of such consideration.—Gerson v. Kelsey, *supra*.

Surrender of personal property to which mortgagors had, at least, legitimate claim, in addition to other property not included in chattel mortgage, was sufficient consideration to support mortgagee's agreement to waive right to deficiency judgment.—Gerson v. Kelsey, *supra*.

18. La.—Maloney Motor Car Co. v. Perrin, App., 155 So. 289.

Negating consideration for surrender of property without process

As respects right to obtain deficiency judgment, mortgagor must

have made it clear to mortgagor that he was not to be granted any consideration for his surrender of automobile without legal process, and that executory proceedings would be filed against mortgagor as if he had not surrendered automobile.—Maloney Motor Car Co. v. Perrin, *supra*.

19. N.Y.—Holliday v. McGraw, 176 N.Y.S. 661, 106 Misc. 661—Porter v. Parmly, 43 How.Pr. 445, reversed on other grounds 52 N.Y. 185, 14 Abb.Pr.N.S., 161.

20. U.S.—In re Haake, D.C.Cal., 11 F.Cas.No.5,883, 2 Sawy. 231.

21. N.Y.—Olcott v. Tioga R. Co., 40 Barb. 179, affirmed 27 N.Y. 546, 84 Am.D. 298.

22. S.C.—National Exch. Bank v. Holman, 9 S.E. 824, 31 S.C. 161.

23. Cal.—Ex parte Braun, 196 P. 499, 51 Cal.App. 202. Idaho.—Portland Cattle Loan Co. v. Biehl, 245 P. 88, 42 Idaho 39.

24. Cal.—Ex parte Braun, 196 P. 499, 51 Cal.App. 202.

Additional security under executory agreement

Where, in consideration of a promise to dismiss an action to foreclose a chattel mortgage, a contract of sale of other property was given mortgagee, to be held as additional security, such additional security need not be exhausted before a deficiency judgment can be entered in

an action to foreclose the mortgage as resort thereto could not be had without recognizing the contract to dismiss.—Mission Brewing Co. v. Rickert, 179 P. 720, 39 Cal.App. 668.

25. Tex.—McDaniel v. Staples, Civ. App., 113 S.W. 596.

26. Cal.—Ladd v. Mathis, 13 P.2d 1012, 125 Cal.App. 535.

27. Ark.—Haymes v. Priest, 33 S.W.2d 396, 182 Ark. 864.

28. S.D.—Coughlin v. Brumwell, 219 N.W. 256, 52 S.D. 551.

Tex.—Automobile Finance Co. v. Bryan, Civ.App., 3 S.W.2d 835. 11 C.J. p 733 note 77.

29. Ill.—Wylder v. Crane, 53 Ill. 490.

Ky.—Madison v. Grant, 6 J.J.Marsh. 641.

Prayer for general relief

Personal judgment may, in some jurisdictions, be rendered under a prayer for general relief.—Kastner v. Fashion Livery Co., 85 P. 120, 10 Ariz. 23.

30. La.—Maloney Motor Car Co. v. Perrin, App., 155 So. 289—Industrial Acceptance Corporation v. Hodge, 121 So. 263, 9 La.App. 516.

Insurance received by mortgagee

Mortgagor sued for deficiency could not have collision insurance received by mortgagee purchasing automobile at foreclosure credited, where insurance merely represented payments for repairs.—Industrial Acceptance Corporation v. Hodge, *supra*.

A deficiency judgment cannot be based on a return of a commissioner appointed to make a sale of the mortgaged chattels under a decree of foreclosure to the effect that the chattels were covered by a first mortgage entered to their full value;³¹ nor has the clerk power to enter a personal judgment against defendant, unless the amount due on the indebtedness is found and a personal judgment ordered therefor, or for a deficiency;³² but where a foreclosure sale is ordered and the officer returns the order unsatisfied after an attempted sale of valueless mortgaged chattels, the clerk may enter a deficiency judgment for the full amount of the mortgage.³³ A deficiency judgment against the purchaser of mortgaged property after sustaining his plea of limitation has been held void as ambiguous.³⁴

Where all the property covered by a mortgage is not delivered to the officer for sale on foreclosure of the mortgage and the mortgagee takes a deficiency judgment, the mortgagee is not entitled to a further foreclosure sale while the deficiency judgment remains a subsisting adjudication of the rights of the parties,³⁵ and the mortgagee cannot go behind the deficiency judgment and claim he is entitled to the possession of the remainder of the mortgaged property under his mortgage.³⁶ Where a deficiency judgment is denied in a proceeding to foreclose, it has been held that such denial will bar the right to prosecute an independent action for the deficiency.³⁷

Where judgment is entered, in an action to recover the amount due and to foreclose, on the note alone and not on the mortgage, a subsequent bona fide purchaser of the property will obtain a valid title.³⁸

Sufficiency of evidence

In suit for deficiency judgment, evidence was held to establish that mortgagee was estopped to deny that mortgagor surrendered automobile to mortgagee without legal process in consideration of cancellation of balance of debt.—*Maloney Motor Car Co. v. Perrin*, La.App., 155 So. 289.

31. Cal.—*Redlands Hotel Assoc. v. Richards*, 58 P. 152, 125 Cal. 569.

32. N.D.—*Nome First Nat. Bank v. Mahoney*, 135 N.W. 771, 23 N.D. 177.

33. Cal.—*Ladd v. Mathis*, 13 P.2d 1012, 125 Cal.App. 535.

34. Tex.—*Ross v. Dozier*, Civ.App., 32 S.W.2d 911.

35. Cal.—*Ex parte Braun*, 196 P. 499, 51 Cal.App. 202.

36. Idaho.—*Portland Cattle Loan Co. v. Biehl*, 245 P. 88, 42 Idaho 39.

37. Wash.—*Bradley Engineering, etc., Co. v. Muzzy*, 103 P. 37, 54 Wash. 227, 18 Ann.Cas. 1072.

38. Tex.—*Johnson v. Murphy*, 17 Tex. 216.

39. Ill.—*Lawrence v. Elmwood Elevator Co.*, 253 Ill.App. 101.

Most precarious debt secured

Where the mortgage does not provide how the proceeds of the property shall be applied, the creditor may apply the same to the most precarious debt secured thereby.—*Graff v. Fox*, 204 Ill.App. 598.

40. Okl.—*Kyser v. Norris-Williams & Co.*, 41 P.2d 644, 171 Okl. 6.

41. Ill.—*Graff v. Fox*, 204 Ill.App. 598.

§ 420. Proceeds and Surplus

The proceeds from the sale under a chattel mortgage must ordinarily be applied on the mortgage indebtedness and after the payment of superior claims of other creditors any surplus remaining must be paid over to the mortgagor.

The proceeds from the sale of mortgaged chattels must ordinarily be applied on the mortgage indebtedness,³⁹ in the absence of the mortgagor's consent to a different application,⁴⁰ or unless a sufficient legal excuse is shown for their application otherwise.⁴¹ A mortgagee cannot pay from the proceeds of a chattel mortgage the interest on a real estate mortgage, where the chattel mortgage is invalid as to some of the owners of the chattels;⁴² and on foreclosure of a first mortgage, an allowance out of the proceeds cannot be made to any person under, or by virtue of, any provisions of a second mortgage to which the first mortgagee was not a party.⁴³

Where a receiver has been appointed to take charge of the property pending foreclosure of a mortgage thereon, the property is chargeable with the necessary expense involved in its preservation and care.⁴⁴ Where a mortgage was executed to take care of the mortgagor's outstanding debts and on the assurance of the mortgagee that he would pay them, the creditors of the mortgagee are entitled to a preference in the distribution of the proceeds of a foreclosure sale as against the mortgagee who failed to pay such debts;⁴⁵ and under a mortgage of fixtures only, the sale in a lump of stock and fixtures so that the proceeds of the stock could not be separated from the proceeds of the fixtures has been held to result in the loss of the mortgage lien as against other creditors of the mortgagor.⁴⁶

Surplus. As in case of foreclosure under a power, which is treated supra § 387, so in judicial foreclosures, the surplus remaining after the payment of the mortgage debt⁴⁷ and the superior claims of

42. Iowa.—*People's Sav. Bank v. McCarthy*, 217 N.W. 453, 206 Iowa 28.

43. Ariz.—*Hathaway v. Neal*, 251 P. 173, 31 Ariz. 155.

44. Idaho.—*Colorado Nat. Bank of Denver v. Meadow Creek Live Stock Co.*, 211 P. 1076, 36 Idaho 509.

45. La.—*Fabacher v. Crampes*, 117 So. 439, 166 La. 397.

46. Wis.—*Morley-Murphy Co. v. Jordan*, 264 N.W. 926, 220 Wis. 302.

47. N.Y.—*Halladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141. Tex.—*O'Neal v. Allison*, Civ.App., 10 S.W.2d 257—*O'Neal v. Allison*, Civ. App., 292 S.W. 269.

other creditors⁴⁸ must be paid over to the mortgagor. A junior mortgagee of the property has been held entitled to the proceeds remaining after satisfying prior encumbrances.⁴⁹

Claims of third persons to property mortgaged or seized for sale on foreclosure are treated *supra* § 413.

§ 421. Review

Questions relating to review of judgments or decrees in chattel mortgage foreclosure proceedings are treated in the title Appeal and Error. The effect of an appeal as a stay of execution is treated in § 674 of such title; and the measure of damages recoverable on a supersedeas bond is treated in § 2072 of such title.

D. FORECLOSURE BY AFFIDAVIT AND EXECUTION

§ 422. In General

Substantial compliance with statutes providing for the foreclosure of mortgages by means of the issuance of execution on the affidavit or petition of the mortgagee is generally necessary and sufficient.

The statutes in some jurisdictions provide for the foreclosure of chattel mortgages by means of the issuance of an execution on the affidavit or petition of the mortgagee. As the remedy provided for by such statutes is of a summary nature, it is generally held that substantial compliance with the provisions of such statutes is necessary and sufficient.⁵⁰

While, under such statutes, it has been held that there can be no foreclosure for debt owing to any one other than the holder of the mortgage,⁵¹ a transferee of a mortgage execution may foreclose the mortgage in his own name as transferee if for any reason the first foreclosure on which the execution is based is irregular or defective.⁵² Where a cropper has mortgaged his interest in the crops, such interest cannot be subjected to the mortgage

debt before there has been a division between the cropper and the landlord;⁵³ and where the mortgage is executed to indemnify an insurer or indorser, no foreclosure can be had ordinarily until after judgment against the mortgagee.⁵⁴ However, where a distress warrant and landlord's lien for supplies are levied on crops, a mortgagee thereof may summarily foreclose and place the mortgage *feri facias* with the levying officer;⁵⁵ and where the mortgagor defaults in the payment of taxes in accordance with the terms of the mortgage, the mortgagee may foreclose although no levy has been made to collect the unpaid taxes.⁵⁶ Likewise, where a city license is due by the mortgagor, foreclosure may be had although no execution has been issued therefor.⁵⁷ Also, a bill of sale to secure a debt may be foreclosed as a chattel mortgage without reconveying the property covered by the bill of sale before the foreclosure;⁵⁸ and where the mortgage and notes provide for maturity of the notes where the first is due and unpaid, executory process can

Wash.—Northwest Hay Ass'n v. Slayton, 242 P. 354, 137 Wash. 248. 11 C.J. p 733 note 95.

Must account for actual amount realized

Where accounts payable to mortgagor are assigned to mortgagee as collateral security for note secured by mortgage, the accounts will not be given an estimated value in reducing balance due on note, but actual amount realized on accounts will be added to proceeds of sale of mortgaged property for satisfaction of balance due on note and costs of foreclosure, surplus to go to mortgagor.—Kenney v. Hurlburt, 173 P. 158, 88 Or. 688, L.R.A.1918E 652, Ann.Cas. 1918E 737, modifying 172 P. 490, 88 Or. 688, L.R.A.1918E 652, Ann.Cas. 1918E 737.

48. Vt.—Darling v. Burlington Drug Co., 142 A. 75, 101 Vt. 155. 11 C.J. p 734 note 96.

49. Or.—Northern Brewery Co. v. Princess Hotel, 153 P. 37, 78 Or. 453. 11 C.J. p 734 note 97.

50. La.—Advance Rumley Thresher Co. v. Shove, 7 La.App. 472. 11 C.J. p 734 note 4.

Certification of copy of mortgage

Substantial compliance with a statute requiring an order granting executory process to contain a certificate that the copy of the act of mortgage is a true copy of the original is sufficient.—Advance Rumley Thresher Co. v. Shove, *supra*.

General statute requiring verification not applicable

A statute providing for the verification of petitions has been held not to contemplate nor provide for executory process and verification is not necessary.—Advance Rumley Thresher Co. v. Shove, *supra*.

Order of seizure and sale must be supported by authentic evidence exclusively; and where the record fails to show an offer or the filing of the mortgage note, the order of seizure will be set aside and the executory proceedings dismissed.—Commercial Credit Co. v. Melba Candy Co., 3 La. App. 267.

Variance between notes and mortgage

Executory process is invalid where issued on notes secured by a mortgage and there is a variance between the dates of the notes and the dates in the description thereof in the mortgage.—Southern Hardware & Woodstock Co. v. Smith, 123 So. 403, 11 La.App. 49.

51. La.—Southern Hardware & Woodstock Co. v. Smith, *supra*. 11 C.J. p 734 note 5.

52. Ga.—Ragan v. Coley, 61 S.E. 862, 4 Ga.App. 421.

53. Ga.—Fountain v. Fountain, 71 S.E. 1096, 10 Ga.App. 758.

54. Ga.—Jones v. Norton, 72 S.E. 337, 136 Ga. 835.

55. Ga.—Ford v. Tifton Guano Co. 87 S.E. 274, 144 Ga. 353.

56. Ga.—Jones v. Norton, 72 S.E. 337, 136 Ga. 835—Importers', etc. Bank v. McGhees, 16 S.E. 27, 81 Ga. 702.

57. Ga.—Jones v. Norton, 72 S.E. 337, 136 Ga. 835.

58. Ga.—Jackson v. Parks, 174 S.E. 203, 49 Ga.App. 29.

properly issue on all the notes where the first is due and unpaid.⁵⁹

A demand by the mortgagee that the mortgagor turn over the property peaceably before placing the affidavit with the proper officer is not necessary if the mortgagor cannot be found in the county where the mortgage is being foreclosed.⁶⁰ A judgment entered on a verdict for the full amount of principal and interest is not erroneous because of the addition of an order that illegality be overruled and dismissed and that the mortgage fieri facias proceed for the aforesaid sums of principal, interest, and costs.⁶¹

Effect of foreclosure. Where the requirements of the statute for the foreclosure of a chattel mortgage have substantially been complied with, and all defects are amendable, the proceeding is not void;⁶² and in such case the mortgagor cannot question the title of the purchaser at foreclosure sale.⁶³

§ 423. Venue

The provisions of the statutes as to venue of summary proceedings to foreclose a mortgage must be followed.

59. La.—Advance Rumley Thresher Co. v. Shove, 7 La.App. 472.

60. Idaho.—Hudson v. Carlson, 170 P. 100, 31 Idaho 196.

61. Ga.—Taliaferro v. J. S. Cowart & Son, 171 S.E. 406, 47 Ga.App. 730.

62. Ga.—Hardy v. Luke, 89 S.E. 540, 18 Ga.App. 423.

63. Ga.—Hardy v. Luke, *supra*.

64. Ga.—Harper v. Grambling, 66 Ga. 236—Rich v. Colquitt, 65 Ga. 113—Callaway v. Walls, 54 Ga. 167. 11 C.J. p 734 note 14.

65. Ga.—Rich v. Colquitt, 65 Ga. 113.

66. Ga.—Hubbard v. Andrews, 76 Ga. 177—Griffin v. Marshall, 45 Ga. 549.

67. Ga.—Edwards v. Price, 75 S.E. 1067, 11 Ga.App. 658.

68. Ga.—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544.

Annexing affidavit to mortgage

(1) A provision of a statute requiring annexation of an affidavit of foreclosure to the mortgage or a verified copy thereof has been held merely directory.—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544—Thigpen v. Vidalia Chemical Co., 156 S.E. 635, 42 Ga.App. 563—11 C.J. p 735 note 27.

(2) The failure to comply with such a provision has been held not to void the fieri facias issued pursuant

to the affidavit.—Simpson v. Jones, *supra*.

(3) In one case, however, which apparently overlooked the decision in an earlier case, it was held that a failure to comply with this provision of the statute was fatal to plaintiff's case.—Hillis v. Comer, 79 S.E. 930, 14 Ga.App. 30.

(4) Foreclosure affidavit reciting defendant's indebtedness on certain mortgage, copy of which is attached, sufficiently verified copy of mortgage attached to affidavit.—Thigpen v. Vidalia Chemical Co., 156 S.E. 635, 42 Ga.App. 563.

(5) Where the mortgage is otherwise identified by a statement as to its date and amount, it is not necessary to state that the mortgage is annexed to the affidavit.—Bosworth v. Matthews, 74 Ga. 822.

69. Ga.—Hamilton v. Kerr, 10 S.E. 502, 84 Ga. 105. 11 C.J. p 734 note 17.

70. Ga.—Harper v. Grambling, 66 Ga. 236—Callaway v. Walls, 54 Ga. 167.

71. La.—Advance Rumley Thresher Co. v. Shove, 7 La.App. 472. 11 C.J. p 734 note 19.

Demanding payment at place where payable

In suit by executory process on mortgage note payable at certain place, it is unnecessary to allege payment was demanded at such

In accordance with the statutory provisions, proceedings must be brought in the county in which the mortgagor resides,⁶⁴ unless he resides without the state,⁶⁵ in which case the proper venue is the county in which the property is found.⁶⁶

§ 424. Affidavit

Although amendable to the same extent as ordinary declarations, affidavits in summary foreclosure proceedings must substantially comply with the mandatory provisions of the statutes.

An affidavit is a necessary basis of the mortgage foreclosure;⁶⁷ and it must substantially comply with the mandatory requirements of the statutes.⁶⁸ The affidavit must show on its face the jurisdiction of the court to which it is addressed,⁶⁹ by stating that defendant resides in the county where the mortgage is to be foreclosed,⁷⁰ and by stating the necessary facts to show the rights of the mortgagee and the object of the affidavit,⁷¹ and the grounds for suing out the affidavit.⁷² It must also be signed⁷³ and verified by the oath of the mortgagee or his attorney.⁷⁴ The affidavit must state the amount of principal and interest due to the mortgagee;⁷⁵ but an error in stating the amount of the mortgage will not invalidate the proceedings,⁷⁶ since only the

place.—Advance Rumley, Thresher Co. v. Shove, *supra*.

72. Ga.—Hardy v. Luke, 89 S.E. 540, 18 Ga.App. 423—Upchurch v. Nichols, 83 S.E. 273, 15 Ga.App. 359—Bainbridge Stock Co. v. Krause-McFarlin Co., 68 S.E. 1013, 8 Ga. App. 220.

73. Ga.—Edwards v. Price, 75 S.E. 1067, 11 Ga.App. 658—Meadows v. Alexander, 57 S.E. 901, 1 Ga.App. 40.

11 C.J. p 735 note 22.

74. Ga.—American Agr. Chemical Co. v. Smith, 164 S.E. 83, 45 Ga. App. 159.

11 C.J. p 735 note 23.

By notary public who is agent to collect

A notary public who is the agent of a corporation to collect its note secured by a chattel mortgage, but who is not a stockholder, director, or officer of the corporation, and has no pecuniary interest in the collection of the mortgage, is not disqualified from taking the foreclosure affidavit made by the attorney at law of the corporation.—American Agr. Chemical Co. v. Smith, 164 S.E. 83, 45 Ga.App. 159.

Taking oath ministerial act

The taking of such affidavit is a purely ministerial act.—American Agr. Chemical Co. v. Smith, *supra*.

75. Ga.—Jones v. Norton, 72 S.E. 337, 136 Ga. 835.

76. Ga.—Robinson v. J. T. Bothwell

amount actually due can be retained by the mortgagee.⁷⁷

In a suit involving an attack on a foreclosure proceeding, where the record does not disclose the contents of the affidavit and it was not attacked as insufficient, it will be presumed to state sufficient facts and to be in proper form.⁷⁸

Amendment. Under some statutes, which should be broadly and liberally construed,⁷⁹ affidavits are amendable to the same extent as ordinary declarations,⁸⁰ it being held that, if the requirements of the statute have been complied with substantially, a claimant is not hurt by amendable irregularities.⁸¹

By whom taken. A statute authorizing the judges of county courts to foreclose mortgages on personal property and liens has been held to authorize such judges to take statutory affidavits for the foreclosure of chattel mortgages.⁸²

§ 425. Execution

The issuance of execution, by a judge or clerk of court authorized to do so, is essential to a valid foreclosure, and the property should be sufficiently identified, and the execution is final process unless arrested by a counter affidavit.

The making of the affidavit alone is not sufficient; the issuing of the execution thereunder is also necessary to effect a valid foreclosure.⁸³ Although a statute authorizing judges of county courts to foreclose mortgages on personal property has been held to authorize such judges to issue executions on statutory affidavits,⁸⁴ when the affidavit is properly verified and filed,⁸⁵ execution thereon may

be issued by a clerk of the superior court without a special order of court.⁸⁶ The execution dates from the making and filing of the mortgage for record,⁸⁷ and need not be entered on the general docket.⁸⁸ When placed in the levying officer's hands, he must proceed to sell the same although an attachment or execution is subsequently placed in his hands for execution against the same property.⁸⁹

It has been held that a levy will not be dismissed because of an indefinite description of the property in the mortgage;⁹⁰ nor will the execution and levy be quashed as illegal because the descriptions of the property vary from the descriptions in the mortgage, if both descriptions are equally applicable;⁹¹ and property, although inaccurately described in the mortgage and in the execution and levy, has been held sufficiently identified where it was the only property of such nature possessed by the mortgagor at the time of execution of the mortgage and was in fact the property levied on.⁹² The mortgagor need not point out the property sought by the sheriff under an execution to foreclose.⁹³ Where the statute prohibits a judgment for interest from bearing interest, the joinder of the principal and interest in one sum is ground for quashing the levy.⁹⁴

A statute authorizing a mortgagee to cause the property to be sold and the proceeds distributed among the lienors in order of priority does not apply where some of the encumbrances are put on the property by the vendee of the original mortgagor.⁹⁵ The dismissal of the levy as to some of the property with the consent of the mortgagee will not defeat the right of the mortgagee to sell the residue.⁹⁶

Grocery Co., 95 S.E. 316, 22 Ga. App. 56.

11 C.J. p 735 note 25.

77. Ga.—Vance v. Roberts, 12 S.E. 653, 86 Ga. 457.

78. Ga.—Simpson v. Jones, 186 S.E. 558, 188 Ga. 544.

79. Ga.—Hardy v. Luke, App., 89 S.E. 540—Bainbridge Stock Co. v. Krause-McFarlin Co., 68 S.E. 1013, 8 Ga.App. 220.

80. Ga.—Simpson v. Jones, 186 S.E. 558, 182 Ga. 544—Taliaferro v. J. S. Cowart & Son, 171 S.E. 406, 47 Ga.App. 730—Stanfield v. Darby, 165 S.E. 864, 45 Ga.App. 686—Collins v. Armour Fertilizer Works, 89 S.E. 1054, 18 Ga.App. 533.
11 C.J. p 735 note 29.

By attaching copy of mortgage

Affidavit for chattel mortgage foreclosure reciting that mortgage was "annexed" to affidavit was amendable by attaching thereto verified copy of mortgage.—Stanfield v. Darby, 165 S.E. 864, 45 Ga.App. 686.

81. Ga.—Bainbridge Stock Co. v.

Krause-McFarlin Co., 68 S.E. 1013, 8 Ga.App. 220.

82. Ga.—Gunn v. J. M. Johnson & Co., 114 S.E. 709, 154 Ga. 568, answers to certified questions conformed to 116 S.E. 921, 29 Ga.App. 610.

83. Ga.—De Vaughn v. Byrom, 36 S.E. 267, 110 Ga. 904.

Notice

(1) Where notice is required by statute, the want of notice to the mortgagor at the time of issuing the execution may be ground for dismissal.—McFarlin v. Reeves, 73 S.E. 862, 40 Ga.App. 581—11 C.J. p 735 note 40.

(2) The execution need not recite that the notice has been given.—Spoonier v. Coachman, 90 S.E. 373, 18 Ga.App. 705.

84. Ga.—Gunn v. J. M. Johnson & Co., 114 S.E. 709, 154 Ga. 568, answers to certified questions conformed to 116 S.E. 921, 29 Ga.App. 610.

85. Ga.—Adams v. Goodwin, 25 S.E. 24, 99 Ga. 138.

86. Ga.—Chamberlin v. Beck, 68 Ga. 346.

87. Ga.—Standard Oil Co. v. R. D. Cole Mfg. Co., 33 S.E. 825, 108 Ga. 227.

88. Ga.—Courson v. Walker, 21 S.E. 287, 94 Ga. 175.

89. Idaho.—Blumauer-Frank Drug Co. v. Branstetter, 43 P. 575, 4 Idaho 557, 95 Am.S.R. 151.

90. Ga.—Nussbaum v. Waterman, 70 S.E. 259, 9 Ga.App. 56.
11 C.J. p 735 note 38.

91. Ga.—Fisher v. Jones Co., 21 S.E. 152, 93 Ga. 717—Smith v. Camp, 10 S.E. 539, 84 Ga. 117.

92. Ga.—Jones v. Avant, 152 S.E. 264, 41 Ga.App. 211.

93. Ga.—Coleman v. Allen, 5 S.E. 204, 79 Ga. 637, 11 Am.S.R. 449.

94. Ga.—Harris v. Usry, 77 Ga. 426.

95. Ga.—Pasley v. Beland, 36 S.E. 296, 111 Ga. 828.

96. Ga.—Lamar v. Coleman, 14 S.E. 608, 88 Ga. 417.

Amendment. A direction in the fieri facias in which plaintiff's name was inserted in place of defendant's, may be corrected by substituting the name of defendant in order to make the fieri facias conform to the affidavit;⁹⁷ and a transfer of a chattel mortgage fieri facias is amendable by the transferee with the transferor's consent.⁹⁸

As final process. Unless execution issued on foreclosure of a chattel mortgage be arrested by a counter affidavit, it is final process.⁹⁹

Sheriff's return or entry. An execution commanding a return at "our next justice court" has been held returnable to the justice's court of the district in which such magistrate presides.¹ Where the affidavit of illegality raised no issue as to the description, a sheriff's entry in the foreclosure that he levied on crops growing on the farm has been held sufficient,² and such a description has been held not to show on its face that the property levied on was realty;³ and an entry reciting that the sheriff levied the foreclosure on the within described property, coupled with evidence of actual seizure, is sufficient to show a valid levy.⁴

Unexplained dismissal of execution. In some jurisdictions it is provided by statute that an unexplained dismissal of a mortgage fieri facias entitles one to presume that the debt has been satisfied.⁵

§ 426. Affidavit of Illegality

Provided they are properly pleaded, a mortgagor may set up any defense in an affidavit of illegality which he

could have set up in an ordinary suit on the demand, including a defense by way of recoupment.

When an execution has issued on the foreclosure of a mortgage as hereinbefore set forth in § 425, the mortgagor may file his affidavit of illegality to such execution in which he may set up and avail himself of any defense which he might have set up according to law in an ordinary suit on the demand secured by the mortgage and which goes to show that the amount claimed is not due,⁶ and defendant may not only contest the amount alleged to be due, but also the validity of the mortgage as to all or a part of the property sought to be subjected to the lien.⁷ The defense must be particularly set up, and a general denial, or a denial in general terms, is insufficient as it is but a plea of the general issue and not issuable, and not a denial of plaintiff's right to recover.⁸

While an affidavit is not defective for failing to allege a tender, before the filing of the affidavit, of the amount admittedly due, the failure of an affidavit, alleging fraud, to show that the mortgagor restored, or offered to restore, the property received under the contract before the filing of the affidavit will preclude rescission.⁹ However, a plea in an affidavit alleging that part of the property was returned to, and accepted by, the mortgagee because of defects, and alleging a total failure of consideration has been held a good plea of rescission, and such plea is not defeated because defendant denominated it as a failure of consideration.¹⁰ An affidavit of illegality which attempts to vary the terms of the mortgage by showing another and different con-

97. Ga.—Simpson v. Jones, 186 S.E. 558, 188 Ga. 544.

98. Ga.—Ragan v. Coley, 61 S.E. 862, 4 Ga.App. 421.

99. Ga.—Ford v. Fargason, 48 S.E. 180, 120 Ga. 606—Powell v. A. J. Fowler & Son, 129 S.E. 13, 34 Ga.App. 186—Collier v. Blake, 85 S.E. 354, 16 Ga.App. 382.

1. Ga.—Adams v. Goodwin, 25 S.E. 24, 99 Ga. 138.

2. Ga.—King v. Coweta Fertilizer Co., 140 S.E. 390, 37 Ga.App. 350.

3. Ga.—King v. Coweta Fertilizer Co., supra.

4. Ga.—Thomason v. Decatur County Bank, 111 S.E. 578, 28 Ga.App. 422.

5. Dismissal not unexplained

A statement that the levy of a mortgage fieri facias was dismissed and the property not sold does not show dismissal of the levy "unexplained," as is contemplated by Civ. Code [1910] § 6047, which declares that in such case the debt is pre-

sumed satisfied.—Todd v. Hurst Supply Co., 86 S.E. 255, 17 Ga.App. 98.

6. Ga.—Fellows v. Sapp, 163 S.E. 314, 45 Ga.App. 89—Glass v. Adams, 161 S.E. 630, 44 Ga.App. 437—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga.App. 274—Futch v. Taylor, 96 S.E. 183, 22 Ga.App. 441—Robinson v. J. T. Bothwell Grocery Co., 95 S.E. 316, 22 Ga.App. 56.
11 C.J. p 735 note 46.

Same defenses as in chancery proceeding

The same defenses are open to the mortgagor that were formerly available to him in answer to the chancery proceeding.—Crawford v. Scott, 74 S.E. 520, 137 Ga. 760—Mell v. Moony, 30 Ga. 413—Dixon v. Cuyler, 27 Ga. 248—Bailey v. Lumpkin, 1 Ga. 392.

Fraud

Mortgagor could set up seller's fraud in falsely representing that mortgage note given for purchase money was for amount of cost price.—Fellows v. Sapp, 163 S.E. 314, 45 Ga.App. 89.

Breach of warranty improperly pleaded

Court did not err in striking affidavit not alleging breach of warranty within time alleged to have been covered by warranty.—Cook v. Cobb & Roper, 95 S.E. 1022, 22 Ga.App. 328.

Question of fact not raised

Dispute raised by affidavit as to amount due by reason of admitted partial payment did not involve question of fact but only legal application of payment.—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga.App. 274.

7. Ga.—Crawford v. Scott, 74 S.E. 520, 137 Ga. 760—Smith v. Walker, 18 S.E. 830, 93 Ga. 252.

8. Ga.—Gosa v. E. A. Clark & Sons, 158 S.E. 608, 43 Ga.App. 310—Cook v. Cobb & Roper, 95 S.E. 1022, 22 Ga.App. 328.

9. Ga.—Fellows v. Sapp, 163 S.E. 314, 45 Ga.App. 89.

10. Ga.—E. E. Bass & Co. v. Vinson, 98 S.E. 365, 23 Ga.App. 393.

sideration is insufficient and is properly stricken.¹¹

A failure to set up a defense by counter affidavit prevents the mortgagor from availing himself of any defenses after the foreclosure has been completed,¹² and an affidavit filed after a legal sale of the property under the mortgage execution is too late to convert the proceeding into mesne process and is dismissible on motion.¹³

Recoupment or set-off. While the mortgagor is permitted to avail himself of a valid defense by way of recoupment,¹⁴ he is not entitled to plead the defense of set-off in such a summary proceeding,¹⁵ since the latter defense is not one which goes to the justice of plaintiff's demand.¹⁶

Amendment; second affidavit. Although, in a proper case, defendant has the right to amend his affidavit of illegality interposed as a defense to an action to foreclose the mortgage,¹⁷ an affidavit making a denial in general terms is not amendable, as there is nothing to amend by,¹⁸ and a mortgagor has been held not to have the right to amend his affidavit so as to have a third person made a co-party plaintiff with the mortgagee on the ground that he was a joint owner of the mortgage and equally entitled to collect from the mortgagor, and that he had collected certain specified partial payments.¹⁹

While a second affidavit not alleging facts which could not have been discovered when the first affidavit was filed is properly stricken,²⁰ the rule that

no second affidavit shall be received for causes which existed and were known, or in the exercise of reasonable diligence might have been known, at the filing of the first has no application where the first affidavit was void;²¹ and, where the first was fatally defective, because of a failure to give bond or make affidavit as to inability to do so and was voluntarily dismissed by defendant, it was not to be counted and one subsequently filed was not to be classed as a second affidavit under the rule just stated, although the rule might be otherwise if the parties had acted on the theory that the so-called first affidavit was valid, and facts had arisen whereby defendant should be estopped from asserting it was void.²²

Hearing. The burden is on the mortgagor or affiant to establish allegations of fact in the nature of an affirmative defense.²³ Where defendant fails to set up a defense, the exclusion of testimony relative thereto is proper;²⁴ and an affidavit which fails to state a defense is properly dismissed.²⁵

Affidavits of illegality to stay executions generally are treated in the C.J.S. title Executions §§ 147-150, also 23 C.J. p 546 note 42-p 553 note 92.

§ 427. Forthcoming Bond

The giving of a bond in substantial compliance with the applicable statute, or the filing of a pauper's affidavit, is a condition precedent to a trial on an affidavit of illegality; and on dismissal of the affidavit of illegality the bond is broken by a failure to produce the property without a demand therefor.

11. Ga.—Collins v. Armour Fertilizer Works, 89 S.E. 1054, 18 Ga. App. 533.

12. Ga.—Ford v. Fargason, 48 S.E. 180, 120 Ga. 606—Forsyth Bank v. Gammage, 34 S.E. 307, 109 Ga. 220—Collier v. Blake, 85 S.E. 354, 16 Ga. App. 382.

13. Ga.—General Motors Acceptance Corporation v. Merritt, 179 S.E. 655, 51 Ga. App. 63.

14. Ga.—Glass v. Adams, 161 S.E. 630, 44 Ga. App. 437—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga. App. 274—Futch v. Taylor, 96 S.E. 183, 22 Ga. App. 441.

Plea of payment and recoupment

Where a party to a contract, agreeing to pay the other party for certain services when performed, advances money to the other party and takes a chattel mortgage, the other party, in defense to a foreclosure suit, may show that the advancement has been satisfied by performance of the original contract, and recover any balance due thereunder, such defense not being a set-off, but a plea of payment and recoupment.—Interstate Lumber Co. v. Bennett, 110 S. E. 500, 28 Ga. App. 179.

15. Ga.—Arnold v. Carter, 54 S.E. 177, 125 Ga. 319—Glass v. Adams, 161 S.E. 630, 44 Ga. App. 437—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga. App. 274—Futch v. Taylor, 96 S.E. 183, 22 Ga. App. 441.

Breach of independent contract

(1) Defense by mortgagor alleging damages arising out of breach of independent contract is not available.—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga. App. 274.

(2) Defense of payment based on damages accruing through mortgagee's failure as mortgagor's landlord to sell farm products when requested, and through other transactions unrelated to mortgage, is not available.—Glass v. Adams, 161 S.E. 630, 44 Ga. App. 437.

Plea allowed in early case

Ga.—Garner v. Cohen, 24 S.E. 851, 99 Ga. 78.

16. Ga.—Glass v. Adams, 161 S.E. 630, 44 Ga. App. 437—Humphreys v. W. L. Jessup & Sons, 158 S.E. 442, 43 Ga. App. 274—Futch v. Taylor, 96 S.E. 183, 22 Ga. App. 441.

17. Ga.—McConnell v. Cherokee Nat. Bank, App., 88 S.E. 824.

Amplifying preëxisting allegation

The allowance of an amendment to an affidavit of illegality, which merely amplified a preëxisting ground alleging payment and referred to a contract between the holder of a mortgage and the mortgagor, was not error, the material subject of inquiry being whether the mortgagor had paid the holder of the mortgage a sufficient amount to discharge it, either in money or in specifics accepted in lieu of money.—McCook v. Laughlin, 71 S.E. 917, 9 Ga. App. 550.

18. Ga.—Gosa v. E. A. Clark & Sons, 158 S.E. 608, 43 Ga. App. 310.

19. Ga.—Culver v. Mullally, 21 S.E. 895, 94 Ga. 644.

20. Ga.—Gosa v. E. A. Clark & Sons, 158 S.E. 608, 43 Ga. App. 310.

21. Ga.—Bridges v. Melton, 129 S.E. 913, 34 Ga. App. 480.

22. Ga.—Bridges v. Melton, supra.

23. Ga.—Cook v. Cobb & Roper, 95 S.E. 1022, 22 Ga. App. 328.

11 C.J. p 735 note 45 [a].

24. Ga.—Spooner v. Coachman, 90 S. E. 373, 18 Ga. App. 705.

25. Ga.—Wilder Bros. v. Montgomery, 179 S.E. 861, 51 Ga. App. 231.

the right itself,³⁶ such as a right or title, actual or supposed, to a debt, privilege, or other thing in possession of another;³⁷ a right to lay claim to a specific property which is in another's possession;³⁸ a title to any debt or privilege or other thing in possession of another;³⁹ or a title to anything which another should give or concede, or confer on, the claimant;⁴⁰ also the facts giving rise to the demand, which show the right asserted,⁴¹ hence a cause of action,⁴² or a chose in action.⁴³

When applied to real property the term imports a legal or equitable right to the land,⁴⁴ comprehends every species of right, title, or interest, legal or equitable,⁴⁵ including title and ownership.⁴⁶

—**The Thing Demanded.** In the enlarged sense of the word, "claim" has been defined as meaning a debt not yet due;⁴⁷ an asserted but unadjudicated obligation;⁴⁸ the subject claimed,⁴⁹ something asked for, or asserted to be due, for which a pretense has been set up, as distinguished from that which was due of right and could be maintained as such;⁵⁰ something asked for or demanded on the

one hand and not admitted or allowed on the other;⁵¹ something that could be in law the subject of a demand;⁵² those obligations which are in the broad sense of the word debts.⁵³

—**What Term May Include.** Depending on the context or circumstances of its use, "claim" has been held to include a counterclaim,⁵⁴ a mortgage,⁵⁵ a promissory note,⁵⁶ a tax bill,⁵⁷ a tax claim,⁵⁸ a tax lien,⁵⁹ and a warrant issued for a pension;⁶⁰ and not to include a contractor's lien,⁶¹ a fixed lien on a bankrupt's estate,⁶² a mortgage lien,⁶³ and an action to enforce a mechanic's lien.⁶⁴

—**Compared with Other Terms.** In one or another of the senses hereinabove indicated, and, of course, under the particular circumstances of the case, the word "claim" or "claims" has been held synonymous with, equivalent to, or used interchangeably with, "account" see Account 1 C.J.S. p 571 note 48, "bill" see Bill 10 C.J.S. p 381 note 21, "case" see Case 14 C.J.S. p 1 note 31, "cause of action" see Actions 1 C.J.S. p 987 note 40, "debt,"⁶⁵

Wyo.—Great Western Ins. Co. v. Pierce, 1 Wyo. 45, 50.
11 C.J. p 816 notes 50, 51.

36. Cal.—Mellus v. Potter, 267 P. 563, 564, 91 Cal.App. 700.
Conn.—Beach's App., 55 A. 596, 599, 76 Conn. 118, 125.

37. N.Y.—Home Ins. Co. v. Watson, 59 N.Y. 390, 394—Lawrence v. Miller, 2 N.Y. 245, 254.

38. U.S.—Vidal v. South American Securities Co., C.C.A.N.Y., 276 F. 855, 871, 872.

39. U.S.—Vidal v. South American Securities Co., supra.

Ala.—Steele v. State, 48 So. 673, 674, 159 Ala. 9—Douglas v. Beasley, 40 Ala. 142, 147.

Ark.—Unionaid Life Ins. Co. v. Smith, 15 S.W.2d 321, 322, 179 Ark. 164.

40. Ark.—Unionaid Life Ins. Co. v. Smith, supra.

41. La.—Jackson State Nat. Bank of Jackson, Miss., v. Merchants' Bank & Trust Co. of Jackson, Miss., 149 So. 539, 540, 177 La. 975.

42. Tex.—Citizens' Guaranty State Bank v. National Surety Co., Com. App., 258 S.W. 468, 470.

43. U.S.—Motlow v. Southern Holding & Securities Corporation, C.C. A.Mo., 95 F.2d 721, 725.

Conn.—Beach's Appeal, 55 A. 596, 599, 76 Conn. 118.

44. Tex.—Sauvage v. Wauhup, Civ. App., 143 S.W. 259, 263.

45. Cal.—McGarrahan v. Maxwell,

"All the rights which a person holds"

"'Claim,' when used as a noun and in relation to land, has, in most of the States, a signification beyond that of a mere demand—a right not reduced to enjoyment but to be enforced against another—but it is used as well to express all the rights which a person holds and enjoys in the land. Preemption claims, homestead claims, and mining claims are familiar instances."—Marshall v. Shafter, 32 Cal. 176, 191.

46. S.D.—Sherman v. Sherman, 122 N.W. 439, 443, 23 S.D. 486, 495, citing Bouvier L.D.

47. Ala.—McDowell v. Brantley, 80 Ala. 173, 177.

Minn.—Radichel v. Federal Surety Co., 212 N.W. 171, 172, 170 Minn. 92.

48. N.Y.—In re Franks' Estate, 277 N.Y.S. 573, 575, 154 Misc. 472.

49. N.Y.—Lawrence v. Miller, 2 N.Y. 245, 254.

Similarly expressed

(1) "A thing claimed or demanded."—Burlington & M. R. R. Co. v. Abink, 15 N.W. 317, 14 Neb. 95, 97.

(2) "The thing claimed or demanded."—Corkran Oil & Development Co. v. Arnaudet, 35 So. 747, 754, 111 La. 563.

(3) "The thing demanded or challenged."—Fordyce v. Godman, 20 Ohio St. 1, 14.

50. N.Y.—People v. Fields, 58 N.Y. 491, 499.

Or., 7 F.Cas.No.4,039, 4 Sawy. 217, 228.

52. N.C.—Gill v. Dixon, 42 S.E. 538, 539, 131 N.C. 87.

53. Conn.—Sherwood v. City of Bridgeport, 195 A. 744, 745, 123 Conn. 348.

54. Ga.—Metropolitan Casualty Ins. Co. v. Maloney, App., 192 S.E. 320, 324.

11 C.J. p 818 note 85 [a].

55. Cal.—Anglo-California Bank v. Field, 80 P. 1080, 1083, 146 Cal. 644—Ellissen v. Halleck, 6 Cal. 386, 393.

56. Vt.—Noyes v. Hall, 28 Vt. 645, 650, 651.

57. W.Va.—State v. Barnes, 43 S.E. 131, 132, 52 W.Va. 85.

58. Conn.—Sherwood v. City of Bridgeport, 195 A. 744, 745, 123 Conn. 348.

59. S.D.—Dodson v. Crocker, 94 N.W. 391, 393, 16 S.D. 484.

60. N.C.—Gill v. Dixon, 42 S.E. 538, 539, 131 N.C. 87.

61. Idaho.—Rathbun v. State, 97 P. 335, 337, 15 Idaho 273.

62. Colo.—Hawthorne v. Hendrie & Bolthoff Mfg. & Supply Co., 116 P. 122, 124, 50 Colo. 342.

63. Cal.—In re McCausland, 52 Cal. 568, 577—Fallon v. Butler, 21 Cal. 24, 26, 32, 81 Am.D. 140.

64. Cal.—Booth v. Pendola, 23 P. 200, 201, 25 P. 1101, 88 Cal. 36.

65. Conn.—Sherwood v. City of Bridgeport, 195 A. 744, 745, 123

"defense,"⁶⁶ "demand,"⁶⁷ "lien" see C.J.S. title Liens § 1, also 37 C.J. p 310 note 73, "moneyed demand,"⁶⁸ "plea,"⁶⁹ "pretension," "privilege,"⁷⁰ "right,"⁷¹ "theory,"⁷² and "title,"⁷³ and has been compared with, or distinguished from, "account" see Account 1 C.J.S. p 573 notes 71, 72, "bank stock,"⁷⁴ "belief" see Belief 10 C.J.S. p 237 note 44, "debt,"⁷⁵ "demand,"⁷⁶ "grant,"⁷⁷ "gratuity,"⁷⁸ "inquiry,"⁷⁹ "judgment,"⁸⁰ "legacy,"⁸¹ "liability,"⁸² "lien" see C.J.S. title Liens § 1, also 37 C.J. p 310 notes 75, 76, "money in bank,"⁸³ "penalty,"⁸⁴ "petition,"⁸⁵ "pretension,"⁸⁶ "request,"⁸⁷ and "salary account."⁸⁸

—Phrases in Which Term Used.

Claim continual or continual claim. A mode through which a claimant of land by "continual claim" prevented the loss of his right of entry by the person in possession dying seized of the land.⁸⁹

Claim in equity. In simple cases in English practice where there is not any great conflict as to facts, and a discovery from a defendant was not sought, but a reference to chambers was nevertheless necessary before the final decree, which would be as of course, all parties being before the court,

the summary proceeding by claim was sometimes adopted, thus obviating the recourse to plenary and protracted pleadings.⁹⁰

Claim of consuance. In practice, an intervention by a third person in a suit, claiming that he has rightful jurisdiction of the cause which plaintiff has commenced out of claimant's court; now obsolete.⁹¹

Claim of liberty. In English practice, a suit or petition to the queen, in the court of exchequer, to have liberties and franchises confirmed there by the attorney general.⁹²

Contingent claim. The phrase generally implies the existence of a contract or covenant on which the claim is based, and has been defined as meaning a claim which may never accrue, or one where the liability depends upon some future event which may or may not happen, and therefore makes it uncertain whether there ever will be a liability.⁹³ "Contingent claim" has been held not to include a claim for deficiency by a conditional vendor who, before his vendee made an assignment for the benefit of creditors, repossesses the property and resells it with a deficiency after such assignment,⁹⁴ a fixed amount due at a definite time in the future,⁹⁵ an absolute and unconditional claim, the time of pay-

66. Ill.—People v. Dugas, 141 N.E. 769, 772, 310 Ill. 291.

67. U.S.—Southern Pacific R. Co. v. U. S., C.C.Cal., 38 F. 55, 56. Or.—Crow v. Abraham, 167 P. 590, 592, 86 Or. 99.

Wis.—Town of Stephenson Marinette County v. Industrial Commission, 180 N.W. 842, 843, 173 Wis. 251.

68. Minn.—Radichel v. Federal Surety Co., 212 N.W. 171, 172, 170 Minn. 92.

69. Ill.—People v. Dugas, 141 N.E. 769, 772, 310 Ill. 291.

70. U.S.—Southern Pacific R. Co. v. U. S., C.C.Cal., 38 F. 55, 56.

71. U.S.—Southern Pacific R. Co. v. U. S., supra.

N.Y.—U. S. Fidelity & Guaranty Co. v. Borough Bank of Brooklyn, 146 N.Y.S. 870, 876, 161 App.Div. 479. See also Right 54 C.J. p 803 notes 26-33.

72. Conn.—DiMaio v. Yolen Bottling Works, 107 A. 497, 500, 93 Conn. 597.

73. U.S.—Southern Pacific R. Co. v. U. S., C.C.Cal., 38 F. 55, 56.

74. Pa.—Delamater's Est., 1 Whart. 362, 365, 375.

75. U.S.—Dowell v. Cardwell, D.C. Or., 7 F.Cas.No.4,039, 4 Sawy. 217—Fisher v. Consequa, C.C.Pa., 9 F. Cas.No.4,816, 2 Wash.C.C. 382.

Ga.—State Banking Co. v. Hinton, 172 S.E. 42, 47, 178 Ga. 68, 91 A.L.R. 596.

N.Y.—In re Franks' Estate, Sur., 277 N.Y.S. 573, 575, 154 Misc. 472. 11 C.J. p 313 note 86 [b].

76. Okl.—Golden v. Golden, 8 P.2d 42, 46, 155 Okl. 10. 11 C.J. p 313 note 86 [a].

77. Cal.—McGarrahan v. Maxwell, 28 Cal. 75, 95. La.—Corkran Oil & Development Co. v. Arnaudet, 35 So. 747, 754, 111 La. 563.

78. Mich.—Allen v. State Auditors, 81 N.W. 113, 114, 122 Mich. 324, 80 Am.S.R. 573, 47 L.R.A. 117.

79. U.S.—U. S. v. Primilton, C.C.A. La., 76 F.2d 555, 557.

80. N.D.—Marshall-Wells Hardware Co. v. New Era Coal Co., 100 N. W. 1084, 1086, 13 N.D. 396.

81. Iowa.—Packer v. Overton, 203 N. W. 307, 309, 200 Iowa 620.

82. Miss.—Drainage District No. 1 of Noxubee County v. Evans, 99 So. 819, 821, 136 Miss. 178.

Tex.—International-Great Northern R. Co. v. Texas Co., Civ.App., 280 S.W. 282, 285.

83. W.Va.—Wyatt v. Norris, 66 S. E. 1016, 1017, 66 W.Va. 667, 669.

84. Ark.—Western Union Tel. Co. v. Cobbs, 1 S.W. 558, 559, 47 Ark. 344, 58 Am.R. 756.

85. Neb.—Temple v. Cotton Transfer Co., 253 N.W. 349, 351, 126 Neb. 287.

86. Conn.—Beach's Appeal, 55 A. 596, 599, 76 Conn. 118.

87. Wis.—Town of Stephenson Marinette County v. Industrial Commission, 180 N.W. 842, 843, 173 Wis. 251.

88. U.S.—Lopez v. U. S., 24 Ct.Cl. 84, 96, 2 L.R.A. 571.

89. Brown L.D.

A continual claim is of no avail at the present day to preserve a right of entry, or distress, or action, 3 & 4 Wm. IV c 27 § 11.—Brown L.D.

90. Black L.D.

11 C.J. p 326 note 11.

91. Black L.D., citing Villers v. Monsley, 2 Wils.C.P. 403, 409, 95 Reprint 836.

92. Black L.D.

93. Kan.—Grand Lodge I. O. O. F. v. Troutman, 103 P. 94, 98, 80 Kan. 441.

Minn.—In re Flewell, 276 N.W. 732, 733.

R.I.—Hicks v. Wilbur, 94 A. 872, 874, 38 R.I. 268.

Wis.—Davis v. Davis, 119 N.W. 334, 337, 137 Wis. 640. 13 C.J. p 114 notes 13, 14 [a].

94. N.Y.—In re White Allon & Charles Roberson of London, Inc., 1 N.Y.S.2d 715, 719, 253 App.Div. 220.

95. Wis.—Schmidt v. Grenzow, 156 N.W. 143, 162 Wis. 301.

ment only being uncertain;⁹⁶ nor an obligation certain as to liability and uncertain only as to amount;⁹⁷ has been contrasted with "accrued claim;"⁹⁸ and has been distinguished from "absolute debt," "liability," and "absolute liability,"⁹⁹ "conditional claim,"¹ and "debt."²

Legal claim. One which the party asserting it may enforce by action or by some proceeding at law or in equity.³

Possessory claim. A claim founded upon or growing out of possession, as distinguished from simply the claim of possession.⁴ The term has been used with reference to claims of those occupying lands under the provisions of the preemption laws.⁵

Private claim. One in behalf of a private interest, as distinguished from a claim of a public character.⁶ The term has been contrasted with "public claim."⁷

Public claim. A claim of a public nature or character.⁸

Unliquidated claim. One which one of the parties to the contract cannot alone render certain.⁹ It has been said that the term may be properly used to designate a claim with reference to which the holder, in order to obtain a settlement, must bear some further burden in order to have the amount

so fixed that the debtor is bound thereby.¹⁰ In particular connections, it has been said that a claim is generally called unliquidated if the amount thereof cannot be ascertained at the time of the trial by mere computation, based either on the terms of the obligation or some other accepted standard, and this regardless of whether the debtor disputes his liability in any or every respect;¹¹ and so "unliquidated claim" has been distinguished from "unliquidated debt."¹²

Other phrases: "Adverse claim," see Adverse 2 C.J.S. p 503 note 25, "adverse claim of title," see Adverse 2 C.J.S. p 503 note 27, "all persons having any claim or interest," see All 3 C.J.S. p 874 note 92, "any claim," see Any 3 C.J.S. p 1404 note 5, "any claim for money," see Any 3 C.J.S. p 1404 note 7, "any claim of any character," see Any 3 C.J.S. p 1404 note 8, "any claim or demand," see Any 3 C.J.S. p 1404 note 9, "any claim or demand of whatsoever nature," see Any 3 C.J.S. p 1414 note 90, "any claim shall occur,"¹³ "any legal claim to real property," see Any 3 C.J.S. p 1408 note 73, "any other claim or lien," see Any 3 C.J.S. p 1416 note 53, "bank claim," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 750 note 48—p 751 note 75, "before any judgment, mortgage, or any other claim," see Any 3 C.J.S. p 1412 note 71, "briefly state his claim,"¹⁴ "claim accrued,"¹⁵ "claim against

96. Ala.—Farris v. Stoutz, 78 Ala. 130, 134.

97. Vt.—Downer v. Topliff, 19 Vt. 399, 402.

When accounting necessary

"The mere fact that an accounting is necessary to determine the amount due does not make a claim a contingent claim."—Davis v. Davis, 119 N. W. 334, 337, 137 Wis. 640.

98. Ala.—Farris v. Stoutz, 78 Ala. 130, 133.

99. Wis.—South Milwaukee Company v. Murphy, 88 N.W. 583, 585, 112 Wis. 614, 58 L.R.A. 82.

1. N.Y.—In re Emmet, 150 N.Y.S. 260, 263, 87 Misc. 69.

2. R.I.—Hicks v. Wilbur, 94 A. 372, 874, 38 R.I. 268.

3. N.Y.—People v. Woodruff, 68 N. Y.S. 100, 103, 57 App.Div. 342—Cowan v. New York, 3 Hun 632, 633.

Legal claim against state defined see C.J.S. title States § 200, also 59 C.J. p 282 note 90.

4. Idaho.—Denney v. Arritola, 174 P. 135, 136, 31 Idaho 428. 49 C.J. p 1109 note 66.

5. Wash.—Enoch v. Spokane Falls & N. Ry. Co., 33 P. 966, 967, 6 Wash. 393.

49 C.J. p 1109 note 66 [a].

See also C.J.S. title Public Lands &

42, and 50 C.J. p 926 note 28—p 929 note 43.

6. N.Y.—Board of Supervisors of Cayuga County v. State, 47 N.E. 288, 290, 153 N.Y. 279.

50 C.J. p 371 note 68.

"Private claim" within statutory provisions permitting allowance by court of claims of claims for damages sustained by construction and maintenance of canals see C.J.S. title Canals § 25, within constitutional prohibition of legislative allowance of private claim against the state see C.J.S. title States § 201, also 50 C.J. p 371 note 68, 59 C.J. p 285 note 62.

Audit and allowance by court of claims of private claims against the state see C.J.S. title States § 206, also 59 C.J. p 289 note 48.

7. N.Y.—Board of Supervisors of Cayuga County v. State, supra.

8. N.Y.—Board of Supervisors of Cayuga County v. State, 47 N.E. 288, 290, 153 N.Y. 279—New Lebanon v. State, 181 N.Y.S. 322, 328, 111 Misc. 310.

9. Ala.—Leader v. Vaughan, 103 So. 713, 719, 20 Ala.App. 545.

Ga.—Lincoln Lumber Co. v. Keeter, 145 S.E. 68, 70, 167 Ga. 231—Roberts v. Prior, 20 Ga. 561, 562.

10. U.S.—Chicago M. & St. P. Ry.

Co. v. Clark, N.Y., 92 F. 968, 975, 35 C.C.A. 120.

11. N.Y.—Hettrick Mfg. Co. v. Barish, 199 N.Y.S. 755, 767, 120 Misc. 673.

Computation possible

"The claim here was not unliquidated. The jury having ascertained the terms of the contract, the amount of the claim rested in mere computation."—Kuhn v. Powell, 111 N.E. 639, 640, 61 Ind.App. 131.

12. N.Y.—Hettrick Mfg. Co. v. Barish, 199 N.Y.S. 755, 767, 120 Misc. 673.

13. Minn.—Chandler v. St. Paul F. & M. Ins. Co., 21 Minn. 85, 86, 87, 18 Am.R. 385.

14. As implying necessity of stating a "cause of action"

"The statutory direction to 'briefly state his claim' is not to be deemed a requirement to 'state a cause of action' in the technical sense of those words."—Temple v. Cotton Transfer Co., 253 N.W. 349, 351, 126 Neb. 287.

15. "Damages accrued" equivalent N.Y.—Edlux Const. Corporation v. State, 300 N.Y.S. 509, 511, 252 App. Div. 373.

"Cause of action accrued" distinguished see Cause ante p 48 note 95

real or personal property,"¹⁶ "claim against the city,"¹⁷ "claim against the treasury,"¹⁸ "claim and delivery," see the C.J.S. title Replevin § 2, also 54 C.J. p 417 note 20—p 418 note 24, "claim 'arising from contract subject to the rules of the Exchange,'"¹⁹ "claim arising on a contract,"²⁰ "claim as locator,"²¹ "claim cognizable in a court of equity,"²² "claim due or to become due,"²³ "'claim' enforceable in equity,"²⁴ "claim for bounty land,"²⁵ "claim for compensation,"²⁶ "claim for damages,"²⁷ "claim for damages accrued," see *Acerue* 1 C.J.S. p 762 note 21, "claim for labor,"²⁸ "claim for money,"²⁹ "claim for 'neglect or wrongful injury to personal property,'"³⁰ "claim for refund,"³¹ "claim from which a discharge would be a release,"³² "claim in and to the business,"³³ "claim in the nature of an easement,"³⁴ "claim justly due,"³⁵ "claim

liquidated by judgment,"³⁶ "claim . . . not accrued due,"³⁷ "claim of any soldier or sailor,"³⁸ "claim of a party,"³⁹ "claim of compensation,"⁴⁰ "claim of necessary self-defense,"⁴¹ "claim of ownership," see the C.J.S. title Adverse Possession § 55, "claim of possession,"⁴² "claim of right" and "claim of title" see the C.J.S. title Adverse Possession § 55, "claim of transfer,"⁴³ "claim on contract for the direct payment of money,"⁴⁴ "claim or demand,"⁴⁵ "claim payable out of treasury,"⁴⁶ "claim submitted, audited and rejected,"⁴⁷ "claim, title, or interest in the property,"⁴⁸ "claim to an estate,"⁴⁹ "claim to . . . any land,"⁵⁰ "'claim' to be 'denied,'"⁵¹ "claim to property,"⁵² "claim to real . . . property . . . within the district,"⁵³ "claim under the bond,"⁵⁴ "claim upon the land,"⁵⁵ "colorable adverse claim,"⁵⁶

16. U.S.—*Shainwald v. Lewis*, D.C. Nev., 5 F. 510, 517.

17. Neb.—*Lobeck v. State*, 101 N.W. 247, 248, 72 Neb. 595.

18. Utah.—*Uintah State Bank v. Ajax*, 297 P. 434, 438, 77 Utah 455.

19. U.S.—*Seattle Curb Exchange v. Knight*, C.C.A.Wash., 59 F.2d 39, 41.

20. Minn.—*In re Flewell*, 276 N.W. 732, 733.

S.D.—*Meade County v. Welch*, 148 N.W. 601, 602, 34 S.D. 348.

21. U.S.—*Hollingsworth v. Barbour*, Ky., 4 Pet. 466, 473, 7 L.Ed. 922.

22. N.J.—*Maloney v. Maloney*, 174 A. 28, 31, 12 N.J.Misc. 397.

23. Ohio.—*Cincinnati v. Hafer*, 30 N. E. 197, 199, 49 Ohio St. 60.

24. W.Va.—*Mabie v. Moore*, 84 S.E. 783, 790, 75 W.Va. 761.

25. U.S.—*U. S. v. Wilcox*, C.C.N.Y., 28 F.Cas.No.16,691, 4 Blatchf. 385, 388.

26. Ill.—*Brodek v. Indemnity Ins. Co. of North America*, 11 N.E.2d 228, 235, 236, 292 Ill.App. 363.

Tex.—*Texas Employers Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231, 241.

11 C.J. p 822 note 45.

27. Ark.—*Western Union Tel. Co. v. Moxley*, 98 S.W. 112, 114, 80 Ark. 554.

Or.—*Colby v. City of Portland*, 174 P. 1159, 89 Or. 566, 3 A.L.R. 819.

Tex.—*Commercial Standard Ins. Co. v. Harper*, Com.App., 103 S.W.2d 143, 144, 110 A.L.R. 529—*Lone Star Finance Co. v. Universal Automobile Ins. Co.*, Civ.App., 28 S.W.2d 573, 575—*Western Union Tel. Co. v. Vann*, Civ.App., 283 S.W. 541, 542—*Western Indemnity Co. v. Free and Accepted Masons of Texas*, Civ.App., 198 S.W. 1092, 1095.

28. N.H.—*Weymouth v. Sanborn*, 43

29. Tex.—*Moore v. Rice*, Civ.App., 80 S.W.2d 451, 452—*Massie v. De Shields*, Civ.App., 62 S.W.2d 322, 325—*Goldman v. Ramsay*, Civ.App., 62 S.W.2d 176, 178—*National Guarantee L. & T. Co. v. Fly*, 69 S.W. 231, 232, 29 Tex.Civ.App. 533.

"Lien" not included

Tex.—*Western Mortg., etc., Co. v. Jackman*, 14 S.W. 305, 306, 77 Tex. 622.

30. Ala.—*City of Birmingham v. Davis*, 155 So. 94, 26 Ala.App. 133.

31. U.S.—*Carman v. U. S.*, D.C. Mass., 21 F.Supp. 239, 240.

32. U.S.—*In re United Wireless Tel. Co.*, D.C.N.J., 192 F. 238, 239.

33. Conn.—*Kornblau v. McDermant*, 98 A. 537, 590, 90 Conn. 624.

34. N.Y.—*Brooklyn Dime Sav. Bank v. Butler*, 152 N.Y.S. 633, 635, 167 App.Div. 257, 258.

35. Conn.—*Sperry's App.*, 47 Conn. 87, 88.

36. U.S.—*In re Coventry Evans Furniture Co.*, D.C.N.Y., 171 F. 673.

37. Ont.—*Grant v. West*, 23 Ont. App. 533, 539.

38. N.C.—*Gill v. Dixon*, 42 S.E. 538, 539, 131 N.C. 87, 89.

39. N.Y.—*Orvis v. Jennings*, 6 Daly 434, 446, 447.

40. Tenn.—*Hudgins v. Nashville Bridge Co.*, 113 S.W.2d 738, 740.

41. Ill.—*People v. Dugas*, 141 N.E. 769, 772, 310 Ill. 291.

42. Idaho.—*Denney v. Arritola*, 174 P. 135, 31 Idaho 428.

43. Tex.—*Finch v. Trent*, 22 S.W. 132, 134, 3 Tex.Civ.App. 568.

"Chain of transfer" sometimes used interchangeably see *Chain ante* p 349 note 82.

44. Idaho.—*Twin Falls Nat. Bank v. Reed*, 258 P. 526, 527, 44 Idaho 573

45. Cal.—*Pelton v. Andrews*, App., 74 P.2d 523, 530.

Or.—*Crow v. Abraham*, 167 P. 590, 592, 86 Or. 99.

11 C.J. p 823 note 64.

46. Ala.—*Scruggs v. State*, 20 So. 642, 643, 111 Ala. 60, 63.

47. N.Y.—*O'Neil v. State*, 119 N.E. 95, 96, 223 N.Y. 40.

"Audit refused for lack of jurisdiction" distinguished see *Audit* 7 C. J.S. p 1275 note 43.

48. Nev.—*State v. Central Pacific R. Co.*, 30 P. 686, 688, 21 Nev. 247.

49. Iowa.—*Patterson v. Carr*, 176 N. W. 265, 266, 139 Iowa 69.

"Claim against an estate" contrasted see *Against* 2 C.J.S. p 1013 note 34.

50. Cal.—*People v. Frisbie*, 31 Cal. 146, 148.

11 C.J. p 824 note 67.

51. U.S.—*Werner v. U. S.*, C.C.A.N. Y., 86 F.2d 113.

52. U.S.—*Ladew v. Tennessee Copper Co.*, C.C.Tenn., 179 F. 245, 251.

"Encumbrance" distinguished

U.S.—*Vidal v. South American Securities Co.*, C.C.A.N.Y., 276 F. 855, 872.

"Lien" distinguished

U.S.—*Vidal v. South American Securities Co.*, supra.

53. U.S.—*Ladew v. Tennessee Copper Co.*, Tenn., 31 S.Ct. 81, 83, 218 U.S. 357, 54 L.Ed. 1069.

54. U.S.—*U. S. Fidelity & Guaranty Co. v. Jones*, C.C.A.Tex., 87 F.2d 346, 348.

N.J.—*Maryland Casualty Co. v. Hanlon*, 100 A. 352, 354, 87 N.J.Eq. 167.

55. Minn.—*National Bond, etc., Co. v. Daskam*, 97 N.W. 458, 91 Minn. 81, 82.

56. Lamb v. Townshend, C.C.A.W. Va., 71 F.2d 590, 594.

"colorable claim,"⁵⁷ "compromise of claim," see C.J.S. title Contracts § 105, also 13 C.J. p 349 note 6, "conditional claim,"⁵⁸ "contingent or unliquidated claim,"⁵⁹ "creek claim," see the C.J.S. title Mines and Minerals § 3, also 15 C.J. p 1453 notes 12, 13, "debt or claim,"⁶⁰ "disputed claim,"⁶¹ "doubtful claim," see the C.J.S. title Compromise and Settlement § 11, also 11 C.J. p 816 note 30[a], "equitable claim,"⁶² "fictitious claim," see the C.J.S. title Assignments for Benefit of Creditors § 79, "fictitious or colorable claim," see the C.J.S. title Appeal and Error § 73 b, "fictitious or fraudulent claims," see the C.J.S. title Courts § 56, also 15 C.J. p 758 note 70-p 759 note 78, "file a claim in the Court of Claims,"⁶³ "interpose a claim,"⁶⁴ "just claim,"⁶⁵ "just claim of the assured,"⁶⁶ "lienable claim" or "lien claim," see the C.J.S. title Liens § 1, also 37 C.J. p 310 note 77, "liquidated claim,"⁶⁷ "lode claim" or "lode mining claim," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 750 notes 55, 56, "mining claim" see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 750 note 48-p 751 note 60, "municipal claim,"⁶⁸ "notice . . . of . . . claim for damages,"⁶⁹ "owner of possessory claim,"⁷⁰ "placer claim," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 751 notes 61-67, "preemption claim," see the C.J.S. title Public Lands § 44, also 50 C.J. p 931 note 2-p 933 note 5,

"prior claim,"⁷¹ "right and claim,"⁷² "Setting up a claim,"⁷³ "setting up claim thereto,"⁷⁴ "stale claim," see the C.J.S. title Equity § 112, also 21 C.J. p 211 note 40-p 212 note 47, "tunnel claim," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 751 note 60, and "valid claim,"⁷⁵ also "against all other claims,"⁷⁶ "all benefits and claims," see All 3 C.J.S. p 869 note 34, "all claims," "all claims and demands," "all claims and obligations arising or accruing in this state by virtue of any bond or contract," "all claims, demands, action or actions, cause or causes of action whatsoever," and "all claims for damages," see All 3 C.J.S. p 870 notes 63-67, "all claims whatsoever,"⁷⁷ "all just claims," see All 3 C.J.S. p 872 note 66, "all lawful claims for . . . supplies furnished," see All 3 C.J.S. p 872 note 74, "all other . . . demands and claims," see All 3 C.J.S. p 882 note 69, "all persons having any claims against the estate," see All 3 C.J.S. p 874 note 93, "all solvent debts, claims, or demands," see All 3 C.J.S. p 876 note 59, "all such . . . demands or claims," see All 3 C.J.S. p 876 note 66, "beyond legal claims,"⁷⁸ "claims absolutely owing,"⁷⁹ "claims against an estate," see Against 2 C.J.S. p 1013 note 34, "claims against such corporations or banker,"⁸⁰ "claims against the estate of a deceased person,"⁸¹ "claims against the State," see the C.J.S. title States § 194, also 59 C.J. p 282 notes

57. U.S.—In re Blum, Wis., 202 F. 883, 885, 121 C.C.A. 241.

58. N.Y.—In re Emmet, 150 N.Y.S. 260, 263, 87 Misc. 69.

59. N.Y.—In re Littleton's Estate, 223 N.Y.S. 470, 474, 129 Misc. 845.

60. Contracts and judgments included

"A contract obligation is a debt or claim; likewise a judgment."—Jennings v. Loucks, 297 N.Y.S. 893, 896, 163 Misc. 791.

61. N.Y.—Matter of Latham, 130 N.Y.S. 535, 539, 145 App.Div. 849. 18 C.J. p 1283 note 30 [b].

62. Vt.—Purdy v. Purdy, 30 A. 695, 67 Vt. 50, 53—Spaulding v. Warner, 52 Vt. 29, 32.

63. N.Y.—Edlux Const. Corporation v. State, 300 N.Y.S. 509, 511, 252 App.Div. 373.

64. Ga.—Walden v. Walden, 57 S.E. 323, 325, 128 Ga. 126.

65. Wis.—Bostwick v. New York Mutual Life Ins. Co., 89 N.W. 538, 92 N.W. 246, 253, 116 Wis. 392, 67 L.R.A. 705.

35 C.J. p 433 note 71.

66. U.S.—Charter Oak Life Ins. Co. v. Rodel, Mo., 95 U.S. 232, 237, 24 L.Ed. 433.

67. Colo.—Chicago, R. I. & P. Ry. Co. v. Mills, 69 P. 317, 318, 18 Colo. App. 8.

Conn.—State v. Staub, 23 A. 924, 927, 61 Conn. 553.

Tex.—Commercial State Bank v. Van Hutton, Civ.App., 208 S.W. 363, 364. 37 C.J. p 1264 note 60.

Agreement or litigation implied

"To liquidate a claim is to determine by agreement or litigation the precise amount of it."—In re Cook, D.C.Ga., 298 F. 125, 126, citing Bouvier L. D. and Webster Int. D.

Claim for damages

"Appellant's claim, 'founded on a tort or breach of covenant on the part of the plaintiff,' . . . cannot be said [to be] . . . 'liquidated.'"—Worley v. Smith, 63 S.W. 903, 904, 26 Tex.Civ.App. 270.

68. Pa.—Jones v. Beale, 66 A. 254, 217 Pa. 182—Philadelphia v. Scott, 72 Pa. 92, 97—Kohler v. Reitze, 38 Pa.Co. 17, 20—City v. Vandevier, 1 Leg.Gaz. 397, 398.

69. Tex.—Citizens' Guaranty State Bank of Hutchins v. National Surety Co., Com.App., 258 S.W. 468, 470.

70. Idaho.—Denney v. Arritola, 174 P. 135, 31 Idaho 428.

71. Ky.—Stansberry v. Pope, 6 J.J. Marsh. 189, 192.

Tex.—La Brie v. Cartwright, 118 S.W. 785, 788, 55 Tex.Civ.App. 144.

72. Mass.—Richardson v. Cam-

bridge, 2 Allen 113, 121, 79 Am.D. 767.

73. Wis.—Maxon v. Ayers, 28 Wis. 612, 614.

74. Ky.—Brown v. Ward, 105 S.W. 964, 965, 32 Ky.L. 261—Campbell v. Disney, 18 S.W. 1027, 1028, 93 Ky. 41, 42, 13 Ky.L. 919.

75. Can be supported or defended

"The bill alleges that it [the claim] was not 'legal' and not 'valid.' The word 'valid' addressed to a court of equity in the connection in which it is used in the bill, I think, includes the charge that the claim is not of such a character that it can be supported or defended either at law or in equity."—Herbert v. Herbert, 20 A. 290, 291, 47 N.J.Eq. 11.

76. N.Y.—Folliard v. Wallace, 2 Johns. 395, 402.

77. Mich.—Johnson v. Hollensworth, 11 N.W. 843, 844, 48 Mich. 140.

78. N.Y.—Cowan v. New York, 3 Hun 632, 636.

79. U.S.—In re Buzzini, D.C.N.Y., 183 F. 827, 830.

80. Mo.—Garden of Eden Drainage Dist. v. Bartlett Trust Co., 50 S.W.2d 627, 634, 330 Mo. 554.

81. Wis.—In re George's Estate, 274 N.W. 294, 296.

11 C.J. p 821 note 32.

85-8, "claims against the United States," see the C.J.S. title United States § 136, also 65 C.J. p 1372 note 87-p 1374 note 23, "claims and contingent liabilities,"⁸² "claims and demands,"⁸³ "claims" and "effects,"⁸⁴ "claims arising from contracts,"⁸⁵ "claims arising out of the same transaction,"⁸⁶ "claims by the United States," see the C.J.S. title United States § 132, also 65 C.J. p 1368 notes 9-16, "claims contracted in carrying on the business,"⁸⁷ "claims . . . for damages . . . sounding in tort,"⁸⁸ "claims for injuries to persons,"⁸⁹ "claims for labor or material,"⁹⁰ "claims for loss, damage, or delay,"⁹¹ "claims for losses,"⁹² "claims for taxes,"⁹³ "claims for work and labor performed,"⁹⁴ "claims 'founded upon the Constitution of the United States or any law of Congress,'"⁹⁵ "claims, liens, or judgments that may be judicially obtained against them,"⁹⁶ "claims . . . not less than the amounts so set forth,"⁹⁷ "claims . . . of all other persons,"⁹⁸ "claims of a 'right under an authority exercised under the United States,'"⁹⁹ "claims provable in bankruptcy,"¹ "claims upon contract,"² "claims upon the treasury,"³ "claims which can be allowed, rejected, or ordered paid,"⁴ "class claims,"⁵

"commission claims,"⁶ "Court of Claims," see the C.J.S. title Federal Courts § 327, also 25 C.J. p 988 notes 56-61, "other and further claims,"⁷ "other claims or rights,"⁸ and "without claims, rents, or demands of any kind or amount."⁹

As a Verb

—Present Tense. In the intransitive sense, "claim" has been defined as meaning to be entitled to anything as a matter of right.¹⁰ Used in its transitive sense, it has been said that the term has the force of "asks for," or "demands as his due,"¹¹ and implies an active assertion of right and the demand for its recognition,¹² an assertion by words or other means,¹³ although it does not imply necessarily a demand made in words,¹⁴ and it has been said that, etymologically, it by no means implies that either place or presence is essential to its potency or completeness;¹⁵ and in this sense has been defined as meaning to affirm;¹⁶ to affirm to be one's own, or one's due;¹⁷ to ask or seek;¹⁸ to assert;¹⁹ to assert a right to, or an ownership of, as to claim a title;²⁰ to challenge as a right;²¹

82. Eng.—Lever v. Land Securities' Co., 8 T.L.R. 94.

83. Okl.—Golden v. Golden, 8 P.2d 42, 46, 155 Okl. 10. 11 C.J. p 821 note 37.

84. Tex.—De Cordova v. Knowles, 37 Tex. 19, 20.

85. Mass.—Austin v. Hayden, 133 N.E. 576, 579, 244 Mass. 286.

86. Cal.—Boulden v. Thompson, 131 P. 765, 766, 21 Cal.App. 279.

87. U.S.—In re Vicksburg Bridge & Terminal Co., D.C.Miss., 22 F. Supp. 490, 500.

88. U.S.—Juragua Iron Co. v. U. S., Ct.Cl., 29 S.Ct. 385, 386, 212 U. S. 297, 302, 53 L.Ed. 520.

Wash.—Kincaid v. Seattle, 134 P. 504, 508, 135 P. 820, 74 Wash. 617.

89. N.Y.—Gaouette v. Aetna Life Ins. Co. of Hartford, Conn., 2 N.Y. S.2d 497, 498, 253 App.Div. 388.

90. U.S.—Title Guaranty & Trust Co. v. Puget Sound Engine Works, Wash., 163 F. 168, 173, 89 C.C.A. 618.

91. Mo.—Bailey v. Missouri Pac. R. Co., 171 S.W. 44, 46, 184 Mo.App. 457.

92. Mass.—Cutting v. American Ins. Co., 83 N.E. 396, 397, 197 Mass. 131.

93. Conn.—Sherwood v. City of Bridgeport, 195 A. 744, 745, 123 Conn. 348.

94. Wis.—Employers' Mut. Liability Ins. Co. of Wisconsin v. Ferd. H.

Grahl Const. Co., 234 N.W. 326, 327, 203 Wis. 315.

95. U.S.—Juragua Iron Co. v. U. S., Ct.Cl., 29 S.Ct. 385, 386, 212 U. S. 297, 302, 53 L.Ed. 520.

96. La.—Lyon Lumber Co. v. Home Accident Ins. Co., 143 So. 379, 381, 175 La. 476.

97. Ill.—Mallers v. Crane Co., 60 N.E. 804, 806, 191 Ill. 181.

98. N.Y.—Home Ins. Co. v. Watson, 59 N.Y. 390, 394.

99. U.S.—Montana v. Rice, Mont., 27 S.Ct. 281, 283, 204 U.S. 291, 51 L. Ed. 490.

1. U.S.—In re Levitt, D.C.Wis., 126 F. 889, 891.

Mass.—McIntire v. Cottrell, 69 N.E. 1091, 1092, 185 Mass. 178.

2. Cal.—Welsbach Co. v. State, 275 P. 436, 437, 206 Cal. 556.

3. Neb.—Lancaster County v. State, 104 N.W. 187, 188, 107 N.W. 388, 74 Neb. 211—State v. Moore, 59 N.W. 753, 757, 40 Neb. 854, 25 L.R. A. 774.

4. Cal.—Johnson v. Superior Court of California in and for Fresno County, 247 P. 249, 251, 77 Cal.App. 599.

5. N.Y.—In re New York Title & Mortgage Co., 296 N.Y.S. 550, 555, 163 Misc. 42.

6. Wash.—Smith v. Cadillac Motor Car Co., 277 P. 453, 457, 152 Wash. 131.

7. N.Y.—Colt v. O'Connor, 109 N.Y. S. 689, 694, 59 Misc. 83.

8. U.S.—Trodick v. Northern Pac. R. Co., Mont., 164 F. 913, 915, 90 C.C.A. 653.

9. N.Y.—Schork v. Mortiz, 6 N.Y.S. 554.

10. Ala.—Douglas v. Beasley, 40 Ala. 142, 147.

11. Wis.—John R. Davis Lumber Co. v. Milwaukee First Nat. Bank, 58 N.W. 743, 744, 87 Wis. 435.

12. Iowa.—Grube v. Wells, 34 Iowa 148, 151.

13. Iowa.—Morrison v. Springer, 15 Iowa 304, 346.

14. Iowa.—Grube v. Wells, 34 Iowa 148, 151—Morrison v. Springer, 15 Iowa 304, 346.

15. Iowa.—Morrison v. Springer, supra.

16. Mont.—Pollock Mining & Milling Co. v. Davenport, 78 P. 768, 31 Mont. 452, 454.

17. Ga.—Dugas v. Hammond, 60 S. E. 268, 269, 130 Ga. 87.

18. Ala.—Douglas v. Beasley, 40 Ala. 142, 147.

19. Mont.—Pollock Mining & Milling Co. v. Davenport, 78 P. 768, 31 Mont. 452, 454.

Vt.—Collins v. Farley, 66 A. 713, 714, 80 Vt. 144.

20. Ga.—Dugas v. Hammond, 60 S. E. 268, 269, 130 Ga. 87, quoting Standard D.

21. N.J.—Hill v. Henry, 57 A. 554, 558, 66 N.J.Eq. 150.

to demand as due;²² to demand or require;²³ to lay claim to;²⁴ to obtain by virtue of authority, right, or supposed right.²⁵ The word has also been commonly used as meaning to hold or maintain as a fact or as true;²⁶ to hold to be true against implied denial or doubt.²⁷

In particular connections or contexts "claim" has been held equivalent to "assume" see Assume 7 C.J. S. p 105 note 25, but not equivalent to "has a right to," or "owns;"²⁸ and the use of "insist," "state," "think," and "urge" as synonymous has been said to be incorrect.²⁹

Phrases: "Claim his vote,"³⁰ and "those under whom they claim;"³¹ also "assumes or claims,"³² "claims an estate or interest,"³³ "claims [the land] in fee simple absolute,"³⁴ "claims title,"³⁵ "claims to be a married man,"³⁶ and "plaintiff claims."³⁷

—**Claimed.** "Claimed," in the past tense, has been employed as synonymous with, or equivalent to, "alleged" see Allege 3 C.J.S. p 885 note 75, "assumed" see Assume 7 C.J.S. p 106 note 45, "contended,"³⁸ and "insisted."³⁹

Phrases: "Claimed by him,"⁴⁰ "claimed by them,"⁴¹ "claimed or recoverable,"⁴² "claimed to be his self-defense,"⁴³ "claimed to be this self-defense,"⁴⁴ "it is claimed,"⁴⁵ and "owned or claimed."⁴⁶

—**Claiming.** The present participle occurs in phrases which have received judicial construction,

such as "all claiming under him," see All 3 C.J.S. p 870 note 62, "any one claiming under the same bond and affidavit," see Any 3 C.J.S. p 1413 note 42, "claiming under,"⁴⁷ and "rightfully claiming under, or in trust for him."⁴⁸

As an Adjective

As an adjective, "claim" has been used in phrases which have received judicial construction, such as "claim affidavit," see the C.J.S. title Executions § 105, 23 C.J. p 456 note 13, "claim agent" see the C.J.S. titles Corporations § 1050, also 14a C.J. p 435 note 71-p 436 note 78, and Railroads § 15, also 51 C.J. p 426 notes 92-1, "claim cases,"⁴⁹ "claim check" and "claim check system," see Carriers § 866, "claim committee,"⁵⁰ and "claim property bond," see the C.J.S. titles Executions §§ 176, 192, also 23 C.J. p 590 note 89-p 591 note 2, p 612 notes 33-40, and Replevin § 103, also 54 C.J. p 477 note 69-p 478 note 75.

CLAIMANT. A person who claims, demands anything as his right, or who makes a claim in an administrative proceeding;⁵¹ a voluntary applicant for justice, as distinguished from one compelled to answer for his wrong.⁵² In a broader sense, however, the term might be used to designate the owner of property, whether prosecuting or defending his right to such property, although this does not agree with the ordinary legal meaning of the word.⁵³ In a particular connection, the term was restricted in its application to claimants whose claims were liqui-

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| 22. Ala.—Douglas v. Beasley, 40 Ala. 142, 147. | 32. Okl.—Anicker v. Doyle, 202 P. 281, 284, 84 Okl. 62. | 43. Ill.—People v. O'Gara, 110 N.E. 828, 830, 271 Ill. 138. |
| Ga.—Dugas v. Hammond, 60 S.E. 268, 269, 130 Ga. 87, 89. | 33. Cal.—Akley v. Bassett, 228 P. 1057, 1063, 68 Cal.App. 270. | 44. Ill.—People v. McGinnis, 84 N.E. 687, 690, 234 Ill. 68. |
| N.J.—Hill v. Henry, 57 A. 554, 558, 66 N.J.Eq. 150. | 34. Cal.—Marshall v. Shafter, 32 Cal. 176, 190. | 45. Cal.—People v. Glover, 74 P. 745, 747, 141 Cal. 233. |
| 23. Wyo.—Great Western Ins. Co. v. Pierce, 1 Wyo. 45, 50. | 35. "Has title" equivalent
Cal.—Marshall v. Shafter, supra.
Ga.—Bentley v. Phillips, 156 S.E. 898, 901, 171 Ga. 866. | 46. Tex.—Hand v. Errington, Civ. App., 233 S.W. 567, 571—Gameson v. Gameson, Civ.App., 162 S.W. 1169, 1170. |
| 24. Ga.—Dugas v. Hammond, 60 S.E. 268, 269, 130 Ga. 87. | 36. Ga.—Tison v. State, 53 S.E. 809, 125 Ga. 7. | 47. Vt.—Lee v. Follensby, 85 A. 915, 917, 86 Vt. 401. |
| 25. Ala.—Douglas v. Beasley, 40 Ala. 142, 147, quoting Webster D. | 37. Ala.—Douglas v. Beasley, 40 Ala. 142, 144. | 48. Mo.—Clare v. Graham, 64 Mo. 249, 253. |
| 26. Vt.—Collins v. Farley, 66 A. 713, 714, 80 Vt. 144. | Ark.—Climer v. Aylor, 185 S.W. 1097, 1099, 123 Ark. 510. | 49. Ga.—Lingo v. Harris, 73 Ga. 28, 30. |
| 27. Mont.—Pollock Min. & Mill. Co. v. Davenport, 78 P. 768, 31 Mont. 452, 454. | 38. Cal.—People v. Glover, 74 P. 745, 747, 141 Cal. 233. | 50. Wis.—Rogan v. Walker, 1 Wis. 527, 536. |
| 28. Wis.—John R. Davis Lumber Co. v. Milwaukee First National Bank, 58 N.W. 743, 744, 87 Wis. 435. | 39. Cal.—People v. Glover, supra. | 51. Iowa.—Ater v. Mutual Ben. Department of Order of Railway Conductors, 271 N.W. 517, 519, quoting Corpus Juris. |
| 29. N.J.—Hill v. Henry, 57 A. 554, 558, 66 N.J.Eq. 150. | 40. Tex.—Gameson v. Gameson, Civ. App., 162 S.W. 1169, 1170. | 52. Pa.—Talbot v. Three Brigs, 1 Dall. 95, 108, 1 L.Ed. 52. |
| N.Y.—Orvis v. Jennings, 6 Daly 434, 446. | 41. Alaska.—Sutter v. Heckman, 1 Alaska 188, 200. | 53. U.S.—The Conqueror, N.Y., 17 S.Ct. 510, 515, 166 U.S. 110, 122, 41 L.Ed. 937. |
| 30. Iowa.—Morrison v. Springer, 15 Iowa 304, 346. | 42. Eng.—Lovejoy v. Cole, [1894] 2 Q.B. 861, 864, citing Stroud Jud. D. | |

dated as distinguished from those who must go into the proper forum and have the amount of their claims ascertained,⁵⁴ but in another connection, under a statute expressly providing for the submission of claims to a jury, the term was held to apply to a person having an unliquidated claim sounding in tort.⁵⁵ The term has been held to include a beneficiary under a certificate of life insurance⁵⁶ and a member or deceased member of a benefit association.⁵⁷ Depending on the context or circumstances of its use, "claimant" has been held synonymous or interchangeable with "affiant," see *Affiant* 2 C.J.S. p 920 note 35, and "creditor,"⁵⁸ and has been distinguished from "creditor"⁵⁹ and "intervener" see *Admiralty* § 99.

"Claimants" as parties to appeal see *Appeal and Error* § 185; claimants to attached property see *Attachment* §§ 339, 340, and to public lands see C.J.S. title *Public Lands* §§ 40, 66, 67, 70, also 50 C.J. p 922 notes 69-80, p 949 notes 97-6, 8, p 951 note 25, p 955 notes 2-10. For other specific uses of the term see the *Descriptive-Word Index*.

Phrases: "Any claimant," see *Any* 3 C.J.S. p 1404 note 6, "any member or claimant who is dissatisfied with any decision,"⁶⁰ "any such claimant," see *Any* 3 C.J.S. p 1414 note 76, "bona fide claimant," see *Bona Fide* 11 C.J.S. p 388 notes 52-55, "claimant of a benefit,"⁶¹ "claimant in admiralty," see *Admiralty*, *Pocket Parts* § 99, "claimant under color of title," see *Adverse Possession* § 60, "defendant or claimant,"⁶² "lien claimant," see C.J.S. title *Liens* § 1, also 37 C.J. p 310 note 78, "on the part of the claimant,"⁶³ "pension claimant,"⁶⁴ "possessory claimant,"⁶⁵ "relative of the claimant,"⁶⁶

"successful claimant,"⁶⁷ "to the knowledge of said claimant,"⁶⁸ "unless the claimant gives written notice,"⁶⁹ and "unless the claimant has been a member for at least one month,"⁷⁰ also "adverse claimants," see *Adverse* 2 C.J.S. p 503 note 26, "all the claimants," see *All* 3 C.J.S. p 876 note 91, "claimants interested or pretending to be interested,"⁷¹ "claimants other than citizens,"⁷² and "creditors and claimants."⁷³

CLAIRVOYANT. In its accurate and ordinary meaning the word is confined to a person who sees, while in a trance, things which by reason of distance or for other reasons are not ordinarily visible, although it has been said that the word possibly might be interpreted to include one who hears communications made by occult force.⁷⁴

CLAM. A name given in different localities to different bivalve mollusks.⁷⁵

In the civil law, covertly, secretly.⁷⁶

CLAM DELINQUENTES MAGIS PUNIUNTUR QUAM PALAM.⁷⁷

CLAMEA. Law Latin, a claim.⁷⁸

CLAMEA ADMITTENDA IN ITINERE PER ATTORNATUM. An ancient writ by which the king commanded the justices in eyre to admit the claim by attorney of a person who was in the royal service and could not appear in person.⁷⁹

CLAM FACTUM ID VIDETUR ESSE, QUOD QUISQUE, QUUM CONTROVERSIAM HABERET, HABITURUMVE SE PUTARET, FECIT.⁸⁰

54. Miss.—*Drainage Dist. No. 1 of Noxubee County v. Evans*, 99 So. 819, 821, 136 Miss. 178.

55. N.J.—*Lehigh & Wilkesbarre Co. v. Stevens & Condit Transp. Co.*, 51 A. 446, 447, 63 N.J.Eq. 107.

56. Iowa.—*Ater v. Mutual Benefit Department of Order of Railway Conductors*, 271 N.W. 517, 519.

57. Me.—*Croteau v. Lunn & Sweet Employees' Ass'n*, 126 A. 284, 285, 124 Me. 85.

58. Cal.—*Gray v. Palmer*, 9 Cal. 616, 637.

59. N.J.—*Lehigh & Wilkesbarre Co. v. Stevens & Condit Transp. Co.*, 51 A. 446, 63 N.J.Eq. 107, 109.

60. Iowa.—*Ater v. Mutual Benefit Department of Order of Railway Conductors*, 271 N.W. 517, 519.

61. U.S.—*Metropolitan Life Ins. Co. v. Mason*, D.C.Pa., 21 F.Supp. 704, 706.

62. Ala.—*Ex parte Elba Bank &*

Trust Co., 75 So. 294, 295, 199 Ala. 651.

63. Me.—*Croteau v. Lunn & Sweet Employees' Association*, 126 A. 284, 124 Me. 85.

64. U.S.—*U. S. v. Benecke*, Mo., 98 U.S. 447, 448, 449, 25 L.Ed. 192.

65. Wash.—*Enoch v. Spokane Falls & N. Ry. Co.*, 33 P. 966, 967, 6 Wash. 393.

66. Wash.—*Lund v. City of Seattle*, 1 P.2d 301, 304, 163 Wash. 254.

67. Mo.—*Russell v. Woerner*, 110 S. W. 691, 692, 131 Mo.App. 253, 257—*Smith v. Laumeier*, 12 Mo.App. 546, 550.

68. Cal.—*Warren v. McGill*, 37 P. 144, 145, 103 Cal. 153—*Davis v. Browning*, 27 P. 337, 91 Cal. 603, 605.

69. Ill.—*Globe Acc. Ins. Co. v. Gerisch*, 45 N.E. 563, 565, 163 Ill. 625, 54 Am.S.R. 486.

70. Me.—*Croteau v. Lunn & Sweet*

Employees' Association, 126 A. 284, 285, 124 Me. 85.

71. Pa.—*Talbot v. Three Brigs*, 1 Dall. 95, 108, 1 L.Ed. 52.

72. U.S.—*Reising v. Deutsche Dampfschiffahrts - Gesellschaft Hansa*, C.C.A.N.Y., 15 F.2d 259, 261.

73. N.J.—*Lehigh & Wilkesbarre Co. v. Stevens & Condit Transp. Co.*, 51 A. 446, 63 N.J.Eq. 107.

74. Mass.—*Commonwealth v. Delon*, 106 N.E. 846, 219 Mass. 217, 218.

75. Wash.—*Sequim Bay Canning Co. v. Bugge*, 94 P. 922, 49 Wash. 127, 131, 16 Ann.Cas. 196.

11 C.J. p 827 note 25.

76. Black L.D.

77. A maxim meaning "Those sinning secretly are punished more severely than those sinning openly."—Black L.D.

78. Adams Gloss., citing Reg.Orig. p 19 b.

79. Black L.D.

80. A maxim meaning "That ap-

CLAMO; CLAMARE. In law Latin, a verb meaning to call, cry out, shout aloud, to complain with a loud voice.⁸¹

CLAMOR. In old English law, a claim or complaint, an outcry. In the civil law, a claimant, hence a debt, or anything claimed from another; also a proclamation, or an accusation.⁸²

CLAMP. As a noun, an instrument of wood, metal, or other rigid material, used to hold anything, or to hold or fasten two or more things together by pressure, so as to keep them in the same relative position, and specifically, in the manufacture of can bodies, it has been defined as an adjustable band of iron which engages the unfolded edge of the tin and holds it fast against the horn.⁸³

As a verb, it has been said to convey the conception of the progressive application of mechanical force, has been defined as meaning to fasten or secure, and has been compared with, and distinguished from, "to draw" and "to wedge."⁸⁴

CLAM, VI, AUT PRECARIO. A technical phrase of the Roman law, meaning by force, stealth, or importunity.⁸⁵

CLANDESTINE. As defined by Webster, withdrawn from public notice for an evil purpose, kept secret, hidden, or private.⁸⁶

Clandestine marriage. Legally, one contracted without observing the conditions precedent prescribed by law, such as publication of bans, procuring a license, or the like.⁸⁷

Other phrases: "Clandestine importation,"⁸⁸ "clandestine introduction," see the C.J.S. title Customs Duties § 246, also 17 C.J. p 666 note 8, and "clandestine running and landing."⁸⁹

CLANDESTINELY. The Century Dictionary de-

fines the word as meaning secretly; privately; furtively.

Phrases: "Bring into . . . clandestinely," see Bring 11 C.J.S. p 1140 note 66, "clandestinely and without entering the same at the . . . Customs Office" and "clandestinely introduce."⁹⁰

CLAP. Vulgar name for "gonorrhea."⁹¹

CLARE CONSTAT. Literally "It clearly appears." In Scotch law, the name of a precept for giving seizin of lands, to an heir; so called from its initial words.⁹²

CLAREMETHEN. In old Scotch law, the warranty of stolen cattle or goods; the law regulating such warranty.⁹³

CLARENDON, ASSIZE OF. See Assise or Assize 6 C.J.S. p 1435 note 27.

CLARENDON, CONSTITUTIONS OF. The constitutions of Clarendon were certain statutes made in the reign of Henry II of England, at a parliament held at Clarendon (A. D. 1164), by which the king checked the power of the pope and his clergy, and greatly narrowed the exemption they claimed from secular jurisdiction.⁹⁴

CLARIFICATIO. Latin, in old Scotch law, a making clear; the purging or clearing (clenging) of an assise.⁹⁵ In ecclesiastical Latin, a glorification.⁹⁶

CLARIFICATION. When speaking of making a meaning clear, as of a law or a writing, it has been said that "clarification" means that the thing to be clarified exists, but is uncertain and cloudy, never, however, nonexistent.⁹⁷

CLARIFY. The Century Dictionary defines the word as meaning to make clear.

pears to be covertly (secretly) done, which any one did, when he had a legal dispute, or thought he would have one."—Adams Gloss.

81. Adams Gloss.

Clamare de pecunia—to call or cry out for money.—Adams Gloss.

82. Black L.D.

83. U.S.—American Can Co. v. Hickmott Asparagus Canning Co., Cal., 142 F. 141, 145, 73 C.C.A. 359.

84. U.S.—Bonnell v. Ward, C.C.A.N.Y., 238 F. 171.

85. Black L.D.

86. See 11 C.J. p 827 notes 32-35.

87. Fla.—Hay v. State, 67 So. 107, 108, 68 Fla. 458, quoting Black L.D. 11 C.J. p 827 note 36.

88. U.S.—Keck v. U. S., Pa., 19 S.Ct. 254, 258, 172 U.S. 434, 443, 455, 43 L.Ed. 505—Rogers v. U. S., Mich. 180 F. 54, 58, 103 C.C.A. 408, 31 L.R.A., N.S., 264.

89. U.S.—Keck v. U. S., Pa., 19 S.Ct. 254, 258, 172 U.S. 434, 43 L.Ed. 505.

90. U.S.—U. S. v. Jordan, D.C.Mass., 26 F.Cas.No.15,498, 2 Lowell 537, 539.

"Bring into . . . clandestinely" synonymous see Bring 11 C.J.S. p 1140 note 66.

"Bringing on shore . . . goods . . . for which the duty has not been paid" equivalent see Bring 11 C.J.S. p 1141 note 92.

"Smuggling" synonymous

U.S.—Keck v. U. S., Pa., 19 S.Ct. 254, 261, 172 U.S. 434, 43 L.Ed. 505—Rogers v. U. S., Mich., 180 F. 54, 58, 103 C.C.A. 408, 31 L.R.A., N.S., 264.

91. Ky.—Sally v. Brown, 295 S.W. 890, 891, 220 Ky. 576.

92. Black L.D.

93. Black L.D.

94. Black L.D.

11 C.J. p 828 note 41 [a].

95. Black L.D.

96. Adams Gloss.

97. U.S.—Chisolm v. U. S., Ct.Cl., 19 F.Supp. 274, 279.

Phrases: "Clarified the matter" and "clarifying amendment."⁹⁸

CLASH. Some trifling articles for trade, and also personal clothing, given by way of compensation to natives of Africa employed as laborers in loading and unloading foreign vessels.⁹⁹

CLASS.

As a Noun

A number of objects distinguished by common characters from all others, and regarded as a collective unit or group, a collection capable of a general definition, a kind;¹ a number of persons or things ranked together for some common purpose or possessing some attribute in common;² the order or rank according to which persons or things are arranged or assorted;³ and, in a particular connection, it has been held synonymous with the phrase "same descriptive properties."⁴

Phrases: "'A class' of [life insurance] policies,"⁵ "and all other cases in this class,"⁶ "any class thereof," see Any 3 C.J.S. p 1404 note 10, "class of cases,"⁷ "class of persons,"⁸ "class or grade,"⁹ "gift to

a class,"¹⁰ "in all cases in this class,"¹¹ and "insurants . . . of the same class;"¹² also "classes of disability,"¹³ "classes of state lands,"¹⁴ and "classes upon which they operate."¹⁵

As an Adjective

Class action or suit. An action or suit in which one or more members of a numerous class, having a common interest, sue in behalf of themselves and all other members of that class,¹⁶ such action or suit not being included within the rules that all persons having an interest in the subject matter of an equity suit must be made parties,¹⁷ and that only parties to the suit will be bound by the judgment therein.¹⁸

Other phrases: "Class B motor carrier,"¹⁹ "class C motor carrier,"²⁰ "class case," see Case ante p 2 note 46, "class claims," see Claim ante p 1189 note 5, "class gift," see the C.J.S. title Wills § 692, also 69 C.J. p 231 note 51-p 232 note 52, "class legislation," see the C.J.S. title Constitutional Law § 489, also 12 C.J. p 1128 note 11-p 1131 note 36, "class lottery,"²¹ "class rate,"²² and "class representation."²³

98. U.S.—Chisolm v. U. S., Ct.Cl., 19 F.Supp. 274, 279.

99. U.S.—Sunday v. Gordon, D.C.N.Y., 23 F.Cas.No.13,616, Blatchf. & H. 569.

11 C.J. p 828 note 42 [a].

1. U.S.—Cheek-Neal Coffee Co. v. Hal Dick Mfg. Co., C.C.P.A., 40 F. 2d 106, 107, quoting Century D.

2. U.S.—In re Harpke, Wis., 116 F. 295, 297, 54 C.C.A. 97, quoting Bouvier L.D.

Tex.—Hagood v. Hagood, Civ.App., 186 S.W. 220, 225.

11 C.J. p 828 notes 44, 47, 48.

Fluctuating number

A "class" held to be a body of persons which may fluctuate in number.—Perry v. Leslie, 126 A. 340, 343, 124 Me. 93.

Popular concept

Md.—Stahl v. Emery, 127 A. 760, 761, 147 Md. 123.

11 C.J. p 828 note 44 [a].

3. Black L.D.

4. U.S.—California Canneries Co. v. Bear Glace Co., C.C.P.A., 44 F.2d 866, 867—Cheek-Neal Coffee Co. v. Hal Dick Mfg. Co., C.C.P.A., 40 F. 2d 106, 107.

5. Ky.—Miller v. New York Life Ins. Co., 200 S.W. 482, 484, 179 Ky. 246.

6. Idaho.—Barry v. Peterson Motor Co., 46 P.2d 77, 78, 55 Idaho 702.

7. Mo.—U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Foskett-Kessner Feed Co., 73 S.W. 364, 365, 100 Mo.App. 724.

8. Cal.—Goodspeed v. Great Western Power Co. of California, App., 65 P.2d 1342, 1345.

11 C.J. p 828 notes 44 [b], 45 [b].

9. Pa.—Commonwealth ex rel. Margiotti v. Sutton, 193 A. 250, 252, 327 Pa. 337.

10. Ill.—Blackstone v. Althouse, 116 N.E. 154, 157, 278 Ill. 481, L.R.A. 1918B 230.

Misc.—In re Denniston's Will, 282 N.Y.S. 900, 904, 157 Misc. 80.

Tex.—Hocker v. Stevens, Civ.App., 18 S.W.2d 842, 843—Hagood v. Hagood, Civ.App., 186 S.W. 220, 225. See also C.J.S. title Wills § 692, and 69 C.J. p 231 note 51-p 232 note 52.

11. Me.—Clark v. Kennebec Journal Co., 113 A. 51, 52, 120 Me. 133.

12. S.C.—Pressly v. Pilot Life Ins. Co., 195 S.E. 332, 335, 186 S.C. 209.

13. Mont.—Dosen v. East Butte Copper Mining Co., 254 P. 880, 887, 78 Mont. 579.

14. Fla.—State v. Richards, 39 So. 152, 153, 50 Fla. 284.

15. U.S.—Republic Acceptance Corporation v. De Land, D.C.Mich., 275 F. 632, 638.

16. U.S.—Eberhard v. Northwestern Mut. Life Ins. Co., Ohio, 241 F. 353, 356, 154 C.C.A. 233—Huester v. Gilmour, D.C.Pa., 13 F.Supp. 630, 631—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825, 829—Seminole Securities Co. v. Southern L. Ins. Co., C.C.N.C., 182 F. 85, 96.

N.J.—Naspo v. Summit Sweets

Shoppe, 150 A. 199, 201, 106 N.J. Eq. 49.

N.Y.—Dresdner v. Goldman Sachs Trading Corporation, 269 N.Y.S. 360, 363, 240 App.Div. 242.

Pa.—Ashcom v. Borough of Westmont, 148 A. 112, 114, 298 Pa. 203—Schlanger v. Borough of West Berwick, 104 A. 764, 261 Pa. 605.

Tex.—City of Dallas v. Armour & Co., Civ.App., 216 S.W. 222, 224.

17. Tex.—Pacific American Gasoline Co. of Texas v. Miller, Civ.App., 76 S.W.2d 833, 847.

18. Tex.—Southern Ornamental Iron Works v. Morrow, Civ.App., 101 S.W.2d 336, 342.

19. Okl.—Clark v. Walworth, 56 P. 2d 355, 357, 176 Okl. 349—Herring v. State, Cr., 64 P.2d 921, 923.

20. Okl.—Pure Oil Co. v. Cornish, 52 P.2d 832, 834, 174 Okl. 615.

21. Or.—Fleming v. Bills, 3 Or. 286, 291.

22. U.S.—Board of Public Utility Com'rs of New Jersey v. U. S., D. C.N.J., 21 F.Supp. 543, 545.

Defined

"Where a single rate applies to a number of articles of the same general character, it is a class rate."—Norfolk Southern R. Co. v. Freeman Supply Corporation, 133 S.E. 817, 818, 145 Va. 207.

"Commodity rate" distinguished

Va.—Norfolk Southern R. Co. v. Freeman Supply Corporation, supra.

23. Ariz.—Grand International Brotherhood of Locomotive Engineers v.

CLASSIARIUS. A seaman or soldier serving at sea.²⁴

CLASSICI. Latin, in the Roman law, marines; also persons employed in servile duties on board vessels.²⁵

CLASSIFICATION. It has been said that, in general terms, the word means the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those same particulars, and that it is essentially the same in law as in other departments of knowledge or practice, the classification depending on the object in view, or the purpose,²⁶ so that, as applied to legislation, "classification" may be made with reference to similarity of situation, circumstances, requirements, and convenience best to subserve the public interest,²⁷ and may have two meanings, one primary, signifying a division required by statute, fundamental and substantial, and the other secondary, signifying an arrangement or enumeration adopted for convenience only, a creature, not of the statute, but of local rules, formal and not substantial.²⁸ Depending on

the purpose and context of the particular statute, the word has been defined as meaning a characterization through the selection of some quality or feature;²⁹ a grouping of classes, or a putting together of like subjects or facts under a common designation;³⁰ the grouping together of communities or public bodies which by reason of similarity of situation, circumstances, requirements, and convenience will have their public interests best subserved by similar regulations.³¹ "Classification," has been held to involve exclusion as well as inclusion,³² and, if valid, to imply a reasonable and just relation to the act with respect to which the classification is made,³³ a substantial basis therefor,³⁴ and good faith, as distinguished from wisdom.³⁵ "Classification" has been distinguished from "assessment" see Assessment 6 C.J.S. p 1025 note 39, "class legislation" see the C.J.S. title Constitutional Law § 489, also 12 C.J. p 1128 note 11-p 1131 note 36, "discrimination,"³⁶ and "power of the legislature."³⁷

Phrases: "Classification of claimant's disability,"³⁸ "classification of lands,"³⁹ "classification of property,"⁴⁰ "classification of risks,"⁴¹ "classification of temporary total disability,"⁴² and "classifi-

Mills, 31 P.2d 971, 982, 43 Ariz. 379.

See also C.J.S. titles Equity § 145, also 21 C.J. p 284 note 16-p 285 note 27; Judgments § 777, also 34 C.J. p 1002 note 33-p 1003 note 41; Parties § 13, also 47 C.J. p 40 note 91-p 42 note 94.

24. Black L.D.

25. Adams Gloss., citing Justinian Cod. xi tit 12.

26. U.S.—Tanner v. Little, Wash., 36 S.Ct. 379, 383, 240 U.S. 369, 60 L.Ed. 691—Billings v. Illinois, Ill., 23 S.Ct. 272, 278, 188 U.S. 97, 47 L.Ed. 400.

Fla.—Anderson v. Board of Public Instruction of Hillsborough County, 136 So. 334, 337, 102 Fla. 695.

Miss.—Southern Package Corporation v. State Tax Commission, 164 So. 45, 47, 174 Miss. 212—State ex rel. Rice v. Evans-Terry Co., 159 So. 658, 659, 173 Miss. 526.

In English practice

In the practice of the English chancery division, where there are several parties to an administration action, including those who have been served with notice of the decree or judgment, and it appears to the judge, or chief clerk, that any of them form a class having the same interest, for example, residuary legatees, he may require them to be represented by one solicitor in order to prevent the expense of each of them attending by separate solicitors. This is termed "classifying the in-

terests of the parties attending," or, shortly, "classifying," or "classification." In practice the term is also applied to the directions given by the chief clerk as to which of the parties are to attend on each of the accounts and inquiries directed by the judgment.—Black L.D.

27. Fla.—Hayes v. Walker, 44 So. 747, 751, 54 Fla. 163.

28. N.Y.—Story v. Craig, 131 N.E. 560, 561, 231 N.Y. 33.

29. U.S.—West v. Edward Rutledge Timber Co., Idaho, 37 S.Ct. 587, 590, 244 U.S. 90, 61 L.Ed. 1010—Bourdieu v. Pacific Western Oil Co., D.C.Cal., 8 F.Supp. 407, 410.

30. Utah.—Tuttle v. Board of Education of Salt Lake City, 294 P. 294, 299, 77 Utah 270.

31. Pa.—Commonwealth v. Gilligan, 46 A. 124, 195 Pa. 504, 509. 11 C.J. p 829 note 51.

32. To exclude is to classify

"That 'exclusion is not classification' is an arresting but illusory expression. . . . To exclude a commodity from all classes is classification of it in as real a sense and with as definite an effect as to include it in any one of the usual classes."—Director General of Railroads v. Viscoose Co., Pa., 41 S.Ct. 151, 153, 254 U.S. 498, 65 L.Ed. 372.

33. Fla.—Anderson v. Board of Public Instruction of Hillsborough County, 136 So. 334, 337, 102 Fla. 695.

Miss.—Southern Package Corporation v. State Tax Commission, 164 So. 45, 47, 174 Miss. 212—State ex rel. Rice v. Evans-Terry Co., 159 So. 658, 659, 173 Miss. 526.

34. A reasonable necessity

"Classification . . . must be based upon something substantial—something which distinguishes one class from another in such a way as to suggest the reasonable necessity for legislation based upon such classification."—Tolerton & Warfield Co. v. Iowa State Board of Assessment and Review, Iowa, 270 N.W. 427, 429.

35. Fla.—Hayes v. Walker, 44 So. 747, 751, 54 Fla. 163.

36. N.D.—Investors' Syndicate v. Pugh, 142 N.W. 919, 921, 25 N.D. 490.

37. U.S.—Billings v. Illinois, Ill., 23 S.Ct. 272, 273, 188 U.S. 97, 47 L. Ed. 400.

38. N.Y.—Santo v. Symington Mach. Co., 261 N.Y.S. 706, 707, 237 App. Div. 242.

39. U.S.—Bourdieu v. Pacific Western Oil Co., D.C.Cal., 8 F.Supp. 407, 410.

40. Ky.—Raydure v. Board of Sup'rs of Estill County, 209 S.W. 19, 25, 183 Ky. 84.

41. N.Y.—Hopkins v. Connecticut General Life Ins. Co., 121 N.E. 465; 467, 225 N.Y. 76.

42. N.Y.—McCulla v. American Locomotive Co., 261 N.Y.S. 184, 185, 237 App.Div. 300.

cation of titles and accounts in such budget;"⁴³ and also, adjectively, "classification basis."⁴⁴

CLASSIFY. To arrange according to recognized and well-known principles;⁴⁵ to arrange in groups and to designate;⁴⁶ to bring under heads or classes;⁴⁷ to distribute into classes; to arrange according to a system; to arrange in sets according to some method founded on common properties or characters.⁴⁸ The term has been distinguished from "estimate,"⁴⁹ "graduate,"⁵⁰ and "make progressive."⁵¹

Phrases: "Classify . . . any shares,"⁵² "classify materials,"⁵³ "classify taxation,"⁵⁴ and "right to classify the tax;"⁵⁵ also "cars classified as a train,"⁵⁶ "classified as nonmineral,"⁵⁷ "classified civil service," see the C.J.S. title Municipal Corporations § 712, "classified service," see the C.J.S. title Municipal Corporations § 738, "may be graduated, classified, or progressive,"⁵⁸ and "office classified under the civil service rules;"⁵⁹ and also "'classifying' railroad cars."⁶⁰

CLAUDERE. Latin, in old English law, to inclose, hence to turn open fields into closes and inclosures; also, to close, finish, or end.⁶¹

CLAUSE.

As a Noun

A single paragraph or subdivision of a legal docu-

ment;⁶² sometimes a sentence or part of a sentence.⁶³ Specifically, the term has been defined as meaning one of those distinct and generally numbered subdivisions into which wills are frequently aparted, or an entire unconnected provision making disposition of property;⁶⁴ some collocation of words in a will which, when removed therefrom, still leaves the rest of the will intelligible.⁶⁵

Clause irritant. In Scotch law, by this clause, in a deed or settlement, the acts or deeds of a tenant for life or other proprietor, contrary to the conditions of his right, become null and void; and by the "resolutive" clause such right becomes resolved and extinguished.⁶⁶

Clause potestative. In French law, the name given to the clause whereby one party to a contract reserves to himself the right to annul it.⁶⁷

Other phrases: "Blank clause," see the C.J.S. title Insurance § 227, also 1 C.J. p 420 note 70, "clear space clause,"⁶⁸ "collision clause," see the C.J.S. title Insurance § 858, also 38 C.J. p 1102 notes 90-7, "commercial clause," see the C.J.S. title Commerce § 123, also 12 C.J. p 140 note 16, "confederacy clause," see the C.J.S. title Equity § 211, also 21 C.J. p 386 notes 19-23, "lumber space clause,"⁶⁹ "running down" clause," see the C.J.S. title Insurance § 858, also 38 C.J. p 1102 note 10-p 1103 note 16, and "tower's liability" clause," see the C.J.

43. Utah.—Tuttle v. Board of Education of Salt Lake City, 294 P. 294, 295, 77 Utah 270.

44. "Cost basis" distinguished Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 435, 146 Tenn. 135.

45. U.S.—Garysburg Mfg. Co. v. Pender County, D.C.N.C., 42 F.2d 500, 504.

46. N.Y.—Breslav v. New York & Queens Electric Light & Power Co., 291 N.Y.S. 932, 935, 249 App.Div. 181.

47. Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 435, 146 Tenn. 135.

48. Ia.—State v. Banner Cleaners & Dyers, 127 So. 370, 371, 170 La. 76—quoting Webster New Int.D.

49. Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 435, 146 Tenn. 135.

50. La.—State v. Banner Cleaners and Dyers, 127 So. 370, 371, 170 La. 76.

51. La.—State v. Banner Cleaners and Dyers, supra.

52. N.Y.—Breslav v. New York & Queens Electric Light & Power Co., 291 N.Y.S. 932, 935, 249 App. Div. 181.

53. Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 435, 146 Tenn. 135.

54. U.S.—Garysburg Mfg. Co. v. Pender County, D.C.N.C., 42 F.2d 500, 504.

55. "Right to discriminate" equivalent
"The right to classify the tax . . . means the right to discriminate with regard to the class of inheritances on which any specified tax may be levied."—Succession of Lith, 90 So. 364, 365, 149 La. 977.

56. Va.—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 659, 148 Va. 148.

57. U.S.—West v. Edward Rutledge Timber Co., Idaho, 37 S.Ct. 587, 589, 244 U.S. 90, 61 L.Ed. 1010.

58. La.—State v. Banner Cleaners and Dyers, 127 So. 370, 371, 170 La. 76—Succession of Lith, 90 So. 364, 365, 149 La. 977.

59. Mass.—Barnes v. Rivers, 99 N. E. 464, 465, 213 Mass. 1.

60. According to destination
"By classifying is meant the placing of all cars destined for one point on one track, and those destined to another point on another track."—

Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 659, 148 Va. 148.

61. Adams Gloss., citing Cowell.
Diem clausit extremum—he closed his last day.—Adams Gloss.

62. U.S.—Bee Line Transp. Co. v. Connecticut Fire Ins. Co. of Hartford, C.C.A.N.Y., 76 F.2d 759, 760, citing Corpus Juris.

63. Colo.—Noland v. Hayward, 192 P. 657, 658, citing Corpus Juris.

64. Md.—Eschbach v. Collins, 61 Md. 478, 499, 48 Am.R. 123.

11 C.J. p 831 notes 66-74.

65. Black L.D.

66. Conn.—Miles' App., 36 A. 39, 41, 68 Conn. 237, 36 L.R.A. 176.

67. Eng.—Swinton v. Bailey, 4 App. Cas. 70, 77.

See generally C.J.S. title Wills §§ 619-622, also 69 C.J. p 104 note 64-p 120 note 68.

68. Black L.D.

69. Black L.D.

70. N.Y.—Gough v. Jewett, 52 N.Y. S. 707, 709, 32 App.Div. 79.

Tex.—Hartford Fire Ins. Co. v. Post, 62 S.W. 140, 142, 25 Tex.Civ.App. 428.

71. Okl.—Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co., 69 P. 938, 939, 11 Okl. 585.

S. title Insurance § 859, also 38 C.J. p 1103 notes 25-32.

As an Adjective

Clause rolls. In English law, rolls which contain all such matters of record as were committed to close writs; these rolls are preserved in the Tower.⁷⁰

CLAUSTURA. Law Latin, in old English law, an inclosure, or that which bounds it, hence a barrier around a field; also, brushwood for fences or hedges.⁷¹

CLAUSULA. Latin, literally a close, conclusion, or end; and in the Latin of the jurists, a law formula, and in general, a clause;⁷² a sentence or part of a sentence in a written instrument or law.⁷³

In the Roman, Spanish, and modern civil laws, a formula or provision in some instrument, public or private, such as a contract, will, edict, or treaty. The term has a somewhat more extended meaning than the English word "clause" with which it is etymologically connected.⁷⁴

CLAUSULÆ INCONSUETÆ SEMPER INDUCUNT SUSPICIONEM.⁷⁵

CLAUSULA GENERALIS DE RESIDUO NON EA COMPLECTITUR QUÆ NON EJUSDEM SINT GENERIS CUM IIS QUÆ SPECIATIM DICTA FUERANT.⁷⁶

CLAUSULA GENERALIS NON REFERTUR AD EXPRESSA.⁷⁷

70. Black L.D.

71. Adams Gloss.

72. Adams Gloss.

73. Black L.D.

Clausula ancillaris—law Latin, an ancillary, auxiliary, subservient clause.—Adams Gloss.

Clausula de non obstante de futuro—a clause of notwithstanding of the future.—Adams Gloss., citing Bacon Max. in Reg. p 19.

Clausula inutilis—a useless or inoperative clause.—Adams Gloss., citing Bacon Max. in Reg. p 19.

Clausula non obstante—a clause notwithstanding.—Adams Gloss.

74. Escriche Diccionario. 11 C.J. p 831 notes 80-81.

75. A maxim meaning "Unusual clauses [in an instrument] always excite suspicion."—Wharton L.Lex.

Applied in *State v. O'Neill*, 52 S. W. 240, 151 Mo. 67, 84—11 C.J. p 831 note 82 [a].

76. A maxim meaning "A general

clause of remainder does not embrace those things which are of the same kind with those which had been specially mentioned."—Burrill L.D.

It is otherwise quoted, "*Clausula generalis non complectitur ea quæ non ejusdem generis sunt cum iis quæ speciatim dicta fuerant*,"—a general clause does not embrace those things which are of the same kind with those which had been specially mentioned.—Adams Gloss., citing Loft Max. Append. p 419.

77. A maxim meaning "A general clause does not refer to things expressed."—Burrill L.D.

78. A maxim meaning "A clause [in a law] which precludes its abrogation, is void from the beginning."—Burrill L.D.

79. A maxim meaning "a useless clause or disposition [one which expresses no more than the law by intendment would have supplied,] is not supported by a remote presumption [or foreign intendment of some

CLAUSULA QUÆ ABROGATIONEM EXCLUDIT AB INITIO NON VALET.⁷⁸

CLAUSULA VEL DISPOSITIO INUTILIS PER PRESUMPTIONEM REMOTAM, VEL CAUSAM EX POST FACTO NON FULCITUR.⁷⁹

CLAUSUM.

As a Noun

In old English law, a close, see *Close post*.

Clausum fregit. Literally "He broke the close." In pleading and practice, technical words formerly used in certain actions of trespass, and still retained in the phrase "quare clausum fregit."⁸⁰

Clausum paschæ or *clausum paschiæ.* In English law, the morrow of the "utas," or eight days of Easter; the end of Easter; the Sunday after Easter Day.⁸¹

As an Adjective

Closed up or sealed,⁸² the term being applied to writs and letters, as distinguished from those that were open or patent, for example, *clausum vel aper-tum*.⁸³ The term also means inclosed as a parcel of land.⁸⁴

CLAUSURA. In old English law, an inclosure.⁸⁵

CLAUSURE. Law French, an inclosure.⁸⁶

CLAVES. Latin, keys.⁸⁷

Claves curiæ. Literally "The keys of the court;" a term applied, in old Scotch law, to the officers of a court, such as the serjeant, clerk, and dempster or doomster.⁸⁸

purpose, in regard whereof it might be material] or by a cause arising afterwards, [which may induce an operation of those idle words]."—Burrill L.D.

80. Black L.D.

81. Black L.D.

In old English practice, the octave ("octas," the eighth day after the feast) of Easter was so called because it closed the feast.—Adams Gloss., citing St. Westminster 1, and 2 Coke Inst. p 157.

82. Black L.D.

83. Adams Gloss., citing Bracton fols 188, 372b.

84. Black L.D.

85. Black L.D.

Clausura heyæ—the inclosure of a hedge.—Black L.D.

86. Adams Gloss.

87. Adams Gloss., citing Ulpianus Dig. xix, I fr 17.

88. Burrill L.D.

Claves insulae. Literally "The keys of the island."⁸⁹ In Manx law, the keys of the Island of Man, or twelve persons to whom all ambiguous and weighty causes are referred.⁹⁰

CLAVIA. Law Latin, in old English law, a club or mace.⁹¹

CLAVIGERATUS. A treasurer of a church.⁹²

CLAWA. A close, or small inclosure.⁹³

CLAY. A common earth of various colors, compact and brittle when dry, but plastic and tenacious when wet. In its natural state, it is a part of the soil and regarded as part of the real estate, and as an essential element in the manufacture of brick, completely changing its form and character and entirely losing its identity, as clay, in the manufactured state.⁹⁴ In manufacturing generally, it is regarded as a raw material.⁹⁵

Fire clay. The particular kind of clay used in the manufacture of fire brick.⁹⁶

Modeling clay. A substance used by artists and others engaged in plastic work, for making busts and models. It is also sometimes called "plastilina."⁹⁷

Other phrases: "Furnishers of any ore, clay, coal, or other raw material;"⁹⁸ and also, adjectively, "clay mines" or "clay pits."⁹⁹

CLEAN.

As a Verb

In a particular context, the word has been held to imply an undertaking to do no more than clean the superficial area as distinguished from an undertaking to remove stains in stonework several inches in depth.¹

Phrases: "Clean down thoroughly all the front and side of [said] building;"² and also "cleaned and disinfected,"³ "cleaned rice,"⁴ and "cleaned wool."⁵

As an Adjective

A term of variable meaning, owing to the connection in which it is used. In its primary sense, "clean" has been said to be a term of certain and generally understood meaning, frequently used in ordinances and laws defining certain nuisances,⁶ and also applicable to a great variety of merchandise,⁷ and has been defined as meaning free from dirt, filth, impurity, foreign or undesirable matter, soil or stain; pure; as clean water.⁸ In derived senses, the word has been defined as meaning completely cleared or rid of something; free from bungling, not awkward, or dexterous, as a clean track; free from knots or knot holes, clear, or smooth, as clean timber; having no blemish or imperfections, complete, perfect, or whole, as clean copy; irreproachable, innocent of fraud or wrongdoing, without defilement, morally pure, as clean literature, or a clean man; also ceremonially pure as conforming to the ceremonial law; said among the Jews of persons, animals, etc.; and also free from exceptions or reservations.⁹

Clean bill of health. One certifying that no contagious or infectious disease exists, or certifying as to healthy conditions generally without exception or reservation.¹⁰

Clean oil. A term having a well-understood meaning in the trade, and defined as such a petroleum liquid as carries in cohesion with it three per cent or less by volume of water and sediment.¹¹ It is also called "dry oil," and is distinguished from "wet oil."¹²

89. Burrill L.D.

90. Black L.D.

91. Adams Gloss.

92. Black L.D.

93. Black L.D.

94. Kan.—Townsend Brick & Contracting Co. v. Allen, 62 P. 1008, 1009, 62 Kan. 311, 84 Am.S.R. 388, 52 L.R.A. 323.

95. Md.—Hicks v. Consolidation Coal Co., 25 A. 979, 77 Md. 86.

96. U.S.—De Casse v. Spader, C.C.N.J., 7 F.Cas.No.3,720, 3 Int.Rev.Rec. 163.

97. U.S.—Bancel v. U. S., C.C.N.Y., 176 F. 132.

98. Md.—Hicks v. Consolidation Coal Co., 25 A. 979, 77 Md. 86.

99. Terms defined

"The excavations under ground

from which clay is extracted, and the perpendicular shaft sunk from the surface of the land for the purpose of raising the clay which is done by steam engine, whinsels, and other mining apparatus."—Rex v. Brettell, 3 B. & Ad. 424, 23 E.C.L. 192, 110 Reprint 152.

1. N.Y.—Krauth v. Harris, 194 N. Y.S. 526.

2. N.Y.—Krauth v. Harris, supra.

3. Tex.—Clampitt v. St. Louis Southwestern R. Co., Civ.App., 185 S.W. 342, 344.

4. U.S.—Bush & Co. v. U. S., 12 Ct. Cust.App. 22, 25—Hoyt, Shepston & Sciaroni v. U. S., 12 Ct.Cust.App. 7, 8—U. S. v. Brandenstein & Co., 8 Cust.App. 435.

5. U.S.—U. S. v. Stone & Downer, 12 Cust.App. 293, 295.

6. Tex.—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 97 S.W. 720, 722.

7. N.Y.—Lichtenstein v. Rabolinsky, 90 N.Y.S. 247, 250, 98 App.Div. 516.

8. Tex.—Clampitt v. St. Louis Southwestern R. Co. of Texas, Civ. App., 185 S.W. 342, 344.

9. Black L.D.

Tex.—Clampitt v. St. Louis Southwestern R. Co. of Texas, Civ.App., 185 S.W. 342, 344, quoting Webster D.

10. Black L.D.

11. U.S.—In re Great Western Petroleum Corporation, D.C.Cal., 16 F. Supp. 247, 252.

12. Cal.—Alamitos Land Co. v. Shell Oil Co., 44 P.2d 573, 575, 3 Cal.2d 396.

Other phrases: "Clean and sanitary condition,"¹³ "clean bill of lading," see the C.J.S. title Shipping § 111, also 58 C.J. p 359 notes 62-65, "clean busheling scrap,"¹⁴ "clean hands," see the C.J.S. title Equity § 93, also 21 C.J. p 180 note 89-p 182 note 98, "clean letter of credit," see Banks and Banking § 175, and "good clean hole."¹⁵

CLEAR.

As a Verb

—**Present Tense.** As defined in the Century Dictionary, to free from any impediment or encumbrance, or from obstructions; to leave no doubt. In maritime law, to satisfy the customs, harbor dues, and the like, and to obtain from the governmental authority of the port leave to depart.¹⁶ It has been said that, as applied to ordinary wood or timber land, the word may have a definite meaning, namely, to remove the timber, but not the stumps,¹⁷ but that it means something else when applied to cut over land, and may then mean either to remove the saplings and brush which had grown up since the first clearing, or to remove the old stumps so that the land could be put under plow.¹⁸

Clear the title. The phrase has been said to have a well-understood meaning in real estate law; to refer to all such acts, steps, or proceedings as are necessary to render the title good and marketable, including the opinion of counsel that this has been done; and to be equivalent to "cure the title," "remove cloud from title," and "straighten out the title."¹⁹

Other phrases: "Clear and fence,"²⁰ "clear any land or improve the same,"²¹ "clear out,"²² "clear" . . . seven acres of the land,"²³ "clear . . . the

brush,"²⁴ and "'clear' the transactions of the day."²⁵

—**Cleared.** The past tense and past participle of the verb.

Cleared land. Improved land, the term conveying the idea of cultivation, as contrasted with "unimproved land."²⁶

—**Clearing.** In maritime law, the departure of a vessel from port after complying with the customs and health laws and like local regulations;²⁷ and in mercantile law, sometimes used in the plural, a method of making exchanges and settling differences in mutual accounts, usually between banks or bankers.²⁸

Clearing land. The word "clearing," as commonly used in connection with land, imports no ambiguity, although its meaning may be enlarged by the parties using it; and so the phrase "clearing lands" may have different significations in various localities. In timbered lands, in the absence of words of limitation by the parties using it, the term has been held to mean removing therefrom all the timber of every size, but not to include taking out the stumps,²⁹ while in arid regions, where land must be prepared for irrigation, the clearing of such land has been held to mean not only the removal or destruction of the brush, but the plowing or breaking up of the roots as well.³⁰

Other phrases: "Clearing house" or "clearing houses," see Banks and Banking § 1074, "clearing house certificate," see Banks and Banking § 1076, and Bills and Notes §§ 7, 23, and "clearing loan;"³¹ also "in payment of clearings."³²

From new wells

"Usually also a well, when first put upon production, carries only dry or clean oil, but with increased pumping the encroachment of water becomes greater, and larger percentages thereof are emulsified with the petroleum."—*Alamitos Land Co. v. Shell Oil Co.*, 44 P.2d 573, 575, 3 Cal. 2d 396.

13. Tex.—*Missouri, K. & T. Ry. Co. of Texas v. State*, Civ.App., 97 S. W. 720, 721.

14. N.Y.—*Lichtenstein v. Rabolinsky*, 90 N.Y.S. 247, 250, 98 App.Div. 516.

15. U.S.—*Bain v. White*, Tex., 256 F. 428, 432, 167 C.C.A. 556.

16. U.S.—*International Mercantile Mar. Co. v. Stranahan*, C.C.N.Y., 155 F. 428, 432.

17. Ind.—*Seavey v. Shurick*, 11 N.E. 597, 598, 110 Ind. 494.

18. Wis.—*Zielica v. Worzalla*, 156 N.W. 623, 625, 162 Wis. 603.

19. Fla.—*Johnston v. Cox*, 154 So. 206, 207, 114 Fla. 243.

20. Ind.—*Harper v. Pound*, 10 Ind. 32, 33.

21. Or.—*Craig v. Crystal Realty Co.*, 173 P. 322, 324, 89 Or. 25.

22. N.J.—*Winter v. Peterson*, 24 N. J.Law 524, 528, 61 Am.D. 678.

23. Wis.—*Zielica v. Worzalla*, 156 N. W. 623, 624, 162 Wis. 603.

24. Ill.—*Holmes v. Stummel*, 15 Ill. 412, 413.

25. Iowa.—*Andrew v. Farmers' & Merchants' Sav. Bank of Moravia*, 245 N.W. 226, 229, 215 Iowa 1336.

26. Pa.—*Hathaway v. Ellsbree*, 54 Pa. 498, 505.

27. Black L.D.

See also the C.J.S. title Shipping § 7, and 58 C.J. p 43 notes 77-97.

28. Iowa.—*Andrew v. Farmers' &*

Merchants' Sav. Bank of Moravia, 245 N.W. 226, 228, 215 Iowa 1336.

S.D.—*Nash Finch Co. v. Farmers' & Merchants' Bank*, 246 N.W. 637, 638, 61 S.D. 149.

See also Banks and Banking § 1076.

29. Ind.—*Seavey v. Shurick*, 11 N. E. 597, 598, 110 Ind. 494—*Harper v. Pound*, 10 Ind. 32, 37.

30. Or.—*Craig v. Crystal Realty Co.*, 173 P. 322, 325, 89 Or. 25.

31. What constitutes

"One made to a bond dealer who brings to a bank an issue of bonds on which he desires a temporary loan while the bonds are being sold."—*In re Stone's Will*, 248 N.W. 446, 447, 211 Wis. 518.

32. Iowa.—*Andrew v. Farmers' & Merchants' Sav. Bank of Moravia*, 245 N.W. 226, 229, 215 Iowa 1336. S.D.—*Nash Finch Co. v. Farmers' & Merchants' Bank*, 246 N.W. 637, 638, 61 S.D. 149.

As an Adjective

A word in general use and of comprehensive meaning, which in its primary, physical, or visual sense has been defined generally as free from all that dims, blurs or obscures;³³ free from defect or blemish, or without admixture, adulteration, or dilution;³⁴ and, more specifically, as meaning free from all deductions, drawbacks, encumbrances, or other defects, free from all limitation, qualification, question, or shortcoming, and also unencumbered condition, hence absolute, complete, entire, free, sure, sheer;³⁵ and in a particular connection as meaning free from taxes.³⁶ In its derived or intellectual sense, "clear" has been defined as meaning beyond a reasonable doubt;³⁷ evident; free from doubt or conjecture; plain.³⁸ "Clear" has been sometimes held synonymous with, and has sometimes been compared with, "evident,"³⁹ "manifest,"⁴⁰ "obvious,"⁴¹ "plain,"⁴² and "unobstructed."⁴³

Clear legal right. A right which is inferable as

a matter of law from uncontroverted facts, regardless of the difficulty of the legal question to be decided.⁴⁴

Clear view ahead. A view free from obstruction or hindrance.⁴⁵

Other phrases: "Clear almonds, shelled,"⁴⁶ "clear and convincing,"⁴⁷ "clear and decisive proof,"⁴⁸ "clear and irreconcilable,"⁴⁹ "clear and satisfactory evidence,"⁵⁰ "clear and undoubted proof,"⁵¹ "clear and unexceptionable evidence,"⁵² "clear annual value,"⁵³ "'clear' bill of lading,"⁵⁴ "clear, cogent, and convincing,"⁵⁵ "clear days," see the C.J.S. title Time § 13, also 62 C.J. p 984 note 82—p 985 note 86, "clear deed,"⁵⁶ "clear, free, and unincumbered,"⁵⁷ "clear from,"⁵⁸ "clear from obscurity,"⁵⁹ "clear, full, and satisfactory,"⁶⁰ "clear lumber,"⁶¹ "clear market price,"⁶² "clear market value,"⁶³ "clear of all assessments and charges,"⁶⁴ "clear of all charges and deductions,"⁶⁵ "clear of all incumbrances,"⁶⁶ "clear of all reasonable doubt,"⁶⁷ "clear opportuni-

33. Conn.—Bremner v. Marc Eidlitz & Son, 174 A. 172, 174, 118 Conn. 666.

Tex.—Ex parte Williams, 79 S.W.2d 325, 326, 128 Tex.Cr. 148, quoting Webster New Int. D.

34. U.S.—Heide v. U. S., C.C.N.Y., 175 F. 316, 317.

Mo.—Forbes v. Dunnivant, 95 S.W. 934, 937, 198 Mo. 193.

35. Ohio.—Condorodis v. Kling, 169 N.E. 836, 838, 33 Ohio App. 452.

Okl.—Ketch v. Smith, 268 P. 715, 717, 131 Okl. 263.

11 C.J. p 833 notes 16–23.

36. Black L.D.

37. Ohio.—State v. Price, 128 N.E. 173, 174, 101 Ohio St. 50.

38. Okl.—Ketch v. Smith, 268 P. 715, 717, 131 Okl. 263.

11 C.J. p 832 note 8—p 833 note 15.

39. Conn.—Bremner v. Marc Eidlitz & Son, 174 A. 172, 174, 118 Conn. 666.

S.D.—State v. Kauffman, 108 N.W. 246, 20 S.D. 620.

40. Conn.—Bremner v. Marc Eidlitz & Son, 174 A. 172, 174, 118 Conn. 666.

41. W.Va.—Combs v. Colonial Casualty Co., 80 S.E. 779, 781, 73 W. Va. 473, 50 L.R.A.N.S., 1218.

42. Conn.—Bremner v. Marc Eidlitz & Son, 174 A. 172, 174, 118 Conn. 666.

43. Tex.—Ex parte Williams, 79 S.W.2d 325, 326, 128 Tex.Civ.App. 148.

44. N.Y.—Poucher v. Teacher's Retirement Board, 225 N.Y.S. 176, 180, 130 Misc. 896.

45. Wash.—Fawcett v. Manny, 19 P.2d 934, 935, 172 Wash. 212—

Mercer v. Lovering, 15 P.2d 930, 931, 170 Wash. 140.

See also C.J.S. title Motor Vehicles § 326, and 42 C.J. p 953 note 30.

46. U.S.—Heide v. U. S., C.C.N.Y., 175 F. 316, 317.

47. U.S.—In re Lang Body Co., C.C. A.Ohio, 92 F.2d 338, 341.

See also C.J.S. title Evidence § 1023, and 23 C.J. p 25 note 4.

48. Cal.—Freese v. Hibernia Sav. & Loan Soc., 73 P. 172, 173, 139 Cal. 392.

49. Ohio.—State v. Price, 128 N.E. 173, 174, 101 Ohio St. 50.

50. Idaho.—Molyneux v. Twin Falls Canal Co., 35 P.2d 651, 656, 54 Idaho 619, 94 A.L.R. 1264.

S.D.—M. E. Smith & Co. v. Kimble, 162 N.W. 162, 163, 38 S.D. 511.

Tex.—Pierce-Fordyce Oil Ass'n v. Staley, 190 S.W. 814, 815.

11 C.J. p 833 note 34.

51. Tex.—Pitts v. Thompson, Civ. App., 71 S.W.2d 368, 370.

52. Ala.—Washam v. Beaty, 99 So. 163, 167, 210 Ala. 635.

53. Mass.—Marsh v. Hammond, 103 Mass. 146, 149.

54. Pa.—William Zoller Co. v. Hartford Fire Ins. Co., 116 A. 359, 361, 272 Pa. 386.

55. Utah.—Dovich v. Chief Consolidated Mining Co., 174 P. 627, 630, 53 Utah 522.

56. Pa.—Rohr v. Kindt, 3 Watts & S. 563, 565, 39 Am.D. 53.

57. Ohio.—Condorodis v. Kling, 169 N.E. 836, 838, 33 Ohio App. 452.

58. "Free from" equivalent
Ohio.—Condorodis v. Kling, supra.

59. "Liquidated" synonymous
Ga.—Parris v. Hightower, 76 Ga. 631, 634.

60. R.I.—Reynolds v. Blaisdell, 49 A. 42, 43, 23 R.I. 16.

61. Mo.—Forbes v. Dunnivant, 95 S.W. 934, 937, 198 Mo. 193.

"Sound lumber" distinguished
Mo.—Forbes v. Dunnivant, supra.

62. "Fair market price" equivalent
Cal.—In re Spitly's Estate, 13 P.2d 385, 386, 124 Cal.App. 642.

63. Neb.—In re Woolsey's Estate, 190 N.W. 215, 216, 109 Neb. 138, 24 A.L.R. 1038.

N.J.—Bugbee v. Roebling, 111 A. 29, 30, 94 N.J.Law 438.

N.Y.—Matter of Penfold, 142 N.Y.S. 678, 680, 81 Misc. 598.

Defined
"Clear 'market value means the open or honest market.'"—In re Dupignac's Estate, 204 N.Y.S. 273, 276, 123 Misc. 21.

"Fair market value" equivalent
N.Y.—In re Dupignac's Estate, 204 N.Y.S. 273, 276, 123 Misc. 21.

"Cash value" equivalent see Cash ante p 22 note 80.

"Then cash value" synonymous see Cash ante p 23 note 19.

64. Pa.—Peart v. Phipps, 4 Yeates 386, 387.

65. "Net" synonymous
Pa.—Bispham's Estate, 24 Wkly.N.C. 79, 80.

66. Me.—Porter v. Noyes, 2 Me. 22, 25, 11 Am.D. 30.

67. "Convincing proof" equivalent
Kan.—Winston v. Burnell, 24 P. 477, 478, 44 Kan. 367, 21 Am.S.R. 289.

ty,"⁶⁸ "clear' or 'true' residue,"⁶⁹ "clear, precise, and indubitable,"⁷⁰ "clear, precise and indubitable evidence," see the C.J.S. title Evidence § 1023, also 23 C.J. p 24 note 92, "clear preponderance of the evidence,"⁷¹ "clear proceeds,"⁷² "clear profits,"⁷³ "clear proof," see the C.J.S. title Evidence § 1023, also 23 C.J. p 24 note 92, "clear property,"⁷⁴ "clear space clause," see the C.J.S. title Insurance § 550, also 26 C.J. p 202 note 13[a], "clear stock,"⁷⁵ "clear, strong, and cogent proof,"⁷⁶ "clear title," see the C.J.S. title Vendor and Purchaser § 191, also 66 C.J. p 862 note 95, p 863 note 3, "clear to the understanding,"⁷⁷ "clear to the vision,"⁷⁸ "clear value,"⁷⁹ "clear yearly income,"⁸⁰ "clear yearly value,"⁸¹ "first quality clear,"⁸² "good, clear, and sufficient,"⁸³ "in the clear,"⁸⁴ "keeping himself 'in the clear,'"⁸⁵ "last clear chance," see the C.J.S. title Negligence § 136, also 45 C.J. p 984 note 82-p 988 note 3, "perfectly clear,"⁸⁶ and "reasonably clear and satisfactory."⁸⁷

CLEARANCE. As a clearance card see the C.J.S.

title Master and Servant § 45, also 11 C.J. p 836 notes 80-83, as a passport for a vessel leaving port see the C.J.S. title Shipping § 7, also 58 C.J. p 43 notes 77-97; and as space requirements under railroad bridges crossing highways see the C.J.S. title Railroads § 721, also 52 C.J. p 193 notes 25-28.

CLEARLY. In a clear manner, without obscurity, or obstruction, without entanglement or confusion, without uncertainty;⁸⁸ beyond question, or beyond a reasonable doubt;⁸⁹ in words of no uncertain meaning, unmistakably, visibly.⁹⁰ "Clearly" has been distinguished from "specifically."⁹¹

Phrases: "Clearly and beyond all doubt,"⁹² "clearly and distinctly proven,"⁹³ "clearly and fairly proven,"⁹⁴ "clearly and manifestly against the evidence,"⁹⁵ "clearly and manifestly appear,"⁹⁶ "clearly and substantially,"⁹⁷ "clearly appear,"⁹⁸ "clearly contradictory,"⁹⁹ "clearly convinced,"¹ "clearly cumulative,"² "clearly establish,"³ "'clearly' established,"⁴ "clearly established by satisfactory proof,"⁵ "clearly expressed,"⁶ "clearly express-

"Satisfactory proof" equivalent

Kan.—Winston v. Burnell, 24 P. 477, 478, 44 Kan. 367, 21 Am.S.R. 289.

68. Cal.—Harrington v. Los Angeles R. Co., 74 P. 15, 19, 140 Cal. 514, 98 Am.S.R. 85, 63 L.R.A. 238.

69. N.Y.—In re Foster's Will, 256 N.Y.S. 383, 386, 143 Misc. 191.

70. U.S.—McDonnell v. General News Bureau, C.C.A.Pa., 93 F.2d 898, 901.

Pa.—Broida, in Own Right and for Use of Day, v. Travelers' Ins. Co., 175 A. 492, 494, 316 Pa. 444.

"Beyond a reasonable doubt" equivalent see Beyond 10 C.J.S. p 353 note 44.

71. Miss.—Choate v. Pierce, 88 So. 627, 629, 126 Miss. 209. 11 C.J. p 834 note 54.

72. Wis.—State v. DeLano, 49 N.W. 808, 809, 80 Wis. 259. 11 C.J. p 834 note 55.

73. Ky.—Kreitz v. Gallenstein, 185 S.W. 132, 170 Ky. 16.

"Ascertained balance" compared
Colo.—Bean v. Gregg, 4 P. 903, 904, 7 Colo. 499.

74. Minn.—In re Boutin's Estate, 182 N.W. 990, 991, 149 Minn. 148.

75. Without knots

The term, as used in a contract for the sale of lumber calling for "clear stock," means "lumber without knots and nothing more."—Herrmann Lumber Co. v. Heidelberg, 92 N.Y.S. 256, 257, 46 Misc. 465.

76. N.C.—O'Briant v. Lee, 195 S.E. 15, 20, 212 N.C. 793.

77. S.D.—State v. Kauffman, 108 N.W. 246, 20 S.D. 620, 622.

78. S.D.—State v. Kauffman, supra.

79. Minn.—In re Taylor's Estate, 219 N.W. 153, 154, 175 Minn. 310.

Pa.—In re Hildebrand's Estate, 104 A. 866, 262 Pa. 112.

11 C.J. p 835 note 62.

Net value

"Clear value" means net value after the payment of all debts and expenses of administration.—Shelton v. Campbell, 72 S.W. 112, 113, 109 Tenn. 690.

80. Mass.—Pelham v. Middleborough, 4 Gray 57, 58.

81. Mass.—Groton v. Boxborough, 6 Mass. 50, 52.

82. U.S.—Robinson v. U. S., Cal., 13 Wall. 363, 20 L.Ed. 653.

83. Miss.—Peemster v. May, 21 Miss. 275, 277, 53 Am.D. 83.

84. Mass.—Tucker v. Howard, 122 Mass. 529, 533.

85. Linemen's parlance

"Keeping himself 'in the clear'—that is, from contact with the dangerous circuit."—Potts v. Shreveport Belt Ry. Co., 34 So. 103, 105, 110 La. 1, 98 Am.S.R. 452.

86. Mont.—Wall v. Helena St. R. Co., 29 P. 721, 726, 12 Mont. 44.

87. Tex.—Spencer v. Pettit, Civ. App., 268 S.W. 779, 783.

88. U.S.—Mannington v. Hocking Valley R. Co., C.C.Ohio, 183 F. 133, 154.

Okl.—Johnson v. Grady County, 150 P. 497, 502, 50 Okl. 188.

11 C.J. p 837 notes 93-97.

89. Colo.—Beeler v. People, 146 P. 762, 765, 58 Colo. 451.

Neb.—McEvony v. Rowland, 61 N.W. 124, 125, 43 Neb. 97.

90. Okl.—Johnson v. Grady County, 150 P. 497, 502, 50 Okl. 188.

91. Colo.—Lowdermilk v. People, 202 P. 118, 119, 70 Colo. 459.

92. U.S.—In re Lang Body Co., C.C.A.Ohio, 92 F.2d 338, 341.

93. Mont.—Gehlert v. Quinn, 90 P. 168, 170, 35 Mont. 451, 119 Am.S.R. 864.

94. Iowa.—Hall v. Wolff, 16 N.W. 710, 711, 61 Iowa 559.

95. Ill.—Butler v. Whiteman, 196 Ill.App. 320, 321.

96. Kan.—Durboraw v. Durboraw, 72 P. 566, 67 Kan. 139, 141.

Mass.—Brimmer v. Sohler, 1 Cush. 118, 132.

97. Colo.—Beeler v. People, 146 P. 762, 764, 58 Colo. 451, 455, 458.

98. U.S.—Mannington v. Hocking Valley R. Co., C.C.Ohio, 183 F. 133, 153.

Mass.—Willcut v. Calnan, 98 Mass. 75, 76.

99. Cal.—People v. Wreden, 59 Cal. 392, 394.

1. Ala.—Wilcox v. Henderson, 64 Ala. 535, 543.

2. U.S.—Mannington v. Hocking Valley R. Co., C.C.Ohio, 183 F. 133, 153.

3. Tenn.—Fisher v. Travelers' Ins. Co., 138 S.W. 316, 330, 124 Tenn. 450, Ann.Cas.1912D 1246.

4. U.S.—In re Lang Body Co., C.C.A.Ohio, 92 F.2d 338, 341.

5. Cal.—People v. Hamilton, 62 Cal. 377, 384.

11 C.J. p 837 note 13.

6. Mo.—Missouri Province Educational Institute v. Schlect, 15 S.W.

ed in the title" see the C.J.S. title Statutes § 219, also 59 C.J. p 804 note 87, "clearly germane" and "clearly indicated,"⁷ "clearly preponderating evidence,"⁸ "clearly preponderating testimony,"⁹ "clearly proved,"¹⁰ "clearly right,"¹¹ "damages . . . clearly ascertainable,"¹² "fully and clearly proven,"¹³ "naturally and clearly,"¹⁴ and "very clearly."¹⁵

CLEARNESS. As defined in the Century Dictionary, the state or quality of being clear.

Phrase: "Clearness and certainty."¹⁶

CLEAT. A piece of wood nailed to short crosspieces or lugs extending through the links of a chain, its function being to strengthen the lugs and at the same time to make them fast in the chain.¹⁷

CLEMENCY. It has been held that the exercise of the power of "clemency," conferred by a state constitution on the chief executive, is to be distinguished from the exercise of the judicial function to modify a judgment.¹⁸

CLEMENTINAS. Clementine constitutions or constitutions of Pope Clement, being a collection of constitutions and decretals of Pope Clement V, published A.D. 1308 or 1313; they were authenticated by Pope John XXII A.D. 1317, and form part of the Corpus Juris Canonici, or body of the canon law.¹⁹

2d 770, 774, 322 Mo. 621—Bolin v. Tyrol Inv. Co., 200 S.W. 1059, 1060, 273 Mo. 257, L.R.A.1918C 869.

"Specifically mentioned" compared
Colo.—Lowdermilk v. People, 202 P. 118, 119, 70 Colo. 459.

7. Colo.—Lowdermilk v. People, supra.

8. "Beyond all reasonable doubt and uncertainty" practically equivalent

Pa.—Coyle v. Commonwealth, 100 Pa. 573, 580, 45 Am.R. 397.

"Clearly preponderating testimony" distinguished

Pa.—Commonwealth v. Scovern, 140 A. 611, 614, 292 Pa. 26.

"Fairly preponderating evidence" distinguished

Pa.—Coyle v. Commonwealth, 100 Pa. 573, 580, 45 Am.R. 397.

9. Quality rather than quantity or weight

"'Clearly' as used in this case does not mean that insanity must clearly appear. . . . It does mean that the evidence to show insanity should not be obscure. The word has reference to the quality of the evidence in the sense of being intelligible and understandable as opposed to ambiguous and uncertain. It was not used as a word denoting

weight or quantity."—Commonwealth v. Scovern, 140 A. 611, 614, 292 Pa. 26.

10. Cal.—Olson v. Union Oil Co. of California, App., 78 P.2d 446, 447. 11 C.J. p 837 note 16.

11. "Plainly right" nearly synonymous

W.Va.—State v. Reed, 149 S.E. 669, 672, 107 W.Va. 563.

12. As to origin and amount

(1) "The two words 'clearly' and 'ascertainable', taken together, mean without obscurity, obstruction, confusion, or uncertainty, and the damage claimed must be made sure, certain, fixed, established, determined and settled."—Davies v. Sutherland, 256 P. 32, 33, 123 Okl. 149—Baker & Strawn v. Miller & Jones Bros., 235 P. 476, 478, 109 Okl. 184.

(2) "With reasonable exactness as to origin and reasonably certain as to amount."—Stearnes Co. v. Robins, 245 P. 63, 64, 114 Okl. 156.

13. Iowa.—State v. Stewart, 3 N.W. 99, 101, 52 Iowa 284.

14. Iowa.—Ley v. Metropolitan L. Ins. Co., 94 N.W. 568, 569, 120 Iowa 203.

15. R.I.—Reynolds v. Blaisdell, 49 A. 42, 43, 23 R.I. 16.

CLEMENT'S INN. An inn of chancery.²⁰

CLENGE. Literally, "To cleanse or clean." In old Scotch law, to clear or acquit of a criminal charge.²¹

CLEP AND CALL. In old Scotch practice, a solemn form of words prescribed by law and used in criminal cases, as in pleas of wrong and unlaw.²²

CLEPSYDRA. A water clock; an hour glass. Among the Romans, "clepsydras" were used by speakers to measure their discourse, and were of different length, sometimes three of them to the hour.²³

CLERGY. In English law, that division of the people which comprehends all persons in holy orders, and in ecclesiastical offices, as distinguished from the laity; the whole body of clergymen or ministers of religion. Also used as an abbreviation for "benefit of clergy."²⁴

Regular clergy. In old English law, monks who lived secundum regulas (according to the rules) of their respective houses or societies were so denominated, in contradistinction to the parochial clergy, who performed their ministry in the world, in seculo, and who from thence were called "secular clergy."²⁵

Secular clergy. In ecclesiastical law, this term is

16. Beyond conjecture and presumption

"By 'clearness and certainty' is meant, generally, that there must be sufficient positive facts shown to take the matter without the realm of conjecture and presumption."—Marshall v. Fleming, 53 P. 620, 621, 11 Colo.App. 515.

17. La.—Ramsey v. Tremont Lumber Co., 46 So. 608, 121 La. 506, 507.

18. Okl.—Tah Do Quah v. State, Cr., 70 P.2d 818.

See also the C.J.S. title Constitutional Law § 157, and 12 C.J. p 896 notes 34-37.

19. Adams Gloss., citing 1 Blackstone Comm. p 82.

11 C.J. p 838 note 24.

20. Black L.D.

21. Black L.D.

22. Black L.D.

23. Adams Gloss.

11 C.J. p 838 notes 27, 28.

Dare clepsydras—to give more clepsydras, that is, to give permission to speak.—Adams Gloss.

Petere clepsydras—to ask more clepsydras, that is, more time to speak.—Adams Gloss.

24. Black L.D.

See the C.J.S. title Criminal Law § 1576, also 16 C.J. p 1300 notes 1-4.

25. Black L.D.

applied to the parochial clergy, who perform their ministry "in seculo" [in the world] and who are thus distinguished from the monastic or "regular" clergy.²⁶

CLERGYABLE. In old English law, allowing of, or entitled to, the benefit of clergy (privilegium clericale); used of persons or crimes.²⁷

CLERGYMAN. A member of the clergy.²⁸ See the C.J.S. title Religious Societies § 39, also 54 C.J. p 38 note 64—p 39 note 95. Used in particular connections see the C.J.S. titles Charities § 18, Juries § 153, also 35 C.J. p 255 note 95, Libel and Slander § 112, also 36 C.J. p 1261 notes 93—95, and Marriage § 29, also 38 C.J. p 1311 notes 42—53.

Phrase: "Clergyman or other minister of any religion."²⁹

CLERICAL. Of, or pertaining or relating to, a clerk, copyist, or writer, or to writing;³⁰ also pertaining to clergymen.³¹

Clerical assistance. As applied to assistance in the discharge of official duties, it has been said that the term implies merely such assistance as aids in the execution of official authority by the public officer himself, such as writing letters, making entries of record, copying grants and the like service, being distinguished from "official assistance."³²

Clerical error. An error committed in the performance of clerical work, no matter by whom com-

mitted;³³ more specifically, a mistake in copying or writing;³⁴ a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination;³⁵ an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only.³⁶ It has been said that a clerical error exists when without evident intention one word is written for another, when the statement of some detail is omitted the lack of which is not a cause of nullity, or when there are mistakes in proper names or amounts made in copying, which do not change the general sense of a record,³⁷ and that it implies negligence or carelessness.³⁸

As particularly applied to errors in judicial proceedings, it has been said that the term has been used somewhat loosely in the decisions, some of the cases indicating that it is limited to error in transcribing figures, or the addition of figures, or mere misprision,³⁹ while others employ it in a broad sense to include all such errors, being matters of record, as intervene in the progress of a cause, whether committed by clerk, court, or counsel, to which judicial sanction or discretion cannot reasonably be said to have been applied,⁴⁰ but not to extend to errors of omission or inclusion which involve the exercise of judgment or discretion in pursuance of a determination,⁴¹ intentional acts based on a mistaken belief,⁴² or on a misconstruction of evidence or a misapplication of the law thereto,

26. Black L.D.

27. Black L.D.

28. Century D.

29. Minn.—In re Swenson, 237 N.W. 589, 590, 183 Minn. 602.

30. Iowa.—Crooke v. Farmers' Mutual Hail Ins. Ass'n, 218 N.W. 513, 514, 206 Iowa 104, 62 A.L.R. 342, quoting Webster D.
N.Y.—Matter of Stewart, 48 N.Y.S. 957, 966, 24 App.Div. 201, quoting Century D.

31. Black L.D.

32. N.C.—Beam v. Jennings, 2 S.E. 245, 246, 96 N.C. 82.

33. Cal.—In re Goldberg's Estate, 76 P.2d 508, 511, 512.
Ky.—Buchanan v. West Kentucky Coal Co., 291 S.W. 32, 35, 218 Ky. 259.

La.—State v. F. B. Williams Cypress Co., 61 So. 988, 994, 132 La. 949, Ann.Cas.1914D 1290.

34. Cal.—Leonis v. Leffingwell, 58 P. 940, 941, 126 Cal. 369.

Mo.—Cassidy v. St. Joseph, 152 S.W. 306, 247 Mo. 197, 204.

11 C.J. p 839 notes 54, 55.

35. Cal.—Los Angeles Shipbuilding and Dry Dock Corporation v. Los Angeles County, App., 71 P.2d 282, 284, quoting *Corpus Juris*.

Ky.—Buchanan v. West Kentucky Coal Co., 291 S.W. 32, 35, 218 Ky. 259.

N.Y.—People v. Wilson, 23 N.E. 1064, 119 N.Y. 515, 518.

36. U.S.—U. S. v. Sterling, C.C.A.N. Y., 70 F.2d 708, 711.

Ala.—Trott v. Birmingham Ry., Light & Power Co., 39 So. 716, 717, 144 Ala. 383.

Ky.—Buchanan v. West Kentucky Coal Co., 291 S.W. 32, 35, 218 Ky. 259, citing *Corpus Juris*—Combs v. Deaton, 251 S.W. 638, 641, 199 Ky. 477, quoting *Corpus Juris*.

N.Y.—Matter of Stewart, 48 N.Y.S. 957, 966, 24 App.Div. 201, quoting Imperial D.

S.D.—Castle v. Gleason, 141 N.W. 516, 517, 31 S.D. 590.

Tex.—Hart v. Estelle, Civ.App., 34 S.W.2d 665, 669.

11 C.J. p 839 note 59.

37. Cal.—Los Angeles Shipbuilding and Dry Dock Corporation v. Los

Angeles County, App., 71 P.2d 282, 284, quoting *Corpus Juris*.
Porto Rico.—Carbonell v. Registrar, 18 Porto Rico 745, 749.

38. U.S.—Morimura v. U. S., C.C.N. Y., 160 F. 280, 281.

39. U.S.—New England Furniture & Carpet Co. v. Willcuts, D.C.Minn., 55 F.2d 983, 987.

"Clerical misprision" compared

"'Clerical error' . . . is closely akin and related to 'clerical misprision.'"—Combs v. Deaton, 251 S.W. 638, 641, 199 Ky. 477.

40. Ala.—Wilder v. Bush, 75 So. 143, 146, 201 Ala. 21—Clinton Mining Co. v. Bradford, 76 So. 74, 78, 200 Ala. 308.

Minn.—Wilson v. City of Fergus Falls, 232 N.W. 322, 323, 181 Minn. 329.

N.D.—Enderlin Farmers' Store Co. v. Witliff, 217 N.W. 537, 538, 56 N.D. 380.

41. Minn.—Wilson v. City of Fergus Falls, 232 N.W. 322, 324, 181 Minn. 329.

42. Cal.—Los Angeles Shipbuilding & Dry Dock Corporation v. Los

even though the court is misled therein by counsel.⁴³

In particular situations, a "clerical error" has been held to include a failure of a judgment to award interest admittedly due,⁴⁴ a failure to enter a judicial order actually made,⁴⁵ a misspelled word,⁴⁶ an arithmetical mistake in calculation,⁴⁷ and an improper placing of a case by the clerk on the trial calendar;⁴⁸ and not to include a failure to state that property was not benefited by an improvement,⁴⁹ or an erroneous listing of fixtures as personal property.⁵⁰ "Clerical error" has been distinguished from "error of substance"⁵¹ and "judicial error."⁵²

As to the effect of clerical errors in particular instruments, legal provisions or proceedings see Descriptive-Word Index.

Clerical misprision. A mistake or a fraud perpetrated by a clerk of court, which is susceptible of demonstration by the face of the record.⁵³ It has been said that, by a universal rule of practice, the term implies that the record shall furnish the data upon which the correction can be made,⁵⁴ but that a record which contains merely a bare allegation of the existence of such data, as distinguished from the data itself, does not satisfy the rule.⁵⁵ "Clerical misprision" has been held to include an error in calculation of interest added to the face of the note

period,⁵⁷ an entry of judgment before the case stood for trial,⁵⁸ a judgment prematurely entered,⁵⁹ and, by the terms of a statute, a judgment against a person of unsound mind before a defense or report is filed.⁶⁰

Clerical tonsure. The having of the head shaven, which was formerly peculiar to clerks or persons in orders, and which the coifs worn by sergeants at law are supposed to have been introduced to conceal.⁶¹

Clerical work. In ordinary, popular speech, the kind of work in which a clerk is engaged; and in practice the term is not confined to one who is always occupied as a mere amanuensis, scribe, or transcriber, or to one who does only stenographic or typewriting work or who is confined to one desk, but is also applied to a file clerk or supply clerk, who consults books and files, makes searches, and uses the adding machine and other equipment, and the work is still clerical notwithstanding changes or improvements in the appliances for performing it.⁶² The phrase has been held to include ticket selling in a moving picture house.⁶³ "Clerical work" is contrasted with "manual labor," and, in a particular connection, with work that brings the employee into the field of "hazards of the business," although one whose work is clerical may be subject to such haz-

the assessor,"⁶⁷ "clerical mistake,"⁶⁸ "clerical mistake, error, or default,"⁶⁹ "clerical service,"⁷⁰ "clerical service of a standardized sort,"⁷¹ "clerical worker exclusively,"⁷² "clerical work of any kind,"⁷³ "in clerical work only,"⁷⁴ and "to correct any manifest, clerical, or other error."⁷⁵

CLERICALIS. Ecclesiastical Latin, clerical, priestly.⁷⁶

Clericale privilegium. In old English law, the clerical privilege; the privilege or benefit of clergy.⁷⁷

CLERICI NON PONANTUR IN OFFICIIS.⁷⁸

CLERICI VEL MONACHI, NE SÆCULARIBUS NEGOTIIS SE IMMISCEANT.⁷⁹

CLERICO ADMITTENDO. See *Admittendo Clerico* 2 C.J.S. p 362 notes 1, 2.

CLERICO CAPTO PER STATUTUM MERCATORUM. A writ for the delivery of a clerk out of prison, who was taken and incarcerated upon the breach of a statute merchant.⁸⁰

CLERICO CONVICTO COMMISSO GAOLÆ IN DEFECTU ORDINARIJ DELIBERANDO. An ancient writ, that lay for the delivery to his ordinary of a clerk convicted of felony, where the ordinary did not challenge him according to the privilege of clerks.⁸¹

CLERICO INFRA SACROS ORDINES CONSTITUTO, NON ELIGENDO IN OFFICIUM. A writ directed to those who had thrust a bailiwick or oth-

er office upon one in holy orders, charging them to release him.⁸²

CLERICUM ADMITTENDUM. See *Admittendo Clerico* 2 C.J.S. p 362 notes 1, 2.

CLERICUS (plural **CLERICI**). Generally, a clergyman or priest.⁸³ In Roman law, a minister of religion in the Christian church, an ecclesiastic, or priest, a general term, including bishops, priests, deacons, and others of inferior order; also the amanuenses of the judges or courts of the king.⁸⁴ In old English law, a clerk or priest, a person in holy orders,⁸⁵ including inferior ecclesiastical officers as well as those in orders, and those who were not authorized to administer the several sacraments as well as those who were; the regular and secular clergy, not all of whom were authorized to solemnize marriage; and in the technical language of the law, an ordained minister of religion, a person within holy orders, being equivalent to, and descriptive of, clergymen in England where there are various grades of clergy with various privileges and emoluments, some sinecures, others with cures;⁸⁶ a secular priest, in opposition to a regular one;⁸⁷ also a clerk or person who used his pen in any courts, or otherwise, hence a clerk of a court, an officer whose duties were to issue writs, enroll pleas, etc.;⁸⁸ and also an officer of the royal household, having charge of the receipt and payment of moneys, etc.⁸⁹

Clericus et custos rotulorum. Law Latin, clerk and keeper of the rolls.⁹⁰

Clericus mercati. Law Latin, clerk of the market.⁹¹

67. Cal.—Kuhlemeier v. Los Angeles County, 40 P.2d 828, 829, 2 Cal.2d 257.

68. Tex.—Acosta v. Realty Trust Co., Civ.App., 111 S.W.2d 777, 779. 11 C.J. p 838 note 45.

69. U.S.—New England Furniture & Carpet Co. v. U. S., D.C.Minn., 2 F.Supp. 648, 650.

70. U.S.—Post v. U. S., 27 Ct.Cl. 244, 254.

71. **Routine character**
"Service of a routine character such as bookkeeping, typing, and stenography."—Amyot v. Caron, 190 A. 134, 136, 88 N.H. 394.

"Secretarial engagement of a selective type" distinguished
N.H.—Amyot v. Caron, 190 A. 134, 136, 88 N.H. 394.

72. Okl.—Pawnee Ice Cream Co. v. Price, 23 P.2d 168, 169, 164 Okl. 120.

73. Wash.—Larsen v. Rice, 171 P. 1037, 1038, 100 Wash. 642.

74. Iowa.—Crooke v. Farmers' Mutual Hail Ins. Ass'n, 218 N.W. 513, 514, 206 Iowa 104, 62 A.L.R. 342.

75. N.Y.—People v. Forrest, 96 N.Y. 544, 549—Hernance v. Ulster County, 71 N.Y. 481, 485, 486.

76. Adams Gloss.

77. Black L.D.

78. A Latin phrase [almost a maxim], meaning "Clergymen should not be placed in offices," that is, secular offices.—Black L.D., citing Lofft p 508.

79. A maxim in canon law meaning "Clergymen or monks should not mix themselves in secular matters."—Adams Gloss., citing Ferrier Rom. L.

80. Black L.D.

81. Black L.D.

82. Black L.D.

83. Adams Gloss.

84. Black L.D.

85. Black L.D.

86. U.S.—U. S. v. McCormick, C.C. D.C., 26 F.Cas.No.15,663, 1 Cranch C.C. 593.

Clericus parochialis—a parish clerk.—Adams Gloss.

Clericus sacerdotis—the priest's clerk.—Adams Gloss.

87. Bouvier L.D., citing Kennett Paroch. Ant. p 171.

88. Adams Gloss., citing Fleta lib ii c 36.

89. Black L.D.

90. Adams Gloss.

Clericus parvæ bagæ et custos rotulorum, et domus conversorum—in old English law, clerk of the petty bag, and keeper of the rolls, and of the house of the converts. So applied to the master of the rolls.—Adams Gloss., citing 3 Reeve Hist.Eng.L. p 154.

91. Adams Gloss., citing Fleta lib ii c 3.

Clerici de cancellaria. Law Latin, clerks of the chancery.⁹²

Clerici de cursu. Law Latin, clerks of course, or in the usual course. In English practice, clerks whose business it was to make out the common writs or writs of course (*de cursu*).⁹³

Clerici de prima forma, or de primo gradu. Law Latin, clerks of the first form or rank. In English law, the chief clerks of chancery; the assistants and associates of the chancellors in the framing of writs "*in consimili casu*," afterward termed masters in chancery; also called "*clerici de secunda forma*."⁹⁴

Clerici de secunda forma. Law Latin, clerks of the second form or grade.⁹⁵

Clerici prænотarii. Law Latin, the six clerks in chancery.⁹⁶

CLERICUS ABSENS, PER ALIUM VEL ALIUS, MAGIS PRO IPSO POTERIT DE BENEFICIO ECCLESIASTICO INVESTIRI.⁹⁷

CLERICUS ET AGRICOLA ET MERCATOR, TEMPORE BELLI, UT ORET, COLAT, ET COMMUTET, PACE FRUUNTUR.⁹⁸

CLERICUS NON CONNUMERETUR IN DUBUS ECCLESIIS.⁹⁹

CLÉRIGO. In Spanish law, one who has taken holy orders in the state church.¹

CLERK.

As a Noun

—**Ecclesiastical Sense.** Originally, the term was

used to designate a person who could read, a scholar; a term subsequently used to designate a secular priest, in opposition to a religious or a regular; but later as a "*nomen generalissimum*" to include both regular and secular clergy.² To explain another particular application of the word, it has been said that historically the law and the gospel flowed from the same source and judges of courts were taken from the ranks of the clergy, and that, because of the manifest impossibility of the judge attending to the records and issuing writs, new offices were created to take over the performance of these clerical duties.³

—**Ordinary Sense.** "Clerk" as a general term has been defined as meaning one engaged in, or hired to do, clerical work, such as bookkeeping, copying, transcribing, typing, writing, tabulating, etc., without special executive qualifications and without being in charge of work of special importance.⁴

—**Mercantile Sense.** The term has had wide application in business and commercial pursuits, and has been used to designate an assistant employed to aid in any business, mercantile or otherwise, subject to the advice and direction of his employer;⁵ an assistant in a shop or store;⁶ an assistant in a shop or store who sells goods or keeps accounts;⁷ a person in the employ of a merchant who attends only to a part of his business, while the merchant himself superintends the whole;⁸ one who hires his services to an employer at a fixed price, under a stipulation to do and perform some specific duty or labor which requires the exercise of skill;⁹ and implies knowledge by the clerk of the business in which he is employed,¹⁰ his subjection to the or-

92. Adams Gloss.

93. Adams Gloss., citing Crabb Hist. Eng.L. p 547.

Clerici de majori gradu—clerks of the higher grade.—Adams Gloss.

94. Adams Gloss., citing Crabb Hist.Eng.L. pp 184, 187, and 2 Reeve Hist.Eng.L. pp 250, 251.

95. Adams Gloss.

96. Adams Gloss., citing 2 Reeve Hist.Eng.L. p 251.

97. A maxim meaning "An absent clergyman can be invested, especially for himself, through one or another, of an ecclesiastical benefice."—Adams Gloss., citing Reg.Jur.Canon. cap 24, x, "*de Præbent.*" pp 3, 5.

98. A maxim meaning "Clergymen, husbandmen, and merchants, in order that they may preach, cultivate, and trade, enjoy peace in time of war."—Black L.D., citing 2 Coke Inst. p 543.

99. A maxim meaning "A clergyman should not be appointed to two churches."—Adams Gloss.

1. Escribe Diccionario.

2. U.S.—U. S. v. McCormick, C.C.D. C., 26 F.Cas.No.15,663, 1 Cranch C.C. 593.

Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597. 11 C.J. p 841 notes 76–81.

3. Mo.—State v. Sheppard, 91 S.W. 477, 482, 192 Mo. 497.

4. U.S.—In re Scanlan, D.C.Ky., 97 F. 26, 27.

Ga.—Park v. Callaway, 57 S.E. 229, 230, 128 Ga. 119.

Md.—Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 34 A. 778, 782, 82 Md. 535, 38 L.R.A. 97.

N.H.—Amyot v. Caron, 190 A. 134, 136, 88 N.H. 394.

N.D.—State v. Currie, 55 N.W. 858, 860, 3 N.D. 310.

Pa.—Appeal of Walker, 144 A. 288, 289, 294 Pa. 385—In re Appointment and Fixing of Salary of Controller's Clerks by Salary Board, 11 Pa. Dist. & Co. 307, 309, citing Cor-

pus Juris—Barricklow v. Howard, 41 Pa.Co. 33, 34.

11 C.J. p 841 notes 82–92.

5. La.—Ballard v. Goldsby, 76 So. 219, 220, 142 La. 15.

Tenn.—Hand v. Cole, 12 S.W. 922, 923, 88 Tenn. 400, 7 L.R.A. 96.

6. Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

7. U.S.—In re Goldman, D.C.La., 3 F.Supp. 936, 938.

Pa.—Witmer v. Miller, 12 Pa.Co. 363, 364.

Tenn.—Hand v. Cole, 12 S.W. 922, 923, 88 Tenn. 400, 7 L.R.A. 96.

8. Mo.—State v. Sale, 132 S.W. 1119, 1121, 232 Mo. 166.

11 C.J. p 841 note 97.

9. La.—Salaun v. Consolidated Realty & Mfg. Co., 78 So. 974, 975, 143 La. 593.

11 C.J. p 842 note 99.

10. N.M.—Radcliffe v. Chaves, 110 P. 699, 701, 15 N.M. 258.

lers and control of his employer,¹¹ and a power of control in someone.¹²

—**Administrative or Executive Sense.** In an administrative sense, "clerk" has been defined as meaning an assistant; a subordinate;¹³ a hired assistant in an office, counting house, library or the like;¹⁴ a secretary;¹⁵ a subordinate who writes letters or keeps books;¹⁶ a subordinate functionary, whose duties are ministerial and clerical in character;¹⁷ one employed in an office, public or private, for keeping records or accounts, whose business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs.¹⁸ Ordinarily the word does not connote supervisory or managerial powers, but, under the circumstances of a particular case, it may imply a certain discretion in the performance of duties which are, incidentally and secondarily, of that nature.¹⁹ "Clerk" as an officer of a court see the C.J.S. title Clerks of Courts § 1.

—**Compared with Other Terms.** In one or another

of the senses above indicated, and having regard, of course, to the circumstances of its use, "clerk" has been held to include a bookkeeper,²⁰ a cashier see Cashier ante p 24 notes 32, 33, an amanuensis,²¹ an apprentice in a solicitor's office see the C.J.S. title Attorney and Client § 8, an assistant cashier of a national bank,²² an employee in a surrogate's office,²³ a person employed, at a monthly salary, as a registered pharmacist,²⁴ a salesman in a store or shop,²⁵ a shop assistant,²⁶ a stenographer and office girl, who served as an assistant in the office of her employer,²⁷ a stenographer in charge of office supplies,²⁸ or a teller in a bank;²⁹ but not to include a bookkeeper, for service of summons on corporation,³⁰ a cashier see Cashier ante p 24 notes 32, 33, a certified public accountant carrying on his profession on his own responsibility,³¹ a clerk while acting as assistant to the superintendent of water works in the collecting and handling of funds,³² a hotel bookkeeper and clerk,³³ a manager,³⁴ a manager in charge of a branch store of a broker in another city,³⁵ a merchant appraiser,³⁶ an adjuster,³⁷ an assistant district attorney,³⁸ an attor-

11. La.—State v. Charles E. Wer-muth Co., 147 So. 692, 693, 177 La. 83.

12. Fla.—Tipton v. State, 43 So. 684, 686, 53 Fla. 69.

13. N.Y.—Demarest v. New York, 42 Barb. 186, 192, quoting Worcester D.

14. Pa.—Barricklow v. Howard, 41 Pa.Co. 33, 34.

Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

15. N.D.—State v. Currie, 55 N.W. 858, 860, 3 N.D. 310.

11 C.J. p 841 note 87.

In New England, the term is used to designate a corporation official who performs some of the duties of a secretary.—Bouvier L.D.

16. U.S.—In re Greenwald, D.C.Pa., 99 F. 705, 3 Am.Bankr.R. 696.

17. N.D.—State v. Currie, 55 N.W. 858, 861, 3 N.D. 310.

18. U.S.—In re Scanlan, D.C.Ky., 97 F. 26, 27, 3 Am.Bankr.R. 202.

Neb.—In re Appropriations for Deputy State Officers, etc., 41 N.W. 643, 645, 25 Neb. 662.

N.D.—State v. Currie, 55 N.W. 858, 860, 3 N.D. 310.

Pa.—Barricklow v. Howard, 41 Pa. Co. 33, 34.

Tenn.—Hand v. Cole, 12 S.W. 922, 923, 88 Tenn. 400, 7 L.R.A. 96.

Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

11 C.J. p 843 notes 9, 10—p 844 note 13.

19. U.S.—In re Pacific Co-op. League Stores, C.C.A.Cal., 291 F. 759, 761.

Superintending the markets

"Some clerks, however, have little or no writing to do in their offices, as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived probably from the office of the clericus, who attended, amongst other duties, to the provisioning the king's household."—In re Appropriations for Deputy State Officers, etc., 41 N.W. 643, 645, 25 Neb. 662, quoting Bouvier L. D.

20. U.S.—In re Baumblatt, D.C. Penn., 156 F. 422, 424.

Mo.—State v. Sale, 132 S.W. 1119, 1121, 232 Mo. 166.

21. Mo.—State v. Sale, 132 S.W. 1119, 1121, 232 Mo. 166.

22. U.S.—Cochran v. U. S., Colo., 15 S.Ct. 628, 629, 157 U.S. 286, 39 L. Ed. 704.

23. N.J.—In re Allen, 95 A. 215, 216.

24. La.—Ballard v. Goldsby, 76 So. 219, 220, 142 La. 15.

25. U.S.—In re Flick, D.C.Ohio, 105 F. 503, 505, 5 Am.Bankr.R. 465—In re Greenwald, D.C.Pa., 99 F. 705, 3 Am.Bankr.R. 696.

La.—State v. Chapman, 35 La.Ann. 75, 76.

Mo.—State v. Sale, 132 S.W. 1119, 1121, 232 Mo. 166.

Pa.—Barricklow v. Howard, 41 Pa.Co. 33, 34.

Tenn.—Hand v. Cole, 12 S.W. 922, 923, 88 Tenn. 400, 405, 7 L.R.A. 96.

Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

26. U.S.—In re Flick, D.C.Ohio, 105 F. 503, 505, 5 Am.Bankr.R. 465.

Pa.—Barricklow v. Howard, 41 Pa. Co. 33, 34.

Tex.—Miller v. State, 225 S.W. 379, 381, 88 Tex.Cr. 69, 12 A.L.R. 597.

27. Pa.—Barricklow v. Howard, 41 Pa.Co. 33, 34.

28. Cal.—People v. Howard, 160 P. 697, 701, 31 Cal.App. 353.

29. N.Y.—Union Dime Sav. Inst. v. Neppert, 3 N.Y.S. 797, 799.

30. Kan.—Chambers' v. King Wrought-Iron Bridge Mfy., 16 Kan. 270, 276.

N.Y.—McGoldrick v. Traphagen, 88 N.Y. 334, 338.

31. La.—State v. Charles E. Wer-muth Co., 147 So. 692, 693, 177 La. 83.

32. Hawaii.—Holloway v. Richardson, 18 Hawaii 523, 525.

33. D.C.—Chanock v. U. S., 267 F. 612, 613, 50 App.D.C. 54, 11 A.L.R. 799.

34. La.—Salaun v. Consolidated Realty & Mfg. Co., 78 So. 974, 975, 143 La. 593.

35. U.S.—In re Brown, D.C.N.Y., 171 F. 281.

36. U.S.—Auffmordt v. Hedden, N. Y., 11 S.Ct. 103, 108, 137 U.S. 310, 34 L.Ed. 674.

37. Md.—Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 34 A. 778, 782, 82 Md. 535, 38 L.R.A. 97.

38. Pa.—Appeal of Walker, 144 A. 288, 290, 294 Pa. 385—Maginnis v. Schlottman, 114 A. 782, 784, 271 Pa. 305.

ney at law,³⁹ an employee delivering goods manufactured and keeping a memorandum of the delivery for a temporary purpose,⁴⁰ an engineer, although designated a "coal clerk,"⁴¹ an investigator, even though appointed as a "field clerk,"⁴² a New York buyer for stores doing business in Louisiana and Texas,⁴³ a person employed to sell goods on commission,⁴⁴ a police surgeon,⁴⁵ a school teacher,⁴⁶ a superintendent of a mine,⁴⁷ a supervisor of construction,⁴⁸ a teacher in a business school,⁴⁹ a telegraph operator,⁵⁰ a tradesman to whom raw materials are given to be converted into manufactured articles,⁵¹ a trained accountant familiar with city affairs engaged for research work,⁵² a traveling salesman,⁵³ a yard foreman,⁵⁴ or the medical staff or the board of visiting physicians of the Philadelphia Hospital.⁵⁵ The term "clerk," as used in a particular connection, has been held equivalent to, or interchangeable or synonymous with, "agent,"⁵⁶ "Board of Election Commissioners,"⁵⁷ "cashier" see *Cashier ante* p 24 note 32, "secretary,"⁵⁸ and "servant;"⁵⁹ and has been contrasted with, or distinguished from, "agent,"⁶⁰ "amanuensis,"⁶¹ "assistant" see *Assistant* 7 C.J.S. p 15 note 13, "assistant clerk,"⁶² "broker" see the C.J.S. title *Brokers* § 3, "cashier" see *Cashier ante* p 24 note 33, "factor"

see the C.J.S. title *Factors* § 1, also 25 C.J. p 343 note 44, "laborer,"⁶³ "manager,"⁶⁴ "public accountant,"⁶⁵ "salesman,"⁶⁶ "secretary and superintendent,"⁶⁷ "servant,"⁶⁸ "stenographer" see the C.J.S. title *Stenographers* § 1, also 11 C.J. p 841 note 85 [a], "traveling agent,"⁶⁹ "traveling salesman,"⁷⁰ and "workman."⁷¹

—Phrases in which term employed.

Clerks of indictments. Officers attached to the central criminal court in England, and to each circuit.⁷²

Clerks of records and writs. Officers formerly attached to the English court of chancery, whose duties consisted principally in sealing bills of complaint and writs of execution, filing affidavits, keeping a record of suits, and certifying office copies of pleadings and affidavits. They were three in number, and the business was distributed among them according to the letters of the alphabet.⁷³

Clerks of seats. In England, clerks of seats in the principal registry of the probate division discharge the duty of preparing and passing the grants of probate and letters of administration, under the supervision of the registrars.⁷⁴

39. Md.—*Lewis v. Fisher*, 30 A. 608, 609, 80 Md. 139, 45 Am.S.R. 327, 26 L.R.A. 278.

40. N.Y.—*Sickles v. Mather*, 20 Wend. 72, 75, 32 Am.D. 521.

41. Pa.—*Appeal of Walker*, 144 A. 288, 290, 294 Pa. 385—*Bedford v. Rosses*, 129 A. 92, 93, 283 Pa. 345.

42. Pa.—*Appeal of Walker*, 144 A. 288, 289, 294 Pa. 385.

43. U.S.—*In re Goldman*, D.C.La., 3 F.Supp. 936, 938.

44. Pa.—*Appeal of Walker*, 144 A. 288, 290, 294 Pa. 385—*Muholland v. Wood*, 31 A. 248, 249, 166 Pa. 486.

45. N.Y.—*People v. Board of Police*, 75 N.Y. 38, 41.

46. Okl.—*Grant County v. Gautier*, 73 P. 954, 957, 13 Okl. 194.

47. Tenn.—*Cocking v. Ward*, Ch. App., 48 S.W. 287, 289.

48. La.—*Salaun v. Consolidated Realty & Mfg. Co.*, 78 So. 974, 975, 143 La. 593.

49. U.S.—*In re Estey*, D.C.N.Y., 6 F. Supp. 570.

50. N.Y.—*People v. Ennis*, 7 N.Y.S. 630, 631.

51. N.Y.—*People v. Burr*, 41 How. Pr. 293, 297.

52. N.H.—*Amyot v. Caron*, 190 A. 134, 136, 88 N.H. 394.

53. La.—*Feibleman v. Mississippi*

Cane Syrup Co., 120 So. 482, 483, 10 La.App. 60.

11 C.J. p 842 note 2 [a] (3), (6), (7).

54. La.—*Salaun v. Consolidated Realty & Mfg. Co.*, 78 So. 974, 975, 143 La. 593.

55. Pa.—*Commonwealth v. Fitler*, 23 A. 568, 572, 147 Pa. 288, 15 L. R.A. 205.

56. La.—*State v. Roubles*, 9 So. 435, 43 La.App. 200, 202, 26 Am.S.R. 179.

"Clerk" as one of the many classes of agents see *Agency* 2 C.J.S. p 1025 note 22.

57. Ill.—*People v. Blankenburg*, 215 Ill.App. 506, 507.

58. N.D.—*State v. Currie*, 55 N.W. 858, 860, 3 N.D. 310.

Tex.—*Mauritz v. Schwind*, Civ.App., 101 S.W.2d 1085, 1090, quoting *Corpus Juris*.

11 C.J. p 841 note 87—56 C.J. p 1270 note 18.

59. La.—*State v. Roubles*, 9 So. 435, 43 La.App. 200, 26 Am.S.R. 179.

60. Mo.—*State v. Sale*, 132 S.W. 1119, 1121, 232 Mo. 166.

N.M.—*Territory v. Maxwell*, 2 N.M. 250, 261.

11 C.J. p 841 note 97 [a].

61. N.M.—*Radcliffe v. Chaves*, 110 P. 699, 701, 15 N.M. 258.

62. Vt.—*Charleston v. Lunenburg*, 21 Vt. 488, 490.

63. Ga.—*Tuten v. Cudahy Packing Co.*, 66 S.E. 249, 250, 133 Ga. 509—*Oliver v. Macon Hardware Co.*, 25 S.E. 403, 404, 98 Ga. 249, 251, 58 Am.S.R. 300—*Ricks v. Redwine*, 73 Ga. 273, 275—*Hinton v. Goode*, 73 Ga. 233, 234—*Richardson v. Langston*, 68 Ga. 658, 659.

Mass.—*Crowell v. Cape Cod Ship Canal Co.*, 46 N.E. 424, 425, 168 Mass. 157.

11 C.J. p 842 note 97 [d].

64. U.S.—*In re Pacific Co-op. League Stores*, C.C.A.Cal., 291 F. 759, 761.

65. La.—*State v. Charles E. Wer-muth Co.*, 147 So. 692, 693, 177 La. 83.

66. La.—*Feibleman v. Mississippi Cane Syrup Co.*, 120 So. 482, 483, 10 La.App. 60.

67. U.S.—*The Short Cut*, D.C.Pa., 6 F. 630, 631.

68. U.S.—*In re Goldman*, D.C.La., 3 F.Supp. 936, 938.

69. La.—*State v. Chapman*, 35 La. Ann. 75, 77.

70. U.S.—*In re Greenewald*, D.C.Pa., 99 F. 705, 3 Am.Bankr.R. 696.

11 C.J. p 842 note 2 [a].

71. U.S.—*In re Goldman Stores*, D C.La., 3 F.Supp. 936, 938.

72. Black L.D.

73. Black L.D.

74. Sweet L.D.

Other phrases: "Agent, attorney, clerk, or servant,"⁷⁵ "any clerk, apprentice, or servant,"⁷⁶ "any officer, agent, clerk or attorney at law or in fact,"⁷⁷ "articled clerk," see Article 6 C.J.S. p 777 note 56, "assistant clerk,"⁷⁸ "attestation of the clerk,"⁷⁹ "chief clerk,"⁸⁰ "clerk employed in a store or elsewhere,"⁸¹ "clerk having charge of the docketing and filing of police records,"⁸² "clerk of the chief engineer,"⁸³ "clerk of the corporation,"⁸⁴ "clerk of the individual ledger,"⁸⁵ "clerk or secretary to the chief of police,"⁸⁶ "clerk or servant,"⁸⁷ "clerk, servant, or agent,"⁸⁸ "clerk, treasurer, or cashier,"⁸⁹ "competent clerk,"⁹⁰ "confidential clerk,"⁹¹ "laborer . . . clerk, servant, nurse, or other person,"⁹² "lawyer's clerk" and "miner, mechanic, laborer, or clerk,"⁹³ "prepared by the clerk of the court,"⁹⁴ "president, director, cashier, teller, clerk, or agent of any association,"⁹⁵ "principal clerk,"⁹⁶ "proper clerk,"⁹⁷ "regular clerk,"⁹⁸ and "workman, clerk, or servant,"⁹⁹ also "clerks and other employees,"¹ "clerks employed in stores,"² "clerks, secretaries, and other persons of that kind,"³ "clerks, servants, and em-

ployees,"⁴ "laborers, servants, clerks, and operatives,"⁵ "officers, clerks, and employees,"⁶ "of such clerks,"⁷ "secretaries, clerks, and other agents of that kind,"⁸ "such other clerks as may be necessary,"⁹ "workmen, clerks, or servants,"¹⁰ and "workmen, clerks, traveling or city salesmen, or servants."¹¹

As an Adjective

"Clerk" also has been used adjectively in phrases, such as: "As clerk hire," "in lieu of clerk hire," and "in the nature of clerk hire."¹²

CLERKSHIP. In old English practice, the art of drawing pleadings and entering them on record in Latin, in the ancient court hand; otherwise called "skill of pleading in actions at the common law."¹³

As the period which must be spent by a law student in the office of a practicing attorney before admission to the bar see the C.J.S. title Attorney and Client § 8.

Phrase: "Regular clerkship."¹⁴

75. D.C.—Chanock v. U. S., 267 F. 612, 613, 50 App.D.C. 54, 11 A.L.R. 799.

76. "Cashier" included

Kan.—State v. Yeiter, 38 P. 320, 321, 54 Kan. 277.

77. Tex.—Miller v. State, 225 S.W. 379, 88 Tex.Cr. 69, 12 A.L.R. 597.

78. Vt.—Charleston v. Lunenburg, 21 Vt. 488, 490.

79. Tex.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, 1089.

80. U.S.—In re Pacific Co-op. League Stores, C.C.A.Cal., 291 F. 759, 760.

81. Pa.—Mulholland v. Wood, 31 A. 248, 249, 166 Pa. 486.

82. N.J.—Hayes v. Atlantic City, 151 A. 210, 8 N.J.Misc. 607.

"Stenographer in the detective bureau" distinguished

V.J.—Hayes v. Atlantic City, supra.

83. Mass.—Crowell v. Cape Cod Ship Canal Co., 46 N.E. 424, 168 Mass. 157.

84. Mass.—Crowell v. Cape Cod Ship Canal Co., supra.

85. Tenn.—Budd v. State, 3 Humphr. 483, 489, 39 Am.D. 189.

86. N.J.—Hayes v. Atlantic City, 151 A. 210, 8 N.J.Misc. 607.

"Stenographer in the detective bureau" distinguished

V.J.—Hayes v. Atlantic City, supra.

7. Cal.—People v. Howard, 160 P. 697, 701, 31 Cal.App. 358.

N.Y.—People v. Burr, 41 How.Pr. 293, 297.

88. N.H.—State v. Barter, 58 N.H. 604, 605.

89. Ill.—People v. Goss & Phillips Manufacturing Co., 99 Ill. 355, 361.

90. Wis.—Tenney v. State, 27 Wis. 387, 393.

91. N.Y.—People v. Gardiner, 53 N. Y.S. 451, 453, 33 App.Div. 204, quoting Standard D.

92. Okl.—Grant County v. Gautier, 73 P. 954, 957, 13 Okl. 194.

93. Pa.—Barricklow v. Howard, 41 Pa.Co. 33, 34.

94. "Clerk" in the generic sense
"Manifestly in this sentence the word 'clerk' is used in a generic sense and includes the recorder of the land court."—Crawford v. Roloson, 149 N.E. 707, 709; 254 Mass. 163.

95. U.S.—Cochran v. U. S., Colo., 15 S.Ct. 628, 629, 157 U.S. 286, 39 L. Ed. 704.

96. Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 1054, 49 Idaho 756.

97. Ill.—Alton v. Middleton, 41 N.E. 926, 928; 153 Ill. 442.
50 C.J. p 723 note 81.

98. N.Y.—People v. New York Fire Commissioners, 86 N.Y. 149, 151, affirming 23 Hun 317.
53 C.J. p 1170 note 3.

99. U.S.—In re Brown, D.C.N.Y., 171 F. 281.

1. U.S.—Burnap v. U. S., Ct.Cl., 40

S.Ct. 374, 376, 252 U.S. 512, 64 L. Ed. 692.

2. Pa.—Barricklow v. Howard, 41 Pa.Co. 33, 34.

3. La.—Feibleman v. Mississippi Cane Syrup Co., 120 So. 482, 483, 10 La.App. 60.

4. Md.—Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 34 A. 778, 782, 82 Md. 535, 38 L.R.A. 97—Lewis v. Fisher, 30 A. 608, 609, 80 Md. 139, 45 Am.S.R. 327, 26 L.R.A. 278.

5. Tenn.—Cocking v. Ward, Ch.App., 48 S.W. 287, 289.

6. Pa.—Commonwealth v. Fitler, 23 A. 568, 572, 147 Pa. 288, 15 L.R.A. 205.

7. N.H.—Amyot v. Caron, 190 A. 134, 136, 88 N.H. 394.

8. La.—Salaun v. Consolidated Realty & Mfg. Co., 78 So. 974, 975, 143 La. 593.

9. Pa.—Appeal of Walker, 144 A. 283, 289, 294 Pa. 385.

10. U.S.—In re Estey, D.C.N.Y., 6 F. Supp. 570—In re Baumblatt, D.C. Penn., 156 F. 422.

11. U.S.—In re Goldman, D.C.La., 3 F.Supp. 936, 937.

12. Kan.—Barrett v. Board of Com'rs of Montgomery County, 201 P. 1098, 1099, 109 Kan. 685.

13. Black L.D.

14. N.J.—See Matter of Dunn, 43 N. J.Law 359, 360, 39 Am.R. 600.

CLERKS OF COURTS

This Title includes officers of civil tribunals authorized to perform clerical functions, with incidental judicial powers, whether designated as clerks, prothonotaries, or by other titles; appointment, qualification, tenure, and removal of such officers, and *ex officio* and *de facto* clerks of courts; and their rights, powers, duties, and liabilities.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITION, NATURE OF OFFICE, APPOINTMENT, QUALIFICATION, AND TENURE**§ 1. Definition and Distinctions**

The clerk of a court is a ministerial officer intrusted with the duty of keeping its records, issuing its process, entering its judgments and the like. The clerk has been distinguished from a master in chancery and from a receiver of the court.

A clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records and the like.¹ While

the clerk of a court belongs to the judicial as distinguished from the executive or legislative branch of government,² his office is essentially a ministerial one,³ and is in no way necessary to the existence of a court;⁴ that is, while the clerk is an officer of the court,⁵ a public officer,⁶ and an "officer of the law",⁷ he is not a judicial officer,⁸ nor is he the court.⁹ In some jurisdictions, however, the clerk is regarded as an essential, constituent part of a court.¹⁰ Where the office is created or recognized

1. Ill.—People v. Brady, 114 N.E. 25, 275 Ill. 261.

Porto Rico.—Ex parte Plata, 22 Porto Rico 175.

11 C.J. p 844 note 11, p 848 note 1.

2. Ill.—People v. Brady, 114 N.E. 25, 275 Ill. 261.

3. Mass.—Patrick v. Dunbar, 200 N. E. 896.

N.Y.—People ex rel. Trost v. Bird, 172 N.Y.S. 412, 184 App.Div. 779—Marc v. Pinkard, 230 N.Y.S. 765, 133 Misc. 83.

Porto Rico.—Ex parte Plata, 22 Porto Rico 175.

11 C.J. p 848 note 3.

Acts under direction

"The clerk of the court is a mere ministerial officer, who can only act upon the direction of the court, and must find authority in the decision in order to enter judgment."—Marc

v. Pinkard, 230 N.Y.S. 765, 766, 133 Misc. 83.

Clerk of municipal court

The clerk of the Municipal Court of New York City, Third District, is merely a ministerial officer, and is vested with no judicial functions.—People ex rel. Trost v. Bird, 172 N.Y.S. 412, 184 App.Div. 779.

4. Porto Rico.—Ex parte Plata, 22 Porto Rico 175.

11 C.J. p 849 note 4.

5. Cal.—McClung v. Johnson, 289 P. 199, 106 Cal.App. 264.

Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

Ill.—Toth v. Samuel Phillipson & Co., 250 Ill.App. 247.

Pa.—Commonwealth v. Smith, 96 Pa. Super. 31.

11 C.J. p 849 note 5.

Not mere employee

Clerk of justice's court, empow-

ed to administer oaths, prepare bonds, etc., was an "officer," not mere "employee."—McClung v. Johnson, 289 P. 199, 106 Cal.App. 264.

6. Mass.—O'Connell v. Retirement Board of City of Boston, 150 N.E. 2, 254 Mass. 404.

Pa.—In re Beaver's Petition, 29 Pa. Dist. 245.

7. Tex.—Gordon v. State, 2 Tex.App. 154, 158.

8. Minn.—Nelson Lumber Co. v. McKinnon, 63 N.W. 630, 61 Minn. 219.

9. N.J.—National Docks, etc., R. Co. v. United New Jersey R., etc., Co., 28 A. 673, 52 N.J.Eq. 366, 370, affirmed 30 A. 580, 581, 52 N.J.Eq. 552.

11 C.J. p 849 note 8.

10. Okl.—U. S. v. Warren, 71 P. 685, 12 Okl. 350.

Vt.—In re Durant, 12 A. 650, 60 Vt. 176.

11 C.J. p 849 note 9.

by the constitution of the state, it is of course a constitutional office and the clerk is a constitutional officer;¹¹ and where the office is created by statute, it is a statutory office.¹² The clerks of particular courts have been held to be state officers,¹³ although the clerk of a county court is not a state officer,¹⁴ and the clerks of some courts are county officers;¹⁵ but the clerk of a police court is neither a county nor a township officer,¹⁶ the clerk of a municipal court has been held neither a county officer nor an officer of an inferior court,¹⁷ and where the clerk is a constitutional state officer, he is not a city officer.¹⁸ Reference must be had to the constitutional and statutory provisions of the state, and the construction placed thereon by the courts, in order to determine what courts are referred to when the expression "office of clerk" or "clerk of court" is employed in a constitution, statute, or contract.¹⁹

Judge as clerk. Under constitutional or statutory provisions, a judge may also serve as clerk of his own court.²⁰

Master in chancery distinguished. While at an early date the duties which are now devolved on the master of chancery were performed by certain

clerks of the court of chancery,²¹ there is at present a clear distinction between a master in chancery and a clerk of court,²² and where the two offices are combined in one,²³ the office has a dual character.²⁴

The offices of receiver and clerk of court are distinct in their nature and functions;²⁵ and a clerk of court is not, by virtue of his office, a receiver of the court.²⁶

Ordinary as clerk. In some states an ordinary acts both as judge and as clerk.²⁷

Prothonotary. The chief or principal clerk of the court is sometimes called a prothonotary,²⁸ and it has been said that a prothonotary is merely the clerk of the court.²⁹

§ 2. Creation and Abolition of Office

- a. Creation
- b. Abolition

a. Creation

The power to create a court ordinarily includes the power to create the office of clerk therefor, and, in general, the creation of the office of clerk of court is a matter of statutory or constitutional provision.

11. N.Y.—Olmstead v. Meahl, 114 N. E. 393, 219 N.Y. 270, affirming Wilcox v. Meahl, 160 N.Y.S. 708, 172 App.Div. 263.

11 C.J. p 849 note 10.

12. U.S.—U. S. v. Oliphant, N.J., 230 F. 1, 144 C.C.A. 299.

13. N.Y.—Peo. v. Prendergast, 159 N.Y.S. 574, 94 Misc. 481—Olmstead v. Meahl, 153 N.Y.S. 1029.

11 C.J. p 849 note 12.

14. Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

15. Ala.—Osborn v. Henry, 76 So. 119, 200 Ala. 353.

N.Y.—Olmstead v. Meahl, 114 N.E. 393, 219 N.Y. 270, affirming Wilcox v. Meahl, 160 N.Y.S. 708, 172 App.Div. 263.

11 C.J. p 849 note 13.

As officer of two counties

Where two counties are embraced in one chancery division, register is county officer of both counties, in view of character of primary services to be rendered in each.—Osborn v. Henry, 76 So. 119, 200 Ala. 353.

Legislative designation

In act of February 18, 1895, Acts 1894-95, p. 884, reference "to the register of chancery court of Jefferson county" is legislative designation of that official as a county officer.—Osborn v. Henry, 76 So. 119, 200 Ala. 353.

16. Cal.—Rowe v. Rose, 148 P. 535, 26 Cal.App. 744.

17. Cal.—Simpson v. Payne, 251 P. 324, 79 Cal.App. 780.

18. N.Y.—Peo. v. Prendergast, 159 N.Y.S. 574, 94 Misc. 481.

19. Ga.—Equitable Mfg. Co. v. Davis Co., 60 S.E. 262, 130 Ga. 67.

Ky.—Kirkpatrick v. Brownfield, 31 S.W. 137, 97 Ky. 558, 17 Ky.L. 376, 53 Am.S.R. 422, 29 L.R.A. 703.

Mass.—Atty.-Gen. v. Campbell, 78 N. E. 133, 191 Mass. 497.

11 C.J. p 849 note 17.

20. Ala.—State v. Torbert, 77 So. 37, 200 Ala. 663—Thomas v. State, 77 So. 35, 200 Ala. 661.

Ky.—Greenleaf v. Woods, 96 S.W. 458, 123 Ky. 306, 29 Ky.L. 723.

N.D.—State ex rel. Reese v. Mooney, 255 N.W. 105, 64 N.D. 620.

County judge

Under constitutional amendment, in counties having population exceeding 6,000 and not exceeding 15,000, officer, elected as county judge, must "also" fill office of clerk of district court.—State ex rel. Reese v. Mooney, 255 N.W. 105, 64 N.D. 620.

Police judge, under some statutory provisions is clerk of his own court.—Greenleaf v. Woods, 96 S.W. 458, 123 Ky. 306, 29 Ky.L. 723.

Probate judge

Under Code 1907 § 6698, probate judge of Hale county is clerk of county court of which he is also

judge; provision of Acts 1915 p 865 § 9 subs. 3, which makes clerk of circuit court ex officio clerk of county court, being limited to counties having more than twenty-six thousand and less than twenty-six thousand one hundred inhabitants.—State v. Torbert, 77 So. 37, 200 Ala. 663.

21. Vt.—In re Durant, 12 A. 650, 60 Vt. 176, 182.

11 C.J. p 849 note 18.

22. Tenn.—Morrow v. Sneed, 114 S. W. 201, 121 Tenn. 173.

11 C.J. p 849 note 19.

23. Tenn.—Waters v. Carroll, 9 Yerg. 102.

24. Tenn.—Morrow v. Sneed, 114 S. W. 201, 121 Tenn. 173.

25. N.C.—Rogers v. Odom, 86 N.C. 432.

Tenn.—Waters v. Carroll, 9 Yerg. 102.

26. Ill.—Hammer v. Kaufman, 39 Ill. 87.

N.C.—Kerr v. Brandon, 84 N.C. 123.

27. Ga.—State v. Henderson, 48 S. E. 334, 120 Ga. 780.

11 C.J. p 849 note 24.

28. N.Y.—Trebilcox v. McAlpine, 46 Hun 469, 11 N.Y.St. 847, citing Webster D.

11 C.J. p 848 note 1 [b]—50 C.J. p 826 note 63.

29. Pa.—Root v. Root, 16 Pa.Dist. 675, 10 North. 344.

Matters regarding the creation of the office of clerk of court usually depend on constitutional and statutory provisions.³⁰ Authority to establish a court necessarily includes the power to provide for a clerk and to define his duties;³¹ and the fact that the clerk of another court has been for several years allowed to perform the duties and receive the emoluments incident to the clerkship of a newly established court will not deprive the legislature of power to establish a separate office of clerk of the latter court, with the necessary effect of depriving the clerk of the other court of the power to discharge the duties of the new office on account of a constitutional prohibition against one person holding two offices.³² However, a statute creating a new court which provides that the clerk of a certain existing court shall perform the duties of clerk of the new court simply imposes additional duties on the clerk of the existing court and does not create a new office,³³ at least where no compensation is provided,³⁴ although it has also been held that a statute authorizing the clerk of one court to perform certain duties of the clerk of another court violates constitutional provisions forbidding more than one clerk for the second court.³⁵ The title of the position is not controlling in determining the validity of a statute creating a position involving performance of clerical duties for a court.³⁶ Where a territory is admitted as a state, the status of a clerk under the state government may be allowed to remain temporarily the same as it was under the territorial government.³⁷

Clerk of justice's court. In some states the law has created no such office as that of a clerk of a

justice of the peace,³⁸ but in some other states the contrary is, or has been true, as to justices' courts in particular cities.³⁹

As dependent on population of county. Where, by statute, the existence of the office depends on the population of the county, the fact that the county attains the required population does not authorize an immediate election, but the office is to be filled at the next regular election;⁴⁰ but it has been held that a county whose population has reached the required number more than thirty days before a general election can elect a clerk, notwithstanding the fact that the population was less when the last census was taken.⁴¹ A statute, providing that, subject to the county commissioners' approval, the county judge may appoint a clerk in a county having a certain population if in their judgment the public interest requires such appointment, is permissive merely.⁴²

Where the clerk's right to hold office depends on the population of the county, the burden is on him to prove its sufficiency in quo warranto proceedings to oust him.⁴³

b. Abolition

On abolition of a court the office of clerk appurtenant thereto is ordinarily also abolished. Clerkships created by constitution may not be abolished by statute.

Where a court is abolished the office of clerk falls with it;⁴⁴ and so, where by statute the jurisdiction of one court is transferred to another, the clerk of the former ceases to have any official powers;⁴⁵ and the clerk of the court to which the jurisdiction is transferred usually succeeds to the

30. Cal.—*People v. Durick*, 20 Cal. 94.

11 C.J. p 850 note 26.

Construction of particular statutory provisions

Gen. Acts 1915 p 865 § 9 subd 3, providing that clerk of circuit court shall be ex officio clerk of county court, applies only to counties having population of more than twenty-six thousand and less than twenty-six thousand one hundred inhabitants, all other counties, not otherwise excepted, being governed by Code provisions as to clerical duties and functions of county court.—*Thomas v. State*, 77 So. 35, 200 Ala. 661.

31. Mo.—*Ex p. Kiburg*, 10 Mo. App. 442.

Municipal court

Authority by force of constitutional provisions to establish municipal courts confers upon the municipal corporation the incidental power to provide for a clerk for the court and to define his duties.—*Ex p. Kiburg*, supra.

32. N.C.—*White v. Murray*, 35 S.E. 256, 126 N.C. 153.

33. Tex.—*Carter v. Missouri, etc., R. Co.*, 157 S.W. 1169, 106 Tex. 137.

34. Tenn.—*Hodge v. State*, 188 S.W. 203, 135 Tenn. 525.

35. Ky.—*Neutzel v. Williams*, 230 S.W. 942, 191 Ky. 351.

36. N.Y.—*Devoey v. Craig*, 131 N.E. 884, 231 N.Y. 186, affirming 187 N.Y.S. 478, 196 App.Div. 567.

"General clerk of the Supreme Court"

That person appointed under L. 1878 c 21, to perform clerical duties in supreme court in Kings county and such duties as may be prescribed in the absence of county clerk, is given title of "general clerk of Supreme Court," is not controlling in determining whether creation of position invaded constitutional right of county clerk to be clerk of supreme court.—*Devoey v. Craig*, 131 N.E. 884, 231 N.Y. 186, affirming 187 N.Y.S. 478, 196 App.Div. 567.

37. Okl.—*Baker v. Newton*, 112 P. 1034, 27 Okl. 436.

38. Ga.—*Park v. Callaway*, 57 S.E. 229, 128 Ga. 119.

11 C.J. p 850 note 33.

39. Mich.—*Seabury v. Wayne County*, 55 N.W. 456, 96 Mich. 46.

N.Y.—*People v. Van Wart*, 55 N.Y.S. 68, 25 Misc. 215, affirmed, 55 N.Y.S. 522, 36 App.Div. 518, affirmed 53 N.E. 1130, 158 N.Y. 720.

11 C.J. p 850 note 34.

40. Va.—*Watkins v. Venable*, 39 S.E. 147, 99 Va. 440.

11 C.J. p 850 note 35.

41. Neb.—*State v. Long*, 23 N.W. 337, 17 Neb. 502.

42. Okl.—*Stewart v. State*, 105 P. 374, 3 Okl. Cr. 618.

11 C.J. p 850 note 37.

43. Neb.—*State v. Davis*, 92 N.W. 740, 66 Neb. 333.

44. Pa.—*French v. Com.*, 78 Pa. 339.

11 C.J. p 850 note 39.

45. Wash. T.—*Boyer v. Fowler*, 1 Wash. T. 101.

powers, duties, emoluments, and liabilities of the clerk of the superseded court;⁴⁶ but the rule that repeals by implication are not favored applies to statutes claimed to have impliedly abolished the office of clerk.⁴⁷ Furthermore, if the office of clerk was created by the constitution, the legislature may not abolish it,⁴⁸ where it has not been abolished by the adoption of amendments to the constitution.⁴⁹ A constitutional provision entitling a county to two clerks is not violated by a statute enacted by a legislature which erroneously assumed that the county was entitled to only one clerk but which did not carry its error into the statute.⁵⁰

§ 3. Appointment or Election

The appointment or election of clerks of court is ordinarily governed by statutory or constitutional provisions, and in compliance therewith the clerk may be elected by the people or appointed.

Particular constitutional and statutory provisions control the appointment or election of clerks of court.⁵¹

In the absence of anything to the contrary in the constitution, the subject may properly be regulated by the legislature,⁵² but where the constitution itself provides a method, that governs, and a statute attempting to provide a different method is void.⁵³ Sometimes it is provided that a clerk of one court shall be clerk of another court, and statutes of this character are not violative of constitutional provisions relating to the election of clerks of courts,⁵⁴ but when not so provided by law, a clerk of one court is not the clerk of another court.⁵⁵

Where the time of holding elections for the office

of clerk of court is not prescribed by the organic law, the legislature may properly regulate such matter.⁵⁶

Appointment by judge or court. Under some statutes a judge is authorized within the limits of his discretion to appoint a clerk of court,⁵⁷ and it has been held that a chancellor appointed pro tempore may himself appoint a clerk of court.⁵⁸ Where the court is empowered by the constitution to make the appointment, the act is deemed that of the court and not that of the individuals comprising the court;⁵⁹ and after the appointment has been made the power cannot be resumed or again exercised until a vacancy shall regularly occur,⁶⁰ and such appointment is not affected by any subsequent change in the number of persons composing that court.⁶¹ However, before the person appointed has qualified, it has been held that the appointment may be rescinded and another person appointed.⁶²

Where election by the people is required by the constitution, the power to appoint such officers cannot be conferred by the legislature on the governor;⁶³ nor can it be properly provided that, on ouster of the clerk for bribery in the election, the next highest candidate may have judgment for the office.⁶⁴ Likewise, where, under the law, the office of clerk of a particular court is to be filled by election, the judge of such court has no authority to fill the office by appointment.⁶⁵

Where a judge acts as his own clerk, he may empower another to act in his stead, without any order entered of record.⁶⁶ Some statutes authorizing probate judges to appoint clerks are regard-

46. Ill.—Adams v. Cutright, 53 Ill. 361—Hague v. Porter, 45 Ill. 318—People v. Thurber, 13 Ill. 554.

47. U.S.—In re Mason, C.C.Iowa, 85 F. 145.

48. Nev.—State v. Douglass, 110 P. 177, 33 Nev. 82.

11 C.J. p 850 note 43.

49. Nev.—State v. La Grave, 48 P. 193, 674, 23 Nev. 373.

11 C.J. p 851 note 44.

50. Ark.—Pryor v. Murphy, 96 S.W. 445, 80 Ark. 150.

11 C.J. p 851 note 45.

51. N.Y.—Devoy v. Craig, 187 N.Y. S. 478, 196 App.Div. 567, affirmed 131 N.E. 884, 231 N.Y. 186.

11 C.J. p 851 notes 46-47.

52. Tenn.—Hodge v. State, 188 S.W. 203, 135 Tenn. 525.

11 C.J. p 851 note 48.

53. Minn.—State v. Berg, 157 N.W. 652.

11 C.J. p 851 note 49.

54. Tenn.—Hodge v. State, 188 S.W. 203, 135 Tenn. 525.

11 C.J. p 851 note 51.

55. Ala.—State v. Hasty, 63 So. 559, 184 Ala. 121, 50 L.R.A., N.S., 553, Ann.Cas.1916B 703.

11 C.J. p 851 note 53.

56. S.C.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.

57. N.J.—Horowitz v. Civil Service Commission, 170 A. 639, 12 N.J. Misc. 190, affirmed 171 A. 779, 112 N.J.Law 499.

N.Y.—Devoy v. Craig, 187 N.Y.S. 478, 196 App.Div. 567, affirmed 131 N.E. 884, 231 N.Y. 186.

Abuse of discretion not shown

District court judge did not abuse discretion in appointing former district court clerk from civil service eligible list to succeed himself, where he had highest standing, and second highest applicant on eligible list, a war veteran, was claimed to

be incompetent.—Horowitz v. Civil Service Commission, 170 A. 639, 12 N.J.Misc. 190, affirmed 171 A. 779, 112 N.J.Law 499.

58. Tenn.—Gold v. Fite, 2 Baxt. 237.

59. Hawaii.—Matter of Pringle, 22 Hawaii 557.

Ill.—People v. Mobley, 2 Ill. 215.

Ohio.—State v. Este, 7 Ohio 135.

11 C.J. p 851 note 54.

60. Ill.—People v. Mobley, 2 Ill. 215.

61. Tex.—In re Supreme Ct. Clerkship, 40 Tex. 1.

62. Ohio.—State v. Este, 7 Ohio 135. 11 C.J. p 851 note 57.

63. Mass.—In re Opinion of Justices, 117 Mass. 603.

64. Mo.—State v. Towns, 54 S.W. 552, 153 Mo. 91.

65. Okl.—Matney v. King, 93 P. 737, 20 Okl. 22.

66. Ky.—Daniels v. Dils, 4 Ky.L. 836.

ed as permissive only and to leave it optional with the judges of probate as to whether they shall or shall not make appointments.⁶⁷

Appointment by de facto court or judge. Since the acts of a de facto officer are valid, it follows that the appointment of a clerk by a court or judge de facto, acting under color of office, is valid and constitutes such clerk an officer de jure.⁶⁸ Therefore, the subsequent appointment by the judge de jure of a clerk does not make the latter an officer de jure, and the first appointee cannot be ousted by him;⁶⁹ but it has been held in one jurisdiction that if quo warranto is instituted by a clerk to establish his rights to the office, he cannot recover on proof of title to the office derived from an appointment by a de facto judge.⁷⁰ The validity of an appointment by a de facto court or judge cannot be questioned collaterally.⁷¹ Where a provisional government was not a de facto government, the official acts of a person appointed thereby county court clerk are not valid for any purpose.⁷²

Questions concerning vacancies are treated in § 7 infra.

§ 4. Eligibility and Qualification

- a. Eligibility
- b. Qualification

a. Eligibility

Eligibility to the office of clerk of court is largely a matter of statutory and constitutional provision. Conviction of misconduct in office renders the incumbent ineligible.

The question of eligibility to the office of clerk of court depends on the same principles that apply to other public officers, that is, it is largely a question of construction of constitutional and statutory

requirements relating to officers generally and such specific provisions as may exist relative to the office of clerk,⁷³ and it is usually required that the clerk shall be a resident of the county or judicial district in which he acts.⁷⁴ Conviction for misconduct in office renders a clerk of court ineligible to hold office for the remainder of the term for which he was elected.⁷⁵

Where the matter of eligibility to the office of clerk of court is controlled by constitutional mandate, the legislature may not add a disability unprovided for by the constitution.⁷⁶

Women. It has been held that at common law and in the absence of an enabling act or constitutional provision, a woman is ineligible to the office of clerk of court,⁷⁷ although other authority holds that a woman is eligible to the office in the absence of a constitutional or statutory provision requiring the clerk to be a male.⁷⁸

b. Qualification

- (1) In general
- (2) Bond

(1) In General

Statutory and constitutional provisions control the matter of a clerk of court's qualification, and in the absence of express requirement he need not produce his commission before qualifying.

Matters relating to the qualification and induction into office of clerks of courts depend for the most part on particular constitutional or statutory provisions.⁷⁹ A proper offer to qualify should not be refused.⁸⁰

Commission. In the absence of a statute requiring it, the clerk need not produce his commission before he will be allowed to qualify.⁸¹

67. Idaho.—Ada County v. Ryals, 39 P. 556, 4 Idaho 365.
Okl.—Walton v. Williams, 49 P. 1022, 5 Okl. 642.

68. N.C.—People v. Staton, 73 N.C. 546, 21 Am.R. 479.
Ohio.—State v. Alling, 12 Ohio 16.
Tenn.—Turney v. Dibrell, 3 Baxt. 235.

69. N.C.—Norfleet v. Staton, 73 N.C. 546, 21 Am.R. 479.

70. N.Y.—People v. Anthony, 6 Hun 142.
11 C.J. p 852 note 65.

71. N.C.—Culver v. Eggers, 63 N.C. 630.

72. Ky.—Simpson v. Loving, 3 Bush 458, 96 Am.D. 252.

73. Ky.—Kirkpatrick v. Brownfield,

31 S.W. 137, 97 Ky. 558, 17 Ky.L. 376, 53 Am.S.R. 422, 29 L.R.A. 703.
11 C.J. p 855 note 4.

74. Ga.—McGill v. Simmons, 157 S.E. 273, 172 Ga. 127.
11 C.J. p 855 note 10.

"Qualified voter"

Resident of county for requisite time paying taxes six months before general election was "qualified voter" eligible to election as clerk of superior court at special election held less than six months after paying taxes.—McGill v. Simmons, 157 S.E. 273, 172 Ga. 127.

75. Ga.—McClellan v. Pearson, 136 S.E. 429, 163 Ga. 492.
Neb.—State v. Farley, 243 N.W. 867, 123 Neb. 687.

Misappropriation of funds

Ga.—McClellan v. Pearson, 136 S.E. 429, 163 Ga. 492.

76. S.C.—State v. Williams, 20 S.C. 12.

77. Pa.—In re Beaver's Petition, 29 Pa.Dist. 245.

78. Mo.—Crow v. Hostetter, 39 S.W. 270, 137 Mo. 636, 59 Am.S.R. 515, 38 L.R.A. 208.
Okl.—Gilliland v. Whittle, 127 P. 698, 33 Okl. 708.
11 C.J. p 855 note 5.

79. Ky.—Kirkpatrick v. Brownfield, 31 S.W. 137, 97 Ky. 558, 17 Ky.L. 376, 53 Am.S.R. 422, 29 L.R.A. 703.
La.—State v. Fahey, 35 La.Ann. 9.
11 C.J. p 855 note 9.

80. Ky.—Matter of Jones, 6 Ky.L. 633.
11 C.J. p 855 note 11.

81. Ky.—Newcum v. Kirtley, 13 B. Mon. 515.
11 C.J. p 857 note 33.

(2) Bond

Clerks of courts are ordinarily required to give bonds, which should be executed in the manner and form prescribed by statute, although a substantial compliance is sufficient.

A usual statutory requirement is that before entering on the discharge of his duties the clerk shall give an official bond,⁸² and it seems that a clerk may be required to give bond and security for the faithful performance of his official duties even by a statute enacted after he came into office.⁸³ At any rate, a bond voluntarily given by him before the statute requiring it became effective is a valid and binding obligation.⁸⁴ Some statutes relating to the appointment of a clerk pro tempore do not require the giving of a bond;⁸⁵ and it has been held that where a clerk is appointed in vacation he has the whole of the next term of court to give the bond required by law.⁸⁶

Form and sufficiency. The statutes generally prescribe the substance and sometimes the form of the bond which is required to be given by a clerk of court before entering on the duties of his office.⁸⁷ To be sufficient as a statutory bond, the bond given must be executed⁸⁸ and conditioned substantially as required by statute;⁸⁹ but a mere deviation from the phraseology of the statute will not destroy its force and effect as a statutory obligation,⁹⁰ nor does surplusage deprive it of its character as a statutory bond so far as it embodies statutory conditions;⁹¹ neither does a slight omission which can be supplied by construction render the bond void,⁹² nor does such omission make it other than the statutory bond.⁹³ It has also been held that a mere irregularity, such as the fact that the

bond runs to "the people" of the state or county, does not render it void;⁹⁴ and that delay in the approval of the bond does not deprive the clerk of his right to the office where the delay is not due to his fault.⁹⁵ In accordance with well settled principles a bond valid as a common-law obligation is sufficient, although not in the statutory form.⁹⁶ However, a bond is wholly void where the obligor is also named as one of the obligees.⁹⁷

Approval by court. It has been held that a county court may postpone the hearing for approval of a court clerk's bond, and retains jurisdiction to approve the bond after the time set by statute.⁹⁸

Filing and recording. The official bond of a clerk of court should be filed in accordance with applicable statutory requirements.⁹⁹

While a clerk of court's bond should be recorded, failure to record the same does not necessarily preclude a recovery thereon.¹

New or additional bond. Some statutes require or provide for the giving of a new or additional bond by a clerk of court under certain circumstances; and where such a statute contemplates that the new bond shall be ordered by the court, a bond filed without any order by the court is void.² A statute making county clerks ex officio clerks of the district courts has been construed not to require that they should give other and additional bonds for the discharge of their duties as clerks of such courts.³

Lien of sureties on fees. The official fees of a clerk belong to his estate, like other property, and the sureties on his official bond have no lien on them for their indemnity, nor right of priority over other creditors.⁴

82. Colo.—Sullivan v. People, 64 P. 1049, 16 Colo.App. 303.
 83. Va.—In re Dance, 5 Munf. 349, 19 Va. 349.
 11 C.J. p 855 note 13.
 84. Okl.—Ahsmuhs v. Bowyer, 135 P. 413, 39 Okl. 376, 50 L.R.A., N.S., 1060 and note.
 85. Mass.—Com. v. Gay, 26 N.E. 571, 852, 153 Mass. 211.
 86. Va.—Dew v. Judges Sweet Springs Dist. Ct., 3 Hen. & M. 1, 13 Va. 1, 3 Am.D. 639.
 87. *Form of sufficient bond*
 Colo.—Cooper v. People, 63 P. 314, 28 Colo. 87.
 88. Colo.—Cooper v. People, supra.
 11 C.J. p 856 note 19.
 89. Ga.—Terrell v. McLean, 61 S.E. 485, 130 Ga. 633.
 11 C.J. p 856 note 20.
 90. Ill.—People v. McGrath, 117 N. E. 74, 279 Ill. 550, reversing 204 Ill.App. 169.
 11 C.J. p 856 note 21.
 91. U.S.—U. S. v. Ambrose, C.C., 2 F. 552.
 Wis.—Milwaukee v. U. S. Fidelity, etc., Co., 129 N.W. 786, 144 Wis. 603.
 11 C.J. p 856 note 22.
 92. Colo.—Cooper v. People, 63 P. 314, 28 Colo. 87.
 11 C.J. p 856 note 23.
 93. Ill.—People v. Barnwell, 41 Ill. App. 617.
 11 C.J. p 856 note 24.
 94. Neb.—Toncray v. Dodge County, 51 N.W. 235, 33 Neb. 802.
 11 C.J. p 856 note 25.
 95. N.C.—Buckman v. Beaufort, 80 N.C. 121.
 11 C.J. p 856 note 26.
 96. Mich.—City of Grand Rapids v. Krakowski, 174 N.W. 201, 207 Mich. 483.
 11 C.J. p 857 note 27.
 97. N.C.—Cumberland v. Armstrong, 14 N.C. 284.
 11 C.J. p 857 note 28.
 98. Ky.—Commonwealth v. Platt, 292 S.W. 785, 219 Ky. 185.
 99. Colo.—Board of Com'rs of Rio Grande County v. Von Bernuth, 245 P. 490, 79 Colo. 300.
 1. N.C.—State v. Martin, 118 S.E. 914, 186 N.C. 127, modified in other respects Lee v. Martin, 123 S.E. 631.
 2. Colo.—Sullivan v. People, 64 P. 1049, 16 Colo.App. 303.
 11 C.J. p 857 note 31.
 3. Neb.—People v. McCallum, 1 Neb. 182.
 4. Tenn.—Steger v. Frizzell, 2 Tenn. Ch. 369.
 Ala.—Cook v. State, 8 So. 686, 91 Ala. 53.

§ 5. De Facto Officers

One exercising the functions of clerk of court under a mere color of right is a de facto clerk and his acts may not be questioned collaterally.

A person who, although not the lawful clerk, yet exercises the functions of the office under color of right is an officer de facto.⁵ The acts of a clerk de facto are valid as to the public and third persons, and cannot be questioned collaterally.⁶

§ 6. Title to, and Possession of, Office

Title to the office of clerk of court should be determined by an appropriate proceeding, such as quo warranto, and prima facie title may confer the right to possession pending a contest.

Pending a contest for the office a prima facie title gives a right of possession.⁷ The question of title must be determined by some appropriate proceeding,⁸ the usual one being quo warranto.⁹ It has been held unnecessary for the incumbent of the office of clerk to contest before the election officials an alleged illegal election as a prerequisite to bringing injunction proceedings.¹⁰ The title to the office of the clerk of court cannot be collaterally attacked.¹¹

Clerks of court departments. Where a court is divided into departments each constituting a separate court, the clerk of each department is regarded as the clerk of that court.¹²

§ 7. Term of Office, Vacancy, and Holding Over

a. Term of office in general

b. Vacancy

c. Holding over

a. Term of Office in General

The term of office of a clerk of court is ordinarily fixed by constitutional or statutory provision, although it is subject to be cut down by changes in the law or by violation of the implied condition of good conduct in office.

Generally speaking, constitutional or statutory provisions control a clerk of court's term of office, as with respect to its commencement, duration, and other matters.¹³ If the time for the commencement of the term is prescribed by the constitution or statutes, the clerk may not be inducted into office until such time arrives.¹⁴ While it is held in some jurisdictions that, where the constitution fixes no limit to the duration of the term, the appointee holds ad libitum until the legislature prescribes a limit to his tenure,¹⁵ in others the general rule that, where the tenure of office is not prescribed by law, the term continues during the pleasure of the appointing power is applied.¹⁶ Statutes relating to the term of office of a clerk of court must not violate constitutional provisions;¹⁷ and where the term is fixed by constitutional provision the legislature has no power to alter it,¹⁸ although in the absence of a constitutional provision clearly protecting an incumbent clerk of court, his term may be shortened or ended at once by act of the legislature;¹⁹ but, even if the power to change the clerk's term of office belongs to the legislature, it cannot be effected by ambiguous, uncertain legislation.²⁰ Where the term of office for which the clerk may be appointed by the judge is fixed, his term may continue after that of the judge has expired.²¹

5. Ky.—Taylor v. Com., 3 J.J.Marsh. 401.

N.C.—Threadgill v. Carolina Cent. R. Co., 73 N.C. 178.
11 C.J. p 854 note 94.

De facto character held not shown
Ark.—Dougherty v. Garner, 275 S.W. 706, 169 Ark. 368.

6. Ala.—Conner v. State, 102 So. 809, 212 Ala. 360.
11 C.J. p 854 notes 95, 96.

Validity of decree
Ala.—Conner v. State, supra.

7. Okl.—Matney v. King, 93 P. 737, 20 Okl. 22.
11 C.J. p 854 note 97.

8. U.S.—U. S. v. Harsha, Mich., 56 F. 953, 6 C.C.A. 178.
11 C.J. p 854 note 98.

9. Ark.—Rhodes v. Driver, 65 S.W. 106, 69 Ark. 606, 86 Am.S.R. 215.
N.C.—Swain v. McRae, 80 N.C. 111—
Ex p. Daughtry, 28 N.C. 155.
11 C.J. p 854 note 99.

10. S.C.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.

Dispute respecting length of term
Incumbent of office of clerk of court claiming right to hold office for additional two years, and therefore declining to enter primary and bringing action for injunction to prevent holding of primary, was not required to contest or protest, before the election officials, nomination or election of candidate.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.

11. U.S.—U. S. v. Harsha, Mich., 56 F. 953, 6 C.C.A. 178.
La.—State v. Lawson, 66 So. 769, 136 La. 172.

12. Cal.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 38 P.2d 442, 2 Cal.App.2d 600.

13. Ala.—Batson v. State, 89 So. 500, 206 Ala. 317.
Ga.—Ex parte Camden County, Charlt. 191.
Ind.—Enmeier v. Blaize, 181 N.E. 1, 203 Ind. 475.

R.I.—Gorham v. Robinson, 186 A. 832.

11 C.J. p 857 note 34.

14. Ohio.—State v. Bader, 50 N.E. 813, 58 Ohio St. 384.

15. Ill.—People v. Mobley, 2 Ill. 215.
11 C.J. p 857 note 36.

16. Hawaii.—Matter of Pringle, 22 Hawaii 557.
11 C.J. p 857 note 38.

17. Ohio.—State v. Hall, 65 N.E. 1019, 67 Ohio St. 303.
11 C.J. p 857 note 39.

18. S.C.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.
11 C.J. p 857 note 40.

19. R.I.—Gorham v. Robinson, 186 A. 832.

20. Ind.—Taylor v. State, 80 N.E. 849, 168 Ind. 294.
11 C.J. p 857 note 41.

21. N.Y.—People v. Leask, 6 Daly 517, affirmed 67 N.Y. 521.
11 C.J. p 858 note 42.

Expiration of term of office. Election or appointment of a clerk of court for a specified term does not vest in him an absolute tenure for such term, but his term is subject to be cut down by a change in the law and is subject to the condition that he conduct his office properly.²² A clerk's term of office may expire by death, resignation, or removal, as well as by the expiration of the statutory period for which he was elected.²³

One duly appointed clerk of a county court remains the de jure clerk thereof despite the enactment of an invalid statute purporting to abolish such court and an attempted appointment of another as clerk of the court which was to replace such county court under the terms of the invalid statute.²⁴

b. Vacancy

- (1) In general
- (2) Existence of vacancy
- (3) The commission
- (4) Appointment to fill future vacancy

(1) In General

In the absence of provisions of organic law regulating such matters, the legislature may prescribe the method of filling vacancies in the office of clerk of court and the term. Vacancies should be filled in the manner prescribed by law.

In the absence of a constitutional provision on the subject, the legislature may prescribe the method of filling a vacancy in the office of clerk of court,²⁵ and a vacancy in the office of clerk of court must be filled in the manner prescribed by law.²⁶ Sometimes it is required to be filled by election²⁷ and sometimes by appointment,²⁸ and no matter what method is prescribed the court or judge usually has power, both under statute and otherwise, to appoint a clerk pro tempore to perform the duties of the office until the vacancy can be regularly filled,²⁹ or he may exercise the duties

of the office himself until an appointment to fill the vacancy is made.³⁰ A statute authorizing the court to make a temporary appointment until the office can be filled by election is within the power of the legislature.³¹ There is authority, both statutory and otherwise, for the appointment of a clerk pro tempore on the disqualification of the regular clerk;³² and where the same person is clerk of two courts a statute of this kind applies in the event of his disqualification in either or both capacities.³³ Where it appears that a certain person acted as clerk pro tempore, the presumption is that he was appointed under the circumstances and in the manner provided for by statute;³⁴ but where, although the case is one making such an appointment necessary to the validity of the proceedings in question, the record is silent, such silence of the record on that point indicates that one was not appointed rather than that one was.³⁵ The power of a clerk pro tempore necessarily ceases when the clerk resumes his duty; and without a reappointment the clerk pro tempore cannot act as such in the absence of the clerk.³⁶

Power of legislature to provide for election. Where under the state constitution a clerk must be elected by the voters of the county, if the constitution is silent as to elections to fill vacancies the legislature may provide by law for such election.³⁷

Appeal from appointment. The appointment by a court of a clerk to fill a vacancy is an executive and not a judicial act, so that neither writ of error nor appeal lies to review the order of appointment.³⁸

Term of one chosen to fill vacancy. In the absence of any constitutional provision on the subject, the legislature may prescribe the term of one appointed or elected to fill a vacancy in such office,³⁹ although where the constitution fixes the

22. Pa.—Commonwealth v. Wehr, 17 Pa. Dist. & Co. 689.

23. N.J.—County v. Lee, 70 A. 925, 76 N.J. Law 327.
11 C.J. p 859 note 54.

24. Wis.—Clausen v. Fond du Lac County, 170 N.W. 287.

25. S.C.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.

26. Miss.—Brady v. Howe, 50 Miss. 607.

N.C.—Rodwell v. Rowland, 50 S.E. 319, 137 N.C. 617—White v. Murray, 35 S.E. 256, 126 N.C. 153.

S.C.—Reister v. Hemphill, 2 S.C. 325.

27. Ky.—Loran v. Webb, 82 Ky. 246, 6 Ky. L. 233.

Md.—Wells v. Munroe, 38 A. 987, 86 Md. 443.

Mass.—Atty.-Gen. v. Campbell, 78 N. E. 133, 191 Mass. 497.

11 C.J. p 852 note 69.

28. Tex.—Carolan v. McDonald, 15 Tex. 327.

11 C.J. p 852 note 70.

29. Fla.—State v. Givens, 37 So. 308, 48 Fla. 165.

11 C.J. p 852 note 71.

30. S.C.—State v. Coleman, 32 S.E. 406, 54 S.C. 282.

31. N.C.—White v. Murray, 35 S.E. 256, 126 N.C. 153.

32. Miss.—Ex p. Lehman, 60 Miss. 967.

Mo.—State v. Sheppard, 91 S.W. 477, 192 Mo. 497.

Tex.—Goodman v. Schwind, Civ.App.,

186 S.W. 282—Hendricks v. Huffmeyer, Civ.App., 27 S.W. 777.

11 C.J. p 853 note 74.

33. Tex.—Goodman v. Schwind, Civ. App., 186 S.W. 282.

11 C.J. p 853 note 75.

34. Tex.—Hendricks v. Huffmeyer, Civ.App., 27 S.W. 777.

35. Tex.—Goodman v. Schwind, Civ. App., 186 S.W. 282.

11 C.J. p 853 note 77.

36. W.Va.—Taney v. Woodmansee, 23 W.Va. 709.

37. S.C.—Reister v. Hemphill, 2 S.C. 325.

38. Ky.—Taylor v. Com., 3 J.J. Marsh. 401.

39. Ohio.—State v. Neibling, 6 Ohio St. 40.

term of one elected to fill a vacancy, a statute purporting to vary such term is invalid.⁴⁰ Under some statutes, such person is entitled to serve a full term,⁴¹ in others until the next general election,⁴² or until the office is filled in another manner provided by statute,⁴³ while under others he is entitled to serve out the unexpired term of his predecessor.⁴⁴ Under a statute providing that on a vacancy in the office of clerk, the deputy shall serve until a new clerk shall be elected or appointed, the deputy's authority terminates on the election or appointment of another person to the office.⁴⁵

Right of pro tem appointee to hold office during good behavior. It is held that a person appointed clerk pro tempore cannot avail himself of a constitutional provision entitling a clerk to hold his office during good behavior;⁴⁶ but there is authority to the contrary where the appointee qualifies as a regular clerk.⁴⁷

(2) Existence of Vacancy

An appointment or election to fill a vacancy presupposes its existence, from whatever cause, and vacancies may arise inter alia, from the death, removal, or suspension of the incumbent of the office of clerk of court.

In order to justify a new election or appointment it is, of course, essential that a vacancy exist,⁴⁸ whether arising from the clerk's resignation or removal,⁴⁹ from his death,⁵⁰ from a failure to elect a successor to the incumbent,⁵¹ or from other cause.⁵²

Where the office of clerk of court is to be filled by general election, and where pending the next

general election a new court is created, there occurs a vacancy in the office of clerk of such court which may properly be filled by appointment of an incumbent to hold until the next general election, and the term of the clerk to be chosen by election does not begin to run until the time of such general election.⁵³

Failure to give bond. It has been held that a clerk of court's failure to qualify by giving the required bond forfeits his right to office so as to create a vacancy permitting selection of another for the office,⁵⁴ although the office cannot be declared vacant, so as to justify appointment of another, for failure of the incumbent to give bond within the time stipulated by statute where such failure arises from direction of the judge.⁵⁵ There is also authority to the effect that, in the absence of a valid⁵⁶ statutory provision to that effect and covering the clerkship in question,⁵⁷ the failure of a clerk to qualify by giving the required bond does not per se operate to vacate the office.⁵⁸

On suspension of the clerk, there is ordinarily a vacancy which may be filled by appointment for the term of such suspension.⁵⁹

(3) The Commission

An appointment to fill a vacancy in the office of clerk of court is ordinarily complete without issuance of a commission.

Unless the issuance of a commission is made by law a necessary part of the appointment of a clerk to fill a vacancy, the appointment is complete when

40. S.C.—Cannon v. Sligh, 169 S.E. 712, 170 S.C. 45.

41. N.C.—Davis v. Moss, 80 N.C. 141.

11 C.J. p 853 note 44.

42. Iowa.—State v. Brown, 123 N.W. 779, 144 Iowa 739.

11 C.J. p 853 note 45.

43. Iowa.—State ex rel. Ingram v. Larson, 275 N.W. 566.

44. Ohio.—Harte v. Bode, 7 Ohio S. & C.P. 74, 4 Ohio N.P. 421.

11 C.J. p 853 note 46.

45. N.Y.—People v. Snedeker, 14 N. Y. 52—People v. Fisher, 24 Wend. 215.

46. Tenn.—State v. Turk, Mart. & Y. 287.

47. Ky.—Stonestreet v. Harrison, 5 Litt. 161.

48. Iowa.—State v. Brown, 123 N.W. 779, 144 Iowa 739.

11 C.J. p 853 note 81.

49. Resignation pending charges

(1) In Louisiana, where, pending charges against him and after the

appointment of a clerk pro tem., the clerk resigns, a vacancy exists.—Ruddock v. Mallory, 14 La. Ann. 314.

(2) But the contrary has been held in Missouri.—State v. Blakemore, 15 S.W. 960, 104 Mo. 340, reversing 40 Mo. App. 406.

Pending appeal from order of removal no vacancy exists.—Ex p. Thatcher, 7 Ill. 167.

50. Ohio.—State ex rel. Kopp v. Blackburn, 8 N.E.2d 434, 132 Ohio St. 421.

11 C.J. p 853 note 85.

Death after qualification

Where a person elected to the office of clerk of court dies after he has qualified but before commencement of the term to which he has been elected, and where governing statutes provide that an incumbent shall hold office until his successor is elected and qualified, there is a vacancy in the office which may be filled by appointment.—State ex rel. Kopp v. Blackburn, 8 N.E.2d 434, 132 Ohio St. 421.

51. Mont.—State v. Foster, 104 P. 860, 39 Mont. 583.

11 C.J. p 853 note 86.

52. S.D.—Driscoll v. Jones, 44 N.W. 726, 1 S.D. 8.

11 C.J. p 853 note 87.

53. Fla.—In re Advisory Opinion to Governor, 114 So. 889, 94 Fla. 986.

54. La.—State v. Hargis, 154 So. 628, 179 La. 628.

55. Ky.—Commonwealth v. Flatt, 292 S.W. 785, 219 Ky. 185.

56. Md.—Dowling v. Smith, 9 Md. 242.

11 C.J. p 853 note 88.

57. Cal.—Rowe v. Rose, 148 P. 535, 26 Cal. App. 744.

11 C.J. p 853 note 89.

58. La.—State v. Peck, 30 La. Ann. 280.

N.C.—Buckman v. Beaufort, 80 N.C. 121—Hunter v. Routledge, 51 N.C. 216.

59. Okl.—Smith v. State, 166 P. 463, 13 Okl. Cr. 619.

the choice is made.⁶⁰ When a commission or certificate is issued or given, no great formality therein is required.⁶¹

(4) Appointment to Fill Future Vacancy

A present appointment to fill a future vacancy has been upheld.

An appointment to fill a vacancy sure to occur in the office of clerk, made by the person or body empowered to fill such vacancy, is a valid appointment vesting the title to the office in the appointee, in the absence of any law declaring the contrary.⁶²

c. Holding Over

The right of an incumbent of the office of clerk of court to hold over depends on applicable provisions of law and is ordinarily accorded until qualification of his successor.

Under some statutes and constitutions the incumbent is entitled to hold over after the expiration of his term until his successor qualifies,⁶³ although it has been said that this would be true even in the absence of statute, if the constitution contains no express or implied prohibition.⁶⁴ A clerk merely appointed to fill a vacancy for an unexpired term is not an incumbent within the meaning of the rule.⁶⁵ In a few jurisdictions a clerk is not entitled to hold over, but his powers expire with his term of office.⁶⁶

Under constitutional provisions to the effect that, except in cases of impeachment or suspension, officers shall continue to discharge the duties of their offices until their successors shall be inducted into office, an acting clerk of court who has failed to qualify as de jure clerk and whose resignation has been accepted necessarily continues in office pending induction of his successor.⁶⁷

Under statutes providing that an incumbent shall hold office until his successor is elected and qualified, or is elected or appointed and qualified, where a newly elected clerk qualifies and then dies before

commencement of his term, and where another is appointed in the place of decedent, the original incumbent is not entitled to hold over.⁶⁸

§ 8. Resignation, Suspension, and Removal

- a. Resignation
- b. Suspension
- c. Removal

a. Resignation

Clerks of courts may resign and the resignation need not be in any set form to become effective, although it is not complete until accepted.

A clerk of court has the same right to resign as other public officers have, and this right is not affected by the fact that charges are pending against him.⁶⁹ Where the judge of the court is empowered to fill the vacancy, the clerk's resignation is properly tendered to him;⁷⁰ and the resignation need not be in any set form, but is sufficient if it shows a clear intention to relinquish the office.⁷¹

A resignation is not complete until the tender thereof has been accepted with the knowledge and consent of the resigning incumbent;⁷² and, where there is not only no acceptance, but the incumbent continues to perform the duties and receive the fees of the office, there is no resignation.⁷³

An unconditional resignation, to take effect immediately, cannot be withdrawn, even with the consent of the power authorized to accept it; and it does not seem to be material that the resignation has not been accepted.⁷⁴ A contingent or a prospective resignation, however, can be withdrawn at any time before it is accepted.⁷⁵

b. Suspension

A clerk of court may be suspended for cause, such as misconduct in office.

In some jurisdictions provision is made for the suspension of a clerk of court pending the trial of charges against him.⁷⁶ He may not, however,

60. La.—State v. Morgan, 12 La. Ann. 712.

11 C.J. p 853 note 91.

61. Ind.—Brower v. O'Brien, 2 Ind. 423.

Va.—Dew v. Judges Sweet Springs Dist. Ct., 3 Hen. & M. 1, 13 Va. 1, 3 Am.D. 639.

11 C.J. p 853 note 92.

62. Minn.—State v. O'Leary, 66 N. W. 264, 64 Minn. 207.

63. Mo.—State v. Jenkins, 43 Mo. 261.

11 C.J. p 858 note 50.

64. Mont.—State v. Foster, 104 P. 860, 39 Mont. 533.

65. Iowa.—State v. Brown, 123 N.W. 779, 144 Iowa 739.

66. Mont.—State v. Foster, 104 P. 860, 39 Mont. 533.
11 C.J. p 858 note 53.

67. La.—State v. Hargis, 154 So. 628, 179 La. 623.

68. Ohio.—State ex rel. Kopp v. Blackburn, 3 N.E.2d 434, 132 Ohio St. 421.

69. La.—Ruddock v. Mallory, 14 La. Ann. 314.

Mo.—State v. Blakemore, 15 S.W. 960, 104 Mo. 340.

70. La.—State v. Morgan, 12 La. Ann. 712.

71. Va.—Smith v. Dyer, 1 Call 562, 5 Va. 562.

11 C.J. p 859 note 58.

72. Mo.—State v. Boecker, 56 Mo. 17.

73. Pa.—Steel v. Commonwealth, 18 Pa. 451.

74. Ala.—State v. Fowler, 48 So. 985, 160 Ala. 136, 135 Am.S.R. 91.

75. Mo.—State v. Boecker, 56 Mo. 17.

11 C.J. p 859 note 62.

76. Ark.—Coit v. State, 28 Ark. 417.
Iowa.—Battley v. Wheeler, 123 N.W. 737, 145 Iowa 16.

Mo.—State v. Schofield, 41 Mo. 38.
11 C.J. p 859 note 63.

be removed for this cause. The proper procedure is to appoint a clerk pro tem. to perform the duties of the clerk until the charges against him are heard and determined.⁷⁷ In some jurisdictions, the court has no authority to suspend its clerk except on conviction on an indictment for misconduct or misdemeanor in office,⁷⁸ and it has been held that a court clerk may not be suspended for misconduct committed in another office before commencement of his term as clerk, even though he is under indictment for such misconduct.⁷⁹

Provided the jurisdictional facts exist, it is not essential to the validity of an order suspending a clerk that the facts justifying it should be recited therein;⁸⁰ but in some jurisdictions the evidence must be placed on record in such a manner as to show that the action of the court is based on tangible premises.⁸¹

c. Removal

- (1) In general
- (2) Grounds
- (3) Procedure
- (4) Review

(1) In General

Clerks of courts are subject to removal within the limits, if any, fixed by constitutional and statutory provisions.

Where there is no provision, either constitutional or statutory, as to a clerk's tenure of office, or as to removing him from office, it is held that the authority to remove is a necessary attribute and within the discretion of the appointing power;⁸² but usually the power of removal is regulated by constitution or by statute, and, where such is the case, it can be exercised only within the prescribed limits,⁸³ as where the power of removal is limited to removal for cause,⁸⁴ on notice,⁸⁵ and after a trial

on charges.⁸⁶

It has been held that a provision of a city charter to the effect that the appointing authority shall have power of removal does not apply to a clerk of a police court because he is not a city officer.⁸⁷

A board for trying contested elections has no authority to declare the office of clerk of the courts vacant.⁸⁸

Removal by legislature. The legislature cannot, by statute, deprive a clerk of his office, where the office itself continues to exist.⁸⁹ However, a constitutional provision relating to the time and place of election and to the term of office of clerks of courts is not infringed by a statute abolishing a court, but retaining the clerk in office for the term for which he was elected and assigning to him, for that period and no longer, the right to execute his old duties in the new tribunal to which the jurisdiction of the abolished court has been transferred.⁹⁰ In some jurisdictions the senate may remove a clerk from office by impeachment.⁹¹

Civil service. Clerks of courts may⁹² or may not⁹³ come within the protection of particular civil service regulations as respects the right of removal.

Superannuation. A clerk of court has been held a public officer and not an employee within the meaning of statutes providing for compulsory retirement of employees for old age.⁹⁴

(2) Grounds

The grounds for removal specified in controlling statutory or constitutional provisions are exclusive. Generally speaking a clerk of court is removable for misconduct affecting his office.

Where express provision is made for the removal of clerks, the power of removal can be exercised for no causes other than those specified.⁹⁵ It

77. Mo.—State v. Sheppard, 91 S.W. 477, 192 Mo. 497.
11 C.J. p 859 note 64.

78. Miss.—Ex p. Lehman, 60 Miss. 967.

79. Ark.—Montgomery v. Nowell, 40 S.W.2d 418, 183 Ark. 1116.

80. Iowa.—Battley v. Wheeler, 123 N.W. 737, 145 Iowa 16.

81. Ark.—Coit v. State, 28 Ark. 417.
11 C.J. p 859 note 67.

82. U.S.—Ex p. Hennen, La., 13 Pet. 230, 10 L.Ed. 138.

83. N.Y.—In re Theofel, 258 N.Y.S. 61, 143 Misc. 666.

N.C.—Stephens v. McDowell, 181 S.E. 629, 208 N.C. 555.

11 C.J. p 860 notes 71, 72.

84. N.Y.—In re Theofel, 258 N.Y.S. 61, 143 Misc. 666.

85. N.C.—Stephens v. Dowell, 181 S.E. 629, 208 N.C. 555.

86. N.Y.—In re Theofel, 258 N.Y.S. 61, 143 Misc. 666.

87. Cal.—Rowe v. Rose, 148 P. 535, 26 Cal.App. 744.

88. Ky.—Leeman v. Hinton, 1 Duv. 37.

89. N.C.—Wilson v. Jordan, 33 S.E. 139, 124 N.C. 683.

90. Pa.—Commonwealth v. Kline, 2 Pa.L.J. 323.

91. S.C.—State v. O'Driscoll, 7 S.C. Law 713.

92. N.J.—Wilson v. District Court of First Judicial District of Monmouth County, 107 A. 589, 93 N.J.

Law 103, affirmed 111 A. 927, 95 N.J.Law 265.

Without fixed tenure

N.J.—Wilson v. District Court of First Judicial Dist. of Monmouth County, 107 A. 589, 93 N.J.Law 103, affirmed 111 A. 927, 95 N.J.Law 265.

93. Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

Regulation embracing "state officers"
Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

94. Mass.—O'Connell v. Retirement Board of City of Boston, 150 N.E. 2, 254 Mass. 404.

95. Ill.—People v. Mobley, 2 Ill. 215.
Ky.—Commonwealth v. Barry, Hard. 229.

seems that, where the statute authorizes removal for breach of good behavior, the clerk may be removed for misbehavior which has no connection with his official duties,⁹⁶ provided the facts are such as to induce a conviction that it would be unsafe for the public if the clerk should continue to discharge his duties;⁹⁷ but, where the grounds of removal are limited to misconduct in office, the misconduct must be of a kind affecting the performance of his official duties,⁹⁸ such as the making of false entries⁹⁹ or certificates,¹ making or permitting alterations or erasures in papers in his custody,² the exaction of illegal fees,³ misdating his file mark,⁴ the misappropriation of funds,⁵ or a willful neglect or refusal to perform duties imposed on him by law.⁶ Under statutes authorizing removal of clerks for "cause," the ground of removal must be something causing prejudice to public rights or seriously interfering with the discipline of the office or department;⁷ where the ground of removal is specified as "sufficient cause," the statute contemplates removal for a cause relating to and affecting the administration of the office of clerk of the court from which it is sought to remove defendant and not one relating to his official duties in another court;⁸ and, where the ground is "moral turpitude," a clerk of court may be removed for retaining for his individual benefit interest on funds intrusted to his official custody.⁹

Under a constitutional provision for forfeiture of office where an officer with power of appointment of another shall appoint one related to him by "affinity," a clerk of court's wife is so far his "affinity" as to warrant forfeiture of his office where he appoints her a deputy clerk.¹⁰

Necessity for corrupt motive. If the act charged against a clerk is one which per se amounts to a breach of good behavior, he will be removed without regard to the motive that actuated him;¹¹ but, if the act is of a nature which, according to circumstances, may or may not constitute misconduct, the clerk will not be removed, where he appears to have acted in good faith and without any improper motive.¹²

(3) Procedure

The procedure must comply with applicable statutory or constitutional requirements, which usually require charges and an opportunity to be heard.

Where the procedure for the removal of a clerk is pointed out by statute, it must be followed.¹³ Usually the proceeding is required to be prosecuted in the name of the state,¹⁴ on due notice to defendant,¹⁵ and with an opportunity to be heard.¹⁶

The general rules of pleading control,¹⁷ and the acts charged must be specifically alleged¹⁸ in writing,¹⁹ supported by affidavit,²⁰ and proved as charged.²¹ New charges cannot be added by

Mo.—State v. Sheppard, 91 S.W. 477, 192 Mo. 497.

96. La.—State v. Bell, 2 Mart.N.S. 683.

11 C.J. p 860 note 79.

97. La.—State v. Kellam, 4 La. 494. 11 C.J. p 860 note 80.

98. Ky.—Commonwealth v. Rodes, 1 Dana 595.

Mo.—State v. Sheppard, 91 S.W. 477, 192 Mo. 497.

11 C.J. p 860 note 81.

99. Ky.—Commonwealth v. Rodes, 6 B.Mon. 171.

11 C.J. p 860 note 82.

1. Ky.—Commonwealth v. Chambers, 1 J.J.Marsh. 108.

2. Ky.—Commonwealth v. Barry, Hard. 229.

11 C.J. p 860 note 84.

3. Ky.—Commonwealth v. Rodes, 6 B.Mon. 171.

4. Tex.—Howard v. Gulf, etc., R. Co., Civ.App., 135 S.W. 707.

11 C.J. p 860 note 86.

5. Ky.—Commonwealth v. Rodes, 6 B.Mon. 171.

11 C.J. p 860 note 87.

6. Ark.—State v. Watson, 38 Ark. 96.

11 C.J. p 860 note 88.

7. N.Y.—In re Theofel, 253 N.Y.S. 61, 143 Misc. 666.

8. Ga.—Wallace v. State, 128 S.E. 759, 160 Ga. 570, answers to certified questions conformed to 129 S.E. 299, 34 Ga.App. 281.

9. Kan.—State v. Anderson, 230 P. 315, 117 Kan. 117, affirmed 232 P. 238, 117 Kan. 540.

10. Mo.—State ex inf. Norman v. Ellis, 28 S.W.2d 363, 325 Mo. 154.

11. Ky.—Commonwealth v. Chambers, 1 J.J.Marsh. 108.

11 C.J. p 861 note 89.

12. Ky.—Commonwealth v. Chinn, 62 S.W. 7, 685, 110 Ky. 527, 22 Ky. L. 1921.

11 C.J. p 861 note 90.

13. N.C.—State v. Norman, 82 N.C. 687.

11 C.J. p 861 note 91.

14. Ala.—Callahan v. State, 2 Stew. & P. 379.

11 C.J. p 861 note 92.

15. Ky.—Commonwealth v. Rodes, 1 Dana 595.

11 C.J. p 861 note 93.

16. N.J.—Corcoran v. McCarthy, 149 A. 765, 8 N.J.Misc. 281.

17. Ga.—Wallace v. State, 128 S.E. 759, 160 Ga. 570, answers to certi-

fied questions conformed to 129 S.E. 299, 34 Ga.App. 281.

Kan.—State v. Fishtack, 171 P. 348, 102 Kan. 178.

Allegations good on general demurrer

Ga.—Wallace v. State, 128 S.E. 759, 160 Ga. 570, answers to certified questions conformed to 129 S.E. 299, 34 Ga.App. 281.

Kan.—State v. Fishback, 171 P. 348, 102 Kan. 178.

18. La.—State v. Winthrop, 2 Mart. N.S. 530.

11 C.J. p 861 note 94.

Allegations held sufficient

Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S.E. 759, 160 Ga. 570.

19. Ala.—Ledbetter v. State, 10 Ala. 241.

Iowa.—Battey v. Wheeler, 123 N.W. 737, 145 Iowa 16.

20. Ky.—Commonwealth v. Rodes, 1 Dana 595.

11 C.J. p 861 note 96.

21. Ala.—Ledbetter v. State, 10 Ala. 241.

Ky.—Commonwealth v. Arnold, 3 Litt. 309.

11 C.J. p 861 note 97.

amendment;²² nor will a supplemental information be allowed, where it makes a charge not covered by an agreement of the parties relative to the taking of proof.²³

A clerk prosecuted for breach of good behavior will be required to produce any books and papers belonging to his office which may be necessary as evidence.²⁴

Other holdings, under various statutes, are that the attorney general may institute proceedings without first obtaining leave of court;²⁵ that the petition must state the name of the accuser;²⁶ that, where the charges are denied by a sufficient answer, a time must be set for the hearing;²⁷ that default need not be proved by conviction on indictment where the clerk's default is apparent from his admission in court;²⁸ and that, where in a proceeding to remove a clerk the jury has found the facts adversely to defendant, the judge has no discretion in determining whether the facts as found by the jury constitute sufficient cause for removing the clerk,²⁹ although, where the jury find that sufficient cause for removal exists, it is discretionary with the judge whether such finding shall be enforced or suspended.³⁰ Evidence of the conduct of defendant as clerk of a city court has been held irrelevant and immaterial in a proceeding to remove him as clerk of a superior court.³¹ Bench dockets kept by defendant clerk have been held admissible.³² The general rules control as respects the sufficiency of the evidence.³³ Where the proceeding is summary in its nature, the judgment must contain all the facts necessary to show juris-

diction in the court.³⁴ The judges must act jointly,³⁵ and a majority must concur, as to the cause for which the clerk is to be removed, as well as in the propriety of a sentence of removal.³⁶

A clerk may not be convicted on counts of a petition charging him with acts not forming ground for removal in the particular proceeding involved.³⁷

A finding that defendant clerk is guilty of any one of several charges is sufficient to authorize his removal, although other counts of the petition may be unsustained by the evidence.³⁸

Where the power of removal is incident to the power of appointment, it may be exercised either by notice to the officer or by the mere appointment of a successor,³⁹ although under some provisions of law a clerk or register may be removed by the appointive power only for cause to be entered on the minutes.⁴⁰

(4) Review

The right of a clerk of court to review of an order for his removal depends on the statutory provisions in the particular jurisdiction.

A judgment removing a clerk from office may usually be reviewed on writ of error,⁴¹ although an appeal in the nature of a writ of error does not lie under some statutes.⁴² It has been held that an order denying a petition to remove a clerk is not appealable;⁴³ and that, where a clerk is removed from office by the senate on impeachment, the courts of law will not review the proceedings.⁴⁴ Where the case comes up on review the usual rules of appellate practice will apply.⁴⁵

22. Ky.—Commonwealth v. Rodes, 1 Dana 595.

23. Ky.—Com. v. Chinn, 62 S.W. 7, 685, 110 Ky. 527, 22 Ky.L. 1921. 11 C.J. p 861 note 99.

24. Ky.—Commonwealth v. Rodes, 1 Dana 595.

25. Ky.—Commonwealth v. Chinn, 62 S.W. 7, 685, 110 Ky. 527, 22 Ky.L. 1921, distinguishing Commonwealth v. Barry, Hard. 229.

26. Iowa.—Battay v. Wheeler, 123 N.W. 737, 145 Iowa 16.

27. N.Y.—Matter of DeMahaut, 59 N.Y.S. 353, 43 App.Div. 56.

28. Tenn.—Sevier v. Washington County, Peck 334—Hardin County Ct. v. Hardin, Peck 291.

29. Ga.—Wallace v. State, 128 S.E. 759, 160 Ga. 570, answers to certified questions conformed to 129 S. E. 299, 34 Ga.App. 281.

30. Ga.—Wallace v. State, supra.

31. Ga.—Wallace v. State, supra.

32. Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to

answers to certified questions 128 S.E. 759, 160 Ga. 570.

33. Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S.E. 759, 160 Ga. 570.

N.Y.—In re Theofel, 258 N.Y.S. 61, 143 Misc. 666.

Evidence held sufficient

Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S. E. 759, 160 Ga. 570.

N.Y.—In re Theofel, 258 N.Y.S. 61, 143 Misc. 666.

34. Ill.—Street v. Gallatin County, 1 Ill. 50.

Tenn.—Ragsdale v. State, 2 Swan 415.

11 C.J. p 861 note 8.

35. Hawaii.—Matter of Pringle, 22 Hawaii 557.

36. Ky.—Commonwealth v. Rodes, 1 Dana 595.

37. Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S.E. 759, 160 Ga. 570.

Misconduct in a different official capacity

Ga.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S. E. 759, 160 Ga. 570.

38. Ga.—Wallace v. State, 128 S.E. 759, 160 Ga. 570, answers to certified questions conformed to 129 S. E. 299, 34 Ga.App. 281.

39. U.S.—Ex p. Hehnen, La., 13 Pet. 230, 10 L.Ed. 138.

40. Ala.—Batson v. State, 89 So. 500, 206 Ala. 317.

41. Ala.—Callahan v. State, 2 Stew. & P. 379.

11 C.J. p 861 note 13.

42. Tenn.—Ragsdale v. State, 2 Swan 416.

11 C.J. p 862 note 14.

43. Wis.—In re Aldrich, 90 N.W. 173, 114 Wis. 308.

11 C.J. p 862 note 16.

44. S.C.—State v. O'Driscoll, 7 S.C. L. 713.

45. Harmless error

In suit for removal of clerk of su-

II. COMPENSATION AND FEES

§ 9. In General

The compensation of a clerk of court, by way of salary or fee, is ordinarily such as may be expressly stipulated by statute, and, in the absence of statutory provision, the clerk may be obligated to perform the duties of his office, or part of them, without compensation.

The compensation of clerks of courts is ordinarily regulated by statutory or constitutional provision,⁴⁶ the legislature may fix their compensation,

by way of salary or fees, within constitutional limitations,⁴⁷ and a clerk is entitled to the compensation provided by law;⁴⁸ but a clerk of a court is entitled to such compensation only as is specifically provided for by statute,⁴⁹ and, where the statute so provides, such as is first approved by the proper officials.⁵⁰ He takes his office cum onere and must perform gratuitously those official duties for which no compensation is provided by law,⁵¹ even

perior court, refusal to allow defendant to make statement was harmless to him, where he voluntarily took witness stand and gave testimony under oath.—Wallace v. State, 129 S.E. 299, 34 Ga.App. 281, conforming to answers to certified questions 128 S.E. 759, 160 Ga. 570.

46. Ala.—In re Opinions of Justices, 143 So. 345, 225 Ala. 359.

Mass.—Campbell v. City of Boston, 195 N.E. 802.

Compensation as "county officer"

Ala.—In re Opinions of Justices, 143 So. 345, 225 Ala. 359.

Cal.—Boyarsky v. Ross, 11 P.2d 641, 123 Cal.App. 267.

Statutory and not contractual right

As respects city's right to deduct from salary of clerk of superior court for public welfare, obligation to pay salary rested on city by virtue of statute, and not by virtue of express or implied contract.—Campbell v. City of Boston, Mass., 195 N.E. 802.

Pro rata fee

Under Rev.St. § 2687, Comp.St.1916 § 5394, and Act June 29, 1906, a clerk of a court is not entitled to the full maximum sum allowed for fees collected in naturalization proceedings in any one fiscal year, received during six months of such year, but is only entitled to retain his pro rata share of such maximum sum for the period during which such fees were collected.—Darling v. United States, 51 Ct.Cl. 100.

Validity of appointment

"General clerk of Supreme Court" for Kings County appointed under L.1878 c 21, by justices of supreme court residing in that county, is entitled to salary of such position as against one appointed by county clerk with same title.—Devoy v. Craig, 131 N.E. 884, 231 N.Y. 186, affirming 187 N.Y.S. 478, 196 App.Div. 567.

47. Office created by constitution

Ark.—Washington County v. Davis, 258 S.W. 324, 162 Ark. 335.

43. U.S.—Larabee Flour Mills Co. v. Nee, C.C.A.Mo., 81 F.2d 623, remanding cause, D.C., 12 F.Supp. 395.

Cal.—Simpson v. Payne, 251 P. 324, 79 Cal.App. 780.

Ky.—Taylor, for Use and Benefit of Laurel County, v. Jones, 69 S.W.2d 372, 253 Ky. 285.

Mass.—Campbell v. City of Boston, 186 N.E. 577, 283 Mass. 365.

S.D.—Minnehaha County v. Foster, 249 N.W. 688, 61 S.D. 406.

Tex.—McCormick v. Sheppard, 86 S.W.2d 213, 126 Tex. 25.

Fees under statute later declared unconstitutional

Tex.—McCormick v. Sheppard, 86 S.W.2d 213, 126 Tex. 25.

Deductions

In action by county court clerk for part of salary where city introduced pay roll sheet showing deduction of day's pay for relief purposes by order of mayor, he is entitled to full salary as matter of law where jury found that such entries were made after he signed pay roll.—Campbell v. City of Boston, 186 N.E. 577, 283 Mass. 365.

Habeas corpus proceeding is independent of offense charged, and there is no statutory authority for making payment of fee allowed district clerk for entering judgment therein depend on final disposition of case.—McCormick v. Sheppard, 86 S.W.2d 213, 126 Tex. 25.

49. Ala.—Swindle v. Crocker, 115 So. 252, 217 Ala. 199.

Ark.—Swearingen v. State, 254 S.W. 537, 160 Ark. 326.

Fla.—State ex rel. Atlantic Peninsular Holding Co., 164 So. 128, 121 Fla. 417.

Idaho.—Williams v. Board of Com'rs of Benewah County, 282 P. 867, 48 Idaho 462.

Ky.—Baker v. Tedders, 52 S.W.2d 715, 244 Ky. 736—Logan County v. Russell, 262 S.W. 953, 203 Ky. 592—Greene v. Smither, 202 S.W. 485, 173 Ky. 742.

Mo.—State ex rel. Jacobsmeier v. Thatcher, 92 S.W.2d 640, 338 Mo. 622.

Neb.—Buffalo County v. Bowker, 197 N.W. 620, 111 Neb. 762.

Tenn.—State, for Use of Sullivan County, v. O'Dell, 84 S.W.2d 577, 169 Tenn. 248—Hickman v. Wright, 210 S.W. 447, 141 Tenn. 412.

Tex.—McCormick v. Sheppard, 86 S.

W.2d 213, 126 Tex. 25—Texas Brewing Co. v. State, Civ.App., 195 S.W. 211.

11 C.J. p 862 note 19.

"It is well settled that a county court clerk or other public officials of a county cannot charge and collect fees of the county for services in any case except where such fees are specifically authorized by statute."—Logan County v. Russell, 262 S.W. 953, 954, 203 Ky. 592.

Reimbursement for deficiency

Under Comp.St.1922 § 2369 the compensation of the clerk of the district court should be figured on a yearly basis, and not on a term basis, and such clerk is not entitled to retain an excess of fees earned by him in "any one year above maximum amount allowed per annum, to make up for a deficiency in amount of fees earned by him during preceding years of his term of office."—In re Koyen, 199 N.W. 1022, 112 Neb. 237—Buffalo County v. Bowker, 197 N.W. 620, 111 Neb. 762.

50. Idaho.—Williams v. Board of Com'rs of Benewah County, 282 P. 867, 48 Idaho 462.

Miss.—Tunica County v. Shannon, 132 So. 533, 160 Miss. 197, followed in 132 So. 535, suggestion of error overruled 133 So. 117.

Allowance by supervisors and not by court

Chancery court is without power to make allowance to chancery clerk for services rendered where such power rests solely within discretion of supervisors.—Tunica County v. Shannon, supra.

Exclusion from budget

Where final determination of salary of clerk of probate court rests with board of county commissioners, salary, not having been included in county budget, and not being "emergency or mandatory charge," cannot lawfully be paid.—Williams v. Board of Com'rs of Benewah County, 282 P. 867, 48 Idaho 462.

51. Ky.—Logan County v. Russell, 262 S.W. 953, 954, 203 Ky. 592.

11 C.J. p 862 note 20.

Undertaking to perform services without fees

"The county court clerk under-

though the constitution of the state provides that "no man's particular services shall be demanded without just compensation,"⁵² and, if he refuses, appropriate proceeding will lie to compel him to perform the services.⁵³ While the court cannot authorize the clerk to charge fees if there is no statute authorizing it,⁵⁴ yet a court can require service from a clerk which he is bound to perform, although there is no statutory fee for the service,⁵⁵ and, on the performance of such service, the clerk is entitled to compensation, although he is unable to point to the clause of a statute authorizing compensation for such services.⁵⁶ Sometimes provision is made by statute for compensation for services "not otherwise provided for,"⁵⁷ and various provisions for special and extra compensation are to be met with, as is shown in § 23; but, in the absence of any such provision, a clerk is not entitled to any greater compensation than that provided by the statute,⁵⁸ and it is against public policy to allow a clerk to contract with parties for greater fees than those provided by law,⁵⁹ although a party may be bound by an implied contract to pay clerk's fees.⁶⁰ Where a gross sum is provided as the compensation of a clerk for his services in a certain proceeding, he is not entitled to charge other fees for specific services involved in such proceedings.⁶¹ A statute making the clerk's fees in each proceeding payable in a lump sum and chargeable in that way, instead of in itemized detail, as formerly, does not change existing law making the fees payable to the county and not to the clerk individually.⁶²

It has been held, under particular statutes, that the clerk in office at the time a judgment is rendered is entitled to all the fees provided in respect thereof and that, where there is a change of clerks, there should be no division of fees as between the old and new clerks.⁶³

Under some statutes the fixing of compensation for a clerk of court may rest in the discretion of designated officials, subject to control by the courts for abuse of discretion,⁶⁴ or may be based on the population of the county wherein the court lies.⁶⁵

Where no compensation provided except fees. Where the statute makes no provision for the compensation of a clerk except the fees he is to receive, he can receive no other pay for official services except that which may be classed as "fees."⁶⁶

§ 10. Constitutional and Statutory Provisions

Statutes regulating compensation of clerks of court should be strictly but reasonably construed in the light of applicable constitutional provisions, and will ordinarily be denied a retroactive effect.

Statutes authorizing the clerk to collect fees for his services are strictly construed and will not be extended beyond their letter;⁶⁷ and more especially is this true in the case of special statutory enactments.⁶⁸ A general provision covering services not specially provided for will not embrace services for the state or a county, unless they are expressly named in the statute or necessarily implied from the language thereof;⁶⁹ nor will statutes allowing the clerk certain fees be construed retroactively, unless such is the clear intention of the legisla-

takes to perform certain duties for which no fees are specifically provided by statutes when he assumes the duties of the office, accepting for all such services the compensations as allowed by law for other services specifically mentioned in the statutes."—*Logan County v. Russell*, supra.

52. Ind.—*Falkenburgh v. Jones*, 5 Ind. 296.

53. Neb.—*State v. Several Parcels of Land*, 117 N.W. 450, 32 Neb. 51.

54. Ky.—*Logan County v. Russell*, 262 S.W. 953, 203 Ky. 592.
11 C.J. p 862 note 23.

Recovery of fees wrongfully allowed by fiscal court to clerk of county court may be had by county in direct proceeding for that purpose.—*Logan County v. Russell*, supra.

55. U.S.—*Alexander v. U. S.*, 43 Ct. Cl. 389.

56. U.S.—*U. S. v. Van Duzee*, Iowa,

11 S.Ct. 758, 140 U.S. 169, 35 L.Ed. 399.

11 C.J. p 863 note 25.

57. U.S.—*Anonymous*, C.C.Md., 1 F. Cas.No.472, Taney 453.

11 C.J. p 863 note 26.

58. U.S.—*U. S. v. Meigs*, 95 U.S. 748, 24 L.Ed. 578.

Tex.—*McLennan County v. Graves*, Civ.App., 62 S.W. 122.

Wis.—*St. Croix County v. Webster*, 87 N.W. 302, 111 Wis. 270.

59. Ky.—*Bates v. Foree*, 4 Bush 430.

11 C.J. p 863 note 29.

60. Ky.—*Shackelford v. Phillips*, 6 S.W. 419, 68 S.W. 441, 112 Ky. 563, 24 Ky.L. 154.

61. Ga.—*Macmurphy v. Dobbins*, 53 Ga. 294.

11 C.J. p 863 note 31.

62. Colo. — *Newitt v. Board of Com'rs of Chaffee County*, 249 P. 269, 80 Colo. 109.

63. Ky.—*Jones v. Howard*, 271 S.W. 1048, 208 Ky. 757.

64. Idaho.—*Huffaker v. Board of Com'rs of Bonneville County*, 35 P. 2d 260, 54 Idaho 715.

Clear abuse of discretion essential Idaho.—*Huffaker v. Board of Com'rs of Bonneville County*, 35 P.2d 260, 54 Idaho 715.

65. Mo.—*Perkins v. Burks*, 78 S.W. 2d 845, 336 Mo. 248, affirming, App., 64 S.W.2d 712, transferring, Sup., 61 S.W.2d 756.

Okl.—*Board of Com'rs of Oklahoma County v. Beaty*, 171 P. 34, 67 Okl. 281.

66. Ala.—*Troup v. Morgan County*, 19 So. 503, 109 Ala. 162.

Iowa.—*Palo Alto County v. Burlingame*, 32 N.W. 259, 71 Iowa 201.

11 C.J. p 863 note 32.

67. Ky.—*Elliott v. Com.*, 138 S.W. 300, 144 Ky. 335.

11 C.J. p 863 note 34.

68. Ala.—*Reese v. Cleburne County*, 35 So. 879, 139 Ala. 299.

11 C.J. p 863 note 35.

69. Ark.—*Cole v. White County*, 32 Ark. 45.

ture;⁷⁰ but, although statutes regulating the clerk's fees are to be strictly construed, they must also receive a reasonable construction;⁷¹ in case of ambiguity the construction placed on the statutes by the legislative and executive departments of the state will be given weight;⁷² and, where a word is used in its ordinary and generally accepted sense in some parts of the statute, it will not be deemed to have been used in a narrow and restricted sense in other parts of the same statute.⁷³ The well settled rule of statutory construction, which confines the meaning of additional and general descriptive words to the class to which the preceding specific words belong, is especially applicable in the construction of statutes under which clerks claim fees.⁷⁴ Where words have been erroneously employed in a statute providing for the clerk's fees and compensation, and the context affords the means of correction, the proper words will be deemed to be substituted.⁷⁵ Particular statutes in the various states relating to the compensation and fees of clerks of courts have been held to be amended⁷⁶ or to be repealed,⁷⁷ or not to be repealed,⁷⁸ or to be revived,⁷⁹ by subsequent statutes, or to be valid⁸⁰ or invalid.⁸¹ Also, certain statutes, rather

than others, have been held to govern the particular case,⁸² and some statutes have been held inapplicable to a clerk of the supreme court,⁸³ while others are deemed applicable to the clerks of courts of every county in the state.⁸⁴

On the admission of a territory to statehood, the federal fee bill which was in force in the territory is not brought over and put in force by the constitution of the new state, where it is inconsistent therewith and repugnant thereto and is locally inapplicable.⁸⁵

Time of taking effect. The time when statutes altering existing provisions for compensating clerks of court take effect depends on the terms of the statute or the constitution in the particular jurisdiction.⁸⁶

§ 11. Fees for Particular Services

The right of a clerk of court to fees for sundry particular services is ordinarily dependent on statutory authorization.

Under statute in many jurisdictions, clerks of court are entitled to particular fees for particular services,⁸⁷ such as services performed in connection with the jury,⁸⁸ although in the absence of

70. U.S.—Matthews v. U. S., 35 Ct. Cl. 595.

Tenn.—Sherrill v. Thomason, 238 S. W. 876, 145 Tenn. 499.

71. Va. — Martz v. Rockingham County, 69 S.E. 321, 111 Va. 445. 11 C.J. p 864 note 38.

Particular statutes construed

Ind.—Rauch v. Board of Com'rs of Marion County, 124 N.E. 704, 72 Ind.App. 412.

Miss.—Smith v. Chickasaw County, 125 So. 96, 156 Miss. 171, suggestions of error overruled 125 So. 705, 156 Miss. 171.

72. Kan.—Harrison v. Masonic Mut. Ben. Soc., 59 P. 266, 61 Kan. 134.

73. U.S.—U. S. v. Marsh, Fla., 106 F. 474, 45 C.C.A. 436. 11 C.J. p 864 note 40.

74. Ark. — Hempstead County v. Harkness, 84 S.W. 799, 73 Ark. 600. 11 C.J. p 864 note 42.

75. Okl. — Schaffer v. Muskogee County, 124 P. 1069, 33 Okl. 288. 11 C.J. p 864 note 44.

76. Ark.—Swearingen v. State, 254 S.W. 537, 160 Ark. 326.

77. Fla.—State ex rel. Atlantic Peninsular Holding Co. v. Butler, 164 So. 128, 121 Fla. 417.

S.D.—Hareid v. Risty, 178 N.W. 948, 43 S.D. 270.

W.Va.—McHenry v. Humes, 164 S.E. 501, 112 W.Va. 432.

11 C.J. p 864 note 45.

Implied repeal

S.D.—Hareid v. Risty, 178 N.W. 948, 43 S.D. 270.

W.Va.—McHenry v. Humes, 164 S.E. 501, 112 W.Va. 432.

78. U.S.—Loisel v. Mortimer, C.C.A. La., 277 F. 882.

Kan.—Wolff v. Rife, 38 P.2d 102, 140 Kan. 584—State v. Richardson, 284 P. 367, 129 Kan. 806.

11 C.J. p 864 note 46.

79. Mo.—State v. Auditor, 32 Mo. 222.

80. Ariz.—Berryman v. Bowers, 250 P. 361, 31 Ariz. 56.

Ark.—Washington County v. Davis, 258 S.W. 324, 162 Ark. 335.

Fla.—Flood v. State, 129 So. 861, 100 Fla. 70.

Ill.—People ex rel. Soble v. Gill, 193 N.E. 192, 358 Ill. 261.

Ky.—Herold v. Talbott, 88 S.W.2d 303, 261 Ky. 634.

Tenn.—Sherrill v. Thomason, 238 S. W. 876, 145 Tenn. 499.

W.Va.—McHenry v. Humes, 164 S.E. 501, 112 W.Va. 432.

Extra compensation

Ark.—Washington County v. Davis, 258 S.W. 324, 162 Ark. 335.

Fees of clerk of municipal court

Ill.—People ex rel. Soble v. Gill, 193 N.E. 192, 358 Ill. 261.

81. Md. — City of Baltimore v. O'Connor, 128 A. 759, 147 Md. 639, 40 A.L.R. 1058.

Mo.—State ex rel. Summers v. Hamilton, 279 S.W. 33, 312 Mo. 157.

Tenn.—Hickman v. Wright, 210 S.W. 447, 141 Tenn. 412.

11 C.J. p 864 note 43.

82. Ala.—Osborn v. Henry, 76 So. 119, 200 Ala. 353.

11 C.J. p 864 note 48.

83. N.C.—Supreme Ct. Clerk's Office v. Richmond County, 79 N.C. 598.

84. Tex. — Kabelmacher v. Kabelmacher, 50 S.W. 1118, 51 S.W. 353, 21 Tex.Civ.App. 317.

85. Okl. — Hughes v. Oklahoma County, 150 P. 1029, 50 Okl. 410.

11 C.J. p 864 note 51.

86. N.J.—Atlantic County v. Lee, 70 A. 925, 76 N.J.Law 327, affirmed 76 A. 1118 mem, 77 N.J.Law 799 mem. 11 C.J. p 864 note 52.

87. U.S.—Larabee Flour Mills Co. v. Nee, C.C.A.Mo., 81 F.2d 623, remanding cause, D.C., 12 F.Supp. 395.

S.D.—Minnehaha County v. Foster, 249 N.W. 688, 61 S.D. 406.

Impounding fee

U.S.—Larabee Flour Mills Co. v. Nee, C.C.A.Mo., 81 F.2d 623, remanding cause, D.C., 12 F.Supp. 395.

Vital statistic fees

S.D.—Minnehaha County v. Foster, 249 N.W. 688, 61 S.D. 406.

88. U.S.—U. S. v. Jones, 24 S.Ct. 561, 193 U.S. 528, 48 L.Ed. 776, affirming 37 Ct.Cl. 571, and modifying 37 Ct.Cl. 565.

statutory provision therefor fees for particular services will be denied,⁸⁹ as in the case of denial of fees for particular services rendered in connection with a jury;⁹⁰ and where the clerk is entitled to some compensation, the amount thereof is limited to that provided by statute.⁹¹

§ 12. — Services Performed by Party or Attorney

It has been both affirmed and denied that a clerk of court may recover fees for services imposed on him by law but in fact performed by a party or attorney.

As a general rule, a party has no right to perform services which the law imposes on the clerk and thus deprive the latter of his lawful compensation. Where such services are performed by a party or his attorney the clerk is nevertheless entitled to compensation as if he had performed them himself;⁹² but the contrary has been held in some jurisdictions;⁹³ and when a statute provides that a party litigant shall cause a certain thing to be done, it impliedly repeals a statute authorizing a court to fix the fee of the clerk for the same service and deprives the clerk of his right to the fee.⁹⁴

§ 13. — Voluntary Services

Ordinarily, a clerk may not recover for performance of services which are purely voluntary.

For services which he is not required by law to perform, the clerk is not entitled to compensa-

tion;⁹⁵ and it is sometimes expressly so provided by statute as to certain matters.⁹⁶

§ 14. — Ex Officio Services

The right of a clerk of court to compensation for ex officio services must ordinarily rest on statutory provision therefor.

In some jurisdictions the clerk is allowed special compensation for ex officio services,⁹⁷ but particular statutes in these jurisdictions have been construed not to confer the right to ex officio fees,⁹⁸ and local statutes have been held to be impliedly repealed by general statutes establishing a general system throughout the state as to ex officio fees.⁹⁹ In other jurisdictions a clerk is denied compensation for ex officio services,¹ and clerks have been held within a general statutory provision that no compensation can be allowed for any ex officio services rendered by any officer.² In the event that it is not provided otherwise by statute, where the clerk fills but one office, he is entitled to but one salary, although he is, by statute, ex officio discharging the duties of another officer, and thus performing dual functions;³ but where a statute requires that a clerk of one court shall be compensated for services performed for another court, the latter court has authority to make him reasonable allowances therefor.⁴

Another official acting as ex officio clerk of court has been held entitled to compensation for such ex officio services.⁵

Ky.—Auditor v. Cain, 61 S.W. 1016, 22 Ky.L. 1888.

11 C.J. p 870 note 95.

89. Fla.—State ex rel Atlantic Peninsular Holding Co. v. Butler, 164 So. 128, 121 Fla. 417.

Iowa.—Ripley v. Gifford, 11 Iowa 367.

Ky.—Wortham v. Grayson County Ct., 13 Bush 53.

Fee for deed

Fla.—State ex rel. Atlantic Peninsular Holding Co. v. Butler, 164 So. 128, 121 Fla. 417.

90. Ky.—Greene v. Smither, 202 S. W. 485, 178 Ky. 742.

11 C.J. p 870 note 97.

Fees for summoning jurors

Ky.—Greene v. Smither, supra.

91. Pa.—Sipler v. Clarion County, 8 Pa. Dist. 253.

11 C.J. p 870 note 98.

92. Ky.—Morrison v. Rodes, 7 T.B. Mon. 19.

11 C.J. p 869 note 83.

93. Fla.—State v. McMillan, 38 So. 666, 49 Fla. 243, 6 Ann.Cas. 537.

11 C.J. p 869 note 84.

94. U.S.—Rainey v. Grace, Wash.,

34 S.Ct. 242, 231 U.S. 703, 58 L.Ed. 445.

95. U.S.—U. S. v. Van Duzee, Iowa, 22 S.Ct. 648, 185 U.S. 278, 46 L. Ed. 909.

Tenn.—Henderson v. Walker, 47 S. W. 430, 101 Tenn. 229.

11 C.J. p 869 note 87.

96. Ala.—Carmichael v. Matthews, 32 So. 681, 134 Ala. 210.

11 C.J. p 869 note 88.

97. Ala.—Calhoun County v. Watson, 44 So. 702, 152 Ala. 554.

11 C.J. p 870 note 89.

98. Ala.—Long v. O'Rear, 65 So. 59, 186 Ala. 558.

11 C.J. p 870 note 90.

99. Ala.—Isbell v. Shelby County, 65 So. 706, 10 Ala.App. 639.

11 C.J. p 870 note 91.

1. Ark.—Goode v. Union County, 76 S.W.2d 100, 189 Ark. 1123—State v. Swaim, 268 S.W. 366, 167 Ark. 225.

N.M.—State ex rel. Mirabal v. Greer, 21 P.2d 819, 37 N.M. 292.

Tenn.—State, for Use of Sullivan County, v. O'Dell, 84 S.W.2d 577, 169 Tenn. 248.

Circuit court clerk acting as ex officio clerk of chancery court is entitled only to the compensation granted him as clerk of the circuit court.—Goode v. Union County, 76 S. W.2d 100, 189 Ark. 1123.

Clerk acting as ex officio commissioner

Salary of clerk of circuit court, acting as "ex officio" commissioner, under Crawford & M.Dig. § 1364, covers all services performed as commissioner.—State v. Swaim, 268 S.W. 366, 167 Ark. 225.

2. Ky.—Pigman v. Slone, 107 S.W. 230, 32 Ky.L. 798—Wortham v. Grayson County Ct., 13 Bush 53.

11 C.J. p 870 note 92.

3. Ark.—Durdin v. Sebastian County, 83 S.W. 1048, 78 Ark. 305.

4. Ky.—Elliott v. Com., 138 S.W. 303, 144 Ky. 341.

5. Tex.—City of Texarkana v. Floyd, Civ.App., 59 S.W.2d 449, error refused.

City secretary receiving maximum compensation for such office is entitled to receive additional compensation for services as ex officio clerk of corporation court.—City of Texarkana v. Floyd, supra.

§ 15. — Copies, Duplicates, and Exemplifications

Clerks of court are ordinarily entitled to statutory compensation for making copies, duplicates, and exemplifications, although compensation in some instances may be based on a quantum meruit or denied.

In most jurisdictions, by statute or rule of court, the clerk is entitled to some fee or compensation for furnishing copies of records and papers,⁶ except under some circumstances, or as to copies of some records and papers.⁷ Where the compensation is fixed by statute, it may not be varied by agreement,⁸ although where no express provision of law covers the service, compensation has been allowed on the basis of a quantum meruit.⁹

The word "copy" has been construed to mean certified copy,¹⁰ although if the clerk furnishes the original instead of a copy, he may nevertheless

charge for a copy;¹¹ but a "copy" does not include carbon manifolds thereof.¹²

§ 16. — Miscellaneous Services

A clerk of court's right to fees for miscellaneous services, such as filing and recording papers, trial and docket matters, taking affidavits and acknowledgments, and the like, depends largely on local statutory provisions.

Questions regarding the specific fees to which a clerk is entitled depend so entirely on the various statutory provisions in the different jurisdictions that a detailed discussion of the decisions would serve no useful purpose here. Consequently, little more is attempted than to present a collection of the cases which deal with the right to, and amount of, compensation of the clerk for the performance of particular services, such as the issuing of writs, process, and notices;¹³ the filing of papers;¹⁴ the entering of judgments, decrees, or orders;¹⁵ the

6. Ind.—*Rauch v. Board of Com'rs of Marion County*, 124 N.E. 704, 72 Ind.App. 412.

Kan.—*State v. Richardson*, 284 P. 367, 129 Kan. 306.
11 C.J. p 870 note 1.

Transcripts

Under L.1911 c 125, and L.1913 c 84, amending Fee and Salary Law of 1895, clerk of Marion county circuit court, was entitled to fees for copies of records, including transcripts, between time act of 1911 and act of 1913 became effective. — *Rauch v. Board of Com'rs of Marion County*, 124 N.E. 704, 72 Ind.App. 412.

7. U.S.—*Cross v. U. S.*, Ct.Cl., 37 S. Ct. 5, 242 U.S. 4, 61 L.Ed. 114.

11 C.J. p 871 note 2.

Naturalization papers

Charge by clerk of district court for triplicate copies of declarations of intent for naturalization is not authorized by U.S.Rev.St. § 828, Comp.St.1913 § 1383, as if authorized by Act June 29, 1906, § 12, it would be forbidden by § 21, the services not having been included in fees named in § 13, and if the duty arose under § 12, prohibition of § 21 would be applicable.—*Cross v. U. S.*, supra.

8. Pa.—*Werner v. Hillman Coal & Coke Co.*, 150 A. 471, 300 Pa. 256, 70 A.L.R. 967.

9. Pa.—*Werner v. Hillman Coal & Coke Co.*, supra.

Furnishing carbon manifolds of record

Pa.—*Werner v. Hillman Coal & Coke Co.*, supra.

10. Ind.—*Ex parte Brown*, 78 N.E. 553, 166 Ind. 593.

Mo.—*Blackwater Drain. Dist. v. Borgstadt*, 144 S.W. 888, 162 Mo. App. 151.

11 C.J. p 871 note 3.

11. Ky.—*Henry v. Vinson*, 13 Ky.L. 400.

11 C.J. p 871 note 4.

12. Pa.—*Werner v. Hillman Coal & Coke Co.*, 150 A. 471, 300 Pa. 256, 70 A.L.R. 967.

13. Fla.—*McMillan v. Escambia County*, 75 So. 195, 73 Fla. 891.

11 C.J. p 864 note 55.

14. U.S.—*In re Taxation of Costs in Actions in Equity and at Law, Including Criminal Cases*, D.C.Ohio, 17 F.2d 779—*U. S. v. School District of Tinicum Tp.*, D.C.Pa., 13 F.2d 953.

Cal.—*Doyle v. Coulter*, 253 P. 49, 201 Cal. 602.

Tex.—*Texas Brewing Co. v. State*, Civ.App., 135 S.W. 211.

Utah.—*Beck v. Lee*, 172 P. 686, 52 Utah 31.

11 C.J. p 865 note 56.

Fees of interveners

After payment by one defendant of five dollar fee, any party separately appearing by intervention or otherwise need only pay single two dollar fee on filing first paper.—*In re Taxation of Costs in Actions in Equity and at Law, Including Criminal Cases*, D.C.Ohio, 17 F.2d 779.

"Filing each paper"

*Vernon's Sayles Civ.St.Annot.*1914 art 3855, giving clerks a fee for "filing each paper," refers only to papers forming part of record proper, and is inapplicable to letters introduced in evidence.—*Texas Brewing Co. v. State*, Tex.Civ.App., 195 S.W. 211.

"Papers not otherwise provided for"

The provision in Comp.L.1907 § 972, that district court clerks may charge twenty-five cents for filing of papers not otherwise provided for, does not apply to affidavits supporting motion for new trial, since the

same section provides specifically for a fee of two dollars and fifty cents from the moving party.—*Beck v. Lee*, 172 P. 686, 52 Utah 31.

15. U.S.—*In re Taxation of Costs in Actions in Equity and at Law, Including Criminal Cases*, 17 F.2d 779—*The Mallicor*, D.C.N.Y., 9 F. 2d 89.

N.Y.—*In re Friedman*, 267 N.Y.S. 56, 149 Misc. 278.

Tex.—*McCormick v. Sheppard*, 86 S. W.2d 213, 126 Tex. 25.

11 C.J. p 865 note 57.

What constitutes "order"

Memorandum of judge as to his decision with direction that order be entered, and reciting, by reference, papers submitted on motion, was not "order" which would entitle clerk to twenty-five cent filing fee.—*In re Friedman*, 267 N.Y.S. 56, 149 Misc. 278.

Interlocutory decree

On entry of final judgment, order, or decree, prevailing party must be charged by clerk five dollar fee, which, however, cannot be taxed on entry of interlocutory order or decree in equity.—*In re Taxation of Costs in Actions in Equity and at Law, Including Criminal Cases*, D.C. Ohio, 17 F.2d 779.

Judgment in habeas corpus proceeding

Under statute allowing district clerk fee for entering judgment in habeas corpus proceeding, district clerk is entitled to fees in such proceedings regardless of whether offense charged was misdemeanor or felony, since proceedings for writs of habeas corpus are to be regarded as in special class and costs incident thereto are not to be regarded as costs in main case.—*McCormick v. Sheppard*, 86 S.W.2d 213, 126 Tex. 25.

making of other record entries;¹⁶ the taxing of costs;¹⁷ the making of records;¹⁸ the indexing of records;¹⁹ the searching for records;²⁰ the drafting and furnishing of papers;²¹ the making of certificates;²² such as the certificate of attendance in court of grand and petit jurors and witnesses;²³ the making of transcripts;²⁴ the making of returns;²⁵ the administering of oaths or the taking of affidavits;²⁶ the taking of acknowledgments;²⁷

the making of settlements with the county;²⁸ services in criminal cases;²⁹ and services in connection with judicial sales;³⁰ trial and docket fees generally;³¹ naturalization proceedings;³² the submission of causes;³³ election proceedings;³⁴ certiorari proceedings;³⁵ liquor license proceedings;³⁶ the enrolling and licensing of attorneys;³⁷ tax proceedings;³⁸ special assessment proceedings;³⁹ the con-

16. Mass.—*Littlejohn v. Littlejohn*, 128 N.E. 425, 236 Mass. 326.
Pa.—*Gregory v. Davis*, 177 A. 331, 117 Pa.Super. 1.
11 C.J. p 865 note 58.

Entry of appeal from probate to supreme judicial court under St.1919 c 274, is "entry of an action or suit," or "of a question or cause," within Rev.L. c 204 § 6, relative to fees of clerks of courts.—*Littlejohn v. Littlejohn*, 128 N.E. 425, 236 Mass. 326.

What constitutes an "entry"
Statute entitling prothonotary to fee for "entering" county treasurer's report of tax sale contemplates something more than mere "filing," and means placing of minute on docket or making some sort of permanent court record, as regards validity of tax sale.—*Gregory v. Davis*, 177 A. 331, 117 Pa.Super. 1.

17. Ky.—*Rodes v. Reese*, 4 B.Mon. 536.
Tenn.—*Henderson v. Walker*, 47 S.W. 430, 101 Tenn. 229.
11 C.J. p 866 note 59.

18. Ala.—*Swindle v. Crocker*, 115 So. 252, 217 Ala. 199.
Ark.—*Washington County v. Davis*, 258 S.W. 324, 162 Ark. 335.
Fla.—*State ex rel. Atlantic Peninsular Holding Co. v. Butler*, 164 So. 128, 121 Fla. 417.
S.D.—*Hareid v. Risty*, 178 N.W. 948, 43 S.D. 270.
11 C.J. p 866 note 60.

Refund to clerk
Spec.Acts 1921 p 111 § 2, providing that county court may refund to circuit clerk one half fees received by him for recording oil leases, is mandatory, notwithstanding use of "may" instead of "shall," in view of the circumstances surrounding passage of act and the object had in view.—*Washington County v. Davis*, 258 S.W. 324, 162 Ark. 335.

19. U.S.—*Rainey v. Grace*, Wash., 34 S.Ct. 242, 231 U.S. 703, 58 L.Ed. 445.
11 C.J. p 866 note 61.

Failure to index

(1) Where there is no index of testimony of witnesses, as required by Rules of Court, rule 5, subs 6, 154 S.W. viii, record will be condemned, and clerk of circuit court prohibited from collecting any of his fees there-

for.—*Searcy v. Golden*, 188 S.W. 1098, 172 Ky. 42.—*Lemon v. Commonwealth*, 188 S.W. 853, 171 Ky. 822.—*Anderson v. Sandy Valley & E. Ry. Co.*, 188 S.W. 772, 171 Ky. 740.

(2) Where record on appeal containing depositions of thirteen witnesses covering one hundred forty pages had no index as required by Court of Appeals Rules, rule 5, 154 S.W. viii, clerk was held to be allowed only one half usual fee for copying depositions.—*Allen v. Ligon*, 194 S.W. 1050, 175 Ky. 767.

20. Fla.—*State ex rel. Atlantic Peninsular Holding Co. v. Butler*, 164 So. 128, 121 Fla. 417.
11 C.J. p 866 note 62.

21. Fla.—*State ex rel. Atlantic Peninsular Holding Co. v. Butler*, supra.
11 C.J. p 866 note 63.

22. Kan.—*State v. Richardson*, 234 P. 367, 129 Kan. 806.
Miss.—*Board of Suprs of Hancock County v. Kergosien*, 112 So. 595, 146 Miss. 835.
11 C.J. p 866 note 64.

23. Kan.—*Heller v. Shawnee County*, 23 Kan. 128.
11 C.J. p 867 note 65.

24. Tenn.—*McConnell v. McBroom*, 1 Tenn.App. 180.
11 C.J. p 867 note 66.

25. U.S.—*Mohrstadt v. New York Mut. L. Ins. Co.*, C.C.Mo., 145 F. 751.
11 C.J. p 868 note 67.

26. U.S.—*U. S. v. Jones*, Ct.Cl., 24 S.Ct. 561, 193 U.S. 528, 48 L.Ed. 776, affirming 37 Ct.Cl. 571, and modifying 37 Ct.Cl. 565.
11 C.J. p 868 note 68.

27. U.S.—*U. S. v. Taylor*, Tenn., 13 S.Ct. 479, 147 U.S. 695, 37 L.Ed. 335, reversing, C.C., *Taylor v. U. S.*, 45 F. 531—*Goodrich v. U. S.*, D.C. Ark., 47 F. 267, affirmed 54 F. 21, 4 C.C.A. 160—*Martin v. U. S.*, 26 Ct.Cl. 160.

28. Ark.—*St. Francis County v. Folbre*, 48 S.W. 1070, 66 Ark. 91.

29. U.S.—*In re Taxation of Costs in Actions in Equity and at Law, Including Criminal Cases*, D.C.Ohio, 17 F.2d 779.

Ala.—*Swindle v. Crocker*, 115 So. 252, 217 Ala. 199.
11 C.J. p 37 note 85 [h] (1), p 868 note 71.

Final records of criminal cases

Clerk of circuit court, acting in ex officio capacity as clerk of county court, is entitled to compensation for making final records of criminal cases, where nolle prosequis were entered or defendants discharged.—*Swindle v. Crocker*, supra.

30. Pa.—*Griel's Estate*, 33 A. 375, 171 Pa. 412.—*Ramsey v. Alexander*, 5 Serg. & R. 338.
Tenn.—*Harris v. Petigrew*, 5 Lea 596.

31. Ill.—*People v. Campbell*, 204 Ill. App. 226.
Nev.—*Page v. Walser*, 139 P. 675, 44 Nev. 1.

N.Y.—*Schuster v. Schuster*, 256 N.Y. S. 550, 235 App.Div. 239.
Tex.—*Duclos v. Harris County*, Com. App., 298 S.W. 417, affirming, Civ. App., 291 S.W. 611—*Collins v. Tarrant County*, Civ.App., 242 S.W. 1103.

Appearance fee

Ill.—*People v. Campbell*, 204 Ill.App. 226.

Calendar fee

N.Y.—*Schuster v. Schuster*, 256 N.Y. S. 550, 235 App.Div. 239.

32. U.S.—*Jaynes v. U. S.*, 47 Ct.Cl. 523.

Wis.—*St. Croix County v. Webster*, 87 N.W. 302, 111 Wis. 270.
11 C.J. p 868 note 73.

33. Ark.—*Trimble v. St. Louis, etc., R. Co.*, 19 S.W. 839, 56 Ark. 249.
Mo.—*Shed v. Kansas City, etc., R. Co.*, 67 Mo. 687.

34. U.S.—*U. S. v. Jones*, Ala., 13 S. Ct. 437, 147 U.S. 672, 37 L.Ed. 325.
11 C.J. p 868 note 75.

35. Ga.—*McMichael v. Southern R. Co.*, 43 S.E. 850, 117 Ga. 518.

36. Pa.—*Commonwealth v. Jacobs*, 56 Pa.Super. 173.

37. Ill.—*In re Reardon*, 89 N.E. 169.
11 C.J. p 868 note 78.

38. Ariz.—*Cochise County v. Wilcox*, 108 P. 458, 13 Ariz. 150.
11 C.J. p 868 note 79.

39. Ill.—*Leroy v. Guthrie*, 190 Ill. App. 527.

tinuance of causes;⁴⁰ and in the settlement of decedents' estates.⁴¹

§ 17. Separate Fees

Although a clerk of court is not entitled to separate fees for each service where a gross fee is prescribed for the entire proceeding, nor where fees designated for particular services are sufficient to compensate him for discharge of all the duties of his office, in the absence of a gross fee regulation, he may be entitled to separate fees for each separate step in the case.

When compensation to clerks of courts is made by fees, they are not paid for each and every service performed; but for certain designated services prescribed fees are allowed, the aggregate of which is generally deemed sufficient for the discharge of all the duties of the office.⁴² Separating a single order or proceeding into separate parts will not justify the clerk in increasing the charge;⁴³ but, for each separate step or proceeding in a case in connection with which the clerk performs any services and for which services compensation is provided by law, he is entitled to charge a separate fee,⁴⁴ except where a gross fee for the entire action or proceeding is provided for by statute; and, where duplicate copies of papers must be made out, the clerk may charge for the duplicates,⁴⁵ except as to certain matters in some jurisdictions.⁴⁶

§ 18. — Services Rendered Joint Parties or in Consolidated Cases

A clerk of court is ordinarily entitled to only one fee for services rendered for joint parties or in consolidated causes, although in the case of a severance he may become entitled to separate fees.

For services rendered for joint parties or in consolidated causes, the clerk is entitled ordinarily to but one fee,⁴⁷ but, where his services are required

to be performed separately for each party, or in each cause, he is entitled to separate fees,⁴⁸ as where there is a severance following a joint indictment.⁴⁹ In determining whether the clerk is entitled to a single or to several fees for his services in a case, usage, custom, or uniform practice cannot be invoked in the face of positive law.⁵⁰

§ 19. Discriminatory Fees

A clerk of court must charge uniform fees and may not discriminate in the rates charged different parties for the same service.

The clerk cannot discriminate between litigants and charge fees against one at a higher rate than he would be entitled to charge another.⁵¹ So, if the statute designates the amount of the fee to be charged, the clerk cannot perform the designated services for less than the maximum prescribed by the statute,⁵² especially where his compensation is a fixed salary and he is required to account to the treasurer for all fees earned. In such case, if he charges less than the maximum for his services, he must nevertheless account in full as required by law.⁵³

§ 20. Commissions on Funds Handled

The right of a clerk of court to commissions on funds handled by him ordinarily depends on specific statutory provisions. In the federal courts a commission of one per cent is allowed on funds received, kept and paid out.

If there is a statute authorizing it,⁵⁴ the clerk is entitled to a commission on funds handled;⁵⁵ and the fact that the right to such a commission is given by statute does not deprive the clerk of fees to which he would have been entitled if the funds in question had been kept and disbursed by another officer.⁵⁶

40. N.C.—*Luther v. Southern R. Co.*, 69 S.E. 762, 154 N.C. 103.

11 C.J. p 868 note 81.

41. Iowa.—*In re Pitts*, 133 N.W. 660, 153 Iowa 269.

11 C.J. p 869 note 82.

42. N.C.—*Guilford v. Beaufort County*, 27 S.E. 94, 120 N.C. 23.

43. U.S.—*U. S. v. Kurtz*, Ct.Cl., 17 S.Ct. 15, 164 U.S. 49, 41 L.Ed. 346.

11 C.J. p 874 note 24.

44. U.S.—*Marsh v. U. S.*, D.C.Fla., 109 F. 236.

11 C.J. p 874 note 25.

45. U.S.—*U. S. v. Dundy*, Neb., 76 F. 357, 22 C.C.A. 221.

11 C.J. p 874 note 27.

46. U.S.—*Hart v. U. S.*, 38 Ct.Cl. 571.

11 C.J. p 874 note 28.

47. Ga.—*Court Officers v. Wyatt*, 62 Ga. 172.

11 C.J. p 875 note 29.

48. U.S.—*U. S. v. Keatley*, W.Va., 27 S.Ct. 404, 204 U.S. 562, 51 L.Ed. 618.

11 C.J. p 875 note 30.

49. Tex.—*Graham v. Shephard*, 70 S.W.2d 693, 123 Tex. 283.

What constitutes a "case" within statute

Where two or more defendants have been jointly indicted for felonies and severance is had, cause against each defendant so severing is separate "case" within statute providing that criminal district clerk shall receive certain fee for each felony "case" finally disposed of.—*Graham v. Shephard*, supra.

50. U.S.—*Gillum v. Stewart*, C.C. Tex., 112 F. 30.

11 C.J. p 875 note 31.

51. Tex.—*Wichita Mill, etc., Co. v. State*, 122 S.W. 427, 57 Tex.Civ. App. 165.

52. Ind.—*Ex parte Brown*, 78 N.E. 553, 166 Ind. 593.

11 C.J. p 883 note 58.

53. Neb.—*State v. Scott*, 59 N.W. 893, 41 Neb. 263—*State v. Hazelet*, 59 N.W. 891, 41 Neb. 257.

54. Tenn.—*Louisville, etc., R. Co. v. Boswell*, 58 S.W. 117, 104 Tenn. 529.

11 C.J. p 871 note 5.

Commissions for collection of motor vehicle license fees

Ky.—*Lewis v. James*, 231 S.W. 526, 191 Ky. 769.

N.Y.—*Allegany County v. Snyder*, 155 N.E. 886, 244 N.Y. 533, affirming 210 N.Y.S. 820, 214 App.Div. 810.

55. U.S.—*The Adula*, D.C.Ga., 127 F. 849.

11 C.J. p 871 note 6.

56. U.S.—*U. S. v. Kurtz*, Ct.Cl., 17 S.Ct. 15, 164 U.S. 49, 41 L.Ed. 346.

11 C.J. p 871 note 7.

In the federal courts, under statute, a clerk is entitled to a commission on money received, kept, and paid out under court order,⁵⁷ although his commissions attach only when he has actually received, kept and paid out the fund, and where the clerk has collected his commission in advance of paying out the money he may not collect again when he does pay it out.⁵⁸ If the fund is not subject to the clerk's check, and he is in no way responsible for it, the commission will be disallowed.⁵⁹ A statute conferring the right to a commission on "moneys" does not entitle the clerk to a commission on securities⁶⁰ or certificates of deposit,⁶¹ nor, it has been held, on money deposited as a cash substitute for a bond,⁶² although a clerk has been held entitled to commissions on certificates of deposit where in substance and in fact the deposit itself was made on his behalf and the money itself was given to him by paying it into the bank for his account.⁶³ Where the statute allows the commission "for receiving, keeping and paying out mon-

ey, in pursuance of any statute or order of court, including cash bail or bonds or securities authorized by law to be deposited in lieu of other security," to entitle the clerk to his commission there must be a receiving, a keeping, and a paying out in pursuance of statute or order of court.⁶⁴ Although a commission may, under such statute, be had with reference to securities authorized by law,⁶⁵ there can be no commission allowed where certificates of deposit are given and made payable to the clerk on a condition which is never fulfilled.⁶⁶

§ 21. Per Diem Compensation

Under statute clerks of court may be entitled to a per diem compensation, although where they have previously received the maximum allowed by law they cannot get an additional allowance per diem.

In some, but not in all,⁶⁷ jurisdictions the clerk is entitled to a per diem compensation for attendance on the court while in session, whether any business is transacted or not.⁶⁸ Under the federal

57. U.S.—U. S. v. Pennsylvania R. Co., C.C.A.Md., 283 F. 937, modifying, D.C., 283 F. 438, certiorari denied Pennsylvania R. Co. v. U. S., 43 S.Ct. 96, 260 U.S. 736, 67 L.Ed. 488.

Commissions on fines and fees

Money paid to the clerk of a district court in discharge of a fine imposed by the court is money received, kept, and paid out pursuant to an order of the court, on which the clerk, under Rev.St. § 828, Comp.St. § 1383, is entitled to a commission of one per cent, but he is not entitled to collect a commission on his own fees or on those of the district attorney or marshal which may be paid to him.—U. S. v. Pennsylvania R. Co., supra.

Prize money

Prize money deposited in a bank under a decree of court and subject to its order, is "money deposited in court" within the meaning of a statute entitling a court clerk to commissions on money deposited in court.—Ex parte Prescott, C.C.N.H., 19 F.Cas.No.11,388, 2 Gall. 146—11 C.J. p 871 note 5 [b].

58. U.S.—The Lord Ormonde, D.C. N.Y., 276 F. 846.

59. U.S.—Ford Motor Co. v. Voorheis, C.C.A.Mich., 295 F. 582—In re Newbold, D.C.Utah, 244 F. 388. 11 C.J. p 872 note 8.

Mere disbursing agent

The clerk of the district court is not entitled to any commission, where, under order of court, he distributes the consideration deposited on a composition in bankruptcy.—In re Newbold, supra.

60. U.S.—Hazeltime Research Corporation v. Freed-Eisemann Radio

Corporation, C.C.A.N.Y., 10 F.2d 148—Ford Motor Co. v. Voorheis, C.C.A.Mich., 295 F. 582—U. S. v. Williams, D.C.Wash., 282 F. 324—Anderson v. U. S., C.C.A.Kan., 282 F. 258.

11 C.J. p 872 note 9.

United States treasury certificates are not "money" within the meaning of the statute.—Hazeltime Research Corporation v. Freed-Eisemann Radio Corporation, C.C.A.N.Y., 10 F.2d 148.

Liberty bonds

(1) Liberty bonds are not money, within the fee bill of the circuit court of appeals.—Anderson v. U. S., C.C.A.Kan., 282 F. 258.

(2) They are to be deemed money within Cir.Ct.App.Rules, rule 23, 150 F. cxxxix, 79 C.C.A. cxxxix, adopted in conformity to Rev.St. § 828, Comp. St. § 1383, and in pursuance of Act Febr. 19, 1897, Comp.St. § 1376.—McGovern v. U. S., C.C.A.Ill., 272 F. 262.

(3) Under Rev.St. § 828, Comp.St. § 1383, the clerk of a district court must charge a commission of one per cent on the par value of liberty bonds deposited as bail.—U. S. v. Pennsylvania R. Co., D.C.Md., 283 F. 438, modified in other respects, C.C.A., 283 F. 937, certiorari denied Pennsylvania R. Co. v. U. S., 43 S.Ct. 96, 260 U.S. 736, 67 L.Ed. 488.

61. U.S.—Curtice v. Crawford County Bank, C.C.Ark., 124 Ark. 919.

62. Porto Rico.—U. S. v. Cook, 7 Porto Rico Fed. 28. 11 C.J. p 872 note 11.

63. U.S.—Hazeltime Research Corporation v. Freed-Eisemann Radio

Corporation, C.C.A.N.Y., 10 F.2d 148.

64. U.S.—Amoskeag Mfg. Co. v. Gagne, D.C.N.H., 13 F.Supp. 514.

65. U.S.—Amoskeag Mfg. Co. v. Gagne, supra.

Liberty bonds

Words "bonds or securities authorized by law to be deposited in lieu of other securities" in statute giving clerk of court poundage fee on such deposits referred to United States liberty bonds and other United States bonds which by another statute clerk was authorized to accept in lieu of other security.—Amoskeag Mfg. Co. v. Gagne, supra.

66. U.S.—Amoskeag Mfg. Co. v. Gagne, supra.

Determination as to liability for taxes

Certificates of deposit in authorized depository which were deposited with clerk of court in proceeding to enjoin collection of processing taxes assessed under Agricultural Adjustment Act were not subject to clerk's poundage fee upon return of certificates after decision of supreme court holding Agricultural Adjustment Act unconstitutional, where certificates were payable to clerk only on final determination that depositor was liable for such taxes.—Amoskeag Mfg. Co. v. Gagne, supra.

67. Okl.—Hughes v. Oklahoma County, 150 P. 1029, 50 Okl. 410—Harper v. Oklahoma County, 149 P. 1102, 154 P. 529, 54 Okl. 545—Grant County v. Ernest, 147 P. 322, 45 Okl. 725.

68. U.S.—Marvin v. U. S., 45 Ct.Cl. 528, 530.

11 C.J. p 872 notes 13, 14.

statute, providing that, when the circuit and district courts sit at the same time, no greater per diem compensation shall be made to the clerk than is made for attendance on one court, the clerk may charge his per diem compensation against either court as he may elect;⁶⁹ and where the two courts, or different divisions of the same court, are held in different places at the same time, the clerk is entitled to charge per diem compensation for both his personal attendance on one court and his attendance by deputy on the other court.⁷⁰

Where applicable statutes forbid a clerk to receive any compensation in addition to his salary, a salaried clerk of court is not entitled to a per diem,⁷¹ and after receiving the maximum compensation allowed by law, a clerk may not also collect per diem fees.⁷²

§ 22. Office Expenses, Supplies, Clerk Hire, Etc.

The right of a clerk of court to an allowance for office supplies and other expenses ordinarily depends on statutory authorization and due compliance with regulatory requirements.

The clerk is entitled to an allowance for office expenses, supplies, etc.,⁷³ if authorized by statute,⁷⁴ and if there has been due compliance with the requirements of governing statutes⁷⁵ or regulations.⁷⁶ Where particular services have in fact been performed by salaried deputies, the clerk is not entitled to an allowance of personal compensation therefor from the county.⁷⁷

Under the Illinois constitution, a clerk of court is not entitled to retain more funds for clerk hire and office expenses than the amount allowed him by the county board, although he has in fact expended more,⁷⁸ nor, where he has expended less for that purpose than the amount allowed, is he entitled to retain the excess.⁷⁹

§ 23. Extra or Additional Compensation

Ordinarily, a clerk of court is not entitled to extra compensation for extra services unless there has been due provision of law therefor, although for the performance of services not incidental to his office he may be allowed compensation without express statutory authorization.

Generally speaking, a clerk of court may not recover extra compensation for extra services where there is no statutory or constitutional authorization therefor.⁸⁰ The general rule, in the absence of legislation, is that, if the statute increases the duties of the clerk by the addition of other duties germane to his office, he must perform them without extra compensation;⁸¹ but, if he is required to render services in an independent employment, not incidental to his official duties, he may recover for such services.⁸² A clerk who is paid a fixed salary for all services required by law cannot recover additional compensation for extra services.⁸³ Likewise, where a clerk has been paid for his services the maximum amount allowed by law, he is not entitled to receive additional compensation for the performance of duties in connection with his office.⁸⁴ If additional compensation is paid without authority of law, it may be recovered back by action;⁸⁵ but in some jurisdictions extra allowanc-

69. U.S.—Clough v. U. S., C.C.Tenn., 55 F. 921—Goodrich v. U. S., C.C. Ark., 35 F. 193—Butler v. U. S., 23 Ct.Cl. 162.

70. U.S.—U. S. v. King, Ga., 13 S.Ct. 439, 147 U.S. 676, 37 L.Ed. 328—Erwin v. U. S., D.C.Ga., 37 F. 470, 2 L.R.A. 229.
11 C.J. p 873 note 16.

71. Ind.—Stein v. Board of Com'rs of Marion County, 136 N.E. 34, 79 Ind.App. 478—Rauch v. Board of Com'rs of Marion County, 124 N.E. 704, 72 Ind.App. 412.

72. U.S.—Johnson v. United States, 50 Ct.Cl. 126.

73. Ga.—Floyd County v. Graham, 100 S.E. 728, 24 Ga.App. 294.
11 C.J. p 873 note 17.

Telephone as within "office supplies" Civ.Code 1910 § 402, requiring county authorities to furnish county officers with "office supplies generally," includes telephone in office of clerk of superior court, when it appears that its installation is reasonably necessary to carry on legitimate

business of that office.—Floyd County v. Graham, supra.

74. Mo.—State ex rel. Buchanan County v. Patton, 197 S.W. 353, 271 Mo. 554.
11 C.J. p 873 note 18.

Allowance for assistants as ex officio clerk of criminal court denied clerk of circuit court because not authorized by applicable statutes.—State ex rel. Buchanan County v. Patton, supra.

75. Mo.—St. Louis County Ct. v. Ruland, 5 Mo. 268.
11 C.J. p 874 note 19.

76. U.S.—Johnson v. United States, 50 Ct.Cl. 126.

Failure to procure authorization of attorney general, as required by applicable regulations of the department of justice, precludes reimbursement of a clerk of court for compensation paid assistants.—Johnson v. United States, supra.

77. N.Y.—People v. Sutherland, 100 N.E. 440, 207 N.Y. 22, reversing 132 N.Y.S. 588, 147 App.Div. 668.
11 C.J. p 874 note 20.

78. Ill.—Daggett v. Ford County, 99 Ill. 334.

79. Ill.—Cullon v. Dolloff, 94 Ill. 330.

80. Fla.—Flood v. State, 129 So. 861, 100 Fla. 70.

Reclassifying records on transfer to new file Ky.—Allin v. Mercer County, 192 S.W. 638, 174 Ky. 566.

81. N.C.—Brandon v. Caswell County, 71 N.C. 62.
11 C.J. p 875 note 33.

82. U.S.—Erwin v. U. S., D.C.Ga., 37 F. 470, 2 L.R.A. 229.
Ind.—Rauch v. Board of Com'rs of Marion County, 124 N.E. 704, 72 Ind.App. 412.
11 C.J. p 875 note 33.

83. Mich.—Gardner v. Newaygo County, 67 N.W. 1091, 110 Mich. 94.
11 C.J. p 875 note 34.

84. U.S.—Johnson v. U. S., 49 Ct.Cl. 453.

85. Wis.—St. Croix County v. Webster, 87 N.W. 302, 111 Wis. 270.

es may be made to the clerk for extra services, especially if they are extraordinary and unusually onerous, and cannot be considered official business of the clerk.⁸⁶ Thus, "indispensable public necessity" is recognized in some jurisdictions as a ground for allowing the clerk additional compensation.⁸⁷ Furthermore, the principle under which a clerk is denied additional compensation for extra services is inapplicable where the duties imposed and the services rendered are for the federal government, and not for the state government under which he holds office.⁸⁸

§ 24. Salary

In some jurisdictions clerks of court are paid a stipulated salary, the amount of which is fixed by or under statutory provisions.

Under statutes in some jurisdictions clerks of court receive their compensation in the form of a salary,⁸⁹ which is usually payable out of the official fees received by them.⁹⁰ Where this is the case the clerk cannot receive more than the amount designated,⁹¹ as computed in accordance with the period of service,⁹² and if a deficiency occurs it cannot be made up out of other funds,⁹³ except where a minimum salary is fixed by law, and the fees fall below that amount.⁹⁴ While, if in any one year of his term the aggregate of the fees of the clerk is insufficient to pay his salary for that year, he is entitled to have an excess standing to his credit in a preceding year of his term applied to meet the deficit,⁹⁵ yet, in the case of a clerk serving two or more terms, he cannot appropriate a surplus accruing in one term to a deficit occurring in another term.⁹⁶

Fixing of salary by municipal corporation. Where a city charter fixes the salary of the clerk of the police court, an ordinance attempting to fix such salary is invalid.⁹⁷ In a jurisdiction where a clerk of a particular court is considered neither a city nor a local officer, his salary cannot be fixed and determined by city officials under a statute giving them that power as to local officers,⁹⁸ or under a city charter conferring the power as to officers whose compensation is paid out of the city treasury.⁹⁹

§ 25. Accounting for Fees

- a. In general
- b. Naturalization fees

a. In General

A clerk of court must account for fees to which he is not individually entitled, as where the fees collected exceed his authorized compensation or were illegally exacted under color of office.

In many jurisdictions in which a salary compensation has been substituted for fees, the clerk is required to account to the public treasurer for any excess of fees above the compensation and allowances authorized by law to be retained by him,¹ if earned in his official capacity,² whether collected before or after his term of office expires,³ or whether collected by him at all, for he extends credit at his peril;⁴ but a clerk need not account for uncollected fees not falling within the purview of the statute involved,⁵ and he may hold back all fees earned by his office until the salary allowed

Recovery denied

Miss.—Board of Sup'rs of Grenada County v. King, 76 So. 543, 115 Miss. 521.

86. Ind.—State v. Shutts, 69 N.E. 397, 161 Ind. 590.
11 C.J. p 875 note 37.

87. Ind.—Tippecanoe County v. Mitchell, 30 N.E. 409, 131 Ind. 370, 15 L.R.A. 520.

88. Utah.—Eldredge v. Salt Lake County, 106 P. 939, 37 Utah 188.
11 C.J. p 875 note 39.

89. Mo.—Despain v. Shannon County, 292 S.W. 1027.

Okl.—Board of Com'rs of Oklahoma County v. Beaty, 171 P. 34, 67 Okl. 281.

Tenn.—Underwood v. Hickman, 39 S.W.2d 1034, 162 Tenn. 689.
11 C.J. p 875 note 40.

Population of county as determining salary

Mo.—Chapman v. McDonald County, 5 S.W.2d 403—Despain v. Shannon County, 292 S.W. 1027—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302.

Tenn.—Underwood v. Hickman, 39 S.W.2d 1034, 162 Tenn. 689.

11 C.J. p 875 note 40 [a].
90. Ark.—Burnett v. Stephenson, 100 S.W.2d 256, 193 Ark. 333.
11 C.J. p 876 note 41.

91. Fla.—Carlton, for Use of Duval County, v. Fidelity & Deposit Co. of Maryland, 151 So. 291, 113 Fla. 63, petition denied 154 So. 317, 113 Fla. 63—Orange County v. Robinson, 149 So. 604, 111 Fla. 402.

Ind.—Losche v. Marion County, 191 N.E. 143, 207 Ind. 44.
11 C.J. p 876 note 42.

92. Effect of temporary removal
Wis.—Clausen v. Fond du Lac County, 170 N.W. 287, 168 Wis. 432.

93. Ill.—Hamilton County v. Buck, 8 Ill.App. 248.
Pa.—Steel v. Com., 18 Pa. 451.

94. Idaho.—Woodward v. Idaho County, 51 P. 143, 5 Idaho 524.

95. Pa.—Wiegand v. Luzerne County, 7 Kulp 133.

96. Pa.—Steel v. Com., 18 Pa. 451—Commonwealth v. Steel, 8 Pa. 128.

97. Mich.—Burton v. Detroit, 156 N.W. 453, 190 Mich. 195.

98. N.Y.—Whitmore v. New York, 5 Hun 195, affirmed 67 N.Y. 21.

99. N.Y.—People v. Prendergast, 159 N.Y.S. 574, 94 Misc. 481.

1. Ark.—State v. Swaim, 268 S.W. 366, 167 Ark. 225.

Fla.—Orange County v. Robinson, 149 So. 604, 111 Fla. 402.
11 C.J. p 876 note 51.

Fees received by deputy
Ark.—State v. Swaim, 268 S.W. 366, 167 Ark. 225.

2. Idaho.—Rhea v. Washington County, 88 P. 89, 12 Idaho 455.
11 C.J. p 877 note 52.

3. Mo.—Matter of Lewis, 52 Mo. 550.

4. U.S.—Bean v. Patterson, 4 S.Ct. 23, 110 U.S. 401, 28 L.Ed. 190.
11 C.J. p 877 note 54.

5. Tex.—Tarrant County v. Hollis, Civ.App., 76 S.W.2d 198, error dismissed Hollis v. Tarrant County, Com.App., 102 S.W.2d 1055.

him by law has been paid.⁶ In other jurisdictions, or as to clerks of other courts in the same jurisdictions, the clerk's salary is the full compensation to which he is entitled for all services rendered, and he must pay into the treasury all fees and moneys⁷ earned by him in his official capacity,⁸ although other statutes have been construed as not requiring a clerk to account for fees.⁹ Under some statutes it has been held that the clerk must account for all fees received in tax suits brought by cities, towns, and independent school districts,¹⁰ or that all "fees" collected by the clerk are the property of the county and must be paid into the treasury,¹¹ even though the county pays them back to the clerk as salary;¹² but the clerk is not prohibited from retaining the per diem compensation allowed him for court attendance.¹³ On an accounting the clerk is not entitled to credits for hire of assistants where he failed to follow statutory requirements in respect of procuring prior authorization for their employment.¹⁴

Statutes exempting fees from a maximum fee bill will not be extended by implication to include fees not specified.¹⁵

Illegal fees. It has been held that the public authorities may recover illegal fees collected by a clerk of court under color of office, although the right of recovery has been denied in respect of il-

legal fees collected without color of office.¹⁶ It has also been held that a clerk cannot be compelled to account to the state or county for fees illegally exacted by him, because he is liable for their repayment.¹⁷

Clerks of federal courts must account for fees and emoluments of office in accordance with statutory requirements,¹⁸ and the clerk's return thereof must be in writing and verified.¹⁹ It has been held that there is no obligation on the part of a clerk to account for fees until he has collected them.²⁰ The government is not entitled to interest on fees and emoluments collected by the clerk and deposited in a bank.²¹ The treasury department lacks authority to order canceled checks of the clerk, drawn against fees and emoluments deposited by him in a bank, to be retained by the bank.²²

Change of incumbents. After a clerk has received the amount allowed by law for his compensation, he has no further interest in the fees, and his successor is entitled to collect the uncollected fees;²³ and in case his successor receives certain fees and turns them over to him, he must account for them.²⁴ Under the various salary laws, the clerk's successor in office must account for fees received by him for work begun but not completed by his predecessor in office; but the clerk is not required to account for fees collected by him for

Stenographer's fee

Tex.—Tarrant County v. Hollis, *supra*.

8. Mo.—Corbin v. Adair County, 71 S.W. 674, 171 Mo. 385.

7. Ala.—Armstrong v. Jefferson County, 95 So. 39, 208 Ala. 645.
11 C.J. p 877 note 56.

8. Iowa.—Baldwin v. Stewart, 222 N.W. 348, 207 Iowa 1135—Burlingame v. Hardin County, 164 N.W. 115, 180 Iowa 919.
11 C.J. p 877 note 57.

Services as member of commission of insanity

Iowa.—Baldwin v. Stewart, 222 N.W. 348, 207 Iowa 1135.

Services as referee

Iowa.—Burlingame v. Hardin County, 164 N.W. 115, 180 Iowa 919.

9. Ala.—Jefferson County v. Waldrop, 93 So. 540, 207 Ala. 606—Waldrop v. Henry, 92 So. 425, 207 Ala. 128.

Fees for services rendered by salaried deputies

Ala.—Jefferson County v. Waldrop, 93 So. 540, 207 Ala. 606.

Application of general and special acts

General statute, requiring municipal court clerks to pay fines and pen-

alties collected to county law library associations, is inapplicable to municipal court created by special act containing conflicting provisions.—State ex rel. Allen County Law Library Ass'n v. Welker, 190 N.E. 150, 47 Ohio App. 42.

10. Tex.—Duclos v. Harris County, Civ.App., 291 S.W. 611, affirmed, Com.App., 298 S.W. 417.

11. Ind.—State v. Carey, 84 N.E. 761, 87 N.E. 670, 44 Ind.App. 659.

12. Ind.—Ex p. Fitzpatrick, 86 N.E. 964, 171 Ind. 557.

13. Ind.—State v. Flynn, 69 N.E. 159, 161 Ind. 554.

14. Tenn.—State v. Bond, 8 S.W.2d 367, 157 Tenn. 326.

15. Tex.—Duclos v. Harris County, Civ.App., 291 S.W. 611, affirmed, Com.App., 298 S.W. 417.

16. Ariz.—Yuma County v. Wisener, 46 P.2d 115, 45 Ariz. 475, 99 A.L.R. 642.

Marriage license fees

County could recover from superior court clerk sums collected by clerk as charge for unnecessary special marriage certificate which clerk induced nonresident applicants to believe was required by law, on ground that clerk obtained money under

"color of office" as "fee," but county could not recover sums in addition to regular fee which clerk collected for issuing marriage licenses outside regular office hours, since such sums were not obtained under "color of office."—Yuma County v. Wisener, *supra*.

17. Tex.—Tarrant County v. Rogers, Civ.App., 125 S.W. 592.

18. U.S.—U. S. v. Clayton, C.C.A. Ga., 2 F.2d 150.

Fees in bankruptcy cases

U.S.—U. S. v. Clayton, *supra*.

19. U.S.—U. S. v. Mason, C.C.Mass., 177 F. 552, affirmed 31 S.Ct. 28, 218 U.S. 517, 54 L.Ed. 1133.

11 C.J. p 877 note 62.

20. U.S.—The Memphian, D.C.Mass., 245 F. 484.

21. U.S.—U. S. v. MacMillan, Ill., 40 S.Ct. 540, 253 U.S. 195, 64 L.Ed. 857, affirming 251 F. 55, 163 C.C.A. 305, which affirmed, D.C., 209 F. 266.

22. U.S.—Petition of Clerk for Instructions Respecting Canceled Bank Checks, C.C.A., 261 F. 154.

23. Mo.—Thornton v. Thomas, 65 Mo. 272.

24. Pa.—Com. v. West, 1 Rawle 29.

services rendered by his predecessor before the act requiring such accounting went into effect, even though the act was in force when such fees were collected.²⁵ A clerk of a court who collects his fees, pays the salaries and expenses of his office, and at the end of the year pays the balance into the treasury is not bound by the terms of the statute providing that an outgoing officer shall at once deliver to his successor in office all fees due to such officer in his official capacity.²⁶

A compromise between a clerk of court and the county board respecting fees for which he failed to account in violation of his official duty is void.²⁷

Procedure in suits to recover fees. The usual rules governing matters of procedure apply to suits by the public authorities to recover fees from clerks of court, as with respect to the jurisdiction of the court,²⁸ and matters of pleading²⁹ and evidence,³⁰ and amount of recovery.³¹

Retention of property. It has been held that a clerk of court may retain in his possession property in respect of which he has rendered services until his compensation is paid.³²

b. Naturalization Fees

Clerks of state courts are in most, but not all, jurisdictions required to account to local authorities for the portion of naturalization fees which do not have to be paid to the federal government. Clerks of federal courts may retain a portion of the fees collected.

In most jurisdictions in which the clerk has been placed on a salary and required to account to the public treasury for fees received by him, it is held that fees for services in naturalization proceedings must be accounted for, because they are regarded as having been received in his official capacity.³³ Generally speaking, congressional legislation is exclusive of state legislation with regard to the amount of the fees to be charged in naturalization proceedings and the disposition of such fees as between the clerk of court and the bureau of naturalization.³⁴ In some jurisdictions it is held that the act of congress authorizing clerks to retain one half of the fees collected refers merely to the adjustment between the clerk and the bureau of immigration and does not affect his duty to account to the state or county treasurer for the balance,³⁵ and that half the fees should be paid to the federal government and the other half to the

25. Neb.—Boettcher v. Lancaster County, 103 N.W. 1075, 74 Neb. 148.

26. Ky.—Chinn v. Shackelford, 73 S.W. 908, 117 Ky. 700, 25 Ky.L. 1813.

11 C.J. p 877 note 67.

27. Neb.—Douglas County v. Broadwell, 148 N.W. 930, 96 Neb. 682.

28. Ark.—Johnson County v. Bost, 213 S.W. 388, 139 Ark. 35.

Fla.—Hillsborough County v. Dickenson, 169 So. 734, 125 Fla. 181—Orange County v. Robinson, 149 So. 19, 110 Fla. 318.

Kan.—State v. Richardson, 284 P. 367, 129 Kan. 806.

Particular court

Accounting by district court clerk for fees collected should be had in district court of which defendant is clerk, not in supreme court.—State v. Richardson, 284 P. 367, 129 Kan. 806.

Relief in equity

(1) Court of equity has jurisdiction of suit by county to recover from circuit clerk on account of fraudulent and illegal claims for services rendered, which had been allowed by the county court and for which warrants had been issued, some of which were paid.—Johnson County v. Bost, 213 S.W. 388, 139 Ark. 35.

(2) Amount due by clerk of court above statutory compensation can-

not be recovered in equity, there being adequate law remedy.—Orange County v. Robinson, 149 So. 19, 110 Fla. 318.

(3) Suit by county against former clerk of court to recover excess fees not accounted for by clerk and to impress trust on property allegedly purchased with such fees could not be maintained in equity, since amount of claim could only be established by law action and property allegedly held in trust could be reached by creditor's bill.—Hillsborough County v. Dickenson, 169 So. 734, 125 Fla. 181.

29. Sufficiency of complaint

Ark.—State for Use and Benefit of Garland County, v. Jones, 100 S. W.2d 249.

30. Sufficiency of evidence

Ark.—Johnson County v. Bost, 213 S. W. 388, 139 Ark. 35.

31. Interest

Fla.—Orange County v. Robinson, 149 So. 604, 111 Fla. 402.

32. Iowa.—Ripley v. Gifford, 11 Iowa 367.

33. Cal.—Alameda County v. Cook, 162 P. 405, 32 Cal.App. 165.

Iowa.—Plymouth County v. Topplings, 183 N.W. 592, 191 Iowa 1028.

N.Y.—Price v. Erie County, 116 N.E. 988, 221 N.Y. 260, reversing 148 N.Y.S. 864, 163 App.Div. 437.

11 C.J. p 878 note 70.

Retention not warranted by implication

Cal.—Alameda County v. Cook, 162 P. 405, 32 Cal.App. 165.

34. Mass.—Hampden County v. Morris, 93 N.E. 579, 207 Mass. 167, Ann.Cas.1912A 815.

Utah.—Eldredge v. Salt Lake County, 106 P. 939, 37 Utah 188.

Wash.—State v. Libby, 92 P. 350, 47 Wash. 481.

2 C.J. p 1127 notes 47, 48.

Formerly the question of the amount and disposition of fees in naturalization proceedings conducted in state courts was left to the states.—Matter of Palmer, 47 N.Y.S. 433, 21 App.Div. 180, affirmed 49 N.E. 1101, 154 N.Y. 776—People v. Seabury, 28 How.Pr.N.Y. 121—2 C.J. p 1127 note 46.

35. N.Y.—Price v. Erie County, 116 N.E. 988, 221 N.Y. 260, reversing 148 N.Y.S. 864, 163 App.Div. 437.

11 C.J. p 878 note 71.

Disposition of fees as controlled by state law

Under L.1885 c 502, and L.1891 c 149, naturalization fees received by clerk of Erie county belong to county and not to clerk individually, since Act Congr.June 29, 1906, authorizing clerks of state courts to retain portion of naturalization fees, leaves ownership and disposition of fees so retained to control of state law.—Price v. Erie County, supra.

local government in accordance with applicable statutory requirements.³⁶ In other jurisdictions it has been held that the clerk is entitled under the act of congress to retain such fees,³⁷ and that a state statute requiring the clerk to account therefor is invalid and inoperative as being in conflict with the federal statute,³⁸ although there is also authority to the effect that the state may abolish the fee system and require all fees to be paid into the treasury.³⁹

The clerks of the federal courts were formerly not required to account for fees received in naturalization proceedings;⁴⁰ but according to the express provisions of the act of June 29, 1906, they are entitled to retain one half of such fees in any fiscal year up to the sum of three thousand dollars, and required to account for and to pay over the excess to the bureau of immigration; and, by virtue of other statutory provisions, where the clerk serves only part of the year, he is entitled to retain only a proportionate part of the maximum amount allowed by statute.⁴¹ The courts have upheld the validity of a regulation requiring clerks to remit quarterly on a pro rata basis.⁴²

§ 26. Recovery Back of Fees Accounted for

A clerk may not recover fees paid the state or county under mistake of law nor illegal or excessive fees collected by him and paid over.

If the clerk exacts illegal and excessive fees and pays them over to the state or county, he cannot recover them back;⁴³ nor may fees voluntarily paid to the county under a mistake of law be recovered back. The clerk's settlement with the county is

conclusive on both him and the county, unless impeachable for fraud, collusion, or mistake.⁴⁴

§ 27. Who Liable

- a. Public authorities
- b. Private persons

a. Public Authorities

Generally speaking, public authorities may be held liable for the fees of a clerk of court where there is statutory authorization but not otherwise. Public officials are not ordinarily personally liable.

Under statute a state, county, or city may be held liable for the fees of a clerk of court.⁴⁵ Although the county has been held liable for certain services and expenditures of a clerk, even in the absence of a statute authorizing such compensation,⁴⁶ as a general rule the public is liable for the compensation of a clerk of court only where there is specific authority to the officer to make a charge for the service rendered, and a positive statutory provision making the public liable therefor.⁴⁷ If the clerk is unable to collect from the parties, he must himself sustain the loss and cannot hold the county liable.⁴⁸ The fact that certain services were performed in pursuance of a court order will not render the county liable if the court had no power to contract obligations for it,⁴⁹ nor will the allowance of an unlawful claim by the person or body authorized to contract obligations for the county bind the county.⁵⁰ A city has no right to deprive a clerk of court of his costs for services rendered in a cause, by causing a fieri facias issued on a judgment in its favor to be set aside.⁵¹

36. Iowa.—Plymouth County v. Topplings, 183 N.W. 592, 191 Iowa 1028.

37. Neb.—State v. Smith, 165 N.W. 896, 102 Neb. 82.

Ohio.—Talbot v. State, 5 Ohio App. 262.

11 C.J. p 878 note 72.

38. Ind.—State v. Quill, 102 N.E. 106, 53 Ind.App. 495.

N.Y.—Matter of Beyer, 130 N.Y.S. 281, 72 Misc. 443.

Utah.—Eldredge v. Salt Lake County, 106 P. 939, 37 Utah 188.

11 C.J. p 878 note 73.

39. Ohio.—State of Ohio ex rel. Locher v. Horner, 16 Ohio N.P.N. S., 449.

40. U.S.—U. S. v. McMillan, 17 S.Ct. 395, 165 U.S. 504, 41 L.Ed. 805, affirming 37 P. 263, 10 Utah 184—U. S. v. Hill, Mass., 7 S.Ct. 510, 120 U.S. 169, 30 L.Ed. 627, affirming Hill v. U. S., C.C., 40 F. 441.

41. U.S.—Robb v. U. S., Pa., 233 F. 525, 147 C.C.A. 411.

11 C.J. p 878 note 76.

42. U.S.—Gross v. U. S., C.C.A.Cal., 64 F.2d 72.

43. Tex.—Tarrant County v. Rogers, 135 S.W. 110, 136 S.W. 255, 104 Tex. 224.

11 C.J. p 878 note 78.

44. Mo.—Corbin v. Adair County, 71 S.W. 674, 171 Mo. 385.

45. Ala.—Herrmann v. Mobile County, 80 So. 112, 202 Ala. 274.

Cal.—McClung v. Johnson, 289 P. 199, 106 Cal.App. 264.

Md.—City of Baltimore v. Pattison, 110 A. 106, 136 Md. 64.

11 C.J. p 878 note 82.

County consolidated fund

Ala.—Herrmann v. Mobile County, 80 So. 112, 202 Ala. 274.

Clerk of justice's court in city

Cal.—McClung v. Johnson, 289 P. 199, 106 Cal.App. 264.

Services in criminal prosecution

Md.—City of Baltimore v. Pattison, 110 A. 106, 136 Md. 64.

11 C.J. p 878 note 82 [d].

46. Mo.—Boone County v. Todd, 3 Mo. 140.

N.Y.—Bright v. Chenango County, 18 Johns. 242.

47. N.Y.—City of New York v. Schafer, 256 N.Y.S. 460, 143 Misc. 298.

11 C.J. p 878 note 82.

48. Ind.—Ex p. Harrison, 14 N.E. 225, 112 Ind. 329.

Md.—Peter v. Prettyman, 62 Md. 566.

49. Minn.—Rasmusson v. Clay County, 43 N.W. 3, 41 Minn. 283.

S.C.—Ostendorff v. Charleston County, 14 S.C. 403.

50. Ind.—Huntington County v. Buchanan, 51 N.E. 939, 21 Ind.App. 178.

Wis.—St. Croix County v. Webster, 87 N.W. 302, 111 Wis. 270.

11 C.J. p 879 note 85.

51. La.—Lynne v. New Orleans, 26 La. Ann. 48.

Under statutes providing that fees shall be taxed as costs against land sold under judgment for taxes and paid out of the proceeds of sale after taxes, penalty, and interest, and that in no case shall the state or county be held liable therefor, if tax suits are tried and judgment rendered on the merits, the state or county will not be liable for the fees of the clerk of court; and it has also been held that no liability exists where the suit is dismissed without trial on the merits.⁵²

A third party appearing and defending a suit in admiralty in behalf of an absent party thereto may be made personally liable for fees of the clerk covering services rendered in the cause at his request.⁵³ Under a statute providing for collection of fees by a clerk for services rendered "except when on behalf of the United States," the quoted phrase has been held inapplicable to suits in which the United States is a party litigant, so that the United States may be held liable for the clerk's fee in such a case.⁵⁴

A public official, such as a district attorney, is not liable to the clerk of court for the latter's fees in a criminal case.⁵⁵

b. Private Persons

Generally speaking, the party for whom a clerk of court renders services in connection with a suit may be held responsible for his fees.

Usually the party for whom services are rendered or the assignee of his interest⁵⁶ is answerable to the clerk for his fees,⁵⁷ and where the clerk cannot make his fees out of the unsuccessful party he may generally hold the successful party liable for them,⁵⁸ although he may not in such case hold the sureties on the prosecution bond of the successful party,⁵⁹ and it has been held that

on affirmance the clerk or prothonotary cannot resort to the writ of error recognizance for his fees.⁶⁰ Where an action to recover land is dismissed by plaintiff, the clerk has no lien on the land for services rendered by him for the benefit of plaintiff.⁶¹

§ 28. To Whom Payable

The fees are ordinarily payable to the clerk of court incumbent at the time when they were earned.

The clerk, to whom fees are taxed in any case, is the only person entitled by law to receive them from the party chargeable, or from the sheriff who has collected them on fee bill or execution.⁶² Although the contrary has been held in some cases,⁶³ the general rule is that the incumbent clerk has no right to fees earned by, or taxed to, his predecessor; they belong either to the latter or to the county.⁶⁴ However, within the meaning of some fee statutes, a fee is earned by the incumbent and is payable to him where the final steps were taken during his term, although some steps were taken during the term of his predecessor.⁶⁵

§ 29. Time for Payment

- a. In general
- b. Prepayment

a. In General

The practice varies in respect of whether a clerk of court may collect his costs as they accrue or must abide the event.

As to when the fees of a clerk are payable is a question depending on the statutes and the practice of the particular court. With regard to some services the clerk may collect his costs as they accrue irrespective of the final result,⁶⁶ while as to

52. Tex.—Grant v. Ellis, Com.App., 50 S.W.2d 1093, reversing, Civ.App., 35 S.W.2d 460.

53. U.S.—In re Stover, C.C.R.I., 23 F.Cas.No.12,507, 1 Curt. 201.

54. U.S.—U. S. v. Payne, D.C.Wash., 30 F.2d 960.

Forfeiture proceedings by United States
U.S.—U. S. v. Payne, supra.

55. N.Y.—Fairlie v. Maxwell, 1 Wend. 17.

56. Cal.—Wickersham v. Denman, 9 P. 723, 68 Cal. 383.

Md.—Peter v. Prettyman, 62 Md. 566. 11 C.J. p 379 note 88.

57. Md.—City of Baltimore v. Pattison, 110 A. 106, 136 Md. 64.

Mass.—Romanausky v. Skutulas, 154 N.E. 856, 258 Mass. 190.

11 C.J. p 379 note 89.

Expense of reporting evidence
must be paid by appealing party.—Romanausky v. Skutulas, supra.

58. Ala.—South, etc., Alabama R. Co. v. Bradley, 4 So. 611, 84 Ala. 468.

11 C.J. p 379 note 90.

59. Tenn.—Carren v. Breed, 2 Coldw. 465.

60. Pa.—Moore v. Porter, 13 Serg. & R. 100.

61. Ky.—Skaggs v. Hill, 14 S.W. 363, 12 Ky.L. 382.

62. Mo.—Thornton v. Thomas, 2 Mo. App. 596, affirmed 65 Mo. 272.

63. Ky.—Chinn v. Shackelford, 78 S.W. 908, 117 Ky. 700, 25 Ky.L. 1813.

11 C.J. p 381 note 11.

64. Iowa.—Peet v. White, 43 Iowa 400.

11 C.J. p 381 note 12.

65. Tex.—McHugh v. Reese, Civ. App., 149 S.W. 743.

11 C.J. p 381 note 13.

66. Pa.—Banks v. Juniata Bank, 16 Serg. & R. 155.

11 C.J. p 380 note 94.

In Arkansas Act July 16, 1868 § 16, providing that in all cases of appeal to any superior court the clerk of court from which the appeal is taken shall not be required to deliver or forward the transcript until his fee for such transcript, together with all costs that may have accrued, are paid, is in conflict with state Const. art 7 § 4, authorizing the bringing of final judgments into the supreme court for revision, and is inoperative.—Norman v. Curry, 27 Ark. 440.

A prothonotary has a right to receive his fees eventually, plaintiff becoming liable therefor when a non

others his costs must abide the event,⁶⁷ and an established usage amongst clerks of court prematurely to demand their fees is no justification.⁶⁸

In Louisiana clerks have the right every six months after the institution of the suit to demand their costs from plaintiff.⁶⁹

b. Prepayment

Whether or not a clerk of court is entitled to prepayment of his fees depends upon the local practice and the nature of the services.

Both in cases where there is express or implied statutory authority or requirement, and in cases where there is an absence of statutory prohibition, a clerk of court is entitled to demand prepayment of his fees before performing certain services;⁷⁰ but as to certain services in some jurisdictions, in the absence of an express provision therefor, the right to prepayment has been denied.⁷¹ Even where the clerk is deemed to have no right to refuse arbitrarily to perform the desired services until his fees have been paid, the court will exercise discretion, and where necessary to the protection of the clerk will order that the fees be paid in advance;⁷² but the mere fact that the clerk does not exercise the statutory right to demand his fees in advance does not bar him from recovering pay for his services from the party for whose benefit they were rendered,⁷³ nor does it render void the act done by him,⁷⁴ nor affect the rights of the parties thereunder.⁷⁵ The clerk may waive his right to

demand prepayment of his fees,⁷⁶ and he cannot insist that before performing some service required of him he shall first be paid his fees for some previous service for which he has given credit.⁷⁷

Prepayment and return. It is sometimes provided by rule of court that trial fees paid to the clerk shall not be returned to plaintiff after issue joined or trial had.⁷⁸

§ 30. Proceedings to Recover Compensation

- a. Against the public
- b. Against parties
- c. Against other officials
- d. Action by clerk de facto

a. Against the Public

- (1) In general
- (2) Defenses

(1) In General

A clerk of court is ordinarily the proper party to bring suit for his fees, and proceedings to collect compensation are generally governed by the usual rules as interpreted in the light of controlling statutory provisions. Under some practice the clerk may deduct his salary and expenses from fees collected.

Ordinarily, the clerk himself is the proper party to bring suit for his fees.⁷⁹ In order to recover fees or salary due him for public services the clerk must file a sufficient petition or complaint⁸⁰ in the proper court,⁸¹ and usually it is a statutory con-

prosequitur is entered, but until judgment is entered the prothonotary may not demand his fees.—Goodfleck v. Landis, 28 Pa. Dist. 169.

67. Ga.—Ballin v. Ferst, 55 Ga. 546. 11 C.J. p 880 note 95.

68. N.Y.—Costa v. New York City R. Co., 100 N.Y.S. 558.

69. La.—In re New Orleans, 19 La. Ann. 382.

70. U.S.—Bean v. Patterson, 4 S.Ct. 23, 110 U.S. 401, 28 L.Ed. 190.

Neb.—State v. Several Parcels of Land, 117 N.W. 450, 82 Neb. 51. 11 C.J. p 880 note 1.

71. Ky.—Jeffers v. Taylor, 198 S.W. 1160, 178 Ky. 392.

Tex.—State v. Hickey, Civ.App., 97 S.W.2d 713.

Wash.—State ex rel. Hamilton v. Ayer, 77 P.2d 610. 11 C.J. p 880 note 2.

Fees due two months after service under statute

Since under Ky. St. § 904, it was duty of clerk to furnish plaintiff with copy of pleadings on request, and, as under § 1751 clerk's fees are not due until two months after rendition of service, clerk could not refuse to make copies upon ground

that fees were not paid.—Jeffers v. Taylor, 198 S.W. 1160, 178 Ky. 392.

As against state

(1) State as appellant is entitled to have transcript of proceedings without advance payment of costs therefor, in view of statute allowing state to appeal without bond.—State v. Hickey, Tex.Civ.App., 97 S.W.2d 713.

(2) In Louisiana the clerk may not demand prepayment as against the state or its subsidiaries.—State v. Estorage, 34 So. 643, 110 La. 479.

72. Ky.—Duncan v. Baker, 13 Bush, Ky., 514—Mulholland v. Troutman, 7 Ky.L. 517.

11 C.J. p 880 note 3.

73. Wis.—Williams v. Willock, 101 N.W. 927, 123 Wis. 293.

74. Del.—Newlin v. Adair, 89 A. 209, 27 Del. 452.

75. Mass.—Clemens Electrical Mfg. Co. v. Walton, 47 N.E. 102, 168 Mass. 304.

11 C.J. p 881 note 6.

76. Cal.—Tregambo v. Comanche Mill, etc., Co., 57 Cal. 501.

Ill.—Dowie v. Chicago, etc., R. Co., 73 N.E. 354, 214 Ill. 49.

11 C.J. p 881 note 7.

77. N.Y.—Purdy v. Peters, 15 Abb. Pr. 160, 23 How.Pr. 328.

78. N.Y.—Peo. v. Wilson, 68 N.Y.S. 850, 34 Misc. 273.

11 C.J. p 880 note 98.

79. Md.—City of Baltimore v. Pattison, 110 A. 106, 136 Md. 64.

Surplus payable to state

Clerk of criminal court of Baltimore city, and not the state, is proper party to sue city for fees chargeable and taxed as costs in cases in court in which defendants were convicted and made liable for costs, to extent to which they were not paid by convicted criminals themselves, although recovery will constitute surplus payable to state treasurer.—City of Baltimore v. Pattison, 110 A. 106, 136 Md. 64.

80. U.S.—Alexander v. U. S., 43 Ct. Cl. 389.

Tex.—Escaville v. Stephens, 119 S.W. 842, 102 Tex. 514.

11 C.J. p 881 note 14.

Complaint held sufficient

Ala.—Herrmann v. Mobile County, 80 So. 112, 202 Ala. 274.

81. U.S.—Pleasants v. U. S., D.C. Va., 35 F. 270.

11 C.J. p 881 note 15.

dition precedent to suit that there be a presentation of a sufficiently specific claim to, and action thereon by, a judge, county board, or other designated official or body.⁸² Pending an investigation of the clerk's bill, no action will lie to enforce it,⁸³ and if the account is duly approved as required by law, plaintiff need not prove each particular item,⁸⁴ as the approval of a clerk's account, as provided by statute, is prima facie evidence of the correctness of the items,⁸⁵ and in some states its allowance by a particular court or judge is as conclusive as a judgment.⁸⁶ A disallowance by a comptroller of the treasury of fees claimed by a clerk of the court is not conclusive against the clerk on a petition by him for the recovery of such fees.⁸⁷ In an action by a clerk to recover his salary, annual statements required of the clerk by law are admissible in evidence to show the amounts collected by the clerk and the amounts allowed by the county board as deputy hire.⁸⁸ Questions of fact should be submitted to the jury.⁸⁹ In a proper case, the court will direct payment on the fees;⁹⁰ and the judgment cannot be reversed on the ground that the record fails to show that the amount of the judgment, together with the amount already paid the clerk, would not increase his emoluments beyond the maximum allowed by law.⁹¹

Collection without suit. It has been held that a clerk of court may deduct his salary and expenses from the fees collected each quarter regardless of when they were earned or accrued.⁹²

(2) Defenses

Fraud or payment to another and de facto officer may constitute a defense to an action by a clerk of court for compensation, although it is ordinarily no defense that

the claim was disallowed by auditing officials or that a receipt was given for money not in fact received.

It is no defense to an action by a clerk of court to recover his fees or salary that the claim has been disallowed by the officials authorized to audit the clerk's accounts,⁹³ that the clerk failed to furnish a new bond on being requested so to do,⁹⁴ or that he failed or refused to account for fees received by him.⁹⁵ Alteration of a pay-roll sheet after signature by the clerk and without his consent, showing deductions, is of no legal effect and does not afford any defense to the clerk's suit for salary.⁹⁶ A receipt reciting payment in full will not bar recovery where it appears that the full amount was not in fact received;⁹⁷ but fraud or false representation constitutes a good defense to the action,⁹⁸ as does also payment of salary to a de facto officer for the period for which plaintiff claims salary.⁹⁹

b. Against Parties

A clerk of court may recover fees due him from a private individual by an action of debt, and under statute by summary remedy, although in the absence of statute he should proceed by action or fee bill.

The fees due a clerk for official services performed by him at the request of a party, being such as are authorized by law, constitute a debt for which an action of debt or indebitatus assumpsit or actions in the nature thereof will lie against such party,¹ even though the party is the successful one in the suit in which the costs accrued;² and the clerk may set off such fees against an action or his bond by the party from whom the fees are due.³ In some jurisdictions a summary remedy is given the clerk by statute;⁴ but in the absence of an ex

82. Ark.—Desha County v. Jones, 11 S.W. 875, 51 Ark. 524. 11 C.J. p 881 note 16.

Claim held sufficient

Ala.—Herrmann v. Mobile County, 80 So. 737, 16 Ala.App. 634.

83. U.S.—Marvin v. U. S., D.C. Conn., 114 F. 225. 11 C.J. p 881 note 17.

84. U.S.—Marsh v. U. S., D.C.Fla., 109 F. 236.

85. U.S.—Marsh v. U. S., supra—Marvin v. U. S., 45 Ct.Cl. 528—Owen v. U. S., 41 Ct.Cl. 69.

86. Ky.—Boone County v. Dils, 5 Ky.L. 686, 12 Ky.Op. 482. N.H.—County v. Clark, 60 N.H. 209. 11 C.J. p 881 note 20.

87. U.S.—Davis v. U. S., D.C.Me., 45 F. 162—Harmon v. U. S., C.C.Me., 43 F. 560, affirmed 13 S.Ct. 327, 147 U.S. 268, 37 L.Ed. 164.

88. Mo.—Lycett v. Wolff, 45 Mo. App. 489.

89. Mass.—Campbell v. City of Boston, 186 N.E. 577, 283 Mass. 365.

Authenticity of deduction shown by pay roll
Mass.—Campbell v. City of Boston, supra.

90. U.S.—Clough v. U. S., C.C.Tenn., 55 F. 921.

91. U.S.—U. S. v. Jones, Ala., 13 S. Ct. 437, 147 U.S. 672, 37 L.Ed. 325, following U. S. v. Harmon, 13 S. Ct. 327, 147 U.S. 268, 37 L.Ed. 164.

92. Tenn.—Hamilton County v. Clark, 55 S.W.2d 266, 165 Tenn. 292.

93. U.S.—U. S. v. Fitch, Mich., 70 F. 578, 17 C.C.A. 233.

94. Wyo.—Laramie County v. Atkinson, 33 P. 995, 4 Wyo. 334.

95. Wyo.—Laramie County v. Atkinson, supra. 11 C.J. p 882 note 27.

96. Mass.—Campbell v. City of

Boston, 186 N.E. 577, 283 Mass. 365.

97. Mass.—Campbell v. City of Boston, supra.

98. Ky.—Norman v. Hammond, 3 S.W. 1092, 17 Ky.L. 896. 11 C.J. p 882 note 28.

99. N.Y.—Dolan v. New York, 68 N. Y. 274, 23 Am.R. 168.

1. W.Va.—Johnson v. MacCoy, 9 S. E. 887, 32 W.Va. 552. 11 C.J. p 882 note 30.

2. Ala.—South, etc., Alabama R. Co. v. Bradley, 4 So. 611, 84 Ala. 468. 11 C.J. p 882 note 31.

3. Va.—Craig v. Lobb, 12 Leigh 627, 39 Va. 627.

4. Ky.—Moser v. Summers, 189 S. W. 715, 172 Ky. 553. 11 C.J. p 882 note 33.

Distress warrant

A circuit court clerk may under express provision of Ky.St. § 175:

press provision to that effect, he can proceed only by action or fee bill.⁵ In some jurisdictions, a clerk may maintain an action for his fees without first having placed them in an officer's hands and having had them returned, "No property found";⁶ but in other jurisdictions no action lies for clerks' fees until they are put into an officer's hands for collection, and he has returned that they cannot be levied by distress.⁷ Clerks of court have no lien against a plaintiff's property for fees in cases wherein executions against defendants were returned unsatisfied, so far as summary process is concerned, until the execution has been issued and placed in the sheriff's hands, and the clerk's claim to the proceeds of an execution sale in payment of fees due in other cases becomes subject to the claim of an assignee without notice of the clerk's equities.⁸ Under a statute which imposes on the incoming clerk the duty of finishing all business left unfinished by his predecessor, and which provides that he shall be paid the usual fees for such work by his predecessor, where the latter has received the fees, no action lies for the same until all the unfinished business has been completed.⁹

Interest may be allowed in a proper case.¹⁰

Statutes governing suits by clerks of court against public officers have no application to a suit by a clerk on a fee bill against one—not a public officer.¹¹

It is no defense to the action that the clerk has failed to demand his fees in advance, as he is authorized to do by statute,¹² or that he was negligent in the performance of the services for which a recovery is sought.¹³

Instructions correctly stating the law applicable to the case are sufficient.¹⁴

collect his cost bill by distress warrant.—*Moser v. Summers*, *supra*.

5. Ill.—*Wickliff v. Robinson*, 18 Ill. 145.

11 C.J. p 882 note 34.

6. W.Va.—*Johnson v. MacCoy*, 9 S. E. 887, 32 W.Va. 552.

7. Va.—*Craigen v. Lobb*, 12 Leigh 627, 39 Va. 627.

8. Ala.—*Bain v. J. A. Lusk & Son*, 109 So. 187, 21 Ala.App. 442.

Purchaser

Clerk and sheriff, as licensees to apply proceeds of judgment to payment of fees in other cases, had no interest in money or judgment until collected, and proceeds belonged to purchaser of judgment without notice of claim.—*Bain v. J. A. Lusk & Son*, *supra*.

Judgment awarding costs to clerk, in cases wherein executions against

defendant were returned unsatisfied, from proceeds of subsequent execution sale, was erroneous without proof of judgments on which claimed or amounts due.—*Bain v. J. A. Lusk & Son*, *supra*.

9. Md.—*State v. Carman*, 27 Md. 706.

10. Refusal to pay on demand

Pa.—*Werner v. Hillman Coal & Coke Co.*, 150 A. 471, 300 Pa. 256, 70 A. L.R. 967.

11. Ky.—*Moser v. Summers*, 189 S. W. 715, 172 Ky. 553.

12. Wis.—*Williams v. Willock*, 101 N.W. 927, 123 Wis. 293.

13. Pa.—*Cone v. Donaldson*, 47 Pa. 363.

11 C.J. p 882 note 39.

14. Okl.—*Lawson v. Guthrie*, 137 P. 1186, 40 Okl. 593.

15. Okl.—*Lawson v. Guthrie*, *supra*.

Questions of fact are to be determined by the jury.¹⁵

c. Against Other Officials

In a proper case a clerk of court may proceed by action or bill in equity against another official illegally withholding the clerk's compensation.

An action can be maintained by a clerk of court in his own name, on the official bond of the sheriff, for the recovery of costs collected by the sheriff and due and payable to the clerk,¹⁶ or he may sue in equity to restrain a United States marshal from unlawfully withholding his salary on order of the comptroller.¹⁷

d. Action by Clerk De Facto

De facto clerks of court are not entitled to the salary attached to the office.

In accordance with the rule applicable to de facto officers generally, which is considered in § 145 of the C.J.S. title Officers, also 46 C.J. p 1059 note 70, a de facto clerk of court cannot recover the salary annexed to the office, as the salary is incident to the title to the office and not to its occupation and exercise.¹⁸

§ 31. Penalties and Forfeiture of Fees

Clerks of court are subject to forfeiture of fees or infliction of penalties for sundry derelictions in the performance of their duties, such derelictions ordinarily being specified by statute or rule of court.

Under statute in some jurisdictions a clerk may forfeit his fees for specified causes,¹⁹ or may be subjected to a penalty for certain acts and omissions,²⁰ but in accordance with well settled principles such statutes are to be strictly construed and will not be extended beyond their terms,²¹ nor cover cases not within their purview;²² therefore, if the

16. N.C.—*Jackson v. Maultsby*, 78 N.C. 174.

17. U.S.—*Loisel v. Mortimer*, C.C.A. La., 277 F. 832.

18. Cal.—*Burke v. Edgar*, 7 P. 488, 67 Cal. 182.

19. Tenn.—*Sharp v. State*, 97 S.W. 812, 117 Tenn. 537.

11 C.J. p 882 note 46.

20. Ky. — *Smedley v. Commonwealth*, 124 S.W. 408, 136 Ky. 464.

Tenn.—*State v. Cole*, 6 Lea 492, 11 C.J. p 908 notes 25, 26.

21. Ala.—*Holmes v. Lambreth*, 50 So. 140, 163 Ala. 460.

11 C.J. p 908 note 27.

22. Statute designed for protection of individuals only

Ark.—*Johnson County v. Bost*, 213 S.W. 338, 139 Ark. 35.

clerk was not acting in his official capacity at the time of the alleged violation of the statute, no penalty can be imposed.²³ Furthermore, a clerk is liable to a penalty only where expressly made so by statute. The court cannot impose a penalty where the law has imposed none,²⁴ although even in the absence of statute the clerk may forfeit his fees for official misconduct.²⁵ It is sometimes provided by rule of court that for a certain specified cause, the clerk's fees shall not be allowed;²⁶ but such a rule of court is inapplicable to fees for services rendered before its promulgation.²⁷

Denial or deduction of fees has been held proper where there was performance of an unnecessary service,²⁸ or for neglect of duty, or failure to fully perform the particular service for which a fee is desired,²⁹ as in the case of a clerk's dereliction of duty with respect to indexing,³⁰ or the preparation of depositions.³¹ The manner in which the clerk prepares a copy has been held immaterial; he may charge the statutory fee for his services whether he has it printed, typewritten, or written with a pen,³² although fees have been denied where the paper used was too thin.³³

Taking illegal fees. In some jurisdictions if a

clerk charges illegal fees the court may declare them forfeited.³⁴

In the federal courts, the clerk's right to a docket fee, "where issue is joined," attaches at the time such issue is in fact joined, and is not lost by the subsequent withdrawal of the plea constituting the issue, the statute restricting the docket fee to a smaller amount in a case which is dismissed or discontinued applying only in case of dismissal or discontinuance before the issue has been joined.³⁵ The right to the fee authorized by the latter statutory provision is not lost where there is a discontinuance in one court by reason of the case being transferred to another court for trial.³⁶

Constitutionality of statutes. Statutes allowing such penalties as fixed damages to the injured party have generally been held to be constitutional.³⁷

§ 32. Fees of Clerks of Territorial Courts

The fees of clerks of territorial courts are controlled by federal statutes.

The federal statutes govern the right to, and the allowance of, fees to clerks of territorial courts and are controlling up to the time the territory is admitted as a state.³⁸

III. POWERS AND DUTIES

§ 33. In General

The powers and duties of a clerk of court are ordinarily governed by statutory or constitutional provisions.

The authority of a clerk of court is as a rule en-

tirely statutory, and his official action, to be binding on others, must be in conformity with the statutes.³⁹ Although the duties and authority of the clerk are usually defined by statute,⁴⁰ and it has

23. N.D.—Milburn-Stoddard Co. v. Stickney, 103 N.W. 752, 14 N.D. 232.

11 C.J. p 908 note 28.

24. Ky.—Commonwealth v. Craig, 6 T.B.Mon. 45.

Pa.—Baldwin v. Cash, 7 Watts & S. 427.

25. Mo.—Chastain v. Missouri, etc., R. Co., 133 S.W. 853, 152 Mo.App. 478.

11 C.J. p 883 note 49.

26. Miss. — Jordan v. Mississippi Cent. R. Co., 65 So. 276, 107 Miss. 323.

11 C.J. p 883 note 47.

27. Miss.—Warren v. Yates, 64 So. 1, 106 Miss. 438.

28. Cal.—Caffey v. Mann, 84 P. 424, 3 Cal.App. 124.

Ga.—Walrop v. Wolff, 40 S.E. 830, 114 Ga. 610.

11 C.J. p 883 note 51.

29. N.C.—State v. Cameron, 29 S.E. 418, 122 N.C. 1074.

11 C.J. p 883 note 50.

30. Ky.—Sheppard v. Koch, 27 S.W. 2d 389, 234 Ky. 1—Yeary v. Yeary, 26 S.W.2d 536, 233 Ky. 691—Perry

v. Thomas, 24 S.W.2d 603, 232 Ky. 781—Wallace v. City of Louisa, 273 S.W. 720, 217 Ky. 419—Crider v. Kentenia-Catron Corporation, 283 S.W. 117, 214 Ky. 353—First Nat. Bank v. Williams Feed Co., 282 S.W. 551, 214 Ky. 31—Howard v. Watkins, 276 S.W. 1075, 211 Ky. 75—Emberger v. Commonwealth, 271 S.W. 1083, 208 Ky. 782—Mitchell v. Pratt, 197 S.W. 961, 177 Ky. 438—Golden v. Cornett, 195 S.W. 1080, 176 Ky. 133—Golden v. Lewis, 195 S.W. 144, 176 Ky. 28, rehearing overruled 197 S.W. 798, 177 Ky. 366.

Failure to observe court rule

Ky.—Emberger v. Commonwealth, 271 S.W. 1083, 208 Ky. 782.

Inadequate indexing

Ky.—Commonwealth v. Campbell, 21 S.W.2d 474, 231 Ky. 386—Dotson v. Hunt, 270 S.W. 38, 207 Ky. 832.

31. Miss.—Horton v. Misso, 128 So. 103, 157 Miss. 371.

32. U.S.—Cudahy Packing Co. v. McGuire, C.C.Iowa, 135 F. 891.

N.M.—Summers v. Sandoval County, 110 P. 509, 15 N.M. 376.

11 C.J. p 883 note 52.

33. Ky.—McNabb v. South Eastern Gas Co. of West Virginia, 105 S.W.2d 622, 268 Ky. 532—Meek v. Commonwealth, 283 S.W. 1032, 214 Ky. 572 — Pendleton v. Garrard Bank & Trust Co., 272 S.W. 917, 209 Ky. 451.

34. Ill.—Herod v. Lawler, 20 Ill. 610.

Ky.—Rodes v. Reese, 4 B.Mon. 586.

35. U.S.—U. S. v. Kurtz, Ct.Cl., 17 S.Ct. 15, 164 U.S. 49, 41 L.Ed. 346.

36. U.S.—Butler v. U. S., D.C.Ind., 87 F. 655.

37. Ky.—Harrison v. Chiles, 3 Litt. 194.

Neb.—Graham v. Kibble, 2 N.W. 455, 9 Neb. 182.

38. Ariz.—Cochise County v. Wilcox, 108 P. 458, 13 Ariz. 150.

11 C.J. p 884 note 66.

39. Fla.—Security Finance Co. v. Gentry, 109 So. 220, 91 Fla. 1015, followed in 109 So. 222, 91 Fla. 1024.

40. N.D.—Milburn-Stoddard Co. v. Stickney, 103 N.W. 752, 14 N.D. 282.

been said that he has only the powers conferred thereby,⁴¹ and may not go beyond his statutory jurisdiction,⁴² yet where neither the constitution nor the statute prescribes his duties, he is subject to all the legitimate orders of the court of which he is clerk.⁴³ A statute conferring powers on a clerk is to be construed strictly, and will not be extended beyond its terms.⁴⁴

In the absence of any constitutional provision to the contrary, the legislature has full control over the powers and duties of clerks of courts, and may take from, or add to, them;⁴⁵ but powers vested in the clerk by the constitution of the state cannot be taken away from him by statute.⁴⁶

It has been said that the clerk is an integral part of the court and that his acts performed within the scope of his official duties are the acts of the court and must be accepted as true unless their verity is seriously assailed.⁴⁷

The official duties of a clerk of court embrace every act which the law requires him to perform by virtue of his office;⁴⁸ not only those which the statutes expressly impose on him, but also such duties as, by the long established practice of the court, he has been required to perform;⁴⁹ and, likewise, his authority to perform a certain act is sometimes recognized on the ground of long usage.⁵⁰ The clerk may apply to the court or to the judge that he

serves for advice in matters pertaining to his office.⁵¹

It has been held that the clerk has no duty to keep parties informed of proceedings or rules of court.⁵²

Duties of clerk to judge. While the duties of a clerk to a judge are not defined by law, they are clearly of a personal, and mainly of a confidential, nature.⁵³

Rules. A clerk of court has the right to adopt reasonable rules for the transaction of the business of his office.⁵⁴

Seal. A court clerk has been held not one of the officers required by law to have and use a seal, the court itself having a seal which he should use as prescribed by statute.⁵⁵

Failure to object to clerk's erroneous actions. Failure to take timely exception to a clerk's erroneous action in the exercise of power he possesses may give such action legal status, but failure to except to the clerk's action in assumption of power he does not possess has no such effect,⁵⁶ although under some practice the clerk should give immediate notice to counsel of record of all orders, judgments, or other papers filed in the cause without being obligated to keep counsel informed of the condition of the record in other respects.⁵⁷

Particular statutes

(1) Under L.1882-83 p 535 § 5, the clerk of the superior court of Floyd County is ex officio clerk of the city court of Floyd County.—*Moore v. Tippin*, 104 S.E. 17, 25 Ga. App. 638.

(2) Clerk of probate court of intestate's parish had authority under statute to call family meeting and to homologate its proceedings.—*Soule v. West*, 170 So. 26, 185 La. 655.

(3) Act 43 of 1882, authorizing clerks of district courts to order family meetings and to homologate their proceedings when not opposed, is not in violation of Const.1879 arts 92 or 122, nor Const.1898 art 123.—*Cole v. Richmond*, 100 So. 419, 156 La. 262.

41. N.C.—*Read v. Turner*, 158 S.E. 475, 200 N.C. 773.

N.D.—*State v. Roth*, 220 N.W. 901, 57 N.D. 196.

Proceeding in county court

Application for marriage license made to county judge is not "proceeding in county court," within law authorizing clerk to exercise certain powers concurrently with judge.—*State v. Roth*, supra.

42. N.C.—*Jefferson Standard Life Ins. Co. v. Buckner*, 159 S.E. 1, 201 N.C. 78.

Limited to express or implied authority

N.C.—*Jefferson Standard Life Ins. Co. v. Buckner*, supra.

Practicing law

Pa.—*Martin's Estate*, 20 Pa.Dist. & Co. 470.

43. Mich. — *Smith v. Kent Cir. Judge*, 102 N.W. 971, 139 Mich. 463.

44. Ind.T.—*Moore v. Fannin*, 104 S. W. 842, 7 Ind.T. 580.

45. Ark.—*State v. McDiarmid*, 27 Ark. 176.

46. N.Y.—*Olmsted v. Meahl*, 114 N. E. 393, 219 N.W. 270, affirming *Wilcox v. Meahl*, 160 N.Y.S. 708, 172 App.Div. 263—*Devo v. Craig*, 187 N.Y.S. 478, 196 App.Div. 567, affirmed 131 N.E. 884, 231 N.Y. 186.

11 C.J. p 886 note 3.

Right to attend court in person or by deputy

N.Y.—*Devo v. Craig*, 187 N.Y.S. 478, 196 App.Div. 567, affirmed 131 N.E. 884, 231 N.Y. 186.

47. La.—*Dana v. Yazoo & M. V. R. Co.*, App., 154 So. 365.

48. Miss.—*McNutt v. Livingston*, 15 Miss. 641.

49. U.S.—*Howard v. U. S.*, Mo., 102 F. 77, 42 C.C.A. 169, affirming 93 F.

719, and affirmed 22 S.Ct. 543, 184 U.S. 676, 46 L.Ed. 754.

11 C.J. p 886 note 97.

50. N.Y.—*Hotaling v. Schermerhorn*, 59 N.Y.S. 484, 28 Misc. 311, affirmed 63 N.Y.S. 1110 mem, 48 App.Div. 638 mem.

11 C.J. p 886 note 98.

51. Ind.—*Ex p. Brown*, 78 N.E. 553, 166 Ind. 593.

52. Tex. — *Stevenson v. Thomas*, Civ.App., 56 S.W.2d 1095, error dismissed.

53. N.Y. — *People v. Prendergast*, 150 N.Y.S. 329, 165 App.Div. 186, affirmed 108 N.E. 1105, 214 N.Y. 664.

11 C.J. p 914 note 34.

54. Ohio.—*Shipp v. Brown*, 20 Ohio N.P., N.S., 223.

Date of filing

A clerk may make a rule that papers left in his box after office hours is to be deemed filed as of the date on which it was left in his office.—*Shipp v. Brown*, supra.

55. Minn.—*State v. Barrett*, 41 N. W. 459, 40 Minn. 65.

56. N.Y.—*Malkin v. Derow*, 298 N. Y.S. 339, 163 Misc. 731.

57. Vt.—*Spencer v. Lyman Falls Power Co.*, 196 A. 276.

Notice of failure to sign and file bills of exceptions need not be given

§ 34. Judicial Functions and Proceedings

A clerk of court has certain judicial functions which are considered in the following sections. Consult Pocket Parts for later cases.

§ 35. — In Absence of Statute

In the absence of statutory or constitutional authority, a clerk of court has no judicial powers, although he may perform acts of a ministerial and nondiscretionary character with respect to judicial proceedings.

In as much as a clerk of court is essentially a ministerial officer, as is stated in § 1 of this Title, he cannot, without express constitutional or statutory authority to that effect, exercise any judicial functions,⁵⁸ and the court, it has been held, has no power, in the absence of statutory authority, to delegate such matters to the clerk,⁵⁹ although the clerk may properly perform acts which are classified as ministerial.⁶⁰ The attempted performance by the clerk of any function of the judge during his absence, even though done by his direction, is void;⁶¹ but an objection that the clerk, in performing a particular function, was usurping judicial powers is not available on collateral attack.⁶²

by the clerk.—*Spencer v. Lyman Falls Power Co.*, *supra*.

58. Cal.—*People v. Kuder*, 266 P. 337, 90 Cal.App. 594.—*Wolf v. Mulcrevy*, 169 P. 259, 35 Cal.App. 80.

Ill.—See *Illinois Valley Bank v. Harshman*, 201 Ill.App. 107.

La.—*Reuter v. Krieger*, 152 So. 758, 178 La. 1061.

N.Y.—*Winokur v. Federman*, 183 N.Y.S. 41.—*Montrose Farms v. Rogerson*, 183 N.Y.S. 34.

N.C.—*In re Smith's Estate*, 156 S.E. 494, 200 N.C. 272.

Tex.—*Benge v. Foster*, Civ.App., 47 S.W.2d 862, error refused.

11 C.J. p 890 note 82.

Concerning probate petitions

Clerk of superior court is not invested with power to determine whether two petitions for probate of estate of decedent are identical.—*Wolf v. Mulcrevy*, 169 P. 259, 35 Cal. App. 80.

Entry of judgment

Where, in an action against two defendants, tried without a jury, the court did not direct judgment either for or against one of them, the entry of a judgment by the clerk against such defendant was a nullity.—*Winokur v. Federman*, 183 N.Y.S. 41.

Issuance of injunction

Clerk of district court, in absence of district judge from parish, is without power to issue preliminary injunction.—*Reuter v. Krieger*, 152 So. 758, 178 La. 1061.

Order of dismissal

Although payment by the tenant

into court of the amount claimed in a petition in a summary proceeding for nonpayment of rent entitled the tenant to dismissal of the proceeding, the clerk has no authority to grant such dismissal.—*Montrose Farms v. Rogerson*, 183 N.Y.S. 34.

59. N.C.—*Strickland v. Cox*, 9 S.E. 414, 102 N.C. 411.

11 C.J. p 891 note 83.

60. D.C.—*Nealon v. Davis*, 18 F.2d 175, 57 App.D.C. 133.

La.—*Cole v. Richmond*, 100 So. 419, 156 La. 262.

"Ministerial act" is one performed in obedience to legal authority, without regard to actor's own judgment as to propriety of act.—*Nealon v. Davis*, 18 F.2d 175, 57 App.D.C. 133.

61. Kan.—*In re McClasky*, 34 P. 459, 52 Kan. 34.—*In re Terrill*, 34 P. 457, 52 Kan. 29, 39 Am.S.R. 327.

Okl.—*In re McClaskey*, 37 P. 854, 2 Okl. 563.

62. Iowa.—*Maynes v. Brockway*, 8 N.W. 317, 55 Iowa 457.

11 C.J. p 891 note 85.

63. N.C.—*C. L. Hardy & Co. v. Turnage*, 168 S.E. 823, 204 N.C. 538.—*In re Styers' Estate*, 164 S.E. 123, 202 N.C. 715.—*Clark v. Carolina Homes*, 128 S.E. 20, 189 N.C. 703.—*Waldroop v. Waldroop*, 103 S.E. 381, 179 N.C. 674.—*Bank of North Wilkesboro v. Wilkesboro Hotel Co.*, 61 S.E. 570, 147 N.C. 594.

W.Va.—*Starcher v. South Penn Oil Co.*, 95 S.E. 28, 81 W.Va. 587.

11 C.J. p 891 note 86.

§ 36. — When Conferred by Statute

Under statute or constitution in some jurisdictions clerks of court are vested with judicial powers, usually of a limited character and subject to supervision of the judge.

In some jurisdictions clerks of court are, by statute or constitutional provision, vested with certain judicial or quasi-judicial powers.⁶³ Where this is the case the clerk's authority is strictly limited within the terms of the statutory or constitutional provision conferring it.⁶⁴ In some jurisdictions, the performance of such functions by the clerk is subject to the supervision and approval of the judge;⁶⁵ and in some there is provision for an appeal to the judge, or the transmission of certain questions to the judge for decision.⁶⁶

Place of review. Code provisions forbidding the hearing of motions, on proceedings pending in the superior court, outside the county do not apply to appeals from the clerk in partition proceedings, but the latter are governed by other code provisions expressly declaring that the clerk shall send the statement of the case to the judge by mail or otherwise,

During recesses of regular sessions of county courts, clerks thereof are clothed with general jurisdiction to appoint administrators, etc., subject to review by county courts at next regular session.—*Starcher v. South Penn Oil Co.*, 95 S.E. 28, 81 W.Va. 587.

64. N.C.—*Southern State Bank v. Leverette*, 123 S.E. 68, 187 N.C. 743.

11 C.J. p 891 note 87.

Chancery powers

Under the constitution, limiting the powers of the clerk of the superior court to those imposed by statute, he has no chancery powers.—*Southern State Bank v. Leverette*, *supra*.

65. N.C.—*Madison County v. Cox*, 167 S.E. 486, 204 N.C. 58.

11 C.J. p 891 note 88.

Supervisory power

Judge of superior court may require clerk to send up appeal, or transfer case to civil issue docket for trial.—*Madison County v. Cox*, *supra*.

66. N.C.—*Southern v. Freeman*, 189 S.E. 190, 211 N.C. 121.

11 C.J. p 891 note 89.

Derivative character of jurisdiction

Appeal from clerk confers jurisdiction on superior court, notwithstanding that answer to question raised issues which clerk should have transferred to civil issue docket, and jurisdiction of superior court on appeal is not derivative, since case is still in same court.—*Southern v. Freeman*, *supra*.

clearly contemplating that such appeals may be heard outside the county.⁶⁷

§ 37. — Constitutionality of Statute

Statutes purporting to confer judicial powers upon clerks of court are ordinarily invalid, although where the power is more ministerial than judicial the enactment may be upheld.

Various statutes conferring, or purporting to confer, on clerks of court powers of a judicial or semi-judicial character have been held valid,⁶⁸ or invalid,⁶⁹ their validity usually turning on the question of whether or not the power conferred was of a true judicial character, in accordance with principles developed in the C.J.S. title Constitutional Law § 166, also 12 C.J. p 897 note 66 and the C.J.S. title Constitutional Law § 173, also 12 C.J. p 903 notes 41-52.

§ 38. Ministerial Functions and Proceedings

- a. In general
- b. Filing papers
- c. Searching and certifying records

a. In General

The functions of a clerk of court are ordinarily ministerial in character, such as signing warrants, issuing subpoenas and the like, and he should act in accordance with the regulations or orders of the court.

A clerk of court being essentially a ministerial officer, as explained in § 1, and ordinarily lacking judicial powers, as shown in §§ 34-37, as a rule his functions, powers, and duties are ministerial in character.⁷⁰ Aside from merely routine duties, a

clerk is entitled to a directing order of the court for his protection;⁷¹ but the clerk need not pass on the legality of orders of the court,⁷² and should obey any order regular on its face,⁷³ the duty of obedience continuing until reversal of the decision.⁷⁴ Among other matters, the following have been held to be included among the powers and duties of a clerk of court: issuance of an alias writ of execution on application of a judgment creditor;⁷⁵ entering subpoenas issued in the subpoena docket;⁷⁶ signing of complaint and warrant in criminal case;⁷⁷ delivery, on application of defendant in a criminal case, accompanied by a proper tender of fees, of a correct transcript of subpoenas issued by the state and filed in the clerk's office;⁷⁸ and issuance and signing of orders and notices of hearings in probate proceedings.⁷⁹ On the other hand, the clerk may not issue county warrants otherwise than on the order of the court, as is shown in the C.J.S. title Counties § 249, also 15 C.J. p 600 note 2, and 11 C.J. p 890 note 76, nor select the tribunal for the trial of a cause.⁸⁰ It is not a part of his duties to draft writs of mandamus.⁸¹ In cases of certiorari the sole duty of the clerk is to write and sign the certiorari, and to keep safely the petition, the writ, and all other papers appertaining thereto subject to the call of the petitioner before service of the writ and subject to the orders of the court after its service. He is not required to see that the writ of certiorari is served, nor is he required to call the attention of the petitioner to the fact that it has not been served.⁸²

67. N.C.—Ledbetter v. Pinner, 27 S. E. 123, 120 N.C. 455.

68. Ind.—Steve v. Colosimo, 7 N.E. 2d 983.

N.C.—Bank of North Wilkesboro v. Wilkesboro Hotel Co., 61 S.E. 570, 147 N.C. 594.

11 C.J. p 891 note 91.

69. Ill.—Cleveland, etc., R. Co. v. People, 72 N.E. 725, 212 Ill. 638—Hall v. Marks, 34 Ill. 358.

Ind.—Gregory v. State, 94 Ind. 384, 48 Am.R. 162.

11 C.J. p 891 note 90, p 892 note 92.

70. N.Y.—Leveque v. Felda, 195 N. Y.S. 74, 202 App.Div. 853—Merchants' Transfer & Storage Co. v. Lippman, 238 N.Y.S. 310, 135 Misc. 724.

Tex.—Benge v. Foster, Civ.App., 47 S.W.2d 862, error refused.

11 C.J. p 886 note 8.

71. N.J.—Edwards v. Stein, 119 A. 504, 94 N.J.Eq. 251.

Following minutes of trial

Duties of clerk of trial term and law clerk are ministerial, not judicial, and they must follow minutes of trial.—Merchants' Transfer &

Storage Co. v. Lippman, 238 N.Y.S. 310, 135 Misc. 724.

72. Or.—Cobbs-Mitchell Co. v. McMahan, 289 P. 495, 133 Or. 191.

73. Ill.—People v. Windes, 113 N.E. 949, 275 Ill. 108.

Or.—Cobbs-Mitchell Co. v. McMahan, 289 P. 495, 133 Or. 191.

Payment of foreclosure proceeds

Where circuit judge directed clerk to pay surplus of proceeds of foreclosure sale to widow as homestead exemption, and county judge declared such order valid, clerk was justified in making payment to widow.—Cobbs-Mitchell Co. v. McMahan, supra.

74. W.Va.—State v. Fidelity & Deposit Co. of Maryland, 112 S.E. 319, 91 W.Va. 191.

As valid as if prescribed by statute

In so far as decisions give directions to the court clerk and impose duties on him, they are as valid and binding on him, until reversed, as if they had been prescribed by statute, and the court may incidentally prescribe duties for its clerk in ad-

dition to those imposed by statute.—State v. Fidelity & Deposit Co. of Maryland, supra.

75. Tex.—McClaffin v. Winfield, Civ. App., 279 S.W. 877.

76. Ala.—Jackson v. Mobley, 47 So. 590, 157 Ala. 408.

11 C.J. p 890 note 73.

77. Mich.—Toms v. Jeffries, 212 N. W. 69, 237 Mich. 413.

Determination that offense has been committed and of probable cause to suspect person charged is judicial function, although signing of complaint and warrant is ministerial.—Toms v. Jeffries, supra.

78. Ala.—Jackson v. Mobley, 47 So. 590, 157 Ala. 408.

79. Hawaii.—Magoon v. Ami, 8 Hawaii 191.

80. Pa.—Trach v. County, 2 Lehigh Val.L.R. 253.

11 C.J. p 890 note 77.

81. Ohio.—Johnes v. State Auditor, 4 Ohio St. 493.

11 C.J. p 890 note 79.

82. Ga.—Smith v. Washington, 61 S.E. 923, 4 Ga.App. 514.

Approval of bonds. Clerks are frequently given power to pass on bonds of various kinds required to be filed with them,⁸³ as, for example, as considered in Attachment § 158, the C.J.S. title Sheriffs and Constables §§ 7, 32, also 11 C.J. p 888 note 32, 57 C.J. p 737 notes 24, 25, and other titles wherein the giving and approval of specific bonds are considered. The approval of a bond by a clerk of court is sufficiently evidenced by the fact of his receiving and filing the bond.⁸⁴

Administration of oaths. The authority of a clerk of court to administer oaths other than those administered in open court is statutory and extends to such oaths only as are contemplated by the statute.⁸⁵

Purchasing supplies. A clerk has only such power to purchase supplies as is given him by statute.⁸⁶

b. Filing Papers

Clerks of court should file all legal papers tendered and as a rule are not concerned with their merits.

As has been stated in *Corpus Juris* and cited with approval, it is the official duty of the clerk of a court to file all the papers in a cause presented by the parties, and to mark them "Filed," with the date of filing.⁸⁷ He has nothing to do with the character, purpose, or merits of papers which are tendered to him,⁸⁸ his duty being merely to file them,⁸⁹ and where the duty to file is imposed by statute, the judge has no authority to interfere therewith.⁹⁰

The clerk's use of superfluous words when filing papers will not invalidate his acts.⁹¹

c. Searching and Certifying Records

It is a function of a clerk of court to attest to and certify the records, although ordinarily he is under no duty to make a search of the same.

Ordinarily, the clerk is authorized to attest and certify the records and proceedings of his court,⁹² but his authority in this regard is only as great as the statute gives him,⁹³ and beyond that his certificate to the record or proceeding is of no greater force or value than the certificate of any other individual,⁹⁴ and he has authority to certify only to the records in his office.⁹⁵

A clerk of a county court can properly certify to the official character of a magistrate.⁹⁶

In certifying his official acts a clerk should use such a signature as will designate the court of which he is the clerk. The mere affixing of the word "clerk" is not sufficient.⁹⁷

The clerk of a court has no right to certify the substance, purport, or effect of a judgment of record in his office.⁹⁸

Except in some jurisdictions,⁹⁹ it is no part of the official duty of a clerk to make searches of the records in his office for judgments, liens, or suits pending, affecting the title to real property, and to certify to the result of such search.¹

83. Ill.—*People v. Fletcher*, 3 Ill. 482.

Ind.—*Winningham v. State*, 56 Ind. 243.

84. Ala.—*Pearson v. Gale*, 11 Ala. 278.

11 C.J. p 888 note 33.

85. Iowa.—*State v. Harter*, 108 N. W. 232, 131 Iowa 199, 9 Ann.Cas. 764.

11 C.J. p 888 note 34.

86. Ark.—*Clark County v. Scott*, 21 Ark. 467.

11 C.J. p 888 note 35.

87. Ga.—*Brinson v. Georgia Railroad Bank & Trust Co.*, 165 S.E. 321, 322, 45 Ga.App. 459, citing *Corpus Juris*.

11 C.J. p 887 note 28.

Filing with prothonotary in Pennsylvania

Prothonotaries are public officers on whom many duties may be imposed by legislature, and they may have control of documents similar to those filed with recorder of deeds, but when paper is directed to be filed in prothonotary's office, act may give record a quasi-judicial character.—*Delco Ice Mfg. Co. v. Frick Co.*, 178 A. 135, 318 Pa. 337.

88. U.S.—*In re Halladjian*, C.C. Mass., 174 F. 834—U. S. v. Bell, C. C.Pa., 127 F. 1002, affirmed 135 F. 336, 68 C.C.A. 144.

89. N.Y.—*People ex rel. Trost v. Bird*, 172 N.Y.S. 412, 184 App.Div. 779.

Tex.—*Wagner v. Garrett*, 269 S.W. 1030, 114 Tex. 362.

Notice of appeal

It is the duty of the clerk of the municipal court to file a notice of appeal, whether presented in time or not, the question whether the appeal was properly taken being for the appellate term on motion to dismiss.—*People ex rel. Trost v. Bird*, 172 N. Y.S. 412, 184 App.Div. 779.

Mandatory duty

It is mandatory duty of clerk of court of civil appeals, as ministerial officer, to file and forward to supreme court, to which addressed, writ of error or any document tendered to him, pertaining to appeal in cause pending in that court, whatever his opinion as to supreme court's jurisdiction.—*Wagner v. Garrett*, 269 S.W. 1030, 114 Tex. 362.

90. La.—*Alexandria Naval Stores Co. v. J. F. Bail Bros. Lumber Co.*, 54 So. 1035, 128 La. 632.

Tex.—*Cooney v. Isaacks*, Civ.App., 173 S.W. 901.

91. Tex.—*State v. Gillette's Estate*, Com.App., 10 S.W.2d 984, reversing *Gillette's Estate v. State*, Civ.App., 286 S.W. 261.

92. Ala.—*Huff v. Cox*, 2 Ala. 310.

11 C.J. p 887 note 21.

93. Ga.—*Lambert v. Smith*, 57 Ga. 25.

11 C.J. p 887 note 22.

94. Wyo.—*Farmers' State Bank v. Investors Guaranty Corp.*, 45 P.2d 1057, 1059, 48 Wyo. 319, quoting *Corpus Juris*.

11 C.J. p 887 note 23.

95. Idaho.—*Strickfadden v. Green-creek Highway Dist.*, 260 P. 431, 44 Idaho 751, citing *Corpus Juris*.

96. Ill.—*Hague v. Porter*, 45 Ill. 318.

97. Tex.—*Garner v. State*, 36 Tex. 693.

98. U.S.—*U. S. v. Makins*, D.C.Cal., 26 F.Cas.No.15,710, Hoffm.Op. 500.

99. Minn.—*State v. Scow*, 100 N.W. 382, 93 Minn. 11.

11 C.J. p 890 note 70.

1. Kan.—*Mallory v. Ferguson*, 32 P. 410, 50 Kan. 685, 22 L.R.A. 99.

§ 39. Care and Custody of Records

The duties and functions of a clerk of court ordinarily include the making, keeping, and preservation of the records thereof.

It is the duty of the clerk to note the orders of the court² and to make a record of the proceedings in his court;³ under some statutes, a clerk of court must record certain papers filed with him,⁴ and he must exercise proper care and diligence in performing such functions.⁵ In so doing he acts as the amanuensis of the court subject to its control, and record entries are valid only when made under the judicial sanction of the court.⁶ It has been held that a clerk may correct an error in his minutes,⁷ and should verify the record and correct any clerical errors,⁸ but after leaving office a clerk has no power to complete a record previously begun,⁹ nor can his successor complete such record without an order of court;¹⁰ neither can he make up a new record from recollection,¹¹ nor substitute his own recollection for the written memorandum of the judge.¹²

The request of a party or his attorney is sometimes necessary to authorize or require a clerk of court to make a final record, or to incorporate a certain matter in the record, of a cause.¹³

Indexing records. Some statutes do not require a clerk of court to make an index of the journals of the court of which he is clerk.¹⁴

Preservation of records. The clerk is the legal custodian of the records in his office and, while not liable as an insurer, he is bound to exercise a high degree of diligence in their preservation and safe-keeping.¹⁵

On abolition of a court, the clerk of the court acquiring the jurisdiction of the abolished court is under a duty to take charge of all records of such abolished court.¹⁶

§ 40. Care and Custody of Funds

Money paid over to a clerk of court in his official capacity is held by him in trust.

Where a clerk of court receives money by virtue of his office, he holds the same in trust.¹⁷ In the absence of statutory authority the clerk has no power to receive payment of a demand which has not been reduced to judgment;¹⁸ but in a jurisdiction where he is authorized to receive payment of a judgment, where he receives money from defendant before judgment, retains it in his hands until after judgment, and then manifests by some plain and unequivocal act his intention to hold it in his official

2. Ill.—Toth v. Samuel Phillipson & Co., 250 Ill.App. 247.

3. Ark.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135.

Ill.—People v. Windes, 113 N.E. 949, 275 Ill. 108.

Mich.—Robertson & Wilson Scale & Supply Co. v. Richman, 180 N.W. 470, 212 Mich. 334.

Mo.—State v. West, 270 S.W. 279—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 862, 228 Mo.App. 760, citing *Corpus Juris*.

Okl.—Little v. Employer's Casualty Co., 71 P.2d 687, 180 Okl. 628. 11 C.J. p 886 note 10.

Clerk's function is to make record of what court orders and adjuges.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135.

Recording case

Clerk in recording case record acts as ministerial officer of court, and he must enter orders as directed by court.—People v. Windes, 113 N.E. 949, 275 Ill. 108.

Record in criminal cases

It is not customary in a criminal case for the clerk to note in his minutes the requests for a special charge.—State v. Duperier, 39 So. 455, 115 La. 478—11 C.J. p 886 note 10 [c].

In Pennsylvania

(1) Entries made by a prothonotary during vacation are, until

amended or corrected, as much a part of the record as those made by the court while in session.—Miller v. McCullough, 19 Pa.Co. 341, 6 Pa. Dist. 557.

(2) Under the Pennsylvania statute the prothonotary is the officer under whose direction and supervision the transcription of the records, dockets, and indexes of the judgments of the court of common pleas should be done, but the court has no authority to confer upon him the power to do the work or to approve an appointment made by him for the purpose, and there is no provision for his compensation for doing the work.—In re Perry County, 11 Pa. Dist. 557.

(3) The filing of papers with the prothonotary is discussed in § 38.

4. Ga.—Neal-Blun Co. v. Rogers, 82 S.E. 280, 141 Ga. 808.

5. La.—Bayne v. Fox, 18 La. 80. 11 C.J. p 887 note 20.

6. Ill.—Kahl v. Devine, 224 Ill.App. 363.

Mo.—State ex rel. Caldwell v. Cockrell, 217 S.W. 524, 530, 280 Mo. 269, citing *Corpus Juris*.

11 C.J. p 887 note 12.

7. N.Y.—Smith v. Coe, 30 N.Y.Super. 477.

11 C.J. p 887 note 13.

8. Fla.—Long v. Sphaler, 105 So. 101, 89 Fla. 499.

9. Vt.—Perrin v. Reed, 33 Vt. 62.

10. Me.—Rockland Water Co. v. Pillsbury, 60 Me. 425—Longley v. Vose, 27 Me. 179.

11. Mass.—Ryan v. Merriam, 4 Allen 77.

12. Ill.—Crowell v. Deen, 21 Ill. App. 363.

11 C.J. p 887 note 17.

13. Ind.—Carpenter v. Montgomery, 7 Blackf. 415.

N.J.—Thompson v. Pippitt, 18 N.J. Law 176.

14. S.C.—State v. Jones, 5 Strobb. 155.

15. Cal.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 38 P.2d 442, 2 Cal.App.2d 600.

Ill.—Brelsford v. Community High School Dist. No. 36 of Pulaski County, 159 N.E. 237, 328 Ill. 27.

Taking records from office

All papers in cause should be preserved by clerk and not taken from his office except with leave of court.—Brelsford v. Community High School Dist. No. 36 of Pulaski County, supra.

16. Fla.—State v. Dickenson, 138 So. 376, 103 Fla. 907.

17. Okl.—Maryland Fidelity, etc., Co. v. Rankin, 124 P. 71, 33 Okl. 7. 11 C.J. p 888 note 36.

18. Ala.—Ball v. State Bank, 8 Ala. 590, 42 Am.D. 649—Windham v. Coats, 8 Ala. 285—Currie v. Thomas, 3 Port. 293.

capacity as clerk, the payment is good and the judgment thereby discharged.¹⁹ Some statutes authorize a clerk of court to collect fines, penalties, and forfeitures,²⁰ and others impose on him the duty of collecting and receiving jury fees and witness fees.²¹

§ 41. — Control and Disbursement of Funds

Clerks of court receiving funds in their official capacities should control and disburse them under direction of the court.

Clerks of court are not primarily collectors nor custodians of public revenue, but such revenue as comes into their hands ordinarily is incidental to the collection of costs of court.²² When the clerk receives a fund in his official capacity his possession is that of the court, and the court has an inherent right to control such funds,²³ except under some statutory provisions.²⁴ Usually, the clerk has no power, without an order of the court,²⁵ to make any transfer or alteration in the disposition of such fund²⁶ or to pay it out of court,²⁷ or in any way to use it for his own purposes;²⁸ and it has been held that a clerk paying over money contrary to an order of the court will not be protected by an order subsequently procured, on his instance, directing him to pay the money to the one to whom he had already paid it, and not purporting to confirm what he had done.²⁹ However, in some instances a payment without an order of court will be upheld.³⁰

While a clerk of court receives costs deposits in his official and not in his personal capacity,³¹ and is in a sense a trustee rather than a debtor, and under a duty to pay over funds received in his official capacity to the proper parties or authorities,³² he is not to be regarded as a trustee within the meaning of statutory and constitutional provisions regulating investments by trustees, but acts rather as an agent of the court subject to its direction.³³ He may properly deposit funds deposited with him under order of court in a bank in his name as clerk.³⁴

In case of a dispute regarding the ownership of money in the hands of a clerk, it is not proper to direct payment by rule of court to a particular claimant, but the remedy should be by a proceeding at law or in equity.³⁵ The clerk need not pay over the money until after the issue of ownership is determined.³⁶

Under the federal statutes it is the duty of a clerk of a federal court forthwith to deposit with the United States treasurer, an assistant treasurer, or a designated depository of the United States, money coming into his hands, notwithstanding it is immediately levied on under a state writ.³⁷

§ 42. — Duty to Account

Generally speaking, clerks of court are under a duty to account for funds received in their official capacities.

In many jurisdictions it is the duty of the clerk

19. Ala.—Governor v. Read, 38 Ala. 252.

20. Ill.—Hoyne v. Danisch, 106 N.E. 341, 264 Ill. 467.

21. Colo.—Adams v. People, 55 P. 806, 25 Colo. 532.

22. Ala.—State v. Alabama Power Co., 162 So. 110, 230 Ala. 515.

Okl.—Linson v. Barnes, 277 P. 233, 136 Okl. 237.

23. Ill.—Citizens State Bank v. Goebel, 10 N.E.2d 828, 292 Ill.App. 95.

11 C.J. p 889 note 57.

Jurisdiction of court to order return of funds

Where a clerk, has money or property in his hands received in course of legal proceeding which he has no equitable right to retain, court in which such proceeding is pending may order its return to parties entitled, although officer's term has expired.—Citizens State Bank v. Goebel, supra.

24. N.C.—Ex parte Cassidey, 95 N. C. 225.

11 C.J. p 889 note 58.

25. Ind.—State v. Christian, 47 N. E. 395, 13 Ind.App. 11.

Iowa.—Peterson v. Hays, 51 N.W. 1143, 85 Iowa 14.

26. Colo.—Schweizer v. Mansfield, 59 P. 843, 14 Colo.App. 236.

11 C.J. p 889 note 60.

27. Tenn.—Craig v. Governor, 3 Coldw. 244.

28. N.J.—Mott v. Pettit, 1 N.J.Law 344.

29. Tenn.—Boothe v. Bailey, 3 Humphr. 594.

11 C.J. p 889 note 63.

30. Iowa.—Danforth v. Rupert, 11 Iowa 547.

Tenn.—Yoakley v. King, 10 Lea 67. 11 C.J. p 890 note 64.

31. Fla.—State ex rel. Cowles v. Butts, 170 So. 714, 125 Fla. 584.

Accounting by county commissioners

Attorney who had made "court costs" deposit with deceased clerk for future services was entitled to have county commissioners adjust their accounts with successor clerk so that attorney would receive services from successor clerk for which deposit had been made, although such amount had been paid to county commissioners as surplus earnings of clerk's office, and laches did not run

against proceeding by attorney to have credit for court costs deposit made by him set up on clerk's books, where no special prejudice because of delay was made to appear, since court costs deposits are "trust funds."—State ex rel. Cowles v. Butts, supra.

32. Ark.—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

La.—Parish of Evangeline v. Guillery, 138 So. 649, 173 La. 732.

Tenn.—Marion Trust & Banking Co. v. Roberson, 268 S.W. 118, 151 Tenn. 108.

Tex.—Aetna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, Civ.App., 86 S.W.2d 826, error dismissed.

33. Ala.—Shelley v. Thomas, 167 So. 316, 232 Ala. 227.

34. Mo.—State ex rel. Ridge v. Shoemaker, 212 S.W. 1, 278 Mo. 138.

35. Ill.—Lewis v. Cockrell, 31 Ill. App. 476.

36. Tex.—Willis v. Keator, Civ.App., 181 S.W. 556.

37. U.S.—Martin Co. v. Shannon-house, D.C.N.C., 203 F. 517.

to account for moneys received by him as clerk, and it is frequently provided by statute that he shall pay over to the county treasurer, or to some other designated custodian, fees, costs, taxes, and other moneys, or a specified proportion thereof, received by him in his official capacity;³⁸ but statutes of this character do not apply to the proceeds of a civil judgment in favor of a private person.³⁹ If he refuses to account for or turn over money received by him in his official capacity as clerk, the court may compel him so to do,⁴⁰ even though his term of office as clerk of court has expired.⁴¹ Also, the failure to account for or pay over money received by him in his official capacity constitutes a breach of his official bond for which suit may be brought, as shown *infra* § 55.

To successor in office. It is generally the duty of the clerk or his personal representative to pay over to his successor in office moneys held by him in his official capacity;⁴² such payment discharges him from all further liability therefor,⁴³ and statutes requiring this of the clerk are constitutional.⁴⁴ An order of court authorizing or requiring it is not a condition precedent to such payment,⁴⁵ nor is a formal settlement necessary under some statutes.⁴⁶ The remedies for a failure to perform this duty vary in the different states.⁴⁷

§ 43. Other Matters

Consult Pocket Parts for later cases.

§ 44. Performance of Duty and Summary Remedies to Compel

Clerks of court may be compelled by summary or other appropriate proceedings to perform their official duties.

A clerk of court is obliged to perform the official duties imposed on him by law,⁴⁸ and he may be compelled to do so under rule of court⁴⁹ or by appropriate remedy of a summary character.⁵⁰ In the performance of his duties as the ministerial officer of the court, he is subject to the control of the court;⁵¹ and if he fails or refuses to perform any of such duties, when directed so to do by the court he may be punished for contempt.⁵² On the other hand, a clerk cannot be summarily compelled, by a court other than the one of which he is clerk, to do a certain act;⁵³ nor can the clerk of an inferior court be punished by an appellate court which has not acquired jurisdiction of the cause in which the clerk was derelict in the performance of his duty;⁵⁴ nor is he obligated to perform acts not falling within the scope of his official duties.⁵⁵ A merely ministerial act may be performed by the clerk in term time without an order of the court;⁵⁶ and a

38. Kan.—State v. Fishback, 171 P. 348, 102 Kan. 178.

Ohio.—State ex rel. Butler County Bar Library Ass'n v. Kempf, 1 N.E.2d 951, 51 Ohio App. 452.
11 C.J. p 888 note 46.

Misunderstanding of Gen.St.1915 § 3310, and L.1917 c 133, when neither statute is complied with, is not sufficient excuse for failure of clerk of city court of Wichita to pay to county treasurer costs that should have been paid on certain date.—State v. Fishback, 171 P. 348, 102 Kan. 178.

39. Iowa.—Fowler v. Decatur County, 150 N.W. 1061, 168 Iowa 722.

40. Idaho.—Rhea v. County Comrs., 88 P. 89, 12 Idaho 455.
11 C.J. p 889 note 48.

41. Ill.—Baltimore, etc., R. Co. v. Gaultier, 46 N.E. 256, 165 Ill. 233.

42. Ind.—State v. Hess, 91 N.E. 732, 174 Ind. 495.
11 C.J. p 889 note 51.

43. Tenn.—Peeler v. Fane, Ch., 62 S.W. 206.

44. Ind.—State v. Hess, 91 N.E. 732, 174 Ind. 495.

45. N.C.—Peebles v. Boone, 21 S.E. 187, 116 N.C. 57.

Tenn.—Peeler v. Fane, Ch., 62 S.W. 206.
11 C.J. p 889 note 54.

46. Ind.—Scott County v. McFadden, 88 Ind. 333.

47. N.C.—O'Leary v. Harrison, 51 N.C. 338.

S.C.—Smith v. Lake, 5 S.C. 341.
Wis.—Mulholland v. Gerry, 51 N.W. 960, 81 Wis. 647.
11 C.J. p 889 note 56.

48. Ala.—State v. Hasty, 63 So. 559, 184 Ala. 121, 50 L.R.A., N.S., 553, Ann.Cas.1916B 703.

Ark.—In re Barstow, 16 S.W. 574, 54 Ark. 551.
11 C.J. p 884 note 67.

49. N.C.—Gooch v. Gregory, 65 N.C. 142.

50. Cal.—Wolf v. Mulcrevy, 169 P. 259, 35 Cal.App. 80.

Application to court

Sole right which petitioner for probate of estate of decedent has is to have petition filed in superior court, and, if clerk fails to file it properly, petitioner has remedy in superior court by application there to have paper filed, numbered, and indexed as it ought to be.—Wolf v. Mulcrevy, *supra*.

Effect of clerk's answer

In summary proceeding against clerk of court for recovery of money, filing answer casts no greater burden on plaintiff.—Prudential Ins. Co. of America v. Hart, 218 N.W. 529, 205 Iowa 801.

Joinder in rule

Numerous parties having separate

unliquidated claims arising out of separate suits, and involving separate parties against clerk of superior court for collecting alleged excess costs in such cases, are not entitled to join in a rule to have clerk ordered to pay the claims.—Atlanta Coach Co. v. Simmons, 190 S.E. 610, 184 Ga. 1, second case, answers to certified questions conformed to 190 S.E. 610, 55 Ga.App. 532, first case, transferred 181 S.E. 762, 181 Ga. 67.

51. Vt.—In re Durant, 12 A. 650, 60 Vt. 176.

11 C.J. p 884 note 70.

52. Ala.—Shelley v. Thomas, 167 So. 316, 319, 232 Ala. 227, citing **Corpus Juris**.

11 C.J. p 884 note 71.

53. N.Y.—Coe v. Champlain Graphite Co., 139 N.Y.S. 329, 154 App.Div. 518.

54. Ky.—Moore v. Jessamine, Litt. Sel.Cas. 104.

55. Tex.—Andrews v. State, 237 S.W. 1113, 91 Tex.Cr. 122.

Notification of attorneys

The clerk of the appellate court is not required to notify attorneys as to the disposition of cases.—Andrews v. State, *supra*.

56. Ind.—Pennington v. Streight, 54 Ind. 376.

statute providing that the clerk shall perform certain duties under the direction of the judge means such direction as the circumstances may require, and does not mean that direction is necessary in order to confer authority on the clerk to act.⁵⁷ Although a clerk fails to perform certain duties of his office, the court cannot authorize another to perform such duties, and thereby render the clerk's sureties liable for the amount paid for the work.⁵⁸ A clerk of court will not be permitted to stultify himself by swearing that he failed to perform his duty, if there is any evidence to the contrary.⁵⁹

§ 45. Time and Place of Performance

In the absence of statutory regulation, a clerk of court may, but need not, perform official duties outside of office hours or away from his office.

While a clerk is, in the absence of any statute requiring it, under no obligation to perform official duties outside of office hours, as for instance to take an appeal on Sunday,⁶⁰ yet he is at liberty to do so if he wishes unless forbidden by some statute.⁶¹ The powers of a clerk in vacation depend for the most part on statute.⁶² The clerk of a federal court has until the end of the term in which to complete the minute entries for the term.⁶³

Place of performance. In the absence of any statute to that effect, a ministerial act of a clerk is not void, although performed away from his office⁶⁴ or even outside of his county;⁶⁵ and ministerial acts need not be performed in court to be valid.⁶⁶ Where a recognizance is required to be

taken by the court, the clerk has no authority to take it out of court.⁶⁷

§ 46. Presumption of Performance

There is a presumption that a clerk of court has performed his duties.

It will be presumed, in the absence of any showing to the contrary, that a clerk has performed a duty imposed on him by law.⁶⁸

§ 47. Disqualification to Act

Interest may disqualify a clerk of court from acting, although it has been held that interest will not disqualify him from performing purely ministerial acts.

Under some statutes, a clerk of court is disqualified to perform the duties of his office in relation to a matter in which he has an interest.⁶⁹ Such an interest will always disqualify him from performing acts of a judicial nature;⁷⁰ but it has been held in a number of jurisdictions that he may perform a purely ministerial act, such as the issuance of process, notwithstanding he is a party to the action.⁷¹ An indirect interest in the suit will not disqualify the clerk if he is not a party;⁷² and where he is merely a nominal party, his acting as clerk in the case renders the proceedings irregular, but not void,⁷³ although it has also been held that the clerk's relationship to a party litigant by consanguinity and blood disqualifies him from acting as clerk of court during the trial.⁷⁴ In proceedings before the clerk for the sale of land, he may appoint himself commissioner to make the sale of the land, and may direct himself, as commissioner, to pay over the proceeds to the proper persons.⁷⁵

57. Vt.—In re Durant, 12 A. 650, 60 Vt. 176.

58. Tenn.—Alexander v. Marshall, 3 Head 475.

59. Ky.—Thomas v. Bennett, 7 Ky. Op. 458.

60. Ill.—Russell v. Pickering, 17 Ill. 31.

61. Ill.—Zimmerman v. Cowan, 107 Ill. 631, 47 Am.R. 476.

Pa.—Polhemus' Appeal, 32 Pa. 328.

62. Ala.—Currie v. Thomas, 8 Port. 293.

11 C.J. p 885 note 82.

63. U.S.—Ex parte Harlan, C.C.Fla., 180 F. 119, affirmed 31 S.Ct. 44, 218 U.S. 442, 54 L.Ed. 1101, 21 Ann. Cas. 849.

64. W.Va.—Janesville Hay Tool

Co. v. Boyd, 13 S.E. 381, 35 W.Va. 240.

11 C.J. p 885 note 84.

65. Ala.—Collier v. State, 2 Stew. 388.

11 C.J. p 885 note 85.

66. Ill.—People v. Fletcher, 3 Ill. 482.

11 C.J. p 885 note 86.

67. Ky. — Chinn v. Com., 5 J.J. Marsh. 29.

68. Ill.—Palmer v. Emery, 91 Ill. App. 207.

Presumption of performance of official duties generally see C.J.S. title Evidence § 146, also 22 C.J. p 130 note 30—p 141 note 77.

69. N.C.—Scranton, etc., Land, etc., Co. v. Jennett, 37 S.E. 954, 128 N. C. 3.

11 C.J. p 885 note 90.

70. Miss.—Kirkland v. Texas Express Co., 57 Miss. 316.

N.C.—Evans v. Etheridge, 1 S.E. 633, 96 N.C. 42.

11 C.J. p 885 note 91.

71. Ga.—Thornton v. Ferguson, 67 S.E. 97, 133 Ga. 825, 134 Am.S.R. 226.

11 C.J. p 885 note 92.

72. Tex.—Laning v. Iron City Nat. Bank, Civ.App., 36 S.W. 481.

73. Tex.—Kruegel v. Murphy, Civ. App., 157 S.W. 1182, denying motion 126 S.W. 680, 59 Tex.Civ.App. 482.

74. S.C.—Turner v. Southern Ry. Co., 183 S.E. 579, 179 S.C. 38.

75. N.C.—Spencer v. Credle, 8 S.E. 901, 102 N.C. 68.

IV. LIABILITIES

§ 48. In General

Various liabilities of a clerk of court are discussed under appropriate headings in the sections following. Consult Pocket Parts for later cases.

§ 49. For Negligence or Misconduct

Clerks of court may be held liable to respond in damages to persons injured by their official negligence or misconduct.

Where a clerk of court fails or refuses to perform, or is negligent in the performance of, a duty imposed on him by law, or is guilty of misconduct in office, the court will sometimes "animadvert upon his conduct;"⁷⁶ and, if his act was the direct and proximate cause⁷⁷ of the injury, without contributory negligence on the part of the party complaining, the clerk is liable in damages therefor both personally and on his official bond,⁷⁸ as where he is derelict in respect of the distribution of funds,⁷⁹ which matter will be considered in more detail in §§ 54-59 infra.

On the other hand, a clerk is not liable for issuing process against property under a standing rule of court, although the court had no jurisdiction in the premises,⁸⁰ for refusing to issue process at the

request of one not entitled to its issuance,⁸¹ for turning over trust funds to a trust company without exacting a bond where none is required under statute,⁸² for contesting an affidavit of inability to give a bond, where the law authorizes him to make such a contest,⁸³ for refusing to do an act which he has been enjoined from doing,⁸⁴ for the acts or omissions of his successor in office,⁸⁵ for canceling a mortgage under a forged order,⁸⁶ for an error in interpreting a statute,⁸⁷ for failure to observe a directory provision of a statute,⁸⁸ or for an act done in good faith without the notice or knowledge of plaintiff's rights,⁸⁹ and it has been held that a clerk of court is liable only for willful and malicious disregard of his duties, and in the absence of such willful and malicious disregard may not be held responsible for omitting to summon a delinquent guardian and failing to report his absence to the court.⁹⁰

Matters requiring judge's approval. In matters which the clerk is required to submit to the judge for approval, it will be presumed that they were done under the sanction and direction of the judge; and in such case the clerk is responsible only where he refuses to discharge his duty when requested by the judge, or where he is guilty of fraud in collu-

76. Va.—Commonwealth v. Beckley, 4 Call 4, 8 Va. 4.
11 C.J. p 892 note 93.

77. La.—Tirrell v. Gossett, 84 So. 893, 147 La. 334.
11 C.J. p 892 note 94.

78. Ark.—Martin v. Bogard, 2 S.W. 2d 700, 176 Ark. 203.
Ga.—Broyles v. Young, 91 S.E. 437, 19 Ga.App. 294.

La.—Riverside Transfer Co. v. Service Drayage Co., 135 So. 79, 16 La. App. 621.

Miss.—Poyner v. Gilmore, 158 So. 922, 171 Miss. 859.

Ohio.—Stark Electric R. Co. v. McKean, 17 Ohio N.P., N.S., 593.

Pa.—Germantown Trust Co. v. Buckley Excs., 21 Pa. Dist. & Co. 397.
11 C.J. p 892 note 97.

Character of act or omission for which damages recoverable

As respects liability of chancery clerk for failure to attach to claim against estate certificate that claim was probated, allowed, and registered, probating, allowing, and registering of claims against estate are not "judicial acts" but ministerial acts for nonperformance of which damages may be recovered.—Poyner v. Gilmore, 158 So. 922, 171 Miss. 859.

Erroneous records

If clerk of court of appeal should

make erroneous records regarding time of filing transcript and insist that records are correct, party complaining could seek to hold clerk and bondsman liable for injury in separate proceedings.—Riverside Transfer Co. v. Service Drayage Co., 135 So. 79, 16 La. App. 621.

79. Ark.—Martin v. Bogard, 2 S.W. 2d 700, 176 Ark. 203.

Dereliction not shown

There is no cause of action against the clerk of a court of record, in favor of a litigant, because of the fact that the clerk paid to an attorney of record, out of the judgment recovered and paid into court, his fee, under the terms of his contract of employment with the litigant.—Vance v. Jones, 219 P. 375, 106 Okl. 110.

80. U.S.—The Salomoni, D.C.Ga., 29 F. 534.

81. Tex.—Kruegel v. Murphy, Civ. App., 126 S.W. 343.

82. N.C.—Quinton v. Cain, 165 S.E. 543, 203 N.C. 162.

83. Tex.—Kruegel v. Jones, Civ. App., 136 S.W. 835—Kruegel v. Murphy, Civ. App., 126 S.W. 343.

84. Tex.—Kruegel v. Jones, Civ. App., 143 S.W. 989.
11 C.J. p 894 note 41.

85. Mo.—Llewellyn v. Spangler, 88 S.W. 1021, 109 Mo. App. 396.
11 C.J. p 894 note 42.

86. Ga.—Luther v. Banks, 36 S.E. 826, 111 Ga. 374.

87. Pa.—Commonwealth v. Conard, 1 Rawle 249.

88. La.—Barrow v. Robichaux, 14 La. Ann. 207.
N.C.—Fornell v. Koonce, 51 N.C. 379.
11 C.J. p 894 note 45.

89. Okl. — Inter-State Mortgage Trust Co. v. Cunningham, 188 P. 1081, 78 Okl. 62.

11 C.J. p 894 note 46.

Payment of penalty

Where court directed that taxes be paid from proceeds of foreclosure sale, and the clerk paid the taxes and penalty as shown due by treasurer's tax roll, although there was no trial evidence that mortgagors' names appear upon rolls and evidence that they had not been notified as required by Rev.L.1910 § 7389, the clerk, if exercising his discretion in good faith and acting as an ordinarily prudent man, is not personally liable for amount of penalty paid by him.—Inter-State Mortgage Trust Co. v. Cunningham, 188 P. 1081, 78 Okl. 62.

90. Tenn.—Brown v. Brown, 64 S.W.2d 59, 16 Tenn. App. 230.

sion with the judge. Such duties are not governed by the same principles that regulate the duties which he is required to perform independent of, and without regard to, the dictation of any superior.⁹¹

Where no duty imposed by law. A clerk of court incurs no official liability by failing to perform, or for negligently performing, a service which the law does not require of him.⁹² In order to hold the clerk personally liable in such case, plaintiff must show an express agreement to perform such service.⁹³

Where no injury results. In order to recover against the clerk it must be shown that some injury resulted from his act or omission.⁹⁴ If the action is based on the clerk's official bond, something more than nominal damages must be shown to maintain the action;⁹⁵ but the contrary has been held.⁹⁶

Defaults of deputy. Defaults committed by a deputy clerk while acting within the scope of his duties and in the name of his principal are, in legal contemplation, the defaults of the clerk himself, and the latter is liable accordingly to third persons injured thereby;⁹⁷ but the clerk is not liable for the negligence or omissions of his deputy in performing acts not required of him.⁹⁸

The effect of plaintiff's contributory negligence will be considered *infra* § 71.

§ 50. — Making False Certificate of Record of Judgment

Clerks of court may be held liable for making false certificates of record of judgment.

91. Ky.—Commonwealth v. Thompson, 2 Bush 559.
11 C.J. p 895 note 47.

92. Ga.—Broyles v. Young, 91 S.E. 437, 19 Ga.App. 294.
11 C.J. p 895 note 48.

Issuance of execution

One obtaining a judgment may, by himself or counsel, control it, and direct whether execution shall issue thereon, and where he gives no direction, clerk failing to issue execution, or issuing imperfect execution, is not liable in damages for negligent doing of something not his duty under the law. — Broyles v. Young, 91 S.E. 437, 19 Ga.App. 294.

93. Kan.—Mallory v. Ferguson, 32 P. 410, 50 Kan. 685, 22 L.R.A. 99.

94. Md.—Standard Finance Co. v. Little, 152 A. 264, 159 Md. 621.

N.D.—Farmers' Bank of Garrison v. Raugust, 173 N.W. 793, 42 N.D. 503.

Okl.—Richards v. Tynes, 300 P. 297, 149 Okl. 285.

Wis.—Wisconsin Mortg. & Sec. Co.

v. Kriesel, 211 N.W. 795, 191 Wis. 602.

11 C.J. p 895 note 50.

Failure to index mortgage

Md.—Standard Finance Co. v. Little, 152 A. 264, 159 Md. 621.

95. U.S.—U. S. v. Bell, C.C.Pa., 127 F. 1002, affirmed 135 F. 336, 68 C. C.A. 144.

11 C.J. p 895 note 51.

96. Neb.—Heater v. Pearce, 81 N. W. 615, 59 Neb. 583.

11 C.J. p 895 note 52.

97. Ky.—Jeffers v. Taylor, 198 S. W. 1160, 178 Ky. 392.

La.—Fisher v. Levy, 156 So. 220, 180 La. 195.

Minn.—City of Duluth v. Ross, 167 N.W. 485, 140 Minn. 161.

11 C.J. p 915 note 42.

Ministerial duties

La.—Fisher v. Levy, 156 So. 220, 180 La. 195.

Misappropriation of funds

Minn.—City of Duluth v. Ross, 167 N.W. 485, 140 Minn. 161.

Where the clerk certifies through mistake that there is no judgment recorded against a person in his office, when as a matter of fact there is a judgment, he is liable on his official bond for all damages incurred by one relying on the truth of such certificate.⁹⁹

§ 51. — Discriminating between Judgment Creditors

A clerk of court may be held responsible for damages resulting from unlawful discrimination as between judgment creditors.

Where two creditors obtain judgment against their common debtor at the same time, and the clerk wrongfully issues execution to one of them, whereby he obtains a priority over the other, the latter may recover in an action on the official bond of the clerk whatever damage he may have sustained by reason of such discrimination.¹

§ 52. — Approving Insufficient Bond

A clerk of court is ordinarily liable for damages resulting from his negligent approval of an insufficient bond.

Where it is a part of the clerk's official duty to examine and pass on a certain bond, and he is so negligent in the performance of this duty as to cause damage, he can be held liable personally,² and on his official bond therefor;³ but there is no liability if no injury results,⁴ or if the bond is one which the clerk is not by law required to examine and approve.⁵ Proof of negligence is essential to recovery,⁶ and the measure of the clerk's duty

98. Va.—Page v. Taylor, 2 Munf. 492, 16 Va. 492—Stuart v. Madison, 1 Call 481, 5 Va. 481.
11 C.J. p 915 note 43.

99. Pa.—Ziegler v. Com., 12 Pa. 227.
11 C.J. p 893 note 26.

1. N.C.—Newbern Bank v. Jones, 17 N.C. 284.

2. Ala.—Snedicor v. Davis, 17 Ala. 472.

Ill.—People v. May, 133 Ill.App. 139.
11 C.J. p 893 note 28.

3. Iowa.—Field v. Wallace, 57 N.W. 308, 89 Iowa 597.
11 C.J. p 893 note 29.

4. Miss.—Davis v. Hale, 124 So. 370, 155 Miss. 309.

Tex.—Benge v. Foster, Civ.App., 74 S.W.2d 542, error refused.
11 C.J. p 893 note 30.

5. Iowa.—Reno v. McCully, 22 N.W. 902, 65 Iowa 629, 24 N.W. 530, 66 Iowa 730.
11 C.J. p 894 note 31.

6. Tex.—Benge v. Foster, Civ.App., 74 S.W.2d 542, error refused.

usually extends no further than the use of due care in ascertaining the sufficiency of the sureties.⁷ He cannot be considered an insurer of a bond which in his official capacity he has examined and approved as sufficient,⁸ and whether he made proper investigation, and was justified on that investigation in approving the bond, is necessarily a question of fact.⁹

Appeal bonds. It is generally one of the official duties of a clerk of court to pass on the sufficiency of the sureties offered on an appeal bond. Notwithstanding the approval of the bond is a quasi-judicial act, when a supersedeas is granted conditioned on the approval of a bond by the clerk, if the clerk negligently and without making due inquiry as to the sufficiency of the sureties approves such bond, it is a breach of the duty imposed on him by law and covered by the conditions of his bond.¹⁰

The validity of an appeal bond, and of a supersedeas bond, as affected by the necessity of approval by the clerk of court, are treated in Appeal and Error §§ 556 and 651, respectively, and in § 2021 is considered the necessity of approval of an appeal bond by the clerk in order to render the surety liable.

Administrator's bond. Where it is the duty of a clerk to approve an administrator's bond, his negligent acceptance of an insufficient one renders him and the sureties on his official bond liable in damages for any loss which such negligence may occasion.¹¹

§ 53. — Miscellaneous Acts or Omissions

Clerks of courts may in general be liable for damages resulting from any official act or omission within their duties such as failure or refusal to issue process or to record transcripts.

The extent of the clerk's official duties and obligations is, of course, largely dependent on statutory provisions, and in determining whether he is liable in any particular instance reference should be had to the statutes. He is always liable for injuries resulting from his official misconduct¹² or negligence.¹³ Thus a clerk has been held liable for his failure or refusal to issue process,¹⁴ to properly¹⁵ and promptly¹⁶ record a deed or other instrument left with him for recordation,¹⁷ to certify and send up a bill of exceptions,¹⁸ to properly¹⁹ make²⁰ and transmit²¹ a transcript, to collect a state tax,²² to make a correct statement of fees received by him,²³ to enter an action on the docket,²⁴ to enter an attachment within the time fixed by law,²⁵ to enter judgment,²⁶ or for negligence in making such entry,²⁷ for an erroneous entry of satisfaction of a judgment,²⁸ for failing to collect and pay in jury and docket fees,²⁹ for failing to tax costs,³⁰ for failing to copy the sheriff's return on a summons,³¹ for failing to comply with the orders of the court with relation to a partition sale,³² for issuing a writ that does not conform with the judgment,³³ for failing to insert the waiver in a writ of fieri facias issued under a judgment entered by virtue of a warrant of attorney "waiving exemption and inquisition,"³⁴ for issuing a scire facias for too small a

7. Ill.—People v. Leaton, 13 N.E. 241, 121 Ill. 666, affirming 25 Ill. App. 45.

11 C.J. p 894 note 32.

8. R.I.—Santee River Co. v. Webster, 51 A. 218, 23 R.I. 599.

11 C.J. p 894 note 33.

9. Tex.—Benge v. Foster, Civ.App., 47 S.W.2d 862, 864, quoting Corpus Juris.

11 C.J. p 894 note 34.

10. Ill.—People v. May, 193 Ill.App. 625, affirmed 114 N.E. 685, 276 Ill. 332.

11 C.J. p 894 note 35.

The Corpus Juris text is quoted with approval and applied as to the examination of a replevin bond in Benge v. Foster, Tex.Civ.App., 47 S.W.2d 862, 864.

11. Iowa.—Field v. Wallace, 57 N.W. 303, 89 Iowa 597.

12. Iowa.—Logan v. McCahan, 71 N.W. 252, 102 Iowa 241.

11 C.J. p 892 note 98.

13. Ga.—Terrell v. McLean, 61 S.E. 485, 130 Ga. 633.

11 C.J. p 892 note 99.

14. U.S.—U. S. v. Bell, C.C.Pa., 127 F. 1002, 1003, affirmed 135 F. 336, 68 C.C.A. 144.

11 C.J. p 892 note 1.

15. Ky.—Cain v. Gray, 142 S.W. 715, 146 Ky. 402.

16. Ga.—Neal-Blun Co. v. Rogers, 82 S.E. 280, 141 Ga. 808.

17. Ky.—State v. Haggin, 1 A.K. Marsh. 306.

18. Ga.—Collins v. McDaniel, 66 Ga. 203.

Ky.—Houston v. Wandelohr, 14 S.W. 345, 12 Ky.L. 345.

19. Ky.—Commonwealth v. Chambers, 1 Dana 11.

11 C.J. p 893 note 6.

20. Ky.—Bates v. Foree, 4 Bush 430.

21. Mo.—Higbee v. Spangler, 104 S.W. 1143, 127 Mo.App. 220.

22. Tenn.—State v. Cole, 6 Lea 492.

23. Mo.—State v. Henderson, 44 S.W. 737, 142 Mo. 598.

24. Miss.—Brown v. Lester, 21 Miss. 392.

25. Ga.—Stewart v. Sholl, 26 S.E. 757, 99 Ga. 534.

26. Neb.—Ryan v. State Bank, 7 N.W. 276, 10 Neb. 524.

11 C.J. p 893 note 13.

27. Ill.—Governor v. Dodd, 81 Ill. 162.

N.C.—Shackelford v. Staton, 23 S.E. 101, 117 N.C. 73.

Pa.—Coyne v. Souther, 61 Pa. 455—Saylor v. Commonwealth, 5 A. 227, 1 Pa.Cas. 535.

11 C.J. p 893 note 14.

28. Pa.—Van Etten v. Com., 102 Pa. 596—Coyne v. Souther, 61 Pa. 455.

11 C.J. p 893 note 15.

29. Ill.—Governor v. Ridgway, 12 Ill. 14.

30. Mo.—State v. Gideon, 59 S.W. 99, 158 Mo. 327.

31. Tex.—Clark v. Wilcox, 31 Tex. 322.

32. N.C.—State v. Gaines, 30 N.C. 168.

33. Pa.—Wilson v. Arnold, 33 A. 552, 172 Pa. 264.

34. Pa.—Wilson v. Arnold, supra.

sum,³⁵ for furnishing incorrect and misleading information regarding the time when a judgment was entered,³⁶ for the unauthorized issuance in term time of letters of guardianship,³⁷ and for neglecting to keep safely the court records.³⁸

§ 54. Liability for Funds

The matter of a clerk of court's liability for funds is considered in detail in §§ 55-59, following. Consult Pocket Parts for later cases.

§ 55. — Funds Held by Virtue of Office

A clerk of court or his bondsman may be held liable for the clerk's wrongful disposition of official funds, although there is no liability for a disposition in accordance with court order irrespective of its ultimate validity.

Where a clerk of court fails to account for and pay over, at the time when it becomes his legal duty so to do, money received and held by him by virtue of his office, he incurs a personal liability,³⁹ and his default constitutes a breach of his official bond,⁴⁰ even though his default occurred previously to the giving of such bond, the liability being regarded as a continuing one.⁴¹ Accounting for such funds is one of the duties of the clerk's office, and is covered by a bond conditioned generally for the faithful discharge of his duties;⁴² and the liability on such bond, for a misappropriation of money held under order of court, cannot be avoided by showing an agreement between the clerk and the party entitled thereto that the clerk should retain the money and pay interest thereon.⁴³ The bondsmen are,

likewise, liable if the clerk fails to turn over to his successor in office all moneys paid to, and held by, him as such officer,⁴⁴ although a register or clerk failing to distribute funds and turning them over to his successor is not liable where the funds were still subject to the further order of the court at the time he left office.⁴⁵ A litigant may recover from the clerk an excess of a sum deposited in court over that required to pay the judgment, where the clerk has paid out the full sum deposited.⁴⁶ Where statute or constitution places liability on the clerk to account for funds irrespective of their character if received by virtue of his office, the clerk and his surety may be held for loss of private as well as of public funds so received by the clerk and not repaid;⁴⁷ but the clerk incurs no personal liability for paying out a fund in accordance with the court's decree, although an appeal is pending therefrom, unless the court directs him to retain it;⁴⁸ and in the absence of a ripened lien in the attorney's favor, a clerk of court is not liable to him or his assignee for disbursing the proceeds of a judgment.⁴⁹

Payment to wrong person. Where a clerk, without authority, pays money deposited with him to the wrong person, he is liable for the amount to the person entitled to receive it.⁵⁰

Presumption. In some cases the courts have held that the presumption is, as between the sureties on his bonds, that money coming to his hands during the first term was on hand at the commencement of his second term;⁵¹ but in other cases it has been

35. Va.—Russell v. Clayton, 3 Call 41, 7 Va. 41.

36. Minn.—Selover v. Sheardown, 76 N.W. 50, 73 Minn. 393, 72 Am. S.R. 627.

37. Ind.—State v. Christian, 41 N. E. 603, 13 Ind.App. 308.

38. Neb.—Toncray v. Dodge County, 51 N.W. 235, 33 Neb. 802.

11 C.J. p 893 note 25.

39. Ala.—Shelley v. Thomas, 167 So. 316, 232 Ala. 227.

Ark.—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

Cal.—Leach v. Dinsmore, 65 P.2d 1364, 22 Cal.App.2d 735.

40. Ill.—People v. McGrath, 117 N. E. 74, 279 Ill. 550, reversing 204 Ill.App. 169.

Mich.—City of Grand Rapids v. Krakowski, 174 N.W. 201, 207 Mich. 483.

Mo.—State ex rel. Courtney v. Callaway, 237 S.W. 173, 208 Mo.App. 447.

N.C.—Gilmore v. Walker, 142 S.E. 579, 195 N.C. 460, 59 A.L.R. 53.

Okl.—Southwestern Surety Ins. Co. v. Neal, 197 P. 439, 81 Okl. 194.

Pa.—Commonwealth v. Smith, 96 Pa. Super. 31.

W.Va.—State v. Fidelity & Deposit Co. of Maryland, 112 S.E. 319, 91 W.Va. 191.

11 C.J. p 897 notes 78, 79.

De facto clerk

That one was clerk of the superior court de facto acting as such under certified election was sufficient to make surety on his bond responsible for his defalcations.—State v. Martin, 118 S.E. 914, 186 N.C. 127, modified in other respects Lee v. Martin, 123 S.E. 631.

41. N.C.—Judges v. Bryan, 14 N.C. 390.

S.C.—State v. Moses, 20 S.C. 465, 18 S.C. 366.

42. U.S.—U. S. v. Ambrose, C.C. Ohio, 2 F. 552.

11 C.J. p 898 note 81.

43. Ind.—Sullivan v. State, 28 N.E. 150, 121 Ind. 342.

44. N.C.—Peebles v. Boone, 21 S.E. 187, 116 N.C. 57.

Wis.—Schnur v. Hickcox, 45 Wis. 200.

45. Ala.—Farmer v. English, 160 So. 255, 230 Ala. 249.

46. Miss.—Sims v. Hardin, 95 So. 842, 132 Miss. 137.

Sum paid in excess of that pleaded Miss.—Sims v. Hardin, supra.

47. Wash.—Grays Harbor Const. Co. v. Paulk, 37 P.2d 584, 179 Wash. 300.

48. Or.—Ruppert v. Hoyt, 43 P.2d 183, 184, 150 Or. 372, quoting *Corpus Juris*.

11 C.J. p 898 note 84.

Corpus Juris is cited with approval in stating the liability of a register in equity in North Birmingham Trust & Savings Bank v. Hearn, 99 So. 175, 177, 211 Ala. 18.

Reversal of judgment

Or.—Ruppert v. Hoyt, 43 P.2d 183, 150 Or. 372.

49. Neb.—Snyder v. Smith, 272 N. W. 401, 132 Neb. 504.

50. Ind.—Hunt v. Milligan, 57 Ind. 141.

11 C.J. p 898 note 85.

51. Tenn.—State v. Cole, 13 Lea 367.

held that no presumption will be indulged that a clerk who is elected to another term of office, thereby becoming his own successor, paid over to himself, as his own successor, money previously paid into his office,⁵² or that money which came into the principal's official possession while a former bond was in force was in his hands when the second bond was executed.⁵³

When funds held in official capacity. Whether or not a clerk is officially charged with the duty, or vested with the right, to receive money⁵⁴ in any particular instance, or for any particular purpose, without an order of court,⁵⁵ so as to create liability on his bond for a failure to account or pay over is a question depending for the most part on the statutory provisions. There is no presumption that money held by a clerk was acquired by him in an official capacity.⁵⁶ Where the bond covers funds received by the clerk "by virtue or color of his office," the latter term embraces all cases where the clerk receives money in his official capacity when he is not authorized or required to receive the same.⁵⁷ Deposits made to secure costs are received by virtue of the clerk's office so as to come within the condition of his official bond.⁵⁸

Fees of his office. As a general rule, the clerk and his sureties are liable for his failure to account for all receipts in excess of his salary, in those jurisdictions in which the clerk's maximum compensation is limited by law.⁵⁹

Fees of other court officers. Although, in the absence of statutory enactment, it probably is not the duty of a clerk of court to receive costs other than his own, yet, under statutes authorizing costs tendered to be brought into court, the clerk receives such costs by virtue of his office, and the sureties on his official bond are liable for his failure to pay them over to the person entitled thereto;⁶⁰ but some cases hold that fees of other officers collected by the clerk are not held by virtue of his office.⁶¹ The of-

fices of county clerk and clerk of the superior court have been held not so distinct as to render the county clerk and his surety not liable for defalcation of the chief deputy of the clerk of the superior court in respect of converting funds, where the county clerk is ex officio clerk of the superior court.⁶² The clerk and his bondsman may be held liable for misappropriation of official funds by the clerk's deputy.⁶³

Money paid into court by order of court. As has been stated in *Corpus Juris*, in many states, when money is paid into court by order of the court, the clerk is its proper custodian, and receives it by virtue of his office, and on his failure to account therefor, a recovery may be had on his official bond; and this is true, although such order is based on the practice of the court, and not on direct statutory authority.⁶⁴ Failure of the bond expressly to specify payment to the parties entitled of the money coming into the clerk's hands by court order is immaterial.⁶⁵ It has been held that, where money of an infant was ordered by decree of a court to be paid over by a guardian to the clerk of a court, to be by him invested, the sureties are liable on the official bond in force at the time of the making of the decree, independently of the time when the money was actually received, the decree giving him the right to receive it at any and at all times.⁶⁶

Uncollected funds. The fact that a clerk acted in his official capacity in delivering legal notices to newspaper proprietors for publication does not render him personally liable for failure to pay therefor, where he never received funds for payment from the litigant obligated under statute to pay for the notices, and the sureties on the clerk's bond may not be held liable, although liability does exist as respects both clerk and surety to the extent that funds were received to cover such notices.⁶⁷ Where the clerk does not in fact receive the funds for which suit is brought, there is no liability for his failure to pay them over.⁶⁸

52. N.C.—*State v. Morgan*, 95 N.C. 641.

53. Ala.—*McPhillips v. McGrath*, 23 So. 721, 117 Ala. 549.

54. N.C.—*Smith v. Patton*, 42 S.E. 849, 131 N.C. 396, 92 Am.S.R. 783. 11 C.J. p 898 note 89.

55. Colo.—*People v. Cobb*, 51 P. 478, 10 Colo.App. 478.

56. Mo.—*Vogel v. St. Louis*, 13 Mo. App. 116, affirmed 84 Mo. 432.

57. N.C.—*State v. Gant*, 159 S.E. 427, 201 N.C. 211.

Pension warrants

N.C.—*State v. Gant*, *supra*.

58. Okl.—*Southwestern Surety Ins. Co. v. Neal*, 197 P. 439, 81 Okl. 194.

59. U.S.—*U. S. v. Averill*, Utah, 9 S.Ct. 546, 130 U.S. 335, 32 L.Ed. 977.

11 C.J. p 898 note 92.

60. Tex.—*Scott v. Hunt*, 49 S.W. 210, 92 Tex. 389.

11 C.J. p 899 note 93.

61. Miss.—*Matthews v. Montgomery*, 25 Miss. 150.

62. Cal.—*Union Bank & Trust Co. of Los Angeles v. Los Angeles County, Sup.*, 74 P.2d 240, and 81 P.2d 919, reversing, App., 64 P.2d 1135.

63. Minn.—*City of Duluth v. Ross*, 167 N.W. 485, 140 Minn. 161.

64. Mo.—*State ex rel Courtney v. Callaway*, 237 S.W. 173, 176, 208 Mo.App. 447, quoting *Corpus Juris*. 11 C.J. p 899 notes 96, 97.

65. Mo.—*State ex rel Courtney v. Callaway*, *supra*.

66. N.C.—*Latham v. Fagan*, 51 N.C. 62.

67. Ark.—*Eddins v. Williams*, 255 S.W. 868, 161 Ark. 226.

68. Mo.—*Newton Burial Park v. Davis*, App., 78 S.W.2d 150.

§ 56. — Funds Held in Private Capacity

A clerk of court, but not his bondsman, may be held liable to account for funds held by the clerk in a private capacity.

For a failure of the clerk to account for money not received by virtue of his office there is no liability on the sureties on his official bond, notwithstanding the payment was made in the belief that the money was to be received by him in his official capacity, or was made as compensation for unofficial acts directed by the court.⁶⁹ In such case the person entitled to the money may maintain an action against the clerk personally,⁷⁰ or after his death against his estate.⁷¹

§ 57. — Funds Illegally Collected

Although the bondsman of a clerk of court is not responsible for his disposition of funds illegally collected, the clerk himself may be held liable.

The sureties on a clerk's official bond are not liable for moneys illegally received or collected by him in his official capacity;⁷² but the clerk is personally liable to the county for money improperly paid him in compensation for unofficial acts directed by the court.⁷³

§ 58. — Extent of Liability in General

In some jurisdictions a clerk of court is regarded as an insurer of funds committed to his care, although in

others he is liable only for loss resulting from his negligence or misconduct.

It has been held that in the absence of any statute or constitutional provision to the contrary a clerk who receives money by virtue of his office is a bailee and his duty and liability with regard thereto are measured by the law of bailment.⁷⁴ If he acts in good faith and without negligence he cannot be held responsible for the loss of the fund⁷⁵ or for a depreciation of its value.⁷⁶ In other jurisdictions the clerk is liable as insurer for money that comes into his hands, and not merely for a failure to exercise ordinary care.⁷⁷ Other holdings are that a default of the clerk in the payment to the county of surplus fees raises merely the relation of debtor and creditor between them, and does not give the county any special property in deposits of a litigant in the hands of the clerk,⁷⁸ and that, where a clerk pursuant to an order of court loaned a fund in court on mortgage security, he cannot be made liable for his failure to prosecute with diligence the action on the mortgage note in the absence of anything to show that the remedy against the mortgagor has been exhausted.⁷⁹ If the clerk converts to his own use money held by him he is liable for its full value at the time of its conversion.⁸⁰ A clerk depositing money in a bank without court order acts at his peril.⁸¹ He is not liable, however, for acts done under order of court,⁸² and ordinarily the clerk as trustee of

69. Okl.—Southwestern Surety Ins. Co. v. Neal, 197 P. 439, 441, 81 Okl. 194, quoting *Corpus Juris*.
11 C.J. p 899 notes 99, 1, 2.

Not received by virtue of office

Amounts received by the clerk of the county court in administration and guardianship matters, under orders from the county court, of which he was the clerk, are not received by virtue of his office, and the obligation of his bond does not cover the same as sums properly coming into his hands by virtue of his office.—Southwestern Surety Ins. Co. v. Neal, 197 P. 439, 81 Okl. 194.

70. Ind.—Bowers v. Fleming, 67 Ind. 541.

11 C.J. p 899 note 3.

71. Ind.—State v. Givan, 45 Ind. 267.

72. Idaho.—Power County v. Fidelity & Deposit Co. of Maryland, 260 P. 152, 44 Idaho 609.

Ky.—Davis v. National Surety Co. of New York, 35 S.W.2d 560, 237 Ky. 401.

11 C.J. p 899 note 5.

73. Ind.—State v. Flynn, 69 N.E. 159, 161 Ind. 554.

74. Colo.—Wilson v. People, 34 P. 944, 19 Colo. 199, 41 Am.S.R. 243, 22 L.R.A. 449.

Pa.—Aurentz v. Porter, 56 Pa. 115.

11 C.J. p 900 note 7.

75. Fla.—Mordt v. Robinson, 156 So. 535, 116 Fla. 544.

Iowa.—Prudential Insurance Co. of America v. Hart, 218 N.W. 529, 205 Iowa 801.

Tenn.—Atchley v. Isbill, 3 Tenn.App. 325.

11 C.J. p 900 note 8.

Insolvency of depositary

Fla.—Mordt v. Robinson, 156 So. 535, 116 Fla. 544.

Iowa.—Prudential Ins. Co. of America v. Hart, 218 N.W. 529, 205 Iowa 801.

76. N.C.—State v. Engelhard, 70 N. C. 377.

Tenn.—Touchstone v. Whittington, 2 Baxt. 68—Clevenger v. Clevenger, 1 Heisk. 104.

77. Ill.—People v. McGrath, 117 N. E. 74, 279 Ill. 550, reversing 204 Ill.App. 169.

N.C.—Pasquotank County v. American Surety Co. of New York, 160 S.E. 176, 201 N.C. 325—Williams v. Hooks, 154 S.E. 828, 199 N.C. 489—Gilmore v. Walker, 142 S.E. 579, 195 N.C. 460, 59 A.L.R. 53.

11 C.J. p 900 note 10.

Good faith no defense

"If the clerk makes an investment in the utmost good faith and in the exercise of sound business judgment, and the investment fails, he is still

responsible for the money and must pay it to the person entitled thereto. If he deposits the money in a bank of known and approved solvency, and the bank thereafter fails, he must suffer the loss, because, if he fails to pay upon demand, the law presumes that he misappropriated the fund at the very instant it came into his hands."—Williams v. Hooks, 154 S.E. 828, 829, 199 N.C. 489.

Public policy

"Under the law the clerk is an insurer of funds properly and legally paid into his hands by virtue of his office and under color thereof. His liability is founded upon public policy, as well as upon the language of the official bond."—Gilmore v. Walker, 142 S.E. 579, 581, 195 N.C. 460, 59 A.L.R. 53.

78. Mo.—Vogel v. St. Louis, 84 Mo. 432, affirming 13 Mo.App. 116.

79. Ky.—Morgan v. Penick, 62 S.W. 479, 23 Ky.L. 27.

80. N.J.—Mott v. Pettit, 1 N.J.Law 344.

Tenn.—Touchstone v. Whittington, 2 Baxt. 68.

81. Ark.—Martin v. Bogard, 2 S.W. 2d 700, 176 Ark. 203.

82. Ala.—Shelley v. Thomas, 167 So. 316, 232 Ala. 227.

11 C.J. p 900 note 14.

the fund, holding it for the benefit of the parties entitled thereto, has the right to invoke the aid of the court to determine the ownership of the fund to be paid out by him.⁸³ The liability of the sureties on the clerk's bond for his failure to account for funds in his hands cannot be limited by any act of the surety himself,⁸⁴ and if the clerk acts in a dual capacity the sureties on his respective bonds are liable pro rata.⁸⁵

The liability of a custodian or depositary of deposits in court is treated in the C.J.S. title Deposits in Court § 9, also 18 C.J. p 778 notes 74, 75.

§ 59. — Interest

A clerk of court receiving no interest on funds entrusted to his care is not, as a rule, liable for interest, although where he has in fact received interest, or where he has misappropriated the funds, he may be held for interest thereon.

Ordinarily a clerk of court is not liable for interest on funds committed to his care,⁸⁶ although where he has in fact received interest thereon he must account for the same.⁸⁷ A clerk is liable for interest lost by his failure to obey an order requiring him to deposit a fund in bank and to take a certificate of deposit bearing interest at a specified rate,⁸⁸ and if he makes an unauthorized use of the money he is chargeable with interest from the time of such misappropriation,⁸⁹ which may be collected from his surety,⁹⁰ although it has also been held that in the case of a surety on a clerk of court's

bond interest will be allowed only from the date the action was commenced where there was no demand on the surety prior thereto.⁹¹ Furthermore, the clerk is liable for interest received by him on funds collected for the use of the state and deposited in a bank,⁹² which may be recovered from the sureties in an action on his official bond,⁹³ although it has also been held that, where collection of interest does not fall within the official duties of the clerk, the surety is not liable to the county for interest collected on funds held by the clerk.⁹⁴

The federal government has no claim to interest accrued or paid on a fund constituted from deposits made with the clerk of a federal court by litigants pursuant to a rule of court, to be drawn against by the clerk for the payment of the fees of himself and other officers of the court as they accrue, nor has it any claim to interest received by the clerk on a fund constituted from the fees and emoluments of his office collected and deposited by him pending his semiannual return.⁹⁵

What law governs. The interest allowed is that which may be due under the statute existing when the right to interest accrued.⁹⁶

§ 60. Extent and Duration of Sureties' Liability

The extent and duration of the surety of a clerk of court depend on the provisions of the bond and of the governing statutes.

Order as applicable to successor

Order directing clerk of court to distribute funds applies to his successor without new order.—*Martin v. Bogard*, 2 S.W.2d 700, 176 Ark. 203.

83. Mo.—*State ex rel. Scott v. Trimble*, 272 S.W. 66, 308 Mo. 123, quashing record *State ex rel.* and to use of *Clinkscales v. Scott*, 261 S.W. 680, 216 Mo.App. 114.

84. Ala.—*Mitchell v. Rice*, 31 So. 498, 132 Ala. 120.
11 C.J. p 900 note 15.

85. Ill.—*People v. Stewart*, 6 Ill. App. 62.

86. Mo.—*State ex rel. Ridge v. Shoemaker*, 212 S.W. 1, 278 Mo. 138.
N.C.—*Williams v. Hooks*, 154 S.E. 828, 199 N.C. 489.

87. Ill.—*City of Chicago v. Danisch*, 224 Ill.App. 454.

Kan.—*State v. Anderson*, 230 P. 315, 117 Kan. 117, affirmed 232 P. 238, 117 Kan. 540.

Neb.—*Scotts Bluff County v. McHenry*, 266 N.W. 586, 130 Neb. 717.

N.C.—*Williams v. Hooks*, 154 S.E. 828, 199 N.C. 489.

Tenn.—*State v. McLemore*, 37 S.W. 2d 103, 162 Tenn. 129—*Marion Trust & Banking Co. v. Roberson*, 268 S.W. 118, 151 Tenn. 108.

Deducting cost of indemnity bond

In equity suit wherein county court clerk was held liable to state and county for interest collected from bank, on state and county funds, clerk could deduct cost of indemnity bond obtained to protect bank deposits.—*State v. McLemore*, 37 S.W.2d 103, 162 Tenn. 129.

State and county funds

Interest county court clerk collected from bank on deposits of state and county funds became property of state and county in proportion state and county owned funds upon which interest accumulated, anti-fee bill not affecting situation.—*State v. McLemore*, 37 S.W.2d 103, 162 Tenn. 129.

Misappropriation

If defendant coming into possession, as clerk and master of a fund belonging to complainant's wards, diverted such fund to his personal use, he would be liable for interest thereon.—*Marion Trust & Banking Co. v. Roberson*, 268 S.W. 118, 151 Tenn. 108.

88. Ill.—*Baltimore, etc., R. Co. v. Gault*, 46 N.E. 256, 165 Ill. 233, reversing 60 Ill.App. 647.
11 C.J. p 900 note 17.

89. Ala.—*McPhillips v. McGrath*, 23 So. 721, 117 Ala. 549.

11 C.J. p 900 note 18.

90. N.C.—*State v. Gant*, 159 S.E. 427, 201 N.C. 211.
Tex.—*Collins v. Tarrant County, Civ. App.*, 242 S.W. 1105.

Twelve per cent

N.C.—*State v. Gant*, 159 S.E. 427, 201 N.C. 211.

91. Tenn.—*State, for Use of Brown, v. Fidelity & Deposit Co. of Maryland, App.*, 113 S.W.2d 73.

92. Md.—*Vansant v. State*, 53 A. 711, 96 Md. 110.
11 C.J. p 901 note 19.

93. Md.—*Vansant v. State, supra*.
11 C.J. p 901 note 20.

94. Neb.—*Scotts Bluff County v. McHenry*, 266 N.W. 586, 130 Neb. 717.

95. U.S.—*U. S. v. MacMillan, D.C. Ill.*, 209 F. 266, affirmed 251 F. 55, 163 C.C.A. 305, affirmed 40 S.Ct. 540, 253 U.S. 195, 64 L.Ed. 857.
11 C.J. p 901 note 21.

96. Tenn.—*State, for Use of Brown, v. Fidelity & Deposit Co., App.*, 113 S.W.2d 73.

The liability of the sureties on a clerk's official bond is naturally dependent in a large measure on the form and requirements of the bond itself, as well as on the intention of the statute under which the bond is drawn.⁹⁷ Where the bond is conditioned for the faithful discharge of his duties it embraces every duty and obligation imposed on the clerk by express statute or by the practice of the court,⁹⁸ and if the bond is in its terms less broad than the statute requiring it, the provisions of the statute will be read into the bond.⁹⁹ The obligation of the

sureties is, however, *strictissimi juris*, and cannot be extended by construction or implication; they have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent;¹ for acts of the clerk not within the scope of his official duties the sureties are not liable,² and where the alleged breach is not such no liability attaches.³ There can be no recovery in the absence of resultant injury.⁴ The fact that the conditions of the bond, as executed, are less onerous than the statute prescribes does not exempt the sure-

97. Tenn.—*Buford v. Cox*, 3 Lea 518. 11 C.J. p 896 notes 56, 57.

98. Cal.—*Union Bank & Trust Co. of Los Angeles v. Los Angeles County*, Sup., 74 P.2d 240, and 81 P.2d 919, reversing, App., 64 P.2d 1135.

Ga.—*Hall v. Kimsey*, 173 S.E. 437, 48 Ga.App. 605.

Ky.—*Burdine v. White's Adm'x*, 220 S.W. 750, 188 Ky. 10.

La.—*Gus Mayer Co. v. U. S. Fidelity & Guaranty Co.*, 128 So. 63, 13 La. App. 642.

Mich.—*City of Grand Rapids v. Krawkowski*, 174 N.W. 201, 207 Mich. 483.

Miss.—*Ellsworth v. Busby*, 160 So. 575, 172 Miss. 399.

Tex.—*Benge v. Foster*, Civ.App., 47 S.W.2d 862, error refused.

W.Va.—*State v. Fidelity & Deposit Co. of Maryland*, 112 S.E. 319, 91 W.Va. 191.

11 C.J. p 896 note 58.

Duties prescribed by decisions

The duties of a clerk prescribed by decisions are within both the letter and spirit of the official bond of such clerk, and the surety therein is liable for any breach or omission thereof.—*State v. Fidelity & Deposit Co. of Maryland*, 112 S.E. 319, 91 W.Va. 191.

Failure to sign process

Negligent failure of clerk of superior court to sign process attached to petition is a violation of his official bond, rendering clerk and sureties liable for damages resulting when cause of action became barred due to illegality of service of such process, and it was no defense that charter of defendant named in petition as corporation had expired.—*Hall v. Kimsey*, 173 S.E. 437, 48 Ga. App. 605.

Lack of notice of expiration of redemption period

Landowner deprived of property by tax sale could sue on official bond for clerk's failure to give notice of expiration of redemption period, notwithstanding landowner could have initiated proceedings to invalidate sale.—*Gus Mayer Co. v. U. S. Fidelity*

ty & Guaranty Co., 128 So. 63, 13 La. App. 642.

Liability for acts of deputy

Cal.—*Union Bank & Trust Co. of Los Angeles v. Los Angeles County*, Sup., 74 P.2d 240, and 81 P.2d 919, reversing, App., 64 P.2d 1135.

99. Wash.—*Grays Harbor Const. Co. v. Paulk*, 37 P.2d 584, 179 Wash. 300.

1. Colo.—*Peo. v. Cobb*, 51 P. 523, 10 Colo.App. 478.

11 C.J. p 896 note 59.

2. Ala.—*Lee v. Fidelity & Deposit Co. of Maryland*, 158 So. 764, 229 Ala. 546.

Ga.—*Hardwick v. Fidelity & Deposit Co. of Maryland*, 116 S.E. 220, 29 Ga.App. 567.

Md.—*State v. Little*, 146 A. 386, 157 Md. 455.

S.C.—*Brooks v. U. S. Fidelity & Guaranty Co.*, 159 S.E. 488, 161 S.C. 66.

11 C.J. p 896 note 60.

Acting as gratuitous agent of attorney

Ala.—*Lee v. Fidelity & Deposit Co. of Maryland*, 158 So. 764, 229 Ala. 546.

Indexing

Clerk's bond held not liable for loss caused by failure to list mortgage in new annex index, since such listing was not within the scope of the clerk's official duties.—*State v. Little*, 146 A. 386, 157 Md. 455.

Signing name of judge to appointment

S.C.—*Brooks v. U. S. Fidelity & Guaranty Co.*, 159 S.E. 488, 161 S.C. 66.

3. Cal.—*Armstrong v. Brown*, 54 P. 2d 1118, 12 Cal.App.2d 22.

Miss.—*Merchants' & Manufacturers' Bank v. Busby*, 160 So. 577, 172 Miss. 394.

Tenn.—*Atchley v. Isbill*, 3 Tenn.App. 325.

As to making of certified copy of note

Clerk keeps original note probated against estate until creditor requests withdrawal thereof, and clerk's statutory obligation to make certified copy to be retained by him arises only on claimant's request to

withdraw original and exists only while original yet remains in clerk's hands, so that, he is not liable for failure to certify copies of notes filed, in absence of allegations that he had assured creditor at time of withdrawal of originals that certified copies had been made and filed, or promised to make and file certified copies after withdrawal.—*Merchants' & Manufacturers' Bank v. Busby*, 160 So. 577, 172 Miss. 394.

Failure to deliver certificate of deposit

Certificate of deposit deposited with clerk of county court pursuant to stipulation for such deposit in lieu of stay bond is substitute for stay bond and not payment of money in lieu thereof within statute, so that clerk and surety on his bond were not liable on bond for clerk's failure to deliver certificate of deposit to county treasurer.—*Armstrong v. Brown*, 54 P.2d 1118, 12 Cal.App.2d 22.

4. Mo.—*Newton Burial Park v. Davis*, App., 78 S.W.2d 150.

N.C.—*Buncombe County v. Cain*, 188 S.E. 399, 210 N.C. 766.

Or.—*Lane v. Beveridge*, 296 P. 872, 135 Or. 559.

Where bank never had sufficient money to pay check presented by clerk of court, fact that bank was given fifteen days to get money and that time certificate of deposit was accepted did not charge clerk with having money, so as to render sureties liable for his failure to pay over money received, and clerk's delay in presenting check for payment was immaterial.—*Newton Burial Park v. Davis*, Mo.App., 78 S.W.2d 150.

Void order

Infant whose property was sold and conveyed to purchaser, under order of superior court clerk which was void because purported guardian who acted for infant was not properly appointed by clerk, could not recover on clerk's official bond, since infant sustained no damages because purchaser acquired no interest in the property adverse to the infant.—*Buncombe County v. Cain*, 188 S.E. 399, 210 N.C. 766.

ties from liability for a breach of the conditions that are contained in it;⁵ nor does the giving of a special bond by the clerk relieve the sureties on his general bond,⁶ although the sureties on the special undertaking cannot be held liable beyond its terms.⁷

The liability of the clerk's sureties as respects funds received or distributed by the clerk has been considered in §§ 54-59.

A bond from the clerk to the judge is designed to protect the latter from the clerk's misconduct and cannot be relied on by the general public, which is protected by the bond of the judge.⁸

§ 61. — Effect of Giving New Bond

Generally speaking, execution and approval of a new bond for a clerk of court releases the sureties on the old bond, although they remain responsible for defaults occurring before the new bond became operative.

Although this is not strictly true in all states,⁹ ordinarily on the execution and approval of a new bond of a clerk of court the responsibilities of the old sureties cease,¹⁰ although they remain liable for defaults which occurred before the new bond became operative,¹¹ and the latter liability cannot be shifted to the sureties on a bond for a succeeding term.¹²

§ 62. — Duties Added after Execution of Bond

The bond of a clerk of court may cover his performance of duties added after execution of the bond where such duties are similar in kind to those pertaining to

his office before execution of the bond, but does not cover dissimilar duties subsequently added.

Additional duties imposed by law on the clerk subsequent to the execution of the bond, if not different in kind, but merely in degree, from those formerly pertaining to the office, are covered by the bond;¹³ but as to any duty not in its nature pertinent to the office as it existed when the bond was given, there is no liability on the sureties on such bond.¹⁴

Where clerk appointed receiver. When the clerk is appointed receiver in a cause pending in the court, his sureties cannot be held liable for his default as such receiver.¹⁵

§ 63. — Acts Done before Giving Bond

As a general rule sureties are not liable for acts done by a clerk of court before giving of his bond, although liability may attach where the act constitutes a continuing violation of official duty.

While the sureties are not ordinarily liable for an act done by the clerk previous to the giving of such bond,¹⁶ yet where the act constitutes a continuing violation of official duty the liability attaches to a bond subsequently given.¹⁷

Where the clerk serves successive terms and gives separate bonds with different sureties, the sureties on each bond are liable only for the defaults which occurred during the particular term or period for which it was given, and not for the defaults of a prior term.¹⁸ Each bond is as a rule liable only for defalcations occurring during the term for which it was given.¹⁹ Where a defaulting clerk succeeds

5. Colo.—Cooper v. Peo., 63 P. 314, 28 Colo. 37.

6. Miss.—Johnson v. Bobbitt, 33 So. 73, 81 Miss. 339.

7. Tenn.—Longmire v. Fain, 18 S.W. 70, 89 Tenn. 393.

11 C.J. p 896 note 63.

8. S.C.—Brooks v. U. S. Fidelity & Guaranty Co., 159 S.E. 488, 161 S. C. 66.

9. Ind.—Sullivan v. State, 23 N.E. 150, 121 Ind. 342.

11 C.J. p 896 note 64.

10. Ky.—Rodes v. Com., 6 B.Mon. 359.

Tenn.—Bowen v. Evans, 1 Lea 107.

11. Ill.—Cullom v. Dolloff, 94 Ill. 330.

N.C.—Sharpe v. Connely, 11 S.E. 177, 105 N.C. 87.

12. Miss.—Johnson v. Bobbitt, 33 So. 73, 81 Miss. 339.

11 C.J. p 896 note 67.

13. Fla.—Catts v. Winburn, 88 So. 918, 81 Fla. 756.

11 C.J. p 896 note 68.

14. Miss.—Denio v. State, 60 Miss. 949.

Mo.—State v. White, 53 S.W. 1064, 152 Mo. 416.

15. N.C.—Syme v. Bunting, 91 N.C. 48—Rogers v. Odom, 86 N.C. 432—Kerr v. Brandon, 84 N.C. 128.

Tenn.—Waters v. Carroll, 9 Yerg. 102.

16. Ala.—McPhillips v. McGrath, 23 So. 721, 117 Ala. 549.

N.C.—Ward v. Hassell, 66 N.C. 339. 11 C.J. p 897 note 71.

17. N.C.—Judges v. Bryan, 14 N.C. 390.

S.C.—State v. Moses, 18 S.C. 366, Id., 20 S.C. 465, distinguished in State v. Causey, 76 S.E. 707, 93 S.C. 300.

18. Ala.—McPhillips v. McGrath, 23 So. 721, 117 Ala. 549.

S.C.—State v. Causey, 76 S.E. 707, 93 S.C. 300.

19. N.C.—Lee v. Martin, 123 S.E. 631, 188 N.C. 119, modifying State v. Martin, 118 S.E. 914, 186 N.C. 127.

In absence of contract or statute, surety on clerk's official bond, although the principal and sureties be the same, is not liable for nonperformance of his official duties during another and different term.—Lee v. Martin, supra.

Apportionment of Liability

(1) Where bond, given by clerk of court during first term, was kept alive by payment of annual premiums during incumbency of second term, liability of surety should be apportioned to each term as though separate bond for each term was executed for sum named in bond.—Lee v. Martin, supra.

(2) Where money deposited in court is not repaid on demand, if the clerk's bond for any one term be not sufficient to pay judgments against him for defalcations during such term the pro rata interest of each claimant against surety is determinable on basis of principal amount recovered against clerk, plus twelve per cent per annum from time of detention until settlement, not exceed-

himself, and has given the required bond for each term, with the same surety, and continues his defalcation, the surety is liable only to the amount of the bond for each term.²⁰ In the absence of a contrary showing, it will be presumed that a misappropriation of funds occurred during the term in which they were received, and the bond for each particular term is liable for the amount then presumptively misappropriated.²¹

§ 64. — Acts Done after Expiration of Term

In the absence of statutes extending liability, sureties may not be held liable for acts of a clerk of court committed after expiration of the term of office covered by the bond.

The contract of the sureties must be strictly construed, and they cannot be held liable for acts of the clerk done after the expiration of the term of office covered by the bond,²² even though the clerk succeeds himself.²³

§ 65. Actions for Damages or on Official Bond

Matters concerning actions for damages against a clerk of court or proceedings on his official bond will be considered in detail in §§ 66-77. Consult Pocket Parts for later cases.

§ 66. — Right of Action

One injured by a clerk of court's default ordinarily has cumulative remedies on the bond or against the clerk personally.²⁴ No right of action accrues until the plaintiff's right has been established and an infringement thereof has occurred.

The remedy on the clerk's bond is cumulative,²⁴ and does not prevent a personal action against him by any person suffering damage from his official malfeasance or nonfeasance;²⁵ and a statutory summary remedy is not exclusive, so as to prevent an action being brought against the clerk.²⁶

The authority to sue a clerk of court for fees collected and not accounted for will sustain such suit even if recovery is also asked for fees which should have been collected.²⁷

When right of action accrues. A right of action against a clerk for negligently approving and accepting an insufficient stay bond does not accrue until the expiration of the stay;²⁸ and the right to sue the clerk on his bond for the wrongful taxation of costs does not accrue until after such costs have been retaxed by the judgment of the court.²⁹ No right of action on a clerk of court's bond accrues for his nonpayment of money to plaintiff until plaintiff's right to the money has been established.³⁰

Where bond lost. Where a clerk's official bond is lost, and no certified copy thereof can be obtained, a person having a right of action against the clerk on such bond can maintain a suit in equity against the sureties to establish the bond and to obtain leave to sue on it.³¹

§ 67. — Nature and Form of Action

Either assumpsit or money had and received may lie against a clerk of court for money received and unaccounted for, or an action of debt may be brought on his official bond. In some jurisdictions statutes afford a summary remedy.

Assumpsit lies on the part of a county to recover of a clerk of court money received by him and not accounted for when he in equity or good conscience ought to account for it;³² and an action for money had and received may be maintained against a clerk where the money in question was not received by virtue of his office.³³ Also, where the clerk converted to his own use money deposited with him by a party under rule of court, and subsequently ordered repaid, the depositor can recover it in an action for money had and received.³⁴ The proper form of action on the clerk's official bond for an alleged negligent performance of his official duties is

ing penalty of bond, in view of Comp. St. § 2309.—Lee v. Martin, supra.

20. N.C.—State v. Gant, 159 S.E. 427, 201 N.C. 211.

21. N.C.—Gilmore v. Walker, 142 S.E. 579, 195 N.C. 460, 59 A.L.R. 53.

22. N.C.—Gregory v. Morrissey, 79 N.C. 559.

11 C.J. p 897 note 75.

23. S.C.—State v. Lang, 18 S.C.L. 430.

11 C.J. p 897 note 77.

24. Tenn.—Pass v. Dibrell, 8 Yerg. 470.

11 C.J. p 901 note 24.

25. Ga.—Markham v. Ross, 73 Ga. 105.

Tenn.—Pass v. Dibrell, 8 Yerg. 470.

Tex.—Crews v. Taylor, 56 Tex. 461. 11 C.J. p 901 note 25.

26. Tex.—Willis v. Keator, Civ.App., 181 S.W. 556.

27. La.—Parish of Evangeline v. Guillory, 138 So. 649, 173 La. 732.

28. Iowa.—Moore v. McKinley, 14 N.W. 768, 60 Iowa 367—Steel v. Bryant, 49 Iowa 116.

29. Mo.—State v. Hollenbeck, 68 Mo. App. 366.

30. Ind.—State v. Bleeke, 116 N.E. 2, 71 Ind.App. 23.

Attorney's Lien

When amount of attorney's lien of judgment in favor of client is estab-

lished, which it was not in the case at bar, a duty is then imposed on clerk to pay it to them from amount thereof in his hands so as to render him liable on his bond on failure so to do, but until such trial there is no right of action.—State v. Bleeke, supra.

31. Or.—Howe v. Taylor, 6 Or. 284.

32. N.H.—Belknap County v. Clark, 58 N.H. 150.

33. Ind.—Bowers v. Fleming, 67 Ind. 541.

N.J.—Duffield v. Burrough, 22 A. 798, 54 N.J.Law 47.

34. N.J.—Mott v. Pettit, 1 N.J.Law 344.

debt;³⁵ but, if the action is against the clerk personally for negligence in the discharge of his duties, the right of action is founded, not on contract, but on breach of duty.³⁶

In some jurisdictions the statutes provide a summary remedy³⁷ for injuries arising from breaches of duty on the part of clerks of court. Such remedy being of statutory origin and in derogation of the common law must be strictly pursued and cannot be extended by construction.³⁸ The question whether notice is required depends on the terms of the statute.³⁹

§ 68. — Conditions Precedent

A court order to the clerk to pay over money may be a condition precedent to a suit against him for not paying it over.

Where money is held by a clerk in his official capacity subject to the orders of the court, no right of action accrues against him for not paying it over, until the court orders him so to do;⁴⁰ but in Missouri, if the clerk makes a false report of the fees received by him, suit may be brought on his bond without any previous order to him to pay over.⁴¹ Furthermore, it is unnecessary to fix the liability of the principal on a clerk's official bond before a recovery can be had against the sureties.⁴² When the action is based on the clerk's negligent failure to record a materialman's lien within the time prescribed by statute, the materialman need not show, before recovering his damages from the clerk and his sureties, that he has unsuccessfully prosecuted a foreclosure proceeding.⁴³

§ 69. — Time to Sue and Limitations

Suits for default of a clerk of court should be brought within the time limited by statute.

The period of limitation on an action against a clerk of court is governed by statute in the various jurisdictions.⁴⁴ The applicable statute of limitation does not commence to run until the cause of action accrues; and a fraudulent concealment of the cause of action will delay the operation of the statute until after discovery of the fraud.⁴⁵ Suit against the surety is not premature where brought before expiration of the clerk's term for moneys received and not accounted for at the time designated by statute.⁴⁶ Delay without prejudice to defendant will not bar an action on a clerk of court's bond, brought within the statutory period.⁴⁷

§ 70. — Defenses in General

It is a defense to an action for a clerk of court's default to show that he was acting under order of the court. The clerk may defend as a rule by showing his exercise of due care, although negligence of third persons constitutes no defense.

While the clerk and his sureties may defend by showing that he was acting under the orders of the court,⁴⁸ and in a proper case a set-off may be set up in an action on the clerk's bond,⁴⁹ in order successfully to defend a personal action against him for an alleged negligent performance of his duties, the clerk must show that he exercised reasonable and ordinary care and diligence.⁵⁰ Negligence of others in the performance of their duties does not furnish a defense to a clerk of court for nonperformance of his own duty,⁵¹ and many particular matters have been held not to constitute defenses in actions against the clerk or his sureties.⁵²

35. Miss.—McNutt v. Livingston, 15 Miss. 641.

11 C.J. p 901 note 34.

36. Minn.—Selover v. Sheardown, 76 N.W. 50, 73 Minn. 393, 72 Am.S.R. 627.

11 C.J. p 901 note 35.

37. Iowa.—Western Fruit, etc., Co. v. Petersberger, 143 N.W. 399, 161 Iowa 436.

11 C.J. p 901 note 36.

Proceeding construed as summary in nature

N.C.—State v. Gant, 159 S.E. 427, 201 N.C. 211.

38. Ala.—Parks v. Bryant, 31 So. 593, 132 Ala. 224.

11 C.J. p 902 note 37.

39. Ala.—Armstrong v. Holley, 29 Ala. 305.

11 C.J. p 902 note 38.

40. Del.—State v. Houston, 1 Del. 230.

11 C.J. p 902 note 40.

41. Mo.—State v. Gideon, 59 S.W. 99, 158 Mo. 327.

11 C.J. p 902 note 41.

42. Tenn.—Ferrell v. Grigsby, Ch. App., 51 S.W. 114.

43. Ga.—Neal-Blun Co. v. Rogers, 82 S.E. 280, 141 Ga. 808.

44. N.C.—Shackelford v. Staton, 23 S.E. 101, 117 N.C. 73.

11 C.J. p 902 note 44.

45. Mo.—Shelby County v. Bragg, 36 S.W. 600, 135 Mo. 291.

11 C.J. p 902 notes 45, 46.

46. Tenn.—State for Use of Sullivan County v. O'Dell, 84 S.W.2d 577, 169 Tenn. 248.

Excess fees

Tenn.—State, for Use of Sullivan County v. O'Dell, *supra*.

47. Tenn.—State, for Use of Brown v. Fidelity & Deposit Co. of Maryland, 113 S.W.2d 73, 21 Tenn.App. 507.

48. Ala.—Davidson v. Wiley, 31 Ala. 452.

11 C.J. p 902 note 47.

49. Ohio.—State v. Hobson, 6 Ohio S. & C.P. 338, 5 Ohio N.P. 321.

11 C.J. p 903 note 48.

Set-off denied

Ark.—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

50. Ky.—McFarland v. Burton, 12 S.W. 336, 39 Ky. 294, 11 Ky.L. 499.

11 C.J. p 903 note 49.

51. N.C.—Pasquotank County v. American Surety Co. of New York, 160 S.E. 176, 201 N.C. 325.

52. Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.

Iowa.—Prudential Ins. Co. of America v. Hart, 218 N.W. 529, 205 Iowa 801.

N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.

11 C.J. p 903 note 50.

as will appear from an examination of the decisions referred to *infra* this note. A surety company receiving the premium on a clerk of court's bond issued in an amount in excess of that prescribed by statute, is estopped to deny the validity of the bond in a suit thereon.⁵³

§ 71. — Contributory Negligence of Plaintiff

The contributory negligence of plaintiff may afford a defense to an action for damages alleged to have arisen from default of a clerk of court, although it has been held no defense to an action on the bond.

Where, but for the negligence of the party complaining, the injury would not have occurred the clerk cannot be held liable;⁵⁴ but the fact that plaintiff did not personally supervise the performance of a duty imposed by law on the clerk is no defense to an action against the clerk for a failure to perform such duty;⁵⁵ and in other cases there has been held to be no such negligence, or implication thereof, on the part of plaintiff, as to defeat recovery.⁵⁶

Contributory negligence has been held no defense to an action on the bond of the clerk.⁵⁷

§ 72. — Jurisdiction and Venue

Statutory provisions ordinarily control matters of jurisdiction and venue of actions against a clerk of court or his bondsman.

The jurisdiction of actions and proceedings against clerks of courts is dependent on the statutes

in the various jurisdictions, as will appear from an examination of the cases cited *infra* this note.⁵⁸

§ 73. — Parties

The general rules control in respect of parties to actions against a clerk of court or his bondsman, which actions should be brought by or on behalf of the real party in interest and are not ordinarily restricted to the party named as obligee in the bond.

As a general rule, an action for damages may be brought against the clerk by any person injured by his breach of duty,⁵⁹ or by the proper public authorities;⁶⁰ but the liability of a clerk for not including a judgment in a certificate of search is only to the person employing him to make the search,⁶¹ and only the parties interested in, and who had a right to have, the instrument recorded can maintain an action against the clerk for failure to keep a file book for entering mortgages, and to record a mortgage,⁶² and whatever liability may be incurred by a clerk in respect of a certificate as to title to realty is to the person for whom the certificate was intended and not to the latter's grantee.⁶³ Where clerks of courts are bound by statute to pay to the county treasurer all fines received by them in criminal cases, they are not liable to actions by cities or towns to whose use the fines are appropriated by statute.⁶⁴ Under some statutes, an action cannot be sustained by a person entitled to a distributive share of an intestate's estate against the clerk of the county court for neglecting to take an administration bond.⁶⁵

In whose name action brought on bond. While the benefit of the bond of a clerk of court is not

Plaintiff's failure to withdraw money on day notified of deposit

Iowa.—Prudential Ins. Co. of America v. Hart, 218 N.W. 529, 205 Iowa 801.

53. N.C.—State v. Gant, 159 S.E. 427, 201 N.C. 211.

54. Ga.—Broyles v. Young, 91 S.E. 437, 19 Ga.App. 294.

Or.—Lane v. Beveridge, 296 P. 872, 135 Or. 559.

11 C.J. p 895 note 53.

Plaintiff's negligence in respect of issuance of execution

Ga.—Broyles v. Young, 91 S.E. 437, 19 Ga.App. 294.

55. U.S.—Baltimore, etc., R. Co. v. Weedon, Ohio, 78 F. 584, 24 C.C.A. 249.

11 C.J. p 895 note 54.

56. Ga.—Collins v. McDaniel, 66 Ga. 203.

Minn.—Rosenthal v. Davenport, 38 N.W. 618, 38 Minn. 543.

N.Y.—Hartwell v. Riley, 62 N.Y.S. 317, 47 App.Div. 154.

11 C.J. p 896 note 55.

57. Tex.—Ætna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, Civ.App., 86 S.W.2d 826, error dismissed.

58. Tenn.—Glenn v. Moore, 11 Lea 256.

11 C.J. p 903 note 51.

Petition against clerk of criminal court to recover costs illegally collected.—State v. Richards, 113 S.W. 370, 120 Tenn. 477.

Summary proceedings

Ala.—Parks v. Bryant, 31 So. 593, 132 Ala. 224.

Tenn.—Donelson v. State, 3 Lea 692.

—Smiley v. Bigley, 5 Sneed 279.

Tex.—Willis v. Keator, Civ.App., 181 S.W. 556.

County court

Mo.—State v. Dent, 25 S.W. 924, 121 Mo. 162.

Tenn.—Smith v. Woods, 1 Coldw. 535.

59. Ga.—Stewart v. Sholl, 26 S.E. 757, 99 Ga. 534.

11 C.J. p 903 note 53.

60. Miss.—Price v. Gillis, 151 So. 157, 168 Miss. 139.

Mo.—State ex rel Ridge v. Shoemaker, 212 S.W. 1, 278 Mo. 138.

State auditor

Miss.—Price v. Gillis, 151 So. 157, 168 Miss. 139.

Exclusive right of the state

If circuit clerk receives a benefit from banks by reason of improper arrangements as to deposit of funds, a party who has deposited money in court, pending litigation, under court's order, is not entitled to recover the benefit, such right being exclusively in the state, under Rev. St. 1909 § 4558.—State ex rel. Ridge v. Shoemaker, 212 S.W. 1, 278 Mo. 138.

61. Pa.—Siewers v. Com., 87 Pa. 15.

62. Tex.—Crews v. Taylor, 56 Tex. 461.

63. Kan.—Mallory v. Ferguson, 32 P. 410, 50 Kan. 685, 22 L.R.A. 99.

64. Mass.—Taunton v. Sproat, 2 Gray 428.

65. N.C.—Daughtry v. Haynes, 4 N. C. 92.

restricted to the obligee named in the bond,⁶⁶ and under some statutes an action thereon may be brought by the person injured in his own name,⁶⁷ or must be brought, if at all, in his name,⁶⁸ yet an action on the bond is usually required to be brought in the name of the state,⁶⁹ the United States government,⁷⁰ or the governor of the state,⁷¹ for the benefit of the real party in interest;⁷² but it is unnecessary to aver that the action is for the use and benefit of another.⁷³ One who has purchased a forged warrant from a clerk of court cannot maintain a suit on the clerk's bond, where the assignment of the warrant to him is not in the statutory form.⁷⁴ In Pennsylvania, a litigant cannot maintain a suit in his own name for his individual use against the sureties on the official bond of a prothonotary and clerk of court;⁷⁵ and the prothonotary in office is the proper plaintiff, to the use of the court, in an action on the official bond of a former prothonotary to recover a deficit in his account for moneys paid into court.⁷⁶

Where the county is the party in interest the action may, it has been held, be brought in its name,⁷⁷ or should be for the use of the officer or board authorized to represent the county in that regard, such as the county treasurer,⁷⁸ county attorney,⁷⁹ county commissioners,⁸⁰ or the auditor.⁸¹ A county may sue on the bond of a clerk of court elected

by the county for failure to record pleadings and judgments as required by law, and especially for failure to record criminal cases, for which he has been paid by the county;⁸² but where the duties required to be performed for the county are secured by a separate bond as county clerk, the county cannot sue for a breach of such duties on the bond given to protect parties having business in the county court.⁸³ Where, however, the county court has no interest in moneys received by the clerk in his official capacity, it may not maintain an action on his bond in respect of such moneys.⁸⁴

An objection that the action is not brought in the name of the state can be raised by demurrer only.⁸⁵

Defendants. It seems that if the action is brought simply for neglect of duty on the clerk's part, his sureties cannot be made parties to such an action.⁸⁶ Where the clerk is dead, and his estate is insolvent, it is not necessary to bring his representative before the court in order to fix the liability of his sureties.⁸⁷ It has been held that the surety may be sued without joining the clerk as a party.⁸⁸

In receivership proceedings to liquidate the securities of a deceased clerk of court, representing commingled public and personal moneys amply sufficient to discharge official obligations, the sureties on the clerk's bonds are not necessary nor proper parties, and may not be retained, over their objec-

66. Mich.—Kent County v. Krakowski, 175 N.W. 427, 207 Mich. 631. 11 C.J. p 904 note 58.

67. Mich.—Kent County v. Krakowski, *supra*. 11 C.J. p 904 note 59.

68. Ala.—Bagby v. McRae, 2 Ala. 708. 11 C.J. p 904 note 60.

69. U.S.—Fidelity & Casualty Co. of New York v. Hoyle, C.C.A.N.C., 64 F.2d 413, 415.

Okl.—Swarts v. State, 174 P. 255, 70 Okl. 205. 11 C.J. p 904 note 61.

"The clerk is required to give bond for the faithful discharge of his duties . . . and suits upon such bond, as upon other official bonds, run in the name of the state."—Fidelity & Casualty Co. of New York v. Hoyle, *supra*.

70. U.S.—U. S. v. Abeel, Tex., 174 F. 12, 98 C.C.A. 50. 11 C.J. p 904 note 62.

71. Miss.—Brown v. Lester, 21 Miss. 392.

72. U.S.—Howard v. U. S., Mo., 22 S.Ct. 543, 184 U.S. 676, 46 L.Ed. 754, affirming 102 F. 77, 42 C.C.A. 169, affirming, C.C., U. S. v. Howard, 93 F. 719.

Miss.—Brown v. Lester, 21 Miss. 392. 11 C.J. p 904 note 64.

73. U.S.—U. S. v. Abeel, Tex., 174 F. 12, 98 C.C.A. 50.

Wis.—Milwaukee v. U. S. Fidelity, etc., Co., 129 N.W. 786, 144 Wis. 603.

11 C.J. p 904 note 65.

74. Mo.—State v. Harrison, 72 S.W. 469, 99 Mo.App. 57.

75. Pa.—Ellis v. Freeze, 27 Pa.Co. 153.

76. Pa.—Yohe v. Commonwealth, 13 A. 546.

77. Mich.—Kent County v. Krakowski, 175 N.W. 427, 207 Mich. 631.

78. Ill.—Weisenborn v. People, 53 Ill.App. 32.

N.C.—Hewlett v. Nutt, 79 N.C. 263.

79. Okl.—Swarts v. State, 174 P. 255, 70 Okl. 205.

Action in name of state

County attorney may maintain action in name of state on official bond of clerk of county court, whose office exists under the laws, for his failure on retiring from office to deliver funds lawfully lodged in his office to his successor.—Swarts v. State, *supra*.

80. Okl.—Arnold v. Board of Com'rs

of Creek County, 254 P. 31, 124 Okl. 42.

11 C.J. p 905 note 70.

Recovery of items not accounted for—Okl.—Arnold v. Board of Com'rs of Creek County, 254 P. 31, 124 Okl. 42.

81. Ind.—State v. Robinson, 2 Ind. 40.

82. S.C.—Chester County v. Hemphill, 8 S.E. 195, 29 S.C. 584.

83. Ill.—Satterfield v. People, 104 Ill. 448.

84. W.Va.—State ex rel Barbour County Court v. Corder, 181 S.E. 719, 116 W.Va. 458.

Deposits from litigants

W.Va.—State ex rel Barbour County Court v. Corder, *supra*.

85. S.C.—State v. Moses, 18 S.C. 366.

86. S.C.—Strain v. Babb, 9 S.E. 271, 30 S.C. 342, 14 Am.S.R. 905.

87. Tenn.—Ferrell v. Grigsby, Ch. A., 51 S.W. 114.

88. Tenn.—State for Use of Brown v. Fidelity & Deposit Co. of Maryland, 113 S.W.2d 73, 21 Tenn.App. 507.

Failure to turn over cash

Tenn.—State for Use of Brown v. Fidelity & Deposit Co. of Maryland, *supra*.

tion, as parties defendant solely for the purpose of binding them by the court's orders.⁸⁹

§ 74. — Pleading

Under the general rules of pleading, which control in respect of complaints, answers, and issues, proof, and variance in actions for default of a clerk of court, the complaint should ordinarily show the clerk's breach of duty and the plaintiff's damage, and where the action is on the bond so much thereof should be set forth as shows plaintiff to be entitled to his cause of action.

Declaration, petition, or complaint. In an action to recover damages for the misfeasance or nonfeasance of a clerk of court, the declaration, petition, or complaint must, of course, contain sufficient allegations to show a cause of action.⁹⁰ The breach of duty complained of must be alleged with sufficient particularity to apprise defendant of the nature of the demand against him,⁹¹ and actual damage resulting from such breach must be averred,⁹² although the complaint may be held sufficient where the right to nominal damages sufficiently appears.⁹³ Where the breach assigned is a failure of the clerk to account for money received by virtue of his office it must be alleged that the clerk received such money⁹⁴ and held it in his official capacity,⁹⁵ although matters which will be presumed need not be averred.⁹⁶ Where the action is brought on the

clerk's bond the declaration or complaint must set out so much of such bond as entitles plaintiff to his cause of action,⁹⁷ and its averments will be construed strictly against the pleader,⁹⁸ although whatever is necessarily implied in, or is reasonably to be inferred from, the allegations is to be taken as directly averred.⁹⁹ In a suit on the bond, brought in the name of the state by the party injured, it is sufficient to name the person for whose use the suit is brought without setting forth the nature of his interest.¹ A petition disclosing that the bond sued on was executed subsequent to the term in which an alleged defalcation occurred is demurrable.² Failure to show when a default occurred and which of several sureties is liable therefor is not, however, necessarily fatal to a petition.³

Surplusage in the declaration or petition in an action on the clerk's bond does not render it demurrable.⁴

Plea or answer. Nul tiel record is not a good plea in an action on the bond of a clerk of court, although the bond is by law directed to be recorded.⁵ Defendant may amend his answer so as to set up an additional defense to an action against him for neglect of duty.⁶ A plea by a surety on a clerk's

89. N.C.—Williams v. Hooks, 157 S. E. 65, 200 N.C. 419.

90. Ga.—Donaldson v. Walker, 132 S.E. 649, 35 Ga.App. 224.

Ohio.—Stark Electric R. Co. v. McKean, 17 Ohio N.P.N.S., 599.

S.D.—Robinson v. Nelson, 133 N.W. 874, 44 S.D. 281.

11 C.J. p 905 note 78.

Plaintiff's initial pleading held sufficient

La.—Gus Mayer Co. v. U. S. Fidelity & Guaranty Co., 128 So. 63, 13 La. App. 642.

Tenn.—Marion Trust & Banking Co. v. Roberson, 268 S.W. 118, 151 Tenn. 108.

91. Ohio.—State v. Caffee, 6 Ohio 150.

11 C.J. p 905 note 79.

Allegations held sufficiently particular

Miss.—Ellsworth v. Busby, 160 So. 575, 172 Miss. 399.

11 C.J. p 905 note 79 [a].

92. Ga.—Georgia Properties Co. v. Nisbet, 156 S.E. 298, 42 Ga.App. 338—Donaldson v. Walker, 132 S.E. 649, 35 Ga.App. 224.

Ohio.—Stark Electric R. Co. v. McKean, 17 Ohio N.P.N.S., 599.

11 C.J. p 905 note 80.

In action for negligence in failure to issue summons in error, facts must be alleged disclosing material error in court below entitling plaintiff to reversal.—Stark Electric R. Co. v. McKean, supra.

93. Miss.—Poyner v. Gilmore, 158 So. 922, 171 Miss. 859.

Failure to attach certificate to claim

Miss.—Poyner v. Gilmore, supra.

94. Ill.—Governor v. Ridgway, 12 Ill. 14.

95. Colo.—People v. Cobb, 51 P. 523, 10 Colo.App. 478.

11 C.J. p 906 note 82.

Deposit in official capacity sufficiently alleged

Miss.—U. S. Fidelity & Guaranty Co. v. Young, 91 So. 3, 128 Miss. 296, on suggestion of error setting aside judgment 90 So. 448, 127 Miss. 725.

96. Ill.—Governor v. Ridgway, 12 Ill. 14.

11 C.J. p 906 note 83.

97. Del.—State v. Houston, 1 Del. 230.

Ohio.—State v. Caffee, 6 Ohio 150.

98. Ala.—Wynn v. McCraney, 46 So. 854, 156 Ala. 630.

11 C.J. p 906 note 86.

99. Mont.—Silver Bow County v. Davies, 107 P. 81, 40 Mont. 418.

11 C.J. p 906 note 87.

1. Ohio.—State v. Caffee, 6 Ohio 150.

2. Kan.—State v. Songer, 16 P.2d 483, 136 Kan. 607.

3. Tex.—Aetna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, Civ.App., 86 S.W. 2d 826, error dismissed.

Under statute

Overruling special exceptions to municipality's petition against all sureties on official bonds of district court clerk to recover city funds misappropriated by clerk on ground of lack of showing exactly when misappropriation occurred and, therefore, which surety company was liable is not error, in view of statute permitting such suit if it is difficult to determine when default occurred and which surety is liable therefor. —Aetna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, supra.

Effect of presumption

In municipality's suit against three different sureties on official bonds of district court clerk to recover municipal funds deposited with clerk and misappropriated by him at unknown date, it would be assumed that misappropriation occurred during period covered by first surety bond, where balance in clerk's trust fund was reduced during that period to amount less than amount deposited by city. —Aetna Casualty & Surety Co. v. State for Use and Benefit of City of Dallas, supra.

4. Mo.—State v. Gideon, 59 S.W. 99, 158 Mo. 327.

11 C.J. p 906 note 89.

5. Del.—State v. Houston, 1 Del. 230.

6. Ky.—McFarland v. Burton, 12 S.W. 336, 89 Ky. 294, 11 Ky.L. 499.

11 C.J. p 906 note 92.

bond in a county's action thereon that the state also had a claim against the clerk which might support an action on the identical bond is not a plea in bar of the county's action.⁷

Issues, proof, and variance. Under a general denial in an action on the bond of a clerk of court, defendant may offer in evidence any circumstance tending to prove that the acts complained of were not a breach of the bond as alleged.⁸

§ 75. — Evidence

The burden of proving his case rests on one suing a clerk of court or his surety, and general rules control the admissibility and sufficiency of the evidence in such actions.

A plaintiff suing a clerk of court or his bondsman has the burden of proving his case,⁹ although where the clerk fails to pay on demand moneys coming into his possession and for which he should account there arises a presumption of his conversion of the same,¹⁰ casting on the clerk the burden of proving the contrary,¹¹ and the burden of proof rests on defendant to establish his defenses to the action,¹² or to show private ownership of a part of the fund

not accounted for.¹³ Where the report of a clerk fails to comply with statutory requirements, it will not constitute prima facie evidence of the correctness of the entries therein.¹⁴ After a considerable length of time, payment over by the clerk may be presumed.¹⁵ There is no presumption, in an action on the clerk's bond for failure to account for money, that the misappropriation occurred at any particular time;¹⁶ but circumstantial evidence may be admitted to show the time when the misappropriation occurred.¹⁷

The admissibility¹⁸ and sufficiency¹⁹ of the evidence in an action against a clerk of court or his surety is governed by the general rules.

To recover damages for a breach of duty on the part of a clerk the delinquency must be established by competent evidence,²⁰ and actual loss resulting therefrom must be proved.²¹ Where the action is based on a failure of the clerk to account for funds, records in other causes are admissible to show the amounts received,²² and entries made by the clerk in books kept for that purpose are prima facie evidence of the receipt of such money;²³ but

7. Fla.—Fidelity & Deposit Co. of Maryland v. Sholtz for Use of Duval County, 168 So. 25, 123 Fla. 837.

8. N.C.—State v. Reynolds, 68 N.C. 264.

11 C.J. p 906 note 93.

9. Okl.—Inter-State Mortgage Trust Co. v. Cunningham, 188 P. 1081, 78 Okl. 62.

Presence of name on tax roll

Where court directed that the taxes be paid out of proceeds of foreclosure sale, and the clerk paid the taxes and penalty as shown due by the treasurer's tax roll, although there was no trial evidence that mortgagors' names appear upon the rolls, and evidence that they had not been notified as required by Rev.L. 1910 § 7389, one seeking judgment against clerk and his sureties for amount of penalty so paid had burden of proving that his name appeared upon tax rolls chargeable with the taxes.—Inter-State Mortgage Trust Co. v. Cunningham, supra.

10. N.C.—Pasquotank County v. American Surety Co. of New York, 160 S.E. 176, 201 N.C. 325—Gilmore v. Walker, 142 S.E. 579, 195 N.C. 460, 59 A.L.R. 53.

11. N.C.—Gilmore v. Walker, supra.

12. Miss.—State v. Wray, 78 So. 360, 117 Miss. 566.

11 C.J. p 907 note 7.

13. Md.—Vansant v. State, 53 A. 711, 96 Md. 110.

11 C.J. p 907 note 2.

14. N.C.—Gilmore v. Walker, 142 S. E. 579, 195 N.C. 460, 59 A.L.R. 53.

15. Tex.—State v. Purcell, 16 Tex. 305.

Payment not shown

Tenn.—State, for Use of Brown, v. Fidelity & Deposit Co. of Maryland, App., 113 S.W.2d 73.

16. Ala.—McPhillips v. McGrath, 23 So. 721, 117 Ala. 549.

11 C.J. p 907 note 3.

17. S.C.—State v. Causey, 76 S.E. 707, 93 S.C. 300.

11 C.J. p 907 note 4.

18. U.S.—Singletary v. General Motors Acceptance Corporation, C.C. A.Ga., 73 F.2d 453.

Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.

Cal.—Armstrong v. Brown, 54 P.2d 1118, 12 Cal.App.2d 22.

Stipulation and circumstances surrounding same

Cal.—Armstrong v. Brown, supra.

Evidence as to threat

Cal.—Armstrong v. Brown, supra.

Report of state examiner: variant items

Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.

19. Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.

Mo.—State ex rel. Ridge v. Shoemaker, 212 S.W. 1, 278 S.W. 138.

Plaintiff ex-sheriff's right to fees

Ala.—Hurst v. Kirby, 105 So. 872, 213 Ala. 640.

Receipt of interest

Mo.—State ex rel. Ridge v. Shoemaker, 212 S.W. 1, 278 Mo. 138.

20. Cal.—Armstrong v. Brown, 54 P. 2d 1118, 12 Cal.App.2d 22.

11 C.J. p 906 note 95.

Evidence held sufficient to show delinquency

La.—Gus Mayer Co. v. U. S. Fidelity & Guaranty Co., 128 So. 63, 13 La. App. 642.

Evidence held insufficient to show absence of delinquency

Ky.—Commonwealth v. Polk, 75 S.W. 2d 761, 256 Ky. 100.

Evidence supporting judgment for defendant

Cal.—Armstrong v. Brown, 54 P.2d 1118, 12 Cal.App.2d 22.

21. U.S.—Kinney v. U. S. Fidelity & Guaranty Co., C.C.Pa., 182 F. 1005, affirmed 186 F. 477, 108 C.C.A. 455, and affirmed 32 S.Ct. 101, 222 U.S. 283, 56 L.Ed. 200.

11 C.J. p 906 note 96.

Sufficient showing of injury

U.S.—Singletary v. General Motors Acceptance Corporation, C.C.A.Ga., 73 F.2d 453.

11 C.J. p 906 note 96 [b].

22. Colo.—McCune v. People, 46 P. 1083, 8 Colo.App. 430.

N.C.—State v. Smith, 95 N.C. 396.

S.C.—State v. Lake, 8 S.E. 322, 30 S. C. 43.

11 C.J. p 907 note 97.

23. Colo.—Cooper v. People, 63 P. 314, 28 Colo. 87.

Mich.—People v. Treadway, 17 Mich. 480.

Mo.—State v. Thornton, 8 Mo.App. 571.

11 C.J. p 907 note 98.

such evidence may be rebutted by proof that no such payments were in fact made.²⁴ Evidence that the clerk had on deposit in bank, to his credit officially, money in excess of the amount claimed to have been embezzled, is rightly excluded.²⁵ A judgment rendered on an application to retax costs is prima facie evidence of liability on the part of the clerk and his sureties for the original wrongful taxation, but it is only prima facie evidence.²⁶

The fact of a jury trial, in an action on the clerk's bond involving jury fees, must be shown by the best evidence of which the nature of the case admits.²⁷

§ 76. — Trial, Judgment, and Review

a. Trial

b. Judgment

a. Trial

Questions of fact arising in an action against a clerk or his surety are for the jury on conflicting evidence, and the general rules control as to dismissal and nonsuit and the verdict and findings in such an action.

Where an action on the clerk's official bond is tried before a jury, questions of fact are to be determined by the jury;²⁸ but where the trial is not before a jury, it is competent for the court to ascertain all the facts and determine the amount due.²⁹

According to the evidence received in the particular case, it has been held that the trial court properly refused to direct a verdict for plaintiff,³⁰ or erred in granting a nonsuit.³¹

The verdict in an action against a clerk of court or his sureties should either be general or, if special, should find all the facts on which the liability of defendants depends.³² However, a verdict prop-

erly given for the penalty of the bond will not be vitiated by additional findings for the parties injured by the default, as such findings may be rejected as surplusage.³³

b. Judgment

Under the general rules which govern judgments, in actions against a clerk of court and his surety a judgment on the bond may properly be rendered for the penalty with execution for the assessed damages.

In an action on a clerk's bond, judgment is properly rendered for the penalty with execution for the assessed damages,³⁴ and in some states a judgment for the penalty stands for the benefit of all parties who may show that they have been injured.³⁵ The judgment may go against any number of the defendants warranted by the testimony.³⁶

§ 77. — Damages

The measure of a plaintiff's recovery for default of a clerk of court is ordinarily the actual loss suffered, although in a proper case nominal damages may be awarded.

The amount of damages which may be recovered is measured by the actual loss resulting to plaintiff by reason of the clerk's breach of duty,³⁷ although in a proper case plaintiff may be entitled to at least nominal damages irrespective of the actual loss.³⁸ Where the clerk admits that he has converted an uncertain amount which is obviously a certain amount or more, a recovery for the certain amount is justified.³⁹

It has been held that one securing judgment against the surety on a clerk's bond for the full amount of his demand need not prorate with those who have not even filed suit to recover on the bond, although the penalty of the bond is less than the total amount of claims.⁴⁰

24. Mo.—Newton Burial Park v. Davis, App., 78 S.W.2d 150.
11 C.J. p 907 note 99.

Unpaid check

Mo.—Newton Burial Park v. Davis, supra.

25. Iowa.—Ida County v. Woods, 44 N.W. 247, 79 Iowa 148.
11 C.J. p 907 note 1.

26. Mo.—State v. Hollenbeck, 68 Mo. App. 366.
11 C.J. p 907 note 6.

27. Mich.—People v. Treadway, 17 Mich. 480.
11 C.J. p 907 note 9.

28. Miss.—State v. Wray, 78 So. 360, 117 Miss. 566.
N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.
11 C.J. p 907 note 12.

Clerk's negligence as contributing to damage

N.Y.—Cole v. Vincent, 242 N.Y.S. 644, 229 App.Div. 520.

Implied contract to pay for printing notices

Ark.—Eddins v. Williams, 255 S.W. 868, 161 Ark. 226.

29. Mo.—State v. O'Gorman, 75 Mo. 370.
11 C.J. p 907 note 13.

30. Pa.—Com. v. Cruikshank, 96 A. 825, 251 Pa. 390.

31. Ga.—Neal-Blun Co. v. Rogers, 82 S.E. 280, 141 Ga. 808.
11 C.J. p 907 note 15.

32. N.C.—State Bank v. Davenport, 19 N.C. 45.
11 C.J. p 907 note 16.

33. S.C.—State v. Moses, 18 S.C. 366.

34. Mo.—State v. Hollenbeck, 68 Mo.App. 366.

35. S.C.—Strain v. Babb, 9 S.E. 271, 30 S.C. 342, 14 Am.S.R. 905—State v. Moses, 18 S.C. 366.

33. Neb.—Ryan v. State Bank, 7 N.W. 276, 10 Neb. 524.

37. Ky.—Pryor v. Commonwealth, 4 Ky.Op. 180.
11 C.J. p 907 note 23.

38. Ga.—Hall v. Kimsey, 173 S.E. 437, 48 Ga.App. 605.

Failure to attach papers to petition

Ga.—Hall v. Kimsey, supra.

39. U.S.—U. S. v. Mason, D.C.Iowa, 211 F. 233, affirmed 219 F. 547, 135 C.C.A. 315.
11 C.J. p 908 note 24.

40. Idaho.—Power County v. Fidelity & Deposit Co. of Maryland, 260 P. 152, 44 Idaho 609.

§ 78. Actions for Penalties

Actions for penalties are maintainable against a clerk of court although usually not against his surety. The complaint must contain averments duly bringing the case within the statute.

Penalties are usually recoverable in an action against the clerk personally, as his sureties are not liable therefor,⁴¹ but the right to sue on the bond for the actual damages sustained by reason of the clerk's delinquency is not taken away by a statute providing a penalty for the same act,⁴² nor is the right of action for the penalty taken away because the same act is also made a crime. The remedies are cumulative.⁴³

Under some statutes it is no defense to the action to recover the penalty, that the officer acted honestly and in good faith;⁴⁴ or that he was not able to do the work of his office in the manner and within the time required by law;⁴⁵ or that he has accounted for the money in question, where he has not also paid it over;⁴⁶ but in some cases the clerk may defend by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office and to certify thereon as the law requires, and was prevented by the default of such commissioner from obtaining a quietus.⁴⁷ It is not a defense to an action to recover a penalty for failure to transmit a transcript that an arbitration was pending and contemplated by the parties, and on account thereof the clerk withheld the transcript,⁴⁸ unless the attorney for

one of the parties requested the clerk to withhold the transmission of the transcript, pending the settlement of a proposition to arbitrate.⁴⁹

The declaration, petition, or complaint in an action to recover the penalty must set forth every fact necessary to show that the case is within the statute,⁵⁰ and specifically comply with statutory requirements,⁵¹ but it need not aver loss or damage.⁵²

What law governs. Statutes in force at the time when the right accrued control as to penalties.⁵³

§ 79. Criminal Responsibility

Clerks of court may be held criminally responsible for acts or omissions in violation of specific statutory provisions or for other derelictions in official duty made criminal offenses by general statutes.

In some jurisdictions clerks of court are, by statute, made criminally liable for certain acts and omissions,⁵⁴ such as a failure to report receipts of money,⁵⁵ taking and collecting illegal fees,⁵⁶ or a failure to pay over fees and other public moneys as required by law.⁵⁷ Sometimes the code or statutory provisions of the state make it a misdemeanor for a clerk to fail to perform any duty imposed on him, for the failure to perform which no other penalty is provided;⁵⁸ but a clerk being a mere ministerial officer cannot be held criminally responsible for obeying the orders of the court, even though the court has no authority to make such orders.⁵⁹

41. Ala.—Brooks v. Governor, 17 Ala. 306.

11 C.J. p 908 note 30.

42. Miss.—State v. Baker, 47 Miss. 88.

43. Tenn.—Plyley v. Allison, 82 S.W. 475, 113 Tenn. 500.

44. Neb.—Cobbey v. Burks, 8 N.W. 386, 11 Neb. 157, 38 Am.R. 364.

Tenn.—Plyley v. Allison, 82 S.W. 475, 113 Tenn. 500.

11 C.J. p 909 note 33.

45. Mo.—Randol v. Garoutte, 78 Mo.App. 609.

11 C.J. p 909 note 34.

46. Va. — Steptoe v. Auditor, 3 Rand. 221, 24 Va. 221.

47. Va. — Auditor v. Nicholas, 2 Munf. 31, 16 Va. 31.

48. Mo.—Higbee v. Spangler, 104 S.W. 1143, 127 Mo.App. 220, explaining Llewellyn v. Spangler, 88 S.W. 1021, 109 Mo.App. 396.

49. Mo.—Llewellyn v. Spangler, supra.

11 C.J. p 909 note 38.

50. Tex.—Cross v. Wilson, Civ.App., 33 S.W.2d 575.

11 C.J. p 909 note 39.

Allegation as to form of transcript
Tex.—Cross v. Wilson, supra.

51. Tex.—Cross v. Wilson, supra.
Specific allegations

Tex.—Cross v. Wilson, supra.

52. Mo.—Randol v. Garoutte, 78 Mo.A. 609.

11 C.J. p 909 note 40.

53. Tenn.—State, for Use of Brown, v. Fidelity & Deposit Co. of Maryland, App., 113 S.W.2d 73.

54. Mo.—State v. Dishman, 68 S.W. 2d 797, 334 Mo. 874.

N.Y.—People v. Jameison, 183 N.E. 203, 260 N.Y. 134.

Tex.—Graham v. State, 57 S.W.2d 850, 123 Tex.Cr. 121.

11 C.J. p 909 note 43.

Giving false certificate

Tex.—Graham v. State, supra.

55. Mo.—State v. O'Gorman, 68 Mo. 179.

Tenn.—State v. Jones, 2 Lea 716.

11 C.J. p 909 note 44.

Correct keeping of accounts sufficiently shown

Mo.—State v. Dishman, 68 S.W.2d 797, 334 Mo. 874.

56. Ind.—State v. Williams, 77 N.E. 1137, 39 Ind.App. 376.

Tenn.—Plyley v. Allison, 82 S.W. 475, 113 Tenn. 500.

11 C.J. p 909 note 45.

57. Mo.—State v. Dishman, 68 S.W. 2d 797, 334 Mo. 874.

11 C.J. p 909 note 46.

Clerk as within statute

Mo.—State v. Dishman, supra.

"Fines" as not within statute

Mo.—State v. Dishman, supra.

Invoking wrong statute

Clerk of court, if guilty of offense in nature of conversion of money received in payment of fines, should have been prosecuted under statute relating to conversion of public money.—State v. Dishman, supra.

58. Ala.—Chapman v. State, 73 Ala. 20.

11 C.J. p 909 note 47.

59. Mo.—State v. Bowen, 41 Mo. 217 —State v. Hixon, 41 Mo. 210.

Motive. It has been held that if defendant's acts or omissions are intentional his motives are immaterial.⁶⁰

What law governs. Specific provisions of a fees and salaries act have been held to govern a prosecution of a clerk of court for failing and refusing to pay into the county treasury fees charged and collected as costs where the penal law expressly provides that wherever specific provisions exist making a particular act criminal such specific statutes shall control as against the general penal law.⁶¹

§ 80. — Indictment

Indictments of clerks of court for breach of official duty should comply with the general rules, and show an offense within the contemplation of the statute invoked.

It is necessary and sufficient that the allegations of the indictment show an offense within the contemplation of the statute, and in the notes below will be found references to cases wherein particular indictments were held sufficient or insufficient.⁶² Where certain cases are excepted from the operation of the act the indictment need not show that the case is not one of those excepted.⁶³

Where the clerk is charged with collecting and failing to pay over money belonging to the county,

the proof must show that the collection was made in money or its equivalent;⁶⁴ but there is no variance where the proof shows a reception of checks and drafts and a conversion thereof into money.⁶⁵

§ 81. — Evidence

The customary presumption of innocence and requirement that guilt be proved beyond a reasonable doubt apply in a prosecution of a clerk of court.

The general rules that defendant is presumed innocent of the offense charged against him, and that the state must prove his guilt beyond a reasonable doubt, apply to trials on indictments against clerks of courts.⁶⁶

Under the general rules the evidence in particular cases has been held sufficient to support a conviction for refusal to pay over funds to a successor,⁶⁷ or for the giving of a false certificate.⁶⁸

§ 82. — Trial, Sentence, and Punishment

The court should charge the jury respecting the circumstances under which a clerk of court may be convicted of the offense for which he is indicted.

The court should clearly state in charging the jury the circumstances under which defendant may be convicted.⁶⁹

V. DEPUTIES AND ASSISTANTS

§ 83. Nature and Distinctions

Deputy clerks of court are sometimes regarded as mere agents of the clerk, and sometimes regarded as officers of the court, in accordance with varying statutory provisions.

As a general rule a deputy clerk of court is regarded as merely an agent of his principal, because he usually acts in his principal's name, and the principal is answerable for his misconduct;⁷⁰ but in some jurisdictions a deputy is recognized as an officer, and is not merely the private agent of his principal.⁷¹

Deputy clerks are in such jurisdictions regarded as officers of the court,⁷² and may be state officers,⁷³ although it has been held that they are not state officers within the meaning of constitutional provisions regulating civil service.⁷⁴ The position of chief deputy is a public office.⁷⁵ A deputy county clerk may be an ex officio clerk of another court.⁷⁶

A deputy clerk must be distinguished from a mere assistant.⁷⁷

60. Iowa.—State v. Hanlin, 110 N. W. 162, 134 Iowa 493.

Tenn.—State v. Jones, 2 Lea 716. 11 C.J. p 910 note 49.

61. Okl.—McDaniel v. Brown, 181 P. 156, 16 Okl.Cr. 149.

62. U.S.—U. S. v. Dodge, D.C.Fla., 251 F. 742.

Tex.—Graham v. State, 57 S.W.2d 850, 123 Tex.Cr. 121. 11 C.J. p 910 note 51.

Charge as to false entries

U.S.—U. S. v. Dodge, D.C.Fla., 251 F. 742.

False certificate

Tex.—Graham v. State, 57 S.W.2d 850, 123 Tex.Cr. 121.

63. Mo.—State v. O'Gorman, 68 Mo. 179.

64. Ala.—Tucker v. State, 16 Ala. 670.

11 C.J. p 910 note 53.

65. Colo.—Adams v. People, 55 P. 806, 25 Colo. 532.

66. Mo.—State v. Wilson, 108 S.W. 1086, 130 Mo.App. 151.

11 C.J. p 910 note 57.

67. Ill.—People v. Rasmussen, 159 N.E. 360, 328 Ill. 332.

68. Tex.—Graham v. State, 57 S.W. 2d 850, 123 Tex.Cr. 121.

69. Iowa.—State v. Hanlin, 110 N. W. 162, 134 Iowa 493.

11 C.J. p 910 note 58.

70. Ill.—People v. San Filippo, 255 Ill.App. 554.

11 C.J. p 910 note 61.

71. Or.—Willamette Falls Canal, etc., Co. v. Gordon, 6 Or. 175.

11 C.J. p 910 note 62.

72. Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

73. N.Y.—Olmsted v. Meahl, 114 N.E. 393, 219 N.Y. 270, affirming Wilcox v. Meahl, 160 N.Y.S. 708, 172 App.Div. 263.

74. Colo.—People v. Luxford, 207 P. 477, 71 Colo. 442.

75. La.—State v. Smith, 96 So. 127, 153 La. 577.

76. Cal.—People v. Ramirez, 297 P. 51, 112 Cal.App. 507.

77. Ky.—Ellison v. Stevenson, 6 T. B.Mon. 271.

11 C.J. p 910 note 63.

Creation of office. In the absence of some special charter provision or legislative enactment, the office of deputy clerk in a municipal corporation court should be created only by ordinance.⁷⁸

§ 84. Appointment

Generally speaking, deputy or assistant clerks of court may be appointed by the clerk subject, in some jurisdictions, to approval of other officers or boards, and appointment should be made in a form complying with any applicable statutory provisions.

By statute in many jurisdictions authority is expressly conferred on clerks to appoint deputies,⁷⁹ or assistants,⁸⁰ subject, in some jurisdictions, to the determination of another officer or board as to the necessity of the appointment or the number of deputies to be appointed.⁸¹ Deputies may not be appointed pursuant to statutes inapplicable to the particular court to which appointment is purported to be made,⁸² although it seems the power of appointing a deputy exists independently of any statutory authority;⁸³ but in order to make a valid appointment the clerk must himself have power to exercise the functions of his office.⁸⁴ In some jurisdictions, or at least as to some courts in a few jurisdictions, the power of appointing deputy clerks is vested in the judge of the court in which he is to act.⁸⁵ It will be presumed that the laws of another state authorize the appointment of a deputy clerk.⁸⁶

Constitutional provisions to the effect that a county clerk shall be clerk of a particular court within the county are not violated by statutes au-

thorizing the justices of such courts to appoint persons to perform clerical duties connected with the court, and the county clerk may be reasonably controlled as to the number, compensation and manner of appointment of his deputies.⁸⁷

Sufficiency of appointment. Whatever constitutional or statutory provisions exist relative to the method to be pursued by the clerk in appointing or engaging deputies or assistants must be followed.⁸⁸ It seems that, in the absence of any statutory inhibition,⁸⁹ an oral appointment is sufficient,⁹⁰ especially with regard to the performance of an act by a third person, in the presence and under the direction of the clerk, for such an act is in fact that of the clerk himself.⁹¹ It will be presumed, nothing appearing to the contrary, that a person acting as deputy clerk was duly appointed and qualified;⁹² and the court may take judicial notice of the clerk's legally appointed deputies, their names and signatures, or, if the written authority issued by a principal to his deputy has been lost, oral evidence may be admitted to prove the appointment.⁹³ The regularity of the appointment of deputy clerk of court cannot be collaterally attacked.⁹⁴

Number appointed. Under statutes creating the office of deputy clerk, to be appointed by the clerk, with full power to transact all business of such clerk, it has been held that the power to appoint is not limited to one, but as many deputies may be appointed as are necessary,⁹⁵ although in another ju-

78. Tex.—Holcombe v. Grotz, 102 S. W.2d 1041, 110 A.L.R. 234, reversing Grotz v. Holcombe, Civ.App., 97 S.W.2d 301.

79. Ala.—Joseph v. Cawthorn, 74 Ala. 411.
11 C.J. p 910 note 64.

Action as county officer

It has been held that in appointing deputies the county clerk is acting as a county and not as a state officer.—Olmsted v. Meahl, 114 N.E. 393, 219 N.Y. 270, affirming Wilcox v. Meahl, 160 N.Y.S. 708, 172 App. Div. 263.

80. Mass.—Commonwealth v. Wetherbee, 26 N.E. 414, 153 Mass. 159.

81. Ind.—Porter v. State ex rel. Hays, 196 N.E. 238, 208 Ind. 410. Mo.—State ex rel. Hill v. Thatcher, 94 S.W.2d 1053, 230 Mo.App. 1125. Neb.—Ford v. Boyd County, 197 N. W. 953, 111 Neb. 834.
Tenn.—State v. Bond, 8 S.W.2d 367, 157 Tenn. 326.
11 C.J. p 911 note 66.

82. Ala.—State v. Stone, 73 So. 330, 127 Ala. 662.

Approval of county court

Approval of appointment of dep-

uties and assistants of clerk of circuit court held to lie with county court, notwithstanding statute prohibiting county court from revising estimates of expenditures submitted by circuit court and circuit clerk.—State ex rel. Hill v. Thatcher, 94 S. W.2d 1053, 230 Mo.App. 1125.

83. Ga.—Tietjen v. Merchants' Nat. Bank, 43 S.E. 730, 117 Ga. 501. Mo.—Small v. Field, 14 S.W. 815, 102 Mo. 104.

11 C.J. p 911 note 67.

84. W.Va.—Herring v. Lee, 22 W. Va. 661.

11 C.J. p 911 note 68.

85. Ky.—Greenleaf v. Woods, 96 S. W. 453, 123 Ky. 306, 29 Ky.L. 723. N.Y.—People v. Unger, 108 N.Y.S. 373, 123 App.Div. 310.

11 C.J. p 911 note 69.

86. Ill.—Hope v. Sawyer, 14 Ill. 254.

87. N.Y.—Devoy v. Craig, 131 N.E. 884, 231 N.Y. 186, affirming 187 N. Y.S. 478, 196 App.Div. 567.

88. N.Y.—People v. Sutherland, 100 N.E. 440, 207 N.Y. 22, reversing 132 N.Y.S. 588, 147 App.Div. 668.—Olmsted v. Meahl, 158 N.Y.S. 1029.

89. N.C.—Suddereth v. Smyth, 35

N.C. 452.—Shepherd v. Lane, 13 N. C. 148.

11 C.J. p 911 note 72.

90. Ala.—Lucas v. Belcher, 103 So. 909, 20 Ala.App. 507, certiorari denied Ex parte Lucas, 103 So. 912, 212 Ala. 597.

11 C.J. p 911 note 73.

91. Ala.—McMahan v. Colclough, 2 Ala. 68.

Miss.—Jackson v. State, 55 Miss. 530.—Gamble v. Trahen, 4 Miss. 32.

92. Ala.—Southern R. Co. v. Hundley, 44 So. 195, 151 Ala. 378.

Colo.—Nesbit v. People, 36 P. 221, 19 Colo. 441.

Ill.—Hague v. Porter, 45 Ill. 318.

11 C.J. p 911 note 75.

93. U.S.—Wright v. U. S., Tex., 15 S.Ct. 819, 158 U.S. 232, 39 L.Ed. 963.

Tex.—Cabell v. Holloway, 31 S.W. 201, 10 Tex.Civ.App. 307.

94. Neb.—Haskell v. Dutton, 91 N. W. 395, 65 Neb. 274.

11 C.J. p 911 note 78.

95. Ala.—Brandon v. State, 173 So. 238, answers to certified question conformed to (App.) 173 So. 240, reversed 173 So. 251, 233 Ala. 20,

isdiction it has been held that the clerk may appoint only one deputy.⁹⁶

§ 85. — De Facto Deputies

One in fact acting as a deputy clerk of court but under an irregularity of appointment or qualification is ordinarily regarded as a de facto clerk whose acts are valid.

A person claiming to be a deputy clerk by virtue of an appointment, and recognized as such by the public, is at least a de facto deputy; and his acts are valid notwithstanding some defect or irregularity in his appointment or qualification.⁹⁷ It has been held that a regularly appointed deputy clerk who remained in office after his term expired under an irregular oral appointment for the second term of the clerk is a de facto deputy clerk of court,⁹⁸ although it has been held that one who has been deputy county clerk during the first term of the clerk, and who continues to act without re-appointment during his second term, is not a de facto officer.⁹⁹

§ 86. Eligibility and Qualification

The matter of eligibility and qualification of deputy clerks of court is ordinarily governed by applicable statutory or constitutional provisions, and in the absence of positive prohibition one may be a deputy clerk although not a voter.

The legislature may within its reasonable power of regulation prescribe qualifications for persons to be employed as deputy clerks of court.¹

Eligibility. In the absence of any statutory or constitutional provision to the contrary, the office

or position of deputy clerk may be held by one who is not a qualified voter,² such as a minor³ or a woman,⁴ and, under constitutional provisions enabling women to vote, a woman may act as a deputy clerk of court.⁵ Where a minor is ineligible, his acts may nevertheless be valid as those of a de facto officer if he is recognized by the public as a deputy.⁶

Qualification. Provision is usually made by statute for the qualification of deputy clerks, as by taking the prescribed oath and giving bond.⁷ A deputy who fails to qualify as the statute requires has no power to perform any of the duties of the office,⁸ although the validity of his acts may be upheld as a de facto deputy, as shown in § 85. In some jurisdictions, the clerk may require a bond from his deputy to indemnify himself in case he is held liable for his acts or omissions. If the clerk fails to demand such a bond, he cannot complain of the enforcement of his statutory liability for the malfeasance of his deputy.⁹

§ 87. Term of Office

The term of a deputy clerk of court's office is such as may be prescribed by law, or in the absence of statutory or constitutional regulation he may hold for the period of good behavior and during the term of office of the appointing power.

If a statute providing for the appointment of deputy or assistant clerks of court fails to define the period for which they shall hold office, they hold only during good behavior;¹⁰ and sometimes it is expressly provided that they shall hold at the pleasure of the appointing power.¹¹ While, under

certiorari denied 173 So. 253, 233 Ala. 600.

96. Wis.—State v. Olin, 23 Wis. 309.

97. Ala.—Lucas v. Belcher, 103 So. 909, 20 Ala.App. 507, certiorari denied Ex parte Lucas, 103 So. 912, 212 Ala. 597.

Ark.—Stafford v. First Nat. Bank, 34 S.W.2d 759, 182 Ark. 1169.

Miss.—State v. Boykin, 75 So. 378, 114 Miss. 527.

S.C.—King v. Belcher, 9 S.E. 359, 30 S.C. 381.

11 C.J. p 911 note 79.

Oral appointment and failure to take official oath

Acts of a deputy clerk, appointed orally by the circuit clerk without exacting oath of office or bond, were acts of a de facto deputy clerk, and as to the public and third persons had the same force and effect as the acts of the circuit clerk would have had.—Lucas v. Belcher, 103 So. 909, 20 Ala.App. 507, certiorari denied Ex parte Lucas, 103 So. 912, 212 Ala. 597.

98. Ky.—Allen v. Maynard, 260 S.W. 2, 202 Ky. 477.

Validity of acts

One who was regularly appointed deputy during one official term of the circuit court clerk, and remained in possession and control of the office during a second official term of such clerk only under a parol appointment, and not by an order of court, was a deputy circuit court clerk de facto for the second term, and as such could validly receive and file papers necessary to the taking of an appeal from the county court, and could accept an appeal bond and issue supersedeas and summons required on the appeal.—Allen v. Maynard, supra.

99. Ky.—Smith v. Cansler, 83 Ky. 367.

11 C.J. p 911 note 80.

1. Ill.—People v. Brady, 114 N.E. 25, 275 Ill. 261.

2. Tex.—Delaney v. State, 90 S.W. 642, 48 Tex.Cr. 594.

3. Ky.—Talbot v. Hooser, 12 Bush 408.

Tex.—Harkreader v. State, 33 S.W. 117, 35 Tex.Cr. 243, 60 Am.S.R. 40.

4. Colo.—Jeffries v. Harrington, 17 P. 505, 11 Colo. 191.

11 C.J. p 911 note 83.

5. N.C.—Preston v. Roberts, 110 S.E. 586, 183 N.C. 62.

6. Miss.—Wimberly v. Boland, 16 So. 905, 72 Miss. 241.

7. Ky.—Greenleaf v. Woods, 96 S.W. 458, 123 Ky. 306, 29 Ky.L. 723.

11 C.J. p 912 note 89.

8. Ind.—Muir v. State, 8 Blackf. 154.

Tenn.—Atkinson v. Micheaux, 1 Humphr. 312.

11 C.J. p 912 note 90.

9. Mont.—Silver Bow County v. Davies, 107 P. 81, 40 Mont. 418.

10. Mo.—Horstman v. Adamson, 74 S.W. 398, 101 Mo.App. 119.

11. N.Y.—Hartwell v. Riley, 62 N.Y.S. 317, 47 App.Div. 154.

some statutes, an assistant clerk of a particular court holds over until his successor is appointed,¹² the term of a clerk to a justice expires with that of the justice making the appointment,¹³ the appointment of a "successor" to fill a vacancy created by resignation has been held valid for the unexpired term of office only,¹⁴ and where there is no such office as that of assistant clerk of a particular court, a person referred to as an assistant clerk does not succeed to that office when it is created for the first time on the consolidation of that court with another one.¹⁵ Where the clerk is a constitutional officer, a statute providing for the appointment of a deputy for a term extending beyond that of an incumbent clerk is unconstitutional as depriving the incoming clerk of part of his office, namely, the power of the appointment of, and the control over, his deputies.¹⁶

§ 88. Resignation, Suspension, and Removal

A deputy or assistant clerk of court may be removed for cause, and in the absence of contrary provision of law may be removed without cause at the pleasure of the appointing authority.

The right to remove a deputy or assistant clerk of court belongs to the appointing official as a necessary incident to his power to appoint,¹⁷ and it has been held that deputy clerks of court are not within the protection of constitutional or statutory provisions precluding removal without cause.¹⁸ However, under civil service laws, the chief clerk of the law department in a clerk's office is entitled

to notice and an opportunity to explain before he can be dismissed.¹⁹ A deputy clerk of court may be removed for cause.²⁰ It has been held that an act passed after appointment of a deputy clerk of court will not authorize his removal for grounds other than those specified in the statute in force when he was appointed, although on a reorganization of the courts effected by such subsequent statute, the power of removal is not confined to the officer formerly holding such power.²¹

§ 89. Compensation

Deputy and assistant clerks of court are ordinarily entitled under express or implied statutory authorization to compensation which may be recovered in appropriate proceedings.

Ordinarily, provision is made by statute for the compensation of deputy clerks²² and assistants,²³ and compensation may not be recovered under a statute inapplicable to the deputy clerk seeking the same,²⁴ although, even in the absence of an express provision for compensation, a statute authorizing the appointment of a deputy will also carry the power to provide for his compensation.²⁵ Under applicable statutes it has been held that the fixing of compensation of deputy and assistant clerks of a circuit court lies with the county court notwithstanding general provisions of a budget law forbidding the county court to revise estimates of expenditures duly made by the circuit court and its clerk,²⁶ or that concurrent action is essential in fixing the compensation of deputy and assistant clerks of court.²⁷ In fixing the salary of a deputy or as-

12. N.Y.—*People v. Unger*, 108 N.Y.S. 373, 123 App.Div. 310.

11 C.J. p 912 note 94.

13. N.Y.—*People v. Prendergast*, 150 N.Y.S. 329, 165 App.Div. 186, affirmed 108 N.E. 1105, 214 N.Y. 664.

11 C.J. p 912 note 95.

14. N.Y.—*People ex rel. Domschke v. Messenger*, 192 N.Y.S. 734, 200 App.Div. 418, affirmed 135 N.E. 971, 233 N.Y. 687.

15. N.Y.—*People v. Van Wart*, 55 N.Y.S. 522, 36 App.Div. 518, affirming 55 N.Y.S. 68, 25 Misc. 215, and affirmed 53 N.E. 1130, 158 N.Y. 720.

16. N.Y.—*People v. Rafferty*, 102 N.E. 582, 208 N.Y. 451.

11 C.J. p 912 note 97.

17. Mo.—*Horstman v. Adamson*, 74 S.W. 398, 101 Mo.App. 119.

Pa.—*Seltzer v. Fertig*, 85 A. 869, 237 Pa. 514.

11 C.J. p 912 note 98.

18. Colo.—*People v. Luxford*, 207 P. 477, 71 Colo. 442.

N.Y.—*Meahl v. Ordway*, 162 N.Y.S. 576, 98 Misc. 394.

Exemption not shown

That in a county several parts of the supreme court are held, and to each a special deputy clerk is assigned, does not make them exempt, under Civ.Serv.L. § 13 subd 3, exempting one deputy clerk of each court.—*Meahl v. Ordway*, 162 N.Y.S. 576, 98 Misc. 394.

19. N.Y.—*In re Donnelly*, 137 N.Y.S. 789, affirming 135 N.Y.S. 1108, 151 App.Div. 893.

20. N.Y.—*Toney v. Hughes*, 261 N.Y.S. 10, 237 App.Div. 347, reargument denied *In re Toney*, 261 N.Y.S. 965, 237 App.Div. 875.

Attack on justice

N.Y.—*Toney v. Hughes*, *supra*.

21. Mich.—*Beck v. Keidan*, 183 N.W. 742, 215 Mich. 13.

22. Mo.—*Whalen v. Buchanan County*, 111 S.W.2d 177.

Okl.—*Board of Com'rs of McIntosh County v. Kirby*, 49 P.2d 746, 174 Okl. 20.

11 C.J. p 912 note 1.

Duty to provide for salary

Phrase "by and with the consent and approval of the board of county

commissioners," relating to appointment of deputy court clerks, vests no discretion in board whereby it may fail to provide in its estimated needs for salary of a deputy or for a suitable place for performance of duties of such deputy.—*Board of Com'rs of McIntosh County v. Kirby*, *supra*.

Construction of statutes

Mo.—*Whalen v. Buchanan County*, 111 S.W.2d 177.

23. Neb.—*Ford v. Boyd County*, 197 N.W. 953, 111 Neb. 834.

11 C.J. p 912 note 2.

Payment out of county general fund

Neb.—*Ford v. Boyd County*, 197 N.W. 953, 111 Neb. 834.

24. Cal.—*Boyarsky v. Ross*, 11 P.2d 641, 123 Cal.App. 267.

25. Ky.—*Greenleaf v. Woods*, 96 S.W. 458, 123 Ky. 306, 29 Ky.L. 723.

Md.—*State v. Turner*, 61 A. 334, 101 Md. 584.

26. Mo.—*State ex rel. Hill v. Thatcher*, 94 S.W.2d 1053, 230 Mo.App. 1125.

27. W.Va.—*State v. O'Brien*, 125 S.E. 154, 97 W.Va. 343.

sistant the court may properly consider his qualifications, experience, and capacity.²⁸ Where a clerk is allowed, by the county board, a certain sum for deputy hire, he is not obliged to let the office of deputy to the lowest bidder.²⁹ Where the deputy's remuneration is not otherwise provided for, it is not improper for the clerk to contract with him that he shall receive a certain share of the fees taxed and collected during the deputyship,³⁰ and under statute it has been held that deputies may look to the fees of the clerk's office remaining unpaid at expiration of the clerk's term for payment of any salaries due and unpaid to themselves.³¹

Increase³² or decrease³³ of the compensation of a deputy or assistant during his term will depend largely on applicable statutory provisions.

Extra or additional compensation is not ordinarily allowable to a salaried assistant clerk of court,³⁴ and a county clerk acting as ex officio deputy clerk of a district court has been denied the right to compensation additional to his salary as county clerk.³⁵

Reimbursement for deputy hire. A clerk of court may employ deputies only on application to the person and at the time specified by statute, and has been denied the right to a nunc pro tunc order approving disbursements for clerk hire where no previous disposition had been made.³⁶ A clerk employing more deputies than authorized by law and paying them out of his own funds may recover for the compensation of only the number he was authorized to employ.³⁷ The clerk may not recover from the county more than he has actually paid his deputy.³⁸

Validity of statutes and ordinances. The courts have upheld the validity of statutes regulating salaries of deputy clerks irrespective of their reasonableness,³⁹ and ordinances fixing the compensation of deputy or assistant clerks of police courts have been upheld.⁴⁰

Proceedings to recover fees or salary. Where the deputy is by statute made an employee of the county, he may maintain an action against the county for services rendered, if he complies with the statute relating to the allowance of claims by county commissioners;⁴¹ but the county is liable to him only where made so by statute.⁴² It has been held that a deputy or assistant may not hold the clerk personally liable for payment of his compensation,⁴³ nor recover from the successor of the clerk under whom he served for unpaid compensation even if the successor is obligated to collect the unpaid fees of his predecessor from which the unpaid portion of the suing deputy's compensation would be met.⁴⁴ In some jurisdictions the deputy may sue on the clerk's bond to recover his salary;⁴⁵ but a deputy clerk suing to compel payment of his salary as such must show his appointment to that position.⁴⁶ Recovery may not be had under a statute which is inapplicable.⁴⁷

§ 90. Powers and Duties

- a. In general
- b. In whose name deputy should act
- c. Presumptions and burden of proof

a. In General

Generally speaking the powers and duties of a deputy

28. Pa.—Appeal of Welch, 96 Pa. Super. 475.

29. Ill.—Peo. v. Dieckmann, 84 Ill. App. 244.

30. Ind.—Cheek v. Tilley, 31 Ind. 121.

31. Ky.—Meriwether v. Summers, 200 S.W. 619, 179 Ky. 437.

32. Mass. — Simmons v. Suffolk County, 119 N.E. 751, 230 Mass. 236.

33. Mo. — State ex rel. Hill v. Thatcher, 94 S.W.2d 1053, 230 Mo. App. 1125.

11 C.J. p 912 note 1 [a].

34. N.Y.—Cowan v. New York, 3 Hun 632, 6 Thomps. & C. 151—Cronkright v. Brooklyn, 55 N.Y.S. 513, 25 Misc. 386.

35. N.M.—State ex rel. Mirabal v. Greer, 21 P.2d 819, 37 N.M. 292.

36. Tenn.—State v. Bond, 8 S.W.2d 367, 157 Tenn. 326.

37. Miss. — Claiborne County v. Morehead, 111 So. 372, 145 Miss. 367.

38. Miss. — Smith v. Chickasaw County, 125 So. 96, 156 Miss. 171, suggestions of error overruled 125 So. 705, 156 Miss. 171.

Ignorance of law

That circuit clerk in fixing deputy's salary at amount not exceeding maximum in statute did so in ignorance of law did not entitle him to recover more from county for deputy's services than he paid.—Smith v. Chickasaw County, *supra*.

39. Ky.—Herold v. Talbott, 88 S.W. 2d 303, 261 Ky. 634.

Power of legislature

That statute fixing salaries of chief deputy clerk and deputy clerks of circuit courts in counties having population of seventy-five thousand to two hundred thousand would make it impossible for clerk to carry out duties of his office would not warrant giving new meaning to constitutional provision which for more than forty years had been interpreted as vesting in legislature whole power of state to deal with

subject of fixing and regulating salaries of county officers on basis of population.—Herold v. Talbott, *supra*.

40. Ky.—Greenleaf v. Woods, 96 S. W. 453, 123 Ky. 306, 29 Ky.L. 723. Mich.—Burton v. City of Detroit, 156 N.W. 453, 190 Mich. 195.

41. Minn.—Sertedahl v. Polk County, 88 N.W. 21, 84 Minn. 509. 11 C.J. p 913 notes 8, 9.

42. Idaho.—Woodward v. Idaho County, 51 P. 143, 5 Idaho 524. 11 C.J. p 913 note 10.

43. La.—Tucker v. Clancy, 6 La. App. 118.

44. Ky.—Meriwether v. Summers, 200 S.W. 619, 179 Ky. 437.

45. Md.—State v. Turner, 61 A. 334, 101 Md. 584.

46. Cal.—Burke v. Edgar, 7 P. 488, 67 Cal. 182.

47. Colo.—Newitt v. Board of Com'rs of Chaffee County, 249 P. 269, 80 Colo. 109.

or assistant clerk of court may embrace the ministerial functions of the clerk, although ordinarily any judicial functions of the clerk are beyond the power of the deputy.

A deputy clerk of court ordinarily has powers coextensive with those of his principal,⁴⁸ and the courts have upheld the validity of statutes authorizing the appointment of assistant clerks of court and their performance of the duties and functions of the clerk,⁴⁹ although under other statutory provisions a deputy clerk is not authorized to act generally for his principal.⁵⁰ The clerk may promulgate reasonable rules and regulations with respect to his assistants.⁵¹

Ministerial acts. In the absence of any statutory provision or implication to the contrary, a deputy clerk is authorized to perform any official⁵² ministerial act⁵³ that may be done by his principal, except to appoint a deputy;⁵⁴ and his action in the premises is just as regular and binding as if performed by his principal.⁵⁵ It has even been held that the deputy may not be restricted in the exercise of those functions which he is otherwise qualified to perform.⁵⁶

Particular ministerial functions of a deputy or assistant clerk of court include the making of certificates,⁵⁷ the issuance and testing of writs,⁵⁸ and the ordering of the seizure of personalty in an action of claim and delivery.⁵⁹ The power and duty of such a deputy or assistant to perform sundry other particular acts is considered in specific titles such as Acknowledgments § 48, Affidavits § 10, Ap-

peal and Error § 556, Arbitration and Award § 42, Attachment § 158, the C.J.S. title Costs § 274, also 11 C.J. p 914 note 21, 15 C.J. p 176 note 36 [a], the C.J.S. title Depositions § 42, also 11 C.J. p 914 note 26, 18 C.J. p 647 note 13, the C.J.S. title Grand Juries §§ 9 and 10, also 11 C.J. p 914 notes 27, 28, 28 C.J. p 776 notes 72, 73, 74 [b], and the C.J.S. title Oaths and Affirmations § 5, also 11 C.J. p 913 note 18.

By statute in some jurisdictions a deputy clerk is given express authority to perform the duties of his principal in case of the absence or disability of the latter,⁶⁰ but it has been held that such a statute does not deprive the deputy of power to act when his principal is not absent or disabled.⁶¹ Where duties not necessarily belonging to his office as clerk are imposed on the clerk by statute, it seems that they may not be performed by his deputy.⁶²

Entering judgment. The fact that a judgment is entered up by a deputy clerk, and not by the clerk in person, does not affect its validity.⁶³

Practice of law. Statutory provisions have been held to preclude a deputy or an assistant clerk from practicing law in the court of which he is clerk,⁶⁴ but, at least in some jurisdictions, do not preclude him from practicing in other courts.⁶⁵

Judicial functions. Judicial powers vested in the clerk cannot be exercised by a deputy in the absence of express statutory authority.⁶⁶

48. Cal.—People v. Ramirez, 297 P. 51, 112 Cal.App. 507.

La.—State v. Washington, 111 So. 257, 162 La. 852.

In juvenile court

Powers of clerk of district court may be exercised by deputy clerk in juvenile court to same extent as in district court.—State v. Washington, supra.

49. N.C.—In re Barker, 188 S.E. 205, 210 N.C. 617.

Construction of statute as to duties of assistant

Statute changing provision as to duties of assistant clerk held not intended to indicate difference between powers of assistant registers and assistant clerks.—Everett Trust Co. v. Waltham Theatre Amusement Co., 166 N.E. 831, 267 Mass. 350.

50. N.Y.—Meahl v. Ordway, 162 N. Y.S. 576, 98 Misc. 394.

51. N.Y.—Wilson & Co. v. Banque Francaise Du Mexique, 208 N.Y.S. 213, 124 Misc. 690.

Filing of papers

County clerk or clerk of supreme court may make such rules and establish such customs as are reason-

able with regard to which particular assistants shall have duty or authority to accept papers for filing.—Wilson & Co. v. Banque Francaise Du Mexique, supra.

52. Tex.—Gray v. State, 5 S.W.2d 518, 519, 109 Tex.Cr. 481, citing Corpus Juris.

11 C.J. p 913 note 13.

53. Fla.—State v. Peeler, 146 So. 183, 189, citing Corpus Juris.

Tex.—Gray v. State, 5 S.W.2d 518, 109 Tex.Cr. 481.

11 C.J. p 913 note 14.

Act held ministerial and not judicial in character

Deputy clerk of recorder's court, taking complaint and issuing warrant pursuant to order of court, held not exercising judicial power.—Toms v. Jeffries, 212 N.W. 69, 237 Mich. 413.

54. Tex.—Gray v. State, 5 S.W.2d 518, 109 Tex.Cr. 481.

11 C.J. p 913 note 15.

55. Okl.—Reed v. Terr., 98 P. 583, 1 Okl.Cr. 481, 129 Am.S.R. 861.

56. Ky.—Ellison v. Stevenson, 6 T. B.Mon. 271.

57. Ill.—Schott v. Youree, 31 N.E. 591, 142 Ill. 233, affirming 41 Ill. App. 476.

11 C.J. p 914 note 24.

58. W.Va.—Pendleton v. Smith, 1 W.Va. 16.

11 C.J. p 914 note 25.

59. N.C.—Jackson v. Buchanan, 89 N.C. 74.

11 C.J. p 914 note 29.

60. Ga.—Steam Laundry Co. v. Thompson, 16 S.E. 198, 91 Ga. 47.

11 C.J. p 914 note 30.

61. Iowa.—Moore v. McKinley, 14 N.W. 768, 60 Iowa 367.

62. Tex.—Harrison v. Harwood, 31 Tex. 650.

63. Wis.—State v. Hoeflinger, 35 Wis. 393.

64. U.S.—Ex parte Burdell, D.C.S.C., 32 F. 681.

65. N.Y.—Reifel v. Interboro Horse Exch., 148 N.Y.S. 337, 85 Misc. 251.

66. Del.—Carlisle v. Thomas, 2 Del. 318.

11 C.J. p 914 note 33.

b. In Whose Name Deputy Should Act

Where a deputy is regarded as a mere agent of the clerk of court he may and should perform official acts in the name of the clerk, although where the deputy is regarded as an officer in his own right, or where statute changes the rule, he may act in his own name as deputy.

Where the deputy clerk is recognized as an officer distinct from the clerk, it is held that he may properly perform his official duties in his own name,⁶⁷ but where the deputy is regarded as merely the agent or servant of his principal he must act in the name of the principal,⁶⁸ and he may use his principal's name in performing acts which the principal is authorized to perform.⁶⁹ Under code provisions to the effect that any duty enjoined on, or permitted to be done by, a ministerial officer may be performed by his deputy, an official act of a deputy clerk of court will not be rendered void by his signing his name as deputy without the name of his principal.⁷⁰ In some jurisdictions, a jurat may be signed by a deputy clerk of court, either in his own name, as deputy, or in the name of his principal, by himself as deputy.⁷¹

c. Presumptions and Burden of Proof

In the absence of countervailing circumstances there is a presumption in favor of a deputy clerk's authority to act, and the burden of showing the contrary rests on the party seeking to annul the act.

In accordance with the maxim, *Omnia præsuntur rite solemniter esse acta*, it will be presumed that the circumstances were such as authorized the deputy to act, in the absence of anything to show the contrary;⁷² and the burden of showing that the circumstances were not such as to author-

ize the deputy to act is on the party seeking to annul the act.⁷³

§ 91. Civil Liability

A deputy clerk and his surety may be held liable for defaults of the deputy. Some authorities permit third persons to recover against a deputy clerk of court for acts of misfeasance although denying recovery for mere nonfeasance.

Where the default of the deputy is one for which the clerk is liable, as considered in § 48, the deputy is liable over to his principal,⁷⁴ and if the act is one of misfeasance or malfeasance, he is also personally liable to third persons;⁷⁵ but no action will lie against a deputy clerk, by third persons, for mere nonfeasance or neglect of official duty.⁷⁶

A deputy and his clerk may not be held responsible for damages to private persons, caused by the deputy's neglect, under a statute having no relation to private persons.⁷⁷

Surety's liabilities and remedies. In some jurisdictions, the sureties on the clerk's official bond are liable for the misconduct of his deputy.⁷⁸

Where no statute requires a bond of a deputy clerk of court, but the clerk, being responsible for the acts of his deputy, takes a bond of the deputy for his own protection, this is not an official bond in the strict sense of the term but is valid as a common-law bond, the clerk individually, and not the public, being the obligee in interest thereunder. Where the conduct of the clerk has precluded any recovery on the deputy's bond by such clerk personally, his trustees in bankruptcy stand in no better

67. Va.—*Farmers' Bank of Southwest Virginia v. McGavock*, 89 S.E. 949, 119 Va. 510.
11 C.J. p 915 note 36.

Attestation of writ

Under Const. art 6 § 26, and Code 1887 § 817, in force when the writ in controversy was attested, a deputy clerk properly attested it in his own name, instead of that of the clerk.—*Farmers' Bank of Southwest Virginia v. McGavock*, supra.

68. Ill.—*People v. San Filippo*, 255 Ill.App. 554, 556.
Tex.—*Kirby Lumber Co. v. Long*, Civ.App., 224 S.W. 906.
11 C.J. p 915 note 37.

"Whatever official act is done by a deputy must be done in the name of his principal and not in the name of the deputy. If he undertakes to act in his own name in his own authority, he no longer acts as deputy, but in an independent capacity, and his acts can no longer be recognized as official."—*People v. San Filippo*, supra.

Depositions

In view of applicable statutory provisions, a deputy district clerk can take depositions only in the clerk's name by himself as deputy.—*Kirby Lumber Co. v. Long*, Tex.Civ. App., 224 S.W. 906.

69. Ill.—*Albert Pick & Co. v. Spoor*, 212 Ill.App. 612.
11 C.J. p 915 note 38.

70. Ky.—*Conner v. Parsley*, 234 S.W. 972, 192 Ky. 827.

Not a recommended practice

Ky.—*Conner v. Parsley*, 234 S.W. 972, 192 Ky. 827.

71. Wash.—*State v. Rosener*, 35 P. 357, 8 Wash. 42, 43—*State v. Devine*, 34 P. 154, 6 Wash. 587.
11 C.J. p 915 note 39.

72. Ala.—*Kemp v. Porter*, 7 Ala. 138.

N.Y.—*Miller v. Lewis*, 4 N.Y. 554.
Wis.—*Delaney v. Schuette*, 5 N.W. 796, 49 Wis. 366.

73. N.S.—*Kandick v. Arthur*, 17 N.S. 289.

11 C.J. p 915 note 41.

74. Iowa.—*Moore v. McKinley*, 14 N.W. 768, 60 Iowa 367.
11 C.J. p 915 note 44.

75. Ark.—*Fidelity & Deposit Co. of Maryland v. Cowan*, 41 S.W.2d 748, 184 Ark. 75.
11 C.J. p 915 note 45.

Misappropriation of funds

Ark.—*Fidelity & Deposit Co. of Maryland v. Cowan*, supra.

76. Ala.—*Snedicor v. Davis*, 17 Ala. 472.
Miss.—*McNutt v. Livingstone*, 15 Miss. 641.
N.C.—*Coltraine v. McCain*, 14 N.C. 308, 24 Am.D. 256.

77. La.—*Tirrill v. Gossett*, 84 So. 893, 147 La. 334.

Failure to certify respecting payment of taxes

La.—*Tirrill v. Gossett*, supra.

78. Mont.—*Silver Bow County v. Davies*, 107 P. 81, 40 Mont. 418.
11 C.J. p 916 note 47.

position and they may not recover on the theory that the bond was given for protection of the public; nor does the fact that the bond ran in the name of the clerk as clerk make it one for protection of the public so as to permit suit by the clerk's trustees in bankruptcy.⁷⁹

The surety on the bond of a deputy clerk to the clerk of court cannot rise any higher than his principal in right and must take his remedies with all the equities and limitations in the premises, and where the surety on the deputy's bond is also surety on the clerk's bond, he is liable for moneys misappropriated by the deputy without the right to any offset as against the deputy. The deputy's surety may be held liable on a continuation certificate which is in effect a new bond.⁸⁰

Proceedings to enforce liability. A cause of action by the clerk over against his deputy, for the negligence or unskillful performance of his duty by

the latter, whereby his principal is exposed to a suit for damages, accrues at the time the act complained of is committed, and not merely when the consequent injury is developed.⁸¹ The clerk, in an action against him, cannot set up in his defense the invalidity of his deputy's appointment,⁸² although he may show that the alleged damage resulted from an honest error of judgment on the deputy's part.⁸³

§ 92. Criminal Responsibility

Under statute deputy clerks of court may be held criminally responsible for falsification of dockets or accounts.

A comprehensive statute making it a misdemeanor for any officer required to keep a court docket or to keep an account of fees or fines, and to pay over the same, to falsify such docket or account, is applicable to a deputy clerk of court.⁸⁴

CLERONIMUS. Law Latin, an heir.¹

CLERUS. The clerical order; in English law, the clergy.²

CLEVER. To say of a horse that it is not "clever" is to say that it has not the intelligence of an ordinary horse.³

CLEVIS. A metal device which serves as a connecting medium between the equalizer and the brake of an automobile.⁴

CLEW. Webster defines "clew" as that which guides or directs one in anything of a doubtful or intricate nature, that which gives a hint in the solution of a mystery.⁵

CLIENS. In the Roman law, a client or dependent, one who depended on another as his patron or protector, adviser or defender, in suits at law and oth-

er difficulties, and was bound, in return, to pay him all respect and honor, and to serve him with his life and fortune in any extremity.⁶

CLIENT. See Attorney and Client § 2.

CLIENTELA. In English law, the state of a client, clientship, protection, patronage, guardianship. Applied also to the relation of a church to its patrons.⁷

CLIFFORD'S INN. An inn of chancery.⁸

CLIMATE. The word is defined in the Standard Dictionary as meaning the average weather of a place or region, as regards the temperature, moisture, and prevailing winds.

Phrase: "Effect of climate."⁹

CLINCHER TIRE. As defined in the Standard Dictionary, a tire with flanges on each side of the

79. U.S.—Fidelity & Casualty Co. of New York v. Hoyle, C.C.A.N.C., 64 F.2d 413.

80. Ark.—Fidelity & Deposit Co. of Maryland v. Cowan, 41 S.W.2d 748, 184 Ark. 75.

81. Ala.—Snedcor v. Davis, 17 Ala. 472.
11 C.J. p 916 note 48.

82. Miss.—Beard v. Holland, 59 Miss. 164.
11 C.J. p 916 note 49.

83. U.S.—Patons v. Lee, D.C., 18 F. Cas.No.10,800, 2 Cranch C.C. 646.
11 C.J. p 916 note 50.

84. Iowa.—State v. Hanlin, 110 N.W. 162, 134 Iowa 493, 499.
11 C.J. p 916 note 51.

1. Adams Gloss.

2. Adams Gloss., citing Reg.Orig. p 289 b.

3. Mass.—Webber v. McDonnell, 150 N.E. 189, 190, 254 Mass. 387.

4. Ill.—Rotche v. Buick Motor Co., 193 N.E. 529, 532, 358 Ill. 507.

Method of securing

The ends of a clevis are perforated to receive a cotter pin and the free ends of this pin are spread or clinched to prevent the clevis from

slipping out of place.—Rotche v. Buick Motor Co., supra.

5. As constituting a discovery or knowledge

"A clew which, if followed up diligently, would lead to a discovery, in law, is equivalent to a discovery—equivalent to knowledge."—German Sav. Bank v. Des Moines Nat. Bank, 98 N.W. 606, 122 Iowa 737, 745.

6. Black L.D.

7. Adams Gloss., citing 2 Blackstone Comm. p 21.

8. Black L.D.

9. U.S.—The Aline, D.C.N.Y., 19 F. 875, 876.

inner circumference fitting into turned-over edges of the wheel rim, and securely attached thereto by the pneumatic pressure exercised by the highly inflated inner tube.¹⁰

CLINICAL. The word is defined in the Standard Dictionary as meaning, of or pertaining to a sick-bed, or of or having a clinic.¹¹

Clinical tests. Observations made of a patient by physician or surgeon without the aid of instruments, apparatus, or chemical examinations for the discovery of the existence or progress of disease or the patient's condition, the term being distinguished from "laboratory tests."¹²

CLINKERS. Stony matter vitrified or fused from impurities in burning coal.¹³

CLYPEUS or **CLYPEUS.** In old English law, a shield; metaphorically one of a noble family.¹⁴

CLIP HOOKS. A type of hook used for vessel rigging and defined as two regular shaped iron hooks having one side flat, suspended (reversed to one another) from a small iron thimble. By overlapping, these two shapes form one complete inclosing hook. These are also known as "sister hooks;"¹⁵ and are then defined as a pair of hooks so mounted that they face and overlap each other; match hooks.¹⁶

CLITO. In Saxon law, the son of a king or emperor, hence the next heir to the throne; the Saxon adeling.¹⁷

CLOERE. A jail, a prison or dungeon.¹⁸

CLOSE

As a Noun

In common acceptation the term means an inclosed field;¹⁹ but in law, it is a purely technical term to indicate the interest of a party in land,²⁰ whether inclosed or not,²¹ being distinguished from "inclosure."²²

In another sense the word means termination, or winding up.²³

Phrases: "Close of such account,"²⁴ "close of the session,"²⁵ "close of the war,"²⁶ and "put a close to this affair."²⁷

As a Verb

—**Present Tense.** To finish, terminate, complete, wind up,²⁸ as to "close" an account, a bargain, an estate, or public books, such as tax books.²⁹ Also to shut up, so as to prevent entrance or access by any person, as in statutes requiring saloons to be "closed" at certain times, which further implies an entire suspension of business;³⁰ to vacate or obstruct, when applied to streets and roads.³¹

Phrases: "Close its business of banking,"³² "close the deal,"³³ "close the same,"³⁴ and "permit to close a street to travel."³⁵

—**Closed.** The past tense or past participle of the verb.

Closed court. A term sometimes used to designate the common pleas court of England when only

10. U.S.—Boston Woven Hose & Rubber Co. v. Pennsylvania Rubber Co., C.C.Mass., 156 F. 787, 788.

11. Derived from "clinno" or "clinum" which, it has been said, in Latin means bed.—Peterson v. Widule, 147 N.W. 966, 970, 157 Wis. 641, 52 L.R.A., N.S., 778.

12. Wis.—Peterson v. Widule, supra. 11 C.J. p 917 note 11.

13. Miss.—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 425, 170 Miss. 840.

14. Black L.D.
Clypei prostrati—noble families extinct.—Black L.D.

15. U.S.—Louden Mach. Co. v. Janesville Hay Tool Co., Wis., 148 F. 686, 693, 78 C.C.A. 548, quoting Patterson Nautical Encyc.

16. U.S.—Louden Mach. Co. v. Janesville Hay Tool Co., C.C.Wis., 141 F. 975, 985, affirmed 148 F. 686, 693, 78 C.C.A. 548.

17. Black L.D.

18. Black L.D.

19. Ill.—Wright v. Bennett, 4 Ill. 258, 259.

11 C.J. p 917 note 15.

20. Cal.—Meade v. Watson, 8 P. 311, 67 Cal. 591, 593.

11 C.J. p 917 note 16.

21. Ill.—Wright v. Bennett, 4 Ill. 258, 259.

11 C.J. p 917 note 17.

22. Vt.—Dudley v. McKenzie, 54 Vt. 685, 687.

23. Black L.D.

11 C.J. p 917 note 18 [a].

24. U.S.—U. S. v. Cash, C.C.A.Ga., 293 F. 584, 585.

25. N.Y.—In re New York, 87 N.E. 759, 193 N.Y. 503, 516.

26. Tex.—Fielder v. Houston Oil Co., of Texas, Com.App., 208 S.W. 158, 160—Fielder v. Houston Oil Co., Civ.App., 165 S.W. 48, 50.

27. Pa.—Patton v. Ash, 7 Serg. & R. 116, 128.

28. U.S.—U. S. v. Cash, C.C.A.Ga., 293 F. 584, 585—Amalgamated Royalty Oil Corporation v. Hemme, C.C.A.Okl., 282 F. 750, 759—In re Van Schaick & Co., N.Y., 228 F. 465, 469, 143 C.C.A. 47.

Del.—Henderson v. Plymouth Oil Co., 136 A. 140, 143, 15 Del.Ch. 231.

Mass.—Bilafsky v. Abraham, 67 N.E. 313, 183 Mass. 401.

N.Y.—Coleman v. Garrigues, 18 Barb. 67—Clark v. New York, 13 N.Y.St. 292.

Pa.—Patton v. Ash, 7 Serg. & R. 116.

29. Black L.D.

30. Ga.—Harvey v. State, 65 Ga. 570.

Mich.—People v. James, 59 N.W. 236, 100 Mich. 522—People v. Cummerford, 25 N.W. 203, 58 Mich. 328—Kurtz v. People, 33 Mich. 282.

31. Mich.—Jones v. Brookfield Tp., 190 N.W. 733, 734, 221 Mich. 235. Tex.—Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928, 931. Va.—City of Lynchburg v. Peters, 133 S.E. 674, 677, 145 Va. 1.

32. U.S.—Metropolitan Nat. Bank v. Claggett, N.Y., 12 S.Ct. 60, 141 U. S. 520, 527, 35 L.Ed. 841.

33. U.S.—Amalgamated Royalty Oil Corporation v. Hemme, C.C.A.Okl., 282 F. 750, 760.

34. U.S.—In re Van Schaick & Co., C.C.A.N.Y., 228 F. 465, 469.

35. Mass.—Jones v. Boston, 74 N.E. 295, 188 Mass. 53, 57.

serjeants could argue cases, which practice persisted until 1833.³⁶

Closed shop. A union shop, or one that employs only union labor.³⁷

Other phrases: "Account closed,"³⁸ "after the estate has been closed,"³⁹ "bargains closed,"⁴⁰ "before the estate is closed,"⁴¹ "closed and unopened streets,"⁴² "closed loop,"⁴³ "closed out,"⁴⁴ "closed primary,"⁴⁵ "closed road,"⁴⁶ "closed saloon,"⁴⁷ "closed shipment,"⁴⁸ "closed the evidence in the case,"⁴⁹ "closed transaction,"⁵⁰ "kept closed,"⁵¹ "the instant the above proposition of sale is closed,"⁵² and "trust . . . closed."⁵³

—*Closing.* The present participle of the verb.

Phrases: "After 90 days from closing"⁵⁴ "closing of a street,"⁵⁵ "closing of the books,"⁵⁶ "closing of the polls,"⁵⁷ "closing out,"⁵⁸ "closing up, or use, or obstruction of the street,"⁵⁹ "closing up without . . . payment of differences,"⁶⁰ and "the time for closing the contract."⁶¹

As an Adjective

In its general sense, the term has been defined in *Corpus Juris*, as meaning closed to keep out something, fast shut, or pent up.⁶²

In practice, closed or sealed up, the term being applied to writs and letters, to distinguish them from those that are open or patent.⁶³

In a different sense, the adjective has been defined as meaning near,⁶⁴ and the term has been held synonymous with "adjacent."⁶⁵

Close corporation. In the vernacular, a corporation in which the stock is held in a few hands or in a few families, and is not at all, or only rarely, dealt in by buying and selling; and in the law of England, a corporation in which the directors and officers have the power to fill vacancies in their own number, without allowing to the general body of stockholders any choice or vote in their election.⁶⁶

Close copies. Copies of legal documents which might be written closely or loosely at pleasure, as distinguished from "office" copies, which were to contain only a prescribed number of words on each sheet.⁶⁷

Close molds. Molds in two parts, called the drag and the case, or cope, forming together a two-part flask, one part being placed over the other and each being impressed with one half of the matrix or pattern.⁶⁸

Close rolls. Rolls containing the record of the close writs (*literæ clausæ*) and grants of the king, kept with the public records.⁶⁹

Close writs. In English law, certain letters of the king, sealed with his great seal, and directed to particular persons and for particular purposes, which, not being proper for public inspection, are closed

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| <p>36. Black L.D.</p> <p>37. U.S.—<i>Irving v. United Brotherhood of Carpenters and Joiners of America</i>, C.C.N.Y., 180 F. 896, 897, 899.
11 C.J. p 919 note 56.</p> <p>38. Mass.—<i>Bass v. Bass</i>, 8 Pick. 187, 192.</p> <p>39. Mass.—<i>Bilafsky v. Abraham</i>, 67 N.E. 318, 183 Mass. 401, 402.</p> <p>40. N.Y.—<i>Mactier v. Frith</i>, 6 Wend. 103, 115, 21 Am.D. 262.</p> <p>41. Mich.—<i>First State Bank of South Haven v. Monroe's Estate</i>, 261 N.W. 287, 288, 272 Mich. 171.</p> <p>42. Kan.—<i>Kiehl v. Jamison</i>, 101 P. 682, 79 Kan. 788, 791.</p> <p>43. U.S.—<i>McGill v. Whitehead & Hoag Co.</i>, C.C.N.J., 137 F. 97, 98.</p> <p>44. Ark.—<i>Fortenbury v. State</i>, 1 S. W. 58, 47 Ark. 188, 193.</p> <p>45. Neb.—<i>State v. Sheldon</i>, 113 N. W. 802, 80 Neb. 4, 8.</p> <p>46. Mich.—<i>Jones v. Brookfield Tp.</i>, 190 N.W. 733, 734, 221 Mich. 235.</p> <p>47. Mich.—<i>People v. Cummerford</i>, 25 N.W. 203, 58 Mich. 328.
11 C.J. p 917 note 22.</p> | <p>48. Tex.—<i>Smith v. Landa</i>, 101 S.W. 470, 45 Tex.Civ.App. 446, 447.
11 C.J. p 918 note 40.</p> <p>49. Ind.—<i>Bender v. Wampler</i>, 84 Ind. 172, 175.</p> <p>50. U.S.—<i>Grigsby v. Commissioner of Internal Revenue</i>, C.C.A., 87 F. 2d 96, 97—<i>Commissioner of Internal Revenue v. Union Pac. R. Co.</i>, C.C.A., 86 F.2d 637, 639—<i>Ferguson v. Commissioner of Internal Revenue</i>, C.C.A.Kan., 59 F.2d 893, 894.
Utah.—<i>Utah-Idaho Sugar Co. v. State Tax Commission</i>, 73 P.2d 974, 976.</p> <p>51. Mich.—<i>People v. Norman</i>, 122 N. W. 369, 370, 158 Mich. 37, 39.</p> <p>52. Ky.—<i>Main v. Creech</i>, 241 S.W. 349, 350, 194 Ky. 818.</p> <p>53. Utah.—<i>Charter Oak L. Ins. Co. v. Gisborne</i>, 15 P. 253, 5 Utah 319, 320.</p> <p>54. Fla.—<i>Gabel v. Simmons</i>, 129 So. 777, 778, 100 Fla. 526.</p> <p>55. Kan.—<i>Banister v. Atchison, T. & S. F. Ry. Co.</i>, 282 P. 751, 754, 129 Kan. 302.
11 C.J. p 919 note 45.</p> <p>56. N.Y.—<i>Clarke v. New York</i>, 55 N.Y.Super. 259, 263.</p> <p>57. N.Y.—<i>Newcomb v. Leary</i>, 112 N. Y.S. 657, 128 App.Div. 329.</p> | <p>58. N.Y.—<i>Kingsbury v. Kirwin</i>, 43 N.Y.Super. 451, 454.
11 C.J. p 919 note 49.</p> <p>59. Wis.—<i>Smith v. Eau Claire</i>, 47 N.W. 830, 78 Wis. 457, 463.</p> <p>60. Wis.—<i>Carson v. Milwaukee Produce Co.</i>, 113 N.W. 393, 133 Wis. 85, 92.</p> <p>61. Del.—<i>Henderson v. Plymouth Oil Co.</i>, 136 A. 140, 143, 15 Del. Ch. 231.</p> <p>62. Tex.—<i>Gladden v. State</i>, 2 Tex. App. 508, 509, quoting Webster D.</p> <p>63. Black L.D.
11 C.J. p 917 note 20.</p> <p>64. N.C.—<i>Ward v. Wilmington, etc., R. Co.</i>, 13 S.E. 926, 109 N.C. 358, 363.
11 C.J. p 918 note 24.</p> <p>65. U.S.—<i>U. S. v. Crary</i>, D.C.Va., 2 F.Supp. 870, 877.</p> <p>66. U.S.—<i>Brooks v. Willcuts</i>, C.C.A. Minn., 78 F.2d 270, 273.
Ala.—<i>Lovell v. Smith</i>, 169 So. 280, 286, 232 Ala. 626.
Md.—<i>McKim v. Odom</i>, 3 Bland 416.</p> <p>67. Black L.D.</p> <p>68. U.S.—<i>Cole v. U. S.</i>, C.C.A.Colo., 269 F. 250, 252.</p> <p>69. Black L.D.</p> |
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up and sealed on the outside, and are thence called "writs close."⁷⁰

Other phrases: "Close confinement,"⁷¹ "close jail,"⁷² "close preliminary,"⁷³ "close season" or "close time," see the C.J.S. title Game § 10, also 27 C.J. p 949 note 3, and "in close proximity."⁷⁴

As an Adverb

Used as an adverb the term, as defined by the Century Dictionary, may mean tightly or closely.

Close to. Immediately adjoining, near or very near.⁷⁵ Used with reference to either time or place, the term is relative.⁷⁶ The phrase has been held to be equivalent to "approximately" see Approximately 6 C.J.S. p 132 note 13, and "at" see At 7 C.J. S. p 153 note 36, but has also been contrasted with the latter.⁷⁷

Another phrase: "Close to the wind," see the C.J. S. title Collision § 2.

CLOSE-HAULED. See the C.J.S. title Collision § 2.

CLOSELY. *Phrases:* "Closely affiliated interests,"⁷⁸ "closely built up,"⁷⁹ "jury . . . to be closely governed by the charge."⁸⁰

CLOSH. An unlawful game, supposed to be similar to nine-pins and the same as skittels, forbidden by the repealed Statute 17 Edward IV c 3, and, under the name of cloyscaglo, by Statute 33 Henry VIII c 9.⁸¹

CLOTH. A woven fabric, of fibrous material, used for garments or other purposes.⁸²

Phrases: "Bolting cloth," see 11 C.J.S. p 384 notes 91, 92, "cotton cloth," see the C.J.S. title Customs Duties § 40, also 17 C.J. p 569 note 13, and "waterproof cloth."⁸³

CLOTHE. Figuratively, to cover as with clothing, to invest.⁸⁴

Phrases: "Clothe with indicia of ownership,"⁸⁵ and "take care of, support, clothe, maintain or look after;"⁸⁶ also "clothed with a public use."⁸⁷

CLOTHES or CLOTHING. Defined by the Standard Dictionary as meaning the various articles of raiment worn by human beings, garments collectively.

Phrases: "Clothing wool,"⁸⁸ "stock of clothing,"⁸⁹ and "sufficient clothing."⁹⁰

CLOTURE. The procedure in deliberative assemblies whereby debate is closed.⁹¹

CLOUD ON TITLE. As an outstanding claim or encumbrance which if valid would affect or impair the title of the owner of a particular estate, see the C.J.S. title Quieting Title §§ 12-15, also 51 C.J. p 149 note 82-p 168 note 70.

CLOUGH. A valley; also an allowance for the turn of the scale, on buying goods wholesale by weight.⁹²

70. Black L.D.

71. U.S.—Rooney v. North Dakota, 25 S.Ct. 264, 196 U.S. 319, 326, 49 L.Ed. 494, 3 Ann.Cas. 76, affirming 95 N.W. 513, 12 N.D. 144.
11 C.J. p 918 note 23.

72. Vt.—Jewett v. Pudlo, 172 A. 423, 425, 106 Vt. 249.

73. U.S.—Denver & R. G. Co. v. Alling, Colo., 99 U.S. 463, 474, 25 L.Ed. 438.

W.Va.—Chesapeake & O. Ry. Co. v. Deepwater Ry. Co., 50 S.E. 890, 897, 57 W.Va. 641.

74. "In the immediate vicinity" equivalent

N.C.—Ward v. Wilmington R. Co., 13 S.E. 926, 109 N.C. 358.

75. Kan.—Rantoul Rural High School Dist. No. 2, Franklin County v. Davis, 160 P. 1008, 1009, 99 Kan. 185.

Wis.—Govier v. Brechler, 149 N.W. 740, 742, 159 Wis. 157.

76. Place

"The words 'close to a railroad' ordinarily must be understood relatively to local conditions. Lands in

Alaska sixteen miles from a railroad might be considered close to a railroad."—Govier v. Brechler, 149 N.W. 740, 159 Wis. 157, 163.

Time

When used with reference to time the term is so elastic as not to indicate with certainty the length of time intended.—American Trust & Safe Deposit Co. v. Eckhardt, 162 N. E. 843, 845, 331 Ill. 261.

77. U.S.—Robins v. Wettlauffer, Cust. & Pat.App., 81 F.2d 832, 833.

78. U.S.—Great Lakes Hotel Co. v. Commissioner of Internal Revenue, C.C.A., 30 F.2d 1, 4.

79. Ohio.—Community Traction Co. v. Konte, 172 N.E. 442, 443, 122 Ohio St. 514.

R.I.—State v. Buchanan, 79 A. 1114, 32 R.I. 490, 493.

80. Vt.—First Cong. Meeting House Soc. v. Rochester, 29 A. 810, 66 Vt. 501.

81. See 11 C.J. p 919 note 65.

82. U.S.—Robertson v. Hedden, C.C. N.Y., 40 F. 322, 323, reversed on

other grounds 14 S.Ct. 424, 151 U. S. 520, 38 L.Ed. 257.

11 C.J. p 920 note 68.

83. U.S.—U. S. v. Brown & Eadie, N.Y., 136 F. 550, 552, 69 C.C.A. 260 —Brown & Eadie v. U. S., C.C.N.Y., 126 F. 446.

84. See 11 C.J. p 920 notes 69, 70.

85. N.Y.—Adams v. Coe, 119 N.Y.S. 1086, 65 Misc. 517.

86. Ala.—Ballenger v. Ballenger, 94 So. 127, 208 Ala. 147.

87. Ill.—Joseph Triner Corporation v. McNeill, 2 N.E.2d 929, 935, 363 Ill. 559, 104 A.L.R. 1435.

88. U.S.—U. S. v. Stone & Downer, Cust.App., 47 S.Ct. 616, 621, 274 U. S. 225, 71 L.Ed. 1013—U. S. v. Stone & Downer Co., 12 Ct.Cust. App. 557, 558.

89. Kan.—Bane v. Hartzell, 46 P. 961, 964, 57 Kan. 482.

90. Ohio.—Brittain v. Industrial Commission of Ohio, 115 N.E. 110, 95 Ohio St. 391, 394.

91. Black L.D.

92. Black L.D.

C. L. P., C. L. P. Act, and C. L. R. P. See Abbreviations 1 C.J.S. p 276-note 5.

CLUB. A bludgeon, a heavy staff or piece of wood, or a heavy staff or stick, fit to be used in the hand as a weapon.⁹³ "Club" has been held synonymous with "stick;"⁹⁴ and contrasted with "pistol."⁹⁵

In the sense of a company of persons organized for some particular purpose see the C.J.S. title Clubs § 1.

Clubhouse. A home occupied by a club, or in which a club assembles.⁹⁶

Club law. Rule of violence, regulation by force or the law of arms.⁹⁷

Other phrases: "Club caterer" see Caterer 14 C.J.S. p 35 note 64, and "club transaction;"⁹⁸ also "clubs, rackets, and bats."⁹⁹

93. N.C.—State v. Phillips, 10 S.E. 463, 104 N.C. 786, 789.
11 C.J. p 920 note 88.

94. La.—State v. Richard, 53 So. 669, 671, 127 La. 413.

95. "A pistol is not a club and has

no resemblance to it. The one is a recognized dangerous weapon; the other only when employed as such."
—State v. Braxton, 16 So. 745, 47 La. Ann. 158, 159.

96. Mass.—Doyle v. Wheeler, 163 N. E. 859, 265 Mass. 256.

97. Black L.D.

98. Pa.—Blauner's v. City of Philadelphia, 198 A. 889, 893, 330 Pa. 340.

99. U.S.—U. S. v. Cofod Co., 12 Ct. Cust.App. 539, 540.

CLUBS

This Title includes bodies formed by the incorporation or association of persons for social purposes or for any common purpose other than pecuniary profit or benefit, and not of a specifically educational, charitable, or religious nature.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definition and Kinds

A club is a voluntary association of persons for purposes of a social, literary, or political nature, or the like.

While the word "club" has no very definite mean-

ing, it may be defined generally as a voluntary association of persons for purposes of a social, literary, or political nature, or the like.¹ A club is a definite association organized for an indefinite ex-

1. Fla.—Van Pelt v. Hilliard, 78 So. 693, 695, 75 Fla. 792, L.R.A.1918E 639, quoting Black L.D.

Other definitions

(1) "An association of persons for the promotion of some common object, as literature, science, politics, good fellowship."—Boyden v. Roberts, 111 N.W. 701, 131 Wis. 659, 672, quoting Webster D.

(2) Further definitions see 11 C.J. p 922 note 1.

Association held a club

Where persons in large numbers deposit with a proprietor of a restaurant their individual liquor and such proprietor holds himself out as ready to receive such liquor and dispense it to such patrons for pay for such service, furnishing glassware, ice, milk, etc., for making such liquors palatable; and such persons frequently by day and night resort to such place, engage in discussing

current events, politics, etc., and have the intoxicating liquors served to them, although each person is served only his own liquor, it is a club.—Van Pelt v. Hilliard, 78 So. 693, 75 Fla. 792, L.R.A.1918E 639.

Social club

(1) An association organized, as shown by its certificate of incorporation, for social fellowship, with the privilege of providing for its members refreshment, etc., is a social

istence; not an ephemeral meeting for a particular occasion, to be lost in a crowd at its dissolution.²

There are various kinds of clubs. An unincorporated members' club is a society of persons each of whom contributes to the funds out of which the expenses of conducting the society are paid.³ An unincorporated proprietary club is one whose property and funds belong to a proprietor who usually conducts it with a view to profit; the members, in consideration of the payment by them to the proprietor of entrance fees and subscriptions, are entitled to make such use of the premises and property, and to exercise such other rights and privileges, as the contract between them and the proprietor justifies.⁴

Beneficial associations generally are considered in the title Beneficial Associations §§ 1-86. Employees' relief and benefit associations are discussed in the C.J.S. title Master and Servant §§ 167-170, also 39 C.J. p 247 note 65-p 259 note 26. Unincorporated associations generally are considered in the title Associations §§ 1-39.

§ 2. Nature and Status

Voluntary clubs are not partnerships, although a proprietary club may be conducted by either an individual, a partnership, a voluntary association, or a corporation.

A proprietary club may in its nature be conducted by either an individual, a partnership, a voluntary association, or a corporation.⁵ Organizations ordinarily referred to as clubs are usually members' clubs, and may be either incorporated⁶ or voluntary⁷ associations. Voluntary clubs are not partnerships, because the members are not associated with a view to profit,⁸ and the members do not hold the relation

of principal and agent the one to the other.⁹ Where, however, the members of a club associate themselves together for the purpose of a commercial venture, such association constitutes a partnership.¹⁰

§ 3. Statutory Provisions

Clubs are subject to statutory regulation under the police power of the state.

Since the police power of the state includes the regulation and supervision of amusements and places of amusements, as they have a tendency to become harmful, the mere fact that the objects of a club are lawful within themselves does not place its conduct in providing amusements and maintaining places for its members to enjoy amusements beyond the police power of the state.¹¹ A statute authorizing the secretary of state to revoke the charter of a club used for gambling or other unlawful acts has been held to be valid.¹²

§ 4. Incorporation and Organization

The general rules as to the organization of associations govern the organization of an unincorporated club. There must be a compliance with statutory requirements in the incorporation of a club.

Clubs may be incorporated or unincorporated, in which latter event the rules of law applicable to associations, as discussed in the title Associations § 3, in general apply. Accordingly, the organization of unincorporated clubs, unlike that of corporations, usually does not depend on statutory provisions, but, as to its manner and effect, is within the discretion of the associators.¹³

In many states statutes exist which provide for the incorporation of clubs, and in order for a club to incorporate, there must be a compliance with the

club.—Hanger v. Commonwealth, 60 S.E. 67, 68, 107 Va. 372.

(2) Other examples of social clubs see 11 C.J. p 922 note 1 [c].

2. Ga.—Wright v. Macon, 64 S.E. 807, 5 Ga.App. 750.

Pa.—Eichbaum v. Irons, 6 Watts & S. 67, 49 Am.D. 540.

3. Fla.—Van Pelt v. Hilliard, 78 So. 693, 695, 75 Fla. 792, L.R.A.1918E 639, quoting *Corpus Juris*. 11 C.J. p 922 note 2.

4. Fla.—Van Pelt v. Hilliard, 78 So. 693, 695, 75 Fla. 792, L.R.A.1918E 639, quoting *Corpus Juris*. 11 C.J. p 922 note 3.

5. Fla.—Van Pelt v. Hilliard, 78 So. 693, 75 Fla. 792, L.R.A.1918E 639, quoting *Corpus Juris*.

6. Ala.—Lavretta v. Holcombe, 12 So. 789, 98 Ala. 503.

Va.—Hanger v. Com., 60 S.E. 67, 107 Va. 372.

7. Wash.—Burckhardt v. Chambers, 294 P. 977, 978, 160 Wash. 256, citing *Corpus Juris*. 11 C.J. p 922 note 7.

8. Fla.—Van Pelt v. Hilliard, 78 So. 693, 75 Fla. 792, L.R.A.1918E 639. Mass.—Blackinton v. Pillsbury, 156 N.E. 895, 260 Mass. 123. 11 C.J. p 922 note 8.

Duck shooting club

Informal unincorporated duck shooting club is not "partnership," but confers on members only right to joint use of club's property.—Burckhardt v. Chambers, 294 P. 977, 160 Wash. 256.

Political clubs

Associations and clubs, the objects of which are political rather than for purposes of trade or profit, are not partnerships.—American Art Works

v. Republican State Committee, 60 P. 2d 786, 177 Okl. 420.

9. Mass.—Blackinton v. Pillsbury, 156 N.E. 895, 260 Mass. 123.

10. Tex.—Golden v. Wilder, Civ. App., 4 S.W.2d 140.

Night club, being a place where personal property consisting of food and drinks is bought and sold, has been held to be a commercial partnership.—Claude Neon Federal Co. v. Four Hundred Club, 134 So. 445, 16 La.App. 651.

11. Or.—Slovanian Literary & Social Ass'n v. City of Portland, 224 P. 1098, 111 Or. 335.

Immunity of clubs from public interference see *infra* § 8.

12. Utah.—Citizens' Club v. Welling, 27 P.2d 23, 83 Utah 81.

13. Ind.—Laycock v. State, 36 N.E. 137, 136 Ind. 217.

statutory requirements. In the absence of a statute to the contrary, the lack of necessity for a charter for a purely social club is no reason for refusing it a charter.¹⁴ It has been held that a charter should not be refused because the name of the club is possibly offensive to canons of good taste,¹⁵ or because it is a foreign one;¹⁶ but it has also been held that the charter should be denied where the name proposed for the club is not appropriate and is undignified.¹⁷

Where the statute so requires, the application for incorporation must state the purposes of the club with sufficient definiteness to enable the court to determine whether or not the object falls within the purview of the law,¹⁸ and state a satisfactory manner in which club revenues are to be provided,¹⁹ and a satisfactory basis on which membership may be acquired.²⁰ The certificate of incorporation should provide for capital or pecuniary means, declare an object such as is indicated by the statute, and designate an office or place of business.²¹ It is not necessary, however, that a charter giving the power to make by-laws should contain a provision against the adoption of by-laws which would be contrary to law.²² An application for a charter will be denied where the proposed by-laws provide for an illegal method of management of the club.²³

A social club with power to dispense liquors to its members cannot be organized under a statute providing for the formation of benevolent, religious, scientific, educational, and miscellaneous associations, or any association which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects.²⁴

Under a statute requiring judicial approval of a certificate of incorporation, an application for such approval is addressed to the judge's discretion, which ought to be exercised cautiously and on conservative principles.²⁵ Where a club is organized under statutory authority, it being the duty of courts to see that such statute is obeyed, any infractions of it are matters of judicial cognizance.²⁶

In case of the incorporation of a preëxisting club, the corporation generally succeeds to its property.²⁷

Sale of memberships. Where the contracts for a sale of memberships in a club, such as a golf club, specify no limitation of time within which the proposed membership list is to be completed, or improvements to be made on the club grounds, the law affords a reasonable time therefor, and what constitutes a reasonable time depends on the facts of the particular case.²⁸ On failure of the promoter to

14. Pa.—In re Deutsch-Amerikanischer Volksfest-Verein, 49 A. 949, 200 Pa. 143.—In re Roseto Republican Club, 20 Pa.Dist. 714.

15. Pa.—In re Hampton Booster Club, 29 Pa.Dist. 934.

16. Pa.—In re Deutsch-Amerikanischer Volksfest-Verein, 49 A. 949, 200 Pa. 143.

17. N.Y.—In re Jiggs Nut Club, 256 N.Y.S. 273, 142 Misc. 762.

"Jiggs Nut Club, Inc." N.Y.—In re Jiggs Nut Club, 256 N.Y.S. 273, 142 Misc. 762.

18. Pa.—In re Young Men's Republican Club of Twenty-eighth Ward, 12 Pa.Dist. 584, 29 Pa.Co. 141. 11 C.J. p 922 note 17.

Application in foreign language

An application for a charter, part of which, including the name of the incorporation, is in a foreign language, which does not set forth how the object of the association is to be accomplished and how its membership is to be perpetuated, will be refused.—In re Societa Italiana di Mutui Soccorso de Benefeienza of Bristol, 24 Pa.Co. 84.

"Social enjoyment"

In setting forth the purposes of the club, the term "social enjoyment" is too indefinite. The articles of association should go farther and set out with particularity the nature and character of the social enjoy-

ment proposed to be furnished for the members of the club, and how they are to be conducted, so that the court, after examination of the articles, can without hesitation certify that the purposes are lawful and not injurious to the public.—In re Hampton Booster Club, 29 Pa.Dist. 934.—In re Monroe Republican Club, 19 Pa.Co. 568, 6 Pa.Dist. 515, 45 Pa.L.J. 52—11 C.J. p 922 note 17 [b] (2).

19. Pa.—In re Rox Athletic Ass'n of McKees Rocks, Pa., 178 A. 464, 465, 318 Pa. 258. 11 C.J. p 922 note 18.

"With the preposterous initiation fee of 25¢ and the equally preposterous monthly dues of 25¢, it seems asking too much to designate such a Club as a bona fide Athletic Club. We do not intend to grant a Charter to an organization that cannot exist except by 'passing the hat,' or else by procuring a license and selling liquor to the members,—thus adding one more drinking resort to those already posing as 'Chartered Clubs.'—In re Rox Athletic Ass'n of McKees Rocks, Pa., supra.

20. Pa.—In re Fourth Street Club, 18 Pa.Dist. 1039.—In re Societa Italiana di Mutui Soccorso de Benefeienza of Bristol, 24 Pa.Co. 84. 11 C.J. p 922 note 19.

21. N.Y.—Matter of Carpenters', etc., Union, 17 Abb.N.Cas. 109.

22. Pa.—In re Roseto Club, 20 Pa.Dist. 714.

23. Pa.—In re Fourth Street Club, 18 Pa.Dist. 1039.

Quorum

Where a statute provides that a majority of the directors or trustees of the club shall be necessary to constitute a quorum, a proposed by-law that three of seven directors shall constitute a quorum is illegal and is a basis for denial of the application.—In re Fourth Street Club, supra.

Voting by share

The court cannot grant a charter containing a provision that each share shall be entitled to one vote in the government of the corporation.—Com. v. Conover, 10 Phila., Pa., 55.

24. Mo.—State v. Missouri Athletic Club, 170 S.W. 904, 261 Mo. 576, L.R.A.1915C 876, Ann.Cas.1916D 931.

25. N.Y.—Matter of Carpenters', etc., Union, 17 Abb.N.Cas. 109.

26. Mo.—Brandenburger v. Jefferson Club Assoc., 88 Mo.App. 148.

27. N.Y.—Associate Alumni, etc., v. General Theological Seminary, etc., 57 N.E. 626, 163 N.Y. 417, modifying 49 N.Y.S. 745, 26 App.Div. 144. 11 C.J. p 923 note 26.

28. Cal.—Ottney v. Finnie, 42 P.2d 714, 5 Cal.App.2d 356.

complete the proposed membership list, persons who have purchased memberships in reliance on his agreement may recover from the promoter their damages resulting from such failure.²⁹

§ 5. — Purpose and Object

The purpose and object of the club must be lawful and for the best interests of the community.

Whether incorporated or unincorporated, the purpose and object of a club must, of course, be lawful.³⁰ Statutes permitting the incorporation of clubs usually require not only that their purposes be lawful, but that they shall have as well a worthy and commendable object, and a charter should be denied where it may be readily seen that the proposed assemblages will not be conducive to the welfare of the members or of the community at large.³¹ Accordingly, clubs for the purpose of cultivating foreign nationalism, which might result to the detriment of American interests,³² or a purely political club with no capital or property,³³ or a labor union without capital or property,³⁴ or a club whose purpose is to sell intoxicating liquors without a license,³⁵ have been refused incorporation. On the other hand, it is no objection to the application for incorporation that the name is indicative of political

belief or affiliation if the real purpose is legitimate;³⁶ and a social club may be formed for the purpose of purchasing and maintaining a driving park and clubhouse with the object of improving horses in speed, style, action, and blood.³⁷

§ 6. Registration

Examine Pocket Parts for later cases.

§ 7. Constitution, By-Laws, and Rules

The constitution and by-laws of a club constitute a contract binding both it and the members. By-laws may be adopted, amended, or repealed only in accordance with the provision, if any, in the by-laws therefor.

In case a club is incorporated, its rights and powers, and duties and liabilities are governed by its charter, the same as other corporations. Accordingly, a constitution adopted by a membership corporation after its organization, not in conformity with its charter or certificate of incorporation, is invalid.³⁸

If a club adopts a constitution and by-laws they constitute a contract between the club and its members, binding on both,³⁹ whether the club is incorporated⁴⁰ or not;⁴¹ and every member of the club

29. Cal.—Ottney v. Finnie, *supra*.

Measure of damages

Members of proposed club were entitled to recover membership fees and moneys expended in improving individual properties where promoter breached contracts by refusing to complete membership list and make promised improvements.—Ottney v. Finnie, *supra*.

30. Pa.—In re Lake Wynola Assoc., 3 Pa.Co. 626.

31. Pa.—In re Overbrook Social Club, 22 Pa.Dist. & Co. 725—In re Slavic Citizens' Club, 14 Pa.Dist. 588, 9 North.Co. 382—In re Young Men's Republican Club of Twenty-eighth Ward, 12 Pa.Dist. 584, 29 Pa.Co. 141—In re Application of Accountants Ass'n of Pitts., 5 Pa. Dist. 699, 18 Pa.Co. 159.

11 C.J. p 923 note 28.

Refusal warranted

Application for a charter for a social club will be denied, where it appears that its proposed location is on the first floor of the home of the principal officers, that the club assets are very small, that the standard of membership is only that the proposed member be introduced by a member, and where it is evident that the club hopes to live off the dances, boxing matches, and other similar activities to be held in the clubroom, particularly where the club may sell liquor.—In re Charter for Club, 22 Pa.Dist. & Co. 669.

Liquor essential

An application for a charter for a social club will be refused, if it proposes to dispense alcoholic beverages to its members, not as an incident of club life but as an essential in support of the club itself.—In re Green Hills Lake Sportsmen's Club, 23 Pa.Dist. & Co. 134.

32. N.Y.—Application of Catalanian Nationalist Club of New York, 184 N.Y.S. 132, 112 Misc. 207.

Pa.—In re Societa Italiana di Mutui Soccorso de Benefeienza of Bristol, 24 Pa.Co. 84.

11 C.J. p 923 notes 29, 30.

Foreign nationalist club

On an application of the Catalanian Nationalist Club of New York for approval of its certificate of incorporation as a membership corporation, where the certificate stated that its object was to make a center of representation in North America of Catalanian culture and of the legitimate national aspirations of Catalonia, to diffuse information thereof, and to strengthen the bonds of brotherhood among Catalanians of New York and its vicinity, would be denied, as its object, if executed, might result to the detriment of American interests.—Application of Catalanian Nationalists Club of New York, 184 N.Y.S. 132, 112 Misc. 207.

33. Pa.—In re Monroe Republican Club, 6 Pa.Dist. 515, 19 Pa.Co. 568.

11 C.J. p 923 note 31.

34. N.Y.—Matter of Carpenters', etc., Union, 17 Abb.N.Cas. 109.

35. Pa.—In re Slavic Citizens' Club, 14 Pa.Dist. 588—In re Societa Italiana di Mutui Soccorso de Benefeienza of Bristol, 24 Pa.Co. 84.

11 C.J. p 923 note 33.

36. Pa.—In re Central Democratic Assoc., 8 Pa.Co. 392.

37. Ind.—Mullen v. Beech Grove Driving Park, 64 Ind. 202.

Mich.—Detroit Driving Club v. Fitzgerald, 67 N.W. 899, 109 Mich. 670.

38. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.

11 C.J. p 924 note 56.

39. Kan.—Lake of the Forest Club v. Buttles, 51 P.2d 18, 142 Kan. 538.

La.—Colonial Country Club v. Richmond, 140 So. 86, 87, 19 La.App. 272, quoting *Corpus Juris*.

11 C.J. p 924 note 58.

Amendment after resignation

By-laws of country club could not, after resignation of member, be amended to change method or amount of compensation for stock.—Brown v. Green Brook Country Club, 150 A. 336, 106 N.J.Law 560.

40. Mass.—Boston Club v. Potter, 98 N.E. 614, 212 Mass. 23, Ann.Cas. 1913C 397.

41. Minn.—Anderson v. Amidon, 130 N.W. 1002, 114 Minn. 202, 34 L.R.A., N.S., 647, Ann.Cas.1912B 987.

is presumed to be acquainted with its rules.⁴² The laws so adopted by the club must, of course, be lawful in order to be binding.⁴³

A by-law of a club can be adopted only on compliance with the provision, if any, in the by-laws therefor,⁴⁴ and by-laws, which are the permanent and continuing rules of government, can be amended or repealed only in the manner prescribed by the by-laws.⁴⁵ Ordinarily, whether any given rule of action becomes a by-law or is a mere resolution depends on the solemnity with which it is passed,⁴⁶ and a resolution offered and adopted without previous notice, on mere motion by majority vote, cannot have the effect of impairing the binding force of a valid existing by-law.⁴⁷

§ 8. Rights and Powers

The rights and powers of a club are ordinarily governed by the controlling statutes and its charter, constitution, and by-laws.

The rights and powers of a club, subject, of course, to such limitations as may exist either at common law or by statute, are governed primarily by its charter, constitution, and by-laws.⁴⁸ A club, even though unincorporated, particularly where it is organized to promote some purpose beneficial to the general public or of certain classes thereof, are generally held to have the power to acquire and convey real property,⁴⁹ and to occupy and hold property as a tenant.⁵⁰ A club also has power, under a statute authorizing it to hold real and personal estate, and to provide suitable buildings for its accommodation, to borrow money for such purposes;⁵¹ and it may enforce a trust created for its benefit.⁵² A bona fide social club, if permitted by its articles of incorporation or association, may engage in business by transactions with either its members or members of the public.⁵³ However, a club cannot issue stock on which the votes of members shall be based.⁵⁴

Immunity from public interference. The public authorities have no right to interfere with the festivities of a private club organized for a legitimate purpose and conducted in a manner not amounting to a nuisance or breach of the peace; but a social club cannot complain of the surveillance of the police where it gives a public ball and sells wines and liquors to all persons willing to pay for them.⁵⁵

§ 9. — Racing Associations

The rights and powers of a racing association are governed by the controlling statutes, its charter, constitution, and by-laws.

A corporation organized under a statute, providing for the incorporation of associations for improving the breed of horses, etc., acquires its only right to conduct races for a stake or reward by virtue of a license issued by the racing commission created by the act; and, as such license must contain a condition that all running races and running race meetings shall be subject to the reasonable rules and regulations of the jockey club, such a corporation and its patrons are as much subject to such rules and regulations as if the same were a part of the act authorizing the issuing of the license; and hence patrons of the races conducted by such an association subject themselves to such rules, and to the liabilities and penalties prescribed thereby.⁵⁶ A rule adopted by the jockey club, under the provisions of such a statute requiring the exclusion from race meetings of a person ruled off the turf for improper practices, is not an illegal restriction on the franchise enjoyed by a racing association incorporated under the act, nor on the rights of the public in such franchise; and it invades the right of no person not a member of such an association, violates no contract, takes away no property or vested right, and is not illegal;⁵⁷ and the penalty which may be inflicted under the rule is not limited to the

42. La.—Colonial Country Club v. Richmond, 140 So. 86, 19 La.App. 272, quoting *Corpus Juris*.
11 C.J. p 924 note 61.

43. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.
11 C.J. p 925 note 62.

44. Ga.—Hornady v. Goodman, 146 S.E. 173, 167 Ga. 555.

45. Ga.—Hornady v. Goodman, supra.
11 C.J. p 925 notes 63, 64.

46. Ga.—Hornady v. Goodman, supra.

47. Ga.—Hornady v. Goodman, supra.

48. Authority to dispense intoxicating liquors to its members is not im-

plied from the charter of a social club, where, under the statutes, a corporation cannot secure a license to sell such liquors.

Mo.—State v. Missouri Athletic Club, 170 S.W. 904, 261 Mo. 576, L.R.A. 1915C 876, Ann.Cas.1916D 931.

Tex.—State v. Country Club, Civ. App., 173 S.W. 570.

49. Ark.—Town of Gravette v. Veach, 54 S.W.2d 704, 186 Ark. 544.

50. Ill.—Miller v. McElin, 208 Ill. App. 605.

51. Mass.—Bradbury v. Boston Canoe Club, 26 N.E. 132, 153 Mass. 77.

11 C.J. p 925 note 66.

52. Pa.—Hays v. Glassport Bridge Co., 32 Pittsb.L.J.N.S., 265.

53. Cal.—Cuzner v. California Club, 100 P. 863, 155 Cal. 303, 20 L.R.A., N.S., 1095 and note.

54. N.Y.—Anderson v. Reid, 45 N.Y. S. 742, 19 Misc. 95.

55. N.Y.—Cercle Francais de L'Harmenie v. French, 44 Hun 123.
11 C.J. p 925 note 72.

Clubs subject to valid exercise of police power see supra § 3.

56. N.Y.—Grannan v. Westchester Racing Assoc., 47 N.E. 896, 153 N. Y. 449, reversing 44 N.Y.S. 790, 16 App.Div. 8.

57. N.Y.—Grannan v. Westchester Racing Assoc., 47 N.E. 896, 153 N.Y. 449, reversing 44 N.Y.S. 790, 16 App.Div. 8.

exclusion of the offender on the particular day when the offense is committed.⁵⁸

The executive committee appointed under the rules of a jockey club to settle disputed points that may arise are the final arbiters in regard to the rights of horses to enter any of the club's races, and the decision of such committee will not be disturbed by the courts except for plain abuse of power.⁵⁹

Free passes. In the absence of a statute or provision in its charter to the contrary, a racing association has the right to issue free passes, particularly in an effort to obtain favorable publicity in the newspapers.⁶⁰

§ 10. Liabilities

A club may be liable either in contract or tort for the acts of its agents acting within the scope of their employment.

A club is liable on contracts made in its behalf by its duly authorized agents.⁶¹ However, one dealing with a membership corporation is bound to know of its strictly limited powers and sharply defined methods of procedure.⁶²

An unincorporated club is not liable for the debts of a member, nor are club funds liable therefor, unless the share of such funds belonging to such member is shown.⁶³

Torts. An incorporated club, conducting club houses, and sustained by membership dues, is liable to its members for negligence;⁶⁴ and a club may be held liable for a tort committed by its members or guests while engaged in the sport for which it was organized.⁶⁵ A club, particularly where its organization is such as to constitute its members partners, may be liable for any negligence on the part of its agents in the performance of their duties.⁶⁶ A club, maintaining a clubhouse, owes a duty to its paying guests to use reasonable care that the premises as a whole, and the rooms assigned to the use of the guest in particular, should be reasonably fit and safe for the use intended.⁶⁷ It is also the club's duty to take fair and reasonable precautions that the guest is informed and warned against all dangers incident to the enjoyment of the club privileges, which are not obvious to the senses of an ordinarily intelligent person.⁶⁸ As to invitees on club property, the club owes them the duty to exercise ordinary care to prevent their injury.⁶⁹

A club is not liable to a person not a member for excluding him from membership where he shows no right to become such, even though certain officers and employees, acting entirely beyond their functions, individually deceived him into believing that he was a member.⁷⁰

58. N.Y.—Grannan v. Westchester Racing Assoc., 47 N.E. 896, 153 N.Y. 449, reversing 44 N.Y.S. 790, 16 App.Div. 8.

59. N.Y.—Corrigan v. Coney Island Jockey Club, 20 N.Y.S. 437, 61 N.Y. Super. 393, reversing 15 N.Y.S. 705.

60. Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.

61. N.Y.—Maresi v. American Yacht Club, 30 N.Y.S. 1068, 10 Misc. 220, 11 C.J. p 925 note 81.

No defense

The mere fact that a club, if required to repay, pursuant to certificates of membership, amounts received from deceased members, would become insolvent, constitutes no defense to a statement of claim by the members' representatives.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

62. N.Y.—Fischer v. Motor Boat Club of America, 113 N.Y.S. 56, 61 Misc. 66.

Repayment of life member fees

* Promise by club, having received specified sum from life member, to repay sum on member's death, was not shown to be ultra vires.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

63. Kan.—Chastain v. Baxter, 31 P. 2d 21, 139 Kan. 381.

64. N.Y.—Beecroft v. New York Atlantic Club, 97 N.Y.S. 331, 111 App. Div. 392.

Deposit of valuables

Where a club, as part of the service rendered its members, received a deposit of valuables by a club member without requiring any statement of the value of the deposit, and gave a receipt, on failure to return such valuables on demand therefor, it was liable as a bailee for hire for the full value thereof, notwithstanding a statute providing that liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth.—Greer v. Los Angeles Athletic Club, 258 P. 155, 34 Cal.App. 272.

65. La.—Simmonds v. Southern Rifle Club, 27 So. 656, 52 La. Ann. 1114.

66. Tex.—Golden v. Wilder, Civ. App., 4 S.W.2d 140.

67. Mass.—Kitchen v. Women's City Club of Boston, 166 N.E. 554, 267 Mass. 229.

68. Mass.—Kitchen v. Women's City Club of Boston, *supra*.

Rug slipping

A paying guest of a women's club could not recover for injuries sustained when a rug slipped on a slippery floor of her room and she fell, where she knew when the room was assigned to her that it had slippery floors and light rugs, and that light rugs when stepped on might be expected to slip on slippery floors, since she voluntarily assumed the risk of any accident which naturally attached to the condition which she observed and, by assenting, negated the existence of any duty on the part of the club to warn her of such dangers.—Kitchen v. Women's City Club of Boston, *supra*.

69. Free-lance jockey riding horse in race under license from jockey club was an invitee to whom club owed duty to exercise ordinary care.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99.

70. Cal.—Jackson v. The Gables, 297 P. 983, 113 Cal.App. 80.

Ordering from clubhouse

Corporation conducting club, and its directors, could not be held liable for acts of clubhouse manager ordering plaintiff, who was not a member, from clubhouse.—Jackson v. The Gables, *supra*.

§ 11. Officers, Agents, and Committees

See *infra* §§ 12-14.

§ 12. — Appointment or Election

The appointment or election of an officer of a club should be in accordance with any statutory requirement therefor and with the provisions therefor in the club by-laws.

In order for an officer to be validly elected to office in a club, there must be a compliance with statutory requirements therefor, if any, and with the by-laws of the club.⁷¹ If the election of an officer is illegal, a court of equity may restrain him from acting as such.⁷² It has been held, however, if the proceeding involves merely the question of title to office in a club, that equity has no jurisdiction,⁷³ the remedy of quo warranto, as discussed in the C.J.S. title *Quo Warranto* §§ 7, 9, also 51 C.J. p 315 note 2, p 318 note 39, being available.

Nomination. A by-law, providing that nominations from the floor shall always be in order, authorizes nominations from the floor until the election of officers is in fact held.⁷⁴

§ 13. — Rights and Powers

The rights and duties of the officers of a club are usually based on its charter, constitution or by-laws, usage, and general principles of law.

Generally speaking, the rights and duties of the officers of a club find their basis in the applicable provisions of its charter, constitution or by-laws, usage, and general principles of law, and frequently the question of authority resolves itself into one

of fact.⁷⁵ If the act done by an officer is not within the scope of his authority, the club is not of course bound thereby,⁷⁶ in the absence of ratification or estoppel;⁷⁷ and one who seeks to hold the club liable for the act of an officer must show that the officer had authority to do the act.⁷⁸

A power conferred by a club through a meeting of its members on one person to do an act is superior to and supersedes the power to do the same act conferred upon another person by the board of trustees.⁷⁹

Directors or trustees. The restrictions on the powers of the governors of a membership corporation must be strictly construed, where the statute imposes on each director a liability for the debts of a corporation.⁸⁰ Provisions in the constitution of an incorporated club authorizing its board of trustees to "have the control and management of its property, funds and affairs," and "determine all matters affecting the welfare of the club," and to "authorize and control all the expenditures," do not confer authority on such board to acquire real estate for club premises, or to authorize a committee so to do.⁸¹ Powers vested in the directors of an incorporated club to secure the payment of the debts of the club out of its fund are not nullified by the fact that in certain contingencies the directors may be personally liable for the debts or some of them.⁸²

President. The president of an incorporated club has been held to have presumptive authority to act in the ordinary business of the club.⁸³

71. Ga.—Hornady v. Goodman, 146 S.E. 173, 167 Ga. 555.

11 C.J. p 926 note 87.

72. N.Y.—Boston Baseball Assoc. v. Brooklyn Baseball Club, 75 N.Y.S. 1076, 87 Misc. 521.

73. Ga.—Hornady v. Goodman, 146 S.E. 173, 167 Ga. 555.

74. Ga.—Hornaday v. Goodman, *supra*.

Motion to close

Under such a by-law the fact that at a previous meeting of the club a motion to close the nominations was carried will not bind a subsequent meeting at which the election was to be held.—Hornady v. Goodman, *supra*.

75. Pa.—Shea v. Quaker City Wheelmen, 9 Pa.Super. 225.
11 C.J. p 926 notes 90, 91.

76. N.Y.—Crocker Nat. Fire Prevention Engineering Co. v. Montauk Club, 155 N.Y.S. 355.

Recognition of claim

Where the president of a golf club by authority of the directors engaged plaintiff as engineer in the

construction of the courses and as architect for a building, the engineering work having been partially completed, but the building plans were not used on account of the financial condition of the club, in view of the relation of the president to the club, he did not exceed his authority in recognizing the architect's claim for compensation.—Blackwell v. Ranier Golf & Country Club, 208 P. 21, 120 Wash. 384.

77. Md.—Metropolitan Club v. Hopper, McGaw & Co., 139 A. 554, 153 Md. 666.

11 C.J. p 926 note 93.

Imputed knowledge

Deliveries of accounts for goods used by a company conducting a restaurant on the premises of a club to the club's bookkeeper, whose duty it was to open all mail and deliver accounts rendered against the club to its officers, was equivalent to a delivery thereof to the club, and the bookkeeper's knowledge of their contents became the club's knowledge, so as to estop the club from setting up its agent's lack of author-

ity in charging goods used by the restaurant to the club's account.—Metropolitan Club v. Hopper, McGaw & Co., *supra*.

78. Pa.—Shea v. Quaker City Wheelmen, 9 Pa.Super. 225.

11 C.J. p 926 note 94.

79. N.J.—Kirwan v. Barney, 61 N.Y.S. 122, 29 Misc. 614, affirming 57 N.Y.S. 812, 27 Misc. 181.

80. N.Y.—Fischer v. Motor Boat Club of America, 113 N.Y.S. 56, 61 Misc. 66.

81. N.Y.—Kirwan v. Barney, 61 N.Y.S. 122, 29 Misc. 614, affirming 57 N.Y.S. 812, 27 Misc. 181.

82. N.Y.—Thompson v. Wyandanch Club, 127 N.Y.S. 195, 70 Misc. 299.

83. Fla.—Miami Jockey Club v. Lillias Piper, Inc., 155 So. 806, 115 Fla. 612.

Decoration of clubhouse

President of incorporated club had presumptive authority to execute contract binding on club for decoration and furnishing of clubhouse on cost-plus basis.—Miami Jockey Club v. Lillias Piper, Inc., *supra*.

House committees. In the absence of any restrictions on the powers of the house committee, one who has duly leased the clubhouse from the officers thereof for the purpose of maintaining a restaurant for the exclusive use of the members and their guests may recover for refreshments furnished to guests of the club at the request of members of the house committee.⁸⁴

Execution of powers. Under a statute prohibiting the making of leases by a membership corporation, unless authorized by two thirds of the directors, where there are nine members of a board of governors, six must concur in authorizing the signing of a lease;⁸⁵ and under a by-law of a social corporation providing that an assessment could be made by a majority of the executive committee which consisted of twenty members, five of which constituted a quorum, by a "majority of the committee" was meant a majority of the whole committee, and not a majority of the quorum of five.⁸⁶

§ 14. — Liabilities

An officer or agent of an incorporated club is not liable on contracts entered into by him in behalf of the club where it is clear that he is acting in his official capacity; but the rule is otherwise as to officers or agents of unincorporated clubs. An officer or agent may be held liable for secret profits made by him while acting in a fiduciary capacity for the club.

Where there is no question of the legal entity of the club, an officer is not liable on contracts made by him for the club, at least where it is clear that he was acting as the club's agent and did not intend to bind himself personally.⁸⁷ On the other hand, an officer who acts for an unincorporated club in sign-

ing an instrument in its behalf is personally liable thereon;⁸⁸ although, in the absence of any intervening rights of third persons, it has also been held that an officer of an unincorporated association is not liable on an instrument signed by him in his official capacity when he was assured by all concerned that no personal liability would attach thereto.⁸⁹

Under some statutes the trustees of an incorporated club are liable for the debts of the club contracted while the trustees are in office.⁹⁰ Under such a statute, the president of an incorporated club, if he is not also a trustee, is not individually liable although the debt is incurred by him as president.⁹¹ A creditor need not first exhaust his remedy against the club before proceeding against the trustees under this statute;⁹² and the fact that the creditor has brought an action to enforce a mechanic's lien against the club does not affect his right to enforce a claim against the trustees under their statutory liability.⁹³

An officer or a member of the club who acts in a fiduciary capacity for the club, such as a purchasing agent, will be liable to the club for secret profits made by him on transactions with the club.⁹⁴ A person alleging fraud and collusion on the part of the directors of an incorporated club has the burden to establish such allegations.⁹⁵ A member of an incorporated social club must make a strong showing of mismanagement of its affairs by the board of directors, of which he had knowledge and made no complaint, before he can be heard to say that such mismanagement has resulted to his injury;⁹⁶ and the member is charged with knowledge

84. N.Y.—Deller v. Staten Island Athletic Club, 9 N.Y.S. 876.

85. N.Y.—Fischer v. Motor Boat Club of America, 113 N.Y.S. 56, 61 Misc. 66.

86. Mass.—Rogers v. Boston Club, 91 N.E. 321, 205 Mass. 261, 23 L.R. A., N.S., 743.

87. R.I.—Beattie Corporation v. Gidley, 171 A. 505, 54 R.I. 180.

Lease containing a recital of the capacity in which an officer signs, and which is executed by him in that capacity, is a lease of the club, if incorporated, and not the officer's personal act.—Whitford v. Laidler, 94 N.Y. 145, 46 Am.R. 131.

88. Iowa.—Lewis v. Tilton, 19 N.W. 911, 64 Iowa 220, 52 Am.R. 436.

11 C.J. p 926 note 6, p 927 note 9. Nonexistent or incompetent principal, liability of agent generally see Agency § 213.

Goods received at club

Where the treasurer and steward

of a club having no valid charter orders goods which are received at the club, he is liable for the price thereof.—Shiffett v. Kelly, 84 S.E. 606, 16 Ga.App. 91.

89. Iowa.—Andrew v. Pella Golf Club, 250 N.W. 709, 217 Iowa 577.

90. N.Y.—Metzger v. Carr, 29 N.Y.S. 410, 79 Hun 258.
11 C.J. p 927 note 13.

91. N.Y.—Sieger v. Culyer, 2 Abb. N.Cas. 347, affirmed 67 N.Y. 601.

92. N.Y.—Robinson v. Fay, 19 N.Y. S. 120.

93. N.Y.—Robinson v. Fay, supra.

94. Ill.—Dixmoor Golf Club v. Evans, 156 N.E. 785, 325 Ill. 612.
11 C.J. p 927 note 20.

Directors

Where directors incorporated golf club and issued stock in order that director having option on property could sell it to corporation at large advance, directors were liable for

profits made, stockholders not being represented.—Dixmoor Golf Club v. Evans, supra.

95. Validity of claim

Finding of creditors' committee that certain claimant had valid claim against golf corporation for material furnished to one of promoters and actually used in improving property, and that claimant was entitled to stock in corporation to amount of claim, was held to be sustained by evidence.—Henderson v. Jacobs, 27 P. 2d 378, 219 Cal. 477.

Evidence sustained finding that director's purchase of corporation's property at execution sale was not part of fraudulent conspiracy to purchase property for benefit of other directors and to relieve them from liability on notes to damage of other stockholders and in violation of statute.—Henderson v. Jacobs, supra.

96. Colo.—Rollins v. Denver Club, 96 P. 188, 43 Colo. 345.

of the expenditure of the club's income and profits, and with the management of its affairs by the directors.⁹⁷ The treasurer of a committee of a society which has two factions, who collects money in his official capacity and pays it over to the treasurer elected by the faction which was in the wrong, is not liable for conversion.⁹⁸

§ 15. Membership Generally

See *infra* §§ 16, 17.

§ 16. — Admission to

Election to membership by the members of the club is usually prerequisite to membership in a social club.

In the ordinary social club persons applying for membership are required to have a certain standard of social standing and moral character and are voted in by the unanimous vote, or by the vote of a fixed majority of all the members voting on the applications of candidates.⁹⁹ A member of a club, who received notice of its incorporation and continued for three years thereafter to pay dues, is a member of the corporation and liable for dues.¹ The purchaser of a share in a proprietary club is not necessarily entitled to membership, as, under the by-laws of the club, his election may be a prerequisite to his enjoyment of its privileges or to any rights as a shareholder.²

§ 17. — Termination and Reinstatement

- a. By act or omission of member
- b. By act of club
- c. Judicial prevention of expulsion

a. By Act or Omission of Member

On compliance with reasonable club regulations in regard thereto, a member may resign from a club.

In the absence of any rules to the contrary, a member of a club who has paid his subscription for

the current year, and who is in no other arrears to his fellow members, may resign his membership at any time by communicating such intention to the society; and ordinarily it is not necessary that the resignation shall be accepted by the club.³ A club, however, may impose reasonable restrictions on a member's right to resign,⁴ and to entitle a member to resign, so as to relieve himself from further liability as such, he must comply with such provisions as may be contained in the by-laws relating to resignation.⁵ Accordingly, if the by-laws of the club permit a member to resign only when he has paid up all dues, an attempted resignation of a member who owes dues is not effectual;⁶ and if the resignation is not received by the officer of the club designated by the by-laws to receive it, its receipt by a clerk in the club's offices does not render it effective.⁷ On the other hand, club by-laws that no resignation shall be effective until accepted by the club directors and a transfer of the certificate of membership made on the club books,⁸ or a by-law that the assignment of a new candidate for membership is necessary before a resignation will be accepted,⁹ have been held to be invalid as unreasonable and arbitrary. A provision that a member shall be dropped from the roll by the board of governors of the club, when in arrears for a specified length of time, is not self-executing, and does not terminate the membership without action on the part of the governors;¹⁰ and a member cannot, by failure to pay dues, terminate his membership so as to avoid further liability, although the club might have terminated it.¹¹

Restoration to membership. Where a member of a membership corporation tenders his resignation, he at once ceases to be a member, and is not entitled to be restored to membership, although he attempts to withdraw the resignation before it is accepted.¹²

97. Colo.—Rollins v. Denver Club, *supra*.

98. N.Y.—Beggars Students' Pleasure Soc. v. Eichel, 54 N.Y.S. 128, 25 Misc. 177.

99. W.Va.—Cohen v. King Knob Club, 46 S.E. 799, 55 W.Va. 108.

1. N.Y.—Building Trades Club v. Hausling, 56 N.Y.S. 1056, 26 Misc. 746.

2. N.Y.—McAlpin v. Garden, 103 N.Y.S. 509, 53 Misc. 401.

Damages

In an action for damages for failure to deliver a share of stock in a club, where the election of the purchaser to membership in the club is a prerequisite to his enjoyment of its privileges or to any rights as a

stockholder, plaintiff is entitled to nominal damages only.—McAlpin v. Garden, *supra*.

3. N.Y.—Peo. v. New York Motor Boat Club, 129 N.Y.S. 365, 70 Misc. 603.

11 C.J. p 927 note 27.

4. Cal.—Haynes v. Annandale Golf Club, 47 P.2d 470, 4 Cal.2d 28, 90 A.L.R. 1439.

5. La.—Colonial Country Club v. Richmond, 140 So. 86, 87, 19 La. App. 272, quoting *Corpus Juris*.

11 C.J. p 927 note 28.

6. Mass.—Boston Club v. Potter, 98 N.E. 614, 212 Mass. 23, Ann.Cas. 1913C 397.

N.Y.—Westchester Golf Club v. Pinkney, 87 N.Y.S. 153, 43 Misc. 338.

7. La.—Colonial Country Club v. Richmond, 140 So. 86, 19 La. App. 272.

11 C.J. p 928 note 30.

8. Cal.—Haynes v. Annandale Golf Club, 47 P.2d 470, 4 Cal.2d 28, 90 A.L.R. 1439.

9. Cal.—Haynes v. Annandale Golf Club, *supra*.

10. N.Y.—Westchester Golf Club v. Pinkney, 87 N.Y.S. 153, 43 Misc. 338.

11. Mass.—Boston Club v. Potter, 98 N.E. 614, 212 Mass. 23, Ann.Cas. 1913C 397.

12. N.Y.—Peo. v. New York Motor Boat Club, 129 N.Y.S. 365, 70 Misc. 603.

b. By Act of Club

A member of a club may be expelled from membership for sufficient cause, and the procedure therefor should be in accordance with the by-laws and rules of the club.

Since, as already discussed in § 7, the constitution and by-laws of a club constitute a contract between it and its members, a member, as one of the incidents of membership, consents to accept liability to expulsion, ordered in accordance with the club's regulations;¹³ and in case the rules provide that the board of trustees may expel a member for conduct, prejudicial to the welfare of the club, the trustees, when charges are filed, have the right, and it is their duty, to proceed to the trial of the charges.¹⁴ The power of expulsion is also sometimes conferred by statute.¹⁵ On the other hand, if the offense with which the member of an incorporated club is charged is not grave enough to constitute grounds for expulsion by a corporate body at common law,¹⁶ it is necessary that authority for his expulsion shall be expressed by some provision of the charter.¹⁷

Grounds. A member of a club cannot be expelled arbitrarily and on insufficient grounds.¹⁸ A cause sufficient to justify the expulsion of a member of a club which has power to expel members for cause is conduct which in some way, or to some degree, tends to injure the club materially or in reputation, or which is contrary to, and destructive of, the purpose of its organization.¹⁹

The power to prescribe grounds for expulsion is given sometimes by statute, and usually by the charter of incorporation or by the constitution of the club.²⁰ When the power to expel is given by char-

ter, the by-laws may properly prescribe the causes for expulsion,²¹ provided, however, that the grounds prescribed are reasonable and not in violation of law.²²

Procedure in general. Where the power to expel is given by charter, the by-laws may properly prescribe, not only the causes for expulsion, but also the mode of procedure.²³ In exercising the right of expulsion, it is essential that the conditions and mode of procedure, as prescribed by statute, or by the charter, constitution, or by-laws of the club, be strictly observed.²⁴

A written notice to each member of the board of trustees of a club being required in a call of a special meeting, the board had no jurisdiction to expel a member at a special meeting, if one of the trustees had not received written notice and was not present, although only a two-thirds vote of the trustees present was required for such purpose.²⁵ Where the meeting of the members of a membership corporation is not called by a quorum of seven of them, and on notice, as required by its by-laws, it is not a meeting of the corporation, and a suspension of a member at such a meeting is invalid.²⁶ Where it is provided that a member may be expelled by a two-thirds vote of the governing committee, and that a majority of the committee shall constitute a quorum, a two-thirds vote of a quorum, there being vacancies in the committee at the time when the vote is taken, is insufficient.²⁷

A member who files charges as prosecutor against another member cannot act as a judge or vote on any issue as to the guilt or innocence of the accused.²⁸ The manner of appointing the in-

13. Mass.—Richards v. Morison, 118 N.E. 868, 229 Mass. 458.

11 C.J. p 929 note 68.

14. Ohio.—Cheney v. Ketcham, 7 Ohio S. & C.P. 183, 5 Ohio N.P. 139.

15. D.C.—U. S. v. Washington Metropolitan Club, 11 App.D.C. 180.

16. Pa.—Com. v. Union League, 19 A. 1030, 135 Pa. 301, 20 Am.S.R. 870, 8 L.R.A. 195.

11 C.J. p 928 note 35.

17. Pa.—Evans v. Philadelphia Club, 50 Pa. 107.

11 C.J. p 928 note 36.

18. N.Y.—Barry v. The Players, 132 N.Y.S. 59, 147 App.Div. 704, reversing 130 N.Y.S. 701, 73 Misc. 10, and affirmed 97 N.E. 1102, 204 N.Y. 669.

11 C.J. p 928 note 40.

19. Mass. — Richards v. Morison, 118 N.E. 868, 229 Mass. 458.

11 C.J. p 928 note 41.

Matters held grounds for expulsion

(1) Under a provision in the con-

stitution of the club that a member found guilty of conduct injurious to the good order, peace, or interest of the association might be expelled, to make a charge against the governing committee that one of its members misappropriated club property, unless it was true or appeared to be true, warrants expulsion.—Richards v. Morison, *supra*.

(2) Other illustrations see 11 C. J. p 928 note 41 [a].

20. Mo.—Brandenburger v. Jefferson Club Assoc., 88 Mo.App. 148. 11 C.J. p 928 note 43.

21. D.C.—U. S. v. Washington Metropolitan Club, 11 App.D.C. 180. Pa.—Com. v. Union League, 19 A. 130, 135 Pa. 301, 20 Am.S.R. 870, 8 L.R.A. 195.

22. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.

Relinquishment of right of suffrage

By-laws of a membership corporation requiring members to give up,

under penalty of expulsion, their exercise of the right of suffrage, are in violation of a constitutional provision that no citizen shall be disfranchised or deprived of any rights except by the law of the land.—Stein v. Marks, *supra*.

23. Pa.—Com. v. Union League, 90 A. 1030, 135 Pa. 301, 20 Am.S.R. 870, 8 L.R.A. 195.

24. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.

Pa.—Berghof v. Fairmont Post, 17 Pa.Dist. 681.

11 C.J. p 928 note 46-47.

25. N.Y.—Peo. v. Greenwood Lake Assoc., 18 N.Y.S. 491.

26. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.

27. N.Y.—Loubat v. Le Roy, 40 Hun 546, reversing 15 Abb.N.Cas. 1.

28. Ohio.—Cheney v. Ketcham, 7 Ohio S. & C.P. 183, 5 Ohio N.P. 139.

investigating committee is generally regulated by the rules of the club.²⁹

An accused member is entitled to a trial of the charges against him.³⁰ In the absence of a statute or by-law of the club to the contrary, however, an accused member is not entitled to be represented by counsel at the hearing.³¹

Notice to member. While it has been held that no notice to an accused member need be given, in the absence of a special requirement therefor,³² the giving of notice is generally required so that the member may have an opportunity to defend;³³ and if notice is not given, the accused is under no obligation to ask for a hearing.³⁴ It has been held, in the absence of any agreement or provisions to the contrary, that the required notice must be personal.³⁵

c. Judicial Prevention of Expulsion

A wrongful expulsion must affect a member's property right before a court will interfere therewith, and, where the expulsion was in accordance with the club's by-laws, the decision of the organization and its officers, if made in good faith, is final.

As the foundation for the jurisdiction which a court exercises to prevent an improper expulsion of a club member rests on the principle that the member may thereby be deprived of his right of property, no judicial restraint will be accorded in the absence of such property interest.³⁶ Where

the rules of a club provide the manner of expelling a member, the court will not enjoin it from thus proceeding, in the absence of prejudice or malice.³⁷ Also, where the expulsion was in accordance with the rules of the club, the decision of the organization and its officers acting in good faith is final, and there is no general appeal to the courts.³⁸ A member who has submitted his cause to a tribunal set up for such purposes by the club is in no position to challenge in the courts the jurisdiction of that tribunal.³⁹ On the other hand, if the expulsion was illegal, a court of equity will reinstate the member,⁴⁰ if all remedies open to him in the club itself have been exhausted.⁴¹ The proceedings, however, are presumed to be regular⁴² and the decision fair;⁴³ and where the rules provide that the proceedings of the trial committee shall be strictly private, a member of the committee cannot, in an action for reinstatement, be interrogated as to his reasons for his vote, or as to what he deemed proper and sufficient ground for the expulsion of a member.⁴⁴

§ 18. Rights and Powers of Members

A member in a club ordinary has such rights and powers as are granted him by the charter and by-laws of the club.

A member of a club has such rights and powers as are granted him by the club charter and by-laws.

29. Mich.—*Peo. v. St. George's Soc.*, 28 Mich. 281.

11 C.J. p 929 note 53.

30. Ohio.—*Cheney v. Ketcham*, 7 Ohio S. & C.P. 183, 5 Ohio N.P. 139.

31. Mass.—*Richards v. Morison*, 118 N.E. 868, 229 Mass. 458.

32. Tex.—*Manning v. San Antonio Club*, 63 Tex. 166, 51 Am.R. 639. 11 C.J. p 929 note 57.

33. N.Y.—*Stein v. Marks*, 89 N.Y.S. 921, 44 Misc. 140.

34. N.Y.—*Loubat v. Le Roy*, 40 Hun 546, 17 Abb.N.Cas. 512, reversing 15 Abb.N.Cas. 1.

35. N.Y.—*Peo. v. Hoboken Turtle Club*, 14 N.Y.S. 76, 60 Hun 576. 11 C.J. p 929 note 60.

36. Mo.—*State ex rel. Baumhoff v. Taxpayer's League of St. Louis County*, App., 87 S.W.2d 207. 11 C.J. p 929 notes 62, 63.

37. N.Y.—*Gebhard v. New York Club*, 21 Abb.N.Cas. 248.

38. Mass.—*Richards v. Morison*, 118 N.E. 868, 229 Mass. 458. 11 C.J. p 929 note 70.

"The courts do not investigate whether the decision was right or wrong, but go no further than to as-

certain whether the essential formalities required by the constitution and by-laws of the association have been complied with, whether the proceedings have been regular, whether the cause assigned is one sufficient in law to warrant expulsion, whether the member has been given a fair chance to present his side of the controversy so as to satisfy the requirements of natural justice, whether the decision is within the scope of the jurisdiction and whether it has been reached in good faith, and whether the action appears to have been within an exercise of sound reason or to have been capricious, arbitrary and irrational."—*Richards v. Morison*, supra.

Expulsion held proper

Where a member of athletic club charged that one of governing board of club had misappropriated club property, whereupon governing board expelled such member, it was held that governing board was not disqualified from acting because it felt aggrieved by member's conduct; that it was not malice or bad faith in such board to act promptly, without waiting for usual formalities, their act otherwise being proper; that fact that board secured attor-

ney's advice as to procedure to be followed was not evidence of bad faith or malice; that fact that slanders about such member were in circulation and came to attention of board while considering his expulsion was not evidence of bad faith; that it was duty of member, upon being granted hearing by board to justify before board what he had said; and that evidence, in action for damages for such expulsion, did not justify inference that board exceeded its constitutional powers, or that it was actuated by bad faith or malice.—*Richards v. Morison*, supra.

33. N.Y.—*Rodger v. American Kennel Club*, 245 N.Y.S. 662, 138 Misc. 310.

40. N.Y.—*Stein v. Marks*, 89 N.Y.S. 921, 44 Misc. 140. 11 C.J. p 930 note 71.

41. Mo.—*Brandenburger v. Jefferson Club Assoc.*, 88 Mo.App. 148.

42. Mich.—*Peo. v. St. George's Soc.*, 28 Mich. 261.

43. D.C. — *U. S. v. Metropolitan Club*, 11 App.D.C. 180.

44. N.Y.—*Loubat v. Leroy*, 65 How. Pr. 138.

Generally, a member of a social club, during his life, is considered as a part owner of its property, not a creditor,⁴⁵ but since, as already indicated in § 2, an association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership, the members have no individual rights in the club property, and own no proportionate share thereof, but have only the right to its joint use so long as they remain members,⁴⁶ and none less than the whole number can dispose of it or any interest therein.⁴⁷ As otherwise stated, membership in a social club entitles the member to certain social opportunities and enjoyments, and affords him an interest, although not a transmissible interest, in the club property.⁴⁸

The rights of members in the property of an incorporated club are defined in the law of the state and in the charter, constitution, and by-laws of the corporation.⁴⁹ Ordinarily, such stockholders are not tenants in common of the club property.⁵⁰ A member of a club organized as a nonprofit corpora-

tion, whose membership is terminated, has no right or interest in the property of the corporation except such as is given him by the articles and regulations of the corporation.⁵¹ Special contracts between a club and its members concerning corporate property may be made for club purposes and will be given effect.⁵² Accordingly, where the by-laws provide that a member's right to corporate property ends with his death, as such by-law constitutes a contract between the club and member, see *supra* § 7, such contract may be enforced.⁵³ On the other hand, where the contract between the club and member provides that the club is to repay the amount paid for a life membership on the member's death, such contract is also enforceable.⁵⁴

Where the members of a membership corporation are illegally excluded from meetings of the club, they may sue the members in possession to enjoin them, and to compel such administration of the affairs of the corporation as will prevent a diversion of its assets to any purposes other than those pro-

45. Pa.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

46. Colo.—Manning v. Canon City, 101 P. 978, 45 Colo. 571, 23 L.R.A., N.S., 192.

Ill.—South Shore Club v. Peo., 81 N.E. 805, 228 Ill. 75, 119 Am.S.R. 417, 12 L.R.A., N.S., 519, 10 Ann. Cas. 333.

Not property

Club membership is not property in broad sense.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

47. Colo.—Manning v. Canon City, 101 P. 978, 45 Colo. 571, 23 L.R.A., N.S., 192.

48. Va.—Jones v. Rhea, 107 S.E. 814, 130 Va. 345.

49. Pa.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

Assessment asset of corporation

Where articles of incorporated thrift club specifically authorized assessments of sixty dollars per year on each share, provided that assessments should be "held by the corporation in trust for the stockholders", such assessments nevertheless became assets of corporation, since to construe articles otherwise would be to hold that corporation had organized and engaged in business as trust company, in violation of law.—Melville v. Rhodes, 239 P. 560, 136 Wash. 220.

50. Ill.—South Shore Club v. Peo., 81 N.E. 805, 228 Ill. 75, 119 Am.

S.R. 417, 12 L.R.A., N.S., 519, 10 Ann.Cas. 333.

51. Ohio.—Chestnut Beach Ass'n v. May, 184 N.E. 856, 44 Ohio App. 217.

Recovery of initiation fee

The code of regulations of a club, organized as a corporation not for profit, provided that if a member should be expelled for failure to pay dues he should be entitled to the return of the initiation fee paid by him, and also provided that the corporation should have a lien on his membership for unpaid dues. The corporation, in a written notice to a delinquent member, called attention to such lien and to the fact that in his case the lien exceeded the amount paid in by him, and notified him that if he failed to pay by a given date his certificate of membership would be canceled and all of his rights and privileges terminated. Such member failed to pay and ceased to claim privileges as a member, and made no protest or complaint or demand for the return of his initiation fee for a long time thereafter; and the corporation did nothing further to enforce the lien or expel such member. It was held, that such member was not entitled to recover such initiation fee.—Chestnut Beach Ass'n v. May, 184 N.E. 856, 44 Ohio App. 217.

52. Pa.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

Breach of contract

Club, by reducing entrance fee and dues, after plaintiff signed subscription contract, breached contract to

plaintiff's damage in amount of fee paid. — Ballinger v. City Athletic Club, 165 A. 873, 11 N.J.Misc. 348.

Increased value of property

Where the certificates of membership in a golf club did not require the club to pay any sums of money to the holder of the certificate, no interest in the property of the corporation is conferred by them, and a holder has the rights specified therein, subject to the conditions stated, and nothing more. Accordingly, a club, which issues certificates of membership signifying the payment of a certain sum by the holder of the certificate, does not become accountable for the increased value of the property of the corporation, in the absence of specific provisions in the certificate that the owner shall participate in such increased value.—Rau & Richter v. Torresdale-Frankford Country Club, 87 Pa.Super. 153.

53. Pa.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.—In re Columbia Club, 92 Pa.Super. 198.

54. Pa.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 211, 104 Pa.Super. 546.

Statement of relationship to club

"He [deceased member] had all the rights of a life member with such member's equal undivided share in all its property; he could have claimed it on dissolution during his lifetime; the club was not holding the member's money; it was paid to the club once for all the consideration specified." — Flaherty v. Manufacturers' Club of Philadelphia, *supra*.

vided by the charter of the organization;⁵⁵ and a member of an incorporated club has a standing in equity for the purpose of securing an injunction to restrain the club from carrying out its declared purpose of committing an act which, if found to be criminal, will imperil the charter of the club.⁵⁶

The members of an incorporated club are entitled to inspect the membership roll for a proper purpose;⁵⁷ but, under a provision of a club constitution that action taken by the executive and advisory committees, not affecting the club's finances or property, shall be final, a member is not entitled to access to the membership roll, where such right is denied by the officers and the committees pursuant to a general policy, the member's rights being limited by the agreement under which the club was formed, as shown by the constitution and the by-laws.⁵⁸

Right to resort to courts. Exhaustion of a club member's remedy under its constitution and by-laws is a prerequisite to a judicial enforcement of his personal rights as a member.⁵⁹ A contract between a club and its members providing that in case a member should feel aggrieved by any action taken by the organization, its governors, or any of its committees, either with respect to such member or any of the other members, the member will first file a complaint with the organization or its governors before resorting to the courts for relief, does not prevent a member from resorting to the courts for relief against a fellow member not falling within the classes designated.⁶⁰

§ 19. Duties and Liabilities of Members to Club

The duties and liabilities of partners do not attach to members of unincorporated social clubs.

55. N.Y.—Stein v. Marks, 89 N.Y.S. 921, 44 Misc. 140.

56. Pa.—Klein v. Livingston Club, 35 A. 606, 177 Pa. 224, 55 Am.S.R. 717, 34 L.R.A. 94.

57. Pa.—McClintock v. Young Republicans, 59 A. 691, 210 Pa. 115, 105 Am.S.R. 784, 68 L.R.A. 459. 11 C.J. p 930 note 85.

58. N.Y.—Allee v. James, 123 N.Y. S. 581, 68 Misc. 141.

59. N.Y.—Allee v. James, 123 N.Y. S. 581, 68 Misc. 141.

60. Va.—Kessler v. Friedman, 147 S.E. 201, 152 Va. 446.

61. N.Y.—Lumbard v. Grant, 71 N.Y.S. 459, 35 Misc. 140, affirmed 71 N.Y.S. 1141, 62 App.Div. 617, 74 N.Y.S. 1135, 68 App.Div. 639.

62. U.S.—Garden City Golf Club v. Corwin, C.C.A.N.Y., 62 F.2d 246, reversing, D.C., 57 F.2d 283—Pen-

dennis Club v. U. S., D.C.Ky., 20 F.Supp. 758.

Minn.—Jackson v. Minnetonka Country Club, 207 N.W. 632, 166 Minn. 323.

11 C.J. p 930 note 89.

Resignation assessment

Club whose articles of incorporation provided that terms and conditions for members' resignation should be prescribed by by-laws was not entitled to recover from resigning members resignation assessment fixed by board of governors, even if club had power to make assessment, where only by-law attempting to set out terms and conditions for resignation provided that resignation should not terminate membership until accepted by board of governors, since by-law merely delegated whole matter to board's uncontrolled discretion. — Lafayette Club v. Wright, Minn., 271 N.W. 702.

Since, as already considered in § 2, membership clubs are not partnerships, a member is not under a partner's duties and liabilities to the club. Accordingly, where a member of an unincorporated club renews in his own name and for his own benefit a lease of ground which the club had held as tenant at sufferance without payment of rent, an action to have the lease claimed by such person impressed with a trust in behalf of an officer of the association, or else to have it adjudged that the member acted as the officer's agent in procuring the lease, will not lie.⁶¹

§ 20. — Dues, Fines, and Assessments

A club has no incidental power to levy assessments on members, and a contract to pay dues and assessments must be founded on a consideration. Where, however, a member is under a binding obligation to pay dues and assessments, his liability therefor continues as long as his membership exists.

An incorporated club has no incidental power to levy assessments on its members and to compel them to pay the same by action at law;⁶² and, there being no statutory authority therefor, a membership corporation cannot levy assessments on the members and exclude them from their rights and privileges as such because of their refusal to pay the same.⁶³ Accordingly, where the laws of the state constituting a part of the charter of an incorporated club give it no power to levy assessments on members, long continued corporate action and acquiescence therein in levying and collecting assessments cannot operate as a practical construction of the charter as giving such power.⁶⁴ However, provisions of articles of association imposing on members the payment of dues and assessments at stated times create a legal obligation by each member to pay the same so long as the society re-

63. N.Y.—Thompson v. Wyandanch Club, 127 N.Y.S. 195, 70 Misc. 299.

Certificates issued to organizer

(1) Club membership certificates issued to organizer as compensation were held not to be subject to dues and assessments or cancellation for nonpayment thereof.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

(2) Amendment of club by-laws to require payment of dues on each membership certificate owned by member was held to be a fraud on contract rights of organizer to whom one thousand certificates were issued as compensation.—Genslinger v. New Illinois Athletic Club of Chicago, supra.

64. U.S.—Pendennis Club v. U. S., D.C.Ky., 20 F.Supp. 758.

11 C.J. p 931 note 91.

mains a going concern and his membership continues,⁶⁵ the purpose for which an assessment may be levied depending on the terms of the contract between the members.⁶⁶

In order for a member's promise to a club to pay membership fee, dues, and assessments to be enforceable, the promise of the member, like any other contract, must be supported by a consideration;⁶⁷ but ordinarily a membership contract in a club, entitling the member to a proportionate share in club property and to the use thereof the same as all members, does not lack mutuality or consideration.⁶⁸ Such a contract should be construed as any other contract and the words interpreted ac-

cording to the common, ordinary, and usual meaning.⁶⁹

A member of a club when called on to pay dues and assessments cannot avoid liability therefor by resigning.⁷⁰ On the other hand, a member is not liable for dues accruing after the termination of his membership.⁷¹ A distinction must be drawn, however, between a termination of membership and a suspension of membership; and where the by-laws of the club do not provide that a member shall cease to pay dues on suspension for nonpayment, he may be required to pay dues during the period of suspension.⁷² Also, a member cannot, by failure to pay dues as required by the by-laws, terminate

Authority must be specific

"The authority of an incorporated club to levy assessments on its members must be found in the statute of the state under which it is created or in its charter. This authority cannot be implied, but must be specific, and long-continued corporate action and acquiescence therein by the members in levying and collecting assessments cannot operate as giving such power, under a practical construction of the charter."—*Pendernis Club v. U. S., D.C. Ky.*, 20 F.Supp. 758, 760.

65. Kan.—*Lake of the Forest Club v. Buttles*, 51 P.2d 18, 142 Kan. 538.

N.Y.—*Mechanicville War Chest v. Butterfield*, 181 N.Y.S. 428, 110 Misc. 257.

11 C.J. p 931 note 92.

Acts of directors

A person, on joining a club, submits himself to the acts of the directors as the common representatives of all the members. He is not only clothed with all the rights of membership, but is bound by any assessment made by them, unless there is fraud or gross mistake.—*Locust Club v. Einstein*, 195 A. 432, 129 Pa.Super. 338.

Signer of a "pledge card" issued by an incorporated association pursuant to a "war chest" plan, who thereby enlisted as a member of the local War Chest and agreed to make monthly payments of one dollar for a year, became a member of the corporation, bound by implied knowledge of its certificate and by-laws, and the signer of a contract in fact and in law, and liable, either on the theory of contract to pay dues, or on the theory of an enforceable subscription contract in good faith relied and acted on.—*Mechanicville War Chest v. Butterfield*, 181 N.Y.S. 428, 110 Misc. 257.

What constitutes payment

Where by-laws of lake resort club

provided for active membership by lot owners and associate membership by nonowners, payment of dues by associate member renting lot of active member was not payment of dues of active member.—*Lake of the Forest Club v. Buttles*, 51 P.2d 18, 142 Kan. 538.

66. N.Y.—*Whiteside v. Cottage Assoc.*, 37 N.E. 624, 142 N.Y. 585. 11 C.J. p 931 note 93.

67. Minn.—*Thorpe Bros. v. Woodward*, 256 N.W. 729.

Membership fees

(1) A note in payment of initiation or membership fees in a society has been held to be supported by consideration.

Mass.—*Middlesex Husbandmen, etc., Soc. v. Davis*, 3 Metc. 133.

S.C.—*Goree v. Wilson*, 1 Bailey 597.

(2) There is, however, authority to the contrary.

Iowa.—*Nightingale v. Barney*, 4 Greene 106.

N.Y.—*Nash v. Russell*, 5 Barb. 556.

No mutuality

Where a member of a golf club made application for a renewal of his membership and in such application promised to pay dues, which application was accepted by the club, in the absence of evidence of either act, forbearance, or promise on the part of the club as consideration for the promise of the member, it is not enforceable.—*Thorpe Bros. v. Woodward*, Minn., 256 N.W. 729.

Rescission of contract

(1) Where a member of a club executed a note in payment for a lot on club grounds, payment for the lot constituting membership in the club, on the member's failure to make payment on the note, the club had two remedies; it could forfeit his rights of membership and cancel his right or interest in the lot, or it could allow membership to remain and sue on the note. It could not do both, as the cancellation of membership destroyed the consider-

ation given for the note.—*Gulf Coast Shrine Club v. Clarkson*, Tex. Civ.App., 74 S.W.2d 1048—*Park v. Gulf Coast Shrine Club*, Tex.Civ. App., 48 S.W.2d 765, error dismissed.

(2) Where club members indorsing club's indebtedness were secured by pledge of notes given by other members for membership rights, rights of such indorsers, as respects such collateral, were subject to conditions recited in collateral notes, including club's right to cancel membership.—*Gulf Coast Shrine Club v. Clarkson*, supra.

68. Minn.—*Lafayette Club v. Roberts*, 265 N.W. 802, 196 Minn. 605.

69. Word "guarantee," in contract whereby defendant agreed to guarantee payment of club membership on certain conditions, should be interpreted according to its common, ordinary, and usual meaning, and it expressed an original, primary obligation to pay for one membership provided certain other conditions were performed.—*Rodway v. Botterel*, 11 N.E.2d 201, 56 Ohio App. 497.

70. Pa.—*Locust Club v. Einstein*, 195 A. 432, 129 Pa.Super. 338.

71. N.Y.—*Westchester Golf Club v. Pinkney*, 87 N.Y.S. 153, 43 Misc. 338.

Question of fact

Whether member had resigned from club suing for dues was held to be for trier of fact.—*Lafayette Club v. Roberts*, 265 N.W. 802, 196 Minn. 605.

72. Cal.—*Anandale Golf Club v. Smith*, 289 P. 806, 106 Cal.App. 765.

No estoppel

Golf club was held not to be estopped to collect dues from suspended member because of alleged unreasonable rule respecting transfer of membership.—*Anandale Golf Club v. Smith*, supra.

his liability therefor, although the club might have terminated it for that reason.⁷³ A subscriber to the stock of an incorporated club cannot avoid paying assessments pursuant to the terms of his subscription because all the stock had not been subscribed or paid in, where, after knowledge of all the facts, he participated in the purposes of the club, accepted membership tickets and badges without paying a membership fee, and paid annual dues only, and availed himself of the benefit of being a stockholder.⁷⁴ A resignation, in order to relieve the member from liability for subsequent dues, must be made in accordance with the by-laws.⁷⁵ Where the rules provide that when a member has been in arrears for a certain length of time his name shall be dropped from the rolls by the board of governors, his mere delinquency in paying dues does not ipso facto terminate his membership; and, accordingly, where, during the delinquency, he receives notice from the club that unless his account is paid before a time stated he will be dropped without further notice, he is justified in assuming that the expressed intention to drop him has been followed by the proper resolution of the board of governors, and he is not liable to the club for dues subsequently accruing.⁷⁶

Where dues are payable in advance, although the member is given the privilege of paying them in installments,⁷⁷ payment is not excused by the fact that the club becomes insolvent and goes into the

hands of a receiver within the period for which the dues are demanded,⁷⁸ and this is so, although the member is deprived of expected benefits.⁷⁹ Also, an applicant for life membership in a club is not relieved from his obligation to pay membership fees specified in his accepted application by the fact that a building project which had induced him to apply for membership has been abandoned by the club; it not being a total failure of consideration for his promise to pay for membership in the club.⁸⁰

No member of a club, as such, becomes liable to pay into the funds of the society, or to anyone else on its account, a greater sum than required by its rules to remain a member.⁸¹ A club, however, organized under a statute providing that the fees and dues of the members shall be established by by-laws which may from time to time be modified has power to increase the annual dues by an amendment of its by-laws,⁸² in the absence of bad faith.⁸³

Assignment. Unpaid dues may be assigned by the club, in which case the assignee may recover the same.⁸⁴

Actions for dues. The mere fact that a club's by-laws, which do not purport to furnish an exclusive remedy, provide that a membership may be forfeited and sold for nonpayment of dues does not preclude an action by the club for delinquent dues.⁸⁵ Where the club forecloses by suit a lien

73. Mass.—*Boston Club v. Potter*, 98 N.E. 614, 212 Mass. 23, Ann. Cas.1913C 397.

74. Mich.—*Detroit Driving Club v. Fitzgerald*, 67 N.W. 899, 109 Mich. 670.

75. La.—*Colonial Country Club v. Richmond*, 140 So. 86, 19 La.App. 272.

11 C.J. p 931 note 3.

Delivery of resignation

Member handing written resignation from golf club to golf professional, unauthorized to receive resignations, was required to suffer consequences in form of additional dues from professional's failure to deliver resignation to proper official.—*Colonial Country Club v. Richmond*, 140 So. 86, 19 La.App. 272.

Securing purchaser

A club member's obligation to pay dues continued until member had in good faith tendered performance of his agreement to offer his stock to club so that if it desired to exercise its option to purchase it might do so and, if it refused to purchase stock, to offer to have stock transferred to a purchaser reasonably satisfactory to governing body of the club.—

Larchmont Shore Club v. Field, 1 N.Y.S.2d 884, 253 App.Div. 897.

76. N.Y.—*Westchester Golf Club v. Pinkney*, 87 N.Y.S. 153, 43 Misc. 338.

77. Mass.—*Boston Club v. Potter*, 98 N.E. 614, 212 Mass. 23, Ann. Cas. 1913C 397.

78. Mass.—*Boston Club v. Hannan*, 101 N.E. 375, 214 Mass. 286.

N.Y.—*Freedman v. Chamberlain*, 24 N.Y.S. 388, 70 Hun 193.

79. Mass.—*Rogers v. Boston Club*, 91 N.E. 321, 205 Mass. 261, 28 L. R.A., N.S., 743.

80. Ohio.—*Boone v. Century Athletic Club*, 195 N.E. 395, 49 Ohio App. 155.

81. U.S.—*Pendennis Club v. U. S.*, D.C.Ky., 20 F.Supp. 758.

82. N.Y.—*Thompson v. Wyandanch Club*, 127 N.Y.S. 195, 70 Misc. 299.

83. N.Y.—*Thompson v. Wyandanch Club*, supra.

84. Minn.—*Anderson v. Amidon*, 130 N.W. 1002, 114 Minn. 202, 34 L.R. A., N.S., 647, Ann. Cas.1912B 987.

85. Kan.—*Lake of the Forest Club v. Buttles*, 51 P.2d 18, 142 Kan. 538.

Minn.—*Lafayette Club v. Roberts*, 265 N.W. 802, 196 Minn. 605.

Alleged error immaterial

In suit by lake resort club to collect delinquent dues, alleged error in finding that provisions in deeds of lots owned by defendant, whereby conveyances were made subject to by-laws of club, constituted covenants running with land, was immaterial where defendant was not suspended or expelled as member for violation of covenants in her deed.—*Lake of the Forest Club v. Buttles*, 51 P.2d 18, 142 Kan. 538.

No estoppel

(1) A club was not estopped to recover dues because of treasurer's statements to member that membership would be declared forfeited and sold for nonpayment of dues where no delegation of authority to treasurer to make such statements was shown and letter from board of governors stated that they would accept no resignations.—*Lafayette Club v. Roberts*, 265 N.W. 802, 196 Minn. 605.

(2) Lake resort club failing promptly to assert claim for dues was not guilty of laches precluding foreclosure of lien against member's

held by it for delinquent dues on a member's lot, the member has the usual right of redemption, notwithstanding a provision in the by-laws waiving redemption, where the procedure provided in the by-laws was not followed.⁸⁶

§ 21. Duties and Liabilities of Members to Third Persons

Liability of members of an unincorporated social club must be predicated on the basis of agency, rather than that of partners.

Unless the organization of the club is such as to constitute it a partnership,⁸⁷ which is not ordinarily the case in membership clubs, *supra* § 2, the liability of its members for debts contracted in behalf of the association is governed not by the principles of partnership, but by those of agency. Membership as such imposes no personal liability for the debts of the club; but to charge a member therefor it must be shown that he has actually or con-

which the liability is predicated.⁸⁸ If, however, a member, as such, directly incurs a club debt, or expressly or impliedly authorizes or ratifies the transaction in which it was incurred, he is liable therefor as a principal,⁸⁹ even though the credit was in fact, popularly speaking, extended to the club.⁹⁰ On the other hand, where the local chapter of a national fraternity which was incorporated in a

foreign state leased a residence, the lease being signed by the then president and secretary, the fact that the lease was in the name of the fraternity, and that there was a corporation by that name, does not estop the lessor from showing that the local chapter was no more than a voluntary association, and that its members were liable as such.⁹¹ The liability of each member continues so long as he remains such and until he notifies the creditors of his withdrawal from the club.⁹²

In the case of incorporated clubs, the charter may impose personal liability on the members for debts incurred by the club.⁹³

Torts. Unless the organization of the club is such as to constitute its members partners,⁹⁴ liability cannot be fastened on individual members of a club for torts committed by club members or employees, unless the injury resulted from the acts of those sought to be held liable therefor or their agents.

§ 22. — Contribution between Members

Club as partnership see *supra* § 2. Examine Pocket Parts for later cases.

§ 23. Stock

The general rules as to corporation stock apply to stock of an incorporated club.

lot given by by-laws, where delay was not prejudicial to member.—*Lake of the Forest Club v. Buttles*, 51 P.2d 18, 142 Kan. 538.

86. Kan.—*Lake of the Forest Club v. Buttles*, *supra*.

87. "Night club" has been held to be a commercial partnership with members solidarily liable for its defaults.—*Claude Neon Federal Co. v. Four Hundred Club*, 134 So. 445, 16 La.App. 651.

88. Kan.—*Chastain v. Baxter*, 31 P. 2d 21, 139 Kan. 381.

N.Y.—*Hart v. Cowdin*, 273 N.Y.S. 141, 242 App.Div. 702, affirmed 195 N.E. 159, 266 N.Y. 472.

Okl.—*American Art Works v. Republican State Committee*, 60 P.2d 786, 177 Okl. 420.

11 C.J. p 931 note 11.

Mere association insufficient

Agency for club, objects of which are political rather than for purpose of trade or profit, must be made out and cannot be implied from mere fact of association.—*American Art Works v. Republican State Committee*, 60 P.2d 786, 177 Okl. 420.

Mere silence insufficient

Where business affairs of unincorporated local chapter of college national fraternity are conducted by business manager selected by mem-

bers of local chapter, mere silence of member after hearing report of partial payment on existing obligation incurred by manager will not ordinarily create legal liability against such member or constitute acquiescence therein or ratification thereof.—*Chastain v. Baxter*, 31 P.2d 21, 139 Kan. 381.

Not joint adventure

Running of boarding and rooming house by members of unincorporated local chapter of college national fraternity is not "joint adventure" as regards members' liability for obligation incurred by another member.—*Chastain v. Baxter*, *supra*.

89. Okl.—*American Art Works v. Republican State Committee*, 60 P. 2d 786, 177 Okl. 420.

11 C.J. p 932 note 12.

Admissibility of evidence

In an action against a member of the club to recover for club indebtedness, a telegram signed by defendant as manager of a polo team and sent to a player, asking his terms, is admissible in evidence as tending to prove that defendant was a member of the association and was its manager.—*Bennett v. Lathrop*, 42 A. 634, 71 Conn. 613, 71 Am.S.R. 222.

90. Iowa.—*Lewis v. Tilton*, 19 N.W. 911, 64 Iowa 220, 52 Am.R. 436.

91. Wash.—*Korstad v. Williams*, 141 P. 881, 80 Wash. 452.

92. N.Y.—*Park v. Spaulding*, 10 Hun 128.

93. Mo.—*Nelson Distilling Co. v. Loe*, 47 Mo.App. 31.

94. Tex.—*Golden v. Wilder*, Civ. App., 4 S.W.2d 140.

Club to construct telephone line

Members of club associating themselves to construct telephone line were liable as partners for injuries resulting from negligence of their employees. Accordingly, the members were liable individually for injury to lineman while constructing telephone line for the association.—*Golden v. Wilder*, *supra*.

95. Ill.—*Miller v. McElin*, 208 Ill. App. 605.

Defective water pipes

Members of an unincorporated club who signed a lease for the club could not be held liable for damages resulting to a third person caused by water escaping from a frozen water pipe, where it is admitted that defendants did not occupy or control the premises, and where they were not charged with nor had undertaken a duty to care therefor.—*Miller v. McElin*, *supra*.

The general rules as to subscription to capital stock and the purchase of stock from corporations, as discussed in the C.J.S. title Corporations § 282 et seq., also 14 C.J. p 507 note 29 et seq., apply to stock subscriptions in incorporated clubs. Accordingly, a subscription to stock in a club "building fund" naming no payee nor showing any purchase of stock in the club itself is unenforceable, at least in the absence of allegations warranting a reformation.⁹⁶ Consideration for stock in an incorporated club may consist in the members' right to the property of another club given therefor.⁹⁷

§ 24. Superior, Inferior, and Affiliated Bodies

A superior lodge may be enjoined from wrongfully withdrawing the charter of a subordinate chapter.

A court of equity will enjoin the grand council of a fraternal college society from wrongfully withdrawing the charter of a subordinate chapter⁹⁸ on insufficient grounds, although no property rights are infringed,⁹⁹ and only one member of the grand council can be reached by the court.¹ Individual members of the chapter may enjoin the unauthorized withdrawal of its charter, although membership would remain to them in spite of the withdrawal.²

§ 25. Consolidation and Merger

The usual rules as to consolidations and mergers of associations and corporations govern mergers of clubs.

Consolidations and mergers of clubs are governed by the usual rules applicable to associations and corporations generally. Accordingly, where a statute designates the kinds of corporations which may merge, incorporated clubs not falling within the statutory permission cannot merge.³ Where the consideration for the merger is adequate, the transfer of the club's assets cannot be set aside on the grounds of a lack of consideration.⁴ Of course, the directors of the club and the majority of the

members of the club cannot benefit themselves by the merger at the expense of a minority of the members.⁵

Under a statute permitting any person interested to appeal from an order of the corporation commission, members of an incorporated club may appeal from an order of the commission merging the club with another, even though such members were not formal parties to the proceeding, at least where they were erroneously rejected in their effort to become parties.⁶ Where the right to appeal is granted by statute, an appeal from an order of the commission merging two nonstock social clubs cannot be denied on the grounds that the commission was acting ministerially.⁷

§ 26. Dissolution, Forfeiture of Charter, and Receivership

On dissolution of a club, its property, subject to the claims of creditors, vests in the club members. Charters of incorporated clubs may be forfeited for sufficient cause.

Generally, on dissolution of a club, its property, subject to the claims of creditors, vests in its members according to their respective rights as secured by statute and the club's constitution and by-laws.⁸ Where the constitution and by-laws of the club clearly provide that the club should be owned and governed by the resident members and that non-resident members were merely licensees, nonresident members are not entitled to share in the distribution of assets on dissolution,⁹ and an undivided interest in the club's realty, subject to outstanding encumbrances vests in the resident members.¹⁰ In accordance with the rule as to associations generally, as discussed in the title Associations § 9 a (6), if the members of a club unanimously vote to incorporate it, the creation of the corporation pursuant thereto ipso facto dissolves the club and transfers its property and rights to the corporation.¹¹

96. Cal.—Saturday Morning Musical Club v. Vialut, 295 P. 852, 111 Cal.App. 562.

97. Mass.—In re Savin Hill Yacht Club Ass'n, 140 N.E. 299, 246 Mass. 75.

98. N.Y.—Heaton v. Hull, 59 N.Y.S. 281, 28 Misc. 97, affirmed 64 N.Y.S. 270, 51 App.Div. 126.

11 C.J. p 932 note 20.

99. N.Y.—Heaton v. Hull, 64 N.Y.S. 279, 51 App.Div. 126, affirming 59 N.Y.S. 281, 28 Misc. 97.

11 C.J. p 932 note 21.

1. N.Y.—Heaton v. Hull, 59 N.Y.S. 281, 28 Misc. 97, affirmed 64 N.Y.S. 279, 51 App.Div. 126.

2. N.Y.—Heaton v. Hull, 64 N.Y.S.

279, 51 App.Div. 126, affirming 59 N.Y.S. 281, 28 Misc. 97.

3. Va.—Jones v. Rhea, 107 S.E. 814, 130 Va. 345.

"Engaged in business"

A social club, organized to maintain a library and promote social intercourse, although renting rooms to members, running a restaurant, and maintaining a bar for the sale of soft drinks, cigars, and cigarettes, is not "engaged in business," so as to fall within Code 1919 § 3821, authorizing corporations engaged in the same business to merge.—Jones v. Rhea, supra.

4. Cal.—Crebs v. Uplifters Country Home, 23 P.2d 807, 133 Cal.App. 83.

5. Cal.—Crebs v. Uplifters Country Home, supra.

6. Va.—Jones v. Rhea, 107 S.E. 814, 130 Va. 345.

7. Va.—Jones v. Rhea, supra.

8. Life member of club had equal undivided share in its property, which he could have claimed on dissolution during his lifetime.—Flaherty v. Manufacturers' Club of Philadelphia, 159 A. 209, 104 Pa.Super. 546.

9. N.C.—Smith v. Dicks, 148 S.E. 464, 197 N.C. 355.

10. N.C.—Smith v. Dicks, supra.

11. Ark. — Town of Gravette v. Veach, 54 S.W.2d 704, 186 Ark. 544.

A sale of club property, on dissolution, will not be set aside if conducted in accordance with law, where no fraud or collusion is practiced.¹²

A member who has properly been expelled from a social club for nonpayment of dues and assessments ordinarily has no such interest in the club's property as to entitle him to secure the club's dissolution and a distribution of its assets.¹³

It has been held that a statute regulating proceedings for the dissolution of corporations generally does not apply to a proceeding for the social club;¹⁴ but in some states regulative statutes exist which relate specially to clubs.¹⁵

Forfeiture of charter. Clubs should not be dissolved for slight causes, and, if at all, only when it is entirely apparent that the organization has ceased to answer the ends of its existence and no other mode of relief is attainable.¹⁶ The charter of an incorporated club may, however, be annulled, and its franchise forfeited, for sufficient cause,¹⁷

as where a club, organized as a nonprofit corporation, engages in profit making as one of its most important purposes;¹⁸ where the club has not attempted to pursue the objects of its incorporation, and has persisted in conducting a gaming and disorderly house,¹⁹ or where the club makes illegal sales of intoxicating liquors;²⁰ and, where it is made clearly to appear that the charter of a club was fraudulently obtained, or is being abused by its use to shield individuals or a corporation from punishment for violating the laws or otherwise, the charter, in a proper proceeding for that purpose, will be adjudged void.²¹ Also, a court of equity may decree the dissolution of a club, and wind up its affairs, where the objects for which the club was formed are no longer possible of attainment, and the dissension of the parties has substantially dissolved it;²² but, if such a condition of affairs is denied, the court before final hearing will only restrain the disposition or encumbrance of the property.²³

12. Purchase by committee

Defendants, five of whom had been designated as a committee to reorganize, a golf and country club, which had been incorporated as a business corporation, were held to have acted in good faith in purchasing property of club on its dissolution, and to have owed no duty to stockholders inconsistent with right to purchase, so that court was warranted in declining to set aside sale, or decreeing that defendants hold property in trust for stockholders.—*Anderson v. Johnson*, 210 S.W. 23, 277 Mo. 132.

13. Wash.—*Burckhardt v. Chambers*, 294 P. 977, 160 Wash. 256.

Burden of proof

In action by former members for accounting and dissolution of duck shooting club, burden of proof rested on plaintiffs.—*Burckhardt v. Chambers*, supra.

14. N.Y.—*In re Sportsmen's Assoc.*, 2 N.Y.S. 63, 15 N.Y.Civ.Proc. 215.

15. Tex.—*Alamo Club v. State*, Civ. App., 147 S.W. 639.
11 C.J. p 924 note 47.

16. Del.—*Southerland v. Decimo Club*, 142 A. 786, 16 Del.Ch. 183.
11 C.J. p 924 note 43.

Free passes

The mere fact that a racing association issued free passes to secure favorable publicity, which it had a right to do, supra § 9, does not warrant a forfeiture of its charter.—*Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 238 Ky. 739.

17. Ky.—*Commonwealth v. Kentucky Jockey Club*, supra.
11 C.J. p 923 note 36.

18. Del.—*Southerland v. Decimo Club*, 142 A. 786, 792, 16 Del.Ch. 183.

"It is doubtless true that a social organization may be incorporated under the non-profit provision of our statute and within reasonable and proper limits engage in an activity to make profit. How far such an organization can go in that direction it is impossible to say in general terms. Each case . . . must stand on its own facts. Where, however, a non-profit corporation shows by its conduct that profit-making is one of its important purposes, if not its chief one, I can see no escape from the conclusion that it has misused and abused its franchise. If its sponsors desire to resort to the act of this state for its incorporation, resort may be had to the provisions appropriate for that form of organization. It was not the intention of the Legislature to allow the easy and liberal provisions of the corporation and revenue statutes applicable to corporations organized not for profit to be enjoyed by corporations whose purpose is in fact to engage in business for profit to such an extent that the desire for profits constitutes a conspicuous object of its existence."—*Southerland v. Decimo Club*, supra.

Mere liquidation by a club of a profit earning corporation organized by the club's promoter is insufficient of itself to warrant forfeiture of the

club's charter.—*Southerland v. Decimo Club*, supra.

Purchase of certificates in trust

Nonprofit club, requiring members purchase certificates in trust to earn profits through another corporation for itself and members, was subject to dissolution.—*Southerland v. Decimo Club*, supra.

19. Mo.—*State v. Springfield African Social, etc., Club*, 154 S.W. 458, 169 Mo.App. 137.

20. Md.—*State v. Easton Social, etc., Club*, 20 A. 783, 73 Md. 97, 10 L.R.A. 64.

11 C.J. p 923 note 37.

Reliance on court construction

The fact that a social club, in reliance on a construction placed by the supreme court on the Dramshop Act and on legislative acquiescence in such decision, has enjoyed the privilege of selling intoxicating liquor, and made expenditures in anticipation of the continued enjoyment of such privilege, will not preclude a forfeiture of its charter for abuse of its corporate powers by keeping and selling liquor.—*State v. Missouri Athletic Club*, 170 S.W. 904, 261 Mo. 576, L.R.A.1915C 876, Ann. Cas.1916D 931.

21. Mo.—*State v. Meramec Rod, etc., Club*, 98 S.W. 815, 121 Mo. App. 364.

Va.—*Hanger v. Com.*, 60 S.E. 67, 107 Va. 872.

22. Ill.—*Eury v. Merrill*, 42 Ill.App. 193.

23. N.J.—*Gobert v. Eckhard, Ch.*, 17 A. 305.

11 C.J. p 923 note 42.

Receivership. A receiver may be appointed for a club in a proper case,²⁴ and the usual rules as to receiverships apply.²⁵

§ 27. Actions

The usual rules as to actions by or against associations and corporations apply to actions by or against clubs.

24. Mo.—Price v. St. Louis Bankers' Trust Co., 178 S.W. 745.

25. Distribution of funds

Funds collected from members of club in payment of participation certificates issued by trust organized by club, which funds were deposited by club's agents in banks pending determination of right to issue certificates, was properly awarded to members and not to receiver of club which became insolvent, where agents collected money under agreement that money would be returned if corporation commissioner failed or refused to issue permit to sell certificates.—*Mifflin v. Cunningham*, C.C.A.Cal., 32 F.2d 53.

In suit by receiver of club to collect dues which had been collected from members by agents of trust created by club, in payment of trust participation certificates, evidence of agent that he had been told by club board that permit to issue certificates had not been issued by corporation commissioner and that sums collected would be impounded and returned to members if permit was not received, while incompetent to prove that commissioner had made such order, was proper preliminary testimony in connection with his evidence that he thereafter informed members that money would be so impounded and would be so returned.—*Mifflin v. Cunningham*, C.C.A.Cal., 32 F.2d 53.

26. Cal.—Camm v. Justice's Court of Santa Rosa Tp., 170 P. 409, 35 Cal.App. 293.

11 C.J. p 932 note 25.

Joint and several liability

Members of club building telephone line being liable jointly and severally, judgment was recoverable against one member without necessity of suing others.—*Golden v. Wilder*, Tex.Civ.App., 4 S.W.2d 140.

Right to invoke court's aid

Members of unincorporated informal duck shooting club which owned lease of shooting preserve acquired property rights to protect which they may, in proper case, invoke aid of courts.—*Burckhardt v. Chambers*, 294 P. 977, 160 Wash. 256.

27. Ill.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

11 C.J. p 932 note 26.

Form of action

Club organizer, to whom membership certificates, wrongfully canceled for nonpayment of dues, were issued as compensation may sue in assumpsit on contract or bring action in case.—*Genslinger v. New Illinois Athletic Club of Chicago*, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

Venue

Action for injuries, sustained from shot fired by agent of club outside of club grounds in county wherein club and agent resided, could not be maintained in another county wherein officers of club resided, where officers were not individually liable for acts of agent who had been instructed by officers not to use force on trespassers.—*Diversion Lake Club v. Self*, Tex.Civ.App., 71 S.W.2d 553.

23. Allegations held sufficient

In action on contract for payment of sum of money to club when board of managers should decide that construction of clubhouse was warranted, allegation that defendant made a partial payment was a sufficient allegation of defendant's acceptance.—*Rodway v. Botterel*, 11 N.E.2d 201, 56 Ohio App. 497.

Immaterial matters

In club's action against stockholder to recover annual dues and charges for 'privilege of using property and clubhouse facilities, whether stockholder resigned from club was immaterial, where charges for use of club facilities were not assessments against stockholder or stock but a recurring annual charge which holder of stock agreed to pay as long as stock certificate was registered in his name.—*Larchmont Shore Club v. Field*, 1 N.Y.S.2d 884, 253 App.Div. 897.

Purpose of organization

It is not necessary, to authorize the maintenance of an action against the members of a club by their common name, to show by the complaint the specific purpose or purposes for which the members of the club had associated themselves together.—*Camm v. Justice's Court of Santa Rosa Tp.*, 170 P. 409, 35 Cal.App. 293.

Affirmative defenses

Where contract provided for payment of sum of money to club when board of managers should decide

If a club is unincorporated, actions by or against it are governed by the rules which apply to actions by and against associations generally;²⁶ but, if the club is incorporated, actions by or against it are governed by the rules applicable to actions by and against corporations in general.²⁷ Accordingly, the general rules in such actions as to pleadings, issues,²⁸ and evidence,²⁹ are applicable in actions of

that construction of clubhouse was warranted, board of managers must decide within a reasonable time, and its failure to do so would be a matter of affirmative defense in action to recover balance due under contract.—*Rodway v. Botterel*, 11 N.E. 2d 201, 56 Ohio App. 497.

Matters raised by demurrer

In action on contract guaranteeing payment of club membership on condition that two thousand two hundred fifty memberships shall have been accepted or underwritten, uncertainty and indefiniteness in allegations with reference to condition of acceptance or underwriting of two thousand two hundred fifty members could not be raised by demurrer.—*Rodway v. Botterel*, supra.

29. Burden of proof

Club, failing to return valuables deposited by member for safe-keeping, has burden of showing absence of negligence.—*Greer v. Los Angeles Athletic Club*, 258 P. 155, 84 Cal.App. 272.

Evidence held admissible

Club balance sheet was admissible to show club's solvency in action for wrongful cancellation of membership certificates issued to organizer as compensation.—*Genslinger v. New Illinois Athletic Club of Chicago*, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

Evidence held inadmissible

In action by club's paying guest for injuries sustained when rug slipped, evidence regarding practice of using safety devices to prevent slipping of rugs was properly excluded.—*Kitchen v. Women's City Club of Boston*, 166 N.E. 554, 267 Mass. 229.

Evidence held sufficient to warrant finding of negligence of club in keeping member's valuables deposited for safe-keeping.—*Greer v. Los Angeles Athletic Club*, 258 P. 155, 84 Cal.App. 272.

Evidence held insufficient

(1) To show negligence of club member in making deposit of valuables for safe-keeping.—*Greer v. Los Angeles Athletic Club*, supra.

(2) To sustain finding that chairman of house committee abandoned property taken from locker or failed to protect it.—*Blackinton v. Pillsbury*, 156 N.E. 895, 260 Mass. 123.

this character. Similar general rules are, by a parity of reasoning, also pertinent in questions involv-

ing trial,³⁰ and damages.³¹

CLUTCH. A device introduced in the transmission some place between the mechanism in which power is created and the mechanism to which it is applied and which serves to make and break the connection between the two;¹ it has been held synonymous with "grip."²

CO. A prefix to words, meaning "with" or "in conjunction" or "joint."³ As an abbreviation for "company," and "county," or as the chemical symbol for cobalt, see Abbreviations 1 C.J.S. p 276 note 5.

COACCIÓN. In Spanish penal law, the offense of illegally and forcibly preventing another from doing some lawful act, or of compelling him to do a lawful or an unlawful one. It is committed by a public official who exceeds his authority by making an illegal arrest, or by dispersing a lawful gathering. So, a claimant to property who uses force to dispossess an adverse claimant is guilty of this offense. A similar rule is applied to a creditor who forcibly seizes the debtor's property to satisfy the

claim. A justice of the peace has no jurisdiction to try one accused of this crime, nor can one be convicted thereof under a complaint charging amenazas; but as the crime of detención ilegal cannot be committed without committing that form of coacción which consists in compelling one to do what he does not wish to do, under a complaint for the former crime a conviction may be had for coacción.⁴

COACH. A kind of carriage;⁵ a vehicle that turns, or that runs by turning, on wheels.⁶ It is a generic term,⁷ has been used to designate the closed passenger car of a cable train,⁸ and has been construed as embracing chariots, mail coaches, omnibuses, stage coaches,⁹ and railroad cars or carriages.¹⁰ "Coach" has been compared or held synonymous with, "car" see Car 12 C.J.S. p 1139 notes 87, 89; has been distinguished from other vehicles chiefly, as being a covered box, hung on leathers, with four wheels;¹¹ and specifically has been contrasted with,

30. Questions held for jury

(1) Whether steward had authority to bind club.—Heckel v. Cranford Country Club, 117 A. 607, 97 N.J.Law 538.

(2) Where jockey was thrown from horse which bolted through open gate in fence around track, whether jockey club was negligent in leaving gate open.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99.

Evidence insufficient for jury

In suit to recover purchase price of mowers from members of a golf club, evidence which failed to show that members other than one who signed notes for purchase price authorized such purchase, joined in contract for purchase, signed purchase-money notes, or authorized some one to sign for them, was insufficient for jury on question of liability of members other than one signing notes.—Bell v. Radabaugh, 62 P.2d 79, 178 Okl. 106.

Instructions held proper

Mo.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99.

Instructions held erroneous

Ill.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill. App. 298, transferred 163 N.E. 707, 332 Ill. 316.

Verdict and findings

(1) Finding that club was liable as lodging house keeper for deposit

of valuables by member was not inconsistent with finding that it was liable as bailee for hire.—Greer v. Los Angeles Athletic Club, 258 P. 155, 84 Cal.App. 272.

(2) Verdict awarding maximum value of residence club membership as damages for wrongful cancellation of membership certificates, issued to organizer as compensation was held to be erroneous.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

31. Elements of damage

(1) Loss of wife's company and services was not proper element of damage for club's failure to accord plaintiff privileges.—Jackson v. The Gables, 297 P. 983, 113 Cal.App. 80.

(2) Value of club membership was held not to be recoverable as damages for wrongful cancellation of membership certificates issued to organizer as compensation.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill.App. 298, transferred 163 N.E. 707, 332 Ill. 316.

Interest

Club, failing to return member's valuables deposited for safe-keeping, is liable for interest from date of demand.—Greer v. Los Angeles Athletic Club, 258 P. 155, 84 Cal.App. 272.

1. U.S.—Eclipse Mach. Co. v. Har-

ley-Davidson Motor Co., C.C.A.Pa., 252 F. 805, 806.

2. Minn.—Bishop v. St. Paul City R. Co., 50 N.W. 927, 48 Minn. 26, 11 C.J. p 932 note 1 [a].

3. Black L.D.

4. Philippine.—U. S. v. Mena, 11 Philippine 543, 545, 11 C.J. p 933 notes 8-16.

5. Ohio.—Cincinnati, Lebanon & Springfield Turnp. Co. v. Neil, 9 Ohio 11, 12.

6. N.Y.—New York v. Third Ave. R. Co., 22 N.E. 755, 117 N.Y. 404, 410—New York v. Third Ave. R. Co., 87 N.Y.S. 584, 586, 42 Misc. 599.

7. Ohio.—Cincinnati, Lebanon & Springfield Turnp. Co. v. Neil, 9 Ohio 11, 12.

8. Minn.—Bishop v. St. Paul City R. Co., 50 N.W. 927, 48 Minn. 26, 31.

9. Ohio.—Cincinnati, Lebanon & Springfield Turnp. Co. v. Neil, 9 Ohio 11, 12.

10. Cal.—Ex p. Galivan, 122 P. 961, 162 Cal. 331, 333.

Mass.—Doherty v. Ayer, 83 N.E. 677, 678, 197 Mass. 241, 125 Am.S.R. 355, 14 L.R.A., N.S., 816.

N.Y.—New York v. Third Ave. R. Co., 22 N.E. 755, 117 N.Y. 404, 409.

11. Ohio.—Cincinnati, Lebanon & Springfield Turnp. Co. v. Neil, 9 Ohio 11, 12, citing Encycl.Am. 271.

or distinguished from, "carriage" see Carriage 12 C.J.S. p 1153 note 24, and "grip-car."¹²

Hackney coach. A coach let for hire, whether standing in the streets, or kept in stable for hire.¹³ "Hackney coach" has been held not to include a wagon used in the transportation of property and goods of grocers and merchants,¹⁴ and has been distinguished from "stage coach,"¹⁵ and "wagon."¹⁶

Mail coach. A coach that carries the mail.¹⁷

Stage coach. A coach or other carriage running regularly from one place to another, usually and chiefly employed in the transportation of mails, passengers, and baggage.¹⁸ "Stage coach" has been held to include an automobile used in the place of a stage coach and serving the same purpose,¹⁹ and has been held synonymous with "car" see Car 12 C.J.S. p 1139 note 87.

Other phrases: "Coach, chariot, phaeton, or other four-wheel spring carriage;"²⁰ and also "passenger coaches."²¹

COACT. Defined in the Century dictionary as meaning to act together.

Phrase: "Coacting therewith."²²

COADJUTOR. An assistant, helper; or ally; particularly a person appointed to assist a bishop who from age or infirmity, is unable to perform his duty; also an overseer, (coadjutor of an executor), and one who disseizes a person of land not to his own use, but to that of another.²³

Phrase: "Coadjutor bishop" see Bishop 11 C.J. S. p 350 note 80.

COADMINISTRATOR. As a joint administrator, see the C.J.S. title Executors and Administrators § 1041, also 11 C.J. p 934 note 34.

COADUNATIO. A uniting or combining together of persons; a conspiracy.²⁴

COADVENTURER. A joint adventurer. The relationship of joint adventure has been defined, and compared with, or distinguished from, other relations in the C.J.S. title Joint Adventures § 1, also 33 C.J. p 841 note 1-p 845 note 66.

COAL.

As a Noun

A mineral defined in the C.J.S. title Mines and Minerals § 2, also 11 C.J. p 934 note 39.

Contract coal. Coal contracted for at the mines by brokers to cover their own contracts for future delivery, distinguished from "spot coal."²⁵

Spot coal. Coal already loaded on cars and ready to move, distinguished from "contract coal."²⁶

Other phrases: "Anthracite coal," "bituminous coal," "egg coal," "lump coal," "merchantable coal," "minable coal," "mine-run coal," "rice anthracite coal," "screened coal" see the C.J.S. title Mines and Minerals § 2, also 40 C.J. p 648 note 45, p 748 notes 92, 93, 99, 1, p 749 notes 29-31, p 754 notes 48, 49, 55, 56 and p 1014 note 43-p 1015 note 49, and "steam egg coal" see the C.J.S. title Mines and Minerals § 2, also 60 C.J. p 15 note 7.

As an Adjective

Coal dust. Defined in the Century dictionary as the dust of coal, or powdered coal. As constituting

12. Minn.—Bishop v. St. Paul City R. Co., 50 N.W. 927, 48 Minn. 26, 31.

13. N.Y.—Masterson v. Short, 33 How.Pr. 481, 486.

14. Kan.—Snyder v. North Lawrence, 8 Kan. 82, 83.

15. Ky.—Burton v. Monticello & Burnside Turnpike Co., 109 S.W. 319, 33 Ky.L. 85.

16. Cal.—Quigley v. Gorham, 5 Cal. 418, 63 Am.D. 139.

Kan.—Snyder v. North Lawrence, 8 Kan. 82, 84.

Nev.—Edgecomb v. His Creditors, 7 P. 533, 535, 19 Nev. 149.

17. Ohio.—Cincinnati, Lebanon & Springfield Turnpike Co. v. Neil, 9 Ohio 11, 12.

18. Conn.—Talcott Mountain Turnpike Co. v. Marshall, 11 Conn. 185,

199—Middlesex Turnpike Co. v. Wentworth, 9 Conn. 371, 373.

Ky.—Burton v. Monticello & Burnside Turnpike Co., 109 S.W. 319, 33 Ky.L. 85.

Ohio.—Cincinnati, Lebanon & Springfield Turnpike Co. v. Neil, 9 Ohio 11, 12.

11 C.J. p 933 notes 18-21.

19. Ky.—Burton v. Monticello & Burnside Turnpike Co., 173 S.W. 144, 146, 162 Ky. 787.

20. Mass.—Housatonic River Turnpike Corporation v. Frink, 15 Pick. 443, 444, 32 Mass. 443, 444.

21. Pa.—Pennsylvania R. Co. v. Public Service Commission, 67 Pa. Super. 569, 574.

Pullman sleepers as "passenger coaches" within railroad full crew statutes see the C.J.S. title Railroads § 401, also 51 C.J. p 984 note 70.

22. As meaning "governing" or "commanding"

Where a vaporizer was described as being comprised of "a shell having air and oil supplies and a valve coacting therewith, two springs, and means for bringing one or both into action to resist the opening of the valve," the court said: "The term coacting therewith is as vague as possible, but the specifications and drawings show its meaning to be governing or commanding, so that neither oil nor air can enter unless the valve is open."—Stromberg Motor Devices Co. v. Parker, D.C.Ill., 204 F. 462, 463.

23. Black L.D.

24. Black L.D.

25. U.S.—Cory v. Logan Coal & Supply Co., C.C.A.Fla., 48 F.2d 28, 30.

26. U.S.—Cory v. Logan Coal & Supply Co., supra.

nuisance see the C.J.S. title Nuisances § 23, also 6 C.J. p 686 note 88 [a].

Coal note. A species of promissory note, formerly in use in the port of London, containing the phrase "value received in coals."²⁷

Coal tar. Defined in the Standard Dictionary as black pitch distilled from bituminous coal, condensed in the manufacture of coal gas and used in the arts; and said to yield the aniline dyes and similar compounds.²⁸ As used in tariff schedules see the C.J.S. title Customs Duties § 32, also 17 C.J. p 555 note 39.

Other phrases: "Coal bank," see the C.J.S. title Mines and Minerals § 3, "coal barge," see Barge 9 C.J.S. p 1542 note 74, "coal bed," see Bed 10 C.J.S. p 224 note 77, also the C.J.S. title Mines and Minerals § 3, and 40 C.J. p 741 note 30 [a], "coal car," see the C.J.S. title Railroads § 1, also 11 C.J. p 934 notes 45, 46, "coal elevator,"²⁹ "coal hustler,"³⁰ "coal land, or lands," see the C.J.S. title Mines and Minerals §§ 90-94, also 40 C.J. p 851 note 28-p 854 note 93, "coal lease," see the C.J.S. title Mines and Minerals § 164, also 11 C.J. p 935 note 56, "coal mine," see the C.J.S. title Mines and Minerals § 1, also 11 C.J. p 935 note 58, "coal oil," see the C.J.S. title Mines and Minerals § 2, also 11 C.J. p 935 notes 60-62, "coal privileges," see the C.J.S. title Mines and Minerals § 3, also 11 C.J. p 935 note 63, "coal seam," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 741 notes 27-31, "coal shed," see the C.J.S. title Nuisances § 75, also 46 C.J. p 697 notes 56-58, "coal tar preparation,"³¹ "coal rein," see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 746 notes 55-58, "coal yard," see the C.J.S. title Nuisances § 75, also 46 C.J. p 697 notes 56-58, and "use . . . of the coal banks on said land," see Bank 8 C.J.S. p 385 note 35.

COALITION. Defined in general by the Standard Dictionary as meaning a voluntary joining of per-

sons or parties, for the purpose of combining their resources, as in the support of some plan or policy, especially of states against a common enemy; the formation of an alliance, especially for temporary purposes.

In French law, an unlawful agreement among several persons not to do a thing except on some conditions agreed upon; particularly, industrial combinations, strikes, etc.; a conspiracy.³²

COARSE. Defined in the Standard Dictionary as meaning composed of large, thick, or rough particles; not fine or delicate in texture or structure.

Phrases: "Coarse meal,"³³ and "good coarse salt."³⁴

COASSIGNEE. One of two or more assignees of the same subject matter.³⁵ The word "assignee" has been defined and distinguished from other terms in Assignments § 1 d.

COAST.

As a Noun

The seaboard of a country or the seashore.³⁶ More specifically, the contact of the mainland with the main sea, where no bay intervenes, and with the latter, wherever it exists.³⁷ Depending on the context in each case, "coast" has been held to include shores of the bays,³⁸ tide and overflowed lands along a river emptying into the ocean,³⁹ and the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified;⁴⁰ and has been distinguished from "shoals."⁴¹

Pacific coast. A term frequently applied to that portion of the country which drains into the Pacific Ocean.⁴²

Other phrases: "At all or any port or place on the coast of," see At 7 C.J.S. p 155 note 85, "Atlantic coast," see Atlantic 7 C.J.S. p 167 note 21,

27. Black L.D.

28. U.S.—Ayling v. Hull, C.C.Mass., 2 F.Cas.No.686, 2 Cliff 494, 497. 11 C.J. p 935 notes 67, 68.

29. Mass.—Cochran v. Roemer, 192 N.E. 58, 63, 287 Mass. 500.

30. U.S.—John P. Agnew & Co. v. Hoage, D.C.D.C., 17 F.Supp. 606, 607.

31. U.S.—Schulze-Berge v. U. S., C. C.N.Y., 66 F. 748, 749. 1 C.J. p 935 note 66 [a].

32. Black L.D.

33. "Cracked corn" distinguished Feb.—State v. Chicago, B. & Q. R. Co., 101 N.W. 23, 24, 72 Neb. 542. Also known as "chop" see Chop ante p 1113 note 67.

34. Vt.—Goss v. Turner, 21 Vt. 437, 441.

35. Black L.D.

36. U.S.—Ravesies v. U. S., D.C.Ala., 35 F. 917, 919—U. S. v. The James Morrison, D.C.Mo., 26 F.Cas.No.15-465, Newb.Adm. 241, 253—U. S. v. William Pope, D.C.Mo., 28 F.Cas. No.16,703, Newb.Adm. 256, 259.

37. Tex.—Hamilton v. Menifee, 11 Tex. 718, 751.

38. Tex.—Hamilton v. Menifee, supra.

39. Or.—Pacific Milling & Elevator Co. v. Portland, 133 P. 72, 77, 65 Or. 349, 46 L.R.A.,N.S., 363.

40. Drifted material at the mouth of a river

"The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, form a part of the coast."—Mowat v. North Vancouver, 9 B.C. 205, 206.

41. U.S.—Soult v. L'Africaine, D.C. S.C., 22 F.Cas.No.13,179, Bee 204, 207, 208.

42. Or.—Pacific Milling & Elevator Co. v. Portland, 133 P. 72, 77, 65 Or. 349, 46 L.R.A.,N.S., 363.

and "on the seashore and coast,"⁴³ also "coasts or shores of the United States,"⁴⁴ and "from the coasts."⁴⁵

As a Verb

—**Present Tense.** In a maritime sense, to navigate along the shore.⁴⁶

In a different sense, to slide on a sled down a hill or an incline covered with snow or ice; also to descend a hill on a bicycle, removing the feet from the pedals, or to ride, glide, or move by, or as by, the force of gravity.⁴⁷

—**Coasting.** As a verbal noun, in a maritime sense, "coasting" is defined in the Century Dictionary as meaning the act or business of sailing along the coast or from port to port in the same country for purposes of trade; and the term has been held not applicable to a ferry crossing a river.⁴⁸

In another and commonly accepted sense, the term imports the movement of a sled or vehicle by momentum due to some previously exerted force or to the force of gravity;⁴⁹ and has been defined as meaning the movement of vehicles down grade by force of gravity;⁵⁰ also the sport of sliding down hill on a sled or car, or of riding a bicycle, as down a slope, without working the pedals.⁵¹

As relating to the liability of a municipal corporation for injuries due to coasting on the streets see the C.J.S. title Municipal Corporations § 800, also 43 C.J. p 998 notes 23-26.

Coasting trade. A well understood term, defined as meaning the trade along the shore;⁵² commercial

intercourse carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river.⁵³ The term has been held to import sea-going trade as distinguished from internal commerce;⁵⁴ has been held applicable to a voyage from New Jersey to New York,⁵⁵ or the trade between the United States and Puerto Rico,⁵⁶ but not to a ferry crossing a river.⁵⁷ The terms "coasting trade" and "coastwise trade" have been used synonymously.⁵⁸

With reference to the federal regulation of vessels see the C.J.S. title Commerce § 79, also 12 C.J. p 67 note 94-p 69 note 8, and to the obligation of taking on a pilot, see the C.J.S. title Pilots § 7, also 48 C.J. p 1193 note 37.

Coasting trade license. A legislative authority to carry on the coasting trade;⁵⁹ a warrant to traverse the waters washing or bounding the coasts of the United States.⁶⁰

Coasting vessel. A term ordinarily applied to a vessel plying exclusively between domestic ports, and usually to one engaged in domestic trade as distinguished from a vessel engaged in the foreign trade or plying between a port of the United States and a port of a foreign country.⁶¹

Coasting voyage. A voyage in a vessel engaged in the coasting trade.⁶²

As an Adjective

"Coast waters," see the C.J.S. title Collision § 2, also 11 C.J. p 1014 notes 64, 65.

43. Or.—Pacific Milling & Elevator Co. v. Portland, supra.

44. U.S.—Soul v. L'Africaine, D.C. S.C., 22 F.Cas.No.13,179, Bee 204.

45. "Off the coasts" distinguished U.S.—Soul v. L'Africaine, supra.

"On the coasts" distinguished U.S.—Soul v. L'Africaine, supra.

46. U.S.—U. S. v. The James Morrison, D.C.Mo., 26 F.Cas.No.15,465, Newb.Adm. 241, 253.

"To cross a river" distinguished U.S.—U. S. v. The William Pope, D. C.Mo., 28 F.Cas.No.16,703, Newb. Adm. 256.

47. Iowa.—Samuelson v. Sherrill, 280 N.W. 596, 599, quoting Century D., and Webster D.

48. U.S.—U. S. v. The James Morrison, D.C.Mo., 26 F.Cas.No.15,467, Newb.Adm. 241.

49. N.Y.—Tyne v. B. F. Goodrich Co., 297 N.Y.S. 425, 428, 252 App. Div. 24.

50. Minn.—Peterson v. Minneapolis

St. R. Co., 95 N.W. 751, 752, 90 Minn. 52.

51. Iowa.—Samuelson v. Sherrill, Iowa, 280 N.W. 596, 599, quoting New Standard D.

52. U.S.—U. S. v. The James Morrison, D.C.Mo., 26 F.Cas.No.15,465, Newb.Adm. 241, 253.
11 C.J. p 936 note 93.

53. N.Y.—North River Steamboat Co. v. Livingston, 3 Cow.N.Y. 713, 747.
11 C.J. p 936 note 94.

54. Mich.—American Transportation Co. v. Moore, 5 Mich. 368, 388.

55. U.S.—Gibbons v. Ogden, N.Y., 9 Wheat. 1, 214, 6 L.Ed. 23.
11 C.J. p 936 note 94 [a].

56. **Depending on legislative intent**
It has been said that while the original and primary significance of the term is restricted to trade along the contiguous line of coast of the United States, the meaning of the term, when used by congress, depends on the legislative intent, and may include trade between the United

States and Puerto Rico.—Bigley v. New York & P. R. SS. Co., D.C. N.Y., 105 F. 74, 78.

57. U.S.—U. S. v. The William Pope, D.C.Mo., 28 F.Cas.No.16,703, Newb. Adm. 256.
11 C.J. p 936 note 93 [a].

58. U.S.—Ravesies v. U. S., C.C.Ala., 37 F. 447.

Md.—Baltimore & Philadelphia Steamboat Co. v. State Tax Commission of Maryland, 145 A. 770, 772, 157 Md. 279.

N.J.—Gordon v. Blackton, 186 A. 689, 690, 117 N.J.Law 40.

59. N.Y.—North River Steamboat Co. v. Livingston, 3 Cow.N.Y. 713, 748.

60. U.S.—Veazie v. Moor, Me., 14 How. 568, 575, 14 L.Ed. 545.

61. U.S.—Belden v. Chase, N.Y., 14 S.Ct. 264, 271, 150 U.S. 674, 37 L. Ed. 1218.

62. N.Y.—North River Steamboat Co. v. Livingston, 3 Cow.N.Y. 713, 747.
11 C.J. p 936 note 89.

Coast guard. In English law, a body of officers and men raised and equipped by the commissioners of the admiralty for the defense of the coasts of the realm, and for the more ready manning of the navy in case of war or sudden emergency, as well as for the protection of the revenue against smugglers.⁶³

COASTER. A term ordinarily applied to a vessel plying exclusively between domestic ports, and usually to one engaged in domestic trade as distinguished from "a vessel engaged in foreign trade or plying between a port of the United States and a port of a foreign country," "an ocean going vessel calling at two domestic ports," or "a pleasure yacht."⁶⁴

COASTWISE. By way of the coast; along shore.⁶⁵ Applied to such vessels as sail coastwise from one port to another port, the term has been held to embrace ships and vessels performing voyages coastwise from state to state, but to exclude those boats which never go out of sight of the port from which they move, and are used merely as ferry boats to cross a river.⁶⁶

Coastwise commerce. It has been said that the term "coastwise," used in its commercial or maritime sense as defining a class of water-borne commerce, includes traffic on a bay, as well as that which goes outside the bay to other domestic ports.⁶⁷

Coastwise trade. Coasting trade; trade or intercourse carried on by sea between two ports or places belonging to the same country.⁶⁸ In a particular context, however, it has been held that the term does not include trade between the Atlantic and Pacific ports of the United States.⁶⁹ "Coastwise trade" has been held synonymous with "coasting trade" see Coast *supra* note 58; has been compared with "commerce;"⁷⁰ and has been distinguished from "foreign trade."⁷¹

Plying coastwise. A statutory term which, in a particular connection, has a settled meaning, and is intended to indicate vessels engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country.⁷²

Other phrases: "Any vessel engaged in the coastwise trade,"⁷³ "being in the coastwise trade,"⁷⁴ and "seamen engaged on vessels in the coastwise trade."⁷⁵

COAT.

As a Noun

Defined by the Standard Dictionary as a garment for outside wear. As applied to a coating for woven fabrics, "coat" has been defined as being a layer proposition that is integrate throughout, and is not usually broken up in any way nor subdivided.⁷⁶

"Coat of arms," see Arm 6 C.J.S. p 341 note 28.

As a Verb

—**Coated.** Defined by Webster as meaning clad in, or furnished or covered with, a coat.

Phrases: "Coated with . . . metal,"⁷⁷ and "rubber coated fabric."⁷⁸

—**Coating.** The present participle of the verb "coat," which, as a verbal noun, has been defined in general terms as meaning a covering; any substance spread over a surface for protection or ornamentation, as a coating of plaster or tin foil; and, as applied specifically to woven fabrics, a layer that lies on the surface and is anchored to the fabric in the pores of the fabric, distinguished from "saturating" and "saturation."⁷⁹ Applied specifi-

63. Black L.D.

64. U.S.—Belden v. Chase, N.Y., 14 S.Ct. 264, 271, 150 U.S. 674, 696, 37 L.Ed. 1218.

65. U.S.—Ravesies v. U. S., D.C.Ala., 35 F. 917, 919.

66. N.Y.—Birkbeck v. Ferry Boats, 17 Johns. 54, 57.

67. Md.—Baltimore & Philadelphia Steamboat Co. v. State Tax Commission of Maryland, 145 A. 770, 771, 157 Md. 279.

Dictionary definition of term differs
"The meaning of the term 'coastwise commerce,' as defined by lexicons or dictionaries, differs from the meaning given to it by the courts, both federal and state, when called upon to construe statutes in which the term is used."—Baltimore & Phi-

adelphia Steamboat Co. v. State Tax Commission of Maryland, 145 A. 770, 772, 157 Md. 279.

68. U.S.—Ravesies v. U. S., C.C.Ala., 37 F. 447—Ravesies v. U. S., D.C. Ala., 35 F. 917, 919.

69. U.S.—U. S. v. Patten, C.C.Me., 27 F.Cas.No.16,007, Holmes 421.

70. **A part of "commerce"**
"Coastwise trade" may be a part of the commerce among the several states, but commerce among the several states is not necessarily 'coastwise trade.'—Ravesies v. U. S., D.C.Ala., 35 F. 917, 919.

71. U.S.—U. S. v. Patten, C.C.Me., 27 F.Cas.No.16,007, Holmes 421.

72. Cal.—San Francisco v. California Steam Nav. Co., 10 Cal. 504, 508.

73. U.S.—Ravesies v. U. S., C.C.Ala., 37 F. 447—Ravesies v. U. S., D.C. Ala., 35 F. 917, 919.

74. **"Going coastwise" distinguished**
U.S.—U. S. ex rel. Chong Mon v. Day, D.C.N.Y., 36 F.2d 278, 279.

75. N.J.—Gordon v. Blackton, 186 A. 639, 690, 117 N.J.Law 40.

76. U.S.—Respro, Inc. v. Vulcan Proofing Co., D.C.N.Y., 1 F.Supp. 45, 48.

77. U.S.—U. S. v. Baker, N.Y., 176 F. 730, 732, 100 C.C.A. 276, affirming, C.C., 168 F. 464.

78. U.S.—Respro, Inc. v. Vulcan Proofing Co., D.C.N.Y., 1 F.Supp. 45, 48.

79. U.S.—Respro, Inc. v. Vulcan Proofing Co., *supra*.

cally to bakers' specialties, a covering over fruit tarts in order to keep the fruit in position, compared with "frosting," "glace," "glazing," "shine," and "topping."⁸⁰

Phrases: "Apricot Coating,"⁸¹ "galvanizing or coating with metals,"⁸² and "machine for coating materials."⁸³

As an Adjective

Coat armor. Heraldic ensigns, introduced by Richard I from the Holy Land, where they were first invented.⁸⁴

COBBLE or **COBBLESTONE.** A stone rounded by the action of water, and of a size suitable for use in paving; and it has been held that there is nothing in the dictionaries to indicate that "cobblestone" and "waterstone" are synonymous or interchangeable.⁸⁵

COBRANZA. In Spanish law, the collection of that which is due.⁸⁶

COBRAR. A Spanish term meaning to recover;⁸⁷ also defined in Velázquez Dictionary as to collect, or receive what is due.

COBRA-VENOM REACTION. In medical jurisprudence, a method of serum-diagnosis of insanity from hæmolytic (breaking up of the red corpuscles of the blood) by injections of the venom of cobras or other serpents.⁸⁸

COCA-COLA. A term applied to a well-known soft drink, and of which it is a trade-mark; and it has been compared with the term "Extract of Coca and Kola."⁸⁹

COCAINE. A derivative, an alkaloid, or a crystalline alkaloid obtained from coca leaves;⁹⁰ and has

been held to include cocaine hydrochloride.⁹¹ It is a word in common use and about which there is no obscurity, controversy, or dispute, technically known as "alkaloid-cocaine,"⁹² and classed as a narcotic drug.⁹³

Phrases: "A preparation of cocaine," and "cocaine . . . or any of the salts, derivatives or compounds."⁹⁴

COCCYX. A small bone at the extremity of the backbone; the extreme end of the spine.⁹⁵

Phrase: "Coceyx neuralgia."⁹⁶

COCHIN OIL. A kind of cocoanut oil that comes from Cochin, China.⁹⁷

COCKBILL. See the C.J.S. title Collision § 2.

COCKET. In English law, a seal belonging to the customhouse, or rather a scroll of parchment, sealed and delivered by the officers of the customhouse to merchants, as a warrant that their merchandises are entered; likewise a sort of measure.⁹⁸

COCKFIGHTING. As the matching of gamecocks, see the C.J.S. title Gaming § 1, also 27 C.J. p 971 note 52; as cruelty to animals see Animals § 70 h notes 23, 24; as not ejusdem generis with baseball see Baseball 9 C.J.S. p 1554 note 39; and as used in a Sunday statute see the C.J.S. title Sunday § 18, also 60 C.J. p 1079 note 64.

COCK OF HAY. A small conical pile of hay.⁹⁹

COCKPIT. As the pit or ring for cockfighting, hence a gaming term, see the C.J.S. title Gaming § 1, also 27 C.J. p 983 note 18.

In quite a different sense, a name which used to be given to the judicial committee of the privy

Separable from fabric

"If the coating material is of sufficient strength it can be separated as a coat from the fabric."—Respro, Inc. v. Vulcan Proofing Co., supra.

80. N.Y.—Adolf J. Mainzer, Inc. v. Gruberth, 260 N.Y.S. 694, 696, 237 App.Div. 89, quoting Century D.

81. "Apricoating" compared N.Y.—Adolf J. Mainzer, Inc. v. Gruberth, supra.

82. "Welding metal sheets together" contrasted

U.S.—Boker v. U. S., 2 Cust.A. 162, 164, affirming 180 F. 959, 960, distinguishing U. S. v. Boker, 176 F. 730, 100 C.C.A. 276.

83. U.S.—Respro, Inc. v. Vulcan Proofing Co., D.C.N.Y., 1 F.Supp. 45, 48.

84. Black L.D.

85. N.Y.—Doyle v. New York, 69 N. Y.S. 120, 122, 58 App.Div. 588.

86. Escriche Diccionario.

87. Philippine.—Paterno v. Solis, 15 Philippine 153, 156.

88. Black L.D.

89. U.S.—Coca-Cola Co. v. American Druggists' Syndicate, D.C.N.Y., 200 F. 107.

11 C.J. p 938 notes 18, 19.

90. U.S.—Hughes v. U. S., C.C.A. Mo., 253 F. 543, 545.

Mont.—State v. Brennan, 300 P. 273, 275, 89 Mont. 479.

Use and effects

"Cocaine . . . is used as a local anaesthetic. In large doses cocaine produces intoxicating effects similar to those of the Indian hemp."—Baker v. State, 58 S.W.2d 534, 535, 123 Tex.Cr. 209.

91. U.S.—Hoffman v. U. S., C.C.A. Minn., 20 F.2d 328, 330.

92. Mont.—State v. Brennan, 300 P. 273, 275, 89 Mont. 479.

93. Tex.—Baker v. State, 58 S.W.2d 534, 535, 123 Tex.Cr. 209.

94. Cal.—People v. Bill, 35 P.2d 645, 648, 140 Cal.App. 389.

95. La.—Varnado v. Rex Petroleum Corporation, App., 147 So. 513, 516. 11 C.J. p 938 notes 21, 22.

96. Ky.—Louisville & N. R. R. Co. v. Reaume, 107 S.W. 290, 292, 128 Ky. 90, 32 Ky.L. 946.

97. U.S.—U. S. v. Oriental American Co., C.C.Or., 129 F. 249, 251.

98. Black L.D.

99. Cal.—People v. Doyle, 110 P. 453, 459, 13 Cal.App. 611, quoting Webster D.

11 C.J. p 938 note 28.

council, the council room being built on the old cockpit of Whitehall Place.¹

COCKTAIL. An American drink, strong, stimulating, and cold, made of spirits, bitters, and a little sugar, with various aromatic and stimulating additions.²

COCOA. A corruption of the word "cacao,"³ a South American shrub, the dry leaves of which are a powerful nerve stimulant.⁴

Phrases: "Cocoa butter," see Butter 12 C.J.S. p 62 note 97, "cocoa butterine," see Butterine 12 C.J.S. p 862 note 12, and "cocoa, manufactured."⁵

COCOANUT OIL. Defined by the Century Dictionary as an oil obtained from the fruit of the *cocos nucifera*, or cocoa palm. "Cocoanut oil" has been compared with, and distinguished from, "cocoa butterine" see Butterine 12 C.J.S. p 862 note 2 (1), and, in a particular connection, has been held to include refined as well as unrefined oil.⁶

Phrase: "Refined cocoanut oil."⁷

CO-CONSPIRATOR. See the C.J.S. title Conspiracy § 92, also 12 C.J. p 636 notes 61-64.

COCOON. Defined by the Standard Dictionary as the envelope spun by certain larval insects, as silkworms, in which they are inclosed in the chrysalis state.

Phrase: "Silk cocoons and silk waste."⁸

COCOTTE. A French word meaning a woman who leads a fast life, one who gives herself up for money; but in other associations it may mean a poached egg.⁹

C. O. D. As an abbreviation, see Abbreviations 1 C.J.S. p 276 note 5. For judicial notice of the meaning of C. O. D. see the C.J.S. title Evidence § 68, also 23 C.J. p 125 note 48 [c]; for the effect of a bill of lading C. O. D. as a lien on the vessel see the

C.J.S. title Shipping § 116, also 58 C.J. p 371 notes 17, 18; shipment of goods C. O. D. see the C.J.S. title Carriers § 186.

CODE. (Latin, *codex*;—Spanish, *código*;—French, *code*;—Italian, *codice*).

In General

As stated in 11 Corpus Juris p 940, this term is used in various senses, but probably the one most approved is that which treats a code as the written expression in concise and logical form of the entire body of law on one or more subjects. This, however, describes the code in its most advanced stage. Those of primitive times were mere collections of laws whose one distinguishing feature was their written form, examples of which are referred to in 11 Corpus Juris p 940.

Roman Codes

In 11 Corpus Juris p 940, an enumeration of early Roman codes is given, including the Gregorian, Hermogenian, and Theodosian codes, the effect of which, it has been said, was to supersede all previous laws.¹⁰

Corpus Juris Civilis. The system of Roman Jurisprudence compiled and codified under the direction of the Emperor Justinian in A. D. 528, 534, comprising the Institutes, Digest or Pandects, Codex, and Novels.¹¹ The history of Corpus Juris Civilis and its component parts is given in 11 Corpus Juris pp 942, 943. The Code of Justinian has perhaps had a greater effect upon the destinies of mankind than almost any other merely human work. The Code was compiled by Tribonian and his associates, who were directed to revise the statutes and laws in very much the same manner that the codification committees revise our statutes; and when the revision was completed, and adopted or proclaimed, it alone became the law, and all laws not included were repealed.¹²

1. Black L.D.

2. Kan.—State v. Pigg, 97 P. 859, 860, 78 Kan. 618, 130 Am.S.R. 387, 19 L.R.A.N.S., 848, quoting Century D.

11 C.J. p 939 note 31.

3. U.S.—U. S. v. Oriental American Co., C.C.Or., 129 F. 249.

4. Tex.—Baker v. State, 58 S.W.2d 534, 535, 123 Tex.Cr. 209.

1 C.J. p 939 notes 33, 34.

5. Includes preparations of chocolate

late
"The term 'cocoa, manufactured,' is not a commercial term, and is broad enough to include the prepa-

rations of chocolate which are not more specifically mentioned in the comprehensive statute of 1890."—In re Schilling, N.Y., 53 F. 81, 84, 3 C. C.A. 440.

6. U.S.—Fuerst v. U. S., N.Y., 176 F. 95, 100 C.C.A. 25.

7. Manufacture and use

"Made from the fleshy part of the cocoanut, a product of the cocoa palm . . . it is in fact cocoanut oil deodorized and prepared for edible purposes . . . placed on the market under various names indicating a different product and use from cocoanut oil, such as 'Mannheim but-

ter,' 'vegetable butter,' etc."—U. S. v. Oriental American Co., C.C.Or., 129 F. 249.

8. U.S.—Fawcett v. U. S., C.C.N.Y., 146 F. 83.

9. N.Y.—Rovira v. Boget, 148 N.E. 534, 535, 240 N.Y. 314.

10. Tex.—American Indemnity Co. v. City of Austin, 246 S.W. 1019, 1024, 1025, 112 Tex. 239, citing Corpus Juris.

11. Black L.D.

12. Tex.—American Indemnity Co. v. City of Austin, supra, citing Corpus Juris.

Mediæval and Modern European Codes

Codex Maximillianus Bavaricus Civilis, Constitutio Carolina Criminalis, Corpus Juris Canonici, and Corpus Juris Fredricianum are described and discussed in 11 Corpus Juris p 943.

Code Civil or Code Napoleon. The code which embodies the civil law of France. Framed in the first instance by a commission of jurists appointed in 1800. This code, after having passed both the tribunate and the legislative body, was promulgated in 1804 as the "Code Civil des Français." When Napoleon became emperor, the name was changed to that of "Code Napoléon," by which it is still often designated, although it is now officially styled by its original name of "Code Civil." Here for the first time the entire field of law was covered by a single group of codes, each devoted to a separate and distinct branch.¹³

Montenegrin Code. Independent of the movement inaugurated by the Napoleonic codification was that which produced the "General Code of Property of Montenegro." It was framed by Professor Bogisic of the University of Odessa, a Dalmatian, and came into force in 1888. Owing to the peculiar customs of the south Slavs with reference to the family law and succession, the code covers these subjects only with relation to property. It does, however, treat of persons in general (natural and artificial) as well as of obligations.¹⁴

New German codes. As stated in 11 Corpus Ju-

ris p 943, the German Civil Code (Gesetzbuch) initiated in 1874, and finally promulgated in 1896, has been pronounced "the most carefully considered statement of a nation's law the world has ever seen." It was the source of the civil code of Japan, which displaced one framed on French models, and also of the proposed civil code for China.

In the United States

In this country, a compilation of a body of law, or in a broader sense a system of rules;¹⁵ and so the term has been variously defined as a system of law, a systematic and complete body of law upon the subject to which it relates,¹⁶ or a general collection or compilation of laws by public authority.¹⁷ In a more restricted sense, the term means a collection and compilation of the general statutes in logical and concise form,¹⁸ although it has been stated that there is quite a difference between a code of laws for a state and a compilation of its statutes, the code being broader in its scope and more comprehensive in its purpose;¹⁹ also the word is used frequently in the United States to signify a concise, comprehensive, systematic reenactment of the law, deduced from both its principal sources, the preëxisting statutes, and the adjudications of courts, as distinguished from compilations of statute law only.²⁰

Phrases: "Adopting a code,"²¹ "Agricultural Code of Alabama,"²² "bills adopting a code,"²³

13. Black L.D.
11 C.J. p 943.

Code de commerce

A French code, enacted in 1807, as a supplement to the Code Napoléon, regulating commercial transactions, the laws of business, bankruptcies, and the jurisdiction and procedure of the courts dealing with these subjects.—Black L.D.

Code de procédure civil

That part of the Code Napoléon which regulates the system of courts, their organization, civil procedure, special and extraordinary remedies, and the execution of judgments.—Black L.D.

Code d'instruction criminelle

A French code, enacted in 1808, regulating criminal procedure.—Black L.D.

Code noir

French, the black code; a body of laws which formerly regulated the institution of slavery in the French colonies.—Black L.D.

Code pénal

The penal or criminal code of France, enacted in 1810.—Black L.D.

14. See "The Code of Property of Montenegro" 13 L.Quart.Rev. 70.

15. N.J.—Wilentz v. Crown Laundry Service, 172 A. 331, 332, 116 N.J.Eq. 40.

16. Ala.—Gibson v. State, 106 So. 231, 233, 214 Ala. 38.

11 C.J. p 941 notes 54, 57.

17. Miss.—Mobile, etc., R. Co. v. Weiner, 49 Miss. 725, 739.

18. Tenn.—Chumbley v. People's Bank & Trust Co., 60 S.W.2d 164, 166, 166 Tenn. 35.

What term implies

"A Code implies, first, a compilation of existing laws, systematic arrangement into chapters, or articles and sections with subheads, table of contents, and index for ready reference; second, a revision to harmonize conflicts, supply omissions, and generally clarify and make complete body of laws 'designed to regulate completely subjects to which they may relate.'"—Gibson v. State, 106 So. 231, 235, 214 Ala. 38.

19. Ga.—Central of Georgia R. Co. v. State, 31 S.E. 531, 104 Ga. 331, 342, 42 L.R.A. 518.

20. N.M.—Ex parte Bustillos, 194 P. 886, 890, 26 N.M. 449, citing *Corpus Juris*.

11 C.J. p 941 note 61.

Source immaterial

In discussing a codifying act the court said: "It will be immaterial as to the source of the matter included in the act, whether coming from old statutes, decisions of the court, or whether the matter be entirely new." —Ex parte Bustillos, supra, citing *Corpus Juris*.

21. What term signifies

"Whenever the legislature . . . employs such words as 'adopting a code,' no other legitimate or reasonable construction can be given the language itself than an intention to enact and make of force as a statute every provision in the entire work which it has under consideration."—Central of Georgia R. Co. v. State, 31 S.E. 531, 104 Ga. 331, 342, 42 L.R.A. 518.

22. Ala.—Gibson v. State, 106 So. 231, 233, 235, 214 Ala. 38.

23. Ala.—Gibson v. State, supra.

'Code of Alabama,"²⁴ "Code of Civil Procedure,"²⁵ 'Code of Tennessee,"²⁶ "code or codes of fair competition,"²⁷ "criminal code,"²⁸ and "Probate Code;"²⁹ also "revised codes."³⁰

CODEBTOR. Defined by Webster as a joint debtor.

Phrase: "Co-debtor with, or guarantor, or in any manner a surety for, a bankrupt."³¹

CODEFENDANT. Defined by Webster as a joint defendant.

As used in criminal prosecutions see the C.J.S. title Criminal Law § 754 et seq, also 16 C.J. p 644 note 74 et seq, and in civil actions or proceedings see the C.J.S. title Parties § 33 et seq, also 47 C.J. p 68 note 83 et seq.

CODEINE. An alkaloid associated in opium with morphine and therefore extracted in some manner from opium. It has been held that "codeine" is included within the phrase "opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof."³²

CODEX. A code or collection of laws, see Code ante; also a roll or volume, and a book written on paper or parchment.³³

CODICIL. See the C.J.S. title Wills § 1, also 68 C.J. p 412 note 30—p 413 note 46.

CODICILLUS (plural **CODICILLI**). In the Roman law, a codicil; also an informal and inferior kind of will, in use among the Romans.³⁴

CODIFICATION. The process of collecting and arranging the laws of a country or a state into a

code, that is, into a complete system of positive law, scientifically ordered, and promulgated by legislative authority.³⁵

As applied specifically to statutes, see the C.J.S. title Statutes §§ 271-276, also 59 C.J. p 887 note 94—p 898 note 45.

CODIFY. Defined in the Century Dictionary as meaning to reduce to a code or digest, as laws.

Phrases: "An act to codify the laws of the state;"³⁶ and also "codifying act."³⁷

COEMPLOYEE. See the C.J.S. titles Master and Servant § 327, also 39 C.J. p 550 note 21—p 552 note 59; and Negligence § 166, also 45 C.J. p 1028 note 5—p 1029 note 9.

COEMPTIO. Mutual purchase; also one of the modes in which marriage was contracted among the Romans.³⁸

COEMPTION. The act of purchasing the whole quantity of any commodity.³⁹

COEQUAL. Of equal rank; neither inferior nor superior to the other; having a common standing;⁴⁰ also as a verb, to be or become equal to; to have the same quantity, the same value, the same degree or rank, or the like, with; to be commensurate with.⁴¹

Phrase: "Co-equal liens."⁴²

COERCE. To compel to compliance, or to constrain to obedience or submission in a vigorous or forcible manner; to impel to, or restrain from, action by physical or moral force, to constrain to do or forbear by force or fear; to restrain by force, es-

24. Ala.—Anniston v. Calhoun County Comrs., 48 So. 605, 158 Ala. 68, 69.

11 C.J. p 941 note 54 [c].

25. Cal.—Lewis v. Dunne, 66 P. 478, 134 Cal. 291, 293, 86 Am.S.R. 257, 55 L.R.A. 833.

11 C.J. p 941 note 56 [a].

26. Tenn.—State v. Runnels, 21 S.W. 665, 92 Tenn. 320, 323.

11 C.J. p 941 note 59 [a].

27. U.S.—U. S. v. Schechter, D.C.N.Y., 8 F.Supp. 136, 143.

N.J.—Wilentz v. Crown Laundry Service, 172 A. 331, 332, 116 N.J. Eq. 40.

28. "Criminal jurisprudence" synonymous

11.—People v. Van Bever, 93 N.E. 725, 248 Ill. 136, 140.

29. Minn.—Johnson v. Harrison, 50 N.W. 923, 47 Minn. 575, 579, 28 Am.S.R. 382.

1 C.J. p 941 note 56 [b].

30. Tex.—American Indemnity Co. v. City of Austin, 246 S.W. 1019, 1024, 112 Tex. 239.

31. Mo.—Miller v. Collins, 40 S.W. 2d 1062, 1065, 328 Mo. 313.

32. Mont.—State v. Brennan, 300 P. 273, 275, 89 Mont. 479.

33. Black L.D.

Codex repetitæ prælectionis

The new code of Justinian, or the new edition of the first or old code, promulgated A.D. 534, being the one now extant.—Black L.D.

Codex vetus

The old code; the first edition of the Code of Justinian; now lost.—Black L.D.

34. Black L.D.

11 C.J. p 944.

35. Black L.D.

11 C.J. p 944 note 84.

36. N.M.—Ex parte Bustillos, 194 P. 886, 890, 26 N.M. 449.

37. N.Y.—Pratt Inst. v. New York,

75 N.E. 1119, 183 N.Y. 151, 157, 5 Ann.Cas. 198.

11 C.J. p 944 note 85 [a].

Operation and effect of codifying acts see C.J.S. title Statutes § 274, also 59 C.J. p 891 note 65—p 892 note 80.

38. Black L.D.

11 C.J. pp 944, 945.

39. Black L.D.

40. Okl.—Service Feed Co. v. City of Ardmore, 42 P.2d 853, 858, 171 Okl. 155.

41. Okl.—State ex rel. Com'rs of Land Office v. Board of Com'rs of Nowata County, 25 P.2d 1074, 1077, 166 Okl. 78, quoting Webster Int.D.

42. Okl.—Service Feed Co. v. City of Ardmore, 42 P.2d 853, 858, 171 Okl. 155—State ex rel. Com'rs of Land Office v. Board of Com'rs of Nowata County, 25 P.2d 1074, 1077, 166 Okl. 78.

pecially by law or authority; to repress; to curb; to compel or constrain to any action. Coerce means the use of some impelling force against the will or desire of the one coerced. The term imports some actual or threatened exercise of power possessed, or supposed to exist, or be possessed, by the party who, it is claimed, so acted.⁴³ "Coerce" has been compared with "compel."⁴⁴

Coercing the market. Interfering with the right of a particular dealer to enjoy the advantages of freedom to deal with him on the part of all who may voluntarily desire to deal with him.⁴⁵

Other phrases: "Coerce or compel,"⁴⁶ and "coerce, require, demand, or influence."⁴⁷

COERCION. Although it is difficult to define the term sharply, coercion exists where one is, by the unlawful conduct of another, induced to do or perform some act under circumstances which deprive him of the exercise of his free will; it may be either actual (direct or positive), where physical force is put on a man to compel him to do an act against his will, or implied (legal or constructive), where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse.⁴⁸ Violence has been held not to be an essential element,⁴⁹ for coercion is usually accomplished by indirect means, such as threats or intimidation,⁵⁰ physical force being more rarely employed,⁵¹ and may include a compulsion brought about by moral force or in some

other manner with or without physical force.⁵² Moreover, it has been held that coercion may be accomplished without threats.⁵³ While coercion does not necessarily imply force and violence or threats of its immediate use, the word does imply necessarily an actual overriding of the judgment and will,⁵⁴ and, in particular connections, by an act which is itself unlawful,⁵⁵ but the mere giving of information on request and the presentation of facts do not constitute coercion.⁵⁶

The term has been used in the sense of coercion in fact and coercion by law; by coercion in fact is meant that duress of person or goods, where present liberty of person or immediate possession of goods is so needful and desirable as that an action or proceedings at law to recover them will not at all answer the pressing purpose. Coercion by law occurs where a court, having jurisdiction of the person and the subject matter, has rendered a judgment which is collectable in due course. To such a case of coercion by law are to be added those quasi adjudications of inferior tribunals, such as assessors of taxes or assessments; where their proceedings are regular on their face, and on presentation make out a right to have and demand the amount levied, and to collect it in due course of law by the sale of goods or a municipal lease of real estate.⁵⁷ "Coercion," in particular connections, has been specifically defined as meaning an act of compelling by force or arms, compulsion, duress, force, or forcible constraint;⁵⁸ has been generally embraced in the term "duress of goods,"⁵⁹ and has been compared

43. U.S.—*U. S. v. American Naval Stores Co.*, C.C.Ga., 172 F. 455, 462.
Del.—*Fluharty v. Fluharty*, Super., 193 A. 838, 839, quoting *Century D. Ind.—State v. Darlington*, 53 N.E. 925, 153 Ind. 1, 3.
Minn.—*Smith v. Daniels*, 136 N.W. 584, 586, 118 Minn. 155.
11 C.J. p 945 notes 88–93.

44. Ind.—*State v. Darlington*, 53 N.E. 925, 926, 153 Ind. 1.

"Differs but little"

- Va.—*Chappell v. Trent*, 19 S.E. 314, 90 Va. 849, 928.
11 C.J. p 945 note 91 [b].

45. N.J.—*Booth v. Burgess*, 65 A. 226, 229, 72 N.J.Eq. 181.

46. N.Y.—*People v. Marcus*, 77 N.E. 1073, 1074, 185 N.Y. 257, 261, 113 Am.S.R. 902, 7 L.R.A.N.S., 282, 7 Ann.Cas. 118, affirming 97 N.Y.S. 322, 110 App.Div. 255.

47. U.S.—*Coppage v. Kansas*, 35 S. Ct. 240, 236 U.S. 1, 8, 59 L.Ed. 441, L.R.A.1915C 960, reversing 125 P. 8, 87 Kan. 752.

48. Cal.—*Kramer v. Board of Police Comrs.*, 179 P. 216, 218, 39 Cal.App. 396, citing *Corpus Juris*.

- Del.—*Fluharty v. Fluharty*, Super., 193 A. 838, 840.
Minn.—*First State Bank of Hugo v. Federal Reserve Bank of Minneapolis*, 219 N.W. 908, 909, 174 Minn. 535, 61 A.L.R. 467, citing *Corpus Juris*.

- Tex.—*Metro-Goldwyn-Mayer Distributing Corporation v. Cocke*, Civ. App., 56 S.W.2d 489, 491, citing *Corpus Juris*.
11 C.J. p 946 notes 98–1.

49. Mass.—*Plant v. Woods*, 57 N.E. 1011, 1015, 176 Mass. 492, 79 Am. S.R. 330, 51 L.R.A. 339.
11 C.J. p 946 note 2 [a].

50. Minn.—*First State Bank of Hugo v. Federal Reserve Bank of Minneapolis*, 219 N.W. 908, 909, 174 Minn. 535, 61 A.L.R. 467.
11 C.J. p 946 note 3.

51. Ind.—*State v. Darlington*, 53 N.E. 925, 926, 153 Ind. 1.
11 C.J. p 946 note 4.

52. U.S.—*McKenzie-Hague Co. v. Carbide & Carbon Chemicals Corporation*, C.C.A.Minn., 73 F.2d 78, 32.

53. Pa.—*Purvis v. Local No. 500 U. B. C. & J.*, 63 A. 585, 587, 214 Pa. 348, 354, 112 Am.S.R. 757, 12 L.R.A.N.S., 642, 6 Ann.Cas. 275—*Commonwealth v. Urden*, 19 Pa.Dist. 96, 97.

54. Del.—*Fluharty v. Fluharty*, Super., 193 A. 838, 840.

55. N.J.—*Booth v. Burgess*, 65 A. 226, 232, 72 N.J.Eq. 181.

56. U.S.—*Tennessee Electric Power Co. v. Tennessee Valley Authority*, D.C.Tenn., 21 F.Supp. 947, 955.

57. N.Y.—*Peyser v. New York*, 70 N.Y. 497, 501, 26 Am.R. 624.
11 C.J. p 947 notes 6–9.

58. Del.—*Fluharty v. Fluharty*, Super., 193 A. 838, 839, quoting *Century D.*

- Minn.—*First State Bank of Hugo v. Federal Reserve Bank of Minneapolis*, 219 N.W. 908, 909, 174 Minn. 535, 61 A.L.R. 467, citing *Corpus Juris*.

- 11 C.J. p 945 note 97 [a].

59. Miss.—*Hawkins v. Ellis*, 151 So. 569, 570, 168 Miss. 428.

with, or distinguished from, "duress,"⁶⁰ and "persuasion."⁶¹

Phrases: "Coercion or duress,"⁶² and "fraud, coercion, or other improper conduct."⁶³

COERULINE. A dye made by boiling gallein in sulphuric acid, producing shades of green.⁶⁴

COEXECUTOR. As a joint executor, see the C.J.S. title Executors and Administrators § 1041, also 11 C.J. p 947 note 12.

COFFEE. The bean or berry of the coffee tree, whole or crushed or ground after roasting; also the decoction or infusion made of the latter.⁶⁵ As used in particular connections, "coffee" has been compared with, or distinguished from, "coffee essence,"⁶⁶ "food" see the C.J.S. title Food § 1, also 26 C.J. p 750 note 2 [c], and "provisions."⁶⁷

Coffee roaster. Defined in the Century Dictionary as one who prepares coffee beans for use by roasting them; also, a machine or rotary cylinder used in roasting coffee beans; and distinguished from "manufacturer of coffee."⁶⁸

Other phrases: "Articles used as coffee, or as substitutes for coffee,"⁶⁹ "coffee essence,"⁷⁰ "coffee house," see the C.J.S. title Innkeepers § 1; also 11 C.J. p 947 note 15, and 32 C.J. p 530 note 36, and "manufacturer of coffee."⁷¹

COFFERDAM. A temporary, inclosing dam built in the water and pumped dry, to protect workmen while some work, such as the foundation of a pier, is in progress.⁷²

Phrases: "Bulkhead or cofferdam," also "construction and maintenance of cofferdams."⁷³

COFFERER OF THE QUEEN'S HOUSEHOLD.

In English law, a principal officer of the royal establishment, next under the controller, who, in the countinghouse and elsewhere, had a special charge and oversight of the other officers, whose wages he paid.⁷⁴

COFFIN. Defined by Webster as a chest or case for the reception of a corpse, commonly of wood or metal, although among the ancients stone and pottery coffins occurred, the term generally designating the case immediately inclosing the body, and sometimes used interchangeably with "casket," see Casket 14 C.J.S. p 24 note 45.

COFIADOR. In Spanish law, according to Escriche, a cosurety.

COFRADIA. In Spanish ecclesiastical law, according to Escriche, a group or brotherhood, formed under competent authority, to carry on works of piety. The existence of an hermano mayor who had charge of church property has been held insufficient to establish a cofradia to construct it.⁷⁵

COGITATIONIS PCENAM NEMO MERETUR.⁷⁶

COGITATIONIS PCENAM NEMO PATITUR.⁷⁷

COGNAC. A commonly known term meaning a brandy; a distilled liquor containing more than one half of one per centum of alcohol.⁷⁸

COGNACIÓN. In Spanish law, blood relationship through the female line among descendants of a common father; opposed to agnación, where such relationship is through the male line.⁷⁹

60. U.S.—McKenzie-Hague Co. v. Carbide & Carbon Chemicals Corporation, C.C.A.Min., 73 F.2d 78, 82.

Del.—Fluharty v. Fluharty, Super., 193 A. 838, 840.
11 C.J. p 945 note 97 [d].

61. Cal.—Van Valkenburgh v. Oldham, 108 P. 42, 44, 12 Cal.App. 572.

62. Okl.—Illinois Bankers Life Assur. Co. v. Day, 62 P.2d 970, 972, 178 Okl. 284.

63. Pa.—Nigbrowich v. State Workmen's Ins. Fund, 200 A. 282, 284, 131 Pa.Super. 532.

64. U.S.—Pickhardt v. U. S., N.Y., 67 F. 111, 112, 14 C.C.A. 341.
11 C.J. p 947 note 11.

65. Pa.—Commonwealth v. Einhorn, 43 Pa.Co. 445, 446.
11 C.J. p 947 note 14.

66. U.S.—E. C. Hazard & Co. v. U. S., C.C.A.N.Y., 175 F. 967, 968.

67. U.S.—Commonwealth v. Caldwell, 76 N.E. 955, 190 Mass. 355, 356, 112 Am.S.R. 334, 5 Ann.Cas. 879.

68. La.—New Orleans v. New Orleans Coffee Co., 14 So. 502, 503, 46 La.Ann. 86.

See also the C.J.S. title Manufactures § 4, and 38 C.J. p 982 notes 8-13.

69. U.S.—E. C. Hazard & Co. v. U. S., C.C.A.N.Y., 175 F. 967, 968.

70. U.S.—Hazard v. U. S., N.Y., supra.

71. La.—New Orleans v. New Orleans Coffee Co., 14 So. 502, 503, 46 La.Ann. 86.

72. N.Y.—American Pipe & Construction Co. v. State, 159 N.E. 892, 895, 247 N.Y. 150, quoting New Standard D.

73. N.Y.—American Pipe & Construction Co. v. State, supra.

74. Black L.D.

75. Philippine.—Catholic Church v. Santos, 7 Philippine 66, 70, 4 Off. Gaz. 736.

76. A maxim meaning "No man deserves punishment for a thought."—Morgan Leg.Max.

77. A maxim meaning "No one is punished for his thoughts."—Black L.D.

Applied in

N.Y.—McDermott v. People, 5 Park. Cr. 102, 104.

Or.—State v. Taylor, 84 P. 82, 84, 47 Or. 455, 461, 4 L.R.A.,N.S., 417, 8 Ann.Cas. 627.

78. U.S.—Benson v. U. S., C.C.A. Tex., 10 F.2d 309, 310.

79. Escriche Diccionario.

COGNATE. Defined in the Century Dictionary as allied by blood, related in origin; also, allied in nature, quality, or form.

Phrase: "Cognate invention."⁸⁰

COGNATES or **COGNATI.** In the civil law, relatives by the mother, or in the line of the mother; relatives by or through females.⁸¹

COGNATIO or **COGNATION.** In the civil law, cognation, relationship, or kindred generally; more specifically, relationship through females, as distinguished from agnatio, or relationship through males; also consanguinity, as including affinity. In canon law, consanguinity, as distinguished from affinity.⁸²

COGNATIO LEGALIS: EST PERSONARUM PROXIMITAS EX ADOPTIONE VEL AROGATIONE, SOLEMNI RITU FACTA PERVENIENS.⁸³

COGNITIO. Latin, literally a becoming acquainted with; a knowing; knowledge, acquaintance, cognition. In the language of the jurists, a judicial examination, inquiry.⁸⁴ In the Roman law, the judicial examination or hearing of a cause.⁸⁵ In old English law, the acknowledgment of a fine; the certificate of such acknowledgment.⁸⁶

COGNITIONES. Ensigns and arms, or a military coat painted with arms.⁸⁷

COGNITIONIBUS ADMITTENDIS or **COGNITIONIBUS MITTENDIS.** In English law, a former writ to a justice of the common pleas, or other, who has power to take a fine, who, having taken the fine, defers to certify it, commanding him to certify it.⁸⁸

COGNITIONIS CAUSÆ. For the sake of cognizance or jurisdiction; for the purpose of ascertaining or judicially investigating.⁸⁹ In Scotch practice, a name given to a judgment or decree pronounced by a court, ascertaining the amount of a debt against the estate of a deceased landed proprietor, on cause shown, or after a due investigation.⁹⁰

COGNITOR. In Roman law, an advocate or defender in a private cause; one who defended the cause of a person who was present.⁹¹ In old English law, one who acknowledges; a cognizor, or conuser.⁹²

COGNIZABLE. Defined, in a general sense, by the Standard Dictionary as meaning that which may be known, perceived, or apprehended. In law, capable of being tried or examined before a designated tribunal.

Phrases: "Action cognizable before a justice of the peace,"⁹³ "cognizable by probate courts or by justices of the peace,"⁹⁴ "cognizable under the au-

80. Eng.—Neil v. Macdonald, 20 Rep. Pat.Cas. 213.

81. Black L.D.
11 C.J. p 948 notes 28-31.

82. Black L.D.

Cognatio a latere

Law Latin, relationship from the side; collateral consanguinity. In English law, kindred relationship or consanguinity, which exists between persons who are descended from one and the same stock or ancestor, whether near or remote; as between two brothers descended from the same father, or between two cousins descended from the same grandfather; and thus distinguished from lineal consanguinity, in which the relatives are descended the one from the other.—Adams Gloss.

Cognatio civilis

Latin, a relationship pertaining to citizens, or a civil relationship. In the Roman law, a relationship founded upon the "patria potestas," by virtue of which agnation subsists between: First, those who are or have been subject to the same "patria potestas;" second those who would be so subject if the common tie were still alive.—Adams Gloss.

Cognatio multiplex

A many-fold relationship; a relationship that has many windings, hence in the civil law, a relationship which arises when one person can trace his relationship to another by two, three, or more lines (cognati duplices, triplices, etc.), a circumstance which may be very important in cases of intestate succession.—Adams Gloss.

Cognatio naturalis

A natural relationship, that is, only by ties of blood. In the Roman and civil law, relationship by blood if it originates in absence of a legal marriage, called "naturalis," (in a more limited sense), but if otherwise both civil and natural.—Adams Gloss.

Cognatio spiritualis

A spiritual relationship. In the Roman law, there are cases in which persons not related to each other by blood are treated as if they were so related, that is, when a man adopts an infant, the latter is, so long as this relationship continues, treated as an agnate of the former; and in analogous way a sort of spiritual relationship is held by Roman Catholics, although not by Protestants, to result from baptism and confirmation.—Adams Gloss.

83. A maxim meaning "A legal relationship is a proximity (or near degree of affinity) of persons, either from adoption or assumption (as belonging to the family), established by a solemn act."—Adams Gloss.

84. Adams Gloss.

Cognitio de famosis libellis—a judicial examination as to an infamous libel.—Adams Gloss.

Cognitio inter patrem et filium—a judicial examination between father and son.—Adams Gloss.

Cognitio placitum—cognizance of pleas.—Adams Gloss.

85. Black L.D.

86. Black L.D.

87. Black L.D.

88. Black L.D., citing Reg.Orig. p 68.

89. Adams Gloss., citing 2 Erskine Inst. tit 12 § 47.

90. Black L.D.

91. Black L.D.

92. Adams Gloss.

93. Del.—Tappan v. Bacon, 78 A. 294, 295, 25 Del. 113.

94. Idaho.—State v. Wilmot, 4 P.2d 363, 364, 51 Idaho 233.

thority of the United States,"⁹⁵ and "offenses as are usually cognizable by a justice of the peace."⁹⁶

COGNIZANCE, COGNISANCE, or CONUSANCE.

In its ordinary meaning, the word has been defined as apprehension by the understanding, conscious recognition or identification,⁹⁷ knowledge or notice.⁹⁸ It has been said that while in ordinary parlance, to "have cognizance of" means to have knowledge of, the legal meaning of the word "cognizance" is broader than its ordinary meaning; it not only implies knowledge of the subject matter, but also the power to deal with it.⁹⁹ In its broader sense, the word has been defined as meaning judicial knowledge, or jurisdiction;¹ the right to take notice of and determine a cause.² While "cognizance" has been used frequently as synonymous with "powers," it has also been distinguished therefrom;³ and also from "avowry" see *Avowry* or *Advowry* 7 C.J.S. p 1311 note 45.

As a pleading in replevin see the C.J.S. title *Replevin* §§ 154, 160, 161, also 54 C.J. p 517 note 20—p 520 note 67, and 11 C.J. p 949 note 56.

Acknowledgment or confession. "Cognizance" is a term that may also denote an acknowledgment or confession, as, an acknowledgment of a fine.⁴

Cognizance of pleas. Jurisdiction of causes; in another sense, a privilege granted by the king to a city or town to hold pleas within the same.⁵

Other phrases: "Cognizance and control,"⁶ "judi-

cial cognizance," see the C.J.S. title *Evidence* § 6, also 23 C.J. p 58 note 5, "take cognizance of a suit,"⁷ "the court having cognizance thereof,"⁸ and "to enter into cognizance for their appearance."⁹

COGNIZEE. In a conveyance by fine, the party to whom the fine was levied.¹⁰

COGNIZOR. In a conveyance by fine, the party levying the fine.¹¹

COGNOMEN. A surname; a name added to the nomen proper, or name of the individual; a name descriptive of the family.¹²

COGNOMEN MAJORUM EST EX SANGUINE TRACTUM, HOC INTRINSECUM EST; AGNOMEN EXTRINSECUM AB EVENTU.¹³

COGNOVIT. A Latin word meaning literally "He knew," "he acknowledged or recognized;"¹⁴ and in a particular connection, held to mean that defendant has confessed judgment, and admitted the justice of the claim.¹⁵

Taking a "cognovit" as an extension of time releasing indorsers on a note see the C.J.S. title *Bills and Notes* § 272, and as waiver of demand see same title § 425.

Phrases: "Cognovit actionem," see the C.J.S. title *Judgments* § 136, also 34 C.J. p 98 notes 61-71, "cognovit note,"¹⁶ "conditional cognovit," see the C.J.S. title *Judgments* § 136, also 34 C.J. p 98 notes 72-76, and "narr and cognovit."¹⁷

95. U.S.—*U. S. v. Lewis*, D.C.Or., 36 F. 449, 13 Sawy. 532.

96. Me.—*State v. Cram*, 24 A. 853, 854, 84 Me. 271, 274.

R.I.—*State v. Nichols*, 60 A. 763, 765, 27 R.I. 69.

97. S.C.—*Daniels v. Berry*, 146 S.E. 420, 425, 148 S.C. 446.

98. Iowa.—*Comfort v. Kittle*, 46 N.W. 988, 989, 81 Iowa 179.

99. Ga.—*Dean v. Donalson*, 58 S.E. 679, 680, 2 Ga.App. 462.

A word of great import

(1) "'Cognizance' is a word of the greatest import, embracing all power, authority, and jurisdiction."

Ga.—*Dean v. Donalson*, 58 S.E. 679, 680, 2 Ga.App. 462.

Mass.—*Webster v. Commonwealth*, 5 Cush. 386, 400.

(2) "In the language of American jurisprudence, however, this word is used chiefly in the sense of jurisdiction, or the exercise of jurisdiction; the judicial examination of a matter, or the power and authority to make it."—Black L.D.

1. Iowa.—*Comfort v. Kittle*, 46 N.W. 988, 989, 81 Iowa 179.

2. Pa.—*Clarion County v. Western Pennsylvania Hospital for Insane*, 3 A. 97, 98, 111 Pa. 339.

3. U.S.—*Kendall v. U. S.*, D.C., 12 Pet. 524, 636, 9 L.Ed. 1181.

11 C.J. p 948 note 40 [a].

4. Iowa.—*Comfort v. Kittle*, 46 N.W. 988, 989, 81 Iowa 179.

In old practice

"That part of a fine in which the defendant acknowledged that the land in question was the right of the complainant. From this the fine itself derived its name, as being sur cognizance de droit, etc., and the parties their titles of cognizor and cognizee."—Black L.D.

5. Black L.D.

6. N.Y.—*In re Zborowski*, 68 N.Y. 88, 101, per Earl, J., dissenting opinion.

11 C.J. p 948 note 43 [a].

7. Trial implied

"To take cognizance of a suit is to try it, and try it in the manner prescribed by law."—*Colgate v. Hill*, 20 Vt. 56, 62.

8. Ga.—*Dean v. Donalson*, 58 S.E. 679, 680, 2 Ga.App. 462.

9. As meaning "recognition"

After defining "cognizance" and "recognition," the court said: "In view of these definitions, and the inapplicability of a cognizance to the evident purposes of the statute, we are satisfied that this change of words occurred by mistake in transcribing the section of the Revision, and that section 4385 of the Code should be construed as authorizing courts and judges to require recognition."—*Comfort v. Kittle*, 46 N.W. 988, 989, 81 Iowa 179.

10. Black L.D.

11. Black L.D.

12. Black L.D.

11 C.J. p 949 notes 59, 60.

13. A maxim meaning "The cognomen is derived from the blood of ancestors, and is intrinsic; an agnomen arises from an event, and is extrinsic."—Black L.D.

14. Adams Gloss.

15. Tex.—*Dyer v. Johnson*, Civ.App., 19 S.W.2d 421, 422.

16. Ind.—*Hatfield v. Schloss Bros. Inv. Co.*, App., 8 N.E.2d 389, 390.

17. Tex.—*Dyer v. Johnson*, Civ.App., 19 S.W.2d 421, 422.

COGWHEEL. Defined in the Century Dictionary as a wheel having teeth or cogs, used in transmitting motion by engaging the cogs of another similar wheel or of a rack; a geared wheel or a gear. As within the operation of the "attractive nuisance doctrine" see the C.J.S. title Negligence § 29, also 45 C.J. p 774 note 69.

COHABIT.

Present Tense

As defined in the dictionaries and cases the meaning of the word in its broad sense is to dwell or live with or together in the same place, house, or abode.¹⁸ More specifically, however, "cohabit" has been defined as meaning to live together as husband and wife or man and wife lawfully or unlawfully as the case may be,¹⁹ as implying sexual intercourse,²⁰ or the possibility of sexual access.²¹

The word is of large and flexible signification, having several meanings, depending on the ideas which accompany its use, and the subject to which it is applied, so that in order to give it proper effect in any given case regard must be had to the subject matter to which it relates, to the situation and conditions in respect of which it is used, and to the explanatory and qualifying language accompa-

nying it.²² The term imports a dwelling together for some period of time, and does not include mere visits or journeys.²³

Phrases: "Bed and cohabit," see Bed 10 C.J.S. p 224 note 93, "cohabit as man and wife,"²⁴ "cohabit with any other woman,"²⁵ "cohabit with such second husband or wife,"²⁶ "lewdly and lasciviously associate and cohabit together,"²⁷ and "lewdly and lasciviously cohabit."²⁸

Cohabiting

The participial form has been similarly defined as meaning dwelling or living together;²⁹ boarding or tabling together, and living together in one or in the same house;³⁰ also the living together of a man and woman ostensibly as husband and wife. The term carries with it the idea of a fixed residence, rather than that of a transient or single unlawful interview;³¹ and, when referring to husband and wife, implies that they are living together and occupying the same house, and have opportunity for sexual access,³² but it does not necessarily include all acts that may occur between males and females.³³

Phrases: "Cohabiting as husband and wife,"³⁴ "cohabiting in a state of adultery,"³⁵ "cohabiting in

18. Kan.—Biltgen v. Biltgen, 250 P. 265, 268, 121 Kan. 715.

La.—Succession of Jahraus, 38 So.

417, 418, 114 La. 455, 459.

Mont.—In re Wray's Estate, 19 P.2d 1051, 1054, 93 Mont. 525.

Utah.—U. S. v. Musser, 7 P. 389, 4 Utah 153.

Va.—Johnson v. Commonwealth, 146 S.E. 289, 291, 152 Va. 965.

11 C.J. p 949 notes 68-72, p 950 notes 73-75.

Persons included

In this sense the term may be used of sisters or other members of the same family, or of persons not of the same family occupying the same house, and may even be used without reference to the relation of the parties to each other as husband and wife, or otherwise.

La.—Succession of Jahraus, 38 So. 417, 418, 114 La. 455.

Neb.—State v. Lawrence, 27 N.W. 126, 130, 19 Neb. 307.

Va.—Johnson v. Commonwealth, 146 S.E. 289, 291, 152 Va. 965.

11 C.J. p 949 notes 67-72, p 950 notes 73-76, p 951 notes 86, 90, 91.

19. Kan.—Biltgen v. Biltgen, 250 P. 265, 267, 121 Kan. 716.

Md.—Tarr v. Tarr, 164 A. 543, 544, citing *Corpus Juris*.

Mo.—Bishop v. Brittain Inv. Co., 129 S.W. 668, 229 Mo. 699, Ann.Cas. 1912A 868.

Or.—Wadsworth v. Brigham, 266 P.

875, 886, 125 Or. 428, citing *Corpus Juris*.

Va.—Johnson v. Commonwealth, 146 S.E. 289, 291, 152 Va. 965.

11 C.J. p 950 notes 76-79, p 951 notes 87, 88, 89, 92, 93, 94, 95.

20. W.Va.—DeBerry v. DeBerry, 177 S.E. 440, 441, 115 W.Va. 604.

11 C.J. p 951 notes 94, 99.

21. La.—State v. Freddy, 41 So. 436, 437, 117 La. 121, 116 Am.S.R. 195.

11 C.J. p 951 notes 92, 95.

22. U.S.—King v. U. S., C.C.A.N.C., 17 F.2d 61, 62.

W.Va.—De Berry v. De Berry, 177 S. E. 440, 441, 115 W.Va. 604.

11 C.J. p 950 notes 80-84, p 951 note 85.

The word is derived from the Latin word "cohabitare," meaning to dwell with; or from "con" and the old English law word "habitus," meaning to dwell or be often with.—State v. Lawrence, 27 N.W. 126, 129, 19 Neb. 307.—11 C.J. p 949 note 66.

23. Okl.—In re Miller's Estate, 78 P.2d 819, 827, citing *Corpus Juris*.

More than visit implied

Ark.—Turney v. State, 29 S.W. 893, 60 Ark. 259, 260.

Ind.—Jackson v. State, 19 N.E. 330, 116 Ind. 464, 465.

Me.—Calef v. Calef, 54 Me. 365, 366, 92 Am.D. 549.

Ohio.—State v. Connoway, Tapp. 58, 59.

11 C.J. p 951 notes 96-98.

24. Fla.—Le Blanc v. Yawn, 126 So. 789, 790, 99 Fla. 328.

25. Ohio.—State v. Connoway, Tapp. 58, 59.

26. Mass.—Commonwealth v. Lucas, 32 N.E. 1033, 1034, 153 Mass. 81.

27. Va.—Johnson v. Commonwealth, 146 S.E. 289, 291, 152 Va. 965.

28. Me.—State v. Tuttle, 150 A. 490, 129 Me. 125.

29. Mo.—State v. Chandler, 33 S.W. 797, 798, 132 Mo. 155, 53 Am.S.R. 483.

11 C.J. p 951 note 2 [a].

30. Ark.—Turney v. State, 29 S.W. 893, 60 Ark. 250.

Ohio.—State v. Connoway, Tapp. 58, 59.

11 C.J. p 951 note 3, p 952 note 5.

31. Ark.—Turney v. State, 29 S.W. 893, 60 Ark. 259, 260.

Cal.—In re Mills, 70 P. 91, 92, 137 Cal. 298, 92 Am.S.R. 175.

Mass.—Commonwealth v. Calef, 10 Mass. 153.

Ohio.—State v. Conoway, Tapp. 58, 59.

11 C.J. p 951 note 2 [a].

32. Mont.—In re Wray's Estate, 19 P.2d 1051, 1054, citing Bouvier L.D.

33. Cal.—Sbarboro's Est., Myr.Prob. 255, 256.

34. Iowa.—In re Boyington, 137 N. W. 949, 951, 157 Iowa 467.

35. Ind.—Martin v. State, 165 N.E. 763, 89 Ind.App. 107.

a state of adultery or fornication,"³⁶ and "cohabiting without being lawfully married."³⁷

COHABITACIÓN. In Spanish law, cohabitation.³⁸

COHABITATION. A derivative of "cohabit," with the same origin and large signification.³⁹ Cohabitation may be lawful or it may be illicit,⁴⁰ and, as sometimes employed, has a very disgraceful meaning.⁴¹ Also, it has been said that cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time, but that the term implies continuity;⁴² and in its usual sense implies some degree of publicity, since two persons cannot secretly live together.⁴³ In its primary sense, the word has been defined as meaning the act or state of dwelling together, or in the same place with another, living together;⁴⁴ and in its secondary sense, as meaning a living together as husband and wife, or as man and wife;⁴⁵ living together, claiming to be married, in the relationship of husband and wife;⁴⁶ a condition or status of the parties, a status resembling that of the marital relation;⁴⁷ and in a particular connection, has been held to mean habitual concubinage or lying together.⁴⁸ In particular connections, it has been said that the term does not simply mean the gratification of the sexual passion, but to live or dwell together, to have the same habi-

tation,⁴⁹ to live in the same house,⁵⁰ and while, as commonly understood, the term implies sexual intercourse,⁵¹ it seems that sexual intercourse is not necessarily implied, as the word does not even include necessarily the occupying of the same bed.⁵²

For specific uses of the term see the particular titles in the Descriptive-Word Index.

Phrases: "Cohabitation of the gamblers and the courts in the temple of justice,"⁵³ "lewd and lascivious cohabitation,"⁵⁴ "live together in a state of cohabitation,"⁵⁵ "marital cohabitation,"⁵⁶ "matrimonial cohabitation,"⁵⁷ "open and notorious illicit cohabitation,"⁵⁸ "open and notorious illicit cohabitation of a widow,"⁵⁹ and "unlawful cohabitation."⁶⁰

COHÆREDES SUNT QUASI UNUM CORPUS PROPTER UNITATEM JURIS QUOD HABENT.⁶¹

COHÆREDES UNA PERSONA CENSENTUR, PROPTER UNITATEM JURIS QUOD HABENT.⁶²

COHÆRES. In old English law, a coheir, or joint heir.⁶³

COHECHO. In Spanish and French law, bribery.⁶⁴

33. Ind.—Warner v. State, 175 N.E. 661, 663, 202 Ind. 479, 74 A.L.R. 1357.

37. Mo.—State v. Bobbst, 32 S.W. 1149, 1151, 131 Mo. 328.

38. Escriche Diccionario.

39. Ala.—Cox v. State, 23 So. 806, 117 Ala. 103, 105, 67 Am.S.R. 166, 41 L.R.A. 760.

Ga.—Wilkinson v. Wilkinson, 125 S. E. 856, 861, quoting *Corpus Juris*. 11 C.J. p 952 notes 9, 10.

40. Cal.—Sharon v. Sharon, 16 P. 345, 360, 75 Cal. 1.

Ga.—Wilkinson v. Wilkinson, 125 S. E. 856, 861, quoting *Corpus Juris*.

41. Neb.—Estelle v. Daily News Pub. Co., 156 N.W. 645, 648, 99 Neb. 397.

11 C.J. p 953 note 20.

42. Mont.—In re Wray's Estate, 19 P.2d 1051, 1054, 93 Mont. 525, quoting *Corpus Juris*.

Okl.—In re Miller's Estate, 78 P.2d 819, 827.

11 C.J. p 953 notes 14, 15.

43. Miss.—Granberry v. State, 61 Miss. 440, 444.

44. Kan.—Biltgen v. Biltgen, 250 P. 265, 267, 121 Kan. 716, quoting *Corpus Juris*.

11 C.J. p 952 notes 9, 10.

45. Hawaii.—King v. Kalailoa, 4 Hawaii 39, 41.

Ill.—Teal v. Teal, 155 N.E. 28, 33, 324 Ill. 207.

11 C.J. p 952 note 11.

46. Okl.—In re Miller's Estate, 78 P.2d 819, 827.

Tex.—Humble Oil & Refining Co. v. Jeffrey, Civ.App., 38 S.W.2d 374, 376.

11 C.J. p 952 note 11 [a].

47. Kan.—Biltgen v. Biltgen, 250 P. 265, 267, 121 Kan. 716, quoting *Corpus Juris*.

11 C.J. p 953 note 13.

48. Miss.—Cutrer v. State, 121 So. 106, 107, 154 Miss. 80.

49. Cal.—Kilburn v. Kilburn, 26 P. 636, 637, 89 Cal. 46, 23 Am.S.R. 447.

11 C.J. p 952 note 9 [a].

50. U.S.—Barksdale v. U. S., D.C.S. C., 4 F.Supp. 207, 208.

51. W.Va.—DeBerry v. DeBerry, 177 S.E. 440, 441, 115 W.Va. 604.

11 C.J. p 953 note 21.

52. Ga.—Wilkinson v. Wilkinson, 125 S.E. 856, 861, quoting *Corpus Juris*.

Kan.—Biltgen v. Biltgen, 250 P. 265, 267, 121 Kan. 716, quoting *Corpus Juris*.

Utah.—U. S. v. Cannon, 7 P. 369, 375, 4 Utah 122.

53. Ala.—Cox v. State, 23 So. 806,

117 Ala. 103, 67 Am.S.R. 166, 41 L.R.A. 760.

54. Or.—State v. Naylor, 136 P. 889, 891, 68 Or. 139.

55. Tex.—Parks v. State, 4 Tex. App. 134, 138.

56. Pa.—Brinckle v. Brinckle, 12 Phila. 232, 234.

57. Kan.—Biltgen v. Biltgen, 250 P. 265, 268, 121 Kan. 716.

"Matrimonial intercourse" distinguished

Utah.—U. S. v. Musser, 7 P. 389, 390, 4 Utah 153.

11 C.J. p 952 note 11 [c].

58. U.S.—King v. U. S., C.C.A.N.C., 17 F.2d 61, 62.

59. U.S.—Robinson v. U. S., D.C. La., 33 F.2d 545, 547.

60. Utah.—U. S. v. Musser, 7 P. 389, 4 Utah 153, 155.

61. A maxim meaning "Coheirs constitute, as it were, one body on account of the unity of right which they have."—Adams Gloss, citing 2 Bracton c 34 § 1 fol 76b.

62. A maxim meaning "Co-heirs are deemed as one person, on account of the unity of right which they possess."—Black L.D.

63. Black L.D.

64. Philippine.—U. S. v. Sy-Suikao, 18 Philippine 482, 483.

COHEIR. One of several to whom an inheritance descends.⁶⁵

COHEREDERO. In Spanish law, according to Es-eriche, a coheir, although the term is broad enough to include one of several devisees.

COHERER. As a term used in wireless telegraphy, see the C.J.S. title Telegraphs and Telephones § 289, also 11 C.J. p 955 note 30.

COHUAGIUM. A tribute made by those who met promiscuously in a market or fair.⁶⁶

COIF. A title given to sergeants at law, who are called "sergeants of the coif," from the coif they wear on their heads.⁶⁷

COIN.

As a Noun

In its primary sense, the die used for stamping money.⁶⁸

In a monetary sense, coin was the sacred, as well as profane, currency of the ancient world.⁶⁹ In modern times, particularly when used without any prefix, it means metallic money generally;⁷⁰ more specifically, a piece of metal stamped and made legally current as money,⁷¹ or a piece of gold or silver, or other metal, stamped by authority of the government, in order to fix its value, and commonly called money;⁷² and it has been described as a collective word which contains in it all manner of the several stamps and portraitures or species of money in any kingdom.⁷³ While "money" is a

generic term, and includes coin, see Money 40 C.J. p 1489 note 81, and p 1491 note 44—p 1492 note 57, it is neither confined to "coin," nor synonymous therewith;⁷⁴ but strictly speaking, "coin" differs from "money" as the species differs from the genus; for coin is a particular species, struck according to a certain process, called "coining";⁷⁵ and is always made of metal,⁷⁶ although the contrary has also been stated.⁷⁷ In a particular connection, "coin" has also been contrasted with "commodity."⁷⁸ The plural "coins" has been defined as meaning pieces of metallic money,⁷⁹ and, pieces of metal, of a particular weight and standard, or value, stamped such by the authority of the government, and to which a particular value is given in account and payment.⁸⁰

For the term as used in indictments and informations for counterfeiting, larceny, and robbery, see the C.J.S. titles Counterfeiting § 27, also 15 C.J. p 368 note 62—p 369 note 72, Larceny § 76, also 36 C.J. p 817 notes 4—14, and Robbery § 36, also 54 C.J. p 1038 note 94.

Copper coin. Used without further description, it means copper money generally, and not a single coin, nor any specific number or kinds of coin.⁸¹

Current coin of the United States. Circulating money, coined by authority of congress.⁸²

Other phrases: "Base coin" see Base 9 C.J.S. p 1553 note 20, "coin of the United States,"⁸³ "counterfeit coin," see the C.J.S. title Counterfeiting § 1, 15 C.J. p 357 notes 8, 9, "current silver coin of the United States,"⁸⁴ "debasement of the coin" and "debasement the coin,"⁸⁵ "foreign coin,"⁸⁶ "gold and

65. Black L.D.

66. Black L.D., citing Du Cange Gloss.

67. Black L.D.
11 C.J. p 955 note 31.

68. Pa.—Borie v. Trott, 5 Phila. 366, 403.

69. Ind.—Thayer v. Hedges, 22 Ind. 282, 304.

70. Mass.—Commonwealth v. Gallagher, 16 Gray 240, 241.
S.D.—State v. Faulk, 116 N.W. 72, 22 S.D. 183, 186.

71. U.S.—U. S. v. Bogart, D.C.N.Y., 24 F.Cas.No.14,617, 9 Ben. 314, 315, 24 Int.Rev.Rec. 46.
11 C.J. p 956 note 35 [a], [b].

"The coins known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here."—U. S. v. Bogart, D.C.N.Y., 24 F.Cas.No.14,617, 9 Ben. 314, 315, 24 Int.Rev.Rec. 46.

72. U.S.—Gregory v. Morris, Wyo., 96 U.S. 619, 625, 24 L.Ed. 740—Latham v. U. S., 1 Ct.Cl. 149, 152.

73. Mass.—Commonwealth v. Gallagher, 16 Gray 240, 241.

74. Wis.—Klauber v. Biggerstaff, 3 N.W. 357, 47 Wis. 551, 557, 32 Am. R. 773.
40 C.J. p 1491 note 43.

"The Federal Constitution and statutes indicate that there may be a difference between the word 'coin' and the word 'money.'" — Emery Bird Thayer Dry Goods Co. v. Williams, C.C.A.Mo., 98 F.2d 166, 171.

75. Pa.—Borie v. Trott, 5 Phila. 366, 403.

76. Ind.—Thayer v. Hedges, 22 Ind. 282, 306.
11 C.J. p 956 note 52.

77. U.S.—Latham v. U. S., 1 Ct.Cl. 149, 156.

78. Ky.—Barnett v. Powell, Litt. Sel.Cas. 409, 410.

79. N.Y.—Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 530.

80. U.S.—Julliard v. Greenman, N. Y., 4 S.Ct. 122, 137, 110 U.S. 421, 28 L.Ed. 204.

N.Y.—Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 490.

81. Mass.—Commonwealth v. Gallagher, 16 Gray 240, 241.
S.D.—State v. Faulk, 116 N.W. 72, 22 S.D. 183, 186.

82. Ind.—Thayer v. Hedges, 22 Ind. 282, 304.

83. U.S.—U. S. v. Bogart, D.C.N.Y., 24 F.Cas.No.14,617, 9 Ben. 314, 24 Int.Rev.Rec. 46.

84. Vt.—State v. Bowman, 6 Vt. 594, 597.

85. Pa.—Borie v. Trott, 5 Phila. 366, 403.

86. Ind.—Thayer v. Hedges, 22 Ind. 282, 306.
N.Y. — Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 530.

Pa.—Borie v. Trott, 5 Phila. 366, 405.

silver coin,"⁸⁷ "gold coin,"⁸⁸ "gold coins, to wit,"⁸⁹ "in coin,"⁹⁰ "in gold coin,"⁹¹ "in gold coin of the United States of America, of the present standard weight and fineness,"⁹² "in United States gold coin,"⁹³ "lawful money of the coin of the United States,"⁹⁴ "par value of the coin" and "silver coin,"⁹⁵ also "par value of the coins,"⁹⁶ "silver coins, to wit,"⁹⁷ and "the current silver coins of this state and of the United States, called half-dollars."⁹⁸

As a Verb

In a broad sense, "to coin" means not only to shape and stamp, or mint, metals, but to make or fabricate other things as well.⁹⁹ It has a certain and fixed meaning,¹ that is, to fabricate money out of metallic substances,² to mould metallic substances into forms convenient for circulation and to stamp them with the impress of the government authority

indicating their value established by law,³ to make money out of coin,⁴ to mint,⁵ to stamp, to impress, to fabricate or forge, to stamp metal as money,⁶ to stamp metal and convert it into coin, or into money.⁷

Coining of money. The formation of metallic pieces of money by such mechanical means as are appropriate to such an operation;⁸ minting or stamping metals for money.⁹

Other phrases: "Coin a story,"¹⁰ "coin money,"¹¹ "coin money and regulate the value thereof,"¹² and "coin words."¹³

As an Adjective

"Coined copper,"¹⁴ "coined money,"¹⁵ "four ounces, two pennyweights and twelve grains of pure gold, in coined money,"¹⁶ and "loan of coin money."¹⁷

87. U.S.—Julliard v. Greenman, N. Y., 4 S.Ct. 122, 131, 138, 110 U.S. 421, 462, 28 L.Ed. 204—Knox v. Lee, Tex., 12 Wall. 457, 545—Latham v. U. S., 1 Ct.Cl. 149, 152, 156, 165.

N.Y. — Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 466, 507.

88. U.S.—Gregory v. Morris, Wyo., 96 U.S. 619, 624, 24 L.Ed. 740.

Ala.—Judson v. Bessemer, 6 So. 267, 268, 87 Ala. 240, 4 L.R.A. 742.

Pa.—Borie v. Trott, 5 Phila. 366, 404.

S.D.—State v. Faulk, 116 N.W. 72, 22 S.D. 183, 186.

Gold coin as money or merchandise

"While gold coin is in one sense money, it is in another an article of merchandise."—Gregory v. Morris, Wyo., 96 U.S. 619, 625, 24 L.Ed. 740.

89. U.S.—Knox v. Lee, Tex., 12 Wall. 457, 593, 20 L.Ed. 287.

90. Ind.—Thayer v. Hedges, 22 Ind. 282, 308.

91. Miss.—Woodruff v. State, 6 So. 235, 66 Miss. 298, affirmed 16 S.Ct. 820, 162 U.S. 291, 40 L.Ed. 973.

92. Ala.—Judson v. Bessemer, 6 So. 267, 268, 87 Ala. 240, 4 L.R.A. 742.

93. Ill.—Belford v. Woodward, 41 N.E. 1097, 1098, 158 Ill. 122, 29 L.R.A. 593.

94. U.S.—Latham v. U. S., 1 Ct.Cl. 149, 150, 151.

95. Pa.—Borie v. Trott, 5 Phila. 366, 404, 405.

96. Pa.—Borie v. Trott, *supra*.

97. U.S.—Knox v. Lee, Tex., 12 Wall. 457, 593, 20 L.Ed. 287.

98. Vt.—State v. Bowman, 6 Vt. 594, 596.

99. N.Y. — Hague v. Powers, 39 Barb. 427, 466.

11 C.J. p 856 note 46.

Nonmonetary applications

(1) "To coin" sometimes means to make, as "to coin words."—Meyers

v. Roosevelt, 25 How.Pr. (N.Y.) 97, 118.

(2) "We may say figuratively to coin a story, meaning to invent one, but never to coin the book in which it is printed. The story is a fiction, the coinage of the brain—the book, a reality."—Borie v. Trott, 5 Phila. (Pa.) 366, 403.

1. U.S.—Julliard v. Greenman, N.Y., 4 S.Ct. 122, 137, 110 U.S. 421, 28 L.Ed. 204—Latham v. U. S., 1 Ct.Cl. 149, 152.

2. Nev.—Maynard v. Newman, 1 Nev. 271, 273.

3. U.S.—Julliard v. Greenman, N.Y., 4 S.Ct. 122, 110 U.S. 421, 462, 28 L.Ed. 204.

Similarly expressed

(1) To fashion pieces of metal into a prescribed shape, weight, and degree of fineness, and stamp them with prescribed devices, by authority of government, in order that they may circulate as money.—Black L.D.

(2) "To mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency."—Griswold v. Hepburn, 2 Duv. (Ky.) 20, 29.

4. Ind.—Thayer v. Hedges, 22 Ind. 282, 306.

Pa.—Shollenberger v. Brinton, 52 Pa. 9, 50.

5. N.Y. — Meyer v. Roosevelt, 25 How.Pr. 97, 118.

6. U.S.—Latham v. U. S., 1 Ct.Cl. 149, 154.

7. N.Y. — Meyer v. Roosevelt, 25 How.Pr. 97, 118.

Similarly expressed

"To coin, is simply to give the stamp of supreme governmental power to any subject—to give it all

the attributes of money."—Shaw v. Trunslor, 30 Tex. 390, 396.

8. N.Y.—Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 530.

9. U.S.—Knox v. Lee, Tex., 12 Wall. 457, 584.

Inapplicable to paper money

"Coining" cannot, without violence, be applied to the issue of paper money.—Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 490.

10. Pa.—Borie v. Trott, 5 Phila. 366, 403.

11. Ky.—Griswold v. Hepburn, 2 Duv. 20, 29.

Phrase defined

(1) "To coin money is to make, stamp and issue coins as money."—Metropolitan Bank v. Van Dyck, 27 N.Y. 400, 490.

(2) "The power given is 'to coin money.' This must mean to put an imprint upon that which is adopted as money. . . . 'To coin money' . . . is the act of impressing symbols on bullion that has already been adopted as the money of a government."—Emery Bird Thayer Dry Goods Co. v. Williams, C.C.A.Mo., 98 F.2d 166, 171.

12. U.S.—Emery Bird Thayer Dry Goods Co. v. Williams, *supra*—Latham v. U. S., 1 Ct.Cl. 149, 156.

13. N.Y.—Meyers v. Roosevelt, 25 How.Pr. 97, 118.

14. Ind.—Thayer v. Hedges, 22 Ind. 282, 306.

15. Mass.—Sears v. Dewing, 14 Allen 413, 418, 420.

Wis.—Klauber v. Biggerstaff, 3 N.W. 357, 359, 47 Wis. 551.

16. Mass.—Sears v. Dewing, 14 Allen 413, 416, quoted Cushing v. Wells, 98 Mass. 550, 553.

17. U.S.—Julliard v. Greenman, N. Y., 4 S.Ct. 122, 138, 110 U.S. 421, 28 L.Ed. 204.

COINAGE. The process or the function of coining metallic money, also the great mass of metallic money in circulation;¹⁸ the stamping of metal in some way so as to give it currency.¹⁹

Phrase: "Coinage of the United States."²⁰

COINCIDENT. Defined in the Standard Dictionary as having the same position and extent, taking place at the same time, agreeing, concurring, or corresponding. "Coincident" has been distinguished from "contemporaneous."²¹

Phrase: "Coincident rule" see the C.J.S. title Evidence § 411, also 11 C.J. p 957 note 58 [a].

COINCIDENTALLY. Defined in the Century Dictionary as in a coincident manner, with coincidence. As used in a patent see the C.J.S. title Patents § 193, also 48 C.J. p 217 note 57.

COINSURANCE. The term is defined and distinguished from "concurrent insurance" in the C.J.S. title Insurance § 917, 26 C.J. p 357 notes 48, 48 [a].

COINSURER. See the C.J.S. title Insurance § 917, also 11 C.J. p 957 note 65.

COITION. The act of gratifying the sexual desire, held to be synonymous with "copulation."²²

COITUS. Sexual intercourse; carnal copulation; coition.²³

COJUDICES. Latin, in old English law, associate judges having equality of power with others.²⁴

18. Black L.D.

Confined to metals

"Coinage . . . is not applied to any other material."—Meyer v. Roosevelt, 25 How.Pr. (N.Y.) 97, 105.

19. N.Y.—Meyer v. Roosevelt, *supra*.

20. The phrase has been construed to mean that which is "coined at the mints of the United States."—U. S. v. Otey, C.C.Or., 31 F. 68, 70, 12 Sawy. 416.

21. Ga.—Supreme Lodge K. P. v. Few, 76 S.E. 91, 93, 138 Ga. 778.

22. Ala.—Anonymous, 7 So. 100, 89 Ala. 291, 292, 18 Am.S.R. 116, 7 L. R.A. 425.

23. Black L.D.

24. Black L.D.

25. Mass.—Cochran v. Roemer, 192 N.E. 58, 63, 287 Mass. 500.

26. U.S.—Otto Coking Co. v. Koppers Co., C.C.A.Del., 258 F. 122, 124.

Methods of production

"Coking coals are converted into coke in the industrial arts in two

principal ways, the gas-retort method and the coke-oven method. The gas-retort method produces illuminating gas as a main product and yields as a by-product a soft, spongy and fragmentary coke known as 'domestic coke.' The coke-oven method produces a hard, strong and structurally coherent coke known as 'metallurgical coke' because of its utility in foundry and blast furnace processes. In the production of coke of the latter grade, the gases of coal distillation may be altogether consumed as in the wasteful bee-hive coke-ovens, or they may be saved as highly valuable by-products as in by-product coke-ovens. The difference in coke products reflects the difference in methods of producing them and in the problems incident to their production."—Otto Coking Co. v. Koppers Co., *supra*.

27. U.S.—Mitchell v. Connellsville Central Coke Co., C.C.A.Pa., 231 F. 131, 137.

28. U.S.—Otto Coking Co. v. Koppers Co., C.C.A.Del., 258 F. 122, 124.

COKE.

As a Noun

The kind of coal from which certain volatile gases have been removed by heat,²⁵ the mass of carbon which is left after the volatile matter of coal has been driven off by heat applied in such a manner as not to burn the carbon,²⁶ partially consumed bituminous coal, from which the volatile constituents have been burned away, or partly graphitized carbon, whose fiber has been affected by escaping and burning gases, so that it is lighter than coal, although its substance is hard and dense.²⁷

"Domestic coke." A soft, spongy, and fragmentary coke.²⁸

"Metallurgical coke." A hard, strong and structurally coherent coke.²⁹

As an Adjective

Coke oven. Defined in the Century Dictionary as a furnace, oven, kiln, or retort used for reducing bituminous coal to coke.

As not included by the term "building" see Building 12 C.J.S. p 383 note 9; and as constituting a nuisance see the C.J.S. title Nuisances § 62, also 46 C.J. p 697 notes 66–68.

Other phrases: "Coke products,"³⁰ and "new and useful coke oven;"³¹ also "coking chamber," see Chamber ante p 351 note 15, "coking coals,"³² and "standard coking coal."³³

COL. An assimilated form of "com."³⁴

29. U.S.—Otto Coking Co. v. Koppers Co., *supra*.
Me.—See Hotchkiss v. Bon Air Coal, etc., Co., 78 A. 1108, 1114, 108 Me. 34.

Reason for name

The term comes from the utility of the coke in foundry and blast furnace processes.—Otto Coking Co. v. Koppers Co., C.C.A.Del., 258 F. 122, 124.

30. U.S.—Otto Coking Co. v. Koppers Co., *supra*.

31. U.S.—Mitchell v. Connellsville Central Coke Co., C.C.A.Pa., 231 F. 131, 137.

32. U.S.—Otto Coking Co. v. Koppers Co., C.C.A.Del., 258 F. 122, 124.

33. Me.—Hotchkiss v. Bon Air Coal, etc., Co., 78 A. 1108, 1114, 108 Me. 34.

34. U.S.—National Fire Ins. Co. of Hartford, Conn. v. Elliott, C.C.A. Mo., 7 F.2d 522, 525, 42 A.L.R. 1121.

COLD.

Cold blood. In common parlance a term used to designate a willful, deliberate, and premeditated homicide.³⁵

Cold drawn. Defined in the Standard Dictionary as meaning drawn while cold; as, cold-drawn steel wire.³⁶

Cold water ordeal. The trial which was anciently used for the common sort of people, who, having a cord tied about them under their arms, were cast into a river; if they sank to the bottom until they were drawn up, which was in a very short time, then they were held guiltless; but such as did remain on the water were held culpable, being, as they said, of the water rejected and kept up.³⁷

Other phrases: "Black, double annealed, cold-rolled, smoothed sheet steel,"³⁸ "cold calculations,"³⁹ "cold chisel," see Chisel ante p 1112 note 35, "cold rolled,"⁴⁰ "cold-rolled sheet," "cold-rolled sheet, smooth," and "cold-rolled, single pass, annealed, smoothed,"⁴¹ "cold-rolled, smoothed only,"⁴² "cold-rolling,"⁴³ "cold storage," see the C.J.S. title Warehousemen and Safe Depositaries § 1, also 11 C.J. p 958 note 79, "cold storage building,"⁴⁴ "cold storage warehouse," see the C.J.S. title Warehousemen and Safe Depositaries § 1, also 11 C.J. p 958 note 79 [b], "doing a cold storage business," see the C.J.S. title Warehousemen and Safe Depositaries § 5, also 11 C.J. p 958 note 79 [a], and "sheet steel, cold-rolled, smooth."⁴⁵

COLECTIVO or COLECTIVA. In Spanish, defined in Velázquez Dictionary as meaning collective, applied to nouns of multitude, as *compañía*,—a company.⁴⁶

COLECTOR GENERAL DE ESPOLIOS. In Spanish law, as defined by Escriche, an official charged

with the duty of sequestering property left by ecclesiastics and applying the same to public uses.

COLEGATARIO. In Spanish law, according to Escriche, one of several joint legatees.

COLEGIO. In Spanish, according to Escriche, the word is used in somewhat the same sense as the English word "college," but as designating an educational institution it sometimes means one of lower grade, for example, Colegio General Militar, the Spanish military academy. In another sense, an association or society, usually of professional men, as "Colegio de Abogados"—the college of attorneys—which is about the equivalent of the American Bar Association or the English Incorporated Law Association.

COLIBERTUS, COLLIBERTUS, or CONLIBERTUS. Law Latin, one of the Coliberti, a class of inferior tenants mentioned in Domesday.⁴⁷ In feudal law, one who, holding in free socage, was obliged to do certain services for the lord; a middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services, said to be the same as the "conditionales."⁴⁸

COLITIGANTE. In Spanish law, as defined by Escriche, one of two or more joint parties to a cause.

COLITIS. Acute dysentery; acute inflammation of the mucous membrane of the large intestine, characterized by fever, pain, and frequent small, bloody discharges from the bowels.⁴⁹

COLLAPSE. To break down or fail abruptly and utterly, to cave in;⁵⁰ to close by falling or shrinking together, to fall together, or into an irregular mass or flattened form, through loss of firm con-

35. Ala.—Skeggs v. State, 135 So. 431, 432, 24 Ala.App. 307.

"In cold blood"

A term commonly used to designate a homicide in which it is believed there are no circumstances in mitigation or to justify or excuse the killing.—State v. Robison, 6 P. 2d 433, 437, 54 Nev. 56.

36. U.S.—See U. S. v. Nash, N.Y., 158 F. 401, 85 C.C.A. 511.

37. Black L.D.

38. U.S.—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 386, 69 C.C.A. 576.

39. Tenn.—Davidson Benedict Co. v. Severson, 72 S.W. 967, 109 Tenn. 572—Louisville, etc., R. Co. v.

Stacker, 6 S.W. 737, 86 Tenn. 343, 352, 6 Am.S.R. 840.

40. U.S.—U. S. v. George Nash & Co., N.Y., 158 F. 401, 85 C.C.A. 511—U. S. v. Crucible Steel Co., C.C. N.Y., 147 F. 537—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 385, 386, 69 C.C.A. 576.

41. U.S.—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 386, 69 C.C.A. 576.

42. U.S.—U. S. v. Crucible Steel Co., C.C.N.Y., 147 F. 537—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 385, 69 C.C.A. 576.

43. U.S.—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 385, 69 C.C.A. 576.

44. Cal.—Woolford v. Electric Appliances, App., 75 P.2d 112, 113.

45. U.S.—U. S. v. Crucible Steel Co. of America, N.Y., 137 F. 384, 385, 69 C.C.A. 576.

46. "Sociedad mercantil regular colectiva,"—words used in describing the partners in a mercantile company, regularly organized under a designated firm name.—Bauermann v. Casas, 10 Philippine 386, 387.

47. Adams Gloss.

48. Black L.D., citing Cowell.

49. Tenn.—Blackman v. U. S. Casualty Co., 103 S.W. 784, 117 Tenn. 578, 592.

50. Kan.—Grady v. Erhard, 53 P.2d 478, 479, 143 Kan. 170.

nection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it, or to fall together suddenly, as the two sides of a hollow vessel;⁵¹ to go to pieces;⁵² and to shrink up; as, a tube in a steam boiler collapses.⁵³ The term has been said to have almost an opposite meaning from "explosion."⁵⁴

COLLAR. Defined in general by the Century Dictionary as something worn about the neck, whether for restraint, convenience, or ornament; also anything resembling a collar; something in the form of a collar, or analogous to a collar in situation.

In mechanics, a ring or round flange on or against an object.⁵⁵

As a mining term see the C.J.S. title Mines and Minerals § 3, also 11 C.J. p 959 note 91 [a].

Collar leak clamps. Devices coming into use in comparatively recent years, which are clamps used on pipe joints to supplement the old method of joining the pipes together and to prevent leakage, and which are extensively used in natural gas mains.⁵⁶

COLLATERAL.

As a Noun

An obligation or security attached to another to

secure that other's performance;⁵⁷ any property or right of action, which is given as security for the fulfillment of a contract or a pecuniary obligation, in addition to the principal security,⁵⁸ a separate obligation attached to another contract to guarantee its payment.⁵⁹ In this sense the term is used to denote a pledge of incorporeal personal property, such as corporate stock or bonds, choses in action, and the like,⁶⁰ assigned or transferred and delivered by a debtor, or by some one for him, to a creditor as security for the payment of a debt or the fulfillment of an obligation.⁶¹

Phrases: "Collateral for indebtedness to assured,"⁶² and "pledge sufficient collateral as security."⁶³

As an Adjective

As an adjective, the word has been defined by Webster as meaning accompanying, indirect, or subordinate;⁶⁴ accompanying as a coördinate, or as a secondary fact, or acting as a secondary agent;⁶⁵ additional or auxiliary;⁶⁶ on the side, or at one side, of a subject;⁶⁷ related to or complementary;⁶⁸ secondary or subsidiary.⁶⁹

In another sense the term means not lineal, but on a parallel or divergent line.⁷⁰

"Collateral" has been held to be the antithesis of "direct."⁷¹

51. Ind. — Louisville Underwriters v. Durland, 24 N.E. 221, 123 Ind. 544, 550, 7 L.R.A. 399.

Pa.—Skelly v. Fidelity & Casualty Co. of New York, 169 A. 78, 79, 313 Pa. 202.

Similarly expressed

(1) "To fall into a flattened, wrecked, distorted, or disorganized state."—Grady v. Erhard, 53 P.2d 478, 479, 143 Kan. 170.

(2) "To fall or shrink together abruptly, as the sides of a hollow vessel."—Grady v. Erhard, supra.

52. Kan.—Grady v. Erhard, supra, quoting Webster New Int. D.

53. Ind. — Louisville Underwriters v. Durland, 24 N.E. 221, 123 Ind. 544, 550, 7 L.R.A. 399.

Pa.—Skelly v. Fidelity & Casualty Co. of New York, 169 A. 78, 79, 313 Pa. 202.

54. Ind. — Louisville Underwriters v. Durland, 24 N.E. 221, 123 Ind. 544, 550, 7 L.R.A. 399.

55. U.S.—Beardsley v. Howard, etc., Mach. Co., C.C.R.I., 176 F. 619, 621, quoting Knight Mechanical D.

56. U.S.—Columbus Gas & Fuel Co. v. City of Columbus, D.C.Ohio, 17 F.2d 630, 633.

57. Tex.—City Investment & Loan Co. v. Wichita Hardware Co., Civ. App., 57 S.W.2d 222, 227.

58. Tenn.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 190, 191, 20 Tenn.App. 168, quoting *Corpus Juris*.

11 C.J. p 959 note 8.

59. U.S. — Thomson-Houston Electric Co. v. Capital Electric Co., C. C.Tenn., 56 F. 849, 854.

60. Fla.—Travers v. Stevens, 145 So. 851, 854, 108 Fla. 11—Pepper v. Beville, 129 So. 334, 337, 100 Fla. 97.

11 C.J. p 959 note 8.

Stock may become collateral as well as any other incorporeal property.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 191, 20 Tenn.App. 168.

61. Mont. — A. H. Averill Co. v. Bain, 148 P. 334, 335, 50 Mont. 512.

Not limited to security

The use of the term collateral is not confined to describing pledges of notes or property as security.—City Investment & Loan Co. v. Wichita Hardware Co., Tex.Civ.App., 57 S.W.2d 222, 223.

62. Mich.—Cohen v. London Guarantee & Accident Co., Limited, of London, England, 225 N.W. 549, 551, 247 Mich. 226.

63. S.C.—Temple v. McKay, 174 S. E. 23, 31, 172 S.C. 305.

64. Ill.—People v. McDonald, 106 N. E. 501, 502, 264 Ill. 514, 517, Ann. Cas.1915C 31.

65. Ill.—People v. McDonald, supra. Tex.—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, 223.

66. Ga.—Continental Trust Co. v. Bank of Harrison, 134 S.E. 775, 778, citing *Corpus Juris*.

N.Y.—Lenner v. Corso, 295 N.Y.S. 827, 830, 162 Misc. 500.

67. Cal.—In re Campbell, 77 P. 674, 143 Cal. 623, 629.

Ga.—Continental Trust Co. v. Bank of Harrison, 134 S.E. 775, 778, citing *Corpus Juris*.

68. Tex.—City Investment & Loan Co. v. Wichita Hardware Co., Civ. App., 57 S.W.2d 222, 223.

69. N.H.—Barbin v. Moore, 159 A. 409, 415, 85 N.H. 362.

11 C.J. p 959 note 96.

70. Black L.D.

Lawful relations

"Collateral" as used in Rev.Civ. Code art 917, means lawful collateral relations.—Montégut v. Bacas, 7 So. 449, 42 La. Ann. 158, 160.

71. Mo.—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 139, 333 Mo. 673 — Inter-River Drainage Dist. of Missouri v. Hen-son, App., 99 S.W.2d 865, 872.

There is no technical legal definition of the word "collateral" distinct from its common significance.⁷²

Collateral act. In old practice, the name given to any act, except the payment of money, for the performance of which a bond, recognizance, etc., was given as security.⁷³

Collateral security. A concurrent security for another debt, whether antecedent or newly created, designed to increase the means of the creditor to realize the principal which it is given to secure;⁷⁴ a separate obligation attached to another contract to guarantee its performance;⁷⁵ security for the

fulfillment of a contract or a pecuniary obligation in addition to the principal security;⁷⁶ some security additional to the personal obligations of the borrower.⁷⁷

The term necessarily implies the transfer to the creditor of an interest in some property or lien on property, or obligation which furnishes a security in addition to the responsibility of the debtor.⁷⁸ It is said to refer to personal property exclusively,⁷⁹ and to be properly and commonly applied to incorporeal property such as stocks, bonds, and choses in action generally,⁸⁰ as distinguished from pledges of

72. Pa.—Seanor v. McLaughlin, 30 A. 717, 165 Pa. 150, 156, 32 L.R.A. 467.

Tex.—City Investment & Loan Co. v. Wichita Hardware Co., Civ.App., 57 S.W.2d 222, 223.

73. Black L.D.

74. N.Y.—In re Alexander's Estate, 273 N.Y.S. 984, 988, 152 Misc. 354. 11 C.J. p 961 note 42 [a].

Collateral to original debt

The etymology of "collateral security" indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness.

U.S.—Pontiac Buggy Co. v. Skinner, D.C.N.Y., 158 F. 858, 864.

Colo.—Moffatt v. Corning, 24 P. 7, 14, 14 Colo. 104, quoting note to Le Breton v. Pierce, 2 Allen (Mass.) 8.

It is subsidiary to the principal debt; running parallel with it, collateral to it; and, when collected, is to go to the credit of the principal debt.—In re Alexander's Estate, 273 N.Y.S. 984, 988, 152 Misc. 354—11 C. J. 961 note 42 [a].

Stand beside original debt

The collateral security stands by the side of the principal promise as an additional or cumulative means for securing payment of debt.

U.S.—Pontiac Buggy Co. v. Skinner, D.C.N.Y., 158 F. 858, 864.

Colo.—Moffatt v. Corning, 24 P. 7, 14 Colo. 104, 123, quoting Colebrooke Collateral Securities § 2.

Pa.—Provident Life & Trust Co. of Philadelphia v. Gratz, 114 A. 498, 499, 271 Pa. 133, quoting *Corpus Juris*.

Tex.—Cattlemen's Trust Co. v. Swearingen, Civ.App., 200 S.W. 596, 599, quoting *Corpus Juris*.

75. Cal.—Johnson v. National Surety Co., 5 P.2d 39, 40, 118 Cal.App. 227, quoting Bouvier L.D.

N.Y.—Lenner v. Corso (Co.Ct.) 295 N.Y.S. 827, 829, 162 Misc. 500.

11 C.J. p 961 note 37.

Similar definitions

(1) "A separate obligation attach-

ed to another to guarantee its payment."

U.S.—National Typewriter Co. v. Pope Mfg. Co., C.C.Mass., 56 F. 349, 354.

Colo.—Butler v. Rockwell, 23 P. 462, 14 Colo. 125, 136.

(2) "A separate obligation, as the negotiable bill of exchange or promissory note of a third person, or other representative of value, indorsed, where necessary, and delivered by a debtor to his creditor, to secure the payment of his own obligation, represented by an independent instrument."—International Trust Co. v. Union Cattle Co., 31 P. 408, 3 Wyo. 803, 804, 19 L.R.A. 640, quoting Colebrooke Collateral Securities.

76. Colo.—Butler v. Rockwell, 23 P. 462, 14 Colo. 125, 136.

Similar definition

"Any property or right of action; as a bill of sale or stock certificate which is given to secure the performance of a contract or discharge of an obligation and as additional to the obligation of that contract, and which, upon the performance of the latter, is to be surrendered or discharged."—Cattlemen's Trust Co. v. Swearingen, Tex.Civ.App., 200 S. W. 596, 599, quoting *Corpus Juris*.

For payment of money

"Collateral security" is a security for "the payment of money besides the principal security."

Colo.—Butler v. Rockwell, 23 P. 462, 14 Colo. 125, 136.

Kan.—Schnitzler v. Wichita Fourth Nat. Bank, 42 P. 496, 500, 1 Kan. App. 674.

For performance of covenants

Collateral security is a "security for the performance of covenants . . . besides the principal security."—Butler v. Rockwell, 23 P. 462, 14 Colo. 125, 136.

77. U.S.—Jones v. Third Nat. Bank of Sedalia, C.C.A.Mo., 13 F.2d 86, 87.

11 C.J. p 961 note 40.

Similar definitions

(1) "Any security in addition to the original obligations."—Thomp-

son v. Sav., etc., Co., 83 A. 284, 285, 234 Pa. 452.

(2) "One side by side with or in addition to the first or in addition to the debtor's own obligation."—Chambersburg Ins. Co. v. Smith, 11 Pa. 120, 127.

(3) "The term implies . . . an obligation which furnishes a security in addition to the responsibility of the debtor."—Union Nat. Bank of Johnstown, Pa., v. People's Savings & Trust Co., of Pittsburgh, Pa., C.C.A.Pa., 28 F.2d 326, 328—A.Pa., 28 F.2d 326, 328.

78. U.S.—Union Nat. Bank of Johnstown, Pa., v. People's Savings & Trust Co., of Pittsburgh, Pa., C.C.A.Pa., 28 F.2d 326, 328—Jones v. Third Nat. Bank of Sedalia, C.C.A.Mo., 13 F.2d 86, 87.

Tex.—Cattlemen's Trust Co. v. Swearingen, Civ.App., 200 S.W. 596, 599, quoting *Corpus Juris*.

11 C.J. p 961 note 41.

Mortgage and mechanic's lien on same property

It seems that the taking of a mortgage from the debtor on the same identical property covered by the mechanic's lien, and for the same debt, cannot be deemed collateral security on the same contract.—Gilcrest v. Gottschalk, 39 Iowa 311, 313.

79. Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, 767.

Wash.—Hodge v. Truax, 51 P.2d 357, 359, 184 Wash. 360, 103 A.L.R. 420. 11 C.J. p 962 note 43.

80. Fla.—Travers v. Stevens, 145 So. 851, 854, 108 Fla. 11—Pepper v. Beville, 129 So. 334, 337, 100 Fla. 97.

Ohio.—Schmidt v. Hicks, 162 N.E. 762, 764, 28 Ohio App. 413.

As pledge

(1) "Collateral security means a pledge of incorporeal property assigned or transferred and delivered by a debtor, or some one for him, to a creditor as security for the payment of a debt or the fulfillment of an obligation."—A. H. Averill Ma-

corporeal chattels.⁸¹

The phrase has no technical significance distinct from the meaning of the term "collateral" where the latter is used in the sense of an additional obligation or security.⁸²

Collateral undertaking. A contract based upon a preëxisting debt, or other liability, and including a promise to pay, made by a third person having immediate respect to and founded upon such debt or liability, without any new consideration moving to him;⁸³ a contract of ordinary guaranty or suretyship.⁸⁴

Other phrases: "Additional collateral security,"⁸⁵ "any matter collateral to the issue,"⁸⁶ "collateral actions or proceedings,"⁸⁷ "collateral agreement,"⁸⁸ "collateral attack," see the C.J.S. title Judgments §§ 401-435, also 34 C.J. p 511 note 46-p 567 note 71, "collateral attack on a judicial proceeding,"⁸⁹ "collateral attendant facts,"⁹⁰ "collateral condition,"

see Condition in 15 C.J.S., "collateral consanguinity,"⁹¹ "collateral consequence,"⁹² "collateral consideration,"⁹³ "collateral descent," see the C.J.S. title Descent and Distribution § 1, also 18 C.J. p 803 note 44, "collateral estoppel," see the C.J.S. title Estoppel § 1, also 11 C.J. p 959 note 17, "collateral facts,"⁹⁴ "collateral fraud,"⁹⁵ "collateral heirs," see the C.J.S. title Descent and Distribution §§ 38-42, also 18 C.J. p 835 note 12-p 837 note 59, "collateral inheritance tax," see the C.J.S. title Taxation § 1111, also 61 C.J. p 1590 note 11 [c], "collateral issues,"⁹⁶ "collateral kinsmen,"⁹⁷ "collateral limitation," see the C.J.S. title Estates § 120, also 21 C.J. p 1024 note 10, "collateral loans,"⁹⁸ "collateral negligence,"⁹⁹ "collateral or additional security,"¹ "collateral or naked powers," see the C.J.S. title Powers § 7, also 49 C.J. p 1252 note 62, "collateral power of appointment,"² "collateral proceeding,"³ "collateral promise,"⁴ "collateral promise . . . to pay the debt

chinery Co. v. Bain, 148 P. 334, 335, 50 Mont. 512.

(2) "The transaction by which collateral security is delivered by the debtor and accepted by the creditor constitutes a pledge."—Smith v. Blancas, Tex.Civ.App., 87 S.W.2d 781, 784, quoting *Corpus Juris*.

Chose in action

The term is most commonly applied where the additional security is a chose in action.

U.S.—Mitchell v. Roberts, C.C.Ark., 17 F. 776, 5 McCrary 425.

Tex.—Central Nat. Bank v. Latham & Co., Civ.App., 22 S.W.2d 765, 767, Wash.—Hodge v. Truax, 51 P.2d 357, 184 Wash. 360, 103 A.L.R. 420, 11 C.J. p 962 note 44.

When stock certificates are pledged as security for the fulfillment of a contract or a pecuniary obligation the term collateral security is applied to the bailment.—Gibson County v. Fourth & First Nat. Bank, 96 S.W.2d 184, 191, 20 Tenn.App. 168.

81. Ohio.—Schmidt v. Hicks, 162 N. E. 762, 764, 28 Ohio App. 413, 11 C.J. p 962 note 45 [a].

82. Mont.—A. H. Averill Mach. Co. v. Bain, 148 P. 334, 50 Mont. 512, 514.

83. Ill.—Robinson v. Holmes, 82 Ill. App. 307, 308, 11 C.J. p 962 note 46 [a].

To pay debt of another

If the party to whom a consideration moves becomes personally liable for the payment of the debt, the promise of any other person to pay it, although the promise be made at the same time, and upon the same consideration, is a "collateral undertaking" to pay the debt of another.—Allen v. Smith & Brand, 133 So. 599, 601, 160 Miss. 303.

84. Ala.—Smith-Shultz-Hodo Realty Co. v. Henley-Spurgeon Realty Co., 140 So. 443, 444, 224 Ala. 331.

85. N.H.—Barbin v. Moore, 159 A. 409, 85 N.H. 362.

86. Ark.—Terrell v. State, 2 S.W.2d 87, 88, 176 Ark. 1206.

87. Mo.—State ex rel. City of St. Louis v. Public Service Commission of Missouri, 47 S.W.2d 102, 105, 329 Mo. 918.

88. Neb.—State v. Dunbar State Bank, 228 N.W. 868, 869, 119 Neb. 335.

89. Phrase defined

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its force and effect in some manner not provided by law."—In re Armstrong's Estate, Or., 32 P.2d 880, 884, quoting Vanfleet Collateral Attack § 2 p 5.

90. Ga.—Blanchard v. State, 69 S.E. 313, 8 Ga.App. 419, 420.

"Immaterial matters" distinguished

While the phrases "immaterial matters" and "collateral attendant facts" are primarily not absolutely synonymous, as collateral attendant facts may be material, it has been held that the phrase "collateral attendant facts," being placed in antithesis to the phrase "material facts," in an instruction did, by every rule of construction, become for the nonce equivalent in meaning to the phrase "immaterial facts."—Blanchard v. State, 69 S.E. 313, 8 Ga. App. 419, 420.

91. Tex.—Tyler Tap R. Co. v. Overton, 1 Tex.A.Civ.Cas. §§ 533, 534, 11 C.J. p 959 note 14.

"Lineal consanguinity" distinguished La.—State v. De Hart, 33 So. 605, 109 La. 570.

92. A term which has been employed as synonymous with "consequential injury" and has been defined to be an injury occasioned by an act, but arising after the act has been completed.—Jordan v. Wyatt, 4 Gratt. 151, 155, 45 Va. 151, 155, 47 Am.D. 720.

"Immediate injury" compared

Va.—Jordan v. Wyatt, 4 Gratt. 151, 155, 45 Va. 151, 155.

93. Md.—Chicora Fertilizer Co. v. Dunan, 46 A. 347, 350, 91 Md. 144, 50 L.R.A. 401.

94. Ga.—Summerour v. Felker, 29 S.E. 448, 102 Ga. 254, 257.

N.H.—Pulsifer v. Walker, 159 A. 426, 429, 85 N.H. 434.

95. Ariz.—Dockery v. Central Arizona Light & Power Co., 45 P.2d 656, 663, 45 Ariz. 434.

96. Vt.—State v. Lapan, 141 A. 686, 691, 101 Vt. 124.

97. Md.—Suman v. Harvey, 79 A. 197, 114 Md. 241, 260.

11 C.J. p 960 note 26.

98. U.S.—In re Gotham Can. Co., C. C.A.N.Y., 48 F.2d 540, 542.

99. Equivalent of "casual negligence" see Casual ante p 29 note 31.

1. U.S.—Union Nat. Bank of Johnstown, Pa. v. People's Savings & Trust Co. of Pittsburgh, Pa., C.C.A. Pa., 28 F.2d 326, 328.

2. Pa.—In re McKallip's Estate, 188 A. 343, 345, 324 Pa. 438, 108 A.L.R. 1095.

3. Wash.—Peyton v. Peyton, 68 P. 757, 28 Wash. 278, 309, 11 C.J. p 960 note 32.

4. Ky.—Miller v. Davis, 182 S.W. 839, 840, 168 Ky. 661.

Me.—Fairbanks v. Barker, 97 A. 3, 5, 115 Me. 11.

of a third person,"⁵ "collateral promissory note,"⁶ "collateral relations,"⁷ "collateral to a continued liability of the original debtor,"⁸ "collateral to the main issue,"⁹ "collateral undertaking in the nature of a guaranty,"¹⁰ "collateral warranty," see the C. J.S. title Descent and Distribution § 126, also 18 C.J. p 951 notes 51-57, "extrinsic or collateral fraud,"¹¹ "immaterial or collateral matter,"¹² "material and not collateral,"¹³ "matter collateral to the questions which are submitted to the court,"¹⁴ and "original undertaking and not collateral."¹⁵

COLLATERALES ET SOCII. Law Latin, assistants and associates [of the chancellor]; the titles of masters in chancery who were so called because they sat by his side at a certain table in Westminster Hall and elsewhere.¹⁶

COLLATIO. Latin, a bringing together, collecting, or contribution, as of money; a throwing into one fund or mass; in juridical Latin, a technical term meaning the putting together of the possessions of several in order to divide them equally among themselves; in English law, a comparison of two things by putting them together.¹⁷

Collatio beneficii. In English ecclesiastical law, the conferring or bestowing of a benefice by the bishop where he has himself the advowson or right of patronage, and which single act of collation affects all that is done in common cases by the acts of presentation and institution.¹⁸

Collatio bonorum. As the civil law doctrine of "collation" requiring one of several heirs to restore to the inheritance, before sharing in the distribution, any property which he may have received from the decedent, hence described in Blackstone's Commentaries as "equalizing the estates or goods," and so analogous to the common-law "hotch pot," see the C.J.S. title Descent and Distribution § 106, also 18 C.J. p 927 notes 26-29, also 11 C.J. pp 962-966.

Collatio signorum. In old English law, a compar-

ison of marks or seals; a mode of testing the genuineness of a seal, by comparing it with another known to be genuine.¹⁹

COLLATION. In its primary sense, the word has been defined by the Century Dictionary as meaning the act of collating, or bringing together and comparing. In derived senses, "collation" has been defined as a devout work;²⁰ and also as a luncheon, and it has been said that in this latter sense, the word may have perhaps a local meaning approximately synonymous with "house of public entertainment," but that such meaning cannot be judicially recognized.²¹

In ecclesiastical law, the act by which the bishop who has the bestowing of a benefice gives it to an incumbent.²²

In practice, the comparison of a copy with its original to ascertain its correctness; or the report of the officer who made the comparison.²³

In maritime law, as contribution or average, see the C.J.S. title Shipping § 224, also 11 C.J. p 966 note 55.

In the civil law, the term, or its Latin, Spanish, and Italian equivalents, namely "collatio," "colación," and "collazione," may be synonymous with the common-law "hotch-pot,"²⁴ and it has been so used in the law of descent, see the C.J.S. title Descent and Distribution § 106, also 18 C.J. p 927 note 28.

Collation of seals. This occurs when upon the same label one seal is set on the back or reverse of the other.²⁵

Collation to a benefice. In ecclesiastical law, this occurs where the bishop and patron are one and the same person, in which case the bishop cannot present the clergyman to himself, but does, by the one act of collation or conferring the benefice, the whole that is done in common cases both by presentation and institution.²⁶

5. U.S.—Charles Broadway Rouss, Inc., v. Cooper, C.C.A.Fla., 69 F.2d 671, 673.

6. Wis.—In re Stone's Will, 248 N. W. 446, 450, 211 Wis. 518.

7. La.—Hite v. Hite, App., 171 So. 429, 431.

8. Pa.—Bayard v. Pennsylvania Knitting Mills Corporation, 137 A. 910, 912, 290 Pa. 79.

9. Mo.—State v. English, 274 S.W. 470, 474, 308 Mo. 695.

10. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Kelsey, 44 P.2d 617, 620, 6 Cal.App.2d 346.

11. Ariz.—Dockery v. Central Ari-

zona Light & Power Co., 45 P.2d 656, 663, 45 Ariz. 434.

12. Miss.—Bradford v. State, 146 So. 635, 636, 166 Miss. 296.

13. Mo.—State v. Day, 95 S.W.2d 1183, 1185, 339 Mo. 74.

14. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments are Delinquent, 178 So. 143, 146.

15. Ga.—Bank of Omega v. Wingo, Ellett & Crump Shoe Co., 91 S.E. 251, 19 Ga.App. 177.

Tex.—Kinney v. Pearce, Civ.App., 65 S.W.2d 502, 503.

16. Adams Gloss., citing 2 Reeves Hist.Eng.L. p 251.

17. Adams Gloss.

18. Adams Gloss., citing 2 Blackstone Comm. p 22.

19. Black L.D.

20. La.—State v. Denoist, 40 So. 365, 115 La. 949, 950.

21. La.—State v. Denoist, supra.

22. Black L.D., citing 2 Blackstone Comm. p 22.

23. Black L.D.

24. U.S.—The Henry Ewbank, C.C. Mass., 11 F.Cas.No.6,376, 1 Sumn. 400, 421.

11 C.J. p 966 note 54.

25. Black L.D.

26. Black L.D.

COLLATIONE FACTA UNI POST MORTEM ALTERIUS. A writ directed to justices of the common pleas, commanding them to issue their writ to the bishop, for the admission of a clerk in the place of another presented by the crown, where there had been a demise of the crown during a suit.²⁷

COLLATIONE HEREMITAGII. A writ whereby the king conferred the keeping of an hermitage upon a clerk.²⁸

COLLECT. Generally defined as meaning to assemble or gather;²⁹ to bring scattered things (assets, accounts, articles of property) into one mass or fund, or to gather together;³⁰ and more specifically as meaning to reduce to possession;³¹ to demand or obtain payment of an account or other indebtedness;³² to do that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity.³³ When employed with reference to the collection of money, it often means more than the mere act of receiving the money, and includes the means by which the payment is enforced.³⁴ The power to collect carries with it the authority to use force in the

manner pointed out by law to obtain judgment;³⁵ and implies and includes the right, and ordinarily the duty, to employ all the usual, ordinary, and necessary means to accomplish a collection,³⁶ such as the employment of counsel and the institution of legal proceedings for collection,³⁷ although there is authority to the contrary;³⁸ and, under some circumstances at least, the power to sell may likewise be implied in the right to collect.³⁹

"Collect" has been held synonymous with "raise,"⁴⁰ and sometimes synonymous with "levy"⁴¹ and sometimes distinguished therefrom;⁴² and has been also contrasted with "commencement of a legal process."⁴³ The particular meaning of the term "collect" is determined by the sense in which it is used.⁴⁴

Phrases: "Allowed to collect,"⁴⁵ "collect a fine,"⁴⁶ "collect . . . and pay over,"⁴⁷ "collect and remit,"⁴⁸ "collect by a different method,"⁴⁹ "collect on delivery," see C.J.S. titles Carriers § 186, and Shipping § 116, also 58 C.J. p 371 notes 17, 18, "collect, receive and apply to . . . own use,"⁵⁰ "collect taxes,"⁵¹ "forthwith collect,"⁵² "levy and collect,"⁵³

27. Black L.D.

28. Black L.D.

29. Iowa.—Purdy v. Independence, 39 N.W. 641, 643, 75 Iowa 356.
N.M.—Hubbell v. Bernalillo County, 86 P. 430, 431, 13 N.M. 546.
11 C.J. p 966 note 61.

30. Black L.D.

31. Kan.—Ekblad v. Hanson, 117 P. 1028, 1030, 85 Kan. 541.

32. N.Y.—Isler v. National Park Bank of New York, 147 N.E. 66, 68, 239 N.Y. 462, quoting Webster D.

33. Iowa.—Shenandoah Nat. Bank v. Marsh, 56 N.W. 453, 459, 89 Iowa 273, 48 Am.S.R. 331.

34. Iowa.—Purdy v. Independence, 39 N.W. 641, 643, 75 Iowa 356.
11 C.J. p 966 notes 67, 68.

Scope of authority to collect

"Authority to collect is broader and more comprehensive than authority to receive payment."—Ryan v. Tudor, 2 P. 797, 798, 31 Kan. 366.

35. Ky.—Krieger v. Title Insurance & Trust Co., 83 S.W.2d 850, 854, 260 Ky. 1.
11 C.J. p 967 note 69.

36. Iowa.—McInerny v. Reed, 23 Iowa 410, 414.

Ky.—Krieger v. Title Insurance & Trust Co., 83 S.W.2d 850, 854, 260 Ky. 1.
11 C.J. p 967 notes 71, 72.

37. Ky.—Krieger v. Title Insurance & Trust Co., supra.
11 C.J. p 967 note 74.

38. Cal.—People v. Reis, 18 P. 309, 313, 76 Cal. 269.

39. Mass.—Going v. Emery, 16 Pick. 107, 112, 26 Am.D. 645.
11 C.J. p 967 note 73.

40. Mass.—Bates College v. Bates, 135 Mass. 487, 488.
N.Y.—Town of Amherst v. Erie County, 258 N.Y.S. 76, 79, 236 App. Div. 58, citing Webster D.

41. Del.—Rhoads v. Given, 10 Del. 183, 186.

Mo.—Valle v. Fargo, 1 Mo.App. 344, 347.

42. Colo.—Parsons v. People, 76 P. 666, 669, 32 Colo. 221.

43. "The word collect of itself is not synonymous with a commencement of a legal process."—Thompson v. Hazen, 25 Me. 104, 108.

44. Iowa.—Purdy v. Independence, 39 N.W. 641, 643, 75 Iowa 356, 360.

45. Me.—Thompson v. Hazen, 25 Me. 104, 108.

46. "In legal sense, the term 'to collect a fine' includes all the acts by which the penalty is imposed and enforced."—Pottawattamie County v. Carroll County, 25 N.W. 703, 67 Iowa 456, 457.

47. Mass.—Going v. Emery, 16 Pick. 107, 112, 26 Am.D. 645.

48. Implies agency .

"Collection and credit' and 'collect and remit', whatever other difference in meaning in the two phrases there may be, both convey the idea that the party giving is the owner and the one receiving is the agent."—First State Bank v. Taylor, 39 S.W.2d 519, 520, 183 Ark. 967.

"Collection and credit" distinguished Ark.—First State Bank v. Taylor, 39 S.W.2d 519, 520, 183 Ark. 967.

49. Ky.—Krieger v. Title Insurance & Trust Co., 83 S.W.2d 850, 854, 260 Ky. 1.

50. Pa.—Tharp v. Smith, 2 Watts 387, 389.

51. Meaning

"The words 'collect taxes,' as used in the statute, mean to obtain payment of the same from the taxpayers."—Taylor v. Kearney County, 53 N.W. 211, 213, 35 Neb. 331—11 C.J. p 967 note 87.

52. "Merely assemble" distinguished

Ky.—Krieger v. Title Insurance & Trust Co., 83 S.W.2d 850, 854, 260 Ky. 1.

"Reduced to possession" distinguished

Ky.—Krieger v. Title Insurance & Trust Co., supra.

53. Iowa.—McInerny v. Reed, 23 Iowa 410, 413, 414.

"shall not be entitled to collect from both,"⁵⁴ and "to collect."⁵⁵

Phrases in which "collected" has been used: "Actually collected," see Actually 1 C.J.S. p 1445 note 59, "all sums of money collected," see All 3 C.J.S. p 876 note 70, "amount collected," see Amount 3 C.J.S. p 1057 note 94, "by whom such tax . . . was collected,"⁵⁶ "cause to be collected," see Cause ante p 52 note 69, "collected and received,"⁵⁷ "collected from a tax levied for one purpose,"⁵⁸ "collected from policies subsequently canceled and from reinsurance,"⁵⁹ "collected in the regular way,"⁶⁰ "collected or collectible,"⁶¹ "earned and collected,"⁶² "fines and costs collected in the police court,"⁶³ "fines and penalties . . . 'collected,'"⁶⁴ "fines are 'collected,'"⁶⁵ "moneys collected,"⁶⁶ "moneys collected by him,"⁶⁷ "out of the first money collected by him,"⁶⁸ "paid or collected,"⁶⁹ "sums collected,"⁷⁰ and "when collected,"⁷¹ also "collected forfeiture,"⁷² and "collected fund balance."⁷³

Phrases in which "collecting" has been used: "Duty of collecting taxes,"⁷⁴ and "failure or delay in collecting or remitting,"⁷⁵ also adjectively, "col-

lecting and/or adjusting agencies or companies,"⁷⁶ "collecting bank," see the C.J.S. title Banks and Banking §§ 216-218, "collecting officer,"⁷⁷ and "collecting vessel."⁷⁸

COLLECTABLE or COLLECTIBLE. Defined in the Century Dictionary as capable of being collected; and held synonymous with "demandable."⁷⁹

Phrases: "Collected or collectible," see Collect supra note 61, "collectible assets,"⁸⁰ and "good and collectible."⁸¹

COLLECTION.

As a Noun

Defined in a general sense by the Century Dictionary as the act or practice of collecting or of gathering together; also an assemblage or gathering of objects; and, in a specific application, by the Standard Dictionary as the act or process of receiving or enforcing payment due, as for taxes or personal debts, also the amount of such a payment. When applied to the liquidation of a debt, it has been held that the word implies necessarily the payment of money,⁸² but not necessarily, a full dis-

54. Implies money payment

"The language of the statute is that the employee may not 'collect' from both employer and third person who is at fault. It would be inapt to refer to the temporary medical attention as having been 'collected' by the injured employee. The word 'collect' in the context implies the act of payment and reception of money."—City of Nashville v. Lat-ham, 28 S.W.2d 46, 47, 160 Tenn. 581.

As to grounds of liability

"'Collect' . . . is a term not usually employed in statutes creating legal liability, and . . . 'imports an act of payment without reference to the legal grounds on which payment may be demanded.'"—Walters v. Eagle Indemnity Co., 61 S.W.2d 666, 667, 166 Tenn. 383, 88 A.L.R. 654.

55. "For collection" equivalent

Iowa.—Shenandoah Nat. Bank v. Marsh, 56 N.W. 458, 459, 89 Iowa 273, 276, 48 Am.S.R. 381.

56. U.S.—U. S. v. Reeves Bros. Co., C.C.A.Ohio, 38 F.2d 121, 122.

57. N.Y.—Adams v. Bristol, 111 N. Y.S. 231, 234, 126 App.Div. 660.

58. Ark.—Collins v. Humphrey, 27 S. W.2d 102, 105, 181 Ark. 609.

"Arising from a tax levied for one purpose" sometimes equivalent see Arise 6 C.J.S. p 337 note 52.

"Received from a tax levied for one purpose" sometimes equivalent

Ark.—Collins v. Humphrey, 27 S.W. 2d 102, 105, 181 Ark. 609.

59. N.Y.—People v. Miller, 70 N.E. 10, 177 N.Y. 515, 521, 522.

60. "Issued in the regular way" equivalent

N.J.—Sperry & Hutchinson Co. v. Hertzberg, 60 A. 368, 370, 69 N.J. Eq. 264.

61. N.Y.—Fellerman v. Goldberg, 58 N.Y.S. 1113, 1114, 28 Misc. 235.

62. Cal.—Scudder v. Perce, 114 P. 571, 572, 159 Cal. 429.

63. Fines worked out not included

"It is the contention of the appellant that fines and costs collected in the police court mean all fines and costs, whether paid in cash or worked out on the streets or public works of the city. With this contention we cannot agree. The word 'collected,' as used in the statute, means recovered into the city treasury in money."—Board of Trustees of Carnegie Public Library v. City of Paducah, 7 S.W.2d 858, 225 Ky. 224.

64. Ill.—Galpin v. Chicago, 109 N. E. 713, 721, 269 Ill. 27.

65. Ky.—Power v. Fleming County, 35 S.W. 541, 99 Ky. 200, 201, 18 Ky. L. 61.

66. "Moneys raised" equivalent

N.Y.—Town of Amherst v. Erie County, 258 N.Y.S. 76, 78, 236 App. Div. 58.

67. N.Y.—Ireland v. Corse, 67 N.Y. 343, 344, 345.

68. Ala.—Crow v. Board of School Com'rs of Mobile County, 152 So. 26, 28, 228 Ala. 107.

69. Ark.—Floyd v. State, 32 Ark. 200, 202.

70. Mo.—State v. Smith, 13 Mo.App. 421, 423.

71. Mo.—Grand River Drainage Dist. of Cass and Bates Counties v. Reid, 111 S.W.2d 151, 153.

72. Cal.—Leach v. Dinsmore, Super., 65 P.2d 1364, 1367.

73. U.S.—Scully v. Pacific States Savings & Loan Co., C.C.A.Cal., 88 F.2d 384, 387..

74. "Duty of receiving taxes" distinguished

Pa.—Stewart v. Hadley, 193 A. 41, 44, 327 Pa. 66.

75. N.Y.—Isler v. National Park Bank of New York, 147 N.E. 66, 68, 239 N.Y. 462.

76. Tenn.—Tennessee Credit Clearing Co. v. Lindsey, 35 S.W.2d 393, 394, 162 Tenn. 149.

77. N.J.—Borough of Park Ridge v. Bellavigna, 179 A. 312, 313, 13 N. J.Misc. 631.
11 C.J. p 967 note 84..

78. U.S.—Louis Schopper & Foreign Paper Mills v. Starr Brass Mfg. Co., D.C.Mass., 34 F.2d 664, 665.

79. Pa.—McDoal v. Yeomans, 8 Watts 361, 362.

80. Va.—Ames v. American Nat. Bank of Portsmouth, 176 S.E. 204, 218, 163 Va. 1.

81. Conn.—Lemmon v. Strong, 13 A. 140, 141, 55 Conn. 443.
28 C.J. p 717 note 59.

82. Miss.—Davis v. Cochran, 24 So. 168, 169, 906, 907, 76 Miss. 439.

charge of the debtor's liability, although the word may imply a full discharge under certain conditions.⁸³ "Collection" has been held equivalent to "receiving money"⁸⁴ and "recovery,"⁸⁵ and has been distinguished from "levying,"⁸⁶ and "payment" see the C.J.S. title Payment § 2, also 48 C.J. p 588 note 47.

Collection of accounts. It has been said that it is a matter of common knowledge that the collection of accounts is a part, and a vital part, of any merchandising business in which credit is extended.⁸⁷

Collection of illegal fees. Collection by public official of fees in excess of those fixed by law for certain services.⁸⁸

Other phrases: "Attorney's receipt 'for collection,'" see the C.J.S. title Attorney and Client § 144 note 87, "collection of all fines, forfeitures and penalties,"⁸⁹ "collection of antiquities,"⁹⁰ "collection of

people,"⁹¹ "collection of taxes," see the C.J.S. title Taxation § 640, also 61 C.J. p 1010 note 23-p 1012 note 46, "collection of the note,"⁹² "deposits for collection," see the C.J.S. title Banks and Banking § 280, "expense of collection,"⁹³ "for collection,"⁹⁴ "for collection and credit,"⁹⁵ "for collection and credit for deposit," see the C.J.S. title Banks and Banking § 222 note 63, "for collection and payment,"⁹⁶ "for collection and remittance,"⁹⁷ "for collection and return,"⁹⁸ "for collection for account of" and "for collection to the credit of" see the C.J.S. title Banks and Banking § 222 notes 64, 65, "guarantee the collection," see the C.J.S. title Guaranty § 61, also 28 C.J. p 969 note 23-p 970 note 31, "indorsement 'for collection,'" see the C.J.S. title Bills and Notes § 214 c (4), "restraining the collection of money,"⁹⁹ "revenues in process of immediate collection,"¹ "taxes . . . in immediate process of collection,"² "to provide for collection of special taxes imposed by law,"³ and "with collection;"⁴

83. S.D.—Koch v. Lunschen, 123 N. W. 692, 693, 24 S.D. 227.

84. Iowa.—Purdy v. City of Independence, 39 N.W. 641, 643, 75 Iowa 356.

85. Neb.—Durland v. Durland, 87 N. W. 1048, 1049, 62 Neb. 813.

86. Ga.—Dunn v. Harris, 86 S.E. 556, 559, 144 Ga. 157.

Wash.—Denny v. Wooster, 27 P.2d 328, 329, 175 Wash. 272.

87. U.S.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A. Cal., 73 F.2d 157, 168, 96 A.L.R. 412.

88. Utah.—Parker v. Morgan, 160 P. 764, 765, 48 Utah 405.

89. Ill.—People v. Christerson, 59 Ill. 157, 158.

90. U.S.—Davis v. U. S., N.Y., 77 F. 172, 173, 23 C.C.A. 113.

11 C.J. p 968 note 98 [a]. See also C.J.S. title Customs Duties § 55, and 17 C.J. p 596 notes 19-22.

91. Ohio.—Zmund v. Lexa, 175 N.E. 458, 459, 37 Ohio App. 479.

92. Payment and not renewal

(1) "A collection of the note is a taking of payment thereof in money or in money's worth."—Davis v. Cochran, 24 So. 906, 907, 76 Miss. 439.

(2) "The taking of a new note, payable at a future day, was not a collection of the note, in fact, or otherwise. The strict, plain meaning of 'collection' would be satisfied only by a money payment."—Davis v. Cochran, 24 So. 168, 169, 76 Miss. 439.

93. Cost of suit included

Ark.—State v. Desha County, 99 S. W. 1108, 1109, 82 Ark. 360.

94. U.S.—Commercial National Bank

v. Armstrong, Ohio, 13 S.Ct. 533, 534, 148 U.S. 50, 37 L.Ed. 363.

Iowa.—Shenandoah National Bank v. Marsh, 56 N.W. 458, 459, 89 Iowa 273, 48 Am.S.R. 381.

11 C.J. p 968 note 6, 26 C.J. p 792 note 95.

As applied to banks see Banks and Banking § 222 notes 59, 66.

95. N.Y.—Bank of America v. Waydell, 92 N.Y.S. 666, 668, 103 App. Div. 25.

Tex.—United States Nat. Bank of Galveston v. Azar, Civ.App., 102 S. W.2d 242, 243.

Implies agency

"'Collection and credit' and 'collect and remit,' whatever other difference in meaning in the two phrases there may be, both convey the idea that the party giving is the owner and the one receiving is the agent."—First State Bank v. Taylor, 39 S.W.2d 519, 520, 183 Ark. 967.

Agency not implied

In distinguishing the phrases "collection and credit" and "collection and remittance," the court said: "Language employed to create the relationship . . . was for collection and credit. That authorization and the acceptance thereof did not create the relation of principal and subagent between appellee and appellant; but, rather, it conferred upon appellant a provisional ownership of the check."—Thompson v. Cedar Rapids National Bank, 223 N.W. 517, 519, 207 Iowa 786.

"For collection and remittance" distinguished

Iowa.—Thompson v. Cedar Rapids National Bank, supra.

As applied to banks see Banks and Banking § 222 note 62.

96. U.S.—Ludington Lumber Co. v. Metropolitan Nat. Bank of Minneapolis, C.C.A.Mich., 55 F.2d 169, 170.

Ohio.—Fulton v. Schuky, 191 N.E. 3, 4, 128 Ohio St. 147—Union Trust Co. of Dayton v. Simpson, 191 N. E. 4, 128 Ohio St. 154—Union Trust Co. of Dayton, v. Republic Asphalt Paving Co., 191 N.E. 4, 5, 128 Ohio St. 153—Fulton v. B. R. Baker-Toledo Co., 190 N.E. 459, 462, 128 Ohio St. 226, 93 A.L.R. 933—Fulton v. B. R. Baker-Toledo Co., 182 N.E. 518, 515, 125 Ohio St. 518.

97. Iowa.—Thompson v. Cedar Rapids Nat. Bank, 223 N.W. 517, 519, 207 Iowa 786.

La.—In re Hibernia Bank & Trust Co., 169 So. 464, 472, 185 La. 448. As applied to banks see Banks and Banking § 222 note 60.

98. Tex.—United States Nat. Bank of Galveston v. Azar, Civ.App., 102 S.W.2d 242, 243.

As applied to banks see Banks and Banking § 222 note 61.

99. Tex.—Hicks v. Murphy, Civ. App., 151 S.W. 845, 847.

1. Wis.—Rice v. Milwaukee, 76 N. W. 341, 342, 100 Wis. 516.

2. Wis.—Balch v. Beach, 95 N.W. 132, 134, 119 Wis. 77.

3. Ga.—Brown v. State, 73 Ga. 38, 39.

4. Collection charges included

"The contract in this case reading 'with collection,' should be interpreted to mean, with a charge for collection, that is to say, a reasonable and customary charge for the nature of the collection which may be necessary."—Buck v. Harris, 102 S.W. 640, 125 Mo.App. 365, 368.

also "fines, penalties and collections,"⁵ and "on collections made by him."⁶

As an Adjective

Collection agency. A concern whose business it is to collect all kinds of claims, as well as notes, drafts, and other negotiable instruments, on behalf of others, and to render an account of the same.⁷

Duties and liabilities of a collection agency or an agent to collect see Agency § 161 c.

Other phrases: "Collection district,"⁸ "collection item,"⁹ and "collection suit."¹⁰

COLLECTIVE. Defined by Webster as characteristic of, or relating to, a group of individuals, as the social or collective interests of mankind.

Collective labor agreement. A term used to describe a bargaining agreement as to wages and conditions of work, entered into by groups of employees, usually organized into a brotherhood or union, on one side, and groups of employers, or corporations, such as railroad companies, on the other side.¹¹

Other phrases: "Collective bargaining," see Bargain 9 C.J.S. p 1542 note 56, and "collective nationalization," see Aliens § 135 note 82.

COLLECTOR. Defined generally in the Century Dictionary as one who collects or gathers; and specifically as an official who collects or receives taxes, duties, or other public revenues;¹² one appointed to receive taxes or other impositions: as, collector of taxes, collector of military fines, etc.; also a person appointed by a private person to collect the credits due him.¹³ As applied to the collection of

money owed, it has been held that the term does not include a person collecting his own accounts,¹⁴ and that, in a particular connection, it is restricted to that class of persons or collectors who, as a profession, for fee or percentage, collect generally for the public;¹⁵ also it has been held that the term "collector" necessarily implies looking after delinquent or distressed loans,¹⁶ but that, appearing as a title after a person's name, it is descriptive merely and may be treated as surplusage,¹⁷ and that in order for an official to be a collector, he need not possess the power to enforce payment by legal process, but that it is sufficient if he is authorized by law to receive the money for and on behalf of the public.¹⁸

For particular collectors see inter alia such C.J.S. titles as Counties § 109, also 15 C.J. p 481, note 5, Customs Duties § 80, also 17 C.J. p 603 note 23—p 604 note 28, Executors and Administrators §§ 1054, 1055, also 24 C.J. p 1207 note 62—p 1208 note 71, Internal Revenue § 164, also 33 C.J. p 350 notes 36—42, Municipal Corporations § 2071, also 44 C.J. p 1344 note 8—p 1345 note 34, Taxation §§ 645—648, also 61 C.J. p 1013 note 59—p 1015 note 2, and Towns § 164, also 63 C.J. p 204 notes 60—65.

Collector and custodian. It has been said that the phrase, as used in a constitutional provision, embraces every person who is given the legal power to collect, demand, or receive taxes or other public dues or moneys, and retain the same in his possession for any time, however short or long.¹⁹

Other phrases: "Bookkeeper and collector,"²⁰ "collector and custodian of public money,"²¹ "collector of accounts or bill collector,"²² "collector of contributions,"²³ "collector of garbage,"²⁴ "collec-

5. Me.—State v. Hanna, 58 A. 1061, 1062, 99 Me. 224.

6. Iowa.—Purdy v. City of Independence, 39 N.W. 641, 643, 75 Iowa 356.

7. R.I.—McCarthy v. Hughes, 88 A. 984, 985, 36 R.I. 66, Ann.Cas.1915D 26.

8. U.S.—The Mazel Tov, C.C.A.R.I., 56 F.2d 921, 926—The Mazel Tov, D.C.R.I., 51 F.2d 292, 297.

9. Mo.—Quaintance v. Moberly, App., 110 S.W.2d 857, 860.

10. Vt.—F. S. Fuller & Co. v. Morrison, 169 A. 7, 8, 106 Vt. 17—Niles v. Rexford, 168 A. 714, 105 Vt. 492.

11. Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 283 —Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 696, 126 Neb. 493, 95 A.L.R. 1.

Or.—Shelley v. Portland Tug & Barge Co., 76 P.2d 477, 481.

12. Neb.—State v. Moores, 73 N.W. 299, 304, 52 Neb. 770, quoting Standard D.

13. U.S.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A. Cal., 73 F.2d 157, 167, 96 A.L.R. 412, quoting Bouvier L.D.

14. U.S.—Ocean Accident & Guaranty Corporation v. Rubin, supra.

15. Nonprofessional collectors not included

"If a person engaged in making collections for others is a collector, by an equally fair interpretation a 'clerk,' a 'servant,' an 'employee,' or 'keeper of accounts,' so engaged, may be collectors; and a collector may be a servant, clerk, employee, and keeper of accounts."—State v. Sarlls, 34 N. E. 1129, 1130, 135 Ind. 195.

16. Okl.—First Federal Savings & Loan Assoc. of Elk City v. Rose, 79 P.2d 796, 797.

17. U.S.—McCaughn v. Union Paving Co., D.C.Pa., 60 F.2d 657, 658.

18. Neb.—State v. Moores, 73 N.W. 299, 304, 52 Neb. 770.

19. Neb.—State v. Moores, 73 N.W. 299, 304, 52 Neb. 770.

20. N.J.—Kellogg v. Scott, 44 A. 190, 192, 58 N.J.Eq. 344.

21. Includes clerk of district court Neb.—State v. Moores, 73 N.W. 299, 304, 52 Neb. 770.

Includes county treasurer

Neb.—State ex rel. Good v. Marsh, 249 N.W. 295, 298, 125 Neb. 125.

22. U.S.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A. Cal., 73 F.2d 157, 167, 96 A.L.R. 412.

23. Eng.—Joyce v. Northumberland Miners' Friendly Society, 4 T.L.R. 525.

24. Farmer gathering city garbage, at regular intervals from various

tor of said township,"²⁵ county collector,"²⁶ and former collector."²⁷

COLLEGA. Literally, one who is chosen at the same-time with another," hence a partner in office, a colleague.²⁸ In the civil law, one invested with joint authority; a colleague or an associate.²⁹

COLLEGATARIUS. Latin, in the civil law, a collegatee;³⁰ one to whom something is bequeathed by will with others, a collegatary or a joint heir.³¹

COLLEGE. An organized assembly or collection of persons, established by law, and empowered to co-operate for the performance of some special function or for the promotion of some common object,

which may be educational, political, ecclesiastical, or scientific in its character.³² The term is used in various senses, as a college of electors, a college of surgeons, or a college of cardinals.³³

As an institution of learning see the title Colleges and Universities post.

College of cardinals. The assemblage of the cardinals at Rome.³⁴

Electoral college. In the United States, the body of the presidential electors.³⁵

Other phrases: "All universities, colleges, academies and school houses;"³⁶ and also "for the purpose of providing them a college education in the University of Pennsylvania."³⁷

places, and transporting it to his farm for use as food for his swine, held to be a "collector of garbage."—*Rochester v. Gutberlett*, 133 N.Y.S. 541, 545, 73 Misc. 607.

25. N.J.—*Gabler v. Elizabeth*, 42 N. J. Law 79, 80.

26. Ark.—*Ex p. McCabe*, 33 Ark. 396, 398.

27. U.S.—*McCaughn v. Union Paving Co.*, D.C.Pa., 60 F.2d 657, 658.

28. *Adams Gloss.*

29. Black L.D.

30. Black L.D.

31. *Adams Gloss.*, citing *Gaius Inst.* ii § 199.

32. Black L.D.

33. Pa.—*Academy of Fine Arts v. Philadelphia County*, 22 Pa. 496, 498.

34. Black L.D.

35. Black L.D.

36. Pa.—*Academy of Fine Arts v. Philadelphia County*, 23 Pa. 496, 498.

37. **Applicable to physical education course in University of Pennsylvania**

"There is a very wide latitude in the term 'a college education,' and inasmuch as these boys have pre-

pared themselves to a point where they could matriculate at the University of Pennsylvania in one of the courses, and having elected to pursue a physical education which equips them for a life work, we feel that they have qualified under the terms of the will to a use of this money in pursuance of a further education, and we believe that it was the intention of the testatrix that these boys should have the benefit of a course at the University of Pennsylvania, which would be of future assistance in their life work."—*In re Weller's Estate*, 164 A. 140, 142, 108 Pa.Super. 137.

COLLEGES AND UNIVERSITIES

This Title includes bodies, incorporated or unincorporated, formed for the instruction of students in one or more courses of study more advanced than those pursued in the ordinary schools or academies.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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1. Definitions, Nature and Status

While the terms are in a broad sense interchangeable, "college" and "university" are in a stricter sense distinct terms, the first meaning an institution of higher learning devoted to the arts and sciences and the second union of college and technical or professional schools. Colleges and universities are usually although not necessarily incorporated.

While the word has other meanings, as shown in the general definition of "college" ante, in its most common use "college" designates an institution of learning (usually incorporated) which offers instruction in the liberal arts and humanities and in scientific branches, but not in the technical arts or those studies preparatory to admission to the professions.¹ The word "school" may include a college,² and the terms "school," "college," and "university" may convey the same idea, differing only in grade;³ but schools have been distinguished from colleges,⁴ as a college is a school where instruction is given in the various higher branches of learning,⁵ and it has the right to confer degrees.⁶ The so-called "junior college" has been regarded as not an institution of higher learning, but a mere over-high school falling within the classification of secondary schools and to be regulated as such rather than as a college or university.⁷

As distinguished from a college, a university is an institution of higher learning, consisting of an assemblage of colleges united under one corporate organization and government, affording instruction

in the arts and sciences and the learned professions, and conferring degrees,⁸ and the term "university" implies an institution of many departments.⁹ While the term "college" is the generic name for all such institutions, sometimes given even to professional schools,¹⁰ the term "university," as said in the Century Dictionary, is properly limited to colleges which in size, organization (especially in division into distinct schools and faculties), methods of instruction, and diversity of subjects taught approach most nearly to the institutions so named in Europe.

The word "college," as employed in a particular context, may include both the undergraduate and the graduate and professional departments of a college or university,¹¹ and the words "college" and "university" may be and often are used as convertible terms.¹²

A "hospital" with incidental educational features, such as the training of nurses and the instruction of medical students, has been held not to be a "college, academy, school, or seminary of learning."¹³

Corporate character. Usually the term "college" implies a corporation,¹⁴ although it has been applied to unincorporated associations.¹⁵ Ordinarily, it is not a business or trading corporation.¹⁶

The physical property of a college or university,

Black L.D.

C.J. p 972 note 2.

Neb.—Omaha Medical College v. Rush, 35 N.W. 222, 22 Neb. 449, 153.

C.J. p 973 note 3.

Each of three terms "indicates an institution of learning, consisting of trustees, teachers and scholars, making up the membership of the institution and representing its active work—an institution engaged in imparting knowledge to resident students and possessing the right to confer degrees."—State v. Erickson, 1 P. 287, 291, 75 Mont. 429.

N.Y.—People v. Brooklyn Bd. of Education, 13 Barb. 400, 410.

C.J. p 973 note 4—56 C.J. p 168 note 30.

Rapalje & L.L.D.

C.J. p 973 note 5.

Pa.—Northampton County v. Lafayette College, 18 A. 516, 128 Pa. 132, 144—Com. v. Banks, 9 Pa. Dist. 136.

C.J. p 974 note 6.

La.—McHenry v. Ouachita Parish School Bd., 125 So. 841, 169 La. 646.

Black L.D.

C.J. p 974 note 7.

Similar definitions

(1) "A university is an institution organized and incorporated for the purpose of imparting instruction in the higher branches of literature, sciences, art, and empowered to confer degrees in the several arts and faculties, as in theology, law, medicine, music, etc."—Board of Directors of University of Cincinnati v. City of Cincinnati, 1 Ohio N.P., N.S., 105, 109, affirmed 74 N.E. 1142, 71 Ohio St. 500.

(2) Other definitions.—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 149, 41 Ohio App. 367—11 C.J. p 974 note 7 [a], [b].

Reference to particular institution

The word "university," as employed in a statute or in a deed of trust may from the context and circumstances involved be construed as referring to a particular institution, whether or not such institution meets the requirements of a real university.—Waddick v. Merrell, 26 Ohio Cir.Ct. 437, 438.

9. Tex.—Ingram v. Texas Christian University, 196 S.W. 608, error refused.

10. Ky.—Nelson v. State Bd. of

Health, 57 S.W. 501, 108 Ky. 769, 22 Ky.L. 438, 50 L.R.A. 338—State Bd. of Pharmacy v. White, 2 S.W. 225, 84 Ky. 626, 633, 8 Ky.L. 678. N.Y.—People v. Albany Medical College, 26 Hun 348, affirmed 89 N.Y. 635.

11 C.J. p 975 note 8.

11. Conn.—Shepard v. Union & New Haven Trust Co., 138 A. 809, 106 Conn. 627.

12. Ky.—State Bd. of Pharmacy v. White, 2 S.W. 225, 84 Ky. 626, 633, 8 Ky.L. 678.

Minn.—Nobles County v. Hamline Univ., 48 N.W. 1119, 46 Minn. 316, 317.

13. U.S.—Massachusetts Gen. Hospital v. U. S., Mass., 112 F. 670, 672, 50 C.C.A. 417.

11 C.J. p 975 note 17.

14. Ill.—Fitzsimmons v. Miller, 231 Ill.App. 389—Lincoln Mining Co. v. Board of Education of State of Illinois, 212 Ill.App. 586.

15. N.Y.—Chegaray v. New York, 13 N.Y. 220.

11 C.J. p 975 note 12.

16. Neb.—McLeod v. Lincoln Medical College, 96 N.W. 265, 98 N.W. 672, 69 Neb. 550.

11 C.J. p 975 note 13.

such as a building or group of buildings, may be indicated by the term as used in a particular context, as will appear from examination of the cases referred to below.¹⁷

§ 2. Public or Private Character and Control

- a. In general
- b. Power of state to change charter

a. In General

The public or private character and control of colleges and universities depend on charter and statutory provisions, and ordinarily an institution supported in whole or in part by state or other public funds is regarded as a state or public institution.

The public or private character and the control of a college or university are determined from its articles of incorporation and the statute authorizing its formation.¹⁸ As stated in a well considered case quoting *Corpus Juris* to such effect, a college or university is usually deemed to be a public institution or corporation and subject, as such, to the plenary control of the state, where it was instituted by the state and maintained out of state funds,¹⁹ or by means of the aid extended by the national or state government for instruction in agriculture and the mechanic arts;²⁰ and in such cases the corporation, if one is created, is a mere agent or instrumentality of the state to carry out the public purpose.²¹ Nevertheless, the view has been taken that such incorporated colleges and universities are technically private, or at most only quasi-public, corporations,²² although where subject to the visitation of regents they form part of

the educational system of the state,²³ and that the property of such corporations is their private property and not the property of the state.²⁴ The fact that private donations have been made to them either at the time of or after their incorporation,²⁵ or that tuition charges are made for instruction,²⁶ does not alter their public character. The power of the legislature to control the affairs, property, and funds of even public colleges and universities is, of course, subject to any existing constitutional limitations.²⁷ Where the constitution vests the government and control of the institution in a board of trustees, curators, or regents, the legislature has no power to interfere by statute;²⁸ but a constitutional provision merely vesting the "government" of a university in a board of curators does not deprive the legislature of power to add departments to the university without or against the consent of such curators.²⁹ Where a state university is established by constitutional provision, the legislature has no power to disestablish it;³⁰ nor may the legislature disestablish any department of the university which is to be established or continued by reason of constitutional provisions;³¹ but the legislature may provide for additional courses and degrees, notwithstanding such constitutional provisions, since the establishment of new courses and degrees is not equivalent to the disestablishment of existing departments.³² A college or university founded by private enterprise, and endowed or supported by private donations, is a private eleemosynary institution.³³ Although, by being dedicated by its charter to general charity, the college

17. Conn.—*Yale Univ. v. New Haven*, 42 A. 87, 71 Conn. 316, 327, 43 L.R.A. 490.

11 C.J. p 975 note 18.

18. Neb.—*McLeod v. Lincoln Medical College*, 96 N.W. 265, 98 N.W. 672, 69 Neb. 550.

19. Ind.—*Russell v. Trustees of Purdue University*, 168 N.E. 529, 201 Ind. 367, 65 A.L.R. 1384.

Or.—*McClain v. Regents of the University*, 265 P. 412, 413, 124 Or. 629. 11 C.J. p 976 note 20—14 C.J. p 74 note 21.

20. Okl.—*Baker v. Carter*, 25 P.2d 747, 165 Okl. 116.

11 C.J. p 976 note 21.

21. Md.—*University of Maryland v. Maas*, 197 A. 123.

11 C.J. p 976 note 22.

22. U.S.—*Vincennes Univ. v. Indiana*, 14 How. 268, 14 L.Ed. 416.

N.Y.—*Anthony v. Syracuse University*, 223 N.Y.S. 796, 130 Misc. 249, reversed 231 N.Y.S. 435, 224 App. Div. 487.

11 C.J. p 976 note 23—14 C.J. p 73 note 98, p 77 note 55.

23. N.Y.—*Anthony v. Syracuse University*, supra.

24. Me.—*Orono v. Sigma Alpha Epsilon Soc.*, 74 A. 19, 105 Me. 214.

Ohio.—*State v. Neff*, 40 N.E. 720, 52 Ohio St. 375, 28 L.R.A. 409.

11 C.J. p 977 note 24.

25. Tenn.—*Carrick Academy v. Clark*, 80 S.W. 64, 112 Tenn. 483, appeal dismissed 27 S.Ct. 319, 204 U.S. 565, 51 L.Ed. 619.

11 C.J. p 977 note 25.

26. Neb.—*McLeod v. Lincoln Medical College*, 96 N.W. 265, 98 N.W. 672, 69 Neb. 550.

27. Miss.—*Mississippi Univ. v. Waugh*, 62 So. 827, 105 Miss. 623, L.R.A.1915D 588, affirmed 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131.

Mich.—*Sterling v. State Univ.*, 68 N.W. 253, 110 Mich. 369, 34 L.R.A. 150.

11 C.J. p 977 note 27.

28. Mich.—*State Univ. Bd. of Regents v. Auditor-Gen.*, 132 N.W. 1037, 167 Mich. 444—*Sterling v. State Univ.*, 68 N.W. 253, 110 Mich. 369, 34 L.R.A. 150.

Okl.—*Trapp v. Cook Constr. Co.*, 105 P. 667, 24 Okl. 850.

11 C.J. p 977 note 29.

29. Mo.—*State v. Missouri Univ.*, 188 S.W. 128, 268 Mo. 598.

30. Cal.—*People v. Kewen*, 10 P. 393, 69 Cal. 215.

Mo.—*State v. Missouri Univ.*, 188 S.W. 128, 268 Mo. 598.

31. Mo.—*State v. Missouri Univ.*, supra.

32. Mo.—*State v. Missouri Univ.*, supra.

11 C.J. p 977 note 33.

33. U.S.—*Vincennes Univ. v. Indiana*, Ind., 14 How. 268, 14 L.Ed. 416.

Ill.—*State Bd. of Education v. Bakewell*, 10 N.E. 378, 122 Ill. 339—*State Bd. of Education v. Greenebaum*, 39 Ill. 609.

Mo.—*State v. Adams*, 44 Mo. 570.

Ohio.—*Koblitz v. Western Reserve Univ.*, 21 Ohio Cir.Ct. 144, 11 Ohio Cir.Dec. 515.

S.C.—*State v. Heyward*, 3 Rich. 389.

11 C.J. p 977 note 34—14 C.J. p 74 note 16.

may acquire the character of a public trust, it does not thereby become a public corporation under the control of the state.³⁴ Subsequent appropriations from the state to the funds of a university which in its foundation was private will not alter its character to that of a public corporation.³⁵ A private corporation may, however, become a public corporation by its own consent and appropriate action by the state.³⁶

b. Power of State to Change Charter

The state ordinarily has power to change the charter of a college or university which is a public corporation, although in the absence of such a reservation by statute or charter it may not do so where the institution is private in character.

Where a college or university is a public corporation, its charter may be altered, amended, or repealed at the pleasure of the legislature,³⁷ even though the state has created a body corporate to control its property and affairs.³⁸ In the case of private institutions, however, if neither the statute under which the college is incorporated nor its charter reserves to the state the right to change or modify its charter, no such right exists;³⁹ and, while the state constitutions or the incorporating acts may reserve the right to alter or repeal the charter,⁴⁰ this right is not absolute and unlimited;

the alterations or amendments must be reasonable, made in good faith, and consistent with the scope and object of the act of incorporation;⁴¹ and, if such reservation is limited or restricted, it can be exercised only in the manner, and for the purposes, specified.⁴² As a general proposition, the charter of an educational corporation may be changed by the legislature with the consent of the corporation.⁴³ The legislature has no power to alter the terms and conditions of a trust under which a university was established by a private donor,⁴⁴ or even by a public donor, such as the United States,⁴⁵ one of the states,⁴⁶ or a municipal corporation.⁴⁷ The terms and conditions of the trust may be enforced, although the institution has been incorporated for the purpose of perpetuating and administering it.⁴⁸ The curators, directors, or visitors have no power to consent to legislative amendments of the charter in violation of the essential terms and conditions of the charitable foundation.⁴⁹ Even the original donor and founder has no control over his gifts, and his consent is ineffectual to validate legislative changes.⁵⁰ Minor changes, however, in furtherance of the real objects of the trust may be made by concurrent action of the legislature and the curators, trustees, or visitors.⁵¹

Adoption of existing institution as state college.

34. U.S.—Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629, reversing 1 N.H. 111—Allen v. McKean, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

Ky.—Louisville v. Louisville Univ., 15 B.Mon. 642.

Md.—State Univ. v. Williams, 9 Gill & J. 365, 31 Am.D. 72.

Ohio.—State v. Neff, 40 N.E. 720, 52 Ohio St. 375, 28 L.R.A. 409—Koblitz v. Western Reserve Univ., 21 Ohio Cir.Ct. 144, 11 Ohio Cir. Dec. 515.

S.C.—State v. Heyward, 3 Rich. 389, 11 C.J. p 978 note 35.

35. U.S.—Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629, reversing 1 N.H. 111—Allen v. McKean, C.C.Me., 1 F.Cas.No. 229, 1 Sumn. 276.

Ga.—Cleaveland v. Stewart, 3 Ga. 283—Georgia Medical College v. Rushing, 57 S.E. 1083, 1 Ga.App. 468.

Ill.—State Bd. of Education v. Bakewell, 10 N.E. 378, 122 Ill. 339—State Bd. of Education v. Greenebaum, 39 Ill. 609.

Ky.—Louisville v. Louisville Univ., 15 B.Mon. 642.

La.—State v. Graham, 25 La. Ann. 440.

Me.—Orono v. Sigma Alpha Epsilon Soc., 74 A. 19, 105 Me. 214.

Md.—State Univ. v. Williams, 9 Gill & J. 365, 31 Am.D. 72.

Ohio.—State v. Toledo, 23 Ohio Cir. Ct. 327.

S.C.—State v. Heyward, 3 Rich. 389, 11 C.J. p 978 note 36.

36. Va.—Lewis v. Whittle, 77 Va. 415.

37. Wyo.—State v. Irvine, 84 P. 90, 14 Wyo. 318, 376.

11 C.J. p 978 note 38.

38. Wash.—State v. Hewitt Land Co., 134 P. 474, 74 Wash. 573.

11 C.J. p 978 note 39.

39. U.S.—Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629, reversing 1 N.H. 111—Allen v. McKean, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

11 C.J. p 978 note 40.

40. Md.—Jackson v. Walsh, 23 A. 778, 75 Md. 304.

Pa.—Houston v. Jefferson College, 63 Pa. 428.

11 C.J. p 979 note 41.

41. Ohio.—State v. Neff, 40 N.E. 720, 52 Ohio St. 375, 28 L.R.A. 409.

Pa.—In re Thiel College, 66 A. 83, 216 Pa. 630.

11 C.J. p 979 note 42.

42. U.S.—Allen v. McKean, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

Cal.—People v. Kewen, 10 P. 393, 69 Cal. 215.

11 C.J. p 979 note 43.

43. U.S.—Pennsylvania College Cases, Pa., 13 Wall. 190, 20 L.Ed. 550.

Md.—State Univ. v. Williams, 9 Gill & J. 365, 31 Am.D. 72.

11 C.J. p 979 note 44.

44. Mo.—State v. Adams, 44 Mo. 570.

Ohio.—State v. Toledo, 23 Ohio Cir. Ct. 327.

11 C.J. p 979 note 45.

45. U.S.—Vincennes Univ. v. Indiana, Ind., 14 How. 263, 14 L.Ed. 416, reversing 2 Ind. 293.

Fla.—State v. Bryan, 39 So. 929, 50 Fla. 293.

46. U.S.—Allen v. McKean, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

11 C.J. p 979 note 47.

47. Ky.—Louisville v. Louisville Univ., 15 B.Mon. 642.

48. U.S.—Allen v. McKean, C.C.Me., 1 F.Cas.No.229, 1 Sumn. 276.

Ohio.—State v. Toledo, 23 Ohio Cir. Ct. 327.

49. Mo.—State v. Adams, 44 Mo. 570.

11 C.J. p 979 note 50.

50. Ky.—Louisville v. Louisville Univ., 15 B.Mon. 642.

51. Mo.—State v. Adams, 44 Mo. 570.

11 C.J. p 980 note 52.

The adoption of an existing college, which is a private corporation, as a state college does not give the state any power to alter its charter⁵² without its consent.⁵³

§ 3. Statutory Provisions

Reasonable regulation of colleges and universities is within the police power of the state, and under particular circumstances and particular constitutional provisions the courts have upheld or denied the validity of sundry statutes relating to colleges and universities.

The regulation of educational institutions, such as colleges and universities, is a matter peculiarly affected with public interest involving the welfare, morals, and safety of the citizens and state,⁵⁴ and some constitutional provisions confer upon the legislature discretionary power to deal with education subject only to fundamental restrictions.⁵⁵ Reasonable regulations designed to create a proper

standard for colleges and universities have been upheld, although the legislature may not under the guise of regulation impose arbitrary restraints nor suppress private colleges.⁵⁶ In the exercise of its police power the state may impose certain standards or requirements which must be met by professional schools operating within the state,⁵⁷ or may limit or abrogate the right of a university to require vaccination of students before admission, although where the act in question makes no attempt to regulate the subject, it may be held invalid where it prohibits the regulation of vaccination by the university authorities in violation of their constitutional right to regulate matters of health.⁵⁸

Under the circumstances disclosed in particular cases, the courts have upheld the validity of sundry statutes relating to colleges and universities,⁵⁹ such

52. Or.—*Liggett v. Ladd*, 21 P. 133, 17 Or. 89.

11 C.J. p 980 note 53.

53. La.—*Hutchinson's Succ.*, 36 So. 639, 112 La. 656.

11 C.J. p 980 note 54.

54. N.Y.—*Institute of the Metropolis v. University of State of New York*, 289 N.Y.S. 660, 159 Misc. 529, affirmed 291 N.Y.S. 893, 249 App.Div. 33.

Curbing of radical doctrines

School giving instruction in any subjects may be required to obtain license from University of State of New York for purpose of seeing that no doctrine advocating overthrow by force of organized government shall be taught.—*Institute of the Metropolis v. University of State of New York*, supra.

55. N.Y.—*Institute of the Metropolis v. University of State of New York*, supra.

Provision of constitution continuing corporation of regents of University of State of New York under name of University of State of New York was held to confirm rights and powers of corporation theretofore existing and to confer upon legislature unlimited discretion to deal with matter of education subject only to general fundamental restrictions contained in constitution.—*Institute of the Metropolis v. University of State of New York*, supra.

56. N.Y.—*Institute of the Metropolis v. University of State of New York*, supra.

Limits of "regulation"

Although legislature may reasonably regulate education in all of its branches and require compulsory education, it cannot go beyond mere regulation and impose arbitrary or unreasonable restraints, "regulation" not involving power to absolutely

prohibit or suppress private schools, colleges, or other institutions of learning.—*Institute of the Metropolis v. University of State of New York*, supra.

57. "Class A" medical college

Statutory requirements to be met by class A medical college in seeking license to operate as such college was held valid as within power of legislature to enact and not to offend against any constitutional provision. *College of Mecca of Chiropractic v. State Board of Medical Examiners of New Jersey*, 174 A. 562, 113 N.J.Law 327.

Existing chiropractic college

Statute requiring license for schools teaching medicine, surgery, or any branch thereof was valid, as against school of chiropractic conducting business in state before act was passed.—*State Board of Medical Examiners of New Jersey v. College of Mecca of Chiropractic*, 142 A. 409, 6 N.J.Misc. 677, affirmed 146 A. 918, 106 N.J.Law 602.

Three-year course for law school

Statute prohibiting corporation not having degree-conferring powers and without consent of regents from advertising or transacting business under name or descriptive material indicating that such corporation conducts school of law, and rule of University of State of New York requiring three years' course of instruction in school of law, was not unconstitutional, under Education Law § 66, as amended by L.1935 c 764, and Rules of Court of Appeals for Admission of Attorneys and Counselors at Law, rule 4.—*Institute of the Metropolis v. University of State of New York*, 289 N.Y.S. 660, 159 Misc. 529, affirmed 291 N.Y.S. 893, 249 App.Div. 33.

License

(1) State could require school of

chiropractic to first obtain license before conducting business in state.—*State Board of Medical Examiners of New Jersey v. College of Mecca of Chiropractic*, 142 A. 409, 6 N.J.Misc. 677, affirmed 146 A. 918, 106 N.J.Law 602.

(2) Statute providing that no individual or corporation should transact business under name "school of law" unless right to do so is granted by regents of the University of the State of New York was not invalid as arbitrary or capricious.—*Institute of the Metropolis v. University of State of New York*, 291 N.Y.S. 893, 249 App.Div. 33, affirming 289 N.Y.S. 660, 159 Misc. 529.

58. Cal.—*Wallace v. Regents of University of California*, 242 P. 892, 893, 75 Cal.App. 274.

Absence of regulation by state board of health

Where there was no regulation in the act nor by the state board of health on the subject of vaccination, a statutory provision to the effect that "the control of smallpox shall be under the direction of the state board of health, and no rule or regulation on the subject of vaccination shall be adopted by school or local health authorities," was void in so far as purporting to preclude state university authorities from regulating the matter of vaccination under their general constitutional power to regulate the university and its health conditions.—*Wallace v. Regents of University of California*, supra.

59. Mont.—*State v. Erickson*, 244 P. 287, 75 Mont. 429.

Wis.—*Loomis v. Callahan*, 220 N.W. 816, 196 Wis. 518.

Consolidation of institutions

Tenn.—*Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550, 149 Tenn. 256.

as acts authorizing the removal of an institution or a department thereof from one location to another,⁶⁰ the erection or maintenance of dormitories,⁶¹ as in the case of maintenance of dormitories by nonprofit associations at state colleges,⁶² or authorizing the trustees of a municipal university to appoint a city personnel commission,⁶³ or empowering the governor of a state to nominate and the senate to confirm members of the board of regents,⁶⁴ or prescribing the term of office of university officers;⁶⁵ and statutes relating to the appointment or

removal of officers of a college or university have been held valid as against objections that they violate charter provisions,⁶⁶ or delegate the execution of the law to a body which is not a governmental agency.⁶⁷ Also, the courts have upheld statutes broadening the functions of a university or any of its units,⁶⁸ such as acts providing for the addition of other courses and departments;⁶⁹ statutes relating to the finances of the college or university,⁷⁰ such as acts authorizing the issuance of bonds,⁷¹ or the charging of fees for instruction;⁷² and stat-

Exclusive privilege of issuing "C.P. A." certificates

Accountancy Act which authorized state university to determine qualifications of applicants for accounting certificates was held not to confer ultra vires powers, since university is not a private corporation, but is an agency of the state.—*Elliott v. University of Illinois*, 6 N.E.2d 647, 365 Ill. 338.

Respecting oil leases

Statutes providing for sale of oil leases covering state university lands, reserving royalties represented by fractional part of oil produced, was not void, as diverting university's permanent fund.—*Theisen v. Robison*, 8 S.W.2d 646, 117 Tex. 489.

60. As to interference with discretion of trustees

Acts 1915 p 133, directing the removal of the medical department of the University of Alabama from Mobile on a certain contingency, does not violate Const. 1901, § 264, by attempting to deprive the university trustees of a discretion as to the management and control of the university, the act relating to a matter within the legislative power of the state.—*Stevens v. Thames*, 86 So. 77, 204 Ala. 487.

61. Mont.—*Barbour v. State Board of Education*, 13 P.2d 225, 92 Mont. 321.

62. N.D.—*State v. Davis*, 229 N.W. 105, 59 N.D. 191.

63. Ky.—*Kerr v. City of Louisville*, 111 S.W.2d 1046, 271 Ky. 335.

University not "corporation" within inhibiting constitutional provision

A statute authorizing board of trustees of municipal university, board of education, and others to appoint city personnel commission does not violate constitutional prohibition against corporations engaging in unauthorized business, since board of education and university are not "corporations" within such provisions.—*Kerr v. City of Louisville*, 111 S.W.2d 1046, 271 Ky. 335.

64. N.D.—*State v. Crawford*, 162 N.W. 710, 36 N.D. 385, Ann.Cas.1917E 955.

65. Or.—*Smith v. Patterson*, 279 P. 271, 130 Or. 73.

Inapplicability of constitutional limitation

Gen.L.1929 p 256, creating board of higher education and providing for appointment of board members for terms exceeding four years, was not in violation of Const. art 15 § 2, prohibiting creation of any office, tenure of which shall be longer than four years, since members of board of higher education are not officers within meaning of constitutional provision.—*Smith v. Patterson*, 279 P. 271, 130 Or. 73.

66. Mo.—*State v. Adams*, 44 Mo. 570.

11 C.J. p 992 note 44.

67. Md.—*Scholle v. State*, 46 A. 326, 90 Md. 729, 50 L.R.A. 411.

68. Plant for hog cholera serum

The Constitution of 1875, by adopting the University of Nebraska as a state institution under a charter declaring a purpose "to afford to the inhabitants of this state the means of acquiring a thorough knowledge of the various branches of literature, science, and the arts." L.1869 p 172 § 2, and by vesting its general government in a board of regents under the direction of the legislature, did not prohibit the latter from imposing new and additional duties on the regents or from requiring them to establish and conduct a plant for the manufacture and distribution of hog cholera serum.—*Fisher v. Board of Regents of University of Nebraska*, 139 N.W. 161, 108 Neb. 666.

Research work

Legislature may require university or units thereof to carry on additional research work. A statute designating head of department of chemistry of State College of Agriculture state chemist, and requiring him or assistant to analyze samples of petroleum products without compensation, was valid.—*State v. Brannon*, 283 P. 202, 86 Mont. 200, 67 A.L.R. 1020.

69. Mo.—*State ex rel. Heimberger v. Board of Curators of University of Missouri*, 183 S.W. 128, 268 Mo. 598.

Interference with management by curators is not shown by statute providing for additional courses or departments in a state university.—*State ex rel. Heimberger v. Board of Curators of University of Missouri*, supra.

70. Financial loan

(1) Act providing for erection of students' union building at state university and for financing thereof through loan from federal government to be paid from special funds was not violative of constitutional provisions respecting state moneys and appropriation thereof.—*State ex rel. Veeder v. State Board of Education*, 33 P.2d 516, 97 Mont. 121.

(2) Act providing for erection and financing of students' union building at state university was not void as appropriating state funds, or creating state debt, notwithstanding provision of loan agreement of state board of education that board should furnish heat, light, power, and water without charge against project or deduction from gross revenues therefrom.—*State ex rel. Veeder v. State Board of Education*, supra.

71. Idaho.—*State ex rel. Miller v. State Board of Education*, 52 P. 2d 141, 56 Idaho 210.

Inapplicability of constitutional limitation

Statute authorizing board of regents of University of Idaho as a corporation to issue bonds to be amortized over thirty-year period from revenues accruing from project financed by bond proceeds was not violative of constitutional limitations on indebtedness of subdivisions of state, since board of regents is not within scope of constitutional limitation.—*State ex rel. Miller v. State Board of Education*, supra.

72. Ariz.—*Board of Regents of University of Arizona v. Sullivan*, 42 P.2d 619, 45 Ariz. 245.

Cal.—*Bryan v. Regents of University of California*, 205 P. 1071, 188 Cal. 559.

Classification of students

Pol.Code § 1394½, and the rules of the regents of the university thereunder, requiring students at the university to pay a tuition fee if they

utes relating to the appointment or removal of teachers⁷³ or trustees.⁷⁴ A statute authorizing the trustees of a university to receive proposals of donations to aid in the foundation of the institution at a certain locality may not be unconstitutional.⁷⁵

On the other hand, under the particular circumstances disclosed in other cases, the courts have held sundry acts relating to colleges and universities invalid,⁷⁶ such as acts providing that a chancellor of a state university shall hold office until removed for cause by the university administrative board,⁷⁷ or providing that counties may send a number of students to a state university free of tuition,⁷⁸ or purporting to transfer the control of university finances from the board of regents to which it was committed by the constitution to another and different body,⁷⁹ or to add to the board

of regents persons other than those selected under constitutional provisions.⁸⁰

A constitutional confirmation of "existing laws" under which a state university is functioning renders it a *de jure* corporation irrespective of the validity of the laws under which it was organized and functioning, and whether or not it was a *de facto* corporation prior to such constitutional confirmation.⁸¹

The validity of acts relative to the name of a college or university is considered *infra* § 7.

Separation of races. In the absence of express or implied constitutional prohibition against the separation of races for the purpose of higher education, the legislature may enact laws providing for such separation, and legislation of this character is valid if reasonable and nondiscriminatory.⁸²

have not been bona fide residents of the state for one year, is a reasonable classification of citizens.—*Bryan v. Regents of University of California*, *supra*.

Free instruction

Educational Institutions Act of 1934, authorizing educational institutions to fix fees and charges, was held not to violate constitutional provision that university and all other state educational institutions shall furnish instruction as nearly free as possible, where there was no suggestion that fees were excessive, or that instruction was not as nearly free as possible.—*Board of Regents of University of Arizona v. Sullivan*, 42 P.2d 619, 45 Ariz. 245.

Sources of revenue

Educational Institutions Act of 1934, authorizing educational institutions to fix fees and charges, was not invalid because of constitutional provision that revenue for maintenance of such institutions should be derived from federal income from institutional lands and investment of proceeds thereof and by appropriations to be met by taxation, which methods were not exclusive.—*Board of Regents of University of Arizona v. Sullivan*, *supra*.

73. Removal only for cause

Statutes under which a college teacher who has completed probationary period is entitled to hold position during good behavior and efficient and competent service and cannot be removed except for cause after hearing do not violate constitutional civil service provision relating to manner of appointment.—*Becker v. Barry*, 300 N.Y.S. 1153, 165 Misc. 877.

74. N.Y.—*People ex rel. Diefenbach v. Regents of the University of the State of New York*, 192 N.Y.S. 108, 199 App.Div. 55.

Concurrent jurisdiction

L.1920 c 745, amending Education Law § 68, authorizing the regents to remove any trustee of a corporation created by them, does not create any conflict of jurisdiction between the board of regents and the supreme court, as such a conflict is not created by the existence of concurrent jurisdiction.—*People ex rel. Diefenbach v. Regents of the University of the State of New York*, *supra*.

75. Ill.—*Burr v. Carbondale*, 76 Ill. 455, 461.

11 C.J. p 990 note 7.

76. N.D.—*State v. Murphy*, 210 N. W. 53, 54 N.D. 529.

Tex.—*State v. Hatcher*, 281 S.W. 192, 115 Tex. 332.

Diversion of funds from U. S. land grants

Legislature cannot divert or authorize diversion of any part of principal or interest or income from investment of funds under control of board of university and school lands arising from rental or sale of lands granted by United States to any purposes other than those for which grants were made, and any diversion to other purposes or any donation thereof in aid of individual by legislative assembly directly, or by board of university and school lands pursuant to legislative enactment is unconstitutional.—*State ex rel. Sathre v. Board of University and School Lands of North Dakota*, 262 N.W. 60, 65 N.D. 687.

77. Kan.—*Lindley v. Davis*, 231 P. 1026, 117 Kan. 558.

78. Ky.—*Barker v. Crum*, 198 S.W. 211, 177 Ky. 637, L.R.A.1918F 673.

79. Minn.—*State v. Chase*, 220 N.W. 951, 175 Minn. 259.

80. Minn.—*State ex rel. Peterson v. Quinlivan*, 268 N.W. 858, 198 Minn. 65.

State officers and governor's appointees

Statute attempting to make three state officers *ex officio* regents of state university, and to vest in governor power to appoint other regents was unconstitutional as contravening constitutional perpetuation of rights, immunities, franchises, and endowments held by university under territorial laws which included administration by board of twelve regents, to be elected by two houses of legislature in joint convention. Under provision of Constitution confirming and perpetuating original franchises of university, which included election by legislature of board of regents, regents of state university was removed from scope of constitutional provision vesting power of appointment of officers in governor, notwithstanding that regents may be such officers.—*State ex rel. Peterson v. Quinlivan*, 268 N.W. 858, 198 Minn. 65.

81. Minn.—*State ex rel. Peterson v. Quinlivan*, *supra*.

82. Mo.—*State ex rel. Gaines v. Canada*, 113 S.W.2d 783, certiorari granted 59 S.Ct. 65, 305 and reversed on other grounds 59 S.Ct. 232.

Distances of required travel

The difference in distances that negroes and whites must travel for higher education, if not unreasonable or discriminatory, is but an incident to any classification for educational purposes and furnishes no substantial ground for complaint that negroes are deprived of their rights.—*State ex rel. Gaines v. Canada*, *supra*.

Discrimination shown by denial of equal rights within the state

Where a state maintains a law school within its borders for the legal education and training of white students but none for the legal edu-

§ 4. Organization and Incorporation

The organization and incorporation of colleges and universities is ordinarily regulated by statute, and such institutions must comply with legal requirements governing their establishment.

Colleges and universities may be incorporated as either public or private corporations, or they may be unincorporated. As organized under some statutes they are mere instrumentalities of the state and not corporations.⁸³ The incorporation of colleges and universities may be and usually is regulated by statute in the several states, as will appear from an examination of statutory provisions and the cases referred to in the note below.⁸⁴ An institution of learning will not be permitted to incorporate unless it appears that its standard of instruction is in conformity to the law providing for such incorporation.⁸⁵ If a certain endowment or subscription is required as a prerequisite to the granting of a charter,⁸⁶ it will not be granted where the subscriptions consist almost entirely of lands, the location and descriptions of which are so indefinite that no valuation can be placed thereon.⁸⁷

Statutes authorizing high-school boards to establish junior colleges impliedly permit them to make the necessary investigations as to the suitability of such a college for the community and to incur the necessary expense, and in the absence of a clear abuse the courts will not interfere with the

board's exercise of its discretion in such respects, and it has been held proper for the board to take over an existing junior college and operate it for experimental purposes to determine whether or not such an institution should be maintained permanently by the board.⁸⁸

A collateral attack on a college charter will be sustainable only if the charter is void as distinguished from merely voidable.⁸⁹

Sectarian colleges. A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation even though it is given into the care, and placed under the management, of a religious body.⁹⁰ The petition for a charter for a denominational university, filed by the designated board of trustees as individuals and not as representatives, made them and no others the incorporators.⁹¹ An amendment to the charter of a college providing for election of its trustees by an unincorporated religious association does not destroy the essential educational purpose of the institution.⁹²

Duration of corporate existence. Educational corporations are designed to be perpetual, and are not subject to the provisions of a general law limiting the life of corporations to the time specified in their charters, or, if no time is mentioned, to a certain term of years.⁹³

cation and training of negro students, and denies the latter the privilege of attending the state law school for white students, it is guilty of an unconstitutional discrimination between the races, and the fact that the state in question pays all of the expenses of negro students at other law schools of equivalent standing in adjacent or other states does not remove the unconstitutional discrimination between races. In the Supreme Court of the United States it was said: "We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it. * * * Separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system."

U.S.—State ex rel. Gaines v. Canada, 59 S.Ct. 232, 237, reversing, Mo., 113 S.W.2d 783.

Md.—University of Maryland v. Murray, 182 A. 590, 169 Md. 478, 103 A.L.R. 706.

83. N.D.—State v. McMillan, 96 N.W. 310, 12 N.D. 280.

Ohio.—State v. Toledo, 23 Ohio Cir.Ct. 327.

11 C.J. p 980 note 56.

84. Pa.—Philadelphia Medical College's Case; 3 Whart. 445—In re Duquesne College, 2 Pa.Dist. 555, 12 Pa.Co. 491.

11 C.J. p 980 notes 56–60, p 981 notes 61–69.

85. Pa.—In re American Electropathic Inst., 14 Phila. 128.

11 C.J. p 981 note 64.

86. Cal.—Matter of Wesleyan College, 1 Cal. 447.

11 C.J. p 981 note 65.

87. Cal.—Matter of California College, 1 Cal. 329.

88. Ill.—Schuler v. Beezley, 13 N.E. 2d 115.

89. Tex.—Rutherford v. Watson, Civ.App., 52 S.W.2d 85, error refused.

90. Mo.—State v. Westminster College, 74 S.W. 990, 175 Mo. 52.

91. Tenn.—State v. Vanderbilt Univ., 164 S.W. 1151, 129 Tenn. 279.

11 C.J. p 981 note 68.

92. Mo.—Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong, 85 S.W.2d 461, 337 Mo. 349.

Continuance for primary purpose of education

Amendment of charter of educational institution, which provided that directors of the college be elected by an unincorporated religious association and that college should be under the auspices of the association, and providing that the directors should have entire control of affairs of the institution but might commit administrative affairs to the faculty, did not destroy, but continued, old corporation for the same primary purpose of education.—Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong, *supra*.

College as not made trustee

Amendment to charter of unincorporated college that committed control to directors to be elected by an unincorporated association whose members were elected each year by various Baptist Churches of the state did not render college a trustee holding property for use and benefit of General Association as cestui que trust, and thus note executed by college did not bind individual members of association.—Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong, *supra*.

93. Mo.—State v. Westminster College, 74 S.W. 1116, 175 Mo. 62. 11 C.J. p 981 note 69.

In *New York* it has been held that colleges and universities must be incorporated under the Education Law, formerly University Law,⁹⁴ pursuant to which the board of regents has power to grant charters of incorporation,⁹⁵ and that they cannot be incorporated as membership corporations;⁹⁶ but it has also been held that certain kinds of institutions for educational purposes and for the promotion of education and instruction could be organized under the provisions of the Business Corporations Law.⁹⁷ There is also authority to the effect that a medical college can be incorporated only by a special act or under an act providing for the organization of such corporations, and that the incorporation of a medical college is not authorized by an act providing for the incorporation of benevolent, charitable, scientific, and missionary societies.⁹⁸

Amendment of charter. The charter of a college or university is ordinarily subject to amendment.⁹⁹ Where an amendment to the charter of a college is ambiguous, it will if possible be construed so as to be valid rather than void.¹

Separate institutions for colored race. In the absence of legislative authorization, the courts may not properly order establishment of a separate law school for colored students.²

§ 5. Location and Change Thereof

While there may be circumstances constituting a valid legal obstacle to change of location of a college or university, as in the case of contractual obligations, the courts will ordinarily recognize the right to change of location.

Where the location of a college is fixed by its charter such location cannot be changed³ without amendment of the charter⁴ or consent of the legislature;⁵ and where it has been fixed by the constitution the location cannot be changed without an amendment of the constitution.⁶ Where a change of location is authorized by statute, the location can be changed only to such places as are authorized by the statute.⁷ An institution established under a contract that it shall be located permanently at a certain place cannot be changed therefrom.⁸

On the other hand, it has been held that inclusion in the charter of provisions fixing the location of a university in a certain place does not necessarily preclude its removal to a different place,⁹ that statutes requiring applicants for new corporate charters to state the places where corporate business is to be transacted refer merely to the place where corporate functions are to be performed and do not limit the operations of a theological school or college so applying to the place specified in the application,¹⁰ and that provisions in an act of incorporation of an existing college which merely recite the borough and county of the college's then

94. N.Y.—*Matter of Lampson*, 53 N.Y.S. 531, 33 App.Div. 49, affirmed 56 N.E. 9, 161 N.Y. 511.

95. N.Y.—*In re McGraw*, 19 N.E. 233, 111 N.Y. 66, 2 L.R.A. 387, affirmed 10 S.Ct. 775, 136 U.S. 152, 34 L.Ed. 427.

11 C.J. p 980 note 59.

96. N.Y.—*Matter of Lampson*, 53 N.Y.S. 531, 33 App.Div. 49, affirmed 56 N.E. 9, 161 N.Y. 511.

11 C.J. p 980 note 60.

97. N.Y.—*Rep. Atty.-Gen.*, 1907, 281.

98. N.Y.—*People v. Gunn*, 96 N.Y. 317, affirmed 30 Hun 322—*People v. Cothran*, 27 Hun 344.

11 C.J. p 981 notes 62, 63.

99. N.Y.—*People ex rel. Diffenbach v. Regents of the University of the State of New York*, 192 N.Y.S. 108, 199 App.Div. 55.

Amendment by regents

Under L.1853 c 184, authorizing the regents of the University of the State of New York to alter, amend, or repeal the charter of any college, etc., incorporated by them, and L. 1866 c 294, giving the regents the same power with respect to the charter or acts of incorporation of a certain medical college as if such charter had been granted by the regents, and the college had been incorporated subsequent to May 1, 1853, such

college was given all the advantages enjoyed by institutions organized by the regents, and the regents had power to amend or revoke its charter or grant a new charter.—*People ex rel. Diffenbach v. Regents of the University of the State of New York*, supra.

1. Mo.—*Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong*, 85 S.W.2d 461, 337 Mo. 349.

2. Md.—*Pearson v. Murray*, 182 A. 590, 169 Md. 473, 103 A.L.R. 706.

Mo.—*Compare State ex rel. Gaines v. Canada*, 113 S.W.2d 783, certiorari granted 59 S.Ct. 65, and reversed in part 59 S.Ct. 232.

3. Ill.—*Santa Clara Female Academy v. Sullivan*, 6 N.E. 183, 116 Ill. 375.

11 C.J. p 982 note 85.

4. Pa.—*Packard v. Thiel College*, 58 A. 670, 209 Pa. 349.

11 C.J. p 983 note 86.

5. N.Y.—*Hascall v. Madison Univ.*, 8 Barb. 174.

6. Colo.—*People v. State Univ.*, 49 P. 286, 24 Colo. 175—*In re State Institutions*, 21 P. 472, 9 Colo. 626.

11 C.J. p 983 note 88.

7. N.Y.—*Hascall v. Madison Univ.*, 8 Barb. 174.

11 C.J. p 983 note 89.

8. Pa.—*In re Thiel College*, 66 A. 83, 216 Pa. 630—*Packard v. Thiel College*, 58 A. 670, 209 Pa. 349.

11 C.J. p 983 note 90.

9. Tenn.—*Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550, 149 Tenn. 256.

Controlling statutory provisions

Although charter of university named the city where it was to be located, it was held that the proper authorities might relocate the university, in view of Acts 1875 c 142 § 2, authorizing dissolution of general welfare corporations, Acts 1897 c 116, and Acts 1907 c 304, authorizing the directors to amend the charter, and Acts 1895 c 6, Shannon's Code §§ 2530–2533, authorizing consolidation of educational institutions.—*Southwestern Presbyterian University v. City of Clarksville*, supra.

10. Pa.—*Hempstead v. Meadville Theological School*, supra.

Educating students in different state
Trustees of Meadville Theological School, incorporated in Pennsylvania, were authorized by Act April 7, 1846, Pub.L. 497, chartering it, to educate students in Illinois in exercise of sound discretion, there being nothing in laws of Pennsylvania or Illinois to prevent.—*Hempstead v. Meadville Theological School*, supra.

location do not restrict it to operating in such location.¹¹ Relocation of a university will not be precluded by conveyances for the purpose of establishing it in a certain city where there also appears a general purpose to promote education throughout certain states,¹² nor will relocation be restrained on the theory of a trust resulting in favor of such city or other donors,¹³ although a city may be entitled to a refund of contributions on relocation of the institution at a situs other than that of such city.¹⁴ Where it appears that the founder of a college does not intend to limit its location permanently on the premises devised, the location may be changed to a more suitable place without a forfeiture of the original site.¹⁵ Where the university is purely a public state institution, its location may be changed by the legislature,¹⁶ notwithstanding donations have been made to it to secure its location at a particular place;¹⁷ but it is sometimes provided by statute in such cases that the university shall refund the amounts subscribed or donated.¹⁸ Constitutional provisions requiring consent of two thirds of the legislature before removal of a state university have been held inapplicable to departments of such university acquired after adoption of such constitutional provisions.¹⁹

11. Mere matter of description

Act April 7, 1846, Pub.L. 497, incorporating "the Meadville Theological School, in the borough of Meadville, in the county of Crawford," simply individuated existing unincorporated school, and did not limit its location to such borough or county.—*Hempstead v. Meadville Theological School*, supra.

12. Benefit of southwestern states generally

Conveyances for the purpose of establishing an educational institution at a certain city, in order to advance the cause of education in the state and throughout the Southwestern States, thus coupling the location with a statement of the general purpose, did not create conditions requiring the institution to be located perpetually at such place.—*Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550, 149 Tenn. 256.

13. Conditions as at most conferring right to withdraw donations

The power of lawfully constituted authorities of a university to proceed by steps authorized by law to relocate its situs cannot be restrained on the theory of a trust resulting in favor of the city or other donors of contributions conditioned on permanency of location within that particular community, however large or numerous, but such conditions can at most give the donors the right to

withdraw their contributions in case of removal.—*Southwestern Presbyterian University v. City of Clarksville*, supra.

14. Contractual obligation

Where city, to induce location of sectarian university, there delivered to it fifty thousand dollars in bonds, on condition that the city should have at all times as many as ten students in the university, it was entitled to a return or refund of the bonds if the university subsequently relocated, a contractual obligation being created in view of the city's doubtful authority to spend its funds outside its limits or to make gratuitous contributions to sectarian institutions.—*Southwestern Presbyterian University v. City of Clarksville*, supra.

15. Ohio.—*Cincinnati v. McMicken*, 6 Ohio Cir.Ct. 188, 3 Ohio Cir.Dec. 409, affirmed 29 Cinc.L.Bul. 168.

11 C.J. p 983 note 95.

16. Wash.—*Callvert v. Winsor*, 67 P. 91, 26 Wash. 368.

17. Fla.—*State v. Bryan*, 39 So. 929, 50 Fla. 293.

18. Ky.—*Kentucky Univ. v. Woods*, 3 Ky.Op. 639.

19. Ala.—*Stevens v. Thames*, 86 So. 77, 204 Ala. 487.

Medical college

Const.1901 § 267, prohibiting the removal of the University of Alabama and other institutions there nam-

ed, except on a vote of two thirds of the legislature, in view of § 264, applies merely to the removal of the University, as located at Tuscaloosa when the constitution was adopted, and not to the Mobile Medical College, a mere subsidiary located in another congressional district.—*Stevens v. Thames*, supra.

It does not follow that because the charter of an educational corporation provides that its buildings shall be located at a place named, with power to establish a branch at another place, that all the powers conferred upon it must be exercised at such places and no other. The corporate purpose, that of furnishing education, must be carried on at the place or places named, but the incidental powers necessary and proper to maintain the institution there may be exercised elsewhere.²¹

Right to sue to prevent removal. A private individual with no special interest has no right to sue with respect to the location of a university;²² although in a proper case persons who have contributed funds for the establishment of the college in the place where it was located have a standing to maintain a suit in equity to prevent its removal.²³

20. Ala.—*Stevens v. Thames*, supra.

Statutory provision against removal as unenforceable

Under Acts 1907 p 357, dissolving charter of Mobile Medical College, and placing ownership of the property of the college in the board of trustees of the University of Alabama, the Mobile Medical College became a state agency, entitling state to move college from Mobile, notwithstanding provisions of such act that it should remain in Mobile for all time.—*Stevens v. Thames*, supra.

21. Ill.—*Santa Clara Female Academy v. Sullivan*, 6 N.E. 183, 116 Ill. 375.

22. Fla.—*State v. Bryan*, 39 So. 929, 50 Fla. 293.

Mich.—*Sterling v. State Univ.*, 68 N.W. 253, 110 Mich. 369, 34 L.R.A. 150.

11 C.J. p 983 note 96.

23. Pa.—*In re Thiel College*, 66 A. 83, 216 Pa. 630—*Packard v. Thiel College*, 58 A. 670, 209 Pa. 349.

11 C.J. p 983 note 91.

§ 6. Powers and Franchises in General

The powers and franchises of a college or university are in general such as may be conferred by charter, statutory, or constitutional provisions. Such an institution will ordinarily be accorded the right to perform acts incidental to its main purpose, although it will be denied the right to perform acts not reasonably incidental.

The charter, under the statutes, measures the power of a college or university to the exclusion of all others not expressed or fairly implied,²⁴ and an incorporated university or college, or an incorporated board of regents or board of trustees of a university, as in the case of any other corporation, can do no act for which authority is not expressly or impliedly granted in its charter or act of incorporation;²⁵ but they have such powers as are expressly given to them by their charters, or such as by fair implication are necessary to the execution of their object.²⁶ A university cannot without express power create corporations²⁷ nor create separate colleges.²⁸ It cannot exceed its chartered or statutory powers with regard to tuition charges, as shown *infra* § 27, nor with respect to distribution of revenue,²⁹ payment of salaries,³⁰ or conditions of admission, as shown *infra* § 25.

Particular powers exercised by a college or university should be reasonably incidental to the main purpose of maintaining such institution, and under applicable charter, statutory, or constitutional provisions it has been held that a college or university may conduct a store to sell books and supplies to students and professors,³¹ or operate a student's

infirmary,³² or rent buildings in which to conduct courses of instruction,³³ although where the particular act is not reasonably incidental to the maintenance of the college or university the power to perform it may be denied, and such institutions have been denied the power to conduct a commercial enterprise.³⁴

A university with a medical college as one of its departments has power to establish and to maintain a clinic and hospital for the sick, a hospital in which clinical instruction can be given being a necessary adjunct to the teaching of medicine.³⁵ A university with a college of agriculture may establish and maintain experimental stations in connection therewith.³⁶

Question of ultra vires, in respect of the action of a college as to a road petition may, it has been held, be raised only by the state.³⁷

§ 7. Name

The right to employ the name "college" or "university" may be prohibited to enterprises not complying with statutory requirements, and an established college or university will be protected against an unfair use of the same or a similar name by another institution. Change of name is ordinarily permissible.

The right to use the name "college" or "university," or the like, is sometimes prohibited except by the institutions and on the terms and conditions prescribed by statute, as will more particularly appear from an examination of the statutes and of the cases referred to in the note below.³⁸ The

24. Mo.—Farm & Home Savings & Loan Ass'n of Missouri v. Armstrong, 85 S.W.2d 461, 467, 337 Mo. 349, citing *Corpus Juris*.

Tex.—R. B. Spencer & Co. v. Thorp Springs Christian College, Civ. App., 41 S.W.2d 482, error dismissed.

25. N.Y.—Onondaga Nation v. Thacher, 62 N.E. 1098, 169 N.Y. 584, affirmed 65 N.Y.S. 1014, 53 App.Div. 561, and appeal dismissed 23 S.Ct. 636, 189 U.S. 306, 47 L.Ed. 826.

11 C.J. p 981 note 70.

26. La.—Hutchinson's Succ., 36 So. 639, 112 La. 656.

11 C.J. p 981 note 71.

27. Mo.—State v. St. Louis, 115 S.W. 534, 216 Mo. 47.

11 C.J. p 981 note 72.

28. Mich.—Hillsdale College v. Rideout, 46 N.W. 373, 82 Mich. 94.

11 C.J. p 981 note 73.

29. Ind.—White v. Butler Univ., 78 Ind. 585.

30. N.Y.—People v. Jackson, 85 N.Y. 541, reversing 23 Hun 568.

11 C.J. p 981 note 76.

31. Ohio.—Long v. Board of Trustees, 157 N.E. 395, 24 Ohio App. 261.

State agency

Operation of student book store on campus at cost was not forbidden to university as agency of state by constitution.—Long v. Board of Trustees, *supra*.

Assumption of debt

Assumption by state university of debt of private corporation as part of purchase price of books for student book store was not prohibited by constitution.—Long v. Board of Trustees, *supra*.

32. Cal.—Davie v. Board of Regents, University of California, 227 P. 243, 66 Cal.App. 693.

33. Tex.—Ingram v. Texas Christian University, Civ.App., 196 S.W. 603, error refused.

34. Tenn.—State ex rel. v. Southern Junior College, 64 S.W.2d 9, 166 Tenn. 535.

Printing shop

Southern Junior College was not authorized, under charter, to conduct commercial printing shop in com-

petition with commercial printers, where the commercial feature was the principal factor involved and not merely incidental to instruction of students.—State ex rel. v. Southern Junior College, *supra*.

35. La.—Hutchinson's Succ., 36 So. 639, 112 La. 656.

36. Neb.—State v. Whitmore, 123 N.W. 1051, 85 Neb. 566, 125 N.W. 606, 86 Neb. 399.

37. Mo.—Johnson v. Underwood, 24 S.W.2d 133, 324 Mo. 578.

Right of objecting taxpayers to raise question

Question of ultra vires with respect to resolution of college trustees authorizing road improvement petition could not be raised by objecting taxpayers.—Johnson v. Underwood, *supra*.

38. Pa.—Commonwealth v. Banks, 9 Pa.Dist. 436, 438.

11 C.J. p 982 note 80.

"School of law"

Corporation which did not comply with requirements prescribed by the department for registration of a university, college, or school of law

use of a name so similar to that of another institution as to be misleading will ordinarily not be permitted, and may be restrained,³⁹ although where an institution has been absorbed by another college of a different name and the name originally given it has not been used for years, a charter may properly be granted to a new institution by the same name.⁴⁰

Change of name. A college or university may, with the consent of the legislature, change its name;⁴¹ and the courts have upheld the validity of legislation authorizing a change in the name of a university.⁴²

§ 8. Degrees, Diplomas, and Certificates

a. In general

b. Granting or withholding

a. In General

Colleges and universities ordinarily have the power to confer degrees and issue diplomas to students properly entitled thereto.

A "degree" is any academic rank recognized by colleges and universities having a reputable character as institutions of learning, or any form of expression indicative of academic rank so as to convey to the ordinary mind the idea of some collegiate, university, or scholastic distinction.⁴³

The conferring of degrees, or the issuing of diplomas or certificates, except by duly authorized institutions, is sometimes prohibited by statute and made an offense, as will appear from an examination of statutory provisions and of the cases referred to in the note below.⁴⁴

Colleges and universities have power to confer degrees and issue diplomas where such power has been conferred upon them either expressly,⁴⁵ or by necessary implication,⁴⁶ although a professional school offering a short course may not conduct it under the pretense that it is a school affording the customary full length course and that its graduates are entitled to diplomas of the same character as those conferred by schools offering the full course required for the profession in question.⁴⁷ A college incorporated under a general law authorizing the incorporation of colleges has implied power to grant diplomas, as this right is one of the characteristic features of a college;⁴⁸ but a college incorporated as a literary or scientific institution has no implied power to confer degrees.⁴⁹ A medical college with authority to confer degrees in medicine may grant degrees in dentistry, surgery, and pharmacy, because the subject "medicine" is broad enough to include them as related subjects.⁵⁰ Under statutes prohibiting the conferring of any degrees, unless specially authorized, special authority to confer the degree of doctor of medicine does not authorize the conferring of a degree in dentistry.⁵¹ Where a college is empowered to grant a degree, and the mode of making such grant or proving the same is not specially pointed out, a vote that the degree be granted is an execution of the power, and a duly authenticated copy of the vote is sufficient proof of it.⁵²

A diploma is not necessary to the conferring of a degree, although it is an appropriate means of evidencing the fact,⁵³ where the diploma is au-

could properly be denied right to use name "school of law" by regents of University of State of New York.—*Institute of Metropolis v. University of State of New York*, 291 N.Y.S. 893, 249 App.Div. 33, affirming 289 N.Y.S. 660, 159 Misc. 529.

39. N.Y.—*Trustees of Columbia University in City of New York v. Axenfeld*, 241 N.Y.S. 4, 136 Misc. 831.

11 C.J. p 982 notes 81, 82.

Columbia University was held entitled to injunction restraining defendants from using name "Columbia Educational Institute."—*Trustees of Columbia University in City of New York v. Axenfeld*, *supra*.

40. Pa.—*In re Duquesne College Charter*, 2 Pa.Dist. 555, 12 Pa.Co. 491.

41. Neb.—*McLeod v. Lincoln Medical College*, 96 N.W. 265, 98 N.W. 672, 69 Neb. 550.

11 C.J. p 982 note 83.

42. Ga.—*State v. Regents of Uni-*

versity System of Georgia, 175 S. E. 567, 179 Ga. 210.

11 C.J. p 982 note 84.

43. Mass.—*Com. v. New England Chiropractic College*, 108 N.E. 895, 221 Mass. 190.

11 C.J. p 983 note 98.

44. Mass.—*Com. v. New England Chiropractic College*, *supra*.

11 C.J. p 983 note 99.

45. N.Y.—*People v. Geneva College*, 5 Wend. 211.

11 C.J. p 983 note 1.

46. Mo.—*State ex inf. Otto v. St. Louis College of Physicians and Surgeons*, 295 S.W. 537, 317 Mo. 49.

Evidence as to propriety of granting diplomas

Certificate of secretary of state and certified copy of incorporation were properly admitted to show college was not improperly granting diplomas.—*Collins v. Tansey*, 126 A. 536, 100 N.J.Law 170.

47. Medical school

School with less than four-year

medical course cannot lawfully conduct course under pretense that it is school of four years' requirement and certify that its graduates are entitled to diplomas as medical graduates.—*State ex inf. Otto v. Kansas City College of Medicine and Surgery*, 285 S.W. 980, 315 Mo. 101, 46 A.L.R. 1472.

48. Mo.—*State v. Gregory*, 88 Mo. 123.

11 C.J. p 984 note 4.

49. Vt.—*Townshend v. Gray*, 19 A. 635, 62 Vt. 373, 375, 376, 8 L.R.A. 112.

11 C.J. p 984 note 6.

50. Pa.—*In re Philadelphia Medico-Chirurgical College*, 42 A. 524, 190 Pa. 121.

51. Mass.—*Kerr v. Shurtleff*, 105 N. E. 871, 218 Mass. 167.

11 C.J. p 984 notes 11, 12.

52. Mass.—*Wright v. Lanckton*, 19 Pick. 288.

53. Mass.—*Wright v. Lanckton*, *supra*.

thenticated by the corporate seal.⁵⁴ A university may not properly issue diplomas to students without requiring necessary attendance and is guilty of fraud in so issuing diplomas to be used as a basis for securing state license to practice a profession.⁵⁵

b. Granting or Withholding

While the granting of degrees is a matter resting largely in the discretion of the college or university authorities, a student ordinarily has the right to pursue his course of study to its completion and to receive his degree on successful completion of the course with due observance of reasonable regulations as to attendance, deportment and other matters, and the college or university may not arbitrarily deny him a degree.

Ordinarily, one matriculating at a college or university establishes a contractual relationship entitling him on compliance with reasonable regulations as to scholastic standing, attendance, deportment and payment of tuition to pursue his selected course of study to completion and to receive a degree or certificate awarded for successful completion of such course; but the ordinary rule is subject to modification by university regulations assented to by the student.⁵⁶ A college or a university may refuse a degree to a contumacious student,⁵⁷ or to one who has not complied with the conditions required,⁵⁸ but a college cannot arbitrarily and without cause refuse examination and degree to a student who has complied with all the conditions entitling him thereto,⁵⁹ nor deny to him a certificate of attendance and that he satisfactorily passed the final examinations, where the conduct, on account of which his degree is denied, occurs after final

examination.⁶⁰ A requirement that a candidate for a degree shall pass a satisfactory examination means satisfactory to the faculty whose duty it is to conduct such examination.⁶¹

The decision of the college authorities is conclusive on the question as to whether a student has performed the conditions entitling him to a degree, if they act in good faith and within their jurisdiction.⁶² The exercise of a discretionary power to withhold a degree will not be interfered with by the court in the absence of bad faith or clear abuse.⁶³ The burden of proving bad faith and misconduct on the part of the college authorities is on the student claiming a degree.⁶⁴

The right to mandamus for the granting of a degree or the issuance of a diploma by a college or university is considered in *Mandamus* § 233, also 38 C.J. p 823 note 23—p 824 note 31, 11 C.J. p 985 notes 26–30.

§ 9. Public Aid

- a. In general
- b. Appropriations

a. In General

In the absence of constitutional prohibition, the state may extend financial aid to public or private colleges and universities.

When prohibited by constitutional provision public aid cannot be extended to private⁶⁵ or sectarian⁶⁶ institutions, but such prohibitions, of course, do not apply to public institutions established and maintained by the state.⁶⁷ In the absence of such

54. S.C.—*Barton v. Wilson*, 9 Rich. 273.

11 C.J. p 984 note 17.

55. Wash.—*State v. American University of Sanipractic*, 250 P. 52, 140 Wash. 625.

Drugless healing

University, issuing diplomas for practice of drugless healing, as required by L.1919 p 64, was guilty of fraud and violation of law in issuing diplomas without requiring proper attendance.—*State v. American University of Sanipractic*, supra.

56. N.Y.—*Anthony v. Syracuse University*, 231 N.Y.S. 435, 224 App. Div. 487, reversing 223 N.Y.S. 796, 130 Misc. 249.

Assent shown

By signing later registration cards, student assented to modification of contract created by signing earlier cards.—*Anthony v. Syracuse University*, supra.

Rule of constructive knowledge was applicable to rule permitting university to dismiss student at any

time for any reason.—*Anthony v. Syracuse University*, supra.

57. N.Y.—*People v. New York Law School*, 22 N.Y.S. 663, 68 Hun 118. Or.—*Tate v. North Pac. College*, 140 P. 743, 70 Or. 160, 166.

58. Colo.—*Steinhauer v. Arkins*, 69 P. 1075, 18 Colo.App. 49. Ill.—See *People v. Bennett Medical College*, 205 Ill.App. 324. 11 C.J. p 984 note 19.

59. Neb.—*State v. Lincoln Medical College*, 116 N.W. 294, 81 Neb. 533, 17 L.R.A.,N.S., 930. 11 C.J. p 984 note 20.

60. N.Y.—*People v. New York Law School*, 22 N.Y.S. 663, 68 Hun 118. Or.—*Tate v. North Pac. College*, 140 P. 743, 70 Or. 160, 166.

61. Colo.—*Steinhauer v. Arkins*, 69 P. 1075, 18 Colo.App. 49. 11 C.J. p 984 note 22.

62. Colo.—*People ex rel. Moore v. Lory*, 31 P.2d 1112, 1113, 94 Colo. 595, quoting *Corpus Juris*.

Or.—*Tate v. North Pac. College*, 140 P. 743, 70 Or. 160.

11 C.J. p 984 note 23.

63. Ill.—See *People v. Bennett Medical College*, 205 Ill.App. 324.

N.Y.—*People v. New York Homoeopathic Medical College*, etc., 20 N. Y.S. 379.

Pa.—*Addy v. College*, 11 Pa.Dist. 687. 11 C.J. p 985 note 24.

64. Or.—*Tate v. North Pac. College*, 140 P. 743, 70 Or. 160.

11 C.J. p 985 note 25.

65. Ala.—*Elsberry v. Seay*, 3 So. 804, 83 Ala. 514.

La.—*State v. Graham*, 25 La. Ann. 440.

11 C.J. p 985 note 31.

66. S.D.—*Dakota Synod v. State*, 50 N.W. 632, 2 S.D. 366, 14 L.R.A. 418. 11 C.J. p 985 note 32.

67. Ky.—*James v. State Univ.*, 114 S.W. 767, 131 Ky. 156.

N.J.—*Rutgers College v. Morgan*, 57 A. 250, 70 N.J.Law 460, affirmed 60 A. 205, 71 N.J.Law 663.

11 C.J. p 985 note 33.

prohibition states may make grants for the endowment and aid of both state and private colleges;⁶⁸ and state aid need not be denied a college or university merely because no provision for such aid is expressly made by the constitution.⁶⁹

b. Appropriations

Appropriations for colleges and universities may be absolute or conditional, and the amount, purpose, and other details of such appropriations will ordinarily depend on applicable statutory provisions.

Appropriations of money in aid of colleges and universities may be absolute and unconditional,⁷⁰ or they may be conditional.⁷¹ If, however, a condition is attached to an appropriation, it must be strictly performed to entitle the institution to the sum offered.⁷² The disposition of the funds ap-

propriated by congress for the aid of colleges of agriculture and mechanic arts is left to the discretion of the states,⁷³ subject only to the limitation that the fund must be applied to its intended purpose.⁷⁴ Under an act making an appropriation to such schools as shall be actually engaged in a certain kind of instruction, only such colleges may take as were in operation at the time of the appropriation.⁷⁵ The amount of such appropriations,⁷⁶ the time⁷⁷ and manner of withdrawing the same, whether on voucher⁷⁸ or otherwise,⁷⁹ the particular purposes for which it may be used,⁸⁰ the time within which such purpose should be executed,⁸¹ the officer or board entitled to expend it,⁸² the priority of warrants,⁸³ and the fund from which the money is to be drawn⁸⁴ are in general con-

68. Va.—Phillips v. Commonwealth Univ., 34 S.E. 66, 97 Va. 472, 47 L. R.A. 284.

11 C.J. p 986 note 34.

69. Ky.—Higgins v. Prater, 14 S.W. 910, 91 Ky. 6, 12 Ky.L. 645.

Ohio.—State v. Ogilvie, 37 Ohio St. 1—State v. Toledo, 23 Ohio Cir.Ct. 327.

70. Iowa.—State v. Sherman, 46 Iowa 415.

11 C.J. p 986 note 38.

71. Mich.—State Board of Agriculture v. State Administrative Board, 197 N.W. 160, 226 Mich. 417.

Use for specific purpose

Legislative appropriation of funds to state college of agriculture may be on condition that it shall be used for specific purpose, or on any other condition that legislature may lawfully impose not invasive of constitutional rights and powers of the governing board of the college.—State Board of Agriculture v. State Administrative Board, *supra*.

72. Mich.—State Bd. of Agriculture v. Auditor-Gen., 147 N.W. 529, 180 Mich. 349.

11 C.J. p 986 note 39.

73. U.S.—Wyoming v. Irvine, Wyo., 27 S.Ct. 613, 206 U.S. 278, 51 L.Ed. 1063.

11 C.J. p 986 note 40.

74. R.I.—In re Agricultural Funds, 21 A. 916, 17 R.I. 815.

11 C.J. p 986 note 41.

75. Ala.—State v. White, 23 So. 31, 116 Ala. 202.

76. N.Y.—People v. Davenport, 23 N. E. 664, 117 N.Y. 549, modifying 30 Hun 177.

11 C.J. p 986 note 43.

77. Ind.—Marks v. Purdue Univ., 37 Ind. 155.

Iowa.—State v. Sherman, 46 Iowa 415.

11 C.J. p 986 note 44.

78. Neb.—State v. Moore, 64 N.W. 975, 46 Neb. 373—State v. Moore,

54 N.W. 866, 36 Neb. 579—State v. Liedtke, 4 N.W. 61, 9 Neb. 468.

79. Mont.—State v. Wright, 42 P. 103, 17 Mont. 77.

11 C.J. p 986 note 47.

80. Mont.—State v. Erickson, 244 P. 287, 75 Mont. 429.

11 C.J. p 986 note 48.

Debts for past support and maintenance

Acts 1922 c 100, appropriating six thousand dollars for improvements to the buildings and grounds of the West Kentucky Industrial College and fifteen thousand dollars annually for support and maintenance, does not authorize the use of the sums appropriated for the payment of debts contracted for past support and maintenance, especially as Acts 1918 c 18, whereby the legislature assumed control of such college, shows intention to incur any obligation in excess of the amounts thereby appropriated.—Davis v. Steward, 248 S.W. 531, 198 Ky. 248.

Past-due wages

Fund provided by L.1917 p 199, appropriating to University of Illinois money for its use and maintenance, could not be drawn on to pay state civil service employee past-due wages.—People v. Board of Trustees of University of Illinois, 119 N.E. 595, 233 Ill. 494.

University or agricultural experimental purposes

Mill Tax Act 1913, limiting appropriations to Purdue University to amounts raised by tax provided for in act, was intended to cut off appropriations for buildings and other special purposes, but not previously established annual appropriations for Agricultural Experiment Station and Agricultural Extension Department of the University, and therefore did not affect appropriation made by Acts 1911 c 54; Acts 1913 c 135, and Acts 1913 c 340; nor did it repeal Acts 1913 c 184, appropriating

money for greenhouse, dairy building and equipment, and purchase of additional farm lands; nor did it prevent other payments to trustees of university as special agents for administration of Agricultural Extension Department. The saving provision in the act did not necessarily apply to state appropriations, federal appropriations to departments of university being thereby preserved, since such federal appropriations were subject to be cut off by action of state; and appropriations for experiment station and Agricultural Extension Department made pursuant to federal acts, such as that made by Acts 1909 c 167, are permanent appropriations exempting them from operation of act. Also, it was held that mention in the act of departments of Indiana University and omission to mention departments of Purdue University sufficiently indicated that departments of Purdue University were excluded from use and benefit, and also from limitations, of the act.—Indiana State Board of Finance v. State, 121 N.E. 649, 188 Ind. 36.

31. Expenses for first year

In appropriating a certain sum to junior college for payment of operation expenses for first year of operation or for school year 1938-1939, legislature intended that college building should be promptly constructed so as to be ready for occupation and use on or prior to beginning of school year 1938-1939, under L.1937 cc 113, 158.—Chez ex rel. Weber College v. Utah State Bldg. Commission, Utah, 74 P.2d 687.

82. Mich.—State Univ. v. Auditor-Gen., 132 N.W. 1037, 167 Mich. 444. Utah.—McCormick v. Thatcher, 30 P. 1091, 8 Utah 294, 17 L.R.A. 243.

83. La.—State v. Burke, 35 La. Ann. 457.

11 C.J. p 986 note 50.

84. Mo.—Lincoln University v.

trolled by the terms of applicable statutes. It has been held that a public school fund may not be used as the basis of an appropriation for colleges and universities,⁸⁵ although constitutional prohibitions against the appropriation of money raised for public schools for the maintenance of sectarian schools do not preclude appropriation of such moneys for sectarian institutions of higher learning, since the term "public schools" does not include colleges and universities.⁸⁶

Necessity for specific appropriation. Money paid into a state treasury as taxes belongs to the state, and cannot be expended by the board of regents of a state university without a specific appropriation by the legislature;⁸⁷ but money donated by the United States to a university for a specific purpose is no part of the funds of the state, and no legislative appropriation is necessary.⁸⁸

§ 10. Property and Funds

The property and funds of a college or university ordinarily comprise its grounds and buildings whether used for study or incidental purposes such as athletics, and also include whatever it may have by way of endowments. The institution may not issue bonds without statutory authority, although where so authorized it may issue valid obligations within the restrictions imposed, which are generally to be regarded as obligations of the college or university itself and not of the state.

A "college estate" comprises not only the college buildings and grounds, but also property held by the college by way of endowment.⁸⁹ While the purpose of a college or university is not the erection or equipment of buildings therefor,⁹⁰ obviously buildings, including new or additional ones as the needs of the institution expand, are necessary to the accomplishment of the purposes of the college or university. In addition to the buildings requisite for instruction, the physical property of a college or university properly includes athletic fields,⁹¹ apartments or dwelling houses for the use of officers and professors,⁹² and dormitories or houses for the residence of the students.⁹³ A legislative restriction on the location of buildings does not prevent a change of location which does not violate the restriction.⁹⁴ The funds of a state university are not public funds within the meaning of statutes relating to public funds or state moneys generally.⁹⁵

Bonds. In the absence of statutory authority, a state college or university may not issue bonds,⁹⁶ although where so authorized by the legislature, it may issue bonds and pledge its resources as security within the limitations imposed by statute.⁹⁷ Under applicable statutory provisions, it has been held that bonds issued by a state university may be sold

Hackmann, 243 S.W. 320, 295 Mo. 118.

11 C.J. p 987 note 51.

85. University as not a "public school"

L.1921 p 86, providing for the reorganization of the Lincoln institution under the name of the "Lincoln University" for the higher education of the negro race, and making appropriation, in § 8, for such university out of the public school fund, were held void under Const. art 11 §§ 1-3, 5-7, the Lincoln University not being a part of the public school system, and the use of the school funds for such purposes not being the use thereof for public school purposes.—*Lincoln University v. Hackmann*, supra.

86. Mass.—In re Opinion of the Justices, 102 N.E. 464, 214 Mass. 599.

87. Neb.—*State v. Moore*, 64 N.W. 975, 46 Neb. 373.

11 C.J. p 987 note 52.

Appropriation held "specific"

Where the legislature makes a specific appropriation in favor of a rotary fund, and the scope and purpose of such fund is defined by the Appropriation Act in terms which fairly and reasonably include the use of said funds for the purpose of maintaining said book and supply store, the appropriation is specific, within the meaning of § 22 art 2 of

the state constitution.—*Long v. Board of Trustees*, 157 N.E. 395, 24 Ohio App. 261.

88. Neb.—*State v. Searle*, 108 N.W. 1119, 109 N.W. 770, 77 Neb. 155.

89. R.I.—*Brown Univ. v. Granger*, 36 A. 720, 19 R.I. 704, 36 L.R.A. 847.

90. Idaho.—*Roach v. Gooding*, 81 P. 642, 11 Idaho 244.

91. Ohio.—*Cincinnati v. Jones*, 16 Ohio S. & C.P. 343—*Cincinnati Univ. v. Cincinnati*, 10 Ohio N.P. 741, 1 Ohio N.P., N.S., 105.

92. N.J.—*State v. Ross*, 24 N.J. Law 497.

Ohio.—*Cincinnati v. Jones*, 16 Ohio S. & C.P. 343.

11 C.J. p 989 note 82.

93. Ohio.—*Cincinnati v. Jones*, 16 Ohio S. & C.P. 343.

11 C.J. p 989 note 83.

94. Mass.—*Massachusetts Inst. of Technology v. Boston Soc. of Natural History*, 105 N.E. 874, 218 Mass. 189.

11 C.J. p 989 note 84.

95. Ind.—*State v. Carr*, 12 N.E. 318, 111 Ind. 335.

Wash.—*State v. Clausen*, 99 P. 743, 51 Wash. 548.

96. Ala.—*Alabama College v. Harman*, 175 So. 394, 234 Ala. 446.

Pledge of students' fees and mortgage of land

Alabama College, a state institution created by statute, could not issue bonds to erect dormitory, and pledge student fees and execute mortgage on lands owned by college to secure bonds, in absence of statutory authority.—*Alabama College v. Harman*, supra.

97. Ala.—*Harman v. Alabama College*, 177 So. 747, 235 Ala. 148.

Idaho.—*State ex rel. Miller v. State Board of Education*, 52 P.2d 141, 56 Idaho 210.

Mont.—*State ex rel. Wilson v. State Board of Education of Montana*, 56 P.2d 1079, 102 Mont. 165—*State ex rel. Veeder v. State Board of Education*, 33 P.2d 516, 97 Mont. 121.

Or.—*McClain v. Regents of the University*, 265 P. 412, 124 Or. 629.

Wyo.—*Arnold v. Bond*, 34 P.2d 28, 47 Wyo. 236.

Construction of dormitory

Ala.—*Harman v. Alabama College*, 177 So. 747, 235 Ala. 148.

Or.—*McClain v. Regents of the University*, 265 P. 412, 124 Or. 629.

Failure to give details as not fatal
Mont.—*State ex rel. Wilson v. State Board of Education of Montana*, 56 P.2d 1079, 102 Mont. 165.

Fees, rents, and revenues of students' union building

Agreement of state board of edu-

to private investors,⁹⁸ or that the primary purpose of the legislature in authorizing the construction and financing of buildings by such institutions was to enable them to erect buildings and pay for them with bonds payable out of revenues derived from the buildings;⁹⁹ or that a state board of education was authorized to pledge a portion of the income and interest from a university land grant to secure bonds issued as security for repayment of a loan from the federal government, for construction of a building at a state university,¹ that the authority of such board to issue the bonds was not vitiated by the fact that the building would not be completed before expiration of the emergency period to which the operative effect of the enabling statute was limited,² and that where no part of the debt to be incurred is to be repaid from taxes, it is unnecessary to submit to the voters the question of issuing the bonds and incurring the indebtedness.³ It has been held that statutory bonds issued by a university are to be regarded as valid obligations of the university, but not as obligations of the state,⁴ and that no provisions need be made to

provide interest and sinking fund requirements out of taxation.⁵

§ 11. — Right to Acquire, Hold, and Convey Property

Broadly speaking an incorporated or unincorporated college or university has the power to acquire, hold and transfer real and personal property essential to its maintenance as an educational institution or within the scope of the purposes contemplated by its charter or by applicable statutory provisions.

An incorporated college or university has at least implied, and frequently express, power to take, receive, hold, and convey property for the purpose of carrying out its objects, that is, the establishment and maintenance of an educational institution.⁶ Even where there is doubt as to the college or university being a *de jure* corporation, but where it is at least a *de facto* corporation, it can take, hold, and convey property.⁷ The amount of property which a college or university may take or hold is, however, often limited by its charter or by the statutes of the state.⁸ While a statute removing the limitation cannot affect property rights already

cation to pledge students' fees, together with rents and revenues of students' union building at university, so long as bonds against building were outstanding, was valid although extending beyond term of individual members, and pledge by state board of education of accumulated assets in students' union building fund to repay money borrowed for immediate erection of union building was authorized, where fund was raised for specific purpose of erection of building.—*State ex rel. Veeder v. State Board of Education*, 33 P.2d 516, 97 Mont. 121.

Pledge of income

Ala.—*Harman v. Alabama College*, 177 So. 747, 235 Ala. 148.
Idaho.—*State ex rel. Miller v. State Board of Education*, 52 P.2d 141, 56 Idaho 210.
Wyo.—*Arnold v. Bond*, 34 P.2d 28, 47 Wyo. 236.

Validity of bonds under constitutional inhibition as to "debts"

Under statute authorizing state institutions to borrow from federal agencies for erection of buildings, to issue bonds and pledge student fees for repayment of money borrowed, and providing that bonds would not constitute an obligation of the state or be payable out of any moneys appropriated to college by the state, money borrowed from a federal agency by the Alabama College would constitute a "debt" of the Alabama College as respects whether obligation was invalid under constitutional provision prohibiting creation of new debts by state or its

authority, but as respects pledge of students' fees and other moneys not derived from appropriation by the state to the college for repayment of bonds, the debt created by the loan would not be a "debt created by the state or its authority" within the inhibition of the constitution against the creation of a new debt by the state or its authority.—*Harman v. Alabama College*, 177 So. 747, 235 Ala. 148.
98. Ky.—*J. D. Van Hooser & Co. v. University of Kentucky*, 90 S.W.2d 1029, 262 Ky. 581.

Borrowing from federal agency as not mandatory

Bonds issued by state university to finance construction of buildings could be sold to private individuals, provision that state educational institutions may borrow money from Public Works Administration or other agency of federal government not being mandatory.—*J. D. Van Hooser & Co. v. University of Kentucky*, supra.

99. Ky.—*J. D. Van Hooser & Co. v. University of Kentucky*, supra.

1. Mont.—*State ex rel. Dragstedt v. State Board of Education*, 62 P.2d 330, 103 Mont. 336.

2. Project initiated two years ahead

Authority of state board of education to issue bonds to secure repayment of loan from federal government for construction of building at state university was not vitiated because building would not be completed prior to expiration of

emergency period to which operative effect of statute under which bonds were issued was limited, where project was initiated nearly two years prior to expiration date of statute.—*State ex rel. Dragstedt v. State Board of Education*, supra.

3. Mont.—*State ex rel. Dragstedt v. State Board of Education*, 62 P.2d 330, 103 Mont. 336.

N.M.—*State v. Regents of University of New Mexico*, 258 P. 571, 32 N. M. 428.

4. N.M.—*State v. Regents of University of New Mexico*, supra.

Slight misnomer of University in statute or contract is immaterial as to validity of University bonds, where its identity appears or can be made to appear by parol, and a statute authorizing "The Board of Regents of the University of New Mexico" instead of "the Regents of the University of New Mexico" to issue bonds was held not to render bonds invalid.—*State v. Regents of University of New Mexico*, supra.

5. N.M.—*State v. Regents of University of New Mexico*, supra.

6. Md.—*St. Charles College v. Carroll*, 88 A. 277, 121 Md. 464.

Mass.—*Dexter v. Harvard College*, 57 N.E. 371, 176 Mass. 192.

Or.—*Liggett v. Ladd*, 21 P. 133, 17 Or. 89.

11 C.J. p 989 notes '86, '87.

7. N.C.—*Claremont College v. Ridge*, 81 S.E. 283, 165 N.C. 211.

8. N.Y.—*In re McGraw*, 19 N.E. 233, 111 N.Y. 66, 2 L.R.A. 387, affirming

vested,⁹ yet an additional grant of power to take and hold, given by a subsequent charter, is not subject to the limitation imposed by a prior charter.¹⁰

Under applicable charter or statutory provisions, it has been held that a college or university may acquire and hold land,¹¹ as in the case of land given it for park purposes of students and the general public,¹² or that it may purchase land for college purposes and construct necessary buildings thereon,¹³ or may purchase property for development and resale,¹⁴ or may acquire and hold national bank stock,¹⁵ or a note and mortgage.¹⁶

§ 12. — Private Donations

Colleges and universities are ordinarily authorized to receive or reject private donations, and where such are accepted the institution must comply with any conditions attached thereto. A promise to contribute to a college or university is enforceable where supported by a sufficient consideration, such as retention of the institution in the place where then located.

The endowment of a college is commonly understood to include all the property, of whatever character, given to the institution for its permanent support.¹⁷ Educational institutions are usually expressly authorized to receive private donations,¹⁸ and it has been held that a college may receive a gift of money for erection of a church for use of

its students.¹⁹ The directors, regents, or trustees are at liberty to reject a proposed donation, if in their opinion the terms are unlawful, or for any reason unacceptable to them.²⁰ If, however, they accept it, they do so on the terms prescribed,²¹ and a college or university may not lawfully carry out an agreement in violation of the terms of an endowment accepted by it.²² A condition precedent must be complied with to make the promise of an endowment a binding contract.²³ Similarly, on the breach of a condition subsequent the donation will be forfeited.²⁴

A promise or offer to donate or contribute is binding and enforceable when supported by a consideration, such as the assumption of responsibilities and incurring of liabilities,²⁵ the retention of the college in the place where it is then located,²⁶ the acceptance of the subscription,²⁷ the raising of an endowment,²⁸ or an implied promise to use the funds subscribed in conformity with the terms and object of the subscription.²⁹ In the event of a failure of consideration, the promise is not enforceable;³⁰ but where the college performs its part of the agreement, the other party is bound to pay the promised sum,³¹ and consolidation of a college or university with another institution in furtherance

45 Hun 354, affirmed 10 S.Ct. 775, 136 U.S. 152, 34 L.Ed. 427.

11 C.J. p 989 note 89.

9. N.Y.—Matter of McGraw, 19 N.E. 233, 111 N.Y. 66, 2 L.R.A. 387, affirming 45 Hun 354, and affirmed 10 S.Ct. 775, 136 U.S. 152, 34 L.Ed. 427.

10. N.Y.—Phoenix v. Columbia College, 84 N.Y.S. 897, 87 App.Div. 438, affirmed 72 N.E. 1149, 179 N.Y. 592.

11. Mich.—State Univ. v. Detroit Young Men's Soc., 12 Mich. 138. Minn.—State Univ. v. Hart, 7 Minn. 61.

Or.—Liggett v. Ladd, 31 P. 81, 23 Or. 26.

12. Vt.—President and Fellows of Middlebury College v. Central Power Corporation of Vermont, 143 A. 384, 101 Vt. 325.

13. Ga.—State v. Regents of University System of Georgia, 175 S.E. 567, 179 Ga. 210.

Discretion of trustees

Regents of University System were authorized, in their discretion to purchase lands for college purposes, to construct dormitories, gymnasias, and other buildings necessary to usefulness of institutions in system, and to require students to pay reasonable fees for their use.—State v. Regents of University System of Georgia, *supra*.

14. Md.—Diggs v. Morgan College, 105 A. 157, 133 Md. 264.

15. U.S.—Gamble v. Cumberland College, D.C.Ky., 4 F.Supp. 767.

16. Neb.—Goddard v. Clarke, 96 N.W. 350, 1 Neb., Unoff., 769.

17. Miss.—Millsaps College v. City of Jackson, 101 So. 574, 136 Miss. 795, affirmed 48 S.Ct. 94, 275 U.S. 129, 72 L.Ed. 196.

18. Ohio.—Hooker v. Wittenberg College, 2 Cinc.Super. 353. 11 C.J. p 990 note 93.

19. Md.—President and Council of Mt. St. Mary's College v. Williams, 103 A. 479, 132 Md. 184.

Under general charter powers

Corporation organized "for the education of youth, the pursuit of science and the general diffusion of knowledge," could receive gift of money for erection of church for use of students, under its charter power entitling it to purchase, take, hold, and convey realty or personalty.—President and Council of Mt. St. Mary's College v. Williams, *supra*.

Number of churches already in vicinity

Where will devised remainder to college for construction of church at specified location, mere fact that sufficient number of churches of that denomination existed already in neighborhood did not affect right of college to receive the fund.—President and Council of Mt. St. Mary's College v. Williams, *supra*.

20. Ohio.—State v. Schauss, 23 Ohio Cir.Ct. 283.

21. Md.—St. Charles College v. Carroll, 88 A. 277, 121 Md. 464. Ohio.—State v. Schauss, 23 Ohio Cir. Ct. 283.

22. Mass.—President and Fellows of Harvard College v. Attorney General, 117 N.E. 903, 228 Mass. 396.

23. Wis.—Grant Univ. v. Bentley, 94 N.W. 42, 117 Wis. 260. 11 C.J. p 990 note 96.

24. Md.—St. Charles College v. Carroll, 88 A. 277, 121 Md. 464.

25. Ill.—Beatty v. Western College, 52 N.E. 432, 177 Ill. 280, 69 Am.S.R. 242, 42 L.R.A. 797, affirming 71 Ill. App. 587.

11 C.J. p 990 note 99.

26. Mass.—Williams College v. Danforth, 12 Pick. 541.

27. Ind.—Barnett v. Franklin College, 37 N.E. 427, 432, 10 Ind.App. 103, 697.

28. Iowa.—Burlington Univ. v. Barrett, 22 Iowa 60, 92 Am.D. 376.

29. Mass.—Ladies' Collegiate Inst. v. French, 16 Gray. 196.

30. Iowa.—Simpson Centenary College v. Tuttle, 33 N.W. 74, 71 Iowa 596.

31. Miss.—Magruder v. Belhaven Collegiate, etc., Inst., 63 So. 349, 106 Miss. 167.

11 C.J. p 990 note 6.

of the general educational purpose of the merged institution does not constitute a failure of consideration absolving a subscriber of his obligation to contribute.³²

The profits accruing to the vendee in a sale of land scrip, by virtue of the general act of congress, donating such scrip to the state, form no part of the purchase price thereof, and may be the subject of a valid gift to a university.³³

A statute validating gifts for the education of persons within the state has been construed as requiring the college or university to be located within the state but as not requiring the beneficiaries or students to be confined to residents of such state.³⁴

§ 13. — Title to Property

A college or university may hold absolute or conditional title to property in accordance with the circumstances involved, and title to property of a state institution is sometimes regarded as vested in the state.

In determining the title of an incorporated col-

lege or university to real property held by it, reference must be had not only to the terms of the conveyance but also to the charter of the institution and pertinent statutes, as the property is held under the conveyance and charter as if they constituted but one instrument,³⁵ and such conveyances are within the operation of a general statute providing that all deeds shall be construed to be in fee, with or without the word "heirs," unless the contrary clearly appears.³⁶ Particular conveyances have been construed to be absolute rather than in trust,³⁷ and to convey a fee rather than an estate of lesser dignity,³⁸ or to be made on condition subsequent.³⁹ Conditions attached to a grant or donation should be observed by the college or university, are ordinarily enforceable where the instrument is supported by sufficient consideration,⁴⁰ although not where in violation of law,⁴¹ and in the absence of waiver breach of a valid condition subsequent may afford ground for reversion of the property to the donor or his representatives.⁴² It has been held that the legal and equitable titles to

32. Ky.—Central University of Kentucky v. Walten, 90 S.W. 1066, 122 Ky. 65, 28 Ky.L. 1041.

33. N.Y.—In re McGraw, 19 N.E. 233, 111 N.Y. 66, 2 L.R.A. 387, affirmed 10 S.Ct. 775, 136 U.S. 152, 34 L.Ed. 427.

11 C.J. p 990 note 8.

34. Va.—Triplett v. Trotter, 193 S. E. 514.

35. Ky.—Kentucky Univ. v. White, 10 Ky.Op. 89.

36. N.C.—Claremont College v. Riddle, 81 S.E. 283, 165 N.C. 211.

37. Md.—St. Charles College v. Carroll, 88 A. 277, 121 Md. 464.
11 C.J. p 991 note 11.

38. N.C.—Claremont College v. Riddle, 81 S.E. 283, 165 N.C. 211.

S.C.—McManaway v. Clapp, 148 S.E. 18, 150 S.C. 249.

Presumption of deed

Where land was conveyed to Baptist Convention for university, which reconveyed portion of land twenty years thereafter, law will presume deed by Convention to university, if necessary to perfect title in university.—McManaway v. Clapp, supra.

39. Assumption of indebtedness

A conveyance of land to a college in consideration of one dollar and of specified covenants and conditions, including grantee's assumption of bonded indebtedness of grantor on the land to become due in the future, and on grantee's failure to pay the indebtedness at maturity, a reversion to grantor, and whereby grantee pledges itself in that event to reconvey to grantor, or its assigns, with

restriction on grantee's right to encumber or dispose of land "conveyed" until conditions of deed had been complied with, is a conveyance on condition subsequent, in view of Civ. Code 1910 §§ 3716, 3717.—City of Gainesville v. Brenau College, 103 S. E. 164, 150 Ga. 156.

Condition subsequent not shown

Deed to Baptist Convention in trust for university for educational purposes did not convey land on condition subsequent, avoiding conveyance if property ceased to be used for purposes specified.—McManaway v. Clapp, 148 S.E. 18, 150 S.C. 249.

40. Iowa.—Curtis & Barker v. Central University of Iowa, 176 N.W. 330, 188 Iowa 300.

Duty to require bond

Where a condition of the instrument donating a fund to a university was that the board of trustees should take a bond from the officers or agents having the custody and investment of the fund, it was the duty of the board to require such bond.—Curtis & Barker v. Central University of Iowa, supra.

Sufficient consideration shown

Where donors made a proposal to donate funds to a university "on such reasonable conditions as we may name when formally presented to the board," a provision in a later instrument of donation, carrying out the provisions of the proposal, for forfeiture and return of the fund for noncompliance with the conditions and trusts therein, was supported by a sufficient consideration.—Curtis &

Barker v. Central University of Iowa, supra.

41. Ill.—Trustees of Eureka College v. Bondurant, 124 N.E. 652, 289 Ill. 289.

Void condition subsequent

Condition subsequent conveyance to trustees of Eureka College providing that receipts of land should remain perpetual fund for the use of college, and that on failure so to use land and receipts therefrom property should revert, was void, and trustees took property in fee absolutely, § 6 of act of Feb. 6, 1855, Priv. Acts 1855 p 542, incorporating college providing that donation of real estate lands shall be sold within ten years from the date of donation and value applied as specified by donor.—Trustees of Eureka College v. Bondurant, 124 N.E. 652, 289 Ill. 289.

42. Change of denominational management

Where by the charter of a university it was under control of the Baptist denomination, and the provisions to this effect were declared unalterable, and an instrument, making a donation to the university, prohibited its removal from the city where it was then located, and provided for the return of the fund for noncompliance with the conditions or trusts thereof, an amendment of the charter to vest control in the Reformed Church was a violation of the contract, entitling the donors' heirs to a return of the fund. Where an instrument donating money to a university contained provisions as to the grade of college work to be main-

a fund do not merge although the trustee and the cestui are the same, where an instrument donating a fund to a university provides for forfeiture and return of the fund for noncompliance with conditions and trusts therein.⁴³

Where lands are deeded to a college or university to be used for specified purposes, and no time is set for the beginning of use for such purposes, it will be presumed that the grantor contemplated that the time element should be left to the discretion of the university authorities, a reasonable time will be allowed for the beginning of such use, and delay not exceeding a reasonable time is no ground for forfeiture of the grant.⁴⁴ Forfeiture will not be decreed for breach of conditions or covenants contained in the deed where the facts show that there was no such breach.⁴⁵

It has been held that on the vesting of title to public lands of the state in a state university, such lands still remain those of the state,⁴⁶ that money deposited in a bank by a state university constitutes state funds,⁴⁷ and that particular records ex-

tant after destruction of general land archives should be construed as showing title in the state through the trustees of a state university rather than in a city,⁴⁸ although in the absence of conditions contained in an appropriation, the proceeds of sale of property of a state university may be paid to the treasurer of the university instead of the state treasurer.⁴⁹

On the sale of goods to a citizens' committee on a credit basis, but without retention of title in the seller, the committee has power to pass title to a university without lien or trust in favor of the seller.⁵⁰

§ 14. — Control and Disposition

The control and disposition of college and university funds ordinarily rests with the trustees of a private institution or with the board of regents in the case of a public institution, and must be in accordance with applicable provisions of controlling grants, charter, statute, and constitution.

The control and disposition of college or university funds and property is ordinarily confided to a board of trustees or regents,⁵¹ or to a state treas-

tained, the naming of professors, the endowment of chairs, etc., and provided for return of the fund for failure to comply with the conditions or in the execution of the trusts therein, "reasonable consideration being made for unavoidable delays and unforeseen contingencies," the quoted provision did not authorize a diversion of the fund to the support of the university after it had changed its denominational management.—*Curtis & Barker v. Central University of Iowa, supra.*

Waiver not shown

Where an instrument donating a fund to a university provided for forfeiture and a return of the fund for noncompliance with its conditions and trusts, and the heirs of the donors acted promptly after the charter was amended to place control of the university in a different religious denomination, there was no waiver of the breach.—*Curtis & Barker v. Central University of Iowa, supra.*

43. Iowa.—*Curtis & Barker v. Central University of Iowa, supra.*

44. Cal.—*Whitaker v. Regents of the University of California*, 178 P. 308, 39 Cal.App. 111.

Forestry investigation and research

In the absence of any specifications in deed, granting lands to the regents of the University of California to be used for forestry investigation and research, as to time when work should begin, a reasonable time would be allowed therefor.—*Whitaker v. Regents of the University of California, supra.*

45. Cal.—*Whitaker v. Regents of the University of California, supra.*

Name

Facts showed sufficient compliance with condition in deed to regents of University of California that "these lands and premises shall be known and called Whitaker's Forest."—*Whitaker v. Regents of the University of California, supra.*

Use for stock range forbidden

That defendant, regents of the University of California, to which plaintiff granted lands to be used for forestry investigation and research, had no knowledge of cattle straying on the lands, and that no damage was caused by such cattle, should be considered in determining whether there had been a breach of covenant forbidding use of lands for a stock range. Facts were insufficient to show that land granted to the regents of the University of California for forestry investigation and research had been "used for a stock range" in violation of condition in deed, the verb "to use" meaning to employ; to put to a purpose; to avail oneself of.—*Whitaker v. Regents of the University of California, supra.*

46. Wyo.—*Ross v. Trustees of University of Wyoming*, 228 P. 642, 31 Wyo. 464, denying rehearing 222 P. 3, 30 Wyo. 433.

University as dependent part of state

The University, although declared by statute to be body corporate by specified name, is not separate from, or independent of, the state, but is so much a dependent part of it that,

even on a vesting of title in it of public lands of a state, the lands would still remain lands of the state.—*Ross v. Trustees of University of Wyoming*, 228 P. 642, 31 Wyo. 464, denying rehearing 222 P. 3, 30 Wyo. 433.

47. Tenn.—*Grigsby v. People's Bank of Martin*, 11 S.W.2d 673, 158 Tenn. 182.

48. S.C.—*Trustees of University of South Carolina v. City of Columbia*, 93 S.E. 934, 108 S.C. 244.

49. Idaho.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415.

50. Ga.—*Sheldon & Co. v. Emory University*, 184 S.E. 401, 52 Ga. App. 628.

51. Ariz.—*Fairfield v. W. J. Corbett Hardware Co.*, 215 P. 510, 25 Ariz. 199.

Cal.—*People v. College of California*, 38 Cal. 166.

Idaho.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415. 11 C.J. p 991 note 28.

Duty of regents in respect of dormitory fund

Under Civ.Code 1913 pars 4472 and 4475, creating the board of regents of the State University as a body corporate, and empowering it to take and hold property in its corporate name and to make contracts and to sue and be sued thereon, and L.1919 c 174 § 41, appropriating a fund to construct a University dormitory and giving the board sole control of the fund, it is the duty of the board to determine who is entitled to the money on its contracts and direct

urer⁵² or board,⁵³ whose discretion in the expenditure of funds⁵⁴ or the use of university property⁵⁵ will not meet court interference in the absence of abuse, although unless otherwise provided by the constitution,⁵⁶ college trustees, regents, and the like are subject to restrictions imposed by the terms of grants or statutes,⁵⁷ and where public funds are appropriated by the state to a college or university such funds are subject to conditions prescribed by the legislature,⁵⁸ and the fact that statutes vest the control and management of a college or university in a board of trustees will not exempt the institution and its trustees from liability at law or in equity for breach of trust and violation of contract in taking away its endowment fund and campus from a Church under whose control the institution had been fostered and giving the same to others.⁵⁹

payment thereof, and it is answerable in its corporate name for violation of duty or breach of contract, and it is not subject to supervision in such matters by the state auditor, who can only decline to draw a warrant for the payment of the claim allowed by the board on the ground that it is not for a public purpose under L. 1921 c 38.—*Fairfield v. W. J. Corbett Hardware Co.*, 215 P. 510, 25 Ariz. 199.

Federal grants and private donations

The proceeds of federal land grants, federal appropriations, and private donations to the state university are trust funds and not subject to the constitutional requirement that money must be appropriated before it is paid out of the state treasury, and may be expended by the board of regents of a state university subject only to limitations imposed by the federal government or private donors.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415.

Public works statutes as inapplicable

Comp.St. §§ 367-380, relative to the powers and duties of the department of public works, pertain only to contracts or purchases creating claims against the state, and do not apply to the purchase of property or the making of contracts by the board of regents, where the board has funds available for the purpose.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415.

52. Neb.—*State Univ. v. McConnell*, 5 Neb. 423.

53. Mich.—*State Board of Agriculture v. State Administrative Board*, 197 N.W. 160, 226 Mich. 417.

"College funds"

In providing that state board of agriculture should have control of affairs of state agricultural college and funds devoted to its use, the

constitution makes no exception as to funds from any particular source, and hence moneys appropriated by the legislature are "college funds" within constitutional sense.—*State Board of Agriculture v. State Administrative Board*, supra.

54. Ohio.—*Carrel v. State*, 11 Ohio App. 281.

55. Tex.—*Splawn v. Woodard*, Civ. App., 287 S.W. 677.

Campus buildings

Regents have full discretionary power over buildings on university campus, subject to review by legislature, but not by courts, except in case of palpable abuse, in view of Acts 1881 c 75, and Rev.St.1925 arts 2592, 2593.—*Splawn v. Woodard*, supra.

Rights acquired by students by making nominal deposit for rooms in dormitory at state university were held not to support injunction depriving regents of inherent power to discontinue use of building as dormitory.—*Splawn v. Woodard*, supra.

56. Mich.—*State Bd. of Agriculture v. Auditor-Gen.*, 147 N.W. 529, 180 Mich. 349.

11 C.J. p 991 note 30.

57. U.S.—*Schell v. Leander Clark College*, C.C.A.Iowa, 2 F.2d 17.

Idaho.—*Moscow Hardware Co. v. State Univ.*, 113 P. 731, 19 Idaho 420.

11 C.J. p 991 note 31.

58. Idaho.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415.

Acceptance by regents subject to conditions

In appropriating public funds to the state university, the legislature may impose such conditions and limitations as it deems proper, and, if accepted by the regents, the appropriation is coupled with the conditions, and can be expended only as

The regents of a university may not impose a trust or condition on the use of a tract of land set aside as university campus by public enactment without consent of the legislature.⁶⁰ It has been held that funds of a state college by statute coming into the hands of the state treasurer can be paid out by him only pursuant to biennial appropriation of the legislature,⁶¹ although federal funds received by a state college and handled without the intervention of state officers other than the board of regents may be disposed of without a legislative appropriation.⁶² Questions as to whether particular federal funds should be paid to the state treasurer and whether an appropriation is prerequisite to their disposal are ordinarily dependent on provisions of controlling statutes.⁶³ In the absence of directions from the board of trustees or regents,

prescribed, and withdrawn from the state treasury only as provided by law.—*State v. State Board of Education*, supra.

59. U.S.—*Schell v. Leander Clark College*, C.C.A.Iowa, 2 F.2d 17.

60. Tex.—*Splawn v. Woodard*, Civ. App., 287 S.W. 677.

Absence of express grant

Where power to impose trusts or conditions on university campus tract was not expressly granted, it could not be presumed, where not necessarily incident to power expressly granted.—*Splawn v. Woodard*, supra.

Trust, if any, created by donation as fulfilled

If donation of money to build dormitory at state university and its acceptance be construed as creating trust, use of building as dormitory for thirty-six years was fulfillment of trust.—*Splawn v. Woodard*, supra.

61. Wash.—*State v. Clausen*, 295 P. 751, 160 Wash. 618.

62. Wash.—*State v. Clausen*, supra.

63. Wash.—*State v. Clausen*, supra.

Hatch act

Money to be paid by federal government under Hatch Act to state college need not be paid to state treasurer. Federal funds available to state college under Hatch Act and paid to state treasurer cannot be paid out by him except pursuant to legislative appropriation.—*State v. Clausen*, supra.

Morrill act

Federal funds available to state college under Morrill Act must be deposited in state treasury and cannot be paid out except pursuant to legislative appropriation.—*State v. Clausen*, supra.

Smith-Lever act

Federal funds available to state college under Smith-Lever Act must

the treasurer may deposit the funds in his hands in such banks as he chooses or may withdraw the same at his pleasure, subject to liability on his bond.⁶⁴

Purposes for which property used, investment, and final disposal. Generally speaking, college or university funds may be used for any legitimate purpose of the institution, such as construction of buildings.⁶⁵ Proceeds of rentals may, it has been held, be applied by a college or university to construction of a dormitory,⁶⁶ as may also profits realized from operation of a university press.⁶⁷ Under statutes permitting funds to be expended for the "support" of a university, such funds may be used for erection of buildings as well as for current expenses, maintenance, up-keep and continuation of existing functions.⁶⁸ Under applicable charter or statutory provisions colleges and universities have been held authorized to pledge income and interest from a land grant fund to secure a loan for erection of a journalism building, such use of the funds being regarded as in furtherance of the maintenance and perpetuation of the institution within

constitutional requirements, and not in violation of constitutional provisions relative to state finances.⁶⁹

While the funds of a college or a university must not be used for the personal and private ends of an individual,⁷⁰ the institution may invest its funds in proper securities,⁷¹ and make a donation of money to a railroad in consideration of the location of the road near the grounds of the institution.⁷² The general rule that a trustee may not invest trust funds in its own obligations is inapplicable to the states in respect of the administration of federal land grant funds for the benefit of land grant colleges.⁷³ A state's acceptance under contract with executors of trust funds created by a will effects a transfer of the specific property to the state as its own, and in such a case it has been held that the state is discharged of its obligations by compliance with the terms of the will in respect of interest at the rate and for the number of years stipulated in the will, a reasonable rate to be paid thereafter, and is not required to account for capital gains or losses.⁷⁴ Where the trust gift is to a specific college, the state university of which such

be deposited with state treasurer and can be paid out by him only in pursuance of legislative appropriation.—*State v. Clausen, supra.*

64. N.M.—*Bowman Bank, etc., Co. v. Albuquerque First Nat. Bank*, 139 P. 148, 18 N.M. 589.

65. Wyo.—*Arnold v. Bond*, 34 P.2d 28, 47 Wyo. 236.

66. Minn.—*Fanning v. University of Minnesota*, 236 N.W. 217, 183 Minn. 222.

Legislative appropriation unnecessary

Rentals from buildings on university campus not used for university purposes are subject to use by board of regents in construction of dormitory, without an appropriation by the legislature.—*Fanning v. University of Minnesota, supra.*

67. Minn.—*Fanning v. University of Minnesota, supra.*

68. Wyo.—*Arnold v. Bond*, 34 P.2d 28, 47 Wyo. 236.

69. Mont.—*State ex rel. Wilson v. State Board of Education of Montana*, 56 P.2d 1079, 102 Mont. 165.

As to building fee

Proposed building fee in connection with journalism building did not invalidate proposed loan from federal government for erection of building and pledge of income and interest from university land grant fund to repay such loan, where it was not intended to make use of any building fee to repay such loan.—*State ex rel. Wilson v. State Board of Education of Montana, supra.*

Repayment of federal loan

Pledging income and interest from university land grant fund to repay loan from federal government for erection of journalism building was not violative of constitutional requirement that income from funds belonging to state institutions of learning should be devoted "to maintenance and perpetuation" of such institutions.—*State ex rel. Wilson v. State Board of Education of Montana, supra.*

70. Ohio.—*Irwin v. Lombard Univ.*, 46 N.E. 63, 56 Ohio St. 9, 60 Am. S.R. 727, 36 L.R.A. 239.

71. Ill.—*Cass v. Yale Univ.*, 107 Ill. App. 518.

72. Ky.—*Louisville, etc., R. Co. v. St. Rose, etc., Literary Socs.*, 15 S. W. 1065, 91 Ky. 395, 13 Ky.L. 5.

73. N.H.—*In re opinion of the Justices*, 128 A. 812, 81 N.H. 573.

Investment in state bonds

Investment of "Agricultural College Fund" in state's own bonds, pursuant to L.1866 c 4216 § 7, and, on maturity of bonds, charging such fund, pursuant to L.1883 c 83 § 2 on books of state treasurer as outstanding state obligation, drawing 6 per cent interest payable to college, was held compliance with federal grant of 1862 under 12 St. p 503 c 130 §§ 2 and 4, as the term "stocks" of states merely refers to state obligations.—*In re Opinion of the Justices, supra.*

74. N.H.—*In re Opinion of the Justices, supra.*

State's guaranty as consideration

State's acceptance under contract with executors of testator, pursuant to L.1891 c 12, of trust funds created by the will of Benjamin Thompson, effected a transfer to the state of the specific property as its own, in consideration of state's guaranty to maintain the principal of the fund, and provide for its accumulation for twenty years at an agreed rate of income, and to administer the trust represented by the act thus provided in accordance with the will.—*In re Opinion of the Justices, supra.*

Charging itself for stipulated number of years

State was held to have discharged its obligations with respect to Benjamin Thompson fund accepted by contract with executors of testator, pursuant to L.1891 c 12, and managed pursuant to that statute, and L.1903 c 125, and L.1909 c 131, by charging itself with interest on the fund at the stipulated rate for twenty years and thereafter paying a reasonable rate of income on the fund and accumulations to the designated college.—*In re Opinion of the Justices, supra.*

Dealings with securities acquired from executors

State is not required to account for capital gains or losses arising from dealing with the securities received from the executors of the estate of Benjamin Thompson, under contract pursuant to L.1891 c 12, whereby it assumed administration of trust, since such securities pass-

college is a part has no claim on the fund.⁷⁵

The fact that colleges or universities may not use their property for other than educational purposes does not restrict their control or power of disposition of the same.⁷⁶ Subject to statutory restrictions,⁷⁷ a college or university has the power to sell and dispose of property belonging to it for purposes clearly tending to promote its interest and the objects for which it was created,⁷⁸ or to extend a lease of property;⁷⁹ and if it conveys its property for a purpose apparently lawful, and within the scope of its powers, to a bona fide purchaser without notice, the transaction will be valid as between the corporation and the purchaser, even though the secret purpose of the corporation was unlawful.⁸⁰ A purchaser with notice, however, will acquire no greater right than the university had.⁸¹ Provided a restriction is not clearly expressed, the power of disposal may be exercised as to property granted, or acquired with funds given, to the college or university for certain purposes.⁸² Under the legislation of some states, the state land commission, rather than the board of regents, has power to sell university lands, regardless of the method by which title to such lands was acquired.⁸³ Where the lands of a state university have been sold, the university officials not only may,⁸⁴ but must,⁸⁵ enforce the right of a vendor. However, where college lands

are required to be sold to provide a fund for the college, arising from the interest on the price, the college may receive the principal when its best interest will be promoted thereby, and its officers will be presumed to have acted bona fide in receiving the principal before maturity with a bonus.⁸⁶

In the absence of objection by the board of directors of a college or university, its lease may be held valid where executed by the business manager pursuant to authority of the executive committee.⁸⁷ The validity of a sublease made by tenants of a university is governed by the terms of the lease rather than by statute.⁸⁸

The deed of a college or university may be upheld despite minor inaccuracies,⁸⁹ and a deed of the president authorized by a new board of trustees, assuming to represent the institution after election under an amended charter without objection by the old board, is valid as against collateral attack although acknowledged before filing of the amended charter.⁹⁰

Under particular charter, constitutional, or statutory provisions, it has been held that commissioners of a sinking fund are not authorized to convey lands held by the state for the use of a state university,⁹¹ or that sinking fund commissioners lack authority to provide funds for reconstruction of a

ed to the state, whether or not contract violated the trust created by the will.—In re Opinion of the Justices, *supra*.

Question as to what constitutes reasonable rate required by state to be paid on Benjamin Thompson fund for benefit of designated college was question of fact for state, whose determination of four per cent, as provided in L.1909 c 131, will prevail in the absence of submission of controversy to some tribunal by state.—In re Opinion of the Justices, *supra*.

75. N.M.—In re Opinion of the Justices, *supra*.

College of agriculture

Trustees of University of New Hampshire have no interest in, or claim on income from Benjamin Thompson fund, the trust being for the New Hampshire College of Agriculture and the Mechanic Arts, which continues to be separate corporate entity under L.1923 c 106 § 3.—In re Opinion of the Justices, *supra*.

76. S.C.—McManaway v. Clapp, 148 S.E. 13, 150 S.C. 249.

77. Iowa.—Smith v. Iowa Agricultural College, 28 Iowa 500.

78. State v. State Centenary Col.

v. Tulane Education Fund, 51 So. 483, 125 La. 432.

79. Neb.—Tash v. Ludden, 129 N.W. 417, 88 Neb. 292.

Ohio.—Crippen v. State Univ., 12 Ohio 96.

11 C.J. p 991 note 15.

79. Miss.—State v. Hamilton, 77 So. 650, 116 Miss. 697.

Continuing power

Where pursuant to L.1860 c 118 § 1, empowering trustees of University of Mississippi "to lease for a term of years" any part of land on which University is located, a fifteen-year lease was made by trustees in 1872, trustees had power to make extension lease in 1892, to then owner of first lease, in view of Rev.Code 1880 § 745.—State v. Hamilton, *supra*.

80. Cal.—People v. State College, 33 Cal. 166.

81. N.Y.—People v. Brooklyn Cooperative Co., 100 N.Y.S. 19, 114 App. Div. 723, affirmed 79 N.E. 866, 187 N.Y. 142.

11 C.J. p 991 note 17.

82. Ky.—Kentucky Univ. v. White, 10 Ky.Op. 89.

N.C.—Claremont College v. Riddle, 81 S.E. 283, 165 N.C. 211.

83. Wash.—State v. Hewitt Land Co., 134 P. 474, 74 Wash. 573.

84. Iowa.—Hann v. State Univ. 99

85. Ala.—State Univ. v. Winston, 5 Stew. & P. 17.

11 C.J. p 991 note 22.

86. Iowa.—Burtis v. Humboldt County Bank, 41 N.W. 585, 77 Iowa 103.

87. Tex.—Ingram v. Texas Christian University, Civ.App., 196 S.W. 603, error refused.

88. Tex.—Francis v. Crowley, Civ. App., 50 S.W.2d 462, error refused.

Terms of occupancy stated by regents

Where board of regents of university stated terms under which its tenants might occupy lands, lease governed rights of parties rather than statute as regards validity of sublease.—Francis v. Crowley, *supra*.

89. Tex.—Rutherford v. Watson, Civ.App., 52 S.W.2d 85, error refused.

Erroneous recital as to location of college's principal office in deed executed by college president and trustees as authorized by charter did not invalidate deed.—Rutherford v. Watson, *supra*.

90. Tex.—Rutherford v. Watson, *supra*.

91. S.C.—Trustees of University of South Carolina v. City of Columi

college building destroyed by fire, either directly or through authorization of the college trustees to rebuild at the state's expense,⁹² or that constitutional provisions for a pro rata distribution of school funds among counties are inapplicable to funds appropriated for a state university,⁹³ or that the proceeds of oil and gas royalties on university lands should be paid into the permanent fund of the university,⁹⁴ or that royalties derived from lands originally granted to a territory can be used only for current income for a state university.⁹⁵

Effect of restriction on disposal of residue. An act consolidating two universities and providing that, in the event of a change of location of the consolidated university, the property of one of the universities shall revert to it, does not prevent the consolidated universities from selling the property, the restriction being on the disposition of the residue of the property.⁹⁶

§ 15. Liabilities

The property of a college or university is liable for its debts. While a private institution is ordinarily responsible for tortious injuries to students or others, a state college or university may be exempted from liability on the theory that it is performing governmental functions and shares the state's exemption from suit.

A university to which is transferred title to college property, building, and equipment purchased

by a citizens' committee as trustee is not a successor trustee so as to be liable for the purchase price of the equipment under a statute providing for enforcement of claims against a trust estate, and may not be held liable in a suit for the invoice price of the goods under express contract, although sale of the property by the citizens' committee to the university under the latter's promise to operate a college in the city for which the committee acted is supported by a valuable consideration.⁹⁷

Liability of property for debts. Broadly speaking, all property of a college or university to which it has unconditional title is liable for its debts.⁹⁸ The property of a private corporation conducting a college may be sold for the payment of its debts,⁹⁹ and, where a college corporation becomes insolvent, and ceases to use its property for college purposes, it has power to sell such property to pay its debts, although its charter does not confer such authority.¹

Torts. Generally speaking, a college or university may be held responsible in damages for tortious injuries to its students² or others,³ and it has been held that a university other than a state institution is not a corporation administering governmental activities so as to absolve it from liability for injury to students.⁴ In the case of a state, college,

92. Ky.—Rhoads v. Fields, 292 S.W. 809, 219 Ky. 303.

Colored industrial college

In the absence of express constitutional or statutory authority in the sinking fund commissioners, they may not provide funds, nor authorize the college trustees to rebuild at the state's expense, for reconstruction of a dormitory of a colored college destroyed by fire, the urgent necessity for rebuilding not affording ground for implication of such power.—Rhoads v. Fields, *supra*.

93. Ky.—Talbot v. Kentucky State Board of Education, 52 S.W.2d 727, 244 Ky. 826.

94. Tex.—State v. Hatcher, 281 S.W. 192, 115 Tex. 332.

95. N.M.—Regents of University of New Mexico v. Graham, 264 P. 953, 33 N.M. 214.

Oil royalties from lands granted territory under Ferguson Act are funds of state university, income therefrom being usable only for current income.—Regents of University of New Mexico v. Graham, *supra*.

96. Ky.—Free Public Library v. Kentucky Univ. Bd. of Curators, 68 S.W. 660, 24 Ky.L. 476.

97. Ga.—Sheldon & Co. v. Emory

University, 184 S.E. 401, 52 Ga. App. 628.

Benefit to city and obligation of university

Sale by city's citizens' committee of property with college building and equipment thereon to university which agreed to operate college in city was supported by valuable consideration, in benefit accruing to city thereunder and obligation of university to operate college with possibility of loss.—Sheldon & Co. v. Emory University, *supra*.

98. Neb.—Hobbs v. Board of Education of Northern Baptist Convention, 253 N.W. 627, 126 Neb. 416.

99. Ky.—Hart v. Princeton College, 10 Ky.Op. 233.

1. Mich.—Knight v. Michigan Female Seminary, 116 N.W. 185, 152 Mich. 616.

11 C.J. p 991 note 26.

2. N.Y.—Barr v. Brooklyn Children's Aid Soc., 190 N.Y.S. 296.

3. Conn.—Lisa v. Yale University, 191 A. 346, 122 Conn. 646.
S.C.—Peden v. Furman University, 151 S.E. 907, 155 S.C. 1.

Ice-coated walk

University's duty as to walk leading to main entrance of building housing patients was to use reason-

able care to keep walk reasonably safe for use by plaintiff, who slipped on ice while on her way to visit patient during prescribed visiting hour, and others having lawful occasion to visit building, and, where it failed to do so, it was liable for resultant injury to plaintiff.—Lisa v. Yale University, 191 A. 346, 122 Conn. 646.

Leasing field to damage of property owner

University leasing athletic field, to baseball association, knowing it was inadequate for baseball purposes, resulting in trespasses on adjacent property, was liable for damages sustained, notwithstanding it might be eleemosynary corporation.—Peden v. Furman University, 151 S.E. 907, 155 S.C. 1.

4. Negligence of servants

Cornell University, creation of legislature to carry out purposes of private donor and United States, with others who may contribute, is not corporation administering government activity, in sense that it is absolved from liability for negligence of servants resulting in injury to student.—Hamburger v. Cornell University, 172 N.Y.S. 5, 184 App.Div. 403, motion granted 112 N.Y.S. 895, 186 App.Div. 929, and affirmed 123 N.E. 868, 226 N.Y. 625, reversing 166 N.Y.S. 46, 99 Misc. 564.

or university, however, there is no liability for injuries arising from torts occurring in connection with performance of whatever may be regarded as a governmental activity.⁵

A college is not liable for the torts of its students committed in the course of activities which are not under college control.⁶

Malicious expulsion. In an action against a college or university for malicious expulsion of a student, recovery cannot be had for mere error of judgment, but only for error grounded on malice.⁷

§ 16. Governing Boards and Officers

The management of a college or university is ordinarily intrusted to trustees, regents, curators, or a board of state officers.

The affairs of some colleges and universities are managed by a board of trustees,⁸ some by regents,⁹ some by curators,¹⁰ and some by a state board of education.¹¹ In some states, the management of a state agricultural college is intrusted to the state

board of agriculture,¹² or to the regents,¹³ or the institution may be governed by regents and a state board of agriculture.¹⁴ According to some statutes vesting the control and management of a university in a board of supervisors, a specified number, less than a majority, may constitute a quorum and take tentative action, but such action does not bind the board unless ratified by it at the next meeting at which a majority of all the members are present.¹⁵ Bouvier Law Dictionary defines "chancellor of a university" as its principal officer, whose office may be for the most part honorary.

§ 17. — Appointment, Removal, and Tenure

Constitutional and statutory provisions ordinarily control the appointment, removal, and tenure of the governing boards of colleges and universities. The practice differs as to whether or not an officer is entitled to a hearing before removal.

The manner of choosing or removing the regents, trustees, or other governing officers of a university

5. Cal.—Davie v. Board of Regents, University of California, 227 P. 243, 66 Cal.App. 693.

Ohio.—Board of Trustees of Combined Normal and Industrial Department of Wilberforce University v. Green, 148 N.E. 355, 113 Ohio St. 15.

Maintenance of an infirmary by state university as an educational activity is a governmental function, and it is not liable for tortious acts of employees, although fees are charged.—Davie v. Board of Regents, University of California, 227 P. 243, 66 Cal.App. 693.

Injury caused by negligence of state employee

Where, under Gen.Code §§ 7975-7986-1, Combined Normal and Industrial Department of Wilberforce University, whose board of trustees consisted of nine members, five of whom were appointed by the governor, had control of buildings and land used by private university, the normal and industrial department was exempt from liability for tort as a state agency, and, control of the land and buildings being in the state, university was not liable for injury caused by negligence of state employee in leaving manhole on state property open and unguarded, fact that university appointed three trustees, and that its president was ex officio a trustee, not giving it control.—Board of Trustees of Combined Normal and Industrial Department of Wilberforce University v. Green, 148 N.E. 355, 113 Ohio St. 15.

6. S.C.—Corley v. American Baptist

Home Mission Soc., 81 S.E. 146, 97 S.C. 460.

11 C.J. p 999 note 38.

7. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

8. Neb.—Nebraska Wesleyan Univ. v. Parker, 72 N.W. 470, 52 Neb. 453.

Pa.—Barker v. Bryn Mawr College Trustees, 1 Pa.Dist. & Co. 383, affirmed 122 A. 220, 278 Pa. 121.

11 C.J. p 992 note 36.

9. Minn.—State ex rel. Peterson v. Quinlivan, 268 N.W. 858, 198 Minn. 65.—Fanning v. University of Minnesota, 236 N.W. 217, 183 Minn. 222.

S.D.—Johnson v. Jones, 216 N.W. 584, 52 S.D. 64.

11 C.J. p 992 note 37.

Administration as within "rights and franchises"

Administration of state university by board of twelve regents as body corporate, to be elected by two houses of legislature in joint convention, was within "rights and franchises" perpetuated by constitutional provision perpetuating rights, immunities, franchises, and endowments held by university under territorial laws confirmed thereby.—State ex rel. Peterson v. Quinlivan, 268 N.W. 858, 198 Minn. 65.

State auditor was competent to question authority of board of regents, but not competent to attempt to substitute his judgment for that of board.—Johnson v. Jones, 216 N.W. 584, 52 S.D. 64.

10. Mo.—State v. Adams, 44 Mo. 570.

11. Mont.—State ex rel. Dragstedt v. State Board of Education, 62 P. 2d 330, 103 Mont. 336.

11 C.J. p 992 note 39.

Board of education as "governmental agency"

Construction and equipment of building at state university by state board of education with funds derived from grant and loan by federal government were authorized by statute authorizing political subdivisions and governmental agencies to undertake program of public works eligible for loans under federal acts, the state board of education being a "governmental agency" within statute.—State ex rel. Dragstedt v. State Board of Education, supra.

Legislative supervision

Constitutional provision vesting general control and supervision of state university in state board of education vested control over state educational institutions in board of education and authorized legislature to define and circumscribe powers and duties of board.—State ex rel. Dragstedt v. State Board of Education, supra.

12. Colo.—State Bd. of Agriculture v. Meyers, 77 P. 372, 20 Colo.App. 139.

Okl.—Trapp v. Cook Constr. Co., 105 P. 667, 24 Okl. 850.

13. S.D.—Johnson v. Jones, 216 N.W. 584, 52 S.D. 64.

14. Okl.—Baker v. Carter, 25 P.2d 747, 165 Okl. 116.

15. La.—State v. Hall, 67 So. 958, 136 La. 920.

is controlled by the constitution or statute under which it is conducted.¹⁶ Under a provision that such officers shall be "elected" in a certain manner, persons will not be allowed to assume the duties of such officers unless duly elected;¹⁷ and a curative statute, intended merely to change de facto corporations into de jure corporations, will not be construed to sanction a custom or usage as to the election of trustees, which is contrary to the express terms of a statute.¹⁸ Where, however, a board of regents stands by and allows a succeeding board to assume the duties of the office without question, the succeeding board, although illegally appointed, becomes the de facto board, and the election by it of one of its number as treasurer constitutes him treasurer de jure.¹⁹ When not prohibited by statute, a professor in a college or university may be a trustee thereof.²⁰

The board of regents or other governing body may be given power to remove any officer of the university, when, in its judgment, the interests of the university require it;²¹ and wrongful intent or fraud need not be shown in order to justify the removal of such officer.²² Under statutes authorizing regents to remove any trustee of a corpora-

tion created by them for certain causes, a medical college to which the regents had granted the standard form of charter is a corporation created by them so as to entitle them to remove the trustees without formally annulling its prior existing charter.²³ Under some constitutional and statutory provisions a regent of a state university may be removed for cause by the appointing power without a hearing,²⁴ although, under other provisions of law, where it is sought to remove an officer of a college or university for cause, he must be given notice and an opportunity to be heard.²⁵

Certain officers of state colleges and universities have been held not to be "public officers" within the meaning of constitutional provisions relating to the terms and removal of the latter kind of officers.²⁶

Filling vacancies. A statute which authorizes the governor to fill vacancies occurring in the office of trustee of a university does not apply to vacancies arising by the expiration of the trustees' terms of office, but is limited to filling vacancies which arise during a term, by reason of death, removal, or resignation.²⁷

16. Ark.—Allen v. Morton, 127 S.W. 450, 94 Ark. 405.

11 C.J. p 992 note 43.

17. Utah.—McCormick v. Thatcher, 30 P. 1091, 8 Utah 294, 17 L.R.A. 243.

11 C.J. p 992 note 46.

18. Minn.—State v. Oftedal, 75 N.W. 692, 72 Minn. 498.

19. Wash.—State v. Smith, 37 P. 294, 9 Wash. 195.

20. N.Y.—People v. Albany Medical College, 10 Abb.N.Cas. 122, 62 How. Pr. 220, reversed on other grounds 26 Hun 348, affirmed 89 N.Y. 635.

11 C.J. p 992 note 49.

21. Kan.—Lindley v. Davis, 231 P. 1026, 117 Kan. 558.

11 C.J. p 992 note 50.

22. Kan.—Yoe v. Hoffman, 59 P. 351, 61 Kan. 265, reversing 58 P. 802, 9 Kan.App. 394.

23. N.Y.—People ex rel. Diffenbach v. Regents of the University of the State of New York, 192 N.Y.S. 108, 199 App.Div. 55.

Interest of petitioner not essential

Under L.1920 c 745, amending Education L. § 68, authorizing the regents to remove trustees of corporations created by them, it was not necessary to the validity of the removal of trustees that the petitioner should have some interest in the proceeding, as the regents might take action on their own motion, or

however the information was brought to their attention.—People ex rel. Diffenbach v. Regents of the University of the State of New York, supra.

Statute not retroactive

Where a medical college had parted with all its property and become inactive prior to L.1920 c 745, amending Education L. § 68, authorizing the regents to remove trustees of corporations created by them, the subsequent removal of its trustees because of their failure, subsequent to that act, to maintain the institution did not give a retroactive effect to the statute.—People ex rel. Diffenbach v. Regents of the University of the State of New York, supra.

24. Wash.—State v. Johns, 248 P. 423, 139 Wash. 525.

Governor was authorized to remove regent of state university for misconduct in office and to appoint successor without granting hearing to incumbent and without setting out acts of misconduct.—State v. Jordan, 248 P. 432, 139 Wash. 706—State v. Johns, 248 P. 423, 139 Wash. 525.

25. S.D.—State v. Hewitt, 52 N.W. 875, 3 S.D. 187, 44 Am.S.R. 788, 16 L.R.A. 413.

11 C.J. p 992 note 52.

Sufficiency of notice

In the absence of a governing statute or by-law it seems that it will be sufficient if the meeting of trus-

tees is assembled in the mode which has been the customary method employed by the corporation, as by mailing a postal card to each member notifying him of the time and place of the meeting, in which case it will be presumed that the cards so mailed have been received, and, where this procedure has been followed, a professor removed on abolition of his professorship at a trustees' meeting could not successfully claim irregularity of such meeting for lack of notice.—People v. Albany Medical College, 26 Hun 348, reversing 10 Abb.N.Cas. 122, 62 How.Pr. 220, affirmed 89 N.Y. 635.

26. Or.—Smith v. Patterson, 279 P. 271, 130 Or. 73.

Secretary, treasurer, and business manager

Even if L.1910 c 114, and L.1912 c 170, did not repeal Code 1906 § 12, relating to the management of Alcorn Agricultural and Mechanical College, appellant, elected secretary, treasurer, and business manager thereof, pursuant to § 12, is not a "public officer" of the state within Const.1890 § 175, providing exclusive method of removing a public officer, the essential distinction between an employment and an office being that in an office the duties and powers are prescribed by law.—McClure v. Whitney, 82 So. 259, 120 Miss. 350.

27. Ala.—State v. Foster, 30 So. 477, 130 Ala. 154.

Terms and holding over. The duration of the term of office of an officer of a college or university is usually fixed by law.²⁸ Some constitutions and statutes of this character, which contain no provisions for holding over, are construed to fix an absolute term, so that, on the expiration of the term of an incumbent, without his successor being chosen, the office becomes vacant;²⁹ yet, where the constitution or statute contains a provision for holding over, a secretary or treasurer continues in office until his successor has been duly elected and qualified, although he has ceased to be a member of the board of regents or other governing body, as he was required to be at the time of his election.³⁰

Denominational university. A statute entitling any religious denomination maintaining or patronizing an educational institution through its representative body to elect its board of directors or trustees is not applicable where a denomination established a university which was afterward practically created by a gift of an individual donor; but such university, by reason of its relations with the denomination, has power to pass by-laws and to enter into agreements relating to the appointment and election of members of its board of trustees, so as to secure fair representation of the church on the board; and where it is agreed that the board of trustees is to make appointments to fill vacancies, subject to confirmation by the church authorities, new members appointed by the board of trustees are entitled to their seats ad interim, until rejected by the church authorities.³¹

§ 18. — Powers, Duties, and Liabilities

- a. In general
- b. Contracts
- c. Authority to bind state
- d. Liabilities

a. In General

The governing board of a college or university is often regarded as a legal entity and has broad power to administer its property and affairs, although the board lacks powers neither expressly conferred nor essentially implied. The governors are under a duty to conduct the institution for the best interests of its students.

In many instances the governing boards of public institutions, such as colleges and universities, are corporations, and, while functioning within the scope of their authority, are not subject to the control or supervision of any other branch or department of the state government, but are regarded as independent legal entities with the general powers ordinarily possessed by such entities;³² and such boards ordinarily have implied power to do everything necessary and convenient to accomplish the objects of the institution and not prohibited by law.³³ It has been held that such a board may construct dormitories on the campus without legislative authority.³⁴ In some cases the functions of such a board affecting the public have been held to be franchises,³⁵ the board having no powers except those which are conferred on it either expressly or by fair implication;³⁶ and in the case of a state college or university, the institution or its governing board has been regarded as a state agency subject to such control as may be specified by law.³⁷ Where the institution is an agency of

28. Ala.—State v. Foster, *supra*.
11 C.J. p 993 note 54.

Particular statute construed

L.1915 c 237 § 2 does not vest title to the offices in appointees as members of state board of regents which continues beyond July 1, 1917.—State v. Scow, 164 N.W. 939, 38 N.D. 246.

Appointment construed as for full term

Where plaintiff was appointed as member of state board of regents in January, 1921, "for term ending January 1, 1927," and governor's message to senate stated that plaintiff was appointed for period ending Jan. 1, 1927, "or when his successor . . . shall have been appointed and have qualified," it was held that appointment was for full term of six years, the quoted clause of message merely referring to Rev.Code 1919 § 5562.—Johnson v. Jones, 203 N.W. 206, 48 S.D. 186.

29. S.D.—State v. Sheldon, 67 N.W. 613, 8 S.D. 525.

30. N.M.—Rowman Bank, etc., Co.

v. Albuquerque First Nat. Bank, 139 P. 148, 18 N.M. 589.
11 C.J. p 993 note 56.

31. Tenn.—State v. Vanderbilt Univ., 164 S.W. 1151, 129 Tenn. 279.

32. Idaho.—State v. State Board of Education, 196 P. 201, 33 Idaho 415.

Minn.—Fanning v. University of Minnesota, 236 N.W. 217, 183 Minn. 222.

11 C.J. p 993 note 61.

As constitutional corporation

Under Const. art 9 § 10, the board of regents of the University of Idaho is a constitutional corporation with granted powers.—State v. State Board of Education, 196 P. 201, 33 Idaho 415.

Free of legislative, executive, and judicial control

Board of regents of state university, so long as it keeps within limits of granted power of government, is not subject to legislative or executive interference or judicial control.—Fanning v. University of

Minnesota, 236 N.W. 217, 183 Minn. 222.

33. Okl.—Rheam v. Board of Regents of University of Oklahoma, 18 P.2d 535, 161 Okl. 268.

34. Minn.—Fanning v. University of Minnesota, 236 N.W. 217, 183 Minn. 222.

35. Colo.—People v. Regents of State Univ., 49 P. 286, 24 Colo. 175.

36. Neb.—State v. Whitmore, 123 N.W. 1051, 85 Neb. 566.

37. Minn.—State v. Chase, 220 N.W. 951, 115 Minn. 259.

Control of governor

State university was within law subjecting agencies of state government to control of governor through commission of administration and finance.—State v. Chase, *supra*.

Regulation of method

Under Const. art 9 § 10, giving the board of regents of the state university general supervision of the university, its funds, etc., under such

the state, the officers thereof are subject to the control of the legislature,³⁸ and particular powers granted them by the legislature may be afterward annulled by that body,³⁹ subject to whatever constitutional limitations may exist.

A religious denomination having relations with a university, but no right of visitation, has no right to veto the action of the board of trustees.⁴⁰

Generally speaking, the authorities of a college or university are under a duty so to conduct the institution that future students will have the benefit of proper facilities in exchange for the fees to be paid by them.⁴¹ Certain duties are expressly imposed on the regents or other officers by the statutes of some states.⁴² Where, however, by constitution or statute, certain matters are placed in the exclusive control of the governing board, or where it has a sound discretion to exercise in the performance of a duty, the court will not interfere unless the delay in the performance of such duty is unnecessary or willful, or unless the acts of the board are subversive of the purposes for which the board was created.⁴³ A duty, imposed by charter,

of teaching agriculture and the mechanical arts must be performed, even though the charter is amended so as to permit instruction in all branches;⁴⁴ but, where the institution is established for the purpose of instruction in "the arts and trades and their related sciences," the trustees have a very broad discretion in respect of the particular subjects of instruction.⁴⁵

Power to hold property. It has been held that the regents of a state university hold title to university property in trust for public purposes, the property being regarded as that of the state.⁴⁶

Surrender of assets. As a rule the trustees or other governing body of a college or university lack authority to surrender its assets in discontinuance of the institution,⁴⁷ and a transaction by which the trustees of a medical school, operated in connection with a hospital, undertake to discontinue the college and thereafter to operate only the hospital will be set aside on a showing of bad faith even without proof of immediate financial gain to such trustees.⁴⁸

regulations as may be prescribed by law, the regulations which may be prescribed and must be observed refer to methods and rules for the conduct of its business and accounting to authorized officers, and cannot interfere essentially with the constitutional discretion of the board.—State v. State Board of Education, 196 P. 201, 33 Idaho 415.

38. Miss.—State Univ. v. Waugh, 62 So. 827, 105 Miss. 623, L.R.A.1915D 588, affirmed 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131.
11 C.J. p 994 note 70.

39. Wash.—State v. Hewitt Land Co., 134 P. 474, 74 Wash. 573.

40. Tenn.—State v. Vanderbilt Univ., 164 S.W. 1151, 129 Tenn. 279.

41. Ala.—Harman v. Alabama College, 177 So. 747, 235 Ala. 148.

42. Kan.—Young v. Regents of State Univ., 124 P. 150, 87 Kan. 239, Ann.Cas.1913D 701.
11 C.J. p 993 note 64.

43. Mich.—Bauer v. State Bd. of Agriculture, 129 N.W. 713, 164 Mich. 415.
11 C.J. p 993 note 66.

44. Ill.—Atty.-Gen. v. Illinois Agricultural College, 85 Ill. 516.

45. Ohio.—State v. Toledo, 23 Ohio Cir.Ct. 327.
11 C.J. p 993 note 68.

46. **Regents as department of state government**

Although Const. art 11 §§ 4, 5 make the regents of the university

an independent corporation with power to hold private property for the use of the university and general supervision and control over it, the regents, nevertheless, form a department of the state government created by the constitution to perform state functions, and the real estate acquired is public property belonging to the state, but held by the corporation in trust for the purposes of the university, which are public purposes.—People v. Brooks, 194 N.W. 602, 224 Mich. 45.

47. Pa.—Hempstead v. Meadville Theological School, 130 A. 421, 284 Pa. 147.

Lack of leave of court

Trustees of theological school, chartered by Act April 7, 1846, P.L. p 497, were not authorized, without dissolution of corporation by leave of court, to deliver school's assets to corporation of another state, although they are self-perpetuating body, and have no stockholders to control them, not being owners of assets, but only trustees to manage them for public good in accordance with purposes specified in charter.—Hempstead v. Meadville Theological School, supra.

48. N.Y.—New York Medical College & Hospital for Women v. Dieffenbach, 211 N.Y.S. 799, 125 Misc. 698.

Action to set aside not irregular

In action by medical college to set aside as fraudulent certain transfers of real and personal property to hospital operated in connec-

tion therewith, and accomplished by trustees through collusive mortgage foreclosure, contention that action was irregular, as a collateral attack on legality of foreclosure, not sustained.—New York Medical College & Hospital for Women v. Dieffenbach, supra.

Rescission of college registration as not barring relief

In action by medical college to set aside as fraudulent transfers of real and personal property to hospital operated in connection therewith by college trustees through a collusive mortgage foreclosure, that college will be unable to carry out its purposes, because its registration as a medical college was rescinded by the University of the State of New York, did not prevent granting of relief, where such action was not taken until after trustees had breached their obligation, and rescission involved no revocation of charter, which was still in effect.—New York Medical College & Hospital for Women v. Dieffenbach, supra.

Contention as to preference unsustainable

In action by medical college to set aside as fraudulent transfers of real and personal property to a hospital operated in connection therewith, and accomplished by trustees through collusive mortgage foreclosure, contention that payment of interest on mortgage would have created a preference, to exclusion of other creditors, was not sustained.—New York Medical College & Hospital for Women v. Dieffenbach, supra.

b. Contracts

The governing body of a college or university has authority to contract for it within the limitations on its power imposed by law, although mere executive officers ordinarily lack power to make such contracts unless specially authorized. The authorities are in conflict respecting the validity of a contract between the college governing board and one of its members.

The governing body of a college or university may make such contracts as are within the limits of the authority conferred on it by charter or statute.⁴⁹

It has been held that a contract between the governing board of a state college or university and one of its own members in relation to the institution is invalid at common law,⁵⁰ although other authority holds that, even a contract made between the trustees, or a committee thereof, and one of

their number is valid, in the absence of fraud.⁵¹

Contracts with officers. Contractors dealing with executive officers of a college or university instead of with its trustees or other governing body are generally chargeable with charter limitations on the power of the former.⁵² The bursar of a college or university has no authority to make purchases for the institution except in accordance with a duly approved budget.⁵³ A seller of goods accepting a note of the college signed by the bursar without using ordinary prudence to ascertain the extent of the bursar's authority does so at his own risk,⁵⁴ and the refusal of the institution to pay such a note on demand is a sufficient repudiation of the bursar's unauthorized act in signing the note.⁵⁵ In the absence of proof that the president of the institution had authority to issue binding notes in its name, it

49. Idaho.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415. 11 C.J. p 994 note 76.

Borrowing money and issuing certificates of indebtedness

Board of supervisors of Louisiana State University and Agricultural and Mechanical College has power to borrow money and incur debt. It has power to borrow money from the Reconstruction Finance Corporation and to issue certificates in repayment thereof for purpose of construction of necessary and useful buildings. Certificates of indebtedness proposed to be issued by such board to provide for construction of necessary and useful buildings were valid. Evidences of indebtedness issued by such board need not be ratified by legislature.—*Caldwell Bros. v. Board of Sup'rs of Louisiana State University and Agricultural and Mechanical College*, 147 So. 5, 176 La. 825.

Lease

Regents of university system were authorized to lease gymnasias of institutions in system to corporate athletic associations connected respectively with institutions at which such buildings are located.—*State v. Regents of University System of Georgia*, 175 S.E. 567, 179 Ga. 210.

Loan agreement

Loan agreement made by regents of university system and board of regents with federal government, whereby bonds would be issued by regents and purchased by government to provide funds for stated university uses, bonds to be paid exclusively out of matriculation, laboratory, hospital, and athletic fees, was not illegal, since a mere pledge of income would not be a pledge of "property" and could not result in a sale of "property" within the purview of the statute.—*State v. Re-*

gents of University System of Georgia, supra.

Contractor's statutory bond

Where contractor failed to give statutory bond, such fact could not be used by him as defense against breach of contract. That contractor failed to obtain bond as required and, in bidding on work, made mistake in calculation, did not justify his refusal to perform.—*State v. Scholz*, Tex.Civ.App., 4 S.W.2d 661.

Limitations on cost; rights of contractor

Where the trustees of the College of the City of New York, who had been constructing a temporary barracks in accordance with the desires of the war department, after the Armistice, entered into an agreement, with the contractor for completion of the building as a one-story building for a course in vocational subjects, and the cost exceeded one thousand dollars, the contractor cannot enforce payment of warrants; for, under L.1895 c 168 §§ 1, 6, L. 1917 c 786 § 875 subd 8, and Greater New York Charter §§ 149, 419, 1541, it was necessary that such contract be on public notice with competitive bidding and this is so, notwithstanding § 1131, as amended by L.1918 c 583 and § 1132, as amended by L.1916 c 580, relating to acceptance of gifts and the use of funds for vocational students.—*People ex rel. Rangeley Const. Co. v. Craig*, 189 N.Y.S. 625, 197 App.Div. 503.

Collateral attack on deed

Authority of college board of trustees and president to execute deed under charter not subject to collateral attack.—*Rutherford v. Watson*, Tex.Civ.App., 52 S.W.2d 85, error refused.

50. Pa.—*Medical Services at State Teachers College*, 21 Pa.Dist. & Co. 647.

Medical care of students

The trustees of a state college may not validly employ one of their own members, a physician, to render medical service to students of the college and contract to pay him for such services out of public funds.—*Medical Services at State Teachers College*, supra.

51. Tex.—*Randolph v. Isaacs*, Civ. App., 113 S.W.2d 628. 11 C.J. p 994 note 77.

52. Tex.—*R. B. Spencer & Co. v. Thorp Springs Christian College*, Civ.App., 41 S.W.2d 482, error dismissed.

Rights of materialman

Materialman dealing with college president was charged with notice of charter vesting sole management and control in trustees.—*R. B. Spencer & Co. v. Thorp Springs Christian College*, supra.

53. Ill.—See *McNeil & Higgins Co. v. Greer College*, 206 Ill.App. 533. La.—*Credit Alliance Corporation v. Centenary College of Louisiana*, 136 So. 130, 17 La.App. 368.

Limited to purchase of books

Head bookkeeper, referred to as bursar, had no authority to make purchases for college except books included in annual budget.—*Credit Alliance Corporation v. Centenary College of Louisiana*, supra.

54. La.—*Credit Alliance Corporation v. Centenary College of Louisiana*, supra.

Duty to investigate

Buyer of note signed by bursar of college was bound to investigate whether or not bursar had sufficient authority.—*Credit Alliance Corporation v. Centenary College of Louisiana*, supra.

55. La.—*Credit Alliance Corporation v. Centenary College of Louisiana*, supra.

cannot be assumed that he had such authority, and, if he lacked such authority, he may not ratify the unauthorized act of the bursar in signing such a note.⁵⁶ Where the by-laws of a college or university do not invest the president with general authority to issue notes but merely designate him as the officer who is to perform the ministerial duty of signing such instruments as may be authorized and required, the corporation is not bound by notes executed by the president for money obtained and used by him for his private purposes without original authority or ratification by the governing board.⁵⁷

Estoppel. A college, having received and retained valuable rights and property under an agreement made by the board of trustees, cannot refuse to pay the price agreed on, on the theory that the board was not authorized to make the agreement.⁵⁸ The doctrine of estoppel cannot be applied, however, against a college where a party, under a contract with the trustees, claims rights and privileges which by the law the college has no right to convey.⁵⁹

Compensation. Where a university athletic association pays in full the portion of an athletic director's salary which it has promised absolutely to pay, the director may not recover from such association an unpaid balance of his total salary, which balance was to be paid by the state board of control over whose actions the university athletic association could not exercise any binding control.⁶⁰

It has been held that the rental value of a house purchased by a city for use of the president of a city college may not be charged as part of the president's compensation.⁶¹

Salaries of professors and sabbatical leaves of president or professor are considered *infra* § 22.

c. Authority to Bind State

The regents or other governing body of a state college or university ordinarily lack power to make contracts binding the state beyond appropriations committed to their control.

Generally speaking the governing body of a state college or university is regarded as a distinct legal entity so far as its debts are concerned and lacks authority to contract indebtedness collectable from the state;⁶² but the state by its conduct after knowledge of the facts may so adopt the board's acts as to waive its right to repudiate the contract.⁶³ If, however, the state merely takes and enjoys the benefit of the execution of the contract, without ratification, it is liable only for the fair and reasonable value of the benefit enjoyed.⁶⁴

The regents or other governing officers of a state university act as agents in behalf of the state, however, when they enter into a contract involving the expenditure of money of the state;⁶⁵ and their authority to bind the state is limited to the amount of the legislative appropriations granted for such purpose.⁶⁶ In some states, the officers of a state university are expressly prohibited by statute from contracting any debt whatever on account of the university without the consent of the legislature previously obtained.⁶⁷

d. Liabilities

Generally speaking, a college or university officer is not personally liable for the defaults of the institution, nor for his own mistakes of judgment in administration thereof, although he may be held liable for his own positive wrongdoing. Sureties on the bond of a college or university officer are liable for moneys received by him in his official capacity or under color of his office.

56. La.—Credit Alliance Corporation v. Centenary College of Louisiana, *supra*.

57. U.S.—St. Vincent College v. Hallett, Ill., 201 F. 471, 119 C.C.A. 647.

58. N.Y.—Doolittle v. Keuka College, 114 N.Y.S. 662, 129 App.Div. 829.

11 C.J. p 994 note 81.

59. Mich.—Hillsdale College v. Rideout, 46 N.W. 373, 82 Mich. 94.

60. Fla.—Boyd v. University Athletic Ass'n, 157 So. 576, 118 Fla. 188.

61. N.Y.—College of City of New York v. Hylan, 199 N.Y.S. 804, 205 App.Div. 372, affirming 199 N.Y.S. 634, 120 Misc. 314, and affirmed 142 N.E. 297, 236 N.Y. 594.

Rental not contemplated under statute and custom

Where the president of the College of the City of New York occu-

pled a house without charge owned by the city of New York it was held, in view of the fact that the statute fixing the salaries of the faculty of the college speaks only of money compensation and that no charge for rent of the house was contemplated when the city purchased it, that the attempt of the city to charge rent as part of the president's compensation could not be permitted.—College of City of New York v. Hylan, *supra*.

62. Idaho.—State v. State Board of Education, 196 P. 201, 33 Idaho 415.

La.—Caldwell Bros. v. Board of Sup'rs of Louisiana State University and Agricultural and Mechanical College, 147 So. 5, 176 La. 825.

Statutes construed

Statutes relating to powers of the board of supervisors of the Louisi-

ana State University and Agricultural and Mechanical College did not authorize contracting of any debt or liability on behalf of the state contrary to constitution.—Caldwell Bros. v. Board of Sup'rs of Louisiana State University and Agricultural and Mechanical College, *supra*.

63. S.D.—Jewell Nursery Co. v. State, 56 N.W. 113, 4 S.D. 213.

64. S.D.—Jewell Nursery Co. v. State, 67 N.W. 629, 8 S.D. 531, affirming 59 N.W. 1025, 5 S.D. 623.

11 C.J. p 994 note 87.

65. Mich.—Weinberg v. State Univ., 56 N.W. 605, 97 Mich. 246.

11 C.J. p 994 note 83.

66. S.D.—Jewell Nursery Company v. State, 56 N.W. 113, 4 S.D. 213.

11 C.J. p 994 note 84.

67. Va.—Phillips v. Commonwealth Univ., 34 S.E. 66, 97 Va. 472, 47 L. R.A. 284.

While the officers of a college or university may not be personally liable for the torts of the institution,⁶⁸ such an officer may, in a proper case, be held responsible for his own wrongdoing, and the immunity of the regents from suit for the negligent conduct of its agents does not operate to exempt the officer or agent himself from liability for his own tort.⁶⁹ Every employee of a university is liable for the misuse of moneys received by him in his fiduciary capacity;⁷⁰ and the receipt of the money by him may be shown by competent testimony fairly tending to prove it, either alone or in connection with other circumstances.⁷¹

A college or university officer may not be held responsible in damages for a mere mistake of judgment in respect of his government of the institution.⁷² The administrative officers of a college or university, while acting within their jurisdiction in discretionary matters, wherein they are given quasi-judicial powers, are not liable in a civil action regardless of the propriety of the motives by which they may be actuated;⁷³ and so long as the governing board exercises its discretionary power to control institutional matters in good faith and for the best interests of the institution as it sees them, no merchant thereby subjected to what in other circumstances might be deemed unfair competition will have a right of action, legal or equitable.⁷⁴

A college or university treasurer is not an insurer of the funds committed to his care, and will not be responsible for loss where he deposits them in

accordance with the directions of the governing board of the institution.⁷⁵

In the absence of express authority, no action can be maintained against a state board of administration or its members for wrongful acts committed by a board of regents where the latter board was abolished by statute prior to the time of suit and replaced by a board of administration to which was committed the conduct of the state university.⁷⁶

Bonds of officers. Where required by statute, a college or university officer must execute a bond before entering on his duties.⁷⁷ The surety on the bond of a state college officer has been held liable for moneys received by him under color of office, although statute made another officer the custodian thereof.⁷⁸ Where no statute authorizes the board of regents to make representations as to the state of the treasurer's accounts, the state is not bound to the surety by any such representations made to him by the regents.⁷⁹

§ 19. — Visitors

Under common-law principles the founder of an incorporated college or university has the right of visitation or inspection, and where the right exists the jurisdiction of the visitors covers the internal management of the institution and the courts will not interfere with the decision of visitors in the absence of an abuse of discretion.

According to common-law principles governing eleemosynary corporations generally, the founder of an incorporated college or university has the

68. Regents of state university

The regents of the University of California are not individually liable on the footing of negligence for an injury arising from the poles and wires of a telegraph and telephone line maintained by the corporation, the constitution declaring that they are not public officers, but that their employment is deemed exclusively a public trust.—*Lundy v. Delmas*, 38 P. 445, 104 Cal. 655, 26 L.R.A. 651.

69. Cal.—*Davie v. Regents of University of California*, 227 P. 247, 66 Cal.App. 689.

Surgeon in students' infirmary

Immunity of state university regents from liability for negligence of its servants and agents in its infirmary does not exempt negligent surgeon acting as its agent from personal liability.—*Davie v. Regents of University of California*, *supra*.

70. Md.—*Regents of State Univ. v. Williams*, 9 Gill & J. 365, 31 Am. D. 72.

11 C.J. p 994 note 88.

71. Mich.—*Regents of State Univ. v. Rose*, 4 N.W. 738, 5 N.W. 674, 7 N.W. 875 45 Mich. 284.

72. Fla.—*John B. Stetson University v. Hunt*, 102 So. 637, 88 Fla. 510.

Suspension or expulsion of student
Mere mistake of judgment of a school officer in governing his school, either as to his duties under the law, or as to facts submitted to him in connection with suspension or expulsion of a student, does not render him liable in the absence of a showing that he acted wantonly, willfully, or maliciously.—*John B. Stetson University v. Hunt*, *supra*.

73. N.D.—*Gottschalck v. Shepperd*, 260 N.W. 573, 65 N.D. 544.

Discharge of professor

Members of board of administration of state agricultural college, acting as such board under powers conferred and in discharge of duty required, were not personally liable for discharge of professor, even if members of board acted maliciously.—*Gottschalck v. Shepperd*, *supra*.

74. Ga.—*Davison-Nicholson Co. v. Pound*, 94 S.E. 560, 147 Ga. 447.

75. Ky.—*Commonwealth v. Coleman*, 268 S.W. 569, 206 Ky. 774.

76. Kan.—*Garrity of State Board of*

Administration of Educational Institutions, 162 P. 1167, 99 Kan. 695.

Action to recover value of eighteen-million-year-old lizard, alleged to have been stolen and converted by the board of regents of a state university, by its assistant curator of mammals, for use in the university museum, would not lie against a board of administration which had succeeded the then abolished board of regents nor against any members of the board of administration.—*Garrity v. State Board of Administration of Educational Institutions*, *supra*.

77. Not qualified without bond

Under L.1889 c 138 §§ 9, 10, 20, 21, secretary treasurer of state agricultural college is not qualified to discharge his duties until he executes a bond for twenty thousand dollars.—*State v. Llewellyn*, 167 P. 414, 23 N.M. 43, certiorari denied *Llewellyn v. State of New Mexico*, 38 S.Ct. 63, 245 U.S. 666, 62 L.Ed. 538.

78. N.M.—*State v. Llewellyn*, *supra*.

79. N.M.—*State v. Llewellyn*, *supra*.

right of visitation.⁸⁰ Where there are visitors, their jurisdiction covers the internal management of the institution.⁸¹ The visitors are summary judges; there is no appeal from their decision, and the courts will not interfere with their discretionary power,⁸² unless in cases of oppression, exceeding powers, or breach of trust.⁸³

§ 20. Faculty, Professors, and Tutors

Where no regulations are prescribed by a higher body, it is within the province of the faculty of a college or university to make rules and regulations for the government of the institution.

Where the matter is not handled by the trustees or regents in control of a college or university, the faculty thereof may make reasonable rules for the government of the institution and in so far as such rules and regulations are neither arbitrarily applied nor in violation of law they are binding on all concerned.⁸⁴ The matter of regulations is considered generally in § 26 below in connection with the government and discipline of the students. Matters relating to the status, appointment, removal, and salary of the faculty, professors, and tutors of a college or university, and to their performance of services beyond the scope of their collegiate duties are treated in §§ 21-23.

A professor has been defined as a public teacher of any science or branch of learning, especially in a university, college, or other seminary.⁸⁵ "Professor" in Immigration Act is defined and construed see Aliens § 89.

A tutor is one who teaches, usually a private instructor.⁸⁶

§ 21. — Status, Appointment, and Removal

Professors in colleges and universities are sometimes regarded as officers thereof, although ordinarily a professor or other teacher is a mere employee. Appointment and removal of members of the faculty is a matter ordinarily resting in the discretion of the college governing board subject to statutory and contract provisions.

Under some statutes or charters a professor in a college or university is deemed an officer thereof, removable only for cause shown and specified in the charter,⁸⁷ although ordinarily a professor is not an officer, but occupies merely a contractual position as an employee.⁸⁸ The board of regents or trustees have power to make a valid contract employing a professor for a stated and reasonable length of time,⁸⁹ although he is subject to removal, before the expiration of such time, for sufficient cause.⁹⁰ In the absence of sufficient cause for his removal, the professor may recover the consequent damages.⁹¹ Although an indefinite hiring at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time by giving notice and no action can be sustained in such case for a wrongful discharge,⁹² yet the terms of the contract, and the consideration therefor, may contemplate that the person employed is to have a professorship permanently, subject to removal for cause.⁹³

80. Tenn.—State v. Vanderbilt Univ., 184 S.W. 1151, 129 Tenn. 279.

11 C.J. p 994 note 91.

81. Ohio.—Koblitz v. Western Reserve Univ., 21 Ohio Cir.Ct. 144, 11 Ohio Cir.Dec. 515.

11 C.J. p 995 note 92.

82. Va.—Bracken v. William, etc., College, 3 Call 573, 7 Va. 573.

83. U.S.—Dartmouth College v. Woodward, N.H., 4 Wheat. 518, 4 L.Ed. 629.

11 C.J. p 995 note 97.

84. Ohio.—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 41 Ohio App. 367.

85. U.S.—U. S. v. Day, C.C.A.N.Y., 32 F.2d 542, 544, quoting Webster D.

86. Mont.—State ex rel Veeder v. State Board of Education, 33 P.2d 516, 97 Mont. 121.

87. Pa.—Commonwealth v. Phillips, 1 Del.Co. 41.

11 C.J. p 995 note 2.

Full and fair trial

When the charter of a university

specifies the causes for which its professors may be removed, and confers on them the exclusive power of granting degrees, which right they may exercise independently of the trustees of the university, the professors are officers, and not mere employees, and they can only be removed for cause shown, as specified in the charter, after a full and fair trial, with opportunity to appear by themselves or counsel with their witnesses, hear the testimony, and reply thereto.—Commonwealth v. Phillips, supra.

88. Ga.—Regents of University System of Georgia v. Woodward, 176 S.E. 677, 49 Ga.App. 608—Regents of University System of Georgia v. Blanton, 176 S.E. 673, 49 Ga.App. 602.

11 C.J. p 995 note 3.

89. U.S.—Ward v. Kansas State Agricultural College Bd. of Regents, Kan., 138 F. 372, 70 C.C.A. 512.

Colo.—State Bd. of Agriculture v. Meyers, 77 P. 372, 20 Colo.App. 139.

11 C.J. p 995 note 4.

90. Ill.—Fuller v. De Paul Univer-

sity, 12 N.E.2d 213, 293 Ill.App. 261.

Concealment of marriage by former priest employed by Catholic university

Where teacher, by silence, concealed fact that he had formerly been a priest but had left priesthood and married, and employment of teacher would not have been considered by officials of a Catholic university had they known such facts, concealment amounted to material and fraudulent misrepresentation precluding enforcement of contract of employment.—Fuller v. De Paul University, supra.

91. Colo.—State Bd. of Agriculture v. Meyers, 77 P. 372, 20 Colo.App. 139.

Kan.—State Agricultural College v. Mudge, 21 Kan. 223.

92. Mo.—Brookfield v. Drury College, 123 S.W. 86, 139 Mo.App. 339.

Wis.—Butler v. Regents of State Univ., 32 Wis. 124.

93. Ky.—Hospital College of Medicine v. Davidson, 131 S.W. 1004,

140 Ky. 776.

11 C.J. p 995 note 7.

It is sometimes provided either by statute or the rules of the institution that the appointee assumes his position subject to removal at the discretion of the governing board.⁹⁴ Such provision becomes a condition of the contract; no notice or hearing is required;⁹⁵ and in the absence of fraud or bad faith, the regents or trustees in discharging a professor before the termination of his contract are not liable for damages for breach thereof;⁹⁶ nor in such a case is the ground of removal a proper subject of judicial investigation.⁹⁷

Delay in appointment. The court will not interfere with the discretionary power of the regents to delay the appointment of a professor, unless there appears to be unnecessary delay or a want of good faith.⁹⁸

Reinstatement. A teacher who has served long enough in a state college to acquire rights of permanent tenure under statute, and who is dismissed without the required statutory hearing, is entitled to be reinstated.⁹⁹

§ 22. — Salary

A professor or instructor may be entitled to salary although not formally employed. The amount of his salary is ordinarily governed by express or implicit provision of contract.

The professors of the clerical universities received no salaries, but were incumbents of ecclesiastical livings.¹ To render a university liable to a professor or an instructor for his salary, it is not necessary that he be formally employed;² and in the absence of an express contract as to the amount of an instructor's salary the amount may be governed by custom,³ or the professor may be limited to the amount regularly paid him despite previous mention of his receiving a larger amount.⁴

The compensation of officers is considered *supra* in § 18c.

Increase or reduction. A contract for an increase in the compensation of a teacher, who is also a member of the governing board, may be upheld although the teacher in his capacity as trustee joined in the vote for his own increase.⁵ Where a professor agrees to hold his office for a specified term of years, unless permitted to resign, his salary during such time cannot be diminished without his consent.⁶

Term for which salary paid. Where a professor first suffers a vote for his removal by the trustees, which is followed by a decree of removal by the visitors, and subsequently there is a court adjudication sustaining his removal, the actual removal will be deemed to have occurred on the rendering of the decree of the visitors and the professor is entitled to his salary up to, but not beyond, such date.⁷ Where a member of the faculty of a college or university is familiar with provisions of the by-laws placing employment of members in the hands of the trustees and confining their election or contract to a period of one year, he is not entitled to recover for breach of an alleged contract for three years purporting to have been made by the president without evidence of the consent of the board of trustees even if the president falsely represented that he had the trustees' consent.⁸

Emeritus positions and sabbatical leaves. Both by custom and in some instances under statutory authority, the governing board of a college or university may elect members of the faculty to emeritus positions and grant them sabbatical leaves of absence with pay, and such grants have been held not to violate state constitutions as respects the faculty of a state institution.⁹

94. Miss.—University of Mississippi v. Deister, 76 So. 526, 115 Miss. 469.

11 C.J. p 995 note 8.

95. W.Va.—Hartigan v. State Univ. Bd. of Regents, 38 S.E. 698, 49 W. Va. 14.

96. Idaho.—Shinn v. State Univ. Bd. of Regents, 129 P. 1074, 23 Idaho 344.

11 C.J. p 995 note 10.

97. U.S.—Ward v. Kansas State Agricultural College Bd. of Regents, Kan., 138 F. 372, 70 C.C.A. 512.

W.Va.—Hartigan v. State Univ. Bd. of Regents, 38 S.E. 698, 49 W. Va. 14.

11 C.J. p 995 note 11.

98. Mich.—People v. State Univ., 4 Mich. 98.

99. N.Y.—Becker v. Barry, 300 N.Y. S. 1153, 165 Misc. 877.

1. Ohio.—Cincinnati v. Jones, 16 Ohio S. & C.P. 343.

2. Or.—Tyler v. Tualatin Academy, 13 P. 329, 14 Or. 485.

11 C.J. p 996 note 15.

3. N.Y.—Hosack v. New York College Physicians, etc., 5 Wend. 547.

4. Miss.—University of Mississippi v. Deister, 76 So. 526, 115 Miss. 469.

5. Tex.—Randolph Junior College v. Isaacks, Civ.App., 113 S.W.2d 628.

Vote unanimous for increase without counting vote of teacher trustee.—Randolph Junior College v. Isaacks, *supra*.

6. Ala.—State Univ. v. Walden, 15 Ala. 655.

7. Mass.—Murdock v. Phillips Academy, 12 Pick. 244.

8. Tenn.—Reece v. Carson-Newman College, 15 Tenn.App. 543.

9. S.D.—Johnson v. Jones, 216 N.W. 584, 585, 52 S.D. 64.

Not mere donation

Board of regents was held to have authority to elect resigned president a president emeritus of Agricultural College and to grant him sabbatical leave of absence for a year with pay, the court saying: "They [election as president emeritus and grant of leave] do not constitute a gratuity or donation, but are for a public purpose, and are sustainable on the ground of their beneficial effect upon the public service."—Johnson v. Jones, *supra*.

Enforcement of contract against state. It has been held that a valid and authorized contract between the state department having charge of the state university system and a person for the position of instructor in the university, entered into for a stipulated salary per annum, and having legislative sanction, is enforceable against the state,¹⁰ and in the absence of any provisions in the contract to the contrary, it will be presumed that a new contract made between the regents and an instructor in a college or school formerly under private auspices and then taken over by the state, is to run for the same length of time and that payment of salary is to be made in the same manner as in respect of the old contract.¹¹

§ 23. — Performance of Other Services

In the absence of interference with his regular duties, a professor, instructor, or tutor may as a rule engage in other lucrative work, and by statute faculty members may be required to perform nonacademic duties without compensation other than their regular salaries as members of the faculty of a public institution.

So long as he performs his full duty to the college or university by which he is employed and does not compete with it or act in opposition to its interests, a professor, instructor, or tutor may properly render services for another university,¹² give public concerts,¹³ publish books,¹⁴ and take private pupils.¹⁵

Nonacademic services as part of official duty. An instructor in a state college may be obligated

to perform nonacademic services without compensation other than that regularly provided for academic services.¹⁶ Under a statute making it the duty of the faculty of a medical college to visit and attend the patients in an asylum, the faculty are bound to render only so much personal service and advice to the asylum as is consistent with their character as professors and the duties which necessarily attach to their positions.¹⁷

§ 24. Students

The relation between student and college or university is essentially contractual in character. The proper college or university authorities ordinarily have power to select the curriculum to be offered and to designate the courses to be pursued by the students.

One may be a student at a college or university without being matriculated, as where he attends recitations and lectures and is under the government of the institution.¹⁸ The relation of a student to the college or university which he is attending is a contractual one,¹⁹ and the terms of the contract are to be interpreted according to their natural meaning.²⁰

Curriculum. Within the limitations imposed by applicable charter and statutory provisions, the governing board of a college or university has a wide discretion in selecting the courses which are to be given at the institution.²¹ Where the purpose statute constituting the charter of a school of mines designates engineering as one of the courses to be given, the regents may properly include in the

10. Ga.—Regents of University System of Georgia v. Woodward, 176 S.E. 677, 49 Ga.App. 608—Regents of University System of Georgia v. Blanton, 176 S.E. 673, 49 Ga.App. 602.

11. Ga.—Regents of University System of Georgia v. Woodward, 176 S.E. 677, 49 Ga.App. 608—Regents of University System of Georgia v. Blanton, 176 S.E. 673, 49 Ga.App. 602.

12. Ill.—State Univ. v. Bruner, 66 Ill.App. 665, appeal dismissed 48 N.E. 54, 168 Ill. 49, and affirmed 51 N.E. 687, 175 Ill. 307.

11 C.J. p 996 note 19.

13. Ill.—Chaddock College v. Bretherick, 36 Ill.App. 621.
11 C.J. p 996 note 20.

14. Ill.—See Chaddock College v. Bretherick, 36 Ill.App. 621, dictum.
11 C.J. p 996 note 21.

15. Ill.—Chaddock College v. Bretherick, 36 Ill.App. 621.
11 C.J. p 996 note 22.

16. Mont.—State v. Brannon, 283 P. 202, 209, 86 Mont. 200, 67 A.L.R. 1020.

Tests of gasoline and kerosene

L.1927 c 109 §§ 9, 10, requiring head of department of chemistry of State College of Agriculture, as state chemist, to make analyses of tests of gasoline and kerosene submitted by public service commission without receiving compensation, and permitting such analyses to be made by competent assistant to be appointed under regulations of state board of education, held not to require public service commission to pay any portion of salary of assistant from gasoline inspection fund, but merely to require payment of laboratory expense of state chemist, where assistant was already on college pay roll, the court saying: "We think the Legislature intended to go no further than to impose additional duties upon the state chemist and his assistant, already on the college pay roll, relieving the college of laboratory expense which must be paid from the gasoline fund."—State v. Brannon, supra.

17. Ohio.—Alexander v. Cincinnati, 2 Handy 183, 12 Ohio Dec., Reprint, 393.

18. Conn.—Morse v. State, 6 Conn. 9.

19. Pa.—Barker v. Bryn Mawr College Trustees, 1 Pa.Dist. & Co. 383, affirmed 122 A. 220, 278 Pa. 121.
11 C.J. p 996 note 26.

Private institution

The relation between a student and institution of learning privately conducted, which receives no aid from the public treasury, is solely contractual in character.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

20. Pa.—Iron City Commercial College v. Kerr, 3 Brewst. 196.
11 C.J. p 996 note 27.

21. S.D.—State ex rel. Bryant v. Dolan, 249 N.W. 923, 61 S.D. 530.

Discretion not abused

Regents, in continuing at state college of agriculture and mechanic arts, which is federal land grant college, courses in engineering, pharmacy, general science, education, and journalism, was not to have violated statute declaring purposes and scope of school.—State ex rel. Bryant v. Dolan, supra.

curriculum a general and professional course in engineering.²²

Under the provisions of the Morrill Act, a land grant university is bound to offer its students instruction in military tactics, although it remains free to determine details in respect of such matter.²³ The courts have upheld the validity of regulations making military training compulsory in such universities.²⁴

§ 25. — Admission

Admission to a purely private college or university rests in the discretion of the appropriate institutional authorities, although admission to a public or state institution is controlled primarily by the public authorities.

The legislature may properly regulate the conditions on which students may be admitted to a university maintained by the state,²⁵ and under delegated authority and in the reasonable exercise of its discretion the governing body of a state college or university may establish rules as to admission of students.²⁶ Thus the state may require a member of a Greek letter fraternity at another college to

renounce his allegiance with such fraternity before admitting him as a student of the state university.²⁷ The right to attend the educational institutions of a state is not a natural right, but is a gift of civilization and a benefaction of the law; if a person seeks to become a beneficiary of this gift, he must submit to such conditions as the law imposes as a condition precedent to this right.²⁸ However, the above rules refer to the power of the legislature to impose conditions; the right of admission to a state university is a right which the trustees or other officers are not authorized to abridge materially, and which they cannot as an abstract proposition rightfully deny;²⁹ for instance, in jurisdictions where there is no statute authorizing or requiring them so to do, the trustees cannot make membership in Greek letter fraternities or other secret societies a disqualification for admission as a student,³⁰ although in these same jurisdictions the trustees may after the admission of persons as students prohibit their connection with such fraternities or societies,³¹ as explained *infra* § 26.

It has been held that under statute a state is

22. S.D.—State ex rel Bryant v. Dolan, *supra*.

Where statute does not qualify term "engineering," in designating such subject as one of the courses to be given, it will be held that the term was used in its broadest sense and general engineering will be within the scope of such term.—State ex rel Bryant v. Dolan, *supra*.

23. U.S.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717, affirming 28 P.2d 355, 219 Cal. 663.

Branches of military training to be provided

The university "remains untrammelled by federal enactment and is entirely free to determine for itself the branches of military training to be provided, the content of the instruction to be given, and the objectives to be obtained."—Hamilton v. Regents of University of California, 55 S.Ct. 197, 202, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal. 663, and rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

24. Under federal constitution

Suspension by regents of University of California of students for refusal to pursue compulsory courses in military training was not infringement of students' rights under federal constitution.—Hamilton v. Regents of University of California, 28 P.2d 355, 219 Cal. 663, affirmed 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed.

343, rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

Under treaty renouncing war

Order of land grant state university making military training compulsory was not in conflict with provisions of treaty renouncing war as an instrument of national policy.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal. 663, and rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

25. U.S.—Waugh v. Mississippi Univ., 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131, affirming 62 So. 827, 105 Miss. 623, L.R.A.1915D 588.

26. Tex.—Foley v. Benedict, 55 S.W.2d 805, 808, 122 Tex. 193, 86 A.L.R. 477.

Classes of persons to be admitted

"The Legislature of this state not having provided who shall be admitted to the University, and having delegated the power to make rules and regulations necessary to the government of the University, to the board of regents, they are invested with the power of determining what classes of persons shall be admitted to the University, provided that the rules and regulations in that regard must be reasonable and arbitrary."—Foley v. Benedict, *supra*.

Rule as to readmission held reasonable

Rule of board of regents of university and board's interpretation, whereby medical students failing in two major subjects, where general

average is less than seventy, are automatically dropped from roll and are not readmitted, should not be set aside as arbitrary or unreasonable.—Foley v. Benedict, *supra*.

27. U.S.—Waugh v. Mississippi Univ., 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131, affirming 62 So. 827, 105 Miss. 623, L.R.A.1915D 588.

11 C.J. p 996 note 30.

28. Miss.—State Univ. v. Waugh, 62 So. 827, 105 Miss. 623, L.R.A.1915D 588, affirmed 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131.

11 C.J. p 996 note 31.

29. Okl.—Cornell v. Gray, 127 P. 417, 33 Okl. 591, 42 L.R.A., N.S., 336, Ann.Cas.1914B 399.

11 C.J. p 996 note 32.

30. Ind.—State v. White, 82 Ind. 278, 284, 42 Am.R. 496.

11 C.J. p 997 note 33.

31. Distinction between admission and control after admission

"The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution, is quite another thing. The first rests upon well established rules, either prescribed by law or sanctioned by usage, from which the right to admission is to be determined. The latter rests largely in the discretion of the officers in charge, the regulations prescribed for that purpose being subject to modification or change from time to time as supposed emergencies may arise."—State v. White, *supra*.

obligated to afford white and black citizens equal opportunities for higher education.³² The validity of statutes relative to higher education of different races is considered *supra* § 3.

Private institutions of learning, although incorporated, may select those whom it will receive, and may discriminate by sex, age, proficiency in learning, and otherwise.³³

Vaccination. Where the constitution of the state invests the board of regents of a state university with a large degree of independence and discretion, the board has power to make a rule requiring persons applying for enrollment as students to be vaccinated; and a person so applying is not entitled to avail himself of the provisions of a statute exempting from vaccination persons seeking admission to educational institutions who produce statements in writing from their parents or guardians showing that such parents or guardians are conscientiously opposed to the practice of vaccination and will not consent thereto.³⁴

§ 26. — Government and Discipline

Broadly speaking, the right of a student to attend a public or private college or university is subject to the

condition that he comply with its scholastic and disciplinary requirements, and the proper college authorities may in the exercise of a broad discretion formulate and enforce reasonable rules and regulations in both respects. The courts will not interfere in the absence of an abuse of such discretion.

The right to attend a public college or university is subject to proper regulation in the furtherance of discipline,³⁵ and, as respects the scholastic fitness of students to continue their study of courses selected or required, the faculty or teaching body of the institution is the tribunal proper to pass on such matter.³⁶ There is inherent in any college or university a duty on the part of its students to conduct themselves in a manner conducive to the proper administration of the institution.³⁷ The governing board of a college or university ordinarily has power to establish reasonable rules and regulations for the government of the institution committed to its care,³⁸ so long as they do not interfere with some positive right;³⁹ they may make suitable regulations to enforce regulations prescribed by statute,⁴⁰ may place inhibitions and restrictions on matters materially interfering with the proper relation of students to the college or university,⁴¹ and have discretionary power to regulate the discipline of the students in accordance with the rules and regula-

32. Mo.—State ex rel. Gaines v. Canada, 113 S.W.2d 783, certiorari granted 59 S.Ct. 65, and reversed on other grounds 59 S.Ct. 232.

33. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.
11 C.J. p 997 note 37.

34. Cal.—Williams v. Wheeler, 138 P. 937, 23 Cal.App. 619.
11 C.J. p 997 note 36.

35. Mich.—Tanton v. McKenney, 197 N.W. 510, 226 Mich. 245, 33 A.L.R. 1175.

36. Ohio.—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 41 Ohio App. 367.

37. "Common law of the school"
In the school there exists on the part of the pupils the obligation of obedience to lawful commands, subordination, civil deportment, respect for the right of other pupils, and fidelity to duty, such obligations being inherent in any school and constituting the common law of the school.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

38. Ga.—Davison-Nicholson Co. v. Pound, 94 S.E. 560, 147 Ga. 447.
N.Y.—Anthony v. Syracuse University, 223 N.Y.S. 796, 805, 33 Misc. 249, quoting *Corpus Juris*.
11 C.J. p 997 note 38.

College authorities as in loco parentis

As to mental training, moral and physical discipline, and welfare of the public, college authorities stand in loco parentis, and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no authority to interfere.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510—11 C.J. p 997 note 38 [a].

Effectuating purposes of institution

The managing officers of a state normal college, maintained at the expense of the taxpayers to prepare teachers for public schools, have the power to maintain such discipline as will effectuate the purposes of the institution.—Tanton v. McKenney, 197 N.W. 510, 226 Mich. 245, 33 A.L.R. 1175.

Statute conferring power as still in force

"The act of the Legislature establishing the State Normal School as a branch of the University of Georgia, approved October 21, 1891 (Acts 1890-91, p. 126), conferred upon the board of trustees of that institution authority 'to ordain and establish such rules and by-laws for the regulation of the school and the training and governing of the students, not inconsistent with this

act, as in their opinion may be proper to secure the success of said school.' The powers and duties of this board of trustees have not been abrogated or changed by any subsequent act of the Legislature."—Davison-Nicholson Co. v. Pound, 94 S.E. 560, 147 Ga. 447.

The term "government," as used in statutes confiding the government of a state university to trustees, "incorporates a trinity of functions: The enactment of laws, rules, and regulations; the judicial construction of same as applicable to their suggested violation; and their execution. This term 'government' is broad enough in its scope, as applied to a university or college, or school, to include administrative rules and regulations affecting scholastic procedure as well as disciplinary measures affecting only moral conduct or order."—West v. Board of Trustees of Miami University and Miami Normal School, 181 N.E. 144, 41 Ohio App. 367.

39. N.Y.—Anthony v. Syracuse University, 223 N.Y.S. 796, 805, 33 Misc. 249, quoting *Corpus Juris*.
11 C.J. p 997 note 39.

40. U.S.—Waugh v. Mississippi Univ., 35 S.Ct. 720, 237 U.S. 589, 59 L.Ed. 1131, affirming 62 So. 327, 105 Miss. 623, L.R.A.1915D 538.

41. Ind.—State v. White, 82 Ind. 278, 42 Am.R. 496.

tions made.⁴² Where such rules are made in the exercise of delegated legislative power they have the force and effect of statutes and the board's official interpretation of the rules becomes a part thereof.⁴³ The rules and regulations adopted by the governing board of a college or university are, however, subject to restrictions imposed by law.⁴⁴

While the relation existing between the college or university and the student is contractual, precluding an arbitrary refusal to permit further attendance,⁴⁵ yet the power of suspension or expulsion of students is an attribute of government of educational institutions,⁴⁶ and obviously and of necessity there is implied in the contract a term or condition that the student will obey and conform to the college rules of government and will not be guilty of such misconduct as would be subversive of the discipline of the college or university, or as would show him to be unfit morally to be continued as a member thereof.⁴⁷ It has been stated that the rules of educational institutions supported in whole or in part by appropriations from the public treasury are viewed somewhat more critically by the courts than those of private institutions.⁴⁸

Authority to enforce the rules may be delegated by the governing board of the institution to one of the officers thereof.⁴⁹ Where the regents of a state college have failed to act, the president thereof may make rules for the conduct of the students, such power inhering in his office.⁵⁰

Particular regulations, and particular grounds for suspension or expulsion. Students may be required to procure or be provided with, and to wear, a prescribed uniform,⁵¹ to attend religious exercises unless excused,⁵² to refrain from hazing⁵³ or from entering restaurants or eating houses not controlled by the college.⁵⁴ So the trustees may absolutely prohibit any connection between Greek letter fraternities and the universities, and prohibit the attendance of students at the meetings of such fraternities or other college secret societies, or may prohibit them from having any active connection with them so long as the students remain under the control of the university;⁵⁵ or they may prohibit the students from joining any secret society under pain of expulsion.⁵⁶

The courts have upheld the validity of a regulation reserving to the university the right to dismiss a student at any time for any reason without divulging its reason, the general purpose of the regulation being recited as one to safeguard ideals of scholarship and moral atmosphere, and under a regulation of the latter description, the university does not have the right of arbitrary dismissal, but the reason for its dismissal must fall within the classes specified of preserving ideals of scholarship or moral atmosphere, although the university authorities have a wide discretion in the matter and the courts will be slow to disturb their decision as to dismissal of a student under such a regulation.⁵⁷

42. D.C.—U. S. v. Georgetown College, 28 App.D.C. 87, dictum.

43. Tex.—Foley v. Benedict, 55 S. W.2d 805, 810, 122 Tex. 193, 86 A. L.R. 477, citing *Corpus Juris*.

44. Okl.—Rheam v. Board of Regents of University of Oklahoma, 18 P.2d 535, 536, 161 Okl. 268.

Admission of students

"The authority of the Board of Regents of the University of Oklahoma to prescribe rules and regulations for the admission of students is limited by the provision that no student who shall have been a resident of the state for one year preceding his admission shall be required to pay any fees for tuition, except in the law department or for extra studies."—Rheam v. Board of Regents of University of Oklahoma, supra.

45. Mich.—Booker v. Grand Rapids Medical College, 120 N.W. 589, 156 Mich. 95, 24 L.R.A., N.S., 447.

Minn.—Gleason v. State Univ., 116 N.W. 650, 104 Minn. 359.

46. N.Y.—Goldstein v. New York Univ., 78 N.Y.S. 739, 76 App.Div. 80, 12 N.Y. Ann. Cas. 128.

"Expulsion," as the term has been defined in respect of expelling a student from a college or university, means to eject, banish, or cut off permanently from the privileges of the institution.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510—60 C.J. p 1193 note 44 [a].

"Suspension," as the word is employed with reference to suspending a student from a college or university, is his temporary cutting off or debarring from the privileges of the institution.—John B. Stetson University v. Hunt, supra—60 C.J. p 1193 note 44 [a].

47. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 640, 88 Fla. 510, citing *Corpus Juris*.

N.Y.—Samson v. Trustees of Columbia University in City of New York, 167 N.Y.S. 202, 101 Misc. 146, affirmed Samson v. Trustees of Columbia University, 167 N.Y.S. 1125, 181 App.Div. 936. 11 C.J. p 998 note 60.

48. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 640, 88 Fla. 510, citing *Corpus Juris*. 11 C.J. p 998 note 49.

49. Superintendent Trustees or governing body of an

institution of learning may vest in the superintendent authority to enforce discipline, and, when acting lawfully in this capacity, courts will not interfere.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

50. Mo.—Englehart v. Serena, 300 S.W. 268, 318 Mo. 263.

51. Okl.—Connell v. Gray, 127 P. 417, 33 Okl. 591, Ann. Cas. 1914B 399, 42 L.R.A., N.S., 336.

52. Ill.—North v. State Univ., 27 N. E. 54, 137 Ill. 296. 11 C.J. p 998 note 51.

53. Ky.—Kentucky Military Inst. v. Bramblett, 164 S.W. 808, 158 Ky. 205.

54. Ky.—Gott v. Berea College, 161 S.W. 204, 156 Ky. 376, 51 L.R.A., N.S., 17.

55. Ind.—State v. White, 82 Ind. 278, 285, 42 Am.R. 496. 11 C.J. p 998 note 54.

56. Ill.—People v. Wheaton College, 40 Ill. 186.

57. N.Y.—Anthony v. Syracuse University, 231 N.Y.S. 435, 224 App. Div. 487, reversing 223 N.Y.S. 796, 130 Misc. 249.

A state university may suspend a student for refusal to take its regular course in military training,⁵⁸ a private college or university may under reserved rights in such respect, dismiss a student merely because he is regarded as "undesirable,"⁵⁹ and the courts have upheld the right of expulsion or suspension for a variety of particular causes subversive of the general welfare of the institution.⁶⁰

A student rooming at a dormitory which is an auxiliary of a state college is not to be deemed a tenant or lodger in the technical sense of those terms and he impliedly agrees to conform to reasonable rules for its government during the period

of his occupancy.⁶¹

Condonation and reinstatement. The doctrine of condonation or waiver is not applicable in connection with the disciplinary relations of students and university officials.⁶²

A student wrongfully dismissed is entitled to reinstatement, since an action for breach of contract would not afford adequate relief.⁶³

Judicial interference. In the absence of a clear showing of abuse, the courts will not interfere with the rules adopted.⁶⁴ Within reasonable limits, the power of the trustees, regents, or other governing

58. Md.—Pearson v. Coale, 167 A. 54, 165 Md. 224, appeal dismissed Coale v. Pearson, 54 S.Ct. 131, 290 U.S. 597, 73 L.Ed. 525.

59. Pa.—Barker v. Bryn Mawr College Trustees, 1 Pa.Dist. & Co. 383, affirmed 122 A. 220, 278 Pa. 121.

60. Cigarette smoking

Where a girl student in a state college was addicted to the smoking of cigarettes before entering the institution and continued their use thereafter, smoking on the public streets, and where she also rode through the streets in an automobile seated on the lap of a young man, and when reprimanded aired her grievances in the public press, her conduct was held to be such as to warrant the school authorities in denying her readmission for a subsequent term of college.—Tanton v. McKenney, 197 N.W. 510, 226 Mich. 245, 33 A.L.R. 1175.

Intoxicants

Action of state university president in suspending student for permitting use of intoxicating liquor by students in her home held not arbitrary under evidence.—State v. Clapp, 263 P. 433, 81 Mont. 200, certiorari denied State of Montana ex rel Ingersoll v. Clapp, 48 S.Ct. 528, 277 U.S. 591, 72 L.Ed. 1003, error dismissed 49 S.Ct. 7, 278 U.S. 661, 73 L.Ed. 568.

Obstructing prosecution of war

Refusal of Columbia University to permit one to continue as a student on ground of his public, reported speech, made outside of university, and while the United States was engaged in war, stating that there would be a draft revolution during the war, held justified.—Samson v. Trustees of Columbia University in City of New York, 167 N.Y.S. 202, 101 Misc. 146, affirmed Samson v. Trustees of Columbia University, 167 N.Y.S. 1125, 181 App.Div. 936.

Ringling cowbells, cutting lights, and parading in the halls of the dormitory at forbidden hours is conduct

so subversive of discipline essential to administration as to warrant suspension of the guilty students.—John B. Stetson University v. Hunt, 102 So. 637, 33 Fla. 510.

Boasting of questionable use of knowledge acquired at law school

Where a woman law student boasted to her fellow students of using her legal knowledge acquired at the law school to get free groceries, coal, and involuntary Christmas presents from her husband, from whom she was living apart, and also told them of suits brought against a chief of police for malicious prosecution and slander, and where the master to whom the case was referred found as facts that the conduct of such woman student with reference to large grocery and coal bills which she refused to pay on the theory that the items were "necessities" for which her husband should be billed was not justified, and that the law suits against the police chief could not have been brought in good faith and good conscience, it was held that communication of such episodes to fellow students with the boast that she was using her legal knowledge of such purposes was so far subversive of discipline and injurious to the reputation of the school as to justify it in expelling her.—White v. Portia Law School, 174 N.E. 187, 274 Mass. 162, certiorari denied 53 S.Ct. 403, 288 U.S. 611, 77 L.Ed. 985.

61. Mo.—Englehart v. Serena, 300 S. W. 268, 318 Mo. 263.

Rule held reasonable

Rule permitting only students agreeing to conduct themselves properly to remain in dormitory held not unreasonable.—Englehart v. Serena, supra.

Refusal to sign pledge

Student expelled from state teachers' college dormitory for refusal to sign pledge to conduct himself properly could not recover damages.—Englehart v. Serena, supra.

62. Md.—Woods v. Simpson, 126 A. 882, 146 M.L. 547, 39 A.L.R. 1016.

Past difficulties

Contention that certain past difficulties between university officials and student did not constitute ground for refusing to enroll her for another term, on theory that any fault of student had been condoned, held not tenable, rule of condonation not being applicable to such case.—Woods v. Simpson, supra.

63. N.Y.—Anthony v. Syracuse University, 223 N.Y.S. 796, 130 Misc. 249.

11 C.J. p 998 note 62.

64. Ga.—Davison-Nicholson Co. v. Pound, 94 S.E. 560, 147 Ga. 447. Tex.—Foley v. Benedict, 55 S.W.2d 805, 122 Tex. 193, 86 A.L.R. 477.

Girl students

"The maintenance of discipline, the upkeep of the necessary tone and standards of behavior in a body of students in a college, is, of course, a task committed to its faculty and officers; not to the courts. It is a task which demands special experience, and is often one of much delicacy, especially in dealing with girl students; and the officers must, of necessity, be left untrammelled in handling the problems which arise, as their judgment and discretion may dictate, looking to the ends to be accomplished. Only in extraordinary situations can a court of law ever be called upon to step in between students and the officers in charge of them. When it is made clear that an action with respect to a student has been, not an honest exercise of discretion, looking to the proper ends, but beyond the limits of that discretion or arising from some motive extraneous to the purposes committed to that discretion, the courts may be called upon for relief. In such case the officials have, as it is sometimes stated, acted arbitrarily, or abused their discretion; and the courts may be required to remedy that."—Woods v. Simpson, 126 A. 882, 883, 146 Md. 547, 39 A.L.R. 1016.

officers as to these matters is plenary and complete;⁶⁵ and unless such rules and regulations are found to be unauthorized, against common right, or palpably unreasonable, the courts will not annul or revise them;⁶⁶ neither will the courts afford relief in case of the enforcement of such rules, unless those whose duty it is to enforce them act arbitrarily and for fraudulent purposes.⁶⁷ The wisdom of the policy manifested by the rules and regulations is a matter within the discretion of the college authorities and beyond interference by the courts,⁶⁸ and with which except in extraordinary cases the court will not interfere.⁶⁹

Right to hearing. It has been held that a college cannot dismiss a student except on a hearing in accordance with a lawful form of procedure, giving him notice of the charge and an opportunity to hear the testimony against him, to question witnesses, and to rebut the evidence,⁷⁰ although this doctrine has been disapproved by other authority holding that a student may be suspended without a hearing as formal as a court proceeding;⁷¹ and, where the regulations of a privately conducted college receiving no state aid reserve the right to exclude any student regarded as undesirable, the college is not required to prove charges and hold a

trial before dismissal of a student whom it regards as undesirable.⁷²

A student must exhaust his recourse before the proper college authorities before resorting to the courts.⁷³

Who entitled to question rules. A person who is not a student or the parent or a guardian of a student is not entitled to complain in the courts of a rule of a private educational institution directed and intended to control only the student body.⁷⁴

§ 27. — Tuition and Charges

The tuition and other charges made to students of a college or university ordinarily depend on the contract of the parties and applicable provisions of statute or constitution. A state institution may charge for tuition and other services where not prohibited by law, and prohibition against a charge to residents for tuition will not preclude a charge for incidental expenses, such as laboratory material.

Where there is no positive prohibition of law, a college or university has the right to furnish instruction free to any student or class of students.⁷⁵ In the absence of constitutional prohibition or limitation, the legislature may provide that a state university shall charge each student prescribed tuition and other fees;⁷⁶ and in the ab-

65. Ind.—State v. White, 82 Ind. 278, 42 Am.R. 496.

66. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

Mich.—Tanton v. McKenney, 197 N. W. 510, 226 Mich. 245, 33 A.L.R. 1175.

N.Y.—Anthony v. Syracuse University, 223 N.Y.S. 796, 130 Misc. 249.

11 C.J. p 997 notes 44, 45.

67. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

Mich.—Tanton v. McKenney, 197 N. W. 510, 226 Mich. 245, 33 A.L.R. 1175.

Mont.—State v. Clapp, 263 P. 433, 436, 81 Mont. 200, certiorari denied State of Montana ex rel. Ingersoll v. Clapp, 48 S.Ct. 523, 277 U.S. 591, 72 L.Ed. 1003, error dismissed 49 S.Ct. 7, 278 U.S. 661, 73 L.Ed. 568, quoting *Corpus Juris*.

Wis.—Frank v. Marquette University, 245 N.W. 125, 209 Wis. 372. 11 C.J. p 997 notes 46, 47.

Different punishments for same offense

Faculty of university may adopt different disciplinary measures against different students guilty of substantially similar infractions of rules, without warranting interference by court on ground of arbitrary discrimination.—Frank v. Marquette University, *supra*.

68. Ky.—Gott v. Berea College, 161 S.W. 204, 156 Ky. 376, 379, 51 L.R. A., N.S.; 17.

Ohio.—State v. Schauss, 23 Ohio Cir. Ct. 283.

11 C.J. p 998 note 48.

69. Md.—Woods v. Simpson, 126 A. 882, 146 Md. 547, 39 A.L.R. 1016.

Mich.—Tanton v. McKenney, 197 N. W. 510, 226 Mich. 245, 33 A.L.R. 1175.

Pa.—Barker v. Bryn Mawr College Trustees, 1 Pa. Dist. & Co. 383, affirmed 122 A. 220, 278 Pa. 121.

11 C.J. p 998 note 59.

Abuse of discretion not shown

Refusal of university to enroll student for another term, because of friction with authorities, held not abuse of discretion.—Woods v. Simpson, 126 A. 882, 146 Md. 547, 39 A.L.R. 1016.

70. N.Y.—Anthony v. Syracuse University, 223 N.Y.S. 796, 805, 130 Misc. 249, citing *Corpus Juris*.

11 C.J. p 998 note 61.

71. Mont.—State v. Clapp, 263 P. 433, 81 Mont. 200, certiorari denied State of Montana ex rel. Ingersoll v. Clapp, 48 S.Ct. 523, 277 U.S. 591, 72 L.Ed. 1003, error dismissed 49 S.Ct. 7, 278 U.S. 661, 73 L.Ed. 568.

Hearing held sufficient

Where young lady suspended from state university was called before deans' council, informed of charges

against her, and given opportunity to deny or explain, she was accorded sufficient hearing.—State v. Clapp, *supra*.

72. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

Pa.—Barker v. Trustees of Bryn Mawr College, 122 A. 220, 278 Pa. 121.

73. La.—State ex rel. Dodd v. Tison, 143 So. 59, 175 La. 235.

State college

Where the entire power of administration of a state college is vested in the state board of education, "a student who complains of the action of the agents or employees of the state board, in matters of discipline, must exhaust his recourse before the proper school authorities, as a condition precedent to a resort to the courts."—State ex rel. Dodd v. Tison, 143 So. 59, 61, 175 La. 235.

74. Ky.—Gott v. Berea College, 161 S.W. 204, 156 Ky. 376, 379, 51 L.R. A., N.S.; 17.

75. N.Y.—Adams v. Perry, 43 N.Y. 487.

76. Wash.—Litchman v. Shannon, 155 P. 783, 90 Wash. 186.

"Tuition" has been defined as the act or business of teaching the various branches of learning.—State ex rel. Veeder v. State Board of Education, 33 P.2d 516, 97 Mont. 121.

sence of legislative or constitutional prohibition, a state college or university may charge all students for tuition and may exact from them other fees in connection with the running of the institution.⁷⁷ Where there is a prohibition against charges to certain students for "tuition," such prohibition will not preclude the exaction of fees or charges for other items not falling within the meaning of the term "tuition."⁷⁸ Where, however, the statute provides that "admission" to the state university shall be free to residents of the state, the right to charge incidental fees has been denied,⁷⁹ or it has been held that no fee may be exacted as a condition precedent to entrance,⁸⁰ although incidental fees may be charged to students after entrance or admission.⁸¹

Where by agreement with public authorities a university is bound to educate certain students, it is precluded from charging such students a matriculation or registry fee,⁸² but it may charge such free students a laboratory fee to cover material actually used and destroyed by them in laboratory courses.⁸³ An agreement to educate pupils at a certain rate per annum for each pupil is not broken by the college until it has failed or refused to receive pupils on the terms prescribed.⁸⁴

It has been held not an abuse of the discretion vested in the governing body of a public college or university designed to afford free tuition, to require students to occupy new buildings in preference to existing buildings in order that funds may thus be raised to defray the cost of erecting such new buildings.⁸⁵

Contracts. Although a college or university catalogue may be binding as a written contract where the student enters under the terms of the catalogue, there is nothing to prevent the parties from making a contract different from that contemplated by such catalogue,⁸⁶ and where a special contract provides for withdrawal of a student if his health does not permit continuance at the institution, the fact that his health improved during his sojourn there does not preclude recovery of unearned charges where it is found as a fact that he did withdraw for such reasons of health.⁸⁷ Under a contract providing for payment of tuition for the whole college session even in cases where the student is suspended, expelled, or withdraws without cause, where a student withdraws before completion of the session, but there is no proof that his withdrawal was without cause, nor that he was suspended or expelled, the courts will deny the col-

77. Mont.—State ex rel Veeder v. State Board of Education, *supra*.
Okl.—Rheam v. Board of Regents of University of Oklahoma, 18 P.2d 535, 161 Okl. 268.
11 C.J. p 998 notes 65, 66.

Implied power

Resolution of board of regents of state university, requiring payment of fee of two dollars and fifty cents per student each semester for construction, equipment, and maintenance of student union building on campus and for retirement of bonds issued for construction, was within implied power of board of regents.—Rheam v. Board of Regents of University of Oklahoma, *supra*.

78. Ga.—State v. Regents of University System of Georgia, 175 S. E. 567, 179 Ga. 210.
Mont.—State ex rel. Veeder v. State Board of Education, 33 P.2d 516, 97 Mont. 121.
Okl.—Rheam v. Board of Regents of University of Oklahoma, 18 P.2d 535, 161 Okl. 268.

Matriculation, laboratory, hospital, and athletic fees

Prohibition on tuition fees in units of university system was not to prevent board of regents from charging reasonable "matriculation," laboratory, hospital, and athletic fees to students in such institutions.—State

v. Regents of University System of Georgia, 175 S.E. 567, 179 Ga. 210.

Student "union" fee

(1) State board of education was held to have authority without consent of student body to charge student union fee to state university students for purpose of discharging bonded indebtedness on students' union building, notwithstanding legislative provision requiring free "tuition" for resident students.—State ex rel. Veeder v. State Board of Education, 33 P.2d 516, 97 Mont. 121.

(2) Resolution of board of regents of state university requiring payment of fee of two dollars and fifty cents per student each semester for construction, equipment, and maintenance of student union building, and for retirement of bonds issued for construction, as condition precedent to admission, was not illegal as charge for "tuition."—Rheam v. Board of Regents of University of Oklahoma, 18 P.2d 535, 161 Okl. 268.

79. Kan.—State v. Regents of University, 40 P. 656, 55 Kan. 389, 29 L.R.A. 378.

Library fee cannot be charged to students where the statute provides that admission to a state university shall be free, and the university authorities may not deny the use of the library to students failing or refusing to pay such fee and entitled

to free admission.—State v. Regents of University, *supra*.

80. Okl.—Connell v. Gray, 127 P. 417, 33 Okl. 591, 42 L.R.A., N.S., 336, Ann.Cas.1914B 399.

81. Okl.—Connell v. Gray, *supra*.

82. La.—New Orleans v. Tulane Educational Fund, 49 So. 171, 123 La. 550.

83. La.—New Orleans v. Tulane Educational Fund, *supra*.

84. Ky.—Stagg v. State Univ., 3 Ky.Op. 451.

85. Ga.—State v. Regents of University System of Georgia, 175 S. E. 567, 179 Ga. 210.

86. Tex.—Texas Military College v. Taylor, Civ.App., 275 S.W. 1089.

Wide circulation of catalogue as immaterial

College, irrespective of how widely circulated its catalogue or written terms and regulations were, and however well known by persons contemplating patronizing the school, might make binding special or conditional verbal contract with parent for entrance of his child, providing that, if child's health did not permit him to remain in college, he could withdraw without costing parent full session tuition and board.—Texas Military College v. Taylor, *supra*.

87. Tex.—Texas Military College v. Taylor, *supra*.

lege the right to collect for the whole session.⁸⁸

Mere recital in a statute that counties may send a certain number of pupils to the state university free of tuition, in consideration of taxes levied by the state and paid by the counties, does not constitute a contract binding on either the counties or the state.⁸⁹

Payment. The payment to a college of its own stock for tuition is valid if made while the institution is solvent.⁹⁰

Obligations of surety. Sureties signing a general bond to be responsible for payment by a student of his expenses may be held by the college or university in respect of an unpaid charge for a room, even though such room was not assigned to the student before he entered the institution.⁹¹

§ 28. — Scholarships

Colleges and universities may properly bind themselves to pay scholarships in accordance with contractual agreements with their founders. One awarded a scholarship may recover damages for breach of the obligation to afford him its benefits. Subject to contractual or statutory requirements, award of scholarship rests in the sound discretion of the college authorities.

Under its general and implied powers the corporation may receive contributions to an endowment fund and may bind the college to furnish tuition therefor to one or more students perpetually,⁹² even in another educational institution than its own.⁹³ A certificate of a permanent and perpetual scholarship in a college is a valid contract⁹⁴ to which no restrictive conditions can subsequently be

annexed,⁹⁵ and on the breach of which the holder is entitled to recover the value of the scholarship with interest.⁹⁶ In an action to enforce a subscription made in consideration of such a scholarship, however, defendant cannot avoid his liability on the ground of a mere change in the means of effecting the general purposes of the institution,⁹⁷ that the prosperity of the institution had failed to fulfill defendant's expectation,⁹⁸ or that tuition had subsequently been made free.⁹⁹

While in some states statutes providing free scholarships in the state university for those students who are financially unable to obtain an education otherwise have been considered unconstitutional,¹ in other states, or at least as to some universities in those states, under the act incorporating the university, or under other statute, county or city boards have the right to send scholars for free tuition.² It has been held that such students may be sent to any department of the university.³

The statutes of the particular state must be consulted in order to determine who are eligible to receive scholarships in state universities as will more particularly appear from an examination of the authorities referred to in the note below.⁴

Where an award of a scholarship to applicant first on the list of those examined is invalidated because of failure to fulfill residence requirements, the committee in charge may properly award it to the second on the list as of the year in question although the actual award is made after a subsequent examination in which another was first.⁵

88. Tex.—*Rogers v. Council*, Civ. App., 266 S.W. 207.

89. Ky.—*Barker v. Crum*, 198 S.W. 211, 177 Ky. 637, L.R.A.1918F 673.

90. Tex.—*Roach v. Burgess*, Civ. App., 62 S.W. 803.

91. N.Y.—*President and Fellows of Harvard College v. Kempner*, 116 N.Y.S. 437, 131 App.Div. 848.

Construction of bond

Where defendants executed bond to a college, conditioned on payment by a prospective student of any sum becoming due it, including all sums for board and gas, together with such as might be charged him for rent of any room assigned to him, in accordance with his application, before he becomes a student, and he entered in 1903, and in 1906 contracted for a room for the next year, but failed to return, the sureties were liable for the rent, the college having made reasonable effort to rent it to others and a contention that they would not be liable because it was not assigned before he entered was untenable, a fair construction of the bond imposing liability for

any room which might be assigned him in accordance with his application to become a student.—*President and Fellows of Harvard College v. Kempner*, supra.

92. Ohio.—*Farmers' College v. Cary*, 35 Ohio St. 648.

93. N.Y.—*Genesee College v. Dodge*, 26 N.Y. 213.

94. Ala.—*Howard College v. Turner*, 71 Ala. 429, 46 Am.R. 326.

Iowa.—*Oskaloosa College v. Hull*, 25 Iowa 155.

Pa.—*Houston v. Jefferson College*, 63 Pa. 428.
11 C.J. p 998 note 77.

95. Ill.—*Illinois Conference Female College v. Cooper*, 25 Ill. 148.
11 C.J. p 999 note 78.

96. Ala.—*Howard College v. Turner*, 71 Ala. 429, 46 Am.R. 326.
11 C.J. p 999 note 79.

97. Pa.—*Houston v. Jefferson College*, 63 Pa. 428.
11 C.J. p 999 note 80.

98. Iowa.—*Oskaloosa College v. Hull*, 25 Iowa 155.

99. Ind.—*White v. Butler Univ.*, 78 Ind. 585.

1. Mo.—*State v. Switzler*, 45 S.W. 245, 143 Mo. 287, 55 Am.S.R. 653, 40 L.R.A. 280.

2. Ind.—*McDonald v. Hagins*, 7 Blackf. 525.

N.Y.—*People v. Crissey*, 45 Hun 19.

3. Ind.—*McDonald v. Hagins*, 7 Blackf. 525.

11 C.J. p 999 note 85.

4. S.C.—*State v. Blease*, 73 S.E. 769, 90 S.C. 412.

11 C.J. p 999 note 86.

5. N.Y.—*People ex rel. Anthony v. Graves*, 279 N.Y.S. 847, 244 App. Div. 860.

Time of certiorari proceeding

Certiorari proceeding commenced after August 27, 1933, by candidate who was first in 1933 examination for World War scholarship to review action of commissioner of public education in appointing another candidate was commenced within statutory period where unsuccessful candidate did not receive formal notice that he would not be appointed until

College entrance diplomas. Under governing statutes it has been held that regents to whom matters relating to admission to college on scholarship have been delegated may so amend their rules as to require application for a college entrance diploma, prerequisite to award of the scholarship, to be made within a specified period,⁶ and where the legislature has conferred upon another body, such as regents, the power to legislate or make rules on a particular subject, such as award of scholarships, the courts will not inquire into the reasonableness of the rules adopted in the exercise of the power conferred.⁷

§ 29. — Credit

The courts have upheld the validity of statutes forbidding extension of credit to minor students without consent of their parents.

In several states statutes have been enacted providing that credit shall not be given to students under age without the consent of their parents or guardians, or to undergraduates without the consent of officers appointed by the college authorities, or against the college rules. Such statutes are not unconstitutional;⁸ but it is requisite to their enforcement that the rules shall have been established and that some officer shall have been authorized to give or withhold consent as the circumstances may require.⁹

§ 30. Dissolution or Abandonment

See *infra* §§ 31–33.

§ 31. — By Legislative Act

A state college or university is generally subject to dissolution by act of the legislature, and an act transferring the property of a private incorporated college to another institution may operate as a dissolution of the former.

State universities and colleges, being public corporations, are subject to dissolution by an act of the legislature.¹⁰ A statute creating a state board

as a corporate body and conferring on it the control and management of a state college leaves the latter without any corporate function to perform, and thus in legal contemplation destroys the corporate existence of such college.¹¹

A legislative enactment which transferred the property of a private incorporated college to a university has been held to operate as a *de facto* dissolution of the former, since it destroyed the only function which it could perform.¹²

§ 32. — By Surrender of Charter

In the discretion of the proper college or university authorities, a private institution may dissolve itself by surrender of its franchise and acceptance of such surrender by the state.

A college or university corporation may dissolve itself by a voluntary surrender of its franchise¹³ and an acceptance thereof by the state.¹⁴ The power to decide on the advisability of such a voluntary dissolution has been held to reside in the president and trustees.¹⁵

§ 33. — By Transfer of Property and Franchises

Voluntary transfer of its property and franchises by a college or university to another institution operates as a dissolution.

Both at common law and under statute, an educational corporation terminates its existence by a voluntary transfer of all its corporate property and franchises to another corporation or society.¹⁶

§ 34. — By Forfeiture of Charter for Misuser or Nonuser

The charter of a college or university may be forfeited for misuser or nonuser of its franchises, but will not be forfeited for acts falling short of clear misuser or nonuser.

Private incorporated colleges and universities may be dissolved by abandonment of the objects of incorporation through misuser or nonuser of their franchises,¹⁷ and it has been held that acts

August 27, 1933.—*People ex rel. Anthony v. Graves*, *supra*.

6. N.Y.—*Carnes v. Finley*, 164 N.Y. S. 305, 98 Misc. 390.

7. N.Y.—*Carnes v. Finley*, *supra*.

8. Mass.—*Soper v. Harvard College*, 1 Pick. 177, 11 Am.D. 159.

9. Conn.—*Morse v. State*, 6 Conn. 9. Mass.—*Soper v. Harvard College*, 1 Pick. 177, 11 Am.D. 159.

10. N.C.—*State Univ. v. Maulsby*, 43 N.C. 257.

11 C.J. p 999 note 91.

11. La.—*Harris v. Louisiana State Normal College*, 134 So. 308, 18 La. App. 270, modified in other re-

spects and affirmed 138 So. 182, 18 La.App. 270.

12. La.—*Hutchinson's Succ.*, 36 So. 639, 112 La. 656.

13. Cal.—*People v. State College*, 38 Cal. 166.

14. N.Y.—*Magee v. Genesee Academy*, 1 N.Y.S. 709.

15. Cal.—*People v. State College*, 38 Cal. 166.

11 C.J. p 999 note 95.

16. Tenn.—*State v. U. S. Grant Univ.*, 90 S.W. 294, 115 Tenn. 238.

Validation of legislative dissolution by voluntary transfer of property

If the passage of Acts 1907 p 357,

dissolving the charter of the Mobile Medical College and placing it under control of the University of Alabama, was not procured by a vote of two thirds of the board of trustees of such college, the enactment was ratified by the conveyance of its property by the trustees of the college to the university pursuant to such act.—*Stevens v. Thames*, 86 So. 77, 204 Ala. 487.

17. Ill.—*Edgar Collegiate Inst. v. People*, 32 N.E. 494, 142 Ill. 363.

In a case citing *Corpus Juris* with approval, it has been held that issue of degrees to practice medicine to persons unqualified to treat sick is misuse of powers of medical

and omissions of its officers are imputable to a college or university so far as forfeiture of its charter is concerned.¹⁸ However, dissolution will not be effected nor decreed by or for acts or omissions falling short of a clear misuser or nonuser,¹⁹ and it has been held that a college or university cannot actually be dissolved until so judged and determined either by judicial sentence or by sovereign power.²⁰

Failure to maintain a "reputable" institution is a factor for consideration in determining whether or not the charter of a college or university should be forfeited.²¹

Waiver of forfeiture. The legislature may, by statute, waive a forfeiture by nonuser.²²

§ 35. — By War

It was held that colleges incorporated under charter

school to public detriment, justifying dissolution of school.—State ex inf. Otto v. Kansas City College of Medicine and Surgery, 285 S.W. 980, 984, 315 Mo. 101, 46 A.L.R. 1472.

Failure to maintain institution

A failure for several years to maintain an institution of learning, a sale and removal of its buildings, and an attempt to transfer all its land, in the absence of any evidence that further effort would be made to establish a college, have been held sufficient grounds for forfeiture of its charter.—Edgar Collegiate Inst. v. People, 32 N.E. 494, 142 Ill. 363—11 C.J. p 1000 note 98.

Fraudulent exercise of a power to confer degrees is such a misuser of its franchise as will justify the dissolution of an educational institution.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, 295 S.W. 537, 317 Mo. 49, quoting *Corpus Juris*—State ex inf. Otto v. Kansas City College of Medicine and Surgery, 285 S.W. 980, 315 Mo. 101, 46 A.L.R. 1472—11 C.J. p 1000 note 6.

Operation for profit

Operation of a college or university for profit in violation of the statute under which it is incorporated is ground for forfeiture of its charter.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, 295 S.W. 537, 317 Mo. 49.

18. Mo.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, supra.

19. Mo.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, supra.
11 C.J. p 1000 note 99.

Acceptance of office under a new corporation by the members of one of the faculties of the old does not per se effect dissolution.—State

Univ. v. Williams, 9 Gill & J., Md., 365, 31 Am.D. 72.

Failure of trustees to hold meetings
Ind.—State v. Vincennes Univ., 5 Ind. 87.

Failure to keep records

Forfeiture of medical college's charter will not be adjudged for failure to keep records required by statute for corporation's benefit.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, 295 S.W. 537, 317 Mo. 49.

Loss of members

A college or university will not be dissolved by reason of a loss of members, so long as enough remain to continue the succession and to supply vacancies by election.—State v. Vincennes Univ., 5 Ind. 87.

Partial decay of one department caused by students refusing to take that special course of instruction, does not effect dissolution.—State v. Farmers' College, 32 Ohio St. 487.

Good faith

A wrongful exercise of the power to confer degrees will not constitute ground for forfeiture of charter if it appears that it was done in good faith.—State v. National School of Osteopathy, 76 Mo.App. 439.

20. N.Y.—Magee v. Genesee Academy, 1 N.Y.S. 709, reversing 13 N.Y.St. 60.

Tex.—Murphy v. Luttrell, 120 S.W. 905, 56 Tex.Civ.App. 149.
11 C.J. p 1000 note 5.

21. Mo.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, 295 S.W. 537, 317 Mo. 49.

Medical school

Mo.—State ex inf. Otto v. St. Louis College of Physicians and Surgeons, supra.

22. Ind.—State v. Vincennes Univ., 5 Ind. 87.

from the British crown were not dissolved by the Revolution.

Private colleges founded and incorporated before the Revolution under charters from the British crown were not dissolved by the Revolution.²³

§ 36. — Disposition of Property on Dissolution or Other Termination

Subject to rules governing escheat, which are treated elsewhere, on dissolution of a college or university its property ordinarily reverts to the original donors thereof.

Where an incorporated educational institution is dissolved or ceases to exist, property or funds donated or contributed revert to, and are distributed among, the donors or contributors²⁴ rather than among the stockholders²⁵ or religious organizations sponsoring the institution.²⁶

Matters relating to escheat are treated in the

23. U.S.—Dartmouth College v. Woodward, N.H., 4 Wheat. 518, 4 L.Ed. 629.

11 C.J. p 1000 note 9.

24. Ky.—Trustees of Baptist Female College of Liberty Ass'n v. Barren County Board of Education, 228 S.W. 19, 190 Ky. 565.

11 C.J. p 1000 note 10.

Rights of original donors or heirs

Where trustees of the Baptist Female College of Liberty Association established under Acts Adj.Sess. 1873 c 344, sold the school erected by them and lands to pay debts, the surplus proceeds reverted to the original donors or their heirs, such trustee not being a state society, in the meaning of Ky.St. § 323, and neither the Liberty Association nor any of the churches being entitled thereto.—Trustees of Baptist Female College of Liberty Ass'n v. Barren County Board of Education, 228 S.W. 19, 190 Ky. 565.

25. N.Y.—Magee v. Genesee Academy, 13 N.Y.St. 60, reversed on other grounds 1 N.Y.S. 709.

26. Ky.—Trustees of Baptist Female College of Liberty Ass'n v. Barren County Board of Education, 228 S.W. 19, 190 Ky. 565.

Right of association and component churches

Where property of the Baptist Female College of Liberty Association was sold because the college was heavily in debt, neither the Liberty Association nor any of the churches composing that association were entitled to the surplus proceeds after payment of debts. The trustees of the Baptist Female College of Liberty Association established by Acts Adj.Sess. 1873 c 344, is not a "society," within the meaning of Ky. St. § 323, providing that, if any society hold lands at dissolution, title to such lands and appurtenances

C.J.S. title Escheat § 3, also 11 C.J. p 1000 notes 12-14.

§ 37. Actions

Questions relating to actions by or against a college or university are considered in the following sections 38-44.

§ 38. — Right of Action and Defenses

Broadly speaking, existence of a right of action against a college or university for tort or contract depends on the particular circumstances as considered in the light of the public or private character of the institution and its charitable or noncharitable status.

Where a particular college or university is not such an institution as to come within the rules exempting charitable corporations from liability for torts, or where the jurisdiction is one in which such rules do not obtain, as considered in Charities §§ 2, 75, the college or university is subject to the same rule of liability for the negligent conduct of its servants as any other private corporation,²⁷ and the liability of state and private colleges and universities for the torts of their students and agents is considered in § 15 supra.

Contractors have been denied the right to recover from a state university for breach of contract to construct a dormitory where there were no funds available for meeting such claim.²⁸

shall vest in the county seminary or common schools, the word "society," in such section, being limited to religious societies, and the real estate of such college not being owned by the Liberty Association, or any of the churches composing that association.—*Trustees of Baptist Female College of Liberty Ass'n v. Barren County Board of Education*, 228 S.W. 19, 190 Ky. 565.

27. Ga.—*State Medical College v. Rushing*, 57 S.E. 1083, 1 Ga.App. 468.

Board of regents of University of Idaho is a separate entity, and may sue and be sued.—*State v. State Board of Education*, 196 P. 201, 33 Idaho 415.

28. Md.—*University of Maryland v. Maas*, 197 A. 123.

Concerning appropriations

The state university is a state agency under statute and, although university has been rendered liable to suit by statute, contractors could not maintain action against university for breach of contract to construct dormitory, in view of facts that university has only such funds as are appropriated for its use by legislature to be distributed by state

comptroller and treasurer for definite purposes and that university has no authority in itself to raise money for payment of damages. Contractors could not recover from state university for breach of contract to construct dormitory on ground that legislature had made appropriation for construction to be paid out of federal and state funds in hand and that there was money available to pay contractors' claim, where dormitory had been completed, university had no money of its own with which to make payments or pay a judgment, and contractors offered no evidence to substantiate their contentions, since money was impressed with a trust for public use, and it could be inferred that it had been expended for constructing dormitory.—*University of Maryland v. Maas*, supra.

29. Colo.—*Platt v. Carlton*, 168 P. 1118, 69 Colo. 85.

Contract to employ person as president

An application of taxpayers for an injunction to prevent trustee of the school of mines from carrying out an alleged contract of three of the trustees in their individual capacity,

The right of action of a professor for wrongful removal is considered in § 21 supra.

An application of taxpayers for an injunction to prevent college or university trustees from carrying out a contract is properly denied where the circumstances preclude injunctive relief.²⁹

Adjoining landowner. It has been held that an adjoining landowner cannot individually enjoin a college from use of its land in a manner exceeding its corporate powers unless such use amounts to a public nuisance.³⁰

§ 39. — Nature and Form of Action

General rules control the nature and form of an action by or against a college or university.

Where a state auditor has certified an appropriation for a university as reduced by the governor after increased items have passed the legislature by the vote required to make them law irrespective of the governor's disapproval, the institutional authorities may have equitable relief.³¹

Injunction and not quo warranto is the proper remedy where the trustees of a college or university exceed their powers by extending the course of instruction beyond that authorized by the founders.³²

§ 40. — Conditions Precedent

It has been held that an action begun by a state university through private attorneys in violation of a statute

and not at a board meeting, to employ certain person as president of the school, where plaintiff alleged and defendant conceded that the alleged contract was void, where the real purpose was to prevent the trustees from engaging such person as president, and no member of the board of trustees was complaining, and where for aught the record showed each trustee, when convened in regular board session, would discharge his duty, would be denied.—*Platt v. Carlton*, supra.

30. Md.—*Diggs v. Morgan College*, 105 A. 157, 133 Md. 264.

Negro colony

An adjoining landowner cannot individually enjoin a college from exceeding its corporate powers by using a portion of its property as building lots to establish thereon a residential negro colony, unless the doing of the act by the college amounts to the creating of a public nuisance.—*Diggs v. Morgan College*, supra.

31. Neb.—*Elmen v. State Board of Equalization and Assessment*, 231 N.W. 772, 120 Neb. 141.

32. Ohio.—*State v. Toledo*, 23 Ohio Cir.Ct. 327.

requiring consent of the attorney general will not be dismissed.

A statute forbidding the employment of counsel by a state institution without the consent of the attorney general does not require the dismissal of an action brought by a state university through private attorneys.³³

§ 41. — Jurisdiction and Venue

Regular trial courts ordinarily have jurisdiction of actions against colleges.

The ordinary trial courts have jurisdiction of actions against colleges and universities, or against an incorporated board of regents.³⁴

§ 42. — Parties, Process, and Appearance

a. In general

b. Appearance

a. In General

A college or university, or its governing board, may ordinarily sue and be sued if having a corporate existence, but not otherwise.

A college or university, or a branch or department thereof, cannot sue or be sued as such, unless it has in fact a corporate existence,³⁵ and it cannot be sued, in the absence of statutory authority, where it is a public or a quasi-public corporation and a mere agent of the state;³⁶ but acts vesting rights of property of a university corporation in the state, or constituting it one of the departments of a state university, will not take away the rights of the corporation to prosecute suits then pending,³⁷ or impair the right of its creditors.³⁸

Under its charter or act of incorporation, a college or university, or the trustees, directors, or regents as a body corporate, may have capacity to sue and to be sued,³⁹ and this, although no legislative appropriation of funds has been made to meet the claim on which the action was based, the board being entitled to satisfy a judgment against it, if rendered, out of any funds not otherwise specifically appropriated;⁴⁰ and a college duly incorporated may maintain an action on an account due it, although not expressly authorized by its charter to collect such accounts.⁴¹ Where a college or university is a corporate entity capable of suing or being sued, a suit may not be maintained, on an obligation payable to the corporate entity, in the name of its trustees without an assignment.⁴²

A change of name by authority of the legislature will authorize suit in the new name on debts to the original institution.⁴³ One board of management succeeding to another succeeds to its debts and liabilities, and may not only be sued therefor,⁴⁴ but may defend pending actions instituted against the former board.⁴⁵ Trustees may sue by their corporate title without setting out their individual names,⁴⁶ although, where there is neither a setting out of the names of the individuals, nor an allegation of incorporation, no suit may be maintained in the name of the governing board of a college or university.⁴⁷ The trustees of a university are necessary parties in an action to enjoin the giving of instruction on particular subjects in the univer-

33. Ky.—Bosworth v. State Univ., 157 S.W. 913, 154 Ky. 370. 11 C.J. p 1000 note 20.

34. Idaho.—Moscow First Nat. Bank v. State Univ., 140 P. 771, 26 Idaho 15. 11 C.J. p 1000 note 21.

35. Minn.—George v. University of Minnesota Athletic Assoc., 120 N. W. 750, 107 Minn. 424. 11 C.J. p 1001 note 22.

36. Iowa.—Weary v. State Univ., 42 Iowa 335. Okl.—Oklahoma Agricultural, etc., College v. Willis, 52 P. 921, 6 Okl. 593, 40 L.R.A. 677.

R.I.—Tucker v. Pollock, 43 A. 369, 21 R.I. 317. 11 C.J. p 1001 note 23.

37. Ill.—State Univ. v. Globe Sav. Bank, 57 N.E. 417, 185 Ill. 514.

38. La.—Stone v. Louisiana Univ., 28 La. Ann. 104.

39. Ga.—Kersey v. Grant, 170 S.E. 501, 177 Ga. 501, answer conformed to 170 S.E. 503, 47 Ga.App. 408. 11 C.J. p 1001 note 26.

Board of regents

The board of regents of the University of Idaho is a separate entity, and may sue and be sued.—State v. State Board of Education, 196 P. 201, 33 Idaho 415.

School of technology

Georgia School of Technology, established as branch of University of Georgia, was corporation capable of suing and being sued in its name prior to passage of state government reorganization act.—Kersey v. Grant, 170 S.E. 501, 177 Ga. 501, answer conformed to 170 S.E. 503, 47 Ga.App. 408.

40. U.S.—Ward v. Kansas State Agricultural College Bd. of Regents, Kan., 138 F. 372, 374, 70 C. C.A. 512.

Idaho.—Moscow Hardware Co. v. State Univ., 113 P. 731, 19 Idaho 420. 11 C.J. p 1001 note 27.

41. La.—Louisiana College v. Keller, 10 La. 164.

42. Ga.—Kersey v. Grant, 170 S.E. 501, 177 Ga. 501, answer conformed to 170 S.E. 503, 47 Ga.App. 408.

Suit by governing board

Suit on written obligation payable to "Georgia School of Technology" cannot be maintained in name of "The Governing Board of Trustees of the Georgia School of Technology," in the absence of written assignment or indorsement of obligation.—Kersey v. Grant, supra.

43. Ill.—Newlan v. Lombard Univ., 62 Ill. 195.

44. Ala.—State Univ. v. Moody, 62 Ala. 389.

45. Idaho.—Moscow First Nat. Bank v. State Univ., 140 P. 771, 26 Idaho 15.

46. Va.—Legrand v. Hampden Sidney College, 5 Munf. 324, 19 Va. 324. 11 C.J. p 1001 note 32.

47. Ark.—Curators of Central College v. Bird, 229 S.W. 730, 148 Ark. 323.

"Curators of Central College" is not a proper party plaintiff since it is neither a natural nor an artificial person.—Curators of Central College v. Bird, supra.

sity;⁴⁸ but, where a state or territory is proceeding under statute to acquire title to lands for the use and benefit of a state university, it may sue without joining the university or the board of regents thereof.⁴⁹

On the consolidation of two colleges the new corporation acquires the right to sue in its own name, provided both colleges accept the act of consolidation,⁵⁰ and the right to sue is extinguished as regards the original corporations.⁵¹

b. Appearance

The court may authorize an attorney to appear for a defendant college or university at the request of some of its trustees, without formal authorization by the board.

The court in which an action against an educational institution is pending may authorize an attorney to appear for such defendant, at the request of some of its trustees, although the board of trustees had not authorized such appearance, as the trustees have no greater pecuniary interest than the public.⁵²

§ 43. — Pleading and Evidence

General rules governing pleading and evidence apply in actions by or against a college or university. The complaint should allege facts sufficient to show a cause of action, and the plaintiff has the burden of proving his case.

Pleading. General rules control pleadings in actions by or against a college or university.⁵³ The

complaint in an action to cancel a subscription to stock in a university on the ground that the university was to be located at a particular place must allege that the subscription contained that condition, or that the agent who obtained the subscription on that representation was authorized to make such representation.⁵⁴ Where a stock certificate entitles the holder to tuition in the university to a specified amount per annum for each pupil, the complaint in an action to recover the stipulated amount must allege that the university has failed or refused to permit plaintiff to send pupils to the university on the terms prescribed, or that it has put it out of its power to pay him any tuition fees as contemplated.⁵⁵ An averment that the change of name of a university, authorized by an act of the legislature, was made by vote of a majority of the board of directors within the limited time is sufficient, in an action by the university, without alleging who the directors were, how many voted for the change, or whether it was made at a regular or special meeting.⁵⁶

Evidence. The burden rests on a dismissed student, suing for breach of contract resulting from his matriculation in a university, to prove the breach by showing that dismissal was not for a reason within the terms of a rule of the university constituting part of the contract.⁵⁷ The court will indulge every presumption in favor of the good faith of the university.⁵⁸ A defense of fraud must be proved.⁵⁹

48. Ohio.—State v. Toledo, 23 Ohio Cir.Ct. 327.

49. N.M.—Territory v. Crary, 103 P. 986, 15 N.M. 213.

50. Vt.—State Univ. v. Baxter, 42 Vt. 99.

51. U.S.—Pennsylvania College Cases, Pa., 13 Wall. 190, 20 L.Ed. 550. Pa.—Houston v. Jefferson College, 63 Pa. 428.

Tenn.—State v. U. S. Grant Univ., 90 S.W. 294, 115 Tenn. 238. 11 C.J. p 1001 note 36.

52. Wash.—Jenkins v. Jenkins Univ., 49 P. 247, 50 P. 785, 17 Wash. 160.

53. Ill.—McClintock v. Lake Forest University, 222 Ill.App. 468.

Construction of complaint

Complaint in malpractice case against board of regents of University of California held to establish fact that defendant, in operation of infirmary, did not conduct a private and proprietary enterprise, but that infirmary was department conducted as educational and public activity.—Davie v. Board of Regents, University of California, 227 P. 243, 66 Cal. App. 693.

Demurrer

(1) Complaint which alleged that athletic director was employed at annual salary of four thousand five hundred dollars of which one thousand five hundred dollars was to be paid by university, and remaining three thousand dollars was to be procured from state, did not state cause of action for balance of three thousand dollars unpaid, since promise to pay four thousand five hundred dollars was contingent upon action of state, over whom university had no control.—Boyd v. University Athletic Ass'n, 157 So. 576, 113 Fla. 188.

(2) In medical college's action on note, answer admitting its execution, but alleging total failure of consideration in that defendant's dental instruments required to be kept in college building were destroyed when it was burned through college's negligence, etc., was properly stricken on general demurrer, and court did not err in awarding judgment against him.—Albright v. University School of Medicine, 91 S.E. 921, 19 Ga.App. 525.

54. Ky.—Stagg v. State Univ., 3 Ky. Op. 451.

55. Ky.—Stagg v. State Univ., supra.

56. Ind.—Hazelett v. Butler Univ., 84 Ind. 230.

57. N.Y.—Anthony v. Syracuse University, 231 N.Y.S. 435, 224 App. Div. 487, reversing 223 N.Y.S. 796, 130 Misc. 249.

58. Fla.—John B. Stetson University v. Hunt, 102 So. 637, 88 Fla. 510.

Action for malicious expulsion

In action against an institution of learning for malicious expulsion, the court will indulge every presumption in favor of the school authorities, to the extent that, in suspending or expelling plaintiff, they acted in good faith for the best interests of the school and the pupils as they saw it.—John B. Stetson University v. Hunt, supra.

59. Action for tuition

In action by a college for tuition where defense was fraudulent representations of plaintiff, the alleged false representations and reliance on them must be proved.—Blumer College of Natureopathy v. Nelson, 114 A. 115, 96 Conn. 372.

General rules governing admissibility of evidence apply in actions by or against a college or university.⁶⁰ Testimony that male students and professors smoked has been held inadmissible in suit by a female student to secure readmission after her expulsion for smoking;⁶¹ and, in a suit by a student to compel a college to confer a degree on him, pictures purporting to show the college graduating class and a statement clipped from a newspaper are not competent evidence.⁶²

The weight and sufficiency of evidence in actions of this character is subject to the general rules controlling such matters.⁶³

§ 44. — Trial, Judgment, and Review

General rules control as respects trial, judgment, and review in actions by or against a college or university. Where a state university lacks funds available for payment of a judgment, provision is sometimes made for suit by the judgment creditor for a recommendatory judgment to the legislature.

Questions of fact arising in actions by or against

colleges or universities are for the jury or trial judge,⁶⁴ and a nonsuit should not be granted where there is a controverted question of fact for decision.⁶⁵ A verdict may be directed in a proper case,⁶⁶ and dismissal of the complaint on the merits is proper on a finding that a college sued for personal injuries was not negligent.⁶⁷

General rules govern as respects sufficiency of the evidence to sustain the verdict.⁶⁸

A judgment, in a suit by or against a college, should not be rendered individually against the members of a college committee, who were agents only in making the contract in question.⁶⁹

Recommendatory judgment. Under constitutional provisions, it has been held that where a board of regents of a state university has no money out of which to pay a judgment obtained against it, the judgment creditor must sue on such judgment in the supreme court and ask for a recommendatory judgment to the legislature.⁷⁰

60. Ga.—Horton v. Oglethorpe University, 114 S.E. 910, 29 Ga.App. 287.

Instigation of suit by competitive schools

Evidence that suit in nature of quo warranto against university, teaching drugless healing, for forfeiture of corporate rights, was instigated by competitive schools, held properly refused.—State v. American University of Sanipractic, 250 P. 52, 140 Wash. 625.

61. Mich.—Tanton v. McKenney, 197 N.W. 510, 226 Mich. 245, 33 A.L.R. 1175.

62. Or.—Tate v. North Pac. College, 140 P. 743, 70 Or. 160.
11 C.J. p 1002 note 41.

63. Creation of trust

Evidence held not to show intention to create trust on part of either regents or donor of money used to build dormitory at State University.—Splawn v. Woodard, Tex.Civ.App., 287 S.W. 677.

Reservation of rooms

Evidence, showing only arrangement between students and dormitory hall manager at university for reservation of rooms at dormitory terminable at will of either party, held not to show contract with university.—Splawn v. Woodard, supra.

Special contract

In suit on notes for tuition and

board of defendant's son at college, evidence held to warrant finding that defendant's son entered college under special contract that, if son's health would not permit him to remain there, he might withdraw without costing defendant full session tuition and board.—Texas Military College v. Taylor, Tex.Civ.App., 275 S.W. 1089.

64. S.C.—Guignard Brick Works v. Allen University, 152 S.E. 707, 155 S.C. 507.

11 C.J. p 1002 note 43.

Condition of walk

Whether ice on walk to main entrance of university building was sanded when plaintiff slipped while on her way to visit patient in building during prescribed visiting hour, held for jury, and even though jury accepted as true evidence that university provided employees to report condition of walk and to sand it, jury was required to determine what employees did or failed to do, whether they did what a reasonably prudent man would have done under the circumstances, and whether university was negligent and liable to plaintiff.—Lisa v. Yale University, 191 A. 346, 122 Conn. 646.

65. Application of rules to plaintiff

Granting nonsuit in action by a coach for alleged breach of contract because plaintiff violated rules governing college dormitory of which

he was proctor held error where it was controverted whether rules applied to plaintiff.—Newberry v. Upsala College, 147 A. 383, 105 N.J.Law 638.

66. Injuries to student

Directed verdict for college trustees, sued for injuries to student jumping from burning building, held proper under evidence.—Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va., 31 F.2d 869.

67. Fall of metal lockers

In action against women's college for injuries allegedly sustained by plaintiff when certain metal lockers, owned and maintained by the college, fell and struck plaintiff, dismissing complaint on merits on finding that college was not negligent was justified.—Christie v. St. Joseph's College for Women, 300 N.Y.S. 67.

68. Ill.—McClintock v. Lake Forest University, 222 Ill.App. 468.

In parent's action to recover tuition and board money following expulsion of son, verdict for plaintiff sustained.—McClintock v. Lake Forest University, supra.

69. Tex.—Gonzales College v. McHugh, 39 Tex. 346.

70. Idaho.—Moscow Hardware Co. v. Regents of University of Idaho, 113 P. 731, 19 Idaho 420.

COLLEGIA. In the civil law, the guild of a trade.¹
COLLEGIALITER. A term meaning in a corporate capacity.²

COLLEGIATE. Defined by Webster as meaning pertaining to or of the nature of a college, or a body of colleagues.

Collegiate and theological education. In a particular connection the word has been held to mean such academic and theological training as is practicable and suitable to prepare persons to be ministers of the gospel.³

Collegiate church. In English ecclesiastical law, a church built and endowed for a society or body corporate of a dean or other president, and secular priests, as canons or prebendaries in the said church; such as the churches of Westminster, Windsor, and others.⁴

COLLEGIUM. In the civil law, a word having various meanings, an assembly, society, or company; also a body of bishops; an army; a class of men; but the principal idea of the word was that of an association of individuals of the same rank and station, or united for the pursuit of some business or enterprise.⁵

In old English law, the word, in a particular application has been held to be synonymous with "chauntry" see Chauntry ante p 1101 note 2.

Collegium ammiralitatis. The college or society of the admiralty.⁶

Collegium fabrorum. A company of workers in hard materials, that is, in wood, stone, or metal.⁷

Collegium fecialium (or *fetialium*). A Roman college of priests, who sanctioned treaties when concluded and demanded satisfaction from the enemy before a formal declaration of war.⁸

Collegium illicitum. An association or body which abused its right, or assembled for any other purpose than that expressed in its charter.⁹

Collegium licitum. An association of persons, members of a trade; an association of persons possessing the right of forming out of its members, taken collectively, one single moral person (corpus), is termed "collegium licitum," (otherwise called "universitas licitum").¹⁰

COLLEGIUM EST SOCIETAS PLURIUM CORPORUM SIMUL HABITANTIUM.¹¹

COLLEGIUM SEU CORPUS CORPORATUM NISI REGNIS CONSTITUTIONIBUS NON POTEST EXISTERE.¹²

COLLEGIUM SI NULO SPECIALI PRIVILEGIO SUBNIXUM SIT, HEREDITATEM CAPERE NON POSSE, DUBIUM NON EST.¹³

COLLES' FRACTURE. A medical term meaning a split in the lower end of the arm bone.¹⁴

COLLIDE. To clash, to come into collision, or to strike or dash against each other;¹⁵ to come into violent contact, to encounter with a shock, to meet in opposition, to strike against, or to strike together with force;¹⁶ and "colliding" has been sometimes used interchangeably with "being struck."¹⁷

Phrases: "Collided with the automobile;"¹⁸ also

1. Black L.D.
- 11 C.J. p 1002 note 2.
2. Black L.D., citing 2 Kent Comm. p 296.
3. Conn.—Shepherd v. Shepherd, 17 A. 173, 57 Conn. 24, 29.
4. Black L.D.
5. Black L.D.
- Sometimes a corporation, as in the maxim, Tres faciunt collegium, although the more usual and proper designation of a corporation was "universitas."—Black L.D., citing 1 Blackstone Comm. p 469.
6. Black L.D.
7. Adams Gloss., citing 2 Kent Comm. p 269.
8. Adams Gloss.
9. Black L.D.
10. Adams Gloss.

Similarly expressed

"An assemblage or society of men united for some useful purpose or business, with power to act like a single individual."—Black L.D., citing 2 Kent Comm. p 268.

11. A phrase meaning "A college is a society of several persons dwelling together."—Black L.D.

12. A maxim meaning "A college or incorporated body can only exist by consent of the sovereign."—Peloubet Leg. Max.

13. A maxim meaning "If a corporation be erected without any special privilege (or grant) it is certain it cannot take an inheritance."—Adams Gloss., citing 1 Blackstone Comm. p 479.

14. Tex.—Gulf, etc., R. Co. v. Sandifer, 69 S.W. 461, 29 Tex.Civ.App. 356, 357.

15. Cal.—Carey v. Pacific Gas & Electric Co., 242 P. 97, 99, 75 Cal. App. 129.

Mass.—Commonwealth v. Bleakney, 179 N.E. 400, 401, 278 Mass. 198.

16. Ill.—Teitelbaum v. St. Louis Fire & Marine Ins. Co., 15 N.E.2d 1013, 296 Ill.App. 327, quoting Standard D.

Pa.—Dougherty v. Insurance Co. of North America, 38 Pa.Co. 119, 123, quoting Century D.

The etymology of the word "collide" is "col" plus "laedere."—National Fire Ins. Co. of Hartford, Conn. v. Elliott, C.C.A.Mo., 7 F.2d 522, 525, 42 A.L.R. 1121.

17. Mo.—Collins v. Leahy, App., 102 S.W.2d 801, 809.

18. Cal.—Carey v. Pacific Gas &

"in time to have avoided colliding with,"¹⁹ and "knowingly colliding."²⁰

COLLIER. See the C.J.S. title *Mines and Minerals* § 3, also 40 C.J. p 741 notes 42-44.

COLLIERY. See the C.J.S. title *Mines and Minerals* § 2, also 11 C.J. p 1002 note 24-p 1003 note 32.

COLLIGENDUM BONA DEFUNCTI. Literally "To collect the goods of the deceased." In practice,

certain letters granted to some discreet person, approved by the probate court, authorizing him to take care of the goods and to do other acts for the benefit of those who are entitled to the property of the deceased.²¹

COLLISIO. A collision or a dashing or striking together; a concussion; a term, applied to the running together or running foul of vessels, and sometimes distinguished from "allisio."²²

Electric Co., 242 P. 97, 99, 75 Cal. App. 129.

19. Mo.—Collins v. Leahy, App., 102 S.W.2d 801, 809.

20. Mass.—Commonwealth v. Bleakney, 179 N.E. 400, 401, 278 Mass. 198.

21. See 11 C.J. p 1003 note 33.

22. Adams Gloss., citing 3 Kent. Comm. pp 230, 302.

See also the C.J.S. title *Collision* § 1, and 11 C.J. p 1012 notes 16-20.

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